Creative Vigilantism

Author : David Fagundes

Date : October 3, 2018

Amy Adler & Jeanne C. Fromer, *Taking Intellectual Property into Their Own Hands*, 107 **Cal. L. Rev.** __ (forthcoming 2019), available at SSRN.

It's no longer news that a major proportion of property regulation happens outside the bounds of the law thanks to social norms and their extralegal enforcement. Yet legal scholars continue to find new and fascinating ways to advance this insight. The latest installment in the conversation about the norm-based regulation of intangible property is Amy Adler and Jeanne Fromer's *Taking Intellectual Property into Their Own Hands*.

This sparkling article[1] adds a novel perspective to the dialogue that has been developing for more than a decade about the extralegal regulation of creative production. Most of this work considers how a given group regulates their distinctive works via norms, without recourse to copyright or trademark law. This move has been made with respect to recipes developed by French chefs, roller derby skaters' nicknames, clowns' face makeup, tattoo artists' ink designs, and many others.

Adler and Fromer add an important new dimension to the creative norms literature by focusing on extralegal enforcement rather than the substantive rules governing a particular category of work. As they show, many owners who could state plausible claims for copyright or trademark infringement increasingly choose not to file suit, but instead to deploy one of two surprisingly effective means of striking back at the purported infringer: shaming and retaking the copy.

It's hard to choose, but in my view the best part of this article is Adler and Fromer's luminous catalogue of these two novel forms of non-legal enforcement. Most informal norms are enforced to some extent by shaming sanctions, but no one seems better at deploying shame online than the operators of the website Diet Prada, who inflict humorless wrath on any fashion designer they perceive to have copied another without credit.

In terms of retaking the copy, the Suicide Girls finally figured out a way to outflank notorious reappropriation artist Richard Prince. They appropriated his unauthorized use of their Instagram posts, added the words "true art" in a comment, and sold the resulting near-exact copies of Prince canvases for a mere $90, undercutting the market for Prince's works and giving all profits to charity. Adler and Fromer illustrate all of this with photographs, tweets, and other visuals that make their story all the more vivid.

One of the major insights that Adler and Fromer extract from this fascinating story of creative vigilantes is that this extralegal enforcement operates "without the backdrop of a single close-knit community." This feature is important because, they point out, "legal scholars tend to see" such close-knit communities "as prerequisite to enforcing extralegal norms."

While Adler and Fromer's work is not the first to explore norm enforcement outside the context of close-knit communities,[2] the question is indeed a fascinating one. The answer to this puzzle may not be that norm enforcement does not require a close-knit community, but that in the internet age what makes a community has changed. For the Shasta County ranchers Ellickson studied in *Order Without Law*, geographic proximity and relative isolation meant that shaming sanctions by one's neighbors could be socially isolating.

But in the internet age, community is less a function of place than shared interests and values. So if the people in your

online community of fashionistas decide to shame you on Twitter or Instagram, you may not even know the identity behind the online persona responsible, but their message of viral opprobrium among those who share your professional tastes and ambitious could spell ostracism nonetheless.

Adler and Fromer also do admirable work to frame this article about extralegal activity in terms of law. They argue that shaming and retaking the copy can advance the same aims as copyright and trademark law: remuneration and attribution (as well as avoiding misattribution). This account fits with some of their examples. 1980s designer Dapper Dan enjoyed a renaissance of popularity—and, presumably, income—when people shamed Gucci for failing to acknowledge their debt to him in a recent fashion show. And James Turrell's surprisingly hip rebuke of Drake's rip-off of his installations in the "Hotline Bling" video subtly but unmistakably made clear that Drake's use of Turrell's work was unlicensed and unauthorized.

Other examples, though, fit less cleanly with Adler and Fromer's claim that extralegal copyright and trademark enforcement approximates the goals of those doctrines—namely, remuneration and attribution. Putting aside for a moment due skepticism of the claim that either copyright or trademark chiefly seeks to give creators attribution,[3] consider the Suicide Girls. Their retaking of Richard Prince's unauthorized copies got them zero money since all proceeds for sales of their reappropriated works went to charity. Nor did attribution seem to be an issue since Prince's uses did not erase the owners' Instagram usernames.

