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.

DOI: https://doi.org/10.15779/Z38KP7TR8W

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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
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.\(^2\)


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. 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. 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. 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.” 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.

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.”

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. 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

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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).
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. 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. She tweeted the following:

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


15. Id.


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. 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. When Adler denied his copying, Parker angrily tweeted:

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


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. 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


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


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).


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-instagram [https://perma.cc/5AT5-7DGT].

expressed fury on behalf of his “victims,” and lamented the state of an art market that rewards what they saw as rapaciousness and laziness. The popular, non-art world consensus was clear: the work was outright “theft,” not only of the “victims’” images but of their money too. Indeed, the stench of money was a near-constant topic for enraged commentators. 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. As one gallerist said of the controversy, “the art market is a disgrace to humanity.”

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, 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. 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

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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.


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

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

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.

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. Like Prince, they made a slight alteration to each appropriated image, adding their own comment after Prince’s added comment before printing. Their added comment—“true art”—overtly shamed Prince. 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. 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. All profits from their sales went to a nonprofit organization, the Electronic Frontier Foundation. Figure 2 shows an image from the Suicide Girls’ website advertising one of their reappropriations of Prince’s appropriation side by side.

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42. Cariou, 714 F.3d at 712.
44. Supra text accompanying note 22.
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.
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.” Figure 3 shows four more reappropriated works that the Suicide Girls offered for sale.

52. Id.
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.” 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. ;).” The move elicited not only adoring media coverage. It also generated sales. In one day, the Suicide Girls sold more than 250 prints, and soon the entire run sold out. Indeed, Richard Prince himself retweeted their reappropriations of “his” work, as shown in Figure 4, 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.”

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56. Suicide Girls, supra note 51.


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.” 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.”

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. Figure 5 shows one of the many ways in which Gucci deploys the two G’s.

![Gucci Dionysus GG Supreme Shoulder Bag](https://perma.cc/NJ27-2AU7)

Figure 5: Gucci Dionysus GG Supreme Shoulder Bag

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61. Heyman, supra note 57.
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 bedsheets into a ghost costume. In that moment, his alter ego, GucciGhost, was born. In response to positive feedback on his use of the Gucci logo, Andrew started hand-painting a “graffiti-esque” version of the logo 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). He started selling GucciGhost apparel and accessories that similarly incorporate Gucci’s double-G logo in an online store. 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.” 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. 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.”

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

68. See Binlot, supra note 66.
69. Sharkey, supra note 67.
70. Foley, supra note 65.
72. Id.
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. 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.” 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.”

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!”

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.

![Figure 9: Selections from Gucci’s Collaboration with GucciGhost](https://example.com/figure9)

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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.”).

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.” An industry blog noted that this collaboration helped the longstanding—and perhaps starchy—fashion house bottle what is otherwise very elusive street credibility. Another described it as “plenty of graffitied-up handbags that will certainly skyrocket to ["It-bag status"] starting in three, two . . . done.” A fashion and lifestyle publication referred to the collaborative results as “genuinely high-fashion masterpieces.” Gucci’s sales matched the critics’ enthusiasm; much of the collaborative collection quickly vanished from store shelves.

Some addressed the interesting tactic of coopting Andrew into the Gucci fold rather than pursuing legal action against him for using its logo. 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.” 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.” The Fashion Law blog observed how unusual this collaboration was,

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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).
84. Foley, 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.
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.
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. 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.” He would either repurpose existing branded items into new fashion items or screen-print brand logos onto his designs, both of which are likely troublesome as matters of trademark or copyright.

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

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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/RUSN-EHUN].


Though Gucci was “effectively reappropriating the appropriation,” 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. 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.” 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. 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. 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.”).


100. Schneier, supra note 92.

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


104. Schneier, supra note 92.
hit Wild Thing sandals (shown in Figure 12), 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, 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.

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. Claims of copying can then spread.

Figure 12: Aquazzura’s Shaming of Ivanka Trump

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-D3PS] (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.


