

Intellectual Property, Creativity, and a Sense of Belonging

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Dear IPSC readers: The following represents my *very* early thinking regarding this topic, and contains as much hypothesis as thesis. I still have a great deal of social science research to do, as well as a great deal of work synthesizing case studies and other legal scholarship on related topics. Not to mention a great deal of work making my ideas on this subject coherent. Therefore, I offer this document more as an invitation to offer input and suggestions for avenues of exploration than as a “draft.” Thanks – Betsy

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A number of scholars have explored IP’s “negative spaces”: areas of creation and innovation that thrive in the absence of formal protection. Scholars have observed that in many of these areas, copying and imitation are governed by informal “IP without IP” norms, and have speculated that adherence to these norms may be driven by economic motivators such as network effects and non-economic motivators such as shame and reputation. This project observes a potential synergy between low-IP equilibria and motivations to create, hypothesizing that in a number of low-IP communities, the same factors that encourage creation also encourage adherence to informal copying and imitation norms that differ from formal law. Specifically, in these areas, participants are motivated to create by a desire to “belong” to a particular creative community, and are motivated to comply with norms by that same desire for belonging. It follows logically that these communities would develop and adhere to copying and imitation norms different from those imposed by law not only to meet the particular needs of the creative community, but also as a form of “setting apart”—to distinguish the norms of the community from the more conventional strictures of formal law and reinforce the meaning of “belonging” to those creative communities. This refines the common narrative of formal intellectual property law as a necessary incentive for creation and innovation. Finally, the project explores the normative implications of this refinement.

I. Introduction

Creators and innovators often approach intellectual property protection and enforcement in ways not dictated by formal intellectual property law. Some choose not to seek formal protection for their creations or enforce their rights against potential infringers, even when the law would permit them to. Some refrain from copying even when the law would permit them to, or follow attribution norms that the law does not demand.

Some might see this as irrational, or as refuting the premise that formal or informal intellectual property governance creates an incentive to create. But I contend that it is neither; it

merely reflects a set of values other than pure economic gain as incentives for creation. Surely, not every creator is motivated by the same values. In earlier work, I have suggested that people may be motivated to create for reasons other than, or in addition to, interest in economic gain. Of course, I am far from the first to suggest this. [discuss scholarship on non-economic motivations to create.¹]. There has been relatively little in-depth exploration, however, of the idea that some people's desire to create, and their desire to follow norms other than formal intellectual property law, may be driven by the same thing: a desire for community.

Belonging is a basic human value. Social science research shows that people are powerfully motivated by a desire to experience a sense of belonging, and that sense will motivate them to behave in ways that may otherwise conflict with their self-interest. This may help explain the creation and intellectual property behavior of some individual creators. They create, in part, because the reward for creating is membership in a particular creative community. Similarly, they conform to that creative community's protection, enforcement, and copying norms because compliance reinforces their sense of belonging to that community.

This is consistent with legal scholarship demonstrating that a variety of community forces govern how people approach intellectual property protection, enforcement, and copying. Many scholars have examined intellectual property norms and how they interact with the law.² In earlier work, I have considered what motivates people to comply with intellectual property norms, concluding that shame and shaming play major roles in governing how people chose to follow or disregard intellectual property law.³

I suggest that in these creative and innovative sectors and possibly others, individual creators may be motivated in part by a desire for a sense of belonging. This desire motivates them to create and invent, and to follow the protection, enforcement, and copying norms of the

¹ See generally [cite and incorporate] Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009) (describing roles of love, desire, and other passions in creation); Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007) (arguing that creativity emerges from a cultural landscape of encounters not reducible either to economic or rights-based theories of the genesis of creative work); Yochai Benkler, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 92-96 (2006) (discussing the effects of different incentives and summarizing evidence of crowding out); John Quiggin & Dan Hunter, *Money Ruins Everything*, 30 HASTINGS COMM. & ENT. L.J. 203, 214-15 (2008) (“[A]mateur creators do not have commercial interest as their primary motivating force, and so propertization of their work is irrelevant to their production of innovative material. But more than this, propertization may be inconsistent with their continued creativity and so may not just be irrelevant but actively inimical to the development of this modality of production.”).

