

# CLOWN EGGS

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Since 1946, many clowns have recorded their makeup by having it painted on eggs that are kept in a central registry in Wookey Hole, England. This tradition, which continues today, has been referred to alternately as a form of informal copyright registration and a means of protecting clowns' property in their personae. This Article explores the Clown Egg Register and its surrounding practices from the perspective of law and social norms. In so doing, it makes several contributions. First, it contributes another chapter to the growing literature on the norms-based governance of intellectual property, showing how clowns—like comedians, roller derby skaters, tattoo artists, and other subcultures—have developed an elaborate informal scheme in lieu of state-created copyright or trademark law to regulate their creative production. Second, this Article explores a rarer phenomenon in the norms-based IP context: formalized registration related to norms-based ownership rules. It shows that the Register exists not only to support those rules, but it also serves a host of nonexclusion functions, including expressing members' professionalism, conferring a sense of prestige, and creating a historical record. Finally, this Article shows how its analysis of the Clown Egg Register offers lessons for the study of registers in the context of tangible and intellectual property alike.

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## INTRODUCTION

In 1946, an English chemist named Stan Bult began painting portraits of clowns on chicken eggs.<sup>1</sup> The eggs featured members of the International Circus Clown Club (ICCC), of which Bult was the founder and secretary, as well as famous historical clowns.<sup>2</sup> Today, the organization has been renamed Clowns International (CI), but the tradition of memorializing clown makeup designs continues.<sup>3</sup> Newly painted clown eggs are publicly displayed alongside surviving examples of Bult's work as part of the Clown Egg Register ("the

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1 See LUKE STEPHENSON & HELEN CHAMPION, *THE CLOWN EGG REGISTER* 41–42 (2017). Footage shot in 1955 shows Bult creating an egg for Clown Tony. See British Pathé, *Clowns Club (1955)*, YOUTUBE (Apr. 13, 2014), <https://www.youtube.com/watch?v=ZMF5X5eUCQE>.

2 Ella Quitner, *National Clown Week: The History of Clown Eggs*, TIME (Aug. 6, 2010), <http://newsfeed.time.com/2010/08/06/national-clown-week-the-history-of-clown-eggs/>.

3 See STEPHENSON & CHAMPION, *supra* note 1, at Foreword; Interview with Debbie Smith, Clown Egg Artist, Clowns Int'l, in Folkestone, U.K., at 15–16 (July 21, 2017) (transcript on file with authors) [hereinafter Smith] (current egg artist discussing process for creating eggs).

Register”),<sup>4</sup> housed in Wookey Hole, a sprawling tourist attraction in the countryside of Somerset, England.<sup>5</sup>

In the intervening seventy-odd years, this practice has been an object of ongoing fascination. Early on, Bult and his eggs were featured in newspapers, magazines, and television reports.<sup>6</sup> More recently, various websites and news outlets have highlighted the Register.<sup>7</sup> The eggs have received considerable attention as art objects.<sup>8</sup> And the Register has seeped into pop culture as well. It inspired the Hall of Faces in Terry Pratchett’s fantasy book series *Discworld*,<sup>9</sup> played a pivotal role in an episode of the classic BBC show *The Avengers*,<sup>10</sup> and figured prominently—in a darkly modified version—in the creepy-clown indie horror flick *Stitches*.<sup>11</sup>

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4 Christopher Stone, Vice President of CI, opined that the term “clown egg registry” is a misnomer. He prefers the term “Clowns International Register” to emphasize the role played by that organization in creating and managing the register, and because he understands the register to be the written record of clown identities maintained by CI, not the eggs themselves. See Interview with Christopher Stone, Vice President, Clowns Int’l, in Bournemouth, U.K., at 32 (July 22, 2017) (transcript on file with authors) [hereinafter Stone] (“The only register is the book.”). While mindful of his opinion on this matter, we choose to refer to the egg collection and related records as the “Clown Egg Register.”

5 See STEPHENSON & CHAMPION, *supra* note 1, at Foreword.

6 See, e.g., Norman J. Badderly, *Clowns’ Eggs: Essentialism*, BRIDGEPORT POST, Apr. 28, 1968, at 104; *Heyday of the English Clown in Picture and Relic*, TIMES, Nov. 18, 1955, at 3; *It’s Not Funny When a Clown Has a Twin*, SUN, July 5, 1966; Mog Johnstone, *Easter Eggs: How Clowns Keep the Paint on Their Faces*, SUNDAY TIMES, Apr. 6, 1980; *Oh! Wondrous Face! Half Red, Half White, Half Grand and Half Grotesque*, ILLUSTRATED LONDON NEWS, Nov. 9, 1956, at 34.

7 See, e.g., *Every Little Thing: Do Scarecrows Scare Crows?*, GIMLET (July 2, 2018), <https://www.gimletmedia.com/every-little-thing/do-scarecrows-scare-crows>; Dave Fagundes & Aaron Perzanowski, *The Fascinating Reason Why Clowns Paint Their Faces on Eggs*, BBC (Dec. 6, 2017), <http://www.bbc.com/future/story/20171206-the-fascinating-reason-why-clowns-paint-their-faces-on-eggs>; Constance Grady, *How Whimsical/Horrifying! Here’s A Book of Clown Faces Painted onto Eggs.*, VOX (Aug. 20, 2018), <https://www.vox.com/culture/2018/8/20/17719884/clown-egg-register-luke-stephenson-helen-champion>; Ella Morton, *Why Smart Clowns immortalize Their Make-up Designs on Ceramic Eggs*, ATLAS OBSCURA (July 14, 2016), <https://www.atlasobscura.com/articles/why-smart-clowns-immortalize-their-makeup-designs-on-ceramic-eggs>; Jennifer Nalewicki, *How Do You Copyright a Clown Face? Paint It on an Egg*, SMITHSONIAN (May 18, 2018), <https://www.smithsonianmag.com/travel/gallery-london-houses-dozens-clown-egg-portraits-180968914/>; Clayton Purdom, *Clowns Copyright Their Faces by Drawing Them on Eggs, Because They Are Insane*, AV NEWS (Jan. 4, 2017), <https://news.avclub.com/clowns-copyright-their-faces-by-drawing-them-on-eggs-b-1798255950>.

8 See STEPHENSON & CHAMPION, *supra* note 1, at Foreword; SAM TAYLOR-JOHNSON, *BIRTH OF A CLOWN* (2013).

9 TERRY PRATCHETT & STEPHEN BRIGGS, *DISCWORD: FOOL’S GUILD YEARBOOK AND DIARY 2001* (2000) (describing clowns who prohibit copying of make-up and record designs on eggs stored in the Hall of Faces).

10 *The Avengers: Look—(Stop Me If You’ve Heard This One) But There Were These Two Fellers . . .* (BBC television broadcast May 8, 1968) (clown egg register used to identify murderer).

11 *STITCHES* (Fantastic Films 2012) (to defeat a clown who has returned from the dead, his egg must be destroyed).

Throughout this seven-decade cultural conversation about clown eggs, a surprising number of references to property and ownership emerge. Sources refer to the eggs not just as miniature portraits, but as a register designed to preserve the uniqueness of performers' identities by fending off copying.<sup>12</sup> Interviews with Bult and others reveal that clowns regard their personae as "property."<sup>13</sup> And observers refer to the need to safeguard clowns' "copyright" in their makeup designs.<sup>14</sup> This Article takes up these cues, examining the Clown Egg Register from the perspective of law and social norms. This investigation reveals a trove of insights about the tradition of painting clown eggs. The eggs highlight clowns' use of norms, rather than state-created law, to govern their creative production. They show how extralegal registers operate not only to back up informal exclusion rights, but to serve a host of other social functions as well. And they point toward the underappreciated ways that other ownership registers from land title recording to copyright registration also serve nonexclusion functions.

This Article is the first serious and systematic effort to describe and analyze the Clown Egg Register and the informal regulation of creativity among clowns. To better understand these norms and the Register that supports them, we conducted a series of qualitative interviews with working clowns in the United States and the United Kingdom, current and former administrators of the Register, and the current clown egg artist.<sup>15</sup> Our interview subjects included former Ringling Brothers and Barnum & Bailey Circus clowns as well as semiprofessional event clowns. They included both men and women and ranged in age from their twenties to their seventies. We also consulted all historical and contemporary sources that comment on the Clown Egg Register.

Through these interviews, we discovered that clowns, like many other creative communities, demonstrate a preference for private, informal ordering rather than formal law. Like chefs,<sup>16</sup> drag performers,<sup>17</sup> graffiti writers,<sup>18</sup>

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12 *King of the Eggheads* (Apr. 1957), MODERN MECHANIX (July 17, 2009), <http://modernmechanix.com/king-of-the-eggheads/>.

13 *Id.*

14 Morton, *supra* note 7 ("[T]he register allows professional clowns to essentially copy-right their makeup designs to protect against unimaginative imitators."); see also Matthew Dessem, *These Shelves of Clown Eggs Are Nothing to Worry About, According to Clowns*, SLATE (Jan. 4, 2017), [http://www.slate.com/blogs/browbeat/2017/01/04/clown\\_eggs\\_are\\_nothing\\_to\\_worry\\_about\\_say\\_clowns.html](http://www.slate.com/blogs/browbeat/2017/01/04/clown_eggs_are_nothing_to_worry_about_say_clowns.html) (referring to the registry as a kind of "informal copyright registry").

15 Roughly half of our interviews were face to face. The rest were conducted over telephone. We identified principal actors through popular press reports and then relied on snowball sampling—a "nonrandom sampling technique . . . in which survey subjects are selected based on referral from other survey respondents"—to identify the rest of our interviewees. KEN BLACK, BUSINESS STATISTICS FOR CONTEMPORARY DECISION MAKING 232 (7th ed. 2012).

16 See Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187 (2008).

17 See Eden Sarid, Don't Be a Drag, Just Be a Queen—How Drag Queens Protect Their Intellectual Property Without Law, 10 FLA. INT'L U. L. REV. 133 (2014).

magicians,<sup>19</sup> physicians,<sup>20</sup> roller derby athletes,<sup>21</sup> standup comedians,<sup>22</sup> and tattooers,<sup>23</sup> clowns regulate creativity and copying primarily through community self-governance. The account of the norms that prevail within the clowning community, while unique in several key respects, is consistent with the growing literature on intellectual property (IP) and social norms. By adopting, communicating, and enforcing a shared set of expectations about copying, clowns have largely avoided conflict and manage to address it effectively when it occurs. And they have done so while avoiding the significant transaction costs imposed by formal law.

The Clown Egg Register is also a fascinating and truly unique iteration of a very familiar institution, the property register. From the recordation of real property transfers<sup>24</sup> to vehicle title registration<sup>25</sup> to trademark<sup>26</sup> and copyright registration,<sup>27</sup> the formal legal system has developed mechanisms for tracking and publicizing ownership interests. The typical justifications for these registries are rooted in the legal rights they support. Registries provide strong, and in some cases definitive, proof of priority and ownership.<sup>28</sup> That proof is often crucial in resolving disputes between competing claims. Registries can also provide notice of ownership interests that facilitate transactions and avoid conflicting claims, all of which supports owners' rights to exclude.<sup>29</sup> But the Clown Egg Register presents a puzzle. Although the Register supports this system of norms, those norms appear to function largely independently of the Register. Many clowns, such as most professional circus

18 See MARTA ILJADICA, *COPYRIGHT BEYOND LAW: REGULATING CREATIVITY IN THE GRAFFITI SUBCULTURE* (2016).

19 See Jacob Loshin, *Secrets Revealed: Protecting Magicians' Intellectual Property Without Law*, in *LAW AND MAGIC* 123 (Christine A. Corcos ed., 2010).

20 See Katherine J. Strandburg, *Derogatory to Professional Character?: The Evolution of Physician Anti-Patenting Norms*, in *CREATIVITY WITHOUT LAW: CHALLENGING THE ASSUMPTIONS OF INTELLECTUAL PROPERTY* 63 (Kate Darling & Aaron Perzanowski eds., 2017).

21 See David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 *TEX. L. REV.* 1093 (2012).

22 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 (2008).

23 See Aaron Perzanowski, *Tattoos & IP Norms*, 98 *MINN. L. REV.* 511 (2013).

24 See Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 *DUKE L.J.* 637, 666 (2013) ("Among the formalities associated with land conveyance is recordation. Every state has a real-property recordation statute.").

25 See *A Comparison of Land and Motor Vehicle Registration*, 48 *YALE L.J.* 1238, 1246–51 (1939) (cataloging a range of motor vehicle registration acts).

26 See Rebecca Tushnet, *Registering Disagreement: Registration in Modern American Trademark Law*, 130 *HARV. L. REV.* 867, 875–78 (2017) (describing the benefits of the trademark register).

27 See Dotan Oliar et al., *Copyright Registrations: Who, What, When, Where, and Why*, 92 *TEX. L. REV.* 2211, 2215 (2014) (describing U.S. copyright registration system).

28 See *infra* Section III.C.

29 See *infra* Section III.C.

clowns, typically do not seek inclusion in the Register.<sup>30</sup> In terms of time and effort, the Register is an immensely costly enterprise. So why does it endure?

In light of the somewhat attenuated relationship between the Clown Egg Register and the norms-based system it is intended to facilitate, standard exclusion-based justifications fall short of fully explaining the continued centrality of the Register. We identify a range of nonexclusion functions of the Register that both help explain its persistence and offer lessons for registration systems more broadly.<sup>31</sup> The Register facilitates the professionalization of clowning and signals its value to the public. It also contributes to a sense of community among clowns and serves as a source of prestige. Moreover, the Register creates a durable archive of clown makeup designs, preserving the art form for posterity.

The nonexclusion functions we identify are not confined to the Clown Egg Register. Indeed, registers for both physical and intangible property serve many of the same purposes. Inventors register patents because they seek prestige. Writers may register their screenplays to signal insider status to other professionals. And we keep records of ownership and transactions to secure a historical record. Those nonexclusion functions, however, are often overshadowed by the role registers play in securing and recording ownership interests. By highlighting these less appreciated features of registers generally, we enrich both the general understanding of the purpose and operation of these institutions and point toward ways to design them more effectively.

Part I provides a brief overview of clowning and the legal doctrines that may apply to clowns' creative output. As we will describe, despite the availability of legal exclusivity, most clowns forego any formal legal protections. Instead, as we detail in Part II, clowns rely on a set of overlapping informal social norms to define and police the sometimes-nebulous boundary between influence and appropriation when it comes to their visual appearance, names, and performances. In Part III, we turn to the Clown Egg Register. After outlining both its history and contemporary procedures, we consider a range of explanations for this costly yet persistent practice. While the Register appears to serve some of the traditional purposes associated with property registries, those legal-centric explanations are insufficient to fully explain the Register's endurance. So we identify a number of nonexclusion functions of the Register. In Part IV, we consider what lessons the Clown Egg Register offers for the study of social norms as alternatives to formal law and for our understanding of the values served by registers.

## I. CLOWNING AND LAW

For reasons that remain unclear to us, the existing legal academic literature is curiously silent on the question of clowns. As a result, we assume only passing familiarity with clowning. In order to contextualize our discussion of

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30 Interview with Gareth "Bippo" Ellis, Clown, in Bristol, Eng., at 16 (July 23, 2017) (transcript on file with authors) [hereinafter Bippo].

31 See *infra* subsection III.C.2.

the practices and norms of clowning, this Part provides a brief history of its emergence and development. Next, it describes the structure and hierarchy of contemporary clowning. Clowns generally fall into reasonably well-defined categories based on their visual appearance and demeanor, as well as the venues in which they perform. Finally, this Part considers the application of formal legal rules to the defining elements of clown personae and performances, concluding that while various forms of exclusivity are available, on the whole clowns have neglected to pursue them.

### A. *A History of Clowning*

Nearly every culture has developed a comic template we would call a clown.<sup>32</sup> They have many names and developed largely independently, but at their core, they are clowns—comic, irreverent, and sometimes subversive performers who rely on upsetting settled social expectations to elicit laughter, typically through physical acts.<sup>33</sup> French<sup>34</sup> and Russian<sup>35</sup> clowning are well known and influential. But Egyptian clowns date back to roughly 2400 B.C.<sup>36</sup> And a range of Asian, African, and South American cultures have well-developed clowning traditions,<sup>37</sup> as do Native American tribes like the Zuni<sup>38</sup> and Hopi.<sup>39</sup>

Because the Clown Egg Register is central to our project, we focus our attention on the European and American clowning traditions. The antecedents of modern European clowning can be found in Greek and Roman mimes, medieval jesters, and the *zanni* of *commedia dell'arte*.<sup>40</sup> The first recorded use of “clown” (or “cloyne”) in English occurred in 1563.<sup>41</sup> The term referred to a rustic or peasant, but its origins are unclear.<sup>42</sup> Regardless

32 See PAUL BOUISSAC, *THE SEMIOTICS OF CLOWNS AND CLOWNING* 181 (2015).

33 See *id.* at 173; Lucile HOERT Charles, *The Clown's Function*, 58 J. AM. FOLKLORE 25, 33 (1945).

34 See John Townsen, *The Clown to the Ring: The Evolution of the Circus Clown (1770–1975)* 12–15 (June 1976) (unpublished Ph.D. dissertation, New York University).

35 See *id.* at 211–15.

36 Michael Bala, *The Clown: An Archetypal Self-Journey*, 4 JUNG J. 50, 50 (2010).

37 Charles, *supra* note 33, at 26.

38 See Ruth L. Bunzel, *Introduction to Zuni Ceremonialism*, in FORTY-SEVENTH ANNUAL REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY, 1929–1930, at 473, 498 (1932), <http://www.sacred-texts.com/nam/zuni/bunzel/zunirel.htm>.

39 See DON C. TALAYESVA, *SUN CHIEF: THE AUTOBIOGRAPHY OF A HOPI INDIAN* (Leo W. Simmons ed., 2d ed. 2013).

40 Townsen, *supra* note 34, at 1–2.

41 *Clown*, OXFORD ENG. DICTIONARY, <http://www.oed.com/view/Entry/34756?rskey=D57Sso&result=1#eid> (last visited Nov. 14, 2018).

42 *Id.* Some contend it was derived from a Scandinavian dialect; the Icelandic “klunni,” for example, means an “awkward boorish fellow.” Anatoly Liberman, “Clown”: *The KL-Series Pauses for a While*, OUPBLOG (Aug. 31, 2016), <https://blog.oup.com/2016/08/clown-word-origins>. Others suggest Germanic roots; the North Frisian “klönne” is likewise a “clumsy” person. *Clown*, *supra* note 41. A third theory attributes the term to the Latin “colonus,” a “settler” or “farmer.” Liberman, *supra*.

of etymology, the implication is clear. The clown was a rube whose comedic effect depended on his real or perceived lack of sophistication. Consistent with this understanding, William Shakespeare's rustic fools were likely another important influence in the evolution of the modern clown archetype. Indeed, beginning in the late 1580s, Shakespeare named three such characters "Clown."<sup>43</sup> And by roughly 1600, "clown" came to refer to one who plays the fool onstage.<sup>44</sup>

During the seventeenth and eighteenth centuries, the clown became firmly entrenched in British popular culture through pantomime—the dominant form of family entertainment during the era—which combined song, dance, and slapstick with fairy and folk tales.<sup>45</sup> The distinguishing feature of British pantomime was the harlequinade—a theatrical genre defined by "four figures . . . instantly recognisable [sic] to every man, woman and child in Britain: the fleet-footed and shimmering Harlequin and his gauzy, dove-like lover, Columbine, and their enemies, the elderly 'libidinous, miserly Dotard', Pantaloon, and his titular manservant, Clown."<sup>46</sup>

While Clown was a stock harlequinade character played by countless performers, no figure was more crucial to the development of our current notion of clowning than Joseph Grimaldi.<sup>47</sup> Over the course of his career, Grimaldi elevated the clown from a buffoonish servant to an astute critic of the human condition, and in the process, became one of the most famous performers of his day.<sup>48</sup> Equally importantly, Grimaldi reimagined the visual appearance of the clown, largely creating the figure nearly universally recognized today. Stretching back to the sixteenth century, the clown wore drab servant's attire or a long peasant's smock.<sup>49</sup> Grimaldi's signature look opted for garish geometric patterns adorned with tassels.<sup>50</sup> Grimaldi also created and popularized a distinct makeup style, characterized by a white base that completely covered any exposed skin, a bright red mouth, and exaggerated

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43 Clowns appeared by name in *Othello*, *Titus Andronicus*, and *The Winter's Tale*, but Shakespeare's works include a number of clown characters under other names. See generally BENTE A. VIDEBAEK, *THE STAGE CLOWN IN SHAKESPEARE'S THEATRE* (1996).

44 See ERNEST WEEKLEY, *AN ETYMOLOGICAL DICTIONARY OF MODERN ENGLISH* 316 (1921) ("The pantomime *clown* represents a blend of the [Shakespearean] rustic with one of the stock types of the It[alian] comedy.").

45 See ANDREW MCCONNELL STOTT, *THE PANTOMIME LIFE OF JOSEPH GRIMALDI*, at xxii (2009).

46 *Id.* at xxiii. The term "dotard," which refers to a weak or senile elderly person, recently enjoyed a brief surge in popularity after Kim Jong Un deployed it to insult Donald Trump. See Rachel Chason & J. Freedom du Lac, *A Short History of 'Dotard,' the Arcane Insult Kim Jong Un Used in His Threat Against Trump*, WASH. POST (Sept. 22, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/09/21/a-short-history-of-the-word-dotard-which-north-korea-called-trump>.

47 See R. J. BROADBENT, *A HISTORY OF PANTOMIME*. 240–42 (1901), <http://www.gutenberg.org/files/13469/13469-h/13469-h.htm> (extolling the skill and fame of Grimaldi).

48 See STOTT, *supra* note 45, at xxvi–xxvii.

49 See *id.* at 117.

50 *Id.* at 117–18.



eyebrows.<sup>51</sup> As discussed in more detail below, Grimaldi's makeup design formed the template for the modern whiteface clown.<sup>52</sup> In a literal sense, Grimaldi became synonymous with clowning. "Joey" became a generic term for clowns, one that is still in use today.<sup>53</sup> Grimaldi died at fifty-eight,<sup>54</sup> shortly after completing a sprawling draft of his autobiography, a volume that was edited and significantly rewritten by Charles Dickens.<sup>55</sup>

With the creation of the first modern circuses in London during the late eighteenth century, the clown found a new performance venue. In the 1770s, Philip Astley combined skilled equestrians, acrobats, strong men, conjurers, and a clown named Fortunelly in a ring.<sup>56</sup> In 1782, Astley's first competitor—the Royal Circus—gave the form its name.<sup>57</sup> Early circus clowns were recruited from pantomime, as well as the ranks of street acrobats. They performed on ropes and horseback.<sup>58</sup> And soon, they began disrupting and antagonizing the ringmaster, a stern authority figure in quasi-military dress.<sup>59</sup> Within two decades, the circus and the circus clown had spread from London to Germany, Russia, and across the Atlantic.<sup>60</sup>

Clowns began performing in the United States in the late eighteenth century. A 1785 advertisement for an equestrian show, for example, noted that a "clown will entertain the Ladies and Gentlemen between the feats."<sup>61</sup> In 1793, a troupe of rope dancers advertised a clown called Mr. Clumsey.<sup>62</sup> The first true American circus launched that same year when John Bill Ricketts, who had previously performed at London's Royal Circus, produced shows in Philadelphia and New York.<sup>63</sup> The first such show featured a clown, Mr. M. McDonald, performing "comic feats on horseback."<sup>64</sup> Within a few years, "the circus was fairly well established in American cities and, with the opening of new roads and the eventual possibility of travel by rail or steam-

51 *Id.*

52 *See infra* Section I.B.

53 STOTT at 118, 320. The newsletter published by Clowns International for its members is called *The Joey* in homage to Grimaldi. *See* THE JOEY (Clowns International), Winter 2015, at 30, <http://www.clownsinternational.com/wp-content/uploads/2015/12/December-2015-Joey-proofread-Finished-Approved-By-Bubblz.pdf>.

54 *Joseph Grimaldi Biography*, BIOGRAPHY (Apr. 2, 2014), <https://www.biography.com/people/joseph-grimaldi-9321325>.

