

Taking Intellectual Property into Their Own Hands

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When we think about people seeking relief for infringement of their intellectual property rights under copyright and trademark laws, we typically assume they will operate within an overtly legal scheme. By contrast, creators of works that lie outside the subject matter, or at least outside the heartland, of intellectual property law often remedy copying of their works by asserting extralegal norms within their own tight-knit communities. In recent years, however, there has been a growing third category of relief-seekers: those taking intellectual property into their own hands, seeking relief outside the legal system for copying of works that fall well within the heartland of copyright or trademark laws, such as visual art, music, and fashion. They exercise intellectual property self-help in a constellation of ways. Most frequently, they use shaming, principally through social media or a similar platform, to call out perceived misappropriations. Other times, they reappropriate perceived misappropriations, therein generating new creative works. This Article identifies, illustrates, and analyzes this phenomenon using a diverse array of recent examples. Aggrieved creators can use self-help of the sorts we describe to accomplish much of what they hope to derive from successful infringement litigation: collect monetary damages, stop the appropriation, insist on attribution of their work, and correct potential misattributions of a misappropriation. We evaluate the benefits and demerits of intellectual property self-help as compared with more traditional intellectual property enforcement.

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INTRODUCTION

When we think about people seeking relief for infringement of their intellectual property rights pursuant to copyright and trademark laws, we

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*** Notice and Disclaimer: After this Article was substantially written, one of us (Amy Adler) became of counsel to Richard Prince in the *Graham* and *McNatt* litigations. See generally *McNatt v. Prince*, No. 1:16-cv-08896 (S.D.N.Y. filed Nov. 16, 2016); *Graham v. Prince*, No. 1:15-cv-10160-SAS (S.D.N.Y. filed Dec. 30, 2015). Our arguments here reflect our views as academics and should in no way be attributed to Prince. Everything that appears here is based on publicly available information.

typically assume they will operate within an overtly legal scheme of cease-and-desist letters, notice-and-takedown requests, litigation, or settlement. By contrast, those seeking relief for the copying of creative works like tattoos, recipes, jokes, roller derby pseudonyms, and magic—which lie outside the subject matter, or at least the heartland, of these intellectual property laws—often assert extralegal norms within a tight-knit community.¹

In recent years, however, there has been a growing third category of relief-seekers: those taking intellectual property into their own hands as a way to seek relief outside the legal system for copying of works well within the heartland of copyright or trademark laws, such as visual art, music, and fashion. Moreover, they can do so successfully across different artistic communities or in the absence altogether of any discrete community—that is, without the backdrop of a single close-knit community, which legal scholars tend to see as a prerequisite to enforcing extralegal norms.²

1. See, e.g., Stephanie Plamondon Bair & Laura G. Pedraza-Fariña, *Anti-Innovation Norms*, 112 NW. U. L. REV. 1069 (2018); David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093 (2012); Emmanuelle Fauchart & Eric A. von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187 (2008); Marta Iljadica, *Painting on Walls: Street Art Without Copyright?*, in CREATIVITY WITHOUT LAW: CHALLENGING THE ASSUMPTIONS OF INTELLECTUAL PROPERTY 118 (Kate Darling & Aaron Perzanowski eds., 2017) [hereinafter CREATIVITY WITHOUT LAW]; Jacob Loshin, *Secrets Revealed: Protecting Magicians' Intellectual Property without Law*, in LAW AND MAGIC: A COLLECTION OF ESSAYS 123, 140 (Christine A. Corcos ed., 2010); Dotan Oliar & Christopher Jon Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008); Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511 (2013); Matthew Schruers, *An IP Lawyer Walks into a Bar: Observations on Creativity in Cocktails*, in CREATIVITY WITHOUT LAW, *supra*, at 45. See generally CREATIVITY WITHOUT LAW, *supra*, at 3 (highlighting less mainstream areas of creative activity, and noting that “[s]ome of these communities are forced to operate without [intellectual property] protection because current law does not reach or explicitly excludes their creative output,” while others “choose to opt out of the formal legal system and rely on informal social norms to govern their creative behavior”).

2. Classic scholarship in this vein is ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (applying the theory to ranchers and farmers in California’s Shasta County); Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEG. STUD. 115 (1992) (applying the theory to midtown Manhattan’s ultra-Orthodox Jewish diamond merchants); Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders*, 49 J. ECON. HIST. 857 (1989) (applying the theory to eleventh-century Mediterranean merchants); cf. Eric A. Feldman, *The Tuna Court: Law and Norms in the World’s Premier Fish Market*, 94 CALIF. L. REV. 313 (2006) (analyzing how a legal court can be used to enforce norms successfully for Tokyo’s closely knit Tsukiji tuna merchants); Arti Kaur Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77 (1999) (applying this literature to norms in the context of patenting basic scientific research). This literature emphasizes how the successful development and enforcement of extralegal norms depend on a close-knit community. E.g., Douglas Litowitz, *A Critical Take on Shasta County and the “New Chicago School”*, 15 YALE J. L. & HUMAN. 295, 306 (2003) (“But even if Ellickson’s conclusions were valid, by his own admission they hold only for *internal* group affairs on *humdrum* disputes in *close-knit* communities where *utilitarian concerns are paramount*.”); Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 U. PA. L. REV. 2237, 2241–42 (1996) (clarifying that his study on group norms assumes Ellickson’s “close knit group”); Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2340 n.37 (2004); cf. Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHI.-KENT L. REV. 1257,

They exercise intellectual property self-help in a constellation of ways. Most frequently, they use shaming, principally through social media or a similar platform, to call out perceived misappropriations. Other times, they reappropriate perceived misappropriations, therein generating new creative works. We identify, illustrate, and analyze this phenomenon using a diverse array of recent examples, including the Suicide Girls' retaking of Richard Prince's copies of their Instagram photos, Gucci's hiring of street artist GucciGhost for a fashion collaboration, a dizzying number of intellectual property diss songs in hip-hop, James Turrell's calling out of Drake for using artwork reminiscent of Turrell's in a popular music video, and Instagram phenomenon Diet Prada, which devotes itself to shaming copycats in fashion.³

As we explain, aggrieved creators can use self-help of the sorts we describe to accomplish much of what they could hope to derive from successful infringement litigation: first, to collect monetary damages (either directly from the alleged appropriator or, more interestingly, indirectly from unrelated third parties via financial opportunities created directly by the intellectual property self-help); second, to stop the appropriation; third, to insist on attribution of their work; and fourth, to correct potential misattributions of a misappropriation.⁴ Yet aggrieved creators who use intellectual property self-help do so outside of the legal system. They oftentimes rely on norms much like smaller tight-knit communities unable or unlikely to obtain legal protection would. This phenomenon might not be entirely new, but its prevalence and effectiveness is unprecedented.

1267 (1998) ("It is no accident that virtually all of the empirical work on norms has taken place in small, close-knit communities with little change in membership over time: cattle ranchers in a rural area, or businesses (like diamond merchants) that have a closed, guild-like quality. Norms develop most clearly and most easily in a *static community* . . . *Enforcing* the rules is also easier in a static community, particularly if there is no legal force behind the social sanctions."); Jonathan R. Macey, *Public and Private Ordering and the Production of the Legitimate and Illegitimate Legal Rules*, 82 CORNELL L. REV. 1123, 1130–32 (1997) (arguing that iterated relationships—more so than a mere closely knit community—are what causes extralegal cooperation). A few scholars explore whether cooperation can emerge without a close-knit community, though they have not focused on successful enforcement of norm-violation absent a close-knit community. See Ann E. Carlson, *Recycling Norms*, 89 CALIF. L. REV. 1231, 1232 (2001) (proposing that governments can undertake "norm management efforts that involve face-to-face communication or individual feedback [to] have . . . success in inducing behavioral change" with regard to recycling behavior); Lior Jacob Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359, 364–65 (2003) (positing that cooperation can emerge in loosely knit groups, such as file-sharers on a peer-to-peer system or commuters in traffic, due to "social-psychology-based conceptions of human behavior," and that intermediate-knit groups—in which "strangers will be interacting with other strangers, but they will do so while surrounded by non-strangers"—have cooperative aspects); cf. Lemley, *supra*, at 1267–77 (expressing skepticism about the viability and desirability of norms governing internet-based behavior because the community is dynamic, large, and dispersed).

3. *Infra* Part I.

4. *Infra* Part II.

We evaluate the benefits and demerits of intellectual property self-help compared to more traditional intellectual property enforcement.⁵ Self-help can be a cheaper and faster path to relief, but it lacks the important procedural protections that the law traditionally installs to ensure relief is warranted. Self-help has a cachet that drawn-out litigation in stodgy courts lacks. Self-help provides a significant opportunity to shame appropriators, but it also threatens to embed us deeper in a culture governed more by shame than law. Self-help can reduce the uncertainty of litigation, but it disregards the nuances of intellectual property laws that internally balance competing considerations between protection and freedom to copy. Self-help can lead to negative cycles of feuds and lawlessness, but it can also lead to beneficial cycles of creativity. Thus, when compared to litigation, intellectual property self-help offers both advantages as well as troubling drawbacks. Interestingly, most of the advantages intellectual property self-help offers accrue to aggrieved creators, whereas most of the costs are borne by the public or the alleged infringer.

Even if intellectual property self-help in general has drawbacks, certain forms are more promising than others. In particular, we think that self-help through retaking of copies offers some societal advantages over social media shaming.⁶ Reappropriations, at their core, provide society with new artistic creations. Reappropriators turn the intellectual property paradigm on its head by seeing infringement as an impetus for creativity rather than an obstacle to it. By contrast, social media shaming gives far less to the public, at least artistically.

I.

INTELLECTUAL PROPERTY SHAMING AND RETAKING THE COPY

In this Part, we explore two related phenomena, which we call “intellectual property shaming” and “retaking the copy.” Intellectual property shaming occurs when someone—often the creator or owner of intellectual property rights in a work—publicly calls out a third party for engaging in what the shamer believes is an improper copying of that work. Retaking the copy occurs when an intellectual property creator or owner similarly believes a third party has improperly copied his or her work, but in contrast to shaming, the creator or owner responds by retaking the supposedly improper copy into a new work of art. Intellectual property shaming and retaking the copy can, but need not, happen simultaneously. For example, a creator might retake the copy into a new work of art and might also shame the appropriator in that same new work. Intellectual property shaming and retaking the copy sometimes occur alongside legal action for intellectual property infringement, but they frequently occur without any accompanying legal process.

5. *Infra* Part III.

6. *Infra* Part IV.

Incidents of shaming and retaking are on the rise, though neither phenomenon is new.⁷ In fact, the term “plagiarism” was first used by the Roman poet Martial approximately two thousand years ago in the context of intellectual property shaming. The Latin word “plagiarius” originally meant “someone who either stole someone’s slave or enslaved a free person.”⁸ In his epigrams, Martial uses the term metaphorically to accuse other poets of claiming authorship of poetry he originally wrote, thereby enslaving his words:

I entrust my little books to your care, Quintianus—if I can still call them mine, that your pet poet keeps reciting. If they wail about their intolerable servitude, please be their public defender and stand bail for them; and, when he declares himself their master, please testify that they were mine and I have set them free. Proclaim this loudly three or four times and you’ll shame the plagiarist into keeping quiet.⁹

In my little books, Fidentinus, there’s just one page that’s your own—but one that’s branded with the unmistakable style of its master, which exposes your poems to public disgrace as blatant plagiarism. A Lingonian kaftan hung alongside double-dyed city purples dirties them with its greasy tufts—just like this; if a black raven promenades along the banks of the Cayster amidst Leda’s swans it attracts mockery—just like this; when a sacred grove swarms with Philomela’s birds, the harmonious nightingales, the dastardly magpie clashes with their Cecropian lullabies—just like this. My books have no need of an informer or a judge: your own page takes the stand against you and tells you, “You’re a thief.”¹⁰

Although Martial’s shaming shows that the technique has a long history, intellectual property shaming and retaking the copy today exhibit some fresh and distinct characteristics. Specifically, both the scale and possibility of deploying these techniques successfully are unprecedented.¹¹ For intellectual property shaming and retaking the copy to be successful, an individual must (1) detect something he or she thinks is another’s improper copying and (2) have a platform from which to broadcast his or her shaming or retaking the copy. Previously, it was harder to detect improper copying; it was even harder to amass the fame or media access that would give shaming or retaking widespread impact. With the prevalence of internet and social media, both of these preconditions are

7. Jeremy Sheff writes about the separate phenomenon of trademark owners seeking to use law to control the use of their marks in popular culture, such as rap lyrics or reality television shows. Jeremy N. Sheff, *Brand Renegades*, 1 N.Y.U. J. INTELL. PROP. & ENT. L. 128 (2011).

8. RICHARD A. POSNER, *THE LITTLE BOOK OF PLAGIARISM* 49–50 (2007).

9. 1 MARTIAL, *EPIGRAMS* 17 epigram 52 (Gideon Nisbet trans., 2015).

10. *Id.* at 19 epigram 53.

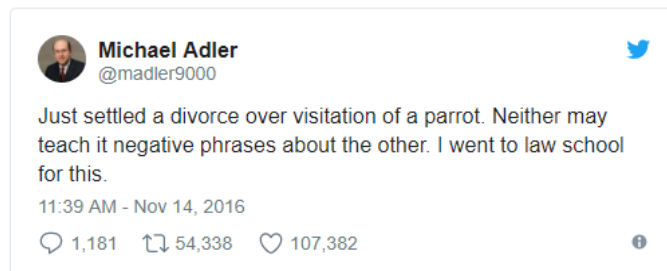
11. As we explore below in Part II, we understand success in this context to mean some combination of financial compensation, cessation of appropriation, attribution for the original work, and avoidance of misattribution for the appropriated work.

increasingly easy for just about anyone to satisfy.¹² All it takes is one person to detect a perceived appropriation and others to rebroadcast or retweet it.

As the recent “Parrot-Ghazi scandal” underscores, given the current state of technology, intellectual property shaming can be successful even for non-famous creators of obscure works. In 2016, divorce lawyer Jo Anna Parker posted a parrot joke on Twitter that was motivated by a case she had recently worked on to settle custody of a divorced couple’s dog.¹³ She tweeted the following:¹⁴



The tweet went viral with thousands of retweets and likes.¹⁵ A few months later, business lawyer Michael Adler¹⁶ posted an eerily similar tweet:¹⁷



12. See Karni Lotan, *The Price of Free Software: Information Costs and the Free Software Foundation’s General Public License*, 40 AIPLA Q.J. 441, 468 (2012) (“Infringers, once hard to detect, must now carefully conceal their actions from copyright owners.”); Pamela Licalzi O’Connell, *Online Diary*, N.Y. TIMES (July 17, 2003), <http://www.nytimes.com/2003/07/17/technology/online-diary.html> [<https://perma.cc/P9RG-42DD>] (“With the popularity of blogs, everyone has their own soapbox . . .” (quoting Derek M. Powazek)); Harrison Weber, *9 Things That Were Way More Difficult Before the Internet*, THENEXTWEB (Dec. 8, 2011), <https://thenextweb.com/shareables/2011/12/08/9-things-before-the-internet> [<https://perma.cc/9Q6A-ZX3D>] (“The sharing of information and ideas, in general, has never occurred at such a rapid pace in all of history.”).

13. Tanya Chen, *This Woman’s Allegedly Stolen Tweet Became a Bizarre “Parrot-Ghazi” Scandal and Now She’s Speaking Out*, BUZZFEED NEWS (Mar. 28, 2017), <https://www.buzzfeed.com/tanyachen/parrotghazi> [<https://perma.cc/W5RH-MVN5>].

14. Lady Lawya (@Parkerlawyer), TWITTER (Sept. 15, 2016, 1:19 PM EST), <https://twitter.com/Parkerlawyer/status/776515702542839809> [<https://perma.cc/AF7Q-6NQU>].

15. *Id.*

16. *About Us*, LAW OFF. MICHAEL E. ADLER, <http://www.adlerlawpa.com/about-us> [<https://perma.cc/9S3L-YRPA>].

17. Michael Adler (@madler9000), TWITTER (Nov. 14, 2016, 8:39 AM EST), <https://twitter.com/madler9000/status/798203707594637312> [<https://perma.cc/E6BR-XZHQ>].

This tweet was even more popular (as measured by retweets and likes). That same day, some Twitter users who must have seen Parker's post noticed similarities, including the phrasing of the words, and shamed Adler on Twitter for stealing Parker's tweet.¹⁸ Adler was interviewed about his tweet, including by the BBC, whereupon he insisted that it was not copied from Parker's tweet but instead was independently created and grounded in a real parrot custody case he had just handled.¹⁹ When Adler denied his copying, Parker angrily tweeted:²⁰



In sum, an obscure parrot joke attracted significant media attention after the intellectual property shaming Adler's tweet endured, and all because of a small number of eagle-eyed Twitter users who spotted the similarities between the two tweets and broadcast as much on the platform. The absurdity of this example proves the rule.

This Part focuses on the heartland of copyright and trademark subject matter to explore the intertwined phenomena of intellectual property shaming and retaking the copy. To do so, we use five case studies: the Suicide Girls' reappropriation of Instagram photos appropriated by artist Richard Prince; the cooption of street artist GucciGhost by fashion company Gucci; the growth of fashion copying shamer Diet Prada; diss songs in hip-hop music; and the shaming of musician Drake by visual artist James Turrell for incorporating art similar to his in a music video. These case studies help give texture to intellectual property shaming and retaking the copy. They also provide building blocks for

18. See Chen, *supra* note 13 (linking to, *inter alia*, Skellyton (@cornax), TWITTER (Nov. 14, 2016, 7:58 PM EST), <https://twitter.com/cornax/status/798374537536487424> [<https://perma.cc/E5UV-ZNKJ>]). Whether jokes or Twitter posts are protected under copyright law is contested. See Olliar & Sprigman, *supra* note 1, at 1795–805. On the protectability of Twitter posts, see Rebecca Haas, Comment, *Twitter: New Challenges to Copyright Law in the Internet Age*, 10 J. MARSHALL REV. INTELL. PROP. L. 231 (2010). On both together, see Hanna Pham, *Standing Up for Stand-Up: Joke Theft and the Relevance of Copyright Law and Social Norms in the Social Media Age*, <https://www.nyipla.org/images/nyipla/Committees/Conner/HannahPhamHon.WilliamC.ConnerSubmission.pdf> [<https://perma.cc/737V-HLGX>].

19. See Chen, *supra* note 13; Mark Dent, *Viral Case: No Free Speech for Post-Divorce Philly Parrot*, BILLYPENN (Nov. 14, 2016), <https://billypenn.com/2016/11/14/viral-case-no-free-speech-for-post-divorce-philly-parrot> [<https://perma.cc/Q7MT-47DV>]; *Who Gets the Parrot?*, BBC NEWSDAY (Nov. 16, 2016), (listen to podcast at <http://www.bbc.co.uk/programmes/p04gh34c> [<https://perma.cc/8CNQ-FKPS>]).

20. Lady Lawya (@Parkerlawyer), TWITTER (Nov. 14, 2016, 3:29 PM EST), <https://twitter.com/Parkerlawyer/status/798306921434345472>. [<https://perma.cc/U8P6-Y8S3>].

analyzing the role of these forms of self-help in intellectual property law and our culture, which we discuss in Parts II through IV.

A. Richard Prince and the Suicide Girls

In 2014, Richard Prince, one of the most revered—and controversial—contemporary artists, unveiled a new series of artworks, *New Portraits*. The series was based almost entirely on other people’s Instagram posts, as shown in Figure 1.²¹ Four different parties sued Prince for copyright infringement based on his use of their works in *New Portraits*.²² However, one set of creators from whom Prince borrowed chose a radically different approach to having their photo appropriated. Instead of suing, these creators, known collectively as the “Suicide Girls,” turned the table on Prince, producing their own art by retaking the copy.²³

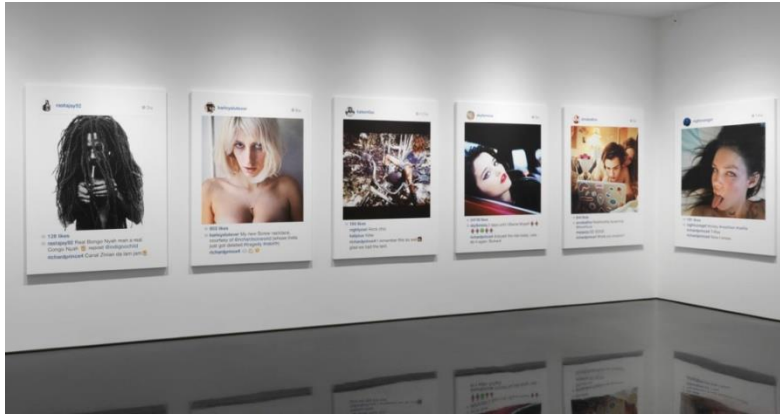


Figure 1: Richard Prince’s *New Portraits* Series (installation view)

Richard Prince created his *New Portraits* series by searching for other people’s Instagram posts; when he found images he liked, he added his own online comment to the user’s post, screen-grabbed the image, and emailed it to an assistant, who had it inkjet-printed and stretched on canvas.²⁴ The resulting series of six-by-four foot works sold for \$90,000 to \$100,000 each, impressive

21. Jerry Saltz, *Richard Prince’s Instagram Paintings Are Genius Trolling*, VULTURE (Sept. 23, 2014), <http://www.vulture.com/2014/09/richard-prince-instagram-pervert-troll-genius.html> [https://perma.cc/8QMX-6RYA].

22. See Complaint, *McNatt v. Prince*, No. 1:16-cv-08896 (S.D.N.Y. Nov. 16, 2016); Complaint, *Graham v. Prince*, No. 1:15-cv-10160-SAS (S.D.N.Y. Dec. 30, 2015). Two California cases were dismissed by stipulation. See Stipulation to Dismiss Case Pursuant to FRCP 41(a)(1), *Salazar v. Prince*, No. 2:16-cv-04282 (C.D. Cal. Aug. 12, 2016); Stipulation to Dismiss Case Pursuant to FRCP 41(a)(1), *Dennis Morris, LLC v. Prince*, No. 2:16-cv-03924 (C.D. Cal. Aug. 12, 2016).

23. This Section draws on Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 318–24 (2018) [hereinafter Adler, *Why Art Does Not Need Copyright*] (using the story of the Suicide Girls’ reappropriation of Prince to question basic assumptions about copyright and art).

24. See Saltz, *supra* note 21.

sums but a bargain compared to Prince's typical selling prices.²⁵ Prince's only additions to the user's Instagram posts were his own brief online comments, alternately salacious and nonsensical and often appropriated from things he heard on television while he found the image.²⁶ The bulk of the photos he chose from Instagram were vaguely prurient selfies of young, attractive women. They also included artists and celebrities like Taylor Swift and Kate Moss.²⁷ Several of the *New Portraits* were based on photos posted by the Suicide Girls, young women in an alt-porn pin-up collective.²⁸

Prince's almost total lack of intervention in the works he copied is part of his longstanding tradition of appropriating and re-photographing images.²⁹ This technique, which he arguably "invented" but which draws on a history in twentieth-century art,³⁰ has generated both great critical acclaim and great controversy.³¹ The *New Portraits* series in particular received a mix of positive and negative reviews in the art world,³² but it generated nearly unanimous popular outrage. Indignant citizens of the web called for Prince's suicide,³³

25. E.g., Rozalia Jovanovic, *Richard Prince Is Selling Conceptual Instagram Art at Gagosian*, ARTNET NEWS (Sept. 18, 2014), <https://news.artnet.com/market/richard-prince-is-selling-conceptual-instagram-art-at-gagosian-106536> [<https://perma.cc/RD68-WQUE>]; Lizzie Plaugic, *The Story of Richard Prince and His \$100,000 Instagram Art*, THE VERGE (May 30, 2015, 11:28 AM EST), <http://www.theverge.com/2015/5/30/8691257/richard-prince-instagram-photos-copyright-law-fair-use> [<https://perma.cc/388L-GDU7>]. The resale value of the works was higher. One sold for \$150,000 in a 2015 auction. Anny Shaw, *Richard Prince Instagram Portrait Leaps in Value at Phillips*, ART NEWSPAPER (Oct. 15, 2015), <http://theartnewspaper.com/market/richard-prince-instagram-portrait-leaps-in-value-at-phillips> [<https://perma.cc/UQ9T-KLFX>]. Prince's record at auction is \$9.7 million, achieved in 2016 at Christie's. Rain Embuscado, *The Top 10 Artists Who Broke Auction Records This Week*, ARTNET NEWS (May 13, 2016), <https://news.artnet.com/market/artists-who-set-auction-records-spring-2016-495011> [<https://perma.cc/RP2J-ZGNB>].

26. See Richard Prince, *Artist's Statement*, GAGOSIAN GALLERY (June 9, 2015), http://www.gagosian.com/exhibitions/richard-prince-june-12-2015?_v%3Afile=1f156f321ba609cf4bed67a08aa4e846 [<https://perma.cc/ZL2J-T25M>].

27. For a critique of the exhibition's supposedly pervasive "sexism," see Paddy Johnson, *Richard Prince Sucks*, ARTNET NEWS (Oct. 21, 2014), <https://news.artnet.com/art-world/richard-prince-sucks-136358> [<https://perma.cc/G77V-MT69>].

28. *Press*, SUICIDE GIRLS, <https://suicidegirlspress.com> [<https://perma.cc/K8VA-AAEY>].

29. Nancy Spector, *Nowhere Man*, in RICHARD PRINCE 24 (Nancy Spector ed., 2007) (showing Prince's central place in the generation of artists who "promoted a radical interrogation into the very nature of representation").

30. Other artists before Prince, such as Andy Warhol and Robert Rauschenberg to name just two, had relied heavily on copying in a way that makes this claim seem overblown. Nonetheless, Prince was famously called "the 'inventor' of appropriation." DOUGLAS EKLUND, *THE PICTURES GENERATION, 1974–1984*, at 153 (2009).

31. E.g., *Richard Prince: The Controversial Artist and Master of Appropriation*, HIGHSNOBIETY (Sept. 5, 2016), <https://www.highsnobiety.com/2016/09/05/richard-prince-artist> [<https://perma.cc/K7EE-3P8C>].

32. Compare, e.g., Saltz, *supra* note 21, with, e.g., Peter Schjeldahl, *Richard Prince's Instagrams*, NEW YORKER (Sept. 30, 2014), <http://www.newyorker.com/culture/culture-desk/richard-princes-instagramms> [<https://perma.cc/5AT5-7DGT>].