² Much of this literature discusses norms as they relate to fields outside the scope of formal intellectual property. [cite negative space articles, notes 4-19 of Shame article]. Another strand explores the relationship between norms and existing formal law. See, e.g., Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1905–06 (2007) (discussing influence of norms on scope of IP rights); Sean B. Seymore, *Rethinking Novelty in Patent Law*, 60 DUKE L.J. 919, 929 (2011) (referencing a “disconnect between patent law and the norms of science”); John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 543–50 (discussing disparity between copyright law and norms of infringement). See generally Christopher Jensen, Note, *The More Things Change, The More They Stay the Same: Copyright, Digital Technology, and Social Norms*, 56 STAN. L. REV. 531 (2003) (discussing attempts to create a link between digital copyright law and social norms surrounding tangible property rights).

³ See Elizabeth L. Rosenblatt, *Fear and Loathing: Shame, Shaming, and Intellectual Property*, 63 DEPAUL L. REV. 1 (2013).

community to which they belong, even when those norms diverge from formal law and from creators' economic self-interest.

A few caveats: I do not suggest that the desire to belong is the *only* motivating force for these creators. Rather, it is a powerful motivator and shaper of behavior, and may play a significant role in some individual creators' motivation to create and their divergence from formal intellectual property law. Nor do I suggest that the desire to belong is a motivating force for every individual creator. Some may have strictly pecuniary interests; some may be driven by non-monetary incentives like a desire for fame;⁴ some may be driven by intrinsic motivators like curiosity or compulsion;⁵ most will be driven by some combination of these things. But the complicated nature of creation does not render "belonging" irrelevant. I also recognize a few limitations in this theory. First, a desire to belong is unlikely to be a significant motivator for firms or collective entities. While individual directors and employees may be motivated by the desire to belong, corporations and other collective entities may by their very nature lack the capacity to care about values such as "belonging." These entities are more likely to be driven by purely economic motivations—and are also likely to act as important intermediaries for the dissemination of creation. Second, even the most "belonging"-focused creator may benefit from economic incentives that make it possible to make a living as a creator. For these reasons, the economic impact of intellectual property laws cannot be ignored. But I do suggest that in analyzing creators' motivations to create, there is little reason to privilege economic benefit above other human values⁶—and that lawmakers should take the desire for belonging into account in crafting and refining formal intellectual property law.

Therefore, this "belonging" theory of creation has significant implications for intellectual property law policy. First, it suggests that formal intellectual property law may not offer much to certain classes of creators. To the extent that creators are motivated to create by a desire for

⁴ See generally [cite and incorporate] James Boyle, *The Public Domain: Enclosing the Commons of the Mind* 189 (2008) ("Assume a random distribution of incentive structures in different people ... [I]t just does not matter why they do it. In lots of cases, they will do it. One person works for love of the species, another in the hope of a better job, a third for the joy of solving puzzles, and a fourth because he has to solve a particular problem anyway for his own job and loses nothing by making his hack available for all. Each person has their own reserve price, the point at which they say, 'Now I will turn off Survivor and go and create something.'"); Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1177 & n.25 (2005) (arguing that the desire for fame is a primary incentive for creativity); Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 42, 58 (2007) (arguing that copyright law should be reconfigured to support reputation-based incentives as well as monetary incentives); Tom W. Bell, *The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy*, 10 VAND. J. ENT. & TECH. L. 841, 851 (2008) (We need not specify what motivates ... authors [who share their works for free or for nominal prices] We need only observe that ... non-monetary incentives sometimes suffice to inspire authorship).

⁵ See Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009) (describing roles of love, desire, and other passions in creation).

⁶ Indeed, there is little empirical evidence for the premise that economic benefit spurs creativity, and good reason to believe that it does not. [cite E Johnson fallacy]; Raymond Shih Ray Ku et al., *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty* 4 (Case Research Paper Series in Legal Studies, Working Paper No. 09-20, 2009), available at <http://ssrn.com/abstract=1410824> ("[S]tatistically, there is no uniform or fully predictable relationship between laws that increase copyright term, subject matter, rights, or criminal penalties and the number of new works registered in general.... [T]he data suggest[] that these relationships may be essentially random.... So while increasing copyright protection may increase the rewards available to authors, it does little to change their incentives overall.").

belonging, the right to exclude will play a relatively small role in inducing them to create, may in fact undermine their creative impulse.⁷ It also suggests that the desire to belong, and associated community self-regulation mechanisms like shame and shaming, will likely govern protection, enforcement, and copying within particular creative communities at least as well as, or better than, formal law will. These communities will organically choose the norms that work best for their own creative needs, and members will comply with them. But these forces will do little—if anything—to regulate intercommunity behavior. Members of different communities will feel no compunction to live by each others’ norms—in fact, they are most likely to reject each others’ norms precisely because they are not their own. The motivation to belong not only fuels compliance with the one’s own community’s norms, but also fuels rejection of others’ norms because being “in with the in-group” requires setting oneself apart from the out-group.

