MORE COLLABORATION, LESS LITIGATION:[1] ANALYZING CRAFT BEER WITHIN INTELLECTUAL PROPERTY'S NEGATIVE SPACE

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Once upon a time, two brewers, despite working for competing craft breweries, were good friends.[2] This friendship led to the realization that each brewery had a beer named "Salvation" in its lineup.[3] Being friends, perhaps it is not surprising that neither brewer, nor their respective breweries, pursued legal action in order to determine which brewery was legally entitled to the "Salvation" trademark and, in turn, which brewery should cease to use the name.[4] What may be surprising, however, is that beyond resolving the dispute amicably, the two breweries swapped their "Salvation" beer recipes with one another, and then collaborated in creating "an even more complex and rich libation" that merged the best qualities of each beer.[5] Two years later, this exchange among friendly brewers resulted in a new beer for distribution, amusingly named "Collaboration, not Litigation" ale.[6]

This is not just a trademark bedtime story, but the true story of a trademark dispute resolution between Avery Brewing of Boulder, Colorado, and Russian River Brewery of Santa Rosa, California.[7] Both breweries are well known and successful—each boasts beers that rank in the top 150 according to BeerAdvocate, a popular online community and compiler of beer ratings powered by beer enthusiasts and professionals from around the world.[8]

1. *Collaboration not Litigation Ale*, AVERYBREWING.COM, https://www.averybrewing.com/beers/collaboration-not-litigation-ale (last visited Mar. 8, 2016) [https://perma.cc/T5NX-DLGZ].

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2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Top 250 Beers, as Rated by Our Users*, BEERADVOCATE.COM, http://www.beeradvocate.com/lists/top/ (last visited Nov. 12, 2015)

Since the emergence of the modern craft beer industry in the 1970s and 80s, craft brewers have often chosen to solve trademark disputes amicably, rather than through litigation.[9] Such disputes actually arise fairly frequently: there are "only so many words and names that make sense with beer" that it's not surprising that craft brewers "come up with the same ideas."[10]

However, the recent economic growth of the craft beer industry has paralleled an increase in craft brewers taking adversarial approaches to trademark disputes, including expensive trademark litigation,[11] harming competitors'

[https://perma.cc/9BT5-AKZ3] (Russian River's Pliny the Younger imperial IPA beer is ranked number four).

9. *See* Brian Sorenson, *Apple Blossom Collaborates with Local Beer Personality*, FAYETTEVILLE FLYER.COM (Aug. 26, 2015), http://www.fayettevilleflyer.com/2015/08/26/apple-blossom-collaborates-with-local-beer-personality/ [https://perma.cc/86XK-BJZJ] (describing how collaboration brewing has likely always been a part of craft beer culture, and became even more common after Avery and Russian River teamed up to create Collaboration, not Litigation Ale); Jane Lothrop, *Legal Experts Weigh in on Craft Trademark Disputes in 2015*, BREWBOUND.COM (Dec. 31, 2015, 2:35 PM), http://www.brewbound.com/news/legal-experts-weigh-in-on-craft-trademark-disputes-in-2015 [https://perma.cc/S9D4-D6LE] (attorneys describing that the craft brewery industry is and continues to be a collegial industry where many trademark issues are informally worked out rather than litigated); Samantha Drake, *Craft Beer's Recent Spate of Lawsuits has Beer Drinkers Hopping Mad*, QUARTZ.COM (Jan. 13, 2016), http://qz.com/589208/craft-beers-recent-spate-of-lawsuits-has-beer-drinkers-hopping-mad/ [https://perma.cc/28AH-K7T5]. ("Negotiation is always preferable to litigation . . . . [P]lenty of craft brewers resolve their differences quietly and out of the public eye. Approaching another brewer about a potential trademark conflict may not be easy, but it doesn't have to be contentious" and can usually be done though a simple phone call. "Sometimes this means one party agrees to change the name of a beer or even its brewery."); Interview with Andrew Riedel, Founder, Open Door Brewing Company, in Boulder, Colo. (Oct. 30, 2015) (recording on file with author) (arguing that before sending cease and desist letters, diligent attempts at a phone call or a meeting between brewers to resolve a dispute amicably is more appropriate given the camaraderie of the industry).

10. Alastair Bland, *Craft Brewers are Running Out of Names, and into Legal Spats*, NPR.COM (Jan. 5, 2015, 9:08 AM), http://www.npr.org/sections/thesalt/2015/01/05/369445171/craft–brewers–are–running–out–of–names–and–into–legal–spats [https://perma.cc/L3DD-VX4J] ("A frequently recurring issue . . . is different breweries thinking they've coined the same hopcentric puns and catchphrases for their beers. A quick Google search reveals multiple beers named 'Hopscotch,' and at least three India Pale Ales with the name 'Bitter End.'").

11. Sara Randazzo, *As Hop Puns Run Dry, Craft Beer Trademark Litigation Heats Up*, WALL STREET J. (June 11, 2016), http://blogs.wsj.com/law/2016/07/11/as-hop-puns-run-dry-craft-beer-trademark-litigation-heats-up/ [https://perma.cc/7UQ5-8U85].

reputations on social media,[12] or trademark bullying.[13] Thus, the threat of losing market share may mean that craft brewers (and their legal counsel) are being increasingly drawn to the adversarial strategy[14] of "protect first and ask questions later."[15]

Even though the financial stakes are higher,[16] open communication, collaboration, and collegial dispute resolution remain key values of the modern craft beer industry.[17] We see this when craft brewers make their recipes available to the public,[18] when craft beer consumers cease to buy from litigious

12. *See* Bland, *supra* note 10 (describing the demands of Atlanta-based brewery, SweetWater Brewing Co., that Northern California-based Lagunitas Brewing Company stop using the "marijuana code '420' in the cryptic artwork and messaging found on many Lagunitas beer labels," as well as Lagunitas' response to SweetWater's demands in the form of a "volley of Twitter jabs at SweetWater").