55 JOSEPH GRIMALDI, MEMOIRS OF JOSEPH GRIMALDI (Boz ed., London, George Routledge and Sons 1838). Early in his career, Dickens adopted the pen name "Boz." ROBERT L. PATTEN, CHARLES DICKENS AND "BOZ": THE BIRTH OF THE INDUSTRIAL-AGE AUTHOR, at xvii (2012).

56 Towsen, *supra* note 34, at 11–15.

57 *Id.* at 5.

58 *See id.* at 22.

59 *See id.* at 17–18.

60 *See id.* at 22–23, 27, 213.

61 *Id.* at 28.

62 *See* R.W.G. Vail, *Random Notes on the History of the Early American Circus*, 1933 AM. ANTIQUARIAN SOC'Y 116, 156.

63 Towsen, *supra* note 34, at 27.

64 *Id.* at 28.

boat, it soon began to reach out into the more remote areas.”<sup>65</sup> And during the nineteenth century the clown emerged as the star of the American circus, helping to establish the clown’s continued cultural salience today.<sup>66</sup>

### B. A Typology of Clowns

Contemporary clowns generally fit within one of a small number of identifiable categories. Those types help to define the clown’s onstage persona, and also guide her visual appearance. Regardless of category, clowns perform in a range of spaces for a variety of audiences. Some are full-time circus professionals, and others are amateurs who entertain at community or charity events, with a spectrum of gradations in between. This hierarchy informs the ways in which clowns regard and enforce the antiappropriation norms discussed in the next Part.

There are three primary categories of clowns—the whiteface, the auguste, and the character clown.<sup>67</sup> Inspired in part by Grimaldi, the whiteface, as the name suggests, features the entire face and neck covered in white makeup, accentuating thin red lips and high, exaggerated, and asymmetrical eyebrows.<sup>68</sup> Traditionally, whitefaces donned elaborate silk and sequined outfits and conical hats. The whiteface is elegant, graceful, and rarely on the receiving end of physical gags. Taken together, these visual cues communicate a sense of dominance and imperiousness well-suited to the whiteface’s function in a standard clown act.<sup>69</sup> Typically paired with the foolish auguste, the whiteface is clever and cunning.

If the whiteface is the straight man, the auguste is the bumbling comic relief.<sup>70</sup> The auguste developed as a distinct character in the late nineteenth

65 *Id.* at 32.

66 *See id.* at 33.

67 *See* Rodney A. Huey, *Social Construction of the American Circus Clown: Production of Clowning in the United States from 1968 to 1997*, at 221 (Sept. 21, 2005) (unpublished Ph.D. dissertation, George Mason University); *see also* BOUISSAC, *supra* note 32, at 123; STEPHENSON & CHAMPION, *supra* note 1, at Foreword.

68 BOUISSAC, *supra* note 32, at 33, 42. The whiteface tradition is also heavily influenced by the French Pierrot, a character Jean-Gaspard Debrau debuted in 1825. Huey, *supra* note 67, at 116–17. He was “mischievous and a bit sinister,” featuring “all-white face, accented only with eyebrows, eyeliner and rouged lips.” *Id.* at 117.

69 *See* Interview with Mattie Faint, Curator, Clowns Gallery Museum, in London, U.K., at 5 (July 20, 2017) (transcript on file with authors) [hereinafter Faint] (referring to the whiteface as “aloof”).

70 Townsen, *supra* note 34, at 167. Sex and gender are complicated questions in clowning. Although less true today, traditionally the vast majority of clowns were men. But clowns often exist independently of any gender identity. *See* Huey, *supra* note 67, at 286 (“[B]eing male or female didn’t really much matter’ because ‘clowns have always been unisex.’” (quoting interview with Ruth Chaddock, Clown College Makeup Instructor, in McLean, Va. (June 20, 2002))); *see also* Stone, *supra* note 4, at 9 (“Clowns are neither male nor female.”).

century and was popularized by James Guyon.<sup>71</sup> The *auguste* is typically the butt of the joke in a clown act. He plots some prank on the whiteface or the ringmaster, only to see it backfire, inevitably leaving the *auguste* to take the proverbial or literal pie in the face.<sup>72</sup> The *auguste*, to put it succinctly, is “the one who gets slapped.”<sup>73</sup>

In terms of makeup, the prototypical *auguste* wears a flesh-toned foundation, with the areas around the eyes and mouth highlighted in white, and the cheeks and nose colored red.<sup>74</sup> In part, this design is practical; by enlarging the eyes and mouth, the clown can better communicate emotion to the audience from a distance.<sup>75</sup> At the same time, oversized facial features leverage our innate biological response to cuteness.<sup>76</sup> Like babies, puppies, and cartoon characters,<sup>77</sup> the *auguste* wins our affection and sympathy through infantile facial features.<sup>78</sup> The *auguste*’s costumes vary considerably, but they are generally brightly patterned, made from relatively low cost materials, or are a bit worse for the wear.<sup>79</sup> In contrast to the pristine ensemble of the

71 Towsen, *supra* note 34, at 132–33. When the whiteface’s “aggressiveness and knavery eventually came to symbolize a sort of cunning wisdom” “there was a real need for a new *stupidus* in the circus.” *Id.* at 128–29. The *auguste* emerged to play that role. The name is sarcastic, as the term “*august*” refers to a person or thing that is honored or venerated. See BOUISSAC, *supra* note 32, at 171. But the *auguste* is generally perceived as dimwitted, clumsy, and sometimes drunk. See *id.*; Stone, *supra* note 4, at 22.

72 See Towsen, *supra* note 34, at 161–63. The pairing of the whiteface and *auguste* defined the basic structure of the clown act for decades, but as *auguste* clowns gained popularity, many circuses eliminated the whiteface as a cost-cutting measure. See BOUISSAC, *supra* note 32, at 42, 173. And instead, they pitted the *auguste* against the whiteface’s original foil, the ringmaster. See Towsen, *supra* note 34, at 42.

73 BOUISSAC, *supra* note 32, at 123.

74 See *id.* at 30–32; Huey, *supra* note 67, at 298. In recent years, some *auguste* clowns have opted for subtler, more naturalistic makeup. See, e.g., Bippo, *supra* note 30, at 8 (describing his look as “enhanced”). This look is variously referred to as continental, contemporary, or new age. BOUISSAC, *supra* note 32, at 43; Faint, *supra* note 69, at 6; Huey, *supra* note 67, at 313.

75 See BOUISSAC, *supra* note 32, at 31–33.

76 See Morten L. Kringelbach et al., *On Cuteness: Unlocking the Parental Brain and Beyond*, 20 TRENDS IN COGNITIVE SCI. 545 (2016) (describing how behavioral and neuroimaging studies demonstrate a link between cuteness and caregiving instincts); Andrew S. Winston, *Sweetness and Light: Psychological Aesthetics and Sentimental Art*, in EMERGING VISIONS OF THE AESTHETIC PROCESS: PSYCHOLOGY, SEMIOLOGY, AND PHILOSOPHY 118, 123–25 (Gerald C. Cupchik & János László eds., 1992) (discussing Konrad Lorenz’s notion of *das Kinderschema*, or “babyiness”).

77 STEPHEN JAY GOULD, THE PANDA’S THUMB: MORE REFLECTIONS IN NATURAL HISTORY 96–105 (1980) (describing the change in Mickey Mouse’s head to eye ratio as the character shifted from mischievous to benign).

78 See BOUISSAC, *supra* note 32, at 30–31.

79 See *id.* at 53–54; see also Faint, *supra* note 69, at 5 (describing the *auguste* as a “funny knockabout”); Stone, *supra* note 4, at 22 (describing the *auguste* as looking like “a gent who has seen better days”).

whiteface, the auguste's livery is exposed to dirt, water, and a host of potential stains.<sup>80</sup>

Unlike the whiteface or the auguste, the character clown adopts some specific and recognizable vocation.<sup>81</sup> She may be a police officer, doctor, or—most commonly in American clowning—a hobo or tramp.<sup>82</sup> Although they can borrow elements from the whiteface, most character clowns more closely resemble the auguste in terms of their visual appearance and persona.<sup>83</sup> Weary Willie, Emmett Kelly's famous hobo clown character, is a useful example. Willie's makeup featured a dark five o'clock shadow covering the lower half of his face, with a bright white frown highlighting his mouth.<sup>84</sup> The rest of his face was white, except for a bulbous red nose.<sup>85</sup> Willie dressed in a tattered suit and tie, exaggerating and updating the disheveled auguste for the Depression era.<sup>86</sup>

Primarily, clowns categorize themselves in terms of these three varieties, but they also draw important distinctions on the basis of their professional standing. The practice of clowning embraces a wide range of skill and experience. Full-time circus clowns, for whom clowning is their sole or primary means of financial support, are generally seen as the most skilled and experienced clowns. Although the largest American circus, the famed Ringling Brothers and Barnum & Bailey Circus, ceased operations in May of 2017,<sup>87</sup> clowns continue to perform in the popular Cirque du Soleil productions as well as a number of smaller touring circuses.<sup>88</sup> In the United Kingdom, clowns are a staple of the popular touring circuses operated by Gerry Cottle, John Lawson, and Zippo, among others.<sup>89</sup>

More common than circus clowns are what we will call event clowns. They perform at birthday parties, carnivals and fairs, school festivals, and on cruise ships.<sup>90</sup> Although these performances are paid, event clowns operate as freelancers and often have some additional source of income. Many clowns perform simply for the joy of it. Unpaid amateur clowns are regularly

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80 BOUISSAC, *supra* note 32, at 50–54.

81 *See id.* at 42.

82 *Id.* at 109.

83 *Id.* at 43.

84 *See* EMMETT KELLY & F. BEVERLY KELLEY, CLOWN 49, 69 (1954) (describing the origin and design of his distinctive tramp clown makeup).

85 *Id.* at 69.

86 *Id.*

87 *See* Sarah Maslin Nir & Nate Schweber, *After 146 Years, Ringling Brothers Circus Takes Its Final Bow*, N.Y. TIMES (May 21, 2017), <https://www.nytimes.com/2017/05/21/nyregion/ringling-brothers-circus-takes-final-bow.html>.

88 Teri Silver, *Touring Circuses in the United States and Beyond*, WANDER WISDOM (Oct. 13, 2018), <https://wanderwisdom.com/misc/Touring-circuses-In-the-United-States-and-Beyond>.

89 *See* Bippo, *supra* note 30, at 11, 15.

90 *See id.* at 3 (formerly worked at school assemblies); Faint, *supra* note 69, at 5 (parties).

seen at parades, community gatherings, and charity events painting children's faces or making balloon animals.<sup>91</sup>

Other clowns serve in more specialized therapeutic settings. So-called clown doctors, for example, work with hospitalized children.<sup>92</sup> Others work in disaster relief and refugee camps.<sup>93</sup> Some of these clowns are volunteers, while others are compensated for their work.<sup>94</sup>

The professional roles outlined above are not hard and fast divisions. At points throughout their careers, clowns move between these categories. A young clown may begin working local events before embarking on a successful circus career, for example.<sup>95</sup> Clowns may also operate within more than one sphere during a given period. A clown doctor may perform at parties or conventions. The working lives of clowns are fluid and largely self-directed. But whether they are full-time circus folk, amateur performers, or convention goers, clowns may wish to prevent appropriation of their creative works. The next Section considers what tools the law offers them.

### C. *Clowning and Formal Law*

Several aspects of a clown's persona are susceptible to some form of legal exclusivity. Copyright, trademark, and the right of publicity each present plausible theories for protecting some combination of a clown's visual appearance, name, and routine, doctrinal hurdles notwithstanding. Nonetheless, clowns have largely ignored formal legal rights.

Copyright law offers one potential avenue for protecting clown makeup designs, some features of their costumes, and aspects of their acts. Assuming it is original, a makeup design would appear to be a protectable graphic work.<sup>96</sup> Although a clown's makeup may evolve over time and may not be executed identically day to day, even application for a single performance should be sufficiently stable to satisfy the fixation requirement.<sup>97</sup>

91 See Faint, *supra* note 69.

92 See Edward Alan Glasper et al., *Does Clowning Benefit Children in Hospital? Views of Theodora Children's Trust Clown Doctors*, 1 J. CHILD. & YOUNG PEOPLE'S NURSING 24 (2007).

93 See BOUISSAC, *supra* note 32, at 198; RED NOSE RESPONSE, <http://www.rednoseresponse.org> (last visited Oct. 22, 2018).

94 Claus Barkmann et al., *Clowning as a Supportive Measure in Paediatrics—A Survey of Clowns, Parents and Nursing Staff*, 13 BMC PEDIATRICS 166, 169 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3851858/> (“Hospital clowns receive their payment from parents' associations, special support groups or donations . . .”).

95 Bippo, *supra* note 30, at 2–3.

96 See *Carell v. Shubert Org.*, 104 F. Supp. 2d 236 (S.D.N.Y. 2000) (holding that the makeup featured in the Broadway musical *Cats* was protectable); see also Lee Ann Lockridge, *Clowning Around, or More on Clowns and Copyright*, LAW & MAGIC BLOG (Oct. 19, 2010), [http://lpcprof.typepad.com/law\\_and\\_magic\\_blog/2010/10/clowning-around-or-more-on-clowns-and-copyright.html](http://lpcprof.typepad.com/law_and_magic_blog/2010/10/clowning-around-or-more-on-clowns-and-copyright.html).

97 17 U.S.C. § 101 (2012) (defining a work as “fixed” when its embodiment is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration”).

The useful article doctrine, which limits protection for utilitarian works, may complicate the copyrightability of clown makeup. Pictorial, graphic, and sculptural elements incorporated into a useful article are protectable only to the extent they are physically or conceptually separable from the underlying article.<sup>98</sup> Here, makeup designs are applied to the surface of an arguably useful article, namely a clown's face and head. In the context of a performance, the clown's face is employed for expressive purposes. But at the same time, it serves a number of undeniable biological functions—breathing, seeing, hearing, and the like. Nonetheless, a court would likely conclude that the makeup design is separable from its physiological substrate.<sup>99</sup> Since the makeup design can exist apart from the body, copyright attaches.

In contrast, clown costumes as such are not copyrightable since clothes are considered useful articles.<sup>100</sup> However, in *Star Athletica v. Varsity Brands*, the Supreme Court recently held that geometric patterns comprising cheerleading uniforms are separable graphic elements.<sup>101</sup> That holding opens the door to copyright assertions in the geometric patterns and color blocking of clown costumes.<sup>102</sup>

Finally, assuming that a clown creates an original gag, entrée,<sup>103</sup> or routine, copyright would seem to apply to those aspects of a performance.<sup>104</sup> The Copyright Act explicitly recognizes choreography and pantomime as categories of protected works, although neither term is defined.<sup>105</sup> And although there is no system of movement notation designed to capture pan-

98 *Id.* (“[T]he design of a useful article . . . shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”).

99 *See* *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1012 (2017) (finding separability because “if the arrangement of colors, shapes, stripes, and chevrons on the surface of the cheerleading uniforms were separated from the uniform and applied in another medium—for example, on a painter’s canvas—they would qualify as ‘two-dimensional . . . works of . . . art’”) (alterations in original) (quoting 17 U.S.C. § 101).

100 *See* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1699 (2006).

101 *Star Athletica*, 137 S. Ct. at 1012.

102 As the Court made clear, the creator of such a work would still be required to demonstrate the originality of the design. *Id.* at 1012 n.1.

103 *See* Townsen, *supra* note 34, at 150 (“In the twentieth-century circus, a clown entrée is an act some ten to twenty minutes in length, performed by a white-face clown and an auguste. It is a separate act on the circus program and not merely a fill-in during the brief pauses between the standard acts of skill.”).

104 *See infra* Part II.

105 17 U.S.C. § 102(a)(4) (2012). Pantomime may refer to a number of distinct creative forms. Brian L. Frye, *Copyright in Pantomime*, 34 CARDOZO ARTS & ENT. L.J. 307, 311–16 (2016). The Berlin Act of 1908, which amended the Berne Convention and eventually prompted the United States to recognize these works, used the phrase “entertainments in dumb show,” suggesting that “pantomime” referred to gestures without accompanying speech. *Id.* at 309.

tomime or clown acts, presumably a detailed written account could satisfy the fixation requirement.<sup>106</sup> And if not, a video recording would suffice.<sup>107</sup>

Despite its availability, we have found very little evidence that clowns have relied on copyright protection for their makeup, costumes, or acts. Although we have encountered scattered rumors of copyright disputes,<sup>108</sup> we were unable to verify any litigation addressing these aspects of clown personae.<sup>109</sup> There are a handful of U.S. copyright registrations for clown makeup designs, two of which we were able to trace to working clowns.<sup>110</sup> But we found no registrations for individual clown costumes or acts.<sup>111</sup> Although registration is not necessary to secure copyright protection, it is required before a U.S. author can commence litigation.<sup>112</sup> Overall, the practical importance of formal copyright law to clowns is minimal.<sup>113</sup>

106 Frye, *supra* note 105, at 316–25.

107 *Id.* at 325–36.

108 See, e.g., *Clown Eggs*, NAT'L CLOWN WK., <http://nationalclownweek.org/eggs.shtml> (last visited Nov. 5, 2018) (explaining that, according to Linda McBryde, “a person used the registry in a court case in which someone was infringing on his makeup design”); Mr. Boe, Comment to *Stolen Clown Picture and Identity!*, CLOWN F. (Feb. 18, 2010), <http://www.clown-forum.com/threads/stolen-clown-picture-and-identity.10297/page-2> (claiming that Earl Chaney “had someone steal his costume, face, and show . . . [and that] Earl whent [sic] to court and provided the [McBryde] “Clown Eggs’ . . . [and] proved that he was the original owner of the face”).

109 See Telephone Interview with Greg DeSanto, Clown, at 12 (Nov. 25, 2017) (transcript on file with authors) [hereinafter DeSanto] (“I don’t know really off hand if anything has ever gotten past the cease and desist. . . . I’ve heard of clowns saying they were going to sue or got a lawyer to draw up some kind of paperwork to just indicate that this [is] inappropriate and please stop this. But as far as actually going to court, I don’t know if that’s ever happened . . .”).

110 See APPLESAUCE THE CLOWN, Registration No. VAu000302101; RICH GUTTENDORF’S CLOWNFACE MAKEUP, Registration No. VAu000077215. Guttendorf trained at the Ringling Brothers Clown College. See Marcia Bennett, *Be a Clown*, PITTSBURGH POST-GAZETTE, Nov. 17, 1983, at 8. Sandy Parks performed under the name Applesauce. See *Everyone Loves a Parade . . .*, NEW BRAUNFELS HERALD-ZEITUNG, Apr. 23, 1995, at 17; see also CHUCKLES CLOWN FACE, Registration No. VAu000749498; GABBIE, THE CLOWN, Registration No. VAu000322671; KUKU KLOWN, Registration No. VAu000064246; “TOODLES” THE CLOWN: A.K.A. “TOOTLES” THE CLOWN, Registration No. VAu000427087.

111 We did locate registrations for a clown-themed fabric design and a clown Halloween costume. See CLOWN COSTUME: DESIGN NO. 3969, Registration No. VA0000288896; DIAMOND THE CLOWN, Registration No. VA0001208609.

112 17 U.S.C. § 411(a) (2012). In *Fourth Estate Public Benefit Corp. v. Wall-Street.com, L.L.C.*, the Supreme Court will decide whether the registration requirement is satisfied by merely delivering the application, deposit, and fee to the Copyright Office, or if the Office must first act on the application. 856 F.3d 1338 (11th Cir. 2017), *cert. granted*, 138 S. Ct. 2707 (2018).

113 For some clowns, the most relevant copyright concerns relate to copyrighted characters that appear in their acts. See Linda Goldston, *No Clowning Around in Threatened Lawsuit*, SAN JOSE MERCURY NEWS (July 25, 2006), <http://www.mercurynews.com/mld/mercurynews/15116297.htm> (describing cease and desist letter sent by a law firm repre-

Many clowns perform under a stage name that helps separate their clown persona from their offstage identity.<sup>114</sup> Trademark law, unlike copyright, could enable clowns to exert some degree of control over those *noms de guerre*.<sup>115</sup>

In order to secure trademark protection, a clown would need to establish that her name is distinctive—that is, that the name communicates to the public that goods or services bearing the mark originate from the same source.<sup>116</sup> If a term is generic, like “clown,” consumers have no reason to associate it with a particular source.<sup>117</sup> If, on the other hand, the mark is arbitrary (“Pickles”),<sup>118</sup> fanciful (“Bippo”),<sup>119</sup> or suggestive (“Whimmy Walker”),<sup>120</sup> trademark law presumes that consumers will treat the mark as an indicator of source when they first encounter it.<sup>121</sup> Descriptive terms, which describe some aspect of the good or service, require a trademark owner to demonstrate secondary meaning.<sup>122</sup> In other words, consumers must learn to treat the descriptive term as a trademark through repeated exposures and advertisement.<sup>123</sup> An auguste going by the name “Trip-and-Fall the Clown,” for example, would face some difficulty obtaining trademark protection, at least initially.<sup>124</sup> Most clowns, however, tend to choose inherently distinctive names.

Unless registered, trademarks in the United States extend only to those markets in which the rights holder has actually sold goods or provided services.<sup>125</sup> As a result, a Buttons the Clown in Cleveland would have no

senting owners of the rights to Bob the Builder, Thomas the Tank Engine, and Clifford the Big Red Dog that threatened to sue clowns for “costume infringement”).

114 Many circus clowns do not perform under a stage name. Telephone Interview with Ron “Toto” Johnson, Clown, at 7 (Sept. 14, 2017) (transcript on file with authors) [hereinafter Johnson]. Lou Jacobs, for example, performed under his own name for more than sixty years as a Ringling Brothers and Barnum & Bailey Circus clown. See Glenn Collins, *Lou Jacobs, 89, Master Clown of Ringling Circus*, N.Y. TIMES (Sept. 15, 1992), <http://www.nytimes.com/1992/09/15/arts/lou-jacobs-89-master-clown-of-ringling-circus.html>.

115 Titles and short phrases are ineligible for copyright protection. See U.S. COPYRIGHT OFFICE, WORKS NOT PROTECTED BY COPYRIGHT 2 (2017), <https://www.copyright.gov/circs/circ33.pdf>.

116 See *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992).

117 *Retail Servs. Inc. v. Freebies Publ’g*, 364 F.3d 535, 538 (4th Cir. 2004) (“Because a generic mark, by definition, neither signifies the source of goods nor distinguishes the particular product from other products on the market, a generic term cannot be protected as a trademark nor registered as one.”), *abrogated on other grounds by Verisign, Inc. v. XYZ.com LLC*, 891 F.3d 481 (4th Cir. 2018).

118 STEPHENSON & CHAMPION, *supra* note 1, at 17.

119 *Id.* at 25.

120 *Id.* at 39.

121 *Two Pesos*, 505 U.S. at 768.

122 *Id.* at 769.

123 See *Kellogg Co. v. Nat’l Biscuit Co.*, 305 U.S. 111, 118 (1938).

124 A name like Will E. Droppit is perhaps somewhat closer to the suggestive boundary. See STEPHENSON & CHAMPION, *supra* note 1, at 111.

125 *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 100 (1918).



recourse against a second Buttons the Clown in Houston, unless the two enter the same market. A clown who successfully registered her name as a mark, however, would enjoy nationwide priority and could enforce her trademark against subsequent users regardless of geography.<sup>126</sup>

In addition to their names, clowns could assert trademark protection for their visual appearance. A clown's makeup and costume, either separately or in combination, would likely be considered product design trade dress, a category of marks the Supreme Court has held always requires proof of secondary meaning.<sup>127</sup> A clown's visual appearance is primarily designed to make the clown and her performance more effective and appealing.<sup>128</sup> All but the most famous clowns would find it difficult to prove that consumers regard a particular makeup design or costume as an indication of the source of the performance.<sup>129</sup> That is not to say it could not be done. Pop-metal band Kiss, known for its aggressive licensing program, successfully registered the makeup designs of its four members, for example.<sup>130</sup> But most clowns lack that degree of recognition and exposure.