Therefore, although norms are excellent for governing intragroup behavior, they may be wholly inadequate for governing intergroup behavior. This observation provides new insight into when formal law is and is not necessary as an incentive to create. It also provides insight into when formal law should steer clear of regulation. The law cannot create a sense of belonging—and we should not expect it to. But we should expect it to respect not only the human need for belonging, but also the role of belonging in motivating creation.

[roadmap]

II. IP Norms Often Differ From Formal Law and Diverge from Creators’ Economic Self-Interest

A. IP Norms and Creative Communities

[Discuss negative spaces/ other IP norms communities. Describe case studies.]

[Describe/draw on scholarship work explaining what may create and perpetuate negative spaces and other IP norms communities. Norms are often more powerful than law in shaping behavior.⁸ [pull in examples from shame paper of people following norms] Norms may also trump economic self-interest. [same]].

In earlier work, I suggested that individuals’ shame may drive them to comply with intellectual property norms in their given communities, because they would be more ashamed to betray their communities’ norms even if betraying those norms—for example, by seeking formal

⁷ See Tushnet, *Economies of Desire*, *supra* note 1, at 537; Cohen, *supra* note 1, at 1193 (“Copyright fulfills some important economic functions ... and therefore plays an important role in organizing cultural production, but it is hardly ever the direct cause of a representational shift in creative practice, nor does it appear to play a direct role in motivating much that is normal science.”); Quiggin & Hunter, *supra* note 1, at 241 (“To the extent that innovation and productive growth arise from activities that are pursued primarily on the basis [of] non-economic motives, the link between incentives and outcomes is weakened. This in turn undermines the rationale for policies aimed at sharpening incentives and ensuring that everyone engaged in the production of goods and services is exposed to the incentives generated by a competitive market.”).

⁸ See Tushnet, *Economies of Desire*, *supra* note 1, at 539; Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1545 (2008).

protection for their work or pursuing an infringer—would serve their personal economic interests. This implies that shame and shaming may do much of the work of formal law in relatively close-knit communities where members are likely to communicate with each other and may depend on each other for creative or inventive purposes.⁹ This includes communities like academia, cuisine, fashion, open-source software, and media fandom that involve creative copying; and countercultures in which belonging to the community and adhering to its values becomes part of the participant’s identity, such as sharing or free-information movements, athletics, performance magic, stand-up comedy, or roller derby. Likewise, I suggested that public shaming may be a mechanism for punishing rebels within a community, inviting creators to adopt the intellectual property norms of particular communities, and disseminating norms among communities.

But while shame and shaming are powerful shapers of behavior, they are proscriptive tools—providing rules about what *not* to do—rather than prescriptive ones. They may teach us about why some creators comply with norms, but they say nothing about why creators create, or why they join the communities that teach them what constitutes acceptable or shameful behavior. For that we may turn to another well-studied field of human values: the need to experience a sense of belonging.

III. The Need to Belong

A. Generally

People need to belong. Social scientists from many disciplines have concluded that a “sense of belonging” is among the basic human values. While individuals differ in how strongly they experience the drive to experience belonging and how important it is to them in comparison with other values, many consider it to be universal.

People have a basic desire to belong

- Incorporate reams of social science research

Belonging is not only something people want; it’s something they need. [incorporate mental health studies].

Studies have shown that the desire to belong may trump other self-interests, such as personal health. [discuss study with student musicians’ injuries, and others]. People create in order to belong, and they are motivated to create by belonging. [music studies; Walton et al.]

Trust is a major aspect of belonging, and compliance with norms both fosters and flows from those norms. Shame and shaming enforce the norms. [cite Zhao et al and shame/shaming studies]

⁹ Here, I am referring to communities in which the members are likely to interact with each other.

Belonging requires a certain degree of “setting apart.” Many communities define themselves not only by what they are, but also what they are not—or in the language of social science, belonging demands not only an ingroup, but also an outgroup. [discuss studies.]

