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## Unacknowledged Legislators: The Contemporary Poetry Community's Quasi-Regime of Intellectual Property

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# UNACKNOWLEDGED LEGISLATORS: THE CONTEMPORARY POETRY COMMUNITY'S QUASI-REGIME OF INTELLECTUAL PROPERTY

“[P]oetry . . . shall one day be the pole-star for a thousand years.”<sup>1</sup>

## ABSTRACT

Intellectual property grants artificial monopolies to authors, and this practice has long been justified as an economic bargain necessary to encourage new authors. However, many creative communities thrive without intellectual property protection. These communities have been described as intellectual property's negative spaces. This Note navigates those negative spaces by the light of the contemporary poetry community's efforts to discourage thieving and encourage transformative copying. The community does so though there is little money in poetry, and thus little to animate an economic justification for intellectual property protection. Observing how one community considers intellectual property without an economic underpinning will help the legal community make informed decisions as intellectual property continues to navigate the creative sea of changes of the twenty-first century.

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1. Ralph Waldo Emerson, Address to the Phi Beta Kappa Society at Cambridge (Aug. 31, 1837), in *NATURE; ADDRESSES AND LECTURES* 78 (1849), <http://www.emersoncentral.com/amscholar.htm> (the speech is commonly referred to as *The American Scholar*).

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## I. INTRODUCTION

On *The Big Bang Theory*, characters sometimes sing a lullaby to Sheldon, the character played by breakout star Jim Parsons.<sup>2</sup> The lullaby is “Soft Kitty”:

Soft kitty,  
Warm kitty,  
Little ball of fur.

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2. See, e.g., *The Big Bang Theory: The Pancake Batter Anomaly* (CBS television broadcast Mar. 31, 2008).

Happy kitty,  
 Sleepy kitty,  
 Purr, purr, purr.<sup>3</sup>

The song became a bit of a fan favorite.<sup>4</sup> The network even sells Soft Kitty t-shirts.<sup>5</sup>

In 1937, Edith Newlin wrote this poem:

Warm kitty, soft kitty,  
 Little ball of fur,  
 Sleepy kitty, happy kitty,  
 Purr! Purr! Purr!<sup>6</sup>

The poem was set to music and published in a children's songbook.<sup>7</sup> The melody is identical to that used in *The Big Bang Theory*.<sup>8</sup>

By now, you know where this is going; a lawsuit was filed in 2015.<sup>9</sup> The lawsuit was brought by Newlin's daughters, who alleged that *The Big Bang Theory* infringed upon their mother's copyright for the poem.<sup>10</sup>

Poetry may not seem like a hotbed of legal action. There is little money to be made in poetry.<sup>11</sup> At the same time, people have expressed

3. *Id.* I don't know how the producers of Big Bang Theory punctuate the lyrics, so the punctuation given here is my own.

4. See The Big Bang Theory - BeatleBobify, *Soft Kitty Compilation – The Big Bang Theory (Lyrics)*, YOUTUBE (Jan. 16, 2013), <https://www.youtube.com/watch?v=Ds2VWVVR97J0> (a compilation video viewed more than 275,000 times); see also shellreyes, *Big Bang Theory Cast Sings Soft Kitty*, YOUTUBE (July 26, 2010), [https://www.youtube.com/watch?v=h\\_5\\_jt8hII4](https://www.youtube.com/watch?v=h_5_jt8hII4). In 2010, the cast of the show held a question-and-answer panel at the San Diego Comic-Con. *Id.* During the panel, an audience member yelled "Sing Soft Kitty!" *Id.* The smirking cast led the entire ballroom in the song. *Id.* This video has been viewed more than one million times. *Id.*

5. CBS STORE, <http://www.cbsstore.com/the-big-bang-theory-soft-kitty-womens-junior-fit-t-shirt/detail.php?p=290282> (last visited June 20, 2016).

6. Sarah Begley, *Lawsuit Claims Big Bang Theory's 'Soft Kitty' is Copyright Infringement*, TIME, (Dec. 29, 2015), <http://time.com/4163497/big-bang-theory-soft-kitty/>.

7. LAURA PENDELTON MACCARTENEY, SONGS FOR THE NURSERY SCHOOL 21 (1937), <http://www.nla.gov.au/apps/doview/nla.mus-vn2628642-p>.

8. Compare *id.*, with *The Big Bang Theory: The Pancake Batter Anomaly*, *supra* note 2.

9. Begley, *supra* note 6.

10. *Id.*

11. As is the case elsewhere, cost is relative within the poetry world. What is a huge sum of money for one poem is negligible outside poetry. An anecdote is our example. A poem once sparked debate of governmental waste, when the National Endowment for the Arts cut a \$750 check for Aram Saroyan's one-word poem, *Light*. Aram Saroyan, *The Most Expensive Word in History*, MOTHER JONES, August 1981 at 36. In 1970, the award was chastised from the floor of the House of Representatives as a "misuse of public money at the rate of \$107 per letter." *Id.* at 37. The wastefulness of spending \$750 on a poem was rekindled on the floor of the Senate in 1997. 143 CONG. REC. S9450-02 (1998). Currently, a signed and numbered silkscreen print of *Light* may be purchased for \$1000. THE PARIS REVIEW, <http://store.theparisreview.org/products/aram-saroyan-light> (last visited June 20, 2016).

themselves through poetry for thousands of years.<sup>12</sup> By its very nature it is easily copied – the devices of rhyme and rhythm are mnemonic.<sup>13</sup> For these reasons—its lack of economic reward, its ubiquity, and its copyability—poetry may be a perfect medium to consider whether intellectual property needs an economic justification.

Eric E. Johnson, Associate Professor at the University of North Dakota School of Law, criticizes the fundamental assumption that copyrights incentivize creative activity.<sup>14</sup> Citing examples of the fashion industry, open-source software, and the Internet’s user-generated content, he argues that creativity is flourishing with little or no intellectual property protection.<sup>15</sup> Elizabeth Rosenblatt, Associate Professor at Whittier Law School, observes the “negative spaces” of intellectual property – circumstances where practitioners of an art form protect their intellectual property without resorting to the legal system.<sup>16</sup> Comedians are a colorful example of an artistic community forbearing the legal regime in lieu of norms, shunning, and self-policing.<sup>17</sup> Indeed, the most influential podcast in comedy<sup>18</sup> has often included heated conversations between host Marc Maron and alleged joke thieves.<sup>19</sup>

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12. See Sebnem Arsu, *The Oldest Line in the World*, N.Y. TIMES, Feb. 14, 2006, [http://www.nytimes.com/2006/02/14/international/europe/14poem.html?\\_r=0](http://www.nytimes.com/2006/02/14/international/europe/14poem.html?_r=0) (reporting on a Sumerian love poem dated to about 2030 BCE).

13. *Poems, Acronyms, Rhymes & Acrostic*, MEMORY INST., <http://www.thememoryinstitute.com/poems-acronyms-rhymes-and-acrostics.html> (last visited June 20, 2016).

14. Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623, 678 (2012) (“The economic centerpiece in the conventional wisdom justifying intellectual property law is a longstanding blunder. There is no broad necessity for incentives for intellectual labor. As a general matter, innovative and creative activity will thrive without artificial support.”).