In practice, trademark law plays a relatively minor role in clowning. The United States Patent and Trademark Office's Principal Register currently includes six registered service marks for individual clown names.<sup>131</sup> And we found no registered marks for the visual appearance of individual clowns, although clown mascots like Ronald McDonald are sometimes registered.<sup>132</sup> Nor did our research uncover any instances of trademark litigation between clowns. We were, however, told about a clown called Paddywack who changed her name to Poppolino after another clown—who had registered "Paddywack" as the name of his clowning business—threatened legal

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126 See 15 U.S.C. § 1057(c) (2012).

127 See *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 212 (2000) (determining that "design, like color, is not inherently distinctive").

128 See *id.* at 213 ("Consumers are aware of the reality that, almost invariably, even the most unusual of product designs—such as a cocktail shaker shaped like a penguin—is intended not to identify the source, but to render the product itself more useful or more appealing.").

129 See Lockridge, *supra* note 96.

130 See Registration No. 1,128,427; Registration No. 1,128,762; Registration No. 1,128,763; Registration No. 1,130,566.

131 See "BRUSHIE" THE CLOWN, Registration No. 1,612,396; CLOWNVIS, Registration No. 2,751,356; CORY THE CLOWN, Registration No. 2,783,989; GANDALF THE WIZARD-CLOWN, Registration No. 2,679,245; GRANDMA THE CLOWN, Registration No. 3,232,806; OOOPSY THE CLOWN, Registration No. 2,242,868. A search of the European trademark registration turned up even fewer examples. See, e.g., EDDIE DE CLOWN, EUTM Registration No. 010,274,587.

132 See Registration No. 0,876,723; Registration No. 1,454,618; see also RRR POPS, Registration No. 5,363,120 (registration for a "three-dimensional configuration of a costumed clown character" in connection with "promoting charitable giving and special events").

action.<sup>133</sup> In addition, one press account describes a dispute between two dunking booth clowns named Bobo at the Allentown, Pennsylvania, fair.<sup>134</sup>

Finally, clowns may be able to leverage the right of publicity to protect aspects of their personae. The right of publicity, which is embodied in various state statutes and common-law doctrines, generally forbids the unauthorized commercial use of a person's name or likeness.<sup>135</sup> But the scope of protection differs in important respects between jurisdictions. In some states, it is limited to commercial speech;<sup>136</sup> in others, it reaches noncommercial speech as well.<sup>137</sup> In some states, it applies only to living people;<sup>138</sup> other states have adopted postmortem rights.<sup>139</sup> Most importantly, some states limit the right of publicity to discrete aspects of one's persona—a name, photo, image, or signature, for example.<sup>140</sup> Other states, like California, have adopted considerably broader definitions of a protected persona.<sup>141</sup>

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133 STEPHENSON & CHAMPION, *supra* note 1, at 179; Smith, *supra* note 3, at 10; Telephone Interview with Clown Bluey, Clown, at 15–16 (Sept. 19, 2017) (transcript on file with authors) [hereinafter Bluey].

134 Bill White, *Bobo or Bozo? Epic Legal Battle Fizzles at Fair*, MORNING CALL (Sept. 4, 1999), [http://articles.mcall.com/1999-09-04/news/3261086\\_1\\_new-clown-dunking-fair](http://articles.mcall.com/1999-09-04/news/3261086_1_new-clown-dunking-fair). Clowns have also encountered trademark issues when they adopt the name of well-known characters. See, e.g., Bill Bell, *Lord of the Rings—Of Battle*, N.Y. DAILY NEWS, July 21, 1997, at 12 (noting a settlement between Tolkien Enterprises and Michael Kaplan, who performed under the name Gandalf the Wizard-Clown). The only reported trademark decision involving a clown was brought by Larry Harmon Pictures, owner of the rights to Bozo the clown, against Bozo's pit barbecue restaurant. *Larry Harmon Pictures Corp. v. Williams Rest. Corp.*, 929 F.2d 662, 662–63 (Fed. Cir. 1991) (holding that restaurant satisfied the “use in commerce” requirement for registration).

135 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. LAW INST. 1995) (“One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability . . .”).

136 See, e.g., *Tyne v. Time Warner Entm't Co.*, 901 So. 2d 802, 806 (Fla. 2005) (holding that Florida's right of publicity statute did not apply to a motion picture because it “did not directly promote a product or service”).

137 See, e.g., OHIO REV. CODE ANN. § 2741.01 (West 2018) (defining a “[c]ommercial purpose” as a use “[o]n or in connection with a place, product, merchandise, goods, services, or other commercial activities . . . ; [f]or advertising or soliciting . . . ; [for] promoting travel to a place; [and] [f]or the purpose of fundraising”).

138 See, e.g., N.Y. CIV. RIGHTS LAW § 50 (McKinney 2018) (prohibiting unauthorized use of “the name, portrait or picture of any living person”).

139 See, e.g., CAL. CIV. CODE § 3344.1 (West 2018); IND. CODE ANN. § 32-36-1-8 (West 2018); TEX. PROP. CODE ANN. § 26.001 (West 2018).

140 See, e.g., IND. CODE § 32-36-1-6 (West 2018) (defining “personality” to include name, voice, signature, photograph, image, likeness, distinctive appearance, gesture, or mannerisms); N.Y. CIV. RIGHTS LAW § 50 (McKinney 2018).

141 See *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992) (reversing district court's grant of summary judgment in favor of defendant on California common-law right of publicity claim based on depiction of a robot performing Vanna White's duties on *Wheel of Fortune*).

In those jurisdictions, a clown could plausibly contend that by adopting an identical or similar visual appearance, another clown has appropriated her likeness. Some courts have entertained claims that the depiction of a fictional character implicates a performer's right of publicity.<sup>142</sup> But they have insisted that plaintiffs show that the performer and character are "inextricably intertwined."<sup>143</sup> Unlike an actor, a clown's stage persona is her only public identity.<sup>144</sup> Nonetheless, most clowns would struggle to establish that their identity is sufficiently recognizable and valuable to establish a violation of the right of publicity. Perhaps not surprisingly, we found no record of right of publicity disputes between clowns. However, some well-known clowns, including Lou Jacobs and Emmett Kelly, Jr., actively license their postmortem publicity rights.<sup>145</sup>

Copyright, trademark, and the right of publicity all offer some degree of legal protection for various aspects of a clown's persona and act. What explains the seeming reluctance of clowns to embrace the available legal tools? It may be that clowns simply do not care about asserting exclusivity in their makeup, costumes, names, and routines. But as the next Part will demonstrate, that is not the case. Clowns do value exclusivity, but they achieve it through other means. We suggest four overlapping explanations for the modest role of law among clowns. First, the doctrinal hurdles noted above may deter some clowns from pursuing formal legal claims, particularly with respect to trademarks and the right of publicity. But most clowns we spoke with were not particularly well versed in the nuances of intellectual property law. That lack of information stands as a second barrier to formal legal protection. Third, the high cost of legal representation would dissuade

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142 *Lugosi v. Universal Pictures*, 603 P.2d 425, 432 (Cal. 1979) (Mosk, J., concurring) ("An original creation of a fictional figure played exclusively by its creator may well be protectable."); *see also* *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 811–12 (9th Cir. 1997) (reversing summary judgment against two actors from the television series *Cheers* who challenged the use of animatronic bar patrons modeled after their characters in *Cheers*-themed airport bars).

143 *McFarland v. Miller*, 14 F.3d 912, 919, 920–21 (3d Cir. 1994) (holding that an actor and character must be "inextricably identified" with one another for publicity claim to be viable such that "[w]here an actor's screen persona becomes so associated with him that it becomes inseparable from the actor's own public image, the actor obtains an interest in the image"); *see also* *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 626 (6th Cir. 2000) (rejecting right of publicity claim brought by actor whose likeness was allegedly used to create action figure based on his character in the movie *Predator*); *Nurmi v. Peterson*, No. CV 88-5436, 1989 WL 407484, at \*3 (C.D. Cal. Mar. 31, 1989) (denying a right of publicity suit filed by an actress playing Vampira against an actress playing Elvira because Elvira was not an exact copy of the Vampira character but only used some similar "props, clothes, and mannerisms").

144 *BOUISSAC*, *supra* note 32, at 3.

145 *See* *Licensing*, LOU JACOBS, <https://www.cmgww.com/stars/jacobs/licensing/> (last visited Oct. 24, 2018); *Licensing Program*, EMMETT KELLY JR, <http://www.emmettkellyjr.com/licensingprogram.html> (last visited Oct. 24, 2018); *see also* *DeSanto*, *supra* note 109, at 23. Emmett Kelly, Jr. was the son of Emmett Kelly and adopted his father's Weary Willie character. *See infra* Section II.B.

many clowns.<sup>146</sup> However, cost is a constraint facing all creators, and we find greater reliance on formal law in other creative fields. Finally, threatening a lawsuit or dragging another clown into court would be at odds with the cheerful, upbeat, and playfully rebellious culture of clowning.<sup>147</sup> Taken together, these factors help explain why clowns have instead developed and enforced a system of social norms governing creativity and copying.<sup>148</sup>

## II. CLOWN NORMS

Like many other communities, clowns prefer to rely on community-driven social norms to regulate their creative practices rather than state-created law.<sup>149</sup> These norms establish standards for originality and priority, inform the often-indeterminate evaluation of improper appropriation, and provide for a range of individual and community responses to transgressive behavior.

By definition, norms do not rely directly on state-sanctioned legal apparatus. Nonetheless, norms systems vary in their degree of formality. Many emerge organically and operate without any centralized authority.<sup>150</sup> Others—whether because of the size or culture of the community or the nature of the norms themselves—rely on some private administrative

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146 Interview with Jeff “Bungles” Potts, Clown, in Canton, Ohio, at 18 (Oct. 13, 2017) (transcript on file with authors) [hereinafter Potts] (“The other thing too is, these things cost money to copyright, to trademark, to file lawsuits, you know? . . . And people that do this, they don’t have that kind of money. They perform for the love of the art and they aren’t like the Hollywood actor who makes millions and millions.”).

147 Smith, *supra* note 3, at 11 (“[I]f you start to come down the whole line of making it a rule and a proper law, then it would be difficult, clowns want to be happy and nice and not have a load of that sort of thing.”). Similar cultural preferences account for some of the resistance to formal law among roller derby athletes and tattoo artists. See Fagundes, *supra* note 21, at 1137–38 (observing that in close-knit subcultures, “turning to lawyers to solve conflicts may be construed either as a sign of betrayal . . . or even of weakness”); Perzanowski, *supra* note 23, at 525–32.

148 In this respect, clowns fall into a long tradition of subcultures and communities that have eschewed legal regulation in favor of their own internal social norms. The literature on the use of social norms in lieu of state-created law is voluminous. For the cornerstone account, see ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (describing use of norms instead of law by Shasta County ranchers to regulate cattle trespass); see also Fagundes, *supra* note 21, at 1094–96 (summarizing this literature).

149 By “norms,” we refer to a set of generally accepted obligations to engage in or refrain from behaviors that are enforced through social sanction rather than state action. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 350–52 (1997). Norms are not merely behavioral regularities; they imply some social obligation. Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1656 (1996). But members of a community often internalize norms to such a degree that a violation entails its own inherent consequence. McAdams, *supra*, at 376–78.

150 See ILJADICA, *supra* note 18 (graffiti writers); Oliar & Sprigman, *supra* note 22 (comedians); Perzanowski, *supra* note 23 (describing the emergence of norms among tattooers).

body.<sup>151</sup> That body may recognize and record claims, adjudicate disputes, or mete out sanctions for norm violations. The precise form and content of a norms system turn on a number of factors, but tend to be responsive to the specific needs and values of the communities in which they operate.

This Part describes the creative norms that clowns use instead of state or federal law.<sup>152</sup> First, it outlines the nearly universal antiappropriation norm among clowns. Although that basic principle is one all of the clowns that we interviewed embraced, its ubiquity belies the nuance and ambiguity of its application. Below we explore the nebulous boundary between inspiration and copying, one that clowns, much like courts, struggle to define. Finally, we turn to the set of social sanctions and interventions clowns rely on to enforce their norms.

### A. *The Antiappropriation Norm*

Among clowns, copying another performer's visual appearance, name, or act crosses a well-established, though not always clearly defined, line. Although they differed in their precise formulations of the rule, every clown we interviewed agreed that the unwritten rules of clowning prohibit the appropriation of another clown's persona or act. Copying is seen as "deviant behavior akin to plagiarism."<sup>153</sup> American and British clowns, professionals and amateurs, and those with or without formal training all share this understanding. The design of a clown's face is seen as "his own personal trademark."<sup>154</sup> As a result, "[b]y unwritten agreement, clowns never copy each other's make-up."<sup>155</sup>

Clowns offer a number of justifications for this antiappropriation norm. Some speak in terms of the labor and effort a clown invests in developing their look or their act.<sup>156</sup> As Brian Foley, a clown and theater instructor, noted: "You're appropriating something that took them who know[s] how

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151 Fagundes, *supra* note 21, at 1114–29 (describing the creation of the master roster); Amy Kapczynski, *Order Without Intellectual Property Law: Open Science in Influenza*, 102 *CORNELL L. REV.* 1539, 1542 (2017) (describing the operation of the World Health Organization's Flu Network).

152 Clown norms are not limited to questions of creativity and ownership. They are expected to keep their acts clean and family friendly. Clowns should not smoke or drink alcohol in costume. And they should only be seen in makeup while performing. See *Code of Ethics*, CLOWNS AM. INT'L, <https://mycoai.com/code-of-ethics> (last visited Oct. 24, 2018); Bippo, *supra* note 30, at 13 (noting rule against smoking and swearing in makeup); Faint, *supra* note 69, at 9 ("You should always be a clown when you're in costume. . . . [N]ot to be in character is[,] [f]or me, awful. It's a sacrilege, clowning for me is a highest state and you should maintain it."); Telephone Interview with Julie "Lovely Buttons" Varholdt, Clown, at 5 (Sept. 12, 2017) (transcript on file with authors) [hereinafter Varholdt].

153 BOUISSAC, *supra* note 32, at 24.

154 Tom Conway, *Eggshell Library for Clowns*, 68 *DESIGN* 36, 36 (1967).

155 Badderly, *supra* note 6.

156 Copyright law has rejected sweat of the brow as a basis for exclusivity. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359–60 (1991) (noting there is "no doubt that originality, not 'sweat of the brow,' is the touchstone of copyright protection").

long to discover, or develop. Who knows how many years of failure on stage it took for them to figure something out?”<sup>157</sup> For some clowns, such copying directly implicates their creative incentives.<sup>158</sup> Bippo, one of Britain’s best-known circus clowns, told us: “[I]f you’ve honed your look in and then someone else copies it, you just think, ‘Well, what am I doing it for, then?’”<sup>159</sup>

Many clowns view their character as an outgrowth of themselves, so copying feels like a personal intrusion.<sup>160</sup> As Mattie Faint, clown and curator of the Clowns’ Gallery-Museum at Trinity Church in London, put it: “[I]t’s quite personal and the character that you build should be individual.”<sup>161</sup> Debbie Smith, clown and current Clowns International egg artist agrees: “You wouldn’t want somebody to actually be posing as you. So why would you want that if . . . you’ve worked on a character and you’ve created this image and this look, that isn’t you, but it’s a form of you.”<sup>162</sup> Foley echoes that sentiment, explaining that “being a clown is a very personal art form” and copying from another clown amounts to “stealing a part of them.”<sup>163</sup>

Other clowns expressed concerns about confusion, mistaken identity, and reputational harm. As Bluey, a longtime clown who served as a CI committee member and trustee of the Gallery-Museum from its earliest days, told us: “[O]bviously you don’t want to be confused with anybody else because they could be a crack or they could be naughty. You don’t want their reputation being mixed up with yours.”<sup>164</sup> Conversely, borrowing someone else’s identity prevents a clown from establishing her own reputation. As Ron “Toto” Johnson, a former Ringling Brothers clown, told us: “[N]o actual professional would ever want to steal somebody else’s look, because now you’re known as somebody else, not yourself.”<sup>165</sup>

157 Telephone Interview with Brian Foley, Dir., Instructor, Performer, Dynamic Theatre, at 13 (Sept. 19, 2017) (transcript on file with authors) [hereinafter Foley].

158 Such incentives and the benefits they confer to the public are the dominant justification for U.S. copyright protection. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”).

159 Bippo, *supra* note 30, at 12.

160 While European law has embraced the rights of authors to control their works as extensions or reflections of their personalities, U.S. law has been resistant to noneconomic justifications for copyright protection. *See Kelley v. Chi. Park Dist.*, 635 F.3d 290, 296 (7th Cir. 2011) (noting that the Visual Artists Rights Act “introduced a limited version of this European doctrine into American law”).

161 Faint, *supra* note 69, at 3.

162 Smith, *supra* note 3, at 8.

163 Foley, *supra* note 157, at 13.

164 Bluey, *supra* note 133, at 9.

165 Johnson, *supra* note 114, at 8. Other sources echo the notion that no clown would ever contravene this rule. *See, e.g.*, Badderly, *supra* note 6 (“By unwritten agreement, clowns never copy each other’s make-up.”). The lived reality of clowns’ experience suggests that such copying is not unheard of. *See, e.g.*, Bippo, *supra* note 30, at 9–12 (relating story of a newcomer clown who appropriated his persona wholesale); Smith, *supra* note 3, at 7 (relating story of an amateur clown copying the look and act of a well-known profes-

The norm against copying is most often cited in the context of clown makeup.<sup>166</sup> It is a widely recognized “unwritten rule within clowning that no clown should copy another clown’s look.”<sup>167</sup> The first clown to adopt a particular design is entitled to some degree of exclusivity.<sup>168</sup> If you are a “proper clown,” you know better than to copy a makeup design.<sup>169</sup> This rule has been consistent for at least sixty years, and likely even longer. As early as 1957, an article described a clown’s look as their “professional, jealously guarded property.”<sup>170</sup>

Although less emphasized in our conversations, much the same is true for costumes.<sup>171</sup> Likewise, clowns view appropriation of original elements of an act, whether a few lines of banter or an entire show, as a violation of the “unwritten rule [that] [y]ou don’t steal somebody else’s material.”<sup>172</sup> The rule against copying extends to clown names as well. As Judy “Dear Heart” Quest, former President of Clowns of America International, explained: “[W]hen people . . . take other people’s names, . . . we’ll have three Sunshine’s in town, or three Daisies, or whatever. People aren’t very happy about that . . . . [I]f I see people going toward a name that somebody else has, I’ll just tell them. They’ve got to find something else.”<sup>173</sup>

The antiappropriation norms of clowning may sound like broad, iron-clad rules. But as discussed below, their application turns on a number of nuanced considerations that complicate the question of infringement, resulting in a subtler analysis than the blunt statements of those rules would suggest.

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sional). These norm violations may be explained in part by the fact that the violators were newcomers to clowning.

166 Despite criticism that it created a recognizable, uniform style of clown, the Ringling Brothers Clown College continued to insist that clowns strive for an individual makeup design. See Huey, *supra* note 67, at 5, 300. As Clown College Dean Ron Severini told clowns: “Think of yourself as a snowflake . . . [in that] no two are ever alike.” *Id.* at 222.

167 STEPHENSON & CHAMPION, *supra* note 1, at Foreword.

168 Johnson, *supra* note 114, at 6 (“Whether it was thirty years before you or 3 years before you, or 3 months before you or whatever, that was their look, they created that first.”).

169 Smith, *supra* note 3, at 7; Varholdt, *supra* note 152, at 7 (noting that whether “you’re a professional clown or even if you’re just learning from the alleys” “you are not supposed to take somebody else’s face. It’s wrong”).

170 *King of the Eggheads* (Apr. 1957), *supra* note 12.

171 Johnson, *supra* note 114, at 7 (“[Y]ou wouldn’t want to exactly copy another clown’s costume. You’re trying to create your own clown persona[,] . . . why would you want to look like somebody else?”); see also Foley, *supra* note 157, at 12.

172 Varholdt, *supra* note 152, at 10–11; see also Faint, *supra* note 69, at 3–4; Stone, *supra* note 4, at 20–21.

173 Telephone Interview with Judy “Dear Heart” Quest, Clown, at 7–8 (Sept. 8, 2017) (transcript on file with authors) [hereinafter Quest]; see also Johnson, *supra* note 114, at 7.

*B. Defining Improper Appropriation*

The antiappropriation norm is universally recognized and almost always respected by clowns. But its application is flexible and often rather forgiving. In part, that is a function of clown culture's emphasis on affability and community. It also reflects the subjectivity of the similarity analysis, as well as recognition of the practical, historical, and conventional constraints on clown creativity. Importantly, the application of the norm varies considerably based on subject matter. For visual appearance, the norm embraces a fair degree of borrowing and tends to prohibit only close, literal copying and wholesale appropriation. With respect to clown routines, the norm recognizes a significant shared commons, but is sensitive to relatively minor copying of original contributions. And finally, clowns tolerate considerable overlap in names, but geographic proximity and a clown's degree of fame complicate the picture.

When it comes to clowns' visual appearances, some degree of imitation is inescapable.<sup>174</sup> For a clown to be recognized by the general public, her look has to fit a certain set of expectations. And as described above, once a clown settles on a type—whiteface, auguste, or character—a number of basic stylistic conventions impose limitations on her creative choices.<sup>175</sup> In the process of developing their makeup, clowns routinely draw inspiration from each other. This was true of clowns whose initial exposure came through their local clown club—or “alley”—as well as clowns who were trained at the Ringling Brothers Clown College.<sup>176</sup>

Nonetheless, clowns often borrow particular elements of a makeup design from predecessors or peers in constructing their own unique design. As Greg DeSanto, a longtime Ringling Brothers clown and director of the International Clown Hall of Fame described:

[It is a point of] honor amongst clowns that you wouldn't copy another clown's face. You could certainly look at elements and go, “I love the way he does his eyebrows, and I wonder if I tried to do something like that and incorporate maybe an eyebrow or a cheek design or something.” But never like, let's just copy this face blatantly.<sup>177</sup>

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174 BOUISSAC, *supra* note 32, at 24.

175 A clown's makeup design is also constrained by her human face. A successful design is one that emphasizes the most expressive features of the face. Faint, *supra* note 69, at 1; Foley, *supra* note 157, at 8; Quest, *supra* note 173, at 4; Smith, *supra* note 3, at 3.

176 DeSanto, *supra* note 109, at 8 (“They had at their disposal, obviously because they were Ringling Brothers, . . . these massive photo files of every clown that had been through the clown college and had been on the circus, and clowns from Europe and clowns from America and clowns from Mexico, Russian clowns. So, you really had a lot of reference material to look at . . .”); Quest, *supra* note 173, at 4–6.

177 DeSanto, *supra* note 109, at 9–10; Johnson, *supra* note 114, at 6 (“[Y]ou can use aspects, if there's a clown that you really admire, or you really respect or that you just really liked the way that they did their eye design. You can use elements of it, [but] don't copy it exact . . .”).



In describing the evolution of his makeup design, Bippo cited two clowns from whom he borrowed discrete elements. From a clown called Mooky, he adopted a white lower lip outlined in black. And inspired by a friend called Henry the Prince of Clowns, he began adding a whorled eyebrow flourish. He modified both of these elements somewhat in what he referred to as a “sort of chop and change” process.<sup>178</sup>

This remixing of makeup elements is widespread among clowns and fully consistent with their understanding of the antiappropriation norm. Toto Johnson recounted an exchange with a clown who borrowed elements from Johnson’s well-known makeup design:

[H]e came up when he joined [Ringling Brothers] and he says, “[H]ey, I liked your look, . . . [and] I’ve used a couple of the basic shapes of your face, in mine.” And the thing is we looked nothing alike, nothing. Because he changed the eyebrow color; he changed the eyebrow shape; he used the shape of the eyes like mine and the basic shape of the mouth, but he changed the lip design, he changed some other elements of the make-up and you would never, ever dream that our makeups had anything to do with each other. Because so much of the face was changed but he used two basic elements of my face that he really liked, and he looked nothing like me.<sup>179</sup>

To run afoul of the rule against copying, clowns need to do more than borrow individual elements. They have to engage in bodily appropriation of something approaching the entire makeup design. While not common, such copying does occur. Bippo described his frustration when a performer he had mentored began wearing nearly identical makeup:

I looked on his Facebook, and he had the same fucking makeup as me. . . . [T]he only thing that’s different is that I have a [prosthetic] nose. . . . And I went, “What the fuck are you doing?” Like, I rung him up and I was quite angry. . . . [H]e was working at the Hippodrome in Great Yarmouth as a clown, which I’d worked there before. And I got messages on my Facebook page: “Great to see you back in Yarmouth.” I was thinking, “What the fuck is this? I’m 260 miles away.”<sup>180</sup>

So while the copying of individual makeup elements is routine and acceptable, appropriating a nearly identical arrangement of such elements violates the norm. But as some clowns pointed out, even copying an entire makeup design may not always result in visual identity since the performer’s underlying facial features contribute so much to the clown’s appearance.<sup>181</sup> When close copies of makeup do result in similarity, the norm violation is compounded if costumes and acts are copied as well.<sup>182</sup>

178 Bippo, *supra* note 30, at 8.

179 Johnson, *supra* note 114, at 8–9.

180 Bippo, *supra* note 30, at 9–10.

181 DeSanto, *supra* note 109, at 9–10 (explaining that copying another clown’s design “probably wouldn’t look exactly the same because your face is [a] different shape and different size than the person doing it”); Faint, *supra* note 69, at 7.