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 shammers today. Diet Prada is a once-anonymous Instagram account since revealed to be the work of duo Tony Liu and Lindsey Schuyler. Although the duo itself chose to appropriate the luxury fashion company Prada’s name, they are unironically sanctimonious in

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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-11e7-8336-d321d8d897a3 [https://perma.cc/684G-7LSK].
shaming almost any and all copying or evocative similarities in the fashion industry, as illustrated in Figures 14–16.\footnote{13}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{example.png}
\caption{Diet Prada’s Shaming of Alice & Olivia for Copying Yves Saint Laurent\footnote{14}}
\end{figure}

\footnote{13}{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.” \textit{Meet Tony Liu and Lindsey Schuyler}, supra note 111.}

\footnote{14}{Diet Prada (@diet_prada), \textsc{Instagram} (Dec. 1, 2017), https://www.instagram.com/p/BcKxG6wIbGR [https://perma.cc/BFC6-ERRA].}
Figure 14: Diet Prada’s Shaming of Emily Ratajkowski for Copying Lisa Marie Fernandez\textsuperscript{115}

Figure 15: Diet Prada’s Shaming of JW Anderson for Copying Hermès\textsuperscript{116}

\textsuperscript{115} Diet Prada (@diet_prada), INSTAGRAM (Nov. 27, 2017), https://www.instagram.com/p/BcArfXQlzi8 [https://perma.cc/C3LE-QR86].

Diet Prada has been called “the fashion police” and been described as “throw[ing] its accusations around like hand grenades.” 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. 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.”

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. There is a long musical tradition of “answer songs” responding to other pieces. 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).
Answer songs sometimes “respon[d] to direct questions or to strong statements.” 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.” At other times, they “adjust[...lyrical content and pronoun references to alter gender-specific messages.” 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. 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.”

Related to answer songs are “diss songs,” hip-hop songs that are intended to disrespect a particular person or group. 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. For example, after Ice Cube left the rap group NWA for a solo career, NWA disparaged Ice Cube on some of its subsequent songs. 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’.”

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. Consider the following examples.

122. 1 id. at 7.
123. Id.
124. 2 id. at 609.
125. 1 id. at 8.
126. Id.
129. Id.
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. 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. Young Jeezy was allegedly upset at this refusal to release a song he collaborated on and helped create. “Icy” turned into a hit for Gucci Mane, particularly in the South where both rappers were based. In addition, Young Jeezy was reportedly upset that Gucci Mane never paid him any royalties for his contributions to “Icy.” 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****”). 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.


[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”).


[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.\(^\text{140}\) “Hit ‘Em Up” is considered one of the canonical diss songs in hip-hop.\(^\text{141}\) 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.”\(^\text{142}\) 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.\(^\text{143}\) 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”).\(^\text{144}\) 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.”\(^\text{145}\) “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.”\(^\text{146}\) Finally, he accuses Smalls of copying his fashion style of wearing Versace: “Now it’s all about Versace, you copied my style.”\(^\text{147}\) 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-
N-Harmony for copying their occult rap style. 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?” Lord Infamous, a member of Triple 6 Mafia, responds with violent imagery targeting Flesh-N-Harmony 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 . . . “ 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.” Though Three 6 Mafia later settled the feud and decided that many of the similarities between the groups’ styles were mere coincidence, this song put Three 6 Mafia on the map. 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.” 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 “disser” extracted value using his diss song. The disser was able to secure financial compensation through the song’s commercial impact to offset any financial harm from appropriation. Each disser 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 disser might well have lost his case for laying claim to material, like style and ideas, that copyright


149. THREE 6 MAFIA, supra note 148.

150. Id. The song also refers derogatorily to other members of Bones 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 Easy, 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. 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. Turrell makes immersive installation artworks that experiment with light, color, space, and perception. Recently, he turned the entire atrium of the Guggenheim Museum into a walk-in sculpture. 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.” 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.

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

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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.


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 Works](image)

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

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

![Figure 17: Drake’s Instagram Post of Him Visiting the Turrell Exhibit](image)

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 LaChappelle brought a copyright claim against singer Rihanna for the video for her song “S&M.” Rihanna’s video contained scenes quite similar to some of LaChappelle’s still photos. The photographer’s claim survived a motion to dismiss, and the parties ultimately settled.

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165. *Id.*
166. *Id.*
the case to proceed, the court had emphasized the visual resemblance between a visual artist’s work and a music video. 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 works—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. 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.

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. 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.”