15. *Id.*

16. Elizabeth L. Rosenblatt, *A Theory of IP’s Negative Space*, 34 COLUM. J.L. & ARTS 317, 319 (2011).

17. See generally Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008).

18. See David Haglund & Rebecca Onion, *The 25 Best Podcast Episodes Ever*, SLATE.COM (Dec. 14, 2014, 9:01 PM), [http://www.slate.com/articles/arts/ten\\_years\\_in\\_your\\_ears/2014/12/best\\_podcast\\_episodes\\_ever\\_the\\_25\\_best\\_from\\_serial\\_to\\_the\\_ricky\\_gervais.3.html](http://www.slate.com/articles/arts/ten_years_in_your_ears/2014/12/best_podcast_episodes_ever_the_25_best_from_serial_to_the_ricky_gervais.3.html) (arguing that an episode of WTF was proof “that podcasts themselves were a remarkable form”).

19. See, e.g., *WTF Podcast Episode 85 – Dane Cook / The Nicotine Diaries*, WTF WITH MARC MARON, (June 28, 2010), <https://www.youtube.com/watch?v=cOUTi7J7ZQA>; *WTF Podcast Episode 75 – Carlos Mencia*, WTF WITH MARC MARON, (May 24, 2010), <https://www.youtube.com/watch?v=BXMNE0b59zw>; *WTF Podcast Episode 76 – Willie Barcena / Steve Trevino / Carlos Responds*, WTF WITH MARC MARON, (May 27, 2010), <https://www.youtube.com/watch?v=vr5-obzqRzA>. Observing that these disputes are not resolved within the legal regime has led some to call for intellectual property reform. See, e.g., Trevor M. Gates, *Providing Adequate Protection for Comedians’ Intellectual Creations: Examining Intellectual Property Norms and “Negative Spaces”*, 93 OR. L. REV. 801, 804 (2015) (advocating for a Digital Joke Exchange database run by the Federal Government that could be used by comedians to prove who first wrote, and thus who owns, a joke).

Poetry is similar to comedy in this respect: poets police their own world. Perhaps this is because the stakes are so often small that litigation is rarely practical. Further, were a poet to make it big, it would scarcely be due to one poem. Likewise, few comedians have ever been discovered from one sterling joke. Infringing on the copyright of one joke (or one poem) is not worth making a federal case.

Perhaps poets do not avail themselves of the intellectual property regime for a different reason. Poets, perhaps more so than in other art forms, borrow from each other.<sup>20</sup> The lines between acceptable and unacceptable borrowing are drawn by what is done after the theft, or as T.S. Eliot put it: “Immature poets imitate; mature poets steal; bad poets deface what they take, and good poets make it into something better, or at least something different.”<sup>21</sup> Thus, for poets, the wrongfulness is judged not by the act of taking but by what is created anew after the taking.

To be sure, this may sound similar to the copyright concept of fair use. That, however, excuses taking copyrighted material if the intention behind the taking is justified.<sup>22</sup> For poets, intention is less important than product. That additional consideration made “the poetry community [realize that it] urgently needed to clarify for itself what ‘best practices’ might be for fair use in poetry.”<sup>23</sup>

For these reasons, the poetry community is not satisfied by the current intellectual property regime; yet, it asserts extra-legal intellectual property protections. The community has its code, literally: the Poetry Foundation commissioned the Center for Social Media and the Program on Information Justice and Intellectual Property to create the Code of Best Practices in Fair Use for Poetry.<sup>24</sup> The community has its enforcement: detectives search out thieves and bring allegations to the community’s attention.<sup>25</sup> In short, we can see an example of a community self-legislating and self-policing its own intellectual property regime.

In Part II, this Note will discuss contemporary intellectual property that might be related to the poetry community. This Note will not discuss patent law because it is unrelated to poetry. Instead, it will discuss copyright law

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20. See *infra* Section III.

21. T.S. ELIOT, *THE SACRED WOOD: ESSAYS ON POETRY AND CRITICISM* 114 (1921).

22. See *infra* Section II.B.

23. *Code of Best Practices in Fair Use for Poetry*, CTR. FOR SOC. MEDIA & PROGRAM ON INTELLECTUAL PROP. AND INFO. JUST., AM. UNIV., 1 (Patricia Aufderheide, Katharine Coles, Peter Jaszi & Jennifer Urban eds., 2011), [http://cmsimpact.org/wp-content/uploads/2016/01/fairusepoetrybooklet\\_singlepg\\_3.pdf](http://cmsimpact.org/wp-content/uploads/2016/01/fairusepoetrybooklet_singlepg_3.pdf) [hereinafter *Code for Fair Use for Poetry*].

24. *Id.*

25. See *infra* Section IV.B.

and the fair use doctrine,<sup>26</sup> trademark law, and moral rights. Then, in Part III, this Note will consider contemporary poetry. The nature of poetry requires poets to take from previously-published poems, whether that be by using forms, making meaning through allusions, or by tactics of re-appropriating language of previously-published works. After gaining an understanding of contemporary poetry, Part IV will discuss the contemporary poetry society. First, this Note will attempt to define what is meant by the contemporary poetry community. Then, this Note will observe how that community is policing literary thievery while encouraging transformative copying through its Code for Fair Use in Poetry. Doing so will show how deemphasizing the economic justification for intellectual property protection, while forwarding with a reputation and community-based justification, might redefine intellectual property law.

## II. CONTEMPORARY INTELLECTUAL PROPERTY LAW

Much of American intellectual property law stems from the federal government's power "[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."<sup>27</sup> As interpreted by the Supreme Court, this power is animated by an "economic philosophy . . . that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors."<sup>28</sup> In other words, the federal government rewards an author with a temporary monopoly over the work. Copies are kept artificially scarce and sold for a premium. Without the monopoly, the market would be flooded with worthless copies of the author's work. The end result would be a world without art: copyright's promise of a monopoly incentivizes authors, because they hear tell of a pot of gold at the end of the rainbow.<sup>29</sup>

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26. Copyright law is statutory and, thus, its precise implications depend on which version of the copyright act was in place when the copyrighted document was published. Because this Note is more concerned with copyright law generally, we will not discuss the variations and history of the copyright statutes themselves. For a good description of the historical development and variations of copyright statutes, see Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 429-42 (2004).

27. U.S. CONST. art. I, § 8, cl. 8.

28. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

29. See *Washingtonian Publ'g Co. v. Pearson*, 306 U.S. 30, 36 (1939) (the government grants "valuable, enforceable rights to authors" in order "to afford greater encouragement to the production of literary [or artistic] works of lasting benefit to the world").

## A. COPYRIGHT LAW

Congress allows a copyright to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>30</sup> The ideas that animated the work are not copyrightable.<sup>31</sup> Rather, it is the precise and recorded thing that is copyrightable, for which the copyright holder has exclusive rights:

- (1) to reproduce the copyrighted work . . . ;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies . . . to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) . . . to perform the copyrighted work publicly;
- (5) . . . to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.<sup>32</sup>

A person who uses any of those exclusive rights without permission of the copyright holder has infringed on the copyright. What is stolen, then, is not the ideas behind the work or the author’s ability to claim authorship, but rather her ability to monetize her creation by selling a copy. Infringement occurs when someone copies “original elements of the work” for which the another owns “a valid copyright.”<sup>33</sup>

To be validly copyrighted, a “work of authorship” must show some minimal degree of originality.<sup>34</sup> To illustrate, recall that mere facts are not copyrightable.<sup>35</sup> For example, all the phone numbers in a city are a set of facts, and that set of facts cannot be copyrighted.<sup>36</sup> However, a precise arrangements of facts is copyrightable in so far as the arrangement itself has met a minimal degree of originality.<sup>37</sup> Similarly, the precise words used to describe a fact are copyrightable in so far as those precise words were

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30. 17 U.S.C. § 102 (2012).

31. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985) (“[n]o author may copyright his ideas or the facts he narrates.”).

32. 17 U.S.C. § 106 (2012).

33. *Taylor Corp. v. Four Seasons Greetings, L.L.C.*, 403 F.3d 958, 962-63 (8th Cir. 2005) (citing *Mulcahy v. Cheetah Learning, L.L.C.*, 386 F.3d 849, 852 (8th Cir. 2004)).

34. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358 (1991).

35. *Harper & Row Publishers, Inc.*, 471 U.S. at 547.

36. *Feist*, 499 U.S. at 363-64.

37. *Id.* at 350-51.



original.<sup>38</sup> Originality is not satisfied by an obvious choice – for example, alphabetization of surnames in a telephone directory is too obvious<sup>39</sup> – but so long as there is some nonobvious arrangement or presentation the writing is original. To satisfy originality, then, “the requisite level of creativity is extremely low; even a slight amount will suffice.”<sup>40</sup>

To prove copyright infringement, a plaintiff must show copying:<sup>41</sup> either direct copying<sup>42</sup> or indirect copying. Indirect copying is shown if the defendant had access to the plaintiff’s copyrighted work and the two works are so “substantially similar” that “an inference that the defendants actually did copy” is supported.<sup>43</sup>

## B. COPYRIGHT’S FAIR USE DOCTRINE

After copying is proven (or admitted to), numerous defenses are available.<sup>44</sup> The most common defense is the doctrine of fair use.<sup>45</sup> At its core, the doctrine relaxes one author’s monopoly in the interest of coexisting with the First Amendment<sup>46</sup> or promoting the authorship of the second author.<sup>47</sup> In this, fair use is usually found when the defendant copied another work but transformed it either through parody, satire, or commentary.<sup>48</sup> The Supreme Court’s decision in *Campbell v. Acuff-Rose Music, Inc.* is illustrative.<sup>49</sup> The rap group 2 Live Crew wrote a vulgar parody of Roy Orbison’s “Pretty Woman,” using samples from the original song.<sup>50</sup> The rap song’s transformative use, its use of the original song to make a comedic parody, was protected by fair use.<sup>51</sup> A unanimous Court agreed that “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”<sup>52</sup> The

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38. *Id.* at 348.

39. *Id.* at 362-63.

40. *Id.* at 345.

41. *See id.* at 361 (“[T]wo elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”).

42. *E.g.*, *Enter. Mgmt., Ltd. v. Warrick*, 717 F.3d 1112, 1120 (10th Cir. 2013).

43. *Hobbs v. John*, 722 F.3d 1089, 1094 (7th Cir. 2013).

44. *See generally* John G. Mills, *Possible Defenses to Complaints for Copyright Infringement and Reverse Engineering of Computer Software: Implications for Antitrust and I.P. Law*, 80 J. PAT. & TRADEMARK OFF. SOC’Y 101 (1998).

45. *See generally* Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2539 (2009).

46. *Id.* at 2547.

47. *Id.* at 2568-69.

48. *Id.* at 2548-49.

49. 510 U.S. 569 (1994).

50. *Id.* at 571-72.

51. *Id.* at 579.

52. *Id.*

economic justification behind intellectual property is still served, because 2 Live Crew was economically rewarded with exclusive rights over their new recording.<sup>53</sup>

### C. TRADEMARKS, PASSING OFF, AND REVERSE PASSING OFF

While copyrights protect an individual product, the goal of trademark law is to “prevent one person from passing off his goods or his business as the goods or business of another.”<sup>54</sup> This goal serves both a person’s business and the consumers of that business. The trademark must be distinctive to consumers, and thus, must accurately inform consumers of the quality of product or service they are to receive.<sup>55</sup> In a word, trademark is about reputation.

Trademarks can be either descriptive of their good or not descriptive. Non-descriptive trademarks—arbitrary, fanciful, or suggestive<sup>56</sup>—do not “suggest or describe any characteristic of the goods or services with which it is used,” and are, therefore, inherently distinctive.<sup>57</sup> A descriptive trademark, conversely, does describe some characteristic of its good.<sup>58</sup> Such a trademark must acquire secondary meaning through continued commercial usage.<sup>59</sup> For example, a person’s name can become a trademark if that person’s name has been used long enough to establish, in the public’s mind, a connection between the name and a service or a good.<sup>60</sup>

A trademark is infringed when another mark is so similar that it is “likely to cause customer confusion.”<sup>61</sup> Because customer confusion is the concern, trademark law not only forbids a person from passing off his products as those of another, but also forbids reverse passing off: “for

53. *See id.* at 490. (dismissing argument that evidence of commercial gain defeated a fair use defense).

54. *Burris Carpet Plus, Inc. v. Burris*, 2010 ND 118, ¶ 16, 785 N.W.2d 164, 172.

55. *See id.* (“A valid trademark is a distinctive mark, symbol, or designation used by a producer or manufacturer to identify and distinguish his services or goods from the services or goods of others”). *Id.* (quoting *KAT Video Prods., Inc. v. KKCT—FM Radio*, 1997 ND 21, ¶ 7, 560 N.W.2d 203, 208).

56. *See* Lisa P. Ramsey, *Descriptive Trademarks and the First Amendment*, 70 TENN. L. REV. 1095, 1098 (2003) (“[T]rademark law protects fanciful marks (e.g., “Kodak” film), arbitrary marks (e.g., “Apple” computers), suggestive marks (e.g., “Tide” laundry detergent”). *Id.*

57. *Burris Carpet Plus*, 2010 ND 118, ¶ 20, 785 N.W.2d at 173.

58. Ramsey, *supra* note 56, at 1098 (citing an example of a descriptive trademark as “Park ‘N Fly long-term parking lot services near airports”); *Id.*

59. *Burris Carpet Plus*, 2010 ND 118, ¶ 19, 785 N.W.2d at 173.

60. *Id.* at ¶¶ 21–22, 785 N.W.2d at 173–74.

61. *Zerorez Franchising Sys., Inc. v. Distinctive Cleaning, Inc.*, 103 F. Supp. 3d 1032, 1041 (D. Minn. 2015). Courts commonly use a factor test to find infringement. *See id.* (citing *Cmty. of Christ Copyright Corp. v. Devon Park Restoration Branch of Jesus Christ’s Church*, 634 F.3d 1005, 1009 (8th Cir.2011)).

example, the Coca-Cola Company [is forbidden from] passing off its product as Pepsi-Cola or reverse passing off Pepsi-Cola as its product.”<sup>62</sup> That is, it is unlawful to cloak your work in the trademark of another and it is unlawful to cloak someone else’s work in your trademark.

#### D. MORAL RIGHTS

Copyright and trademark law are not the only ways to protect to an author’s creation. The Berne Convention for the Protection of Literary and Artistic Works, an international treaty, offers both the “right of attribution and the right of integrity.”<sup>63</sup> These rights are not animated by an economic rationale.

Independently of the author’s economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or another derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.<sup>64</sup>

Moral rights are expressly meant to protect an author’s honor and reputation.

The treaty suffered a cold reception in the United States and was not signed for almost a century.<sup>65</sup> Even when it was, Congress “did not include new provisions recognizing . . . Moral Rights in the Berne Implementation Act. Rather, Congress asserted that American law already protected authors’ Moral Rights adequately through the areas of unfair competition, copyright, contract, defamation, and privacy.”<sup>66</sup>

Despite the cold reception, American law eventually introduced Moral Rights in limited circumstances.<sup>67</sup> For example, the law generally recognizes a right of publicity, which is an individual’s right to control the commercial use of his or her identity.<sup>68</sup> Though state laws differ, enough similarity exists to establish a test to find infringement of the right of

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62. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 32 (2003).