182 Bippo, *supra* note 30, at 10–12.

A clown act typically consists of a series of distinct comedic gags or entrées. Many are decades, if not centuries, old. They comprise a well-understood canon of clowning that performers are expected to know.<sup>183</sup> But that canon is treated as a shared resource; clowns are generally free to perform and modify these basic building blocks of an act as they see fit. As Christopher Stone, longtime secretary of Clowns International, explained, these set pieces—like *Dead and Alive*, *the Mirror*, *the Potato Sack*, and *Three Times Three*—“are bog standard. Every clown knows them, so that they wouldn’t overlap and say ‘[G]et off my patch.’”<sup>184</sup> In the language of copyright law, we might consider the basic setup and content of those gags as *scènes à faire*—elements so closely associated with clown acts that they are not susceptible to claims of exclusivity.<sup>185</sup> But they can be modified and updated in ways that are unique to specific performers.

According to DeSanto, these classic routines serve a number of purposes. They provide useful instruction for new clowns, they preserve clowning’s history, and they offer opportunities for variation and incremental innovation:

[In] American clowning, a lot of our routines are built on tradition. So, we actually learn really . . . old clown routines that have been done for 50, 60, 70, 100 years, and we are taught them as a way to learn how to structure a clown routine or a clown gag. But it also keeps them alive, because we do them. . . . [I]t happens in Europe quite a lot, too. . . . [I]n Europe they call them entrées . . . and clowns have done them for hundreds and hundreds of years. Some of these things go back to . . . the *commedia dell’arte* and the 1600s. They’re very simple premises. You have a toothache, you go to the dentist and he pulls the wrong tooth. In a nutshell, that’s the gag. And then you individually fill it out with your personality and your character and your shtick, if you will.<sup>186</sup>

Occasionally, wholesale copying of a clown’s entire act occurs.<sup>187</sup> But more often, clowns borrow small fragments or ideas from other acts. Perhaps because so much of clowning is derived from public domain material, clowns are sometimes quite sensitive to copying of their original contributions. The use of one-liners, turns of phrase, and new adaptations of existing entrées all

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183 Indeed, there are economic incentives that cut against experimentation. Townsen, *supra* note 34, at 157 (“The repertoire of clown entrées is limited in number and seldom replenished. Audiences are often nostalgic for the good old routines, and circus directors have tended to discourage innovation, often requiring their clowns to perform the traditional entrées.”).

184 Stone, *supra* note 4, at 28; see also Townsen, *supra* note 34, at 159–60.

185 See *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986) (“[D]runks, prostitutes, vermin and derelict cars [were necessary to] any realistic work about the work of policemen in the South Bronx.”).

186 DeSanto, *supra* note 109, at 11–12; see also Varholdt, *supra* note 152, at 10 (“You have to tweak something to make it fit your character.”).

187 Varholdt, *supra* note 152, at 13 (describing an instance in which a young clown performed the entire routine of Don “Homer” Burda “line for line, step by step” at a convention at which Burda was booked as the headlining act).

risk violation of the antiappropriation norm. Mattie Faint described feeling “invaded” and “undermined” when another clown doctor working at the same hospital adopted his “[c]atchphrases, stature, and tricks.”<sup>188</sup> Bippo expressed his frustration when another clown adopted a bit where he performs on his hands and knees in a mini-clown costume.<sup>189</sup> While he acknowledged that the “idea goes back years and years and years, . . . no one had done it in circus for the last ten years.”<sup>190</sup> Because he had revived and modified the act, Bippo felt it crossed the line when another circus adopted it after “see[ing] it works ‘cause you’ve come to the show [and] heard them laughing.”<sup>191</sup>

But because clown performance is rooted in incremental adaptation of established acts, clowns tend to remain open to subsequent personalization, even of material they developed independently. As Julie Varholdt told us:

I have specific skits that are unique to me that I do in a lot of my shows, and if people want to use them that’s fine, but they have to tweak them, they have to change them, ‘cause those are things that I’ve come up with and it takes years to get those just right.<sup>192</sup>

For visual appearance and routines, the antiappropriation norm operates much like copyright law; it sanctions instances in which one clown copies elements from an existing work that result in some meaningful degree of similarity.<sup>193</sup> For clown names, the norm more closely resembles trademark law’s likelihood of confusion analysis, taking into account a number of factors, including priority, geography, and degree of recognition.<sup>194</sup>

Clowns are encouraged to adopt unique stage names.<sup>195</sup> But new clowns, who are initially unfamiliar with the expectation of uniqueness and lack exposure to the broader clown community, often choose common names.<sup>196</sup> Varholdt, who now performs under the name Lovely Buttons, recounted how she initially called herself Buttons. “I found out later on that

188 Faint, *supra* note 69, at 3.

189 Bippo, *supra* note 30, at 19.

190 *Id.*

191 *Id.*

192 Varholdt, *supra* note 152, at 11.

193 See *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946) (identifying “two separate elements” of a copyright claim: “(a) that defendant copied from plaintiff’s copyrighted work and (b) that the copying (assuming it to be proved) went so far as to constitute improper appropriation”).

194 Other informal ownership norm systems closely approximate formal-law systems like trademark. See, e.g., Fagundes, *supra* note 21, at 1136 (“[A]ny similarity between trademark law and derby norms is likely due not to law’s conscious or unconscious influence, but instead to the shared policy goals of these two bodies of law . . . and common instincts about fairness.”); see also Perzanowski, *supra* note 23, at 544–47 (noting the similarity of the idea/expression distinction in copyright law to the informal norms of tattoos).

195 Potts, *supra* note 146, at 27 (noting articles in clowning magazines designed to help new clowns choose unique names).

196 Varholdt, *supra* note 152, at 10.

there are about 5,234 [clowns called] Buttons, so I changed the name . . . to be unique.”<sup>197</sup>

Given the number of amateur clowns and their propensity for stereotypical clown names, there is a high degree of tolerance for name overlap.<sup>198</sup> However, if a clown attempts to adopt the name of a well-known clown, they will meet resistance. Clowns International, for example, refused to register a clown who wanted to be called Coco—the stage name of famed clown Nicolai Poliakov.<sup>199</sup> So she changed her name to Coco-nut.<sup>200</sup> Putting fame aside, geographic proximity is another factor that favors name uniqueness. “[I]n the local clown clubs and the amateur clowns . . . you don’t want to have a ‘Slappy the Clown’ and [another] ‘Slappy the Clown’ that lives two miles away. You want to have a different name, again, so people aren’t confusing you with somebody else.”<sup>201</sup> Much like trademark law, the test for clown names is ultimately rooted in consumer confusion.

Perhaps because these infringement standards are so flexible, clowns have not developed robust exceptions to the antiappropriation norm. The closest they come is a tradition of passing down clown characters or components thereof—makeup, costumes, acts, and names—within a family. Historically, clowning and the circus more generally was a family business.<sup>202</sup> The Cairolis, Fratellinis, and other families represent clowning legacies.<sup>203</sup> And in some cases, clown characters carried on for multiple generations. As Bluey told us: “[T]he usual [ ] story was that if the father died or retired, then he could [pass] his name on to his son.”<sup>204</sup> That was true for Nicolai Poliakov, who gave the Coco moniker to his son Michael Polakovs when he retired.<sup>205</sup> And when the famed auguste Charlie Cairoli retired, his son Charlie Cairoli, Jr.—who had been his father’s whiteface partner—adopted

197 *Id.* at 5. The desire for unique names arises in a variety of contexts, from online communities to roller derby and horseracing. Laura A. Heymann, *A Name I Call Myself: Creativity and Naming*, 2 U.C. IRVINE L. REV. 585, 618–19 (2012).

198 Smith, *supra* note 3, at 10 (“[C]hecking the names is more tricky than the makeup. You can tend to mess up a bit on the names.”).

199 The name was later adopted by his son, Michael Polakovs. See Obituary of *Michael Polakovs*, TELEGRAPH (Dec. 15, 2009), <http://www.telegraph.co.uk/news/obituaries/culture-obituaries/6819508/Michael-Polakovs.html>.

200 Stone, *supra* note 4, at 24 (“[C]hildren have come forward and gone ‘I want to be Coco,’ and we’ve discouraged them, because they’re taking a famous name . . . but they’re not entitled to take it, because they’re not famous enough themselves. They would spoil the image of the man. . . . [B]ut you would say: ‘[T]here’s nothing to stop you calling yourself Coconut, or some other phrase.’”); see also STEPHENSON & CHAMPION, *supra* note 1, at 135.

201 Johnson, *supra* note 114, at 7.

202 Potts, *supra* note 146, at 11.

203 James Kirkup, *Obituary: Annie Fratellini*, INDEP. (July 5, 1997), <http://www.independent.co.uk/news/people/obituary-annie-fratellini-1249053.html>; David Whetstone, *No Tears Behind the Laughter for Charlie*, JOURNAL (Dec. 17, 1998), <http://www.bigredbook.info/charlie-cairoli.html>.

204 Bluey, *supra* note 133, at 9–11.

205 *Id.* at 9.

the elder Cairolì's auguste character and dropped the suffix from his name.<sup>206</sup>

But not all clowns give up their characters so willingly. When Emmett Kelly, Jr. began performing as Weary Willie—the hobo clown made famous by his father—the elder Kelly bristled. He publicly accused his son of “trying to steal his act.”<sup>207</sup> He even threatened a lawsuit, claiming that “[b]oth the name and the picture of Willie’s face are copyrighted.”<sup>208</sup> Although the suit was never filed, father and son were reportedly estranged for years as a result, and a rift remained between family members even after the patriarch’s death.<sup>209</sup>

Two crucial facts separated the Kelly dispute from the examples above. First, unlike Cairolì and Poliakoff, Kelly hadn’t yet retired. As he said at the time, “I resent the stuff they have been putting out saying I’m retired—that hurts my career and affects my billings.”<sup>210</sup> Relatedly, Kelly “never gave Junior permission to copy Weary Willie’s makeup or to use his name.”<sup>211</sup> That’s not to say Kelly would have endorsed his son’s portrayal of Willie even if he had retired. His attachment to Weary Willie was both financial and psychological. According to him: “A clown’s makeup and character, that’s all he has to sell. He loves and believes in that character. ‘Weary Willie’ is very real to me.”<sup>212</sup> And he apparently “abhorred his son’s characterization” as a “trivialized version of Willie.”<sup>213</sup>

In the language of property, it would seem that clown personae are alienable and devisable, but not descendible. That is to say, a clown can transfer her interests in a character either during her lifetime or at her death through some express grant of permission. But in the absence of such permission, the clown’s heirs have no right to the character after she dies. In that case, it seems the character dies as well.

### C. *The Enforcement of Clown Norms*

If violations of the antiappropriation norms occur, how do clowns deal with them? In other norms-based communities, the most common sanction for norm transgression is social opprobrium—negative gossip or some other

206 *Id.* at 10; *see also* *Violetta Cairolì*, TELEGRAPH (Dec. 21, 2002), <http://www.telegraph.co.uk/news/obituaries/1416730/Violetta-Cairolì.html>; Whetstone, *supra* note 203.

207 *Son Stealing Father’s Act*, BALTIMORE SUN, June 21, 1975, at A3.

208 *Id.*

209 Leo Adam Biga, *From the Archives: Monika Kelly Recalls Her Late Father, the Beloved Clown and Ringling Brothers and Barnum & Bailey Circus Legend, Emmett Kelly Sr.*, OMAHA METRO UPDATE (Oct. 9, 2011), <https://leoadambiga.com/2011/10/09/from-the-archives-monika-kelly-recalls-her-late-father-the-beloved-clown-and-ringling-brothers-and-barnum-bailey-circus-legend-emmett-kelly-sr/>.

210 *Son Stealing Father’s Act*, *supra* note 207.

211 *Id.*

212 Bob Kriebel, *Famous Clown Called Lafayette Home*, J. & COURIER (July 22, 2016), <https://www.jconline.com/story/news/history/2016/07/22/famous-clown-called-lafayette-home/85664158/>.

213 Biga, *supra* note 209.

reputational harm.<sup>214</sup> Social stigma can be a very effective tool, but it can also be quite harmful to those on the receiving end. And it is often dispensed without meaningful procedural safeguards or evidentiary standards. Even more troubling is the threat of violence that often lurks below the surface of norms enforcement.<sup>215</sup> Both negative gossip and the threat of violence are among the responses to norms violation among clowns.<sup>216</sup> But clowns employ a number of other responses more in keeping with their cheerful and playfully mischievous culture.

Many clowns viewed norm breaking as an opportunity for early intervention and education. This was true at the Ringling Clown College where “if folks started getting too close to another clown’s make-up [the instructors] would say, ‘You’re kind of starting to look like this person a little bit too much, can you change something around?’”<sup>217</sup> It is also the case with local clown alleys. As Judy Quest described:

[R]ather than say, “Don’t you do that,” I would rather say, “Be yourself and enhance yourself, starting from the positive.” . . . If somebody [said], “I want to look exactly like this clown,” I would say, “I don’t think so. I would so much rather have you be your own person.”<sup>218</sup>

But when clowns violate the norm in a public performance, the response tends to be more direct. A number of clowns reported direct confrontations with clowns who copied from them.<sup>219</sup> Bippo described a conversation with a close friend who copied his makeup: “I had to go up to [him], talk to him myself, and sort of fall out with a best friend over it for a bit.”<sup>220</sup> But in typical clown fashion, all was forgiven after the copyist altered his appearance. As Bippo put it: “[W]e got over it, ‘cause I don’t like holding grudges at all. So I got over it . . . ‘[c]ause he changed [his look].”<sup>221</sup> After a fellow clown doctor copied some of his gags, Mattie Faint illustrated the offense—in what itself sounds like a clown routine—by copying bits from the copyist: “I started

214 See ELLICKSON, *supra* note 148, at 57 (discussing the effectiveness of “truthful negative gossip” as a means of norm enforcement); Fagundes, *supra* note 21, at 1127 (illustrating the impact of social sanctions as a means of enforcing derby-name uniqueness norms); Olliar & Sprigman, *supra* note 22 (detailing social norms enforcement in standup comedy); Perzanowski, *supra* note 23 (describing derision heaped upon copying tattooers).

215 For a discussion of the role violence sometimes plays in the enforcement of social norms, see Stephen Clowney, *Rule of Flesh and Bone: The Dark Side of Informal Property Rights*, 2015 U. ILL. L. REV. 59.

216 See Stone, *supra* note 4, at 27–28 (noting that one potential consequence of violating the antiappropriation norms “is they probably get a black eye. . . . I think it comes down to violence”).

217 Johnson, *supra* note 114, at 5.

218 Quest, *supra* note 173, at 6; Varholdt, *supra* note 152, at 12 (“[H]opefully someone could talk to that person and explain to them what they did wrong, and they’ll come to understand that they did something wrong and they need to change it.”).

219 See Smith, *supra* note 3, at 7 (noting that her husband “had words” with a friend who copied his makeup).

220 Bippo, *supra* note 30, at 18.

221 *Id.*

using things that he was saying. . . . I used his phrase, I walk into the area and he said, ‘You’re using my line!’”<sup>222</sup>

Some clowns invoked the idea of violence as a possible response to copying. Stone observed that “the consequence is they probably get a black eye. . . . [Clowns] don’t use words very often. I think it comes down to violence.”<sup>223</sup> While these references arose occasionally in our interviews, they were all hypothetical.<sup>224</sup> No evidence indicates that clowns actually followed through with threats of violence as a response to misappropriation.<sup>225</sup>

The consequences of copying are not limited to one-on-one confrontation. A number of clowns mentioned the risk of reputational damage within the clowning community. “[C]lown groups are pretty tight groups. If one person hears that someone [violated the norm against copying], it usually gets around pretty quick. . . . That person could lose a lot of respect very quickly if they do things like that.”<sup>226</sup> Although event clowns generally perform alone or in small groups, conventions and other events provide frequent opportunities to share information and exercise social pressure. Message boards and social media have only made it easier for clowns to enlist their community in the effort to sanction copying. But for clowns who are not part of a thriving local community, the threat of detection and meaningful consequences may not seem particularly severe.<sup>227</sup>

Circus clowns rely on another layer of enforcement to police copying. Because circus operators want to differentiate themselves in the market and need to maintain working relationships with a rotating cast of performers, they step in when one clown is borrowing too heavily from another. As Bippo, who has worked for a number of prominent UK circuses, explained:

The director wouldn’t have it either, ‘cause circus directors see every show. . . . They look at everything, so they would have seen every clown. So if you go, “Right, I want to be your clown next year.” . . . [The director will say,] “No, you look like [another clown].”<sup>228</sup>

As a result of these professional pressures, norm violations appear to be less common among circus clowns. As the next Part details, clowns outside of the tight-knit world of the circus have developed another, very different, strategy for instilling professionalism and communicating norms against copying.

222 Faint, *supra* note 69, at 3.

223 Stone, *supra* note 4, at 27–28; *see also* Faint, *supra* note 69, at 3 (noting a “row” with another clown in which he “grabbed him on his sleeve”).

224 *See* Bippo, *supra* note 30, at 11 (stating that if the clown who had copied his look also copied his performance style “then I’d punch him”).

225 *See also* Perzanowski, *supra* note 23, at 551 (noting threats of violence among tattooers used to be common, but that actual instances of actual violence are very rare now).

226 Varholdt, *supra* note 152, at 12; *see also* DeSanto, *supra* note 109, at 10 (“[Y]ou’ll be called out on [copying] most likely by your fellow clowns.”).

227 Foley, *supra* note 157, at 12 (“[I]n many cases the consequences are not very severe, for when clowns do steal.”).

228 Bippo, *supra* note 30, at 17.

### III. THE CLOWN EGG REGISTER

Clowns are not unique in relying on ownership norms with respect to their visual appearance and performance. While clown norms are distinctive in many respects, they share with other groups such as comedians, chefs, and tattoo artists the basic expectation that others in their community will not copy their original creative production. What does distinguish clowns, however, is their remarkable practice of memorializing their names and appearances on eggs collected in centralized registries.<sup>229</sup> In Part III, we explore this practice in detail and ask how it is connected to the ownership norms outlined in Part II. The answer to this question is less obvious than one might assume. The Clown Egg Register exists in part to secure exclusive ownership interests in clowns' names and visual appearances. But the Register records the identities of only a fraction of clowns, and its current location makes it difficult to access. For these and other reasons, a full account of the Register's emergence and persistence requires consideration of its nonexclusion functions, such as signaling professionalism, enhancing a sense of belonging and prestige, creating a historical record, and screening out uncommitted clowns.

#### A. *The Register's Origins*

The tradition of painting clown faces on eggs has an unlikely beginning.<sup>230</sup> Just after the Second World War, Stan Bult found himself bored by his work as a chemist and developed a fascination with clowns.<sup>231</sup> Bult founded the International Circus Clown Club in 1950,<sup>232</sup> about four years after he began making clown portraits in colored pencil on the shells of blown-out chicken eggs.<sup>233</sup> Bult's initial Register served several functions. It was a hobbyist's act of creative self-expression, created a compendium of

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229 At least one other community that uses norms-based governance of its creative production has also developed an elaborate registration scheme. Roller derby skaters use a variety of online rosters to memorialize their interests in the pseudonyms under which they compete. See generally Fagundes, *supra* note 21.

230 Before embarking on this story, it is important to emphasize that the history of the Register is, in places, both fragmentary and disputed. We report only those parts of the history for which there is reliable evidence, and we note major areas of disagreement.

231 See Faint, *supra* note 69, at 11 ("I wasn't around when Bult does the painting but that was around, he was the founder and organizer, so he actually basically, the clowns after the war, the whole country was desolated, and circus was desolated and everything was [ground] to a halt and need to rebuild after the war. . . . And Stan Bult wasn't one of the clowns and was a chemist but he likes clowns.").

232 Conway, *supra* note 154, at 36 ("[I]n 1950 the International Circus Clowns Club was set up . . ."); Faint, *supra* note 69, at 11 ("[Bult] basically became the secretary and the chairman of the organization.").

233 See Faint, *supra* note 69, at 11 ("[I]t was [Bult's] idea [to] record clown[ ] faces into the eggs as a hobby and that started painting clowns in . . . history . . ."); see also Bluey, *supra* note 133, at 11–12 (providing detailed overview and history of the origins of the clown egg painting practice until Bult's death).



ICCC's membership,<sup>234</sup> and memorialized member clowns' unique makeup in order to prevent copying.<sup>235</sup>

Bult died in 1966,<sup>236</sup> and his ICCC colleague Jack "Jago" Gough picked up the egg painting tradition as part of a larger project of registering clown personae.<sup>237</sup> Under the leadership of Gough, ICCC not only managed and expanded the Register, but also issued identity cards featuring members' pictures with and without makeup, connected clowns in need of work with circuses and other performing opportunities, and operated a modest benevolent fund to help clowns who had fallen on hard times.<sup>238</sup> The late 1960s was a period of expansion for ICCC, which boasted an increasing membership, both in terms of numbers—with over 200 registered eggs by the end of the 1960s—and geography—ranging from continental Europe to North America and Africa.<sup>239</sup>

Gough ran ICCC and the Register until at least 1978,<sup>240</sup> when both fell into a period of decline.<sup>241</sup> In the mid-1980s, a group of new leaders revitalized both the organization, now called Clowns International to reflect its

234 See *King of the Eggheads* (Apr. 1957), *supra* note 12 ("The faces he paints on his eggs are authentic copies of those belonging to members of the International Circus Clown Club.").

235 Conway, *supra* note 154, at 36 (explaining that "[o]ne of the main functions" of the ICCC "was to register the make-up of each and every clown who became a member" in order to "prevent[ ] a 'face' from being pirated").

236 Sources differed in their recollection of the date of Bult's death, but the correct date is 1966. He did an interview that year but died before its publication. *Register of Clowns' Make-up*, LISTENER, Aug. 11, 1966, at 203 ("Mr. Bult has died since this interview took place . . .").

237 The fate of the over two hundred eggs painted by Bult before his death is the source of some dispute. Newspaper reports at the time indicate that Gough held all the eggs himself in trust for ICCC. Badderly, *supra* note 6, at 104 (describing Gough as possessing and managing a collection of "more than 200 eggs," primarily those created by Bult). But two credible interviewees told a different story. They claimed that before Bult's death, he loaned his collection of clown eggs to a circus-themed London restaurant called "Clown," which retained possession of the eggs after his passing. These eggs were then destroyed either in an accident or simply "dumped outside" when the restaurant closed. Bluey, *supra* note 133, at 11–12; Email from Christopher Stone, Vice President, Clowns Int'l, to authors (Feb. 7, 2018) (on file with authors) [hereinafter Stone Email]. Regardless of which story is true, all but about forty of the two hundred Bult eggs were believed to be missing. We discovered during our interview with Stone, however, that he recently acquired another forty or so of the Bult eggs. He keeps them secured in his home. See Fagundes & Perzanowski, *supra* note 7 (describing Stone's revelation of the long-lost eggs to us).

238 Badderly, *supra* note 6.

239 *Id.*

240 Gough served as CI secretary, though, as recently as 1985. Sally Brompton, *Putting the Laughter Back into Clowning*, TIMES (London), Apr. 8, 1985, at 9 (identifying Gough as the "secretary of Clowns International").

