American Law & Economics Association Annual Meetings

Year 2008 *Paper* 41

The Emergence of Intellectual Property Norms in Stand-Up Comedy

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Introduction

On his 2006 album "No Strings Attached", popular stand-up comedian[1] Carlos Mencia[2] performed a bit about a devoted father teaching his son how to play football:

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* Authors are Associate Professor, University of Virginia School of Law. Thanks to Rochelle Dreyfus, Brandon Garrett, James Gibson, Caleb Nelson, and Dan Ortiz for helpful comments and conversations. All comedic routines quoted in this Article are on file with authors.

[1] Throughout this paper, we use "comedians" and "comics" interchangeably, but some maintain that these terms describe different practitioners of stand-up comedy. This view goes back to vaudeville performer Ed Wynn's suggestion that "A [mere comic is] a man who says *funny things*. A comedian is a man who says *things funny*." *See* 2 VAUDEVILLE OLD AND NEW 1231-32 (Frank Cullen ed., 2007) [hereinafter VAUDEVILLE OLD AND NEW] ("ED WYNN").

[2] Mencia has his own weekly program, *Mind of Mencia*, on cable network Comedy Central.

> He gives him a football and he shows him how to pass it. He shows him every day how to pass that football, how to three step, five step, seven step drop. He shows him how to throw the bomb, how to throw the out, how to throw the hook, how to throw the corner, he shows this little kid everything he needs to know about how to be a great quarterback, he even moves from one city to the other, so that kid can be in a better high school. Then that kid goes to college and that man is still, every single game, that dad is right there and he's in college getting better, he wins the Heisman trophy, he ends up in the NFL, five years later he ends up in the Super Bowl, they win the Super Bowl, he gets the MVP of the Super Bowl, and when the cameras come up to him and say "you got anything to say to the camera?" "I love you *mom*!"[3]

Mencia's routine may be funny, but it also happens to be very similar to one in Bill Cosby's 1983 hit album "Himself":

> You grab the boy when he's like this, see. And you say "come here boy" – two years old – you say "get down, Dad'll show you how to do it." "Now you come at me, run through me, (boom!). There, see, get back up, get back up – see you didn't do it right now come at me," (boom!). See, now we teach them – see now you say "go, attack that tree, bite it, (argh!) come on back, bite it again" (argh! argh!). You teach them all that: tackle me! (bam!) And then soon he's bigger and he's stronger and he can hit you and you don't want him to hit you anymore, and you say "alright son," turn him loose on high school and he's running up and down the field in high school and touchdowns, he's a hundred touchdowns per game and you say, "yeah, that's my son!" And he goes to the big college, playing for a big school, three million students and eight hundred thousand people in the stands – national TV – and he catches the ball and he doesn't even bother to get out of the way he just runs over everybody for a touchdown and he turns around and the camera's on him and you're looking and he says "hi *mom*!"

Mencia's version does not repeat verbatim any of Cosby's phrases, but the jokes share the same animating idea, narrative structure and plotline, and employ a similar punchline. Mencia has denied copying Cosby.[4] But the striking similarity between the two routines, Cosby's iconic stature, and the wide dissemination of "Himself" – still on sale twenty-five years after its first release[5] – all suggest that Mencia has borrowed his joke from the older comedian. Cosby, who has denounced joke thieves

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[3] *See* http://youtube.com/watch?v=lCixAktGPIg (video clip comparing Mencia and Cosby versions of bit).

[4] *See* Robert W. Welkos, *Funny, that was my joke*, L.A. TIMES (July 24, 2007), 2007 WLNR 14106592 (reporting that Mencia denied having seen Cosby's routine in an email to the L.A. Times).

[5] *See, e.g.*, http://www.amazon.com/Bill-Cosby-Himself/dp/B0002B15I8 (noting that the original video was released on DVD in 2004).

but who has also admitted to having once taken a theme from comedian George Carlin,[6] has taken no action against Mencia.

Comedian George Lopez has not been as generous. Lopez has accused Mencia of incorporating thirteen minutes of his material into one of Mencia's HBO comedy specials. According to his boasting on the Howard Stern Show, in 2005 Lopez grabbed Mencia at the Laugh Factory comedy club, slammed him against a wall and punched him.[7]

If violence is a legitimate response to joke-stealing,[8] then perhaps Lopez should beware. Speaking at the 2008 Grammys, Lopez noted how pleased he was to see a woman (Hillary Clinton) and an African-American (Barack Obama) competing for the Democratic presidential nomination. He worried, however, about the prospect that the first female or black president might be assassinated. The best thing to ensure their safety if elected, he suggested, would be to appoint a Mexican vice-president. "Anything bad happens," Lopez promised, "Vice-President Flaco." The Lopez joke is reminiscent of an earlier bit by comedian Dave Chapelle. In his 2000 HBO special "Killing Them Softly", Chapelle stated that, were he to become the first black president, he would appoint a Mexican vice-president "for insurance." Kill the president, he suggested, and the U.S.-Mexico border would be thrown open. Chapelle's punchline: "So you might as well leave me and Vice President Santiago to our own devices."

Did Mencia steal from Cosby and Lopez? Did Lopez steal from Chapelle? We cannot say for certain: In each of these cases it is possible that one comedian has appropriated from the other, or that both have formulated their version independently. During our research we found scores of examples that raise at least a reasonable inference of joke-stealing. We are interested, however, not in particular disputes or individual instances of alleged appropriation, but rather in the reaction of the community of stand-up comedians to the perceived threat. A look back at the historical record confirms that comedians have long taken or adapted other comedians' jokes, although the practice was not always called stealing, as it is today. In vaudeville, burlesque and minstrelsy – the 19th century precursors of stand-up – different artists would perform similar and even identical routines, and we find almost no evidence that the practice was thought of as theft. In the post-vaudeville era we can see the beginning of sentiment equating appropriation with stealing, but many comics

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[6] *See* Welkos, *supra* note 4 (quoting Cosby as saying that joke-stealing involves the performer accepting acclaim under false pretenses of originality and that whenever he would use other comedians' material he would give public attribution).

[7] *See* http://www.redban.com/audio/lopez.mp3 at 0:40-1:46 (George Lopez on the Howard Stern radio show describing his physical attack on Mencia). *See also* http://www.redban.com/audio/dco.mp3 at 27:23-27:40 (Jamie Masada, owner of the Laugh Factory, claiming to have witnessed Mencia and Lopez punching each other, Dec. 1, 2006).

[8] It seems that physical violence, or threats of violence, are not unheard of as a response to joke-stealing. *See, e.g.*, Gayle Fee & Laura Raposa, *'Thief' Can't Laugh Off Lifting Hub Comics' Material*, BOSTON HERALD (November 21, 2002) (reporting that four Boston comedians who were the victims of 21-years-old fellow comedian Dan Kinno's joke-thievery "ganged up on" him and "explained [forcefully] to the young lad the error of his ways."); Joe Rogan, So, now I'm banned from the comedy store, at http://blog.joerogan.net/archives/111 (suggesting that Mencia felt "physically threatened" to be near Rogan after Rogan accused him of joke-stealing); Welkos, *supra* note 4 (comedian David Brenner states that he saw two comedians punching each other over joke stealing); RICHARD ZOGLIN, COMEDY ON THE EDGE 240 (2007) (reporting that David Brenner once threatened to attack Robin Williams for stealing his material and using it on HBO).

continued to appropriate without apparent penalty. One example is the great comedian Milton Berle, who started his career in vaudeville. Over the years, Berle forged a reputation as "The Thief of Bad Gags". Berle's reaction? Jokes are public property. Berle would joke about his reputation for stealing jokes, opening his act by saying "I laughed so hard watching the comedian who came before me, I almost dropped my pad and pencil." One cannot imagine a present-day comedian taking Berle's approach to accusations of joke-stealing. Today, a credible accusation that a comedian steals jokes can harm or even destroy a career.

In this Article, we examine the phenomenon of joke-stealing among stand-up comics. Comedians tell us that although joke-stealing does not occur with great frequency, it does occur often enough to be a persistent concern. And yet we do not see comedians suing rivals who they believe have stolen their material. This is not because comedians are angels who object to litigation on principle. Nor do they view their work product as public property. Comedians work hard to come up with and perfect original comedic material, and are not amused – to say the least – to see it stolen.

So why are comedians not using the legal system? Because copyright law does not provide comedians with a cost-effective way to protect their expression. The expected benefits of copyright law are too low. Copyright law protects original expression, but not ideas, and much alleged joke-stealing involves telling the same comedic idea in different words. Copyright plaintiffs further bear the burden of proving that the defendant copied their expression rather than created it independently. Since jokes and comedic routines often reference common experience or the events of the day, it would not be easy in many cases for comedians to negate the possibility of independent creation (or "parallel thinking," as it is commonly called among comedians). At the same time, the costs of using the copyright system are too high: copyright registration, court and legal fees overwhelm, in most cases, the market value of jokes. Indeed, comedians believe that using the legal system is not worth their while, and some of them have received legal advice to that effect.[9] It is thus not surprising that we found literally zero copyright lawsuits between rival comics.[10]

Is the lack of effective legal protection of jokes a cause for concern? Scholars to date believe it is. Jokes are public goods, they contend, and absent legal protection comedians will not be able to recoup their investment. The market, they argue, will under-provide jokes. To correct this market failure, they conclude, we should beef up copyright protection.[11] But we have our doubts. Rather than assume a market failure,

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[9] *See also* Raju Mudhar, Nobody's laughing as comics launch lawsuit that seeks to protect origins of comedic content, TORONTO STAR (December 9, 2006), 2006 WLNR 21263386 ("what we found out along the way from my friend who was a lawyer [ ] – we're Canadian comics, neither one of us can afford to be hiring lawyers – was that there isn't any protection of an idea in copyright.") (quoting Canadian comic Glen Foser).

[10] There have been a small number of lawsuits involving jokes, but the defendants in these actions are businesses such as t-shirt manufacturers, motion picture studios, and book authors and publishers who are alleged to have appropriated comic material. *See* infra Part II.B.

[11] *See, e.g.*, Allen D. Madison, *The Uncopyrightability of Jokes*, 35 SAN DIEGO L. REV. 111 (1998); Andrew Greengrass, *Take My Joke . . . Please! Foxworthy v. Custom Tees and the Prospects for Ownership of Comedy*, 21 COLUM.-VLA J.L. & ARTS 273, 274-75 (1997) ("a comedian's material should be protected in its own right both as an ethical recognition of the author's right to the fruits of her creativity and to provide the proper legal incentive structure to promote the 'useful art' of comedy").

in this Article we take a careful look at how comedians do their work. And what we find is a small, tightly-knit creative community that substitutes a system of social practices and institutions for formal copyright protection. Using this informal system, comedians are able to assert ownership of jokes, regulate their use and transfer, and impose sanctions on transgressors.

Part II explores this community-based norms system.[12] Our description is based, in large part, on interviews we conducted with comedians. Through these interviews, we detail the operation of comedians' powerful norm against appropriation. This norm is similar, at the conceptual level, to the exclusive rights granted under formal copyright law. The property right available under the informal norm is, however, even more encompassing than that conveyed by formal copyright law. Whereas copyright propertizes expression but allows free appropriation of "ideas",[13] comedians' norms in many instances ban appropriation both of comedic expression and of comedic ideas (at least where such ideas are below a very general level). Enforcement of comedians' norm against appropriation is done mainly through community policing: there are usually several comedians on a stand-up bill, and they observe one another. Because the community is small and close-knit, comedians know and recognize other comedians' material. When they observe similarities, they usually can tell which comedian performed a routine first. When they believe that a comedian has taken material, they take action. The forms of retaliation vary, from simple bad-mouthing (e.g., suggesting to other comedians that the offender is a "hack"), to refusing to work with the alleged thief (a comedian with whom no one will share a bill will have trouble finding bookings), and even (occasionally) physical violence. We describe various methods of enforcing the community's norms. We also describe additional norms that regulate initial ownership, transfer, attribution, and compulsory licensing of jokes. These informal norms operate in ways that sometimes resemble but often differ from the rules of formal copyright law.

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[12] The study of social norms as either a supplement to or a stand-in for formal legal rules was pioneered by Robert Ellickson, who studied informal norms that govern disputes among cattle ranchers in Shasta County, California. Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution among Neighbors in Shasta County*, 38 STAN. L. REV. 623. (1986); ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991). Following Ellickson, other scholars have described the powerful influence of social norms on the definition and enforcement of property rights in a variety of contexts. *See, e.g.*, JAMES M. ACHESON, THE LOBSTER GANGS OF MAINE (1988); Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUDIES 115 (1992). Recently, a few scholars have begun to identify informal norms that regulate the ownership of intellectual works. *See* Emmanuel Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=881781 (observing a norms-based intellectual property system among French chefs); Jacob Loshin, *Secrets Revealed: How Magicians Protect Intellectual Property Without Law,* available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1005564 (observing a norms-based intellectual property system among magicians). *See also* Robert Merges, *Property Rights and the Commons: The Case of Scientific Research*, 13 SOC. PHIL. & POL'Y 145 (1996) (observing the influence of norms on scientific researchers). This paper joins that developing branch of scholarship. Other scholars have examined creative practices that depend neither on norms nor law to regulate appropriation, but instead exist in an equilibrium where appropriation helps to drive consumption of the particular creative good. *See* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006).

[13] *See infra* Part I.B.1.

In addition to describing comedians' IP norms system, we also detail the interaction between technological change and comedians' strategies for controlling appropriation. Our observations here run counter to the conventional wisdom that new technologies such as the Internet inevitably weaken enforcement of IP rights. Although this view may be correct for the formal copyright law as it applies to such media as recorded music and motion pictures, technological developments such as radio, TV, and the Internet have helped reinforce norms-based protections in the market for stand-up comedy. They do so by lowering the costs of monitoring and detecting appropriations by competing comedians, and by lowering the cost of imposing informal sanctions. Relatedly, we explore the relationship between comedians' norms system and stand-up's move away from the "one-liner" style of the post-vaudeville period in favor of a more personal style of comedy. This change in the content of the comedic product is facilitated by comedians' effective system of IP norms (making the investment in a unique comedic persona worthwhile). At the same time, the shift to more personalized material contributes to the norms system's effectiveness (detection of appropriation is easier when jokes bear the mark of a particular comedian's personality, as distinguished from a generic one-liner).

No social norm, however strong, can prevent all joke-stealing. However, no property law system has ever eradicated all theft. To function well, a social norm system need only prevent enough theft that a healthy level of investment in new comedic material continues. Observing the present supply of comedy and comparing the current level of comic theft to that in copyright-based industries, we cannot say, absent more data, that the norm-system clearly underperforms.

The Article proceeds as follows. Part I describes the scant legal protection that is currently afforded to comedians' intellectual labors. Although the law never afforded jokes effective protection, the industry, and the comedic product, have changed markedly over the years, together with the norms and technology surrounding them. Part II describes the social norms currently regulating the ownership and exchange of comedic expression today. Part III discusses some of the implications of comedians' norms-based property system for IP theory and policy, both within the market for comedy and in markets for other forms of creative work.

I. Why the Law Does Not Provide Effective Protection to Stand-Up Comedians

Copyright law does not provide effective protection to stand-up comedians, a fact made clear by a close look at the business of stand-up.[14] Despite what appears to be a persistent practice of joke-stealing among stand-up comedians, there have been few lawsuits asserting copyright infringement in jokes, and there is also little evidence of threatened litigation, settlements, or indeed public dissatisfaction among comics regarding the weakness of IP protections. There have been a small number of lawsuits by comics complaining about joke stealing, but these lawsuits have focused on theft by non-comics (e.g., movie producers, t-shirt manufacturers, joke-book publishers). We have seen no litigation by comics alleging appropriation by other comics. Of course, appropriation by both comics and non-comics is a concern,

[14] *See, e.g.*, Welkos, *supra* note 4 (quoting comedian David Brenner saying "If we could protect our jokes, I'd be a retired billionaire in Europe somewhere").

although appropriation by non-comics will often be a less pressing threat because of the lower likelihood that that type of appropriation will compete with the originator's telling of the joke.[15]

In this Part we will describe a few related factors, which help to explain why we see so few lawsuits relating to joke-stealing. Although we highlight the shortcomings of legal doctrine in protecting jokes and comedic routines, we do not think that they adequately explain the virtual absence of lawsuits. Under the muscular damages regime in U.S. copyright law, a successful plaintiff could recover – at least from a solvent defendant – a significant money award and reimbursement for attorneys fees. Additionally, because jokes vary so widely, we believe that doctrinal barriers like the idea-expression dichotomy and the independent creation defense,[16] while disabling in some suits, would be far less of a barrier to a successful claim in others. Copyright doctrine, we believe, is just a part of the story. The absence of lawsuits is less puzzling once one learns of the norms system that we uncover later in Part II.

