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## *ARTICLES*

### THERE'S NO FREE LAUGH (ANYMORE): THE EMERGENCE OF INTELLECTUAL PROPERTY NORMS AND THE TRANSFORMATION OF STAND-UP COMEDY

*Dotan Oliar and Christopher Sprigman\**

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One day Milton Berle and Henny Youngman were listening to Joey Bishop tell a particularly funny gag. “Gee, I wish I said that,” Berle whispered. “Don’t worry, Milton, [said Henny,] you will.”<sup>1</sup>

## INTRODUCTION

**M**AKING a living in stand-up comedy takes hard work. You spend most of your free time between performances writing and re-writing new material, ninety percent of which bombs when you first try it on stage. You take whatever is left, work the circuit night after night, play with words, change their order, weave pauses, gestures, and facial expressions here and there. You turn the merely pleasing into funny, and then funnier. One night, maybe a few months later, you have perfected your bit and it kills.<sup>2</sup> But then there is the ever-present danger that a rival comedian who sees your act will be tempted to avoid the hassle of writing new material by taking yours.

Comedians are not amused when their jokes are stolen, and for that reason we might expect joke-stealing disputes to ripen into lawsuits occasionally.<sup>3</sup> Copyright is the most relevant body of law; formally, it applies to jokes and comedic routines. Yet, we could not find even a single copyright infringement lawsuit between rival comedians.<sup>4</sup> The absence of lawsuits is not terribly surprising. For

<sup>1</sup> Melvin Helitzer, *Comedy Writing Secrets* 4 (1987).

<sup>2</sup> See Judy Carter, *Stand-Up Comedy: The Book*, at xxv (1989) (defining “I killed” to mean “I did great” in comic-speak); see also Ritch Shnyder & Mark Schiff, *I Killed: True Stories of the Road from America’s Top Comics* (2006).

<sup>3</sup> In this Article, we distinguish between “joke stealing” and “copyright infringement.” Each term relates to a system that defines a set of rights, determines what conduct violates them, and how violators are to be sanctioned. The former term, however, relates to comedians’ norms and the latter to intellectual property law.

<sup>4</sup> 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

reasons we will detail later, copyright law does not provide comedians with a cost effective way of protecting the essence of their creativity.<sup>5</sup>

Here we have a puzzle. Conventional intellectual property wisdom suggests that absent formal legal protection, there will be an inadequate provision of creative works, as authors and inventors would be unlikely to recoup their cost of creation. If there is no effective legal protection against joke theft, then why do thousands of stand-ups keep cranking out new material night after night?<sup>6</sup> And since they do, what lessons can we take away for IP theory and policy?

Having conducted a series of lengthy interviews with comics, we offer an answer: in stand-up comedy, social norms substitute for intellectual property law. These norms track copyright law at times: for example, the major norm at work is one against publicly performing another stand-up's joke or bit. More often than not, however, the norms deviate from copyright law's defaults: for example, whereas copyright protects expression but not ideas, comedians' norms protect expression as well as ideas. Or take the issue of authorship: under copyright law, two individuals who cooperate in creating a work are considered joint authors and owners of the work. In contrast, if one comedian comes up with a joke's premise and another thinks up the punchline, under comedians' norms of ownership, the first owns the joke and the latter has nothing. Taken as a whole, this norms system governs a wide array of issues

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book authors and publishers who are alleged to have appropriated comic material. See *infra* note 32 and accompanying text.

<sup>5</sup> See *infra* Part I (analyzing current legal protections available to comedians).

<sup>6</sup> The scholarship to date has simply observed the absence of copyright, assumed a market failure, and moved directly to recommending changes to formal law aimed at beefing up protection. See, e.g., Allen D. Madison, *The Uncopyrightability of Jokes*, 35 *San Diego L. Rev.* 111, 133–34 (1998) (lamenting the lack of protection for jokes and suggesting legislative change); Gayle Herman, *The Copyrightability of Jokes: "Take My Registration Deposit . . . Please!"* 6 *Hastings Comm. & Ent. L.J.* 391, 413, 421–22 (1983) (lamenting the lack of protection for jokes and suggesting that courts and Congress should do more to protect jokes); see also 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.”).

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that generally parallel those ordered by copyright law, namely authorship, ownership, transfer of rights, fair use and other exceptions to ownership.

These norms are not merely hortatory. They are enforced with sanctions that start with simple badmouthing and may escalate from refusals to work with an offending comedian up to threats of, and even actual, physical violence. These sanctions, while extra-legal, can cause serious reputational harm to an alleged joke-thief, and may substantially hamper a showbiz career. Hence norms-based sanctions deter joke-stealing. Using this informal system, comedians are able to assert ownership of jokes, regulate their use and transfer, impose sanctions on transgressors, and maintain substantial incentives to invest in new material.<sup>7</sup>

The comedians' norms system offers a number of lessons for IP theory and policy. Although the law and social norms movement is approximately two decades old, its insights have not yet penetrated deeply into the IP literature.<sup>8</sup> As comedians' norms-based intellectual property system shows, the lack of legal protection does not necessarily entail a market failure. Observing the mushrooming of comedy clubs around the nation and the present supply of comedy, and comparing the current level of comic theft to that in other copyright-based industries, we find no reason to suspect, absent more data, that the norms-system underperforms.

Our case study illustrates that the incentives to create provided by the IP system must be assessed not against some notional market failure, but rather against the preexisting (or potential) extra-legal norms, practices, and institutions that creative individuals would tend to establish and enforce using gossip, social and commercial exclusion, and violence.<sup>9</sup> Intellectual property laws come with costs as well as benefits, and these must be assessed relative to those of non-legal regulation. In some cases social norms may do a reasonably good job of controlling appropriation, but perhaps not in others. As a general rule, the case for legal intervention is

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<sup>7</sup> See *infra* Part II.

<sup>8</sup> For previous scholarship at the intersection of IP and norms, see *infra* note 96 and accompanying text.

<sup>9</sup> See Eric Posner, *Law and Social Norms* 4 (2000) (making the point regarding the relation of law to social norms generally).

greater if we see significant dissatisfaction with such non-legal background incentives.<sup>10</sup>

Comedians' stories suggests that the law/norms relationship is even more complex than that described above. Whereas law never protected jokes effectively, social norms evolved over time in the direction of increased protection. Initially, in the vaudeville and post-vaudeville<sup>11</sup> eras, no effective norms existed. In these early eras, we see some evidence suggesting market failure. There was not much innovation in the text of jokes, many of which plowed old themes and genres. As norms emerged, starting in the early 1960s, innovation and originality in text spiked up.<sup>12</sup> This history suggests that the desirability of legal intervention must be assessed not only in view of extant norms. It is necessary also to consider whether norms are likely to evolve, and, if so, in which direction. Moreover, the comedians' case suggests that the evolution of norms is not independent of law's existence: comedians' norms may have evolved the way they have because the field they occupy was effectively unregulated by law.

To better understand norms' actual or potential evolution, we endeavor to explain why they emerged in the case of stand-up. We will tie the rise of IP norms to the literature on the emergence of property rights. We will suggest that the emergence of stand-up's norms-based property system was helped by technological shifts which simultaneously have increased the value of property rights in jokes and decreased the cost of monitoring and enforcing such rights.<sup>13</sup> We suggest that the emergent property regime took the shape of social norms because of the relative ineffectiveness of copyright doctrine—that is, the formal law alternative. We also endeavor to explain why the emergent norms system recognizes only a very limited set of ownership and transfer forms relative to copyright law. We suggest that the system's crude rights structure is

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<sup>10</sup> See *infra* Section III.A.

<sup>11</sup> Post-vaudeville is the term we use to designate the type of humor prevalent from the 1930s to the 1960s, in which comedians would tell a string of unrelated generic jokes. See *infra* Subsection III.B.1.b.

<sup>12</sup> See *infra* Subsection III.B.1.

<sup>13</sup> See *infra* Section III.C.

driven by the fact that effective out-of-court enforcement requires that ownership be clear to the community.<sup>14</sup>

Our findings will challenge the conventional assumption that the primary effect of IP law is to address the problem of underprovision of public goods. We will suggest that IP protection not only affects how much is produced, but also the *kind* of content produced. In the case of stand-up comedy, we will analyze the interaction between changes in the property rules governing comedians and the contemporaneous shift in the nature of the comedic product. In the post-vaudeville era, text was easy to steal, but rivals had a much harder time replicating another's talent and experience. Comedians of that era—such as Jack Benny, Milton Berle, Henny Youngman, and Bob Hope—invested greatly in performance. They were masters of delivery and timing, but invested relatively little in innovative texts. Under the current norms system, text is a much more appropriable margin. Comedians today have a greater incentive to invest in textual originality. Indeed, comedians of the “new”<sup>15</sup> stand-up—such as Mort Sahl, Chris Rock, and Jerry Seinfeld—create highly original text. They invest more than their predecessors in text, and less in performance. Importantly, whereas jokes in the former era tended to plow through established and generic themes (for instance, mother-in-law jokes or ethnic jokes), humor in the latter era tends to be more personal, observational, and point-of-view driven. In other words, the norms system, ameliorating a market failure, did not result in the production of more or even better mother-in-law jokes, but rather contributed to the development of a new kind of humor.<sup>16</sup>

We do not mean to suggest that social norms are always a viable alternative to formal law, or that, even when they are, that they are superior to it. As we acknowledge with respect to stand-up com-

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<sup>14</sup> See *infra* Section III.D.

<sup>15</sup> See Steve Allen, Lenny Bruce, Bill Dana, Jules Feiffer, Mike Nichols, Mort Sahl & Jonathan Winters, Discussion, *Hip Comics and the New Humor*, *Playboy*, 1961, at 35, 40 (discussing the characteristics of the emerging “new humor,” and Feiffer suggesting that “[t]he really new thing about the new humorists in nightclubs is that . . . [f]or the first time, a comic comes out on a nightclub floor and he is more than a comic. He is speaking in his personal voice with his own point of view. He’s not telling mother-in-law jokes”, and Nichols adds that they base their gags “out of common experiences, rather than a set-up made for the vaudeville stage”).

<sup>16</sup> See *infra* Subsection III.B.2.

edy, social norms come with their own costs and benefits. Rather, we emphasize the possibility that social norms can supplement, or in some cases stand in for, legal regulation and that lawmakers should consider them—their existence, their potential emergence or dissolution, their reinforcement, or their supplementing—prior to making law. We emphasize that one attractive feature of social norms is that they offer a way to order creative practices that do not fit well within copyright law's one-size-fits-all regime.

Comedians' case may also suggest that social norms are capable of regulating culturally and economically significant creative industries. One central theme in social norms scholarship—at least in its earlier years—has been that norms are likely to evolve among small, close-knit, geographically concentrated, and ethnically homogenous groups subject to repeat interaction.<sup>17</sup> Comedians, however, are probably better described as an “intermediate-knit” group.<sup>18</sup> There are several thousand stand-up comedians in the United States, who live and work nationwide and who come from different religions, ethnicities, and backgrounds. Although many engage in repeat interaction, many others will never meet. The important components that seem to have played a role in comedians' social norms are the lack of effective legal ordering, effective monitoring (of comedians' acts by peers), and a reasonably good flow of information about copying among creators and fans.

The Article will proceed as follows. Part I will suggest that intellectual property law—mainly copyright law—does not provide comedians with a cost-effective way to protect their creativity. Part II will describe the social norms and customs that currently order the creation, ownership, use, and exchange of jokes and comedic routines among stand-up comedians, and the sanctions imposed on

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<sup>17</sup> See Robert C. Ellickson, *Order Without Law* (1991) (studying cattle trespass dispute resolution among farmers and ranchers in Shasta County, California); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 *J. Leg. Studies* 115, 140 (1992) (noting the importance of “geographical concentration, ethnic homogeneity, and repeat dealing” to the emergence of contractual social norms, but suggesting that these conditions are not necessary to the maintenance of informal order, once established).

<sup>18</sup> See Lior Jacob Strahilevitz, *Social Norms From Close-Knit Groups to Loose-Knit Groups*, 70 *U. Chi. L. Rev.* 359, 365 (2003) (defining an intermediate-knit group as one in which “strangers will be interacting with other strangers, but they will do so while surrounded by non-strangers”).

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those who do not respect the rules. Part III will detail the lessons that comedians' social norms-based IP system teaches us about IP theory and policy more generally.

I. THE LAW DOES NOT PROTECT STAND-UP COMEDIANS  
EFFECTIVELY

On his 2006 album "No Strings Attached," popular stand-up comedian<sup>19</sup> Carlos Mencia<sup>20</sup> performed a bit about a devoted father teaching his son how to play football:

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!" Arrrgh . . . the bitch never played catch with you!<sup>21</sup>

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

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<sup>19</sup> Throughout this Article, 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: "A [mere comic is] a man who says funny things. A comedian is a man who says things funny." Ed Wynn *in* 2 *Vaudeville Old and New* 1231, 1231–32 (Frank Cullen ed., 2007).

<sup>20</sup> Mencia has had his own show, *Mind of Mencia*, on cable network Comedy Central since 2005. See *Mind of Mencia*, <http://www.imdb.com/title/tt0468999> (last visited Aug. 19, 2008).

<sup>21</sup> See *nomencia, Mencia Steals from Cosby?*, <http://www.youtube.com/watch?v=ICixAktGPIg> at 1:18–2:03 (last visited Aug. 18, 2008) (comparing Mencia and Cosby versions of bit).

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! arg!). 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!*” Ah . . . you don’t mind that. You know who taught him.<sup>22</sup>

Mencia’s version does not repeat verbatim any of Cosby’s phrases, but the two routines share the same animating idea, narrative structure, and plotline, and employ a similar punchline (albeit a different post-punchline epilogue). Mencia has denied ever watching Cosby’s routine prior to performing his.<sup>23</sup> But the striking similarity between the two routines, Cosby’s iconic stature, and the wide dissemination of “Himself”—which is still on sale twenty-five years after its first release<sup>24</sup>—support the opposite inference. Cosby, who has denounced joke thieves, but who has also admitted to having once appropriated from comedian George Carlin,<sup>25</sup> has taken no action against Mencia.

Comedian George Lopez has not been as generous. Lopez accused Mencia of incorporating thirteen minutes of his material into

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<sup>22</sup> Id. at 0:09–1:17.

<sup>23</sup> See Robert W. Welkos, *Funny, That Was My Joke*, L.A. Times, July 24, 2007, at A1 (reporting that Mencia denied having seen Cosby’s routine in an email to the L.A. Times).

<sup>24</sup> See, e.g., Bill Cosby, *Himself*, <http://www.amazon.com/Bill-Cosby-Himself/dp/B0002B1518> (last visited Aug. 18, 2008) (noting that the original video was released on DVD in 2004).

<sup>25</sup> See Welkos, *supra* note 23 (quoting Cosby as saying that joke-stealing involves the performer accepting acclaim under “false pretenses” of originality and that whenever Cosby would use other comedians’ material he would give public attribution).

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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.<sup>26</sup>

If violence is a legitimate response to joke-stealing,<sup>27</sup> 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 will live in the White House." Now compare the Lopez joke to an earlier bit by comedian Dave Chappelle. In his 2000 HBO special "Killing Them Softly," Chappelle stated that he would not be afraid if he were elected the first black president, even though he knew that some people would then want to kill him. The reason? Chappelle would appoint a Mexican vice-president "for insurance." Kill him, he suggested, and you are

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<sup>26</sup> See Lopez, <http://www.redban.com/audio/lopez.mp3> at 0:40–1:46 (last visited Aug. 18, 2008) (providing George Lopez's description on the Howard Stern radio show of his physical attack on Mencia); see also Q&A 12-01-06, <http://www.redban.com/audio/dco.mp3> at 27:23–27:50 (last visited Aug. 18, 2008) (providing the account of Jamie Masada, owner of the Laugh Factory in Los Angeles, who claimed to have witnessed Mencia and Lopez "almost killing each other").

