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A Name I Call Myself: Creativity and Naming

Laura A. Heymann
College of William & Mary

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A Name I Call Myself: Creativity and Naming

Laura A. Heymann*

In recent years, various disputes involving the use of creative works have demonstrated how trademark-related concerns lurk at the heart of what are ostensibly copyright-related claims. When recording artists such as Jackson Browne or the members of Heart object to the unauthorized use of their songs in connection with a political campaign, they are most likely not troubled about the loss of revenue resulting from the use; rather, they are likely concerned that the public will wrongly assume that the use of the song indicates that they have endorsed the political candidate. But because it is sometimes easier for them to bring a successful copyright claim than a false endorsement claim, we risk an overbroad result: an injunction against the use of the work altogether, despite its expressive benefits, rather than a narrower injunction requiring a disclaimer or similar information-correcting device.

Naming practices can, on occasion, illustrate the reverse trademark/copyright divide: disputes that more naturally fit a trademark-related framework but that actually embody copyright-related concerns. For example, innumerable advice columns have featured some variation of the following question: "We chose a lovely, original name for our soon-to-be born baby and told my sister-in-law about it. Now she has named her child, born last week, the exact same name. I can't believe she stole our baby name. Should I ever speak to her again?" Although naming is typically seen as trademark-related, part (or all) of what causes this anguish is a copyright-related concern: the creativity that went into choosing, finding, or inventing the name and, relatedly, a desire to be recognized for that creativity.

* Class of 2014 Professor of Law, College of William & Mary, Marshall-Wythe School of Law. Many thanks to Michael Adams, Mark Badger, Eric Goldman, Justin Hughes, Greg Lastowka, Mark Lemley, Mark McKenna, Brent Nicholas, Zahr Said, Michal Shur-Ofry, Jessica Silbey, David Simon, Eva Subotnik, Peter Swire, John Tehranian, Rebecca Tushnet, and the participants in the "Governing the Magic Circle: Regulation of Virtual Worlds" symposium at the UC Irvine School of Law, for which this piece was written, and the 2011 Intellectual Property Scholars Conference. Thanks also to John Alford, Patrick Berry, and Stefan Oehrlein for research assistance and to the staff of the *UC Irvine Law Review*. One of the risks of writing about online environments is the speed at which they change. The citations in this Article were accurate as of March 29, 2012, but may have since become outdated.

Social networks, virtual worlds, and other forms of electronic interaction that require users to choose identifiers to facilitate communicative exchanges offer interesting environments in which to consider this intersection of trademark and copyright interests. If users select names as much for their expressive power as for their functional ability to distinguish one user from another, as they appear to do, what does that tell us about the kinds of creativity that matter to noncommercial creators? From where do some participants get the idea that names can be owned and, therefore, “stolen”? And what, then, do these instincts tell us about the interests and rhetoric that are typically invoked in discussions of intellectual property law?

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Proper names are poetry in the raw. Like all poetry, they are untranslatable.

—W.H. Auden¹

INTRODUCTION

Readers of advice columns have no doubt at least once come across something like the following (hypothetical) missive: “We chose a lovely, original name for our soon-to-be born baby and told my sister-in-law about it. Now she has named her child, born last week, exactly the same name. I can’t believe she stole our baby name. Should I ever speak to her again?”²

1. W.H. Auden, *Names, Proper*, in *A CERTAIN WORLD* 267, 267 (1970); cf. John Colapinto, *Famous Names*, *NEW YORKER*, Oct. 3, 2011, at 38, 39 (discussing naming consultant David Placek’s view that “the best brand names, like poems, work by compressing into a single euphonious word an array of specific, resonant meanings and associations,” but noting that Placek’s clients are typically more concerned with effectiveness than art).

2. See, e.g., Gail Saltz, *My Sister-in-Law Stole My Baby Name! What to Do If Someone Wants to Use the Same Moniker for Their Child*, *TODAY* (Mar. 21, 2007, 5:38 PM), <http://today.msnbc.msn.com/id/17724692/ns/today-relationships/t/my-sister-in-law-stole-my-baby-name>. The scenario is common enough to have been mentioned in an episode of *Sex and the City* and an episode of *Seinfeld*. See *Sex and the City: The Baby Shower* (HBO television broadcast Aug. 9, 1998) (depicting Charlotte complaining about a childhood friend who “stole [the] baby name” that she invented when she was eleven years old); *Seinfeld: The Seven* (NBC television broadcast Feb. 1, 1996) (depicting George’s outrage when his

The selection or invention of a name for one's child—or one's pet, product, or avatar—is frequently associated with such property-related rhetoric. It should not be surprising in a society where naming rights for buildings go for millions of dollars³ that one's name is thought of as property and thus as something that might be bought, sold, or stolen.⁴ Marketers of consumer data have accustomed us to the notion of names as the subject of commerce, a position some online environments anticipate when they explicitly restrict the sale of usernames.⁵ Our continuing (and unfortunate) awareness of the crime commonly known as identity theft has also trained us to think of the indicia used to identify ourselves in society, including our names, as things that can be owned. And various literary metaphors invoke the concept of one's name as the hook on which reputation hangs; when one's reputation is besmirched, it is one's name that is seen as damaged or pilfered goods.⁶

When parents or parents-to-be complain of someone having “stolen” the name they have chosen for their baby, this property rhetoric is not likely to have been driven by legal concerns. Indeed, the law has a particularly utilitarian view of names as property. Names have value in the law largely as a result of their denotative function—that is, their ability to identify an individual or entity. Thus, the use of a name is unlawful when that use confuses or misleads consumers (as in trademark law's prohibition of the use of another's trademark to cause confusion as to source), or when the name is used to obtain an unauthorized economic benefit (as in a false endorsement case, identity theft, or a violation of the right of publicity). The same is true in environments governed by contract rather than by tort, such as terms of service on social networking sites that prohibit impersonation of other users. These concerns are not likely to be relevant to the

girlfriend reveals the name for his future first-born child to her cousin, leading the cousin to give it to her child: “It's my name. I made it up. You can't just steal it.”).

3. See, e.g., Ann Bartow, *Naming Rights and the Physical Public Domain*, 40 U.C. DAVIS L. REV. 919, 926–29 (2007); Joseph Blocher, *School Naming Rights and the First Amendment's Perfect Storm*, 96 GEO. L.J. 1, 9 (2007).

4. Courts' rhetoric occasionally contributes to this notion. See, e.g., *Perfection Mfg. Co. v. B. Coleman Silver's Co.*, 270 F. 576, 577 (7th Cir. 1921) (referring to the “business parasite” who “first steals another's name, then his business, and finally attempts to deceive the retail trade”); *Pump, Inc. v. Collins Mgmt., Inc.*, 746 F. Supp. 1159, 1166 (D. Mass. 1990) (“A world-famous group such as Aerosmith, enjoying a strong base of loyal teenage support, would have absolutely no reason for stealing the name of an unknown band to sell its records. Indeed, such action would be irrational.”).

5. See, e.g., *Dwyer v. Am. Express Co.*, 652 N.E.2d 1351, 1356 (Ill. App. Ct. 1995) (affirming the dismissal of a misappropriation claim based on the rental of cardholder information for marketing purposes, noting that the value came from defendants' aggregation of names on the list); *The Twitter Rules*, TWITTER HELP CENTER, <http://support.twitter.com/articles/18311-the-twitter-rules> (last visited Mar. 29, 2012) (noting that selling usernames is prohibited).

6. The usual citation is to *Othello*: “Who steals my purse steals trash; 'tis something, nothing; / 'Twas mine, 'tis his, and has been slave to thousands; / But he that filches from me my good name / Robs me of that which not enriches him, / And makes me poor indeed.” WILLIAM SHAKESPEARE, *OTHELLO* act 3, sc. 3.

hypothetical letter writer, as she is not worried that someone will use her chosen baby name to commit fraud, reap a commercial benefit, or ruin her child's reputation, nor is she likely concerned that some future third-grade teacher will be unable to tell the two children apart. Indeed, in some instances, the child has yet to be born; the naming announcement is intention but not yet action.

Rather, the parent sees her chosen baby name as property in a Lockean sense, in that she views naming as a creative activity that leads to ownership.⁷ "Stealing" in this scenario relates not to economic interests or to issues of fraud or deceit but to dignitary interests: the idea that products of creative expression "belong" to their creator and so should not be copied within a particular community without either permission or attribution. This is a belief that is likely shared by creators in many fields, even as commentators debate whether such property metaphors are useful in discussing copyright infringement.⁸ Some of these creators may indeed view their work as property in the economic sense: they expect at some point to receive remuneration for their efforts and so experience the harm that comes from copying as economic injury. But even creators who are motivated to create by intrinsic rewards may still view their works through a property lens. Part of this feeling might be explained by the fact that they work in the shadow of the law. Because U.S. copyright law affords all qualifying authors legal rights in their work, so long as that work surmounts relatively low hurdles of originality and fixation,⁹ authors who declare that others may use their work without cost so long as it is attributed gain the authority to do so from the ownership of the work that copyright law provides. But even where such creators are not influenced by their legal rights, the same Lockean sense of their creative efforts as something that belongs to them is likely to engender talk of dignitary transgressions in property-related terms: that someone has copied or altered work that is "mine." When an author seeks attribution for her work, after all, she is seeking a public acknowledgment that the work belongs to her in some sense.

Indeed, the act of naming may feel, to some, as if it involves much the same sort of creative process that, for others, attends writing a poem or composing a

7. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ch. 5, § 27 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) ("Whatsoever then [man] removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joynd to it something that is his own, and thereby makes it his Property.").

8. Many commentators have noted that in the context of nonrivalrous goods, the notions of "theft" and "stealing" may be inapt. See, e.g., Stuart P. Green, *When Stealing Isn't Stealing*, N.Y. TIMES, Mar. 28, 2012, at A27. Regardless of the vocabulary used, however, such goods are often discussed in terms of ownership, control, and transgression. See *id.* (suggesting that concepts such as "unauthorized use, trespass, conversion and misappropriation" would be more appropriate terminology).

9. 17 U.S.C. § 102 (2006); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) ("Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.").

song: thoughtfulness about the message that the choice of name will communicate; the incorporation of cultural and other references; decisions about rhythm, meter, spelling, and other prosodic elements; and the purposeful claiming of that act of creation as one's own.¹⁰ Even when a name is appropriated rather than invented—a child named for a favorite literary character, for example¹¹—some no doubt believe that this process involves creative activity because the use of the name in a new context transforms the name's meaning into something more personal, even as it involves its own act of copying.¹² The woman who names her daughter Lisbeth after the heroine of *The Girl with the Dragon Tattoo*,¹³ for example, likely does so because the character or the story means something to her. When her sister-in-law hears of this choice and decides to adopt the name for her own child, she is seen as devaluing the creative expression inherent in the initial choice by avoiding the effort required to come up with a similarly meaningful name on her own.¹⁴ For those who may not otherwise see themselves as authors or artists, then, the process of naming is a small way of giving form to one's creative impulses. It should therefore not be surprising that those who engage in naming feel a sense of both authorship and ownership over the product of this process, in a Lockean sense, and view the act of deliberate duplication of the name as a social, if not legal, transgression.

Because the law does not tend to treat names as products of creative expression (U.S. copyright law, for example, generally denies protection to names

10. I do not mean to suggest by this that all types of creative activity should be assessed or valued equally; rather, I contend that different individuals will express creative impulses in different ways, some more prominently than others. Cf. James C. Kaufman & Ronald A. Beghetto, *Beyond Big and Little: The Four C Model of Creativity*, 13 REV. GEN. PSYCHOL. 1 (2009) (proposing a model of creativity ranging from “mini-c” creativity to “Big-C” creativity). Of course, this raises the question of what it means to be creative, a task too enormous for me to tackle here. Recent forays in the intellectual property literature include Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 NW. U. L. REV. 1441 (2010), and Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007). Thanks to David Simon for pointing me to Kaufman and Beghetto's work.

11. One study concludes that most baby names in the United States are copied rather than invented. Matthew W. Hahn & R. Alexander Bentley, *Drift as a Mechanism for Cultural Change: An Example from Baby Names*, 270 PROC. ROYAL SOC'Y LONDON B: BIOLOGY LETTERS 120 (2003).

12. Cf., e.g., Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004) (discussing how nontransformative copying can serve free speech interests).

13. Lisbeth Salander is the main character in Swedish author Stieg Larsson's Millennium series, the first novel of which was published in 2008 under the English title *The Girl with the Dragon Tattoo*.

14. At the same time, the sister-in-law might likewise claim that forbidding her from using the name of her choice would infringe on her autonomy and personhood. Cf. Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1544 (1993) (considering “a basic question at the heart of Lockean natural law: what happens when a conflict arises between fundamental entitlements of the public, and the moral claims that a creative laborer possesses by virtue of having created an intellectual product?”).

on the grounds that names do not exhibit the required amount of creativity¹⁵), only creators who have rights in a copyrightable work with which a name is associated can use the law to vindicate interests in the name itself that arise from the creator's perception of the name as a creative work.¹⁶ This is not to say that the law fails to engage with the creative impulse in naming altogether. Courts have considered the name of a fictional character, for example, in determining whether that character is sufficiently delineated to be copyrightable as opposed to being merely a stock figure.¹⁷ Trademark doctrine suggests that more inventive trademarks are stronger marks entitled to more protection, while section 2(a) of the Lanham Act allows the U.S. Patent and Trademark Office to refuse registration to names with particular connotations, such as names deemed "immoral" or "scandalous."¹⁸ And although its impact has been blunted by later election law cases, the Supreme Court's decision in *McIntyre v. Ohio Elections Commission*,¹⁹ holding that the plaintiff had a First Amendment right to distribute handbills under the pseudonym "Concerned Parents and Tax Payers," evidences recognition of the importance of expressing oneself creatively through naming, even if the chosen name obscures one's "true" identity. But the law's utilitarian focus on naming's denotative function means that individuals and entities that experience others' use of a name as an expression-related harm (rather than as, say, fraud) must typically turn to extralegal regimes for vindication.

As various scholars have discussed, norms and other means of enforcement within a particular community can reinforce values that are important to the community without the need for more formal legal proceedings. An ever-growing

15. 37 C.F.R. § 202.1 (2011) (noting various works not subject to copyright, including "[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents").

16. *Cf.*, e.g., Roberta Rosenthal Kwall, *Originality in Context*, 44 HOUS. L. REV. 871, 882 (2007) ("Moral rights are aimed at preserving an author's artistic autonomy and dignity; copyrights afford economic protection and are steeped in a utilitarian framework."). The exception in U.S. copyright law is the Visual Artists Rights Act, which provides limited moral rights-like protection for certain works of visual art. *See* 17 U.S.C. § 106A (2006); *see also* *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) (rejecting attempt to use Lanham Act to vindicate attribution interest); *cf.* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959–61, 1014–15 (1982) (describing the types of personal property bound up with personhood and advocating legal protection as against competing property claims not tied to personhood).

17. *See infra* notes 95–98 and accompanying text.

18. *See infra* notes 69–77 and accompanying text; *see also* Lanham Act § 2(a), 15 U.S.C. § 1052(a) (2006). The latter phenomenon also appears in various online environments' terms of service, as well in state court decisions denying name change petitions. *See, e.g., Terms of Service*, SECOND LIFE, <http://secondlife.com/corporate/tos.php> (last updated Dec. 15, 2010) (prohibiting account names that are "vulgar, offensive, or otherwise inappropriate"). One difference between the two systems is that the Patent and Trademark Office's refusal to register a trademark does not prevent the putative registrant from using the mark in commerce, whereas an online network's refusal to allow a certain username to be registered does prevent its use on that network.

19. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 337 (1995).

group of intellectual property scholars have considered what is typically called “IP without IP” or “IP’s negative space”—realms in which creativity apparently flourishes without intellectual property protection but with the constraint provided by community norms or regulation.²⁰ It is in such realms that the creative interests arising from a view of names as property are recognized and adjudicated. For example, as David Fagundes has entertainingly demonstrated, the roller derby community places a high value on creativity in naming, such that it formally prohibits duplication of roller derby names even when there is little risk that audience members will confuse two skaters using the same name.²¹ The letter writer whose sister-in-law “stole her baby name,” by contrast, is working within less formal, but no less deeply felt, community norms—namely, that within certain trust-based relationships, one does not duplicate another’s naming efforts without permission. In both cases, there is a copyright-like interest, but not the economic one that is traditionally assumed to incentivize authors. Rather, the interest—if not a pure incentive—is twofold: preventing duplication and, thereby, inviting recognition of one’s authorial efforts.

These two interests—uniqueness and recognition—are closely connected. To begin with, naming is, quite obviously, related to issues of personality. When we name ourselves (as in a social network) or name others, we are not only making reference possible but also engaging in an act of identity creation. As a result, we are apt to choose or invent names that serve not only as a reference but also as a way of communicating some quality or characteristic about ourselves or the people or things we are naming. Additionally, and relatedly, this act of naming and communicating carries with it a desire for recognition of the creativity inherent in the naming process. The letter writer in the advice column is likely motivated not only by the desire to name her child something personal and individual but also by the desire to be recognized for that choice. If she were simply trying to avoid the plethora of Emilys and Daniels in the kindergarten class by choosing Rosetta or Ethelred, she might be concerned that her sister-in-law’s copying represents the camel’s nose in the tent, and that her unique child might now be less special. But she also likely wanted to prevent her sister-in-law from taking credit when others said, “What a beautiful name! How did you come up

20. Some early forays include Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121 (2007); Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187 (2008); 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); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006). For commentary on this scholarship, see, for example, Rochelle Cooper Dreyfuss, *Does IP Need IP?: Accommodating Intellectual Production Outside the Intellectual Property Paradigm*, 31 CARDOZO L. REV. 1437 (2010); Elizabeth L. Rosenblatt, *A Theory of IP’s Negative Space*, 34 COLUM. J.L. & ARTS 317 (2011).

21. David Fagundes, *Talk Derby to Me: Emergent Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093, 1111, 1123–24 (2012).

with it?” The concern for credit, in this instance as in many others, is so closely tied with creativity as to be nearly inseparable. The impulse to say “I did this” evolves, I think, quite naturally into “This is mine”—hence the belief that the baby’s name was the letter writer’s “property” to begin with.²²

Both the desire to communicate via the choice of a name and the feeling of transgression when that creative act is dishonored depend on the presence of a community. If one indeed intends to engage in creative expression through naming, one’s audience must be expected to understand or appreciate the effort. Likewise, one is more apt to feel as if a name has been “stolen” if the perpetrator is a member of one’s community, however defined, rather than a stranger. The participant in an online community whose username pays homage to Buffy the Vampire Slayer is more likely to care if another member of that online community adopts the same username as opposed to a participant in another, unrelated community. Thus, the property-like approach to names in these situations both gives rise to and is reinforced by norms in those communities that see names as works of authorship and experience copying of those works as moral rights-like harms.

We now have many more ways in which to engage in and observe this kind of creativity than ever before. Our online naming opportunities, including e-mail addresses, social networking sites, blog writing and commenting, and virtual worlds such as Second Life and World of Warcraft, all encourage us, by offering limited space for our expressive impulses, to demonstrate that brevity is indeed the soul of wit.²³ Because we are attaching names to online identities that are both ourselves and not ourselves, we can experience naming both as claiming and as identity creation. We can participate only once, using the same screen name in each online interaction, or change our names with each forum or over time,

22. Christopher Buccafusco & Christopher Jon Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31 (2011) (demonstrating that authors who maintain a creative attachment to their work are likely to value it higher than would the market); David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652, 675 (2010) (discussing the common view of property, as opposed to the “formal legal definition,” that “gives property romance its formidable force”); F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CALIF. L. REV. 1, 36 (2004) (noting “how seriously some people take protection of ‘their ideas,’ even in contexts where those ideas cannot be protected using the laws of intellectual property”); Jessica Silbey, *Harvesting Intellectual Property: Inspired Beginnings and “Work-Makes-Work,” Two Stages in the Creative Processes of Artists and Innovators*, 86 NOTRE DAME L. REV. 2091, 2122 (2011) (noting that creators’ description of their work “in material, physical terms strengthens their possessive impulse and in some cases manifests as assertions of control that are more robust than current intellectual property law provides”); cf., e.g., Fauchart & von Hippel, *supra* note 20, at 199–200 (noting the attribution norm among French chefs who desire reputation-related benefits from recipe disclosure).

23. Cf. CHRISTOPHER JOHNSON, *MICROSTYLE: THE ART OF WRITING LITTLE* (2011) (providing suggestions for effective short communications); Charlene Hagström, *Playing with Names: Gaming and Naming in World of Warcraft*, in *DIGITAL CULTURE, PLAY, AND IDENTITY: A WORLD OF WARCRAFT READER* 265, 276 (Hilde G. Corneliussen & Jill Walker Rettberg eds., 2008) (noting that creativity in naming is “highly valued” in World of Warcraft).

creating our own personal villages of online identities or leaving a “trail of discarded online aliases, each a distillation of how we viewed ourselves and our place in the world at the time of sign-on.”²⁴ And we can observe how various online communities acknowledge and respond to the interests in uniqueness and authorial recognition, either by establishing rules of conduct that control the names participants can adopt or by enhancing system architecture to accomplish the same goals.²⁵

To be clear, the fact that naming practices may exhibit some of the same interests and incentives as other works of authorship does not mean that the law should expand to protect naming choices. And not every naming decision exhibits the same degree of creativity in selection or invention. But because we can be fairly confident that most personal naming choices are incentivized not by economic interests but by personality-based interests in creation, expression, and authorial recognition, we might use communities, particularly online ones, as laboratories to determine whether and how the law should respond to these interests.

I. NAMING AND CREATIVITY

Naming is not a rote or thoughtless exercise, even if the result of the naming process is not particularly interesting or unusual. The naming of a child, a pet, an avatar, a product, or a band is a deliberative, creative act that often has cultural significance no matter whether the name is selected or invented, in part due to the perceived permanence of the decision.²⁶ Names are pondered over, made the subject of both informal and formal focus groups, and often kept secret until their official release for fear that someone else (another parent or a competing company) will use the name first.²⁷ Pharmaceutical names, which are typically

24. Amanda Hess, *The Eternal Shame of Your First Online Handle*, GOOD (June 29, 2011), <http://www.good.is/post/the-eternal-shame-of-your-first-online-handle> (featuring contributions from various writers about why they chose their first screen names).

25. For example, when Twitter users developed a norm of crediting the original user when a tweet was retransmitted, Twitter eventually built “retweeting” functionality into the software to make attribution easier. See Axel Bruns, *Ad Hoc Innovation by Users of Social Networks: The Case of Twitter* (Sept. 19, 2011), http://snurb.info/files/2011/Ad_Hoc_Innovation_by_Users_of_Social_Networks.pdf.

26. See, e.g., JOHNSON, *supra* note 23, at 116 (“Names of punk and heavy-metal bands have long been a genre of antibranding that embraces everything offensive and unappealing.”); John Jugensen, *From ABBA to ZZ Top, All the Good Band Names Are Taken*, WALL ST. J., Feb. 16, 2010, at A1 (describing trend in modern rock of “unwieldy or nonsensical” names); Stephanie Kang, *Naming the Baby: Parents Brand Their Tot with What’s Hot*, WALL ST. J., Dec. 26, 2003, at B1 (describing trend of naming babies after brand names); Stephanie Rosenbloom, *Mi, a Name I Call Myself. And You Are?*, N.Y. TIMES, Apr. 13, 2006, at G1 (describing choices users make in selecting screen names).

27. See, e.g., Alexandra Alter, *The Baby-Name Business*, WALL ST. J., June 22, 2007, at W1 (interviewing parents who hired name consultants when naming their children); Ruth Shalit, *The Name Game*, SALON (Nov. 30, 1999), <http://www.salon.com/1999/11/30/naming> (describing branding companies). In such cases, naming begets naming, as in the case of the creative names often given to

invented, are subject to regulation by the Food and Drug Administration to ensure that creativity in naming doesn't frustrate effective provision of prescriptions.²⁸ A name may attempt to connote certain things about an individual; work as a commentary, criticism, or parody of existing structures, names, or rules; or, in some cases, be the subject of a public battle over ownership, as occurred during the "Roxanne Wars" of the 1980s, in which rap artists released several rounds of "answer records" battling over the rights to the name "Roxanne."²⁹

The attention given to choosing or inventing a name results from a name's two primary functions: its denotative function and its connotative function.³⁰ A name's denotative function is what allows a name to refer to or identify something. When someone tells us that she is going to have lunch with Susan at noon or that she is heading to the Apple Store to buy a new iPad, the words "Susan," "Apple," and "iPad" all, in context, point to a referent identified by a shared understanding of that reference among the participants to the conversation. A name's connotative or expressive function conveys or suggests certain qualities, characteristics, or attributes about the individual or entity named or about the person or entity conferring the name.³¹ A child's distinctly religious, cultural, or ancestral name typically identifies his or her parents as members of a particular community. For example, starting in the 1960s, African American parents were considerably more likely to give their children invented names, a trend that, Stanley Lieberson concludes, "suggests an influence stemming from the broad and intense social and political changes beginning in the 1960s, a period marked by intensified African-American social protest, the development of the Black Power movement, a renewed emphasis on a distinctive and valued African-American culture, and black separatism."³² A chosen name may, similarly, facilitate engagement with a particular culture or group, such as when Chinese citizens

software or other products in development. *See, e.g.*, *Sagan v. Apple Computer*, 874 F. Supp. 1072, 1074 (C.D. Cal. 1994) (dismissing libel claim by astronomer Carl Sagan alleging that after he objected to Apple's use of "Carl Sagan" as an internal code name for a new personal computer, Apple changed the code name to "Butt-Head Astronomer"); Steve Lohr, *Can These Guys Make You "Bing"?*, N.Y. TIMES, July 30, 2011, at B1 (reporting that planned upgrades of Microsoft's search engine had been code-named for West Coast rock bands, including Metallica, Nirvana, and Soundgarden).

28. U.S. Food & Drug Admin., *How FDA Reviews Proposed Drug Names*, <http://www.fda.gov/downloads/Drugs/DrugSafety/MedicationErrors/ucm080867.pdf> (last visited Mar. 29, 2012); James Gleick, *Get Out of My Namespace*, N.Y. TIMES, Mar. 21, 2004, § 6 (Magazine), at 44 (noting that pharmaceutical companies "spend millions on market research to make sure their names are both serious and sexy").

29. *See, e.g.*, THE ANTHOLOGY OF RAP 11–12 (Adam Bradley & Andrew DuBois eds., 2010).

30. *See* Laura A. Heymann, *Naming, Identity, and Trademark Law*, 86 IND. L.J. 381, 394 (2011).

31. For an extreme example, see Chaya Babu, *Name Changers: 285 Indian Girls No Longer "Unwanted"*, MSNBC.COM (Oct. 22, 2011, 11:54 AM), http://www.msnbc.msn.com/id/44998378/ns/world_news-wonderful_world (describing how the names "Nakusa" and "Nakushi," which mean "unwanted," are "widely given to girls across India").

32. STANLEY LIEBERSON, A MATTER OF TASTE: HOW NAMES, FASHIONS, AND CULTURE CHANGE 76 (2000).

adopt English-sounding professional names for business, educational, or other purposes.³³ A name that connotes a well-known real or fictional individual or entity may communicate something about one's cultural preferences. One of the more infamous examples in recent memory is the New Jersey couple whose children were named after Adolf Hitler, Heinrich Himmler, and the Aryan Nation.³⁴ More benignly, a Missouri man officially changed his name to Led Zeppelin II to honor the rock band that, he said, "changed [his] life, forever."³⁵ A wholly invented name may mark an individual as supremely creative or wildly unconventional. None of this presumably escapes parents, who support an ever-growing cottage industry in baby-name advice.³⁶ Companies, likewise, spend large sums of money on consultants to aid them in finding brand names for their products with appealing linguistic and emotional connotations³⁷ and in avoiding missteps based on cultural or other meanings.³⁸

The denotative and connotative functions of naming, in turn, invoke two kinds of interests or motivations. The denotative function requires clarity in reference and hence is akin to a trademark interest. George Foreman aside,³⁹ one

33. See Tania Branigan, *Facebook's "Real Name" Policy Attacked by Chinese Blogger*, GUARDIAN (U.K.), Mar. 9, 2011, <http://www.guardian.co.uk/world/2011/mar/09/chinese-blogger-mark-zuckerberg-dog> (quoting Chinese commentator Michael Anti (born Zhao Jing) as noting that such English names are not fake names but "professional name[s] in the English-speaking world").

34. See Lisa W. Foderaro, *Naming Children for Nazis Puts Spotlight on the Father*, N.Y. TIMES, Jan. 20, 2009, at A28.

35. Valerie Schremp Hahn, *New Names Can Bring Joy and Easier Lives*, STLTODAY, Sept. 15, 2011, http://www.stltoday.com/news/local/metro/article_aa855f01-4dfe-5b6e-865e-fd38a0288d98.html.

36. Alter, *supra* note 27 (reporting that about 80 baby name books were published between 2004 and 2007, and that more than 100 websites exist on how to choose a baby name).

37. JOHNSON, *supra* note 23, at 220 (contrasting Latin-sounding technology names from the 1990s (such as "Lucent"), which connote authority and trust, with later, more whimsical names (such as "Twitter"), which "initiate[] an informal and fun interaction"). One study has concluded that companies with names that are easier to pronounce are likely to outperform companies with difficult-to-pronounce names in the initial days of trading. Adam L. Alter & Daniel M. Oppenheimer, *Predicting Short-Term Stock Fluctuations by Using Processing Fluency*, 103 PROC. NAT'L ACAD. SCI. 9369, 9371 (2006). More functionally, companies may seek particularly inventive names to increase the likelihood that their sites will lead the top of the list in a search engine query. See Seth Godin, *The New Rules of Naming*, SETH GODIN'S BLOG (Oct. 16, 2005), http://sethgodin.typepad.com/seths_blog/2005/10/the_new_rules_o.html (describing the author's choice of "Squidoo" as the name of his online company because many users use search engines to find company websites: "This means that having the perfect domain name is nice, but it's WAY more important to have a name that works in technorati and yahoo and google when someone is seeking you out.>").

38. Cf. JOHNSON, *supra* note 23, at 55 (discussing Reebok's decision to call one of its women's athletic shoes "Incubus," which is "a demon from medieval folklore that rapes women in their sleep"). Occasionally, personal naming and product branding become one, as with the couple who offered to sell naming rights to their then unborn child. See Matthew Purdy, *A Boy Named Soup?*, N.Y. TIMES, Aug. 1, 2001, at B1; Joseph P. Fried, *Following Up*, N.Y. TIMES, Nov. 11, 2001, at A39 (reporting that the couple, receiving no offers, named their son Zane).

