

The Emergence of Intellectual Property Norms in Stand-Up Comedy

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Introduction

On his 2006 album “No Strings Attached”, popular stand-up comedian¹ Carlos Mencia² 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!”³

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

You grab the boy when he’s like this, see. And you say “come here boy” – two years old – you say “get down, Dad’ll show you how to do it.” “Now you come at me, run through me, (boom!). There, see, get back up, get back up – see you didn’t do it right now come at me,” (boom!). See, now we teach them – see now you say “go, attack that tree, bite it, (argh!) come on back, bite it again” (argh! 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

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

² Mencia has his own show, *Mind of Mencia*, on cable network Comedy Central.

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

turns around and the camera's on him and you're looking and he says
"hi mom!"

Mencia's version does not repeat verbatim any of Cosby's phrases, but the two routines share the same animating idea, narrative structure and plotline, and employ a similar punchline. Mencia has denied ever watching Cosby's routine prior to performing his.⁴ But the striking similarity between the two routines, Cosby's iconic stature, and the wide dissemination of "Himself" – still on sale twenty-five years after its first release⁵ – support the opposite inference. . Cosby, who has denounced joke thieves, but who has also admitted to having once appropriated from comedian George Carlin,⁶ 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 one of Mencia's HBO comedy specials. According to his boasting on the Howard Stern Show, in 2005 Lopez grabbed Mencia at the Laugh Factory comedy club, slammed him against a wall and punched him.⁷

But if violence is a legitimate response to joke-stealing,⁸ then perhaps Lopez should beware. Speaking at the 2008 Grammys, Lopez noted how pleased he was to see a woman (Hillary Clinton) and an African-American (Barack Obama) competing for the Democratic presidential nomination. He worried, however, about the prospect that the first female or black president might be assassinated. The best thing to ensure their safety if elected, he suggested, would be to appoint a Mexican vice-president. "Anything bad happens," Lopez promised, "Vice-President Flaco will live in the

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

⁵ See, e.g., <http://www.amazon.com/Bill-Cosby-Himself/dp/B0002B1518> (noting that the original video was released on DVD in 2004).

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

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

⁸ It seems that physical violence, or threats of violence, are not unheard of as a response to joke-stealing. See, e.g., Gayle Fee & Laura Raposa, *'Thief' Can't Laugh Off Lifting Hub Comics' Material*, BOSTON HERALD (November 21, 2002) (reporting that four Boston comedians who were the victims of 21-year-old fellow comedian Dan Kinno's joke-thievery "ganged up on" him and "explained [forcefully] to the young lad the error of his ways."); Joe Rogan, So, now I'm banned from the comedy store, at <http://blog.joerogan.net/archives/111> (suggesting that Mencia felt "physically threatened" to be near Rogan after Rogan accused him of joke-stealing); Welkos, *supra* note 4 (comedian David Brenner states that he saw two comedians punching each other over joke stealing); RICHARD ZOGLIN, COMEDY ON THE EDGE 240 (2007) (reporting that David Brenner once threatened to attack Robin Williams for stealing his material and using it on HBO); 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."). See also *infra* notes 81-86 and accompanying text.

White House.” Now compare the Lopez joke to an earlier bit by comedian Dave Chapelle. In his 2000 HBO special “Killing Them Softly”, Chapelle 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? Chapelle would appoint a Mexican vice-president “for insurance.” Kill him, he suggested, and you are going to open the border. Chapelle’s punchline: “So you might as well leave me and Vice President Santiago to our own devices.”⁹

Did Mencia steal from Cosby and Lopez? Did Lopez steal from Chapelle? We cannot say for certain: In each of these cases it is possible that one comedian has appropriated from the other, or that both have formulated their version independently. During our research we found scores of examples that raise at least a reasonable 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.

A look back at the historical record confirms that comedians have long taken or adapted other comedians’ jokes, although the practice was not always called stealing, as it is today. In vaudeville, burlesque and minstrelsy – the 19th and early 20th-century precursors of stand-up – different artists would perform similar and even identical routines, and we find almost no evidence that the practice was thought of as theft.¹⁰ In the post-vaudeville era, beginning in the late 1930s and lasting at least until the mid-1960s, we can see the beginning of sentiment equating appropriation with stealing, but many comics continued to appropriate without apparent penalty.¹¹ One example is the great comedian Milton Berle, who started his career in vaudeville and found enormous popularity during the post-vaudeville period. Over the years, Berle’s tendency to appropriate his rivals’ material earned him a reputation as “The Thief of Bad Gags”. Berle’s reaction? Jokes are public property. Berle joked openly about his reputation for stealing jokes, sometimes opening his act by saying “I laughed so hard watching the comedian who came before me, I almost dropped my pad and pencil.”

This ethic of free appropriation is no longer with us. Comedy today is personal and original.¹² One cannot imagine a present-day comedian taking Berle’s approach to accusations of joke-stealing. Today, a credible accusation that a comedian steals jokes would likely greatly damage a career. And yet this is not because comedians are suing rivals who steal their jokes. Rather, what has shifted is comedians’ community norms about appropriation, and their willingness to enforce informal but nonetheless significant sanctions against joke thieves. What caused this shift? And how effective is the current norm against appropriation as an informal property system regulating the creation, ownership and exchange of comedic material?

In this Article, we examine the phenomenon of joke-stealing among stand-up comics. Comedians tell us that although joke-stealing does not occur with great

⁹ See [deadfrogcomedy, George Lopez v. Dave Chapelle: Is this joke stealing? \(February , at http://www.youtube.com/watch?v=-OHMeDqhAgU.](http://www.youtube.com/watch?v=-OHMeDqhAgU)

¹⁰ See *infra* Part II.A.1.

¹¹ See *infra* Part II.A.2.

¹² See *infra* Part II.A.3.

frequency, it does occur often enough to be a persistent concern. And yet we do not see comedians suing rivals who they believe have stolen their material. This is not because comedians are angels who object to litigation on principle. Nor do they view their work product as public property. Comedians work hard to come up with and perfect original comedic material, and are not amused – to say the least – to see it stolen.

So why are comedians not using the legal system? Because copyright law does not provide comedians with a cost-effective way to protect their expression. The expected benefits of copyright law are too low. Copyright law protects original expression, but not ideas, and much alleged joke-stealing involves relaying an appropriated comedic idea using different words. Copyright plaintiffs further bear the burden of proving that the defendant copied their expression rather than created it independently. Since jokes and comedic routines often reference common experience or the events of the day, it would not be easy in many cases for comedians to negate the possibility of independent creation (or “parallel thinking,” as it is commonly called among comedians). At the same time, the costs of using the copyright system are relatively high: copyright registration, court and legal fees overwhelm, in most cases, the market value of jokes. Indeed, comedians believe that using the legal system is not worth their while, and some of them have received legal advice to that effect.¹³ It is thus not surprising that we found literally zero copyright lawsuits between rival comics.¹⁴

Is the lack of effective legal protection of jokes a cause for concern? Scholars to date believe it is. Jokes are public goods,¹⁵ they contend, and absent legal protection unauthorized copying will destroy comedians’ opportunities to recoup their investments in the creation of new material. The market, they argue, will underprovide jokes. To correct this market failure, they conclude, we should beef up copyright protection.¹⁶ But we have our doubts. Rather than assume a market failure, in this Article we take a careful look at how comedians do their work. And what we find is a creative community that substitutes a system of social practices and institutions for formal copyright protection. Using this informal system, comedians are able to assert ownership of jokes, regulate their use and transfer, impose sanctions on transgressors, and maintain a functioning market which provides incentives to invest in new material. Certainly, this norms system does not prevent all joke-stealing.

¹³ See also Raju Mudhar, *Nobody’s laughing as comics launch lawsuit that seeks to protect origins of comedic content*, TORONTO STAR (December 9, 2006), 2006 WLNR 21263386 (“what we found out along the way from my friend who was a lawyer [] – we’re Canadian comics, neither one of us can afford to be hiring lawyers – was that there isn’t any protection of an idea in copyright.”) (quoting Canadian comic Glen Foser).

¹⁴ There have been a small number of lawsuits involving jokes, but the defendants in these actions are businesses such as t-shirt manufacturers, motion picture studios, and book authors and publishers who are alleged to have appropriated comic material. See *infra* note 21 and accompanying text.

¹⁵ A “public good” is a good that is non-rival (i.e., usable by many without impairment) and non-excludible (i.e., in the absence of law, readily accessed or copied).

¹⁶ See, e.g., Allen D. Madison, *The Uncopyrightability of Jokes*, 35 SAN DIEGO L. REV. 111 (1998); Andrew Greengrass, *Take My Joke . . . Please! Foxworthy v. Custom Tees and the Prospects for Ownership of Comedy*, 21 COLUM.-VLA J.L. & ARTS 273, 274-75 (1997) (“a comedian’s material should be protected in its own right both as an ethical recognition of the author’s right to the fruits of her creativity and to provide the proper legal incentive structure to promote the ‘useful art’ of comedy”).