241 CI's membership had dwindled to about sixty-five by the mid-1980s. See *id.* (referring to CI's membership shrinking to this number amid a general decline in interest in clowns). Some reported that it was even lower. See Stone Email, *supra* note 237 (stating that CI was down to membership in the "single figures" at one point during this period).

increasingly international orientation,<sup>242</sup> and the Register. This group consisted mostly of professional clowns, such as Mattie Faint and Bluey. But the group was also influenced by nonclowns such as Christopher Stone who, like Bult, found his daily work as a law clerk stultifying and found diversion in the world of clowns.<sup>243</sup> CI sought to organize and professionalize clowns,<sup>244</sup> lending an air of dignity and ethics to a group often regarded as unruly ruff-raff.<sup>245</sup> For example, CI's leadership organized a yearly clowns' church service—a tradition that still survives—to confer a sense of respectability to their membership.<sup>246</sup>

The main means, though, by which CI sought to achieve this goal was by reviving the Clown Egg Register.<sup>247</sup> Starting anew in 1984,<sup>248</sup> CI offered its new members the option of having an egg painted in their likeness and included in CI's permanent collection.<sup>249</sup> This tradition continues to the present day. Currently, exercising this option requires only a few ministerial steps. As was the case under ICCC leadership, clowns must submit a form to CI that contains basic identifying information and certifies their status as a

242 *Clown History*, CLOWN BLUEY, <https://www.clownbluey.co.uk/more-info/clown-history> (last visited Dec. 18, 2018) (noting that ICCC's name was changed in 1978 for this reason).

243 Stone reflected that CI "allowed me into the organization, because they needed a suit. . . . [T]hey needed somebody like me, who wandered only in a suit and never performed, to stand up and organize their affairs." Stone, *supra* note 4, at 14.

244 Faint commented that the goal of CI was "to set the standard of, shall we say, a standard of ethics." Faint, *supra* note 69, at 14.

245 See Huey, *supra* note 67, at 293–94 (describing "the urge to professionalize the clown . . . [and] substantiate a vocation that was always looked upon as being marginal" that partly motivated the creation of Ringling Brothers Clown College).

246 Stone reflected that the goal of CI's encouraging regular church services for clowns was to "bring[ ] the standard up" by associating clowns with the dignity of religious practice. Stone, *supra* note 4, at 38. Of course, the clown services were often "pandemonium," but a "controlled pandemonium" that did not undermine this aim. *Id.*

247 Faint, *supra* note 69, at 16 ("[I]t was always the intention that the egg registers should be restarted."). Our interviews with Faint, Stone, and Bluey all indicate that they revived the Register, which indicates that Gough stopped working on it, or at least let it fall into decline. See Bluey, *supra* note 133, at 12; Faint, *supra* note 69, at 12–13; Stone, *supra* note 4, at 35.

248 STEPHENSON & CHAMPION, *supra* note 1, at Foreword (dating the revival of the clown egg practice to 1984).

249 Estimates on the percentage of CI members who choose this option vary, though it appears that the likelihood of a clown's opting for an egg increases with the importance in their life of their work as a clown. Nearly all of the CI members we spoke to who make their living or consistently perform professionally as clowns opted to have an egg painted. Several commented, though, that CI members who treated clowning as a mere weekend hobby were much less likely to request an egg. U.S. clowns were less familiar with the practice. Dear Heart, a past president of the United States–based Clowns of America International, said, "I don't know anybody who has an egg painted of them. . . . It's just not something that's real common." Quest, *supra* note 173, at 8.

member.<sup>250</sup> Applicants must also facilitate the creation of the egg by providing the current egg artist with their likeness—typically with a photograph—as well as including any materials that may help her create the egg, like fabric from their costumes or hair from their wigs.<sup>251</sup> And finally, if they want an additional egg for themselves,<sup>252</sup> they must pay a nominal fee.<sup>253</sup>

So while CI leaders describe the creation of eggs as “automatic” for its members, they emphasize that it is only “automatic after a few procedures have been obeyed.”<sup>254</sup> CI performs only a light vetting of submitted egg forms for possible similarity to other members’ makeup.<sup>255</sup> This is a more forgiving standard than in previous years. Bult and Gough carefully scrutinized submitted designs for similarity, sometimes sending them back if they were identical to that of a current registrant.<sup>256</sup> And even when he found two similar makeup designs sufficiently different to register both, Gough made an extra effort to “make the faces exact in every detail” on each egg to assure that they would accurately reflect and distinguish the clowns’ faces.<sup>257</sup> Some clowns also inspect the collection to ensure that their makeup is

250 See Faint, *supra* note 69, at 10 (“When you join CI, you get a voucher [that] entitles you to ‘An Egg for the Collection.’”); see also Conway, *supra* note 154, at 36 (featuring photograph of ICCC membership).

251 See Smith, *supra* note 3, at 25–27 (detailing this process). Under the ICCC regime, clowns either submitted materials or, in some cases, appeared in person to have Bult or Gough paint their eggs. Conway, *supra* note 154, at 36 (“The applicant-clown fills in all the details, and either sends a copy of his make-up or comes along himself to be immortalized on an eggshell.”).

252 See Stone, *supra* note 4, at 7–8 (“[I]f you’re a member of CI, and you want your egg [done], you must buy the egg for the museum first. . . . And then you can buy an egg for yourself. . . . Some people have bought even multiple eggs, but one is deemed to be the requirement, so. You will get one egg, and the egg for the museum.”).

253 As of the summer of 2017, this fee was a mere ten pounds for the first egg, and fifteen pounds for any others. Scandalously, this pittance is all the egg artists themselves receive as compensation for their painstaking efforts in creating the eggs—a process that can take as long as three days. Smith, *supra* note 3, at 25.

254 Faint, *supra* note 69, at 9.

255 Stone, *supra* note 4, at 9 (stating that the Register filters “in a half hearted way. . . . [I]t would be deceit if I said that there was somebody who was checking them minutely.”). This weak filter makes sense in this context though, given the low likelihood of infringement due to both strong internal norms and the physical difficulty of copying another clown’s face. Cf. David Fagundes & Jonathan S. Masur, *Costly Intellectual Property*, 65 VAND. L. REV. 677 (2012) (explaining that different kinds of screening mechanisms will be optimal for different kinds of intangible property).

256 Conway, *supra* note 154, at 37 (“If, as sometimes happens, a design is sent in which is identical, or very similar to a design already registered, Mr. Gough returns the design to the applicant, explaining that this design is already on record as being used by a working clown.”); Ernest Dewhurst, *A Face-Saving Operation*, GUARDIAN, July 4, 1966, at 3 (noting that Bult’s “registry helps clowns to avoid faces which are alike” and that Bult “has suggested changes in a number of cases, to avoid copying”).

257 Conway, *supra* note 154, at 37.

unique, but CI does not require—or even encourage—members to do so.<sup>258</sup> The application stage is also an opportunity to check for overly similar names. For example, as we recount above,<sup>259</sup> CI discovered that a member sought to use the name of the iconic clown Coco when she submitted an egg application.<sup>260</sup> CI does not, however, screen on the basis of design quality; even CI members whose makeup may be regarded as garish can still have their eggs painted.<sup>261</sup> CI leaders may, however, take it upon themselves to make suggestions to new members before they commit to a poor design choice.<sup>262</sup>

But not all requests for an egg are approved. Gough rejected excessively similar submitted designs.<sup>263</sup> Other kinds of exclusions prevail even under the current more permissive CI regime. For example, the Register is intended only for working clowns, not people who simply want an egg as a novelty. So one mother who sought to have her infant daughter memorialized in egg form as “Hiccup the Harlequin” had her request declined.<sup>264</sup> This was partly because “Hiccup” was “not a clown yet, . . . only a baby,” and also because “[t]he egg registry is for established clowns who’ve got a character based on their face.”<sup>265</sup> The rejection of this request demonstrates that CI regards the clown eggs as a meaningful reflection of its membership, not a trifle that anyone can simply purchase. A member may also have their request for an egg rejected if they do not wear makeup. CI considered such a case some years ago from a member who performed as a clown but did not enhance or alter his face in any way during his act. The organization

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258 This failure to leverage the full capacity of the Register is a point of contention to some clowns. Consider Bippo’s perspective:

The eggs are just there. When I started, no one came up to me and went: “Look at the eggs.” I knew the eggs were there and I did look at them, and did reference them, and did sort of use them as a sort of guideline, as a stencil sort of thing, but I never had anyone take me under their arms. “Right, listen, with your makeup, you’ve got to look, make sure it’s not similar.” No one said that.

Bippo, *supra* note 30, at 22.

259 See *supra* Section I.C.

260 See *supra* notes 199–200 and accompanying text.

261 Smith, *supra* note 3, at 14 (saying that one applicant looked “slappish” and that she thought “he shouldn’t be a member” of CI, but that “it’s not my role to say that”).

262 Debbie Smith related that at clown conventions, more established performers typically take newbies aside to comment on ways to improve their makeup. Smith, *supra* note 3, at 16. Mattie Faint also reported that he took aside a new clown at a convention and “designed him a whole new face. He must have thanked me during that convention ten times.” Faint, *supra* note 69, at 7.

263 See sources cited *supra* note 256 and accompanying text (discussing more exacting screening practices under ICCC regime).

264 Faint, *supra* note 69, at 15 (recounting story of how he “banned” Hiccup from CI because her mother wanted an egg only as a novelty, and “that’s not what the register is all about”).

265 Smith, *supra* note 3, at 16–18 (relating her perspective on the “Hiccup the Harlequin” controversy in detail).

“decided in the end that as he didn’t have a clown face, he wasn’t entitled to have an egg.”<sup>266</sup>

Finally, CI admonishes new members not to apply for an egg prematurely, but instead to wait at least a year or so after joining. This is largely a pragmatic limitation to avoid a clown securing their egg before they have finalized their makeup and overall performance identity.<sup>267</sup> Ideally registration and egg painting occur only after a clown has matured into their persona. As Bluey reflected:

Don’t order your egg if you are new. You’ve got to find your clown inside. You got to find your character and you’ll find that your makeup is going to change as your character grows and as you find your clown, you’ll find your makeup changing. So wait . . . a couple of years.<sup>268</sup>

Clowns who fail to adhere to this rule may thus find that their egg does not reflect their current look,<sup>269</sup> because “once you’re an egg, you’re done.”<sup>270</sup>

Since the Register was revived, the practice of egg painting has changed considerably. Following Bult, a succession of four artists have painted the eggs: Jack Gough, who continued the Register and egg painting tradition until at least 1978; Jan Webb, who reinitiated the practice in 1984; Kate Stone, the most prolific of the three; and, currently, Debbie Smith.<sup>271</sup> While

266 Bluey, *supra* note 133, at 12–13.

267 Faint admonished that: “[Y]ou shouldn’t have your egg done too quickly because maybe you haven’t decided on all the lines on your face.” Faint, *supra* note 69, at 9; *see also* Stone, *supra* note 4, at 3 (“We don’t register every member because they haven’t reached that stage. What we do is, we let them choose when they want to register it as their makeup. . . . They can have it done immediately. . . . I mean, nobody’s going to say they can’t, but clearly. They’ll suddenly say ‘oh I regret that.’ Yes, they can keep to that one, but they’re forced to keep to it in a way.”).

268 Bluey, *supra* note 133, at 15.

269 Bippo, among the most famous clowns currently performing in the United Kingdom, did not follow this rule and had his egg painted early in his career, which he grew to regret and had another painted to reflect his more mature persona years later. “I had one painted when I was very, very small. . . . You’ll see it at Wookey. It’s embarrassing. Big, blue top hat thing on. Ginger, really bright ginger hair . . . and really old makeup. So I had that done, and then I had another one done.” Bippo, *supra* note 30, at 15.

270 Faint, *supra* note 69, at 9; *see* Abraham Bell & Gideon Parchomovsky, Essay, *Of Property and Information*, 116 COLUM. L. REV. 237, 244 (2016) (“[R]egistries are most valuable when there is confidence that the asset as it exists in the real world will continue to match the description in the registry.”). This represents another iteration of the Register’s cautionary function. *See infra* subsection III.C.1.b. By asking that clowns wait until they are confident in their personae before having an egg painted, CI impresses upon them the seriousness of both the registration process and the establishment of their visual identity.

271 Webb painted eggs until January 1995, creating a total of seventy-six clown eggs. Stone painted eggs from Webb’s retirement until the end of 2009, creating a total of 144. Since then, Smith has worked as the egg artist, creating the remainder of the collection. Stone, *supra* note 4, at 36–37. We know less about the Register under Gough’s leadership. He began working on it in 1966, upon Bult’s death, and in 1968 the collection contained over two hundred eggs. *See* Badderly, *supra* note 6 (referring to a collection of “more than 200 faces”). An article from early 1978 shows Gough still working on the Register. *Who Sez? How Do We Register Our Clown Faces?*, CALLIOPE, Jan.–Feb. 1978 [hereinafter *Who Sez?*].

Bult used blown-out chicken eggshells<sup>272</sup> decorated with colored pencils, modern clown eggs are painted, which lends them more richness of detail. The artists now also use larger and more durable ceramic eggs.<sup>273</sup>

The eggs are not the only record of each clown's identity connected with the Register. ICCC recorded clowns' faces by first copying them from their application materials to create something akin to an "Identi-Kit picture" of each member.<sup>274</sup> Bult or Gough would then create the egg based on this design in order to complete "a two-fold record: one in the book and one on the egg."<sup>275</sup> The CI iteration of the registry, by contrast, includes a written registry that records a member's government name, clown name, design registration date, and a unique membership number.<sup>276</sup> Since CI took over the clown egg practice, the modern collection has grown to 217 specimens,<sup>277</sup> the majority of which are housed at Wookey Hole, with a small number kept at the Clowns' Gallery in Holy Trinity Church in East London.<sup>278</sup> By contrast, few of the early Bult/Gough eggs remain. Forty are housed at Wookey Hole, with another forty held privately by Stone, and the whereabouts of the rest are unknown.<sup>279</sup>

An exploration of the procedures and functions of the Clown Egg Register would be incomplete without accounting for how both have varied over time. The Register grew in coverage from Bult's founding of the ICCC in 1950 until partway through Gough's stewardship in the 1970s.<sup>280</sup> This was a period of both economic growth and continued interest in clowns. By the

272 Bult's eggs were only hollow shells. Gough, by contrast, filled the hollow eggshells with "plaster of paris" to make them more durable. Conway, *supra* note 154, at 37 (describing this process).

273 STEPHENSON & CHAMPION, *supra* note 1, at Foreword (noting use of "more durable ceramic eggs").

274 Conway, *supra* note 154, at 37.

275 *Id.*

276 The written register "was basically kept to see that we were paid, and how much we charged, and who the real name of the person was, and what their clown name was, and when they did it. And we give an egg a number, and essentially we remember when the egg was done." Stone, *supra* note 4, at 3. The date at which an egg is completed is the date used by CI to determine when a clown officially starts using their makeup. *Id.* The relationship between the written registry and the eggs is close to the relationship between copyright registration, which formalizes an owner's interest in a work of authorship, and deposit of a copy of the work, which provides evidentiary support for that registration. See 17 U.S.C. § 408(b) (2012).

277 The current collection consists of 217 total eggs, though of those only 209 are numbered, and one (number 77) is missing. See Author Notes, Wookey Hole, Eng. (July 25, 2017) (on file with authors).

278 STEPHENSON & CHAMPION, *supra* note 1, at Foreword.

279 In a recent email exchange, Stone expressed skepticism that Gough painted any eggs at all, indicating his belief that the Bult collection only ever comprised eighty eggs. Stone Email, *supra* note 237 (dismissing Gough as a "fantasist"). Documentary sources from the late 1960s indicate otherwise. See, e.g., Badderly, *supra* note 6 (noting existence of "over 200" eggs).

280 Badderly, *supra* note 6 (describing the growth of ICCC and the Register as of the late 1960s).

mid-1980s, though, CI membership had declined along with the popularity of clowns.<sup>281</sup> CI's new leadership breathed life into the organization, and by the 1990s both it and the second iteration of the Register were expanding their footprint.<sup>282</sup> In the early 2000s, a waning of demand for clowning<sup>283</sup> and the increasingly prevalent social trope of creepy clowns<sup>284</sup> contributed to another slump in CI membership.<sup>285</sup> The group's current membership tends to be older,<sup>286</sup> and only a handful of new eggs are registered per year.<sup>287</sup> Under some pressure to increase its ranks, CI has been eager to attract new members. This may explain the shift away from Bult's approach to registration—characterized by careful evaluation and comparison of makeup designs—to the recordation approach—characterized by minimal checking for similarity—that prevails today.<sup>288</sup>

Nonetheless, the Register has been and continues to be influential. Although it is the oldest and best known, the Register is not the only, or even the largest, collection of clown eggs. Inspired by the UK register,<sup>289</sup> Leon and Linda McBryde operated a U.S. analog beginning in the early 1990s.<sup>290</sup> The collection numbers over 600 eggs,<sup>291</sup> which were displayed for several

281 Brompton, *supra* note 240, at 9 (reflecting on the decline of CI membership in the overall context of lower social interest in clowns as entertainment).

282 See Smith, *supra* note 3, at 13 (CI is “not as strong as it used to be when I first started in '89 or even 1990”); Varholdt, *supra* note 152, at 20–21 (“Years ago . . . back in the 90's, everybody knew about the clown registry . . . [CI] used to be huge.”).

283 See Faint, *supra* note 69, at 17 (recounting increasing indifference among children to his performances); Smith, *supra* note 3, at 13 (“[T]he actual industry as a whole in [the] UK, entertainers, even just children's entertainers that aren't clowns, the bookings have gone right down.”).

284 Smith, *supra* note 3, at 21 (“[I]n the past few years we just had so much negative with all the people dressed up as clowns to scare people.”).

285 See *id.* at 13–14 (noting that CI has “gone pretty quiet at the moment”); Varholdt, *supra* note 152, at 20–21 (“Clowns International, CI, has kind of dropped off the face of the earth . . . They've become very, very, very tiny now.”).

286 Cf. Varholdt, *supra* note 152, at 9 (“[S]o many clowns in the United States are seniors. You'd be shocked how many are seniors.”).

287 See Smith, *supra* note 3, at 12 (estimating that, recently, “one or two” new egg applications come into CI per year).

288 See Faint, *supra* note 69, at 12–13; Smith, *supra* note 3, at 12; Stone, *supra* note 4, at 35; see also BENITO ARRUNADA, INSTITUTIONAL FOUNDATIONS OF IMPERSONAL EXCHANGE: THEORY AND POLICY OF CONTRACTUAL REGISTRIES 11 (2012) (defining “registration” and “recordation” with regard to formalization of legal property rights).

289 See *Are Clown Faces Registered by Painting Them on Eggs?*, STRAIGHT DOPE (Oct. 31, 2002), <https://www.straightdope.com/columns/read/2046/are-clown-faces-registered-by-painting-them-on-eggs/> (explaining that the McBrydes started the U.S. registry because they had heard of the UK registry).

290 Linda McBryde would charge thirty dollars to forty dollars to make an egg for clowns who sought one, then send them a picture of it, and keep the egg itself for her collection. See Johnson, *supra* note 114, at 13.

291 See *Are Clown Faces Registered by Painting Them on Eggs?*, *supra* note 289 (“This collection now includes over 600 eggs, covering clowns of all types from around the world.”); DeSanto, *supra* note 109, at 15 (observing that “[t]here were over 600 eggs” when the U.S.

years at the International Clown Hall of Fame until its relocation.<sup>292</sup> McBryde is no longer making new eggs, and the collection is no longer on public display.<sup>293</sup> Nonetheless, it reflects the impact of Bult's initial efforts. Likewise, a small UK collection of clown eggs was created by the Circus Friends Association (CFA) in the 1970s.<sup>294</sup> British circus impresario Zippo also keeps a private collection of eggs featuring the clowns who have performed in his events.<sup>295</sup> And egg painting remains a popular diversion for clowns, such as the yearly clown face Easter egg contest organized by Clown Forum.<sup>296</sup>

Beyond eggs, clowns have assayed different approaches to registration. Consider the International Clown and Character Registry (ICCR). Created in the 1990s and operated until the early 2010s,<sup>297</sup> it allowed clowns to add their names and photos to a centralized registry and provided them identification cards that featured their photo both in and out of makeup.<sup>298</sup> The ICCR was spurred by the perceived need to connect a clown's legal identity

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collection was housed at the International Clown Hall of Fame); Johnson, *supra* note 114, at 15 (reflecting that his registration number in the McBryde collection is number 620, suggesting the existence of over 600 eggs).

292 DeSanto, *supra* note 109, at 15.

293 *Id.* at 21 (observing that the U.S. clown eggs are all located at the McBryde's house "[i]n Buchanan, Virginia").

294 References to the CFA collection are few but it seems to have been operated by circus enthusiast Eric Moore in the 1970s and associated with the Blackpool Tower Circus. See Author Photograph from the Third Circus World Championships, Clapham Common, London (1979) (on file with authors); see also Author Photographs of Arnold Rattenbury, *Clowning: Clown Make-ups*, displayed at Nottingham Castle Museum, Nottingham, Eng. (June 11–Sept. 4, 1977) (on file with authors). These may or may not be the same eggs held by CFA.

295 John Dingwall, *Don't Laugh . . . This Is Harder than It Looks; Clowning Around Is a Tricky Business, As Record Man John (Or Jonno) Found Out*, DAILY RECORD (UK), June 21, 2008, at 22 (describing Zippo's private collection).

296 For several years, Clown Forum operated a contest on Easter where clowns would design their own eggs—using digital design, not actual eggs—that was inspired by the Register. See Princess of Bozonia, *Easter 2007 Clown Egg Contest!*, CLOWN F. (Mar. 5, 2007), <http://www.clown-forum.com/threads/easter-2007-clown-egg-contest.1734/> ("Easter is quickly approaching, and that means Easter eggs! We held a Clown Egg contest last year, and everyone enjoyed themselves so much we're doing it again. For years now Clowns International has kept a collection of eggs painted with clown faces as a registry of unique face designs, and now it's your turn to make your own Clown Egg. To enter, decorate an egg with a clown face; it can be your clown face, something completely new, or an homage to a famous clown (as long as it is clearly labeled as such; you may not copy a famous clown face and pass it off as your idea).").

297 The history of the ICCR is complicated and incomplete. It changed hands more than once and was most recently operated by Tom "Tom E. Boy" King. The records are currently maintained by Jeff Potts. Potts, *supra* note 146, at 20–21. The ICCR and the notion of clown ID cards made their way into an episode of the police procedural television show *CSI Crime Scene Investigation*. See *CSI: Crime Scene Investigation: Getting Off* (CBS television broadcast Feb. 26, 2004) (clown registry used to identify murder victim).

298 Potts, *supra* note 146, at 22–26. For at least a time in the late 1960s, ICCR offered a similar service. See Badderly, *supra* note 6 ("Each member, whether a professional or ama-



to her onstage persona. Cashing checks, driving a vehicle, or even just appearing in public in a mask or makeup can give rise to criminal liability in many states.<sup>299</sup> The ICCR ID cards sought to address this problem, with debatable efficacy, by providing evidence that a clown had good reason to conceal their face.<sup>300</sup>

### B. *The Property Puzzle of the Clown Egg Register*

The emergence and persistence of the Clown Egg Register raises a puzzle about the nature of property registration systems. The typical explanation for such systems is intuitive and familiar. They arise to allow owners a public means of memorializing their ownership rights in order to facilitate transactions, establish the priority of their interest, and help owners find lost chattels.<sup>301</sup> The canonical example is recording title to land. By publicly recording one's interests in a particular parcel,<sup>302</sup> the owner announces his interest to the world, putting others on notice and guarding against conflicting claims to the same parcel.<sup>303</sup>

Similar registration systems govern intangible property as well. Copyright holders, for example, may register their interests with the U.S. Copyright Office, which “creates a public record of key facts,” including the title of the work, its author, its owner, and the year of its creation.<sup>304</sup> Documents reflecting later transactions may also be recorded with the Copyright Office.<sup>305</sup> This dual system performs the same function as title recording in physical property: it provides a public record of a copyright's chain of title

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teur clown, receives an identity card, with pictures of the holder with and without make-up, and a badge.” (quoting remarks of Jack Gough)).