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. Turrell also quotes back Drake’s statement to Rolling Stone, “I fuck with Turrell.” 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. As others have explained, the term “woes” is probably an “abbreviation of the word ‘Woadie,’ which is New Orleans slang.

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171. Id.
172. See generally Samuelson, supra note 155 (discussing copyright’s merger doctrine).
173. Infra section II.A (discussing fair use).
176. DRAKE & FUTURE, WHAT A TIME TO BE ALIVE (Cash Money Records 2015).
177. See supra text accompanying note 165.
for people from the same ward,” though it could also mean “working on excellence.”

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.” 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, 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. As one blogger responded, in disbelief and admiration: “That’s not a typo, James Turrell said woes. Lesson: Maybe don’t fuck with Turrell?” 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.” In short, Turrell’s response borrowed a bit of Drake’s swagger, just as Drake had borrowed from him.

183. Id.
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 names—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 protection and are also often protected under copyright law as pictorial or graphic works.

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.

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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, Yot/Tube (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. A copyright holder receives, among other things, the exclusive right to reproduce the work, distribute copies of it, and prepare derivative works typically until seventy years after the author’s death. Copyright protection extends to the expression of particular ideas rather than to the ideas themselves. Yet protection actually reaches well beyond the actual work to works that are copied and substantially similar, “else a plagiarist would escape by immaterial variations.”

Utilitarianism is the dominant theory underpinning American copyright law. 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. 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.

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.” Pursuant to utilitarian thinking, copyright law confers rights that are designed to be limited in time and scope. If the rights provided are excessive, social welfare would

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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).
195. Nichols, 45 F.2d at 121.
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).
be diminished. 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. For another, given that knowledge is frequently cumulative, society benefits when creators are permitted to build on previous artistic creations to generate new works. 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. 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.

Relevant for our purposes, copyright law excuses some third-party uses that would otherwise be infringing by deeming them to be fair use. 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. 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. As suggested by statutory directives on fair use and elaborated in case law, some prototypical examples include news reporting, critical reviews, and parodies. Not only might these uses not undercut the market for the original work, but they might stimulate it. Wendy Gordon further theorized that “fair use [ought] to permit uncompensated transfers that are socially desirable but not capable of effectuation through the market.” 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.

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

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. 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.” 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.”

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

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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).


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


220. Schechter, supra note 219, at 817.


who have had a positive past experience with a good will likely use the trademark to identify and buy it again.\textsuperscript{223} Protecting against trademark infringement, from this vantage point, thus prevents others from trading on the goodwill that the trademark represents.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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—

\begin{itemize}
  \item \textsuperscript{223} Id.
  \item \textsuperscript{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.
  \item \textsuperscript{225} Beebe, The Semiotic Analysis of Trademark Law, supra note 221, at 623.
  \item \textsuperscript{226} Graeme B. Dinwoodie, The Death of Ontology: A Teleological Approach to Trademark Law, 84 Iowa L. Rev. 611, 614 (1999).
  \item \textsuperscript{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).
\end{itemize}
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. 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. Allowing a copyright holder to recover the profits of the infringer beyond the copyright holder’s losses seems principally designed as deterrence.

Copyright holders who prevail on an infringement claim can seek statutory damages instead of actual damages. 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. A court is authorized to award statutory damages within the specified range “as the court considers just.” 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. That said, there has been abundant criticism of statutory damages awards that far exceed any reasonable calculation.

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).
235. Samuelson & Wheatland, supra note 233, at 446–63.
of actual damages,\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{240} Moreover, requiring an infringing defendant to pay damages and sometimes turn over its profits ought to deter infringement.\textsuperscript{241}

2. \textit{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.\textsuperscript{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.”\textsuperscript{243} This decision made it somewhat harder for successful copyright and trademark plaintiffs to get injunctive relief

\textsuperscript{236} E.g., Goold, \textit{supra} note 230, at 285–89; Samuelson & Wheatland, \textit{supra} note 233, at 480–97.

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


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

\textsuperscript{240} Blair & Cotter, \textit{supra} note 230, at 1643–45.


\textsuperscript{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. 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.

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

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]tribution can bolster a [creator’s] reputation,” which can lead to financial rewards, such as more professional opportunities and a higher salary. 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.” Even more to the point of copyright law, “artists frequently think—mistakenly—that seeking copyright protection is worthwhile to provide them with attribution rights.”