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

Part II.C describes this community-based norms system. Our description is based, in large part, on interviews we conducted with comedians. Through these interviews, we detail the operation of comedians' powerful norm against appropriation. This norm is similar, at the conceptual level, to the exclusive rights granted under formal copyright law. The property right available under the informal norm is, however, even more encompassing than that conveyed by formal copyright law. Whereas copyright propertizes expression but allows free appropriation of "ideas",¹⁷ comedians' norms in many instances ban appropriation both of comedic expression and of comedic ideas (at least where such ideas are below a very general level). Enforcement of comedians' norm against appropriation is done mainly through community policing: there are usually several comedians on a stand-up bill, and they observe one another. Because the comedians spend a lot of time observing other comedians at work, they often recognize appropriation, and know (or at least suspect) which comedian performed a routine first. When they believe that a comedian has taken material, they take action. The forms of retaliation vary, from simple bad-mouthing (e.g., suggesting to other comedians that the offender is a "hack"), to refusing to work with the alleged thief (a comedian with whom no one will share a bill will often have trouble finding bookings), and even (occasionally) physical violence or threats thereof. We describe various methods of enforcing the community's norms. We also describe additional norms that regulate authorship, initial ownership, transfer, attribution, and compulsory licensing of jokes. These informal norms operate in ways that sometimes resemble but often differ from the rules of formal copyright law.

Part III contains analysis and implications. It details the interaction between technological change and comedians' evolving strategies for controlling appropriation. Our observations here run counter to the conventional wisdom that new technologies such as the Internet weaken enforcement of IP rights. Although this view may be correct for the formal copyright law as it applies to such media as recorded music and motion pictures, technological developments such as radio, TV, and the Internet have helped reinforce norms-based protections in the market for stand-up comedy. They do so by lowering the costs of monitoring and detecting appropriations by competing comedians, and by lowering the cost of imposing informal sanctions.

Relatedly, we explore the relationship between comedians' norms system and stand-up's move away from the "one-liner" style of the post-vaudeville period in favor of a more personal style of comedy. This change in the content of the comedic product is facilitated by comedians' effective system of IP norms – i.e., comedians' enforcement of anti-appropriation norms help make the investment in comedic content worthwhile. At the same time, the shift to more personalized material contributes to the norms system's effectiveness, because detection of appropriation is easier when jokes bear the mark of a particular comedian's personality, as distinguished from a generic one-liner. In our view, the co-development of

¹⁷ See *infra* Part I.B.1.

comedians' norms system and the more personalized modern style of stand-up comedy illustrates a broader point about intellectual property. IP theorists often emphasize the role that intellectual property rules can play in ensuring that we have a sufficient supply of creative works, by increasing the monetary appropriability of investment. But our research suggests that the rules that govern a particular area of creativity, and the mix of rewards that they hold out to creators, affect not only *how much* creativity we get but also *what kind*. In the market for stand-up comedy, the informal IP norms system prizes and rewards originality, and protects material at a relatively high level of expressive generality. It has favored the development of a personalized style of comedy relative to the previous era of generic-jokes and one-liners. This suggests the general possibility that a change in the rules governing a creative practice may also lead to a change in the nature of the creative good supplied.

The Article proceeds as follows. Part I describes the scant legal protection that is currently afforded to comedians' intellectual labors. Part II describes the social norms currently regulating the ownership and exchange of comedic expression today. Part III discusses some of the implications of comedians' norms-based property system for IP theory and policy, both within the market for comedy and in markets for other forms of creative work.

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

Formally, jokes and comedic routines can enjoy copyright protection. Jokes are literary works, which is a protected category under copyright law. Particular jokes and routines are protected if they are original¹⁸ and fixed in a tangible medium.¹⁹ In practice, however, formal copyright law does not play a significant role in the market for stand-up comedy.²⁰ Despite what appears to be a persistent practice of joke-stealing among stand-up comedians, there have been few lawsuits asserting copyright infringement in jokes, and there is also little evidence of threatened litigation or settlements.²¹

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.

¹⁸ *Feist Publications v. Rural Tel. Svc.*, 499 U.S. 340 (1991).

¹⁹ 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.

²⁰ *See, e.g., Welkos, supra* note 4 (quoting comedian David Brenner saying “If we could protect our jokes, I’d be a retired billionaire in Europe somewhere”).

²¹ There have been a small number of lawsuits by comics focusing on theft by non-comics (e.g., movie producers, t-shirt manufacturers, joke-book publishers). What is distinct about these cases is the presence of a deep pocket. We have seen no litigation by comics alleging appropriation by other comics.

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 federal rather than state law and a complex specialty area, which restricts the number of lawyers one might engage. This is especially true given the mismatch between the market value of jokes – jokes typically sell for anywhere between \$50 and \$100 – and the much larger market value of a copyright lawyer’s billable hour (which ranges roughly from \$150 to \$1000).

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.²² Regardless of the plaintiff’s choice of actual or statutory damages, copyright law also holds out the inducement of the award of court costs and – perhaps most significantly – attorneys fees. If the copyright damages regime were the only variable, we would venture that potential plaintiffs would be more likely, relative to a typical non-copyright plaintiff, to find a lawyer willing to work for a contingent fee. However, a comic’s prospect of finding a contingency fee lawyer depends both on the damages likely to be awarded for a successful claim, and on the likelihood that the claim will prevail. Copyright law holds out the prospect of significant damages, but the chance of prevailing is likely to be low in most (albeit not all) cases. In addition, many comedians are judgment proof, making very little and having few assets. In short, the cost of suit is often smaller than the probability of winning times the likely award times 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.²³ The cost of registration – a \$45 fee (or \$30 if registration is done on-line)²⁴ plus the time involved – is low but not trivial compared to the market value of the typical joke or comedic routine. It is true that comedians can wait and pay the same fee to register a successful routine or even a show. Perfecting routines and developing shows, however, takes much time and many club performances, during which the jokes would remain unregistered. In our interviews, many comedians indicated that they were aware of the copyright registration system, and a search through Copyright Office records shows that some comedians do indeed register material, albeit for the most part not individual jokes or comic routines. Nonetheless, use of the registration system by comedians confirms some level of awareness of the copyright law within the stand-up community.²⁵

²² 17 U.S.C. § 504(c).

²³ *Id.* at § 505.

²⁴ See United States Copyright Office, Circular 4 (schedule of Copyright Office fees).

²⁵ 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”

This awareness has not yet translated into litigation. The comedians we queried about the absence of lawsuits provided a consistent response: lawsuits are expensive, the chances of winning are low, and – importantly – lawsuits are “just not the way it’s done” among comics. Indeed, we 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 chances 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 vs. original elements, it is difficult to provide an exhaustive account of the application of copyright (or trademark) doctrine in this area – and impossible within the scope of this paper. Our purpose here is to explain the application of doctrine on a general level, and to highlight some of the serious difficulties that would arise if efforts to bring formal law to bear were to begin.

1. Idea vs. Expression

It is a commonplace of copyright that the law protects the expression of ideas, but not the ideas themselves.²⁶ 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 appropriate the idea

returned four, “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.

²⁶ 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.*, 45 F.2d 119 (2d Cir. 1930):

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.

Id. at 121

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.

animating a joke lawfully simply by telling it in different words. Indeed, commentators have suggested that comics sometimes intentionally do so.²⁷

In our review of alleged instances of joke stealing, we have seen numerous instances that appear to involve changing a joke to “write around” another comic’s copyright. Consider the first example 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 re-casting 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 that this was joke-stealing, whether this is also copyright infringement is a closer call.²⁸

2. Independent Creation

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

²⁷ “Comics who steal concepts rather than lines are sometimes referred to as rewriters. It is even more difficult to prove theft in their case, since a concept is vague and potentially available to anyone. Sometimes a rewriter or line thief will, in a flash of honesty, footnote onstage the source of the material or idea. But this academic gesture is lost on the audience – concerned only with being entertained – and is of little consolation to the aggrieved creator whose concept loses its freshness without him or her having benefited from its discovery.” Robert A. Stebbins, *The Laugh-Makers: Stand-Up Comedy as Art, Business and Lifestyle* 119 (1990).

²⁸ Cosby would have a realistic chance at least of making his prima facie case. First, it seems probable to us that a factfinder hearing both jokes would find it more likely than not that Mencia heard the Cosby joke and decided to work it into his act. Independent creation seems less likely here given 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 – i.e., the father receives little credit for helping his son become a football star, of all possible professions and even professional sports. 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, and thereupon expresses affection to only his mother as the punch line.

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

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

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

Carlos Mencia (Jan. 2006): Um, I propose that we kick all the illegal aliens out of this country then we build a super fence so they can't get back in and I went, um, "Who's gonna build it?"