13. Drake, *supra* note 9.

14. *See* Interview with Andrew Riedel, Founder, Open Door Brewing Company, *supra* note 9 (suggesting that former small craft brewers that have become large and successful are being increasingly persuaded by their legal teams to first initiate legal action to enforce trademark rights before attempting an amicable compromise); Tony Kiss, *Bell's Brewery: Name Dispute Not About Bullying*, CITIZEN-TIMES.COM (Mar. 13, 2015), http://www.citizen-times.com/story/news/local/2015/03/13/bells-brewery-name-dispute-bullying/70298722/ [https://perma.cc/6SWV-HXVM] (describing the zeal of Michigan-based craft brewery Bell's in "taking the appropriate steps to protect its brand" against North Carolina's Innovation Brewing. Bell's brews 310,000 barrels of beer a year; Innovation brews about 500).

15. Elizabeth L. Rosenblatt, *Intellectual Property's Negative Space: Beyond the Utilitarian*, 40 FLA. ST. U. L. REV. 441, 482 (2013).

16. *See* Andy Crouch, *The Great Beer Trademark Wars*, ALL ABOUT BEER MAGAZINE.COM (Nov. 12, 2015), http://allaboutbeer.com/article/beer-trademarks/ (suggesting that there is an inevitable increase of trademark disputes as the craft brewery industry becomes more crowded); Jonathan Shikes, *In an Era of Trademark Battles, Would Avery and Russian River Still Collaborate, Not Litigate?* WESTWORD.COM (Feb. 5, 2014), http://www.westword.com/restaurants/in-an-era-of-trademark-battles-would-avery-and-russian-river-still-collaborate-not-litigate-5753330 [https://perma.cc/3P22-X6ES].

17. Interview with Andrew Riedel, Founder, Open Door Brewing Company, *supra* note 9 (describing that Colorado craft brewers are collegial and often even willing to mentor a friend in starting his or her own craft brewery, despite the risk of increased competition).

18. *DIY Dog: Giving Back*, BREWDOG BREWERY.COM, https://www.brewdog.com/lowdown/blog/diy-dog (last visited Mar. 8, 2016) [https://perma.cc/69WS-ACPR] ("So here it is. The keys to our kingdom. Every single BrewDog recipe, ever. So copy them, tear them to pieces, bastardise them, adapt them, but most of all, enjoy them. They are well travelled but with plenty of miles still left on the clock. Just remember to share your brews, and share your results. Sharing is caring."); Nancy Stiles, *Attention Home Brewers: Earthbound Brewing Sponsoring Open-Source Beer Competition*, ST. LOUIS MAGAZINE.COM

craft breweries,[19] and when brewers reach collegial dispute resolutions, like that between Avery and Russian River.[20]

The friction between the collegial culture of the craft beer industry and adversarial trademark enforcement tactics is analogous to that experienced by industries in intellectual property's "negative space."[21] Industries in intellectual property's negative space are those in which creation and innovation thrive without significant legal protection,[22] either because the "law excludes them from protection or because creators opt out of protection or enforcement."[23] Negative space industries may rely on community norms to regulate intellectual property[24] or forego intellectual property regulation entirely.[25] Although "[n]egative spaces do not undermine the justifications for formal intellectual property protection, . . . they do shed light on when such protection is—or is not—called for."[26]

(Apr. 13, 2015, 4:41 PM), http://www.stlmag.com/dining/attention-home-brewers-earthbound-brewing-sponsoring-open-source-beer-competition/ [https://perma.cc/FZ47-BWNW] (profiling an open-source brewing competition sponsored by Earthbound Brewery, in which Earthbound reveals its brown ale recipe and invites home brewers to come up with their own variations).

19. Drake, *supra* note 9 (profiling one craft brewer who "heard from hundreds of Craft Beer Enthusiasts who were outraged that we needed to sue anyone let alone another Craft Brewery," and another whose trademark enforcement activities resulted in a customer petition to boycott the brewery until the trademark suit was dropped).

20. *See* Michael Kanach et al., *The Brewhaha: Working with Craft Breweries for Trademark, Brand Protection, and Other Issues*, THE AMERICAN BAR ASSOCIATION (Mar. 27, 2015), http://www.americanbar.org/content/dam/aba/administrative/intellectual_property_law/2015/spring/materials/aba-ipl-brewhahacraftbeertrademarks-kanach-pdf-combined.authcheckdam.pdf [] (noting that many trademark disputes are "amicably settled" and that the "[i]ndustry is collaborative").

21. Rosenblatt, *supra* note 15, at 447.

22. *Id.* at 442.

23. *Id.*

24. For example, the tattooing industry has "nearly uniformly reject[ed] formal legal mechanisms for adjudicating claims over ownership and copying" in favor of community policing, whereby members of the tattooing industry themselves informally discourage and resolve unauthorized copying. Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511, 549–54 (2013).

25. Unrestricted copying is permitted in the area of open-source software. *What is Open Source?* OPENSOURCE.COM, https://opensource.com/resources/what-open-source (last visited Mar. 5, 2016) [https://perma.cc/7ETJ-T5D6] ("Open source software is software whose source code is available for modification or enhancement by anyone.").