<sup>27</sup> It seems that physical violence, or threats of violence, are not unheard of as a response to joke-stealing. See, e.g., Dave Schwensen, *How to Be a Working Comic: An Insider's Guide to a Career in Stand-Up Comedy* 16 (1998) ("You must never copy someone's act, because either you'll get sued and find yourself with a reputation as a comedy thief, or—maybe the less painful outcome—you'll get punched in the mouth that got you into that trouble."); Richard Zoglin, *Comedy at the Edge* 169 (2008) (reporting that David Brenner once threatened to attack Robin Williams for stealing his material and using it on HBO); Gayle Fee & Laura Raposa, "Thief" Can't Laugh Off Lifting Hub Comics' Material, *Boston Herald*, Nov. 21, 2002, at 8 (reporting that four Boston comedians who were the victims of fellow comedian Dan Kinno's joke-thievery "ganged up on" him and "explained [forcefully] to the young lad the error of his ways"); Welkos, *supra* note 23 (providing comedian David Brenner's description of two comedians punching each other over joke stealing); The Joe Rogan Blog, <http://blog.joerogan.net/archives/111> (Feb. 14, 2007) (suggesting that Mencia felt "physically threatened" to be near Rogan after Rogan accused him of joke stealing); see also *infra* notes 92–96 and accompanying text.

going to open the border. Chappelle's punchline: "So you might as well leave me and Vice President Santiago to our own devices."<sup>28</sup>

Did Mencia steal from Cosby and Lopez? Did Lopez steal from Chappelle? We cannot say for certain: in these, as in many other cases, it is possible that one comedian has appropriated from the other, or that each has formulated his version independently. During our research we found scores of examples that raise at least a reasonable possibility of joke stealing. We are interested, however, not in particular joke-stealing disputes, but rather in the ways in which stand-ups respond when they believe their material is appropriated, and, more broadly, how comedic material is created, protected, and exchanged.

One thing is perfectly clear: copyright law has played little role in stand-up comedy. Formally, jokes and comedic routines can enjoy copyright protection. Jokes are literary works, which constitute a protected category under copyright law. Particular jokes and routines are protected if they are original<sup>29</sup> and fixed in a tangible medium.<sup>30</sup> In practice, however, copyright law does not play a significant role in the market for stand-up comedy.<sup>31</sup> 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 none we could find involving disputes between stand-up comics—and there is also little evidence of threatened litigation or settlements.<sup>32</sup>

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<sup>28</sup> See *deadfrogcomedy, George Lopez v. Dave Chappelle: Is This Joke Stealing?*, <http://www.youtube.com/watch?v=-OHMeDqhAgU> at 0:15–1:16 (last visited Aug. 18, 2008).

<sup>29</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

<sup>30</sup> 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. See 17 U.S.C. § 102 (2000).

<sup>31</sup> See, e.g., *Welkos*, *supra* note 23 ("If we could protect our jokes, I'd be a retired billionaire in Europe somewhere . . .") (quoting comedian David Brenner).

<sup>32</sup> There have been a small number of lawsuits by comics focusing on theft by non-comics. What is distinct about these cases is the presence of a deep pocket. For examples of the defendants that plaintiffs have chosen to sue, see, e.g., *Alvarez Guedes v. Marcano Martinez*, 131 F. Supp. 2d 272, 273 (D.P.R. 2001) (insured radio broadcasting company); *Novak v. Nat'l Broad. Co.*, 752 F. Supp. 164, 166 (S.D.N.Y. 1990) (national television broadcasting company); *Smith v. Weinstein*, 578 F. Supp. 1297, 1299 (S.D.N.Y. 1984) (motion picture company); see also Jay Leno and Fellow Comedians Represented by Gibson Dunn Put a Stop to Unauthorized Copying of Their Jokes in 'Joke Books,' Reuters, Jan. 23, 2008, <http://www.reuters.com/article/pressRelease/>

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In this Part we describe two factors which help to explain why we see virtually no lawsuits relating to joke stealing. The first is a set of practical considerations having to do with the relatively high cost of enforcing the formal law. The second is a set of doctrinal features of intellectual property law—in particular, copyright law—that make success particularly difficult and uncertain in lawsuits over joke stealing.

*A. Practical Barriers to Copyright Enforcement*

The first and most daunting practical barrier is the cost of suit. 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 a complex specialty area of federal, rather than state, law, which restricts the number of lawyers one might engage. This is especially true given the mismatch between the market value of jokes (which typically sell for anywhere between \$50 and \$200) and the much larger market value of a copyright lawyer's time (which ranges roughly from \$150 to \$1000 per billable hour).

Cost of suit is a barrier, but not an insuperable one. There are a number of successful and wealthy comics who could easily afford to fund litigation. And even for less well-heeled comics, copyright law contains powerful inducements to sue, including the ready availability of injunctions and a choice 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.<sup>33</sup> 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.<sup>34</sup> 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

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idUS235909+23-Jan-2008+PRN20080123 (reporting on an out-of-court settlement of Case No. CV-06-7572 SJO (VBKx), Central District of California, between plaintiffs NBC, Jay Leno, and a few other comedians against a joke book editor and publisher). We have seen no litigation by comics alleging appropriation by other comics.

<sup>33</sup> 17 U.S.C. § 504(c) (2000).

<sup>34</sup> *Id.* § 505.

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. In addition, many comedians are judgment-proof, making very little and having few assets. In short, the cost of suit is often greater than the expected return: the probability of winning multiplied by the likely award multiplied by the likelihood of actual collection.

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.<sup>35</sup> The cost of registration—a \$45 fee (\$35 if registration is done online)<sup>36</sup> plus the time involved—is low but not trivial compared to the market value of the typical joke. It is true that comedians can wait and pay the same fee to register a successful routine or even a show, rather than individual jokes. Perfecting routines and developing shows, however, takes much time and many club performances, during which the constituent jokes and bits 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, registration is limited to extended routines and not individual jokes or comic bits. Nonetheless, use of the registration system by comedians confirms some level of awareness of the copyright law within the stand-up community.<sup>37</sup>

This awareness has not yet translated into litigation. The comedians we queried about the absence of lawsuits provided a consis-

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<sup>35</sup> Id. § 412.

<sup>36</sup> For a schedule of Copyright Office fees, see United States Copyright Office, Circular 4, <http://www.copyright.gov/circs/circ04.pdf> (last visited Aug. 18, 2008).

<sup>37</sup> 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 hits, and "Robin Williams" returned five. "Milton Berle" returned two, which pertain to the two joke books he published, his belief that jokes are public domain material notwithstanding. See United States Copyright Catalog (1978 to Present), <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First> (last visited Aug. 19, 2008).

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tent response: lawsuits are expensive, the chances of winning are low, and—importantly—lawsuits are “just not the way it’s done” among comics.<sup>38</sup> Indeed, we learned 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 of copyright law to joke stealing. The legal opinion suggested the futility of relying on copyright law. That guild disbanded shortly thereafter, one of the reasons being its inability to fight joke thievery.

### *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 chance of success and the likely amount of recovery believe that help from copyright law is unlikely. Because jokes vary widely in their length, structure, and dependence on stock versus 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 Article. 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. Fixation*

To enjoy copyright protection, a joke must be fixed in a tangible medium of expression. While writing the joke on a piece of paper would suffice, the nature of the art sometimes makes this requirement difficult to meet. First, many stand-up acts are not fully scripted, and depend, to a non-trivial degree, on ad-libbing and audience interaction (including responding to hecklers). Comedians often feel the need to change or adapt their material to the particu-

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<sup>38</sup> We should note that many of our interviewees told us that they would not disprove if a comedian sued, but that litigation was not a practical way to deal with joke stealing. Based on these comments, it seems to us that comedians saying that litigation is “not the way it’s done” may be a descriptive rather than a normative statement.

lar audience before them, and therefore even when a version of a particular joke is fixed before a show, a comedian may tell the joke differently. Because there often will be many ways to express the same comedic idea, copyright in many jokes is likely to be thin. In such cases, a copyright on the fixed version may not protect the altered, unfixed version. Relatedly, jokes and comedic routines often are perfected over dozens of performances, in which the joke changes its form, and new ideas and expressions are added to or subtracted from it. Unless the comedian is meticulous in fixing jokes as they change, the fixation requirement may not be met, and the joke would remain unprotected against copying until fixed.

## 2. *Idea Versus Expression*

It is a commonplace of copyright that the law protects the expression of ideas, but not the ideas themselves.<sup>39</sup> The application of the idea/expression dichotomy to jokes leaves comedians with little protection in many instances of joke stealing. 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 in most instances lawfully appropriate the idea animating a

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<sup>39</sup> 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.*:

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.

45 F.2d 119, 121 (2d Cir. 1930) (citation omitted). *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.

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joke simply by telling it in different words.<sup>40</sup> Indeed, commentators have suggested that comics sometimes intentionally do so.<sup>41</sup>

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 earlier example in 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 Mencia has in fact copied from Cosby, he has succeeded in recasting the joke in a way that mimics very little of the text of the Cosby telling. In instances like this, the idea/expression dichotomy presents copyright plaintiffs with uncertain prospects. Although our interviewees were unanimous in the opinion that this was joke stealing, whether this was also copyright infringement is a closer call.<sup>42</sup>

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<sup>40</sup> In instances where a comedic idea is capable only of one or very few expressions, copyright’s merger doctrine would limit the author’s ability to obtain protection. Relatedly, copyright’s scenes a faire doctrine would limit protection in instances where a particular mode of expression is conventionally used in employing a particular comedic idea—for example, in the form of the “knock-knock” joke.

<sup>41</sup> “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 delivery.” Robert A. Stebbins, *The Laugh-Makers: Stand-Up Comedy as Art, Business and Life-Style* 119 (1990).

<sup>42</sup> Cosby would have a realistic chance at least of making his prima facie case. First, it seems probable to us that a fact finder 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 the iconic status of both Cosby and this particular album of his. 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. Mencia clearly did not engage in literal infringement, so whether his copying is actionable turns on whether the similarities remain at a relatively high level of abstraction or go down to relatively lower-level expressive detail. In addition to the most general idea of the Cosby joke (mothers getting credit for fathers’ deeds), Mencia’s joke sets out the same specific instantiation of that idea: the father receives little credit for helping his son become a football star, of all possible professions. Mencia’s joke also shares a narrative structure with Cosby’s: the joke begins with the father teaching a young boy the fundamentals 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. Still, both end with the son featured on national TV, given the opportunity to talk,

### 3. *Independent Creation*

Copyright in jokes will sometimes be difficult to enforce because of the difficulty of proving copying rather than independent creation. We present here 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:

[California Governor Arnold Schwarzenegger] wants to build a brick wall all the way down [to the] California/Mexico border, like a twelve-foot high brick wall, it’s like three feet deep, so no Mexicans get in, but I’m like “Dude, Arnold, um, who do you think is going to build that wall?”<sup>43</sup>

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?”<sup>44</sup>

*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?”<sup>45</sup>

*George Lopez (Nov. 2006)*: The Republican answer to illegal immigration is they want to build a wall 700 miles long and

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and thereupon expressing affection to only his mother as the punch line. Both jokes include an epilogue after the punchline in which the father expresses disappointment.

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 would be likely.

<sup>43</sup> See deadfrogcomedy, *Whose Joke Is It? Carlos Mencia? D.L [sic] Hughley? George Lopez?*, [http://www.youtube.com/watch?v=kPuu\\_VE7KOA](http://www.youtube.com/watch?v=kPuu_VE7KOA) at 0:14–0:27 (last visited Aug. 21, 2008).

<sup>44</sup> *Id.* at 0:28–0:44.

<sup>45</sup> *Id.* at 0:51–0:59.

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twenty feet wide, okay, but “Who you gonna get to build the wall?”<sup>46</sup>

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. For example, in this particular case Ari Shaffir alleged that Mencia began telling the joke only after watching Shaffir tell it.<sup>47</sup> Also, in disputes involving longer, more detailed, more linguistically inventive jokes that are not so clearly inspired by current events (and are therefore less likely to be formulated by many comics working independently), judges and juries will be disposed to infer copying based on the relative likelihood 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.

*C. Other Relatively Ineffective Forms of Intellectual Property Protection*

*1. Trademark Law*

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. Trademark law may also have some role in limiting unauthorized appropriation of jokes, although that role is likely very narrow. The possibility of limited trademark protection for jokes is raised in *Foxworthy v. Custom Tees, Inc.*, a

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<sup>46</sup> Id. at 1:02–1:14.

<sup>47</sup> See silo369, Joe Rogan and Carlos Mencia Fight, <http://www.youtube.com/watch?v=5gVYfDCgYxk> at 2:08–3:43 (last visited Oct. 2, 2008) (showing Ari Shaffir claiming that he told the joke while opening for Mencia and that Mencia never told it before, then showing Mencia denying); redban, Carlos Hangs Up, <http://myspacetv.com/index.cfm?fuseaction=vids.individual&videoid=7562854> (last visited Oct. 2, 2008) (playing a recording from a radio show in which Ari Shaffir accuses Carlos Mencia of having stolen his joke, whereafter Mencia denies and hangs up).

case in which 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.<sup>48</sup> 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.") Foxworthy filed suit, contending that the t-shirts violated both his copyright and trademark rights. Foxworthy claimed a copyright only in the second part of each of his redneck jokes—for example, "your dog and your wallet are both on a chain." With respect to the recurring first part of these jokes—"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 (that is, to lead consumers to believe the t-shirts were produced or sponsored by Foxworthy) in violation of Section 43(a) of the Lanham Act.<sup>49</sup>

The court's analysis of Foxworthy's copyright claim was relatively perfunctory, focusing on 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.<sup>50</sup>

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<sup>48</sup> 879 F. Supp. 1200, 1204 (N.D. Ga. 1995).

<sup>49</sup> 15 U.S.C. § 1125(a) (2000).

<sup>50</sup> *Foxworthy*, 879 F. Supp. at 1218–19 (citation omitted).

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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.<sup>51</sup>

The balance of the opinion in *Foxworthy* focused on the trademark claim: that is, 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 Section 43(a) of the Lanham Act. On a motion for preliminary injunction, the district court held 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 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

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<sup>51</sup> Is the *Foxworthy* holding a basis for expanded copyright liability for joke stealing? We cannot say anything with much confidence on the basis of one brief district court opinion granting a preliminary injunction, but we doubt it. 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—that is, a right so thin that it protects only against virtually word-for-word appropriation—the defendant is still properly held liable. The *Foxworthy* holding, on this reading, governs only the most literal instances of comedic appropriation.