39. The professional boxer George Foreman famously named each of his five sons "George Foreman." Bill Dwyre, *By George, He'll Carry On His Dad's Legacy in the Ring*, L.A. TIMES, Aug. 25, 2009, at C1.

would assume that naming each of one's children with the same given name would tend to cause confusion as to which child was being referred to at a given time. Of course, context typically helps in this regard. We can expect that when we use the word "apple" in a conversation that our conversational partners will know whether we are referring to produce or electronic gadgetry; likewise, we can reasonably conclude that the "Madonna" mentioned on the cover of *Rolling Stone* magazine does not denote the same individual as the "Madonna" mentioned during Sunday services.⁴⁰ The challenge arises when context is insufficient to resolve a lack of clarity, such as when two individuals with the same name operate (or could plausibly operate) in the same space. When a parodist adopted the Twitter name "ShaquilleONeal" to offer comic tweets in the voice of the professional basketball player, the joke was apparently clear to all of the account's followers (leading O'Neal to use the name "The_Real_Shaq" for his own account), but other parodies may not be as clear.⁴¹ Thus, part of the concern that arises from the naming process is a trademark-like concern: whether the chosen reference cleanly points to only one referent or instead creates a likelihood of confusion.

The connotative or expressive function of names, by contrast, gives rise to a more copyright-like interest. The selection or creation of a name with an eye and ear toward the effect it will have on those who hear it is an act that derives from the namer's creative impulses. To be sure, this may not be creativity on the scale of an opera or a novel, but even acts of microcreativity are committed with concerns for audience and authorial identity. This is particularly true in communities in which naming practices are embedded in cultural values and history, in which the conferring of a name situates the named individual in a social network,⁴² but it is true even of more individualistic acts of christening. It should therefore be uncontroversial to note that naming is an expressive activity, even if the constitutional dimensions of that activity are uncertain.⁴³

40. See Heymann, *supra* note 30, at 398.

41. Howard Beck, *Off the Dribble: The Real O'Neal Puts His Cyber Foot Down*, N.Y. TIMES, Nov. 20, 2008, at B16. O'Neal now uses the name "Shaq" on Twitter. See Shaquille O'Neal, TWITTER, <http://twitter.com/shaq> (last visited Mar. 29, 2012); see also, e.g., Mike Musgrove, *When Famed Twitter Friend Proves Faux: Behind Some Celeb Feeds Lie Only Tweet Nothings*, WASH. POST, Mar. 28, 2009, at C1 (reporting that the number of followers of a fake account attributed to Tina Fey more than quadrupled after the account was revealed as fake); Lisa P. Ramsey, *Brandjacking on Social Networks: Trademark Infringement by Impersonation of Markholders*, 58 BUFF. L. REV. 851 (2010).

42. See, e.g., PETER M. WHITELEY, *RETHINKING HOPI ETHNOGRAPHY* 123 (1998) (describing Hopi names as "'tiny imagist poems' or narrative mental-pictures through which the subject as author delightfully and instructively marks the individual identity of another subject"); Betsy Rymes, *Naming as Social Practice: The Case of Little Creeper from Diamond Street*, 25 LANGUAGE SOC'Y 237, 246 (1996) ("[J]ust as Hopi names seem simple to outsiders, but reference a world of cultural associations for Hopi who understand them, gang names also have stories (and implicit predicates) behind them.").

43. *Henne v. Wright*, 904 F.2d 1209, 1216 (8th Cir. 1990) (Arnold, J., dissenting) (discussing the naming of a child as an exercise of freedom of speech); Carlton F.W. Larson, *Naming Baby: The*

The creative impulse is particularly salient when the individual is conferring the name on himself or herself as an identifier for his or her expressive activities. Graffiti writers (those who tag walls or trains) use their names both as a functional way of marking their presence and as a medium of creative expression, such that writing over another's tag is often considered akin to an assassination.⁴⁴ Hip-hop performers rarely perform under their given names; indeed, "inventing a name is an important part of hip-hop's performativity."⁴⁵ Drag queen names are a critical part of developing one's identity in the community; many such names are humorous, parodic, or otherwise entertaining in themselves.⁴⁶ Roller derby names are likewise playful, and particularly creative names, such as "Kristi Imahootchie" and "Anne R. Kissed," give rise to "name envy" among derby participants.⁴⁷ CB radio users typically choose handles that, by communicating something about the user, attempt to create the conditions for a fruitful interaction with others⁴⁸—the handle "Loving Mom of 3," for example, is likely to result in a different initial interaction from the one involving the username "Vindictive Misanthrope."⁴⁹ And, more recently, SSIDs (the names that individuals choose for their wireless networks) have become a way of "asserting individual personality within the

Constitutional Dimensions of Parental Naming Rights, 80 GEO. WASH. L. REV. 159, 181 (2011) (asserting that naming a child "is a deeply expressive act"). *But see* Redmond v. Jockey Club, No. 05-6607, 2007 WL 2250978 (6th Cir. Aug. 2, 2007) (affirming the dismissal of a complaint alleging a constitutional violation in the denial of a racehorse name by a club).

44. MARCUS BOON, IN PRAISE OF COPYING 150 (2010).

45. *Id.*

46. *See* LEILA J. RUPP & VERTA A. TAYLOR, DRAG QUEENS AT THE 801 CABARET 32 (2003) ("Being a drag queen requires having a drag name."); *id.* at 32–33 (describing how individual drag queens devised their drag names); *id.* at 33–34 ("To a different extent for the different girls, the use of drag names symbolizes the creation of a separate personality."). For a list of drag names used by performers in the past, see *Drag Queen Names*, QUEER MUSIC HERITAGE, <http://www.queermusicheritage.us/drag-names.html> (last visited Mar. 29, 2012) (listing, as examples, "Clare Boothe Luce Change" and "Rhea Listik").

47. Fagundes, *supra* note 21, at 1103 n.45 (describing phenomenon of "name envy" among roller derby participants as to particularly creative names); *id.* at 1105 ("Indeed, derby names are often the most identifiable and memorable part of bouts for first-time viewers."); *id.* at 1106 ("For [some] skaters, derby supplies a space for self-discovery and self-expression as well as a fun extracurricular activity. A skate name is often the central vehicle by which this self-expression is effected."); *id.* at 1112 ("[Roller derby names] are typically a product of careful thought and effort, so that they express not just the holder's identity, but also her cleverness.").

48. Susan J. Kalčik, *Women's Handles and the Performance of Identity in the CB Community*, in WOMEN'S FOLKLORE, WOMEN'S CULTURE 99, 101–02 (Rosan A. Jordan & Susan J. Kalčik eds., 1985).

49. *Id.* at 108 (noting how the choice of a CB handle "must be one that is safe and comfortable for both speaker and listener, if the interaction is to continue. Thus a handle that evokes a neutral, joking, or familiar image is often chosen by CBers."); *id.* (noting that the use by women CBers of handles that "evoke stereotyped images of women help ease entry into the CB community and social interaction within it"); *cf.* *How to Choose a Good Twitter Username*, DUMMIES.COM, <http://www.dummies.com/how-to/content/how-to-choose-a-good-twitter-username.html> (last visited Mar. 29, 2012) ("On Twitter, you want people to respond to you, not be put off by a risqué or otherwise questionable username.").

dimensions of metropolitan life” by broadcasting short messages to a dynamic, local community.⁵⁰ Thus, when writers discuss the process of adopting another identity for one’s creative or other endeavors, the choice of a name for that identity is often highlighted as an inherent part of that process, an act that is creative in its own right⁵¹ and that represents “a means to announce one’s willingness to play.”⁵² And just as the wholesale adoption of another’s copyrighted work can be seen as transformative or creative,⁵³ the act of naming can be seen as creative, even if the particular name chosen is not. This can be seen most starkly in the case of artist Kristin Sue Lucas, who in 2007 persuaded a California court to allow her to change her name to Kristin Sue Lucas, an action that she characterized as a “reboot.”⁵⁴

As with other creative acts, however, our assessment of naming choices is both contextual and community-based. Some communities value a high degree of creativity, while others permit creativity only within explicit or implicit constraints. A modestly creative personal name may be admired and eventually adopted by others, but a too creative name may be seen as aberrant.⁵⁵ Parents, conscious of

50. See Lauren Collins, *The Tao of WiFi*, NEW YORKER, Dec. 5, 2011, at 29, 29 (quoting Elihu Rubin, professor at the Yale School of Architecture). Collins’s article profiles Alexandra Janelli, who maintains a website collecting wireless names, such as “Dumpling Manor,” “More Cowbell,” and “Stop Cooking Indian!!!” *Id.* “Like other forms of self-expression,” Collins notes, “wireless names are subject to trends.” *Id.*

51. See, e.g., Paul Hemp, *Avatar-Based Marketing*, HARV. BUS. REV., June 2006, at 1, 2 (“People have long taken on alternative identities, from authors’ sly noms de plume to CB radio operators’ evocative handles to chatroom visitors’ sexually suggestive user names.”). This is also true for more formal name adoptions. For example, a North Dakota high school teacher named Michael Herbert Dengler petitioned the North Dakota courts, and later the Minnesota courts, for approval of his request to change his name to the number “1069,” which, he believed, “expressed his individuality and personal philosophy . . . , each of its four digits, respectively, standing for his relationship with nature, time and movement, the universe and ‘essence.’” JUSTIN KAPLAN & ANNE BERNAYS, *THE LANGUAGE OF NAMES* 191 (1997); see also *In re Dengler*, 246 N.W.2d 758, 764 (N.D. 1976); *In re Dengler*, 287 N.W.2d 637 (Minn. 1979); Thomas M. Lockney & Karl Ames, *Is 1069 A Name?*, 19 NAMES 1 (1981).

52. Haya Bechar-Israeli, *From <Bonehead> to <LoNebEAd>: Nicknames, Play, and Identity on Internet Relay Chat*, 1 J. COMPUTER-MEDIATED COMM. (1995), available at <http://jcmc.indiana.edu/vol1/issue2/bechar.html>.

53. See, e.g., Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 457–59 (2008); Tushnet, *supra* note 12.

54. Transcript of Change of Name Hearing at 1, *In re Kristin Sue Lucas*, No. RG07336497 (Cal. Super. Ct. Sept. 21, 2007); see also Transcript of Change of Name Hearing at 1, *In re Kristin Sue Lucas*, No. RG07336497 (Cal. Super. Ct. Oct. 5, 2007) (granting petition). In granting the order, the judge adopted Lucas’s metaphor. *Id.* (“So you have changed your name to exactly what it was before in the spirit of refreshing yourself as though you were a web page.”).

55. LIEBERSON, *supra* note 32, at 123 (suggesting that an invented name may be more appealing to other parents “when it is compatible with general naming trends among the existing inventory of names, or the pressure to name a baby after a relative or friend may weaken, or there is a decline in the resistance to naming innovations”); cf. Fromer, *supra* note 10, at 1441 (“In the arts, while the newness component of creativity is valued in our individualistic culture, for typical audience members and in most artistic contexts . . . it is important that artists not stray too far from accepted

the connotative function of names, generally tend to stick to certain linguistic conventions; for example, as Stanley Lieberson has documented, “[b]ecause in the United States (and most other societies) names mark the infant’s gender, parents who invent names still follow the linguistic connections between gender and naming that exist among the very same set of major names that they are passing over,” such as ending girls’ names, but not boys’ names, with an “a” sound.⁵⁶ As with other aspects of naming, there are race, ethnicity, and class aspects to a community’s view of creativity, confirmed (albeit anecdotally) by various first-person accounts detailing others’ reactions to perceived boundary crossing.⁵⁷

Given this connection between naming and creativity, it should not be surprising that, for some, names are imbued with a property-like characteristic akin to the way some creators view other types of creative expression. This may be influenced by Lockean principles; by the same intuition that has led courts to recognize that selection and arrangement of existing material, and not simply invention, can represent authorship;⁵⁸ or by cultural norms that dictate what is an

conventions . . .”). For a description of recent psychological research suggesting that humans are “secretly—unconsciously—biased against creative ideas,” see Wray Herbert, *A Bias Against Creativity?*, ASS’N PSYCHOL. SCI. (Aug. 3, 2011), <http://www.psychologicalscience.org/index.php/news/full-frontal-psychology/a-bias-against-creativity.html>.

56. LIEBERSON, *supra* note 32, at 206. Lieberson notes that “Joshua” is an exception to this general observation. *Id.*

57. For one such example, see DaisyDeadhead, *On Having a Black Name*, DAISY’S DEAD AIR (Apr. 22, 2008), <http://daisysdeadair.blogspot.com/2008/04/on-having-black-name.html> (describing, as a “blond, blue-eyed white woman,” others’ reactions to her first name, which went unstated in the post but which the writer claimed is “strongly associated with black women”); *see also* Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name: On Being “Regarded As” Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1325–27 (arguing that Title VII should be interpreted to allow claims where names, among other characteristics, are used as proxies for race).

58. *See, e.g.*, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 59–60 (1884); *cf.* Domsalla v. Stephens, No. 3:00-CV-2763, 2001 U.S. Dist. LEXIS 5845, at *4–5 (N.D. Tex. May 3, 2001) (“The phrase ‘Texas Thunder’ lacks the originality required of copyrighted material. This is evidenced by the fact that a simple search on the Internet returns over twenty examples of the use of the phrase by people other than Domsalla, including a motor speedway, at least three bands, and a girls’ fastpitch softball team. Further, the Defendants have presented examples of forty-six organizations that use the phrase ‘Texas Thunder’ in their name. As such, the phrase ‘Texas Thunder’ is not sufficiently original to be the subject of a copyright.”); John Barth, *Do I Repeat Myself?*, ATLANTIC, <http://www.theatlantic.com/magazine/archive/2011/08/do-i-repeat-myself/8572> (last visited Mar. 29, 2012) (“Originality, after all, includes not only saying something for the first time, but re-saying (in a worthy new way) the already said: rearranging an old tune in a different key, to a different rhythm, perhaps on a different instrument.”). Some scholars have proposed revising copyright law to reflect originality concerns; my observation here is descriptive, not normative. *See, e.g.*, Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 486 (2009) (proposing “a more demanding statutory originality requirement for copyright,” based on patent law’s obviousness requirement, in which “copyright protects a work insofar as the author can show that the work departed from a routine, typical, or conventional expression in the pertinent genre at the time he or she authored the work”); Gideon Parchomovsky & Alex Stein, *Originality*, 95 VA. L. REV. 1505, 1507 (2009) (proposing a copyright system “that calibrates authors’ protection and liability to the originality level of their work”).

open resource and what requires authorization to use.⁵⁹ But, for the most part, the law is not a fruitful avenue for vindicating this interest. Hence, as I will discuss subsequently, such interests are recognized, if at all, by extralegal community regulations and norms.