33. Noah Dillon, *What's Not the Matter with Richard Prince*, ARTCRITICAL (July 9, 2015), http://www.artcritical.com/2015/07/09/noah-dillon-on-richard-prince/#_ftnref [<https://perma.cc/Z7BB-XG7R>] (indicating that some "encouraged suicide").

expressed fury on behalf of his “victims,”³⁴ and lamented the state of an art market that rewards what they saw as rapaciousness and laziness.³⁵ The popular, non-art world consensus was clear: the work was outright “theft,” not only of the “victims” images but of their money too.³⁶ Indeed, the stench of money was a near-constant topic for enraged commentators.³⁷ In their view, a rich, famous artist had ripped off young women who were mostly unknown; he profited from their images and bodies while luxuriating in his own salaciousness and hands-off production values. While online critics expected people to ostracize Prince as a thief, instead art collectors and powerful galleries showered Prince with praise and money.³⁸ As one gallerist said of the controversy, “the art market is a disgrace to humanity.”³⁹

The series attracted not only vituperative online commentary, but also legal action. Even before the lawsuits surrounding the *New Portraits* series, Prince’s technique of appropriating existing imagery had caused him significant legal trouble. In a major decision in 2013, *Cariou v. Prince*,⁴⁰ the Second Circuit considered thirty Prince artworks from 2007 that appropriated images from the photographer Patrick Cariou to varying degrees. The district court in that case found that Prince had infringed Cariou’s copyrights and ordered Prince to turn over all thirty artworks to Cariou for destruction.⁴¹ The Second Circuit reversed, declaring twenty-five of the Prince works to be permissible fair uses of the photographs and remanding to the district court for reconsideration of the

34. For one of the many articles to use this term to describe Prince’s subjects, see, for example, Cait Munro, *Richard Prince Instagram Victims Speak Out*, ARTNET NEWS (May 29, 2015), <https://news.artnet.com/market/more-richard-prince-instagram-303166> [https://perma.cc/YUH2-TMRV].

35. Dillon, *supra* note 33 (observing that online comments stated that Prince’s “work augers [sic] the death of creativity”).

36. See, e.g., Allen Murabayashi, *Opinion: Richard Prince Is a Jerk*, PETAPIXEL (May 26, 2015), <http://petapixel.com/2015/05/26/richard-prince-is-a-jerk> [https://perma.cc/N72N-MZ2C] (calling Prince a “thief”). But see Adler, *Why Art Does Not Need Copyright*, *supra* note 23 (arguing that Prince’s works in this series did not cause market harm and indeed provided probable market benefits to the subjects of his works).

37. E.g., Schjeldahl, *supra* note 32.

38. Kurt Ralske, *Try to Make Yourself a Work of Art: Richard Prince’s New Portraits at Gagosian*, ARTCRITICAL (Oct. 8, 2014), <http://www.artcritical.com/2014/10/08/kurt-ralske-on-richard-prince> [https://perma.cc/5GQ4-XBMP] (stating that “massive amounts of capital are being created and accumulated here,” and noting that Prince is ranked seventh among living artists for sales on the secondary market); Ryan Steadman, *Suicide Girls Sell Pics of Richard Prince Pics in Appropriation Tit for Tat*, OBSERVER (May 28, 2015), <http://observer.com/2015/05/suicide-girls-sell-pics-of-richard-prince-pics-in-tit-for-tat-appropriation-battle> [https://perma.cc/9NSL-7YGF] (claiming “high-powered collectors can’t seem to get enough” of the new work).

39. Ben Davis, *Art Flippers Attempt to Unload Suicide Girls’ Version of Richard Prince Work*, ARTNET NEWS (Aug. 13, 2015), <https://news.artnet.com/art-world/art-flippers-suicide-girls-richard-prince-prints-324580> [https://perma.cc/3B4R-Q852].

40. 714 F.3d 694 (2d Cir. 2013).

41. *Cariou v. Prince*, 784 F. Supp. 2d 337, 355–56 (S.D.N.Y. 2011), *rev’d*, 714 F.3d 694 (2d Cir. 2013).

infringement of five other images.⁴² The parties subsequently settled before that reconsideration.⁴³

The new wave of lawsuits around the *New Portraits* series emerged against this backdrop. Given the uncertain legal status of Prince's appropriated artwork following the Second Circuit's decision and the clear copying of others' Instagram pages—not to mention the furor the series provoked—it is no wonder that four different parties whose images Prince appropriated sued him for copyright infringement.⁴⁴

Yet one set of “victims” responded to the appropriation in the spirit of Richard Prince. Rather than filing a lawsuit, the Suicide Girls decided to retaliate by reappropriating Prince's appropriations of five of their original images. They then sold the reappropriations online, underselling their copyist in the marketplace.⁴⁵ Like Prince, they made a slight alteration to each appropriated image, adding their own comment after Prince's added comment before printing.⁴⁶ Their added comment—“true art”—overtly shamed Prince.⁴⁷ Other than that comment, they produced works that look nearly identical (at least in reproductions) to his: inkjet-printed canvases of the same Instagram posts in the same dimensions.⁴⁸ The main difference was price. Instead of Prince's \$90,000 price tag, the Suicide Girls' nearly identical copies were a bargain, selling at a mere \$90.⁴⁹ All profits from their sales went to a nonprofit organization, the Electronic Frontier Foundation.⁵⁰ Figure 2 shows an image from the Suicide Girls' website advertising one of their reappropriations of Prince's appropriation side by side.⁵¹

42. *Cariou*, 714 F.3d at 712.

43. Brian Boucher, *Landmark Copyright Lawsuit Cariou v. Prince Is Settled*, ART IN AMERICA (Mar. 18, 2014), <http://www.artinamericamagazine.com/news-features/news/landmark-copyright-lawsuit-cariou-v-prince-is-settled> [<https://perma.cc/CH8F-Z4J7>].

44. *Supra* text accompanying note 22.

45. Cait Munro, *Payback for Richard Prince as Models Re-Appropriate Stolen Instagram Images and Sell Them for \$90*, ARTNET NEWS (May 27, 2015), <https://news.artnet.com/market/the-suicide-girls-richard-prince-302384> [<https://perma.cc/MS6N-CB43>].

46. *Id.*

47. *Id.*

48. *Id.* It is not clear that the works would look so similar if viewed in person. This analysis is based only on the presentation of images of the works online, which may fail to capture significant differences.

49. *Id.*

50. *Id.*

51. *Richard Prince SuicideGirl Prints*, SUICIDE GIRLS (May 26, 2015), <https://www.suicidegirls.com/members/missy/blog/2837632/tuesday> [<https://perma.cc/YF6X-DA4L>].



<p>\$90,000</p> <p>SOLD BY FAT CAT ARTISTS AND MILLIONAIRE GALLERY OWNERS</p>	<p>\$90</p> <p>SOLD BY SUICIDEGIRLS</p>
<p> suicidegirls 20h</p>	<p> suicidegirls 20h</p>
<p>Based on people you follow</p> <p>24991 likes</p> <p>bigtimo123 I like her toungue kashimmi @kalypsoskitz basically 🤪 she's obviously my purrfect sister from another mister! 🐾👉</p> <p>richardprince1234 Private Lives, mind if I sneeze on</p>	<p>Based on people you follow</p> <p>24991 likes</p> <p>bigtimo123 I like her toungue kashimmi @kalypsoskitz basically 🤪 she's obviously my purrfect sister from another mister! 🐾👉</p> <p>richardprince1234 Private Lives, mind if I sneeze on suicidegirls true art</p>
<p>size: 67x55 materials: ink jet on canvas</p> <p>profits go to rich gallery owner and millionaire "artist"</p>	<p>size: 67x55 materials: ink jet on canvas</p> <p>sold by the actual people who created the image and profits go to charity</p>

Figure 2: Suicide Girls' Advertisement

The Suicide Girls directly compare their work to Prince's. The collective notes that whereas Prince's "profits go to rich gallery owner and millionaire 'artist,'" the Suicide Girls' reappropriation is "sold by the actual people who created the image" and their "profits go to charity."⁵² Figure 3 shows four more reappropriated works that the Suicide Girls offered for sale.⁵³

52. *Id.*

53. Liron Samuels, *Richard Prince Gets a Taste of His Own Medicine; \$90,000 Prints Offered for \$90*, *DIY PHOTOGRAPHY* (May 28, 2015), <https://www.diyphotography.net/richard-prince-gets-a-taste-of-his-own-medicine-90000-prints-offered-for-90> [<https://perma.cc/5J6D-S4K5>].

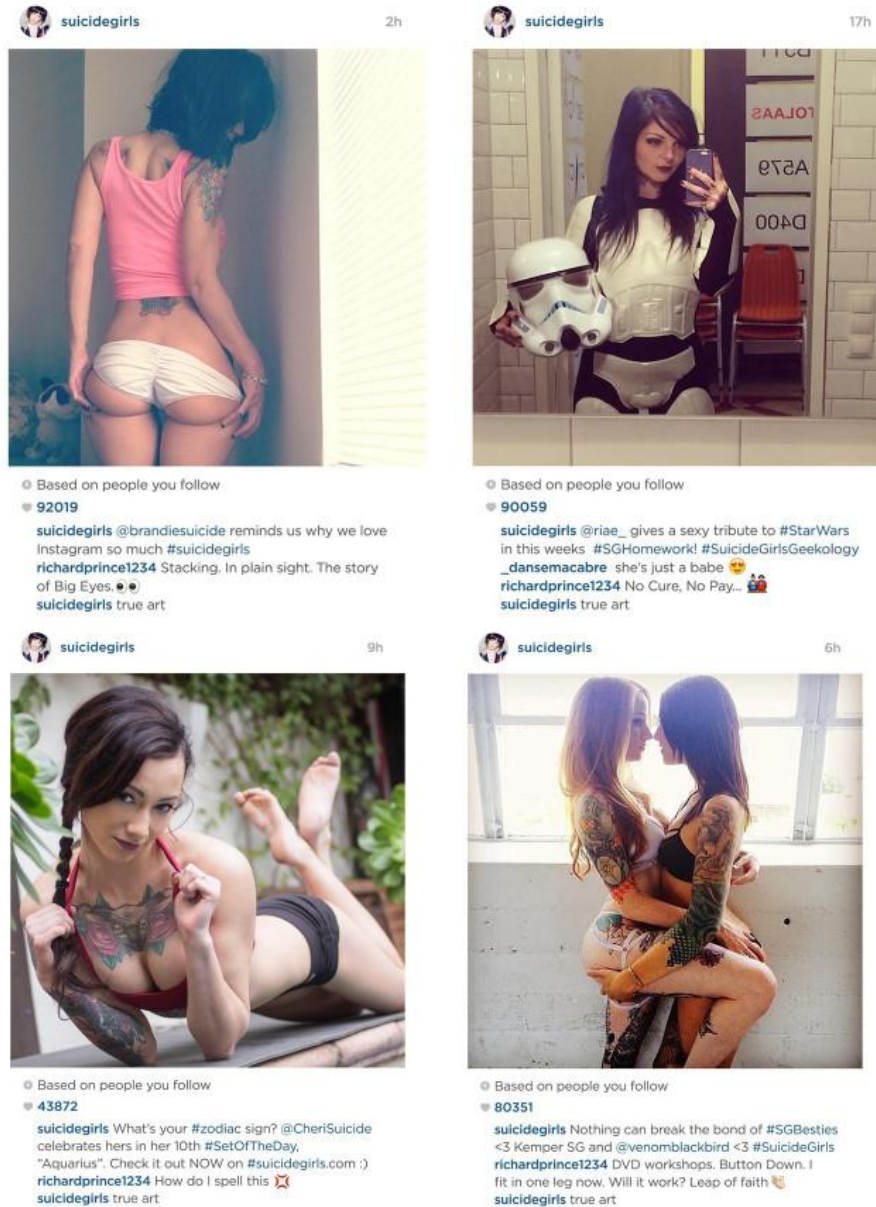


Figure 3: Four Additional Suicide Girls Reappropriated Appropriations

The Suicide Girls' move was an instant internet sensation, as bloggers and reporters hailed the Suicide Girls' act of "payback."⁵⁴ Appealing to the sense of online outrage that Prince's appropriation had caused, the Suicide Girls transformed themselves into online avenging goddesses. Suicide Girls founder

54. Munro, *supra* note 45.

Missy Suicide told the press that “the thing about Prince’s theft of the images is that it feels like such a violation by someone who doesn’t get it.”⁵⁵ She pondered, “Do we have Mr. Prince’s permission to sell these prints? We have the same permission from him that he had from us. ;).”⁵⁶ The move elicited not only adoring media coverage. It also generated sales. In one day, the Suicide Girls sold more than 250 prints,⁵⁷ and soon the entire run sold out.⁵⁸ Indeed, Richard Prince himself retweeted their reappropriations of “his” work, as shown in Figure 4,⁵⁹ which in effect advertised the copies. Instead of seeing the Suicide Girls as threatening his work, Prince welcomed the Suicide Girls’ adoption of the technique, tweeting that the move was “smart.”⁶⁰

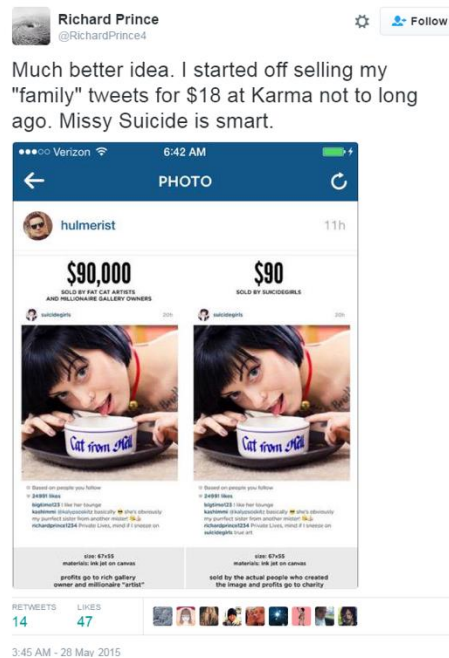


Figure 4: Richard Prince’s Retweet of the Suicide Girls’ Reappropriation of His Appropriation

55. Emerson Rosenthal, *We Talked to the Suicide Girls About Richard Prince’s “Appropriation Art”*, VICE (May 28, 2015), https://creators.vice.com/en_us/article/kbn35a/we-talked-to-the-suicide-girls-about-richard-princes-appropriation-art [<https://perma.cc/83U8-VHXL>].

56. SUICIDE GIRLS, *supra* note 51.

57. Jessie Heyman, *SuicideGirls Respond to Prince in the Best Way Possible*, VOGUE (May 28, 2015), <http://www.vogue.com/article/suicidegirls-richard-prince> [<https://perma.cc/MD4R-6THG>].

58. Paddy Johnson & Corinna Kirsch, *Wednesday Links: People Don’t Get “Au Naturel”*, ARTFCITY (July 23, 2015), <http://artfcity.com/2015/07/23/wednesday-links-people-dont-get-au-naturel> [<https://perma.cc/WK6C-G7CA>].

59. Richard Prince (@RichardPrince4), TWITTER (May 28, 2015, 3:45 AM EST), <https://twitter.com/RichardPrince4/status/603874714201751552> [<https://perma.cc/BAK4-DN6F>].

60. *Id.*; see also Richard Needham, *Richard Prince v Suicide Girls in an Instagram Price War*, THE GUARDIAN (May 27, 2015), <https://www.theguardian.com/artanddesign/2015/may/27/suicide-girls-richard-prince-copying-instagram> [<https://perma.cc/Z4FP-N4HU>].

The Suicide Girls' main goal was not to make money from the sales; all proceeds went to charity. As one member of the group explained, "We're not making any money on the endeavor, but we're trying to soften the blow a little bit."⁶¹ Rather, the reappropriation served other ends: it spread their fame, enacted a sort of public revenge on their appropriator, and vindicated the connection the creators felt to their work. As Missy Suicide explained, "Instagram is such an expression of our identity and to have an old dude steal [our Instagram photos] and get paid such a significant fee for them hurt. . . . We have seen more attention from media and have received tons of messages of support, it has been a little overwhelming, in a good way."⁶²

This jiu-jitsu self-help move stands in stark contrast to the conventional litigation route chosen by other unhappy subjects of Prince's works. Unlike litigation, which can be long, expensive, and—as we know from Prince's previous litigation—uncertain in outcome with regard to fair use, the Suicide Girls' self-help made a quick and big splash. They achieved an immediate sense of vindication, spread their fame, made money (for charity), and gained new admirers for their vigilante response.

B. Gucci's Cooption of GucciGhost and Dapper Dan

Consider another instance of intellectual property self-help, this time by Gucci, the Italian high-fashion company, which has been using its widely recognized double-G logo for almost a century.⁶³ Figure 5 shows one of the many ways in which Gucci deploys the two G's.⁶⁴



Figure 5: Gucci Dionysus GG Supreme Shoulder Bag

61. Heyman, *supra* note 57.

62. Rosenthal, *supra* note 55.

63. *The History of Gucci and Their Logo Design*, LOGOMYWAY (Dec. 29, 2016), <http://blog.logomyway.com/history-of-gucci-and-their-logo-design> [https://perma.cc/NJ27-2AU7] (explaining that the logo represents the initials of Gucci's founder, Guccio Gucci).

64. *Dionysus GG Supreme Shoulder Bag*, GUCCI, <https://www.gucci.com/us/en/pr/women/womens-handbags/womens-shoulder-bags/dionysus-gg-supreme-shoulder-bag-p-403348KHNRN8642> [https://perma.cc/32GB-HJAL].

Because of its now-iconic nature, Gucci's logo has been coopted by others over time. In 2012, Trevor "Trouble" Andrew, a Brooklynite in need of a Halloween costume, created a last-minute look by turning a (perhaps inauthentic) Gucci bedsheet into a ghost costume.⁶⁵ In that moment, his alter ego, GucciGhost, was born.⁶⁶ In response to positive feedback on his use of the Gucci logo, Andrew started hand-painting a "graffiti-esque" version of the logo⁶⁷ on various objects. These included clothing, boxing gloves, television sets, dumpsters, and walls, all of which he would dutifully post on his Instagram account (some of which are depicted in Figures 6–8).⁶⁸ He started selling GucciGhost apparel and accessories that similarly incorporate Gucci's double-G logo in an online store.⁶⁹ Andrew has since explained his use of the Gucci logo as a central part of his creations: "There's a lot of power behind logos. They represent beauty and greatness and a certain lifestyle."⁷⁰ Andrew attributes his appreciation of high fashion to his mother's interest in vintage clothing and his devotion to branding to his longtime involvement in skater culture.⁷¹ He further notes that Gucci "is like a language. What's Gucci? Everything is Gucci. It's good. It's greatness. The fact that it's made it into English slang, that's so dope."⁷²



Figure 6: Instagram Post by troubleandrew, Feb. 5, 2016

65. See Bridget Foley, *Ghosting at Gucci*, WWD (Feb. 24, 2016), <http://wwd.com/fashion-news/fashion-features/ghost-gucci-alessandro-michele-guccighost-fall-10366122> [<https://perma.cc/MW38-6PYQ>].

66. See Ann Binlot, *The Man and Spirit Behind GucciGhost: Gucci's Renegade Line*, N.Y. TIMES (Sept. 2, 2016), <https://www.nytimes.com/2016/09/04/fashion/trevor-andrew-guccighost-brooklyn-fashion.html> [<https://perma.cc/D5L4-6W4R>].

67. Lauren Sharkey, *Who is GucciGhost?*, RACKED (Feb. 25, 2016), <https://www.racked.com/2016/2/25/11113048/guccighost-explainer-trevor-andrew> [<https://perma.cc/XBZ2-9VA9>].

68. See Binlot, *supra* note 66.

69. Sharkey, *supra* note 67.

70. Foley, *supra* note 65.

71. Emilia Petrarca, *Who You Gonna Call? GucciGhost*, W MAG. (Mar. 4, 2016), <https://www.wmagazine.com/story/guccighost-gucci-alessandro-michele-fall-2016> [<https://perma.cc/GWV8-F6Y5>].

72. *Id.*



Figure 7: Instagram Post by troubleandrew, Jan. 5, 2016



Figure 8: Instagram Post by troubleandrew, Nov. 15, 2015

By early 2016, Gucci had taken action but not in the conventional way. Gucci did not ask Andrew to cease and desist from using its logo, nor did it sue him for trademark or copyright infringement. Those would have been plausible claims, particularly given Andrew's online store. Rather, Gucci hired Andrew to help design part of its fall 2016 collection.⁷³ Gucci's creative director, Alessandro Michele, observed that he "saw the way [Andrew] was using the symbol of the company and . . . thought it was quite genius. . . . It's completely different than the idea of copying. It's the idea that you try to [take to] the street, through language like graffiti, the symbols of the company."⁷⁴ Michele also

73. Foley, *supra* note 65.

74. *Id.* (also describing his design aspiration as "haute couture for the street"). Gucci's website similarly states that "[a]rtist Trouble Andrew is as much as Gucci as the brand is, the way he uses the logo of the company is by taking it to the streets." Alessandro Michele, *Behind the Collection*, GUCCI, <https://www.gucci.com/us/en/st/capsule/men-gucci-ghost-collection> [https://perma.cc/Y972-C6UV].

loved the possibility of playing with the theme of “what is real and unreal.”⁷⁵ Andrew likewise saw this collaboration as a huge win: “People ask if I’m mocking [Gucci] and I’m honestly not at all. When I started the project, I wanted Gucci to notice me. Now more than ever before is a time when they would actually get what I was doing and see that it applies to high fashion and can reach a wide range of people. . . . And it worked!”⁷⁶ Figure 9 depicts a few representative pieces from the collection that fuses Andrew’s street-stylized logo and drawings with the more traditional Gucci finish.⁷⁷

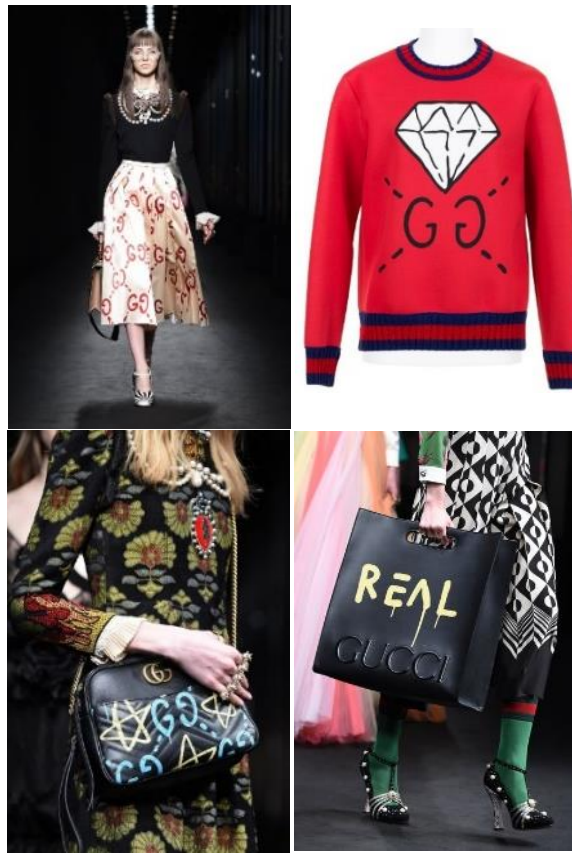


Figure 9: Selections from Gucci’s Collaboration with GucciGhost⁷⁸

75. Foley, *supra* note 65.

76. Petrarca, *supra* note 71.

77. Foley, *supra* note 65 (“Whatever the particular artistic patrimony, a preview of a few of the collection’s pieces enticed. They looked fresh and beautifully rendered, with Michele’s typical gentleness jolted by street grit of the colorful sort.”).

78. Nicola Fumo, *Gucci Brought a Logo-Stealing Artist in House and Now They Have New It Bags*, RACKED (Feb. 24, 2016), <https://www.racked.com/2016/2/24/11105162/gucci-fall-2016-guccighost-bags> [https://perma.cc/R257-ZAVY]; Folashade Odu, *Gucci x GucciGhost Capsule Collection for Colette*, PAUSE (Aug. 22, 2016), <http://pausemag.co.uk/2016/08/gucci-x-guccighost-capsule-collection-for-colette> [https://perma.cc/FS8V-CEEZ].

The reactions from industry insiders, critics, and consumers alike were overwhelmingly positive. *Women's Wear Daily* called it “the boldest collaboration of a major brand with an artist” in years “and the flashiest.”⁷⁹ An industry blog noted that this collaboration helped the longstanding—and perhaps starchy—fashion house bottle what is otherwise very elusive street credibility.⁸⁰ Another described it as “plenty of graffitied-up handbags that will certainly skyrocket to [‘]It-bag status[’] starting in three, two . . . done.”⁸¹ A fashion and lifestyle publication referred to the collaborative results as “genuinely high-fashion masterpieces.”⁸² Gucci’s sales matched the critics’ enthusiasm; much of the collaborative collection quickly vanished from store shelves.⁸³

Some addressed the interesting tactic of coopting Andrew into the Gucci fold rather than pursuing legal action against him for using its logo.⁸⁴ One industry blog stated, “One thing fashion (possibly) adores more than art is raising eyebrows. If the entire industry is against copycats, what better way to shock than by embracing appropriation? . . . Chanel issues lawsuits for misuse of its name, [but] the new Gucci blares it for all to see.”⁸⁵ *Women's Wear Daily* observed how unique this collaboration seemed: “[I]t’s the first time a major fashion brand has enlisted an artist that it has so inspired to such an audacious degree.”⁸⁶ The *Fashion Law* blog observed how unusual this collaboration was,

79. Foley, *supra* note 65.

80. Sharkey, *supra* note 67 (“How did a brand steeped in heritage come to let a street artist loose on its latest designs?”).

81. Fumo, *supra* note 78 (ellipsis in original).

82. Gregory Babcock, *GucciGhost’s Collaborative Gucci Pieces Blend Luxury Logos and Modern Art*, HIGHSNOBIETY (Nov. 10, 2016), <http://www.highsnobiety.com/2016/11/10/gucci-guccighost-photo-editorial> [<https://perma.cc/Q8L2-3F7N>].

83. JQuinones, *Gucci Sales Are Up by 17%*, THE SOURCE (Oct. 26, 2016), <http://thesource.com/2016/10/26/gucci-sales-up-by-17> [<https://perma.cc/AML3-V263>] (reporting a 17 percent increase in Gucci’s 2016 third-quarter sales); *Not Economising Then? Kim Zolciak Goes on \$6,000 Luxury Spending Spree at Gucci and Balenciaga . . . After Husband Is Cut by the Buffalo Bills*, DAILY MAIL (Sept. 17, 2016), <http://www.dailymail.co.uk/tvshowbiz/article-3794467/Not-economising-Kim-Zolciak-goes-6-000-luxury-spending-spree-Gucci-Balenciaga-husband-cut-Buffalo-Bills.html> [<https://perma.cc/Q7RF-BJYS>].

84. Fumo, *supra* note 78 (“Instead of chasing after dude with a lawsuit, Michele invited the artist in to work on official Gucci product together.”).