There is a strong argument, moreover, that even on this narrow construction of the holding the *Foxworthy* court got it wrong. The court ignores 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.

specific as Foxworthy's—accordingly, trademark is of little salience for most comics.<sup>52</sup>

## 2. Patent Law

Patent law has thus far offered no protection to stand-up comedians. Particular jokes and comedic routines do not fall within the bounds of patentable subject matter, because they are not processes, machines, manufactures, or compositions of matter.<sup>53</sup> The exclusion of jokes is also a consequence of patent law's traditional "printed matter" exception to patentability, but whether the exclusionary power of that doctrine is any wider than the statutory subject-matter limitations is currently unclear.<sup>54</sup>

Although patenting of jokes is unlikely under current law, comedians may yet succeed in patenting subject matter relevant to their craft. Currently pending before the patent office are an application for the patentability of a "business method protecting jokes"<sup>55</sup> and four applications for a "process of relaying a story having a unique plot."<sup>56</sup> The interesting issue these applications raise is whether expressive elements at some elevated level of abstraction can be patentable. We doubt that many claims in these applications are going to be held valid, and we see many hurdles blocking their

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<sup>52</sup> *Foxworthy* may be even less helpful to comedians following the Supreme Court's holding in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003). In *Dastar*, the Court refused to read the Lanham Act as creating a right of attribution in copyrightable works. The Court noted that such a right, if it were held to exist, would be perpetual. A perpetual right of attribution would, the Court held, "create a species of mutant copyright law that limits the public's federal right to copy and to use expired copyrights." 539 U.S. at 34 (internal quotations omitted). Although the precise reach of *Dastar* is unclear, it is possible to read the opinion as sharply limiting trademark rights over works subject to copyright. See Christopher Sprigman, *Indirect Enforcement of the Intellectual Property Clause*, 30 Colum. J.L. & Arts 565 (2007). Whether the *Dastar* holding would be likely to limit trademark rights in copyrightable jokes is a subject we do not pursue here.

<sup>53</sup> See 35 U.S.C. § 101 (2000) (defining statutory subject matter).

<sup>54</sup> See 1 Donald S. Chisum, *Chisum on Patents* § 1.02[4] (2007).

<sup>55</sup> See U.S. Patent Application No. 10/569,506, at [54] (filed Aug. 24, 2004) (published Nov. 16, 2006).

<sup>56</sup> See U.S. Patent Application No. 10/869,082, at [54] (filed June 17, 2004) (published Dec. 22, 2005); U.S. Patent Application No. 10/861,849, at [54] (filed June 7, 2004) (published Dec. 8, 2005); U.S. Patent Application No. 10/846,544, at [54] (filed May 17, 2004) (published Nov. 17, 2005); U.S. Patent Application No. 10/722,473, at [54] (filed Nov. 28, 2003) (published Nov. 3, 2005).

way to a patent grant, including statutory subject matter, abstract ideas exception to patentability, enablement, and non-obviousness, among other things.<sup>57</sup>

### 3. *Right of Publicity*

Most states now extend to individuals, either by statute or as a matter of common law, a property-like interest in the use of their name, image, voice, signature, or other personal characteristics in commerce or advertising. This doctrine is of limited help to comedians. It may protect a comedian against an appropriation of his looks or voice, but not against joke stealing. It can also protect a comedian against appropriation of unique performative elements,<sup>58</sup> but most performative aspects comedians use are not unique to them. The most that right of publicity law can do is protect a comedian against the comedic equivalent of an Elvis impersonator. This type of appropriation has not yet emerged as a real threat to comedians for which right-of-publicity lawsuits would be a useful countermeasure.

## II. SOCIAL NORMS REGULATING APPROPRIATION AMONG STAND-UP COMEDIANS

The practical and doctrinal reasons set out above go far toward explaining why there are fewer lawsuits over joke stealing than one might otherwise expect. Nonetheless, one would still expect some lawsuits to be brought, such as in cases where copying were literal or closely so, the defendant were rich, and strong evidence negated

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<sup>57</sup> The commentary to date has argued that the comedic storyline applications should be rejected. See Ben Manevitz, *What's the Story with Storyline Patents—An Argument Against the Allowance of Proposed Storyline Patents and for the Rejection of Currently Pending Storyline Patent Applications*, 24 *Cardozo Arts & Ent. L.J.* 717, 719 (2006); Anu R. Sawkar, *Are Storylines Patentable? Testing the Boundaries of Patentable Subject Matter*, 76 *Fordham L. Rev.* 3001, 3050–63 (2008). Perhaps not surprisingly, the inventor, a patent attorney, believes otherwise. See Andrew F. Knight, *A Patently Novel Plot: Fiction, Information, and Patents in the 21st Century*, 47 *IDEA* 203, 207–22 (2006) (arguing that storyline patent applications do not inherently fail any statutory requirements).

<sup>58</sup> See *Groucho Marx Productions v. Day & Night Co.*, 523 F. Supp. 485 (S.D.N.Y. 1981), rev'd on other grounds, 689 F.2d 317 (2d Cir. 1982) (holding that a musical play that reproduced the Marx Brothers' performative style infringed the deceased comedians' right of publicity).

the possibility of independent creation. The absence of lawsuits is less puzzling once one knows of the norms system that regulates appropriation among stand-up comedians. This informal, norms-based property regime is driven by a set of enforceable community norms that, together, work to limit appropriation of other comics' creative material and to structure the ownership, use, and transfer of jokes.

We have conducted nineteen lengthy, structured interviews of working comics at various levels of the industry (in other words, from more to less well-known). Our group of interviewees had some diversity across sex, race, age, geographic location, income level, and sexual preference. Half of our interviewees were selected at random from a list of comedians maintained on the website of the comedy television channel Comedy Central;<sup>59</sup> the others were selected either randomly from a comedians group maintained on the social networking site MySpace<sup>60</sup> or from personal contacts. The interviews were conducted by telephone; interviewees were promised anonymity and told that the names and details sufficient to identify participants in specific incidents of joke stealing would be kept confidential. Our interviewees provided a consistent account of the most important elements of the norms system that they collectively described, and we summarize their responses below.<sup>61</sup> Where we found variance among the interviewees, we have made note. The interviewees' descriptions of the norms system among stand-up comedians aligned powerfully with what we are able to observe directly via the writings of comedians and comedy experts, news articles, blog entries, and other online material.

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

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<sup>59</sup> See *Comedians A-Z*, <http://www.comedycentral.com/comedians/index.jhtml> (last visited Aug. 18, 2008) (listing stand-up comedians in alphabetical order).

<sup>60</sup> See *Comedians of MySpace*, <http://groups.myspace.com/roflmao> (last visited Sept. 28, 2008) (containing social networking page for comedians and those working in related fields).

<sup>61</sup> This Article reports the results of our exploratory empirical research. It is based on purposive sampling. We cannot guarantee that our interview subjects are a representative sample of comedians. Our findings, however, would be useful to any future quantitative empirical assessment of comedians' norms.

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rules of copyright applied to the particular form of creative work (the joke or comedic routine) at issue in their professional practice. Nonetheless, respondents widely agreed that copyright law and copyright lawsuits were, for the most part, unhelpful 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.<sup>62</sup>

Aside from the respondents' concerns regarding the cost of lawsuits, there was also the view that copyright lawsuits were in most instances unlikely to succeed. Most respondents stated that the originator often 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 created it independently.

Many respondents noted that comics 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 a judge or jury—to know whether a comedian has appropriated a joke, or has created it independently. Relatedly, several respondents suggested that the rewriting of a joke may be an effective means to escape copyright liability. Rewriters often take the "idea" of a joke (its premise, expressed in a high level of generality) and 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.

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: copyright law does not play a significant role, at least directly, in regulating appropriation among comics. What

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<sup>62</sup> 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.

emerged from our interviews instead was evidence of a system of norms that 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.

### *A. The Norm Against Appropriation*

The major norm that governs the conduct of most stand-up comedians is a strict injunction against joke stealing. Our interviewees agreed that appropriating jokes from another comedian is the major no-no in the business; many of our interviewees referred to joke stealing as a "taboo." This norm is so fundamental that a popular guide for new stand-ups, *The Comedy Bible*, puts the following as the first of its Ten Commandments to the novice: "Thou shalt not covet thy neighbor's jokes, premises, or bits."<sup>63</sup> Other "how to" guides convey the same message.<sup>64</sup>

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. Interviewees told us that recidivism is rare, and persistent joke stealing is limited to a few bad actors who are identified as such in the community.

To be a norm rather than a mere behavioral regularity,<sup>65</sup> the rule against appropriation must be enforced; that is, violations must be punished. To expose the operation of the norm system, we will de-

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<sup>63</sup> See Judy Carter, *The Comedy Bible: From Stand-up to Sitcom—the Comedy Writer's Ultimate How-to Guide* 56 (2001).

<sup>64</sup> See, e.g., Dave Schwensen, *How to be a Working Comic: An Insider's Guide to a Career in Stand-Up Comedy* 16 (1998) ("What you never want to do is plagiarize another act. In other words, don't be a carbon copy of someone else. It could haunt you in more ways than one. Comedians are very protective of their material. . . . [W]hat they perform onstage is the basis of their careers and it's not for someone else to 'steal' and profit from. Beginners sometimes fall into the plagiarism trap because they don't understand what's expected from them when they first walk onstage. . . . A major point of this book is that to make it as a stand-up comic, you must be an original.").

<sup>65</sup> See Eric A. Posner, *Law and Social Norms* 8 (2000) (defining social norms to be a sub-group of behavioral regularities in which deviation is accompanied by a sanction).

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scribe the route leading to sanctioning under the norm system while comparing its operation to that of formal copyright law.

### *1. Detection*

The first stage in the enforcement process under copyright law is detection. There, detection is usually the job of the author or her agents, and violations have to be in some sense public in order to come to the author's attention. In contrast, detection in stand-up comedy may arise when any comedian witnesses a performance of material he believes has been stolen—that is, detection is a community project. On a typical stand-up bill there are usually several (sometimes as many as eight or even ten) comedians. The comedians on the bill will often watch each other, motivated in part by curiosity and the desire to see new talent, but also for the purpose of detecting joke stealing from themselves, from their friends, or from the classics. These comedians are often performing several nights a week, and watching several other comedians on many occasions. Given this exposure to their peers' material, many comedians are well-placed to detect appropriation.<sup>66</sup> And, importantly, when they detect an instance of apparent joke stealing, comedians 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.

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<sup>66</sup> And of course, many comedians are well-read in jokes and comedic routines that were pioneered before they started their careers, as recorded comedy albums have been around from the beginning of recorded music, over a hundred years now. If the comedian on stage is famous enough to have their own show then there would of course be no bill, but these shows are often attended by big audiences, including other comedians, and are released on CDs or DVDs, such that joke stealing by the famous performer does not go unnoticed. We understand that other comedians are less likely to observe performances in certain “low level” venues, such as cruise ships or corporate events, and we have been told that in these settings joke stealing is more common.

*2. Process*

In copyright law, an author who detects copying and wishes to act on his discovery might first seek a negotiated settlement. If that avenue proves fruitless, the author must file a lawsuit and make out a prima facie case of infringement, which includes proof by the plaintiff that the defendant copied (that is, negation of the possibility of independent creation by the defendant).

Under comedians' norms system, the initial step is also a form of negotiation. When a comedian believes that another has taken his bit, often he will confront the alleged appropriator directly, face to face. The aggrieved comedian will state his claim and provide evidence by detailing the similarities between the jokes and how long he has performed the joke. He might also state where the joke was performed and name potential witnesses. The accused party would then respond. Although these are charged situations, the parties generally sort out their differences amicably. Sometimes the accused comedian admits fault and promises to stop doing the bit in question. This may happen, for example, in the case of subconscious appropriation, which is also actionable under copyright doctrine. A few interviewees admitted to us that they realized, after having been confronted with an accusation of joke stealing, that what they thought were their original bits were actually subconsciously taken or adapted from someone else's act. On other occasions the parties may conclude that they had each come up with the joke independently. This often happens—and the possibility of independent creation is more believable—when jokes plow common themes (for example, “don't you hate it when your boyfriend/girlfriend does X?”) or relate to events of the day. In such cases, the comedians often work cooperatively towards a solution. They may agree that they will simply not each perform the same joke on the same bill, or that they will each tell it in different ways or in different parts of the country. In many cases of independent creation, one of the comedians would simply volunteer to drop the joke as a courtesy. This may be the case when the joke fits one of the comedians' acts better, when one of them is much more passionate about the joke, when one of them “needs” the joke more, or when one simply tells it better. Here is one interviewee's description of such a cooperative dispute resolution:

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[W]hat you learn as a child is if you have a problem with someone you go and you talk to them. . . . So if somebody has a joke that sounds like mine . . . I'll just go up to the person and say "Hey, 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.

### 3. *Enforcement*

Interviewees agreed that in most instances joke thieves (at least those whose thievery was obvious enough to be 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 chance 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.

Most joke-stealing disputes are resolved amicably, but sometimes the parties fail to come to an agreement. In these instances the norms system brings a number of different enforcement mechanisms to bear. If an aggrieved comedian decides to pursue the matter, in most cases he will seek to impose two types of informal sanctions: attacks on reputation and refusals to deal. Two of our interviewees described the process and the consequences:

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.

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.

Although comedians work for money, it is also true that psychological rewards operate as a substantial, perhaps major, incentive to create for most comedians. One such reward is of course the audience's laughter. But many of our interviewees indicated that comedians also highly prize the appreciation of their peers, and a comedian might bring down the house with a stolen routine but would face the anger of his peers once the show was over. There are perhaps 3000 working comedians in the United States (exact numbers are not available) and they are both geographically dispersed and racially and economically diverse. Nonetheless, many interviewees referred to stand-ups as members of a "tribe." In this context, harm to one's reputation has immediate and painful results. It is no fun coming to work when your peers are angry with you and let you know it. Here is how the well-known comedian Robin Williams, who has faced long-standing allegations of joke stealing, describes the experience:

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 f\*\*\*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. . . . I got tired of [other comics] giving me looks, like, what the f\*\*k are you doing here?<sup>67</sup>

A reputation for joke-thievery is also a barrier to career success. Comedians who are just starting vie for attention and recognition. Connections to more established comedians are often helpful in finding work, and a good name and goodwill among fellow comedians is also a source of job opportunities. One comedian's characterization of the effect of the reputational sanction was representative of what we heard throughout our interviews:

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<sup>67</sup> See Playboy Interview: Robin Williams, *Playboy*, Jan. 1, 1992, at 57, 62.

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

A second retaliation option, often employed as an adjunct to shunning and bad-mouthing, is for an aggrieved comedian (and sometimes that comedian's friends and allies) to refuse to appear on the same bill with a known joke thief. A number of interviewees told us of instances where they made clear to comedy club booking agents that they would not appear in the same evening's lineup with someone they believed either had stolen their material or had a reputation of stealing jokes. This can be, for the accused joke-stealer, a painful sanction. If a more-than-trivial number of come-

dians refuse to share a bill with a perceived joke thief, it would severely hamper the latter's ability to find work.

Intermediaries—club owners, booking agents, agents, and managers—sometimes also refuse to deal with thieves. In particular, several interviewees suggested to us 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.

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.

Our interviewees also suggested that some club owners would similarly not let joke thieves in.<sup>68</sup> Interviewees noted, however, that other club owners ignore joke stealing if the monetary rewards of booking a particular comedian are great enough.<sup>69</sup>

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<sup>68</sup> See also Raju Mudhar, *Punchlines Put to a Full-Court Press: Nobody's Laughing as Comics Launch Lawsuit that Seeks to Protect Origins of Comedic Content*, *Toronto Star*, Dec. 9, 2006, at H9, available at 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)).

<sup>69</sup> See also Steve Persall, *Standing Up Just for Laughs*, *St. Petersburg Times*, Sept. 20, 1991, at Weekend 18, available at 1991 WLNR 1951743 ("Comedy has gotten to

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Reputational sanctions (by way of back-room conversations) and refusals to deal are the most common retaliatory strategies. But comedians are nothing if not inventive, and enforcement strategies varied. Here is one description of a type of public retaliation that several of our interviewees related:

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.

In addition to post hoc retaliation, comedians may engage in avoidance strategies *ex ante*. We heard of instances where comedy clubs would use some sort of signal, such as a flashing light, to indicate to the comedian on stage that a joke thief had entered the room. The comedian may then choose to switch to old material, improvise, or engage the audience (“Where are you from? Oh, I once had a friend from there who . . .”).