D.L. Hughley (Oct. 2006): Now they want to build a wall to keep the Mexicans out of the United States of America, I'm like "Who gonna build the motherf***er?"

George Lopez (Nov. 2006): The Republican answer to illegal immigration is they want to build a wall 700 miles long and 20 ft. wide, okay, but "who you gonna get to build the wall?"

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

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.*,²⁹ in 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

²⁹ 879 F. Supp. 1200 (N.D. Ga. 1995).

comedian Jeff Foxworthy. This type of joke is Foxworthy's stock-in-trade. He has written scores, all following a similar form. To wit:

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

The defendant t-shirt manufacturer copied a number of Foxworthy's jokes, changing the form by reversing the order of premise and punchline. (On one shirt, for example, the copy read "If you've ever financed a tattoo ... you might be a redneck.") 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 – e.g., "your dog and your wallet are both on a chain." With respect to the recurring first part of these jokes – i.e., "You might be a redneck if . . ." – Foxworthy claimed a common law trademark and asserted that defendants' t-shirts made use of the mark in a way likely to confuse consumers regarding the source of defendant's products (i.e., to lead consumers to believe the t-shirts were produced or sponsored by Foxworthy) in violation of § 43(a) of the Lanham Act.³⁰

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.³¹

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.³²

³⁰ 15 U.S.C. § 1125(a).

³¹ 879 F. Supp. at 1218-1219.

³² 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 – i.e., 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 balance of the opinion in *Foxworthy* focused on the trademark claim: i.e., that the defendant's use of the "tagline" - "You might be a redneck if . . ." - resulted in consumer confusion regarding the source of defendant's goods in violation of § 43(a) of the Lanham Act. The court held, on a motion for preliminary injunction, that Foxworthy was likely to prevail on this claim. "You might be a redneck if . . ." had, the court held, attained secondary meaning because it had become the tagline by which plaintiff Foxworthy was widely known.

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

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.³³ 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.³⁴

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 is an application for the patentability of a "business method protecting jokes"³⁵ and four applications for a "process of relaying a story having a unique plot."³⁶ 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

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.

³³ See 35 U.S.C. § 101 (defining statutory subject-matter).

³⁴ See 1-1 CHISUM ON PATENTS § 1.02.

³⁵ See Patent Application No. 20060259306 (filed August 24, 2004).

³⁶ See Patent Applications Nos. 20050282140 (filed June 17, 2004), 20050272013 (filed June 7, 2004), 20050255437 (filed May 17, 2004), and 20050244804 (filed November 28, 2003).

way to patent grant – statutory subject-matter, abstract ideas exception to patentability, enablement and non-obviousness, among other things.³⁷

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 unique performative elements – but most performative aspects comedians use are not unique to them. The most it 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 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, when the defendant were rich, and where strong evidence negated the possibility of independent creation. The virtual lack 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 strong, enforceable community norms that, together, work to limit appropriation of other comics' creative material and to structure the ownership and transfer of jokes.

In Part II.A. we look back at earlier phases in the development of stand-up comedy – the vaudeville and generic joke era stretching from the late-19th century to the mid-20th century. These periods were characterized by a regime of relative free appropriation among stand-up comedians, and the absence of any strong norm against joke-stealing. In Part II.B. we describe the norms system that has operated among current-day comedians over the past five decades.

A. Appropriation and the History of Stand-Up Comedy

1. Vaudeville, Burlesque and Minstrelsy

The roots of American stand-up comedy can be traced back to variety theater and especially vaudeville,³⁸ America's primary form of entertainment in the late 19th and

³⁷ 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 (2006); Any R. Sawkar, *Are Storylines Patentable? Testing the Boundaries of Patentable Subject Matter*, 76 FORDHAM L. REV. 3001 (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 (2006).

early 20th century.³⁹ A vaudeville show consisted of a collection of independent (and typically short) presentations of singing, dancing, juggling, acrobatics, magic, animal performances, pantomime, and comedy.⁴⁰ Comedy in vaudeville was substantially in a theatre format – i.e., presented with the “fourth wall” up, for example as a short, one-act play, or a comedic skit by two or more actors. Within a particular presentation, comic elements would often be intertwined with dance or singing,⁴¹ and occasionally with other talents such as magic or throwing lasso.⁴² Pure joke-telling – i.e., a form closer to modern 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.⁴³ 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.⁴⁴

Stand-up’s early roots can also be traced back to minstrel, a variety show format based in racial stereotypes which was widely performed in America between the 1840’s and the 1940’s. Minstrel acts would script dedicated ad-lib moments for direct

³⁸ See, e.g., 1 VAUDEVILLE OLD AND NEW, *supra* note 1, at xxx (“The comedy clubs of the last decades of the twentieth century were vaudeville without variety.”).

³⁹ Vaudeville was the most successful and lasting form of variety theatre, was family-friendly, and targeted the middle and upper classes. Other formats included burlesque, which targeted the lower-middle classes, and transformed gradually from spoofs and class satire in the 1860’s that ridiculed the upper classes to sexually suggestive humor in the late 19th century and early 20th century when the form transitioned to mostly male audiences, and minstrel, a form based on racial stereotype humor.

⁴⁰ See, e.g., A Day at a Vaudeville Show!, <http://youtube.com/watch?v=USJl-MfAyow> (giving a sense of what one might have encountered going into a vaudeville show).

⁴¹ See, e.g., A Few Moments with Eddie Cantor, <http://youtube.com/watch?v=9Mhpw7gb1fE>.

⁴² Initially, the closest vaudeville came to pure stand-up was in the form of the storyteller, a comedic monologist. Some storytellers would take advantage of opportunities to ad-lib or respond to hecklers with short comic bits; it is, however, difficult to assess how prevalent pure joke-telling was in vaudeville. We could find only two passing references – to Marshall P. Wilder and Jack Benny – who told funny monologues on stage but would also do vaudeville acts that consisted wholly or mostly of joke-telling. See http://www.bookrags.com/Jack_Benny (mentioning Benny’s “vaudeville routine of one-liners”); <http://www.loc.gov/exhibits/bobhope/bits.html> (suggesting that Wilder “was notorious in his time for stealing jokes from other performers.”); *Natural Selection: Gary Giddins on Comedy, Film, Music, and Books* 28 (suggesting that Benny was “raiding joke books for one-liners”).

⁴³ Initially, it would be one of the monologists or a singer that would take up hosting chores for the entire bill. See 1 VAUDEVILLE OLD AND NEW, *supra* note 1, at 355 (“EMCEE”). See also *id.* at 369, 371 (“FRANK FAY”) (“Traditionally, vaudeville did not employ emcees, but in the waning years of big-time vaudeville, the novelty of having Fay, Florence Moore, Jack Benny, Georgie Jessel, Eddie Cantor, Julius Tannen, Lou Holtz, Benny Rubin or Jack Haley introduce the acts at the Palace Theatre, as well as perform their own, gave the box office a needed spike. [] Fay . . . did not simply introduce other acts. He toyed with them, engaged the audience and told stories between the acts; in short, he dominated the bill. So successful was he that other comics [such as Milton Berle and Jack Benny], whether they realized it or not, copied some of his bits, . . . handling the emcee chore much as Fay did, butting into acts and generally commanding the proceedings . . . Fay also could handle a gag: ‘Mayor Frank Hague promised to get the prostitutes out of Jersey City. He’s a man of his word. Last night I saw him driving two of them to Philadelphia.’”).

⁴⁴ 1 VAUDEVILLE OLD AND NEW, *supra* note 1, at 355 (“EMCEE”).

actor-audience communication: these spots often were used for telling quick jokes.⁴⁵ Burlesque was stand-up's third major precursor and involved – alongside entertainment aimed at a male audience – a mix of satiric and ribald humor.⁴⁶

We see evidence of joke-stealing – sharing or collective authorship might be better terms for the practice back then – dating from the very beginnings of vaudeville, burlesque and minstrel, and we see no significant evidence during this formative period of any powerful norm against appropriation.⁴⁷ 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,⁴⁸ *Cohen on the Telephone*, was based on burlesque routines revolving around misunderstandings that stem from a heavy, stereotyped Yiddish accent. The initial release was followed by a flock of exact imitations and derivative works (e.g., “*Cohen Phones the Health Department*” and “*Cohen Becomes a Citizen*”) released by

⁴⁵ Telephone interview with Jerry Zolten, December 18, 2007. 2 VAUDEVILLE OLD AND NEW, *supra* note 1, at 771 (“MINSTRELSY”) (noting that “[s]ome of the humor was topical, including comments about the issues and famous people of the day, or made specific reference to the city or town the show was playing.”). Some minstrel jokes are still familiar, such as “Why does a chicken cross the road?” and “Why do firemen wear red suspenders?” *Id.* at 772.