B. In Creative Communities

Belonging has a recursive effect: people create in order to belong to creative communities, creativity permits inclusion, and inclusion inspires creativity. In turn, belonging motivates compliance with community norms.

[discuss relationship between belonging and creativity – that belonging may be better than mere economic benefit in promoting creativity.¹⁰ Rights don’t even create market value, and payment may inhibit creativity.]

[belonging theory also does a better job than other incentive approaches in saying anything useful about why people create what they create. If it’s just for money or fame, why does anyone make nature poetry?¹¹]

This occurs in a community—such as a community of fanwork creators or athletes—in which creation is a condition and manifestation of membership. For these creators, membership is its own reward, and copying (with attribution) enriches the community in a way that exclusivity would not. Community membership acts as its own incentive to creators.¹² To the extent that intellectual property laws focus on incentives, this story works well. It also works well as part of a labor-desert approach: Sometimes, a creator’s “purpose” for creating expressly envisions that others will take and use their work, and that they will receive a non-financial reward such as respect or membership within a particular community.

A number of scholars have theorized that human flourishing demands creation. [Cites] This personality interest in creation is closely linked to the need to connect with others in

¹⁰ Indeed, there is little empirical evidence for the premise that economic benefit spurs creativity, and good reason to believe that it does not. [cite E Johnson fallacy]; Raymond Shih Ray Ku et al., *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright’s Bounty* 4 (Case Research Paper Series in Legal Studies, Working Paper No. 09-20, 2009), available at <http://ssrn.com/abstract=1410824> (“[S]tatistically, there is no uniform or fully predictable relationship between laws that increase copyright term, subject matter, rights, or criminal penalties and the number of new works registered in general.... [T]he data suggest[] that these relationships may be essentially random.... So while increasing copyright protection may increase the rewards available to authors, it does little to change their incentives overall.”).

¹¹ Tushnet, *Economies of Desire* at 521-22.

¹² See F. Scott Kieff et al., *It’s Your Turn, but It’s My Move: Intellectual Property Protection for Sports “Moves,”* 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 765, 768-81 (2009) (discussing community as a value trumping protection in athletics); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 657 (1997) [hereinafter Tushnet, *Legal Fictions*]. Tushnet explains:

The ethos of [fan fiction] is one of community, of shared journeys to understanding and enjoyment. Regardless of literary value, fan fiction is a pleasurable and valuable part of many fans’ experiences. The political importance of fandom stems from sharing secondary creations. Fans feel that they are making significant life choices when they share their work with a broader community of like-minded people.

Id. (footnotes omitted).

communities of interest, because communities often develop around creative endeavors. People define themselves not only by what they make but also by association with others who make similar things. For example, authors of fan fiction,¹³ writers of open source software,¹⁴ roller derby participants,¹⁵ wiki contributors,¹⁶ chefs,¹⁷ scholars,¹⁸ and athletes belong to communities defined by innovation, creation, and the sharing of creations among community members.¹⁹

Each of these communities exhibits intellectual property norms that are markedly different from formal intellectual property law. Each relies on a philosophy of sharing,²⁰ and creators expect that others will consume and often copy their creations without paying them. But each also includes various limitations on copying that formal law does not provide—for example, the expectation that all copiers will make copies freely available; expectations of attribution; or requirements that all copying be approximate rather than exact.

In these communities, the act of creating supports the personhood interest of community regardless of whether the work is protected by intellectual property law. The communities—and hence, community members’ identities—rely on a philosophy of sharing. When creators’ identities are closely tied to a philosophy of sharing, intellectual property protection and enforcement actually undermines their personhood concerns. It is no surprise, therefore, that in sharing-based communities, IP forbearance is widespread.

Some IP forbearance occurs within communities that enforce norms-based “IP without IP.” These are communities in which formal law—as it exists now—does not satisfy creators’ preferences regarding copying, but the community is sufficiently capable of self-governance that it can generate a set of norms that serves its personhood-promoting needs. For example, comedians could, and sometimes do, protect their jokes through copyright law—but they want to be associated with their ideas in addition to their expressions, something that intellectual property law does not accomplish. Thus, the majority of comedians do not concern themselves with copyright law, but instead turn to community norms for protection.²¹ The community deters copying of both ideas and expressions through professional sanctions and, on occasion, physical violence.²² Along similar lines, roller derby participants could rely on trademark law to protect

¹³ See generally Tushnet, *Payment in Credit* [add full cite] (discussing community among creators of fan fiction).

