IP Norms' Dark Side

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Stephanie Bair & Laura Pedraza-Fariña, *Anti-Innovation Norms*, 112 **Nw. L. Rev.** 1069 (2018).

The early legal literature on law and social norms tended to paint a rosy picture. Social norms were generally depicted as an optimal set of organically developed rules, informed by the experience of a close-knit community, and thus superior to formal law as a way of regulating behavior. Later scholars came to realize that nothing guarantees the optimality of social norms: they may perpetuate practices that no longer make sense, or they may advance the interests of certain groups but not social welfare. In such cases, formal law holds the promise of overriding suboptimal norms and moving society to a better place.

A few years back, I wrote, together with Christopher Sprigman, one of the first papers on social norms in intellectual property law in which we explored how standup comedians informally regulate the ownership and transfer of rights in jokes and comedic routines. While we thought that in that particular case the system of social norms largely brought good outcomes in terms of inducing creativity, that conclusion came at the end of reviewing their advantages relative to copyright law, but, importantly, also their relative disadvantages. For example, we noted aspects of the norms system that we thought were unattractive for creativity relative to formal copyright law: standups norms' system does not recognize a term limit (so the norms' system discourages dissemination and reuse of old materials), does not harbor a concept of fair use (so it discourages derivative and sequential creativity), and grants a scope of protection that exceeds that which is available under copyright's idea/expression doctrine (so it discourages borrowing high level concepts and themes from others).

Since we wrote our paper, the law and social norms field of IP has grown considerably, and is, I believe, one of the most important developments in IP theory over the last decade, not to mention a fun and interesting one. Others have explored social norms that are copyright-like, patent-like, and trademark-like. More recently, the literature moved to make more general claims and observations based on a rich array of norms' systems and case studies. One of the latest and important additions to this recent literature is the paper by Stephanie Bair and Laura Pedraza-Fariña which makes the claim about the dark side—i.e. counterproductive creativity-wise—of social norms more generally. In doing so, it builds on much social science and psychology literature.

Bair and Pedraza-Fariña emphasize that anti-innovation norms are harmful because they tend to hinder breakthrough innovation, namely innovation that recombines knowledge across boundaries of (often distant) creative communities and industries. They create barriers between bodies of knowledge, reinforcing the use of specialized, field-specific terminology rather than one that is shared among fields. They also tend to be over-enforced.

Anti-innovation norms come in three types: research priority norms, methodology norms, and evaluation norms. Research priority norms determine which problems are worth artistic or technological attention. Their dark side is that they implicitly suggest which problems are not worth members' time and attention. This is particularly costly when norms discourage members from exploring intersectional problems.

Methodology norms dictate the proper ways, tools, and routines appropriate to solve the problems community members identified as important. Such norms can have a negative consequence to the extent that they teach against the use of alternative, non-conforming methodologies. Intersectional problems pose a specific challenge as they are often best addressed through the combination of methodologies.

Lastly, evaluation norms dictate how a creative community assesses the contribution of members. Good work may be that which is patented, or published in certain fora, or meets some other community standard. Their dark side lies in reinforcing priority and evaluation norms and in discouraging cross-disciplinary innovation.

Two psychological biases explain why anti-innovation norms emerge and persist. First, the status quo bias describes a preference for the current state of affairs over change. Second, conformity bias describes individuals' tendency to forego exercising their own judgement in favor of following social norms.

Having illuminated social norms' dark side, Bair and Pedraza-Fariña propose solutions. They believe that IP law, which affects the appropriability of the fruits of one's labor, is limited in its ability to incentivize cross-boundary innovation. Instead, they emphasize the need to turn to other mechanisms that affect innovation, such as government grants and tax credits.

Conducting the first general treatment of the topic, this article is important not only for drawing attention to, and advancing the understanding of, social norms' failures, its causes and its effects, and for suggesting possible solutions thereto, but also because the analysis opens up the door for many potential follow-on research paths, of which I would like to suggest a few. First, the article reinforces the understanding that law and social norms are just two ways to foster innovation, and that each comes with relative, rather than absolute, advantages and disadvantages. Law and social norms do not only affect how much is being created, but also the type of innovation that is taking place. For example, in standup comedy, early 20th century norms suggested that copying and reuse were legit and humor tended to be generic, but late 20th century norms suggested that originality was key, and the type of humor created tends to be personal, observational, and point of view driven. The law and social norms literature suggests that in some cases law and social norms may work in tandem and reinforce each other, but that in others they may crowd out one another. After recognizing that social norms have their disadvantages too, an additional step forward would be to develop a theory of the optimal mix of innovation law (IP and non-IP) and social norms.

Second, the authors focus on social norms' dark side in hindering cross-boundary research. It is at least conceivable that social norms also have negative effects within disciplinary boundaries (as the last comedy example may suggest). Examining norms' failure in other communities may suggest whether this is a more general point, and perhaps help to enrich the general theory of norms' failure.

Third, and related, since the article comes at a stage where a considerable number of industry-specific case studies already exists, it likely presents the opportunity to further contextualize and concretize the discussion. For example, for all or some of the communities explored in the literature, scholars could identify particular anti-innovation norms, map the category they fall into, highlight the psychological biases that reinforce them, and propose particular IP and non-IP reforms that would be most effective in countering them. Indeed, it seems that there is much to be gained from paying attention to anti-innovation norms in IP.

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