63. Natalie C. Suhl, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, 12 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1203, 1211-12 (2002).

64. *Id.* (quoting the treaty).

65. *Id.*

66. *Id.* at 1212-13.

67. *See id.* at 1215 (citing 17 U.S.C. § 106A); *see also* Karen Y. Crabbs, *The Future of Authors’ and Artists’ Moral Rights in America*, 26 *BEVERLY HILLS B. ASS’N J.* 167, 171 (1992) (citing New York and California statutes affording moral rights to artists).

68. Jon M. Garon, *Commercializing the Digital Canvas: Renewing Rights of Attribution for Artists, Authors, and Performers*, 1 *TEX. A&M L. REV.* 837, 863 (2014). More than half the states recognize some form of the Right of Publicity. *Id.*

publicity: “(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.”<sup>69</sup> Further, the law requires a showing that the defendant was advantaged by the misappropriation of the plaintiff’s likeness.<sup>70</sup> While there is no requirement that the plaintiff be a celebrity, a more famous plaintiff would tend to increase the resulting injury.<sup>71</sup> Therefore, while the right of publicity nominally protects any individual, in practice it protects celebrities from have their likenesses used for commercial gain without their permission.

The right of attribution, meanwhile, recognizes an individual’s right to be known, or to remain anonymous, as the creator of a work of art.<sup>72</sup> This right, specifically called for in the Berne Convention, has yet to take root in American law.<sup>73</sup> The bulk of American law shows that the “emphasis . . . has been on economic protection, not personality protection.”<sup>74</sup>

#### E. IP’S NEGATIVE SPACES

The intellectual property regime, with or without moral rights, does not entirely protect the creative world. Some activities, most notably fashion design, exist in a “doctrinal no man’s land.”<sup>75</sup> The definitions of the regime categorically shut out the activity: fashion cannot be copyrighted, cannot be trademarked, and cannot be patented. Yet fashion designers still create new fashions, even without the incentive of intellectual property protection. Other activities thrive while forbearing what intellectual property protection they might otherwise enjoy.<sup>76</sup> Creators “forego [intellectual property] exclusivity by declining to seek protection, declining to pursue infringers or engaging in widespread royalty-free licensing . . . [either] on an industry-wide basis (as in the worlds of stand-up comedy, magic and roller derby

69. *Id.* at 864.

70. *See, e.g.* N.Y. CIV. RIGHTS LAW § 51 (McKinney 2016) (protecting likeness from being used “for advertising purposes or for the purposes of trade”).

71. *See* *KNB Enterprises v. Matthews*, 92 Cal. Rptr. 2d 713, 717 (Cal. Ct. App. 2000).

72. *See generally* Garon, *supra* note 68.

73. *But see* 17 U.S.C. § 106A (granting the right of attribution, but only to the “author of a work of visual art”); *see also* Garon, *supra* note 68, at 845 (discussing *Clemens v. Press Pub. Co.*, 122 N.Y.S. 206, 207 (N.Y. App. Term. 1910)). The court produced a plurality decision, while one judge’s concurring opinion called for a right of attribution. *Id.* “Had the judges joined together in the opinion, the New York law on the subject would have become much more protective than that which ultimately occurred.” *Id.*

74. *Crabbs, supra* note 67, at 172 (emphasis omitted).

75. *Rosenblatt, supra* note 16, at 323-24.

76. *Id.* at 324.

pseudonyms) or [within] partial industries (as in popular music, open source software and the copyleft movement).”<sup>77</sup>

Forbearance and the no man’s land show intellectual property’s “negative spaces.” Rosenblatt borrows the term from the world of art, in which an image’s negative space is that background which “defines the subject, and brings balance to a composition.”<sup>78</sup> In other words, she studies those areas that exist outside the regime to better understand the regime.

By observing negative spaces, Johnson argues that the economic justification for intellectual property protection is “a longstanding blunder.”<sup>79</sup> In these negative spaces—and thus without intellectual property protection—creativity has not ceased.<sup>80</sup> On the contrary, we are witnessing an explosion of user-generated content on the Internet, content almost entirely created and published with little or no expectation of copyright protection.<sup>81</sup> Users post photographs on any number of websites for the intended purpose of sharing them with other users.<sup>82</sup> More poetry is being published now than ever before.<sup>83</sup> As the intellectual property theory goes, this simply should not occur.<sup>84</sup>

In light of this, Johnson argues that as the “world’s economic production is increasingly oriented toward the creation of intellectual goods,” there is all the more reason to reconsider intellectual property law.<sup>85</sup> After all, there are costs to the monopolies we grant via intellectual property: “Overprotection chills the creative production of new works because it discourages authors from drawing on ideas and facts presented in prior works . . . .”<sup>86</sup>

So copyright, trademark, and the moral rights protected by the American intellectual property regime all presume some sort of economic justification. Creators, however, do not seem to need a promise of an economic reward to create. American intellectual property, then, seems to rest on an incorrect presumption. Poets, however, still expect their poems to enjoy some sort of protection. Now that an understanding has been

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77. *Id.*

78. *Id.* at 319.

79. Johnson, *supra* note 14, at 678.

80. *Id.*

81. *Id.*

82. *Id.*

83. David Alpaugh, *The New Math of Poetry*, THE CHRON. OF HIGHER EDUC., Feb. 21, 2010, <http://chronicle.com/article/The-New-Math-of-Poetry/64249/>.

84. Johnson, *supra* note 14, at 678.

85. *Id.* at 677.

86. Jennifer Understahl, *Copyright Infringement and Poetry: When is a Red Wheelbarrow the Red Wheelbarrow?*, 58 VAND. L. REV. 915, 920 (2005).

established regarding what an intellectual property regime animated by economic considerations looks like, this Note will turn to the poetry world. The next section will discuss a quasi-regime not animated by economics, but by protecting individuals' reputations within a community.

### III. CONTEMPORARY POETRY NEEDS TO TAKE FROM PREVIOUSLY PUBLISHED POETRY

Poems are concise expressions of language; meaning (and beauty) comes from a poem's ability to create an experience by packing as much significance as possible into as few words as possible.<sup>87</sup> The poet "realizes the . . . basic qualities of all words[, and] makes deliberate and impassioned use of these qualities."<sup>88</sup> So while poetry, utilizing an intricate connection of words' qualities, "may resemble language as we ordinarily know and use it, . . . it transcends that use in its power to express what we had thought inexpressible."<sup>89</sup> That is, poems from mere words explode into meaningful experiences.

To accomplish this, poets necessarily take from previous poems. Any poet recognizes the tremendous history of poetry and uses that history in one of three ways: 1) by writing in received forms, 2) by alluding to previous works, or 3) by re-appropriating previous works.

#### A. FORMAL POETRY

Many poems are written in received forms: prescribed combinations of syllable stresses, rhyme schemes, or lengths.<sup>90</sup> For example, the Shakespearean Sonnet is fourteen lines, each line in iambic pentameter, each line ending with rhyming words as follows:

End-word A

End-word B

End-word rhymes with A

End-word rhymes with B

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87. See, e.g., JOHN CIARDI, *HOW DOES A POEM MEAN?* 6-12 (2d ed. 1975) (discussing how Robert Frost's *Stopping by Woods on a Snowy Evening* creates a meaningful experience through its language and symbols, and how its rhymes and rhythms suggest meaning themselves).