85. Sharkey, *supra* note 67.

86. Foley, *supra* note 65. This is far from the first collaboration between a fashion house and an artist. For example, from 2003–2015, Louis Vuitton famously collaborated with artist Takashi Murakami, who as part of the association recolored the Louis Vuitton logo or placed graphics such as cherry blossoms atop Louis Vuitton’s traditional bag designs. Maude Churchill, *7 of Our Favorite Louis Vuitton x Murakami Pieces as the Collaboration Comes to an End*, HIGHSNOBIETY (July 17, 2015), <http://www.highsnobiety.com/2015/07/17/louis-vuitton-murakami-pieces> [<https://perma.cc/7R7T-R7XN>]; Hanna Ghorashi, *Louis Vuitton Ends Its 13-Year Relationship with Takashi Murakami*, ARTNEWS (July 21, 2015), <http://www.artnews.com/2015/07/21/louis-vuitton-ends-its-13-year-relationship-with-takashi-murakami> [<https://perma.cc/JT8H-MT9H>]. Recently, Louis Vuitton produced a collection with appropriation artist Jeff Koons, who appropriated nothing but classic public-domain artworks like the *Mona Lisa* for this joint effort. See *Masters: A Collaboration with Jeff Koons*, LOUIS VUITTON, <https://us.louisvuitton.com/eng-us/articles/jeff-koons-x-louis-vuitton> [<https://perma.cc/8JCW-EYQF>]. And fashion houses like Louis Vuitton have even collaborated with

describing it as “an exception to the rule, as Gucci—like Chanel—does *not* take kindly to the unauthorized use of its name and/or logo,” not least because Andrew’s sales were plausibly trademark infringement.⁸⁷

Like the Suicide Girls’ reappropriation, the Gucci-GucciGhost collaboration contrasts sharply with other, recent high-profile infringement lawsuits. To name just a few: Christian Louboutin’s trademark infringement suit against Yves Saint Laurent for making women’s pumps with red soles,⁸⁸ Aquazzura’s suit against Ivanka Trump for infringing its design rights in its shoes,⁸⁹ and Varsity Brands’ copyright infringement suit against Star Athletica for copying its cheerleading uniform designs.⁹⁰

It seems obvious why Gucci chose a collaborative path with Andrew, rather than an adversarial one of asserting intellectual property rights to stop him. For one thing, the financial cost-benefit calculus for collaboration surely is more favorable than that calculus for litigation. Gucci almost certainly had more to gain financially from a splashy and daring collaboration of this sort than from suing a relatively resource-poor defendant. Moreover, Gucci might have had difficulty establishing much pecuniary harm to its rights. Gucci might also have faced an uphill battle establishing unlawful appropriation of its rights given Andrew’s possible fair-use defenses.⁹¹ Moreover, while both collaboration and litigation would draw attention to Gucci’s claims against Andrew, collaboration does so in a more positive way that can confer street credibility unlike fraught (not to mention old-fashioned) litigation. Additionally, collaboration spurs creativity in fashion; litigation clearly does not. Finally, collaboration that both calls attention to Andrew’s history of appropriating the Gucci logo and Gucci’s own history of using the logo accomplishes twin goals that often motivate lawsuits: Gucci avoids misattributions of Andrew’s solo Gucci appropriations and regains attribution of its logo.

companies that they have sued for copying their logos in their products. Cam Wolf, *Louis Vuitton Goes from Lawyering Up Against Supreme to Collabing with Them, Maybe*, RACKED (Jan. 3, 2017), <https://www.racked.com/2017/1/3/14157674/louis-vuitton-supreme-collab-rumor> [<https://perma.cc/G366-ZKTL>].

87. *In Response: “Cool Copycatting” Is Not the Future of Fashion*, FASHION LAW (Feb. 26, 2016), <http://www.thefashionlaw.com/home/in-response-cool-copycatting-in-not-the-future-of-fashion> [<https://perma.cc/59QN-S2LU>] (noting Gucci’s lawsuits against Guess and Beyond the Rack).

88. *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012).

89. *Aquazzura Adds Design Patent Infringement Claim to Trump Lawsuit*, FASHION LAW (Nov. 4, 2016), <http://www.thefashionlaw.com/home/aquazzura-adds-design-patent-infringement-claim-to-trump-lawsuit> [<https://perma.cc/S3PZ-H4ZJ>]; *UPDATED: Aquazzura Files Trademark Suit Against Ivanka Trump Over “Exact Copy”*, FASHION LAW (June 4, 2016), <http://www.thefashionlaw.com/home/aquazzura-files-trademark-suit-against-ivanka-trump-and-licensee> [<https://perma.cc/TY4W-YNZH>] (updated on Nov. 3, 2016, explaining that Aquazzura added a design patent infringement claim).

90. *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017).

91. See generally William McGeeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49 (2008) (discussing the ways in which fair use is available and unavailable in trademark law).

Gucci's appropriation of Harlem-based artist Dapper Dan, however, was less well received. In its recent Cruise 2018 collection show, Gucci showed a fur jacket with gigantic balloon sleeves bearing the Gucci double-G logo as shown on the left in Figure 10. Gucci undoubtedly appropriated this design from a similar jacket made nearly three decades ago by Dapper Dan, who instead put a Louis Vuitton logo on the sleeves, as shown in Figure 10 on the right.⁹² Unlike the Andrew collaboration, Gucci appropriated the design without any consultation or other interaction with Dapper Dan. As one article explains, "in the 1980s and early '90s, [Dapper Dan's boutique was] the go-to for rappers, gangsters, boxers and anyone else looking for even more Gucci, Fendi and Louis Vuitton than could be found at Gucci, Fendi or Louis Vuitton."⁹³ He would either repurpose existing branded items into new fashion items or screen-print brand logos onto his designs,⁹⁴ both of which are likely troublesome as matters of trademark or copyright.⁹⁵



Figure 10: Gucci's Cruise 2018 Jacket (left), Dapper Dan 1980s Jacket (right)⁹⁶

92. Matthew Schneier, *Did Gucci Copy 'Dapper Dan'? Or Was It 'Homage'?*, N.Y. TIMES (May 31, 2017), <https://www.nytimes.com/2017/05/31/fashion/gucci-dapper-dan-jacket.html> [<https://perma.cc/2BVG-GR4N>].

93. *Id.*

94. *Id.* For more on Dapper Dan, his fashion designs, and the raids he experienced as a result of these designs, see Kelefa Sanneh, *Harlem Chic*, NEW YORKER (Mar. 25, 2013), <http://www.newyorker.com/magazine/2013/03/25/harlem-chic> [<https://perma.cc/8USN-EHUN>].

95. Compare, e.g., Abigail Abesamis, *Louis Vuitton Fried Chicken Knockoff Ordered to Pay Luxury Retailer \$12,000*, FOX NEWS (Nov. 27, 2016), <http://www.foxnews.com/food-drink/2016/04/21/louis-vuitton-fried-chicken-knockoff-ordered-to-pay-luxury-retailer-12000.html> [<https://perma.cc/JJQ8-UMMH>] (reporting on a South Korean judgment against a fried-chicken restaurant named Louis Vuitton Dak for using that name and packaging too close to Louis Vuitton's logos), with *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425 (S.D.N.Y.), *aff'd*, 674 Fed. Appx. 16 (2d Cir. 2016) (holding that use of Louis Vuitton's trademarked logo on canvas tote bags as a parody did not constitute trademark or copyright infringement).

96. Michel Gaubert (@michelgaubert), INSTAGRAM (May 29, 2017), <https://www.instagram.com/p/BU5GPSAB-2W> [<https://perma.cc/5SCL-NMHL>].

Though Gucci was “effectively reappropriating the appropriation,”⁹⁷ just as with Andrew, it arguably took a different route. First, it acted without Dapper Dan’s involvement. Second, Gucci’s actions sparked racial tensions among critics on the basis that it appropriated the work from an African-American designer.⁹⁸ After both the established press and social media questioned, and even shamed, Gucci for this appropriation, Gucci credited Dapper Dan and called the Gucci piece “an homage” to his work and “in celebration of the culture of that era in Harlem.”⁹⁹ Gucci also indicated that the company had tried to contact Dapper Dan, without success, and that the company was interested in a creative collaboration with him to celebrate his influence on fashion and hip-hop culture.¹⁰⁰ While Dapper Dan did not speak to the press about Gucci’s (re)appropriation, his Twitter post and an article on the front page of the *New York Times* Style Section showed that he appreciated the media coverage.¹⁰¹ A few months later, owing to this widespread outrage, Gucci announced that it would be collaborating officially with Dapper Dan on a capsule collection,

97. Schneier, *supra* note 92; accord Eliza Brooke, *Was Gucci Wrong to Copy Dapper Dan?*, RACKED (June 1, 2017), <https://www.racked.com/platform/amp/2017/6/1/15725666/gucci-dapper-dan> [<https://perma.cc/29MX-TFLF>] (“[The reappropriation is] complicated for a few reasons, the most obvious being that Daniel Day made his name by enthusiastically knocking off luxury logos, including Gucci’s.”).

98. Brooke, *supra* note 97 (“[W]hile [Gucci]’s intentions may be good, no one can ignore the history of the extremely white world of high fashion plundering black culture and transposing those looks on white models.”).

99. Schneier, *supra* note 92 (quoting an official Gucci company statement). *But cf.* Liana Satenstein, *Would You Ever Buy Fake Designer Clothes? How Some Labels Are Changing the Bootleg Stigma*, VOGUE (June 6, 2017), <http://www.vogue.com/article/rise-of-bootleg-fashion-at-gucci-and-velvetements> [<https://perma.cc/V5HB-4DDA>] (citing Gucci’s “Dapper Dan”-inspired jacket as an example of reappropriating an appropriation).

100. Schneier, *supra* note 92. Interestingly, the *New York Times*, soon after the Gucci show, was able to contact Dapper Dan for an article it wrote on the reappropriation. *See* Barry M. Cooper, *The Fashion Outlaw Dapper Dan*, N.Y. TIMES (June 3, 2017), <https://www.nytimes.com/2017/06/03/fashion/dapper-dan-harlem-gucci.html?module=inline> [<https://perma.cc/4PXX-5T5S>].

101. Dapper Dan (@DapperDanHarlem), TWITTER (June 4, 2017 12:34 PM), <https://twitter.com/DapperDanHarlem/status/871450034579099648> [<https://perma.cc/N593-7JP2>].

featuring him in an advertising campaign (as shown in Figure 11) and helping him reopen his atelier.¹⁰²



Figure 11: Gucci Fall 2017 Campaign featuring Dapper Dan¹⁰³

The recent Dapper Dan incident demonstrates how using social media and other online means to call out design appropriations offers fashion designers and their fans another way to take intellectual property into their own hands. In Dapper Dan's case, many of his fans, including Diane Dixon, the Olympic gold medalist who wore the original 1980s fur jacket at issue, used social media to call out Gucci for its (re)appropriation.¹⁰⁴ This reaction is likely what led to Gucci's swift reaction with some apology, to mainstream media coverage, and to the Gucci-Dapper Dan collaboration.

C. *Diet Prada and Other High-Fashion Calling Out*

Others in the fashion world have used social media shaming with varying degrees of success. Examples include luxury Italian footwear designer Aquazzura shaming Ivanka Trump on Instagram for allegedly appropriating its

102. Whitney Bauck, *How Dapper Dan Went from Harlem's Best-Kept Secret to International Fashion Icon*, FASHIONISTA (Nov. 6, 2017), <https://fashionista.com/2017/11/fashionistacon-2017-dapper-dan-harlem-gucci> [<https://perma.cc/SY5K-ZKL5>]; Matthew Schneier, *Thanks, Internet Outrage! Now Dapper Dan and Gucci are Buds*, N.Y. TIMES (Sept. 10, 2017), <https://www.nytimes.com/2017/09/10/fashion/dapper-dan-gucci-partnership.html> [<https://perma.cc/5N5Y-FBAS>]. The Gucci/GucciGhost/Dapper Dan story is not the only one of retaking the copy in the trademark realm. Recently, famed graphic designer and artist Barbara Kruger, skateboarding clothing company Supreme, and the company behind female-centered streetwear brand Supreme Bitch have been locked in an escalating cooption battle over related logos. *From the Name to the Box Logo: The War over Supreme*, FASHION LAW (Feb. 22, 2018), <http://www.thefashionlaw.com/home/from-the-name-to-the-box-logo-the-war-over-supreme> [<https://perma.cc/6U5P-NWNY>].

103. David Renshaw, *Dapper Dan Is Officially Working with Gucci Now*, FADER (Sept. 11, 2017), <http://www.thefader.com/2017/09/11/gucci-dapper-dan-collab> [<https://perma.cc/JMA8-HKL2?type=image>].

104. Schneier, *supra* note 92.

hit Wild Thing sandals (shown in Figure 12),¹⁰⁵ Stefano Gabbana of Dolce & Gabbana calling out the eerie similarities between Chanel’s Ionic-column-shaped pump heels and Dolce & Gabbana’s earlier column-heel,¹⁰⁶ and Alexander Wang accusing Philipp Plein of misappropriation by comparing a Plein fashion show side-by-side with one of Wang’s own earlier fashion shows.¹⁰⁷



Figure 12: Aquazzura’s Shaming of Ivanka Trump

Detecting copying in today’s social media world takes just one observant fan with an itchy Twitter finger. In fact, there are social media accounts dedicated to revealing copying in the fashion world.¹⁰⁸ Claims of copying can then spread

105. Adele Chapin, *Aquazzura Shames Ivanka Trump for Copying its Sandal*, RACKED (Mar. 14, 2016), <https://www.racked.com/2016/3/14/11222812/ivanka-trump-aquazzura-copying-wild-thing> [https://perma.cc/LM74-D3P5] (stating in an Instagram post comparing the two designs that “[o]ne of the most disturbing things in the fashion industry is when someone blatantly steals your copyright designs and doesn’t care. You should know better. Shame on you @ivankatrump! Imitation is NOT the most sincere form of flattery”). Aquazzura has since sued and settled with Trump for infringement of its intellectual property rights. See *supra* text accompanying note 89.

106. Nora Crotty, *Did Chanel Rip Off Dolce & Gabbana’s Column Heels?*, FASHIONISTA (May 5, 2017), <https://fashionista.com/2017/05/chanel-rip-off-dolce-gabbana-heels> [https://perma.cc/K2KD-WV42].

107. Sophia Chabbott, *Alexander Wang Accuses Plein Sport of Knocking Off Runway Show* (Feb. 14, 2017), <http://wwd.com/fashion-news/fashion-scoops/alexander-wang-accuses-plein-sport-knocking-off-runway-show-10802237> [https://perma.cc/SGP7-LAFA]; see also Rosemary Feitelberg, *Allison Janney’s Oscar Night Dress by Reem Acra Fires Up Designer Marc Bouwer*, WWD (Mar. 6, 2018), <http://wwd.com/fashion-news/fashion-scoops/allison-janney-oscars-reem-acra-marc-bouwer-1202622359> [https://perma.cc/W4M2-NYW3] (describing how designer Marc Bouwer used Instagram to call out designer Reem Acra for copying him in designing the dress Allison Janney wore to the Oscars).

108. See Crotty, *supra* note 106 (describing an Instagram account “that pits similar fashions against each other”).

quickly and easily to the design originator, mass media, and the appropriator. Social media shaming can be embarrassing to the appropriator and can lead to financial remuneration, cessation of further appropriation, attribution of the original work accordingly, and avoidance of misattribution of the appropriation to the originator.

With over one million followers, Diet Prada is one of the most successful and systematic intellectual property shamers today.¹⁰⁹ Diet Prada is a once-anonymous Instagram account¹¹⁰ since revealed to be the work of duo Tony Liu and Lindsey Schuyler.¹¹¹ Although the duo itself chose to appropriate the luxury fashion company Prada's name,¹¹² they are unironically sanctimonious in

109. Diet Prada (@diet_prada), INSTAGRAM, https://www.instagram.com/diet_prada [<https://perma.cc/5GQ7-EB8J>]; cf. whos ___ who (@whos___who), INSTAGRAM, https://www.instagram.com/whos___who/?hl=en [<https://perma.cc/DD38-VCJT>] (the anonymous Instagram account, which takes a somewhat similar approach to showing examples of copying in the art world); Rachel Corbett, *Is This Painting by Josh Smith or Mose Tolliver? A Vigilante Instagram Account is Shaming the Copycats of the Art World*, ARTNET NEWS (June 5, 2018), <https://news.artnet.com/art-world/josh-smith-or-mose-tolliver-a-popular-instagram-account-is-subtly-shaming-the-copycats-of-the-art-world-1295255> [<https://perma.cc/PWC6-9R3A>].

110. Alexa Tietjen, *Eyes On: Diet Prada*, WWD (Oct. 5, 2017), <http://wwd.com/eye/lifestyle/diet-prada-instagram-11020510> [<https://perma.cc/X6ST-W4VL>] (describing the person behind the Diet Prada account as “a fashion insider who prefers to remain anonymous”).

111. *Meet Tony Liu and Lindsey Schuyler: The Duo Behind Diet Prada*, FASHION LAW (Oct. 19, 2017), <http://www.thefashionlaw.com/home/meet-tony-liu-and-lindsey-schuyler-the-duo-behind-diet-prada> [<https://perma.cc/F63G-GASU>].

112. Prada seems not to mind. It invited the duo to attend a recent show at Milan Fashion Week. Lou Stoppard, *Diet Prada—Fashion's Most Powerful Critic*, FIN. TIMES (Dec. 27, 2017), <https://www.ft.com/content/777edf64-c94a-11e7-8536-d321d0d897a3> [<https://perma.cc/684G-7LSK>].

shaming almost any and all copying or evocative similarities in the fashion industry, as illustrated in Figures 14–16.¹¹³



Figure 13: Diet Prada’s Shaming of Alice & Olivia for Copying Yves Saint Laurent¹¹⁴

113. In fact, they had Instagram take down as copyright infringement media that reposted their Instagram content, leading the reporter to note that “[a]pparently fair use (when using others’ imagery) only applies to them.” *Meet Tony Liu and Lindsey Schuyler*, *supra* note 111.

114. Diet Prada (@diet_prada), INSTAGRAM (Dec. 1, 2017), <https://www.instagram.com/p/BcKxG6wlbGR> [https://perma.cc/BFC6-ERRA].

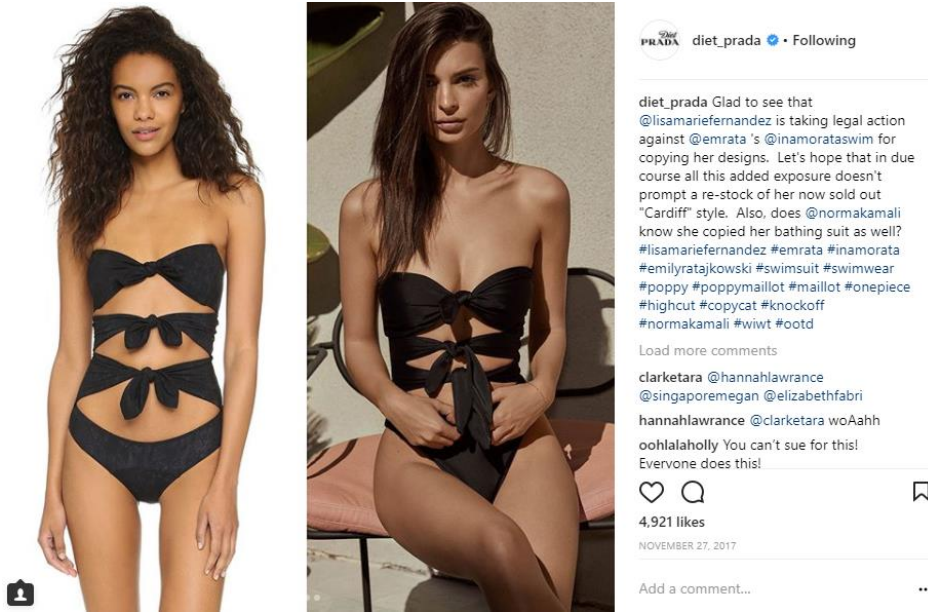


Figure 14: Diet Prada’s Shaming of Emily Ratajkowski for Copying Lisa Marie Fernandez¹¹⁵

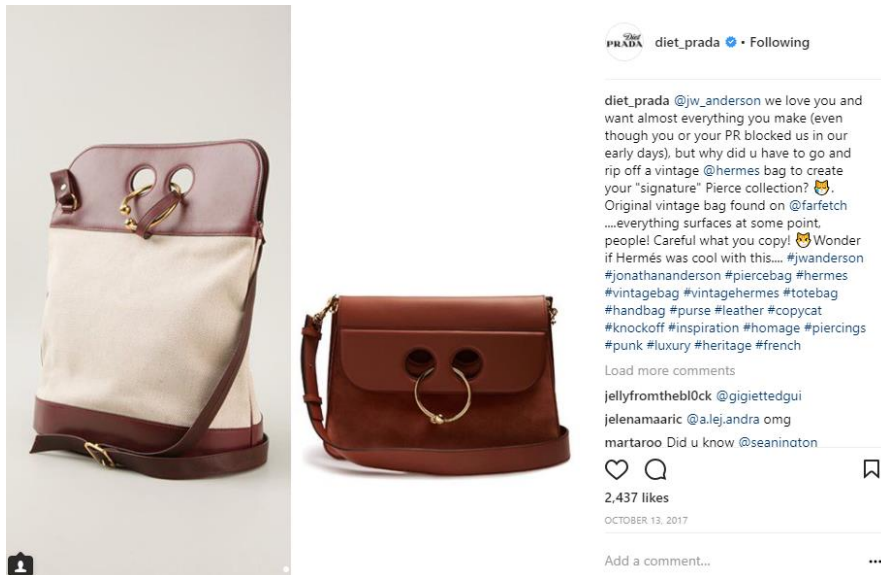


Figure 15: Diet Prada’s Shaming of JW Anderson for Copying Hermès¹¹⁶

115. Diet Prada (@diet_prada), INSTAGRAM (Nov. 27, 2017), <https://www.instagram.com/p/BcArfXQIzi8> [<https://perma.cc/C3LE-QR86>].

116. Diet Prada (@diet_prada), INSTAGRAM (Oct. 13, 2017), <https://www.instagram.com/p/BaMPO31FaUX> [<https://perma.cc/S9M6-S52R>].

Diet Prada has been called “the fashion police” and been described as “throw[ing] its accusations around like hand grenades.”¹¹⁷ Some designers, particularly those with smaller labels, have been grateful to Diet Prada. For example, Diet Prada recently accused luxury fashion company Valentino of knocking off an independent jeweler, who stated:

Before Diet Prada I spent a lot of money instructing lawyers to handle the theft of my intellectual property. I felt that I didn’t have a lot of power against big companies—I fought a lot of cases very privately and felt quite deflated because it feels relentless—especially as finances aren’t endless for a small business. It wasn’t until Diet Prada that I realised the power of social media, and how angry it makes consumers when companies copy independent designer’s work. Since then I’ve called out numerous cases through my social media and received a much more prompt response and apology from brands that have copied my work.¹¹⁸

Nevertheless, Diet Prada has a very particular notion of intellectual property theft that does not precisely map onto copyright and trademark laws’ nuances. In setting out the dividing line between permissible inspiration and impermissible theft, for example, the duo has said, “When it’s from a place of love (and credited) it[’]s inspiration. If you’re trying to keep the reference quiet and cash in [on] someone else’s proven success, then you’re into theft territory.”¹¹⁹

D. Intellectual Property Diss Songs

Musicians also take intellectual property into their own hands by channeling their grievances into new songs. Songs in a musical genre do not exist in a vacuum. In some cases, songs make apparent their connections to past songs by borrowing from them, referencing them directly, or sampling from them.¹²⁰ There is a long musical tradition of “answer songs” responding to other pieces.¹²¹ These answer songs can appear in a variety of guises: “They either support or contradict themes initiated in earlier recordings; they caricature singing styles or ridicule cultural stances presented in prior songs; they directly sample portions of lyrics or melodies from previous hit records; or they create comic tales and satirize social situations through lyrics superimposed over a popular song’s

117. Stoppard, *supra* note 112.

118. *Id.* (quoting Jessie VE).

119. Max Grobe, *Diet Prada Is the Instagram Account Calling Out Copycat Culture in Fashion*, *HIGHSNOBIETY* (Oct. 24, 2017), <https://www.highsnobiety.com/2017/10/24/diet-prada-copy-fashion> [<https://perma.cc/8H8S-MH39>].

120. See generally Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 *N.C. L. REV.* 547 (2006) (discussing the technique and history behind “musical borrowing”).

121. See generally 1–2 B. LEE COOPER ET AL., *ANSWER SONGS: A REFERENCE GUIDE TO RESPONSE RECORDINGS, 1900–2015* (2015) (cataloguing a variety of answer songs).

melody and rhythm pattern.”¹²² Answer songs sometimes “respon[d] to direct questions or to strong statements.”¹²³ For example, Damita Jo famously responded to The Drifter’s 1960 hit “Save the Last Dance for Me” with “I’ll Save the Last Dance for You.”¹²⁴ At other times, they “adjust[] . . . lyrical content and pronoun references to alter gender-specific messages.”¹²⁵ They can repeat “particular song titles or lyrical phrases in successive recordings that promote artist recognition,” in addition to a broad range of other phenotypes.¹²⁶ Consider 2 Live Crew’s rap version of Roy Orbison’s “Pretty Woman,” the subject of a foundational Supreme Court decision on fair use in copyright law. Justice Souter described the rap song as “juxtapos[ing] the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility” and viewed it as “a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies.”¹²⁷

Related to answer songs are “diss songs,” hip-hop songs that are intended to disrespect a particular person or group.¹²⁸ Whereas answer songs tend not to break the fourth wall—by responding to a particular song on its own terms without regard to the song’s artist—diss songs sometimes break through that wall by referring to other songs and their artists.¹²⁹ For example, after Ice Cube left the rap group NWA for a solo career, NWA disparaged Ice Cube on some of its subsequent songs.¹³⁰ Ice Cube then responded with a diss song of his own, “No Vaseline,” which included lyrics taking explicit aim at NWA members: “Yella Boy’s on your team, so you’re losin’ / Ay Yo Dre, stick to producin’.”¹³¹

A further subset of diss songs accuses other artists of appropriating the singer’s songs or style, sometimes even by retaking the copy to emphasize the point.¹³² Consider the following examples.

122. 1 *id.* at 7.

123. *Id.*

124. 2 *id.* at 609.

125. 1 *id.* at 8.

126. *Id.*

127. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994).

128. *E.g.*, Andrew Barber & Frazier Tharpe, *The 50 Best Hip-Hop Diss Songs*, COMPLEX (Oct. 31, 2018), <http://www.complex.com/music/2017/03/the-50-best-hip-hop-diss-songs> [<https://perma.cc/DSJ9-JEAH>].

129. *Id.*

130. *15 of the Most Memorable Diss Tracks in Hip Hop History*, CAPITAL XTRA, <http://www.capitalxtra.com/playlists/best-songs/diss-tracks> [<https://perma.cc/B899-27WG>].

131. *Id.*; ICE CUBE, *No Vaseline*, on *DEATH CERTIFICATE* (Priority Records 1991).