299 Potts, *supra* note 146, at 24. For a state-by-state list of such laws, see Melissa Kaplan, *State Codes Related to Wearing Masks*, ANAPSID.ORG, <http://www.anapsid.org/cnd/mcs/maskcodes.html> (last updated May 23, 2015).

300 Potts, *supra* note 146, at 24. Most of these laws provide exceptions where a driver can prove that they are concealing their face for noncriminal reasons, for example as required by their work. See, e.g., GA. CODE ANN. § 16-11-38(b) (1968) (“This Code section shall not apply to . . . [a] person lawfully engaged in trade and employment . . . where a mask is worn . . . because of the nature of the occupation, trade, or profession . . .”). At the risk of stating the obvious, the ICCR strategy for circumventing these laws was almost certainly ineffective.

301 Bell & Parchomovsky, *supra* note 270.

302 The most familiar kind of interest recorded in property is ownership, but any interest may be recorded, such as a mortgage, easement, lien, or *lis pendens*.

303 JOHN G. SPRANKLING & RAYMOND R. COLETTA, *PROPERTY: A CONTEMPORARY APPROACH* 618–19 (3d ed. 2015) (tracing the origins of the real property title recording system to early modern England, and describing the system as “a ‘library’ of documents that an attorney or buyer can inspect to determine whether anyone other than the seller claims any interest in the land”).

304 U.S. COPYRIGHT OFFICE, *COPYRIGHT BASICS* 5 (2017), <https://www.copyright.gov/circs/circ01.pdf> (providing an official overview of the copyright registration system).

305 *Document Recordation*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/recordation/> (last visited Dec. 18, 2018) (providing an official overview of the copyright document recordation system).

and an evidentiary basis for resolving conflicting ownership claims. Informal registration systems arise for the same reasons. Roller derby's Master Roster functioned to protect skaters' pseudonyms during the period when that community's norms favored strong protection of unique skate names.<sup>306</sup>

In some ways, the Register seems to serve these traditional exclusion functions. The language used by Bult and other contemporary accounts sounds in ownership, with one report going so far as to characterize clowns' makeup designs as their "professional, jealously guarded property."<sup>307</sup> Other accounts speak of the Register protecting clowns' intellectual property and characterizing it as a form of "copyright"<sup>308</sup> or "trademark."<sup>309</sup> Clowns themselves invoke similar language. Bluey, who helped establish the modern iteration of the Register, characterized it as "a form of copyright."<sup>310</sup> Other clowns have variously understood the Register to protect "copyright,"<sup>311</sup> "trademark,"<sup>312</sup> or "intellectual property"<sup>313</sup> in their makeup designs.

The Register also operates, in certain respects, like a traditional property registry. Its administrators designed it as a way to identify unduly similar makeup designs and to resolve disputes between clowns who claimed that another performer had appropriated their makeup design. To the extent that clowns regard themselves as having a right to exclude others from their personae, the Register facilitates enforcement of those rights.

These exclusion functions alone cannot, however, explain the existence of the Register. For one thing, the need to protect ownership interests in clown makeup is limited. Clowns prefer their makeup to be unique and are disinclined to copy. Professional organizations like CI and Ringling Brothers help to inculcate the no-copying norm and to steer newbies away from similar makeup designs. And even if a clown were inclined to copy another makeup design, it can be difficult to do so because individual physiognomy makes similar makeup appear different from face to face. In addition, the Register itself provides only limited protection of ownership interests. Its administrators no longer check for similarity as aggressively as they used to.

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306 See Fagundes, *supra* note 21, at 1108–31 (describing the once-regnant Master Roster, which for years sought to manage the unique performance pseudonyms of roller derby skaters).

307 Badderly, *supra* note 6 ("[T]he face is the property of that particular clown for life"); *King of the Eggheads* (Apr. 1957), *supra* note 12 ("Each clown's make-up is his professional, jealously guarded property.").

308 Dessem, *supra* note 14 (referring to the registry as a kind of "informal copyright registry"); Morton, *supra* note 7 ("[T]he register allows professional clowns to essentially copyright their makeup designs to protect against unimaginative imitators.").

309 Conway, *supra* note 154.

310 Bluey, *supra* note 133, at 12 (explaining that the Register "was a form of copyright and was some protection about people using your face or using your name").

311 Bippo, *supra* note 30, at 21 (referring to the Register as a "form of [copyright]"); Stone, *supra* note 4, at 5 (invoking the "poor man's copyright" as one inspiration for the written portion of the Register).

312 DeSanto, *supra* note 109, at 22–23.

313 *Id.* at 12.

And the roster of clown eggs represents only a fraction of performers. So the full story of the Register requires exploration of not only the traditional functions of registration systems, but their less-appreciated nonexclusion functions as well.

### C. *Explaining the Clown Egg Register*

The Clown Egg Register tests our traditional assumptions about why registration systems—both legal and extralegal—exist. Our claim is not that the standard story of registries that support owners' exclusive claims to property is irrelevant to the Register. Rather, our claim is that this exclusion account alone does not suffice to fully explain the emergence and continued existence of the practice of recording clown identities on eggs. A more complete explanation requires consideration of several, largely unacknowledged rationales for registration that sound, not in rights to exclude, but other social functions of property.

#### 1. Exclusion Theories

Registration systems are fraught with legal formalities.<sup>314</sup> The notion of formality is broad, but generally captures legal requirements that are devoid of substance yet still required to secure rights. Medieval property transfers, for example, required a formality called livery of seisin in order to be valid. This was a largely ceremonial event in which the grantor publicly gave the grantee a physical representation of the deeded land—a shrub from the land or a chunk of soil—to symbolize the transfer.<sup>315</sup> The stylized, legally constructed nature of livery of seisin had nothing to do with the actual substance of the transaction, such as the intent of the parties or the bounds of the land being transferred, but law still regarded it as necessary for an enforceable grant of real property.

Formalities remain a part of modern property systems, from copyright to real property. Title recording epitomizes the modern formality: in order to secure certain rights of priority and other practical advantages, a land transaction must be recorded in the relevant public office in compliance with local procedures. These recordation formalities are unrelated to the substance of the transaction. Indeed, a core principle of title recording is that it memorializes but does not validate a transaction. But compliance with those

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314 One familiar source defines a “formality” as “an act, esp. an established form of conventional procedure, that must be done to make something legal.” *Formality*, BLACK’S LAW DICTIONARY (10th ed. 2014).

315 For a classic account of this ceremony, see 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I* 82–83 (London, Cambridge Univ. Press, 2d ed. 1895).

formalities may nevertheless affect the value and enforceability of one's rights.<sup>316</sup>

Because they can seem arbitrary and needlessly strict, formalities often get a bad rap. The notion of denying someone an important substantive right because they failed to fill out a deed correctly, turned in an application a day late, or gave notice of copyright with "C" rather than "©"<sup>317</sup> seems to elevate technical legal requirements over substantive fairness.<sup>318</sup> Yet a long line of scholarship has illuminated numerous important functions served by formalities.<sup>319</sup> Lon Fuller articulated the most familiar defense of formalities in his canonical 1941 article, *Consideration and Form*.<sup>320</sup> Fuller identified several functions served by legal formalities, including: evidentiary (supplying some fixed record of a legal right or obligation),<sup>321</sup> cautionary (causing careful reflection about the nature of entering into a particular legal arrangement),<sup>322</sup> and channeling (providing a preset legal framework for securing a right or interest).<sup>323</sup>

Other scholars explored the application of these categories to formalities, highlighting the upsides of the seemingly technical requirements law imposes on title transfers. The formalistic requirement that a donor must physically deliver a gift to a donee supplies one illustration. Requiring handover of the object performed an evidentiary function by creating a visible, memorable event associated with the gift that donor, donee, and perhaps even third parties could invoke should the validity of the transfer be

316 The formalism of livery of seisin lives on in, for example, the common-law rule requiring physical delivery in order to pass title to personality. See *Cochrane v. Moore* [1890] 25 QB 57 at 65–66 (Eng.).

317 See *Higgins v. Keuffel*, 140 U.S. 428 (1891) (holding that "registered" instead of "copyright" was insufficient); *Holland Fabrics, Inc. v. Delta Fabrics, Inc.*, No. 85 Civ. 2398, 1987 WL 5789 (S.D.N.Y. Jan. 12, 1987) (holding notice insufficient where "C" rather than "©" was used).

318 As Fred Schauer colorfully put it, "[T]he pejorative connotations of the word 'formalism' . . . make it tempting to conclude that 'formalist' is the adjective used to describe any judicial decision, style of legal thinking, or legal theory with which the user of the term disagrees." Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988).

319 To take just one example in addition to Fuller, Fred Schauer's 1988 article, *Formalism*, articulated a limited defense of formalistic judicial reasoning. See generally *id.*

320 Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941). For a contemporary application of Fuller's schema to the property context, see Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941) (identifying similar functions of the formal requirements of the statute of wills). For another more recent application of this schema, see John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975) (arguing that a will should be rejected as failing to comply with applicable formal rules only when that rejection would have furthered one of the several functions served by formalities).

321 Fuller, *supra* note 320, at 800 (providing "evidence of the existence and purport of [some fact] in case of controversy").

322 *Id.* ("[I]nducing the circumspective frame of mind appropriate in one pledging his future.").

323 *Id.* at 801 (providing "a legal framework into which the party may fit his actions, or . . . channels for the legally effective expression of intention").

challenged. It also performed a cautionary function by making the act of transfer feel very real to the donor, who would be forced to experience a “wrench of delivery” in physically handing over her belonging.<sup>324</sup> Finally, the elements of donative transfer—formal though they may be—serve a channeling function insofar as they give donors and donees a clear set of guidelines for how to make legally effective gifts, saving them the costs and uncertainty associated with inventing their own approach every time.<sup>325</sup>

This rubric for understanding the functional benefits of formal requirements provides a useful framework for exploring the traditional, ownership-protective features of the Register.

#### a. Evidentiary

One would imagine that by publicly recording clowns’ faces on eggs, the registry serves as a form of evidence that clowns can invoke to prove their claim to a persona in the event of a copying dispute. This *ex post* dispute resolution function is akin to what title records do for owners who dispute ownership of land: they provide evidence that can prove whose claim prevails as first in time.

This evidentiary function is one that the administrators of the Register appear to have intended. Stan Bult himself repeatedly suggested that one aim of the Register was to resolve conflicts over copying. When one interviewer asked Bult why a clown would want to register his name and makeup, Bult replied that if “he is a very famous clown who is likely to be copied” that he would “want[ ] to protect himself that way, which is quite important.”<sup>326</sup> And Bult would refer back to eggs and make careful comparisons to resolve disputes among clowns who claimed that one had copied another’s look.<sup>327</sup>

Those who worked on the modern iteration of the Register even more explicitly invoked the evidentiary function they expected it to serve. Providing an evidentiary record “is one of the reasons why the egg registry exists really,” explained Bluey.<sup>328</sup> “It acts in two ways really. It means that you can prove that your makeup for a certain year was, at that point when you registered was like that and . . . it also protects your name.”<sup>329</sup> Stone echoed this point, invoking the Stationer’s Register—the document in which English

324 The familiar phrase “wrench of delivery” comes from another important article on the function of formalities. See Philip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 341, 348 (1926).

325 See generally Adam J. Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797 (2014) (summarizing Fuller’s and Gulliver’s theories of the function of formalities and applying those theories to, *inter alia*, gifts).

326 *Register of Clowns’ Make-up*, *supra* note 236.

327 Bult “would minutely go over the makeups and compare, and liked the control that gave him probably . . . . Only in the case of somebody arguing would [similarity of makeup] be taken [seriously]. . . . And then it would probably be the first one who registered” to prevail in a copying dispute. Stone, *supra* note 4, at 6.

328 Bluey, *supra* note 133, at 8.

329 *Id.*

publishers registered their right to print books—as one inspiration for reviving the clown egg tradition. He “suggested that a book be kept, dated for the purposes of recording who was first [to use a given name and makeup design].”<sup>330</sup> Stone emphasized that the intention behind the Register was explicitly about dispute resolution: “We discussed the possibility that keeping a register would entitle people to say, this was the day the makeup was first established. And they would be able to defend their right to it.”<sup>331</sup> And Bippo suggested it was plausible that the Register could serve this function, at least for some performers:

[I]f a kid’s party clown was [copying my makeup], I reckon I could get in contact and say, “Listen, look on the Register. You’re wearing the same makeup. Now you shouldn’t be doing that.” Whereas . . . if I’d turned round [to a circus clown] and went, “Look at the eggs,” [he]’d go, “What the fuck are you . . . What drugs are you on?” You know what I mean? And that’s why it’s a different world. But if it was a party clown who just did a party every other month, I reckon I could either talk to Mattie, or talk to someone and just say, “Can you have a word with such-and-such because he’s wearing the same makeup? Get him to look at the eggs.”<sup>332</sup>

Despite these aspirations, we found only a single recorded instance in which clown eggs were invoked to resolve a dispute over copying. Bult reported that one ICCC member complained to him that a second clown, who was also in the Register, had copied his makeup. Bult consulted the Register and resolved the dispute by showing the first registrant that there was a “slight difference” between the two designs.<sup>333</sup> The Register did, at least in the ICCC era, play another evidentiary role. Both Bult and Gough used the eggs to make comparisons between applicants’ proposed makeup and preexisting designs.<sup>334</sup> In this sense, the Register served an internal evidentiary function that enabled identification of the kind of excessive similarity that would warrant rejection of a proposed design, supporting its other, cautionary function of deterring conflicts over makeup designs *ex ante*.<sup>335</sup>

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330 Stone, *supra* note 4, at 32. Stone also referred to the Register as inspired by the “poor man’s copyright” and suggested that it would also allow clowns to “take that to the court and say well I did this [makeup] at this time.” *Id.* at 5.

331 *Id.* at 35.

332 Bippo, *supra* note 30, at 21.

333 Conway, *supra* note 154, at 104 (“If, as sometimes happens, a design is sent in which is identical, or very similar to a design already registered, Mr. Gough returns the design to the applicant, explaining [sic] that this design is already on record as being used by a working clown.”); Dewhurst, *supra* note 256, at 3 (“One clown once complained that the system did not work; someone had copied his face. Mr. Bult checked on his albums and proved there was a slight difference.”).

334 See *supra* note 327 and accompanying text.

335 See Conway, *supra* note 154.

b. Cautionary

One might also suspect that the Register serves the cautionary function of preventing makeup copying *ex ante* by deterring aspiring clowns from imitating recorded designs. Here, there is much better evidence that the Register served such an exclusion function. That seems to be the primary original intention for the Register. A 1957 press report on Bult and his eggs stated that since “[e]ach clown’s make-up is his professional, jealously guarded property,” he “keeps a file of faces so that clowns can avoid copying each other.”<sup>336</sup> The Register was thus conceived as a coordination device. Since clowns naturally want to have unique makeup,<sup>337</sup> but cannot be expected to know every other design used by another performer, the Register provided a way for new entrants to avoid inadvertently using a preexisting makeup design. It thus largely served an *ex ante*, cautionary function, fending off those disputes before they occurred.<sup>338</sup> Gough in particular emphasized his work in this role, explaining that while highly similar submissions were not that common, they did occur (though inadvertently), and that when he notified applicants that their makeup infringed a registered design, they invariably complied and chose a different design:

If, as sometimes happens, a design is sent in which is identical, or very similar to a design already registered, Mr. Gough returns the design to the applicant, explaining that this design is already on record as being used by a working clown. “We never have any disputes about this,” says Mr. Gough. “No clown would want to use another clown’s ‘face.’”<sup>339</sup>

Modern clowns have invoked the Register’s cautionary function under CI as well. Bippo explained that he checked the Register when deciding what makeup to use. “I knew the eggs were there, and I did look at them, and did

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336 *King of the Eggheads* (Apr. 1957), *supra* note 12; *see also* Badderly, *supra* note 6 (stating that the Register exists “[t]o make sure two clowns don’t come face to face and both have the same face”).

337 *Who Sez?*, *supra* note 271, at 9 (“Every clown tries to wear a makeup that does not conflict or imitate with another clown.”).

338 As one contemporary source explained, clown face copying “rarely happened, and then only unintentionally.” Conway, *supra* note 154, at 36. But the risk that it might take place necessitated the Register as a “central organization to keep a record of clown ‘faces.’” *Id.* Gough himself emphasized that the Register was designed to facilitate clowns’ inadvertently stepping on the no-copying rule because it provided the only way to identify inadvertent imitation. “Keeping up the facial design records is a time absorbing task, but unless this is done continually, how would anyone, let alone clowns, know whether some solo makeup had a double?” *Who Sez?*, *supra* note 271, at 11; *cf.* Fagundes, *supra* note 21, at 1112–13 (regarding with skepticism the idea that the roller derby Master Roster served a pure coordination function).

339 Conway, *supra* note 154, at 37. Bult used a similar practice. *It’s Not Funny When a Clown Has a Twin*, *supra* note 6 (explaining that when Bult receives a suggested makeup design for registration, “[h]e compares it with . . . the hundreds of . . . similarly (but not identically) decorated eggshells,” and if it “is exactly the same as one already in the collection the sketch is returned with the suggestion [that] the sender should think again”).

reference them, and did sort of use them as a sort of guideline.”<sup>340</sup> It seems, though, that this cautionary function has declined in recent years. Stone conceded that he and other CI administrators did not make “minute” comparisons between submitted designs and registered ones, making the present Register a “half-hearted” filter.<sup>341</sup> Current egg artist Debbie Smith also expressed skepticism that new clowns could use the Register to avoid copying because of its inaccessibility.<sup>342</sup> And while Bippo used the Register as a guideline, he also indicated that this practice was not common, at least among circus clowns.<sup>343</sup> “[A] lot of circus clowns don’t give a shit about the eggs. They don’t really. They don’t go, ‘Oh, I’m going to be a circus clown next year. I need to look at them eggs.’”<sup>344</sup>

But even though the Register may not ward off copying disputes *ex ante* as effectively as it used to, it serves other types of cautionary functions. For example, the mere fact that the Register exists is a powerful advertisement for the norm against copying another clown’s makeup. Formal law does not generally require this sort of notice; even in the absence of title recording, we would understand that property rights and law exist.<sup>345</sup> Norms, by contrast, benefit from being publicized within and beyond a community. The Register is, at least within the relevant community, a well-known institution premised on the “unwritten rule within clowning that no clown should copy another clown’s look.”<sup>346</sup> It thus cautions clowns generally that they should honor the no-copying norm by serving as a highly visible reminder of this core principle.

Moreover, the formality and ceremonial ritual of getting their face on an egg impresses upon clowns the importance of compliance with the norm, not just its existence.<sup>347</sup> The fact that clown visages are recorded, with considerable artistry, on the curious medium of eggshells likely reinforces the Regis-

340 Bippo, *supra* note 30, at 22.

341 Stone, *supra* note 4, at 9 (“[The Register filters] in a half-hearted way. . . . [I]t would be deceit if I said that there was someone checking them minutely”).

342 When asked if the registry allowed clowns to avoid established looks and names, Smith replied, “I don’t think so. Because I don’t think the registry is publicized.” Smith, *supra* note 3, at 22.

343 Circus clowns, like Bippo, tend to be full-time professionals, while event clowns (often derided by circus clowns as mere “birthday clowns”) tend to work as clowns on an extracurricular basis.

344 Bippo, *supra* note 30, at 16. Circus clowns, unlike event clowns, find the Register less necessary because they tend to be more aware of makeup designs within their relatively small community.

345 Property rights and law have ancient origins that well predate the advent of title recording practices in early to modern England. See SPRANKLING & COLETTA, *supra* note 303, at 618–19.

346 STEPHENSON & CHAMPION, *supra* note 1, at Foreword; see also British Pathé, *supra* note 1 (observing that Bult created the egg registry to “safeguard the unwritten law that clowns do not copy each other’s makeup”).

347 See Andrew J. Cappel, *Bringing Cultural Practice into Law: Ritual and Social Norms Jurisprudence*, 43 SANTA CLARA L. REV. 389 (2003) (arguing that social norms become entrenched most effectively when reflected in ritualistic practices).



ter's cautionary functions. A more prosaic catalog of photographs, for example, would not inspire the same public curiosity nor engender the same reverence among clowns.

The Register serves a final, related, cautionary function. Even if neither clowns nor current administrators uniformly consult the Register to avoid the particular makeup designs memorialized there, its mere existence puts clowns on notice that many clowns do seek to secure exclusive rights in their persona, and that copying can be identified and proven.<sup>348</sup> The geographic remoteness of the Register may actually amplify this effect. Because the eggs can be hard to consult, a clown inclined to copy another's look cannot say with certainty whether the preexisting makeup design has been registered. But the risk that it may be painted on an egg, complete with a date of first use, may deter some would-be copyists given the increased likelihood of detection and enforcement. In this sense, the Register may protect the originality of clown makeup, regardless of whether particular eggs deter copying of the designs they memorialize.

### c. Channeling

Finally, one might assume that the Register performs a channeling function insofar as it provides a well-defined means by which clowns can protect the uniqueness of their performance identities. Here, too, there is some evidence that the Register was intended to—and does—provide a clear path for securing rights. Clowns frequently ask what they can do to secure rights in their makeup designs.<sup>349</sup> Accounts of the origins of the Register indicate that it was responding to a felt need in the community to have a single, centralized way to coordinate among various clowns to make sure they followed the unwritten rule not to copy one another's makeup designs.

Until a few years ago there was no way of preventing a "face" from being pirated . . . [T]here was no central organization to keep a record of clown "faces." So, in 1950 the International Circus Clowns Club was set up . . . One of the main functions of the Club was to register the make-up of each and every clown who became a member . . .<sup>350</sup>

And discussions among clowns about the best ways to protect their makeup almost invariably center on—even if they do not fully endorse or exclusively

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348 Bell & Parchomovsky, *supra* note 270, at 246 ("As information about the true state of title of an asset spreads, the ability of nonconsensual takers to seize control of and profitably use the asset shrinks.").

349 For example, one reader wrote to *Calliope*, the member magazine published by Clowns of America, International, to ask: "[C]ould you help me and let me know how I go about getting my clown face registered?" *Who Sez?*, *supra* note 271, at 8. The editors responded: "We have had many, many inquiries about this in past years. You are certainly not alone." *Id.*; see also DJ, *Need Info on Registering Clown Face*, CLOWN F. (May 4, 2004), <http://www.clown-forum.com/threads/need-info-on-registering-clown-face.69/>.

350 Conway, *supra* note 154, at 36.

discuss—the Register.<sup>351</sup> These exchanges show that the Register has to at least some extent fulfilled its initial aspiration of channeling concern about securing ownership interests in clown faces into a central Register governed by a single, well-understood practice.

## 2. Nonexclusion Theories

All the foregoing explanations for formalities, and in particular registration, array around the common theme of exclusion. Whether fending off potential copyists, causing clowns to take their personae more seriously, or streamlining the process by which ownership interests in those personae are secured, these functions of the clown egg register all help construct a regime that enhances the ability of clowns to preclude others from transgressing their face designs. Registration generally promotes owners' rights to exclude by clarifying ownership claims and providing standardized means of searching title. And exclusion is, in turn, one of the core conceptual features of property rights.<sup>352</sup> In fact, some scholars have argued that exclusion is the defining feature of legal ownership.<sup>353</sup> It would thus be easy to conclude that the sole social function of the clown egg registry, or property registers generally, is to promote exclusion.