88. *Id.* at 101. The authors identify four qualities: 1) "a word is a feeling," 2) "a word involves the whole body," 3) "a word is a history," and 4) "a word is a picture." *Id.* at 101-06.

89. Understahl, *supra* note 87, at 932 (quoting DAVID YOUNG, *Language, the Poet as Master and Servant*, in *A FIELD GUIDE TO CONTEMPORARY POETRY AND POETICS*, 189 (Stuart Friebert et al., eds. 1997)).

90. See, e.g., POETS.ORG, *The Sonnet* (Mar. 1 2016), <https://www.poets.org/poetsorg/text/poetic-form-sonnet>.

End-word C

End-word D

End-word rhymes with C

End-word rhymes with C

End-word E

End-word F

End-word rhymes with E

End-word rhymes with F

End-word G

End-word rhymes with G<sup>91</sup>

Through these forms, poems are precise, concise, and ordered language. While a poet may invent a new form,<sup>92</sup> it is much more common to select an established form. Doing so, of course, means that the poet takes from others to determine the rhythm and rhyme structure of the poem.

#### B. ALLUSIONS IN POETRY

Even if a poem does not use a received form, poetry, “as a highly allusive art form, fundamentally relies on the poet’s ability to quote, to copy, and to ‘play’ with others’ language.”<sup>93</sup> For example, a nineteenth century poem by Rainer Rilke, *Archaic Torso of Apollo*, describes deliberately a headless statute, examining it from all angles with procreative images, until the poem surprisingly concludes that there is “no place that does not see you. You must change your life.”<sup>94</sup> The poet commands the

91. *Id.* For those of you having sweaty, anxious flashbacks to dreaded high school English classes, don’t worry; there’s no quiz at the end of this Note. For those of you having pleasant memories of those classes you loved, Hi! Let’s hang out!

92. Tinker, Forum Post on Inverted Verse Forms, POETRY MAGNUM OPUS (June 4, 2009), <http://www.poetrymagnumopus.com/index.php?showtopic=1187>. Even an invented form, however, takes from previous forms. *Id.*

93. *Code for Fair Use for Poetry*, *supra* note 23, at 2.

94. RAINER MARIE RILKE, *Archaic Torso of Apollo*, in AHEAD OF ALL PARTING: SELECTED POETRY AND PROSE OF RAINER MARIA RILKE (Stephen Mitchell trans., Modern Library 1995), <https://www.poets.org/poetsorg/poem/archaic-torso-apollo>.

We cannot know his legendary head  
with eyes like ripening fruit. And yet his torso  
is still suffused with brilliance from inside,  
like a lamp, in which his gaze, now turned to low,  
gleams in all its power. Otherwise  
the curved breast could not dazzle you so, nor could  
a smile run through the placid hips and thighs  
to that dark center where procreation flared.  
Otherwise this stone would seem defaced

reader to live as if always on display. Written decades later, James Wright's *Lying in a Hammock at William Duffy's Farm in Pine Island, Minnesota*, describes deliberately a lazy rural scene, examining it from all angles while imagining the passing of the seasons, until the poem surprisingly concludes "I have wasted my life."<sup>95</sup> Wright's poem makes meaning by alluding to Rilke's poem and then responding to its command. One poet wants you to change your life by knowing you are always observed; the other poet responds that he has squandered his life by merely being an observer. To make this meaning, Wright's poem must take enough from Rilke's work to signify to readers that he is creating new meaning from old work.<sup>96</sup>

### C. POETIC RE-APPROPRIATIONS

Finally, some contemporary poetry takes more directly from previously published poems. These poems are completely made of the language of others but with the poet imaginatively reappropriating that language. An ancient form, called the cento, takes lines from other poems and arranges them into a new poem.<sup>97</sup> Another form is found poetry, which is a

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beneath the translucent cascade of the shoulders  
and would not glisten like a wild beast's fur:  
would not, from all the borders of itself,  
burst like a star: for here there is no place  
that does not see you. You must change your life.

95. JAMES WRIGHT, *Lying in a Hammock at William Duffy's Farm in Pine Island, Minnesota*, in ABOVE THE RIVER: THE COMPLETE POEMS AND SELECTED PROSE (1990), <http://www.poetryfoundation.org/poem/177229>.

Over my head, I see the bronze butterfly,  
Asleep on the black trunk,  
Blowing like a leaf in green shadow.  
Down the ravine behind the empty house,  
The cowbells follow one another  
Into the distances of the afternoon.  
To my right,  
In a field of sunlight between two pines,  
The droppings of last year's horses  
Blaze up into golden stones.  
I lean back, as the evening darkens and comes on.  
A chicken hawk floats over, looking for home.  
I have wasted my life.

96. See ANDREW ELKINS, *THE POETRY OF JAMES WRIGHT* 93 (1991) (identifying Rilke's poem as the source material for Wright's last line). For an entertaining discussion of how one poem creates new meaning by directly alluding and responding to another poem, see CIARDI, *supra* note 88, at 15-18 (discussing two Lewis Carroll's spoofs of his contemporary poets).

97. POETS.ORG, *Poetic Form: Cento*, (Feb. 21 2014), <https://www.poets.org/poetsorg/text/poetic-form-cento> ("Early examples can be found in the work of Homer and Virgil.").



rearrangement of newspaper articles, street signs, or other examples of everyday language.<sup>98</sup>

Jenni Baker has undertaken a long project, *Erasing Infinite*, to create erasure poems, one page at a time, from David Foster Wallace's humungous novel *Infinite Jest*.<sup>99</sup> The poet takes a published page and makes a new poem by removing words—erasing them—until only the words of the poem are left on the page.<sup>100</sup> She then publishes, on Tumblr, images of the resulting poem.<sup>101</sup> Baker discovered Wallace's novel a year after his death, and she was saddened that a writer whose work she admired could no longer write.<sup>102</sup> Her project, then, was an “effort to make something out of this absence.”<sup>103</sup>

Thus, contemporary poetry must take from previously published poetry, either by using a received form, building new meaning through allusion, or by building new meaning through word-for-word taking of previously-published poetry.

#### IV. THE CONTEMPORARY POETRY COMMUNITY

In a 1994 interview, acclaimed American poet and essayist Adrienne Rich declared that “[t]he activity of writing about poems and poetry—the activity of making it available and accessible—became the property of scholars and academics and became dependent on a certain kind of academic training, education, class background.”<sup>104</sup> Rich was speaking at the beginning of the Internet revolution, which, in the midst of changing everything, changed poetry. By virtually negating publication and distribution costs, the Internet has enabled a staggering boom of published poetry.<sup>105</sup> Currently, more than 2000 literary journals publish poetry in the English language.<sup>106</sup> At the current rate, the twenty-first century will

98. POETS.ORG, *Found Poem: Poetic Form*, (Sept. 14, 2004), <https://www.poets.org/poetsorg/text/poetic-form-found-poem>.

99. Jenni Baker, ERASING INFINITE, <http://www.erasinginfinite.com> (last visited June 20, 2016).

100. Jenni Baker, *About This Project*, ERASING INFINITE, <http://www.erasinginfinite.com/about-the-project%20> (last visited June 20, 2016).

101. Jenni Baker, ERASING INFINITE, <http://www.erasinginfinite.com> (last visited June 20, 2016).

102. Jenni Baker, *About This Project*, ERASING INFINITE, <http://www.erasinginfinite.com/about-the-project%20> (last visited June 20, 2016).

103. *Id.*

104. Matthew Rothschild, *Adrienne Rich: 'I Happen to Think Poetry Makes a Huge Difference'*, THE PROGRESSIVE, Jan. 1994, at 31.