132. Somewhat relatedly, some diss songs are derogatory responses to critics that have accused the singer of copying or imitation in the past. For example, Drake’s song “Back to Back” responds to rapper Meek Mill’s charge that Drake has used ghostwriters on previous songs with the lyrics: “This for y’all that think that I don’t write enough / They just mad ‘cause I got the Midas touch.” DRAKE, *Back to Back*, on *BACK TO BACK* (Young Money 2015). The song ends up serving as proof in and of itself that Drake writes his own songs. *Accord* Barber, *supra* note 128 (“How fitting that Drake’s response to a beef ignited by accusations of ghostwriting led to some of his best songwriting to date.”). Similarly, Nicki Minaj’s song “Roman’s Revenge” attacks Lil’ Kim that it is time for her to leave the spotlight

“Icy” is a 2005 song by Gucci Mane, featuring then more famous rapper Young Jeezy.¹³³ Young Jeezy’s record label, Def Jam, asked Gucci Mane if the song could be included on Young Jeezy’s debut album, but Gucci Mane turned down Def Jam and released the track on his own debut album instead.¹³⁴ Young Jeezy was allegedly upset at this refusal to release a song he collaborated on and helped create.¹³⁵ “Icy” turned into a hit for Gucci Mane, particularly in the South where both rappers were based.¹³⁶ In addition, Young Jeezy was reportedly upset that Gucci Mane never paid him any royalties for his contributions to “Icy.”¹³⁷ In response, he released the song “Stay Strapped,” which criticizes Gucci Mane for being fake (“See straight through you n****, you’s a plastic rapper”), for getting money that he does not deserve (“Signed your whole life away for Dodge Magnum money / . . . / . . . you just getting show money”), and for falsely claiming association with “Icy” by wearing a chain necklace bearing the word. In fact, Yeezy rapped that the chain necklace ought to be taken away from Gucci Mane in exchange for a \$10,000 reward (“Went around talking you icy and shit / . . . / . . . I want that motherfucking bullshit-ass Icy chain / Cause you need to take that monkey shit off you, embarrassing us n**** / Matter of fact, real talk n****, I got a bounty on that shit n****, ten stacks / You know Jeezy ain’t fake n****”).¹³⁸ Young Jeezy’s new song gave him an artistic forum to accuse Gucci Mane of taking intellectual property that he thought in part belonged to him. It allowed him to recoup royalties he felt he was owed and claim his part in crafting “Icy.” These accusations had real-world repercussions beyond the diss song. In response to “Stay Strapped,” a group of attackers jumped Gucci Mane to get the “Icy” chain necklace in exchange for the promised reward. Gucci Mane shot one of them dead but was later acquitted for acting in self-defense.¹³⁹

after her repeated but unjustified accusations that Minaj had stolen her image and style. NICKI MINAJ & EMINEM, *Roman’s Revenge*, on PINK FRIDAY (Young Money 2010). And at least one rap/dance hit, 1990’s “The Power” by German music group Snap!, contains a generic warning to listeners not to infringe the band’s copyrights: “When my voice goes through the mesh / Of the microphone, that I am holding / Copywritten lyrics, so they can’t be stolen / If they all Snap, don’t need the police / To try to save them, your voice will cease / So peace, stay off my back / Or I will attack and you don’t want that.” SNAP!, *The Power*, on WORLD POWER (Arista 1990).

133. GUCCI MANE, *Icy*, on TRAP HOUSE (Big Cat Records 2005); see also Shaheem Reid, *Gucci Mane Says ‘I’m Not a Murderer’; Young Jeezy Denies Involvement in Case*, MTV NEWS (May 27, 2005), <http://www.mtv.com/news/1503092/gucci-mane-says-im-not-a-murderer-young-jeezy-denies-involvement-in-case> [https://perma.cc/YBL8-46BG] (describing Gucci Mane and Young Jeezy’s collaboration on “Icy”).

134. *Stay Strapped – Jeezy*, RAP GENIUS, <https://genius.com/Jeezy-stay-strapped-lyrics> [https://perma.cc/D6RE-L632].

135. Reid, *supra* note 133 (noting, however, that Young Jeezy goes on record later to say that he was not upset over being refused “Icy” for his album because “I got 40 hits in the street”).

136. Justin Block, *A History of Young Jeezy and Gucci Mane’s Beef*, COMPLEX (Oct. 15, 2012), <http://www.complex.com/music/2012/10/a-history-of-young-jeezy-and-gucci-manes-beef> [https://perma.cc/6XH2-99CY].

137. *Stay Strapped – Jeezy*, *supra* note 134.

138. YOUNG JEEZY, *Stay Strapped*, on SNOWMAN – MO ICEY (Starz Music 2006).

139. Block, *supra* note 136.

As another example, consider the intellectual property (and all-around) diss song, “Hit ’Em Up,” released by Tupac Shakur shortly before his shooting death in 1996. This iconic song is notorious for igniting a war between the West Coast-based Death Row Records (personified by Shakur) and the East Coast-based Bad Boy Records (personified by Biggie Smalls), which led to the deaths of both Shakur and Smalls.¹⁴⁰ “Hit ’Em Up” is considered one of the canonical diss songs in hip-hop.¹⁴¹ In addition to the many angry, violent, and sexual threats in the song aimed at Smalls and others at Bad Boy Records, Shakur used multiple aspects of the song’s music and lyrics to also accuse them of intellectual property theft. For one thing, Shakur intimated that the group Junior MAFIA, which featured Smalls, appropriated a prior version of “Hit ’Em Up” in its song “Get Money.”¹⁴² In this subsequent version of “Hit ’Em Up,” Shakur made this insinuation by adapting the beat of “Get Money,” instead rapping “Take money” repeatedly as denunciation.¹⁴³ He also reworked Smalls’s hook from another Junior MAFIA song, “Players Anthem,” delivering it with the same melody (turning the vulgar sexual refrain that Smalls originally delivered into the similar-sounding but now violence-focused refrain, “See, grab your Glocks when you see 2Pac / Call the cops when you see 2Pac, uh”).¹⁴⁴ Moreover, Shakur accused Smalls of imitating his style unsuccessfully in “Get Money” and other songs: “Tryna come up off of me, you in the clouds hopin’ / Smokin’ dope, it’s like a sherm high / . . . / Talkin’ about you gettin’ money, but it’s funny to me / All you n***** livin’ bummy while you fuckin’ with me.”¹⁴⁵ “Hit ’Em Up” goes on to accuse Smalls of sampling the same song as Shakur—thought to be the Isley Brothers’ song “Between the Sheets,” which appears on Smalls’ song “Big Poppa” when it had already appeared as part of Shakur’s earlier song “Time to Get My Drank on”: “You’s a beat biter, a Pac style taker / I’ll tell you to your face you ain’t shit but a faker.”¹⁴⁶ Finally, he accuses Smalls of copying his fashion style of wearing Versace: “Now it’s all about Versace, you copied my style.”¹⁴⁷ It is notable how much of the dissing in this canonical diss song regards accusations of copying.

A third example of an intellectual property diss song catapulted its artists to fame in 1995. With “Live by Yo Rep (Bone Dis),” the Memphis-based rap group Three 6 Mafia targeted the more well-known hip-hop group Bone Thugs-

140. 2PAC, *Hit ’Em Up*, on HIT ’EM UP (Death Row 1996); Barber, *supra* note 128.

141. Barber, *supra* note 128.

142. *Hit ’Em Up – 2Pac*, RAP GENIUS, <https://genius.com/13566> [<https://perma.cc/DU5Q-YHA8>].

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* Similarly, he accuses Junior MAFIA of copying Shakur’s and Death Row’s fashion style: “Whole Junior M.A.F.I.A. clique dressin’ up tryna be us.” *Id.*

N-Harmony for copying their occult rap style.¹⁴⁸ The song begins with a news broadcaster interviewing Three 6 Mafia, questioning, “Here interviewing the Triple 6 Mafia from Memphis / Who has a unique quality of rap style / What would you do if someone tried to duplicate your ideas?”¹⁴⁹ Lord Infamous, a member of Triple 6 Mafia, responds with violent imagery targeting Flesh-N-Bone, a member of Bone Thugs-N-Harmony: “Well, I shall take a 1000 razor blades and press them in their flesh / Take my pitchfork out the fire, soak in their chest . . .”¹⁵⁰ Another group member adds, “To you fuckin imitators, watch yo ass fuckin click / Bite a Playa’s style and slip, soon you will be stackin, bitch / Fly gon bring them body bags / Lord you touch the fuckin shovel / Dig it deep and bury that bitch / Lay ’em down there with the Devil / Busta numb, redruM, Mr. I-B-N, fool.”¹⁵¹ Though Three 6 Mafia later settled the feud and decided that many of the similarities between the groups’ styles were mere coincidence,¹⁵² this song put Three 6 Mafia on the map.¹⁵³ As one hip-hop magazine put it, “Whether the beef was just was never determined, but this was a prime example of a lesser-known group gaining notoriety by dissing a bigger artist.”¹⁵⁴ By creating a new song in their normal style to accuse Bone Thugs-N-Harmony of appropriating that same style, Three 6 Mafia disassociated itself from the copiers and sought attribution for that style.

In each of these examples, the “diss” extracted value using his diss song. The diss was able to secure financial compensation through the song’s commercial impact to offset any financial harm from appropriation. Each diss used his song as a vehicle to shame the appropriator for his taking. In doing so, he could claim credit for his original work or style and distance himself from the appropriation. And he did this without the cost, messiness, stodginess, and uncertainty of copyright infringement litigation. In fact, each diss might well have lost his case for laying claim to material, like style and ideas, that copyright

148. THREE 6 MAFIA, *Live by Yo Rep (B.O.N.E. Dis)*, on MYSTIC STYLEZ (Prophet Entertainment 1995). This style, as one of Three 6 Mafia’s members later put it, involves “rapping about triple six, devil shit, and tongue twisting over slow beats.” Justin Hunte, *Three 6 Mafia Beef with Bone Thugs-N-Harmony Explained by DJ Paul*, HIPHOPDX (Apr. 28, 2015), <http://hiphopdx.com/news/id.33626/title.three-6-mafia-beef-with-bone-thugs-n-harmony-explained-by-dj-paul> [https://perma.cc/A2A6-RMJZ].

149. THREE 6 MAFIA, *supra* note 148.

150. *Id.* The song also refers derogatorily to other members of Bone Thugs-N-Harmony, Layzie Bone and Bizzy Bone, as well as the CEO of their label, Eazy-E: “See we can’t tolerate no n[****] that is Layzie / Broke out the blender and I made some Krayzie gravy / It’s Eazy, and when it was time to get Bizzy / Don’t break, you can Wish, but You can’t escape / Because we crave dead Flesh / Triple 6 bitch, easily you can be next.” *Live by Yo Rep (Bone Dis) – Three 6 Mafia*, RAP GENIUS, <https://genius.com/Three-6-mafia-live-by-yo-rep-bone-dis-lyrics> [https://perma.cc/9KP7-BP5X] (asterisks added).

151. THREE 6 MAFIA, *supra* note 148.

152. Hunte, *supra* note 148 (featuring an interview with a Three 6 Mafia member who “explained that the conflict was a ‘misunderstanding’ based off of each group having similar styles”).

153. Barber, *supra* note 128.

154. *Id.*

law does not protect.¹⁵⁵ That said, at least two of these examples reveal a dark side of intellectual property self-help: self-help can be lawless and even deadly. Young Jeezy’s diss song led Gucci Mane to kill someone. Shakur’s song was a piece in the violent rivalry between Shakur and Death Row Records, on the one hand, and Biggie Smalls and Bad Boy Records, on the other, which eventually culminated in the deaths of both Shakur and Smalls.

E. James Turrell and Drake

James Turrell is a revered visual artist, known as a pioneer in the 1960s “Light and Space” movement.¹⁵⁶ Turrell makes immersive installation artworks that experiment with light, color, space, and perception.¹⁵⁷ Recently, he turned the entire atrium of the Guggenheim Museum into a walk-in sculpture.¹⁵⁸ But while Turrell is an icon in the art world, he is not especially well known in broader pop culture. That changed when Drake, the superstar rapper-singer, released his megahit video for his song “Hotline Bling.”¹⁵⁹ The video features Drake dancing in rooms of glowing neon light that look remarkably like Turrell’s works. “Hotline Bling” was so popular that it quickly became a cultural meme.¹⁶⁰ The craze for online imitations of the video became so widespread that publications like *Time*, *Vogue*, and *USA Today* printed stories collecting popular “Hotline Bling” memes.¹⁶¹

It seemed clear that this Drake video was made by using fabricated copies of various Turrell sculptures. Below, in Figure 16, are four shot-by-shot comparisons showing the similarities between Drake’s video and Turrell’s

155. See generally Pamela Samuelson, *Reconceptualizing Copyright’s Merger Doctrine*, 63 J. COPYRIGHT SOC’Y U.S.A. 417 (2016) (discussing how copyright law offers little protection to merged expression).

156. See generally MICHAEL GOVAN & CHRISTINE Y. KIM, *JAMES TURRELL: A RETROSPECTIVE* (2013) (LACMA catalog documenting the artist’s career).

157. See generally *id.*

158. Roberta Smith, *New Light Fixture for a Famous Rotunda*, N.Y. TIMES (June 20, 2013), <http://www.nytimes.com/2013/06/21/arts/design/james-turrell-plays-with-color-at-the-guggenheim.html> [<https://perma.cc/VBC8-QATH>].

159. Drake, *Hotline Bling*, YOUTUBE (Oct. 26, 2015), <https://www.youtube.com/watch?v=uxpDa-c-4Mc> [<https://perma.cc/9RB9-BF4C>].

160. Jon Caramanica, *Drake: Rapper, Actor, Meme*, N.Y. TIMES (Oct. 23, 2015), <https://www.nytimes.com/2015/10/24/arts/music/drake-rapper-actor-meme.html> [<https://perma.cc/T2LA-D3X6>]. Caramanica wrote, “The ‘Hotline Bling’ video is also the moment when Drake fully becomes a meme.” *Id.* He called the video “less a video than an open source code.” *Id.*

161. Eliza Berman, *Drake’s ‘Hotline Bling’ Video Inspired Some Incredible Dancing Memes*, TIME (Oct. 20, 2015), <http://time.com/4079654/drake-hotline-bling-dancing-memes> [<https://perma.cc/J7SX-VUHL>]; Patricia Garcia, *The Funniest Memes Inspired by Drake’s ‘Hotline Bling’ Video*, VOGUE (Oct. 22, 2015), <https://www.vogue.com/article/drake-hotline-bling-video-memes> [<https://perma.cc/76VB-94VN>]; Maevie McDermott, *The Best ‘Hotline Bling’ Drake Memes, from A to Z*, USA TODAY (Oct. 20, 2015), <https://www.usatoday.com/story/life/entertainthis/2015/10/20/best-hotline-bling-memes-drake/74267298> [<https://perma.cc/Y8BZ-BA4H>].

works. In each pairing, a still from “Hotline Bling” appears on top and an image of the Turrell sculpture it resembles appears below.

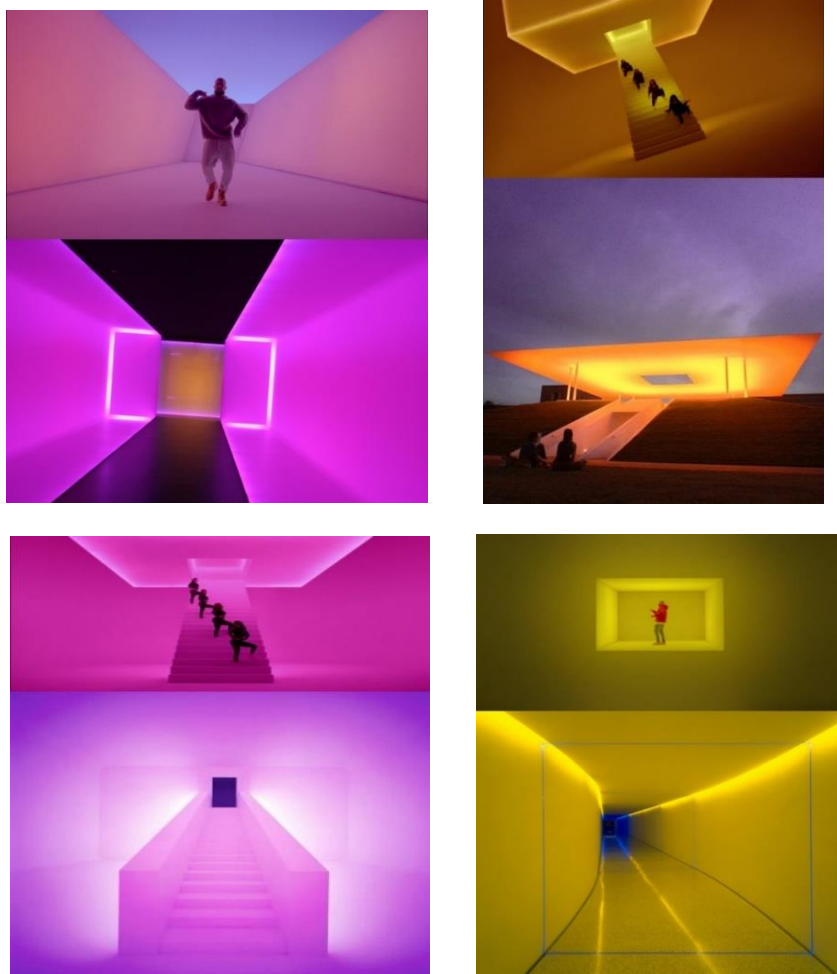


Figure 16: Shot-by-Shot Comparison of Drake’s “Hotline Bling” Video and James Turrell’s Works¹⁶²

Drake’s own Instagram feed featured evidence of copying, as exemplified by the post in Figure 17. The year before he released “Hotline Bling,” the hip-hop artist had posted photos of himself posing in a Turrell installation at the Los

162. These side-by-side comparisons come from Claire Voon, *Did Drake’s New Video Get Its Bling from James Turrell’s Light Installations?*, HYPERALLERGIC (Oct. 21, 2015), <https://hyperallergic.com/246789/did-drakes-new-video-get-its-bling-from-james-turrells-light-installations> [<https://perma.cc/M67F-FN5W>].

Angeles County Museum of Art.¹⁶³ In an interview for *Rolling Stone*, a reporter accompanied Drake to the Turrell retrospective at the museum.¹⁶⁴ Drake lingered in the works, expressing his admiration for Turrell. “I fuck with Turrell,” the rapper told *Rolling Stone*.¹⁶⁵ He continued, “He was a big influence on the visuals for my last tour.”¹⁶⁶



Figure 17: Drake’s Instagram Post of Him Visiting the Turrell Exhibit

In response to the copying, Turrell might have sued for copyright infringement. Indeed, a recent case in the Southern District of New York set a promising precedent for Turrell. In that case, the artist David LaChapelle brought a copyright claim against singer Rihanna for the video for her song “S&M.”¹⁶⁷ Rihanna’s video contained scenes quite similar to some of LaChapelle’s still photos.¹⁶⁸ The photographer’s claim survived a motion to dismiss, and the parties ultimately settled.¹⁶⁹ In its pre-settlement ruling allowing

163. Gallerist, *Drake Visited the James Turrell Show at LACMA*, OBSERVER (Jan. 31, 2014), <http://observer.com/2014/01/drake-visited-the-james-turrell-show-at-lacma> [https://perma.cc/5PPU-GW59].

164. Jonah Weiner, *Drake: High Times at the YOLO Estate*, ROLLING STONE (Feb. 13, 2014), <https://www.rollingstone.com/music/news/drake-high-times-at-the-yolo-estate-20140213> [https://perma.cc/YN3X-HSTD].

165. *Id.*

166. *Id.*

167. Rihanna, *S&M*, YOUTUBE (Jan. 31, 2011), https://www.youtube.com/watch?v=KdS6HFQ_LUc [https://perma.cc/E63D-WXMZ].

168. *LaChapelle v. Fenty*, 812 F. Supp. 2d 434 (S.D.N.Y. 2011).

169. Sean Michaels, *Rihanna and David LaChapelle Settle Lawsuit Over S&M Video*, THE GUARDIAN (Oct. 20, 2011), <https://www.theguardian.com/music/2011/oct/20/rihanna-david-lachapelle-lawsuit> [https://perma.cc/ZQ46-QT64].

the case to proceed, the court had emphasized the visual resemblance between a visual artist's work and a music video.¹⁷⁰ This ruling would have been a helpful precedent for Turrell to cite if he had decided to sue Drake. Nonetheless, Turrell may have faced a significant challenge on other fronts had he brought an actual legal challenge. While he might have been able to show the two elements necessary to prove copyright infringement—actual copying and substantial similarity between the works¹⁷¹—it would have been harder to show that what Drake copied was copyrightable in the first place. Arguably Turrell's works—rooms filled with light—fall more on the unprotected “idea” side of the fabled idea-expression distinction in copyright law.¹⁷² And of course, the highly unpredictable fair use defense could have protected Drake's use even if other elements of a copyright case were met.¹⁷³

No matter. Turrell and his lawyer opted for a non-legal remedy that avoided all this uncertainty and produced immediate results. Instead of suing, Turrell and his lawyer, Donn Zaretsky, posted a statement on Zaretsky's *Art Law Blog*.¹⁷⁴ The post, which quickly went viral, was a work of appropriation in its own right, lifting the language of Drake's music. Here is the post, reproduced in its entirety:

What a Time to Be Alive

You may have seen the video for the rapper Drake's latest single, “Hotline Bling,” which is clearly “inspired by” the work of my client James Turrell. Turrell has issued the following statement in response:

“While I am truly flattered to learn that Drake f*cks with me, I nevertheless wish to make clear that neither I nor any of my woes was involved in any way in the making of the Hotline Bling video.”¹⁷⁵

There are several layers of quotation and appropriation in this response. The title of the post, “What a Time to Be Alive,” appropriates the title of Drake's most recent mixtape.¹⁷⁶ Turrell also quotes back Drake's statement to *Rolling Stone*, “I fuck with Turrell.”¹⁷⁷ Finally, the reference to “woes” quotes a famous line, “Runnin' through the six with my woes,” from Drake's mixtape *If You're Reading This It's Too Late*.¹⁷⁸ As others have explained, the term “woes” is probably an “abbreviation of the word ‘Woadie,’ which is New Orleans slang

170. *LaChapelle*, 812 F. Supp. 2d at 445–48.

171. *Id.*

172. See generally Samuelson, *supra* note 155 (discussing copyright's merger doctrine).

173. *Infra* section II.A (discussing fair use).

174. ART LAW BLOG, <http://theartlawblog.blogspot.com> [https://perma.cc/CFR6-Q2ER].

175. Donn Zaretsky, *What a Time to Be Alive*, ART LAW BLOG (Oct. 21, 2015), <http://theartlawblog.blogspot.com/2015/10/what-time-to-be-alive.html> [https://perma.cc/FW7V-WE24] (asterisk in original).

176. DRAKE & FUTURE, *WHAT A TIME TO BE ALIVE* (Cash Money Records 2015).

177. See *supra* text accompanying note 165.

178. DRAKE, *IF YOU'RE READING THIS IT'S TOO LATE* (Cash Money Records 2015). The line is from the song *Know Yourself. Know Yourself – Drake*, RAP GENIUS, <https://genius.com/Drake-know-yourself-lyrics> [https://perma.cc/QUF5-PY4Z].

for people from the same ward,”¹⁷⁹ though it could also mean “working on excellence.”¹⁸⁰

Turrell’s approach—crafting an appropriation-laden blog post in response to being appropriated—allowed him to avoid the “woes” of litigation. It also served several simultaneous ends. First, the response spread Turrell’s fame beyond the art world, which could potentially translate into higher market value for his works. As Turrell told a reporter, “It’s humbling that more people have probably heard about me through this than anything else.”¹⁸¹ Second, Turrell avoided the possibility of misattribution. Turrell’s post stated that he wanted to make clear that he was not “involved in any way in the making of the Hotline Bling video.” It seems possible that the artist, known for his rigorous, transcendent, almost spiritual visual art,¹⁸² might have wanted to avoid the appearance of having sold out by licensing his “brand” to a music video. Finally, Turrell got widespread admiration for cool. His playful response, the antithesis of legalese, adopted the language of appropriation, borrowing from a thirty-year-old hip-hop musician. This seemed awfully surprising coming from a cerebral, septuagenarian artist who looks a bit like Santa Claus and first rose to fame in the 1960s.¹⁸³ As one blogger responded, in disbelief and admiration: “That’s not a typo, James Turrell said woes. Lesson: Maybe *don’t* fuck with Turrell?”¹⁸⁴ A *Washington Post* reporter seemed agog over the “revelation” that Turrell appeared to have listened to Drake’s mixtape *If You’re Reading This It’s Too Late*, writing, “Cue the shock and awe.”¹⁸⁵ In short, Turrell’s response borrowed a bit of Drake’s swagger, just as Drake had borrowed from him.¹⁸⁶

179. *Stay Strapped – Jeezy*, *supra* note 134.

180. Zara Golden, *What Drake Really Means When He Talks About “Woe”*, FADER (Feb. 13, 2015), <http://www.thefader.com/2015/02/13/what-does-drake-really-mean-when-he-talks-about-his-woe> [https://perma.cc/ZF2D-8TK7] (quoting Toronto rapper and producer Devontée).

181. Rory Carroll, *James Turrell: ‘More People Have Heard of Me Through Drake than Anything Else’*, GUARDIAN (Nov. 11, 2015), <https://www.theguardian.com/artanddesign/2015/nov/11/james-turrell-more-people-have-heard-of-me-through-drake-than-anything-else> [https://perma.cc/29YQ-VJQA]; *see also* Elahe Izadi, *Artist James Turrell Says Drake ‘Honored My Work’*, WASH. POST (Oct. 4, 2016), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2016/10/04/artist-james-turrell-says-drake-honored-my-work-with-hotline-bling> [https://perma.cc/UP5Q-Q7DK] (“I’ve enjoyed a lot more attention since [Drake] got involved.”).

182. Wil S. Hylton, *How James Turrell Knocked the Art World Off Its Feet*, N.Y. TIMES (June 13, 2013), <http://www.nytimes.com/2013/06/16/magazine/how-james-turrell-knocked-the-art-world-off-its-feet.html> [https://perma.cc/RYY4-QHUS].

183. *Id.*

184. Alissa Walker, *Artist James Turrell “Truly Flattered” That Drake Ripped Off His Work in New Video*, GIZMODO (Oct. 22, 2015), <http://gizmodo.com/artist-james-turrell-truly-flattered-that-drake-rippe-1738131548> [https://perma.cc/E96C-ZSSL].

185. Yanan Wang, *Legendary 72-Year-Old Artist James Turrell: I Had Nothing to Do with Drake’s ‘Hotline Bling’ Video*, WASH. POST (Oct. 23, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/10/23/legendary-72-year-old-artist-james-turrell-i-had-nothing-to-do-with-drakes-hotline-bling-video> [https://perma.cc/F7A7-35C6].

186. Another rap/visual art merger suggests another strategy to avoid litigation when appropriating someone’s work: offer fame and appreciation rather than licensing fees. Kanye West’s

II.

SELF-HELP AS ALTERNATIVE TO ENFORCING INTELLECTUAL PROPERTY LAW

The five case studies set out in Part I are different in many ways. Yet they share the common thread of creators using intellectual property shaming or retaking the copy successfully to remediate what they saw as improper use of their creations. Moreover, they did this not for obscure or unprotected areas of intellectual property—like tattoos, recipes, or roller derby names¹⁸⁷—but for those areas that are well within the heartland of copyright and trademark laws. Instead, our cases studies concern photography, music, and visual art, all located at the core of copyright law. And logos, like Gucci’s, are also at the center of trademark protection¹⁸⁸ and are also often protected under copyright law as pictorial or graphic works.¹⁸⁹

Instead of suing their appropriators for copyright or trademark infringement, the creators in these case studies each opted for self-help in the form of intellectual property shaming or retaking the copy. And they each did so extremely successfully, replicating the sorts of relief they could hope to get from successful enforcement of their intellectual property rights in court.

In this Part, we explore key justifications for enforcing copyright or trademark rights in a creation: monetary damages, stopping the appropriation, securing attribution for one’s creation, and avoiding misattribution. We then show how successful implementation of intellectual property shaming and retaking the copy can achieve those same goals, though perhaps in differing degrees.