There are both practical and doctrinal reasons that help to account for the rarity of litigation (indeed, its virtual non-existence) in this area. It is important to note that the difficulties that comedians face in gaining protection for their material is not the result of any specific exclusion of jokes from the domain of federal copyright law. Current copyright law protects a wide range of creative expression, premised only on a weak "originality" requirement (i.e., the expression must not have been copied, and must contain some scintilla of creativity),[17] and a similarly undemanding "fixation" requirement (i.e., the material must be recorded on a tangible medium such as paper, computer memory, photograph, or video- or audiotape).

Depending on the form in which a joke is fixed, it may qualify for copyright protection as a literary work, an audiovisual work, or a sound recording.[18] Although jokes fall within the general subject matter of copyright, it is also true that (1) the law makes no special provision for protection of jokes, and (2) other generally-applicable elements of copyright law – most notably the so-called idea-expression dichotomy and the requirement that a plaintiff prove copying as part of his prima facie case (which we will refer to as "the copying requirement" below) – impose significant limitations on the ability of comedians to successfully assert copyright in their material. How significant these limitations are will depend on the particular comedic material in question. We deal with those doctrinal barriers in sub-section B below. First, however, we note why the costs of the legal system are particularly deterring suits when it comes to joke-stealing disputes.

A. Practical Barriers to Copyright Enforcement

Comics who have had material stolen and are considering a copyright lawsuit will quickly discover that legal fees often mount into tens of thousands of dollars. Copyright law is federal rather than state law and a complex specialty area, which

[15] This is a quantitative difference that becomes qualitative: it is possible that one or a few people in the audience will tell a joke to their friends and thus the joke will spread virally and the stand-up won't be able to tell it again. However, the danger from a competing comedian doing the same – telling it to hundreds of people per performance – is much greater.

[16] Formally, the plaintiff bears the burden to negate the possibility of independent creation.

[17] Feist Publications v. Rural Tel. Svc., 499 U.S. 340 (1991).

[18] *See* 17 U.S.C. § 102.

restricts the number of lawyers one might engage. This is especially true given the mismatch between the market value of jokes – jokes typically sell for anywhere between $50 and $200 – and the much larger market value of a copyright lawyer's billable hour (which ranges roughly from $150 to $1000).

There are, of course, a number of successful and wealthy comics who could easily afford to fund litigation, and we remain puzzled at the absence of lawsuits among comedians. Copyright law contains powerful inducements to sue, including the ready availability of injunctions and a choice, at the plaintiff's election, between the sum of actual damages and the infringer's profit or statutory damages, which can be as high as $150,000 per work infringed.[19] This last figure exceeds the median comedian's *gross* pay for two years. Regardless of the plaintiff's choice of actual or statutory damages, copyright law also holds out the inducement of the award of court costs and – perhaps most significantly – attorneys fees. If the copyright damages regime were the only variable, we would venture that potential plaintiffs would be more likely, relative to a typical non-copyright plaintiff, to find a lawyer willing to work for a contingent fee. However, a comic's prospect of finding a contingency fee lawyer depends both on the damages likely to be awarded for a successful claim, and on the likelihood that the claim will prevail. Copyright law holds out the prospect of significant damages, but the chance of prevailing is likely to be low in most (albeit not all) cases.

Another factor contributing to copyright law's irrelevance to most comedians is the law's requirement, as a predicate to the award of statutory damages and attorneys fees, that the author register the work prior to the commencement of the infringing conduct.[20] The cost of registration – a $45 fee (or $30 if registration is done on-line)[21] plus the time involved – is low but not trivial compared to the expected value of the typical joke. It is true that comedians can wait and pay the same fee to register a whole routine or even a show. Perfecting routines and developing shows, however, takes much time and many club performances, during which the jokes would remain unregistered. In our interviews, many comedians indicated that they were aware of the copyright registration system, and a search through Copyright Office records shows that some comedians do indeed register material, albeit for the most part not individual jokes or comic routines. Nonetheless, use of the registration system by comedians confirms some level of awareness of the copyright law within the stand-up community.[22]

This awareness has not yet translated into litigation. The comedians we queried about the absence of lawsuits provided a consistent response: lawsuits are expensive, the chances of winning are low, and – importantly – lawsuits are "just not the way it's done" among comics. Indeed, we learnt of several attempts to organize a comedians' guild, driven – among other things – by the desire to address joke-stealing. One of these attempts involved hiring legal counsel and seeking an opinion on the application

[19] 17 U.S.C. § 504(c).

[20] *Id.* at § 505.

[21] *See* United States Copyright Office, Circular 4 (schedule of Copyright Office fees).

[22] Searching the copyright office records under the name "Bill Cosby" returned 522 hits, but these are mostly television shows, rather than individual jokes or routines. A search under "Carlos Mencia" returned four, "Robin Williams" returned five. "Milton Berle" returned two, which happen to regard the two joke books he published, his belief that jokes are public domain notwithstanding.

of copyright law to joke-stealing. The legal opinion suggested the futility of relying on the copyright law. That guild disbanded shortly thereafter, one of the reasons being its inability to fight joke-thievery. It is to those doctrinal barriers that we now turn.

B. Doctrinal Barriers to Copyright Enforcement

In addition to the expense of registrations and lawsuits, there are doctrinal hurdles that make joke-stealing lawsuits unlikely, in many cases, to succeed. This uncertainty makes lawsuits less attractive. These doctrinal barriers are far from insuperable, but one can see why comedians balancing the cost of suit against the chances of success and the likely amount of recovery believe that help from copyright law is unlikely. In this section, we will describe and assess the strength of the various doctrinal barriers to effective intellectual property protection of jokes. Because jokes vary widely in their length, structure, and dependence on stock vs. highly original elements, it is difficult to provide an exhaustive account of the application of copyright (or trademark) doctrine in this area – and impossible within the scope of this paper. Our purpose here is to explain the application of doctrine on a general level, and to highlight some of the serious difficulties that would arise if efforts to bring formal law to bear were to begin.

1. Idea vs. Expression

It is a commonplace of copyright that the law protects the expression of ideas, but not the ideas themselves. The canonical formulation of this doctrine, often referred to as the "idea/expression dichotomy", was provided by Learned Hand in *Nichols v. Universal Pictures Corp.*:[23]

> Upon any work. . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended. [.. .] Nobody has ever been able to fix that boundary, and nobody ever can.[24]

The application of the idea/expression dichotomy to jokes leaves comedians with little protection. Often it is the idea conveyed by a joke that causes the audience to laugh. Since the same idea may be communicated by different expressions, comedians can appropriate the idea animating a joke lawfully simply by telling it in different words. Indeed, commentators have suggested that comics sometimes intentionally

[23] 45 F.2d 119 (2d Cir. 1930). Nichols involved allegations of non-literal infringement of characters and plot devices in a play. Non-literal infringement is the type of infringement involved in most instances of joke-stealing, where appropriators do not copy literally but rework the expression taken.

[24] *Id.* at 121.

take advantage of the indistinct boundary between protected expression and unprotected ideas:

> Comics who steal concepts rather than lines are sometimes referred to as rewriters. It is even more difficult to prove theft in their case, since a concept is vague and potentially available to anyone. Sometimes a rewriter or line thief will, in a flash of honesty, footnote onstage the source of the material or idea. But this academic gesture is lost on the audience – concerned only with being entertained – and is of little consolation to the aggrieved creator whose concept loses its freshness without him or her having benefited from its discovery.[25]

In our review of alleged instances of joke stealing, we have seen numerous instances that appear to involve changing a joke to "write around" another comic's copyright. Consider the first example mentioned in the Introduction to this Article, involving Carlos Mencia's possible 2006 appropriation of a 1983 Bill Cosby routine. The Cosby and Mencia bits are plainly similar, but they are not, of course, the same. If Bill Cosby were to bring a copyright lawsuit, what should we expect?

Most comedians look at cases like this and assume that Mencia would escape copyright liability, but our own assessment is that Cosby would have a realistic chance at least of making his prima facie case. First, it seems probable to us that a factfinder hearing both jokes would find it more likely than not that Mencia heard the Cosby joke and decided to work it into his act. Independent creation seems less likely here given both the length of the joke and the lack of fit between this particular joke, which involves a typically American story about a father teaching his son to play football, and Mencia's comic persona, which is based heavily around a crudely sterotyped Hispanic-immigrant ethnic identity.[26] Also suggestive of copying is the different perspective each comic takes in the telling of the joke. Cosby tells it as if it comes from personal experience; in Mencia's telling the father is a third-person character – i.e., Mencia is telling the joke about someone else. Lastly, the wide success and distribution of Cosby's hit album – still on sale today – tend to support an inference of copying under copyright doctrine.

If that is the case, then the second question is whether Mencia has copied sufficient *protected* expression to support copyright liability, or only unprotected ideas. It seems that Mencia has done a little of both. If Mencia has indeed copied Cosby, the most obvious appropriation is of the most general idea that animates the joke – i.e., that mothers often get credit for the work that fathers do. But of course ideas at the most general level cannot be claimed as property via copyright law.[27] Nor

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[25] ROBERT A. STEBBINS, THE LAUGH-MAKERS: STAND-UP COMEDY AS ART, BUSINESS AND LIFESTYLE 119 (1990).

[26] Mencia, whose birth name is Ned Arnel Mencia and who previously was known under the name Ned Holness, is of Mexican and Honduran-German parentage.

[27] In instances where a comedic idea is not capable of a variety of expressions, copyright's merger doctrine will limit the ability of the originator to assert rights even in his particular expression of the joke. The merger doctrine provides that if an idea and its expression are so closely linked that there is only one conceivable way or a sharply limited number of ways to express the idea, then the expression of the idea is uncopyrightable. To do otherwise would effectively convey to the originator a property right in the underlying idea – a move which would involve copyright trespassing on the distinct domain of the patent system. *See* Educational Testing Services v. Katzman, 793 F.2d 533, 539 (3d Cir. 1986).

Some funny ideas can be expressed in a limited number of ways. This is certainly true of what is

can such an idea be claimed as property via the patent system, for it is neither novel nor, standing alone, useful.

Moving for a moment from the most general to the most specific level, it is also clear that Mencia has not committed *literal* infringement of Cosby's text. Again, if Mencia has in fact copied from Cosby, he has succeeded in re-casting the joke in a way that mimics very little of the text of the Cosby telling.

The interesting questions lie at the intermediate levels of generality. In addition to the most general idea of the Cosby joke, Mencia's joke sets out the same specific instantiation of that idea – i.e., the father receives little credit for helping his son become a football star – used by Cosby. Mencia's joke also shares a narrative structure with Cosby's: the joke begins with the father teaching a young boy the fundaments of the game, and then proceeds chronologically through the boy's career as a high school and college player. The Mencia joke takes the boy further into the future, into an NFL career and a star-turn in the Super Bowl. So again, the Mencia joke is not the same as the Cosby joke at the intermediate level of narrative structure, but the two jokes are quite similar at this level of generality, and if Mencia has copied a substantial portion of the plot line it does not matter what he has *not* copied.

Moving down yet another level of generality, the jokes are quite similar again in their specific plot incidents. Both describe a father, who puts much time and labor in teaching his son to play football, and who then watches his son growing and excelling at the game. The son advances up the ladder, becomes a star, and is featured in a game that is being broadcast on national TV, in which he is given the opportunity to talk, and thereupon expresses affection to only his mother. The Cosby and Mencia texts clothe this narrative structure differently, but the scaffolding is much the same.

It is not clear to us where the line should be drawn in this case between unprotectable idea and protected expression. Were Cosby to bring a case, at a minimum we anticipate his lawyers would argue that Mencia has committed non-literal infringement by appropriating the "plot" of Cosby's joke. Were such a claim put forward, we believe that reasonable fact finders could go either way. We do not think that if this case reached a court, a summary judgment for Mencia is likely.

One final note on a related subject. The Cosby/Mencia comparison is suggestive of intentional appropriation. But many of the comics we spoke with also complain about unintentional or inadvertent appropriation. One observer has noted that much of the concern about theft stems from incidents in which one comic hears a joke, and then months later comes up with an idea that unconsciously draws on the first comic's

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perhaps Henny Youngman's trade-mark jest: "Take my wife – please!". This is a four-word joke, and any slight change in the text – such as "Please take my wife!" – would not be funny. There are, as the Youngman joke illustrates, certain word orderings that are funny, and others that simply are not. Youngman brought this joke to perfection, and in the process likely lost protection.

Additionally, the Copyright Office's regulations – which, though not themselves directly enforceable by courts, manifest the expert agency's understanding of the law – suggest that individual words and short phrases are not copyrightable. *See* 37 C.F.R. 202.1(a). Although not formally a barrier to a lawsuit, this regulation puts another hurdle in the way of comics who create mostly one-liners, or authors of jokes that are in a recognized genre, and for which, after the filtration of common expressive elements, the amount of original expression remaining is small.

material. Accusation of this type of unconscious theft have been lodged, for example, against quite well-known comics such as Robin Williams.[28]

Most of the comics we interviewed told us that they believe that such inadvertent copying could not violate the copyright law. But that is in fact incorrect. Under the rules of formal copyright law, unconscious or inadvertent appropriation is actionable, because copyright infringement is a strict liability offense. Indeed, one of the most widely-studied cases in music copyright, *Bright Tunes Music Corp. v. Harrissongs Music, Ltd.*, involved liability for such unintentional copying.[29] *Harrissongs* involved similarities between the melodies of two famous songs – "He's So Fine", by the Chiffons, and "My Sweet Lord," by the late former Beatle, George Harrison. Harrison denied copying the Chiffons melody, and the court credited his denial. It nonetheless imposed liability:

> Seeking the wellsprings of musical composition[; i.e.,] why a composer chooses the succession of notes and the harmonies he does whether it be George Harrison or Richard Wagner is a fascinating inquiry. It is apparent from the extensive colloquy between the Court and Harrison covering forty pages in the transcript that neither Harrison nor Preston were conscious of the fact that they were utilizing the He's So Fine theme . . . .
>
> What happened? I conclude that the composer, . . . in seeking musical materials to clothe his thoughts, was working with various possibilities. As he tried this possibility and that, there came to the surface of his mind a particular combination that pleased him as being one he felt would be appealing to a prospective listener; in other words, that this combination of sounds would work. Why? Because his subconscious knew it already had worked in a song his conscious mind did not remember. [. . .] This is, under the law, infringement of copyright, and is no less so even though subconsciously accomplished. . . .[30]

2. Independent Creation

As we have already mentioned, copyright in jokes will sometimes be difficult to enforce because of the difficulty of proving copying rather than independent creation. Here is an example of four comics telling a similar joke about the construction of a border fence between the United States and Mexico. The first comedian, Ari Shaffir, is recorded telling the joke at a "Latin Laugh Festival" in March 2004:

> Here's his [i.e., California Governor Arnold Schwarzenegger's] new thing, I don't know if you guys have heard this, he wants to build a brick wall all the way down California/Mexico border, like a 12 ft. high brick wall, it's like 3ft deep, so no Mexicans get in, but I'm like "Dude, Arnold, who do you think is going to build that wall?"

[28] *See infra* note 97 (quoting Williams as admitting that his copying was subconscious).

[29] 420 F. Supp. 177 (S.D.N.Y. 1976).