105. See Alpaugh, *supra* note 84.

106. *Id.*

produce more than eighty-six million published poems.<sup>107</sup> And this does not consider “the countless self-published chapbooks and collections printed each year, to say nothing of the millions of personal Web sites, blogs, and Facebook pages where self-published poetry appears.”<sup>108</sup>

This explosion in published poetry, however, does not seem to reflect an explosion in purchasing published poetry.<sup>109</sup> Many Americans can recall, and even recite, favorite verses.<sup>110</sup> A happy few, however, purchase new poetry.<sup>111</sup> It seems that for most people, poetry is seen as a way to articulate something to the outside world; that is, poetry goes in one direction, from a writer out into an indifferent world. In this cacophony of poetry, mere publication is an “event . . . more like a funeral than a birth.”<sup>112</sup>

#### A. A POET’S REPUTATION IS MORE VALUABLE THAN ANY SINGLE POEM

In contrast to the staggering amount of writers, of readers we could count a few, a happy few, a band of readers.<sup>113</sup> Currently, about 120 literary journals in the United States are affiliated with institutions of higher

107. *Id.*

108. *Id.*

109. This Note does not discuss slam poetry and makes no comment on whether it would be a distinguishable community from that of published poetry. That said, slam poetry has seen a dramatic increase in popularity. In the 2000s, HBO’s wonderful Def Poetry Slam ran for seven seasons, airing a half hour of slam poetry hosted by hip-hop emcee Mos Def. INTERNET MOVIE DATABASE, *Def Poetry*, <http://www.imdb.com/title/tt0329823/> (last visited June 20, 2016). Slam poetry, which is almost exclusively performed on a stage, is sometimes seen as separate from on-a-page poetry. See Jeremy Richards, *Performing the Academy*, POETRY FOUND. (June 7, 2007), <http://www.poetryfoundation.org/article/179688>. The two are also sometimes set against each other, as if one is more true than the other or as if one is better than the other. *Id.* (referencing influential literary critic Harold Bloom’s dismissal of slam poetry as “loud and sweaty, [and] full of ‘rant and nonsense’”). I will not wade into the “stage versus page” controversy. *Id.* Further, I do not feel that debating the two subgenres is necessary to this Note. I will say that slam poetry, like any other kind of poetry or art form, can be sometimes a waste of time, sometimes fun, and sometimes fill you with sublime joy.

110. See FAVORITE POEM PROJECT, *Americans Saying Poems They Love*, <http://www.favoritepoem.org> (last visited June 20, 2016); see also Rothschild, *supra* note 105 (quoting Rich saying “[f]ewer people would feel the ‘fear of poetry’ if they heard it aloud as well as read it on the page”).

111. See Kate Angus, *Americans Love Poetry, But Not Poetry Books*, THE MILLIONS (July 21, 2014), <http://www.themillions.com/2014/07/americans-love-poetry-but-not-poetry-books.html> (comparing the 2011 book sales of two of the most successful American poets and an autobiography of a failed professional quarterback and finding Wendell “Berry and [Billy] Collins sold 2,928 and 18,406, respectively, while Tim Tebow’s autobiography sold over 282,000 copies within six months”).

112. Alpaugh, *supra* note 84.

113. See WILLIAM SHAKESPEARE, *THE LIFE OF KING HENRY THE FIFTH* act 4, scene 3.

education.<sup>114</sup> These journals and their academic editorial boards still serve the same function as they did that Rich identified in 1994 – these are the readers that write about poetry.<sup>115</sup> These are the critics, and importantly the teachers, that lead people to new poets.

These academics' jobs, if it is to survey the state of poetry and select the best poetry based solely on a poem itself, are impossible. Not just impossible, but utterly impossible. No critic, no matter how well-intentioned or well-funded, could possibly read every poem written in a year, or even hope to read a decent sample size of poems published in a year.<sup>116</sup> If a poet's goal is to be read by anyone other than immediate friends and family, the only way to cut through the masses is to network among other poets and among other academic critics.<sup>117</sup> Therefore, in the current state of poetry, a poet must nurture a network of people that know the poet to be a poet. In other words, the reputation of being a poet is likely more important than any given published poem.<sup>118</sup>

#### B. SELF-POLICING THIEVERY WITHIN THE CONTEMPORARY POETRY COMMUNITY

In 2011, Christian Ward won the “Exmoor Society’s Hope Bourne prize for his poem *The Deer at Exmoor*.”<sup>119</sup> The award brought attention to Ward’s poetry but probably not the kind he wanted.<sup>120</sup> His award-winning poem was “revealed as a copy of *The Deer*, by Helen Mort, which won the Café Writers Open Poetry Competition . . . in 2009.”<sup>121</sup> Following the revelation, other poets investigated Ward’s poetry and found other instances of thievery.<sup>122</sup> Within the span of a few weeks, poets across the Internet wrote about the controversy.<sup>123</sup> Ward’s previously-published poetry was

114. Rosemarie Dombrowski, *Academia vs. Poetry: How the Gatekeepers of Contemporary Literature Might Be Killing It*, THE REVIEW REVIEW, <http://www.thereviewreview.net/publishing-tips/academia-vs-poetry-how-gatekeepers-contempor> (last visited June 20, 2016).

115. *Id.*

116. See Alpaugh, *supra* note 84 (arguing that collections of the “best” poetry are disingenuous because the editors of the collection often publish their friends and colleagues).

117. See *id.* (arguing that if Sylvia Plath were published today, her poetry would be doomed to obscurity unless she had a prestigious teaching position).

118. This may also be true in the world of slam poetry. See discussion *supra* note 110.

119. Sandra Beasley, *Nice Poem; I’ll Take It*, N.Y. TIMES (Apr. 26, 2013), [http://www.nytimes.com/2013/04/28/books/review/nice-poem-ill-take-it.html?\\_r=1](http://www.nytimes.com/2013/04/28/books/review/nice-poem-ill-take-it.html?_r=1).

120. *Id.*

121. *Id.*

122. *Id.*; see also Alison Flood, *Poetry Competition Winner Exposed as Plagiarist*, THE GUARDIAN (Jan. 14, 2013), <http://www.theguardian.com/books/2013/jan/14/poetry-competition-winner-plagiarist>.

123. See, e.g., Matt Merritt, *Poetry and Plagiarism*, POLYOLBION (Jan. 7, 2013), <http://polyolbion.blogspot.co.uk/2013/01/poetry-and-plagiarism.html>.

removed from websites.<sup>124</sup> Mort herself tweeted “thanks for the backhanded compliment, Mr Ward, but I think you’ll find thieving poetry is bad karma. At the very least.”<sup>125</sup> Finally, Ward issued a statement expressing sorrow for his “mistakes” and that he was going through his catalog of poems to make sure there were no more incidents of plagiarism:

I want to be as honest as I can with the poetry community and I know it will take some time to regain their trust. Already I have discovered a 2009 poem called *The Neighbour* is very similar to Tim Dooley’s *After Neruda* and admit that a mistake has been made. I am still digging and want a fresh start. I am deeply sorry and look forward to regaining your trust in me.<sup>126</sup>

Notably, Ward’s taking was not described in the language of intellectual property. Sometimes the accusations were of plagiarism, sometimes of thievery. The two labels are interchangeable.<sup>127</sup> Ward *took* the poems.<sup>128</sup> Ward did not take from poems to make new meaning, he merely took.<sup>129</sup> Poet Susan Beasley proved her allegations by comparing her poem and Ward’s poem:

The poems are identical in line and stanza, except for a few strategic word changes. The title rotates by one summer calendar month. “The man you love” becomes “the woman you love;” my “baseboards” become “floorboards.” Instead of a sister who thickens “gasoline with jelly, collects canisters” with the intent of making Molotov cocktails, Ward creates a brother, a milder

124. See Christian Ward, *Three Poems*, YALE J. FOR HUMAN. IN MED., <http://yjhm.yale.edu/poetry/cward20090411.htm> (last visited Mar. 8, 2016) (the website stated “The poems previously published on this page were submitted by and attributed to Christian Ward, but were actually the work of award winning poet and novelist Owen Sheers”). The site was taken down sometime after March 8, 2016. See also The Bridport Prize, <https://www.bridportprize.org.uk/content/successes> (last visited July 4, 2016) (an award given to Christian Ward is listed in strikethrough font, as if to signify the award has been retracted); see also Beasley, *supra* note 120 (referencing the above phrase from the website that was removed).