Yet when it comes to clown eggs, the exclusion explanation for the Register only goes so far. Despite several examples of the Register being deployed to resolve disputes within the clown community, our research uncovered no recorded examples of clowns using the Register as evidence in a copying dispute before a court. And the geographic remoteness of the Register undermines its ability to deter clowns from imitating recorded visual

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351 See Looney Ballooney, Comment to DJ, *supra* note 349 (“The way that you register [sic] your clown face is to have it put on an egg”); see also *Who Sez?*, *supra* note 271, at 8 (identifying the “FAMED CLOWN EGGS” in response to a reader question about registering his face); Clowny, Comment to *Register Clown Faces*, CLOWN F. (May 31, 2004), <http://www.clown-forum.com/threads/register-clown-faces.12/> (responding to an inquiry about face registration by suggesting the egg painting route). Some clowns recommend now-defunct ID card schemes as a means of registration. See Scruffy, Comment to *Registering Your Clown Face*, CLOWN F. (Aug. 20, 2005), <http://www.clown-forum.com/threads/registering-your-clown-face.705/#post-5538> (suggesting that other clowns register their name on a (now-defunct) website, [stuff4clowns.com](http://stuff4clowns.com), which would provide a photo ID). Others express skepticism about the need for the Register as a means of securing ownership rights in makeup. See Donuts, Comment to *Register Clown Faces*, CLOWN F. (Mar. 27, 2016), <http://www.clown-forum.com/threads/register-clown-faces.12/> (dismissing the importance of egg painting as a form of registration because “I’ve been at this for 30 years and never had my egg done”).

352 See Thomas W. Merrill & Henry E. Smith, Essay, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001) (advancing a vision of property centered on the right to exclude); see also *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (“[O]ne of the most essential sticks in the bundle of rights that are commonly characterized as property [is] the right to exclude others.”).

353 See Thomas W. Merrill, Essay, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) (characterizing the right to exclude as the “*sine qua non*” of property).

identities. A number of other factors, from the fragmentary character of the Register to the difficulty of literally copying another clown's look, further attenuate its exclusion function.

For these reasons, it is necessary to look beyond the traditional account of registries to other, nonexclusion explanations for the emergence and persistence of the Register. These alternative rationales fall into four major categories. First, the Register signals the professionalism of the practice of clowning by imposing a sense of systematic order on a notoriously unruly group. It also signals the bona fides of individual registrants who rely on inclusion in the Register to express that they have met at least some baseline of professional standards and ethics. Second, the Register generates a sense of community for clowns by providing a ceremonial point of entrée into the profession and an enticement to be part of a leading professional organization. Third, the eggs comprise a lasting historical record that allows observers to get a visual history of the profession and allows registrants to feel part of clowning posterity. Finally, the Register serves as a somewhat costly screen that filters out clowns who lack commitment to the art.

#### a. Signaling

Beyond its exclusion functions, the Register signals a sense of professionalism for a group whose work was often not taken seriously.<sup>354</sup> This operates on three different levels. First, the Register was a major part of the effort of both the early ICCC and the later Clowns International to create a sense of ethics and dignity among its membership. CI aspired not only to improve the professional status of clowns for their own sake, but also to communicate that status to the public, thus improving the reputation of clowns in the outside world.<sup>355</sup> Historically, clowns were regarded as socially marginal riff-raff, associated with transient circus performers or particularly disorderly actors.<sup>356</sup> In fact, one major archetype of clowning—the auguste—was explicitly meant to be a down-on-his-luck, often bibulous bumbler who was an object of humorous derision.<sup>357</sup>

Both ICCC and CI sought to reverse this perception. The creation of a professional organization was a gesture in the direction of dignifying the

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354 Of course, the idea that clowns would ever be taken seriously is more than a little ironic. What we mean is that while in their performances, clowns may engage in absurd antics, they approach the practice of clowning with a seriousness of purpose that is characteristic of any professional.

355 See *supra* Section III.A (describing the aspiration of ICCC/CI to professionalize the working clown community).

356 Huey, *supra* note 67, at 293–94 (characterizing clowning as “a vocation that was always looked upon as being marginal, both outside and inside the circus communities”); see also KELLY & KELLEY, *supra* note 84, at 45–49 (describing his early life as a clown as characterized by wandering with itinerant circuses and people, often in the company of tramps and hobos).

357 See *supra* Part I (describing the outsider status of clowns themselves as well as clown archetypes).

practice of clowning, much as the creation of the Academy of Motion Picture Arts and Sciences in the United States was motivated by a desire to have moviemaking and acting taken seriously as an art form.<sup>358</sup> The Ringling Brothers Clown College, founded in 1968, responded in part to the same need for professionalization.<sup>359</sup> Most of the efforts of the ICCC and CI sought to express that however much clowns acted like fools when performing, they still comprised a group of respectable professionals. This explains why one major initiative of these organizations—which persists to this day—was the creation of a clowns' church service.<sup>360</sup> By organizing such a devotional service, and publicizing it widely, the ICCC and CI leadership sought to communicate that in their daily lives, the individuals who perform as clowns are upstanding members of society.

The Register plays a central role in the aim of professionalizing the practice of clowning.<sup>361</sup> The mere fact that the registry exists expresses that clowning, or at least CI, consists of organized individuals who take their work seriously enough to operate a formal registration system. Relatedly, the fact of record keeping communicates that CI's members are of sufficient status to merit formal recording. Stone explained that the register of copyrighted works maintained by the Stationers' Company in the United Kingdom until 2000 was one inspiration for the Clown Egg Register.<sup>362</sup> The register thus seeks to imitate and even invoke British legal traditions with long historical roots, thereby seeking to elevate clowning to a similar degree of dignity and respect.

In particular, the registry signals the professionalism of the practice of clowning by systematizing a group often regarded as disorderly. Imposing some degree of organization, and in turn professional credibility, was a major aim of the Register's chief administrators.<sup>363</sup> Bult, and later, Gough, also

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358 See *Academy Story*, OSCARS, <https://oscars.org/academy-story> (last visited Dec. 18, 2018).

359 See Huey, *supra* note 67, at 48 (“[Clown College] also transformed a vocation into a profession by virtue of issuing diplomas which granted immediate status as ‘professional’ clowns to graduates, and enlisted them into a unique clowning society—Ringling Bros. and Barnum & Bailey Clown College graduates.”).

360 See Stone, *supra* note 4, at 38.

361 Stone, for example, referred to the Register as having been created for “the purposes of semi-professionalism.” *Id.* at 35 (using the broader term to include those for whom clowning was a side job in addition to their main career).

362 *Id.* at 32–33. The Stationers' Register, operated by the Stationers' Company, was the primary means of securing exclusive publishing rights in the United Kingdom until the Copyright Act of 1710. After that date, the Stationers' Register continued to offer some formal memorialization of authors' and publishers' rights until 2000. See STATIONERS' COMPANY: A HISTORY OF THE LATER YEARS 1800–2000 (Robin Myers ed., 2001) [hereinafter STATIONERS' COMPANY].

363 It is thus no coincidence that others who have sought to create other clown registration schemes have expressed a similar aspiration, that they view the registration scheme as expressing a sense of professional identity. See Potts, *supra* note 146, at 29 (“My full motivation [with the ICCR] was credibility. . . . [And that the ID card] gave you credibility as being professional. It added a level of professionalism to my name . . . .”).

supplemented the eggs with a register of painted faces that provided a fail-safe so that in case an egg was broken, the record of that clown's claim to his makeup and name would persist.<sup>364</sup> Stone, some decades later, replaced the preexisting catalogue of faces that Bult and Gough had used with a written registry to accompany the eggs that was inspired by the Stationers' Register.<sup>365</sup> The written registry added even more order to the profession by recording not only the face and name of CI members, but also giving each member a unique number, numbering their egg as well, and memorializing the date on which they started using their makeup.<sup>366</sup> Stone proudly emphasized his role as a "suit" whose presence in CI generally, and whose work on the Register in particular, helped to "ke[ep] the padlock on" a group that he felt was in much need of organization.<sup>367</sup>

Second, the Register enhances the professional identity of the individual clowns who it records because the fact of inclusion signals a performer's professional bona fides. Having an egg in the Register is a privilege available only to clowns who are members of CI, and the membership process involves some training and criteria to assure that clowns meet a certain standard before inclusion.<sup>368</sup> The eggs also serve as a strong incentive to join CI, which in turn exposes clowns to the group's professional norms.<sup>369</sup> Core clown "commandments" include that once in costume, clowns should avoid smoking and swearing, and should not be seen in character performing everyday tasks such as eating.<sup>370</sup> Mattie Faint emphasized that CI aspirants are vetted to weed out those with undesirable qualities.<sup>371</sup> Getting an egg thus communicates that one has passed this application process.<sup>372</sup>

The Register thus provides some signal for the quality of services provided by its members. This is particularly important in light of the distinctive place of CI's membership in the wider universe of clowning. Relatively few full-time professional circus clowns join CI or have eggs in the Register. By the same token, mere hobbyists who enjoy occasionally dressing up as clowns

364 Conway, *supra* note 154, at 37 (describing the "bound volume" of portraits that, in combination with the eggs, provides a "two-fold record: one in the book and one on the egg").

365 Stone, *supra* note 4, at 3.

366 *Id.*

367 *Id.* at 38.

368 See Faint, *supra* note 69, at 13–15 (describing the "ethics [and] standards" of clowning and how CI enforces them). Some clowns have expressed concern that CI no longer applies rigorous enough standards to those seeking membership. See *infra* note 409.

369 Faint, *supra* note 69, at 13–14.

370 See *id.* at 14 (discussing the "ethics [and] standards" of clowning); see also Bippo, *supra* note 30, at 3–4 (relating the story of a clown who was seen smoking and eating before a performance at a school, which led the school to be dubious of hiring any other clowns as entertainment in the future).

371 Faint, *supra* note 69, at 13–14.

372 Some clowns expressed skepticism that CI still applied exacting enough standards to its incoming members. See Bippo, *supra* note 30, at 3–4 (expressing frustration with CI for not having high enough quality standards for members).

just for fun are unlikely to take the trouble of joining the organization or having an egg made. CI's membership is largely comprised of event clowns: those who are not full-time clowns by trade, but devote substantial time to developing a clown identity.<sup>373</sup> So while circus clowns and mere hobbyists have little need to publicly signal their quality,<sup>374</sup> event clowns benefit from the Register as a public-facing indication of professionalism and status.

b. Belonging and Prestige

Clowns' work is deeply connected to their identity. Those who take the practice of clowning seriously regard it as not just a job, but a calling. They seek to lift the spirits of audiences through laughter, and even to help heal the sick through volunteer work at hospitals. All the clowns we spoke to emphasized that while a visual identity was certainly part of a clown's persona, what it really meant to be a clown was finding an internal performance identity that could connect with audiences. Thus, becoming a clown and being part of the tradition of clowning have outsized personal significance, and a major part of the Register's function is to enhance this sense of belonging in two ways: by effecting a ceremonial induction into the community, and by conferring prestige on those who are members.

First, many close-knit groups have a particular ceremonial moment that defines when one has become a member. This moment is often linked to conferring a particular persona on the new member.<sup>375</sup> During the heyday of the Master Roster, for example, roller derby skaters regarded the registration of their name as the moment when they ceased to be a mere "fresh meat" newbie and became a derby insider. For clowns, too, getting an egg featured in the Register can represent the moment at which one has been inducted into the fraternity of clowns. CI's admonishment that members not secure an egg immediately upon membership emphasizes the seriousness of this practice. It is not until a clown has squared away her identity, both as a performer and as expressed in visual terms, that it is appropriate to secure an egg. The egg thus memorializes the point at which a clown's identity reaches maturity.

Second, the eggs are a sign of prestige within the clown community. The Register has been an object of public fascination since Bult began it in the 1940s, as evidenced by a profusion of news features about it from then

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373 *Id.* at 16 (explaining that "circus, . . . it's a different world from the birthday parties, CI thing"); *see also* Smith, *supra* note 3, at 21 (distinguishing circus clowns and event clowns).

374 Circus clowns need not send such a signal because having been hired by a circus is enough of a quality signal. Mere hobbyists are not seeking to land gigs, so they are indifferent to quality signals for different reasons.

375 This ceremonial induction is more than a mere flourish. By conferring a sense of belonging on its members, CI gives them both status and a sense of community. *See* Betsy Rosenblatt, *Belonging as Intellectual Creation*, 82 MO. L. REV. 91, 98 (2017) (observing that belonging is synonymous with a sense of social connectedness, and contributes to increased subjective well-being).

and continuing to the present day.<sup>376</sup> Moreover, the Register seeks to include not only currently working clowns and CI members, but also famous historical clowns such as Grimaldi, who have iconic status and have defined the genre.<sup>377</sup> Being placed alongside these major figures in a well-known and publicly available setting confers on other clowns a prestige by association. Again, the distinctive choice of eggs as the medium and their visual appeal as art objects reinforce the prestige associated with the registry. A photograph could serve the exclusion function of the Register just as well, if not better. But an egg, hand painted to reflect a clown's makeup, is a source of pride. Many of the clowns we spoke to thus invoked ego as a leading reason that they and their colleagues wanted to be included. Varholdt cited this as the primary reason she believed clowns sought to have an egg painted: "Most people do it for egos. Yeah. They need their ego stroke[d], so they do that stuff so they're cool."<sup>378</sup> And Bluey, who was instrumental in the revival of the Register in the 1980s, referred to the eggs as a marker of "status" that was connected to a performer's "ego."<sup>379</sup>

### c. Posterity

The eggs perform two distinct historical functions, one for the institution of clowning and the other for individual registrants. The Register serves as an archive that memorializes the history of clowning. It provides a permanent—if fragile—public record of clowns, famous and nonfamous alike. This explains why the Register includes renowned clowns who predate CI's existence like Grimaldi or Chocolat.<sup>380</sup> The egg collection thus aspires to reflect not just the CI membership but also to record the major figures that have shaped the practice and culture of clowning. Mattie Faint referred to it as "a way of recording your face through posterity."<sup>381</sup> The Register serves not only as a roster of individual clowns but also as evidence of different visual styles and their historical development. As Bippo observed, the Register functions as a "reference tool" that allows observers to see how clowns'

376 See sources cited *supra* notes 6–11.

377 See STEPHENSON & CHAMPION, *supra* note 1, at 101–03 (featuring Grimaldi's egg).

378 Varholdt, *supra* note 152, at 19. Varholdt explained that she concluded ego was among the major motivations for getting a clown egg because she thought the property-protective function was beside the point: "[T]he cost [of getting an egg] was too much for me and I thought 'You know what, I just got to get over it.' And then, as you go to conventions and you meet other people, you realize nobody looks like me. I'm not gonna pay the money to do this if nobody looks like me. I just let it go after a while." *Id.* She did, however, eventually apply for an egg; it was among the eggs Debbie Smith was working on when we interviewed her at her studio.

379 Bluey, *supra* note 133, at 12 ("It was a status really because if you belong to [CI], you could have your ego egg done if you wanted which would go in to the clowns international museum . . ."); see also *Who Sez?*, *supra* note 271, at 8 (identifying "self-pride" as a major reason for registering a clown face on an egg).

380 STEPHENSON & CHAMPION, *supra* note 1, at 79–80, 101–02, (featuring eggs of Chocolat and Grimaldi, respectively).

381 Faint, *supra* note 69, at 11.

designs have changed over time and how different countries' clown cultures favor different styles.<sup>382</sup>

And because the Register is recognized as a leading way that the history and culture of clowning are recorded, being part of this historical record is a leading motivation to have an egg painted. Placement in the Register is one way of assuring a place, even if a small one, in the history of the art. Bluey remarked that the Register assures those included that they will be "leaving something behind when you eventually got off into the big top in the sky then."<sup>383</sup> Toto added his hope that his egg would secure his place in the history of clowning:

[The egg] shows you that you were part of the history of the Art of Clowning. . . . [G]enerations from now, hopefully the museum will continue on long after I'm done clowning, and long after I'm gone. But, Toto Johnson is still there. There's still a memory of what little contribution I may have given to the Art of Clowning.<sup>384</sup>

#### d. Costly Screening

Registries perform a final, nonexclusion function by forcing some low-quality applicants to screen themselves out. Wherever registration is costly, owners may choose not to register because the cost of the process is greater than the value they expect to extract from registration.<sup>385</sup> This is a self-imposed screen. Where the cost of the process is greater than the benefit expected from it, owners are unlikely to register.<sup>386</sup>

In this way, clowns who are unwilling invest in creating a reasonably developed persona screen themselves out of the Register. Applying for a clown egg is not costly in monetary terms; the fee is only ten British pounds.<sup>387</sup> But creating a design you are willing to memorialize and assembling the materials to do so requires time, effort, and creative skill.<sup>388</sup> Egg applicants must send in a likeness in full makeup, along with materials like

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382 [I]t gives you a good aspect on it all, you know. Like if you're into the big style of clowning, like in America, like in Ringling's, like, we call it slapstick clowning over here. . . . Then you'll go down that road, and you can look at photos of [ ] eggs of American clowns, whereas if you like the more European, you can see the European style . . . . So it is a good sort of reference and tool, sort of thing. It is very good.

Bippo, *supra* note 30, at 16.

383 Bluey, *supra* note 133, at 12.

384 Johnson, *supra* note 114, at 12; see Rosenblatt, *supra* note 375, at 109 ("The importance of engaging with something larger and longer-lived than oneself may be seen in the value that many creators place on attribution: they value the immortality of their work and the reputation it provides.").

385 Fagundes & Masur, *supra* note 255 (discussing process costs in general).

386 *Id.* at 691.

387 Smith, *supra* note 3, at 26 (noting this cost to applicants). Bult and Gough did not charge for clown eggs.

388 The process is costly also because CI admonishes clowns to wait until their personae are relatively complete before requesting an egg. See sources cited *supra* note 267. Appli-



wig cuttings or costume samples, that allow the egg artist to create their likeness.<sup>389</sup> In earlier decades, clowns were required to submit a carefully rendered sketch of their makeup. The costs of getting an egg are nudged higher by the informal norm that clowns should not seek an egg until they have accrued some experience and created a mature persona, a process that often takes years.<sup>390</sup> Clowns who lack the wherewithal to do this will likely forego the egg registration process. The Register thus causes this subset of uncommitted clowns to screen themselves out.

If CI raised the process costs, they could encourage even more clowns to screen themselves out. For example, if CI implemented a three-member panel that would review and approve applications to make sure each registrant met a high criterion of aesthetic quality in terms of their design, this would make getting an egg even more costly because it would demand of each applicant that they refine their makeup extensively before seeking inclusion in the organization. Screening thus represents a tradeoff between inclusiveness and some measure of quality.

\* \* \*

The Register's origins illuminate its aspirations to regulate the profession, which in turn highlight a pair of core functions it serves: some related to clowns' desire to exclude others from using their personae, others rooted in signaling quality, establishing a sense of community belonging, or creating a historical record. Our explanation for the emergence and persistence of the Register is consciously pluralist. It does not, in contrast to many theories of norm emergence, propound a single explanation for why norms arise and persist.<sup>391</sup> Our description of the Register is, of course, an individual explanation rather than a general theory. It seeks only to understand what gave rise to the set of rules and practices surrounding clown eggs without advancing a broader claim about how or whether this explains other norms-based governance systems. Still, the ill fit between the various leading monist norm theories and the messy, multivalent story of clown eggs at least raises a question whether generalized theories possess explanatory leverage in individual cases.

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cants who heed this suggestion must spend additional time waiting and further perfecting their look and identity.

389 Smith, *supra* note 3, at 23 (describing the process of creating the eggs).

390 See sources cited *supra* notes 267–70 (describing this practice).

391 See, e.g., ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000) (advancing the theory that norms arise from a desire to signal to others that we are good cooperators); McAdams, *supra* note 149, at 342 (“[D]ynamic forces can cause the weak desire for esteem to produce powerful norms, sometimes because individuals struggle to avoid deviance, sometimes because they compete to be heroic.”).

## IV. PROPERTY REGISTERS BEYOND EXCLUSION

We typically understand registers to do no more than record ownership interests, define their scope, and establish their relative priority—i.e., to facilitate owners' rights to exclude. Although the Clown Egg Register performs these functions, it does much more. It also signals professionalism, creates a sense of belonging, archives information about clowning, and screens out certain participants. But these nonexclusion functions are not limited to the Clown Egg Register. On the contrary, in this Part we show how other registers—for land and chattel property, as well as copyright, patent, and trademark—reflect these same nonexclusion functions.

A. *Signaling*

The Clown Egg Register signals to the broader public that clowning is a valuable and enduring form of expression that is both historically significant and culturally valuable. It also signals individual clowns' professional quality to potential employers and society at large. Other registries serve a similar function.

Scholars have noted the signaling function of patent registration, for example. As Clarisa Long argues, “patents can inform observers about attributes of the patentee. If patents are correlated with less readily observable firm characteristics, patents can serve as a signal of firm quality.”<sup>392</sup> Patents—rightly or wrongly—are seen as indicators of productivity, innovation,<sup>393</sup> and technological expertise.<sup>394</sup> Investors, for example, treat patents as a valuable source of information, particularly for early-stage companies, about which other indicators may be unavailable or less reliable.<sup>395</sup> One explanation for this focus on patent rights is that investors and other observers can rely on the expert evaluation of the Patent Office.<sup>396</sup> Even for those who discount the Patent Office's evaluation, the managerial sophistication necessary to navigate patent prosecution offers an independent signal of a

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392 Clarisa Long, *Patent Signals*, 69 U. CHI. L. REV. 625, 637 (2002); see also Bronwyn H. Hall, *Is There a Role for Patents in the Financing of New Innovative Firms?* (Max Planck Inst. for Innovation & Competition, Research Paper No. 18-06, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3177027](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3177027) (collecting empirical research on the relationship between patents and financing).

393 Zvi Griliches, *Patent Statistics as Economic Indicators: A Survey*, 28 J. ECON. LITERATURE 1661, 1662 (1990) (suggesting patenting is predictive of inventiveness).

394 Stuart J.H. Graham & Ted Sichelman, *Why Do Start-Ups Patent?*, 23 BERKELEY TECH. L.J. 1063, 1067 (2008) (“[I]nvestors might view a company's securing fifty nanotechnology patents as a mark of its mastery of cutting-edge technology.”).

395 *Id.* at 1078 (noting that for some firms “patents provide no specific value . . . other than merely an ‘optical’ one for investors”).

396 Stuart J.H. Graham et al., *High Technology Entrepreneurs and the Patent System: Results of the 2008 Berkeley Patent Survey*, 24 BERKELEY TECH. L.J. 1255, 1306 (2009).

firm's value.<sup>397</sup> Patents—like clown eggs, in their own way—are costly signals, a fact that tends to bolster their credibility.<sup>398</sup>

Other extralegal registers also send valuable signals. Consider animal registries. The American Kennel Club maintains a purebred dog registry,<sup>399</sup> and there are registries for a variety of horse breeds: thoroughbred,<sup>400</sup> quarter,<sup>401</sup> paint,<sup>402</sup> Icelandic,<sup>403</sup> and Norwegian fjord horses<sup>404</sup> among them. In addition to tracking ownership of horses, these registers offer information about breed and pedigree, employing various procedures for verifying such information. These range from witness declarations and photographs to blood type and DNA testing.<sup>405</sup> As a result, animal registration not only evidences ownership, it also conveys an important signal about the quality and characteristics of individual animals, as well as their breeders.

*Catalogues raisonné*—detailed, comprehensive lists of the known works of an artist—can play a similar role in the art market.<sup>406</sup> Inclusion in a *catalogues raisonné* is a strong signal of authenticity, increasing a work's economic and noneconomic value. But such signals are undermined when registers lack meaningful quality control. In recent years a number of online fine art registries, which purport to establish the authenticity and chain of title for paintings, sculptures, and other works of visual art, have emerged. But given their laxity in verifying the authenticity of owners' art works, these registers have earned a reputation for being unreliable. They are “generally not worth much as a measure of authenticity” since they “give out certificates attesting that someone has registered a work—not that the art is authentic.”<sup>407</sup> The National Fine Arts Title Registry, for example will issue a printable certificate

397 *Id.*

398 Michael Spence, Essay, *Job Market Signaling*, 87 Q.J. ECON. 355, 358 (1973).

399 *Online Registration*, AM. KENNEL CLUB, <http://www.akc.org/register> (last visited Dec. 19, 2018).

400 JOCKEY CLUB, HOW TO EFFECTIVELY IDENTIFY AND REGISTER YOUR THOROUGHbred, [https://www.registry.jockeyclub.com/assets/other/microchip\\_pamphlet\\_press.pdf](https://www.registry.jockeyclub.com/assets/other/microchip_pamphlet_press.pdf).

401 *AQHA Records Research*, AM. QUARTER HORSE ASS'N, <https://www.aqha.com/records> (last visited Jan. 11, 2019).