[30] *Id.* at 179.

The suggestion, of course, is that the wall will be built by Mexican laborers. Here are three other comics, Carlos Mencia, D.L. Hughley, and George Lopez, telling different versions of this joke, all in 2006:

> ***Carlos Mencia (Jan. 2006)*:** Um, I propose that we kick all the illegal aliens out of this country then we build a super fence so they can't get back in and I went, um, "Who's gonna build it?"
>
> ***D.L. Hughley (Oct. 2006)*:** Now they want to build a wall to keep the Mexicans out of the United States of America, I'm like "Who gonna build the motherf***er?
>
> ***George Lopez (Nov. 2006)*:** The Republican answer to illegal immigration is they want to build a wall 700 miles long and 20 ft. wide, okay, but "who you gonna get to build the wall?"

Comedians told us that it is often difficult to disprove independent creation, and that this difficulty makes many copyright lawsuits unlikely to succeed. The "Mexican border fence" joke, for example, is inspired by events in the news, and similar jokes based on this current event easily could have been formulated by many comedians working independently. We should note, however, that the barrier posed to a successful lawsuit may in many cases be overstated. In disputes involving longer, more detailed, more linguistically inventive jokes that are not so clearly inspired by current events (and therefore likely to be formulated by many comics working independently), judges and juries will be disposed to infer copying based on the relative unlikelihood of independent invention. The level of proof required to establish copying requires – as with every element of a copyright claim – only that the evidence suggest that copying is more likely than not.

3. *Foxworthy v. Custom Tees* – Copyright and Trademark Protection at the Margins

We have described the principal doctrinal barriers to successful copyright challenges to joke-stealing, and we have suggested that the consensus among comedians that copyright law is unhelpful may be somewhat too pessimistic. We will end our discussion of doctrine by examining the federal district court's opinion in *Foxworthy v. Custom Tees, Inc.,*[31] a case which suggests that some terrain remains for successful copyright claims arising from appropriation of jokes.

In *Foxworthy*, a district court granted a preliminary injunction against a t-shirt manufacturer's distribution of shirts that included versions of a number of "redneck" jokes told by comedian Jeff Foxworthy. This type of joke is Foxworthy's stock-in-trade. He has written scores, all following a similar form. To wit:

> -You might be a redneck if ... your dog and your wallet are both on a chain.

The defendant t-shirt manufacturer copied a number of Foxworthy's jokes, changing the form by reversing the order of premise and punchline. (On one shirt, for example, the copy read "If you've ever financed a tattoo ... you might be a redneck.")

[31] 879 F. Supp. 1200 (N.D. Ga. 1995).

Foxworthy filed suit, contending that the t-shirts violated both his copyright and trademark rights.

It is worth a moment's pause to be precise about Foxworthy's claims. Foxworthy claimed a copyright only in the second part of each of his redneck jokes – e.g., "your dog and your wallet are both on a chain." With respect to the recurring first part of these jokes – i.e., "You might be a redneck if . . ." – Foxworthy claimed a common law *trademark* and asserted that defendants' t-shirts made use of the mark in a way likely to confuse consumers regarding the source of defendant's products (i.e., to lead consumers to believe the t-shirts were produced or sponsored by Foxworthy) in violation of § 43(a) of the Lanham Act.[32]

Copyright. The *Foxworthy* court, on a motion for preliminary injunction, spent most of its opinion discussing whether Foxworthy could state trademark claims – more on that shortly. The court's analysis of Foxworthy's copyright claim was relatively perfunctory, and most of it, however short, was devoted to the separate issue – not relevant for our immediate purposes – of whether Foxworthy's registration of a book compilation of his jokes was effectively a registration of the individual jokes sufficient under the copyright law to provide a basis for Foxworthy's filing suit. Notably, the *Foxworthy* court did not discuss whether the defendant could shelter within the idea-expression distinction. The doctrine did come up, but in the context of the court's analysis of the related but analytically distinct issue of whether Foxworthy's jokes were "original" expression meriting copyright protection. On that issue, the court answered in the affirmative. In doing so, however, it made clear that the idea-expression distinction would limit, at least to some extent, comics' ability to assert rights in their jokes:

> It must be stressed that, because ideas are not the stuff of copyrights, copyrights inhere in the expression used. Two painters painting the same scene each own a copyright in their paintings. Two news organizations covering the same event each own a copyright in the stories written by their reporters. As the *Feist* Court put it, "[o]thers may copy the underlying facts from the publication, but not the precise words used to present them." In the same way, two entertainers can tell the same joke, but neither entertainer can use the other's combination of words.[33]

In holding that the plaintiff was likely to prevail on his copyright claim, the *Foxworthy* court implicitly found that the defendant's re-ordering of the Foxworthy jokes did not change the protected "combination of words" enough to escape copyright liability.

We cannot say anything with much confidence on the basis of one brief district court opinion granting a preliminary injunction. This is particularly true with respect to the court's holding that the defendant's versions of the jokes were substantially similar to Foxworthy's. Foxworthy claimed a copyright only on the punchlines, and the defendant barely changed the text of Foxworthy's punchlines. Therefore, even under the thinnest possible conception of Foxworthy's copyright – i.e., a right so thin

[32] 15 U.S.C. § 1125(a).

[33] 879 F. Supp. at 1218-1219.

that it protects only against virtually word-for-word appropriation – the defendant is still properly held liable.

Such a conclusion ignores, of course, the fact that the defendant reversed the order of the two pieces of the Foxworthy jokes. That is, he took Foxworthy's punchlines and re-positioned them to function as the premises of the jokes on the t-shirts. And Foxworthy's premises were re-purposed as the t-shirts' punchlines. The word order of each piece was largely preserved, but of course the piece that Foxworthy copyrighted – the punchline – functions differently as it was used by defendant. Does (or should) Foxworthy have a monopoly on the phrase "your dog and your wallet are both on a chain"? Even if the phrase is used in a distinct context? For example, were we to write a play, and in the description of the main character, write in the stage directions that "He keeps both his dog and his wallet on a chain", would we be liable for infringing Foxworthy's copyright? Perhaps the *Foxworthy* court should have taken the Copyright Office's advice and refused to recognize Foxworthy's copyright claim in his punchlines – each of which is a short phrase.

Still, the *Foxworthy* case is a good illustration of the indistinct frontier between unprotected ideas and protected expression. Foxworthy's jokes express ideas about the characteristics of a particular social group – for example, that members of the "redneck" class often learn to drive in the same pickup truck in which their parents conceive them. That the assertions may be fanciful and not meant to be taken as literally true does not mean that they are not ideas about the characteristics of members of the class. They are, in fact, specific instantiations of Foxworthy's more generalized (and hostile, or perhaps self-hating) ideas about the social class: i.e., about their loose sexual mores, their bad health; their poor education; their sartorial missteps. There are many ways to express these ideas, as Foxworthy's own production of scores of similarly-themed jokes illustrates.

Trademark. *Foxworthy* also featured a trademark claim that the defendant's use of the "tagline" - "You might be a redneck if . . ." – resulted in consumer confusion regarding the source of defendant's goods in violation of § 43(a) of the Lanham Act. The court held, on a motion for preliminary injunction, that Foxworthy was likely to prevail on this claim. "You might be a redneck if . . ." had, the court held, attained secondary meaning because it had become the tagline by which plaintiff Foxworthy was widely known.

The success of Foxworthy's trademark argument signifies little, for it is the peculiarities of Foxworthy's humor, and not any unexpected breadth in trademark's coverage of jokes, that is the story in *Foxworthy*. Foxworthy's "redneck" tagline was protectable as a trademark because he had built a large part of his act – at least in the early part of his career – on persistent repetition of this tagline. That is a narrow comedic vein, and one which few comedians can possibly replicate. Most comics do not have a "stock in trade" as specific as Foxworthy's – accordingly, trademark is of little salience for most comics.

II. Social Norms Regulating Appropriation Among Stand-Up Comedians

A. Appropriation and the History of Stand-Up Comedy

We have seen that formal copyright law plays little role in regulating appropriation among stand-up comics. In this section we will trace the growth of a strong norm among stand-up comedians that works to limit appropriation of other comics' creative material. In Part II.B., we will describe the norms system operating among current-day comedians. First, however, we look back at earlier phases in the development of stand-up comedy – the vaudeville and post-vaudeville periods stretching from the late-19th century to the mid-20th century. These periods were characterized by a regime of relative free appropriation among stand-up comedians, and the absence of any strong norm against joke-stealing. At the end of this Part, we will offer some observations on the likely reasons for the shift within the stand-up community away from free appropriation and toward a strong and vigorously enforced system of informal rules that stand in for the formal intellectual property law.

1. Vaudeville, Burlesque and Minstrelsy

The roots of American stand-up comedy can be traced back to variety theater and especially vaudeville,[34] America's primary form of entertainment in the late 19th and early 20th century.[35] A vaudeville show consisted of a collection of independent (and typically short) presentations of singing, dancing, juggling, acrobatics, magic, animal performances, pantomime, and comedy.[36] Comedy in vaudeville was substantially in a theatre format – i.e., presented with the "fourth wall" up, for example as a short, one-act play, or a comedic skit by two or more actors. Within a particular presentation, comic elements would often be intertwined with dance or singing,[37] and occasionally with other talents such as magic or throwing lasso.

Initially, the closest vaudeville came to pure stand-up was in the form of the storyteller, a comedic monologist. Some storytellers would take advantage of opportunities to ad-lib or respond to hecklers with short comic bits; it is, however, difficult to assess how prevalent pure joke-telling was in vaudeville. We could find only two passing references – to Marshall P. Wilder and Jack Benny – who told funny monologues on stage but would also do vaudeville acts that consisted wholly or mostly of joke-telling.[38] Although it is almost certain that they were not the only specialist joke-tellers working a vaudeville circuit, we have found many more references to vaudeville comedy delivered by way of monologues, skits, and comic play-acts, which suggests to us that pure joke-telling – i.e., a form closer to modern

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[34] *See, e.g.*, 1 VAUDEVILLE OLD AND NEW, *supra* note 1, at xxx ("The comedy clubs of the last decades of the twentieth century were vaudeville without variety.").

[35] Vaudeville was the most successful and lasting form of variety theatre, was family-friendly, and targeted the middle and upper classes. Other formats included burlesque, which targeted the lower-middle classes, and transformed gradually from spoofs and class satire in the 1860's that ridiculed the upper classes to sexually suggestive humor in the late 19th century and early 20th century when the form transitioned to mostly male audiences, and minstrel, a form based on racial stereotype humor.

[36] *See, e.g.,* A Day at a Vaudeville Show!, http://youtube.com/watch?v=USJl-MfAyow (giving a sense of what one might have encountered going into a vaudeville show).

[37] *See, e.g.*, A Few Moments with Eddie Cantor, http://youtube.com/watch?v=9Mhpw7gb1fE.

[38] *See* http://www.bookrags.com/Jack_Benny (mentioning Benny's "vaudeville routine of one-liners"); http://www.loc.gov/exhibits/bobhope/bits.html (suggesting that Wilder "was notorious in his time for stealing jokes from other performers."); *Natural Selection: Gary Giddins on Comedy, Film, Music, and Books* 28 (suggesting that Benny was "raiding joke books for one-liners").

stand-up – was uncommon.[39] Nonetheless, in its last decade, vaudeville moved closer to stand-up by placing increasing emphasis on the character of the emcee.[40] The emcee's patter had to be brisk as to not slow down the desired quick flow of the vaudeville bill, and the short jokes he would use seem to have set the standard for post-vaudeville stand-up comics.[41]

Stand-up's early roots can also be traced back to minstrel, a variety show format based in racial stereotypes which was widely performed in America between the 1840's and the 1940's. Minstrel acts would script dedicated ad-lib moments for direct actor-audience communication: these spots often were used for telling quick jokes.[42] Burlesque was stand-up's third major precursor and involved – alongside entertainment aimed at a male audience – a mix of satiric and ribald humor.

Vaudeville, minstrel and burlesque humor was not, in general, tailored to specific performers. The emcee's jokes were mostly short gap-fillers between acts without a narrative thread connecting one joke to another. Minstrel performers were acting black-faced and their identities were not distinct or personalized: they were white men impersonating one of a number of stock black characters, a style of performance not much different from actors in *commedia dell'arte*.[43] Their performance was assessed according to how well it fit the stereotype that the audience expected would be portrayed.

We see evidence of joke-stealing – sharing or collective authorship might be better terms for the practice back then – dating from the very beginnings of vaudeville, burlesque and minstrel, and we see no significant evidence during this formative period of any powerful norm against appropriation. Rather, we see many instances of performers appropriating material from other performers. Vaudeville performers often reprised short acts from well-known plays, sang parts of operas or danced in the styles of the moment. Originality was not a priority. Indeed, vaudeville performers and companies felt free to appropriate popular material even from within the vaudeville form itself. The first comedy record to have sold over a million

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[39] http://www.loc.gov/exhibits/bobhope/bits.html. Wilder would organize jokes by topic.

[40] Initially, it would be one of the monologists or a singer that would take up hosting chores for the entire bill. *See* 1 VAUDEVILLE OLD AND NEW, *supra* note 1, at 355 ("EMCEE"). *See also id*. at 369, 371 ("FRANK FAY") ("Traditionally, vaudeville did not employ emcees, but in the waning years of big-time vaudeville, the novelty of having Fay, Florence Moore, Jack Benny, Georgie Jessel, Eddie Cantor, Julius Tannen, Lou Holtz, Benny Rubin or Jack Haley introduce the acts at the Palace Theatre, as well as perform their own, gave the box office a needed spike. [ ] Fay . . . did not simply introduce other acts. He toyed with them, engaged the audience and told stories between the acts; in short, he dominated the bill. So successful was he that other comics [such as Milton Berle and Jack Benny], whether they realized it or not, copied some of his bits, . . . handling the emcee chore much as Fay did, butting into acts and generally commanding the proceedings . . . . Fay also could handle a gag: 'Mayor Frank Hague promised to get the prostitutes out of Jersey City. He's a man of his word. Last night I saw him driving two of them to Philadelphia.'").

[41] 1 VAUDEVILLE OLD AND NEW, *supra* note 1, at 355 ("EMCEE").

[42] Telephone interview with Jerry Zolten, December 18, 2007. 2 VAUDEVILLE OLD AND NEW, *supra* note 1, at 771 ("MINSTRELSY") (noting that "[s]ome of the humor was topical, including comments about the issues and famous people of the day, or made specific reference to the city or town the show was playing."). Some minstrel jokes are still familiar, such as "Why does a chicken cross the road?" and "Why do firemen wear red suspenders?" *Id.* at 772.

[43] 2 VAUDEVILLE OLD AND NEW, *supra* note 1, at 772 ("MINSTRELSY").

copies,[44] *Cohen on the Telephone*, was based on burlesque routines revolving around misunderstandings that stem from a heavy, stereotyped Yiddish accent. The initial release was followed by a flock of exact imitations and derivative works (e.g., "*Cohen Phones the Health Department*" and "*Cohen Becomes a Citizen*") released by competing labels, and even two "Cohen" movies,[45] all within about a decade.[46] Although we can find no evidence of licensing, no lawsuits were filed, nor, as far as we can tell, threatened, although it is unimaginable that the record companies and film producers did not know about the existence of these other versions.[47]

Indeed, we could find only one complaint about stealing in vaudeville – apparently, Marshall Wilder was accused of stealing jokes.[48] But this accusation is the exception to the general norm – the vaudeville form appears to have incorporated a widespread practice of taking without permission.

If vaudeville performers could freely appropriate others' acts, then did competition drive price down below a level where originators could recoup their investment in the creation of new works? We could find no evidence of complaints in this vein. Perhaps one reason for the absence of evidence of harm from copying has to do with talent: obviously, some people could tell the same joke better. In the last days of vaudeville, we see the development in the medium of a star system – certain artists attracted large audiences and the wage differential in the vaudeville companies between the stars and the regulars grew substantially.