II. NAMING, CREATIVITY, AND THE LAW

Although First Amendment jurisprudence has recognized the value of pseudonymity in allowing speakers to communicate in ways that they would not if they had to reveal their given names, the law does not pay much attention to the creative process involved in choosing pseudonyms, except when such choice appears to be motivated by an intention to defraud.⁶⁰ Cases such as *McIntyre* and the developing case law on whether Internet service providers can be required to disclose a subscriber's identity information are concerned largely with whether the government can force an individual or intermediary to reveal the connection between a pseudonym and a given name or, relatedly, whether the government can criminalize the act of communicating under a pseudonym.⁶¹ To the extent that these courts have ruled in favor of pseudonymity, they have done so based on a belief that allowing pseudonymous communication encourages more (and more

59. As but one example, in a discussion between two First Nation members, hosted by the Simon Fraser University Museum of Archaeology and Ethnology in British Columbia, one participant stated:

Then when we have our ceremonies, like the Indian names that we carry, *Siyamchess*. You know, no other person, outside my family line, can carry that name. . . . If we were in a home where there's 700 or 800 people and they call me "*Siyamchess!*," you know, I have to stand up, and among 800 people, I'm the only one that stands up. . . .

A Journey into Time Immemorial: Importance of the Name, SFU MUSEUM, <http://www.sfu.museum/time/en/videos/18> (last visited Mar. 29, 2012).

The other participant responded:

I am very lucky to carry *Aizyamelkwa*. You know, that's my name. I can share it if I like, but I own that name. So I think that really tells you about the values of what we think is important, you know, that you share food, you share your home, or, you know, whatever resources there are, but you own something very intrinsic and powerful within you, it's your name, and your song.

Id.

60. To the extent that the law does engage with naming and creativity, it is to restrict the choices that those seeking official recognition of their names can make. *See* Heymann, *supra* note 30, at 409–18 (discussing rejection of name-change petitions by courts that conclude that the desired names are inappropriate).

61. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) (“[A]n author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.”); *Dendrite Int’l, Inc. v. Doe*, 775 A.2d 756, 760–61 (N.J. Super. Ct. App. Div. 2001) (setting forth standards for disclosure); *ACLU v. Miller*, 997 F. Supp. 1228, 1230–32 (N.D. Ga. 1997) (preliminarily enjoining enforcement of a statute criminalizing the knowing transmission of data through a computer network “if such data uses any individual name . . . to falsely identify the person”). In his concurrence in *McIntyre*, Justice Thomas noted that creative pseudonyms were used by the Framers and others during the constitutional debates. *McIntyre*, 514 U.S. at 367–68 (Thomas, J., concurring) (“Often writers would choose names to signal their point of view or to invoke specific classical and modern crusaders in an age-long struggle against tyranny.”) (internal quotation marks omitted).

diverse) speech, at least some of which is valuable.⁶² These cases have not, however, given rise to a need to focus on the value of pseudonymous choices apart from the content to which such pseudonyms are attached. As I will now discuss, intellectual property law, while it recognizes naming as a creative act from time to time, also largely treats names as property in light of their denotative function.

A. Trademark Law

Although the development of brands today often involves a creative process, trademark law's primary concern is with disruption of the denotative function of names—in other words, whether a trademark can permissibly refer to more than one entity. For example, if a producer of soft drinks were to market a cola called PEPSI, the PepsiCo corporation, which owns the mark, would object on the grounds that consumers would be deceived into believing that this soft drink was the same product as the one that PepsiCo produces. If a producer of hammers were to market a hammer under the trademark PEPSI, by contrast, the PepsiCo corporation might object on the ground that the uniqueness of the famous and distinctive trademark PEPSI was likely to be diluted through its use on an unauthorized product, even if consumers were clear that the producers of the two products were not related. In both cases, the trademark holder's claims would inhere in the assertion that the trademark PEPSI should refer to only one product: the cola produced by the PepsiCo corporation (or any additional products the company authorized).⁶³

Trademark jurisprudence has long drawn distinctions between the rights conferred by copyright law, which relate to originality and creativity, and the rights recognized by trademark law, which relate to denotative commercial use. The U.S. Supreme Court made this point most famously in *The Trade-Mark Cases*, which considered whether federal trademark law could be validly enacted pursuant to Congress's power under the Patent and Copyright Clause of the U.S. Constitution:

The ordinary trade-mark has no necessary relation to invention or discovery. The trade-mark recognized by the common law is generally the growth of a considerable period of use, rather than a sudden invention. It

62. Many scholars have considered whether this is the right balance. See, e.g., Eric J. Friedman & Paul Resnick, *The Social Cost of Cheap Pseudonyms*, 10 J. ECON. & MGMT. STRATEGY 173, 187–91 (2001) (proposing a method of encouraging commitment to consistent pseudonyms); Rebecca Tushnet, *Naming Rights*, 2007 UTAH L. REV. 789, 811–16 (noting that pseudonyms can seem fraudulent to some readers but are beneficial to others); see generally THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION (Saul Levmore & Martha C. Nussbaum eds., 2010) (presenting various views).

63. In this regard, trademark holders have little cause to complain about unauthorized but nondeceptive uses, as many of them dilute the value of their own marks by authorizing them for a wide range of disparate products. Sara Stadler Nelson, *The Wages of Ubiquity in Trademark Law*, 88 IOWA L. REV. 731, 779 (2003).

is often the result of accident rather than design, and when under the act of Congress it is sought to establish it by registration, neither originality, invention, discovery, science, nor art is in any way essential to the right conferred by that act. If we should endeavor to classify it under the head of writings of authors, the objections are equally strong. In this, as in regard to inventions, originality is required. And while the word *writings* may be liberally construed, as it has been, to include original designs for engravings, prints, &c., it is only such as are *original*, and are founded in the creative powers of the mind. The writings which are to be protected are *the fruits of intellectual labor*, embodied in the form of books, prints, engravings and the like. The trade-mark may be, and generally is, the adoption of something already in existence as the distinctive symbol of the party using it. At common law the exclusive right to it grows out of its *use*, and not its mere adoption. By the act of Congress this exclusive right attaches upon registration. But in neither case does it depend upon novelty, invention, discovery, or any work of the brain. It requires no fancy or imagination, no genius, no laborious thought. It is simply founded on priority of appropriation.⁶⁴

Modern branding practices have rendered some of the Court's assertions outdated. It is true that trademark rights still depend on a "period of use, rather than a sudden invention." But given that many brands are the result of the work of advertising agencies and other specialists, we can no longer say that the development of the trademark itself is "often the result of accident rather than design" or is generally the "adoption of something already in existence," to the extent that those words suggest that trademarks are the result of happenstance rather than the result of a creative process. The Court has been clear, however, that notions of authors and audiences are not trademark law's domain. In 2003, in *Dastar Corp. v. Twentieth Century Fox Film Corp.*,⁶⁵ the Court rejected an attempt to use the Lanham Act to vindicate attributional interests in a work not protected by copyright.⁶⁶ Copyright law and trademark law, the Court suggested, are different animals, and allowing the plaintiff to use the Lanham Act in such circumstances would upset a "carefully crafted bargain," pursuant to which "once the patent or copyright monopoly has expired, the public may use the invention or work at will

64. The Trade-Mark Cases, 100 U.S. 82, 94 (1879); *see also* McLean v. Fleming, 96 U.S. 245, 254 (1878):

Words or devices, or even a name in certain cases, may be adopted as trade-marks which are not the original invention of the party who appropriates the same to that use; and courts of equity will protect the proprietor against any fraudulent use or imitation of the device by other dealers or manufacturers. Property in the use of a trade-mark, however, bears very little analogy to that which exists in copyrights or in patents for new inventions or discoveries, as they are not required to be new, and may not involve the least invention or skill in their discovery or application. Phrases, or even words in common use, may be adopted for the purpose, if, at the time of their adoption, they were not employed by another to designate the same or similar articles of production or sale.

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

66. *Id.* at 33–34.

and without attribution.”⁶⁷ Lower courts, for their part, have overwhelmingly taken *Dastar* at face value, denying plaintiffs the ability to assert trademark-related claims for communicative material for which no copyright claim is available, although a few pockets of uncertainty still remain.⁶⁸

This seemingly bright-line rule does not mean, however, that courts ignore the creative process in branding altogether. For example, it has now become de rigueur to assess the inherent strength of a trademark by locating it along what is now known as the *Abercrombie* spectrum, which assesses a word’s inherent strength linguistically: an invented (or “fanciful” term) is deserving of the most protection, while a generic term deserves no protection whatsoever.⁶⁹ Between these two extremes, the inherent strength of a mark (and therefore whether it gets protection ab initio or requires additional evidence) depends on how creative the mark is. The mark might be a commonplace and dull description of the good’s qualities or characteristics (and therefore might need to be used by others), or use metaphor to suggest the good’s characteristics, or create a new meaning for an existing word. In short, the *Abercrombie* spectrum rewards creativity in naming, a fact that has not gone unnoticed by some courts.⁷⁰ This is a copyright-type interest, in that it

67. *Id.* (quoting *Bonita Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150–51 (1989)).

68. *See, e.g.*, *Zyla v. Wadsworth*, 360 F.3d 243, 252 (1st Cir. 2004); *Agence Fr. Presse v. Morel*, 769 F. Supp. 2d 295, 307 (S.D.N.Y. 2011). *But see* *Fleischer Studios, Inc. v. A.V.E.L.A., Inc.*, 654 F.3d 958 (9th Cir. 2011) (without citing *Dastar*, reversing dismissal of plaintiff’s trademark claims relating to cartoon character despite affirming dismissal of plaintiff’s copyright claims), *superseding* 636 F.3d 1115 (9th Cir. 2011) (citing *Dastar*).

69. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976); *see also* Laura A. Heymann, *The Grammar of Trademarks*, 14 LEWIS & CLARK L. REV. 1313, 1332–33 (2010).

70. *See, e.g.*, *Surfivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 631 (9th Cir. 2005) (“The more unique the mark, the greater the degree of protection.”); *Sinhdarella, Inc. v. Vu*, No. C 07-04353 WHA, 2008 U.S. Dist. LEXIS 14742, at *8 (N.D. Cal. Feb. 12, 2008) (finding “The Boiling Crab” to be suggestive for a seafood restaurant given that “naming a seafood restaurant ‘The Boiling Crab’ required some creativity and imagination, meaning significant steps were taken in order to go from the name of a seafood restaurant to the name in question”); *Synergistic Int’l, Inc. v. Windshield Doctor, Inc.*, No. CV 03-579 FMC (CWx), 2003 U.S. Dist. LEXIS 12660, at *13 (C.D. Cal. Apr. 28, 2003) (finding “Glass Doctor” for glass installation and repair service to be suggestive given an incontestable federal registration and the mark’s “creative metaphorical combination of the terms ‘Doctor’ and ‘Glass’”); *Credit Counseling Ctrs. of Am. v. Budget & Credit Counseling Servs.*, No. 97 Civ. 1368 (LAP), 1997 U.S. Dist. LEXIS 2828, at *9 (S.D.N.Y. Mar. 5, 1997) (“In the present case, the name ‘Credit Counseling Centers of America, Inc.’ seems to lack the creativity or uniqueness to qualify as arbitrary or fanciful.”); *Shen Mfg. Co. v. Suncrest Mills, Inc.*, 673 F. Supp. 1199, 1204 (S.D.N.Y. 1987) (“[T]he legend [‘Ritz a Dish’] uses the company name, Ritz, in a creative way to suggest the use of the product and its source. That is the very essence of a suggestive mark.”). Once a trademark has been adopted, however, trademark law provides an incentive to constrain creativity by holding that trademarks that do not maintain a continuing commercial impression among consumers may be deemed abandoned. *See, e.g.*, *One Indus., LLC v. Jim O’Neal Distrib.*, 578 F.3d 1154, 1160–62 (9th Cir. 2009) (discussing doctrine and citing cases). As Jeanne Fromer has noted, it is not the “author” of the trademark—such as an advertising or branding agency—that is awarded legal rights; rather, it is the entity that has made commercial use of the author’s creativity that is deemed to be the trademark owner. Jeanne Fromer, *The Role of Creativity in Trademark Law*, 86 NOTRE DAME L. REV. 1885, 1899 (2011). This arrangement, however, is not that different from the work-for-hire

distinguishes between less creative marks, which should be available to others except in limited circumstances, and more creative or authored marks, which should be protected against copying by others, similar to copyright doctrine's idea/expression distinction.

Indeed, some courts have described the belief that creativity is related to the scope of trademark protection in language that sounds in copyright-like principles. In *Security Center, Ltd. v. First National Security Centers*,⁷¹ for example, the Fifth Circuit characterized the scope of suggestive marks as asking “whether the first user has devised a term of some creativity or cleverness, as opposed to merely selecting a term that anyone might readily have chosen,” noting that “[a]ny dunce could come up with a generic term.”⁷² The court then concluded that “only a modicum of creativity” was required to come up with the mark “Security Center” as the name for a business providing private storage facilities; in language reminiscent of *Feist Publications, Inc. v. Rural Telephone Service Co.*,⁷³ it noted that the mark was “merely a coupling of two quite common English words, and the coupling itself exhibits little originality.”⁷⁴ And in *Dreamwerks Production Group, Inc. v. SKG Studio*,⁷⁵ Judge Kozinski, in writing for the majority, cast doubt on the defendant's contention that “almost every combination of words has been taken by someone doing business somewhere in what may be a loosely related field”⁷⁶ by suggesting that the defendant could easily have authored a new mark. “A clever

relationships that govern many copyrightable works. See 17 U.S.C. § 201(b) (2006) (“In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”).

71. *Sec. Ctr., Ltd. v. First Nat'l Sec. Ctrs.*, 750 F.2d 1295 (5th Cir. 1985).

72. *Id.* at 1299. Although one might deem a mark suggestive because of the creative work done by the consumer to understand the metaphorical connection between mark and product, this kind of work on the consumer's part is, presumably, what was intended by the producer in naming its product and is therefore not dramatically different from other interpretive work done by readers and audiences with respect to works of authorship. See *id.* (“Creativity on the part of the mark's inventor is a correlative of imagination on the part of the consumer.”).

73. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 346 (1991) (noting that copyrightability requires “independent creation plus a modicum of creativity”); *id.* at 362 (noting that the plaintiff's telephone directory was a “garden-variety white pages directory”).

74. The mark was therefore found to be descriptive. See *Sec. Ctr., Ltd.*, 750 F.2d at 1299. The parallel is not precise because under *Feist*, a “modicum of creativity” is all that is required for copyrightability, whereas the Fifth Circuit used the phrase in a more denigrating fashion. See also *Anheuser-Busch, Inc. v. Stroh Brewery Co.*, 750 F.2d 631, 652 n.16 (8th Cir. 1984) (Bright, J., dissenting) (contending that plaintiff's choice of “LA” as a brand for low-alcohol beer, given its knowledge that “LA” was used generically for low-alcohol beer in other countries, “undermine[s] its claim that, in choosing the name ‘LA,’ it exercised any creativity entitling it to protection under our trademark laws”); *Standard Brands, Inc. v. Smidler*, 151 F.2d 34, 43 (2d Cir. 1945) (Frank, J., concurring) (noting that because plaintiff “did not originate” its mark (in that it “had previously been utilized by others in selling automobile-engines, a shaving-cream and an after-shave lotion”), “the scope of its monopoly should be peculiarly restricted”).

75. *Dreamwerks Prod. Grp., Inc. v. SKG Studio*, 142 F.3d 1127 (9th Cir. 1998).