26. Rosenblatt, *supra* note 15, at 447. Yet even in intellectual property's negative space, litigious outliers can disrupt informal systems of intellectual property protection, sometimes causing problems for these industries. *Id.* at 448–

This Article examines the craft beer industry within intellectual property's negative space. In doing so, it demonstrates that the craft beer industry's over-enforcement of trademark rights may be unnecessary and undesirable given the industry's unique motivations and unique qualities. That said, this Article does not urge craft brewers to cease enforcing their trademark rights altogether. Rather, in demonstrating how and when the pursuit of formal trademark protection may be at odds with the industry's unique motivations and unique qualities, this Article hopes to embolden craft brewers already striving to solve trademark disputes outside of the legal system, and inspire others to do the same.

I. TRADEMARK LAW IN A NUTSHELL

The purpose of trademark law is twofold.[27] First, trademark law protects consumers by ensuring that when they purchase a certain trademarked product, they are purchasing the product that they intended to receive.[28] Second, providing a means for legal exclusivity of a trademark protects the mark owner, who has invested significant resources into establishing a certain reputation of a product, from misappropriation by others.[29] In other words, sellers use trademark rights to protect their investment in creating high quality products by pursuing legal remedies against competitors that may place the seller's trademark on the competitor's inferior goods.[30] If competitors were otherwise allowed to use another's rightful trademark on their own goods, consumers may get confused or disappointed, and ultimately stop buying both the actual trademark owner's quality good and the competitor's phony good.[31]

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27. 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:1 (4th ed. 2016).

28. Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 782, n.15 (1992) (Stevens J., concurring) (quoting S. Rep. No. 1333, 79th Cong., 2d Sess., 3 (1946)). *Cf.* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 158 (1989) ("The law of unfair competition has its roots in the common-law tort of deceit: its general concern is with protecting consumers from confusion as to source. While that concern may result in the creation of 'quasi-property rights' in communicative symbols, the focus is on the protection of consumers, not the protection of producers as an incentive to product innovation.").

29. MCCARTHY, *supra* note 27, § 2:1.

30. *Id.* § 3:10.

31. *Id.* § 2:4.

Today, trademark law advances these purposes primarily through the Lanham Act of 1946,[32] a federal statute that defines a trademark as any word, name, symbol, or device—or any combination of these—which a trademark mark owner uses to distinguish a good or service and identify its source. In order to register a trademark under the Lanham Act, a trademark owner files the appropriate application with the United States Patent and Trademark Office.[33] A trademark examiner then processes the application, and if granted, lists the mark on a searchable Register.[34] The trademark owner then has the exclusive right to use the mark in connection with its product.[35]

The Lanham Act prohibits a person who, without the consent of the mark owner, "use[s] in commerce any reproduction, counterfeit, copy, or colorable imitation" of the mark owner's mark "in connection with the sale . . . [of] goods . . . with which such use is likely to cause confusion."[36] Interpreting this provision, the Supreme Court has held that infringement occurs where one's use of a particular mark is (1) likely to cause confusion (2) among members of the buying

32. The Lanham Act, 15 U.S.C. § 1127 (2012). *See also,* U.S. PATENT TRADEMARK OFFICE, PROTECTING YOUR TRADEMARK 2, https://www.uspto.gov/sites/default/files/BasicFacts.pdf [] (last visited Mar. 8, 2017) (defining a trademark). Trademark rights may also be conferred pursuant to state law. MCCARTHY, *supra* note 27, § 2:1. However, seeking protection under the Lanham Act is paramount for businesses participating in interstate commerce because trademark rights conferred by one state may not be enforced in another state. Indeed, use of, or a bona fide intent to use, a mark in national commerce is required for a federal trademark registration. U.S. PATENT TRADEMARK OFFICE, *supra* note 32, at 18. However, craft brewers in planning, or small craft brewers just starting out, may not anticipate national distribution of their beers, and thus adopt a name before securing federal rights to that name by using it in interstate commerce. *See* Crouch, *supra* note 16 ("Most of the companies are too small to actually go out and trademark their brand.").

33. The Lanham Act, 15 U.S.C. § 1051 (2012).

34. U.S. PATENT TRADEMARK OFFICE, *supra* note 32, at 1–3.

35. *Id.* at 11.

36. The Lanham Act, 15 U.S.C. § 1125(a)(1)(A) (2012) ("Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is *likely to cause confusion*, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.") (emphasis added).

public (3) with a trademark owner's valid mark.[37]

Whether the public is likely to be confused is a question of fact for a jury to decide.[38] The United States Courts of Appeals have developed multi-factor tests "to assist in the difficult determination of whether [there] is or is not a likelihood (probability) of confusion. Such a multi-factor test is not a checklist that must be satisfied for each and every factor, but is a guideline whose application will vary with each different factual pattern."[39]

It is the trademark owner's responsibility to defend her ownership of the trademark.[40] Among other ways, a trademark owner may enforce her mark by informally working out a resolution with the alleged infringer,[41] by sending one or

37. KP Permanent Make-up, Inc. v. Lasting Impression I, Inc., et al., 543 U.S. 111, 117 (2004). *See also*, RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 21 cmt. a (AM. LAW INST. 1995) ("The test for infringement is whether the actor's use of a designation as a trademark, trade name, collective mark, or certification mark creates a likelihood of confusion."); MCCARTHY, *supra* note 27, § 2:8 ("[T]he keystone of that portion of unfair competition law which relates to trademarks is the avoidance of a likelihood of confusion in the minds of the buying public.").

38. *KP Permanent Make-up*, 543 U.S. at 114.

39. 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:28 (4th ed. 2016). For example, the Tenth Circuit determines whether the defendant's use of a mark creates a likelihood of consumer confusion with the mark owner's mark by analyzing six factors:

> 1) the degree of similarity between the marks, 2) the intent of the perceived infringer in adopting its mark, 3) evidence of actual confusion, 4) the relation in use and manner of marketing between the goods or services marketed by the competing parties, 5) the degree of care likely to be exercised by purchasers, and 6) the strength or weakness of the marks.