A second, and perhaps more important, reason is that most vaudeville theatres were part of vaudeville circuits, or chains. The different circuits, though rivals, cooperated in booking performers centrally through an arrangement known as the United Booking Office. The office not only solved the huge transaction costs (search and scheduling) between hundreds of vaudeville theatres and thousands of vaudeville performers traveling around the country, but also made sure to avoid problematic scheduling (e.g. two "*Cohen on the Telephone*" acts on the same bill or on different bills at the same location close in time). Of course, the United Booking Office was far from benign from the perspective of performers. The initiative was jointly owned and operated by vaudeville entrepreneurs, and it gave the circuit owners significant

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[44] *See, e.g.*, TIM GRACYK & FRANK HOFFMAN, POPULAR AMERICAN RECORDING PIONEERS 1895-1925, at 10 (2000) (suggesting that over two million copies were sold).

[45] *See, e.g.,* http://us.vdc.imdb.com/title/tt0490849/ (*Cohen on the Telephone*, 1923, 5 minutes). http://us.vdc.imdb.com/title/tt0844291/ (*Cohen on the Telephone*, 1929, 9 minutes).

[46] *See* Telephone interview with Jerry Zolten, December 18, 2007; Donald Weber, *The Jewish-American World of Gertrude Berg: The Goldbergs on Radio and Television, 1930-1950,* in JOYCE ANTLER, TALKING BACK: IMAGES OF JEWISH WOMEN IN AMERICAN POPULAR CULTURE 85, 89-90 (1998) (suggesting that the *Cohen on the Telephone* routine "drew on the long tradition of ethnic stereotypes from vaudeville routines to create comedy based on 'mis-hearing/mis-readings' of exchanges between a 'Jew comic' and his American interlocutor."); Jason Camlot, *Early Talking Books: Spoken Recordings and Recitation Anthologies, 1880-1920*, 6 BOOK HIST. 147, 163 (2003) ("The 'Cohen on the Telephone' piece was performed by various artists over the years, but always verbatim from the same script."). *See also* www.metafilter.com/58981/cohen-on-the-telephne; http://www.raeproductions.com/music/cohen.html.

[47] Also, a license is improbable (at least regarding the original "*Cohen on the Telephone*") since the different versions were identical – they all followed the same skit.

[48] *See* http://www.loc.gov/exhibits/bobhope/bits.html (Library of Congress exhibit detailing allegations against Wilder).

buy-side market power.[49] If a performer wanted to do an act in any place important, they would have to go through the UBO. The UBO's power to limit competition, however, may have been a factor in maintaining incentives to invest in new work – acts working in the same vein (i.e., potential originators and copyists) would be less likely to be placed into direct geographic and temporal competition within the regional circuits.

2. The Post-Vaudeville Era

Vaudeville declined in popularity during the late-twenties and early-thirties for various reasons, including the emergence of new media such as radio, film and later TV and the Great Depression. Vaudeville comedians and emcees moved to these new mediums, but also performed live in independent stand-up shows in nightclubs, casinos (located principally in Las Vegas) and hotels and resorts located around the country but concentrated in such areas as the upstate New York "Borscht Belt".

Comics like Milton Berle, Henny Youngman, Jack Benny and Bob Hope represent the transition from vaudeville (where comedians played a relatively minor role in the greater variety show) to a new form where stand-up comedy was offered, and consumed, not mixed with other forms of entertainment but as a stand-alone performance. Milton Berle played in vaudeville as a child, participating in a two-kid skit team, and later became a vaudeville star comedian and emcee. When he later did stand-up, he often performed in the vaudeville style, as the emcee of variety shows on the radio and TV. Henny Youngman was a vaudevillian violinist turned comedian – he spontaneously took center stage when one day the comedian called in sick. In his stand-up performances, he would hold a violin and occasionally play a few notes as he delivered another zinger. Like Youngman, Jack Benny started in vaudeville as a violinist and then evolved into a fiddle-monologist, a "fiddle-funologist" (a solo act combining funny violin tricks, singing and telling jokes), and then finally to a pure joke-teller.[50] Bob Hope started out as a vaudeville roleplayer, performing in dancing, singing, black face, and comedy acts. He found wider success later as a joke-telling vaudeville emcee.[51]

These performers carried with them into this post-vaudeville period much of the "vaudeville aesthetic"[52] – fast-paced gags, word-play, remnants of theatre (i.e., music, song, dance, and costumes), and physical humor. In place of vaudeville's emphasis on a variety of different acts, post-vaudeville comics created variety within the boundaries of their single act – i.e., they told strings of jokes that ranged over a wide variety of topics and had little narrative or thematic connection one to another. This style of humor – exemplified at first by figures like Jack Benny, Henny Youngman, Milton Berle, Bob Hope, and later in the performances of Phyllis Diller and Rodney Dangerfield – was the dominant form of stand-up between the late 1920's and the 1960's, and remains a secondary but still significant form of stand-up today.

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[49] 1 VAUDEVILLE OLD AND NEW, *supra* note 1, at xx-xxi.

[50] 1 VAUDEVILLE OLD AND NEW, *supra* note 1, at 87, 88-89 ("JACK BENNY"); http://findarticles.com/p/articles/mi_gx5229/is_2003/ai_n19144874.

[51] 1 VAUDEVILLE OLD AND NEW, *supra* note 1, at 524-26 ("BOB HOPE").

[52] *See* HENRY JENKINS, WHAT MADE PISTACHIO NUTS? EARLY SOUND COMEDY AND THE VAUDEVILLE AESTHETIC (1992).

The basic unit of humor in the post-vaudeville period was the joke, and comedians loaded scores of them into their quiver and shot them, rapid-fire, at the audience.[53] Phyllis Diller, perhaps the fastest worker in the post-vaudeville cohort, could keep up for her one-hour act a constant pace of 12 punchline deliveries a minute. The post-vaudeville comic worked to master the art of timing the audience and feeding them a new zinger (or perhaps more often a clinker) just as the laughs or groans from the previous joke were starting to wane.

Participants in this seminal era of standup functioned largely as joke compilers – they had to have a large number of jokes at hand. Not surprisingly, many post-vaudeville comics maintained significant joke archives. Phyllis Diller maintained an archive of over 50,000 jokes, carefully organized by topic. The Diller archive is now in storage at the Smithsonian in Washington, DC, where we were able to examine it. Approximately half of the jokes in Diller's file were obtained from one of the large group of writers Diller used. There is also evidence in the file suggesting that Diller appropriated – without payment – from other sources, including newspaper comic strips and comedy books. For example, a number of Diller's jokes about her dysfunctional marriage to her fictional husband "Fang" appear to have been inspired by a comic strip, "The Lockhorns", that Diller followed obsessively over the course of nearly a decade. (Indeed, the Diller files contain hundreds of "Lockhorns" panels cut out of newspapers and mounted on index cards.) Milton Berle also maintained a large joke file. He published only its crème-de-la-crème in two heavy volumes, which he had the chutzpah (as someone justifying his joke stealing habit by arguing that jokes are public property) to copyright. Bob Hope also maintained his own joke file, which he contributed upon his death to the Library of Congress.

In addition to maintaining a large stock of material, all of these performers used writers – they could not possibly come up with the huge mass of jokes they required for use on stage and on TV. Bob Hope hired dozens of writers over the years, and in an era where originality (or its appearance) was not as important as it is today to comedians, never tried to hide the fact that he had people writing for him. Jack Benny also hired writers, and admitted their existence publicly.[54] Benny was also among the first to learn that mass exposure of one's jokes – although a blessing – also necessitates constant supply of new material.[55]

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[53] In this sense, this quick-fire style differed markedly from vaudeville's comedic storytellers and their relatively relaxed style of telling jokes, whence the punch line was not the center of the routine, or indeed sometimes was absent altogether. *See, e.g.*, 2 VAUDEVILLE OLD AND NEW, *supra* note 1, at 1090, 1091 ("JULIUS TANNEN") (suggesting that the career of Tannen – built in large part on long vaudeville comedic monologues – faltered partly because audiences "wanted more of the gag-a-second younger comics"); *id.* at 1111 ("FRANK TINNEY") ("Tinney told bad jokes very well. He also took a very long time to tell them. There was his celebrated joke about the goat who did not have a nose. […] The laughs came as Frank tried to set up the joke and shepherd it to its conclusion."); *id.* at 1231-32 ("Ed Wynn") ("Ed Wynn never told a funny joke in his entire career. He was notorious for telling shaggy-dog stories that ended in bad rhymes, one of which ended, 'She is so stout she dresses to fascinate. She has ten hooks on her dress but she's so fat she can only fasten eight.'").

[54] http://www.jackbenny.org/biography/biography.htm (suggesting that Benny bought jokes as a comedian); http://en.wikipedia.org/wiki/Jack_Benny (see "writers"); ANTHONY SLIDE, THE ENCYCLOPEDIA OF VAUDEVILLE 31, 33 (1994) ("JACK BENNY") ("Benny was never great at ad-libbing… During one of his verbal bickerings with Fred Allen, he said, 'You wouldn't dare say that if my writers were here.'").

[55] *See* NATURAL SELECTION: GARY GIDDINS ON COMEDY, FILM, MUSIC, AND BOOKS 29 (2006) (Moving to radio from Vaudeville, Jack Benny "made a terrifying discovery. Radio consumed material

In this post-vaudeville era, bodily appropriation as well as the "refinement" of other comedians' materials was still prevalent, but we find the first signs of some concern with joke-stealing, although we have seen little evidence that the practice was viewed as a serious threat. Bob Hope was widely accused of stealing, and later moved to hiring writers instead. Ed Wynn gave Milton Berle the nickname "Thief of Bad Gags."[56] Berle openly admitted to a penchant for joke-stealing, and he made jokes about it – for example, Berle's famous gibe, made on stage at the Beverly Hills Friar's Club, that the prior act "was so funny I dropped my pencil". On radio, Berle suggested humorously that joke stealing was prevalent among top comedians of the time.[57] And Berle's description rings true. The famous 1940's Abbott and Costello "Who's on First?" routine, voted "Best Comedy Sketch of the 20th Century" by Time Magazine in 1999, was a refinement of the "Baseball Sketch" long performed by a number of vaudeville comics. (That did not stop Abbott and Costello from copyrighting their version of the sketch in 1944.) Jack Benny was accused of stealing jokes during the vaudeville era,[58] and then accused again later of stealing from Milton Berle. To this latter charge, Benny responded, "When you take a joke away from Milton Berle, it's not stealing, it's repossessing".[59]

3. The Rise of Persona-Driven Stand-Up

In the late 1950s and into the 1960s, stand-up comedy made a significant turn: A new generation of comedians began a less inhibited exploration of politics, race and sex as part of a more general move toward an increasingly personalized form of humor. Many comics shifted from the post-vaudeville one-liner style to monologues with a more distinct narrative thread linked to the individual comedian's distinctive persona.[60] Mort Sahl and Lenny Bruce were particularly influential in the

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faster than he could get it. A joke that might have worked for a whole season in vaud was good for only one night on radio.").

[56] *See, e.g.*, BOB HOPE, HAVE TUX, WILL TRAVEL: BOB HOPE'S OWN STORY 103 (2003) ("Milton Berle [ ] was the outstanding thief of bad gags in the history of show business. He kids himself about it now. But for all I know he's stealing gags from others about him stealing gags. In those days he was operating like the James Brothers. He'd steal anything he thought would get him a laugh if it wasn't nailed down. He was delightfully unabashed.").

[57] *See* http://blogs.salon.com/0003139/2004/02/22.html ("you say that I, Milton Berle […] steal from Bob Hope? You don't understand, that's just high finance…I take a joke from Bob Hope…Eddie Cantor takes it from me…Jack Carson takes it from Cantor…and I take it back from Carson…that's the way it operates, it's called *corn* exchange…") (containing transcript of The Milton Berle Show from January 10, 1948).

[58] *See* http://www.jackbenny.org/biography/biography.htm (suggesting that as a Vaudeville performer, Benny would be "occasionally stealing" the acts he performed.).

[59] *See* http://en.wikipedia.org/wiki/Milton_Berle.

[60] *See* STEVE MARTIN, BORN STANDING UP 109 (2007) ("In the late sixties, comedy was in transition. The older school told jokes and stories, punctuated with the drummer's rim shot. Of the new school, Bill Cosby – one of the first to tell stories you actually believed were true – and Bob Newhart – who startled everyone with innovative, low-key delivery and original material – had achieved icon status. George Carlin and Richard Pryor, [and Lenny Bruce were similarly among the new type of comedians.]"); JUDY CARTER, STAND-UP COMEDY: THE BOOK 3 (1989) (listing "Don't Tell Jokes" as "Secret #1" among the "Five Big Secrets to Making People Laugh"); CHARNA HALPERN & DEL CLOSE, TRUTH IN COMEDY: THE MANUAL OF IMPROVISATION 16 (2001) ("The freshest, most interesting

development of this new direction in stand-up. Sahl's act was explicitly political and intellectual, whereas Bruce's profanity-laced commentary pushed at social convention, racial bigotry, religious hypocrisy, and repressive sexual mores.

The descendants of Sahl and Bruce comprise the majority of working comedians today. And like those seminal artists, most of the current generation, which includes comics are different as Jerry Seinfeld, Chris Rock, Zac Gallifianakis, Jim Gaffigan, Cedric "The Entertainer", ANT, Dave Attell, Natasha Leggero, Patton Oswalt, George Lopez, Lewis Black, Carlos Mencia, Louis C.K., Margaret Cho, and Dave Chapelle, work within well-developed comic personae which are both constructed by and work to shape the content of their act.

Modern stand-up reflects greater emphasis, relative to the vaudeville and post-vaudeville periods, on three related elements of the stand-up form: *narrative*, *performance*, and *persona*. Comedic material now tends toward longer narrative jokes and sometimes include performative elements (e.g., Lewis Black's strange, disconnected gesturing and sputtering anger; Zac Gallifianakis's flat affect and meditative piano playing) that further personalize the material and reflect the comedian's individual point of view. The dominant trend, in other words, is a movement from the one-liner to a more discursive style with jokes woven into a persona-driven narrative monologue.

Of course, there remain a number of comedians – e.g., Jimmy Carr, Steven Wright, and the late Mitch Hedberg – who specialize in the older one-liner style. But even with modern purveyors of the one-liner, there is an emphasis on persona and performance – e.g., Steven Wright's monotonic delivery of nuggets of first-person surrealism,[61] or Mitch Hedberg's reliance on his overt stage fright, strange word emphases and paraprosdokian turns of phrase.[62]

Along with this shift in comedic practice we find a concomitant shift in the salience of joke-stealing as an issue within the community of stand-up comics. Comedians who rely, as the vaudeville and post-vaudeville comics did, on joke-telling, rather than comic monologue, are derided as "hacks". In sharp contrast to the vaudeville and post-vaudeville eras, stand-up today is not just about making your audience laugh. It is about bringing yourself – your thoughts, attitudes, beliefs – on stage, and taking the audience on a journey into you. At its highest form, present-day stand-up is not about pleasing or catering to the desires of the audience. Rather, it is about exposing the audience to an individual persona. As a consequence, originality is prized – indeed, it is arguably the first criterion by which comedians judge other comedians – and stealing is condemned. Still, although allegations of stealing are often made, comedians have not yet resorted to lawsuits to protect their original

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comedy is not based on mother-in-law jokes or Jack Nicholson impressions, but on exposing our own personalities").

[61] For example: "Curiosity killed the cat, but for a while I was a suspect."; "I went into this restaurant that serves you breakfast at any time, so I ordered French toast during the Renaissance."; "I spilled spot remover on my dog. Now he's gone."; and "I stayed up all night playing poker with tarot cards - I got a full house and four people died."

[62] A paraprosdokian is a figure of speech in which the latter part of the sentence or phrase is unexpected or surprising in a way that causes the listener or reader to reframe the meaning of the first part. Here are two examples from Hedberg: "I haven't slept for ten days, because that would be too long."; "I don't have a girlfriend, I just know a girl who would get really mad if she heard me say that."

material against appropriation. We now turn to the second reason why formal intellectual property law has remained quiescent – comedians' participation in a system of informal norms that support originality and discourage joke-stealing.