76. *Id.* at 1132.

new trademark,” Kozinski wrote, “diversifies both the marketplace and the marketplace of ideas; a takeoff or copy of a mark, even if accidental, adds nothing but confusion. This dispute could have been avoided had DreamWorks been more careful, or a tad more creative, in choosing its name.”⁷⁷

Trade dress cases also show a concern with creativity when they focus on whether the plaintiff’s packaging is “unique or unusual in a particular field” and thus potentially inherently distinctive, or, by contrast, constitutes a common design or a “mere refinement of a commonly-adopted and well-known form of ornamentation.”⁷⁸ As one court has described it,

the determination of whether a distinctive trade dress is entitled to Lanham Act protection is in essence a resolution of the tension that necessarily arises between the need to encourage and protect creativity in the market place while at the same time insuring [sic] that no competitor in the market is able to insulate itself from effective competition.⁷⁹

Thus, in a case involving a red dripping wax seal on Maker’s Mark whiskey, the court concluded that the seal was “an extremely strong mark due to its unique design and the company’s singular marketing efforts.”⁸⁰ The court further concluded that the strength of the mark was particularly important to the analysis in the case because “trademark laws are designed, in part, to protect creativity, brand identification and brand design loyalty.”⁸¹

Trademark infringement cases are not the only types of trademark cases that are concerned (if obliquely) with authorship. Trademark antidilution law, which prohibits the copying of a famous and distinctive trademark even in circumstances where there is no evidence of consumer confusion,⁸² also involves authorship interests despite its denotative focus. As with a copyright holder’s claim that unauthorized copies of its work diminish the copyright holder’s economic or reputational interests, a trademark holder’s dilution claim alleges that unauthorized copies of its mark dilute the economic or reputational value of the mark, making it more common or unsavory. It is true that, contrary to Frank Schechter’s original proposal,⁸³ dilution law now extends to any famous and distinctive mark, and not merely to fanciful or arbitrary marks. In this regard, Schechter’s original framework reflected creativity concerns to an even greater extent; like the

77. *Id.*; cf. Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 673 (2004) (“One reason why trademark law has traditionally granted broader protection to inherently distinctive marks is to provide an incentive to trademark producers to generate new words rather than appropriate from the language preexisting words for commercial purposes.”).

78. *Seabrook Foods, Inc. v. Bar-Well Foods, Ltd.*, 568 F.2d 1342, 1344 (C.C.P.A. 1977).

79. *Landscape Forms, Inc. v. Columbia Cascade Co.*, 940 F. Supp. 663, 666 (S.D.N.Y. 1996).

80. *Maker’s Mark Distillery, Inc. v. Diageo N. Am., Inc.*, 703 F. Supp. 2d 671, 691 (W.D. Ky. 2010), *aff’d*, Nos. 10-5508, 10-5586, 10-5819, 2012 WL 1605755 (6th Cir. May 9, 2012).

81. *Id.*

82. *See* 15 U.S.C. § 1125(c)(1) (2006).

83. *See* Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 828–31 (1926).

Abercrombie spectrum, it would have rewarded the effort expended in authoring a new word or metaphor. But even courts assessing dilution of nonfanciful marks have come to see the harm to be prevented as the copying of the mark per se, and not copying that has led to some demonstrable reputational harm.⁸⁴ Even the traditional definition of dilution—activity that causes a “whittling away of the value of a trademark”⁸⁵—has echoes in the fourth fair-use factor in the Copyright Act, which considers “the effect of the use upon the potential market for or value of the copyrighted work.”⁸⁶ As to that factor, the Supreme Court has noted, courts should take into account “not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original,”⁸⁷ the same type of cumulative effect on the value of the plaintiff’s property right that anti-dilution law targets.

Despite these discussions, acknowledgment of creativity is undoubtedly a secondary matter in trademark law as adjudicated. Consistent with trademark law’s focus on consumer protection, the courts’ primary concern is with the denotative function of the name—that is, whether the name successfully functions as a referent to a good or service. But the courts’ nod to creativity reminds us that adjudication takes place largely against an assumption that trademarks are intellectual property: that they are the result of a type of creative process, which leads to their ability to be owned⁸⁸ and for calls to limit the scope of that ownership when others use existing marks in service of their own creative efforts.⁸⁹ So when corporations assert “my name is my property,” perhaps we should not be surprised when individuals do the same.

84. For example, in *V Secret Catalogue, Inc. v. Moseley*, the Sixth Circuit interpreted the federal dilution statute to provide for a “rebuttable presumption, or at least a very strong inference, that a new mark used to sell sex-related products is likely to tarnish a famous mark if there is a clear semantic association between the two,” a standard that focuses on linguistics, not on evidence of tarnishment. *V Secret Catalogue, Inc. v. Moseley*, 605 F.3d 382, 385 (6th Cir. 2010).

85. *Mattel, Inc. v. MCA Records*, 296 F.3d 894, 903 (9th Cir. 2002) (internal quotation marks omitted); see also 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:94 (4th ed. Supp. 2004) (“Like being stung by a hundred bees, significant [dilution] injury is caused by the cumulative effect, not by just one.”).

86. 17 U.S.C. § 107(4) (2006).

87. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 590 (1994) (internal quotation marks and ellipsis omitted).

88. See Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain, Part II*, 18 COLUM.-VLA J.L. & ARTS 191, 242 (1994) (discussing how an expansive view of trademarks as investments, and therefore property, has a “quasi-authorial” feel); Greg Lastowka, *Trademark’s Daemons*, 48 HOUS. L. REV. 779, 791–98 (2011) (discussing how some courts protect creativity through trademark law).

89. See, e.g., Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397 (1990); Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960 (1993).

B. Copyright Law

It is standard copyright doctrine in the United States that names are not eligible for copyright protection.⁹⁰ The reason typically given is that a name, like a title or a short phrase, is not an “original work of authorship”⁹¹ because it does not possess even a modicum of creativity.⁹² This is, of course, a legal fiction, as the overview in Part I attests. Names such as John Smith or Elizabeth Brown, while functional, may not seem particularly creative (although they, too, are acts of micro-authorship), but names such as Ludacris or Curren Bell or Eminem seem to exhibit at least as much creativity as Abraham Zapruder’s copyrightable film of the Kennedy assassination.⁹³ Some courts, therefore, interpret the general rule not as setting forth an absolute bar to copyrightability but rather as setting up an inverse relationship: the shorter the phrase, the more creativity that has to be demonstrated before copyright will attach.⁹⁴

The fact that names are generally deemed to be uncopyrightable does not mean, however, that naming is irrelevant to assessments of creativity in copyright law. For example, when courts consider whether a fictional character has crossed the line from being merely a stock type that anyone can copy (the dastardly villain, the bloodthirsty vampire, the pining young lover) to being a sufficiently delineated result of the creative process, one relevant characteristic is whether the character

90. 37 C.F.R. § 202.1 (2011) (noting various works not subject to copyright, including “[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents”); see also Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1013 (1990) (“Language is sufficiently crucial that we insist on unrestricted access to words, even new words.”).

91. 17 U.S.C. § 102 (2006).

92. See, e.g., *Allen v. Destiny’s Child*, No. 06 C 6606, 2009 U.S. Dist. LEXIS 63001, at *25 (N.D. Ill. July 21, 2009) (“Short phrases tend to be excluded from copyright protection because they do not demonstrate a sufficient amount of creative expression.”).

93. JOHNSON, *supra* note 23, at 174 (calling “Jello Biafra,” the stage name of the lead singer of the rock band The Dead Kennedys, “a testament to the power that the juxtaposition of two simple words can unleash”); see also Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575, 578 (2005) (noting that “[m]any very small expressions positively leap over the low threshold of originality we have established in copyright law” and proposing that copyright law abandon the fiction that they do not). Zapruder’s film was held to be copyrightable in *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968).

94. See, e.g., *Allen*, 2009 U.S. Dist. LEXIS 63001, at *28 (declining to find as a matter of law that no reasonable jury could conclude that the phrase “cater to you,” as used as the title of a song and in lyrics, was copyrightable); *J. Racenstein & Co. v. Wallace*, No. 96 Civ. 9222 (TPG), 1999 U.S. Dist. LEXIS 12675, at *3–4 (S.D.N.Y. Aug. 19, 1999) (“[T]he relevant question for the court is not merely whether a name, title or slogan contains some minimal number of words. Rather it is whether the phrase contains some appreciable level of creativity, however few words it may contain.”) (citation omitted); see also 1–2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.01 (2007) (“It appears, then, that there is a reciprocal relationship between creativity and independent effort. The smaller the effort (e.g., two words) the greater must be the degree of creativity in order to claim copyright protection.”).

has been named.⁹⁵ In *Gaiman v. McFarlane*, involving a dispute between Neil Gaiman and Todd McFarlane over the copyrightability of two comic-book characters (Count Nicholas Cogliostro and Medieval Spawn), the Seventh Circuit held that while a stock character could not be protected by copyright, a character that, in that case, was delineated by age, a title, a name, particular facial features, and other characteristics had become a “distinctive character” that was copyrightable.⁹⁶ Likewise, the similarity of the defendant’s character’s name to the plaintiff’s character’s name does not mandate a finding of infringement, but some courts have found such similarity to be a relevant consideration.⁹⁷ This does not

95. Cf. LIEBERSON, *supra* note 32, at 224–30 (discussing writers’ choice of character names); ROBERT HARBOROUGH SHERARD, EMILE ZOLA: A BIOGRAPHICAL AND CRITICAL STUDY 88–89 (1893) (quoting Zola) (“I always judge a young author by the names he bestows on his characters. If the names seem to me to be weak, or to be unsuitable to the people who bear them, I put the author down as a man of little talent, and am no longer greatly interested in his book. . . . It is one of the first rules of the novelist’s art. Bad authors choose bad names.”).

96. *Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004); *id.* at 661 (“Although Gaiman’s verbal description of Cogliostro may well have been of a stock character, once he was drawn and named and given speech he became sufficiently distinctive to be copyrightable.”); *see also* *Bach v. Forever Living Prods. U.S., Inc.*, 473 F. Supp. 2d 1127, 1136 (W.D. Wash. 2007) (finding the character name “Jonathan Livingston Seagull” a relevant factor in determining copyrightability); *Anderson v. Stallone*, No. 87-0592 WDK (Gx), 1989 U.S. Dist. LEXIS 11109, at *21 (C.D. Cal. Apr. 26, 1989) (finding that the Rocky Balboa character “is such a highly delineated character that his name is the title of all four of the Rocky movies”); *Universal City Studios, Inc. v. Kamar Indus., Inc.*, No. H-82-2377, 1982 U.S. Dist. LEXIS 15942, at *11 (S.D. Tex. Sept. 20, 1982) (finding that plaintiff movie studio was likely to prevail on its copyright infringement claim targeting the use of “E.T.” on merchandise given that the character was “distinctive and well developed”). *But see, e.g.*, *Silberstein v. Fox Entm’t Grp.*, 424 F. Supp. 2d 616, 630 (S.D.N.Y. 2004) (noting that because “[i]n James of cartoon characters, in particular, are not considered protectable,” only the “original physical characteristics” of the plaintiff’s character should be analyzed), *aff’d sub nom.* *Silberstein v. John Does 1–10*, No. 04-4401-cv, 2007 U.S. App. LEXIS 14128 (2d Cir. June 14, 2007). A character’s name need not be unusual to serve the purpose of delineation; indeed, one scholar contends that a novelist “typically indicates his intention of presenting a character as a particular individual by naming him in exactly the same way as particular individuals are named in ordinary life.” IAN WATT, *THE RISE OF THE NOVEL* 18 (1957); *see also id.* at 20 (suggesting that the novelist Henry Fielding took some of his characters’ names “somewhat at random from a printed list of contemporary persons”); ALASTAIR FOWLER, *KINDS OF LITERATURE* 82–87 (1982) (offering qualifications of Watt’s thesis).

97. *See, e.g.*, *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 753 (9th Cir. 1978) (noting that the district court found the similarity of names of defendants’ and plaintiffs’ characters to be a relevant consideration in its infringement analysis); *Hogan v. DC Comics*, 48 F. Supp. 2d 298, 311 (S.D.N.Y. 1999) (noting that similarity in character names, “by itself, is insufficient to establish substantial similarity between the characters” but “is, however, a significant similarity”); NIMMER, *supra* note 94, § 2.12 (“Although copying of a character’s name is not in itself decisive, it is a factor to be considered in determining whether the character as appropriated is sufficiently distinctive to constitute an infringement.”); *cf.* *Wihtol v. Wells*, 231 F.2d 550, 553 (7th Cir. 1956) (noting that although the title of a song, by itself, was not subject to copyright protection, “the title of a copyrighted work should be taken into account when the same title is applied to a work copied from it”). *But see* *Cavalier v. Random House, Inc.*, 297 F.3d 815, 828 (9th Cir. 2002) (“Use of the same names does not sufficiently support infringement, especially when attached to such different characters”); *Evans v. Wallace Berrie & Co.*, 681 F. Supp. 813, 818 (S.D. Fla. 1988) (holding that similarity in character names and other characteristics “[d]oes not rise to the level of substantial similarity necessary for Plaintiff to sustain her case”).

seem surprising: If an author were to write a novel involving a child wizard that shared at least some characteristics with the Harry Potter character, we might expect that the author would be more likely to be found to have infringed J.K. Rowling's copyright if the character were called Sally Cotter than if she were called Winifred Anderson. The name Harry Potter signals that the character is a particular result of Rowling's creative efforts, as opposed to a stock figure. Because audiences are accustomed to the use of names to evoke, such as when a comedic film targets a cultural icon through an obvious play on its name,⁹⁸ the use of a character's name in particular primes the audience to think in terms of similarity, with context indicating whether that similarity constitutes parody or infringement.

The taxonomy cases are another area in which creativity in designation has been found relevant to the copyrightability analysis. In *American Dental Ass'n v. Delta Dental Plans Ass'n* (*ADA*),⁹⁹ the Seventh Circuit held that a taxonomy that assigned numbers and descriptions to various dental procedures (to be used for billing and insurance filings, among other purposes) was copyrightable, such that the defendant association could encourage dentists to use the codes when submitting their bills but it could not distribute copies of the code itself.¹⁰⁰ The reason, the court concluded, was that the taxonomy was invented out of whole cloth by the plaintiff (and various committee members): The descriptions were "original to the ADA, not knuckling under to an order imposed on language by some 'fact' about dental procedures," and the numbers (which are akin to names for our purposes) likewise represented choices "original to the author of a taxonomy, [such that] another author could do things differently."¹⁰¹ Compare this result to the Third Circuit's decision in *Southco, Inc. v. Kanebridge Corp.*,¹⁰² in which the plaintiff, having developed a system that assigned numbers to parts based on each part's characteristics (such as material or size), claimed copyright in the numbers that resulted from the system. The Third Circuit, distinguishing *ADA*, held that these numbers reflected no authorship: Once the plaintiff had devised the numbering system, "all of the products in the class could be numbered without the slightest element of creativity. Indeed, if any creativity were allowed to creep into the numbering process, the system would be defeated."¹⁰³ The *Southco* numbers were denotative before they were individually listed—as with the names in *Feist's* telephone directory, they served only to implement a naming decision

98. For example, the Mel Brooks film *Spaceballs*, a parody of the *Star Wars* films (and other science fiction films), featured numerous characters whose names were intended to evoke their corresponding characters in *Star Wars*, including Yogurt (for Yoda), Princess Vespa (for Princess Leia), and Dark Helmet (for Darth Vader). *SPACEBALLS* (Metro-Goldwyn-Mayer 1987).