⁴⁶ Vaudeville, minstrel and burlesque humor was not, in general, tailored to specific performers. Vaudeville and burlesque jokes were mostly 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*. 2 VAUDEVILLE OLD AND NEW, *supra* note 1, at 772 (“MINSTRELSY”).

⁴⁷ See, e.g., Paul M. Levitt, *Introduction to VAUDEVILLE HUMOR: THE COLLECTED JOKES, ROUTINES, AND SKITS OF ED LOWRY*, 1-2 (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.”); LEROY ASHBY, *WITH AMUSEMENT FOR ALL* 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.”); BERNARD SOBEL, *BURLEYSUE: AN UNDERGROUND HISTORY OF BURLESQUE DAYS* 162-64 (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.”).

⁴⁸ See, e.g., TIM GRACYK & FRANK HOFFMAN, *POPULAR AMERICAN RECORDING PIONEERS 1895-1925*, at 10 (2000) (suggesting that over two million copies were sold).

competing labels, and even two “Cohen” movies,⁴⁹ all within about a decade.⁵⁰ 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.⁵¹

Indeed, we could find only one complaint about stealing in vaudeville – apparently, emcee Marshall Wilder was accused of stealing jokes.⁵² But this accusation is the exception to the general norm – the vaudeville form appears to have incorporated a widespread practice of taking without permission.

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

A second, and perhaps more important, reason is that most vaudeville theatres were part of vaudeville circuits, or chains. 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 booking performers centrally through an arrangement known as the United Booking Office.⁵³ 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.⁵⁴ The circuits’ booking cartel not only solved the huge transaction costs

⁴⁹ See, e.g., <http://us.vdc.imdb.com/title/tt0490849/> (*Cohen on the Telephone*, 1923, 5 minutes). <http://us.vdc.imdb.com/title/tt0844291/> (*Cohen on the Telephone*, 1929, 9 minutes).

⁵⁰ See Telephone interview with Jerry Zolten, December 18, 2007; Donald Weber, *The Jewish-American World of Gertrude Berg: The Goldbergs on Radio and Television, 1930-1950*, in JOYCE ANTLER, *TALKING BACK: IMAGES OF JEWISH WOMEN IN AMERICAN POPULAR CULTURE* 85, 89-90 (1998) (suggesting that the *Cohen on the Telephone* routine “drew on the long tradition of ethnic stereotypes from vaudeville routines to create comedy based on ‘mis-hearing/mis-readings’ of exchanges between a ‘Jew comic’ and his American interlocutor.”); Jason Camlot, *Early Talking Books: Spoken Recordings and Recitation Anthologies, 1880-1920*, 6 BOOK HIST. 147, 163 (2003) (“The ‘Cohen on the Telephone’ piece was performed by various artists over the years, but always verbatim from the same script.”). See also www.metafilter.com/58981/cohen-on-the-telephone; <http://www.raeproductions.com/music/cohen.html>.

⁵¹ 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.

⁵² See <http://www.loc.gov/exhibits/bobhope/bits.html> (Library of Congress exhibit detailing allegations against Wilder).

⁵³ Alfred L. Bernheim, “*The Facts of Vaudeville*”, *AMERICAN VAUDEVILLE AS SEEN BY ITS CONTEMPORARIES*, 124-125-80 (Charles W. Stein ed. 1984) (written in 1923) (“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.”).

⁵⁴ *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

(search and scheduling) between hundreds of vaudeville theatres and thousands of vaudeville performers traveling around the country, but also made sure to avoid problematic scheduling (e.g. two “*Cohen on the Telephone*” acts on the same bill or on different bills at the same location close in time). Of course, the United Booking Office was far from benign from the perspective of performers. The initiative was jointly owned and operated by vaudeville entrepreneurs, and it gave the circuit owners significant buy-side market power.⁵⁵ If a performer wanted to do an act in any place important, they would have to go through the UBO. The UBO’s power to limit competition, however, may have been a factor in maintaining incentives to invest in new work – acts working in the same vein (i.e., potential originators and copyists) would be less likely to be placed into direct geographic and temporal competition within the regional circuits.

2. The Post-Vaudeville Era

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

Comics like Milton Berle, Henny Youngman, Jack Benny and Bob Hope represent the transition from vaudeville (where comedians played a relatively minor role in the greater variety show) to a new form where stand-up comedy was offered, and consumed, not mixed with other forms of entertainment but as a stand-alone performance. These performers carried with them into this post-vaudeville period much of the “vaudeville aesthetic”⁵⁶ – fast-paced gags, word-play, remnants of theatre (i.e., music, song, dance, and costumes), and physical humor. In place of vaudeville’s emphasis on a variety of different acts, post-vaudeville comics created variety within the boundaries of their single act – i.e., they told strings of jokes that ranged over a wide variety of topics and had little narrative or thematic connection one to another. This style of humor was the dominant form of stand-up between the late 1920’s and the 1960’s, and remains a secondary but still significant form of stand-up today.

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.⁵⁷

which Keith’s and Orpheum are either owners, or control the policies of the theatres through their bookings.”).

⁵⁵ 1 VAUDEVILLE OLD AND NEW, *supra* note 1, at xx-xxi.

⁵⁶ See Henry Jenkins, *What Made Pistachio Nuts? Early Sound Comedy and the Vaudeville Aesthetic* (1992).

⁵⁷ In this sense, this quick-fire style differed markedly from vaudeville’s comedic storytellers and their relatively relaxed style of telling jokes, whence the punch line was not the center of the routine, or indeed sometimes was absent altogether. See, e.g., 2 VAUDEVILLE OLD AND NEW, *supra* note 1, at 1090, 1091 (“JULIUS TANNEN”) (suggesting that the career of Tannen – built in large part on long vaudeville comedic monologues – faltered partly because audiences “wanted more of the gag-a-second younger comics”); *id.* at 1111 (“FRANK TINNEY”) (“Tinney told bad jokes very well. He also took a very long time to tell them. There was his celebrated joke about the goat who did not have a nose. [...]”

Phyllis Diller, perhaps the fastest worker in the post-vaudeville cohort, could keep up for her one-hour act a constant pace of 12 punchline deliveries a minute. The post-vaudeville comic worked to master the art of timing the audience and feeding them a new zinger (or perhaps more often a clinker) just as the laughs or groans from the previous joke were starting to wane.

Participants in this seminal era of standup functioned largely as joke compilers – they had to have a large number of jokes at hand. Not surprisingly, many post-vaudeville comics maintained significant joke archives. Phyllis Diller maintained an archive of over 50,000 jokes, carefully organized by topic. The Diller archive is now in storage at the Smithsonian in Washington, DC, where we were able to examine it. Approximately half of the jokes in Diller’s file were obtained from one of the large group of writers Diller used. There is also evidence in the file suggesting that Diller appropriated from other sources, including newspaper comic strips and comedy books. For example, a number of Diller’s jokes about her dysfunctional marriage to her fictional husband “Fang” appear to have been inspired by a comic strip, “The Lockhorns”, that Diller followed obsessively over the course of nearly a decade. (Indeed, the Diller files contain hundreds of “Lockhorns” panels cut out of newspapers and mounted on index cards.)⁵⁸

In addition to maintaining a large stock of material, all of these performers used writers – they could not possibly come up with the huge mass of jokes they required for use on stage and on TV. Bob Hope hired dozens of writers over the years, and in an era where originality (or its appearance) was not as important as it is today to comedians, never tried to hide the fact that he had people writing for him. Jack Benny also hired writers, and admitted their existence publicly.⁵⁹ 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.⁶⁰

In this post-vaudeville era, bodily appropriation as well as the “refinement” of other comedians’ materials was still prevalent, but we find the first signs of some concern with joke-stealing, although we have seen little evidence that the practice was viewed as a serious threat. Bob Hope was widely accused of stealing, and later moved

The laughs came as Frank tried to set up the joke and shepherd it to its conclusion.”); *id.* at 1231-32 (“Ed Wynn”) (“Ed Wynn never told a funny joke in his entire career. He was notorious for telling shaggy-dog stories that ended in bad rhymes, one of which ended, ‘She is so stout she dresses to fascinate. She has ten hooks on her dress but she’s so fat she can only fasten eight.’”).

⁵⁸ Milton Berle also maintained a large joke file. He published only its crème-de-la-crème in two heavy volumes, which he had the chutzpah (as someone justifying his joke stealing habit by arguing that jokes are public property) to copyright. Bob Hope also maintained his own joke file, which he contributed upon his death to the Library of Congress.

⁵⁹ <http://www.jackbenny.org/biography/biography.htm> (suggesting that Benny bought jokes as a comedian); http://en.wikipedia.org/wiki/Jack_Benny (see “writers”); ANTHONY SLIDE, THE ENCYCLOPEDIA OF VAUDEVILLE 31, 33 (1994) (“JACK BENNY”) (“Benny was never great at ad-libbing... During one of his verbal bickerings with Fred Allen, he said, ‘You wouldn’t dare say that if my writers were here.’”).