B. Appropriation and Social Norms Among Present-Day Comedians

We have conducted ten lengthy, structured interviews of working comics at various levels of the industry (i.e., from more to less well-known). These interviews were conducted by telephone; interviewees were promised anonymity and told that the names and details sufficient to indentify participants in specific incidents of joke-stealing would be kept confidential. We present here our findings from these interviews, which supplement what we were able to glean from press accounts and the existing literature on comedians and their craft.

Our interviewees spoke with one voice on the important elements of the norms system that they collectively describe. Where we found variance among the interviewees, we have noted that. In addition, the interviewees' descriptions of the norms system among stand-up comedians aligned powerfully with what we are able to observe directly – i.e., via the writings of comedians and comedy experts as well as publicized instances where comedians shame other comedians for instances of perceived joke-stealing.

In our interviews, we inquired into the practices of all of the important players in the market for stand-up comedy in responding to instances of joke-stealing. Our respondents were generally aware of the existence of copyright law and believed that the general rules of copyright applied to the particular form of creative work – the joke – at issue in their professional practice. Nonetheless, respondents widely agreed that copyright law and copyright lawsuits were, for the most part, irrelevant as a means of countering instances of joke-stealing. Several respondents stated that lawsuits were typically too expensive for the ordinary comic. This barrier standing alone would not deter the most financially successful comics from suing, but our interviews suggest that most comics consider lawsuits beyond their reach. We would note, also, that none of our respondents communicated any knowledge regarding the details of copyright law's powerful damages regime. None, in particular, were aware of the law's provision for the recovery of generous statutory damages and attorneys fees.

Aside from the respondents' concerns regarding the cost of lawsuits, there was also the view, widely held among the respondents, that copyright lawsuits were in most instances quite unlikely to succeed. Most respondents, when questioned about this, stated that often the originator would face substantial difficulty proving that another comic copied. These comments reflect the respondents' tacit (and perhaps somewhat overblown) but generally accurate understanding of a real barrier imposed by copyright doctrine to liability for joke-stealing: the difficulty of proving that a defendant copied a joke from the plaintiff, rather than deriving it independently.

Many respondents also noted that comics often appropriate not via literal copying, but by "rewriting". This observation has two implications. The first is that, as several respondents noted, skillful rewriting makes it difficult for an originator – or indeed a judge or jury – to know whether a comedian has appropriated a joke, or has created it

independently. Second, and perhaps more importantly, several respondents suggested that the re-writing of a joke may be an effective means to escape copyright liability. Rewriters often take the "idea" of a joke (i.e., its premise, expressed in a high level of generality), and then rework the expression of that idea. Such a strategy takes advantage of copyright law's distinction between ideas and expression, with protection reserved for the latter and the former given over to the domain of patent law (which, of course, tightly restricts protection only to novel, non-obvious and useful ideas).

Our interviews suggest that the views of participants in the comedy industry are generally aligned with what our analysis of copyright doctrine and the paucity of copyright lawsuits involving joke-stealing suggest: i.e., that copyright law does not play a significant role – at least directly – in regulating appropriation among comics. What emerged from our interviews instead was evidence of a system of norms, widely shared within the relatively small and close-knit community of comics, which works as an informal but nonetheless significant constraint on appropriation of comedians' material. What follows is a description of the norms system assembled from our interviews.

C. The Norm Against Appropriation

Our respondents agreed that there was a strong general norm among comics in favor of originality and against appropriation of others' material.[63] One comedian's characterization of the norms system was representative of what we heard throughout our interviews:

> [I]n terms of sheer numbers, it's a pretty small fraternity of people who make their living telling jokes. And so we kind of run into each other and see each other on TV and pass each other in clubs and hang out in New York together and you know, so there's nothing more taboo in the comedy world, there's no worse claim to make against somebody than "oh, he's a f**king thief" [. . . .]
>
> You know, there are a hand-full of guys [who] just have a reputation for being thieves and for the most part it's amazing to me, actually if you think about it, how rarely it happens, because it's so professionally useful. A joke is such – it's hard to really explain this – but, it's a series of words that makes a room full of strangers laugh out loud consistently: it's such a beautiful little gem. It comes along so rarely and it hopefully reveals something and it connects with them and it fits the voice and it's short and concise and relatable and gut-laugh funny and it has to be a lot of different things at the same time.
>
> So the development of those little phrases is a lot of work and when someone comes along and sort of lifts that idea from you and uses it, it's aggravating – it can't be described how aggravating it is. The thing that's amazing to me about it is it doesn't happen more often. Because the fraternity of comedy and the people who book comedy, they feel like a vested interest and so they also don't want to book someone who would steal jokes. Even once you're already really famous you really can't successfully run around and steal jokes

[63] *See, e.g.*, JUDY CARTER, THE COMEDY BIBLE 56 (2001) (suggesting "Thou shalt not covet thy neighbor's jokes, premises, or bit" to be the first of "The Comedy Bible's Ten Commandments").

> and have a career. It's amazing that's there's enough sort of self-policing within the system.

Given the significant investment that comics make in producing new material, and the importance of good material to their success, the existence of a strong and generally-applicable norm against joke-stealing is not surprising. And the norm tracks, at least in a general way, the legal content of section 106 of the Copyright Act, which conveys to comedians (in relevant part) exclusive rights – often notional, for reasons we have discussed – to reproduce, distribute, and publicly perform their jokes, and to create derivative works based on those jokes.[64] The coincidence between copyright law and stand-up comics' anti-appropriation norm is, however, far from perfect. We will discuss below particular instances where the norms system operating among stand-ups leads to property arrangements different from those set out in the formal law of copyright.

Enforcement. First, however, we pause to detail one recurrent theme of our interviews: the lengths to which comics will go to punish rivals who transgress the anti-appropriation norm. Repeatedly we were told by our interviewees that stand-up comedians monitor each other and, when they detect an instance of apparent joke-stealing, enforce a sort of "prison-gang justice". As one interviewee put it,

> They police each other. That's how it works. It's tribal. If you get a rep as a thief or a hack (as they call it), it can hurt your career. You're not going to work. They just cast you out. The funny original comics are the ones who keep working.

The most common, and most socially acceptable thing for a comedian to do when he thinks another has taken his bit is to confront the alleged appropriator directly, face to face. The aggrieved comedian would make his case and provide evidence for his claim, such as that he's been doing that joke for years, and that certain comedians watched him do it years ago. The accused party would then respond. Sometimes the accused would admit fault. (One instance that we heard about involved a comedian doing a joke his best friend wrote, an unintentional act of appropriation that he wasn't consciously aware of until confronted by that best friend. The abashed comic admitted taking his friend's joke (albeit unintentionally), and never did it again). Other times the accused comedian would suggest that he had independently created that joke and offer supporting evidence. The comedians would then try to reach some understanding – e.g., that they would perform the joke in different ways, or in different geographical areas, or that even though the targeted comic did not admit copying he would stop performing the bit. As one comedian explained to us,

> [W]hat you learn as a child is if you have a problem with someone you go and you talk to them. That's what you learn as a child. And that carries on through your adult life. And that's how I was raised. That's how all my friends were raised. I've had somebody whose done, sort or, like I said I'm a gay comedian so I'm a niche market which is why I make so much money or I've had so much success because I broke away from the crowd. Now what happens is if someone takes a joke from me it's so obvious because it's, everything I do has a gay slant to it, so a straight guy is never going to write this joke because they don't think the way that I do. So if somebody has a joke that sounds like mine it's typically another gay comic and I'll just go up to the person and say "hey,

[64] *See* 17 U.S.C. § 106.

> listen, I do this joke, that joke sounds a little bit similar," and then we talk it out. And they'll say blah, blah, blah. And then one of us will say, "all right I'll stop doing it." And that's that. It's done.

We heard many accounts of these confrontations, but our interviewees were adamant that instances of joke-stealing, and the confrontations that often follow them, are not very prevalent. From our interviews we got the sense that a comedian is unlikely to be a party to more than a very few confrontations in her entire career. When they occur, confrontations are, for the most part, brief, civil, and effective in putting an end to the dispute. But not always:

> The comic who originally wrote [the bit] will go right up to [the comic he believes stole from him] and say, "Hey, that's my material, and here's the freshness date – when I wrote it. I've been doing it for years and suddenly it's in your act and it has to be removed." About 90 percent of the comics will say, "OK, fine." But there is 10 percent out there who will say, "Oh yeah? Well, it's mine now." And then the only copyright protection you have is a quick upper cut.[65]

If at the end of such a confrontation a comedian is left unsatisfied he may seek to punish the perceived joke-stealer. There are several strategies that comedians use to punish joke-stealing rivals. One comedian pithily summarized the most common strategies:

> The guy [who thinks he's been stolen from] is going to try to get the [other comedian] banned from clubs. He's gonna bad mouth him. He is gonna turn other comics against him. The [other comedian] will be shunned.

Our interviewees echoed these views, some even more emphatically:

> If you steal jokes, [other comedians] will treat you like a leper, and they will also make phone calls to people who might give you work. You want to get a good rep coming up so that people will talk about you to the bookers for the TV shows and club dates. Comics help other comics get work on the road.

In addition to shunning and bad-mouthing, many of the comics we interviewed told us that they will refuse to appear in a comedy club on the same bill with a known joke-thief. A number of interviewees told us that they had made clear to comedy club booking agents that they would refuse to appear in the same evening's line-up with someone they believed had stolen their material, with the obvious purpose of discouraging clubs from booking the alleged thief. This can be, for the accused joke-stealer, a painful sanction. There are about eight stand-up comedians most nights on a bill in urban comedy clubs, and three comedians on an evening's bill in most clubs outside of major urban markets. If a more than trivial number of comedians refuse to share a bill with a perceived joke-stealer, it would severely hamper the latter's ability to work.

Our interviews suggested that bad-mouthing, shunning, and attempted blackballing are the most common retaliatory strategies. But comedians are nothing if not inventive. One comedian detailed a particularly interesting and original retaliatory strategy:

[65] *See* Dean Johnson, Stop! Thief!; Comics say they're getting a bad rap, BOSTON HERALD (August 14, 1998), 1998 WLNR 270264.

> I was working in a club in Akron. Six months later, at the same club, [another comedian] did 10 minutes of my act, verbatim. He had to have recorded it at my first show. I spoke to the owner. Then I went up on stage, and told the audience. I said to them, "just to prove it, I'll do the same 10 minutes, and unlike the previous guy I'll do it well." [The other comedian] was fired, and never worked again at that club.
>
> There are also, as we have described, occasional instances of physical violence.

Interviewees agreed that in most instances joke thieves (at least those whose thievery was obvious enough to be easily detectable) faced significant social sanction. In particular, interviewees suggested that allegations of stealing – especially those that appeared to have merit – could impair or destroy a comic's good reputation among his peers. Reputation in the community, comedians told us, is an important asset that, if depleted, could harm a comedian's chances of success. One comedian described the aftermath of a single widely-publicized accusation of joke-stealing directed against him:

> [The accusation] created a tremendous amount of damage as far as the respect factor I get from other comics . . . . And the truth of the matter is I had proof of me doing the joke before [the comedian from whom it was allegedly stolen]. I have a tape of it.

Interviewees also agreed that a significant portion of the community of comedians was involved in detection of and enforcement against joke stealing. Interviewees emphasized that the community of comedians was relatively small, close-knit, and "tribal", and that comics spent much time in each other's company when out on the road. On the typical stand-up bill there would be several comedians, and each would usually observe the material that the others are performing. Comedians watch each other for various reasons. The most obvious reason is self-interest: comedians observe other comedians to stay updated, learn techniques, see what other people are doing and get ideas for their own act. But they also observe other comedians in order to police joke appropriation.

Some interviewees also suggested that comedy booking agents had a role in enforcing the norm against appropriation, although opinion on this among the interviewees was mixed. For example, one comedian suggested that booking agents, many of them former comedians themselves, disdain joke thieves:

> The guys who book clubs, with a few exceptions, for the most part they want to book good comics doing good original jokes . . . . They don't want to book a guy who has stolen a joke. Very often people associated with the comedy business either used to be comics or they think of themselves as funny people and they like the business. There's not a lot of money for the most part in booking comedy or running a comedy club or doing some of the things that are associated with standup. And so for the most part those people do it for the love of the craft. And so again, there's sort of a built in network of folks who are trying to do the right thing.
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> I mean if it's a clear reputation [as a thief] and he's trying to book himself as the middle at the Funny Bone in Omaha, [the agent] who books the Funny Bone in Omaha is likely to have heard of this and not take his calls. It could very directly hurt his career. It might end his career if he's famous enough for doing it. It certainly will keep him down below the middle at Funny Bone

> level. Then he's going to end up telling jokes at [low-class] bars and one-nighters who have a comedy night on a Tuesday, you know. And then it's karaoke and the next night it's trivia night. Some guys wind up in that sort of a circuit.

Some interviewees suggested that certain comedy club owners were particularly sensitive to allegations of joke-stealing,[66] and would sometimes deny work to a joke-thief even where economic considerations counseled against such a course. For the most part, however, interviewees expected club owners to act in their short-term economic interest and ignore the allegation of joke-stealing.[67]

Keeping Enforcement Private. Enforcement actions are perceived as more legitimate the more they are private, personal and done within the comedic community. This point is reflected, among other things, in the rare instances in which confrontations over joke-stealing lead to violence. Physical violence as a response to joke-stealing is an outlier – even repeatedly aggrieved comedians rarely resort to it. Not only is it something removed from the average comedian's conduct, it is also a criminal offense. Paraphrasing one of our interviewees, it is not worth going to jail over a joke. Yet, the comedic community's reactions to reported incidents of violence are telling. The attackers apparently feel morally justified. George Lopez did not try to hide the fact that he physically attacked Carlos Mencia over joke stealing – he boasted about it publicly, as did at least one of the comics who attacked rival comedian Dan Kinno. Also telling is the victims' reaction. We found no evidence that Mencia and Kinno complained to the police. Kinno's reported reaction to the incident is apologetic regarding the use of others' material and devoid of any suggestion that the "intervention" was wrongful. And the comedic community's reaction to these unusual events is also (perhaps not surprisingly) acquiescent. A comedy blog commenting on the Kinno incident suggests that "[i]t's refreshing to see the boys in Boston stand up for their intellectual property… It's admirable that they look out for each other and it's entirely appropriate that they brought the hammer down on someone who so blatantly ignored the unwritten laws."

The preference for private, intra-community measures is also evident from a recent, much publicized enforcement action. One late Saturday night in February 2007, at The Comedy Store in L.A. – one of the nation's most important comedy clubs – Joe Rogan, a working comedian, chose to end his act by insulting Carlos Mencia. Referencing Mencia's alleged practice of joke stealing, Rogan denounced Mencia as "Carlos Menstealia." Mencia was in the audience,[68] and hastened to the stage to defend himself. Rogan recounted the details of Mencia's alleged stealing. Mencia denied copying others' jokes and replied that Rogan's attack was based on Rogan's jealousy of his success. A number of comics joined in the feud, for the most

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[66] *See also* Raju Mudhar, Nobody's laughing as comics launch lawsuit that seeks to protect origins of comedic content, TORONTO STAR (December 9, 2006), 2006 WLNR 21263386 ("If a comic uses a line in one of my clubs that I know isn't his, I warn him the first time and if there's a second time, I fire him") (quoting comedy club owner Mark Breslin).

[67] *See also* Steve Persall, Standing Up Just For Laughs, ST. PETERSBURG TIMES (September 20, 1991), 1991 WLNR 1951743 ("Comedy has gotten to the point where it's all about money. [] A promoter doesn't care if you're stealing somebody else's material.") (quoting comedian Earl Burks).