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).


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.”).


251. Id.

252. Id. at 1791.
accept less money in exchange for it. In fact, by 2004, authors were choosing Creative Commons licenses requiring attribution approximately ninety-eight percent of the time, prompting Creative Commons to make it a standard feature of its licenses.

The attribution that copyright law offers, however, is remarkably thin. American copyright law lacks a general right attributing protected works to their authors. At best, copyright law will encourage indirect attribution of protected works by encouraging copyright registration, which involves listing the work’s authors. 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. 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.

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. 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.


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].


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).


Now consider trademark law. As already discussed, trademark infringement litigation vindicates different interests than copyright infringement litigation. 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. 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. The judgment of infringement is, in that sense, a reassocation 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. Successful litigation of both copyright and trademark claims thus reassocations the protected creation at stake with the plaintiff, an important reclamation of attribution when the defendant has used the creation wrongfully.

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 I.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.”).
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 Authornym: Authorship, Pseudonymity, and Trademark Law, 80 NOTRE DAME L. REV. 1377, 1378 (2005) (“[A]ll authornyms 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.

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.”

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.” 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. 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.

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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, 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. That said, it is important to underscore that self-help also has many recognized benefits. 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.”

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.” 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.” And it is generally permitted “in those cases in which there is no risk of immediate physical confrontation.”

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.” Conversely, self-help measures are beneficial for their low administrative and financial costs when the underlying rights and violation thereof are clear.

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.

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.
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.\footnote{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.”).} 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 reappraisal 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.\footnote{See id.} 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,\footnote{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.} and litigation costs would likely have offset any recovered damages anyway.\footnote{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. 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. 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.

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 would—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 work.
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. Retaking the copy has similar effect. For example, consider James Turrell’s statement released in the wake of Drake’s “Hotline Bling” video. 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.

A. Cost and Speed

Like most general self-help, self-help in the intellectual property context has shown itself to be dramatically cheaper and faster than bringing a lawsuit. 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. The cost of litigating a copyright or trademark infringement case through trial, for either side, readily runs over a million dollars. Furthermore, self-help spares courts the administrative cost that lawsuits impose on them.

The Richard Prince/Suicide Girls dispute described above 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. 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. 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. 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 to the media shaming allowed her to achieve quicker, better results than she had with lawyers.

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 Balganesh, Copyright Infringement Markets, 113 COLUM. L. REV. 2277 (2013) [hereinafter Balganesh, Copyright Infringement Markets] (analyzing the independent financial market for copyright claims).


299. Supra Part IA.

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;\footnote{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.\footnote{304} His new atelier opened in January 2018, less than a year after Gucci appropriated Dapper Dan’s work.\footnote{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.\footnote{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.\footnote{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.\footnote{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.

\footnotesize
\begin{itemize}
\item \footnote{303} Schneier, supra note 92.
\item \footnote{304} Supra Part I.B.
\item \footnote{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”).
\item \footnote{307} Supra Part I.E.
\item \footnote{308} Wang, supra note 185.
\end{itemize}
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.” Mattel was upset that Aqua’s song referenced Barbie in ways that Mattel considered “sexual and . . . unsavory.” 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.” The litigation painted Mattel as a company that could not take a joke and was too uptight.

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. 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 songs), 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; 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).
311. Mattel, 296 F.3d at 908.
314. See, e.g., Jake Woolf, 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-USYE] (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)).
Florence nearly 100 years ago[,] can be something very contemporary. 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. 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.” 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.” 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. 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. This may spread the appeal of self-help as an...
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.\textsuperscript{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.\textsuperscript{323} Here we explore one reason why that may be, by focusing on the element of public shaming in self-help.\textsuperscript{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


322. Shaming of shammers is not yet prevalent. \textit{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. \textit{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, \textit{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, \textit{What Do Alternative Sanctions Mean?}, 63 U. CHI. L. REV. 591, 631–32 (1996); \textit{see also} Amitai Etzioni, \textit{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, \textit{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., \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{327} This literature focuses on

\textsuperscript{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. \textit{Supra} Part I.A. D. But shame seems absent in some of our examples of the reappropriation strategy, such as Gucci’s appropriation of Gucci Ghost. \textit{Supra} Part I.B.