Finally, we heard of several instances in which, after failing to resolve a dispute amicably, aggrieved comedians retaliated against joke stealing either by employing or threatening violence. To wit:

[T]he 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.<sup>70</sup>

Physical violence, we should emphasize, is an outlier and comedians rarely resort to it. None of the comedians we interviewed either participated in or witnessed physical violence over a stolen

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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)).

<sup>70</sup> See Dean Johnson, *Stop! Thief!: Comics Say They’re Getting a Bad Rap*, Boston Herald, Aug. 14, 1998, at S03, available at 1998 WLNR 270264.

joke, although many interviewees had heard from other comedians about such instances. Most conflicts over joke stealing are resolved quickly, and the prospect of violent retaliation is accordingly limited. Still, the possibility of physical retaliation, however remote, was clear to our interviewees, due in part to the charged nature of the face-to-face confrontation and to the wide circulation of stories about violent retaliation and threats of violence against joke thieves.

It is significant, moreover, that such acts of violent or potentially violent retribution enjoy considerable legitimacy within the comedic community. In some instances the attackers appear to feel morally justified. Comedian George Lopez did not try to hide the fact that he punched Carlos Mencia in a dispute over suspected joke stealing—rather he boasted about it publicly on *The Howard Stern Show*.<sup>71</sup> An online article reporting on the attack on Boston comedian Dan Kinno by several rival comedians hints at the identities of some of the attackers, who seem to have contributed to bringing the story to print.<sup>72</sup> Also telling are the victims' reactions. We found no evidence that Mencia, Kinno, or any other comedian who has been attacked or threatened has 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.<sup>73</sup> Mencia, who has denied stealing from Lopez, confirmed that Lopez punched him, but attributed the entire dispute to Lopez's jealousy.<sup>74</sup> Perhaps most importantly, the comedic community's reaction is acquiescent. A comedy blog commenting on the Kinno incident suggests that "it'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

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<sup>71</sup> See Interview by Howard Stern with George Lopez, available at <http://www.redban.com/audio/lopez.mp3> at 0:34–1:46 (describing Lopez's physical attack on Mencia); see also Interview by Howard Stern with Jamie Masada, <http://www.redban.com/audio/dco.mp3> at 27:23–27:40 (claiming Jamie Masada, owner of the laugh factory, had witnessed Mencia and Lopez punching each other, Dec. 1, 2006).

<sup>72</sup> See Brian McKim, *Stolen Goods*, SHECKYmagazine.com, Dec. 2002, [http://www.sheckymagazine.com/mckim/mck\\_0301.htm](http://www.sheckymagazine.com/mckim/mck_0301.htm).

<sup>73</sup> *Id.*

<sup>74</sup> See Silo360, *Joe Rogan and Carlos Mencia Fight*, <http://www.youtube.com/watch?v=5gVYfDCgYxk> 6:00–6:50 (last visited Aug. 17, 2008) (showing the on-stage confrontation between Joe Rogan and Carlos Mencia).

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they brought the hammer down on someone who so blatantly ignored the unwritten laws.”<sup>75</sup> And a number of our interviewees voiced some measure of approval of violent tactics. While some said that they would not themselves engage in violence, some also told us that they understood the temptation toward violent retaliation against joke thieves.

#### 4. *Preference for Private Action*

To the extent enforcement actions are private, personal, and done within the comedic community, they are perceived as more legitimate. This point is reflected in a recent, much-publicized enforcement action. One late Saturday night in February 2007, at The Comedy Store in Los Angeles—one of the nation’s most important comedy clubs—Joe Rogan, a working comedian, chose to end his act by insulting Carlos Mencia, who Rogan had spotted in the audience.<sup>76</sup> Mencia hastened to the stage to defend himself, and there began a long, loud, and profane wrangle between the two comics. 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 part siding with Rogan.<sup>77</sup> The incident gained much publicity, media attention, and a clip of the feud was put online and has been watched (to date) more than two million times.<sup>78</sup>

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<sup>75</sup> See McKim, *supra* note 72.

<sup>76</sup> Mencia was not on the bill that day. See Livemorningshow, Pauly Shore on Joe Rogan Vs Carlos Mencia Live 105, <http://www.youtube.com/watch?v=JruD1mkW5Ds&feature=related> 0:40–1:20 (last visited Aug. 17, 2008) (showing an interview with Pauly Shore, son of The Comedy Store owner and co-founder Mitzi Shore).

<sup>77</sup> See Joe Rogan VS Carlos Mencia, Onstage Video, <http://blog.joerogan.net/archives/110> (Feb. 13, 2007) (recounting the incident between Rogan and Mencia).

<sup>78</sup> See Silo360, *supra* note 74 (showing more than 826,000 views); see also DeathByLight, Carlos Mencia Stole More bits, gets Caught On Air!!, <http://www.youtube.com/watch?v=QDmaG1-H25M&feature=related> (last visited Aug. 17, 2008) (showing more than 1,057,000 views) (recording of a radio show trying to mediate between Mencia and Rogan); Flexnix, Carlos Mencia Steals Jokes (Longer Clip), <http://youtube.com/watch?v=qoQjzJWUvgk> (last visited Aug. 17, 2008) (showing more than 564,000 views); LyndonKJohnson, Joe Rogan Fronts Out Carlos Mencia, <http://youtube.com/watch?v=bx9E4nPUhaA&feature=related> (last visited Aug. 17, 2008) (showing more than 90,000 views); WildWillyParsons, Carlos Mencia vs. Joe Rogan, <http://youtube.com/watch?v=6nEH8H5BqWg> (last visited Aug. 17, 2008).

Reactions 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.<sup>79</sup>

Similarly, comedy blog SHECKYmagazine suggested that “action like Rogan's . . . will keep us all more honest in the future . . .”<sup>80</sup> 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.”<sup>81</sup>

##### *5. Expression Versus Ideas and Overlap with Plagiarism*

We asked interviewees to identify the line separating improper appropriation of a joke from being merely “inspired” by a rival comedian's material. One of the most important doctrinal features of formal copyright law, the so-called “idea/expression dichotomy,” engages in exactly this type of line-drawing. While copyright prohibits the use of expression that is “substantially similar” to a protected work, it does not prevent a later author from appropriating the ideas conveyed by a protected work. As we explained briefly above, exactly where the division between protected expression and unprotected ideas falls in formal copyright law is both intensely context-dependent and often uncertain. Nonetheless, we

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(showing more than 91,000 views). The two million views count is as of the time of this writing, September 22, 2008.

<sup>79</sup> See *Livemorningshow*, *supra* note 76 at 2:40–3:16.

<sup>80</sup> See Brian McKim, *Prosecutors Will Be Violated*, SHECKYmagazine.com, Feb. 15, 2007, <http://www.sheckymagazine.com/2007/02/prosecutors-will-be-violated.html>.

<sup>81</sup> See *Who Steals From Whom? Who Cares?*, SHECKYmagazine.com, Nov. 2, 2007, <http://www.sheckymagazine.com/2007/11/who-steals-from-whom-who-cares.html>.

got the sense from our interviewees that comedians' norms system is less receptive than formal copyright law to the appropriation of even relatively high-level comedic ideas. One comedian suggested to us the example of a joke about a person having sex in a church. The idea behind such a joke is so general, the interviewee stated, that it should remain open to rival comics. Add, however, even a minor bit of extra specificity (the comedian posited a joke about a person having sex in a church who is caught by a priest) and both the particular joke embodying that comedic idea and the idea itself are off-limits. Along these same lines, we heard from many of our interviewees that appropriation of even very general comedic premises—anything that, even if at a high level of generality, was not “stock” or “commonplace”—was objectionable.

If this is right, then comedians' norm system does not merely exceed the scope of copyright law but extends also to the type of appropriation typically dealt with under the heading of plagiarism—that is, the unattributed appropriation of ideas. Copyright scholars recognize the difference between copyright infringement and plagiarism. The former involves the unauthorized copying of protected expression. The latter involves either the unattributed copying of another's expression, which may be actionable as copyright infringement, or of another's *ideas*, which is not copyright infringement, but which may still be regarded as a severe transgression by certain groups (academics are the example most often invoked) and punished by extra-legal sanctions. Our interviews suggest that comedians adhere to a very strong anti-plagiarism norm; indeed, many of our interviewees used the word “plagiarism” to refer to appropriation (whether with or without attribution) of even fairly abstract comedic ideas. This is perhaps not surprising given comedians' powerful commitment to originality as the *sine qua non* of quality in the form. Perhaps less so than any other creative form we can think of, comedians have little esteem for even the most expert reworkings of others' ideas.

#### 6. *Duration*

Finally, we asked comedians whether the norm against appropriating another comedian's jokes or routines was subject to any time limitation—that is, whether comedic material would after some period become available for use by rival comics. In formal

copyright law the answer to this question is clear: seventy years after a person's death, all the works of an author fall into the public domain, and others may use them freely. Comedians, on the other hand, believe that it is never permissible for a comedian to deliver material that is not his.

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Before we move on to a description of other norms, we should state here one important caveat regarding comedians' 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. Also, intermediaries are less likely to enforce the norms or refuse to deal when the alleged thief enjoys public appeal. In such cases, a club owner may sacrifice the sanctity of the norms system in favor of a full house.

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 originality; the audience is there, in this view, to drink, laugh, and have a good time.<sup>82</sup> 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 ten to twenty percent) 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. Several comedians noted that the aficionados can be useful in en-

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<sup>82</sup> See also Jim Geoghan, *Waiter, There's a Joke in My Soup*, N.Y. Times, Aug. 20, 1989, § 2, at 1, 37 ("[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.").

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forcing the norm against joke stealing. These comedians 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 to 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 an attempt to recruit audience members to the task of disciplining joke stealers.

### *B. Norms Regarding Authorship and Transfer of Jokes*

#### *1. Norm Against Joint Authorship*

Jokes are often the result of collaboration between two comedians. Comics spend much time together in clubs and on the road, and they often work out new material in conversations with their peers. It is not uncommon for a comedian with a great premise to probe another for punchline suggestions, or for a comedian to try out new jokes on a friend and replace her punchline with one suggested by her peer.

Under copyright law, the two comedians—the one originating the premise and the one originating the punchline—would be joint authors and co-owners of the resultant joke.<sup>83</sup> However, under the norms system operating among stand up comedians, as a default rule and absent some agreement between the comedians to the contrary, the comedian who came up with the premise owns the joke. The comedian who offered the punchline would know that she has in effect volunteered a punchline.

Why do comedians' norms disfavor joint authorship? Many of our interviewees stated that joint ownership is simply incompatible

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<sup>83</sup> 17 U.S.C. § 101 (2000) (addressing joint work under the Copyright Act).

with the functioning of the norms system. For reasons we will explain in Section III.D, enforcement of comedians' norm against appropriation would be substantially more difficult if comedians frequently shared rights in jokes as joint tenants.

## *2. Norm Regarding Priority*

In copyright law, priority of authorship has little relevance to the validity of a copyright. It is well established that if a second author happened to create a work independently that is identical to a previously existing work, the second creator still has a valid copyright. Each of the authors has the right to prevent others from making copies of her respective work, for the duration of her copyright. But comedians' norms system has elements that recognize priority, a feature that is a major part of patent law, in which an inventor has to be the first to either invent (in the United States) or file an application (in the European Union, Japan, and many other jurisdictions) in order to get a patent.

Priority is an element in many disputes between comedians over suspected joke stealing. Often the accused will deny copying, but may still drop the joke from his act if it is similar to the accuser's joke and the accuser can give evidence that he performed the joke first. It is not always the case that one of the antagonists will drop the joke if the accused denies copying, but if one comedian decides to do so the choice of who drops is determined in part by priority.

Relatedly, many interviewees told us that in instances where two comedians have been performing a similar joke, the first to perform the joke on television comes to own the joke exclusively. If a comedian, while performing her own joke, has seen the same, or a similar, joke done on TV, she would generally drop it. Part of the reason why the comedian would stop doing the joke is that the public would regard her as a joke thief, even if she is not.<sup>84</sup> The act

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<sup>84</sup> Independent creation is hard to prove directly. Under copyright law, courts trying to decide on the question of independent creation look into the degree of similarity between the two works involved and the degree of access that the defendant had to the plaintiff's work as informative. The "first-to-TV" norm is driven, in part, by the access logic. If a joke was aired on TV, then the accused joke thief had access to it, and such evidence, being verifiable, may be conclusive. The argument to the contrary, even if true, may not be verifiable. However, in today's world, when comedians can post their performances online, independent creation may be verifiable and the ra-

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of doing a joke or routine on TV is, in many senses, like filing for patent protection: it grants exclusive title to a joke publicly.<sup>85</sup>

### 3. Norm Regarding Works Made for Hire

Under copyright law's "works made for hire" doctrine, a party who sponsors the creation of a work authored by another can be treated as the author and copyright owner. The doctrine applies if the sponsoring party either (1) is the employer of an employee who created the work on the job, or (2) has commissioned a work that falls into one of several statutory categories and the transaction is documented in a signed writing.<sup>86</sup> In contrast, the relevant norm among stand-up comics treats the party who has paid for a joke as its author and owner, regardless of whether the aforementioned conditions were met.

### 4. Norm Regarding Transfers

In copyright law, transfer of ownership in a copyright or an exclusive license thereof requires the parties to execute a signed writing.<sup>87</sup> Among comedians, however, jokes are for the most part sold

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tionale behind the first-to-TV norm seems weakened (as became apparent in our interviews). However, there still remains the incentive of the independent creator/comedian who did not tell the joke on TV to stop telling it, lest most people suspect him of stealing.

<sup>85</sup> Priority also has a role in determining who owns (or is paid for) jokes submitted by comedian-writers to late-night comedy/talk shows. We were told that both Jay Leno and David Letterman maintain email addresses (initially these were fax lines) that comedians, or at least those comedians who are invited, can use to submit material for the host's nightly monologue. Several times a week a number of comedians will write up a number of jokes and email some to Leno and others to Letterman (but never the same joke to both). If the jokes are aired, then the submitting comedian would get a check in the mail. It sometimes happens, however, that two comedians send in the same jokes, as many of them are topical and regard the events of the day. If that happens, then a priority rule is applied and the first to email gets paid; the comedian who saw his jokes aired but did not see a check following it would know that he was simply too late.

<sup>86</sup> 17 U.S.C. § 101 (addressing works made for hire under the Copyright Act).

<sup>87</sup> 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

orally. And although under copyright law the result would be that the originator remains the rightsholder and the transferee obtains only a nonexclusive license, it is clear to comedians that after oral agreement and exchange of money, the originator divests himself of the joke, and retains no right to perform it or to otherwise use it (for example, by creating a derivative work).<sup>88</sup> The transfer of rights in the joke is so complete that the originator cannot even identify himself publicly as the joke's writer. 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.

Why do the aforementioned norms regarding ownership and transfer differ from the rules of copyright law? We provide an explanation in Section III.D, below.

### *C. Norms that Limit Ownership*

Copyright law contains a number of exceptions to copyright owners' exclusive rights, including, most notably, the fair use doctrine. In contrast to the exceptions to exclusive rights found in the formal law, our interviewees could not unambiguously identify *any* exception or limitation contained in the norms system that would excuse joke stealing. However, we could identify a set of instances in which the violation of an ownership norm is seen by some comedians—though not by all—as less acute than it might otherwise be.

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comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.”).

<sup>88</sup> The norms system does not recognize another limitation on transfers: under copyright law, the originator retains a right to terminate all transfers of ownership thirty-five years after the transfer happened, roughly speaking. 17 U.S.C. § 203(a)(3). The norms system does not recognize such a rule.