[68] Mencia was not on the bill that day. *See* http://www.youtube.com/watch?v=JruD1mkW5Ds&feature=related (interview with Pauly Shore, son of The Comedy Store owner and co-founder Mitzi Shore).

part siding with Rogan.[69] The incident gained much publicity, media attention, and a clip of the feud was put online and has been watched (to date) about three-quarters of a million times.[70]

Reaction to Rogan's public confrontation of Mencia were ambivalent. Some in the comedic community saluted Rogan for fighting joke-thievery, but others have criticized him for airing grievances publicly. Often, these two perspectives would be expressed simultaneously – for example, in this comment by comedian Pauly Shore:

> Joe is totally right . . . as far as people ripping material: you can't do that, . . . But then I also think that . . . people should kind of like keep stuff to themselves. But I think Joe likes to . . . keep it real . . . that's his thing. That's cool if that's how he feels. I respect someone who wants to keep it real like that.[71]

Similarly, comedy blog Sheckymagazine suggested that "action like Rogan's [ ] will keep us all more honest in the future,"[72] but has also warned of "the danger of airing such things too publicly, of broadcasting such grievances too widely and inviting certain parties (like the media!) in on the conversation. We're on record as saying that the aggrieved parties are better off going one-on-one with the alleged offenders."[73]

Limitations of the Norm Against Appropriation. We do not mean to suggest that the anti-appropriation norm is always observed, or that retaliation is always effective in instances of breach. Many of our interviewees stated that enforcement was relatively unlikely to succeed when the appropriator was a more popular comic than the originator. In such instances, attempting to enforce the norm by refusing to appear on a club bill with the alleged thief was, in the interviewees' view, not often likely to work.

Interviewees also suggested another limit to the enforceability of the anti-appropriation norm: it is not widely shared by the audience for stand-up comedy. Some interviewees suggested that audience members do not care at all about

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[69] *See* http://blog.joerogan.net/archives/110 (Rogan's blog entry for February 13, 2007 recounting the incident).

[70] *See* Joe Rogan and Carlos Mencia Fight, http://youtube.com/watch?v=5gVYfDCgYxk&feature=related (more than 314,000 views). *See also* Carlos Mencia Steals Jokes (Longer Clip), http://youtube.com/watch?v=qoQjzJWUvgk (more than 288,000 views); Carlos Mencia vs. Joe Rogan, http://youtube.com/watch?v=6nEH8H5BqWg (more than 57,000 views); Joe Rogan Fronts Out Carlos Mencia, http://youtube.com/watch?v=bx9E4nPUhaA&feature=related (more than 44,000 views); Carlos Mencia Stole More bits, gets CAUGHT ON AIR!!, http://www.youtube.com/watch?v=QDmaG1-H25M&feature=related (more than 690,000 views) (a radio show trying to mediate between Mencia and Rogan). The 0.75M count is as of the time of this writing, Dec. 14, 2007.

[71] *See* http://www.youtube.com/watch?v=JruD1mkW5Ds&feature=related 2:45-3:16 (interview with Pauly Shore).

[72] *See* Prosecutors will be violated, Sheckymagazine.com (February 15, 2007) at http://www.sheckymagazine.com/2007_02_01_archive.html.

[73] *See* Who steals from whom? Who cares?, Sheckymagazine.com at http://www.sheckymagazine.com/2007/11/who-steals-from-whom-who-cares.html.

originality – the audience is there, in this view, to drink, laugh and have a good time.[74] They are consuming stand-up as entertainment, not art. "Stand-up comedy," one comedian told us, "is the only art form with a two-drink minimum."

Some interviewees disagreed on this point, and suggested that some small portion (estimates ranged from 10-20%) of the stand-up audience are aficionados who care about originality and whose appreciation for and willingness to patronize a particular comic might be reduced by credible allegations of joke-stealing. One comedian noted that the aficionados can be useful in enforcing the norm against joke stealing. This comedian suggested that running afoul of this segment of the audience can hurt, for two reasons. First, if the aficionados stop coming, a comedian may not fill the room, and his stock falls as an asset to club owners and bookers. Second, the aficionados talk – especially online – and a reputation for joke-stealing can spread from the aficionados into the more casual consumer of stand-up.

In this regard, the recent spate of comic shaming videos on YouTube, including most prominently Joe Rogan's video shaming Carlos Mencia, is particularly interesting. Most comics do not at the moment expect audience pressure to have any role in disciplining joke-stealing. That said, the shaming videos posted on YouTube have been widely viewed and discussed, both by comics and the public. Like formal law, norms are subject to change, and Rogan and others may be engaged in a form of norm entrepreneurship in an attempt to recruit audience members to the task of disciplining joke-stealers.[75]

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[74] *See also* Jim Gedghan, Waiter, There's a Joke in My Soup, NEW YORK TIMES (August 20, 1989) ("[comedian Paul Provenza] says that while comics keep scrupulous score on who's a joke thief or who has an act that is uncomfortably similar to others, it seems audiences don't seem to notice.").

[75] Our interviewees described two additional potential limitations to the application of the norm against appropriation; namely, when an appropriating comedian provides public attribution, or when the appropriator makes a payment. We should emphasize, however, that these limitations, although widespread, are not universally acceptable.

First, respecting attribution: several comedians stated that attribution will sometimes excuse appropriation that otherwise would be treated as joke-stealing. Our research has uncovered some evidence that this may be true. For example, Bill Cosby admitted that he has performed other comedians' material – always with attribution – and repented not having done so only once. *See* Welkos, *supra* note 4. In the same vein, comedian Mike McDonald suggested that comics do not mind sharing their material if they get credit. "That's called, 'Being quoted,'", he said, "Then they're happy to do it." *See* Johnson, *supra* note 65.

Of course if this is correct, then comedians' norm excusing appropriation made with attribution – which reportedly is what the typical American thinks copyright is all about – *see* Karl Fogel, The Public's Perception of Copyright – Video Interviews with Randomly-Selected People in Chicago, at http://www.questioncopyright.org/public_perception_of_copyright (reporting that "most people [he interviewed] felt that copyright is mainly about credit, that is, about preventing plagiarism") – is markedly different than copyright law's formal attribution rule. In copyright law attribution does not excuse infringement; attribution is relevant only to the academic social norm concerning plagiarism. Copyright law provides an explicit right of attribution only to the authors of a narrow class of works of visual art. This right is rarely available, but when it applies it is enjoyed even if the author has sold the copyright. As far as jokes are concerned, the norm of attribution does not survive a sale of the joke.

In any event, it is clear that not all comedians believe that attribution is curative. Comedian Dan Kinno tried to excuse his appropriation of other comedians' material by suggesting that he had told the audience that the material was not his. In commenting on Kinno's subsequent beating by the aggrieved comedians, comedy blog Sheckymagazine suggests that joke stealing is inexcusable even when done with explicit attribution. *See* Brian McKim, Stolen Goods, Sheckymagazine.com, available at http://www.sheckymagazine.com/mckim/mck_0301.htm. *See also supra* text accompanying note 25

The Co-Development of the Anti-Appropriation Norm and Persona-Driven Comedy. We have no way yet to know whether the anti-appropriation norm is likely to spread from the small community of stand-up comedians to the larger audience for stand-up. It is important to note, however, that the anti-appropriation norm has in the past not always been particularly powerful even among stand-up comics. In particular, the norm does not appear to have been powerful during the vaudeville and post-vaudeville eras. The growth of an anti-appropriation norm makes sense given the differences between vaudeville/post-vaudeville and the modern era both in terms of the comedic product and its means of distribution. We have described the historical development of stand-up comedy, and the move from the vaudeville and post-vaudeville one-liner paradigm to the modern "persona-driven" comedian. This historical account suggests that over the past three-quarters century the comedic form has developed in several ways that together make appropriation more difficult. In the post-vaudeville era, the form of humor was the joke. The lack of legal protection for jokes, however, left comics unprotected. Over time, comedians have shifted the content of their acts from one-liners to comedic narrative. They have also come to rely more heavily on performative content – broadly, the manner in which the jokes are told.[76] And, perhaps most importantly, an increasing number of comedians have built their acts around comic material that is linked to a richly-constructed persona.[77] Put differently, these comics seek to create comic material that is "stamped" with the attributes of a complex persona that they develop over time by performing material that reflects a consistent tone and point of view.

This new style of comedy – built on a unique point of view, persona and character – brings several advantages to the comedian concerned with the possibility of appropriation. First, it makes stealing by a fellow comedian more costly, and thus less likely. When a joke, or an expression, grows out of and fits a particular point of view, another comedian can rarely take it as is. She would have to change it in order to fit it into her particular persona and point of view, which involves a cost. Second, having a joke tailored to a comedian's own persona makes detection by the audience easier should the material be appropriated by a rival comedian. When a joke is generic (e.g. a stock mother-in-law joke) the audience can rarely detect its source. However, a

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(suggesting that attribution does not excuse stealing). This latter conception of attribution is in line with current copyright law.

The other possible limitation on the application of the norm against appropriation may be the availability, in effect, of absolution via compliance with a form of liability rule – namely ex-post payment for the unauthorized use of a joke. We have found one notable example of this in widely-told stories about the very famous comedian Robin Williams. When accused of appropriating jokes or concepts, Williams has admitted that he would sometimes send out a check. *See* 39 PLAYBOY 57 (January 1, 1992), at 1992 WLNR 2644339 ("If I found out I used someone's line, I paid for it – way beyond the call.") (quoting Robin Williams); Paul Brownfield, A Warm-Up Act, L.A. TIMES (Sept. 19, 1999), 1999 WLNR 6676166 (reporting that Williams referred to himself as "The First Bank of Comedy" for having written out "checks to comics who demanded restitution for a one-liner or concept.").

[76] *See, e.g.*, JAMES MENDRINOS, THE COMPLETE IDIOT'S GUIDE TO COMEDY WRITING 78 (2004) ("Performers such as stand-up comics and actors have the visual advantage when it comes to defining their comedic voice.").

[77] *See* MENDRINOS, *supra* note 76, at 63 ("We try to discover how to avoid being typical and just like every other comedy writer out there. When we bring our own inner truth to the page, we are writing from a place so personal and unique that no other person can say the same thing in the same way.").

unique joke written for a certain stand-up, if told verbatim by another comic, can be associated with one or a small group of comedians. The association is not necessarily made by the audience, but rather by fellow comedians, who know the other comedian's material, can recognize or at least suspect adaptations, and have institutional memory. Creating a personalized rather than a generic joke has advantages from the perspective of its author – it makes appropriation and writing around costlier and thus less likely. One of our interviewees put the point this way:

> Yes, I must say I got at least three occurrences where I've seen people do one of my jokes and it happens less frequently now because I've become a comedian who's hard to copy. As I've grown as a comedian myself I have become more and more original. So if someone were to steal it nowadays it would be more obvious. Whereas I used to talk about more boring topics, like let's say I was making fun of being on the subway train and I then see someone do my subway train joke. It's very tough to say they're stealing because everybody talks about the subway. It's one of those hack themes. But nowadays I'm talking about social issues that came up last week that were in the news and I'm talking about them in a way that if someone were to copy my joke it would be very obvious. I could go up and say hey you did my joke word for word.
>
> The number one reason that I think I did it was, well, maybe two reasons, was to be unique. Because in order to be successful in standup comedy when you're fighting against a thousand other guys who all want the same—they want to be on the same shows. They want to be doing the same spot you're doing. I had to be something different. I realize if I'm telling the same topic, if I go on stage and I talk about the subway train and the next guy goes on stage and talks about subway trains, what's going to make me get that TV show and not him. And, so I realized that in order for me to be successful I needed to start talking about things that not everyone was talking about. And as a side effect that also makes it more difficult for people to steal from me, and made it more difficult for someone to accuse me of stealing some topic.
>
> So, it mainly was because I wanted to be unique and I wanted to be different and a good side effect was it made it quite difficult—like now my jokes are longer too. They used to be closer to one-liners meaning just set-up [and] punch line, and so if someone steals a set-up/punch line, it's one sentence. If they steal one sentence it's tough to say whether they stole that sentence from you because it's just one sentence. But now my jokes are much longer. They generally are two or three minutes long and made up of several paragraphs and so if someone were to steal it word for word it would be quite obvious. It would be incredibly obvious that they had stolen three paragraphs out of my act.

These characteristics of modern persona-driven stand-up help the social norms system operate effectively as an informal property system. Creating unique jokes increases competitors' cost of appropriation. It would be costlier for competitors to steal a joke when jokes have unique points of view relative to jokes that are generic. Similarly, it would be costlier to stitch together a new show by taking materials from ten different comedians with different points of view relative to a word where everybody told one-liners or otherwise generic jokes. Creating unique jokes also increases the likelihood that stealing will be detected. The more unique a joke is, the higher the chance fellow comedians will recognize its source in another comedian,

and the harder it would be for the stealer to argue, and convince others, that he had created the joke independently.

It is important to acknowledge that none of these strategies entirely prevent appropriation. They may each be used, however, in ways that make appropriation more apparent, difficult, expensive, and risky.

It is important also to note that we are not making a causal claim. We are not suggesting that the absence of effective legal protection has caused stand-up comedy to move toward longer narrative jokes, toward more performative content, or toward acts based on richly-developed comic persona. Although it is certainly possible that a concern with appropriation has played a role in comedy's move in these directions, there are undoubtedly also many broader cultural trends that have shaped the development of comedians' craft. Nor do we suggest that the history of stand-up comedy is properly characterized as a categorical shift from persona-less, performatively static, rapid-fire one-liner-artists to complexly narrative, performative, and persona-driven modern comedians. The historical shift in stand-up comedy is a matter of degree, not of kind. But this is all, for us, beside the point, for this argument is not about cause but about consequences. It is about describing and understanding how a thriving stand-up comedy market functions in practice when theory would predict rampant appropriation and little remuneration to creative expression. This "tailoring" of jokes to a comedian's individual and distinguishable persona works side by side with the norms system to reinforce and facilitate enforcement of comedians' informal property rights.

D. The "Own the Premise/Own the Joke" Norm

In addition to the general norm against appropriation, our respondents described several related norms that supplement and together help structure enforcement of the general norm against appropriation. These norms sometimes mimic, and sometimes depart from, the rules of formal copyright law.

One of the norms we heard about from respondents governs the question of authorship when more than one person is involved in the creation of a joke. Comics spend much time together in clubs and on the road, and they often work out new material in these settings in conversations with their peers. Our respondents stated that, absent some agreement to the contrary, a comic establishes ownership of a joke when he establishes a premise – even if the rest of the joke, including most importantly the punchline, is supplied by another comic.

This "own the premise/own the joke" norm produces a default rule of ownership different from those that would be created under the rules in formal copyright law governing the creation of authorship interests. U.S. copyright law provides for a default rule of *joint authorship* when a work is prepared by more than one author "with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[78] If joint authorship exists, the authors of the "joint work" are recognized as the co-owners of the copyright in that work. The contributions required to form a joint work must be original expression, and not merely ideas. Thus, in an instance where one comic contributes a premise that is nothing more specific than a general idea, and another formulates the particular

[78] 17 U.S.C. 101.

expression of the joke, then formal copyright law would grant ownership to the second. The existing norm, however, grants ownership to the first. And in the ordinary situation where both the first and second comic contribute copyrightable expression to the joke, the copyright law would create joint authorship and consequent tenancy in common. The norm concentrates ownership in one contributor.

This rule is distinct from the default of the copyright law – and, importantly, the path taken by stand-up's norms system is likely to be much more efficiently aligned both with the economics of the market in jokes and with the norm against appropriation. First, joint ownership of jokes is likely inefficient because the cost of determining and then allocating rents would overwhelm any benefits that might accrue from joint ownership. A modern comedian's act typically mixes together a large number of jokes and comic routines, and, because the comedian does not get paid "per joke" but rather for his routine as a whole, determining the value of any particular piece of the comedian's act is likely to prove difficult and uncertain. This is not to say that such allocation could not be done, at least theoretically. We see, as a model, copyright cases calculating various forms of direct and indirect rents arising from an infringing derivative work, and then estimating the percentage of those rents attributable to the infringing portions of the derivative work, as opposed to the non-infringing portions.[79] But for the overwhelming majority of cases, the expected rents from a joke would not bear the significant costs (estimation, monitoring) of allocation.