⁶⁰ See NATURAL SELECTION: GARY GIDDINS ON COMEDY, FILM, MUSIC, AND BOOKS 29 (2006) (Moving to radio from Vaudeville, Jack Benny “made a terrifying discovery. Radio consumed material faster than he could get it. A joke that might have worked for a whole season in vaud was good for only one night on radio.”).

to hiring writers to ensure a constant flow of new material. Ed Wynn gave Milton Berle the nickname “Thief of Bad Gags.”⁶¹ Berle openly admitted to a penchant for joke-stealing, and he made jokes about it – for example, Berle’s famous gibe, made on stage at the Beverly Hills Friar’s Club, that the prior act “was so funny I dropped my pencil”.⁶²

3. The Rise of Persona-Driven Stand-Up

In the late 1950s and into the 1960s, stand-up comedy made a significant turn: A new generation of comedians began a less inhibited exploration of politics, race and sex as part of a more general move toward an increasingly personalized form of humor. Many comics shifted from the post-vaudeville one-liner style to monologues with a more distinct narrative thread linked to the individual comedian’s distinctive persona.⁶³ 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 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 making tired mother-in-law jokes.

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 “tumbler”, performing a clean act filled with hokey impressions and material

⁶¹ See, e.g., BOB HOPE, HAVE TUX, WILL TRAVEL: BOB HOPE’S OWN STORY 103 (2003) (“Milton Berle [] was the outstanding thief of bad gags in the history of show business. He kids himself about it now. But for all I know he’s stealing gags from others about him stealing gags. In those days he was operating like the James Brothers. He’d steal anything he thought would get him a laugh if it wasn’t nailed down. He was delightfully unabashed.”).

⁶² On radio, Berle suggested humorously that joke stealing was prevalent among top comedians of the post-vaudeville era. See <http://blogs.salon.com/0003139/2004/02/22.html> (“you say that I, Milton Berle [...] steal from Bob Hope? You don’t understand, that’s just high finance...I take a joke from Bob Hope...Eddie Cantor takes it from me...Jack Carson takes it from Cantor...and I take it back from Carson...that’s the way it operates, it’s called *corn* exchange...”) (containing transcript of The Milton Berle Show from January 10, 1948). Berle’s description rings true. The famous 1940’s Abbott and Costello “Who’s on First?” routine, voted “Best Comedy Sketch of the 20th Century” by Time Magazine in 1999, was a refinement of the “Baseball Sketch” long performed by a number of vaudeville comics. (That did not stop Abbott and Costello from copyrighting their version of the sketch in 1944.) Jack Benny has been accused of stealing jokes during the vaudeville era, see <http://www.jackbenny.org/biography/biography.htm> (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”. See http://en.wikipedia.org/wiki/Milton_Berle.

⁶³ See STEVE MARTIN, BORN STANDING UP 109 (2007) (“In the late sixties, comedy was in transition. The older school told jokes and stories, punctuated with the drummer’s rim shot. Of the new school, Bill Cosby – one of the first to tell stories you actually believed were true – and Bob Newhart – who startled everyone with innovative, low-key delivery and original material – had achieved icon status. George Carlin and Richard Pryor, [and Lenny Bruce were similarly among the new type of comedians.]”); JUDY CARTER, STAND-UP COMEDY: THE BOOK 3 (1989) (listing “Don’t Tell Jokes” as “Secret #1” among the “Five Big Secrets to Making People Laugh”); CHARNA HALPERN & DEL CLOSE, TRUTH IN COMEDY: THE MANUAL OF IMPROVISATION 16 (2001) (“The freshest, most interesting comedy is not based on mother-in-law jokes or Jack Nicholson impressions, but on exposing our own personalities”).

liberally appropriated from other comics.⁶⁴ 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).⁶⁵ He incorporated Jewishness into his act,⁶⁶ subverted archaic mother-in-law jokes and one-liners,⁶⁷ publicly belittled established comedians,⁶⁸ and highlighted everything he thought was wrong with comedy.⁶⁹

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

Modern stand-up reflects greater emphasis, relative to the vaudeville and post-vaudeville periods, on *comedic narrative*; i.e., 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, manifest as a comedic character which bears particular traits and which remains fixed throughout the performance

⁶⁴ 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* 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) . . .”).

⁶⁵ Gilbert Millstein, *Man, It’s Like Satire*, N.Y. TIMES, May 3, 1959, at SM 28.

⁶⁶ NACHMAN, *supra* note 61, 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.”)

⁶⁷ *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.” See also *infra* note 75 and accompanying text (discussing Mitch Hedberg’s humor).

⁶⁸ 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.

Interview with Bob Orben by Simon Sandall, Art Gliner Center for Humor Studies (Aug. 2004), available at ____.

⁶⁹ *Id.* 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.”)

(although it may shift over the course of a comedian's career). Modern comedy also sometimes includes performative elements (e.g., Lewis Black's strange, disconnected gesturing and sputtering anger; Zac Gallifianakis's flat affect and meditative piano playing) that further personalize the material and reflect the comedian's individual point of view. The dominant trend, in other words, is a movement from the one-liner to a more discursive style with jokes woven into a persona-driven narrative monologue.

Of course, there remain a number of comedians – e.g., Jimmy Carr, Steven Wright, and the late Mitch Hedberg – who specialize in the older one-liner style. But even with modern purveyors of the one-liner, there is an emphasis on persona and performative elements that establish persona – e.g., Steven Wright's monotonic delivery of nuggets of first-person surrealism,⁷⁰ or Mitch Hedberg's reliance on his overt stage fright, strange word emphases and paraprosookian turns of phrase.⁷¹

Along with this shift in comedic practice we find a concomitant shift in the salience of joke-stealing as an issue within the community of stand-up comics. Comedians who rely, as the vaudeville and post-vaudeville comics did, on joke-telling, rather than comic monologue, are derided as “hacks”. Originality is prized – indeed, it is arguably the first criterion by which comedians judge other comedians – and stealing is condemned. Still, although allegations of stealing are often made, comedians have not yet resorted to lawsuits to protect their original material against appropriation. We now turn to the second reason why formal intellectual property law has remained quiescent – comedians' participation in a system of informal norms that support originality and discourage joke-stealing.

B. Appropriation and Social Norms Among Present-Day Comedians

We have conducted seventeen lengthy, structured interviews of working comics at various levels of the industry (i.e., from more to less well-known). Interviewees were selected at random from a list of comedians maintained on the website of the comedy television channel Comedy Central.⁷² 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 describe. Where we found variance among the interviewees, we have noted that. The interviewees' descriptions

⁷⁰ 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.”

⁷¹ 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.”

⁷² See <http://www.comedycentral.com/comedians/index.jhtml> (alphabetical listing of stand-up comedians).

of the norms system among stand-up comedians aligned powerfully with what we are able to observe directly – i.e., via the writings of comedians and comedy experts, 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 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, irrelevant as a means of countering instances of joke-stealing. Several respondents stated that lawsuits were typically too expensive for the ordinary comic. This barrier standing alone would not deter the most financially successful comics from suing, but our interviews suggest that most comics consider lawsuits beyond their reach.⁷³

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

Many respondents also noted that comics often appropriate not via literal copying, but by "rewriting". This observation has two implications. The first is that, as several respondents noted, skillful rewriting makes it difficult for an originator – or indeed a judge or jury – to know whether a comedian has appropriated a joke, or has created it independently. Second, and perhaps more importantly, several respondents suggested that the re-writing of a joke may be an effective means to escape copyright liability. Rewriters often take the "idea" of a joke (i.e., its premise, expressed in a high level of generality), and then rework the expression of that idea. Such a strategy takes advantage of copyright law's distinction between ideas and expression, with protection reserved for the latter and the former given over to the domain of patent law (which, of course, tightly restricts protection only to novel, non-obvious and useful ideas).

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

⁷³ 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.

C. The Norms System

In place of resort to formal copyright law, comedians have turned to a private system involving norms, behavioral regularities, values and default rules to order their relations and to control appropriation of their creative work. At first blush, comedians' norms system seems to track the tenets of copyright law. But a closer look reveals substantial differences in the scope and particular configurations of the rights granted under the norms system as compared to those conveyed under formal law. To the similarities and the dissimilarities between copyright law and comedians' norms system we now turn.

1. 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."⁷⁴ Other "how to" guides convey the same message.⁷⁵

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,⁷⁶ the rule against appropriation must be enforced; i.e., violations must be punished. To expose the operation of the norm system, we will describe the route leading to sanctioning under the norm system while comparing its operation to that of formal copyright law.

Detection. The first stage in the enforcement process under copyright law is detection. 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 – i.e., detection is a community project. On a typical stand-up bill there are usually several (sometimes as many of eight or even ten) comedians. The comedians on the bill will often watch each other, motivated in

⁷⁴ See JUDY CARTER, *THE COMEDY BIBLE* 56 (2001).