King of the Mt. Sports, Inc. v. Chrysler Corp., 185 F.3d 1084, 1089–90 (10th Cir. 1999). In comparison, the Second Circuit adopts eight, albeit similar, factors:

> (1) the strength of the mark; (2) the degree of similarity between the marks; (3) the proximity of the products; (4) the likelihood of direct competition between the marks; (5) actual confusion; (6) the defendant's good faith in adopting its mark; (7) the quality of the defendant's product; and (8) the sophistication of the buyers.

Arrow Fastener Co. v. Stanley Works, 59 F.3d 384, 391 (2d Cir. 1995).

40. *See* MCCARTHY, *supra* note 27, § 23:76 ("Only the registrant and owner of record of the registration (not a licensee) has standing to sue under Lanham Act" for infringement of its federally registered mark.); 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:91 (4th ed. 2016) ("The law imposes on trademark owners the duty to be pro-active and to police the relevant market for infringers.").

41. Kanach et al., *supra* note 20 (identifying the option of calling an perceived infringer first to see if an amicable agreement can be reached, preventing litigation).

multiple cease-and-desist letters to the alleged infringer,[42] or by initiating litigation to prove a likelihood of confusion to a jury.[43] The following section demonstrates why the first option—informally working out a resolution with an alleged infringer—may often be the best option for craft brewers who find themselves faced with a trademark dispute.

II. CRAFT BEER IN INTELLECTUAL PROPERTY'S NEGATIVE SPACE

A. Intellectual Property's Negative Space

Some industries innovate and create quality goods without fully utilizing the legal exclusivity provided for in intellectual property (IP) law.[44] Industries such as fashion,[45] stand-up comedy,[46] and tattooing[47] operate effectively without utilizing the formal protection of IP law and thus are appropriately placed within IP's negative space.[48] But opting out of formal IP protections, even in part, theoretically leaves such industries

42. *Cease-and-Desist Letter*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A cautionary notice sent to an alleged wrongdoer, describing the offensive activity and the complainant's remedies and demanding that the activity stop. A cease-and-desist letter is commonly used to stop or block the suspected or actual infringement of an intellectual-property right before litigation.").

43. U. S. PATENT AND TRADEMARK OFFICE, ABOUT TRADEMARK INFRINGEMENT http://www.uspto.gov/page/about-trademark-infringement (last visited Mar. 8, 2017) [https://perma.cc/UH4D-Z2EQ] (describing that trademark owners able to prove a likelihood of confusion, and thus infringement, may utilize the following remedies: a court order that the infringer stop using the mark; a court order requiring the destruction or forfeiture of infringing articles; monetary relief; including the infringer's profits, damages sustained by the trademark owner, and the costs of the action; and in some cases, a court order that the infringer pay the trademark owner's attorney's fees).

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

45. *See* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1717–18 (2006) (arguing that copying in the fashion industry drives rather than chills innovation).

46. *See* 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, 1789–90 (2008) (arguing that stand–up comedians continue to create because social norms substitute for IP protections).

47. Perzanowski, *supra* note 24, at 512–13 (2013) (describing how tattoo artists "uniformly reject formal legal mechanisms for adjudicating claims over ownership. Instead, tattooers rely on a set of informal social norms to structure creative production and mediate relationships within their industry").

48. Rosenblatt, *supra* note 44;, at 319.

vulnerable to copying and lost income.[49] Why would an industry make such a choice?

For one, negative space industries choosing to forego IP protections feel that they benefit in some way from doing so.[50] This does not mean that operating in the absence of IP protections maximizes or even increases creation, but rather that increased utilization of IP protection "would impose a cost on [negative-space] creators that would exceed the benefit of exclusivity to those creators."[51] Maximized utilization of IP protections is a cost for negative-space industries because these "creators are not primarily motivated by the prospect of IP protection."[52] They may be more motivated by sharing and collaboration,[53] by promoting distributive justice,[54] or by a simple desire to create.[55]

Further, community and culture norms often operate at a high level in IP's negative space. For example, stand-up comedians overwhelming choose to rely on community norms to protect their intellectual property, because copyright law does not protect their ideas, just their expressions.[56] Likewise, those

49. *See* Rosenblatt, *supra* note 15, at 453 (describing that exclusivity over intellectual property enables creators to economically profit off their creations (assuming that copying costs less than initial creation), and that "without laws preventing copying, consumers would copy works and inventions rather than purchasing them, which would deny creators the resources they need to engage in further creation"); Rosenblatt, *supra* note 44, at 336 ("Although copying may deprive individual creators of licensing income, [creators in negative space] persist in creating without the reward of legally enforced exclusivity.").

50. Rosenblatt, *supra* note 44, at 336.

51. *Id.*

52. *Id.*

53. As in the case of open-source software. Rosenblatt, *supra* note 44, at 339. Likewise, in the area of creative cuisine, members discourage creators from pursuing infringers to promote a "culture of hospitality." 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, 1151-52 (2007).

54. Rosenblatt, *supra* note 15, at 457–58. (positing that the specific goals of promoting distributive justice through IP might include "consumer welfare (i.e., happiness); creation of a cornucopia of ideas (including creative incentive and access to ideas); creation of a rich artistic tradition; distributive justice; semiotic democracy (i.e., the creation of meaning by everyone); sociability (community); and respect").

55. Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 514 (2009) (characterizing creators of fanworks (unauthorized derivative works) as motivated primarily by a desire to create).