99. *Am. Dental Ass'n v. Delta Dental Plans Ass'n*, 126 F.3d 977 (7th Cir. 1997).

100. *Id.* at 981.

101. *Id.* at 979.

102. *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276 (3d Cir. 2004).

103. *Id.* at 282.

that had already been made. The *ADA* numbers, by contrast, were denotative only after they came into existence—before that assignment by the *ADA*, they pointed to nothing except their own expression, such that any other number might have been chosen instead, and thus were copyrightable.

Given, then, that the process of naming sometimes involves creativity, we need an alternative theory as to why names should be excluded from copyright's scope. One such explanation might rely on the incentive theory of copyright. Copyright law is ostensibly justified on the grounds that authors are unlikely to create certain categories of works without the incentive that copyright law provides; without such an incentive, creators would drop out of the market due to an inability to compete with copyists, who need recoup only the costs of copying and not the costs of production. Because it is likely that we have nonmarket incentives to bestow names on our children, pets, products, and creative identities, without any added incentives, copyright law arguably need not operate in this realm¹⁰⁴ or (to borrow from Judge Kozinski's opinion in *Dreamwerks Production Group v. SKG Studio*¹⁰⁵) ought to extend only to particularly creative names in order to encourage inventiveness and thereby enrich, if not the language as a whole, at least the onomastic catalogue. Other explanations might invoke the bar against duplication that is at the heart of copyright's protection. Justin Hughes has suggested, for example, that a name, once adopted, becomes a social fact open to use by anyone as the most efficient way of referring to a person, even if a name is seen as created rather than discovered.¹⁰⁶ In other words, a name is uncopyrightable not primarily because of its length but because it represents an instance in which fact and expression merge—you cannot refer to how something is named without using the name itself. Once we have all agreed to call a man "Robert" (in response to his informing us that "Robert" is what he desires to be called), that name takes on the status of a fact just as much as does the height of Mount Kilimanjaro. We cannot offer the statement "That man is named Robert" without using the name Robert, and so copyright would not protect the name Robert just as it would not protect the height of Mount Kilimanjaro.¹⁰⁷ Similarly,

104. See, e.g., Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141 (2011); Hughes, *supra* note 93, at 610–13; Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009).

105. *Dreamwerks Prod. Grp v. SKG Studio*, 142 F.3d 1127, 1132 (9th Cir. 1998).

106. Justin Hughes, *Created Facts and the Flawed Ontology of Copyright Law*, 83 NOTRE DAME L. REV. 43, 92–93 (2007) (discussing when the incentives of copyright law might be needed for the invention of "created facts").

107. *Id.*; see also, e.g., Hayden v. Chalfant Press, 281 F.2d 543, 547 (9th Cir. 1960) (noting that once a mapmaker had "christened a geographic location, and depicted such name on a copyrighted map, such name may be used with impunity by later cartographers, and such name is not a part of the protected portion of the copyright"); Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 154 n.21 (1992) ("[O]ne's address does not cease to be a fact upon a showing that the name of one's street originated in the fancy of a housing developer."); cf. Litman, *supra* note 90, at 996–97 ("Facts, however, do not exist independently of the lenses through

as David McGowan has suggested, we might deny copyright protection to names because we want to encourage the use of them to refer to the individuals named, not encourage unrelated nicknames or other variations.¹⁰⁸ As with the nominative fair use doctrine in trademark law, copyright law, under this view, should permit the use of names for their denotative purpose because it would be hugely inefficient to require others to substitute descriptions of the individual named.¹⁰⁹

These theories tell us something about the appropriate spheres in which law should operate. Notably, neither theory requires us to deny that the act of naming involves considerations of authorship and creativity. Rather, these theories indicate that copyright law should deny protection to names because copyright law, like trademark law, has an overriding interest in the denotative use of names. In other words, names should not be copyrightable because restrictions on their use would impede the ability of others to engage in the act of referring. If the parents who name their daughter Jennifer Smith can then claim that “Jennifer Smith” is protected by copyright law, her future teachers will have to record her name in student records as “the little girl with brown hair and red eyeglasses in the second row” or risk liability for infringement. Where there is a denotative clash, trademark law operates to solve the problem (at least, where commercial use is at issue); otherwise, the heavy machinery of the law is likely ill-suited to deal with conflicts relating to naming’s expressive functions.

Thus, while both trademark law and copyright law recognize that creativity is relevant to the naming process, both doctrines elevate the denotative function of names over the connotative. The underlying principles of these doctrines, however, are mirrored in many community and social norms surrounding naming. In some instances, communities protect the denotative function of names by prohibiting or discouraging name duplication when such duplication is likely to deceive or cause confusion. In other instances, communities protect the expressive function of names by prohibiting or discouraging name duplication that is seen as a violation of another’s property interest in the name. For our hypothetical letter writer, her community’s constraints are soft norms only: the

which they are viewed. . . . In this sense, facts are no more ‘out there’ than are plots, words, or sculptural forms.”).

108. David McGowan, *Copyright and Convergence: A Pragmatic Perspective*, in INTELLECTUAL PROPERTY PROTECTION OF FACT-BASED WORKS: COPYRIGHT AND ITS ALTERNATIVES 233, 248–49 (Robert F. Brauneis ed., 2009).

109. *Cf.*, e.g., *New Kids on the Block v. News Am. Pub., Inc.*, 971 F.2d 302, 306 (9th Cir. 1992) (“[O]ne might refer to ‘the two-time world champions’ or ‘the professional basketball team from Chicago,’ but it’s far simpler (and more likely to be understood) to refer to the Chicago Bulls. In such cases, use of the trademark does not imply sponsorship or endorsement of the product because the mark is used only to describe the thing, rather than to identify its source.”). Both Hughes and McGowan discuss the part-number cases in light of their respective theories. *See* Hughes, *supra* note 106, at 62–67 (analyzing part-number cases as example of social facts); McGowan, *supra* note 108, at 250 (“Refusing to extend copyright to either the part numbers or compilations of them (catalogues) implements the policy decision that uniformity is better than variation.”).

trust among friends or family members that name copying is inappropriate. Online communities, by contrast, have developed more formal constraints, and so are particularly fertile grounds for observing this phenomenon.

III. NAMING AND NORMS ONLINE

As with other facets of our identities, the names we choose to communicate with each other electronically involve a degree of “social signaling.”¹¹⁰ Many of us have spent considerable time choosing an e-mail address or an alias for communicating on blogs, message boards, or virtual worlds,¹¹¹ and, likewise, many of us have no doubt bemoaned the inelegance of the usernames that are imposed upon us as part of corporate e-mail accounts and the like. In environments ranging from Second Life to chat rooms to blog comments, the choice of a name is one of the first instances of creativity that takes place before further participation can begin.¹¹² Writers from both within and outside online communities have noted the creativity inherent in naming, not only from a functional perspective—choosing something that has not already been taken and thus enabling the user to participate in the network in the first place—but as a representation of personhood.¹¹³ Names invoke cultural connotations, engage in wordplay, tell jokes, and even work as slogans or other direct communications to others.¹¹⁴

Users, recognizing that identities are rooted in communities, may choose different names for different communities. One’s e-mail address for business communications, for example, may reflect a different personality from the one reflected by one’s personal e-mail account; likewise, one may choose to blog on

110. Victoria McArthur, *Professional Second Lives: An Analysis of Virtual World Professionals and Avatar Appearance Codes 22* (Aug. 2010) (unpublished thesis, York University) (on file with author).

111. See Rosenbloom, *supra* note 26.

112. RICHARD A. BARTLE, *DESIGNING VIRTUAL WORLDS* 179 (2004) (“Players identify more with their characters if they get to choose the names themselves; name selection is the first and arguably most important decision concerning their virtual identity that a player can make.”).

113. EDWARD CASTRONOVA, *SYNTHETIC WORLDS: THE BUSINESS AND CULTURE OF ONLINE GAMES* 32–33 (2005) (discussing a hypothetical example of the process one might go through to create one’s online identity); DAVID CRYSTAL, *LANGUAGE AND THE INTERNET* 160 (2001) (“As with all self-selected names (such as car licence plates and CB handles), owners get attached to [online names]. The nick is their electronic identity; it says something about who they are, and acts as an invitation to others to talk to them.”); Bechar-Israeli, *supra* note 52 (noting that in the text-based environment of IRC, nicknames (or “nicks”) are “critical means of presenting ourselves. They are the only initial way of saying who we are, in literally one word or expression.”).

114. One of the hypothetical names that Linden Lab uses to explain how display names work in Second Life is an entire phrase (“Torley amplifies YOUR awesome”). Secondlife, *Display Names Essentials: Second Life Video Tutorial*, YOUTUBE (Aug. 16, 2010), <http://www.youtube.com/watch?v=eGoHjGz2OaQ>; CRYSTAL, *supra* note 113, at 161 (describing the linguistic playfulness of names as being of “sometimes virtuoso quality”); David Jacobson, *Contexts and Cues in Cyberspace: The Pragmatics of Naming in Text-Based Virtual Realities*, 52 J. ANTHROPOLOGICAL RES. 461, 468 (1996) (“A perusal of any social MOO reveals that most character names are, in fact, both fictional and playful.”).

professional topics under one screen name and on cultural interests under another, with no indication that the two names are linked.¹¹⁵ And as in the offline world, different kinds of creativity online may be seen in different cultural subgroups. Part of this creativity, as with other kinds of creation, involves borrowing from other works in order to communicate the author's own characteristics, preferences, and desires. An early study of the hacker community, for example, observed that hackers "take pride in their assumed names," which are "borrowed liberally from the anti-heroes of science fiction, adventure fantasy, and heavy metal rock lyrics, particularly among younger users, and from word plays on technology, nihilism, and violence."¹¹⁶ Children and adolescents who do not use their given names or real-world nicknames online often choose screen names that reference favorite characters, celebrities, or other elements of popular culture.¹¹⁷

Through their terms of service and developed norms, online communities provide the rules that govern creativity in naming in ways similar to the formal constraints of copyright and trademark law. And, like those doctrines, the rules sometimes recognize and validate participants' creative choices and sometimes serve to squelch them. Communities that are concerned primarily with the denotative function of names will have rules or norms that allow use of others'

115. See, e.g., Benjamin M. Gross, *Names of Our Lives*, 4 IEEE INT'L CONF. COMPUTATIONAL SCI. ENGINEERING 747, 751 (2009); Benjamin M. Gross & Elizabeth F. Churchill, *Addressing Constraints: Multiple Usernames, Task Spillage and Notions of Identity*, CHI '07 EXTENDED ABSTRACTS ON HUM. FACTORS COMPUTING SYSTEMS 2393, 2394 (2007) (noting that users often maintain different online identities for different purposes); *id.* at 2397 (noting that lower "status and prestige" of previous user names was often given as a reason for creating a new online identity). Some commentators, however, have suggested that we should tolerate this kind of pseudonymity less in close-knit communities, rather than more, on the theory that the harms that can be exacted within such communities represent a greater breach of trust. See, e.g., Martha C. Nussbaum, *Objectification and Internet Misogyny*, in *THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION*, *supra* note 62, at 68, 85 ("Regulation must consider the size of the community, the status of the objectified victim, and the likelihood of serious damage, both to individuals and to the community.").

116. Gordon Meyer & Jim Thomas, *The Baudy World of the Byte Bandit: A Postmodernist Interpretation of the Computer Underground* 22 (June 10, 1990) (unpublished manuscript), available at <http://www.scribd.com/doc/37110947/The-Baudy-World-of-the-Byte-Bandit-A-Postmodernist-Interpret>.

117. See Sandra L. Calvert et al., *Gender Differences in Preadolescent Children's Online Interactions: Symbolic Modes of Self-Presentation and Self-Expression*, 24 APPLIED DEVELOPMENTAL PSYCHOL. 627, 635 (2003) (describing results of a study in which most children using a virtual world chose a real name or nickname for their avatars; among children who did not, most girls chose names based on musical pop culture, whereas no boys did so); Gill Valentine & Sarah L. Holloway, *Cyberkids? Exploring Children's Identities and Social Networks in On-Line and Off-line Worlds*, 92 ANNALS ASS'N AM. GEOGRAPHERS 302, 310 (2002) (describing, based on interviews with British children, how "the nicknames [some children] give themselves on-line are a product of their off-line lives"). One study of name choices among teenage bloggers concluded that, of the blogs studied, bloggers were about as likely to use their real-life names as an invented online name, with no difference relating to gender. David Huffaker, *Gender Similarities and Differences in Online Identity and Language Use Among Teenage Bloggers* 53–54 (Apr. 28, 2004) (unpublished M.A. thesis, Georgetown University) (on file with author); see also *id.* at 72 ("The online presentations of teenagers demonstrate that blogs are an extension of the real-world, rather than a place where people like to pretend.").

names so long as that use is not likely to deceive, defraud, or confuse other members of the community. Communities that are concerned with the expressive function of naming may have rules or norms that prohibit particular kinds of names from being used in that community, such as names that are profane or obscene, or may prohibit duplication of names regardless of any possible deception or confusion, thus giving the first creator a type of ownership right in the name.

In online communities, recognition of the creativity involved in naming manifests itself in two primary ways: whether the online community allows participants to freely choose their own usernames without restrictions, and whether participants are permitted to duplicate an existing username even when there is no issue of impersonation or deception. These aspects of naming—the valorizing of authorship and the scope of its exclusivity—mirror, although they are obviously not governed by, copyright law. Two recent policy changes serve as small case studies here: (1) Google’s decision in the early days of its social network Google+ (which I will refer to henceforth as “Google Plus,” for ease of reading) to require participants to use their real names on the service,¹¹⁸ and (2) Linden Lab’s decision, in late 2010, to move from a system of restricted account names in Second Life to a system of a stable usernames plus freely chosen display names, including display names that duplicate a display name already in use by another participant. I don’t claim that these examples lead to any definitive conclusions; my discussion of the reactions to these policies by users is decidedly nonscientific and nonuniversal. But they do help us to understand the interests that are at stake for at least some users when their assumptions surrounding naming are upended.

A. The Desire for Creativity

Online participants have often noted that they prefer the ability to express themselves creatively when choosing an online name. In the wake of the initial Google Plus policy, writers, activists, and others spoke out on the importance of being able to choose the names with which one communicates online.¹¹⁹ But in any online environment, the system’s corporate owner can control almost every aspect of the experience, either through the architecture of the system or by policies that exact compliance as a condition of participation, and naming is no different in this regard. For some environments, the architecture of the system

118. In January 2012, Google changed its policy to permit nicknames or pseudonyms upon proof that the individual is known by that name elsewhere. See Claire Cain Miller, *In a Switch, Google Plus Now Allows Pseudonyms*, NYTIMES.COM (Jan. 23, 2012), <http://bits.blogs.nytimes.com/2012/01/23/in-a-switch-google-plus-now-allows-pseudonyms>; see also *Google+ Page and Profile Names*, GOOGLE+, <http://support.google.com/plus/bin/answer.py?hl=en&answer=1228271> (last visited June 15, 2012) (“If we challenge the name you intend to use, you will be asked to submit proof that this is an established identity with a meaningful following.”).