125. Helen Mort (@HelenMort), TWITTER (Jan. 7, 2013, 3:19 AM), <https://twitter.com/HelenMort/status/288243574376632321>.

126. *Poet Christian Ward says ‘I’m sorry’ after prize-winning work exposed*, W. MORNING NEWS (Jan. 12, 2013), <http://www.westernmorningnews.co.uk/Poet-Christian-Ward-says-m-sorry-prize-winning/story-17838451-detail/story.html>.

127. The etymology of plagiarism reveals that it was always meant to signify a heinous crime. The word, introduced in English in the sixteenth century to denote a literary thief, comes from the Latin *plagiarius*, which was a “kidnapper, seducer, plunderer, [or] one who kidnaps the child or slave of another.” PLAGIARISM, ONLINE ETYMOLOGY DICTIONARY, <http://www.etymonline.com/index.php?term=plagiarism> (last visited June 20, 2016).

128. Beasley, *supra* note 120.

129. See *id.*

criminal who “shoplifts canisters of petrol from the BP service station.”<sup>130</sup>

It is unsurprising that she ended her offer of proof with images of crime. Beasley admitted to having a “flexible definition of intellectual property,”<sup>131</sup> which presumably means she allows for some taking of poetry in more circumstances than intellectual property might allow. Had Ward taken parts of her poem to make one different enough to be considered his, it is presumed he would not be a wrong but rather allowable and admirable.<sup>132</sup> Ward’s actions were not allowable; he committed theft; he was not a poet but a thief.<sup>133</sup>

The story of Ward’s thievery was hardly isolated. Stories of plagiarist poets became almost common.<sup>134</sup> Even translations of poems were found to be plagiarized.<sup>135</sup> It became so prevalent that a British poet, Ira Lightman, a “prodigiously gifted ‘poetry sleuth,’ . . . has worked tirelessly to set the record straight, to find the copied poems and restore them, as it were, to their rightful owners.”<sup>136</sup> Parts of the poetry world have formed a “pitchforks at dawn” mentality toward the accused thieves.<sup>137</sup> Other poets lament that thieves *merely* plagiarized: “When [a plagiarist] stole my work, he didn’t make it better.”<sup>138</sup> In the community, largely devoted to the Romantic notion of an individual’s poetic expression, “borrowing has become even more cemented as a literary crime.”<sup>139</sup> The end result for a thief is almost always the same. They are shunned, shamed, and exiled.

In all this, however, there is little legal action.<sup>140</sup> Of course, some of the poets mentioned here hail from countries other than the United States,

130. *Id.*

131. *Id.*

132. See Eliot, *supra* note 21.

133. Beasley, *supra* note 120.

134. See, e.g., Rob Kidd, *Brisbane poet Graham Nunn denies accusations of plagiarism*, THE COURIER-MAIL (Sept. 16, 2013), <http://www.couriermail.com.au/news/queensland/brisbane-poet-graham-nunn-denies-accusations-of-plagiarism/story-fnihsrf2-1226719604925>.

135. Alison Flood, *Poet returns Stephen Spender prize after accusations of plagiarism*, THE GUARDIAN (Dec. 17, 2015), <http://www.theguardian.com/books/2015/dec/17/poet-returns-stephen-spender-prize-after-accusations-of-plagiarism>.

136. Katy Evans-Bush, *Poetry has a plagiarism problem*, LITTLE ATOMS (July 26, 2015), <http://littleatoms.com/words/poetry-has-plagiarism-problem>.

137. *Id.*

138. Ruth Graham, *Word Theft*, POETRY FOUND. (Jan. 7, 2014), <http://www.poetryfoundation.org/article/247130> (quoting poet Ruth Ellen Kocher).

139. *Id.*

140. Cf. Evans-Bush, *supra* note 137 (a poet whose poem was allegedly stolen warned the thief that “his solicitor would be in touch”); *but see* Begley, *supra* note 6; Macklin v. Mueck, No. 00-10492-CIV, 2005 WL 1529259, at \*2 (S.D. Fla. Jan. 28, 2005) *amended*, No. 00-14092-CIV, 2005 WL 1529349 (S.D. Fla. Mar. 10, 2005) *aff’d*, 194 F. App’x 712 (11th Cir. 2006) (suit

and so, would not have access to our same intellectual property regime. That said, it is important to understand that the poets, while feeling a wrong, are dealing with the wrong within their own community. They expose and ostracize thieves. They correct their own record by removing stolen poems from websites. And an exposed thief, as Ward's remorseful statement shows, must work to regain the trust of the community.

Were poets to turn to the American intellectual property regime, it is doubtful they would find the remedy they enforce in their self-policing. To poets, wrongfully taking a poem is criminal and deserves a criminal punishment—the taker can no longer be trusted and must be excised from society.

Poets, when they do speak of intellectual property, seem to refer to copyright.<sup>141</sup> They may be better served by trademark law. As we earlier saw, a person's name can be considered a trademark if the name has been used often enough in the market to acquire a secondary meaning. For example, "Christian Ward" may be both an individual's name and a trademark that denotes a certain quality of poetry. By cloaking Helen Mort's poem under the trademark "Christian Ward," Ward engaged in reverse passing off. By doing so, he confused the community as to the source of the poems in question. It would be as wrong for him to publish one of his own poems under the trademark "Helen Mort." Trademark law, however, is as based on economics as copyright. Mort would need to show that Ward's reverse passing off caused economic damages. Economic damages, however, do not seem to offend the poetry community.

Neither are the American versions of moral rights suitable to the poetry community. While Ward did steal poems, he did not appropriate another person's likeness. This means the right to publicity is no help. The right of attribution may be helpful. Another poet may seek legal recognition that Ward was not the author of a poem. But American law scarcely recognizes a right of attribution for any artists other than visual artists.

Poets, then, are left to their own devices. The wrong they revile is thievery, and the remedy they seek is exile.

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brought by poet against a website for publishing his poems and therefore infringing on his copyright).

141. Interview with Katharine Coles in Grand Forks, North Dakota (Apr. 5, 2016) (transcript on file with North Dakota Law Review).