⁷⁵ 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 on stage 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.").

⁷⁶ 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).

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 rivals' material, many comedians are well-placed to detect appropriation.⁷⁷ 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.

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 chances of success. One comedian described the aftermath of a single widely-publicized accusation of joke-stealing directed against him:

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

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 (i.e., 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 and where, and perhaps by naming 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

⁷⁷ 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.

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 ("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:

[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.

Enforcement. 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. Here is how 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 told us 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 U.S. (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 fu**ing fed up with it. [] To say that I go out and look for people's material is bulls**t and f**ked. And I'm tired of taking

the rap for it. [] I avoid anything to do with clubs. People keep saying, ‘Why don't you do The Comedy Store?’ I don't want to go back and get that rap again from anybody. [] I got tired of [other comics] giving me looks, like, what the f**k are you doing here?’⁷⁸

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 good will 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:

[I]n terms of sheer numbers, it's a pretty small fraternity of people who make their living telling jokes. And so we kind of run into each other and see each other on TV and pass each other in clubs and hang out in New York together and you know, so there's nothing more taboo in the comedy world, there's no worse claim to make against somebody than “oh, he's a f**king thief” [. . .]

You know, there are a hand-full of guys [who] just have a reputation for being thieves and for the most part it's amazing to me, actually if you think about it, how rarely it happens, because it's so professionally useful. A joke is such – it's hard to really explain this – but, it's a series of words that makes a room full of strangers laugh out loud consistently: it's such a beautiful little gem. It comes along so rarely and it hopefully reveals something and it connects with them and it fits the voice and it's short and concise and relatable and gut-laugh funny and it has to be a lot of different things at the same time.

So the development of those little phrases is a lot of work and when someone comes along and sort of lifts that idea from you and uses it, it's aggravating – it can't be described how aggravating it is. The thing that's amazing to me about it is it doesn't happen more often. Because the fraternity of comedy and the people who book comedy, they feel like a vested interest and so they also don't want to book someone who would steal jokes. Even once you're already really famous you really can't successfully run around and steal jokes and have a career. It's amazing that's 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 line-up with someone they believed had either stolen their material, or who had a general reputation of stealing jokes. This can be, for the accused joke-stealer, a painful sanction. If a more-than-trivial number of comedians 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:

⁷⁸ See 39 PLAYBOY 57 (January 1, 1992), at 1992 WLNR 2644339.

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.⁷⁹ Interviewees noted, however, that other club owners ignore joke stealing if the monetary rewards of booking a particular comedian are great enough.⁸⁰

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 that to the comedian on stage that a joke-thief has 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 comedians retaliated against joke stealing either by employing or threatening violence. To wit:

⁷⁹ See also Raju Mudhar, *Nobody's laughing as comics launch lawsuit that seeks to protect origins of comedic content*, TORONTO STAR (December 9, 2006), 2006 WLNR 21263386 ("If a comic uses a line in one of my clubs that I know isn't his, I warn him the first time and if there's a second time, I fire him") (quoting comedy club owner Mark Breslin).

⁸⁰ See also Steve Persall, *Standing Up Just For Laughs*, ST. PETERSBURG TIMES (September 20, 1991), 1991 WLNR 1951743 ("Comedy has gotten to the point where it's all about money. [] A promoter doesn't care if you're stealing somebody else's material.") (quoting comedian Earl Burks).

The comic who originally wrote [the bit] will go right up to [the comic he believes stole from him] and say, “Hey, that’s my material, and here’s the freshness date – when I wrote it. I’ve been doing it for years and suddenly it’s in your act and it has to be removed.” About 90 percent of the comics will say, “OK, fine.” But there is 10 percent out there who will say, “Oh yeah? Well, it’s mine now.” And then the only copyright protection you have is a quick upper cut.⁸¹

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 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 nonetheless 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 some legitimacy within the comedic community. In many 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.⁸² 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.⁸³ Also telling is the victims’ reaction. 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.⁸⁴ Mencia, who has denied stealing from Lopez, confirmed that Lopez punched him, but attributed the entire dispute to Lopez’s jealousy.⁸⁵ Perhaps most importantly, the comedic community’s reaction is acquiescent. A comedy blog commenting on the Kinno incident suggests that “[i]t’s refreshing to see the boys in Boston stand up for their intellectual property... It’s admirable that they look out for each other and it’s entirely appropriate that they

⁸¹ See Dean Johnson, Stop! Thief!; Comics say they’re getting a bad rap, BOSTON HERALD (August 14, 1998), 1998 WLNR 270264.

⁸² See <http://www.redban.com/audio/lopez.mp3> at 0:34-1:46 (a recording of George Lopez on the Howard Stern show describing his physical attack on Mencia). See also <http://www.redban.com/audio/dco.mp3> at 27:23-27:40 (Jamie Masada, owner of the Laugh Factory, claiming to have witnessed Mencia and Lopez punching each other, Dec. 1, 2006).

⁸³ See Brian McKim, Stolen Goods, SHECKYmagazine.com (2002), available at http://www.sheckymagazine.com/mckim/mck_0301.htm.

⁸⁴ See Brian McKim, Stolen Goods, SHECKYmagazine.com (2002), available at http://www.sheckymagazine.com/mckim/mck_0301.htm.

⁸⁵ See silo360, Joe Rogan and Carlos Mencia Fight, available at <http://www.youtube.com/watch?v=5gVYfDCgYxk> 6:00–6:50 (added February 16, 2007).

brought the hammer down on someone who so blatantly ignored the unwritten laws.”⁸⁶

Preference for private action. Enforcement actions are perceived as more legitimate the more they are private, personal and done within the comedic community. This point is reflected in a recent, much-publicized enforcement action. One late Saturday night in February 2007, at The Comedy Store in L.A. – one of the nation’s most important comedy clubs – Joe Rogan, a working comedian, chose to end his act by insulting Carlos Mencia, a famous comedian and alleged joke-thief who Rogan had spotted in the audience.⁸⁷ 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.⁸⁸ The incident gained much publicity, media attention, and a clip of the feud was put online and has been watched (to date) about three-quarters of a million times.⁸⁹

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

Joe is totally right . . . as far as people ripping material: you can’t do that, . . . But then I also think that . . . people should kind of like keep stuff to themselves. But I think Joe likes to . . . keep it real . . . that’s his thing. That’s cool if that’s how he feels. I respect someone who wants to keep it real like that.⁹⁰

Similarly, comedy blog Sheckymagazine suggested that “action like Rogan’s [] will keep us all more honest in the future,”⁹¹ but has also warned of “the danger of airing such things too publicly, of broadcasting such grievances too widely and

⁸⁶ See Brian McKim, Stolen Goods, SHECKYmagazine.com (2002), available at http://www.sheckymagazine.com/mckim/mck_0301.htm.

⁸⁷ Mencia was not on the bill that day. See <http://www.youtube.com/watch?v=JruD1mkW5Ds&feature=related> (interview with Pauly Shore, son of The Comedy Store owner and co-founder Mitzi Shore).

⁸⁸ See <http://blog.joerogan.net/archives/110> (Rogan’s blog entry for February 13, 2007 recounting the incident).

⁸⁹ See Joe Rogan and Carlos Mencia Fight, <http://youtube.com/watch?v=5gVYfDCgYxk&feature=related> (more than 314,000 views). See also Carlos Mencia Steals Jokes (Longer Clip), <http://youtube.com/watch?v=qoQjzJWUvgk> (more than 288,000 views); Carlos Mencia vs. Joe Rogan, <http://youtube.com/watch?v=6nEH8H5BqWg> (more than 57,000 views); Joe Rogan Fronts Out Carlos Mencia, <http://youtube.com/watch?v=bx9E4nPUhaA&feature=related> (more than 44,000 views); Carlos Mencia Stole More bits, gets CAUGHT ON AIR!!, <http://www.youtube.com/watch?v=QDmaG1-H25M&feature=related> (more than 690,000 views) (a radio show trying to mediate between Mencia and Rogan). The 0.75M count is as of the time of this writing, Dec. 14, 2007.

⁹⁰ See <http://www.youtube.com/watch?v=JruD1mkW5Ds&feature=related> 2:45-3:16 (interview with Pauly Shore).

⁹¹ See Prosecutors will be violated, Sheckymagazine.com (February 15, 2007) at http://www.sheckymagazine.com/2007_02_01_archive.html.

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."⁹²

Expression vs. 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 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 – i.e., 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' very 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 re-workings of others' ideas.

Duration. Finally, we asked comedians whether the norm against appropriating another comedian's jokes or routines was subject to any time limitation – i.e., 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

⁹² See Who steals from whom? Who cares?, Sheckymagazine.com at <http://www.sheckymagazine.com/2007/11/who-steals-from-whom-who-cares.html>.

use them freely. Comedians, on the other hand, believe that it is never permissible for a comedian to deliver material that is not his.