402 *Register Your Paint*, AM. PAINT HORSE ASS'N, <http://apha.com/association/education/register-your-paint> (last visited Dec. 19, 2018).

403 *United States Registry of Icelandic Horses*, U.S. ICELANDIC HORSE CONGRESS (May 16, 2013), <https://www.icelandics.org/registry.php>.

404 NORWEGIAN FJORD HORSE REGISTRY, <http://www.nfhr.com/catalog/index.php> (last visited Dec. 19, 2018).

405 See, e.g., *DNA Profile Program*, AM. KENNEL CLUB, <https://www.akc.org/breeder-programs/dna/dna-resource-center/dna-profile-program/> (last visited Dec. 19, 2018); *DNA Typing and Parentage Verification*, AM. PAINT HORSE ASS'N, <http://apha.com/breed/regguides/regguide5> (last visited Dec. 19, 2018).

406 Peter Kraus, *The Role of the Catalogue Raisonné in the Art Market*, in *THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS* 63 (Ronald D. Spencer ed., 2004).

407 Patricia Cohen, *A Picasso Online for Just \$450? Yes, It Is a Steal*, N.Y. TIMES (Sept. 3, 2012), <http://www.nytimes.com/2012/09/03/arts/design/growth-in-online-art-market-brings-more-fraud.html>.

to “anyone who fills out a form and pays \$10.”<sup>408</sup> Criticism of CI and the Clown Egg Register charges that, as CI lowers the bar for entry, having an egg in the Register will lose its meaning as a signal of professional status.<sup>409</sup>

To maximize their value, registries must balance inclusiveness against thorough review procedures that help maintain their ability to reliably signal quality.

### B. *Belonging and Prestige*

By encouraging CI membership and by communicating the shared norms of clowning, the Register helps build and maintain the community of clowns. Inclusion in the Register is also a source of pride and status for many clowns. Like the Clown Egg Register, other registries reinforce a sense of belonging among, and confer some measure of prestige upon, members of the community of registrants.

As Betsy Rosenblatt argues, community is central to many creative endeavors and often overshadows concerns over economics and the production of tangible artifacts.<sup>410</sup> The sense of belonging that emerges from close ties within a community fosters trust, builds shared goals, and fosters social norms.<sup>411</sup> Community is also closely tied to self-conception, identity, and pride.<sup>412</sup> Being a member of a community, in turn, can offer a measure of prestige.<sup>413</sup>

Registers can contribute to both belonging and prestige. As Jessica Silbey has pointed out, patentees take pride in their inclusion in the “storied legacy of the great inventors” as evidenced by being named in a patent.<sup>414</sup> Some inventors see patenting as “a rite of passage” that confers a “trophy, or . . . bragging rights.”<sup>415</sup> So it should come as no surprise that they “just want a patent so they can frame it and put it on the wall.”<sup>416</sup>

408 *Id.*

409 Bippo, *supra* note 30, at 4 (complaining that CI does not effectively screen its members and that there is “no quality control [at all]”); Smith, *supra* note 3, at 14 (expressing disappointment at approval of certain makeup designs and stating, “I think Clowns International used to stand for more than it does now”).

410 Rosenblatt, *supra* note 375, at 95, 106 (identifying one possible result of “pursing creative endeavors is a sense of belonging that can rival financial remuneration in terms of its importance and benefit to the creators”).

411 *Id.* at 99, 123 (noting that belonging “motivates people to create and comply with community norms and values, including copying and attribution norms tailored to the needs of particular creative communities”).

412 *Id.* at 98 (“Participation in creative communities provides people with belonging, which, in turn, provides them with both self-definition and self-worth.”).

413 *Id.* at 106.

414 Jessica Silbey, *Patent Variation: Discerning Diversity Among Patent Functions*, 45 *LOV. U. CHI. L.J.* 441, 456 (2013).

415 Seth Fiegerman, *In Tech, Patents Are Trophies—and These Companies Are Dominating*, CNN (June 19, 2018), <https://money.cnn.com/2018/06/19/technology/tech-patents/index.html>.

416 Graham & Sichelman, *supra* note 394, at 1070.

A similar desire for belonging motivates some trademark registrants. Striking down the Lanham Act provision that barred registration of trademarks that “may disparage . . . persons, living or dead,”<sup>417</sup> the Supreme Court recently held that the Patent and Trademark Office (PTO) could not refuse to register the mark “THE SLANTS” for an Asian-American rock band.<sup>418</sup> As the Court understood, the band chose its name in order to “supplant a racial epithet, using new insights, musical talents, and wry humor to make it a badge of pride.”<sup>419</sup> This justification is consistent with the one the band offered the PTO in its response to the initial refusal of its registration application.<sup>420</sup> In a statement issued after the Court’s decision, Tam celebrated the fact that “[o]ppressed groups will no longer have their identities shaped [by] the sensibilities of dominant ones.”<sup>421</sup>

For Tam and his bandmates, inclusion on the Principal Register was a matter of defining their community and expressing pride in their identity. Even in the absence of registration, no one contended the band could be prohibited from recording and performing under the Slants moniker.<sup>422</sup> And as the Court made clear, the band could still sue accused infringers under federal law.<sup>423</sup> Nonetheless, registration was of sufficient significance that the band pursued the case all the way to the Supreme Court.

Much the same likely proves true for many copyright registrants as well. Under the Copyright Act of 1976, registration is purely voluntary.<sup>424</sup> The standard account of copyright registration posits that works are registered in the United States for three primary reasons<sup>425</sup>: registration is a prerequisite for an infringement suit,<sup>426</sup> it entitles the registrant to statutory damages and other benefits,<sup>427</sup> and it facilitates licensing and other transactions.<sup>428</sup> Disen-

417 15 U.S.C. § 1052(a) (2012).

418 *Matal v. Tam*, 137 S. Ct. 1744 (2017).

419 *Id.* at 1766.

420 See Sarah Jeong, *Should We Be Able to Reclaim a Racist Insult—as a Registered Trademark?*, N.Y. TIMES MAG. (Jan. 17, 2017), <https://www.nytimes.com/2017/01/17/magazine/should-we-be-able-to-reclaim-a-racist-insult-as-a-registered-trademark.html> (noting that band explained the mark was “a positive term of self-reference that promotes cultural pride and recognition” (quoting Simon Tam, *Statement on Recent SCOTUS Ruling*, THE SLANTS (June 19, 2017), <http://www.theslants.com/statement-on-recent-scotus-ruling/>)).

421 Tam, *supra* note 420.

422 Tam, 137 S. Ct. at 1752 (“Without federal registration, a valid trademark may still be used in commerce.”).

423 *Id.* (“[E]ven if a trademark is not federally registered, it may still be enforceable under § 43(a) of the Lanham Act. . .”).

424 17 U.S.C. § 408 (2012) (providing for permissive registration).

425 For a detailed analysis of copyright registration, see Oliar et al., *supra* note 27, at 2215.

426 17 U.S.C. § 411.

427 Oliar et al., *supra* note 27, at 2216 (statutory damages and attorneys’ fees are “available as remedies only for works that had been registered prior to their infringement” (quoting Dotan Oliar & Nicholas Matich, *Copyright Preregistration: Evidence and Lessons from the First Seven Years, 2005–2012*, 55 ARIZ. L. REV. 1073, 1081 (2013))). Registration within five years of publication also creates prima facie evidence of ownership and validity.

tangling these legal and practical motivations from ones rooted in community and prestige raises empirical questions beyond the scope of this project. But for many, registration is viewed purely as formality, and one that entails limited substantive review.<sup>429</sup> When it comes to registration and other formalities, the animating principle of the Berne Convention—the leading international copyright agreement—is that they are a burden on authors that provide no corresponding benefit.<sup>430</sup> But even in jurisdictions in which registration offers little or no legal benefit, significant numbers of works are registered.<sup>431</sup> Ironically, copyright registration may be more attractive to authors if it applied a more meaningful filter, one that sends a stronger signal of quality and inspires some measure of pride among registrants.

Outside of the formal legal system, the Writers Guild of America maintains a register of scripts, treatments, and other documents. And while it promotes the evidentiary value of the register,<sup>432</sup> complying with the rules, norms, and regulations of the WGA boosts one's credibility and esteem within the entertainment industry.<sup>433</sup>

Other registers offer a sense of belonging or group identity. Many American Indian tribes carefully track their enrollment.<sup>434</sup> And while enroll-

428 See *id.* at 2217–18.

429 See Letter from Regan A. Smith, Copyright Office Review Bd., to Michael L. Gentlesk (Aug. 23, 2016), <https://www.copyright.gov/rulings-filings/review-board/docs/fuck-snow-globe.pdf> (rejecting application to register snow globe containing the word “Fuck”); Letter from Catherine Zaller Rowland, Copyright Office Review Bd., to Andrew J. Avsec (Jan. 8, 2018), <https://www.copyright.gov/rulings-filings/review-board/docs/american-airlines-flight-symbol.pdf> (rejecting application to register American Airlines logo).

430 Berne Convention for the Protection of Literary and Artistic Works art. 5(2), Sept. 9, 1886, 828 U.N.T.S. 221.

431 In Canada, for example, registration has little value beyond evidence that copyright exists and is owned by the registrant. Copyright Act, R.S.C. 1985, c C-42, § 53 (Can.). Nonetheless, roughly 8000 works are registered each year. See CANADIAN INTELLECTUAL PROP. OFFICE, COPYRIGHTS AND INDUSTRIAL DESIGNS STATISTICS, ANNUAL REPORT 2015–2016, <https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr04119.html> (last updated June 27, 2017). And after the United Kingdom and all Commonwealth countries moved to voluntary copyright registration, the Stationers' Company maintained a purely voluntary registry for nearly eighty years, until it was finally dissolved in 2000. See STATIONERS' COMPANY, *supra* note 362.

432 See WGA WEST REGISTRY, <https://www.wgawregistry.org> (last visited Dec. 19, 2018).

433 See KATE WRIGHT, SCREENWRITING IS STORYTELLING: CREATING AN A-LIST SCREENPLAY THAT SELLS! 222 (2004); Chad Gervich, *PrimeTime: The Truth About Protecting Your Work*, SCRIPTMAG (June 6, 2011), <https://www.scriptmag.com/features/primetime-the-truth-about-protecting-your-work> (“The truth is: I think a lot of people like registering their script with the Guild simply because it seems cool; it makes them seem like a ‘real’ screenwriter . . .”).

434 Tribal enrollment is “not the only means and is not necessarily determinative of membership; enrollment is not required in order to be considered a member of a tribe.” 41 AM. JUR. 2D *Indians; Native Americans* § 19 (2018); see also Brooke Jarvis, *Who Decides Who Counts as Native American?*, N.Y. TIMES MAG. (Jan. 18, 2017), <https://www.nytimes.com/2017/01/18/magazine/who-decides-who-counts-as-native-american.html>; Lisa Rab, *What Makes Someone Native American?*, WASH. POST (Aug. 20, 2018), <https://>

ment may entitle one to significant legal and economic benefits,<sup>435</sup> “intangible benefits of cultural belonging . . . may motivate individual claims to Indian status far more than any desire for material gain.”<sup>436</sup>

Still others promise prestige. The America Kennel Club advertises its “frameable AKC Registration Certificate.”<sup>437</sup> And the Irish Draught Horse Society of Canada identifies proof of “breeding” and “pedigree,” along with being “a recognized member of the world-wide family of Irish horses” as among the reasons to register a horse.<sup>438</sup>

Even if we strip away the economic value of ownership, registering a claim, however dubious or trivial, still holds appeal—an appeal that must derive from something other than securing the value of ownership. Organizations like the International Star Registry<sup>439</sup> and the Online Star Register<sup>440</sup> allow customers to name a star. These registrations have no official significance or legal effect. Some have described buying such “rights” as “throwing money into a black hole.”<sup>441</sup> And some consumers may in fact be deceived about the nature of these registries.<sup>442</sup> But we think it more likely that these registrants are motivated by the same sense of prestige that derives from having a claim, even if a symbolic one, to ownership of something. And just as the unique form and artistry of clown eggs burnish the prestige function they serve, the Star Registry similarly promises registrants a colorful certificate that reads, “this star will henceforth be known by this name,” is filed in “the Regis-

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[www.washingtonpost.com/news/style/wp/2018/08/20/feature/what-makes-someone-native-american-one-tribes-long-struggle-for-full-recognition/?noredirect=on&utm\\_term=.25282463ae4f](http://www.washingtonpost.com/news/style/wp/2018/08/20/feature/what-makes-someone-native-american-one-tribes-long-struggle-for-full-recognition/?noredirect=on&utm_term=.25282463ae4f).

435 Suzianne D. Painter-Thorne, *A Strange Kind of Identity Theft: How Competing Definitions of “Indian” May Deny Individual Identity*, 14 CONN. PUB. INT. L.J. 29, 35–38 (2014) (cataloguing a number of legal benefits). In the context of some Indian casinos, “membership is the difference between rags and riches.” Gabriel S. Galanda & Ryan D. Dreveskracht, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 57 ARIZ. L. REV. 383, 409 (2015).

436 Painter-Thorne, *supra* note 435, at 35.

437 See *Why Register Your Purebred Dog with the AKC?*, AM. KENNEL CLUB, <https://www.akc.org/public-education/resources/why-register/> (last visited Dec. 19, 2018).

438 *Why Register or Cross-Register My Horse?*, IRISH DRAFT HORSE ASS’N, <http://www.idhs.ca/PDF/Why-Register-2010-01-23.pdf> (last visited Jan. 11, 2019).

439 *About Us*, INT’L STAR REGISTRY, <https://www.starregistry.com/aboutUs.cfm?> (last visited Dec. 19, 2018).

440 ONLINE STAR REGISTER, <https://osr.org> (last visited Dec. 19, 2018).

441 Blaine Friedlander, *Buying a Star for a Holiday Gift Is Like ‘Throwing Money into a Black Hole,’* WASH. POST (Dec. 2, 2014), <https://www.washingtonpost.com/news/capital-weather-gang/wp/2014/12/02/buying-a-star-for-a-holiday-gift-is-like-throwing-money-into-a-black-hole>.

442 *Id.* (“New York City’s Department of Consumer Affairs issued a violation against the International Star Registry, an Illinois company, for engaging in a deceptive trade practice . . .”).

try's vault in Switzerland," and "recorded in a book which will be registered in the copyright office of the United States of America."<sup>443</sup>

To the extent policymakers can design registers that contribute to a sense of belonging within a community or provide registrants with some measure of prestige, we should expect those registers to hold greater appeal.

### C. *Posterity*

The Clown Egg Register serves a crucial archival function in clowning. It documents centuries of makeup designs, serving as a source of inspiration for clowns as well as a rich source of information for research and study. Moreover, the Register assures clowns that aspects of their personae—makeup, costumes, and names—will persist even after their performance careers end. In some sense, the Register offers clowns the promise of immortality.<sup>444</sup>

Some registers serve this archival function quite self-consciously. Copyright registration in the United States, for example, requires the deposit of copies of works with the Library of Congress.<sup>445</sup> The archival purpose of registration is unmistakable. By collecting these works, registration has contributed to "the largest repository ever assembled."<sup>446</sup> And copyright registration data can itself offer valuable insights as a research tool.<sup>447</sup>

Similarly, the patent system is designed to create a useful archive of technological advances. In addition to claims that meet the standards for utility, novelty, and nonobviousness, the patent "specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person

443 See *Taurus RA 5h 35m 24s D 20° 10' Dedicated to: Fagundes-Doyle on February 14, 2015*, STARREGISTRY, [https://www.starregistry.com/namestars/star\\_Detail.cfm?guid=fb873eaa-bc13-424f-a00f-555f6d1de139](https://www.starregistry.com/namestars/star_Detail.cfm?guid=fb873eaa-bc13-424f-a00f-555f6d1de139) (last visited Dec. 19, 2018) (illustrating one such example of a star "ownership" certificate); see also Allison Arieff, *Mapping Detroit, Inch by Inch*, N.Y. TIMES (July 20, 2016), <https://www.nytimes.com/2016/07/21/us/mapping-detroit-inch-by-inch.html> (describing Loveland, a project that divided a once-vacant lot in Detroit into 10,000 one-square-inch parcels, sold them for one dollar each, and maintained a record of the owners).

444 See Rosenblatt, *supra* note 375, at 109 ("Creators can obtain legitimacy, recognition, and even a sort of immortality by association with other creators. . . . Group membership provides a symbolic identity that allows people to project themselves beyond their personal death.").

445 17 U.S.C. § 407 (2012). The deposit requirement was even more demanding in the United Kingdom. See JOHN S. GILCHRIST, *THE GOVERNMENT AND COPYRIGHT* 132 (2015) (noting that current law requires deposit with six institutions, but that earlier iterations favored eleven libraries and institutions).

446 See *Granting Copyright*, LIBR. CONGRESS, <https://www.loc.gov/wiseguide/jan04/deposit.html> (last visited Dec. 19, 2018) (cataloguing this registry publicly); see also R. Anthony Reese, *What Copyright Owes the Future*, 50 Hous. L. REV. 287, 313 (2012) (noting the preservation value of deposit).

447 See, e.g., Raymond Shih Ray Ku et al., *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty*, 62 VAND. L. REV. 1669, 1671 (2009) (relying on copyright registrations to "examine whether changes in copyright law influence the number of new works created").



skilled in the art to which it pertains . . . to make and use the same.”<sup>448</sup> This enablement requirement helps ensure that patent law builds a repository of scientific data capable of “teach[ing] those skilled in the art how to make and use the full scope of the claimed invention without ‘undue experimentation.’”<sup>449</sup> A patent that includes an enabling specification, “enriches the knowledge available to the public.”<sup>450</sup> Collectively, those patents constitute a fertile research corpus.<sup>451</sup>

Recordation of documents related to real property serves a similar archival function. The practice of title recording extends back to the Middle Ages, so for students of history it provides a particularly rich source of evidence about ownership. Even the most basic title information—names of owners and dates of transfers—provides a sketch of how populations distribute themselves over land over time. But since any document related to a parcel of land can be recorded—from wills to mortgages to liens—title records also represent a trove of evidence about economic conditions, debt and lending practices, and individual histories. Since title records are kept locally, typically at county courthouses, they necessarily lack in evidentiary breadth what they possess in evidentiary depth. For that reason, they have largely been the province of local historians and biographers to date. But recent work has explored what title records can tell us about larger themes in property law and beyond. Maureen Brady, for example, studied early American title records to call into question the conventional wisdom about the inefficiency of metes and bounds land descriptions.<sup>452</sup> And Valerie Jaffee analyzed title records in Beaver Hills, Connecticut, in the early 1900s to show that the restrictive covenants in those title records operated more as a system of social norms than private law.<sup>453</sup>

#### D. Costly Screening

Finally, the Register serves as a costly screen that forces would-be applicants to assess whether the trouble of creating a developed clown persona is worth the benefit of getting an egg portrait made for posterity. The Register thus screens out those presumably low-value performers who may have pass-

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448 35 U.S.C. § 112 (2012).

449 *Genentech, Inc. v. Novo Nordisk A/S*, 108 F.3d 1361, 1365 (Fed. Cir. 1997) (quoting *In re Wright*, 999 F.2d 1557, 1561 (Fed. Cir. 1993)).

450 Alan L. Durham, *Patent Scope and Enablement in Rapidly Developing Arts*, 94 N.C. L. REV. 1101, 1103 (2016).

451 See, e.g., Saber A. Akhondi et al., *Annotated Chemical Patent Corpus: A Gold Standard for Text Mining*, 9 PLOS ONE 1 (2014), <https://doi.org/10.1371/journal.pone.0107477> (“Patent analysis can provide understanding of compound prior art, novelty checking, validation of biological assays, and identification of new starting points for chemical exploration.”).

452 Maureen E. Brady, *The Forgotten History of Metes and Bounds*, 128 YALE L.J. (forthcoming 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3165744](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3165744).

453 Valerie Jaffee, Note, *Private Law or Social Norms? The Use of Restrictive Covenants in Beaver Hills*, 116 YALE L.J. 1302 (2007).

ing interest in clowning but are unwilling to make the effort to develop their own look and style.<sup>454</sup> This nonexclusion function of the Register—costly screening—is one that other kinds of registers perform. Fagundes and Masur showed, for example, that the high costs of acquiring a patent serve as a costly screen that deters would-be patentees from applying for federal protection unless they can be reasonably confident that their invention will earn more than the nontrivial price tag (roughly \$22,000) of securing the patent.<sup>455</sup> Not all intangible rights are costly to vest. Copyright, for example, arises upon fixation of a work of authorship in a tangible medium of expression,<sup>456</sup> without any cost to the creator beyond the cost of executing that creation. But registering a copyright is not free, though not particularly pricey either. It requires applicants to submit a form, provide a deposit copy, and pay a nominal fee.<sup>457</sup> This low but nontrivial screen assures at least that only those serious enough about securing the mostly litigation-related advantages of registration bother with it. As with the Clown Egg Register, the screen is costly but the cost is low enough that it mostly functions to force those with trivial or low-value works to screen themselves out of the process.

The costly screen phenomenon applies also to title recording. The cost of recordation is low, typically requiring only the effort to show up at the county recording office with a valid instrument and the paying of a small fee.<sup>458</sup> This low-cost screen deters only those owners whose land is virtually worthless, and therefore does not merit even the minimal effort necessary to secure their rights. For owners, this works well because the state is less likely to identify and regulate their land in the absence of recording. But for the state, this disincentive—however marginal—is not ideal because there is social value in knowing the ownership of all real property, even if worthless. Having a complete picture of local land ownership allows municipalities to accurately calculate the tax base, and facilitates judicial goals like determining domiciliary status or satisfying outstanding judgment through attachment

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454 See *supra* subsection III.C.4 (discussing the costly screen function of the Register).

455 Fagundes & Masur, *supra* note 255, at 692–705. This assumes, of course, that patent applicants are motivated primarily by monetary considerations. Many of them are, but those who are seeking “vanity patents” furnish an exception. These patentees may seek to register even a worthless discovery because they are mainly interested in the prestige they perceive as associated with having a patent. See *supra* Section IV.B (discussing prestige as a motivation for patent registration and the practice of vanity patenting).

456 17 U.S.C. § 102(a) (2012) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . .”).

457 See U.S. COPYRIGHT OFFICE, COPYRIGHT OFFICE FEES 2 (2017), <https://www.copyright.gov/circs/circ04.pdf> (describing registration procedures and setting fees that range from thirty-five dollars for registering an individual registering their solely authored work online to eighty-five dollars for registering works using the hard copy application).

458 The fee to record a title document in Harris County, Texas, for example, is a mere sixteen dollars for the first page of the document, and four dollars for every page thereafter. *Texas—Harris County Recorder Information*, DEEDS, <https://www.deeds.com/recorder/texas/harris/> (last visited Dec. 19, 2018).

of assets.<sup>459</sup> The screening function of title recordation may thus not be socially optimal.<sup>460</sup> Regardless, considering the different kinds of process costs imposed on owners by different kinds of registration schemes invites consideration of such normative questions, and more generally illustrates the value of thinking about the nonexclusion functions of property registers.

#### CONCLUSION

The Clown Egg Register has been a source of popular fascination since Stan Bult first began work on it over seventy years ago. Our Article is the first to take the Register seriously from the perspective of law and social norms. In so doing, it made three contributions. First, it wrote another chapter in the growing literature on norms-based IP governance, illustrating the distinctive way that clowns govern their creative production through community practices rather than state-created law. Second, it demonstrated that the emergence and persistence of the Register cannot be fully accounted for by the standard exclusive-rights rationales. Nonexclusion rationales like professionalization, prestige, and posterity play a crucial role as well. Third and finally, it extended these insights to the study of registers more generally. Our account of the Register's origins highlights the unappreciated nonexclusion explanations for registers of other kinds of assets, from copyrights and trademarks to land and stars. The Clown Egg Register is admittedly an unorthodox topic for legal scholarship, but upon closer examination, it reaffirms that insights about law and regulation may lie in the least likely places.

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459 See Bell & Parchomovsky, *supra* note 270, at 277 n.157 (discussing the upsides for the state of widespread property registration).

460 See Fagundes & Masur, *supra* note 255, at 685 n.18 (“We illustrate here only that costly screens can represent Pareto improvements, not that they necessarily eliminate all social problems.”).