A. *Purposes of Traditional Intellectual Property Law Enforcement*

Before discussing the key purposes of enforcing copyright or trademark rights, we first provide an overview of American copyright and trademark laws and their respective goals.

video for his song *Famous* featured a row of nude celebrities in bed with the rapper and Kim Kardashian West, his wife. Kanye West, *Famous*, YOUTUBE (July 1, 2016), <https://www.vevo.com/watch/kanye-west/famous/USUV71601791> [<https://perma.cc/D3EN-4EXJ>]. The inspirational source was artist Vincent Desiderio’s painting *Sleep* depicting nude bodies lined up in a bed. Joe Coscarelli, *Artist Who Inspired Kanye West’s ‘Famous’ Video: ‘I was Really Speechless’*, N.Y. TIMES (June 28, 2016), <https://www.nytimes.com/2016/06/29/arts/music/kanye-west-vincent-desiderio-famous-sleep.html> [<https://perma.cc/NCH6-RKCG>]. But when Kanye told the artist about the appropriation the night before the video premiered, the artist was thrilled and honored by the appropriation. He told a reporter, “As far as I’m concerned, it has nothing to do with copyright . . . There was no money involved at all . . . It wasn’t offered, but I wouldn’t have taken it. That would have cheapened the whole thing.” *Id.*

187. *Supra* note 1 and accompanying text.

188. 15 U.S.C. § 1127 (2012) (defining a “trademark” to include “any word, name, symbol, or device, or any combination thereof” that is used “to identify and distinguish . . . goods . . . and to indicate the source of the goods”).

189. 17 U.S.C. § 102(a) (2012); *see, e.g.*, *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514 (4th Cir. 2003) (addressing damages in a case in which the plaintiff had prevailed in his copyright infringement claim against a professional football team for using his logo design).

American copyright law protects “original works of authorship fixed in any tangible medium of expression,” including literary works, sound recordings, and movies.¹⁹⁰ A copyright holder receives, among other things, the exclusive right to reproduce the work, distribute copies of it, and prepare derivative works¹⁹¹ typically until seventy years after the author’s death.¹⁹² Copyright protection extends to the expression of particular ideas rather than to the ideas themselves.¹⁹³ Yet protection actually reaches well beyond the actual work to works that are copied and substantially similar,¹⁹⁴ “else a plagiarist would escape by immaterial variations.”¹⁹⁵

Utilitarianism is the dominant theory underpinning American copyright law.¹⁹⁶ According to this theory, copyright law provides authors the incentive of exclusive rights for a limited duration to motivate them to create and distribute culturally valuable works.¹⁹⁷ Without this incentive, the theory goes, authors might not invest the time, energy, and money necessary to create and distribute these works because they might be copied cheaply and easily by free-riders, eliminating the ability of authors to profit from their works.¹⁹⁸

Utilitarianism aligns fluently with (and is frequently justified by) the US Constitution’s grant of power to Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁹⁹ Pursuant to utilitarian thinking, copyright law confers rights that are designed to be limited in time and scope.²⁰⁰ If the rights provided are excessive, social welfare would

190. 17 U.S.C. § 102(a).

191. *Id.* § 106.

192. *Id.* § 302(a).

193. *See id.* § 102(b); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

194. *Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1253 (11th Cir. 2007); *Whitehead v. Paramount Pictures Corp.*, 53 F. Supp. 2d 38, 45–46 (D.D.C. 1999).

195. *Nichols*, 45 F.2d at 121.

196. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”); Shyamkrishna Balganes, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1576–77 (2009) [hereinafter Balganes, *Foreseeability and Copyright Incentives*]; Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1750–52 (2012) [hereinafter Fromer, *Expressive Incentives in Intellectual Property*]; William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989).

197. Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1203 (1996).

198. *Id.*

199. U.S. CONST. art. I, § 8, cl. 8; *see* Barton Beebe, Bleistein, *the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319 (2017) (analyzing copyright law’s struggle with the notion of aesthetic progress); Jeanne C. Fromer, *An Information Theory of Copyright Law*, 64 EMORY L.J. 71 (2014) (exploring, through the lens of information theory, the sorts of progress that copyright law does and ought to encourage).

200. Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 997 (1997).

be diminished.²⁰¹ For one thing, exclusive rights in intellectual property can diminish competition by allowing a rightsholder to charge a premium for access and ultimately limiting these valuable works' diffusion to society at large.²⁰² For another, given that knowledge is frequently cumulative, society benefits when creators are permitted to build on previous artistic creations to generate new works.²⁰³ For these reasons, copyright law ensures both that the works it protects fall into the public domain in due course and that third parties are free to use protected works for certain socially valuable purposes.²⁰⁴ In this way, a utilitarian theory of copyright law rests on the premise that the benefit to society of creators crafting valuable works in exchange for legal incentives offsets the costs to society of the incentives.²⁰⁵

Relevant for our purposes, copyright law excuses some third-party uses that would otherwise be infringing by deeming them to be fair use.²⁰⁶ The fair use doctrine is thought to stimulate the production of creative works that do not undercut the value of the original copyrighted work too much.²⁰⁷ It does so by enabling third parties to create culturally valuable works that must borrow from the original work in some capacity in order to succeed, often transforming it.²⁰⁸ As suggested by statutory directives on fair use and elaborated in case law, some prototypical examples include news reporting, critical reviews, and parodies.²⁰⁹ Not only might these uses not undercut the market for the original work, but they might stimulate it.²¹⁰ Wendy Gordon further theorized that “fair use [ought] to permit uncompensated transfers that are socially desirable but not capable of effectuation through the market.”²¹¹ Examples include parodies that might cast an unfavorable light on an original work or uses for which the transaction costs are too great for the copyright owner to agree to a licensing arrangement.²¹²

Despite the dominance of utilitarian thinking in American copyright law, scholars also proffer other theories to justify copyright protection. These theories are typically grounded in an author's inherent natural or moral rights in the works

201. *Id.* at 996–97.

202. *Id.*

203. *Id.* at 997–98; *see also* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575–76 (1994) (discussing the policy benefits of the fair use doctrine).

204. Lemley, *supra* note 200, at 999.

205. *Id.* at 996–97.

206. 17 U.S.C. § 107 (2012).

207. *Campbell*, 510 U.S. at 577 (noting that the fair use doctrine allows courts to avoid rigid application of copyright law which might stifle the creativity the law seeks to foster).

208. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111–16 (1990).

209. *See Campbell*, 510 U.S. at 578–85 (parodies); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985) (news reporting); *Sundeman v. Seajay Soc’y, Inc.*, 142 F.3d 194, 206 (4th Cir. 1998) (critical review).

210. Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615 (2015); *cf.* Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559 (2016).

211. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1601 (1982).

212. *Id.* at 1633.

they created.²¹³ As discussed in more detail below,²¹⁴ these theories can form the basis of expressive incentives for creators in a utilitarian system.²¹⁵

Trademark law is grounded in different motivations than copyright law: preventing unfair competition and consumer confusion. Yet as discussed below, we think that, at least at a general level, copyright and trademark laws share four key enforcement goals.²¹⁶ Federal trademark law protects words, symbols, logos, and sometimes a product's design or packaging, so long as they are "used by a person" in commerce in a distinctive way "to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods."²¹⁷ Federal law protects trademark holders against another's "use in commerce [of] any reproduction, counterfeit, copy, or colorable imitation of [their] . . . mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive."²¹⁸

Trademark theory emphasizes protecting consumers from confusion to foster fair competition.²¹⁹ A trademark affixed to goods is meant to help consumers know that those goods originated from the same source.²²⁰ Similarly, a trademark distinguishes a product from others with different marks.²²¹ Trademark theory suggests that producers of trademarked goods therefore have the incentive to invest in their goods' quality.²²² The thinking is that consumers

213. *E.g.*, Balganes, *Foreseeability and Copyright Incentives*, *supra* note 196, at 1576–77. Moral-rights theories typically come in two flavors: labor-desert and personhood. For more on the labor-desert theory, see ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* 31–67 (2011); Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 *CHI.-KENT L. REV.* 609 (1993); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533, 1540–83 (1993); Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287, 296–330 (1988). For more on the personhood theory, see Hughes, *supra*, at 330–65; Margaret J. Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982). Scholars, including one of us, debate how much influence moral rights should have on copyright law. *Compare, e.g.*, Amy Adler, *Against Moral Rights*, 97 *CALIF. L. REV.* 263 (2009) [hereinafter Adler, *Against Moral Rights*] (less), *with, e.g.*, ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* (2009) (more).

214. *Infra* section II.A.2.

215. Fromer, *Expressive Incentives in Intellectual Property*, *supra* note 196. *But see* Adler, *Why Art Does Not Need Copyright*, *supra* note 23 (arguing that to the extent moral rights concerns motivate copyright claims, they are often invoked in ways that undermine the public interest that copyright is meant to serve).

216. *Infra* Part II.A.1–3.

217. 15 U.S.C. § 1127 (2012).

218. *Id.* § 1114(1)(a) (protection for registered marks); *accord id.* § 1125(a) (providing similar protection for unregistered marks).

219. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985); Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 *NOTRE DAME L. REV.* 1839, 1843 (2007); Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 *HARV. L. REV.* 813, 814–19 (1927).

220. Schechter, *supra* note 219, at 817.

221. Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 *UCLA L. REV.* 621, 677, 682 (2004) [hereinafter Beebe, *The Semiotic Analysis of Trademark Law*].

222. William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 *J.L. & ECON.* 265, 269–70 (1987).

who have had a positive past experience with a good will likely use the trademark to identify and buy it again.²²³ Protecting against trademark infringement, from this vantage point, thus prevents others from trading on the goodwill that the trademark represents.²²⁴ In these ways, trademarks also reduce consumers' search costs—the expenditures they must make to discern important qualities of goods or services, which are frequently hard to measure.²²⁵ To promote fair competition and enable consumer decision-making, trademark law therefore guards against use of a too-similar mark that confuses consumers as to a good's origin.²²⁶

Trademarks can also serve other important linguistic purposes in commerce and culture, which suggests that rights flowing from trademark law sometimes ought to be—and indeed are—limited. If a mark is used to describe another's goods or services rather than indicate source, such as if Delta Airlines described itself patriotically as “an American airline,” that might be permissible as a descriptive fair use of the AMERICAN AIRLINES mark.²²⁷ Furthermore, there are times when a trademark—like BARBIE, ROLLS ROYCE, and MCDONALD'S—has accrued so much cultural meaning that the law grants some leeway to third parties that wish to use the mark expressively. The law does so on the ground that there is no better way to express the constellation of meanings associated with the mark other than by using the mark, as the musical group Aqua did when it released its song “Barbie Girl” to offer commentary on the values a Barbie doll represents: “I'm a blond bimbo girl, in a fantasy world / Dress me up, make it tight, I'm your dolly.”²²⁸

With this background on copyright and trademark laws, we now turn to four primary goals of copyright and trademark infringement litigation: monetary damages, stopping appropriation, getting attribution, and avoiding misattribution. The underlying theories of copyright and trademark laws are each different, with copyright law focused principally on encouraging the creation and distribution of artistic and cultural works, and trademark law instead centered on promoting a fair marketplace and preventing consumer confusion. Therefore, it is unsurprising that the elements that comprise copyright infringement—

223. *Id.*

224. Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 549 (2006). Producers might then leverage the goodwill engendered by consumers' association of a particular mark for their goods or services with positive value and meaning by using the mark for an ever-wider range of products and services. McKenna, *supra* note 219, at 1843.

225. Beebe, *The Semiotic Analysis of Trademark Law*, *supra* note 221, at 623.

226. Graeme B. Dinwoodie, *The Death of Ontology: A Teleological Approach to Trademark Law*, 84 IOWA L. REV. 611, 614 (1999).

227. See *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004) (discussing the defense of descriptive fair use).

228. *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 901 (9th Cir. 2002). See generally Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397 (1990) (discussing the relationship between trademark law and the First Amendment).

unauthorized substantially similar copying of protected works—are a far cry from those that will yield trademark infringement—unauthorized use of a mark on goods or services that is likely to confuse consumers as to the source of goods or services. Nonetheless, to differing degrees, successful enforcement of copyright or trademark rights offer rightsholders similar remediation: monetary damages, stopping appropriation, getting attribution, and avoiding misattribution.

1. *Monetary Damages*

Copyright and trademark laws both offer successful claimants monetary damages to compensate them for infringement and to deter infringers. Consider first copyright law. The law entitles a copyright owner prevailing on an infringement claim to either the “owner’s actual damages and any additional profits of the infringer” or statutory damages ordinarily ranging between \$750 and \$30,000 per infringed work.²²⁹ Given copyright’s principal goal to encourage the creation and distribution of artistic and cultural works, the law seeks to preserve this incentive by allowing the copyright holder to recover his or her losses from the infringement.²³⁰ Allowing a copyright holder to recover the profits of the infringer beyond the copyright holder’s losses seems principally designed as deterrence.²³¹

Copyright holders who prevail on an infringement claim can seek statutory damages instead of actual damages.²³² Premised on the theory that copyright damages can be expensive and difficult to show, the law offers statutory damages as an alternative to permit some recovery.²³³ A court is authorized to award statutory damages within the specified range “as the court considers just.”²³⁴ One way to see statutory damages is as a court-approximated form of compensatory damages; in fact, that was Congress’s intention in allowing recovery of statutory damages for copyright infringement.²³⁵ That said, there has been abundant criticism of statutory damages awards that far exceed any reasonable calculation

229. 17 U.S.C. § 504(a)–(c) (2012).

230. Roger D. Blair & Thomas F. Cotter, *An Economic Analysis of Damages Rules in Intellectual Property Law*, 39 WM. & MARY L. REV. 1585, 1617–46 (1998); Patrick R. Goold, *Corrective Justice and Copyright Infringement*, 16 VAND. J. ENT. & TECH. L. 251, 271–74 (2014).

231. Christopher Buccafusco & Christopher Sprigman, *Valuing Intellectual Property: An Experiment*, 96 CORNELL L. REV. 1, 40–42 (2010); Dale S. Ciolino, *Reconsidering Restitution in Copyright*, 48 EMORY L.J. 1, 2–4 (1989) (arguing that this remedy “appear[s] to be unnecessary to further copyright’s principal goal of creating market-based incentives for artistic creation”). *But cf.* Goold, *supra* note 230, at 279–83 (positing that the requirement that damages flow from the infringer to the copyright holder suggest that corrective justice plays a bigger role in copyright damages than generally understood).

232. 17 U.S.C. § 504.

233. Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 446 (2009) (citing legislative history).

234. 17 U.S.C. § 504(c)(1).

235. Samuelson & Wheatland, *supra* note 233, at 446–63.

of actual damages,²³⁶ such as a jury's award of \$1,920,000 against file-sharer Jammie Thomas-Rasset for her reproduction of twenty-four musical sound recordings in the course of using a peer-to-peer file-sharing network.²³⁷

Like copyright damages, damages for trademark infringement are principally intended to compensate trademark owners and deter infringement. The Lanham Act provides that "subject to the principles of equity," a successful trademark-infringement plaintiff can "recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action."²³⁸ Although courts regularly award prevailing plaintiffs their actual damages, most courts understand the Lanham Act to require a showing of willful infringement by the defendant as a prerequisite to awarding the defendant's profits.²³⁹ Providing trademark damages to compensate a trademark owner for consumer confusion, unfair competition, and a loss of goodwill caused by the defendant's infringement is aimed at preserving the owner's incentive to invest in high-quality production for its goods or services.²⁴⁰ Moreover, requiring an infringing defendant to pay damages and sometimes turn over its profits ought to deter infringement.²⁴¹

2. Stopping the Appropriation

In addition to an award of damages, most (though not all) successful copyright and trademark plaintiffs can seek an injunction that requires a defendant to refrain from further infringement.²⁴² In 2006, the Supreme Court ruled in a patent infringement case that injunctions should never issue automatically and courts must always evaluate the award of injunctive relief under a "traditional four-factor framework."²⁴³ This decision made it somewhat harder for successful copyright and trademark plaintiffs to get injunctive relief

236. *E.g.*, Goold, *supra* note 230, at 285–89; Samuelson & Wheatland, *supra* note 233, at 480–97.

237. *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 901 (8th Cir. 2012) (remitting damages to a total of \$222,000).

238. 15 U.S.C. § 1117(a) (2012). For a history of trademark damages, see Mark A. Thurmon, *Confusion Codified: Why Trademark Remedies Make No Sense*, 17 J. INTELL. PROP. L. 245, 257–311 (2010).

239. 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS § 30:91 (5th ed. 2017) (citing cases).

240. Blair & Cotter, *supra* note 230, at 1643–45.

241. Dennis S. Corgill, *Measuring the Gains of Trademark Infringement*, 65 FORDHAM L. REV. 1909 (1997).

242. 17 U.S.C. § 502(a) (2012) (authorizing injunctive relief for copyright infringement); 15 U.S.C. § 1116(a) (2012) (authorizing injunctive relief for trademark infringement).

243. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006) (setting out as those factors "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction").

as a matter of course.²⁴⁴ That said, they generally do, and one empirical study after the Supreme Court's 2006 decision found that courts almost never withhold injunctive relief from successful copyright plaintiffs.²⁴⁵

Injunctions serve directly to stop a defendant from continuing to infringe.²⁴⁶ They also sometimes provoke a settlement that authorizes the defendant to use the plaintiff's copyrighted or trademarked material.²⁴⁷ In this sense, injunctive relief can help set a price for continued appropriation.²⁴⁸ To the extent this happens, injunctive relief leads to monetary compensation just as a direct award of monetary damages does.²⁴⁹

3. *Getting Attribution*

In addition to receiving compensation for and stopping infringement, many copyright and trademark plaintiffs sue for infringement as a way to seek attribution for their work. Take attribution in the copyright space. “[A]ttribution can bolster a [creator’s] reputation,” which can lead to financial rewards, such as more professional opportunities and a higher salary.²⁵⁰ Attribution can also lead to expressive rewards, by “express[ing] the creator’s central value to his or her work” and “concretiz[ing] the personhood interest creators have in viewing their creations as strong components of their self-concept.”²⁵¹ Even more to the point of copyright law, “artists frequently think—mistakenly—that seeking copyright protection is worthwhile to provide them with attribution rights.”²⁵² Moreover, empirical evidence indicates that authors value attribution enough that they will

244. See Mark A. Lemley, *Did eBay Irreparably Injure Trademark Law?*, 92 NOTRE DAME L. REV. 1795 (2017) (showing that this decision has been applied in copyright and trademark cases, and arguing that injunctions should issue more frequently, even if not automatically, in trademark infringement cases).

245. See Jiarui Liu, *Copyright Injunctions After eBay: An Empirical Study*, 16 LEWIS & CLARK L. REV. 215, 218 (2012).

246. See John M. Golden, *Injunctions as More (or Less) than “Off Switches”: Patent-Infringement Injunctions’ Scope*, 90 TEX. L. REV. 1399, 1401 (2012). Injunctive relief is not unique at stopping a defendant’s infringing behavior. An award of money damages can also achieve the same effect. As Louis Kaplow and Steven Shavell observe, “a liability rule with very high damages is equivalent to property rule protection of victims.” Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 724 (1996).

247. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1118–20 (1972).

248. See *id.* at 1092 (“An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.”).

249. That being said, monetary and injunctive forms of relief typically locate entitlements distinctively in different litigation parties. See *id.* (“[A property rule] lets each of the parties say how much the entitlement is worth to him, and gives the seller a veto if the buyer does not offer enough. Property rules involve a collective decision as to who is to be given an initial entitlement but not as to the value of the entitlement.”).

250. Fromer, *Expressive Incentives in Intellectual Property*, *supra* note 196, at 1790.

251. *Id.*

252. *Id.* at 1791.

accept less money in exchange for it.²⁵³ In fact, by 2004, authors were choosing Creative Commons licenses²⁵⁴ requiring attribution approximately ninety-eight percent of the time, prompting Creative Commons to make it a standard feature of its licenses.²⁵⁵

The attribution that copyright law offers, however, is remarkably thin. American copyright law lacks a general right attributing protected works to their authors.²⁵⁶ At best, copyright law will encourage indirect attribution of protected works by encouraging copyright registration, which involves listing the work's authors.²⁵⁷ Only for a very limited subset of copyrighted works—that is, visual art in distributions of less than two hundred—the Visual Artist Rights Act of 1990 confers an attribution right to creators.²⁵⁸ Copyright law also sometimes even undercuts attribution: for works made for hire, copyright law deems the employer to be the author of the work rather than the actual employee-creator.²⁵⁹

Despite the weak attribution rights that copyright law offers, as a practical matter, successful copyright infringement litigation offers up a certain form of the attribution that authors care so much about. By winning a copyright infringement lawsuit, the plaintiff can easily proclaim that the work the defendant is trying to claim actually originates with the plaintiff's copyrighted work.²⁶⁰ A legal victory also signals that appropriate accreditation must accompany future uses by the defendant or third parties. In this way, winning a copyright infringement claim is one method of vindicating a copyright holder's attribution interest.

253. Christopher Jon Sprigman, Christopher J. Buccafusco & Zachary C. Burns, *What's a Name Worth?: Valuing Attribution and Publication in Intellectual Property*, 93 B.U. L. REV. 1 (2013). For these reasons, we have each written about the promise of attribution as an expressive incentive for authors. Adler, *Against Moral Rights*, *supra* note 213, at 267 n.16; Fromer, *Expressive Incentives in Intellectual Property*, *supra* note 196, at 1790–98.

254. Creative Commons “provide[s] . . . a set of copyright licenses and tools that create a balance inside the traditional ‘all rights reserved’ setting that copyright law creates,” ranging from the possibility of opting out of copyright altogether to reserving some or all rights. *About*, CREATIVE COMMONS, <http://a5.creativecommons.org/about> [<https://perma.cc/W2D4-E9GM>].

255. Glenn Otis Brown, *Announcing (and Explaining) Our New 2.0 Licenses*, CREATIVE COMMONS (May 25, 2004), <http://creativecommons.org/weblog/entry/4216> [<https://perma.cc/3P8N-7S55>].

256. Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 641 & n.181 (1987).

257. *Id.*

258. 17 U.S.C. §§ 101, 106A (2012). These creators have the right “to claim authorship” and prevent the use of their name on works created by others or modified versions of their work. *Id.* § 106A(a). By contrast, European laws typically provide a general right of attribution as recognition of the author's moral rights in a work. Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 68–69 (2007).

259. 17 U.S.C. § 201; Fromer, *Expressive Incentives in Intellectual Property*, *supra* note 196, at 1794–96.

260. *But cf.* Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317, 344 (2011) (“The remedies for copyright and patent infringement are royalties or injunctions—not credit.”).

Now consider trademark law. As already discussed, trademark infringement litigation vindicates different interests than copyright infringement litigation.²⁶¹ Nonetheless, at a high level of generality, a plaintiff prevails on a trademark infringement claim by showing that a defendant's use of the plaintiff's trademark likely confused consumers.²⁶² A ruling against the defendant here disambiguates the rightful trademark holder to be the plaintiff and, as such, is a form of attribution of the mark to the plaintiff.²⁶³ The judgment of infringement is, in that sense, a reassociation of the trademark symbol with the plaintiff's goods or services. In fact, courts sometimes award damages for, or otherwise require, corrective advertising to undo the confusion experienced in the marketplace and to reorient consumers to associate a trademark with the plaintiff's goods or services rather than those of the defendant.²⁶⁴ Successful litigation of both copyright and trademark claims thus reassociates the protected creation at stake with the plaintiff, an important reclamation of attribution when the defendant has used the creation wrongfully.²⁶⁵

4. Avoiding Misattribution

Just as successful copyright and trademark plaintiffs want to get attribution—by relinking their work to them—they often just as much want to avoid defendants' infringing uses from being attributed to them incorrectly. In essence, they want to distance themselves from being held out as the creators of

261. See *supra* Part II.

262. See *supra* Part II.A.

263. But cf. Rosenblatt, *supra* note 260, at 344 (“[T]he most common remedy for trademark infringement is an injunction against using the mark, not attribution of the mark to the mark holder.”).

264. E.g., *Zelinski v. Columbia 300, Inc.*, 335 F.3d 633, 639 (7th Cir. 2003) (upholding award of damages for corrective advertising when there was consumer confusion resulting in trademark infringement); *Taco Cabana Intern., Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1125–26 (5th Cir. 1991), (upholding an injunction requiring the infringing defendant to “dispel customer confusion by displaying a prominent sign for a year acknowledging that [it] had unfairly copied [the plaintiff]’s restaurant concept”), *aff’d* 505 U.S. 763 (1992). See generally D. Scott Bosworth, Russell W. Mangum & Eric C. Matolo, *Corrective Advertising in Lanham Act Damages: The Use and Misuse of Past Advertising Expenditures*, 107 TRADEMARK REP. 760 (2017) (providing an economic analysis of corrective advertising, and suggesting how to assess damages for corrective advertising); Paul Heald, *Money Damages and Corrective Advertising: An Economic Analysis*, 55 U. CHI. L. REV. 629 (1988) (same).

265. In fact, scholars take note of this correspondence between copyright and trademark in the slightly different context of analyzing authorship as a personal brand. See Laura A. Heymann, *The Birth of the Authorship: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377, 1378 (2005) (“[A]ll authorships are essentially branding choices, even if the brand that is chosen is the author’s true name, and therefore that the ‘author function’ is really a ‘trademark function.’”); Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1172 (2005) (“[A]uthorship marks are sufficiently analogous to trademarks. . . . Consumers can and should be protected from misattributions of authorship where such misattributions can easily be remedied by law and where the failure to provide such remedies is likely to lead to significant consumer harms.”); cf. Laura A. Heymann, *The Trademark/Copyright Divide*, 60 SMU L. REV. 55, 62 (2007) (suggesting that “courts should pay more attention when content owners attempt to use an overbroad notion of copyright law to assert trademark-based claims and restrict assertion of copyright claims to those instances in which such owners are seeking to vindicate copyright interests”).

the infringer's works. Maybe a defendant's creation is shoddy or in poor taste. Maybe a defendant is using a mark in relation to a good or service with which a plaintiff would not want to associate. Maybe a defendant's work does not reflect the plaintiff's values. Maybe the plaintiff simply did not create the work.²⁶⁶

There might be further goals sought in copyright and trademark infringement litigation, but we think that principal among them are collecting damages, stopping appropriation, getting attribution, and avoiding misattribution. Plaintiffs in different cases might seek these four goals in varying degrees. Some may, for example, pursue monetary damages with little attention to attribution. For others, monetary damages may be mostly irrelevant, their efforts aimed at stopping appropriation, getting attribution, or avoiding misattribution. Whatever the mix, as discussed, these four litigation goals are tightly linked to the justifications underpinning American copyright and trademark laws in the first place.

B. *Self-Help's Satisfaction of These Goals*

We think that the forms of self-help described in this Article—intellectual property shaming and retaking the copy—can satisfy the same four goals as successful copyright or trademark litigation, though perhaps in differing degrees. That is, successful intellectual property self-help can yield monetary damages, stop appropriation, garner attribution to the original creator, or avoid misattribution of the copyist's work to the original creator. After situating intellectual property shaming and retaking the copy within the larger universe of self-help measures, we consider how using these forms of self-help can approximate the goals of litigation.

As previously discussed, self-help is not new to intellectual property,²⁶⁷ nor is it unique to intellectual property laws. As many others have surveyed, self-help is or has been prevalent in property, contract, tort, criminal, and family laws, among other areas.²⁶⁸ There is a dizzying number of definitions of “self-help,” each with somewhat different implications. As David Pozen observed:

266. For a small subset of copyright authors, those who have created “visual art” as defined by the Visual Artists Rights Act, see 17 U.S.C. §§ 101, 106A (2012), there is a formal statutory right to avoid misattribution. This Act grants the author of a work of visual art the right “to prevent the use of his or her name as the author of any work of visual art which he or she did not create.” *Id.* § 106A(a)(1). Although other creators have no formal right to correct misattribution under copyright law, a successful copyright action can often approximate a similar result by stopping the misattribution or by drawing attention to the misattribution through the publicity generated by a lawsuit.