Second, and perhaps more importantly, joint ownership is simply incompatible with the functioning of the norms system. Enforcement of comedians' norm against appropriation would be substantially more difficult if the system produced a large number of false positives – i.e., allegations of joke-stealing that turned out to be untrue. The risk of false positives is already present; many instances of apparent joke-stealing may be cases of parallel and independent development. That risk might, however, be raised substantially if comedians followed the default rule of joint ownership set out in the formal copyright law. In such an instance, comedians frequently would share rights in jokes as joint tenants. If both owners set about exploiting their property, the norms system, to the extent it depends on the observations of third-party comedians, would generate more false positives, and the increase in false positives might raise the cost of enforcement and threaten the norms system's continued viability.[80]

E. The "Sponsorship" And "Alienation of Ownership" Norms

Our respondents detailed two related but distinct norms within the stand-up comedy domain regarding ownership of works created for payment. First, comedians agreed that writers hired to create jokes for a comedian understand, absent an explicit arrangement to the contrary, that they have no ownership interest in the work created. This norm differs from the formal "work-made-for-hire" rules in U.S. copyright law. Under those provisions, copyright in a work arises in its author, unless (a) the work is

[79] *See, e.g.*, Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 886 F.2d 1545 (9th Cir. 1989).

[80] On the myriad shifts in behavior, technology, and incentives that may weaken an informal IP system, see Rochelle Dreyfuss, *Fragile Equilibria*, VA. L. REV. IN BRIEF (2007), at http://www.virginialawreview.org/inbrief.php?s=inbrief&p=2007/01/22/dreyfuss.

"prepared by an employee within the scope of his or her employment",[81] or (b) the work is "specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work . . . [or] as a compilation, . . . *if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.*[82]

To determine whether a work is made by an employee within the scope of his employment, and thereby a work-made-for-hire under the first branch of the statutory definition, courts inquire into the typical factors that the common law employs to separate employees (whose works are owned by their employer) from independent contractors (who obtain initial ownership of the works they create). In *CCNV v. Reid*,[83] the Supreme Court considered such factors as the degree of control by the employer over the work (i.e., whether the employer may determine how the work is done, has the work done at the employer's location, and provides equipment or other means to create work); the control by the employer over the author (i.e., whether the employer controls the author's schedule in creating work, has the right to have the author perform other assignments, determines the method of payment, or has the right to hire the author's assistants); and the status and conduct of the employer (i.e.., whether the employer is in business to produce such works, provides the author with benefits, and/or withholds tax from the author's payment). The gravamen of these factors is an assessment of whether the author is in fact a regular, salaried employee of the person claiming ownership of work via the work-made-for-hire rules, or whether the author is merely an independent contractor and therefore the employer, though perhaps entitled to a license to use the work he has sponsored, does not own the copyright in that work.

In contrast to the categories of "employee" vs. "independent contractor" that are relevant under the formal rules of copyright law, the norm at work among stand-up comics treats all works created for use by another comic as the property of the sponsor, rather than the author. This is true regardless of whether the writer is a formal employee (rare) or an independent contractor (the norm). This is also true regardless of whether the criteria of the second branch of copyright's work-made-for-hire rule are met – i.e., whether the work falls into one of the named categories, and whether the transaction is memorialized by a written contract signed by both parties.

It is worth pausing a moment to consider how different the informal norm governing work-made-for-hire in this particular instance is from the formal rule in copyright law. The formal copyright rule is structured as a strong default rule preserving the independent author's ownership of copyright, even for works sponsored by another. The norm among stand-up comics, on the other hand, is structured as a default rule establishing property rights in the sponsor – in effect treating as employees a large number of authors who would never qualify as such under the rules of copyright law. For these reasons, we refer to this as the "sponsorship" norm.

Relatedly, our respondents agreed on another norm governing transactions in jokes – viz., that in selling a joke to a rival the originator divests himself of the joke, and retains no right to perform it or to otherwise use it (e.g., by creating a derivative

[81] 17 U.S.C. 101.

[82] *Id.* (emphasis supplied).

[83] 490 U.S. 730 (1989).

work). We call this the "alienation of ownership" norm. And again, this norm operating among stand-up comedians is quite different from the default rules of formal copyright law. Under the copyright law provisions structuring transfers, transactions transferring an interest in a creative work are construed as non-exclusive licenses, unless the transfer is denominated in a written instrument (signed by the transferor) as a transfer of the entire copyright interest or as an exclusive license.[84] These copyright law arrangements are, again, structured as a strong default rule preserving ownership in the work's author. In contrast, the norm among stand-up comics appears to follow a default rule favoring alienation of ownership. In the words of one of our interviewees,

> [When I buy a joke,] it's mine, lock, stock and barrel. He can't perform them and my . . . oral agreement with my writers is you can't even tell anybody that you wrote the joke. You can say on a resume that you write for me but you cannot say specifically what jokes you have written for me.

One possible explanation for the divergence between copyright law and the "sponsorship" and "alienation of ownership" norms may be found in different conceptions at work in the copyright law and the stand-up community regarding the power of buyers and sellers in transactions over creative works. Whereas transactions between rival comics are, in general, transactions between parties of roughly equal bargaining power, in the markets that are the traditional focus of copyright – music, motion pictures, commercial book publishing – often transactions are between an individual author and a corporate giant. Copyright law structures transactions to protect the weaker party, but of course this protection comes at the expense of producing a written instrument for each exclusive license or transfer of ownership. The "sponsorship" and "alienation of ownership" norms flip the default rule, a sensible course given the rough equality of bargaining power.

A deeper explanation may be found in the inherent limitations of the norms system, as compared with formal law. One important difference between formal IP law and comedians' IP norms is the relative diversity of both property rights and contractual arrangements that are cognizable under the formal law, versus the virtual uniformity of both property rights and contractual arrangements recognized by the norms system. In a notable article, Thomas Merrill and Henry Smith describe the common law principle that limits property rights to a small number of recognized forms – a principle that functions only as a barely-articulated background rule in the common law, but which Merrill and Smith identify as functionally equivalent to the better-understood civil law rule of the "numerus clausus" (i.e., "the number is closed").[85]

The function of the numerus clausus principle is to strike a balance between two competing interests. The first is in permitting the customization of property rights,

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[84] *See* 17 U.S.C. § 204(a) ("A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent."). *See also* 17 U.S.C. § 101 ("A 'transfer of copyright ownership' is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.")

[85] *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

which can lead to more efficient allocation of resources both in the construction of initial entitlements, and then in transacting in the entitlements once created. This interest suggests that the different forms of property rights should multiply. The second interest, however, pulls in the opposite direction. Customization of property rights creates additional information costs: a greater number of possible rights creates uncertainty in others considering either how to avoid transgressing others' property rights or whether to acquire same. Merrill and Smith elaborate:

> By permitting a significant number of different forms of property but forbidding courts to recognize new ones, the numerus clausus strikes a balance between the proliferation of property forms, on the one hand, and excessive rigidity on the other. Proliferation is a problem because third parties must ascertain the legal dimensions of property rights in order to avoid violating the rights of others and to assess whether to acquire the rights of others. Permitting free customization of new forms of property would impose significant external costs on third parties in the form of higher measurement costs. On the other hand, insisting on a "one size fits all" system of property rights would frustrate those legitimate objectives that can be achieved only by using different property rights that fall short of full ownership. Optimal standardization is the solution, and the numerus clausus moves the legal system closer to the optimum, although we do not claim it generates a perfect mix of forms.

As Merrill and Smith note, whereas the numerus clausus principle sharply limits the forms of ownership recognizable in real property (the fee simple, the defeasible fee simple, the life estate, and the lease), it is relatively weak in the area of intellectual property. IP rights come in a greater variety of major forms, including utility patents, design patents, plant patents, plant variety protection certificates, federal and common law copyrights, federal sui generis rights for the design of boat hulls and microprocessor mask works, federal and common law trademarks and trade dress, common law trade secrets, and state law rights of publicity[86] and rights against misappropriation[87]. Importantly, these broad forms are capable of very substantial additional diversification through licensing. Neither IP law itself nor potentially limiting external law (e.g., antitrust) imposes substantial limitations on a rightsholder's ability to sub-divide rights, whether among licensees in different geographic or product markets, or respecting different time periods, media or subject-matter. Additionally, although the law is unsettled, some courts have held, in cases involving the enforceability of copyright licenses, that parties may alter the contours of the copyright right by agreement – for example, by providing in a license agreement that the licensee surrenders his right to make fair uses that would otherwise be permitted under the copyright law. In these instances, the parties to a license effectively create a right in the licensor that differs from the right granted under the copyright law. Such agreements effectively add additional forms of the property right to the numerus clausus, forms which courts have for the most part recognized.

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[86] *See generally* J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY (1999) (limning the contours of the "right of publicity").

[87] *See e.g.*, Bd. of Trade v. Dow Jones & Co., 456 N.E.2d 84 (Ill. 1983). *See also* Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411, 422 (1983).

We would not suggest that the weak numerus clausus we find in formal IP law strikes an ideal balance between efficient customization of property rights and the information costs that customization imposes. Indeed, there are features of the formal IP law that suggest strongly that the numerus clausus has been pushed out of balance – for example, the wide overlap between the domains of copyright, trade dress, and design patent, and the courts' tolerance of plaintiffs asserting more than one form of IP right in the same work. That said, the norms system operating among stand-up comedians doesn't resemble any kind of optimal balance but instead imposes a "one size fits all" property regime. The "own the premise/own the joke", "sponsorship", and "alienation of ownership" norms all work to concentrate ownership in a single rightsholder and sharply limit the choices comedians have in structuring property rights. This is because enforcement in the norms system depends on the maintenance of the clearest possible rules regarding ownership. To the extent that joint ownership involves the possibility of performance by both owners, the functioning of the norms system would be frustrated: comedians monitoring for appropriation would detect false positives, and the enforcement regime might become inefficient enough to break down. The same defect would attend any attempt at non-exclusive licensing of jokes: to the extent that two rightsholders attempt to exploit the same property, the norms system would come under threat because it lacks any ability to distinguish between authorized use and unauthorized appropriation. The cost of false positives, in terms of enforcement actions against non-appropriating community members, could disrupt the norms system. And the informal system has responded by constructing property rights as an all or nothing proposition – a joke is owned by one or none; it cannot be owned by some or many.

III. Implications of Comedians' IP Norms for IP Theory

In this final section, we describe (briefly) two broad implications for the general theory of intellectual property that are posed by our observations regarding the IP norms system operating among stand-up comedians. We cannot explore each of these implications fully within the confines of a single article. We offer these discussions as a jumping off point for further work, both by ourselves and others.

A. Social Norms as an Overlooked Source of Incentive to Create

Intellectual property protection has its benefits, primarily the increase in creative output that results from the increased incentive to create. At the same time it has its costs, primarily the limitations imposed on other people's ability to copy, use and build upon intellectual property that they encounter. Perhaps the most important, and difficult, question in intellectual property policy is whether the benefits associated with intellectual property protections – in particular the patent and copyright laws, which are built on a paradigm of social welfare optimization – outweigh the concomitant cost. This is an exceedingly difficult question to address, due not least to the great diversity of subject matter – from motion pictures to shampoo bottle labels to computer software to antibiotics to photographs to expressed sequence tags (a fragment of genetic material useful as a marker for disease) – that come within the domain of the copyright and patent laws. Additionally, because the patent and copyright laws each apply essentially the same rules to all creative works within their domain, scholars and policymakers are not encouraged to think of IP's cost-benefit

tradeoff in terms of individual industries or creative practices, where the analysis might be more tractable.

That said, our thinking about IP's cost-benefit tradeoff has been enriched by the identification of a number of types of pecuniary and non-pecuniary incentives to create that may exist in the absence of formal IP protection.[88] If a non-IP incentive is active in a particular market or creative practice, the marginal benefit of legal protection would thus be only the added creativity that formal law may induce above and beyond that pre-existing baseline of incentives.

These non-IP incentives come in a variety of forms. Absent IP law, creators are sometimes able to profit during an exclusivity period enjoyed before competitor-copiers enter the market, perhaps by selling their intellectual products through contracts that include anti-copying provisions, or by employing anti-copying technological protection measures.[89] In other instances, creators simply consider the IP incentive scheme to be orthogonal to their incentives to engage in creativity. Some people create for non-pecuniary reasons such as a desire to spread their ideas,[90] or to gain prestige and celebrity.[91]

None of the foundational theoretical studies (as distinguished from the recent topical studies in IP law) acknowledges meaningfully the possibility that social norms can provide incentives to create. If an examination of comedians' practices suggests anything, it is that the failure to more fully explore the effect of social norms on incentives to create is a substantial elision. Comedians' social norms appear to affect incentives in a number of ways. First, they may provide (or enhance) non-pecuniary incentives to create. Such incentives may include the gratification of seeing people laugh and of having one's thoughts heard and appreciated, esteem from a comedians' professional community (peer comedians, club owners, booking agents, etc.), and enhanced public reputation and fame through media coverage and interviews. Social norms may also provide a pecuniary incentive, as higher esteem and reputation, and peer and public recognition of being original and funny often translate to commercial opportunities, ranging from working the stand-up circuit, to performing in resorts and corporate events, to writing for other comedians, sit-coms, speech-givers and movies, among others.

That social norms may provide substantial non-legal pecuniary and non-pecuniary incentives to create is not only of academic significance. Lawmakers should keep this factor in mind when they make IP policy decisions. For example, when lobbying groups approach Congress with complaints about rampant copying and demands to

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[88] *See, e.g.*, Robert. M. Hurt & Robert. M. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421 (1966); William. M. Landes & Richard. A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEG. STUD. 325 (1989); Michelle Boldrin & David K. Levine, *The Case Against Intellectual Property*, 92 AMERICAN ECONOMIC REVIEW PAPERS AND PROCEEDINGS 209 (2002); Stephen Breyer, *The Uneasy Case for Copyright: A Study in Copyright of Books, Photocopies and Computer Programs*, 84 HARV. L. REV. 281 (1970); Fritz Machlup & Edith Penrose, *The Patent Controversy in the Nineteenth Century*, 10 J. ECON. HIST. 1 (1950).

[89] *See, e.g.*, WILLIAM M. LANDES & RICHARD. A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 41-50 (2003) (listing nine pecuniary incentives to create absent formal copyright protection).

[90] *See, e.g.*, Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA (n.s.) 167, 168-69 (1934).

[91] *See, e.g.*, LANDES & POSNER, *supra* note 89, at 48.

beef up legal protections, legislatures should examine how the ratcheting up of legal protections is likely to interact with, strengthen, or perhaps (and more worrisomely) weaken, existing social norms governing appropriation – or, indeed, how legal protections might either encourage or interfere with the formation of new social norms favoring or disfavoring appropriation. Protection based on social norms surely has its costs (i.e. reputational or social sanctions may be ineffective against beginning, soon-to-retire, famous or misanthropic appropriating comedians; and aggrieved parties who must depend on community enforcement may sometimes be obliged to wait until the appropriating comedian had more than an occasional stealing habit), but legal protection has its costs too (costs that are at present prohibitively high for almost all comedians, and which include, for example, litigation costs, enforcement and administrative costs, and limitations on widespread use and improvement of comedic materials). In addition, legal protections are not guaranteed to work, a fact demonstrated by the widespread infringement that has played such a substantial role in the market for recorded music in the past decade.

Intellectual property scholars have analyzed at considerable length the growing gap in recent years between formal copyright law and informal norms relating to the propriety of appropriation – namely the fact that the law regards many activities that individuals ordinarily engage in, such as forwarding an email, as copyright infringements.[92] Against the backdrop of an expanding gap that undermines the law's effectiveness and legitimacy, stand-up comedy stands out as an outlier. In this area of creativity, social norms forestall thievery rather than promote it. One would thus wonder whether the introduction of legal protections would be likely, on balance, to further reduce incidents of joke stealing, or whether the opposite result would be achieved. Depending on the enforcement strategies that go along with the introduction of strengthened formal law, it is possible that a law/norms gap might be created in this area as well – for example, one might fear such a development if comedians began to use the formal law in an attempt (redolent of the RIAA's litigation campaign against file-sharers) to "sue their customers" for sharing copyrighted jokes on the internet or even for telling them in public.