¹⁴ See Rebecca Giblin, *Physical World Assumptions and Software World Realities (and Why There are More P2P Software Providers than Ever Before)*, 35 COLUM. J. L. & THE ARTS 57, 102 (2011) (identifying “strong norms in the software development community that promote sharing [software secrets] with the world”).

¹⁵ See Fagundes [full cite] at 1108-10.

¹⁶ See Garon [full cite] at 06-11 (discussing community value of sharing and curation in wiki and Internet communities; indeed, among wiki contributors, community holds an even higher value than attribution).

¹⁷ See Fauchart von Hippel, [cull cite] at 193-94 (discussing community of sharing and hospitality norms among chefs).

¹⁸ See Strandburg [full cite] at 108-09 (describing community-enforced penalties for failing to share among academic scientists, including “loss of esteem” and “denial of the scarce resources of research funding and attention”).

¹⁹ See Magliocca [full cite] at 876-77 (discussing effects on innovation of community among athletes).

²⁰ [cites – notes 148-154 of previous article].

²¹ See Oliar & Sprigman [full cite] at 1798 (“One thing is perfectly clear: copyright law has played little role in stand-up comedy.”)

²² See *id.* at 1976-97 (describing physical violence as punishment for joke-stealing).

their pseudonyms (and occasionally have done so), but they want to set their own community standards, rather than ceding control to the courts.²³ Participants avoid duplicating pseudonyms using an official database and a detailed system akin to trademark law for determining when two pseudonyms are too similar.²⁴ Thus, in IP-without-IP communities, creators' personhood interests are better satisfied without the operation of law than with it—and in fact, they may be doubly satisfied through the operation of community norms, since innovators enjoy the personhood value of controlling their creations while also enjoying the personhood value of belonging to a community.

Similarly, in other forbearance-based communities, copying is conditional on attribution. While scholars yearn for citations, academic plagiarism is the gravest of sins.²⁵ Fan fiction creators are generous and fastidious about giving credit.²⁶ All six of the creative commons licenses demand it.²⁷ Although these communities do not ensure creator “control” over works, they do protect the originator's personhood interest in being associated with his or her creation—an interest that, in most circumstances, is not protected by intellectual property law.²⁸ The penalty for copyright or patent infringement is damages—which do little to vindicate a personhood interest in control. On the other hand, a community penalty for plagiarism might be banishment or social shaming.²⁹ True, attribution-based communities require creators to relinquish control over whether, how, and to what extent, their work is copied and modified—but in exchange, they provide the creator with recognition. Furthermore, the community dictates the degree of permissible copying and modification. Among chefs, copying is limited and predicated on transformation.³⁰ Under some circumstances, academics encourage copying.³¹ Thus, while members in these communities trade ownership for attribution, they do not relinquish all control over the ways in which their creations will be used. In these ways, the lack of formalized intellectual property protection, when paired with the presence of informal community protection, supports certain creators' personhood interests more than the law does. This is not to say that norms are inherently better at protecting personhood interests than formal law is; but law provides a one-size-fits-some solution. For communities capable of being governed by norms, norms are more customizable than law. Were formal law to adopt the personhood-promoting rules these communities preferred, they could rely on formal law. Since it does not, they must rely on norms.

²³ See Fagundes, *supra* note 15, at 1121-27.

²⁴ See *id.* at 1115-19.

²⁵ See Audrey Wolfson Latourette, *Plagiarism: Legal and Ethical Implications for the University*, 37 J.C. & U.L. 1, 64-65 (2010) (discussing consequences to faculty of plagiarism).

²⁶ See Tushnet, *Legal Fictions*, *supra* note __, at 664 (describing the ritual of attributive copyright disclaimers in fan fiction).

²⁷ About the Licenses, CREATIVE COMMONS, <http://creativecommons.org/about/licenses/>.

²⁸ See Latourette, *supra* note 25, at 45-50 (discussing distinction between plagiarism and copyright infringement).

²⁹ See, e.g., *id.* at 63-64 (describing penalties for plagiarism in academic community).

³⁰ See Fauchart & von Hippel, *supra* note 17, at 192-93 (“[I]t is not honorable for chefs to exactly copy recipes developed by other chefs.”)