\textsuperscript{326} For criticism of the move to shame culture, see, for example, S\textsc{ue} S\textsc{cheff} & M\textsc{elissa} S\textsc{chorr}, \textsc{Shame Nation: The Global Epidemic of Online Hate} (2017); E\textsc{ric} P\textsc{osner}, \textit{A Terrible Shame: Enforcing Moral Norms Without the Law Is No Way to Create a Virtuous Society}, S\textsc{late} (Apr. 9, 2015), http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/04/internet_shaming_the_llegal_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 C\textsc{onor} F\textsc{riedersdorff}, \textit{The Destructiveness of Call-Out Culture on Campus}, A\textsc{tlantic} (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]; K\textsc{elly} O\textsc{liver}, \textit{Education in the Age of Outrage}, N.Y. T\textsc{imes} (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); S\textsc{uzanna} D\textsc{anuta} W\textsc{alters}, \textit{Academe’s Poisonous Call-Out Culture}, T\textsc{he Chronicle of Higher Education} (May 5, 2017), https://www.chronicle.com/article/Academe-s-Poisonous-Call-Out/240016 [https://perma.cc/ZH6C-W9BZ].

\textsuperscript{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. \textit{See}, e.g., K\textsc{ahan}, 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. \textit{See}, e.g., M\textsc{artha} C. N\textsc{usbaum}, \textit{Hiding from Humanity: Disgust, Shame, and the Law} 227–49 (2004) (discussing the effect of shaming, as an unreliable punishment, on human dignity); D\textsc{an} M\textsc{arkel}, \textit{Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate}, 54 V\textsc{anderbilt} L. R\textsc{ev.} 2157 (2001); D\textsc{an} M\textsc{arkel}, \textit{Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice}, 85 T\textsc{ex.} L. R\textsc{ev.} 1385 (2007); T\textsc{oni} M. M\textsc{assaro}, \textit{Shame, Culture and American Criminal Law}, 89 M\textsc{ichigan} L. R\textsc{ev.} 1880, 1936–42 (1991) (discussing the humaneness of the shaming sanctions); T\textsc{oni} M. M\textsc{assaro}, \textit{The Meanings of Shame}, 3 P\textsc{alestine} J. L. 518, 689–703 (1997) (discussing the social and political concerns and the effectiveness of the modern shaming sanctions). D\textsc{an} K\textsc{ahan}, the leading advocate of shame sanctions, later recanted his position. \textit{See} D\textsc{an} M. K\textsc{ahan}, \textit{What’s Really Wrong with Shaming Sanctions?}, 84 T\textsc{ex.} L. R\textsc{ev.} 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 L\textsc{auren} M. G\textsc{oldman}, \textit{Trending Now: The Use of Social Media Websites in Public Shaming Punishments}, 52 A\textsc{m} L. R\textsc{ev.} 415, 419, 443 (2015) (comparing the effectiveness of modern-day online social-media public-shaming punishments to those in colonial times); K\textsc{ate} K\textsc{lonick}, \textit{Re-Shaming the Debate: Social Norms, Shame, and Regulation in an Internet Age}, 75 M\textsc{do} L. R\textsc{ev.} 1029, 1051–52 (2016) (observing that with the internet, shaming now lacks reliable social meaning, calibration, and accuracy);
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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.


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 INT’L 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).


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.\textsuperscript{333} It functions as clickbait: the strange allure of seeing others shamed can make news of a transgression viral.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\begin{footnotes}
\footnote{333. See generally JON RONSON, SO YOU’VE BEEN PUBLICLY SHAMED (2015) (documenting the re-emergence of shaming in internet culture).}
\footnote{334. See infra note 351 (collecting sources detailing the exploration and centrality of shame as a form of entertainment in contemporary culture).}
\footnote{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))).}
\footnote{337. See id.}
\footnote{339. Skeel, supra note 324, at 1818.}
\footnote{340. Supra notes 89, 105 and accompanying text.}
\end{footnotes}
by courts.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{344} Relatedly, some intellectual property shaming, such as Diet Prada’s,\textsuperscript{345} happens not in the shadow of law,\textsuperscript{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.\textsuperscript{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.”\textsuperscript{348} There are further concerns. A troubling pleasure often accompanies the spectacle of watching other people being shamed.\textsuperscript{349} The effectiveness of intellectual property shaming depends on its rapid spread through social media; it must elicit pleasure to be successful clickbait.\textsuperscript{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