267. See *supra* text accompanying notes 8–10.

268. See generally ELLICKSON, *supra* note 2; Adam B. Badawi, *Self-Help and the Rules of Engagement*, 29 YALE J. ON REG. 1 (2012); Douglas Ivor Brandon et al., *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845 (1984); Richard A. Epstein, *The Theory and Practice of Self-Help*, 1 J.L. ECON. & POL'Y 1 (2005); Douglas Gary Lichtman, *How the Law Responds to Self-Help*, 1 J.L. ECON. & POL'Y 215 (2005); David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2 (2014); Catherine M. Sharkey, *Trespass Torts and Self-Help for an Electronic Age*, 44 TULSA L. REV. 677, 698 (2009).

In ordinary language, “self-help” may refer generically to “providing for or helping oneself without dependence on others,” or more specifically to “the act or right of redressing or preventing wrongs by one’s own action . . . without recourse to legal process.” In legal discourse, the meaning of self-help is no less fluid. Some formulations require a unilateral “attempt to redress a perceived wrong,” while others extend to such speculative *ex ante* measures as locking the door of one’s car or walking home on a well-lit street. Another strain of the private law literature construes self-help more narrowly, as the option “to do something that would otherwise be legally actionable in order to prevent or cure a legal wrong.”²⁶⁹

As per Pozen’s nomenclature, in this Article we are not addressing conditional self-help powers—“rights and remedies that may be exercised only to cure a wrong that has been or will imminently be done by another”—but instead general self-help measures—“redressive tools that are not so limited.”²⁷⁰ Intellectual property shaming is general self-help because individuals can legally sound off, with or without intellectual property laws as a backdrop, on someone copying their creations.²⁷¹ Retaking the copy is less easy to characterize definitively: many instances might be properly characterized as non-infringement or fair use, and thus legal, but other instances might be deemed to be themselves an infringement of the copyist’s rights.²⁷²

269. Pozen, *supra* note 268, at 11 (citing, respectively, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2060 (1993); BLACK’S LAW DICTIONARY 1482 (9th ed. 2009); Epstein, *supra* note 268, at 3; and Sharkey, *supra* note 268, at 683).

270. Pozen, *supra* note 268, at 11; accord Sharkey, *supra* note 268, at 106–07. The most difficult policy questions with regard to self-help tend to relate to conditional self-help measures because they are not typically allowed outside of limited contexts. See Epstein, *supra* note 268, at 3 (“The question of self-help, however, becomes considerably more difficult when the user of self-help claims a ‘privilege’ to use self-help.”); Pozen, *supra* note 268, at 12 (“The commission of an act that constitutes a *prima facie* violation of the law, on the theory that it is justified in response to someone else’s violation, is inherently more fraught than the commission of an act that would be lawful regardless.”). In discussing self-help in intellectual property, we do not consider the narrow forms of conditional self-help measures protected under intellectual property laws, such as the Digital Millennium Copyright Act’s protections of anti-circumvention measures and its safe harbors for complying with a specified notice-and-takedown regime. For discussions of those and other proposed conditional self-help measures in intellectual property law, see Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089 (1998), and Lichtman, *supra* note 268. We also do not discuss self-help measures in trade secret law—taking reasonable measures to protect a secret—that are prerequisite to successful assertion of a trade secret misappropriation claim under the law. For an analysis of that sort of self-help, see Lichtman, *supra* note 268.

271. In very extreme, but presumably rare, instances, these reactions might rise to the level of defamation, something we explore below. *Infra* Part III.D. Not all intellectual property shaming happens at the hands of the original creator as “self”-help. As the Diet Prada example shows, it can also happen at the hands of third parties. *Supra* Part I.C. Much of our subsequent analysis is the same whether it is self-help or third-party-help, except that in the latter case the original creator could lose control over whether to shame in the first instance.

272. Legal retaking of the copy might come about, for example, if the first copying constitutes copyright infringement, which withdraws any copyright protection the copy itself would otherwise have enjoyed. See 17 U.S.C. § 103(a) (2012). As a consequence, any retaking of that copy would not

Self-help is often discussed with a negative tinge because it can subvert law and enable individuals to act as judge, jury, and executioner,²⁷³ as we analyze in the next Part with regard to intellectual property self-help. Self-help measures increase the odds of legal error or abuse and violence.²⁷⁴ That said, it is important to underscore that self-help also has many recognized benefits.²⁷⁵ Some of these benefits, according to Pozen, are that self-help “may serve to deter such wrongdoing from occurring in the first place, reduce administrative costs, promote autonomy- or sovereignty-related values, and facilitate speedier redress.”²⁷⁶

Theories abound as to when self-help remedies might be particularly helpful. One theory suggests that they can be helpful when “the available judicial remedies are somehow inadequate and the threat of a self-help remedy to society’s interests in law and order is minimal.”²⁷⁷ Another, as set out by Richard Epstein, understands self-help to “pair[] a quick, cheap and reliable remedy with incomplete relief . . . which by definition and design does not leave the aggrieved party as well [off] as he would have been if the other party had faithfully performed its obligations in the first place.”²⁷⁸ And it is generally permitted “in those cases in which there is no risk of immediate physical confrontation.”²⁷⁹ Adam Badawi builds on Epstein’s analysis to posit that resort to legal process, and possible prohibitions on self-help, are most desirable “when the underlying rights are not clear.”²⁸⁰ Conversely, self-help measures are beneficial for their low administrative and financial costs when the underlying rights and violation thereof are clear.²⁸¹ In the next Part, we rely on these insights to analyze important costs and benefits of employing general self-help within the intellectual property sphere.²⁸²

Before doing so, we sketch how successful intellectual property shaming and retaking the copy can each serve the same four goals of collecting damages, stopping appropriation, getting attribution, and avoiding misattribution that successful copyright and trademark infringement litigation can serve, though perhaps in differing degrees. A target of intellectual property shaming might

constitute copyright infringement. On the other side, retaking the copy might infringe, for example, if the first copying constitutes fair use, but the retaking of that copy does not and constitutes infringement.

273. See Pozen, *supra* note 268, at 48–50.

274. See Epstein, *supra* note 268, at 27; Pozen, *supra* note 268, at 50.

275. See Pozen, *supra* note 268, at 49–50.

276. Pozen, *supra* note 268, at 49 (emphasizing also the possible benefits to “facilitate the maintenance of cooperative relations, mitigate feelings of alienation from the law, or generate deeper internalization of first-order legal norms”); accord Lichtman, *supra* note 268.

277. Brandon et al., *supra* note 268, at 853.

278. Epstein, *supra* note 268, at 26–27.

279. *Id.* at 27.

280. Badawi, *supra* note 268, at 4.

281. See *id.* (explaining the “different repossession rights that apply to personal and real property” based on the dissimilarities in clarity of whether there has been a violation of the underlying right).

282. *Infra* Part III.

worry about the pecuniary consequences that result from earning a reputation for appropriating the works of others. In those cases, the accused appropriator might readily pay the original creator to stop the shaming.²⁸³ Additionally, the shaming itself—assuming it is sufficiently public—casts a spotlight on the original creator, garnering attention that the creator might not otherwise enjoy. The shaming itself thus can generate business opportunities to sell more of the original creator’s creations. In these ways, original creators can collect monetary “damages” for the appropriation.

Monetary “damages” can also accrue to those who retake the copy in a new creative work. Consumers can compensate the reappropriator by purchasing the new work. We see precisely these sorts of monetary compensation in nearly all of our case studies above: the Suicide Girls collect \$90 for each reappropriation of Richard Prince’s appropriation that they sell; Gucci profits from sales of the products of its collaboration with GucciGhost; a small jewelry company benefits from Diet Prada’s shaming of a copyist; and many hip-hop intellectual property diss songs sell to the benefit of their creators.²⁸⁴ Moreover, we think each of these original creators might very well have received greater compensation than they would have had they gone to court and invoked copyright or trademark infringement. Many of their legal claims would have been questionable at best,²⁸⁵ and litigation costs would likely have offset any recovered damages anyway.²⁸⁶

Nonetheless, there are two peculiar features of this monetary compensation that make it different from “damages.” First, in some of the instances just discussed, the monetary compensation from intellectual property shaming or retaking the copy comes from the public rather than from the copyist, as it would in successful copyright or trademark infringement litigation. This means that the victim of copying might receive compensation while leaving the appropriator undeterred.²⁸⁷ Because the appropriator does not have to pay the original creator,

283. Cf. Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 987 (2005) (“First-generation social norms scholarship suggested that gossip networks could be highly effective in facilitating informal social control, as an alternative to formal law. In recent years, the social norms literature may have lost a little bit of momentum. One way for legal scholars to recover that momentum is to study gossip networks in more rigorous ways, so that we can evaluate when informal social control might function as a welfare-enhancing alternative to legal process.”).

284. *Supra* Part I.

285. *See id.*

286. In this way, the compensation creators might receive from intellectual property self-help might be disproportionate to preserving their incentives to create, which is less true of copyright and trademark damages, *supra* Part II.A.1. To the extent the degree of compensation a creator might receive from undertaking self-help measures is predictably and disproportionately large, the creator might be over-incentivized to exercise self-help compared to suing for infringement, and we might worry about overcompensation. That said, we think that the compensation creators can receive is unpredictable enough to mute this concern, if it is one.

287. Intellectual property infringement, like other torts, tends to have a bilateral structure, in which plaintiffs sue defendants, who pay damages to winning plaintiffs, in part to deter defendants. *E.g.*, Goold, *supra* note 230, at 263 (“Why is it necessary that the plaintiff sue this particular defendant? Economists would answer that this defendant is the least-cost avoider and therefore the person best placed to avoid the accident in the most efficient way. By publicly holding this least-cost avoider liable,

the appropriator has little incentive, absent further consequences, not to appropriate in the first place, something that successful copyright or trademark infringement litigation would encourage.²⁸⁸ Of course, shaming itself might nevertheless serve to deter copyists even when they avoid direct financial responsibility for their appropriations.

It is not always clear whether the failure to deter is good, bad, or irrelevant. It might depend on the situation. For example, in the Richard Prince/Suicide Girls situation, Richard Prince's appropriation in the first place created the value for the Suicide Girls' subsequent reappropriation.²⁸⁹ It is highly implausible that the Suicide Girls would have been able to sell canvases for \$90 without Prince's appropriation. With that in mind, one can argue that Richard Prince should not be deterred from appropriating in such a case. He was made better off by the appropriation, but so were the Suicide Girls—at least from a pecuniary perspective—and, arguably, the public, which has two new artistic works to enjoy. In this sense, this situation is much like concluding that an appropriation is a fair use because it generates market benefits for the original creator.²⁹⁰

Second, in some self-help situations, the original creator puts significant creative effort into reappropriation or shaming, and this effort yields a substantial portion of the value of that new work. In this scenario, the financial reward the original creator gets is allocable largely to his or her own extra work. Although we think this is not true of, say, the Suicide Girls' reappropriation of Richard Prince's appropriation of their work, it seems like more of an apt characterization of, say, Tupac Shakur's "Hit 'Em Up." In these scenarios, the financial rewards original creators get are not entirely analogous to litigation damages, and we might ask whether it is fair to understand the creator's own extra labors as making them whole after a copyist's appropriation.

To the extent that a rightsholder cares about stopping appropriations going forward—much as injunctive relief would²⁹¹—self-help involving shaming might get the appropriator to stop appropriating. By contrast, retaking the copy, unless it also involves shaming, is unlikely to get the copyist to stop.

Not only do intellectual property shaming and retaking the copy confer monetary damages and help stop appropriation, but they also provide attribution of a work to the original creator and avoid misattribution of the appropriator's

other similarly situated least-cost avoiders in the future will be given an ultimatum: act efficiently or bear the costs of liability." (footnote omitted)).

288. That said, there might be further consequence to the appropriator despite not having to pay the original creator directly. For one thing, appropriators might not know before they appropriate whether the original creator will choose to take no action, legal action, or action in the form of self-help. Therefore, the possibility that the original creator might take legal action might serve some deterrence value. Moreover, to the extent that the appropriator faces public criticism for his or her copying, the appropriator might lose some business opportunities, which can also serve to deter appropriators.

289. Adler, *Why Art Does Not Need Copyright*, *supra* note 23.

290. *Supra* text accompanying notes 206–212.

291. *Supra* Part II.A.2.

work to that original creator. In fact, they might frequently do so more robustly than successful enforcement of copyright or trademark rights would. Intellectual property shaming highlights that the original creator made the underlying work, thereby attributing it to him or her. It also delineates that the original creator neither desired nor made the appropriation, thereby avoiding misattribution of the reappropriation to him or her too.²⁹² Retaking the copy has similar effect. For example, consider James Turrell's statement released in the wake of Drake's "Hotline Bling" video.²⁹³ The statement both claims attribution of Turrell's light artworks and avoids misattribution of the light artworks appearing in Drake's video to Turrell.

In these ways, intellectual property shaming and retaking the copy allow claimants to replicate the sorts of relief they could hope to get from successful enforcement of their intellectual property rights in court. In some instances, as we discuss yet further in Part III, it might allow them to get more robust relief than copyright or trademark law would provide.

III.

WHAT IS GAINED, WHAT IS LOST

We now analyze the relative advantages and disadvantages of using self-help versus intellectual property law to achieve monetary damages, attribution, and avoidance of misattribution. In doing so, we consider the gains and losses to the parties as well as to the public.²⁹⁴ In Part IV, we build on this analysis to draw normative distinctions between intellectual property shaming and retaking the copy, the two different avenues of self-help we identify.

A. *Cost and Speed*

Like most general self-help,²⁹⁵ self-help in the intellectual property context has shown itself to be dramatically cheaper and faster than bringing a lawsuit.²⁹⁶ It provides the relief of law without law, courts, and lawyers. All parties avoid costly and protracted litigation, a factor that becomes particularly salient when

292. Cf. Sharkey, *supra* note 268, at 121 ("The self-help approaches—particularly the ones that place an affirmative burden on the plaintiff—function as a sort of significance or sincerity index. In the digital context, self-help is a signal to the world (and the law) that one is asserting a property right.")

293. *Supra* Part I.E.

294. Cf. Bair & Pedraza-Fariña, *supra* note 1 (exploring how norms can discourage innovation as well as promote it, in particular with regard to boundary-crossing innovation).

295. *Supra* Part II.B.

296. To be sure, the litigation route can sometimes be swift and cheap if parties negotiate a quick settlement in response to a cease-and-desist letter. But claimants cannot count on a speedy settlement when they embark on the litigation route, whereas the social media shaming and reappropriation examples we explore here have typically resulted in swift resolutions, probably because of the public pressure brought to bear on the alleged infringers through shaming. *Infra* Part III.C (discussing increased shaming opportunities afforded by self-help).

there are power and wealth disparities among them.²⁹⁷ The cost of litigating a copyright or trademark infringement case through trial, for either side, readily runs over a million dollars.²⁹⁸ Furthermore, self-help spares courts the administrative cost that lawsuits impose on them.

The Richard Prince/Suicide Girls dispute described above²⁹⁹ illustrates the relative efficiency of self-help over the law. Prince's *New Portraits* series borrowed images not only from the Suicide Girls, but from many different Instagram users' pages. Unlike the Suicide Girls, four of those Instagram users sued Prince for copyright infringement, choosing the traditional litigation route.³⁰⁰ In the more than three years since the first of these cases was filed, not one has yet been resolved. The first filed, *Graham v. Prince*, survived a motion to dismiss, went through discovery, and is now awaiting the judge's ruling on Prince's motion for summary judgment.³⁰¹ Prince's copying occurred in 2014. While the Suicide Girls got relief practically overnight, these plaintiffs are mired in expensive litigation that may go on for years.

Dapper Dan's approach to Gucci is a good example of the reduced costs that come from self-help when there are power and wealth disparities between two parties. Had Dapper Dan chosen to sue Gucci when it showed the balloon-sleeved jacket clearly based on his work, the case would have paired an "underground" designer, who had not had a shop since he shuttered his Harlem atelier in 1992, against a global fashion behemoth with a powerful team of lawyers.³⁰² Now, thanks to an Instagram post by a friend and the media outrage that followed, Dapper Dan is back in business with a new store funded by Gucci and a capsule Gucci collection. And the timeline from the alleged infringement

297. This attractive feature aligns with current hunger for greater ability to resolve intellectual property rights at lower cost, such as through a copyright small-claims court, *see generally* U.S. COPYRIGHT OFF., COPYRIGHT SMALL CLAIMS (Sept. 2013), <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf> [<https://perma.cc/4FY7-DSZJ>] (documenting the challenges of resolving small copyright claims, and recommending the creation of a voluntary system of adjudication for such claims administered by the Copyright Office), or third-party litigation funding, *see generally* Shyamkrishna Balganes, *Copyright Infringement Markets*, 113 COLUM. L. REV. 2277 (2013) [hereinafter Balganes, *Copyright Infringement Markets*] (analyzing the independent financial market for copyright claims).

298. Balganes, *Copyright Infringement Markets*, *supra* note 297, at 2280 (copyright litigation) (citing AM. INTELL. PROP. LAW ASS'N, REPORT OF THE ECONOMIC SURVEY 2011, at 35 (2012)); Xuan-Thao Nguyen & Jeffrey A. Maine, *Branding Taxation*, 50 GA. L. REV. 399, 419–20 (2016) (trademark litigation) (citing AM. INTELL. PROP. L. ASS'N, REPORT OF THE ECONOMIC SURVEY (2013)).

299. *Supra* Part I.A.

300. *Supra* text accompanying note 22.

301. *See* 265 F. Supp. 3d 366 (S.D.N.Y. 2017) (denying Prince's motion to dismiss the complaint). In denying Prince's motion to dismiss, as well as the defendants' request to convert the motion to dismiss into one for summary judgment, the court found that discovery would be necessary because Prince is asserting a fair-use defense, which is a fact-sensitive inquiry. *Id.* at 386. The *McNatt* case is at the same phase of litigation as *Graham*. *See* Complaint, *McNatt v. Prince*, *supra* note 22.

302. *See* Schneier, *supra* note 92 (quoting Dapper Dan as describing his career as "underground" since the closure of his shop); *cf.* Stoppard, *supra* note 112 (quoting a small-business owner with limited finances who found that social-media shaming allowed her to achieve quicker, better results than she had with lawyers).

to the recovery was dizzyingly fast. Gucci sent the Dapper Dan homage/copy down the runway in May 2017;³⁰³ in September, just four months later, Dapper Dan was already the new “face” of Gucci’s fall ad campaign, and the official collaboration was announced.³⁰⁴ His new atelier opened in January 2018, less than a year after Gucci appropriated Dapper Dan’s work.³⁰⁵

Conversely, self-help may be a cost-effective choice when the power disparities between the parties are reversed and the alleged infringer is not in a position to pay damages. For example, when Gucci found its logo appropriated by relatively resource-poor GucciGhost, the company’s decision to make money by coopting the appropriation rather than sue a skateboarding street artist for damages made eminent business sense.³⁰⁶

The advantages of self-help over law are so significant that a lawyer may be remiss not to advise a client whose work has been copied to consider self-help rather than litigation. Note that James Turrell’s lawyer did just that when Drake copied Turrell’s art.³⁰⁷ Rather than write a cease-and-desist letter and embark on costly legal proceedings that might still be ongoing, Turrell’s attorney helped his client fashion an extralegal approach; he published a blog post and disposed of the matter in a few days.

B. *The Cool Factor*

This brings us to the “cool factor,” a second major advantage self-help affords over reliance on traditional intellectual property law. Self-help can build a creator’s reputation for being cool, while litigation and the stodgy associations of law can do the opposite. To return to the previous example, James Turrell’s lawyer saved his client time and money by avoiding a lawsuit against Drake. But perhaps more importantly, he won something elusive and valuable for Turrell—publicity for being ridiculously cool. Turrell’s playful response, in which the seventy-something-year-old artist appropriated Drake’s hip-hop lingo, was the opposite of a stodgy and intimidating cease-and-desist letter. And the blogosphere noticed, expressing admiration mixed with incredulity.³⁰⁸ Turrell not only gained style points; he also avoided the reputational damage that a lawsuit against a wildly popular rapper could have done to his image.

303. Schneier, *supra* note 92.

304. *Supra* Part I.B.

305. Whitney Bauck, *Peek Inside Dapper Dan’s New Gucci-Backed Harlem Atelier*, FASHIONISTA (Dec. 14, 2017), <https://fashionista.com/2017/12/gucci-dapper-dan-harlem-studio-atelier> [<https://perma.cc/MLT2-L2AZ>].

306. An original creator who is powerful nevertheless retains great ability to decide which third-party uses to tolerate, to coopt, or to litigate. *Cf.* Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617 (2008) (analyzing the phenomenon of “technically infringing, but nonetheless tolerated, use of copyrighted works”).

307. *Supra* Part I.E.

308. Wang, *supra* note 185.

Compare and contrast the self-help “do” of Turrell with the litigation “don’t” of Mattel. In 2000, Mattel, the maker of Barbie dolls, sued MCA Records, the recording company of musical group Aqua, for copyright and trademark infringement of Aqua’s 1997 song “Barbie Girl.”³⁰⁹ Mattel was upset that Aqua’s song referenced Barbie in ways that Mattel considered “sexual and . . . unsavory.”³¹⁰ Litigation lasted three years and culminated in a dismissal of Mattel’s claims, with the Ninth Circuit notoriously concluding in its ruling, “The parties are advised to chill.”³¹¹ The litigation painted Mattel as a company that could not take a joke and was too uptight.³¹² By 2009, Mattel seemed to have learned from its mistake. At that point, it did what would have made it seem much cooler back in 2000: Mattel reappropriated Aqua’s song, using a modified version (mostly making the lyrics more chaste) in a dance video advertising Barbie dolls.³¹³ It helped the Barbie brand, but not nearly as much as if Mattel had reacted the same way nine years earlier.

These examples show that self-help can enhance a brand’s image, whereas resorting to the law can make a cutting-edge creator look uptight. We should not underestimate the cool factor’s importance in the creative industries we consider here—fashion, art, and hip-hop, where an artist’s or brand’s reputation as cutting edge can be worth its weight in gold. Indeed, the cool factor seems central to all our case studies. Gucci, a luxury brand having a renaissance by embracing street cred (witness the endless rappers who name-check it in songs³¹⁴), would have looked foolish suing GucciGhost, a skateboarding street artist from Brooklyn. Gucci has been busily shaking off its associations with fusty Upper East Side ladies;³¹⁵ no wonder it leapt at the chance to be associated with a renegade cool kid. It seeks to tout as much in its own marketing: “[a]rtist Trouble Andrew is as much as Gucci as the brand is, the way he uses the logo of the company is by taking it to the streets[;] it is interesting how our language, started by a family in

309. See *Mattel v. MCA Records*, 296 F.3d 894 (9th Cir. 2002).

310. *Aqua Now Faces Lawsuit Over “Barbie Girl”*, MTV NEWS (Sept. 12, 1997), <http://www.mtv.com/news/1424996/aqua-now-faces-lawsuit-over-barbie-girl> [<https://perma.cc/M2QA-SLRL>].

311. *Mattel*, 296 F.3d at 908.

312. E.g., *Barbie Loses Battle over Bimbo Image*, BBC NEWS (July 25, 2002), <http://news.bbc.co.uk/2/hi/americas/2150432.stm> [<https://perma.cc/DJ4J-E6JV>].

313. Stuart Elliott, *Years Later, Mattel Embraces ‘Barbie Girl’*, N.Y. TIMES (Aug. 26, 2009), <https://mediadecoder.blogs.nytimes.com/2009/08/26/years-later-mattel-embraces-barbie-girl> [<https://perma.cc/7TLG-ES3E>].

314. See, e.g., Jake Wolf, *Gucci Is Officially Hip-Hop’s Favorite Brand*, GQ (Sept. 12, 2016), <https://www.gq.com/story/gucci-hip-hop-brand-tyga-snakes> [<https://perma.cc/LT8D-U8YE>] (citing, inter alia, KANYE WEST, *Champions*, on CRUEL WINTER (GOOD Music 2016); TYGA, *Gucci Snakes* (GOOD Music 2016); JERMAINE DUPRI & DA BRAT, *Alessandro Michele* (SO SO DEF 2016)).

315. Niamh O’Keefe, *Reverse Mentoring Is the New Black*, REPUTATIONINC (Dec. 6, 2017), <https://www.reputation-inc.com/our-thinking/reverse-mentoring-is-the-new-black> [<https://perma.cc/AC3G-C8G7>].

Florence nearly 100 years ago[,] can be something very contemporary.”³¹⁶ Indeed, some of the artists and companies we have considered seem to court the frisson of lawlessness as part of their identity; invoking law would undermine this image.³¹⁷ In the music context, hip-hop artists sometimes craft outlaw personas for themselves; bringing a lawsuit is not for outlaws. Similarly, the Suicide Girls cultivate their image as goth, punk, tattooed alt-porn models. Cheeky vigilante justice burnished their brand; hiring a lawyer could have tarnished it.

Although self-help is particularly relevant for the cool industries we explore here, it also solves a more general problem with which intellectual property lawyers in many industries, beyond just the “cool” ones, are increasingly concerned. That is, asserting your intellectual property rights through traditional legal means carries a new risk in social-media culture that you will be labeled an intellectual property “bully” or “troll.”³¹⁸ A recent study of lawyers who regularly enforce trademarks and copyrights for their clients reported that they often expressed concern “that enforcement can bring unwanted negative publicity.”³¹⁹ Cease-and-desist letters can be risky to send; recipients can post them or send them to a website like Chilling Effects Clearinghouse as way of harming the sender’s reputation.³²⁰ As enforcement of intellectual property rights through traditional legal means now brings its own risk of being shamed, self-help may avoid these reputation risks (and the resulting economic damage) that accompany legal action.³²¹ This may spread the appeal of self-help as an

316. Michele, *Behind the Collection*, *supra* note 74 (quoting Gucci creative director Alessandro Michele).

317. Dapper Dan established his reputation by using other brands’ trademarks without permission. Suing Gucci might have exposed him to charges of hypocrisy. In a similar vein, when artist Shepard Fairey attempted to establish that his use of an Associated Press copyrighted photograph was fair use, the Associated Press answered Fairey’s complaint by citing numerous instances in which it claimed Fairey had aggressively enforced his intellectual property rights against other users. Essentially, this answer sought to portray Fairey as a copyright hypocrite. Answer, Affirmative Defenses and Counterclaims at 31–36, *Shepard Fairey & Obey Giant Art, Inc. v. The Associated Press* (S.D.N.Y. Mar. 11, 2009) (No. 09-01123(AKH)). The case ultimately settled. Summary Order, *Fairey v. Associated Press*, No. 09-CV-1123 (S.D.N.Y. Mar. 16, 2011).

318. Elizabeth L. Rosenblatt, *Fear and Loathing: Shame, Shaming, and Intellectual Property*, 63 DEPAUL L. REV. 1, 2 (2013); *see also* Leah Chan Grinvald, *Shaming Trademark Bullies*, 2011 WIS. L. REV. 625 (2011) (discussing how small businesses and individuals use shaming techniques to defend themselves against trademark bullies).