Our interviewees were nearly unanimous in this view, and yet it is difficult to know how seriously to take this apparent commitment to an anti-appropriation norm that applies perpetually. We would expect that comedians' ability to link particular comedic material with its originator would decline over time. The duration of formal copyright is already very long – in the case of works by natural authors, formal copyright endures for 70 years after the author's death. We question whether comedians could realistically expect their norms system to enforce rights for such a lengthy period with any reliability. That said, the interviewees' commitment, at least in the abstract, to perpetual rights is a signal of the strength of comedians' anti-appropriation norm.

Limitations of the Anti-Appropriation Norm. 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.⁹³ They are consuming stand-up as entertainment, not art. “Stand-up comedy,” one comedian told us, “is the only art form with a two-drink minimum.”

Some interviewees disagreed on this point, and suggested that some small portion (estimates ranged from 10-20%) of the stand-up audience are aficionados who care about originality and whose appreciation for and willingness to patronize a particular comic might be reduced by credible allegations of joke-stealing. Several comedians noted that the aficionados can be useful in enforcing 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 into the more casual consumer of stand-up.

In this regard, the recent spate of comic shaming videos on YouTube, including most prominently Joe Rogan's video shaming Carlos Mencia, is particularly interesting. Most comics do not at the moment expect audience pressure to have any role in disciplining joke-stealing. That said, the shaming videos posted on YouTube have

⁹³ See also Jim Gedghan, Waiter, There's a Joke in My Soup, NEW YORK TIMES (August 20, 1989) (“[comedian Paul Provenza] says that while comics keep scrupulous score on who's a joke thief or who has an act that is uncomfortably similar to others, it seems audiences don't seem to notice.”).

been widely viewed and discussed, both by comics and the public. Like formal law, norms are subject to change, and Rogan and others may be engaged in a form of norm entrepreneurship in an attempt to recruit audience members to the task of disciplining joke-stealers.⁹⁴

2. Norms Regarding Authorship and Transfer of Jokes

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 punch-line suggestions, or for a comedian to try out new jokes on a friend and replace her punch line with one suggested by her peer.

⁹⁴ Our interviewees described two additional potential limitations to the application of the norm against appropriation; namely, when an appropriating comedian provides public attribution, or when the appropriator makes a payment. We should emphasize, however, that these limitations, although widespread, are not recognized by many comedians.

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

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

In any event, it is clear that not all comedians believe that attribution is curative. Comedian Dan Kinno tried to excuse his appropriation of other comedians' material by suggesting that he had told the audience that the material was not his. In commenting on Kinno's subsequent beating by the aggrieved comedians, comedy blog *Sheckymagazine* suggests that joke stealing is inexcusable even when done with explicit attribution. See Brian McKim, *Stolen Goods*, *Sheckymagazine.com*, available at http://www.sheckymagazine.com/mckim/mck_0301.htm. See also *supra* text accompanying note 27 (suggesting that attribution does not excuse stealing). This latter conception of attribution is in line with current copyright law.

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

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.⁹⁵ 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? We can think of two reasons. First, joint ownership of jokes is likely inefficient because the cost of determining and then allocating rents would overwhelm any benefits that might accrue from joint ownership. A modern comedian's act typically mixes together a large number of jokes and comic routines, and, because the comedian does not get paid "per joke" but rather for his routine as a whole, determining the value of any particular piece of the comedian's act is likely to prove difficult and uncertain. This is not to say that such allocation could not be done, at least theoretically. We see, as a model, copyright cases calculating various forms of direct and indirect rents arising from an infringing derivative work, and then estimating the percentage of those rents attributable to the infringing portions of the derivative work, as opposed to the non-infringing portions.⁹⁶ But for the overwhelming majority of cases, the expected rents from a joke would not bear the significant costs (estimation, monitoring) of allocation.

Second, and perhaps more importantly, joint ownership is simply incompatible with the functioning of the norms system. Enforcement of comedians' norm against appropriation would be substantially more difficult if the system produced a large number of false positives – i.e., allegations of joke-stealing that turned out to be untrue. The risk of false positives is already present; many instances of apparent joke-stealing may be cases of parallel and independent development. That risk might, however, be raised substantially if comedians followed the default rule of joint ownership set out in the formal copyright law. In such an instance, comedians frequently would share rights in jokes as joint tenants. If both owners set about exploiting their property, the norms system, to the extent it depends on the observations of third-party comedians, would generate more false positives, and the increase in false positives might raise the cost of enforcement and threaten the norms system's continued viability.⁹⁷

Norm Regarding Priority. In copyright law, priority of authorship has little relevance to validity. It is well established that if a second author happened to independently create a work 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 copyrights. 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 either the first to invent (in the U.S.) or to file an application (the E.U., Japan, and many other jurisdictions) in order to get a patent.

⁹⁵ 17 U.S.C. 101 ("joint work").

⁹⁶ See, e.g., *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545 (9th Cir. 1989).

⁹⁷ On the myriad shifts in behavior, technology, and incentives that may weaken an informal IP system, see Rochelle Dreyfuss, *Fragile Equilibria*, VA. L. REV. IN BRIEF (2007), at <http://www.virginialawreview.org/inbrief.php?s=inbrief&p=2007/01/22/dreyfuss>.

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. Again, if both comedians continue to perform the joke, there is a risk of a false positive – a mistaken allegation of joke-stealing. 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, we were told by many interviewees that in instances where two comedians have been performing a similar joke, the first to perform the joke on TV 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. The act 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.⁹⁸

Norm Regarding Works Made For Hire. Under copyright law's "works made for hire" doctrine, a party who sponsors the creation of a work is, under certain circumstances, treated as the author of a work that was created by another on his behalf, and is therefore the owner of the copyright in that work. The doctrine applies if the sponsoring party is either (1) the employer of an employee who created the work on the job, or (2) has commissioned a work, in a case where the work happened to fall into one of several specified statutory categories, and where the transaction is documented in a writing signed by both parties.⁹⁹ 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.

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.¹⁰⁰ Among comedians, however, jokes are for the most part sold orally. And although under copyright law the result would be that the originator remains the

⁹⁸ 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 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 several 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.

⁹⁹ 17 U.S.C. 101 ("Works Made for Hire").

¹⁰⁰ See 17 U.S.C. § 204(a) ("A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent."). See also 17 U.S.C. § 101 ("A 'transfer of copyright ownership' is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.")

author, it is clear to comedians that after oral agreement and the money changing hands, the originator who then sold the joke divests himself of the joke, and retains no right to perform it or to otherwise use it (e.g., by creating a derivative work).¹⁰¹ 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 are comedians' norms about works made for hire and transfer different from the rules of copyright law? One possible explanation may be found in different conceptions at work in the copyright law and the stand-up community regarding the power of buyers and sellers in transactions over creative works. Whereas transactions between rival comics are, in general, transactions between parties of roughly equal bargaining power, in the markets that are the traditional focus of copyright – music, motion pictures, commercial book publishing – often transactions are between an individual author and a corporate giant. Copyright law structures transactions to protect the weaker party, but of course this protection comes at the expense of producing a written instrument for each exclusive license or transfer of ownership. The work made for hire and transfer norms flip the default rule, a sensible course given the rough equality of bargaining power among comedians.

A deeper explanation may be found in the inherent limitations of the norms system, as compared with formal law. We present this argument in Part III.C, below.

3. Limitations on Ownership Norms

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, at least by some comedians (though not by all), as less acute than it might otherwise be.

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) towards young comedians using others' material at the beginning of their career. There is some sentiment among a substantial number of comedians (but not all) that younger comedians need to find their own voice, and one way of doing so is to try out many

¹⁰¹ The norm 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. The norms-based system does not recognize such a rule.

What happens if the seller keeps doing 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 w¹⁰² See, e.g., JAMES MENDRINOS, *THE COMPLETE IDIOT'S GUIDE TO COMEDY WRITING* 78 (2004) ("Performers such as stand-up comics and actors have the visual advantage when it comes to defining their comedic voice.").

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 career 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 involving the rare instances that the appropriator provides immediate, on-stage attribution. Other interviewees, however, maintained that attribution was not in any sense curative. 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 retailed stories they had heard about comedian Robin Williams, who when confronted post-hoc about stealing, would send a check in the amount he thought suitable. 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 perhaps not surprising, as the fair use doctrine is perhaps the least predictable and most disorganized part of the formal 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 great comedian like Robin Williams on stage, ad-libbing. If he feels at a particular 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 and payment is done voluntarily 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

In this final section, we describe (briefly) several implications for the general theory of intellectual property that are posed by our observations regarding the IP norms system operating among stand-up comedians. We cannot explore each of these

implications fully within the confines of a single article. We offer these discussions as a jumping off point for further work, both by ourselves and others.