What is really going on may be bigger than Adler and Fromer's legalist framing suggests. What the shamers and copy retakers seem to want is not just their own version of what copyright and trademark law promise, but something simpler and less admirable: good old fashioned revenge. The Suicide Girls' delicious judo move got them neither money nor much else other than sticking it to Prince so poetically their scheme could have supplied the plot of a Quentin Tarantino film. This story seems less about creative incentives or avoiding consumer confusion, and much more about righting a wrong felt on a deeply visceral level, showing that moral intuitions about wrongful transgression animate owners of intangible property just as much as owners of physical property.

And to Adler and Fromer's credit, their article evinces due care about the dark side of extralegal copyright and trademark enforcement. They acknowledge that both copyright and trademark law are calibrated to balance owners' rights with the public interest in free access to information, and that aggrieved owners are unlikely to take the latter consideration into account when striking back at an infringer. Leaving enforcement to creative vigilantes threatens to enforce their interests more broadly than law would allow.

There's another downside to self-help that Adler and Fromer don't feature as prominently but merits mention: it often gets things wrong. This is familiar in the crime context, as when online sleuths misidentified a purported terrorist, leading to his suicide. But creators who seek to call out unauthorized copying can also err. The Rubinoos, for example, accused Avril Lavigne of ripping off their musical work in her song "Girlfriend" (and got a decent settlement from her). But closer analysis of the central chord progressions in the purportedly infringed Rubinoos song "Boyfriend" showed that it bore an eerie similarity to the sound of the Rolling Stones "Get Off My Cloud."

The authors explain that self-help often misfires because owners have a "folk sense of law," not an accurate sense of what law actually is. My observations of norm-based systems, however, suggest that the concern is a bit different, and perhaps more problematic. Such extralegal regulation of creative production does not seek to approximate law or substitute for it. Rather, it runs entirely independently of law and its entitlements. I'd wager that the Suicide Girls' outrage at Prince was not rooted in any sense of law at all, but rather a reaction to affront at property transgression that is entirely unmoored from and prior to federal law's entitlements to works or marks.

The remoteness of law to social norms systems is one of the major contributions that Ellickson in particular emphasized. Lawyers, of course, tend to be legal centralists. We read the world through the lens of the law and assume that others do as well. But most work in this area reveals that law is marginal at best to individuals' decisions to regulate their property via norms. Norms arise out of strongly felt moral intuitions about right and wrong that hold true

for people independently of what rights law promises them.

So when the authors criticize Diet Prada because on that site “copying is almost always assumed to be wrong,” this conflates morality and legality. Diet Prada seems to seek only to vindicate to a gut-level sense of what’s right and wrong. The law’s carefully crafted copyright and trademark doctrines, by contrast, are not meant to model moral intuitions but to achieve socially desirable allocations of private rights in information. So while the authors seek to emphasize the overlap between the agendas of creative vigilantes and the remedies supplied by copyright and trademark law, I wonder whether the differences swamp the similarities.

My thoughts and feelings about this article are many so I’ll rein them in here with one final thought. Among the valuable insights of Adler and Fromer’s article is that they distinguish between different kinds of creative self-help, chiefly shaming the infringer and reappropriating the copy. They further show that shaming strategies tend to be costlier and riskier given the downsides of self-help, while reappropriating the copy tends to be more constructive as well as consonant with the goals of copyright and trademark law.

The puzzle this leaves the reader with is: What can law do about this? If it’s right that copy retaking is a better extralegal enforcement strategy than shaming, is there a way to change copyright and trademark to encourage the former and/or discourage the latter? The answer to that question may merit a separate article, but the suggestion is that law may have some role to play even in this world that operates outside legal bounds.

1. The authors term their piece an essay. I have never quite understood what separates an article from an essay but the latter is supposed to be shorter and less formal. Adler and Fromer’s piece warrants all kinds of superlatives, but at 77 heavily footnoted pages, short and breezy are not among them. It’s an article.
2. Lior Strahilevitz called the effectiveness of norms outside close-knit communities “the puzzle crying out for an explanation” in a 2003 article about cooperation on file-sharing networks. See also Dave Fagundes, *Queues*.
3. In some ways copyright infringement causes attribution to happen, but that’s not the same as showing that the aim of the doctrine is to provide authors with proper attribution.

Cite as: David Fagundes, *Creative Vigilantism*, JOTWELL (October 3, 2018) (reviewing Amy Adler & Jeanne C. Fromer, *Taking Intellectual Property into Their Own Hands*, 107 **Cal. L. Rev.** __ (forthcoming 2019), available at SSRN), https://ip.jotwell.com/creative-vigilantism/.