119. See Martin Kaste, *Who Are You, Really? Activists Fight for Pseudonyms*, NPR.ORG (Sept. 28, 2011), <http://www.npr.org/2011/09/28/140879480/who-are-you-really-activists-fight-for-pseudonyms>.

may act as a constraint on creativity (or, conversely, inspire users to be more creative within those constraints). Some early e-mail accounts, for example, allowed usernames of no more than eight characters, which, as one writer has noted, made it unlikely that usernames would resemble users' full given names.¹²⁰ Corporate e-mail accounts often render employees' names in a systematic way, with little choice in how employees' names will be represented (or truncated); the systematic way in which each e-mail address is formed can sometimes make unknown corporate e-mail accounts easy to guess once one address is known. Some virtual worlds impose similar restrictions. For example, the character name policy of EVE Online requires all usernames to contain at least four, but no more than twenty-four, alphanumeric characters.¹²¹ And until late 2010, Second Life did not support European, Asian, and other Unicode characters in usernames—which limited choices by those who wanted to express themselves in languages that use those characters¹²²—and required that the surnames of all usernames be chosen from a list provided by Linden Lab.¹²³

Other naming restrictions are provided by terms of use and similar policies. Like section 2(a) of the Lanham Act, many networks prohibit usernames that have certain connotations, such as names that are offensive or obscene. The terms of use for Blizzard's World of Warcraft, however, go further, prohibiting not only character names that are offensive or racist but also, *inter alia*, any name that belongs or refers to a pop culture or religious figure; any name that consists of a partial or complete sentence ("Inyourface") or gibberish; any name that "utilizes 'Leet' or 'Dudespeak'" (such as "Roflcopter"); any name that incorporates a title (such as "KingMike" or "CorporalTed"); and any name that uses a misspelling or alternative spelling to circumvent these restrictions.¹²⁴ EVE Online prohibits not

120. Matt Haughey, *Growing Old Online*, WHOLE LOTTA NOTHING (Apr. 17, 2003, 12:00 AM), <http://a.wholelottanothing.org/2003/04/growing-old-online.html>.

121. *EVE Online User and Character Name Policy*, EVE ONLINE, <http://www.eveonline.com/pnp/namepolicy.asp> (last visited Mar. 29, 2012) [hereinafter *EVE Online Policy*].

122. Jack Linden, *Display Names: Bringing Greater Self-Expression to Second Life*, SECOND LIFE (Aug. 17, 2010), <http://community.secondlife.com/t5/Features/Display-Names-Bringing-Greater-Self-Expression-to-Second-Life/ba-p/660251/page/10>.

123. See Avril Korman, *The Name Game: Display Names and the Law of Unintended Consequences*, SEARCH ENGINE WATCH (Aug. 13, 2011), <http://searchenginewatch.com/article/2101600/The-Name-Game-Display-Names-and-the-Law-Of-Unintended-Consequences> (describing problems with the new policy). This control over surnames is similar to what governments, totalitarian and otherwise, have done and continue to do worldwide. See, e.g., James C. Scott et al., *The Production of Legal Identities Proper to States: The Case of the Permanent Family Surname*, 44 COMP. STUD. SOC'Y & HIST. 4, 17 (2002) (describing German control over Jewish names); Sam Kean, *What's In a Name?*, N.Y. TIMES, Oct. 28, 2007, § 6 (Magazine), at 25 (reporting that Finland will not recognize a birth if the parents have selected an unapproved name); Sharon LaFraniere, *Your Name's Not on Our List? Change It, Beijing Officials Say*, N.Y. TIMES, Apr. 21, 2009, at A1 (describing Chinese list of acceptable characters to use in naming children).

124. *World of Warcraft Terms of Use*, BLIZZARD ENT., http://us.blizzard.com/en-us/company/legal/wow_tou.html (last updated Dec. 9, 2010).

only character names that impersonate others but also names that parody any employee or representative of EVE Online or CCP, its corporate owner.¹²⁵ Facebook, for its part, reserves the right to delete a username for any reason it believes to be appropriate.¹²⁶

Other environments take a broader view of naming and creativity. When Second Life moved to a display-name policy in late 2010, allowing residents to change the name that appears above their avatars as often as once per week (while maintaining a stable account name), it justified the change as ostensibly enhancing the ability of members to express themselves online. As one communication from Linden Lab explaining the new policy stated, the display name policy “gives you more freedom than ever to express your inworld identity. You can use your real name, a fantasy name, hyphenate with your inworld partner, promote your organization or inworld business name, or anything that you want other Residents to refer to you as.”¹²⁷ Whatever Linden Lab’s motivations for the change, the policy is particularly notable because it can be read as elevating, to some extent, creativity over accountability. Although residents’ account names remain unchanged (and thus serve as an accountability backstop), the fact that the avatar known to others under one display name one week may appear under a different display name the next week means that residents can more easily abandon poor reputational accumulations and start anew.¹²⁸

When Google introduced its social network, Google Plus, in 2011, it took a different approach, requiring participants to use their real names when registering, ostensibly to prevent misuse of the service.¹²⁹ This policy could not, of course, be

125. *EVE Online Policy*, *supra* note 121.

126. *See Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/legal/terms> (last updated June 8, 2012) [hereinafter *Facebook Statement of Rights*].

127. Linden, *supra* note 122; *see also Usernames and Display Names*, SECOND LIFE, <http://community.secondlife.com/t5/English-Knowledge-Base/Display-names-FAQ/ta-p/700173> (last updated Jan. 24, 2012). For a view that the display-names policy has not worked as intended, *see* Korman, *supra* note 123.

128. This is not an unusual practice, of course, for either individuals or corporations. *See* Heymann, *supra* note 30, at 440–42 (discussing companies and individuals that have changed their names in order to get a fresh start).

129. *See User Content and Conduct Policy*, GOOGLE+, <http://www.google.com/intl/en-US/+policy/content.html> (last visited Mar. 29, 2012) [hereinafter *Google Plus Policy*] (“To help fight spam and prevent fake profiles, use the name your friends, family or co-workers usually call you. For example, if your full legal name is Charles Jones Jr. but you normally use Chuck Jones or Junior Jones, either of those would be acceptable.”). Facebook also requires most users to use their real names on the service, although it announced in February 2012 that it would allow some users to display well-known pseudonyms (such as performers’ stage names) on their pages. *See Facebook Statement of Rights*, *supra* note 126 (prohibiting users from providing “any false personal information” or “creat[ing] more than one personal account”); Somini Sengupta, *Letting Gaga Be Gaga: Facebook Policy Now Allows Made-Up Names*, N.Y. TIMES, Feb. 17, 2012, at B6. As with Google Plus, the service’s view of what constitutes a real name may differ from the views of the site’s members. *See* Somini Sengupta, *Naming Names: Rushdie Wins Facebook Fight*, N.Y. TIMES, Nov. 15, 2011, at A1 (describing how Facebook deactivated the writer Salman Rushdie’s account, asked for proof of identity, and then reinstated the

truly justified on accountability grounds, since Google did not require verification of one's government-recognized identity for any username. Hence, in practice, the policy operated as a constraint on naming creativity by prohibiting only usernames that failed to resemble what Google defined as a real name. Thus, "Jonathan Anderson" would presumably be an acceptable username on Google Plus, even if it were not the birth name of the user, while "Angry Farmer" and "Zyxx" (and, perhaps, real names in non-English languages) presumably would not. Notably, celebrities were permitted to register pseudonyms that would not be considered real names in the offline world, such as 50 Cent and Lady Gaga, whereas the well-known pseudonyms of other users were prohibited.¹³⁰ Google's policy defined an acceptable name as "the name your friends, family or co-workers usually call you,"¹³¹ but that, of course, raised the question of which communities the policy deemed relevant. An individual might be called Jennifer at the office, J.J. by her family, Speedy by her softball teammates, and Moonglow by her friends in Second Life, with each of these names considered to be her usual or real name in each context.¹³²

Google's policy engendered considerable controversy, with users and commentators criticizing the company for not letting users choose the names they would use to represent themselves on the service.¹³³ While this opposition was motivated by a belief in the importance of pseudonymity in furthering individual engagement and communication, it is also clear that a desire for pseudonymity or the disaggregation of one's offline and online identities was not the whole story. If pseudonymity alone had been the interest, users might have been satisfied with a policy that assigned each user a name to be used consistently while on the service or an online service in which participants were designated by number instead of by name. Rather, members exhibited a strong desire to *create* their own usernames online—or to be able to use a previously created name in a new environment—a desire likely resulting from the same kinds of creativity impulses that motivate larger acts of creativity: self-expression, communication, and ownership.¹³⁴

account under the name Ahmed Rushdie, the name on Rushdie's passport).

130. See Ryan Tate, *Names Banned by Google Plus*, GAWKER (July 25, 2011, 7:15 PM), <http://gawker.com/5824622/names-banned-by-google-plus>.

131. See *Google Plus Policy*, *supra* note 129.

132. Similarly, one might imagine, for example, that many people would give the name of the forty-second president of the United States as "Bill Clinton," even though his "real" name is William Jefferson Clinton.

133. See, e.g., Tim Carmody, *Google+ Identity Crisis: What's at Stake with Real Names and Privacy*, WIRED (July 26, 2011, 3:48 PM), <http://www.wired.com/epicenter/2011/07/google-plus-user-names>. The response was reminiscent of the controversy over Friendster's deletion of fake profiles ("fakesters") on the service, including profiles for Giant Squid and Homer Simpson. See Katharine Mieszkowski, *Faking Out Friendster*, SALON (Aug. 14, 2003, 4:38 PM), <http://www.salon.com/2003/08/14/fakesters>.

134. The online services, of course, may not share this view of ownership, although their policies demonstrate a recognition of names as valuable assets. See, e.g., *World of Warcraft Terms of Use*, *supra* note 124 (providing that all character names are owned by Blizzard or its licensors).

B. Naming and Uniqueness

Even if an online community gives its members wide latitude to create a username, the degree of property-like status given to that name provides additional information as to how the community recognizes creativity. A community that prohibits members from copying others' usernames, even in situations in which there is no question of impersonation or fraud, is more intellectual property-like than a community that allows duplication of names, as would occur in the offline world. As with the threshold creativity question, whether duplication of another's name is seen as an offense can be determined by the network's formal rules and policies or as a matter of community norms. Two participants who are members of the same community will understand that community's norms about whether names can be copied, as well as the likely communicative effect of that copying. (By comparison, a film studio or record company, whose relationships with consumers are largely financial and impersonal, may have different expectations about whether its work can be copied and shared without compensation, regardless of attribution, than members of a closer-knit academic community, where uncompensated copying may be tolerated so long as attribution is provided.) In each of these environments, participants who are not members of the same community cannot resort to such understood norms and so must either tolerate duplication (if they even see such remote use as a transgression), change their own name, or attempt to resort to more formal means of enforcement.

In the offline world, we see varying levels of tolerance for duplication in naming, even in instances in which fraud or deception is not at issue. Graffiti artists react strongly to tag duplication because of a fierce adherence to the belief that one's name represents one's identity. As Susan Stewart has reported, "One of the principal rules of the writer's code of ethics is that the writer cannot copy, or 'bite,' either the tag or the style of another writer without instigating a cross-out war, or, more directly, a first-person fight."¹³⁵ Under the rules of the Jockey Club, which approves the name of each racehorse in the United States, names can be duplicated only if the first horse is over ten years old and the name has not been used during the preceding five years for breeding or for racing; "permanent names" (such as those of horses in the Hall of Fame) can never be used for another horse.¹³⁶ (By contrast, the American Kennel Club permits thirty-seven

135. SUSAN STEWART, *CRIMES OF WRITING: PROBLEMS IN THE CONTAINMENT OF REPRESENTATION* 213 (1991).

136. This rule might be partially explained by the desire to avoid confusion among those engaging in wagering on horse racing, although note that even names of horses never used for breeding or racing cannot be duplicated until five years from the date of the horse's death. See JOCKEY CLUB, *THE AMERICAN STUD BOOK: PRINCIPAL RULES AND REQUIREMENTS* 16–19 (2011), available at <http://www.jockeyclub.com/registry.asp?section=3>; see also T.D. Thornton, *Aw, Nuts: Why You Can't Give Your Thoroughbred an Obscene Name*, SLATE (Sept. 26, 2007, 12:51 PM), http://www.slate.com/articles/sports/sports_nut/2007/09/aw_nuts.html.

dogs of each breed to be given the same name; it reserves the right to assign Roman numerals for identification purposes.¹³⁷) And as David Fagundes has described, U.S. roller derby participants maintain a “Master Roster” that ensures that derby names will not be duplicated without permission, even if the two skaters compete in distant leagues and are unlikely ever to come in contact with one another.¹³⁸ In all of these instances, duplication seems to be prohibited not out of a desire to avoid confusion or deception (although that might be an alternative justification) but rather to express the community’s belief that naming is a creative act, the benefits of which—including receiving credit for having invented the name—should be enjoyed only by the name’s first author.

In the online world of social networks and other communities, many of the same interests are relevant. The risk of impersonation is, of course, a major concern, as are more functional interests, such as the need to have messages forwarded to the correct participant or the desire to be able to use the same name across several platforms.¹³⁹ Attributional problems can also be significant in any system that does not involve unique identifiers and does not provide functionality to allow speakers to indicate context. For example, whereas in an offline conversation one can address Bob simply by speaking his name and looking in his direction (or by using Bob’s last name if there is more than one Bob in the vicinity), an attributional reference on Twitter (using the “@” convention) has to refer to only one user in order for the reference to be meaningful.¹⁴⁰ On the other hand, disallowing duplication may frustrate some users from participating in the community at all. As one writer has suggested, “[v]irtual worlds with large numbers of players rapidly run out of decent names.”¹⁴¹

Regardless of these functional requirements, many online communities have developed rules or norms that prohibit name duplication based on the view that name creation is an expressive act that warrants recognition as an act of authorship. An early study of the hacker community, for example, concluded that “one of the greatest taboos is to use the handle of another or to use multiple handles.”¹⁴² The same was true in early multi-user dungeons (MUDs).¹⁴³ In

137. *Naming of Dogs*, AM. KENNEL CLUB, <http://www.akc.org/reg/namingofdog.cfm> (last visited Mar. 29, 2012).

138. Fagundes, *supra* note 21 at 1109, 1116 (describing annoyance among derby participants when others are discovered to be using a name similar to theirs or to one they had been planning to use).

139. See, e.g., Milton L. Mueller et al., *Digital Identity: How Users Value the Attributes of Online Identifiers*, 18 INFO. ECON. & POL’Y 405 (2006) (concluding, based on a survey of South Korean users, that consumers value the ability to use the same online identifier across multiple sites).

140. See James Grimmelmann, *First-Class Objects*, 9 J. TELECOMM. & HIGH TECH. L. 421, 425 (2011) (describing use of Twitter references).

141. BARTLE, *supra* note 112, at 178; see also CASTRONOVA, *supra* note 113, at 32–33 (discussing a hypothetical example of the many names a new user might attempt to register, only to find that they have already been taken by other users).