What happens if the seller keeps telling the joke after the sale, or if he sells it then to an additional buyer? Like before, the major sanctions are attacks on reputation and refusals to deal. The cheated buyer will never again buy another joke from the originator. He will then also spread the word.

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In a fashion that somewhat parallels the fair use doctrine in copyright law, there seems to be some level of forgiveness—or at least lessened rage—toward young comedians using others’ material at the beginning of their careers. There is some sentiment among a substantial number of comedians that younger comedians need to find their own voice, and one way of doing so is to try out many different comedic styles. Although comedians do not view these instances of appropriation as in any way justified, they are much more likely to be ignored, or at least dealt with more gently. In part this is because joke stealing by beginners is less of a threat. Comedians at the beginning of their careers do not perform for large crowds and are therefore unlikely to burn a comedian’s material or act through wide exposure, at least if the period during which the appropriated material is performed is short. Again, there is a parallel here between the norms system and copyright’s fair use doctrine: the fact that an unauthorized copying has a negligible effect on the potential market for the work is a consideration favoring a fair use finding.

We also heard from some interviewees that joke stealing is viewed less negatively in the rare instances for which the appropriator provides immediate, on-stage attribution.<sup>89</sup> Other interviewees, however, maintained that attribution was not in any sense

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<sup>89</sup> 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 on one occasion. See Welkos, *supra* note 23, at A15. 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 70.

Of course, if this is correct, then comedians who excuse appropriation made with attribution are in accord with what the typical American arguably thinks copyright is all about. See Karl Fogel, *The Public’s Perception of Copyright—Video Interviews with Randomly-Selected People in Chicago*, [http://www.archive.org/details/QuestionCopyright.org\\_interviews\\_Chicago\\_2006](http://www.archive.org/details/QuestionCopyright.org_interviews_Chicago_2006) (last visited Aug. 18, 2008) (“[M]ost people [he interviewed] felt that copyright is mainly about credit, that is, about preventing plagiarism.”). They are, however, following a path markedly different from copyright law’s formal attribution rule. In copyright law attribution does not excuse infringement; attribution is relevant only to the 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. See 17 U.S.C. § 106A. 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.

curative.<sup>90</sup> Additionally, many interviewees emphasized that appropriation with attribution is contrary to the spirit of modern stand-up comedy, which is focused on originality. As a result, appropriation with attribution is very rare.

Copyright law also provides in some instances for compulsory licenses—for example, for the re-recording of a previously distributed musical composition. In such cases, the exclusive right is protected by a liability rule rather than a property rule. We heard from some of our interviewees about a sort of comedic compulsory license. Many were aware of allegations against comedian Robin Williams, who when confronted post hoc about stealing, would sometimes send a check in the amount he thought suitable.<sup>91</sup> Most of our interviewees maintained that “steal-and-pay” was objectionable. Many of the same interviewees admitted, however, that if they were in such a situation they would cash the check.

It is important to emphasize that our interviewees had mixed views on the notion of a comedic compulsory license, and indeed this uncertainty is consistent with the interviewees’ greater uncertainty about the existence of and permissible scope for comedic fair use. This is not surprising, as the fair use doctrine is perhaps the least predictable and most disorganized part of the copyright law.

But to the extent that some comedians grudgingly admit that they would accept payment from an appropriator, we see a connection to the notion, long understood as a justification for the fair use doctrine, that sometimes an ex post license is created when transaction costs make ex ante licensing very unlikely. Imagine a comedian like Robin Williams on stage, ad-libbing. If he feels at a par-

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<sup>90</sup> 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 SHECKY-magazine suggests that joke stealing is inexcusable even when done with explicit attribution. See McKim, *supra* note 72; see also *supra* note 41 (suggesting that attribution does not excuse stealing). This latter conception of attribution is in line with current copyright law.

<sup>91</sup> Williams has admitted that he has sometimes paid for jokes he unwittingly appropriated. See Playboy Interview, *supra* note 67, at 62 (“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 Magazine, Sept. 19, 1999, at 17, 19 (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’”).

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ticular moment that somebody else's joke would fit perfectly, he of course does not have the time to negotiate a license. Nor, in all likelihood, could he have foreseen the need to do so. In such cases, it might be socially beneficial to allow the taking if unplanned—possibly requiring that payment is made after the show. Copyright law's fair use doctrine uses a liability rule with a zero price, but theoretically the price could be greater than zero in fair use circumstances.

### III. ANALYSIS AND IMPLICATIONS FOR INTELLECTUAL PROPERTY THEORY AND POLICY

Below, we describe observations and implications for intellectual property theory and policy that arise from our research and seem to us generalizable. We cannot explore each of these implications fully within the confines of this Article. We offer these discussions as a jumping off point for further work, both by ourselves and others.

#### *A. The Law/Norms Interface*

##### *1. 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 question in intellectual property policy is whether the benefits associated with intellectual property protections outweigh the concomitant costs. This is an exceedingly difficult question to address. The difficulty stems in part from the great diversity of subject matter that comes within the domain of copyright and patent laws. Additionally, because patent and copyright laws each apply a largely uniform set of 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 advanced by the identification of a number of types of pecuniary and non-pecuniary incentives to create that may exist in the ab-

sence of formal IP protection.<sup>92</sup> If a non-IP incentive is present either generally or in a particular market or creative practice, the marginal benefit of legal protection would thus be only the added creativity that formal law induces above and beyond that preexisting 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-copyers enter the market. Creators also are sometimes able to keep copiers at bay by selling their intellectual products through contracts that include anti-copying provisions or by employing anti-copying technological protection measures.<sup>93</sup> 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.<sup>94</sup> Others create to gain prestige and celebrity, either as desired ends in themselves, or based on the hope that the utility they will derive in the off-chance that they become stars is worthwhile even though they recognize that stealing will reduce the expected value of entering the innovation lottery.<sup>95</sup>

None of the foundational theoretical studies (as distinguished from recent studies in IP law that focus on particular creative communities) meaningfully acknowledges the possibility that social norms can provide incentives to create.<sup>96</sup> If an examination of co-

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<sup>92</sup> See, e.g., Michelle Boldrin & David K. Levine, *The Case Against Intellectual Property*, 92 *Am. Econ. Rev. (Papers & Proc.)* 209, 212 (2002); Stephen Breyer, *The Uneasy Case for Copyright: A Study in Copyright of Books, Photocopies, and Computer Programs*, 84 *Harv. L. Rev.* 281, 313–21 (1970); Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 *Am. Econ. Rev.* 421, 425–26 (1966); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 *J. Legal Stud.* 325, 344–63 (1989); Fritz Machlup & Edith Penrose, *The Patent Controversy in the Nineteenth Century*, 10 *J. Econ. Hist.* 1, 25–28 (1950).

<sup>93</sup> 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).

<sup>94</sup> See, e.g., Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 *Economica* (n.s.) 167, 168–69 (1934).

<sup>95</sup> Frederic M. Scherer, *The Innovation Lottery*, in *Expanding the Boundaries of Intellectual Property* (Dreyfuss et al. eds., 2001).

<sup>96</sup> Most who have studied social norms in the intellectual property context had a different focus than ours. We study the role of social norms as a means for direct pecuniary appropriation of the fruits of one's intellectual labor. Some previous authors studied norms as providing non-pecuniary incentives to create, such as acting from

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medians' practices suggests anything, it is that the failure to more fully explore the effect of social norms on incentives to create is a substantial omission. Comedians' social norms provide significant protection for creators' incentives—protection that provides a baseline against which any contemplated introduction of enhanced formal protections should be assessed. In addition, comedians' IP 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 (including peer comedians, club owners, booking agents, and others), 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,

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curiosity, the desire to advance general knowledge, or the desire to achieve fame. See, e.g., Arnold Plant, *supra* note 94, at 168–69. Others have studied the role of intellectual property norms in academia, where creators, at least to a significant degree, are motivated by non-pecuniary incentives (like those above) and indirect pecuniary incentives (such as being employed by universities and other research institutions). See, e.g., Robert Merges, *Property Rights Theory and the Commons: The Case of Scientific Research*, 13 *Soc. Phil. & Pol'y* 145 (1996); Arti K. Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 *Nw. U. L. Rev.* 77 (1999); Katherine J. Strandburg, *Curiosity-Driven Research and University Technology Transfer*, in 16 *Advances in the Study of Entrepreneurship, Innovation and Economic Growth* 97 (2005). A third group of scholars has studied norms of respect for others' intellectual property rights. See, e.g., Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 *Berkeley Tech. L.J.* 651 (2006); Lior J. Strahilevitz, *Charismatic Code, Social Norms and the Emergence of Cooperation on the File-Swapping Networks*, 89 *Va. L. Rev.* 505 (2003); Tim Wu, *When Code Isn't Law*, 89 *Va. L. Rev.* 679 (2003). Our paper is part of a recent turn toward the study of IP-related social norms as guarantors of direct pecuniary incentives to create. See Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19(2) *Organization Science* 187 (2008); Jacob Loshin, *Secrets Revealed: How Magicians Protect Intellectual Property Without Law*, in *Law and Magic: A Collection of Essays* (Christine A. Corcos ed., 2008), available at <http://ssrn.com/abstract=1005564>. In contrast to these studies, however, our work relates to an area of creativity most resembling copyright law rather than patent or trade secret law (that is, the information the work embodies is clear on its face). It also highlights the emergence (and by implication, the dissolution) of IP-related social norms and the interaction of informal property rules with changes in relative prices and the transformation of a creative practice.

ranging from solo performances to working the stand-up circuit, performing in resorts and corporate events, and writing for other comedians, sitcoms, 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 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 potential future emergence of new social norms favoring or disfavoring appropriation. Our examination of comedians' social norms system makes clear that protection based on social norms has its cost and may be ineffective—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 has more than an occasional stealing habit. However, legal protection comes with costs too—costs that are at present prohibitively high for almost all comedians, and which include, for example, litigation, 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.

## *2. The Law/Norms Gap*

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

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copyright infringements.<sup>97</sup> Against the backdrop of an expanding gap that undermines the law's effectiveness and legitimacy, stand-up comedy is 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.

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 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 they are out of step with preexisting 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 effective informal sanctions.<sup>98</sup>

In short, policymakers 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 in some cases, the introduction of legal protections and sanctions reduces the probability that individuals will impose and

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<sup>97</sup> See, e.g., John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 Utah L. Rev. 537, 543.

<sup>98</sup> 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), <http://virginialawreview.org/inbrief.php?s=inbrief&p=2007/01/22/dreyfuss> (last visited Aug. 20, 2008).

abide by social norms.<sup>99</sup> 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. Finally, third-party enforcement today is also done by comedy fans who have started to post clips of alleged or possible joke stealing instances online.

### *3. Costs and Benefits of Law Versus Norms*

If enforcement of property rights among stand-up comedians shifted toward the 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 may make control of appropriation someone else’s job.

That said, norms systems also have their defects. 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, le-

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<sup>99</sup> See Richard Epstein, *Principles for a Free Society: Reconciling Individual Liberty with the Common Good* 41–70 (2002); Stephan Panther, *Non-Legal Sanctions*, in 1 *Encyclopedia of Law and Economics* 999, 1014–15 (Bouckaert & De Geest eds., 2000), available at <http://encyclo.findlaw.com/0780book.pdf> (describing an experiment in which the introduction of legal sanctions was shown to lessen reciprocity and performance between buyers and sellers); Panther, *supra*, at 1018–19 (summarizing literature that suggests that the introduction of legal sanctions may crowd out norm-based motivations to act); Ernst Fehr & Simon Gächter, *Do Incentive Contracts Crowd Out Voluntary Cooperation?* (Univ. of Zurich, Inst. for Empirical Res. in Econ., Working Paper No. 34, 2001), available at <http://ssrn.com/abstract=229047>.

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gally enforceable protections—because of the practical and doctrinal barriers we described above—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, and 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 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 clear concept of fair use.

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 cross the line to threats of physical violence and even assault.<sup>100</sup> And even in the

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<sup>100</sup> See James Sherwood, *Is Stealing Punch Lines Worth a Punch-up?*, *The Guardian*, [http://blogs.guardian.co.uk/theatre/2007/07/is\\_stealing\\_punch\\_lines\\_worth.html](http://blogs.guardian.co.uk/theatre/2007/07/is_stealing_punch_lines_worth.html), July 26, 2007 (warning against "mob justice"); Brownfield, *supra* note 91 ("Accusing someone of stealing is a popular blood sport among comics.").

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<sup>101</sup>). 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. If Williams, winner of three Grammy awards for best comedy album,<sup>102</sup> is unable to enter comedy clubs ten years after he has been accused of joke stealing, then we might worry that, on occasion, the norms system overdeters.

#### *4. Norms May Undermine Legal Policy*

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 any distinctive element, others cannot write jokes that also include that device. Such a rule would clearly grant protection beyond what copyright law currently provides—it would, in effect, allow the propertization of ideas.

This feature of comedians' norms system raises a series of particularly interesting observations and questions. Formal copyright law embodies a policy choice to exclude ideas from protection, leaving them either to the patent system (if novel, non-obvious, and useful) or, alternatively (and much more frequently), to the public domain (in the case of expressive elements at a high level of abstraction). In contrast, comedians' norms system adopts a very different policy choice. As a consequence, one cannot simply consult the formal law to understand precisely what restrictions apply to the use of comedic ideas—anyone wishing to work successfully

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<sup>101</sup> See Steve Bennett, *You Thieving Bast- Oh, My Mistake*, BBC, May 23, 2005, <http://www.bbc.co.uk/comedy/news/2005/05/23/19513.shtml> (reporting that United Kingdom 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).

<sup>102</sup> See Grammy Award for Best Comedy Album, [http://en.wikipedia.org/wiki/Grammy\\_Award\\_for\\_Best\\_Comedy\\_Album](http://en.wikipedia.org/wiki/Grammy_Award_for_Best_Comedy_Album) (last visited Aug. 17, 2008).

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as a comedian must also be familiar with the informal arrangements that govern that creative practice.

If social norms govern the use of creative material in other settings, then we must inquire whether the norms differ from the formal law in ways that alter the policy choices we thought we had made via ordinary lawmaking. And if social norms do in fact run counter to the policy choices of formal law, should we welcome that divergence as organic private ordering, or perhaps oppose it as IP producers frustrating socially efficient public policy by proper-tizing ideas?

This is a subject far beyond the scope of this paper. We are unable, indeed, to offer an answer to these questions even with respect to comedians' social norms. We lack the baseline to make a reliable determination because we do not know whether formal copyright law is itself under- or over-protective with respect to any particular creative product at issue here. For those who believe that free commerce in ideas is desirable, then the tendency of comedians' social norms system toward broader protection of ideas is likely troubling. On the other hand, for those inclined to worry that exclusion of ideas from copyright's domain raises the risk of insufficient incentives to invest, comedians' social norms system might represent a salutary adaptation.

##### *5. Norms as an Escape from IP's One-Size-Fits-All Straightjacket*

There is a final and even broader implication. For those who believe that formal IP protections are not optimal for a particular form of creative work, norms-based IP systems may be desirable as a way of tailoring otherwise uniform IP rules. Formal IP law is charged with the difficult task of creating and maintaining adequate incentives to innovate without unduly sacrificing the access rights of both follow-on innovators (who contribute to social welfare via improvements) and end-users (who benefit from the spread of knowledge).<sup>103</sup> As a number of commentators have noted, IP law would do a better job at trading off these contending interests if it were sensitive to the contexts within which different crea-

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<sup>103</sup> See, e.g., William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 74–76 (2003) (explaining IP's optimization task).

tive communities innovate.<sup>104</sup> And yet, IP law applies a largely uniform set of legal rights across a wide range of patented inventions and copyrighted works of authorship. In the copyright context, the same basic rules apply to blockbuster movies, poetry, software, graphic designs, photographs, sculpture, and, with a few exceptions, musical compositions and recorded music. Applying socially costly, largely uniform copyright rules across industries that face different innovation conditions and respond differently to innovation incentives means that the formal IP law imposes significant uniformity costs. The law may underprotect some innovation investments, and overprotect others.