The interaction between formal law and informal norms governing appropriation is complex. Formal law may strengthen norms against appropriation – perhaps by helping to create, or to reinforce, agreement within the creative community that appropriation of a particular creative product is unethical or immoral. But it is also possible that effective norms sometimes thrive in the absence of formal law, and may even depend on that absence. For example, the imposition of formal rules that are perceived as illegitimate because out of step with pre-existing beliefs about the harmlessness of appropriation, or formal rules which impose penalties perceived to be out of proportion to expected harms, may act to erode informal norms against appropriation. In such cases, augmenting informal norms with formal protections may not be prudent, as the presence of legal sanctions may crowd out informal sanctions and their effectiveness.

In short, policy makers would be wise to keep in mind that a norms-based system regulating the ownership and exchange of creative material may be superior to one that is exclusively law-based. It is especially important to understand how social norms may act to limit appropriation in light of the existing research suggesting that at

[92] For a recent formulation of the gap, see, e.g., John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537 (2007).

least in some cases, the introduction of legal protections and sanctions reduces the probability that individuals will impose and abide by social norms.[93] Currently, the social norms foundation of property rights in jokes recruits the community in the process of enforcement: comedians who are present in a comedy club performance look for "infringement" not only of their own material, but of others in the community and report and police violations. Sometimes comedians may even incur personal costs to enforce community norms and the "rights" of others, as the Rogan/Mencia incident demonstrates and as several of our interviewees also suggested.

If enforcement of property rights among stand-up comedians shifted toward use of formal law (perhaps following changes in the copyright laws intended to encourage the use of formal law by comedians), the costs of monitoring and enforcement might be much greater, and could even displace the cost-effective informal enforcement customs that have developed over decades. Importantly, the move to legal protection might be difficult to reverse if introduction of formal legal rules into the community of stand-up comics works to deaden comedians' current sense of responsibility for policing appropriation. Put differently, the introduction of more stringent formal property rules makes control of appropriation someone else's job.

That said, norms systems also have their defects – a fact we believe is evidenced by our investigation into the norms system governing appropriation among stand-up comedians. First, like formal IP law, norms-based regulation of jokes may err either by underprotecting or overprotecting creators. A norms-based system may, if it proves unable to discipline appropriators, provide inadequate protection, and in such an instance the absence of formal, legally enforceable protections – either because the formal protections are too expensive to use or because copyright law's current implementation of the idea/expression distinction would leave little protected – may lead to underinvestment in creative work.

But the opposite might be true as well, and the tendency of formal copyright law toward overprotection may even be exacerbated under the norms system we see operating among stand-up comedians. For example, under stand-up's norms system the term of protection afforded to jokes is perpetual – the comedians with whom we spoke suggested it would never be permissible to use someone else's joke. Current copyright law at least allows one to repeat another comedian's joke verbatim after the expiration of the (admittedly very long) statutory term. Another advantage of formal copyright law is that the rules are written down and publicly available. It would be a stretch to suggest that current copyright rules are readily understandable – the contours of the fair use doctrine, for example, are mysterious even to copyright experts. Yet, with formal law there is at least the promise of predictability – a copyright law reformed to provide clear rules to ordinary people might allow users to understand with some precision in advance where the line lies between permitted "taking inspiration" and proscribed appropriation. In contrast, norms systems are

[93] *See* Stephan Pantjer, Non-Legal Sanctions, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS 1018-19 (Bouckaert & De Geest, eds.), available at http://encyclo.findlaw.com/0780book.pdf (summarizing literature that suggests that the introduction of legal sanctions may crowd out norm-based motivations to act). *See also* Ernst Fehr & Simon Gächter, Do Incentive Contracts Crowd Out Voluntary Cooperation?, (Inst. for Empirical Research in Econ., Univ. of Zurich, Working Paper No. 34, 2002), available at http://papers.ssrn.com/abstract_id=229047; http://encyclo.findlaw.com/0780book.pdf (an experiment in which the introduction of legal sanctions was shown to lessen reciprocity and performance between buyers and sellers); RICHARD EPSTEIN, PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD ch. 2 (2002).

inherently indistinct. The exact shape and strength of comedians' norm against appropriation is difficult to know, and this uncertainty may spur risk-aversion. Comedians' unwillingness to risk their reputation on material that may conceivably be perceived as a norms violation is likely further magnified by the absence, in comedians' norms system, of any concept of fair use.[94]

Another worrisome aspect of the norms-based property system in stand-up is the occasional resort to violence as a means of enforcement. An advantage of legal protections is that disputes are channeled to courts and adjudicated by an impartial judge or jury. We generally believe that people should not take the law into their own hands, and certainly not physically harm others. Sometimes we hear about enforcement efforts by comedians that sound uncomfortably like mob justice.[95] And even in the absence of violence, the ways in which norms are enforced by comedians does not always conform to our notions of due process. There is no neutral fact-finder in the norms system, and there are no appeals (although one incident in which a joke-thievery charge was retracted with an apology was reported[96]). Reputational harm may also last forever and be out of proportion to the violation. Comedian Robin Williams has admitted that he avoids entering comedy clubs because he does not want to ever again be subject to a charge of joke-stealing.[97] If Williams, winner of three Grammy awards for best comedy album[98] and an outstanding performer, is unable to

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[94] We had hints in our interviews of one aspect of the norms system that had fair-use-like characteristics. This has to do with appropriation by young comedians. A variety of sources, including several interviewees and comedy "how-to" manuals, suggested that young comedians need some greater space to experiment on their way to finding their own voice: i.e., many comedians start out by appropriating material and aspect of persona from other, more accomplished, comedians until they find the comedic voice and original material that works best for them. We heard from several interviewees that there is some tolerance for this practice, and that established comedians tend to excuse and not pursue too vigorously violations by novices. The rationale offered was consistent – no one will be able to build a career on only copying, and so unless the novice succeeds in finding his own voice and material, his career will end of its own accord.

[95] *See* James Sherwood, Is stealing punch lines worth a punch-up?, The Guardian (July 26, 2007), available at http://blogs.guardian.co.uk/theatre/2007/07/is_stealing_punch_lines_worth.html (warning against "mob justice"); Brownfield, *supra* note 75 ("Accusing someone of stealing is a popular blood sport among comics.").

[96] *See* Steve Bennett, You thieving bast- oh, my mistake (May 23, 2005), available at http://www.bbc.co.uk/comedy/news/2005/05/23/19513.shtml (reporting that U.K. comedian Mac Star, who had publicly accused fellow comedian Dara O'Brian of stealing a Hitler rock-paper-scissors gag, later conceded the possibility of independent creation and apologized).

[97] *See* 39 PLAYBOY 57 (January 1, 1992), at 1992 WLNR 2644339 ("Yeah, I hung out in clubs eight hours a night, improvising with people, playing with them, doing routines. And I heard some lines once in a while and I used some lines on talk shows accidentally. That's what got me that reputation and that's why I'm fu**ing fed up with it. []To say that I go out and look for people's material is bulls**t and f**ked. And I'm tired of taking the rap for it. [] I avoid anything to do with clubs. People keep saying, 'Why don't you do The Comedy Store?' I don't want to go back and get that rap again from anybody. [] Another thing is, I don't want to take anybody else's time. I got tired of [other comics] giving me looks, like, what the f**k are you doing here?") (quoting Robin Williams's response to accusations that he had stolen jokes); Brownfield, *supra* note 75 ("I used to love to watch other people, just because I love comedy [] But now I don't. I don't go into clubs. I can't. I don't want to take a chance that if sometime I'm on a talk show, if in a moment of riffing, something comes out that might be somebody else's--I don't want to take that, I don't want to hear that from anybody. [] Was it a constant practice? [] No. Did it become a myth? Yeah. I would hear [a joke] and it would register in the back of my subconscious. And then sometimes it'll just pop out, and you go, 'Oh, [expletive].' You have to be very careful.") (quoting Robin Williams).

[98] *See* http://en.wikipedia.org/wiki/Grammy_Award_for_Best_Comedy_Album.

enter comedy clubs ten years after he has been accused of joke-stealing, then we might worry that on occasion the norms system over-deters.

In any event, the inherent fuzziness of the norms system came through in our interviews. For example, some comedians have suggested to us that jokes are protected at a relatively high level of generality – these respondents believe that if one comedian writes a joke that includes a distinctive element in its set-up (one instance given to us was a joke built around the idea of having sex in a church) others cannot write jokes that also include that device in the set-up. Such a rule would clearly grant protection beyond what copyright law currently provides. Although we lack the baseline to make a reliable determination – i.e., we do not know whether formal copyright law is itself under- or over-protective with respect to particular creative product at issue here – it is at least clear that stand-up's norms system contains features that point toward the possibility of over-protection.

B. The Emergence of Social Norms

A little over forty years ago, economist Harold Demsetz wrote a seminal article explaining the emergence of property systems.[99] Demsetz's powerful insight was that property systems emerge whenever the benefits of creating and maintaining a property rights system over a resource outweigh the costs of doing so. To illustrate his point, Demsetz used the seventeenth century emergence of property rights in land among the Montagnais Indians in the Labrador Peninsula. He related this emergence to the rising value of beavers. Before the advent of the fur trade, beavers were abundant relative to human needs, and there was no reason to allocate and enforce property rights in them. With the advent of the fur trade with Europe, however, allocating and enforcing property rights in beavers (and hunting areas) gave hunters an incentive to husband the stock and prevent the depletion that would have otherwise occurred. Generalizing from this example, Demsetz suggested that property rights are likely to emerge whenever resource value rises. A huge body of scholarship critiqued, refined, and extended Demsetz's insight.

Our description of comedians' system of IP norms suggests two extensions of the Demsetzian model. First, we see that over time there emerged among the community of stand-up comedians a social norms-based system of property rights. A seeming tolerance of appropriation during the vaudeville and post-vaudeville periods gives way to a strong norm against appropriation in the modern period of persona-driven stand-up. Demsetz's framework talks about precisely this kind of move from open access to some form of property, and scholars have already recognized that Demsetz's theory is silent on the type of property rights that would evolve – public (state) property, common property, or private property. The present study suggests that the Demsetzian insight does not explain whether any of the above is likely to emerge either by way of formal property rights or by way of social norms. Instead, our case study suggests, if one accepts the optimistic Demsetzian story that efficiency alone drives the emergence of property rights, that a norms-based property system will emerge whenever (1) resource value rises as to justify a move away from an open access regime, and (2) the net value of a norm-based property system is greater than that of a formal, legal property right system. If one operates under a more realistic

[99] *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

assumption that rent-seeking also drives the emergence of property rights, then social norms will be chosen over legal mechanisms if they provide the change entrepreneur with greater net benefits.

Second, our case study of IP norms among comedians suggests that changes in resource value are not the only factor driving a change in resource governance. A system of property rights in a resource may be desirable to establish if the resource will be worth more under a system of property rights relative to its value under an open-access regime. A move toward propertization may happen if the benefits of governing the resource under a property regime suddenly increase (as is the case in Demsetz's example), but also if the costs of running the resource under a property regime suddenly fall (as is the case with stand-up comedy). The emergence of proprietary norms in jokes happened alongside technological advance in the distribution of comedy, and we suggest that the two are connected.

The costs of detecting stealing in the vaudeville period were much greater than they are today. In vaudeville, comedians would often travel different circuits, and would rarely appear on the same bill (because a bill would aim for variety of acts and would feature only one comedian or emcee). It was therefore difficult for a comedian to learn that his jokes had been stolen by another comedian.[100] In contrast, today several comedians usually appear on a comedy club bill, such that what a comedian does at the comedy club level is observed by other comedians who know what fellow comedians are doing. As a result, it is less likely that stealing would go unnoticed.

On the level of both club and larger theatre performances, detection of stealing is also less expensive today because of widely-trafficked websites, such as YouTube, that offer audio and video clips of comedians' performances. Many stand-up performances are now recorded by comedians and audience members and posted online, which spreads awareness of a comic's material and helps to establish a date of creation. The posting of performance clips to the Internet may, in the future, develop into a form of defensive publication – defensive in the sense that if a dispute arises over potential joke-stealing the web-posting can be used to establish both temporal priority and the likelihood that the alleged joke-thief has seen and copied the originator's material, rather than formulating a similar bit independently. The Internet already has developed into an active forum for *offensive* publication – i.e., the posting of video and audio clips arguing that one comic or another has stolen (or has not stolen) jokes.

Relatedly, technology has also made it easier for the *audience* to detect stealing. The Internet thus creates the opportunity for norms entrepreneurs within the stand-up community to enlist the audience in enforcing anti-appropriation norms – we have mentioned that this may be the aim of comedians, like Joe Rogan, who engage in public shaming of perceived violators. Due to these technological developments, all of which act to lower the cost of detection, some form of property system in jokes is more appealing today relative to the vaudeville and post-vaudeville periods.

[100] *See* Welkos, *supra* note 4 (quoting Carl Reiner as saying that before the current stand-up era "comedians would work on different club circuits, so it was possible that they didn't know when someone was stealing their routines").

Conclusion

Intellectual property law does not protect effectively the intellectual creations of comedians. Conventional wisdom would have us believe that this entails a tragedy of commons and suboptimal supply of jokes. Our research makes us pause. We see an operating market. It seems to us that the stand-up industry has economized on the costs of the formal copyright system, and substituted an informal norms-based property regulatory system in its stead.

Is norms-based ordering of stand-up comedy superior to the extant legal system? From comedians' perspective, the answer seems to be yes. Comedians rely on the norms system, and they choose not to rely on the legal system. Answering this question from a social perspective is more difficult, but it would seem to us – under certain plausible assumptions – to come out the same way. If comedians recoup a greater return on effort under the social norms system, their comedic output will likely be greater and more diverse.

Is norms-based ordering superior to any conceivable legal regime that might apply to stand-up comedy? That question does not admit of a definitive answer. Our description of comedians' norms system suggests, however, that before recommending the reconfiguration of legal doctrine we must compare the costs and benefits of the two modes of regulation, or any combination thereof. We could readily think up copyright reforms that would make the formal law more attractive to comedians,[101] but we are not sure that any such reforms would result in a system of formal property rules superior to the informal rules that the currently-operating norms system provides.[102] The tale of stand up comedy at least cautions against the careless expansion of legal protections without consideration of the informal norms operating within a particular creative community, and without a good idea of the effect that legal protections would have on the norms system. Bolstering formal protections might reinforce comedians' existing norm against appropriation. Alternatively, it might erode norms that currently do much of the work in governing appropriation. Contrast the regulation of appropriation in stand-up comedy with that in popular music. Owners of music copyrights rely heavily on formal rights yet face a widespread appropriative ideology and practice. Stand-up comedians have little legal recourse, yet operate within a norms system that punishes thievery. We do not suggest that what works for stand-up can necessarily work for the rest of copyright law. We only suggest that formal IP law is not necessarily right for stand-up, or for every creative practice.

We hope that policymakers will take note: Respect for intellectual property rights may often be best enforced through formal intellectual property rules. But in some

[101] Among other things, we could reduce the cost of copyright registration, award attorneys' fee as a matter of course, increase statutory and other damages, require judges to use a higher-than-usual level of generality in applying the idea/expression dichotomy for non-literal infringement of plot lines, or abolish the "independent creation" defense.

[102] *Cf.* Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 UTAH L. REV. 789 (2007) (suggesting that recognizing an attribution right in copyright law would be desirable and moral, but concluding that the costs of formal protection outweigh their benefits, in light of, among other things, the availability and practice of voluntary attribution).

creative communities, property rights are most effectively promoted through respect for intellectual property norms. Our research suggests that the market for stand-up comedy is an example of a functioning norms system that induces substantial investment in the creation of new works. Whether norms systems are functioning in other creative communities, and whether they would be strengthened or threatened by the more vigorous enforcement of formal legal rules, is a subject for further study.