56. Rosenblatt, *supra* note 15, at 468. The community surrounding stand–up comedy discourages copying of both ideas and expressions by way of professional sanctions and sometimes, physical violence. *Id*. For example, comedian George

who participate in roller derby could rely on trademark law to protect their pseudonyms, but this community chooses instead to enforce trademarks in its own way.[57] Roller derby players search an official database and use a detailed system for deciding when two pseudonyms are too similar to coexist, to avoid taking a pseudonym already used by another.[58] These informal enforcement mechanisms work because parties are not only incentivized to carry contracts by the risk of legal sanctions for their not doing so, but are also partly or wholly induced to carry out contracts to protect their reputations, because of social or industry custom,[59] or out of "concern for relationships, trust, honor, and decency."[60]

In negative space, then, innovation and creation is motivated by incentives not based on pure profits as well as community and culture norms.[61] Indeed, these two motivators underlie Professor Elizabeth Rosenblatt's four commonalities of negative space industries.[62] Specifically, Rosenblatt posits that an industry is well suited for IP's negative space when it consistently experiences one or more of the following:

> 1. Rewards besides exclusivity motivate creation
> 2. Exclusivity [over a type of intellectual property] would hinder creation
> 3. There is a high public interest in free access
> 4. Creators prefer to spend limited time, money, and other resources on further creation, rather than seeking,

Lopez accused Mencia of incorporating thirteen minutes of his material into one of Mencia's HBO comedy specials, later boasting that he grabbed Mencia at a comedy club, slammed him against a wall, and punched him. Olia & Sprigman, *supra* note 46, at 1796–97.

57. Rosenblatt, *supra* note 15, at 469.

58. *Id.*

59. *Id.* at 467.

60. Jay M. Feinman, *Relational Contract and Default Rules,* 3 S. CAL. INTERDISC. L.J.. 43, 53 (1993). *See also,* Lisa Bernstein, *Social Norms and Default Rules Analysis*, 3 S. CAL. INTERDISC. L.J. 59, 60 (1993) (recognizing the "centrality of social norms in many transactional settings and acknowledging that not all transactions are 'discrete' and that not all transactors appear to act as 'steely–eyed utility maximizers'").

61. *See* Rosenblatt*, supra* note 44, at 336 (describing that strong community norms and rewards not tied to incentives based on pure profits characterize IP's negative space); Rosenblatt*, supra* note 15, at 461, 468–72 (suggesting that either "unrestricted copying or community norms that govern the circumstances of copying" operate in IP's negative spaces and that community norms do much to protect one's intellectual property in some communities).

62. Rosenblatt*, supra* note 44, at 342.

protecting, or enforcing intellectual property rights.[63]

With regard to three of four of Rosenblatt's factors, the next section demonstrates that over-enforcement of trademark rights may be undesirable, because (1) craft brewers are motivated to create by rewards besides exclusivity, (2) exclusivity over beer trademarks can hinder creation, and (3) craft brewers prefer to spend limited time, money, and other resources on further creation, rather than enforcing trademark rights. It also demonstrates that over-enforcement of trademark rights may also be unnecessary, given that craft brewers participate in an extraordinarily collegial culture, enjoy a sophisticated consumer base, and distribute their products in varying ways.

B. Craft Beer's Fit in Negative Space

1. Rewards Besides Exclusivity Motivate Creation

Where a good has low production costs and fulfills a consumer need, obtaining exclusivity over a trademark, and thus over the good, allows one to sell it for a profit.[64] For example, the owner of a small gluten-free bakery based in Boulder, Colorado, may find that she can charge the most for her trademarked bread among her fellow gluten-free bakers because she is the exclusive owner of the coveted gluten-free bread recipe.[65] Unsurprisingly, a main goal of most American for-profit businesses can thus be simplified as exclusivity over a desirable product,[66] and trademark law helps advance this

63. *Id.*

64. John Burgstone & Bill Murphy Jr., *How to Create a Profitable Business*, ENTREPRENEUR.COM (Feb. 16, 2012), http://www.entrepreneur.com/article/222710 [https://perma.cc/Z3YF-UB7J] (explaining that where a company enjoys low production costs of a high utility product, that company is in the best position to capture value and make a profit).

65. Kim and Jake's Gluten Free Bakery in Boulder, Colorado, sells a four-pack of gluten-free buns for $6.00 and has the third highest rating on Yelp.com in the category of gluten free bakeries. *Products: Breads*, KIM AND JAKES BAKERY.COM, http://www.kimandjakes.com/bread/ (last visited Jan. 30, 2016) [https://perma.cc/9YL4-DH5F]. Conversely, a popular brand of gluten-free bread sold in supermarkets, Udi's, sells an eight-pack of gluten-free buns for $4.50. *Hamburger Buns*, UDI'SGLUTENFREE.COM, http://udisglutenfree.com/products/classic-hamburger-buns/ (last visited Mar. 8, 2016) [https://perma.cc/SWH6-4NU2].

66. Indeed, courts have held that corporations exist to make a profit for

goal.[67] However, negative space industries may be motivated by rewards besides this profitable exclusivity.[68]

Like negative space industries, craft brewers are incentivized to create new and innovative beers for rewards besides those based on pure profits.[69] For one, craft brewers are often motivated to enter the industry with an overwhelming desire to make, share, and enjoy good beer.[70] Brewers who have been experimenting with brewing beer for some time come to enjoy the craft beer making process, and craft beer culture in general, so much so that they try to make a living out of brewing beer.[71] Thus, craft brewers often do not enter the craft beer industry motivated by the primary goal of creating a beer conglomerate to rival Anheuser-Busch or Miller.[72]

This is not to say that craft brewers do not employ sustainable business plans: "Fifty percent of all brewpubs ever started, and seventy percent of production breweries, are still in business, whereas the majority of other small businesses don't make it past their first year."[73] Thus, craft breweries

shareholders. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 681–82 (Mich. 1919).