Against this background, norms-based IP systems are attractive because they offer one way of tailoring IP regulation to particular creative practices that are poorly served by the formal law. As we have seen in the course of this study, formal copyright law does not offer effective protection to stand-up comedians. Comedians have responded by organizing an informal system of IP norms that stands in for the formal law and regulates ownership, transfer, and appropriation. Of course, comedians could have sought some or perhaps all of the benefits of the norms system by pressing for changes in the formal IP law. But changes to formal law present two broad risks. The first is that rewriting the IP law to provide industry-specific rules would create substantial costs (for example, the cost of providing Congress with the industry-specific knowledge necessary to guide the changes and the cost to judges of understanding and applying the proliferation of industry-specific IP rules) and uncertainties (arising both from the law's increased complexity and from the difficulty of monitoring the effect of rule changes on particular industries). The second is that a move toward industry-specific IP law will unleash a wave of rent-seeking by industries seeking to benefit from rule changes that would be, by virtue of being channeled into industry-specific regulation, less likely

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<sup>104</sup> See Michael W. Carroll, *One For All: The Problem of Uniformity Cost in Intellectual Property Law*, 55 *Am. Univ. L. Rev.* 845, 846–47 (2006) (describing variance in creative practices and costs of uniform IP law); Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 *Va. L. Rev.* 1575 (comparing innovation costs in different industries and arguing that uniform patent law is inefficient); Glynn S. Lunney, Jr., *Patent Law, the Federal Circuit, and the Supreme Court: A Quiet Revolution*, 11 *Sup. Ct. Econ. Rev.* 1 (2003) (same).

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to motivate opposition from industries that would have been adversely affected under the current one-size-fits-all system.

*B. The Role of IP Rules in Shaping Creative Output*

Copyright law is conventionally viewed as trading off two important but contending values. First, copyright attempts to spur creative output. It does this by establishing property rights that help authors to control copying of their works and prevent the dissipation of author profits that uncontrolled reproduction and distribution would otherwise threaten. Second, copyright limits the property rights that it creates, in order to encourage the wide dissemination of existing works, as well as the use of existing works as building blocks in the creation of new works. In pursuing these competing goals, copyright law must strike a balance. If protection is too low, existing works will be disseminated widely, but authors may be unwilling to invest enough in the production of new works. Conversely, if the level of protection is set too high, we might expect more new works, but dissemination of existing works will be restricted, and other potential authors will not be able to build upon protected works freely in order to create new ones.

The debate over the optimal level of copyright protection is framed as an inquiry into how to induce the production of an optimal level of creative output. The debate is about how much creativity we will obtain. If we get the level of protection “just right,” we will optimize creative output. Our research suggests a new and separate set of concerns that should inform debates over copyright policy. Changes in IP rules do not just affect how much stand-up comedy is produced. They also play a role in determining *what kind* of stand-up comedy we see.

This effect of IP rules has long been understood in the literature analyzing the interaction of patent and trade secret law. Absent patent law, inventors and firms would be drawn to invest in research and technologies that cannot be easily imitated by rivals (in other words, for which the costs of reverse engineering are high or prohibitive). The introduction of patent protection shifts the direction of innovation away from projects that are easy to keep secret toward projects the details of which are readily discoverable. The commentary generally views this observation as an argument for stronger patent law: inventors and firms would thus tend to explore

and use the technologies with the highest social, rather than private, value. We can see an analogous dynamic unfolding in stand-up comedy, but to understand it clearly we need first to look back at earlier phases in the development of stand-up comedy—the vaudeville and generic joke era stretching from the late nineteenth century to the middle of the twentieth 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.

### *1. Joke Stealing in Historical Perspective*

#### *a. Vaudeville, Burlesque, and Minstrelsy*

The roots of American stand-up comedy can be traced back to variety theater and especially vaudeville,<sup>105</sup> America's primary form of entertainment in the late nineteenth and early twentieth centuries.<sup>106</sup> A vaudeville show consisted of a collection of independent (and typically short) presentations of singing, dancing, juggling, acrobatics, magic, animal performances, pantomime, and comedy.<sup>107</sup> Comedy in vaudeville was substantially in a theatre format, presented with the "fourth wall" up and in the format of 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,<sup>108</sup> and occasionally with other talents such as magic or throwing lasso.<sup>109</sup> Pure joke telling, a form closer to mod-

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<sup>105</sup> See, e.g., 1 *Vaudeville Old and New*, at xxx (Frank Cullen ed., 2007) ("The comedy clubs of the last decades of the twentieth century were vaudeville without variety.").

<sup>106</sup> 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 1860s that ridiculed the upper classes to sexually suggestive humor in the late 19th century and early 20th centuries when the form transitioned to mostly male audiences, and minstrel, a form based on racial stereotype humor.

<sup>107</sup> See, e.g., uanews, <http://www.youtube.com/watch?v=pElRiVQ7FXQ> (last visited Sep. 30, 2008) (discussing what vaudeville was and showing historical footage).

<sup>108</sup> See, e.g., cheyennewong, *A Few Moments with Eddie Cantor*, <http://youtube.com/watch?v=9Mhpw7gb1fE>, at 1:50–3:40 (last visited Aug. 17, 2008) (illustrating the interjection of song and dance into a comedic presentation).

<sup>109</sup> 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 opportuni-

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ern stand-up, was not unknown in vaudeville, but it was not common until the last decade of the form, when vaudeville moved closer to stand-up by placing increasing emphasis on the character of the emcee.<sup>110</sup> 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.<sup>111</sup>

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 1840s and the 1940s. Minstrel acts would script dedicated ad-lib moments for direct actor-audience communication: these spots often were used for telling quick jokes.<sup>112</sup> Burlesque was stand-up's third major precursor and involved a mix of satiric and ribald humor aimed at a male audience.<sup>113</sup>

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ties to ad-lib or respond to hecklers with short comic bits; however, it is difficult to assess how prevalent pure joke telling was in the early period of vaudeville.

<sup>110</sup> Initially, it would be one of the monologists or a singer that would take up hosting chores for the entire bill. See Emcee, *in* 1 *Vaudeville Old and New*, supra note 105, at 355; see also Frank Fay, *in* id. at 369, 371 ("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, . . . handl[ing] 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.'").

<sup>111</sup> Emcee, *in* 1 *Vaudeville Old and New*, supra note 105, at 355.

<sup>112</sup> Telephone Interview with Jerry Zolten (Dec. 18, 2007) (on file with authors) (explaining the history and nature of minstrel shows); Minstrelsy, *in* 2 *Vaudeville Old and New*, supra note 105, at 771 ("Some 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.*

<sup>113</sup> Vaudeville, minstrel, and burlesque humor was not, in general, tailored to specific performers. Vaudeville and burlesque jokes were usually short and lacked 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*. *Id.* at 772.

We see evidence of joke stealing (though 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.<sup>114</sup> 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 copies,<sup>115</sup> *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 (for example, *Cohen Phones the Health Department* and

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<sup>114</sup> See, e.g., LeRoy Ashby, *With Amusement for All: A History of American Popular Culture Since 1830*, at 123–24 (2006) (“[Vaudeville c]omedians in particular often stole each other’s jokes. Indeed, as George Burns recalled, theft was so common that a manager in one North Dakota theater posted a sign ‘listing about 100 jokes and warning, THESE JOKES HAVE ALREADY BEEN USED IN THIS THEATER—DO NOT USE THEM.’ Burns noted that ‘nobody used them there, but everybody wrote them down and put them in their act for the next booking.’”); Abel Green & Joe Laurie, Jr., *Showbiz: From Vaude to Video 44* (1985) (“[Vaudeville p]iracy was so flagrant that one Alexander Byers, who operated under the name of the Chicago Manuscript Company, privately referred to himself as a ‘dramatic pirate.’ He publicly offered to sell scripts of any current show or vaudeville act. Copyright laws couldn’t touch him, because Byers actually sold only manuscripts, not the dramatic rights for performance.”); Paul M. Levitt, *Introduction to Vaudeville Humor: The Collected Jokes, Routines, and Skits of Ed Lowry 1, 1* (Paul M. Levitt ed., 2002) (“If stealing jokes had been a crime, most vaudevillians would have ended up in jail. So great was the traffic in stolen jokes that the trade itself became a source of humor. At the conclusion of their acts, comedians would dash off to other vaude houses to hear competitors’ routines. Shamelessly taking what they liked, sometimes altering the material, sometimes not, they rarely if ever acknowledged the source of their humor.”); Bernard Sobel, *Burleycue: An Underground History of Burlesque Days 164* (1931) (“There was no need worrying about who wrote the bits, after all, as there was more than enough to go around and with repetition, they always supplied an audience with what William Archer calls the ‘joy of recognition,’ that is, pleasurable contact with the familiar. In stock, comics played everything that they could borrow, adapt, or invent. Nothing belonged to anyone and there was a friendly exchange of material—bit for bit.”).

<sup>115</sup> See, e.g., Tim Gracyk with Frank Hoffman, *Popular American Recording Pioneers 1895–1925*, at 10 (2000) (suggesting that over two million copies were sold).

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*Cohen Becomes a Citizen*) released by competing labels, and even two “Cohen” movies,<sup>116</sup> all within about a decade.<sup>117</sup> 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.<sup>118</sup>

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. Vaudeville’s high-end (or “big-time”) theatres were organized into two dominant circuits, separated geographically so that they did not compete. The big-time vaudeville circuits cooperated in book-

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<sup>116</sup> See, e.g., The Internet Movie Database, *Cohen on the Telephone* (1923), <http://us.vdc.imdb.com/title/tt0490849/> (last visited Aug. 20, 2008) (providing details of Monroe Silver’s 5 minute version of *Cohen on the Telephone* produced in 1923); The Internet Movie Database, *Cohen on the Telephone* (1929), <http://us.vdc.imdb.com/title/tt0844291/> (last visited Aug. 20, 2008) (providing details of George Sidney’s 9 minute version of *Cohen on the Telephone* produced in 1929).

<sup>117</sup> See Telephone Interview with Jerry Zolten, *supra* note 112; Donald Weber, The Jewish-American World of Gertrude Berg: *The Goldbergs* on Radio and Television, 1930–1950, in *Talking Back: Images of Jewish Women in American Popular Culture* 85, 89–90 (Joyce Antler ed., 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, in *6 Book History* 147, 163 (Ezra Greenspan & Jonathan Rose eds., 2003) (“The ‘Cohen on the Telephone’ piece was performed by various artists over the years, but always verbatim from the same script.”); see also grumblebee, *cohen on the telephne*, [www.metafilter.com/58981/cohen-on-the-telephne](http://www.metafilter.com/58981/cohen-on-the-telephne) (last visited Aug. 19, 2008); Joe Hayman, *Cohen at the Telephone*, <http://www.raeproductions.com/music/cohen.html> (last visited Aug. 17, 2008).

<sup>118</sup> 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.

ing performers centrally through an arrangement known as the United Booking Office (“UBO”).<sup>119</sup> The “small-time” vaudeville business, although somewhat more competitive, was still dominated by the same Keith and Orpheum circuits that controlled the big-time business.<sup>120</sup> The circuits’ booking cartel 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 (for example, two *Cohen on the Telephone* acts on the same bill or on different bills at the same location close in time). Of course, the UBO 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 buy-side market power.<sup>121</sup> 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 works. Acts working in the same vein (for example, potential originators and copyists) would be less likely to be placed into direct geographic and temporal competition within the regional circuits.

*b. 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 media, but also performed live in independent stand-up shows in night-

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<sup>119</sup> Alfred L. Bernheim, *The Facts of Vaudeville*, in *American Vaudeville: As Seen by Its Contemporaries* 124, 124 (Charles W. Stein ed., 1984) (“The Keith and Orpheum circuits are not competitors. There is an interlocking directorate, and acts which play one circuit regularly play the other. The ‘Big Time’ is so divided that Keith’s controls all houses east of Chicago; while Orpheum functions in Chicago and all points west. Both book from the same floor of the Palace Theatre Building in New York.”).

<sup>120</sup> *Id.* (“The practically absolute control exercised by Keith’s and Orpheum in ‘Big Time’ does not extend to the ‘Small Time’ field. Here the circuits owned by [Alexander] Pantages and [Marcus] Loew offer real competition. There is, however, a bloc of from 300 to 350 ‘Small Time’ vaudeville theatres in which Keith’s and Orpheum are either owners, or control the policies of the theatres through their bookings.”).

<sup>121</sup> 1 *Vaudeville Old and New*, supra note 105, at xx–xxi.

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clubs, casinos (located principally in Las Vegas), and hotels and resorts located around the country, but concentrated in areas such 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. These performers carried with them into this post-vaudeville period much of the “vaudeville aesthetic”<sup>122</sup>—fast-paced gags, word-play, remnants of theatre (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. For example, they told strings of jokes that ranged over a wide variety of topics and had little narrative or thematic connection to one another. This style of humor was the dominant form of stand-up between the late 1920s and the 1960s, and remains a secondary, but still significant form of stand-up today.

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.<sup>123</sup> Phyllis Diller, perhaps the fastest worker in the post-vaudeville cohort, could keep up for her one-hour act a constant pace of twelve punchline deliveries a minute.<sup>124</sup> The post-vaudeville comic worked to master the art of timing

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<sup>122</sup> See Henry Jenkins, *What Made Pistachio Nuts? Early Sound Comedy and the Vaudeville Aesthetic* 281–83 (1992).

<sup>123</sup> 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., Julius Tannen, *in* 2 *Vaudeville Old and New*, *supra* note 105, at 1090, 1091 (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”); Franky Tinney, *in* *id.* at 1111 (“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.”); Ed Wynn, *in* *id.* at 1231–32 (“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.’”).

<sup>124</sup> See Carter, *supra* note 63, at 181; Joanne R. Gilbert, *Performing Marginality* 116–17 (2004); Susan Horowitz, *Queens of Comedy* 2 (1997).

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 stand-up 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.<sup>125</sup> Phyllis Diller maintained an archive of over fifty thousand jokes, carefully organized by topic. The Diller archive is now in storage at the Smithsonian in Washington, D.C., 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 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. The Diller joke files contain hundreds of "Lockhorns" panels cut out of newspapers and mounted on index cards.<sup>126</sup>

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 exis-

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<sup>125</sup> These joke files were valuable property, and were sometimes sold. Joey Adams with Henry Tobias, *The Borscht Belt* 61 (1966) ("When [Henny] Youngman and Henry Tobias heard that the file of one of the funniest standup comics in vaudeville, Richy Craig, Jr., was on the block, they begged and borrowed and sold their clothes to get enough money to grab it. Then they split it between them. It was like an investment. Not only did they have fresh material, but they made copies and peddled them to other emcees at a profit.").

<sup>126</sup> 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. See Milton Berle, *Milton Berle's Private Joke File* (1992); Milton Berle, *More of the Best of Milton Berle's Private Joke File* (1996). Bob Hope also maintained his own joke file, which he contributed before his death to the Library of Congress. A history and description of Bob Hope's joke file is available online. Bob Hope and American Variety: Joke File (Dec. 29, 2004), <http://www.loc.gov/exhibits/bobhope/jokes.html>.