319. William T. Gallagher, *Trademark and Copyright Enforcement in the Shadow of IP Law*, 28 SANTA CLARA COMPUTER & HIGH TECH. L.J. 453, 494–95 (2012).

320. *Id.* at 495; *see also* Rosenblatt, *supra* note 318, at 12, 26.

321. Compare the phenomenon of “cool” cease-and-desist letters as a way to subvert a “bully” label. *See* Rosenblatt, *supra* note 318, at 27 (discussing a creative cease-and-desist letter from Jack Daniel’s that generated good publicity for the rights holder); Tim Nudd, *Bud Light Sent a Hilarious Cease-and-Desist Scroll to the Makers of ‘Dilly Dilly’ Ale*, ADWEEK (Dec. 2, 2017), <http://www.adweek.com/creativity/bud-light-sent-a-hilarious-cease-and-desist-scroll-to-the-makers-of-dilly-dilly-ale> [<https://perma.cc/TXG3-GWXU>] (reporting positively a cease-and-desist parchment scroll delivered and read by a town crier in medieval garb for using Bud Light’s “dilly dilly” advertising phrase as the name of its new IPA beer); Tim Nudd, *Netflix Sent the Best Cease-and-Desist Letter to*

alternative to law, even to industries that do not depend on the cool factor we describe here. Nonetheless, it is possible that as self-help tactics become more commonplace, people could also face accusations of bullying for using self-help, reducing its value as an alternative to law.³²²

Reputation matters. Whether artist or airline, a reputation for a lack of coolness can decrease the demand for goods and services, causing economic harm. For rightsholders in the intellectual property context, self-help has thus far proven to be one way of preserving, and even earning, a cool reputation.

C. *Shaming Opportunities in a Shame Culture*

Earlier we observed that the turn to self-help as an alternative to intellectual property law typically proved more efficient than the law at obtaining relief for claimants.³²³ Here we explore one reason why that may be, by focusing on the element of public shaming in self-help.³²⁴ (Our inquiry into self-help has described two primary strategies: intellectual property shaming and retaking the copy. While the shaming element is the essence of the former, shame is also

This Unauthorized Stranger Things Bar, ADWEEK (Sept. 20, 2017), <http://www.adweek.com/creativity/netflix-sent-the-best-cess-and-desist-letter-to-this-unauthorized-stranger-things-bar> [<https://perma.cc/HY6G-GKJU>] (reporting positively on a “quite adorable” cease-and-desist letter written to the owners of an unauthorized *Stranger Things* bar “in the style of the *Stranger Things* universe”); cf. John McCarthy, *Velcro Hopes Original Music Video About its Brand Trademark Sticks with Consumers*, DRUM (Sept. 26, 2017), <http://www.thedrum.com/news/2017/09/26/velcro-hopes-original-music-video-about-its-brand-trademark-sticks-with-consumers> [<https://perma.cc/DFA7-9LSG>] (describing how the Velcro brand released a music video containing an “upbeat piano number” so as “to protect the integrity of its registered trademark”).

322. Shaming of shamers is not yet prevalent. See *infra* note 355 and accompanying text. Given that intellectual property shaming is a fast-moving and emerging phenomenon, we cannot predict whether self-help will reach a tipping point in which these negative connotations could become predominant.

323. *Supra* Part III.A.

324. Despite the different context, we borrow from the extensive literature on shaming in criminal law, where commentators have described shaming as “the process by which citizens publicly and self-consciously draw attention to the bad dispositions or actions of an offender, as a way of punishing him for having those dispositions or engaging in those actions.” Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 368 (1999). In particular, the intellectual property shaming we consider echoes what Dan Kahan in his taxonomy of criminal-shaming sanctions identified as “stigmatizing publicity,” a common technique in which an offender’s crime is communicated to the general public by media advertisements, billboards, and the like. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 631–32 (1996); see also Amitai Etzioni, *Back to the Pillory?*, AM. SCHOLAR 44 (Summer 1999) (advocating posting names of offenders “on a Web site and in advertisements . . . in key newspapers” as an alternative to jail). For further definitions of shaming in legal scholarship, see Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 743 (1998) (describing shaming punishments as requiring an “offender to publicize his offense to an audience that under normal circumstances would be unaware of it” and that lead the offender to experience shame); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1821 (2001) (defining shaming in the corporate context as requiring an “intent by the enforcer to morally condemn the offender” in a way that is distinct from other public disclosures of corporate misdeeds).

frequently a component in the retaking-the-copy strategy.³²⁵) In analyzing shaming, we consider both its effectiveness as a strategy and its costs. The rise of extralegal intellectual property shaming can be seen as part of a more general societal shift toward shaming as a norm, a shift that threatens to embed us in a culture governed increasingly by shame rather than law.³²⁶

The vast majority of legal literature on shaming exists in the context of criminal law, where scholars have debated the modern return of shaming as court-imposed punishment for criminal offenders.³²⁷ This literature focuses on

325. Shame figures centrally in some of the examples of reappropriation we explore here, such as the Suicide Girls' response to Richard Prince and the hip-hop music examples. *Supra* Part I.A, D. But shame seems absent in some of our examples of the reappropriation strategy, such as Gucci's appropriation of Part I.B.

326. For criticism of the move to shame culture, see, for example, SUE SCHEFF & MELISSA SCHORR, SHAME NATION: THE GLOBAL EPIDEMIC OF ONLINE HATE (2017); Eric Posner, *A Terrible Shame: Enforcing Moral Norms Without the Law Is No Way to Create a Virtuous Society*, SLATE (Apr. 9, 2015), http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/04/internet_shaming_the_legal_history_of_shame_and_its_costs_and_benefits.html [<https://perma.cc/JAJ5-77F5>]. For some of the related, recent critiques of call-out culture and its chilling effects on expression, see Conor Friedersdorf, *The Destructiveness of Call-Out Culture on Campus*, ATLANTIC (May. 8 2017), <https://www.theatlantic.com/politics/archive/2017/05/call-out-culture-is-stressing-out-college-students/524679> [<https://perma.cc/L9D3-HEWL>]; Kelly Oliver, *Education in the Age of Outrage*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/opinion/education-outrage-morality-shaming.html> [<https://perma.cc/F3CC-GWRV>] (arguing that the conditions for critical teaching and learning are undermined when feelings are equated with reasons in call-out culture); Suzanna Danuta Walters, *Academe's Poisonous Call-Out Culture*, THE CHRONICLE OF HIGHER EDUCATION (May 5, 2017), <https://www.chronicle.com/article/Academe-s-Poisonous-Call-Out/240016> [<https://perma.cc/ZH6C-W9BZ>].

327. Shaming as a criminal sanction, once popular in the colonies, was mainly eliminated by reformers by the mid-nineteenth century but made a dramatic return over the last few decades in criminal law. Some scholars advocate for shaming as an alternative to other modes of punishment, extolling among its supposed virtues its expressive capacity and lower cost compared to prison. See, e.g., Kahan, *supra* note 324. Critics decry the return of shame sanctions, pointing among other things to their cruelty, their violation of the offender's dignity, and their supposed inefficacy. See, e.g., MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 227–49 (2004) (discussing the effect of shaming, as an unreliable punishment, on human dignity); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001); Dan Markel, *Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice*, 85 TEX. L. REV. 1385 (2007); Toni M. Massaro, *Shame, Culture and American Criminal Law*, 89 MICH. L. REV. 1880, 1936–42 (1991) (discussing the humaneness of the shaming sanctions); Toni M. Massaro, *The Meanings of Shame*, 3 PSYCH. PUB. POL'Y & L. 645, 689–703 (1997) (discussing the social and political concerns and the effectiveness of the modern shaming sanctions). Dan Kahan, the leading advocate of shame sanctions, later recanted his position. See Dan M. Kahan, *What's Really Wrong with Shaming Sanctions?*, 84 TEX. L. REV. 2075, 2086–87 (2006) (arguing that shaming sanctions grate against the sensibilities of persons who subscribe to egalitarian and individualistic worldviews). For some examples of work considering the changed terms of the debate over shaming given the rise of the internet, see Lauren M. Goldman, *Trending Now: The Use of Social Media Websites in Public Shaming Punishments*, 52 AM. CRIM. L. REV. 415, 419, 443 (2015) (comparing the effectiveness of modern-day online social-media public-shaming punishments to those in colonial times); Kate Klonick, *Re-Shaming the Debate: Social Norms, Shame, and Regulation in an Internet Age*, 75 MD. L. REV. 1029, 1051–52 (2016) (observing that with the internet, shaming now lacks reliable social meaning, calibration, and accuracy);

shaming sanctions imposed by the state and praises or laments those as alternatives to criminal law penalties.³²⁸ In contrast, however, we focus on public shaming in the absence of any state involvement, and indeed, as an alternative to the possibility of direct legal action.³²⁹ In spite of this important difference, criminal law scholarship can nonetheless provide useful insights into the extralegal use of shaming we explore here.

The criminal law literature suggests one reason shame can be a successful weapon in the commercial context: shaming can devastate commercial reputation. As James Whitman observed in his classic article on shaming in criminal law, shaming sanctions have historically been directed against at least two primary types of crimes: sexual and commercial.³³⁰ While the utility of shaming sanctions against sexual offenders depends on the deep-rooted psychological connections between sexuality and shame, commercial shaming is effective because merchants and participants in the world of business fear the economic impact caused by loss of reputation.³³¹ David Skeel has drawn on this literature to explore the effectiveness of shaming in corporate law, noting the exquisite reputational sensitivity of corporations and corporate directors.³³²

Although companies have always been sensitive to reputation, social media has changed the game. Individual customers now have the capacity to wage shaming campaigns that can bring a brand to its knees in a matter of hours.

see also Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004) (setting forth a general framework to think about the shift toward digital speech and its implications for social norms, though not addressing shame directly).

328. Some scholars have explored how private actors, not just judicial ones, may leverage shame. *See, e.g.*, Skeel, *supra* note 324, at 1813 (explaining that shareholder activists and the financial press have made frequent use of shaming techniques against the corporate offenders).

329. A few articles explore the use of shame in intellectual property law, but they have not analyzed the phenomenon we do here, the use of shame as a substitute for legal relief involving copying of works well within the heartland of copyright and trademark laws. *See* Grinvald, *supra* note 318 (exploring shame as a weapon deployed by accused infringers against overreaching by rightsholders); Irina Oberman Khagi, *Who's Afraid of Forever 21?: Combating Copycatting Through Extralegal Enforcement of Moral Rights in Fashion Designs*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 67, 97–98 (2016) (exploring the use of shaming as a norm to reduce copying in fashion when law provides no remedy to rightsholders); Rosenblatt, *supra* note 318, at 12 (exploring how shaming governs copying behavior in intellectual property laws' negative spaces, where there is no formal law in place, and also helps discourage intellectual property owners from enforcing their rights in overreaching ways).

330. James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1064–67 (1998).

331. *See id.* at 1066–67.

332. *See* Skeel, *supra* note 324 (showing the prominent and effective role played by shaming sanctions used against corporations and their directors). Skeel quotes a critic who called the directors of large U.S. corporations “the most reputationally sensitive people in the world.” *Id.* at 1812 (quoting Interview with Nell Minow, Editor, The Corporate Library, in Washington, D.C. (Oct. 25, 2000) (transcript on file with Skeel)). For work exploring the reputational damage caused to corporations by criminal convictions or settlements, see Cindy R. Alexander & Jennifer Arlen, *Does Conviction Matter? The Reputational and Collateral Effects of Corporate Crime*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 87, 88 (Jennifer Arlen, ed. 2018).

Internet shame is a remarkably powerful weapon.³³³ It functions as clickbait: the strange allure of seeing others shamed can make news of a transgression viral.³³⁴ Shame on the internet operates like the stocks of old, displaying the accused in the public square: because public shaming is more attention-grabbing than court trials,³³⁵ it is no wonder that companies act quickly to repair the brand damage shaming can cause.

Outside of the intellectual property context, the power of using shame against corporations is now vividly on display. Recent public-relations crises have illustrated how individual critics can humiliate giant corporations overnight.³³⁶ For example, United Airlines suffered a public-relations fiasco when angry customers' videos of another passenger being violently dragged off a plane went viral.³³⁷ Pepsi likewise withdrew an advertisement featuring Kendall Jenner in less than twenty-four hours when a firestorm of social-media shaming accused the company of racial insensitivity.³³⁸

To be sure, shaming does not always work in the commercial context. Not all shaming campaigns capture public attention. Furthermore, some companies may be more shame-proof than others.³³⁹ Ivanka Trump may be one such brand. As described above, Aquazzura ultimately sued her for infringing its design rights in its shoes, but only after its Instagram shaming of her drew no response.³⁴⁰ Another possible limitation on the effectiveness of shaming may be that as shaming becomes the new normal, brands will be less responsive as the public becomes more blasé. But at least for the moment, the new intellectual property shaming is a remarkably potent weapon.

Efficiency and effectiveness come with a cost, however. As shaming proliferates, particularly in online culture, we pay the price of living in what is increasingly a "shame culture." Twenty years ago, James Whitman objected to criminal shaming sanctions because they involve the government's willingness to delegate part of its enforcement power to the uncontrolled general populace, and as such, represent a form of "officially sponsored lynch justice, meted out

333. See generally JON RONSON, *SO YOU'VE BEEN PUBLICLY SHAMED* (2015) (documenting the re-emergence of shaming in internet culture).

334. See *infra* note 351 (collecting sources detailing the exploration and centrality of shame as a form of entertainment in contemporary culture).

335. Cf. Kahan, *supra* note 324, at 635 (noting the "dramatic and spectacular" nature of shaming sanctions (citing *Goldschmitt v State*, 490 S2d 123, 125 (Fla. Dist. Ct. App. 1986), citing *United States v William Anderson Co.*, 698 F2d 911, 913 (8th Cir. 1983))).

336. See Andrew Winston, *Pepsi, United, and the Speed of Corporate Shame*, HARV. BUS. REV. (Apr. 12, 2017), <https://hbr.org/2017/04/pepsi-united-and-the-speed-of-corporate-shame> [<https://perma.cc/AT4F-T3E6>].

337. See *id.*

338. See Daniel Victor, *Pepsi Pulls Ad Accused of Trivializing Black Lives Matter*, N.Y. TIMES (Apr. 5, 2017), <https://www.nytimes.com/2017/04/05/business/kendall-jenner-pepsi-ad.html> [<https://perma.cc/6YHE-FG22>].

339. Skeel, *supra* note 324, at 1818.

340. *Supra* notes 89, 105 and accompanying text.

by courts.”³⁴¹ Obviously, the extralegal use of shame in the context we are exploring here avoids Whitman’s concerns about the state delegating its powers to the populace.³⁴² Yet Whitman’s account of the corrosive political dangers of shame still has force here. As he wrote, “shame sanctions lend themselves to a politics of stirring up demons,” and as such, “belong to a style of the 20th century mass politics that draws its power not from a sober public, but from a fired-up crowd.”³⁴³ Indeed, for the situations we discuss here, the use of shame may be worse in some ways. While Whitman worried about the partnership between the state and the mob, here the mob may simply bypass the state. As shaming circumvents intellectual property law, the realm will be increasingly governed by the “fickle and uncontrolled general populace” rather than the sober rule of law.³⁴⁴ Relatedly, some intellectual property shaming, such as Diet Prada’s,³⁴⁵ happens not in the shadow of law,³⁴⁶ but in the shadows of both bad publicity and, as we discuss below, lay understandings of intellectual property law that seem to be more broadly protective and unmoored from the nuances of actual law.³⁴⁷

Ultimately, shame culture poses a threat to our ideals of dignity. As Martha Nussbaum wrote, “people who inflict shame are very often not expressing virtuous motives or high ideals, but rather a shrinking from their own human weakness and rage against the very limits of human life. . . . Behind the moralism is something much more primitive, something that involves the humiliation and dehumanization of others.”³⁴⁸ There are further concerns. A troubling pleasure often accompanies the spectacle of watching other people being shamed.³⁴⁹ The effectiveness of intellectual property shaming depends on its rapid spread through social media; it must elicit pleasure to be successful clickbait.³⁵⁰ This pleasure that shaming elicits and depends on may be seen as part of our growing culture of “humilitainment” in which shaming others has become a central

341. Whitman, *supra* note 330, at 1088–89.

342. Note as well the importance of this concern to Martha Nussbaum, who argues that the state’s complicity in social shaming is significant: “For the state to participate in this humiliation, however, is profoundly subversive of the ideas of equality and dignity on which liberal society is based.” NUSSBAUM, *supra* note 327, at 232.

343. Whitman, *supra* note 330, at 1091.

344. *Id.* at 1088. The rise of shame culture also presents significant dignitary concerns about the target of a shame campaign; *cf.* NUSSBAUM, *supra* note 327, at 278–79 (objecting to shame in part because it degrades people’s identities by marking them as defective in society).

345. *See supra* Part I.C.

346. *Cf.* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979) (positing that divorce law “is concerned primarily with the impact of the legal system on negotiations and bargaining that occurs *outside* the courtroom” (emphasis in original)).

347. *See infra* Part III.E.

348. NUSSBAUM, *supra* note 327, at 232–33.

349. Amy Adler, *The Pleasures of Punishment: Complicity, Spectatorship, and Abu Ghraib*, in *PUNISHMENT IN POPULAR CULTURE* 236 (Charles J. Ogletree & Austin Sarat, eds., 2015) [hereinafter Adler, *The Pleasures of Punishment*].

350. *Id.*

feature of popular entertainment, reflected in reality television and online culture more generally.³⁵¹ As one of us has argued, this new culture fuels and feeds on sadistic and voyeuristic impulses; it caters to our basest instincts.³⁵²

D. Lack of Procedural Protections

Another significant concern with intellectual property self-help is that, like most self-help measures, it lacks procedural protections for the accused against frivolous claims.³⁵³ The lack of procedural protections in this area is troubling, as there are no legal safeguards to fortify the accused against claims without merit.³⁵⁴ Protections that typically operate to forbid or deter baseless claims and prevent unjust accusations are wholly unavailable in intellectual property self-help. In the absence of explicit legal provisions, the accused must rely on extralegal measures to protect themselves.

The closest extralegal substitute for procedural protection with regard to intellectual property self-help is a shamer's concern for his or her reputation. However, those who invoke self-help strategies for copying face little reputational risk at this juncture, even if the copying would not remotely count as copyright or trademark infringement. Shamers are retweeted and feared, but

351. Amy Adler, *To Catch a Predator*, 21 COLUM. J. GENDER & L. 130, 152 (2012) [hereinafter Adler, *To Catch a Predator*]; accord MAGGIE NELSON, *THE ART OF CRUELTY: A RECKONING* 33 (2012) (describing the international craze for reality programming involving various forms of torture); MIKE PRESDEE, *CULTURAL CRIMINOLOGY AND THE CARNIVAL OF CRIME* 84–85 (2001) (noting the growing production of violence and humiliation in entertainment); Adler, *The Pleasures of Punishment*, *supra* note 349; Deborah Potter, *Over the Line*, 29 AM. JOURNALISM REV. (Aug.–Sept. 2007) (discussing the popularity and the controversial tactics of NBC's series *To Catch a Predator*); see also *Conrad v. NBC Universal, Inc.*, 536 F. Supp. 2d 380, 385 (S.D.N.Y. 2008) (describing the “mainstay” of *To Catch a Predator*, once one of the highest-rated shows on network television, as “public humiliation”).

352. See Adler, *The Pleasures of Punishment*, *supra* note 349 (connecting Abu Ghraib to “humilitainment” culture); Adler, *To Catch a Predator*, *supra* note 349 (providing a psychoanalytic account of the pleasures and dangers of public shaming). See generally SUSAN SONTAG, *REGARDING THE PAIN OF OTHERS* (2004) (exploring the complex experience of viewing others in pain); Sigmund Freud, *A Child Is Being Beaten: A Contribution to the Study of the Origin of Sexual Perversions*, in *STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 175 (James Strachey trans., James Strachey et al. eds., 1955) (providing a theory of the shifting voyeurism, masochism, and sadism that accompany fantasies of watching punishment).

353. See *supra* Part II.B; cf. Badawi, *supra* note 268, at 14 (“[A]n underappreciated aspect of prohibitions on self-help [is that] these restrictions force creditors (and other potential users of self-help) to make investments in accuracy that they might not otherwise make. These forced investments can prevent the costs of mistakes that creditors might not otherwise be motivated to make.”).

354. See, e.g., *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783–84 (4th Cir. 1999) (emphasizing that “protect[ing] defendants from frivolous suits” is one of the reasons for Federal Rules of Civil Procedure Rule 9(b)'s requirement that the plaintiffs plead fraud with particularity); Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589 (1998) (describing the history of Federal Rules of Civil Procedure Rule 11, which sanctions lawyers for certain representations made to courts, including those “not being presented for any []proper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation,” and the rule's effects on the bar).

rarely shamed in response.³⁵⁵ Further, as intellectual property self-help becomes normalized, those who overreach with these measures will be considerably less concerned with reputational harms. As these circumstances suggest, extralegal procedural protections against frivolous exercises of intellectual property self-help are presently inadequate.

The law also currently provides few checks against frivolous accusations, and the circumstances to assert these checks successfully are limited. For example, an appropriator might be able to bring a lawsuit for defamation against a shamer for an injurious statement. That said, a defamation lawsuit in this context is unlikely to succeed. Many expressions of shaming or retaking the copy with regard to intellectual property infringement are statements of opinion, rather than fact, which insulates them from defamation liability.³⁵⁶ Moreover, for public figures, even false statements must be made with actual malice for a defamation claim to have constitutional merit.³⁵⁷

Additionally, if a rightsholder who has engaged in intellectual property self-help also sues for copyright or trademark infringement—something that happened only once in our case studies, when Aquazzura sued Ivanka Trump—the defendant may invoke overreaching intellectual property shaming or retaking the copy as defenses against the plaintiff’s claim. That is, in a handful of cases, courts have barred a copyright or trademark plaintiff from recovering based on misuse of their right.³⁵⁸ It is important to note, however, that these defenses are only available in the unusual circumstance where a rightsholder files an infringement claim after trying intellectual property self-help measures.³⁵⁹ And

355. That is not to say that there might not ultimately be backlash against shaming that is perceived as overreaching. Such a backlash might open a broad public conversation about copying norms, which could shift the shape of intellectual property self-help. That said, this conversation can be harder to spark given that self-help is often invoked without the backdrop of a distinct community, but rather across creative communities or in the absence of one. *Supra* note 2 and accompanying text. Instead, these conversations might be more likely to occur in distinct communities, like hip-hop, where complex copying norms exist, such as those against copying another person’s choice of music sample, which itself is copied from someone else. *Supra* Part I.D.

356. See 1 ROBERT D. SACK, *SACK ON DEFAMATION* § 4:2.3 (4th ed. 2010) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)). Additionally, truth is an absolute defense to defamation, *Hosseinzadeh v. Klein*, 276 F. Supp. 3d 34, 44 (S.D.N.Y. 2017), though we are less worried that true statements will amount to shaming that overreaches.

357. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

358. See generally William E. Ridgway, *Revitalizing the Doctrine of Trademark Misuse*, 21 *BERKELEY TECH. L.J.* 1547 (2006); Kathryn Judge, Note, *Rethinking Copyright Misuse*, 57 *STAN. L. REV.* 901 (2004).

359. Cf. Lichtman, *supra* note 268, at 241 (“[C]opyright misuse comes into play the moment the relevant copyright holder turns to the courts for help in enforcing any aspect of the implicated copyright. This is also the central limitation on the doctrine: it has no bite as applied to content producers whose self-help options are so appealing that they have no need for copyright. . . . Misuse could therefore effectively pressure Madonna and similarly situated copyright holders to choose between copyright law and self-help, taking away the option of using both regimes to protect any single copyright-eligible work.”).

even in these limited circumstances, courts seem unwilling to apply the doctrine in practice.³⁶⁰

Antitrust law presents another possible technique to combat undesirable self-help, relevant if the parties invoking self-help are industry members who have acted together to restrain trade beyond the extent of their intellectual property rights. This is akin to what happened in the 1930s in the fashion business when copying original fashion designs was rampant. As Scott Hemphill and Jeannie Suk Gersen describe, “Sketch artists in New York would go to such lengths as to intercept brand new dresses from delivery boys on the way to the stores, resulting in knockoffs for sale that very day at less than half the price of the originals.”³⁶¹ In response, in 1932, the twelve most important fashion companies in New York formed the Fashion Originators’ Guild of America to protect original fashion designs registered with the Guild from copying for a period of six months by boycotting both “copyists and retailers willing to merchandise knockoffs.”³⁶² The Guild undertook this form of self-help because there was no legal protection in the early to mid-twentieth century for fashion designs.³⁶³ By 1939, the Federal Trade Commission had put a stop to the Guild’s self-help measures on the ground that they were anticompetitive, as the boycotts forced higher prices and excluded copyists and stores that sold the merchandise from the marketplace.³⁶⁴ The Supreme Court affirmed this reasoning, observing that the Guild was acting anticompetitively as “an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations.”³⁶⁵

Nonetheless, we think it is unlikely that intellectual property shaming or retaking the copy would raise antitrust concerns similar to the Guild’s measures. This is principally because the self-help measures we describe here tend to operate without the need for a distinct community enforcing particular norms. In fact, one noteworthy feature of these self-help measures is that they can achieve success within our diffuse society. In this regard, the Guild’s self-help measures

360. See generally Ridgway, *supra* note 358, at 1554 (“In contemporary cases, courts rarely apply trademark misuse to anticompetitive conduct, and even less frequently do they resort to equitable principles.”); Judge, *supra* note 358, 902 (indicating that while circuit courts either “have accepted copyright misuse as an affirmative defense” or “have recognized the doctrine’s validity,” a successful invocation of copyright misuse is rare).

361. C. Scott Hemphill & Jeannie Suk, *The Fashion Originators’ Guild of America: Self-Help at the Edge of IP and Antitrust*, in *INTELLECTUAL PROPERTY AT THE EDGE* 159, 162 (Rochelle Cooper Dreyfuss & Jane C. Ginsburg eds., 2014).

362. *Id.* at 160, 163.

363. See *id.* at 160. Legal protection for fashion designs is currently relatively piecemeal still. Christopher Buccafusco & Jeanne C. Fromer, *Fashion’s Function in Intellectual Property*, 93 *NOTRE DAME L. REV.* 51 (2017); Kal Raustiala & Christopher Jon Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion*, 92 *VA. L. REV.* 1687 (2006).

364. Hemphill & Suk, *supra* note 361, at 174.

365. *Fashion Originators’ Guild of Am. v. FTC*, 312 U.S. 457, 465 (1941).

are materially different from those involving shaming or retaking the copy.³⁶⁶ Without a distinct community acting together to discipline copyists, it is unlikely that intellectual property shaming or retaking the copy would constitute sufficiently concerted measures rising to the level of an antitrust violation. In short, little to no procedural protection exists—extralegal or legal—to protect lawful appropriators from being intimidated by intellectual property shaming or retaking the copy.