67. MCCARTHY, *supra* note 27, § 2:7 (conveying that one of the purposes of trademark law is to provide a means for legal exclusivity of a trademark in order to protect the trademark owner, who has invested significant resources into establishing a certain reputation of the product, from misappropriation by others).

68. *See* discussion *supra* Section III.A.

69. *See* Interview with Andrew Riedel, Founder, Open Door Brewing Company, *supra* note 9 (commenting on how he decided to start a brewery not for the money but because he realized he could, and enjoyed, making his own craft beers); Steve Nicastro, *Starting a Craft Brewery Requires Passion, Patience, and Deep Pockets*, NERDWALLET.COM (April 8, 2015), https://www.nerdwallet.com/blog/small-business/how-much-does-it-cost-to-start-a-craft-brewery/ [https://perma.cc/5WPT-YPP5] (describing how entering the craft beer business is not a "get-rich-quick scheme," requires a lot of start of capital, but is worth the work if you have passion and patience).

70. Interview with Andrew Riedel, Founder, Open Door Brewing Company, *supra* note 9.

71. STEVE HINDY, THE CRAFT BEER REVOLUTION 219 (2014) (describing that most getting into craft "brewing not expecting great wealth," and that only a few of today's craft brewers are concentrating on building national breweries).

72. *See id.*; Joe+, *61 Brewers Speak Out: What I Wish I'd Known Before Starting a Brewery*, MICROBEWER.COM (Feb. 9, 2014), http://microbrewr.com/what-i-wish-id-known-before-starting-a-brewery/ [https://perma.cc/5QF7-PTWT].
(describing many examples of craft breweries who thought "too small" in starting their business and underestimating how fast they would grow: "I assumed I would be able to grow at a slow comfortable pace").

73. HINDY, *supra* note 71, at 210.

have "certainly shown staying power."[74] Still, the craft beer industry trends towards staying small and sustainable, rather than high-profit and national in size.[75] Unlike previous generations of brewers, many members of today's generation of craft brewers are content running a single brewpub.[76] This is what one craft beer historian has termed the "'back to the future' dream. It recalls a time when all brewing was local."[77]

Craft brewers are further motivated to create by another goal not based on pure profits: connecting with each other and their communities.[78] Besides defining craft beer as small, independent, and traditional,[79] the Brewers Association also notes that craft brewers are highly "involved in their communities through philanthropy, product donations, volunteerism, and sponsorship of events."[80] They find creative and individualistic ways to connect with their customers.[81] Craft brewers are further motivated to collaborate with one another to create innovative beers,[82] garner positive publicity, and reinforce community bonds.[83]

74. *Id.*

75. *Id. at* 210–13 (noting that the modern generation of craft brewers are employing different strategies to stay in business, and "[t]he first is to stay small").

76. *Id.* at 209–10

77. *Id.* at 210.

78. A study conducted by the University of Colorado Leeds School of Business provides one such example of the value the craft beer industry places on giving back to local communities. *Craft Brewers Industry Overview and Economic Impact 2013 and 2014*, UNIVERSITY OF COLORADO LEEDS SCHOOL OF BUSINESS 2 (2015), http://coloradobeer.org/wp-content/uploads/2015/08/Colorado-Brewers-Guild-2014-Economic-Impact-Study-08-10-15.pdf [https://perma.cc/YD8V-MQYW]. The study found that Colorado craft brewers are active philanthropists in their communities. *Id.* For example, 90 percent of brewers surveyed reported participating in fundraising and charitable events. *Id.*

79. Craft Brewer Defined, BREWERS ASSOCIATION, https://www.brewersassociation.org/statistics/craft-brewer-defined/ (last visited Mar. 8, 2017) [https://perma.cc/5NRY-JTE8].

80. *Id.*

81. *Id.*

82. *Collaboration not Litigation Ale, supra* note 1.

83. *See* Jay Brooks, *Brewing Togetherness*, ALL ABOUT BEER MAGAZINE.COM (Jan. 1, 2009), http://allaboutbeer.com/article/brewing-togetherness/ [https://perma.cc/VN5N-YLZ4] (describing the phenomenon of craft brewers collaborating to create a beer that incorporates the strengths of both brewers, speculating that it may be partly for publicity but noting that one brewer praised the practice for its "spiritual" as well as educational benefits).

2. Exclusivity Would Hinder Creation

Craft brewers use a variety of channels[84] to make their beer available to customers and exclusivity puts considerable strain on this widespread industry practice. For example, craft brewers may do any of the following: sell a limited edition[85] or a seasonal beer[86] for a set period of time, sell certain beers on tap in a brewpub location only,[87] or distribute a particularly successful craft beer nationally—or any mixture or variation on those options.[88]

For example, craft beer consumers are not likely to confuse one brewery's limited edition craft beer, offered in its brewpub only during the holiday season, with a second brewery's beer that is distributed nationally on a regular basis.[89] Thus, even

84. Stan Hieronymus, *Brewpubs and Distribution*, PROBREWER.COM, http://www.probrewer.com/library/distribution/brewpubs-and-distribution/ (last visited Jan. 30, 2016) [https://perma.cc/ZHE7-DR5V] (describing some breweries sell on-site at brewpubs, some package and distribute their beer in bottles or kegs for direct sale to the customer or a retail store, and others do both).

