

## *Fear and Loathing and Intellectual Property*

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This paper investigates two significant intersections between intellectual property protection and shame. First, social shaming shapes the behavior of certain would-be copiers (who “fear” community reprisal in norms-based communities without formal intellectual property protection). Second, public shaming informs the activities of certain would-be enforcers (who wish to avoid the “loathing” of consumers who cabin perceived over-enforcement by condemning aggressive rightsholders as copyright and trademark bullies and patent trolls). These two shaming effects may have opposing results—on one hand, restriction on copying, and on the other, freedom to copy—but they unite to establish and enforce intellectual property “negative spaces” where innovation and creation thrive without significant formal intellectual property protection or enforcement. In areas beyond the reach of formal intellectual property protection, social shaming often provides informal or norms-based boundaries for copying that replicate formal intellectual property protection or vary from formal systems in ways tailored to suit a particular creative community. In areas reached by formal intellectual property protection, public shaming often provides incentives for rightsholders to forbear from enforcing their rights, creating bubbles of “productive infringement.” The result of these effects is an overlay of shame-driven behavior that sits atop, and informally adjusts, the boundaries of formal intellectual property protection. This, in turn, requires us to adjust our thinking about the ideal boundaries of formal protection.