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tence publicly.<sup>127</sup> Benny was also among the first to learn that mass exposure of one's jokes on radio and television, although a blessing, also necessitates a constant supply of new material.<sup>128</sup>

In this post-vaudeville era, bodily appropriation as well as the "refinement" of other comedians' materials was still prevalent,<sup>129</sup> 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 to ensure a constant flow of new material.<sup>130</sup> Ed Wynn gave Milton Berle the nickname, "Thief of Bad Gags."<sup>131</sup> Berle openly admitted to a penchant for joke stealing, and he made jokes about it—for example, Berle's famous gibe, made

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<sup>127</sup> Anthony Slide, *The Encyclopedia of Vaudeville* 31, 33 (1994) ("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.'"); JackBenny.org, Jack Benny Biography, <http://www.jackbenny.org/biography/biography.htm> (last visited Aug. 19, 2008) (suggesting that Benny bought jokes as a comedian); Wikipedia, Jack Benny, [http://en.wikipedia.org/wiki/Jack\\_Benny](http://en.wikipedia.org/wiki/Jack_Benny) (last visited Aug. 19, 2008) ("Benny was notable for employing a small group of writers . . . .").

<sup>128</sup> See Gary Giddins, *Natural Selection: Gary Giddins on Comedy, Film, Music, and Books* 29 (2006) ("[Benny] made a terrifying discovery. Radio consumed material faster than he could get it. A joke that might have worked for a whole season in vaudeville was good for only one night on radio.").

<sup>129</sup> See, e.g., Adams & Tobias, *supra* note 125, at 61 ("[Henny] Youngman's style of delivery kept him joke broke. Like all Toomlers his need for new, fresh material was complicated by the fact that he worked to repeater guests season after season. The usual method of obtaining material (by most Social Directors) was to lift from the best. Any opening day at Loew's State or the Palace found a dozen comics in the audience, pencils akimbo.").

<sup>130</sup> See, e.g., Kerry Segrave, *Piracy in the Motion Picture Industry* 19 (2003) ("According to vaudeville historian John DiMeglio, Bob Hope pirated from the magazine *College Humor*, changing its jokes to suit his style. Hope admitted, 'I did anything just trying to get material to do.'"); Raymond Strait, *Bob Hope: A Tribute* 32 (2003) ("[Bob Hope] sang a little, stole jokes and rewrote them to fit his own sense of timing, made himself the butt of jokes . . . ."); see also Robert A. Stebbins, *The Laugh-Makers* 47 (1990) ("Bob Hope is said to have six writers, five men and one woman.").

<sup>131</sup> See, e.g., Bob Hope as Told to Pete Martin, *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 day [sic] 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.").

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on stage at the Beverly Hills Friar's Club, that the prior act "was so funny I dropped my pencil."<sup>132</sup>

*c. The Rise of Point-of-View 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 point of view.<sup>133</sup> Mort Sahl and Lenny Bruce were particularly influential in the 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

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<sup>132</sup> On radio, Berle suggested humorously that joke stealing was prevalent among top comedians of the post-vaudeville era. See Thrilling Days of Yesteryear, <http://blogs.salon.com/0003139/2004/02/22.html> (Feb. 22, 2004) ("[Y]ou 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 . . . [T]hat's the way it operates, it's called *corn* exchange . . .") (containing transcript of *The Milton Berle Show* from January 20, 1948). Berle's description rings true. The famous 1940s 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 has been accused of stealing jokes during the vaudeville era, see [JackBenny.org](http://JackBenny.org), *supra* note 127 (suggesting that as a Vaudeville performer, Benny would be "occasionally stealing" the acts he performed), and then accused again later of stealing from Milton Berle. To this latter charge, Benny is said to have responded that "[w]hen you take a joke away from Milton Berle, it's not stealing, it's repossessing." Wikipedia, Milton Berle, [http://en.wikipedia.org/wiki/Milton\\_Berle](http://en.wikipedia.org/wiki/Milton_Berle) (last visited Aug. 19, 2008).

<sup>133</sup> See 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 & Kim Johnson, *Truth in Comedy: The Manual of Improvisation* 16 (1994) ("The freshest, most interesting comedy is not based on mother-in-law jokes or Jack Nicholson impressions, but on exposing our own personalities."); Steve Martin, *Born Standing Up: A Comic's Life* 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].").

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convention, racial bigotry, religious hypocrisy, and repressive sexual mores. These two pioneers made drastic changes to stand-up at a time when most other comedians were still working within the post-vaudeville model.

Lenny Bruce was particularly open about his intent to break with the comedic culture of the one-liner. He did not start his career as a pioneer, but as a typical Catskills “toomler,” performing a clean act filled with hokey impressions and material liberally appropriated from other comics.<sup>134</sup> After achieving some initial recognition, however, Bruce began making changes to his act. He began writing all of his material himself (a radical concept at the time).<sup>135</sup> He incorporated Jewishness into his act,<sup>136</sup> subverted archaic mother-in-law jokes and one-liners,<sup>137</sup> publicly belittled established comedians,<sup>138</sup> and highlighted everything he thought was wrong with comedy.<sup>139</sup>

<sup>134</sup> See Ronald K.L. Collins & David M. Skover, *The Trials of Lenny Bruce: The Fall and Rise of an American Icon* 15 (2002); Gerald Nachman, *Seriously Funny: The Rebel Comedians of the 1950s and 1960s*, at 399–400 (2003) (“[I]t was [Bruce’s] standard lineup of voices (Bogart, Cagney, Bette Davis) that got him a week at the Strand on Broadway and another at the Tick Tock Club in Milwaukee, capering in a straw hat. He bombed at the Strand—‘I was ready for them, but they weren’t ready for me’—with a stolen Sid Caesar routine, word for word and gesture for gesture . . . He stole impressions from Will Jordan’s treasury of voices, but Bruce’s impressions were funny whereas Jordan’s were only accurate. Many were rip-offs (his Sabu was a swipe from Jordan, his rubber-lipped Bela Lugosi was pilfered from Jack DeLeon) . . .”).

<sup>135</sup> Gilbert Millstein, *Man, It’s Like Satire*, N.Y. Times, May 3, 1959, at SM 28.

<sup>136</sup> Nachman, *supra* note 134, at 397. (“[Jewishness] had been a secret subtext in the humor of everyone from Milton Berle to Groucho Marx and Sid Caesar, but Bruce dragged it out of the comedy closet kicking and kvetching.”).

<sup>137</sup> *Id.* at 401. Bruce was one of the first comics to change the paradigm of the mother-in-law joke when he quipped, “‘My mother-in-law broke up my marriage. My wife came home and found us in bed together.’” *Id.* (emphasis omitted); see also *infra* note 141 and accompanying text (discussing Mitch Hedberg’s humor).

<sup>138</sup> Bob Orben, the author of several gag books that were widely used by stand-up comics and magicians, nearly sued Lenny Bruce for libel because of an advertisement he was running in *Variety* for his new act. In the ad, Bruce publicly declared his departure from the traditional comedy fare of the day:

He was drumming the act he was doing in those days which was he would sit on a stool with a mic and a phone book and a phone in the midst of a night club floor, and at random he would pick a name out of the book and call them, and back and forth, and theoretically it would be funny. And he said it was a new type of act, and on the bottom of the ad every week ran “*No Joe Miller, no corn, no Orben.*” And the reason he was putting “no Orben” was at that point virtually every comedian in the country was using Orben.

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 as different as Jerry Seinfeld, Chris Rock, Zach Galifianakis, 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 Chappelle—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 *comedic narrative*; that is, on longer, thematically linked routines that displace the former reliance on discrete jokes. The narrative content is linked, moreover, to the individual comedian’s point of view, manifested as a comedic character which bears particular traits and remains fixed throughout the performance (although it may shift over the course of a comedian’s career). Modern comedy also sometimes includes performative elements (for example, Lewis Black’s strange, disconnected gesturing and sputtering anger; Zach Galifianakis’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—for example, 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 the performative elements that establish persona, such as Steven Wright’s monotonic delivery of nuggets of first-person surreal-

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Interview with Bob Orben by Simon Sandall, Readersvoice.com (Aug. 2004), available at <http://web.archive.org/web/20040804225123/http://www.readersvoice.com/interviews/2004/August/152/>.

<sup>137</sup> Nachman, *supra* note 134, at 406 (In 1960, Bruce appeared at the Blue Angel. “The showbiz contingent was on the floor when he spun out his long signature piece about a two-bit comedian opening for Georgia Gibbs at the Palladium, Bruce’s favorite routine (‘Well, folks, I just got back from Lost Wages, Nevada. Funny thing about Lost Wages . . .’). It’s a brilliant deconstruction of the hack mentality—of himself, of Catskills comics, of much of show business.” (emphasis omitted)).

ism,<sup>140</sup> or Mitch Hedberg's reliance on his overt stage fright, strange word emphases, and paraprosookian turns of phrase.<sup>141</sup>

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 generic joke telling, rather than comic monologue, are derided as "hacks." Originality is prized—indeed, it is arguably the first criterion by which comedians judge other comedians—and stealing is condemned.

## 2. *Inducing Creativity: 'How Much' Versus 'What Kind'*

Thus, over the history of the form we have seen two major modes of stand-up comedy. In the post-vaudeville era comedians were telling largely interchangeable generic jokes. They differentiated themselves from each other according to their individual performance style. These comedians competed mostly on technique: who delivered the joke better, timed the audience better, was able to compile and assemble from a repository of jokes a subset that fit the particular audience. The text was easily appropriable, and as a result many comedians based their acts on a blend of stock jokes, jokes purchased from others, and appropriated jokes. We see some investment in the creation of new jokes, and we see many comedians purchasing jokes from other comedians and from joke writers. Overall, however, stand-up material, from whatever source, tended to stay close to stock themes and topical humor. We do not see, in the post-vaudeville period, much investment in the kind of personalized or otherwise original material that is prevalent in the market today. Given the regime of free appropriation governing the post-

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<sup>140</sup> 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." See Wikipedia, [http://en.wikipedia.org/wiki/Steven\\_Wright](http://en.wikipedia.org/wiki/Steven_Wright) (last visited Sep. 30, 2008).

<sup>141</sup> A paraprosookian 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." See Mitch Hedberg, [http://www.squidoo.com/mitch\\_hedberg](http://www.squidoo.com/mitch_hedberg) (last visited Sep. 30, 2008).

vaudeville form, this makes sense. Text was the appropriable element of the comedic form; delivery, however, was relatively more difficult to steal. Post-vaudeville comedians were incentivized to invest in the latter element at the margin, in preference to the former.

Compare post-vaudeville stand-up with the modern incarnation of the form. Appropriation in stand-up is now regulated by an informal IP system. Under the current community-based regulation, the text is protected—not perfectly, but the norms system does raise the cost of appropriation. And in line with what we might expect when the cost of appropriating text goes up, we find that comedians invest more at the margin in innovation directed at the text. Creators in today's stand-up community invest in new, original and personal content. The medium is no longer focused on reworking of preexisting genres like marriage jokes, ethnic jokes, mother-in-law jokes, or knock-knock jokes. Following the rise of the norms system, comedians did not simply invest in creating more of the same kinds of material they had produced before. Rather, they changed the content of their material and diversified the types of comedy on offer. At the same time, it seems to us also true that comedians today invest less in developing the performative aspects of their work; indeed, many stand-ups today stand at a microphone, dress simply, and move around very little, compared to the more elaborate costuming, mimicry, musicianship, and play-acting that characterized the post-vaudeville comics.

The change in the comedic product is not the only effect that can be traced, at least in part, to the norms system. The way in which comedy is *produced* has also changed. Through our interviews and research, we have gotten the impression that fewer present-day comedians use joke writers or purchase jokes compared with the practice among post-vaudeville stand-ups.<sup>142</sup> This makes sense to us, because the costs and risk inhering in transactions between comedians and writers have likely gone up. From the comedian's perspective, one now has to look for writers who can write well for her

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<sup>142</sup> See Discussion: Steve Allen, Lenny Bruce, Bill Dana, Jules Feiffer, Mike Nichols, Mort Sahl & Jonathan Winters, *Hip Comics and the New Humor*, 8 *Playboy* 35, 40 (1961) ("The really new thing about the new humorists in nightclubs is that just about all of the good ones, and a few of the mediocre ones, write their own material. Sahl does, Bruce does, Nichols and May do, Berman does—they all do it." (Feiffer)).

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unique persona. The supply of suitable writers is therefore more limited compared to a world where writers wrote largely interchangeable content, and the cost of hiring a writer has likely risen. From the joke writer's perspective, he must now spend time to get to know his client's act before writing for him (which also raises cost) and has a much lower chance of recouping his investment if the deal falls through (since few other comedians are likely to be interested in a joke tailor-written for another). The change in the IP rules governing the form have thus contributed to a change in the way in which comedic material is created. In the post-vaudeville era, we saw much more division of labor between writing and performance of comedic material.<sup>143</sup> In the modern era, both writing and performance are more often undertaken by the comedian.

We pause here to make two clarifying points. First, we cannot claim, based on the evidence we have seen, that the rise of stand-up comedy's norms system caused the shift from generic to point-of-view driven stand-up comedy. Nor are we suggesting that a concern with appropriation is the only factor that has pushed comedians towards a personal, point-of-view driven style. Clearly, there were other social and cultural trends at work, such as the focus on individuality that characterized the sixties and the concomitant disappearance of censorship, which allowed comedians to differentiate their material into areas previously unthinkable.<sup>144</sup> But that does not mean that the two phenomena are not linked, albeit in ways that are much more complicated than linear causation. Stand-up's norms system emerged and won increasing adherence contemporaneously with the growing transformation of the comedic product from generic to personal, point-of-view driven humor. And we believe that the two are interdependent in that each contributed to the evolution of the other rather than one affecting or causing the other unilaterally. Our interviews suggest that comedians have at least a tacit understanding of the relationship between norms and the personalized comedic form. One of them captured this beautifully as follows:

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<sup>143</sup> The production process in post-vaudeville arguably realized greater efficiencies stemming from specialization and division of labor.

<sup>144</sup> As one of our interviewees put this last point, "Lenny Bruce took a bullet for every [expletive] doing stand-up in a New York cellar."

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.

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The more entrenched the norms system becomes, the more it makes sense for comedians to produce point-of-view driven content; and the more unique comedians' material is, the easier it is to enforce and maintain a norms-based property system. In emphasizing the way IP rules affect content, we are not denying causality in the other direction—we believe the relationship runs both ways.

Second, the story of stand-up comedy suggests that our choices regarding which IP rules will govern a particular creative industry often will implicate delicate normative judgments. We can see this in the comparison between the post-vaudeville and modern styles. In the post-vaudeville era, creativity in jokes was more limited, but the form was also perhaps more accessible and communal. Post-vaudeville era mother-in-law jokes, one-liners, and puns were the type of jokes, then and today, that you are likely to share with friends and family. The post-vaudeville form was therefore less personal and inventive, but also more social. The social aspect of post-vaudeville stand-up is not insignificant, because the sharing of jokes creates value (for instance, giving and receiving pleasure, and cementing social relationships) for both tellers and recipients. Today, stand-up is more innovative, but it is also less inclusive; modern stand-up is consumed by the audience alone and less often redistributed by them to others. The audience does not participate in the form in the same way they did when the post-vaudeville comedians produced and reproduced jokes accessible to all.

Which environment is better? It is hard to say, in part because the role that stand-up plays in our culture has changed over time and is linked to the type of creative output prevalent in the stand-up market in a given period. Nevertheless, our study suggests that the choice of IP regime governing stand-up is a factor that helps to shape both the type of material produced and the role of the art form in our society. Over the history of stand-up comedy, different IP regimes—free appropriation in post-vaudeville versus an informal property system limiting appropriation in modern stand-up—have contributed to the production of markedly different forms of stand-up comedy, and have also changed the way in which stand-up is produced and consumed. If these observations generalize to other forms of creativity, then our discussion of desirable IP rules has become more complex. We would need to update our thinking about IP rules in a way that recognizes that they may change the

nature of the creative practices they are regulating, that different people are likely to create and consume at different levels of protection, and that different content is likely to be conducted under different production processes.