85. Also known as a "one-off." Interview with Andrew Riedel, Founder, Open Door Brewing Company, *supra* note 9.

86. *See Beers*, GREAT DIVIDE BREWING COMPANY.COM, http://greatdivide.com/beers/ (last visited Mar. 9, 2016) [https://perma.cc/83BR-5XVZ] (offering both seasonal and year round beers).

87. *See* Tom Wilmes, *Mountain Sun Adding Capacity with New Brewery*, THE BOULDER DAILY CAMERA.COM (Apr. 18, 2012), http://www.dailycamera.com/ci_20416387/mountain-sun-adding-capacity-new-brewery [https://perma.cc/ARC9-LKRA]. According to a brewer of Mountain Sun, a Boulder, Colorado based craft brewery: "We're basically a production brewery that distributes to our own restaurants." All of the beer it brews is kegged and housed in a large cold storage area before it is distributed to its three brewpubs. *Id*.

88. *See* Brad Hargrave, *10 Questions with the Brewer*, MILE HIGH WINE AND SPIRITS.COM (June 23, 2010), http://milehighwineandspirits.com/NotesFromTheBeerCooler/tabid/63/ctl/ArticleView/mid/387/articleId/3/Charlie-Berger-Wynkoop-Brewing-Company.aspx [https://perma.cc/A9KB-235Z] (Wynkoop Brewery was founded in part by Governor John Hickenlooper of Colorado, and sold its beers only within the confines of its downtown Denver brewpub for almost twenty years); Interview with Andrew Riedel, Founder, Open Door Brewing Company, *supra* note 9 (describing that the channel of distribution of either brewery involved in a trademark dispute—for example, whether one beer is only available on tap in a small brewpub while the other is a nationally-distributed beer—informs how craft brewers determine whether infringement has actually caused harm such that a legal remedy is warranted).

89. *See* Nick Breedlove, *Local Brewery Trademark Dispute is 'David vs. Goliath,'* THE SYLVA HERALD.COM (March 11, 2015, 2:00 PM), http://www.thesylvaherald.com/top_stories/article_e3afea54-c81f-11e4-8878-0f9412a4702b.html [https://perma.cc/98YK-WTZX] (describing a petition of craft

though the first brewery's limited edition beer might be named "Hoppy Holidays," and the second brewery's regularly distributed beer might be named "Hoppy Days," not much consumer confusion would result because of the vastly different channels in which the beers are distributed.[90]

Forcing a brewery with inferior legal rights to a trademark to stop using that trademark, even though there is no likelihood of consumer confusion over the use, hinders creation. This is because brewers may have to divert resources to exhaustive trademark searches or expensive legal advice to come up with trademarks that are almost guaranteed not to infringe on another craft brewer's trademark. This, in turn, diverts resources from creating new and unique beers.

3. Creators Prefer to Spend Limited Time, Money, and Other Resources on Further Creation, Rather Than Seeking, Protecting, or Enforcing Intellectual Property Rights

Craft brewers prefer to spend limited resources on further creation than legal enforcement of their intellectual property rights for at least three reasons. First, craft brewers value helping those genuinely interested in starting breweries to do so—thus, not only do they value further creation of their own craft beers, but they also value the further creation of their competitors' craft beers.[91] Craft brewers honestly believe that the more successful breweries there are, the more great beers will be created, and the faster the market will grow, sowing success for all.[92] This attitude engenders a cooperative spirit

brewers and customers calling for Kalamazoo, Michigan-based Bell's Brewery to drop its "baseless lawsuit" against North Carolina's Innovation Brewing because Innovation, a "family" brewery in Sylva, North Carolina, "will not be a competitor to Bell's").

90. *See id.*

91. Corie Brown, *So You Want to Start a Craft Brewery*, ENTREPRENEUR.COM (June 2, 2015) http://www.entrepreneur.com/article/246093; Interview with Andrew Riedel, Founder, Open Door Brewing Company, *supra* note 9. *Cf.* Robert Tuchman, *5 Reasons You Need to Work with Your Competitors*, ENTREPRENEUR.COM (April 27, 2015), http://www.entrepreneur.com/article/245375 [https://perma.cc/LDG3-QDXH] (recognizing that "[i]t seems counterintuitive in any walk of life to help a competitor).

92. Brown, *supra* note 91 ("Craft brewers have been united in their faith that the craft beer market will grow faster with more successful craft breweries.").

among craft brewers that buoys the sector. Brewers consciously reach out to help their competitors make better beer, believing that across-the-board quality is vital to the success of the sector. Even with the blizzard of new brands coming to market, craft brewers maintain their one-for-all-and-all-for-one attitude.[93]

Even large craft breweries are not as confrontational as one might expect, and demonstrate a decreased emphasis on profits in favor of other goals.[94] For example, Samuel Adams is "committed to . . . making sure other breweries have access to the same great ingredients it does at a fair price," and even offers micro-loans program to budding small breweries.[95]

Second, many craft brewers aim to spend limited resources on creating new ways to connect with their customers. Because craft brewers are independent, *local,* and traditional,[96] when just starting out they market their products primarily within their local communities.[97] They also spend resources conducting charitable work, sponsoring local events, and donating their products for worthy causes.[98] Accordingly, some small craft brewers balk at spending their resources enforcing trademark rights.[99]

93. *Id.*

94. Darren Dahl, *Kim Jordan on Why Employee-Owned New Belgium Brewing isn't Worried About a Craft Beer Bubble*, FORBES.COM (May 5, 2015), http://www.forbes.com/sites/forbestreptalks/2015/05/05/kim-jordan-on-why-employee-owned-new-belgium-brewing-isnt-worried-about-a-craft-beer-bubble/2/#1ad08d211fcd [https://perma.cc/P9W9-AYYK] (describing the business motivations of Kim Jordan, CEO of New Belgium Brewing Company of Fort Collins, Colorado: "I also studied social work in school and worked as a social worker for many years before we started New Belgium. I guess it came naturally to me, therefore, to think differently about how to run a business. I saw an opportunity to use New Belgium as a learning lab where we could experiment with choices about sharing equity broadly, making collaborations inside our industry and using profits to promote learning about the environment.").