\textsuperscript{341} Whitman, supra note 330, at 1088–89.
\textsuperscript{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.” NUSBAUM, supra note 327, at 232.
\textsuperscript{343} Whitman, supra note 330, at 1091.
\textsuperscript{344} Id. at 1088. The rise of shame culture also presents significant dignitary concerns about the target of a shame campaign; cf. NUSBAUM, supra note 327, at 278–79 (objecting to shame in part because it degrades people’s identities by marking them as defective in society).
\textsuperscript{345} See supra Part I.C.
\textsuperscript{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) (posing 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)).
\textsuperscript{347} See infra Part III.E.
\textsuperscript{348} NUSBAUM, supra note 327, at 232–33.
\textsuperscript{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].
\textsuperscript{350} Id.
feature of popular entertainment, reflected in reality television and online culture more generally. As one of us has argued, this new culture fuels and feeds on sadistic and voyeuristic impulses; it caters to our basest instincts.

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. The lack of procedural protections in this area is troubling, as there are no legal safeguards to fortify the accused against claims without merit. 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

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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 [pro]per 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. 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. Moreover, for public figures, even false statements must be made with actual malice for a defamation claim to have constitutional merit.

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. 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.

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.


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.\footnote{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).} 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.”\footnote{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.”\footnote{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. 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.\footnote{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.”\footnote{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}}}}
are materially different from those involving shaming or retaking the copy.\textsuperscript{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.

\textbf{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.\textsuperscript{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.\textsuperscript{368} Most

\textsuperscript{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.

\textsuperscript{367}. \textit{See}, \textit{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).

prominently, scholars routinely decry the indeterminate nature of copyright’s
disproportionate attention, scholars have also asserted that “other key copyright doctrines share fair use’s
indeterminacy.” Critics and courts have dwelled on the uncertainties that
surround the idea-expression distinction, which lies at the foundation of
copyright law. As described above, copyright law extends protection only to
the expression of ideas; the ideas themselves remain in the public domain. Yet
this essential boundary between ideas and expression seems hopelessly
indefinite. As Learned Hand once remarked, “Nobody has ever been able to
fix that boundary, and nobody ever can.” In the same way, the substantial-similarity test, central to determining if there has been copyright infringement, has also proven notoriously confusing.


371. Gibson, supra note 368, at 891; see also Shyamkrishna Balganesh, 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”).


373. See supra note 193 and accompanying text.


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. 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. 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. Yet these doctrines are plagued with ambiguity regarding when they apply and how much consumer confusion is tolerable. 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.

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. 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


379. Id.

380. See generally McGeveran, 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).

source. Yet it can be next to impossible to tell the difference between a descriptive mark and a suggestive one, 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. 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. 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. 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).

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.

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385. NutriSys., 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.\footnote{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.’”\footnote{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.\footnote{395}

Self-help disregards this carefully constructed nuance.\footnote{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.\footnote{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

\footnote{393. \textit{Supra} Part II.}
(quoting U.S. CONST. art. I, § 8, cl. 8).
distinction as two realms in which First Amendment values exert themselves in copyright law); see also
(1985) (stating that First Amendment protections are “embodied in” the “latitude for scholarship and
comment” safeguarded by the fair-use defense).
\footnote{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. \textit{See generally} Jeanne C. Fromer & Mark A. Lemley, \textit{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. \textit{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.
\footnote{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. \textit{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.\footnote{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 copist 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.}

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.\footnote{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, 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. 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. 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.”\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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,\textsuperscript{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

\textsuperscript{403} Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); accord supra Part II.
\textsuperscript{404} Supra Part II.
\textsuperscript{405} Supra note 198 and accompanying text.
\textsuperscript{406} Michele, Behind the Collection, supra note 74.
\textsuperscript{407} Supra Part III.C.
folk law, in which copying is almost always assumed to be wrong. 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. 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.” Artistic innovation is built on borrowing and emulation. Many have argued that the history of art, music, literature, and fashion 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. 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).
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, 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,” 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. 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. 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).
418. Supra note 2 and accompanying text.
419. E.g., supra note 399 (describing possible comparisons to the #MeToo movement).