We can now apply these observations to the change in IP rules applying to stand-up comedy. Do we value humor as a sort of social glue? Do we want to encourage consumers to participate in disseminating and improving jokes (to the joy or dismay of others)? If so, we might prefer the post-vaudeville form, and our views would lead us to favor IP rules conducive to that form (free appropriation and sharing). Alternatively, we may view humor as a form of individual self-expression and social commentary. If we are committed to this understanding of humor's purpose, we are likely to favor personalized modern stand-up and the more-encompassing, albeit informal, IP rules that have developed alongside the rise of the modern form.

Given the role of IP rules in shaping comedians' work, it is worth speculating about what comedy might look like if formal IP law played a much bigger role in controlling appropriation. This is not the regime we have today, but we could easily move in that direction. Congress could beef up legal protections to make joke stealing more readily actionable, for example, by directing judges to stretch the boundaries of protected expression in jokes, thereby confining the domain of unprotected comedic ideas to a relatively high level of abstraction. This change in the rules would lower the disincentive to lawsuits currently imposed by the idea/expression doctrine (although, arguably, such a change would merely encode into formal law a feature of the current norms system). Congress could also strengthen formal protections for comedians' material by awarding statutory damages to the victims of joke theft as a matter of course, by waiving copyright registration fees for jokes, by awarding attorney fees automatically in cases involving joke theft, or, most dramatically, by abolishing the defense of independent creation in joke-infringement cases (thus awarding priority to the first to tell, or perhaps register, a joke).

What would be the result of changes of this sort? It is hard to say, and we admit that here we are speculating. Our best guess is that strengthening formal IP protections for jokes would increase the monetary return on joke creation, but would also raise the cost

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of creating new material. In such an environment, comedians would face a much larger monetary sanction if they happened to tread too closely to other people's work, even if they did not know they were doing so (copyright infringement is a strict liability tort). In an environment governed by beefed-up IP law, comedians would be obliged to "clear" jokes (even by virtue of pure risk aversion) before performing them—that is, to ensure that no rival had claimed rights in substantially similar material. Clearing rights is expensive and would be more so if the enhanced copyright regime allowed comedians to pursue copyright lawsuits without complying with the current registration prerequisite. The necessity of clearance, and the risk of lawsuits if clearance is done incorrectly, would raise comedians' cost of doing business. Additionally, copyright's secondary liability doctrines would extend the risk of liability to intermediaries such as booking agents and club owners, who would be obliged to insure or exercise some level of due diligence before booking a comedian.

Under these conditions, it is possible that over time the market would shift toward provision of stand-up comedy by large-scale enterprises, which can deal with such risks better because of risk neutrality and economies of scale. We might, in short, find that stand-up comedy would come to look more like the music recording and motion picture industries, where supply of the creative product is dominated by a relatively small number of large firms. A stand-up market of this sort might be organized around large comedy club chains that could afford to hire lawyers to clear stand-up acts in advance and to ensure against the residual risk of infringement. If so, there is a good chance that entertainment conglomerates would tend to produce comedy of mass appeal, and will take less risk with cutting-edge, subversive speech. The three configurations of property rights above, we believe, suggest that in choosing the level of protection for jokes, policymakers would also be, in effect, making decisions that will favor particular forms of stand-up comedy, and will affect who will produce it and how it will be produced, consumed, and used.

### *C. The Emergence of Intellectual Property Norms*

The story of stand-up comedy traces a move from a regime of open access, where jokes were effectively in the public domain, to

one in which comedians' property rights in their material are protected by a regime of social norms. Our study suggests that even in instances where, at least initially, market failure seems likely, non-legal protections against unauthorized appropriation may later develop and avert the risk of market failure. What factors are likely to spur the emergence of non-legal protections? And why did the norms-based system governing appropriation among stand-up comics emerge only recently?

A little over forty years ago, economist Harold Demsetz wrote a seminal article theorizing about the emergence of property rights.<sup>145</sup> According to Demsetz and subsequent literature, society establishes property rights in previously unowned resources when the benefits of doing so come to outweigh the concomitant costs. The cost-benefit analysis may shift because the benefits may rise (such as when resource value goes up), or because the costs of establishing, enforcing, and maintaining a property system go down. These two Demsetzian causes have preceded the emergence of stand-up's norms system.

The benefits of establishing property rights in jokes have gone up as the harm from appropriation has gone up. Before the widespread use of technological means of disseminating jokes—mainly radio, television, and now the Internet—the harm to comedians from appropriation existed, but was limited by the ability of the joke thief to travel and tell the joke publicly. If the thief traveled east, the author could still travel west and tell the joke. Current-day comedians, however, perform in a leaky environment. If a joke thief performs it on mass media, this may consume the national market for a joke. The benefits from establishing and enforcing a property system under these conditions are thus greater.

At the same time, the costs of establishing an effective property rights system in jokes have gone down. 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 most often feature only one comedian or emcee). It was therefore difficult for a comedian to learn that his jokes had been stolen by

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<sup>145</sup> See Harold Demsetz, *Toward a Theory of Property Rights*, 57 *Am. Econ. Rev.* 347 (1967).

another comedian.<sup>146</sup> Enter the rise of the national comedy club circuit in the 1970s and 1980s. This major organizational shift in industry structure made comedians perform one after the other on stand-up bills. The repeat interaction among comedians increases the flow of information about the content of other comedians' acts and about potential joke thievery. As a result, it is less likely that stealing would go unnoticed.

Another important contributor to the rise of the property system is the changed nature of stand-up—that is, the move from the generic jokes and one-liners of the post-vaudeville era to personal, point-of-view driven humor. This shift further reduces the costs of detection and enforcement. In the post-vaudeville era, many jokes were generic and therefore difficult to associate with a particular comedian. Upon hearing such a joke, the listener cannot be sure if he has heard this particular joke before, especially as comedians tended to work in myriad variations on the same limited number of themes. In today's market, where comedic material is more distinct, it is easier for listeners to detect copying.

Perhaps just as importantly, the changing nature of humor has also increased copiers' costs. In the post-vaudeville era of generic jokes, it was relatively easy for copyists to take an ethnic joke from one comedian and a mother-in-law joke from another, and thereby stitch together an act. Today, if a comedian took one joke from Chris Rock, another from Jerry Seinfeld, a third from Larry the Cable Guy, and a fourth from Sarah Silverman, the result would be comedic cacophony: the act simply would not make sense. Jokes can certainly be adapted, but the costs of such adaptation are likely to be high, and at least higher than in the generic joke era, as comedic material is increasingly tailored to an individual persona and point of view. In the current comedic era, it is harder to steal and more difficult to hide stealing.

Finally, the costs of detection and enforcement are reduced by 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

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<sup>146</sup> See Welkos, *supra* note 23 (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").

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 is taking the shape of defensive publication. Comedians often post their material knowing 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 created a similar bit independently. The Internet is increasingly developing into an active forum for *offensive* publication—that is, the posting of video and audio clips arguing that one comic or another has stolen (or has not stolen) jokes. Comedians and fans also use blogs as a means to disseminate information and clips about joke stealing.

Relatedly, technology has also made it easier for the *audience* to detect stealing. The Internet creates the opportunity for comedic vigilantes 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.

One recognized limitation of the Demsetzian model is that it tells us little about the form that the emergent property rights are likely to take. Our study can suggest, however, why in this particular case the emergent rights were norms-based rather than law-based. Assuming the optimistic version of the Demsetzian model (that efficiency alone drives changes in ownership structures), the net benefit of the emergent norms-based system is expected to be greater than the one of formal property rights. This is plausible: in order to provide comedians with effective copyright protection, substantial doctrinal changes would have to be made, such as abolishing the independent creation defense, revising the idea/expression dichotomy, or doing away with the fixation requirement. It is not clear at all that any of these would be efficient in itself. Even if they were, one should remember that to a considerable (but not absolute) extent, copyright law is a one-size-fits-all regime. Breaking its uniformity would entail costs (for example, raising the cost of applying the law and inviting lobbying efforts in other industries). Thus, even assuming that the aforementioned changes are efficient, it may still be the case that doing them is

nevertheless undesirable because the concomitant costs of heterogeneity are simply not worth bearing.

But there is another, more pessimistic, view of Demsetz's model. Property rights may arise not because they are socially efficient, but because entrepreneurs bring about a self-serving property rights regime.<sup>147</sup> The argument here would be that a system of norms-based protection maximizes net value for those comedians who can write their own material, and who acted as norm entrepreneurs in the hope of private gain. Under this assumption, the emergent rights were norms-based because the net benefit to the norm entrepreneurs was greater than the one associated with a legal change (think about comedians' lobbying abilities). We admit that we cannot rule out the pessimistic account, but it nonetheless seems to us unlikely, at least in its strong form. The two comedians who are generally recognized as starting stand-up's turn away from corn to point-of-view driven material are Mort Sahl and Lenny Bruce. It would be hard to suggest that the two were driven by the bad motives that are usually associated with the pessimistic story: although both are considered icons in the comedic community, neither exercised the kind of organizing influence within the community that is associated with successful norms entrepreneurship. A pessimistic story could be told about present day comics: the norms system arguably benefits them; however, it has a net negative social welfare effect, because even though there is more material created now, it is significantly less disseminated than in the days of corn, where the crowd could use the jokes around the dinner table. Today's stand-up, in contrast, is passive in the sense that the crowd comes to watch a show that they will never repeat. Although a complete assessment of this assertion would necessitate empirical testing, it nevertheless does not seem plausible: if crowds would prefer hearing generic jokes, then we would expect them to flock to the sorts of low-level venues (cruise ships, casinos, and corporate events) that offer that kind of material to this day. Their willingness to pay for generic jokes would arguably be higher than for original material. These, of course, are counter-factuals, which tends to suggest the weakness of the pessimistic account.

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<sup>147</sup> See Saul Levmore, Two Stories About the Evolution of Property Rights, 31 J. Legal Stud. S421, S429 (2002).

*D. Why Is the Norm System So Simple and Crude? Legal Realism and the Numerus Clausus Principle*

The comparison of comedians' norms system to formal copyright law in Part II, above, has shown that whereas the copyright system recognizes a rich multitude of ownership forms and rules for its transfer (among them the doctrines recognizing works made for hire and joint-authorship, non-exclusive licenses, limited duration, the fair use doctrine, and the ability to terminate transfers), the norms-based system is much more crude. As a general rule, the rights in a joke or comedic routine can be owned by just one person at a time; they last forever; and are absolute in nature—there is no clear concept of “fair use”. Why?

Our explanation is legal-realist in nature: the enforcement mechanism that a system uses dictates (or at least influences substantially) the contours of the rights that it recognizes. Take, for example, the non-existence of joint authorship and non-exclusive licenses under the norms system. At first blush, one may think that the norms system is inefficient, as there are good efficiency rationales for recognizing these two forms of ownership in the copyright law. Some academic articles, for instance, could not have been written by one of their co-authors alone. A rule that discourages collaboration—such as the one in the norms system—may be discouraging the creation of such works. Similarly, in many areas of copyright law and IP more generally, parties engage in non-exclusive licensing. If this possibility is off the table for contracting comedians, then one may think that comedians are worse off. But a closer look suggests a different conclusion.

Under the system as it currently operates, if two comedians were true joint authors, and both told the same joke or comedic routine in each of their independent acts, fellow comedians would assume that one is stealing from the other. The same goes in the instance of non-exclusive licenses where more than one comedian is granted the right to perform a joke. This helps to explain why we do not see such arrangements among comedians today. Recognizing these possible forms of ownership would be impossible, or at least very hard, under a norms system. Today, all that one needs in order to enforce the community's norms is to witness two comedians telling a similar joke. However, under a norms system that recognized joint authorship and non-exclusive licenses, detection of stealing

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would be difficult when the signal produced by two comedians telling the same or a similar joke is one of (a) theft, (b) joint authorship, or (c) non-exclusive licensing. With the signal muddied in this way, the observer is not likely to embark on laborious factfinding. More likely, he will do nothing.

Our argument here tracks the logic behind the *numerus clausus* principle, which limits property rights to a small number of recognized forms.<sup>148</sup> 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, 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 the same.

We see this balance at work in the norms system, which sharply limits the forms of ownership and transfer of jokes relative to those offered under copyright law. Comedians' norms regarding joint authorship, works made for hire, and transfer of material all work to concentrate ownership in a single rightsholder and constrain the choices comedians have in structuring property rights. Again, this is because enforcement in the norms system depends on the maintenance of the clearest possible rules regarding ownership—any significant expansion in the norms system's *numerus clausus* would impose on participants intolerable information costs. The informal system constructs property rights as an all or nothing proposition—for the ownership right to be effectively enforced, a joke must be owned by one or none; it cannot be owned by some or many.

#### CONCLUSION

Intellectual property doctrine does not provide effective protection to comedians against copyists. In the absence of formal protec-

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<sup>148</sup> See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *Yale L.J.* 1 (2000).

tion, jokes initially were governed by an open access regime. Under these conditions, there was relatively little comedic investment in textual creativity (which was subject to copying), and comedians hewed to a limited number of subjects. There was, however, a relatively high level of investment in the mechanics of delivery (rivals could not easily copy such talent). Responding to social and economic pressures over the past half century, comedians have increasingly ordered their industry under a set of intellectual property norms. The direction of investment moved at the margin from performance to text, but also the nature of the text changed. Humor changed from jokes hewing to certain established genres to highly original and point-of-view-driven comedic narrative.

The case of stand-up may present some generalizable lessons. First, social norms can serve as an alternative or supplement to legal protection. The case for intellectual property law can no longer be made by comparison to a hypothetical market failure. Rather, the argument must explain why non-legal regulation is inadequate, and why market failure is therefore likely in the absence of formal legal regulation. Second, the regulation of a creative area—by changing the relative returns on different types of investment—affects not only how much is created, but also the nature of the content created and the production process. Third, social norms evolve. Even when a particular creative practice initially exists under an open-access regime, changing social and economic pressures may result in the rise of non-legal norms, institutions, and practices that maintain a non-trivial level of incentives to create. Fourth, copyright law may not be adequately responsive to the numerous creative practices that its letter regulates. When a reasonably well-functioning norms system exists, it may be advantageous to leave it intact. This would allow it to function alongside formal law, thereby obtaining the efficiencies of tailoring while avoiding the costs of doing so through law, namely, lobbying and legal complexity.

Is norms-based ordering preferable to the formal copyright law? This question is impossible to answer as a general matter. Each mode of ordering comes with its own costs and benefits, and we have identified both beneficial and disturbing features of stand-up's norms system. On the one hand, the norms system economizes on enforcement costs and appears to maintain a healthy level of in-

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centives to create. On the other, the system presents the danger of mob justice (including gossip and the inability to appeal), does not recognize the full range of forms of ownership and transfer found in the formal law, and lacks a clear fair use standard or time limitations on the right. We note, however, that all weaknesses are relative, that extant copyright law doctrine offers comedians little help, and that it is unclear to us whether rewriting copyright law for stand-up would be advisable (or even reasonably practical). As far as stand-up's norms-based system is concerned, we are cautiously optimistic.

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.<sup>149</sup> 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 believe, however, that social norms can regulate many creative practices beyond stand-up comedy, and suspect that once people start looking, they will find that they already do.

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<sup>149</sup> See Strahilevitz, *supra* note 96; Wu, *supra* note 96.