95. Thierry Godard, *The Economics of Craft Beer*, SMARTASSET.COM (Jan. 7, 2016), https://smartasset.com/insights/the-economics-of-craft-beer [https://perma.cc/NW3K-6BLQ].

96. *See Craft Brewer Defined*, BREWERS ASSOCIATION, *supra* note 79 ("Craft brewers have distinctive, individualistic approaches to connecting with their customers.").

97. *See id.* (craft brewers are local); HINDY, *supra* note 71, at 209–19 (profiling today's large population of small craft brewers that primarily operate within their local communities, including one brewer whose "most distant customer is a bar ten miles from the brewery").

98. *Craft Brewer Defined*, BREWERS ASSOCIATION, *supra* note 79.

99. *See* Chris Lang, *Hop Head: Breweries Launch Trademark Wars*, THE BURG.COM (April 22, 2015),

Third, craft brewers enjoy a high level of consumer sophistication such that their resources are better-spent delivering new and innovative beers, rather than over-enforcing their trademark rights.[100] Craft beer consumers are very discerning,[101] and thus are not at as high of a risk of confusing products as originating from the same brewer as consumers of other products lining supermarket shelves.[102] Indeed, craft beer customers will often cease to patronize craft breweries that aggressively enforce their trademark rights.[103]

CONCLUSION

When the founder of Avery Brewing, Adam Avery, was

http://www.newsadvance.com/the_burg/food/hop_head/hop-head-breweries-launch-trademark-wars/article_7e5c6fae-e838-11e4-96f5-af6d9c9b12a0.html [https://perma.cc/42ZA-89NC] (describing that one brewery chose to change its name to avoid legal issues with another craft brewery, because the brewery "clearly understood the limitations this would place on the business" and "also thought such a restriction would be unfair to both current and future fans of [its] products").

100. *See* Beth Kaiserman, *Beer. . .The New Sophisticated Spirit*, HIGHBROW MAGAZINE.COM (Aug. 12, 2012), http://www.highbrowmagazine.com/1462–beerthe–new–sophisticated–spirit#sthash.XhJmRoNA.dpuf [https://perma.cc/TK6Y-92JC] (documenting the view of craft beer as becoming more sophisticated and suggesting that it is the new "wine").

101. Corie Brown, *Craft Brewers: This is What your Customers Want*, ENTREPRENEUR.COM (July 14, 2015), http://www.entrepreneur.com/article/246092 [https://perma.cc/PYE3-XQNT] (describing craft beer consumers as "highly individualized and independent," sophisticated, educated, willing to pay more for "something they believe is special to shift the whole market," "knowing what they are looking for," snobbish about beer quality, and "wanting to feel a connection to what's in their glass").

102. *The Downside of Too Many Product Choices on Store Shelves*, CONSUMER REPORTS.COM (Jan. 2014), http://www.consumerreports.org/cro/magazine/2014/03/too–many–product–choices–in–supermarkets/index.htm [https://perma.cc/J3K4-3K78] (describing that consumers are increasingly facing confusion and frustration at the supermarket and select a product not based on reason, but on the product that is easiest to evaluate).

103. Drake, *supra* note 9 (profiling one craft brewer who "heard from hundreds of Craft Beer Enthusiasts who were outraged that we needed to sue anyone let alone another Craft Brewery," and another whose trademark enforcement activities resulted in a customer petition to boycott the brewery until the trademark suit was dropped); Josh Noel, *Lagunitas Drops Lawsuit Against Sierra Nevada after Twitter Backlash*, CHICAGOTRIBUNE.COM (Jan. 14, 2015), http://www.chicagotribune.com/bluesky/technology/ct-lagunitas-sierra-nevada-backlash-20150114-story.html [https://perma.cc/3YQ6-DT6Y]; HINDY, *supra* note 71, at 211 ("People want local. . . . I am taken aback [with] how educated and informed the customer is about beer.").

asked whether he would still choose to collaborate instead of litigate with Russian River[104] in this "new era of trademark battles," he said his attitude was changing.[105] He noted that trademark disputes were a bigger issue in the industry than they used to be, and that he'd now be more likely to pursue legal protection of his beer names.[106]

Avery's response unfortunately suggests that the industry is conforming to a legal regime that may not have its best interests in mind. Certainly, craft brewers should be diligent in selecting names that aren't likely to cause confusion among their consumers,[107] and when confusion does result, craft brewers should legally protect their beer names when a collegial resolution is not possible.[108] Yet the point is that *defaulting* to formal trademark protection may be undesirable and unnecessary given that the craft beer industry's motivations and qualities are similar to those of industries in intellectual property's negative space.[109] Hopefully, the insights contained in this Article will provide even more encouragement to craft brewers and their lawyers to collaborate—not litigate[110]—where at all possible.

104. *See supra* Introduction.

105. Crouch, *supra* note 16.

106. *Id.*. ("We're not just five people anymore . . . . I have to think about the livelihoods of 92 people and their families.").

107. The Lanham Act, 15 U.S.C. § 1125(a)(1)(A) (2012).

108. MCCARTHY, *supra* note 27, § 2:1 (describing that trademark law protects the mark owner, who has invested significant resources into establishing a certain reputation of a product, from misappropriation by others).

109. *See supra* Part II.

110. *Collaboration not Litigation Ale, supra* note 1.