### C. SELF-LEGISLATING FAIR USE WITHIN THE POETRY COMMUNITY

Self-policing can quickly breed crusaders.<sup>142</sup> The punishment for exposed plagiarists is severe.<sup>143</sup> This combination can be combustible. At the same time, poets were working in an art form that, by its nature, took from others' work.<sup>144</sup> All this with a hazy line between imaginative borrowing and loathsome thievery.<sup>145</sup>

To attempt to proactively solve these controversies, some members of the community wrote the Code of Best Practices in Fair Use for Poetry.<sup>146</sup> The authors of this quasi-regime were aware of the legal intellectual property regime.<sup>147</sup> They understood that intellectual property law was supreme and would "apply with undiminished force."<sup>148</sup> They were not writing on a blank slate. They understood that their own intellectual property regime must fit within the larger regime. Thus, the Code articulates seven principles "to which the doctrine of fair use clearly applies."<sup>149</sup>

Like many legislative products, the Code was a compromise of competing interests:

[P]oets . . . want their poetry to be as widely available to potential audiences as possible. . . . However, poets . . . expressed anxiety about how [the Internet] might affect their ability to make money from their work and to establish and advance academic careers. . . . [T]hey were concerned about the ease with which [the Internet] enable[s] others to distribute and alter their poems without

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142. See Greg Freeman, *Interview with Ira Lightman*, WRITE OUT LOUD (June 9, 2013), <http://www.writeoutloud.net/public/blogentry.php?blogentryid=37078> (responding to a question whether he should be so vocal in outing plagiarists by arguing that it "takes someone who will stand up as a spokesperson for stopping poetry plagiarism for more witnesses to come forward").

143. Severity, of course, is relative to the community. See Graham, *supra* note 139 (quoting Kocher as saying "[o]ne of the hardest things is that the stakes in poetry are not very high. I'm not a rocket scientist. I'm not going to cure cancer with one of my poems. I don't get paid an extraordinary amount of money, and I don't have any great notoriety outside of the writing community. So to take something that most people engage in as an act of joy and sully it this way—it just seems one of the most egregious offenses.")

144. See *supra* section III.

145. See Eliot, *supra* note 21.

146. *Code for Fair Use for Poetry*, *supra* note 23. In the early nineteenth century, Percy Shelley praised poets as the "unacknowledged legislators of the world." Percy Bysshe Shelley, A DEFENCE OF POETRY 10 (Palala Press 2015) (1821), <http://www.poetryfoundation.org/learning/essay/237844?page=10>. Perhaps he would find it ironic that twenty-first century poets are unacknowledged legislators of their own world.

147. Indeed, two co-authors of the project, Peter Jaszi and Jennifer Urban, were law professors. *Code for Fair Use for Poetry*, *supra* note 23, at 1.

148. *Id.* at 6.

149. *Id.* at 8.

permission. At the same time, poets urgently expressed their need to use material derived from the poems of others . . . .<sup>150</sup>

The Code does seek to protect economic interests.<sup>151</sup> It is important to note that the economic interest is tied to academic careers, as Rich predicted.<sup>152</sup> As Coles and her working group traveled across the country to ask the community what it wanted out of the Code, she found that most poets' instinct was to allow their poems to be read, written about, and taught in college classrooms "without . . . stupid financial obstacles."<sup>153</sup> Thus, in the Code, economic interest is at most a secondary concern. This is contrary to the traditional justification for copyright, which is purely economic. Rather, the Code "embrac[es] the overarching value of access to poetry."<sup>154</sup>

Note this difference. Intellectual property aims to "promote the Progress of . . . Arts" by giving rights to creators.<sup>155</sup> The Code does not speak of progress.<sup>156</sup> The Code, instead, praises access. As Cole argued, it is "astonishingly liberal. It basically says that [poets] think anybody should be able to use our work, and it would be nice if they asked our permission."<sup>157</sup> The Code's primary focus is not on an individual creator, but on readers. In other words, its focus is the community.

The principles, written in decidedly statutory-like language, set forth rules under instances of (1) parody and satire, (2) remixing, (3) education, (4) criticism and commentary, (5) epigraphs, (6) sharing poetry online, and (7) literary performance.<sup>158</sup> What is striking is how permissive the Code is. Generally, a "poet may" take from another published work when certain conditions are met.<sup>159</sup> The presumption of the Code is to allow taking, contrary to copyright's presumption of exclusivity. This follows from the

150. *Id.* at 2.

151. *E.g., id.* at 13 ("Where a poet's work is reasonably available for purchase in volume form, [internet sharers] should restrict themselves to the use of single or isolated poems only").

152. Rothschild, *supra* note 105.

153. Interview with Katharine Coles in Grand Forks, North Dakota (Apr. 5, 2016) (transcript on file with North Dakota Law Review).

154. *Code for Fair Use for Poetry*, *supra* note 23, at 1.

155. U.S. CONST. art. I, § 8, cl. 8.

156. The Code does argue that poetry is "an *evolving* set of practices that engage, and are engaged by, the creative work of others." *Code for Fair Use for Poetry*, *supra* note 23, at 2 (emphasis added). 'Evolve' and 'progress' are not necessarily synonyms—the latter presumes that each step is qualitatively better while the former presumes that each step is qualitatively different—even if the two concepts are linked by a notion that the art form changes in successively across time.

157. Interview with Katharine Coles in Grand Forks, North Dakota (Apr. 5, 2016) (transcript on file with North Dakota Law Review).

158. *Code for Fair Use for Poetry*, *supra* note 23, at 9-14.

159. *Id.* at 9.



Code's embrace of access to poetry. Instead of erecting barriers to poetry, the Code allows new poets (and thus readers) to take as much as is necessary from existing works.

At the same time, sensitivity to poets' reputations can be seen throughout the Code. While it is fair to use another poem to "hold [something] up to ridicule," a poet should "take care that the source material is drawn from a range of different poets' work."<sup>160</sup> In other words, do not pick on one poet too often. Elsewhere, the Code says it is fair use to perform another's poems to an audience if the "reading [is] primarily intended to celebrate the poet in question."<sup>161</sup>

Finally, we can see that fair use always requires a new poem to transform the taken material in some way. Of course it is not fair use if the taking is done "illegally or in bad faith."<sup>162</sup> But more than only look to the taker's intention, the Code demands that poets avoid "re-use [that] adds no significant value to the original."<sup>163</sup> Reappropriation of others' language should not be "[m]ere exploitation of existing copyrighted material."<sup>164</sup> In other words, the Code follows Eliot's maxim: when you take from another poet, "make it into something better, or at least something different."<sup>165</sup> The literary thief Ward would find no safe harbor in the Code.<sup>166</sup>

Thus, the Code focuses on the community and on the reputations of those within the community. While economic interests are represented, they are not foregrounded. Taking is presumed, and any inappropriateness is judged by what the taking produced.

## V. CONCLUSION

If copyright law should be rethought, poets are providing an example of what that might look like. Their quasi-regime foregrounds the importance of reputation within their community. Sharing is presumed and is not considered an exception to a rule of not taking. Taking from another is allowed if the new poet imaginatively uses the taken material. Taking without imagination—mere copying—is theft, and the punishment is a loss

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160. *Id.*

161. *Id.* at 14.

162. *Id.* at 8.

163. *Code for Fair Use for Poetry*, *supra* note 23, at 9.

164. *Id.* at 10.

165. Eliot, *supra* note 21, at 114. These principles also echo the lament of a victim of plagiarism, who complained that when a thief "stole my work, he didn't make it better." Graham, *supra* note 139.

166. *See* discussion *supra* section IV.B.

of reputation or even exile from the community. Importantly, economic considerations are not completely ignored, though they are lessened.

In other words, intellectual property law need not completely abandon its economic justification. But the Internet continues to showcase creative communities that do not rely on that economic justification. Those communities continue to grow. And those communities do seek to assert some form of intellectual property protection. The legal community may be well served to consider community and reputation justifications as intellectual property develops to meet the needs of these new communities.

*Evan Nelson\**

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