142. Meyer & Thomas, *supra* note 116, at 23.

Internet Relay Chat (IRC), a protocol for real-time Internet communication, duplication of names (“nicks”) was not allowed, initially as a matter of technology and then later as a matter of informal norms.¹⁴⁴ As Haya Bechar-Israeli describes, participants would help police the environment, informing other users that they were duplicating a nick and engaging in discussions to determine the senior user.¹⁴⁵ If informal dispute resolution was not successful, and a nick was deemed stolen, participants would “sanction the thief, . . . prevent his entry into certain channels, and . . . send him several nasty messages.”¹⁴⁶ Pavel Curtis, the creator of LambdaMOO, noted that, in that environment, “[p]layers can be possessive about their names, resenting others who choose names that are similarly spelled or pronounced or even that are taken from the same mythology or work of literature. In one case, for example, a player named ‘ZigZag’ complained to [him] about other players taking the names ‘ZigZag!’ and ‘Zig.’”¹⁴⁷ Other researchers have noted the same tendencies in other virtual worlds, describing the duplication of usernames not in terms of impersonation or fraud, but in language connoting a violation of a property or personality interest.¹⁴⁸

One of the differences between online communities and offline communities is that online communities can more easily use architectural (i.e., code-based) means to police the norms regarding name duplication, including by establishing registries or other means of notifying users of claims to particular names.¹⁴⁹ The woman who does not want her sister-in-law to “steal” her baby name must rely only on familial bonds to prevent duplication and can engage only in soft punishment after the fact to express her disapproval. The roller derby world documented by David Fagundes requires concentration of the policing authority in those who maintain the Master Roster. But online worlds can build in technology that prevents one user from duplicating the name of another. The registration process is an obvious place for this to happen, in that registration of a new user can be blocked until she has chosen a username that is not yet in use. In more decentralized environments, technology can be developed that allows users to police for duplication themselves. For example, many IRC networks once offered NickServ, a program that allowed users, once they had registered their

143. Pavel Curtis, *Mudding: Social Phenomena in Text-Based Virtual Realities*, in *CULTURE OF THE INTERNET* 121, 124 (Sara Kiesler ed., 1997).

144. Bechar-Israeli, *supra* note 52.

145. *Id.*

146. *Id.*

147. Curtis, *supra* note 143, at 121, 127.

148. See, e.g., T.L. Taylor, *Living Digitally: Embodiment in Virtual Worlds*, in *THE SOCIAL LIFE OF AVATARS: PRESENCE AND INTERACTION IN SHARED VIRTUAL ENVIRONMENTS* 40, 52 (R. Schroeder ed., 2002) (“Instances where users attempt to exactly copy another’s avatar (or use a slight variation on their name) is [sic] generally taken as an offense.”).

149. On the use of architecture as “law” more generally, see LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999).

nicknames, to boot off the service any other user they subsequently discovered using the same name on the network.¹⁵⁰

Linden Lab, unlike the developers of these other communities, made the decision when introducing Second Life's display name feature in 2010 that duplication of display names would be permitted, as in real life, assuming that duplication was not for a fraudulent purpose.¹⁵¹ As with the move to display names, Linden Lab justified this policy choice as a means of allowing residents greater opportunities for self-expression:

The Display Names project is about the freedom to express yourselves inworld—including using the tag above your head. As people live out their Second Lives their needs for the name above their head may change—perhaps they meet someone and fall in love, or they make a new professional affiliation or decide to roleplay. This is why an important principle behind this change is that Display Names not be unique or limited.¹⁵²

For some, this kind of creativity may come at a potential cost. As noted earlier, unique and persistent online pseudonyms enable accountability. Thus, it is not necessary that residents know the real name of the Second Life resident participating under the display name “Torley amplifies YOUR awesome” to be able to use that name as a reputational hook, just as it is not necessary for consumers to know that the Kimberly-Clark company makes Huggies diapers in order to use the HUGGIES trademark as a shorthand for the collection of qualities associated with the product.¹⁵³ Once duplication of display names is permitted, it becomes more difficult to know with whom one is interacting (particularly if contextual clues, such as avatar appearance, have also changed) and whether the information one has accumulated with respect to that name remains relevant.¹⁵⁴

150. Wilmer van der Gaast, *Register with NickServ*, HACKS, <http://oreilly.com/pub/h/1940> (last visited Mar. 29, 2012) (describing process); *NickServ Help Page*, TECHNERD, <http://www.technerd.net/nickserv.html> (last visited Mar. 29, 2012).

151. See Linden, *supra* note 122 (noting that display names are “not meant to be unique identifiers”). Other virtual worlds have chosen differently. See *What's in a Name?*, HABBO (Apr. 12, 2010), <http://www.habbo.com/articles/1590-whats-in-a-name> (noting that duplication of usernames in Habbo Hotel would not be permitted after the site's relaunch and that priority in case of conflict would go to more active users).

152. Jack Linden, *Changes to Display Names Based on Your Feedback*, SECOND LIFE, (Sept. 13, 2010, 8:14 PM), <http://community.secondlife.com/t5/Featured-News/Changes-to-Display-Names-Based-on-Your-Feedback/ba-p/664881>.

153. In trademark law, this is referred to as the anonymous source doctrine. 1 MCCARTHY, *supra* note 85, § 3:9.

154. See, e.g., Avril Korman, *Second Life Tinfoil Hat Theory, Part 4: Who Do You Want to Be Today?*, SEARCH ENGINE WATCH (Oct. 30, 2010), <http://searchenginewatch.com/article/2064320/Second-Life-Tinfoil-Hat-Theory-Part-4-Who-Do-You-Want-to-be-Today>; Amity Slade, Comment to *Soon You Arnt [sic] Unique Anymore, Someone Can Steal Your Name!*, SECOND LIFE (Sept. 1, 2010, 12:54 PM), <http://community.secondlife.com/t5/General-Discussions/Soon-you-arnt-unique->

Like the hypothetical letter writer with which this Article opens, however, some Second Life residents opposed the display name policy, not on the grounds that it would cause confusion among residents, but on the grounds that it insufficiently respected the creativity and authorship interests involved in naming oneself. Commentators highlighted the way in which uniqueness in naming was tied to identity and (in language reminiscent of trademark anti-dilution law) the dilutive power of name duplication.¹⁵⁵ Although they expressed concern about impersonation, they characterized the mere adoption of the name by another resident as an offense, much like the offline cultural groups discussed earlier.¹⁵⁶ As one resident commenting on the display name policy put it:

First, each of us is already unique[,] I have [a Second Life] name, Di Falconer. I am currently the only “Di Falconer” in SL. In that way I am unique. More so than in [real life] where my name is “owned” by other people.

Second, I had an incredible amount of choice in selecting my first name, and quite a few options in selecting my second. As did everyone else. More so than in [real life] where my name was issued to me by my parents long before I even understood the concept of naming (or identifying, or uniqueness). I could have chosen “xyz2345x” but I chose “Di.” I could have selected something other than “Falconer”. Regardless, as “Di Falconer” or[,] had I so decided, as “xyz2345x Gumby” I am (and we all are) unique. Soon though, I will no longer be unique.¹⁵⁷

CONCLUSION

Much has been written on the problems and benefits of pseudonymity on the Internet from a masking perspective: the idea that pseudonymity allows participants to experiment with new identities or forms of speech, to participate in

anymore-someone-can-steal-your-name/td-p/341626/page/4 (“Second Life isn’t divided by geography like that. You can get anywhere and talk to anyone instantly. If you tell someone, you ought to go meet Jane Smith, there is no way that someone is going to be able to find that particular Jane Smith in Second Life.”).

155. See, e.g., Darien Caldwell, Comment to *Soon You Arnt [sic] Unique Anymore, Someone Can Steal Your Name!*, SECOND LIFE (Sept. 1, 2010, 8:04 AM), <http://community.secondlife.com/t5/General-Discussions/Soon-you-arent-unique-anymore-someone-can-steal-your-name/td-p/341626> (“I can only feel that [Linden Lab] is allowing people to clone other people’s unique names in a hope to dilute the power of people’s unique identity. As Darien Caldwell, I am a unique individual with a voice. As just another Darien Caldwell in a vast sea of Darien Caldwells, my voice is lost.”).

156. See, e.g., Daniel Regenbogen, Comment to *It’s All in a Name: Display Names in Second Life*, DUSAN WRITER’S METAVERSE (Aug. 19, 2010), <http://dusanwriter.com/index.php/2010/08/18/its-all-in-a-name-display-names-in-second-life> (“Display names destroy identities. I know one thing already: anybody with a display name of ‘Daniel Regenbogen’ will be kicked out and banned from all groups and places that I have control over. I will not even ask for his reason to cho[o]se this display name—I see it as [a] very serious attack [on] me.”).

157. Di Falconer, Comment to *Changes to Display Names Based on Your Feedback*, SECOND LIFE (Sept. 28, 2010, 6:43 AM), <http://community.secondlife.com/t5/Featured-News/Changes-to-Display-Names-Based-on-Your-Feedback/ba-p/664881/page/15#comments>.

discussions that would otherwise be problematic, to maintain a separation between various interests or creative efforts, or, more troubling, to maliciously cause harm to others without immediate detection.¹⁵⁸ These analyses focus on the function of pseudonymity—in other words, pseudonymity as a means of accomplishing some other goal. But there is also value in recognizing pseudonymity as an end in itself, as a creative act of self-determination involving the same kinds of interests as other creative acts: authorship, personality, and attribution. A community's policies and norms surrounding pseudonymity thus facilitate creativity in multiple ways: they allow users to say and create things they might not otherwise say if they were required to use their real names, and, in so doing, they allow users to invent and name an alternate identity, itself a matter of authorial creation.

The creative effort devoted to choosing a name for oneself may well lead individuals to think that this creation leads to a soft, if not a formal, type of property right, made even more robust when the name is self-referential. Naming practices are thus another example of how the assumptions at the heart of our intellectual property doctrines may not always map very well onto the interests that motivate many individuals. For these individuals, the process of naming—whether oneself or another—is a significantly expressive activity, and the use of that name by another gives rise to the same kinds of interests that motivate at least some creators working on a larger scale: harm to the emotional investment in a creative work, concerns about authorial recognition, and resistance to copying of that work. But because one can more easily tell a story about these latter creators that involves economic interests, neither copyright law nor trademark law has been required to take much notice of the fact that creativity also takes place in realms (like naming) where we can be reasonably certain that economics are not a motivating factor but that identity, reputation, and personality are.

The dynamic nature of social networks and other online communities means that such communities are particularly well positioned to think seriously about how to respond to these noneconomic interests. In the same vein, we might benefit from observing the many challenges in effective implementation. For example, although commentators have recognized the pervasive interest in attribution for one's creative efforts, they have also acknowledged the difficulty of constructing an attribution requirement in practice.¹⁵⁹ One cannot easily, for example, allow copying of names but require that credit be given to the individual who came up with the name first. Likewise, we might learn from online and other communities about whether and how intellectual property law should respond

158. *See generally* THE OFFENSIVE INTERNET, *supra* note 62 (collecting essays presenting various views).

159. *See, e.g.*, Tushnet, *supra* note 62, at 803.

when community norms are absent, disparate, or not robust.¹⁶⁰ French chefs, stand-up comics, and roller derby skaters are all part of small enough communities that they can rely on community norms and rules to vindicate creativity and attribution interests.¹⁶¹ In other words, although U.S. copyright is ostensibly about economic interests, and not moral rights, the stories from communities that protect creative products without intellectual property law suggest a tendency to imbed a measure of respect for the creative process into their extralegal enforcement norms that is necessary for such norms to function. Larger or more disparate communities or social networks, on the other hand, may not be as cohesive and thus might require more formal recognition and enforcement of such interests.¹⁶² Additionally, we might also look to the benefits conferred by official registries such as roller derby's Master Roster and the registration processes of online environments that require uniqueness in naming for parallels to the scholarly inquiry into whether returning to a system of copyright formalities would be beneficial.¹⁶³ These benefits might include not only the notice function such registries provide to others but also the psychological benefits they provide to creators: a way both to signify the importance of one's creation and to have that creativity recognized, in some small way, by others.

Finally, we might use the debates that have taken place over naming policies on Google Plus, in Second Life, and elsewhere as object lessons in whether intellectual property law should be normative or reactive. Should the laws and regulations that govern creativity, for example, reflect the norms and preferences that have developed over time in particular communities (and, if so, which communities?), or should the law impose policy choices on those subject to its reach?¹⁶⁴ Are the naming constraints imposed by a particular community reflective

160. ANDREW POTTER, *THE AUTHENTICITY HOAX: HOW WE GET LOST FINDING OURSELVES* 219 (2010) ("The demise of the trust economy does not mean that people stop wanting social goods. . . . But when we can no longer get these things through the informal barter mechanism of the trust economy—that is to say, from our community—we turn to more formal instruments."); Clayton P. Gillette, *Reputation and Intermediaries in Electronic Commerce*, 62 LA. L. REV. 1165, 1166 (2002) (noting that "private enforcement mechanisms such as gossip are unlikely to be suitable for geographically distant transactions if the parties are not members of the same enforcement regime, such as a local trade association"); Viktor Mayer-Schönberger & John Crowley, *Napster's Second Life?: The Regulatory Challenges of Virtual Worlds*, 100 NW. U. L. REV. 1775, 1796 (2006) ("The experience of LambdaMOO and MediaMOO demonstrate that establishing a legitimate, transparent, and inclusive self-governing mechanism in virtual worlds is difficult.").

161. See sources cited *supra* notes 20–21.

162. Dreyfuss, *supra* note 20, at 1458 ("As communities increase in size, detection costs may increase as well, and the efficacy of informal enforcement techniques may then decline."); Oliar & Sprigman, *supra* note 20, at 1813 (noting that detection of joke stealing is a "community project," in that it arises "when any comedian witnesses a performance of material he believes has been stolen," not just the joke's author); *id.* at 1862 (noting that the Internet allows audience members to become more involved in the discipline process).

163. See, e.g., James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167 (2005); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004).

164. See, e.g., Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L.

of the importance the community places on creativity, or do those constraints serve to bolster the perceived importance of naming as a creative act? Do these choices affect individuals' attitudes or beliefs about the law as well as decisions about compliance or exit? As danah boyd has written:

The “real name” culture on Facebook didn't unfold because of the “real name” policy. It unfolded because the norms were set by early adopters and most people saw that and reacted accordingly. Likewise, the handle culture on MySpace unfolded because people saw what others did and reproduced those norms. When social dynamics are allowed to unfold organically, social norms are a stronger regulatory force than any formalized policy. At that point, you can often formalize the dominant social norms without too much pushback, particularly if you leave wiggle room. Yet, when you start with a heavy-handed regulatory policy that is not driven by social norms—as Google Plus did—the backlash is intense.¹⁶⁵

Individuals like the hypothetical woman whose sister-in-law “stole” her baby name, graffiti artists, and derby skaters are almost certainly not directly motivated by what the law tells them about creativity. But their feelings about what constitutes a creative act, what therefore becomes theirs, and what that view of property means for their tolerance of sharing, copying, and attribution are commonplace. Such feelings ought not to be vindicated legally, but they might tell intellectual property law something about the incentives that the law ostensibly exists to provide. More particularly, they might indicate that as we consider the terminology we use to talk about intellectual property law, we should recognize that at least some individuals continue to talk in terms of “theft” and “stealing” when their own creative efforts are at stake.

REV. 1525 (2004). The Center for Social Media at American University has developed a series of guides to fair use based on best practices in various communities and industries; the guides are available at <http://www.centerforsocialmedia.org/fair-use/related-materials/codes>.

165. danah boyd, *Designing for Social Norms (or How Not to Create Angry Mobs)*, APOPHENIA (Aug. 5, 2011), <http://www.zephorias.org/thoughts/archives/2011/08/05/design-social-norms.html>. One may disagree with boyd's characterization of whether naming in these environments was a matter of policy or organically developed. The fact that there is a choice between these two approaches is what is important.