³¹ See Strandburg, *supra* note 18, at 108 (describing a “communalism norm that requires making research results freely available to the community . . .”); Aoki, Part II, [full cite], at 204 (describing “considerable dismay in the scientific community” when Professor Walter Gilbert sought copyright protection for the human genome, something that scientists considered “the essential inheritance of the human species”).

Setting apart [examples]. Many fan fiction writers strongly favor transformative copying, as long as it includes attribution.³² They not only write transformative works, but also welcome others to remix (and attribute) their fanworks.³³ This norm sets fanwork creators apart not only from the world of “traditional authors,” but also from the world of commercial pastiche writers, who are more likely to adhere to formal law rather than fandom’s copying norms. Along the same lines, media fans tend to publish their fanworks under pseudonyms—and this is true even of even fans who are well-known authors under their own names, and might garner greater readership for their fanworks if they used their own names. So why use pseudonyms? Because they value the community that goes along with being part of media fandom. [cite Naomi and Seanan re fanworks; cite and use quotes from Green Paper submission.]

[discuss complication that many creators belong to multiple creative communities. Authors may also be fans of other shows, for example. Tattoo artists may also be illustrators. But that just means they’ll contextualize their norm adoption.]

IV. Implications for IP Policy

While the need to belong may powerfully motivate group members to follow the norms of the in-group, it may carry equal force in motivating group members to shun the values of the outgroup. Whether this causes problems depends entirely on how similar the creative community’s values are to the values of formal law. For example, it may be beneficial that roller derby participants follow their own registry system with rules similar to, but distinct from, trademark law. By doing so, they receive the benefit of belonging as well as the benefit of having a system suited precisely to community needs, and they do no harm to society at large. In contrast, the values of fanwork creators—pro-copying and pro-attribution—may work very well for fanwork creators, but may be in direct opposition to the values of certain copyright holders who are less concerned with attribution than with control over how their works are portrayed and with extracting fees for every conceivable use of their creation.³⁴

This implies that while formal law may be unnecessary for regulating intra-group intellectual property behavior, it may remain a necessary tool for mediating intergroup copying behavior. For fans and commercial authors, the law does just that: the Copyright Act and its fair use provision provide parameters under which fans can make transformative use of commercial authors’ works.³⁵ [consider the complication that what constitutes “intergroup interaction” may

³² See Fiesler, [full cite] at 752-54.

³³ See *id.*

³⁴ See Elizabeth Rosenblatt, *The Adventure of the Shrinking Public Domain*, (forthcoming, Colorado Law Review). See also Complaint for Copyright and Trademark Infringement at 3–4, Marion Zimmer Bradley Literary Works Trust v. Battle, No. 3:12-cv-00073 (N.D. Cal. Jan. 5, 2012); Correspondence between MZB Trust and Organization for Transformative Works (on file with author) (asserting that noncommercial fan fiction stories posted there infringed of Bradley’s trademark and copyright rights).

³⁵ See 17 U.S.C. §§ 101, 107 (2006). [consider the following idea: there are ways of regulating that embrace belonging and ways of regulating that drive creators underground or disintegrate their communities. This goes for norm regulation as well as formal law. consider a fan who writes fanworks in order to belong to the community of people who play in a particular fictional universe’s sandbox. IP holders for that universe (eg TV writers) can embrace fans and help to set fan norms, or they can exclude them from the belonging group and have no say at all in the norms adopted by the fans. The same goes for formal regulation; if lawmakers want to shape what people do,

not always be clear because the lines concerning ingroups and outgroups may not always be consistent, particularly when creative communities have low barriers to entry.]

But it also implies that balance is crucial. As important as formal law may be for mediating intergroup behavior through law, it is equally important that in regulating intergroup behavior, the law must take into account the norms and needs of each group it regulates. The norms of creative communities grow in response to community needs, and gradually optimize to promote creation in each community. If the law eviscerates the norms of creative communities, it undermines the incentives of creators in those communities, rather than enhancing them.

they have to make them feel like they belong within the rule set. Fair use does that—it shapes how people make derivative works by making room for derivative works. Eliminating fair use wouldn’t eliminate derivative works—it would just make everyone who created derivative works into rogues. But see Tushnet, EoD, at 542 (“fans’ reliance on “subtext” “implies an open, plural, and dehierarchized model of textuality wherein diffuse and collective creative labor isn’t easily contained by top-down intention and authority.”)]