E. Loss of Legal Nuance, or Diminution of Legal Uncertainty

One advantage self-help offers to potential claimants as an alternative to litigation is the ability to circumvent some of the notoriously uncertain doctrines that govern copyright and trademark laws. This strategy is particularly useful to rightsholders who have weak legal cases. Indeed, many of our case studies involve claimants who obtained relief through self-help but would have had only borderline wins, at best, using litigation.³⁶⁷

That said, the advantage self-help offers to claimants comes at a cost to the public interest that animates copyright and trademark laws. The complex doctrines in intellectual property law that render this realm so unpredictable are the very ones designed to serve the public purposes of protecting free speech, creativity, and fair competition. Intricate and nuanced doctrines—such as the fair-use defense (in both copyright and trademark), copyright law’s test of substantial similarity for infringement, copyright’s idea-expression distinction that prohibits the protection of ideas, and trademark distinctiveness as a prerequisite to trademark protection—are all designed to ensure that intellectual property law does not overreach in a way that would undermine further creativity and competition. Ultimately, self-help threatens to replace these nuanced internal balances of intellectual property law with a folk-law vision of the rights and wrongs (mostly wrongs) of copying. This vision would limit copying more than current intellectual property law would allow; by doing so, it could threaten the public interest in creativity and competition that intellectual property law is designed to serve.

Nonetheless, many scholars lament the notorious complexity and unpredictability that plague copyright and trademark doctrines.³⁶⁸ Most

366. The form of self-help that Hemphill and Suk Gersen describe is distinct from the forms we analyze herein for another important reason. Unlike the self-help measures taken by the Guild for unprotected fashion designs, the measures we discuss here are taken for subject matter that copyright and trademark laws already protect.

367. See, e.g., *supra* Part I (presenting our primary case studies, and noting that most of them involve claims that were uncertain to succeed as a legal matter).

368. E.g., Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581 (2006) [hereinafter Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*] (studying the thirteen circuits’ different multifactor tests for the likelihood of consumer confusion in trademark law and finding “significant variation among the circuits in the application and outcome of their respective tests”); see James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 887 (2007) (noting that “core” copyright

prominently, scholars routinely decry the indeterminate nature of copyright's fair-use defense, labelling it "one of the most intractable and complex problems in all of law."³⁶⁹ As Lawrence Lessig puts it, "fair use in America simply means the right to hire a lawyer."³⁷⁰ While fair use receives disproportionate attention, scholars have also asserted that "other key copyright doctrines share fair use's indeterminacy."³⁷¹ Critics and courts have dwelled on the uncertainties that surround the idea-expression distinction, which lies at the foundation of copyright law.³⁷² As described above, copyright law extends protection only to the expression of ideas; the ideas themselves remain in the public domain.³⁷³ Yet this essential boundary between ideas and expression seems hopelessly indefinite.³⁷⁴ As Learned Hand once remarked, "Nobody has ever been able to fix that boundary, and nobody ever can."³⁷⁵ In the same way, the substantial-similarity test, central to determining if there has been copyright infringement, has also proven notoriously confusing.³⁷⁶

doctrines such as "the idea/expression dichotomy, the substantial similarity test, and the fair use defense . . . create significant ambiguity regarding the reach of copyright rights").

369. Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1528 (2004); accord 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 12.1 (3d ed. 2005); Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 605–06 (2001); Paul Goldstein, *Fair Use in Context*, 31 COLUM. J.L. & ARTS 433, 433 (2008); David Nimmer, "Fairest of Them All" and Other Fairy Tales of Fair Use, 66 LAW & CONTEMP. PROBS. 263, 287 (2003); Diane Leenheer Zimmerman, *The More Things Change, the Less They Seem "Transformed": Some Reflections on Fair Use*, 46 J. COPYRIGHT SOC'Y 251, 268 (1999). But see Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 574–75 (2008) (suggesting, after an empirical review of fair-use doctrine in the courts, that the doctrine is somewhat more predictable than is typically thought); Madison, *supra*, at 1533 (maintaining that "social and cultural patterns underlying case-by-case adjudication of fair use problems may have achieved . . . a framework . . . that is both stable and relatively predictable in the context of legal doctrine"); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2537 (2009) ("The copyright fair use caselaw is more coherent and more predictable than many commentators seem to believe."). Lamentation over fair use's unworkability has a long history; in 1939, the Second Circuit called it "the most troublesome [issue] in the whole law of copyright." *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (per curiam).

370. LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* 187 (2004).

371. Gibson, *supra* note 368, at 891; see also Shyamkrishna Balganes, *The Questionable Origins of the Copyright Infringement Analysis*, 68 STAN. L. REV. 791, 794 (2016) (arguing that the substantial-similarity test in copyright continues to "confound courts and scholars—perhaps even more so (and more routinely) than the infamous fair use doctrine").

372. See 17 U.S.C. § 102(a) (2012).

373. See *supra* note 193 and accompanying text.

374. See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 304 (1996).

375. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

376. See, e.g., 4 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13.05(D)(3) (2017); Gibson, *supra* note 368, at 891; Rebecca Tushnet, *Worth A Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 716–17 (2012).

Trademark law is similarly complex and unpredictable with regard to important doctrines.³⁷⁷ Barton Beebe’s empirical study of the multifactor likelihood-of-confusion test that courts use to assess trademark infringement shows that there is predictability in how the courts weigh the various factors.³⁷⁸ Nonetheless, there is also variability in how this test is applied. In particular, Beebe exposes how each circuit tests a different set of factors.³⁷⁹ Adding to the complexity, very few of the test’s factors—such as evidence of actual confusion among consumers and the proximity of the plaintiff’s and defendant’s goods in the market—result in binary answers, which makes judges’ assessments hard to predict. Moreover, similar to copyright law, trademark law allows for some uses of an otherwise protected trademark, such as when they are used descriptively rather than to indicate source, when they are used nominatively, and when they are used as parody or cultural commentary.³⁸⁰ Yet these doctrines are plagued with ambiguity regarding when they apply and how much consumer confusion is tolerable.³⁸¹ In addition, a broad range of consumer confusions—initial-interest confusion, confusion at point of sale, and post-sale confusion—are actionable, but that does not clarify which sorts of consumer confusion ought to count.³⁸²

Finally, the prerequisites for trademark protection and scope depend on the degree of distinctiveness inherent in a mark. Deciding the degree of distinctiveness is challenging, but the consequences that flow from the determination render it an important task.³⁸³ For example, descriptive marks—marks that describe their products’ characteristics, such as iPhone for mobile phones—are protectable only upon a showing that the mark has accrued secondary meaning in the marketplace as a source of the markholder’s goods or services. Alternatively, the related category of suggestive marks—marks that are evocative but not directly descriptive of their products’ characteristics, such as Coppertone for suntan oil—are protectable upon use as inherently distinctive of

377. See, e.g., William McGeeveran, *The Trademark Fair Use Reform Act*, 90 B.U. L. REV. 2267, 2275 (2010).

378. Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, *supra* note 368.

379. *Id.*

380. See generally McGeeveran, *supra* note 91 (summarizing these exceptions as they exist in trademark law).

381. See generally *id.*; see also *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 123–24 (2004) (holding that descriptive “fair use can occur along with some degree of confusion[, which] does not foreclose the relevance of the extent of any likely consumer confusion in assessing whether a defendant’s use is objectively fair”).

382. See generally Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67 (2012) (arguing that only a limited number of forms of consumer confusion ought to be actionable under trademark law); Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413 (2010) (same).

383. See Jeanne C. Fromer, *The Role of Creativity in Trademark Law*, 86 NOTRE DAME L. REV. 1885 (2011) [hereinafter Fromer, *The Role of Creativity in Trademark Law*].

source.³⁸⁴ All else being equal, a suggestive mark will have a broader scope than a descriptive one.³⁸⁵ Yet it can be next to impossible to tell the difference between a descriptive mark and a suggestive one in many cases,³⁸⁶ injecting another degree of ambiguity into trademark law.

The complexity of these doctrines and their fact-specific nature makes intellectual property litigation risky, unpredictable, and expensive.³⁸⁷ There are few sure cases, making it no wonder that self-help is an attractive alternative to litigation for claimants, especially those with weak claims. Indeed, in the previous description of our case studies, we noted that all of the potential claims were uncertain as a legal matter despite involving obvious copying. Consider the *Suicide Girls*.³⁸⁸ At first glance, one might think their copyright claim against Richard Prince would have been a slam dunk; their content was clearly copyrightable and Prince clearly copied it. Nonetheless, the *Suicide Girls* may well have lost in court. Their case would have played itself out on the highly uncertain terrain of fair use, and in the wake of a previous case involving somewhat similar facts and thirty paintings by the same defendant in which the Second Circuit found that most were fair use as a matter of law.³⁸⁹ Indeed, fair use would have been a potential defense in most, if not all, of the case studies we explored. Certainly all the rap diss songs we discussed would have presented strong fair-use defenses (not to mention other difficult legal questions such as substantial similarity).³⁹⁰ After all, the Supreme Court's foundational modern fair-use case involved a rap answer song, 2 Live Crew's parodic remake of the song "Pretty Woman," which is now the paradigm of fair use.³⁹¹

Had they sued, the claimants in our case studies would have faced other legal obstacles in addition to fair use. For example, despite Drake's overt copying of artist James Turrell, Turrell would still have faced an uphill battle in court under existing doctrine. As mentioned earlier, even with helpful precedent for Turrell in the Second Circuit on the issue of substantial similarity, it is not clear that Turrell's work would have been protectable under the highly malleable idea-expression doctrine in copyright law.³⁹² Gucci, Dapper Dan, and others

384. See *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9–11 (2d Cir. 1976); accord *Barton Beebe & Jeanne C. Fromer, Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion*, 131 HARV. L. REV. 945, 957–58 (2018).

385. *Nutri/Sys., Inc. v. Con-Stan Indus., Inc.*, 809 F.2d 601, 605 (9th Cir. 1987).

386. See *Fromer, The Role of Creativity in Trademark Law*, *supra* note 383, at 1911–15 (discussing the fine, yet ambiguous, line between these two categories).

387. E.g., *Balganesh, Copyright Infringement Markets*, *supra* note 297, at 2280; *Gibson*, *supra* note 368, at 889; *Jessica Litman, Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 45–46 (1996).

388. *Supra* Part I.A.

389. *Cariou v. Prince*, 714 F.3d 694, 698–99 (2d Cir. 2013); see also *Adler, Fair Use and the Future of Art*, *supra* note 210, at 603–05 (arguing that the *Cariou* court's inability to justify its division of the paintings has made fair use even harder to predict going forward).

390. *Supra* note 194 and accompanying text.

391. *Supra* note 127 and accompanying text.

392. *Supra* note 193 and accompanying text.

discussed earlier would have faced similar legal hurdles. Self-help allowed the rightsholders in all of our case studies to circumvent the uncertainty and complexity of law; all of these borderline cases resulted in a “win.”

Yet these wins, and the rise of self-help more generally, threaten to undermine the delicate balance that copyright and trademark laws have struck between protecting rightsholders and protecting the public. While scholars critique the maddening uncertainty of these doctrines, they also recognize the urgency of the public interest concerns that these doctrines are designed to protect. These labyrinthine doctrines exist to ensure that intellectual property law does not overreach in a way that would unduly limit copying, and thereby undermine further creativity and competition.³⁹³

For example, the Supreme Court has declared that the notoriously vexing fair-use doctrine is “necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts.’”³⁹⁴ And fair use provides other urgent, public protections: beyond the defense advancing copyright’s public, utilitarian aims, it also serves as a crucial “First Amendment safeguard[]” against the exclusive rights that copyright grants creators.³⁹⁵

Self-help disregards this carefully constructed nuance.³⁹⁶ It caters instead to a folk sense of law, reflected for example, in the avenging Diet Prada site, where copying is almost always assumed to be wrong and where accusations are often lodged against copying that in all likelihood would be protected by law.³⁹⁷ This is starkly discordant with the principles and the substance of intellectual property law. The intricate doctrines discussed above—such as fair use, substantial similarity, idea-expression distinction, and trademark distinctiveness—may be indeterminate, but their purpose is to set important

393. *Supra* Part II.

394. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 8).

395. *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003) (discussing fair use and the idea-expression distinction as two realms in which First Amendment values exert themselves in copyright law); *see also* *Golan v. Holder*, 565 U.S. 302, 329 (2012) (describing the “‘speech-protective purposes and safeguards’ embraced by copyright law”); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (stating that First Amendment protections are “embodied in” the “latitude for scholarship and comment” safeguarded by the fair-use defense).

396. That said, self-help is more nuanced than copyright law in its attunement to a real audience in real time. Specifically, copyright infringement turns on assessing whether a certain audience—be it a reasonable observer, consumer, or expert—regards the defendant’s work as substantially similar to that of the plaintiff. *See generally* Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251 (2014) (analyzing which audience intellectual property laws use and should use against which to assess infringement). Unlike trademark law, in which consumer confusion provides relevant evidence of infringement, copyright’s infringement audiences are nearly always a construct rather than an actual assessment of these audiences’ views. *See id.* By contrast, self-help’s success will typically turn on the actual reactions of consumers and experts to intellectual property shaming or retaking the copy.

397. For another example of the misfit between legal rules and folk-law notions of copying, contrast the online rage directed at Richard Prince for copying the Suicide Girls with the very real possibility that his copying is protected fair use under copyright law. *Supra* Part I.A.

limits on the rights of claimants. As with the previous discussion of shaming as a replacement for law, we see once again a disadvantage of self-help from a public perspective. It ushers in lawlessness, and in this case, a disregard for the substantive law of intellectual property law and the public policy goals that the jurisprudence, in all its maddening complexity, has been calibrated to achieve.³⁹⁸ Moreover, the greater hold that self-help takes in intellectual property law, the less the law and its carefully crafted nuances will be relevant. If fewer at-the-edge cases are brought in courts of law rather than in courts of public opinion, self-help would also stifle the further development of intellectual property law.

Yet as we explore in Part IV, one of the two strategies of intellectual property self-help has features that offset, at least to an extent, some of the disadvantages we note here. In our view, retaking the copy offers certain public benefits in terms of creativity and copying that shaming without reappropriation does not.³⁹⁹

398. Cf. Pozen, *supra* note 268, at 50 (“In taking it upon themselves to rectify the misdeeds of others, self-helpers effectively act as judges of their own cause. There is ample reason to worry that they will misconstrue the law along the way . . .”). A third path, which we disfavor in this Article’s context, is to encourage standard-setting by creative communities, with the hope that they will both reflect their own copying norms and retain balanced nuance that will promote creativity and competition. For example, Catherine Fisk describes how “Hollywood (both motion picture and television production) has a highly formal attribution system that is thoroughly infused with legally enforceable rules for granting screen credit. Elaborate rules govern whose name will appear and whose will not, who can be listed under which job title (director, screenplay by, key grip, etc.), and the order and size of the print in which names are listed. The credit rules are the subject of negotiations between the guilds representing various workers and the production companies . . .” Catherine L. Fisk, *Credit Where It’s Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 77 (2006). Nonetheless, we think standard-setting is impractical in the scenarios discussed here for the important reason that the original creator and the copyist frequently belong to different communities than one another or are not part of any discrete community at all. That makes them quite unlike the distinct community of Hollywood screenwriters (not to mention the guild to which they belong), where it is possible to hash out attribution rules reflective of Hollywood screenwriting norms. Moreover, even when there is a discrete community, we worry that less powerful members can be strong-armed out of a role in developing the community’s norms. Cf. Katherine J. Strandburg, *Who’s in the Club?*, 95 VA. L. REV. ONLINE 1, 6 (2009) (“Comedians as a group benefit from [a] reduction in competition, making it worth their while to enforce [an anti-copying] norm.”). That is a realistic fear for, say, the alternative, lesser-known Suicide Girls vis-à-vis Richard Prince, art-world royalty, were we to locate them in the same discrete community (which we would not). Consider not only the Fashion Originators’ Guild exclusion of the considerations of the medium- and lower-end fashion designers in creating its standards, *supra* text accompanying notes 361–365, but also the guidelines CBS and Paramount Pictures recently released for when it would refrain from pursuing legal action against makers of *Star Trek* fan films: among other things, a fan film cannot use bootleg uniforms, must be noncommercial, and must be “family friendly and suitable for public presentation.” STAR TREK, *Fan Films*, <http://www.startrek.com/fan-films> [<https://perma.cc/7G6S-ELY5>]. Not only are these guidelines stingier than fair use in copyright law would be, but they reflect a lack of considerable input from fan-filmmakers.

399. Although it is beyond the scope of this Article, we note that there are comparisons to be drawn between intellectual property self-help and the #MeToo movement, another extralegal campaign that arose in a realm already regulated by law. By comparing the two movements, we do not mean to obscure the dramatic differences between them or to suggest by the comparison a trivialization of the urgent harm of sexual violence and systemic oppression that the #MeToo movement addresses. In spite of the enormous differences, we focus here on one commonality: both areas illustrate the potential irrelevance of law in a changing social media landscape that enables the leveraging of shame. Indeed,

IV.

DISTINGUISHING RETAKING THE COPY FROM SOCIAL MEDIA SHAMING

In this Part, we briefly explore the differences between intellectual property shaming and retaking the copy in terms of their public costs and benefits. Of these two forms of self-help, we are more hopeful that retaking the copy can become a net win for society than we are for social media shaming. As we have shown, intellectual property self-help can lead to negative cycles of feuds, shaming, and lawlessness,⁴⁰⁰ yet it can also lead to cycles of creativity, as new artistic works emerge in response to an initial appropriation. Retaking the copy by definition entails this production of new creative work, and thus provides a social benefit. In contrast, shaming as a strategy offers none of the offsetting benefits to creativity. This public benefit of added creativity is especially important because it aligns with the fundamental goals of intellectual property law.⁴⁰¹ As such, retaking the copy, unlike shaming, can offer an upside to society that offsets, at least to some extent, the downsides we explored in the previous Part.

As our case studies illustrate, the retaking-the-copy strategy has led to the creation of significant new works.⁴⁰² For example, the Suicide Girls responded to Prince's appropriation of their work by creating their own works that Richard Prince then welcomed and promoted. Gucci responded to GucciGhost not by suing him but by collaborating with him and thereby producing a new line of fashion melding their styles. In the same way, when Dapper Dan was copied by Gucci, it ultimately led to another collaboration and new opportunities for him to create work. In the hip-hop context, we have seen alleged intellectual property infringements lead not to lawsuits but to the creation of new music in response. A perceived violation becomes fuel for the next song.

both movements show how public shame and social media can be deployed to redress grievances well beyond what law would allow in areas already regulated by law. As we have seen, intellectual property self-help has allowed "wins" for claimants with weak legal cases. In a similar vein, the #MeToo movement has exposed the gap between what law would redress and what the current social climate demands. Substantive law in this area simply does not reach as far as #MeToo has in condemning sexual behavior. For example, some of the men who have been fired after being publicly exposed by the #MeToo movement would be found to have acted legally (albeit reprehensibly) had their victims taken them to court for sexual harassment. On this account, both movements suggest a disjuncture between law and norms, and perhaps an impatience with law's sluggishness and shades of grey.

Ultimately, both #MeToo and intellectual property self-help make law look somewhat irrelevant. Self-help is emerging as an extremely effective system of redressing perceived intellectual property wrongs while avoiding the trappings of law. In a similar vein, without a single legal proceeding, #MeToo has ushered in a social revolution in a space occupied by law. But as social opprobrium begins to displace law, it is worth pausing to ask: what do we lose as well as gain on the way to this new kind of justice?

400. *Supra* Part III. Indeed, as one of our case studies shows, such tactics can even lead to feuds that result in death. *Supra* text accompanying notes 133-139 (describing killing that resulted from dispute between Young Jeezy and Gucci Mane).

401. *Supra* Part II.

402. *Supra* Part I.

The artistic creativity generated by retaking the copy is particularly noteworthy because it aligns with the underlying goals of intellectual property law. This is most obviously the case with copyright. As the Supreme Court explained, the ultimate aim of copyright is “to stimulate artistic creativity for the general public good.”⁴⁰³ When creators respond to infringement by retaking the copy, they produce potentially valuable new works and thus maximize social welfare. Retaking the copy also advances trademark’s goals of promoting competition and consumer welfare,⁴⁰⁴ as it enables companies to reorient their brand messaging by coopting or incorporating those whose work advances that messaging. In fact, the GucciGhosts of the world might be more effective than the Guccis of the world at conveying the desired brand message.

At the same time, the creation of new works resulting from the retaking-the-copy strategy is a surprising development in light of basic assumptions in intellectual property law. Indeed, it turns the intellectual property paradigm on its head. The purpose of the exclusive rights that copyright provides to authors is to ward off the threat that unauthorized copying poses to creativity. The theory is that without excluding free-riders who copy, creators would be unable to profit from their works and they would cease to create.⁴⁰⁵ But the case studies we explore here cast infringement in a radically different light. They show that infringement can be an incentive for creativity rather than an obstacle to creativity. Sometimes this new creativity emerges not just from the creator whose work is copied, but from the copyist as well, as a dialogue between them over the initial infringement stimulates further new work. Similarly, our case studies challenge trademark law’s assumption that copied marks that might confuse consumers will undermine commerce and consumer welfare. Even if customers were confused by GucciGhost’s creations, Gucci used them to promote commerce and enhance consumer welfare by offering products that incorporated street elements and that Gucci’s creative director called “as much as Gucci as the brand is.”⁴⁰⁶

Thus, retaking the copy, unlike shaming, provides a benefit to society in terms of added creativity. Perhaps if shaming takes on a more negative tinge or retaking the copy continues to be well-received,⁴⁰⁷ creators will be persuaded that retaking the copy is a better response to appropriation than shaming.

While retaking the copy incentivizes artistic creation, the general rise of self-help nonetheless poses a threat to creativity and commerce, regardless of which strategy is chosen. This is so primarily because self-help threatens to over-police copying. As we argue, self-help both draws on and produces a sense of

403. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *accord supra* Part II.

404. *Supra* Part II.

405. *Supra* note 198 and accompanying text.

406. Michele, *Behind the Collection*, *supra* note 74.

407. *Supra* Part III.C.

folk law, in which copying is almost always assumed to be wrong.⁴⁰⁸ In doing so, self-help disregards the many aspects of copyright law and trademark law that aim to balance the interests of rightsholders and the public by protecting copying when it advances creativity and competition.⁴⁰⁹ Thus, the rise of self-help may ultimately undermine creativity and competition by over-chilling publicly beneficial copying.

This chilling effect may have particularly deleterious consequences in the digital age. Copying has always been an essential building block of artistic creation. As the literary critic Northrop Frye wrote in the mid-twentieth century, “[p]oetry can only be made out of other poems; novels out of other novels.”⁴¹⁰ Artistic innovation is built on borrowing and emulation. Many have argued that the history of art,⁴¹¹ music,⁴¹² literature,⁴¹³ and fashion⁴¹⁴ depend on copying. Although creativity has always relied to some extent on copying, the role of copying has taken on much greater urgency in our contemporary digital culture. Shifts in both art and technology have transformed copying into a central subject for contemporary creators, as well as a basic tool of how people create.⁴¹⁵ As copying comes to play an increasingly prominent role in the creation of new work, self-help’s negative view of copying may chill creativity in a way that intellectual property law would not. This renders self-help particularly ill-suited to a digital culture in which copying is of growing importance to creativity.

408. *Supra* Part III.E.

409. *Supra* Part III.E.

410. NORTHROP FRYE, *ANATOMY OF CRITICISM* 97 (1957).

411. As Kathy Halbreich, Associate Director at MoMA, explained in a copyright case, “virtually every work of art is based upon or inspired by some other work of art.” Affidavit of Kathy Halbreich, *Rogers v. Koons*, 89 Civ. 6707 (CSH) (1990); accord *MARTHA BUSKIRK, THE CONTINGENT OBJECT OF CONTEMPORARY ART* (2003) (exploring the dominance of copying in contemporary art); HEINRICH WOLFFLIN, *PRINCIPLES OF ART HISTORY* 230 (M.D. Hottinger trans., Dover Publications 7th ed., 1929) (1915) (writing that “the effect of picture on picture . . . is much more important than what comes directly from the imitation of nature”).

412. Arewa, *supra* note 120 (arguing that the history of music shows the continuity and importance of musical borrowing).

413. *E.g.*, HAROLD BLOOM, *THE ANXIETY OF INFLUENCE: A THEORY OF POETRY* (1973) (offering a theory of poetic influence); Note, *Originality*, 115 HARV. L. REV. 1988, 1989 (2002) (recounting the role of copying in “originality”).

414. *E.g.*, *A Reflection on Fashion and Inspiration in 2017*, FASHION LAW (Dec. 12, 2017), <http://www.thefashionlaw.com/home/a-reflection-on-fashion-and-inspiration-in-2017> [<https://perma.cc/8LPA-MUMC>] (“[M]uch of the ‘new’ designs that are introduced by way of the runway each season tend to be derived largely from existing creations. This is not news. In fact, this is very much how design works or should work.”); Kal Raustiala, *Fashion Victims: How Copyright Law Could Kill the Fashion Industry*, NEW REPUBLIC (Aug. 13, 2007), <https://newrepublic.com/article/63828/fashion-victims> [<https://perma.cc/XD4B-GLHZ>] (“[G]rowth and creativity in the fashion industry depend upon copying.” (emphasis in original)).

415. Adler, *Fair Use and the Future of Art*, *supra* note 210, at 568–72; accord LAURA HOPTMAN, *THE FOREVER NOW: CONTEMPORARY PAINTING IN AN ATEMPORAL WORLD* 14–15 (2014); DAVID JOSELIT, *AFTER ART* 58 (2013); MARJORIE PERLOFF, *UNORIGINAL GENIUS: POETRY BY OTHER MEANS IN THE NEW CENTURY* (2010); SETH PRICE, *DISPERSION* (2002).

CONCLUSION

Self-help is an important phenomenon that will likely grow in prominence in the coming years. As we have shown, self-help allows aggrieved creators to accomplish much of what they could hope to derive from successful infringement litigation, while offering them some advantages over the traditional legal route. While these advantages all have costs, these costs are borne almost entirely by the public or the alleged infringer.

Digital culture also increases the likelihood that self-help will become more prevalent for three reasons. First, as the entire archive of past creative works becomes more accessible,⁴¹⁶ creators will have access to more past works to build on and copying will likely play an even more significant role in creativity. Second, this expanded digital archive will also allow greater detection of copying through increased accessibility and searchability. The famous maxim holds that “originality is the art of concealing your sources,”⁴¹⁷ but this premise is becoming a thing of the past in digital culture. Finally, the rise of social media and other internet platforms has enabled greater ability to spread word of detected copying, even for non-famous creators of obscure works.

This rise of intellectual property self-help is surprising in light of the existing literature on law and norms. Until now, legal scholars have tended to assume that extralegal norms could substitute for law only in close-knit communities.⁴¹⁸ Yet the phenomenon we identify shows that digital culture has unleashed the possibility of circumventing law in the complete absence of any discrete community. This has relevance beyond intellectual property law. The option of digital self-help may take hold as a substitute for law in other areas, particularly those that are susceptible to social media public shaming.⁴¹⁹ Although there is more to explore, this Article identifies a growing phenomenon and begins the conversation around it. In our view, intellectual property self-help is here to stay whether we like it or not.

416. *E.g.*, *Authors Guild v. Google, Inc.*, 804 F.3d 202, 207 (2d Cir. 2015) (approving as fair use Google’s digital scanning of “tens of millions of books,” which can be accessed in part using Google’s search services).

417. R. KEITH SAWYER, *EXPLAINING CREATIVITY: THE SCIENCE OF HUMAN INNOVATION* 275 (2012).

418. *Supra* note 2 and accompanying text.

419. *E.g.*, *supra* note 399 (describing possible comparisons to the #MeToo movement).