A. The Co-Development of the Anti-Appropriation Norm and Persona-Driven Comedy

This paper has described the community norms that operate among comedians and limit instances of joke-stealing. In our interviews, it became clear to us that most comedians take this norms system for granted, almost as if it is an inevitable part of comedians' professional practice. It is important to note, however, that in the past comedians did not share an anti-appropriation norm, but instead operated within an environment of relatively free appropriation. This was true, as we have described, during the vaudeville and post-vaudeville eras. The growth of an anti-appropriation norm makes sense given the differences between vaudeville/post-vaudeville and the modern era both in terms of the comedic product and its means of distribution. We have described the historical development of stand-up comedy, and the move from the vaudeville and post-vaudeville one-liner paradigm to the modern "persona-driven" comedian. This historical account suggests that over the past three-quarters century the comedic form has developed in several ways that together make appropriation more difficult. In the post-vaudeville era, the form of humor was the joke. The lack of legal protection for jokes, however, left comics unprotected. Over time, comedians have shifted the content of their acts from one-liners to comedic narrative. They have also come to rely more heavily on performative content – broadly, the manner in which the jokes are told.¹⁰² And, perhaps most importantly, an increasing number of comedians have built their acts around comic material that is linked to a richly-constructed persona.¹⁰³ Put differently, these comics seek to create comic material that is "stamped" with the attributes of a complex persona that they develop over time by performing material that reflects a consistent tone and point of view.

This new style of comedy – built on a unique point of view, persona and character – brings several advantages to the comedian concerned with the possibility of appropriation. First, it makes stealing by a fellow comedian more costly, and thus less likely. When a joke, or an expression, grows out of and fits a particular point of view, another comedian can rarely take it as is. She would have to change it in order to fit it into her particular persona and point of view, which involves a cost. Second, having a joke tailored to a comedian's own persona makes detection by the audience easier should the material be appropriated by a rival comedian. When a joke is generic (e.g. a stock mother-in-law joke) the audience can rarely detect its source. However, a unique joke written for a certain stand-up, if told verbatim by another comic, can be associated with one or a small group of comedians. The association is not necessarily made by the audience, but rather by fellow comedians, who know the other comedian's material, can recognize or at least suspect adaptations, and have institutional memory. Creating a personalized rather than a generic joke has advantages from the perspective of its author – it makes appropriation and writing around costlier and thus less likely. One of our interviewees put the point this way:

¹⁰³ See MENDRINOS, *supra* note __, at 63 ("We try to discover how to avoid being typical and just like every other comedy writer out there. When we bring our own inner truth to the page, we are writing from a place so personal and unique that no other person can say the same thing in the same way.").

Yes, I must say I got at least three occurrences where I've seen people do one of my jokes and it happens less frequently now because I've become a comedian who's hard to copy. As I've grown as a comedian myself I have become more and more original. So if someone were to steal it nowadays it would be more obvious. Whereas I used to talk about more boring topics, like let's say I was making fun of being on the subway train and I then see someone do my subway train joke. It's very tough to say they're stealing because everybody talks about the subway. It's one of those hack themes. But nowadays I'm talking about social issues that came up last week that were in the news and I'm talking about them in a way that if someone were to copy my joke it would be very obvious. I could go up and say hey you did my joke word for word.

The number one reason that I think I did it was, well, maybe two reasons, was to be unique. Because in order to be successful in standup comedy when you're fighting against a thousand other guys who all want the same—they want to be on the same shows. They want to be doing the same spot you're doing. I had to be something different. I realize if I'm telling the same topic, if I go on stage and I talk about the subway train and the next guy goes on stage and talks about subway trains, what's going to make me get that TV show and not him. And, so I realized that in order for me to be successful I needed to start talking about things that not everyone was talking about. And as a side effect that also makes it more difficult for people to steal from me, and made it more difficult for someone to accuse me of stealing some topic.

So, it mainly was because I wanted to be unique and I wanted to be different and a good side effect was it made it quite difficult—like now my jokes are longer too. They used to be closer to one-liners meaning just set-up [and] punch line, and so if someone steals a set-up/punch line, it's one sentence. If they steal one sentence it's tough to say whether they stole that sentence from you because it's just one sentence. But now my jokes are much longer. They generally are two or three minutes long and made up of several paragraphs and so if someone were to steal it word for word it would be quite obvious. It would be incredibly obvious that they had stolen three paragraphs out of my act.

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

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

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

B. The Role of IP Rules in Shaping Creative Output

Comedians appear to thrive under a regime in which a community norms system substitutes for formal IP law and does a good enough job controlling appropriation to maintain what appears to be a robust market for new comedic material. Our study of comedians thus illustrates that IP norms can sometimes take the place of IP law in providing incentives to create. But we also see a related implication that has been far less discussed than IP's effect on the overall quantity of creative works produced. Based on what we see over the past century in the markets for stand-up comedy, we believe that changes in IP rules have played at least as large a role in determining *what kind* of stand-up comedy we see, relative to the role that IP has played in determining *how much* stand-up comedy is produced.

This effect of IP rules has long been understood in the literature analyzing the interaction of patent and trade secret law. To the extent that patent law is weak in relationship to the laws governing trade secrecy, inventive activity is likely to shift, if all other incentives are held constant, toward projects likely to yield valuable inventions which cannot readily be duplicated or reverse engineered, versus those for which distribution is likely to yield quick imitation. Most of the commentary views this trade-off as an argument for stronger patent law – because we favor wide disclosure of new scientific and technical inventions (and the knowledge spillovers that disclosure produces), we therefore wish to avoid pushing inventors away from projects that would not be excludible under a strong-trade secret/weak-patent regime. We see an analogous dynamic unfolding in stand-up comedy, with different types of stand-up comedy dominating under the historical no-IP versus the current informal-IP regime, and the shift between the two modes coinciding with the incentives produced by the IP rules governing each. As we shall show, however, the decision about which system to favor is exceedingly difficult.

Historically, we have seen two major modes of stand-up comedy. In the post-vaudeville era of one-liners we saw comedians telling largely interchangeable generic jokes. They differentiated themselves from each other according to their individual performance style. Post-vaudeville comedians competed mostly on technique: i.e., on who delivered the joke better, timed the audience better, was able to compile and assemble from a repository of jokes a subset that fitted the particular audience. The

text was easily appropriable, and as a result many comedians based their acts on a blend of stock and appropriated jokes. We see some investment in the creation of new jokes, but these 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 material that is prevalent in the market today. Given the regime of free appropriation governing the post-vaudeville form, this makes sense. Text was the appropriable element of the comedic form; delivery, however, was relatively more difficult to appropriate. 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 re-working of previously-existing genres like marriage jokes, mother-in-law jokes or (heaven forbid) knock-knock jokes. At the same time, it is perhaps also true – at least it seems so to us – that comedians today appear to 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 audience interaction that characterized the post-vaudeville comics.

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. 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 tell to your friend, or to your child. 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 (e.g., giving and receiving pleasure, and cementing of 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 re-distributed 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 re-produced jokes accessible to all. (Of course, the corn-style joke industry still exists, not in stand-up clubs, but in joke books, which remain popular.)

In sum, 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. If these observations generalize to other forms of creativity, then our discussion of desirable IP rules has become more complex. The choice between more or less encompassing IP protections is not simply a matter of calculating how much output we think optimal in the market for stand-up comedy. The choice of IP regimes helps also to shape the kind of stand-up comedy that is produced. As a consequence, our choice about which regime we prefer requires more than purely economic arguments about the desired level of investment in new works.

It requires also that we have a theory about the best role for stand-up comedy in our culture. Do we value humor as a sort of social glue? If so, we might prefer the post-vaudeville form, and our views would lead us to favor IP rules conducive to that form (i.e., post-vaudeville's regime of free appropriation). Alternatively, we may view humor as a form of individual self-expression and sometimes social critique. 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 would 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 this 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 higher statutory damages to the victims of joke-theft, 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 create, 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 would increase the monetary return on joke creation, but would also raise the cost of creating new material. In such an environment, comedians would face a much larger monetary sanction if they happened to tread too close to other people's work, even if they didn't know they were doing so (remember, copyright infringement is a strict liability tort). In an environment governed by beefed-up IP law, comedians would be obliged to "clear" jokes before performing them – i.e., 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 pre-requisite. 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 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 which could afford to hire lawyers to clear stand-up acts in advance and to ensure against the residual risk of infringement. Or, alternatively, stand-up may retain its current market structure (i.e., small-scale producers and distributors) but revert to reliance on one-liners, topical jokes, and stock themes – the

kind of material for which proof of copying is most difficult and thus copyright lawsuits relatively unattractive even in a bolstered regime (unless, of course, Congress goes so far as moving to a priority system where proof of copying is no longer an element of the plaintiff's prima facie case).

C. The Emergence of Social Norms

A little over forty years ago, economist Harold Demsetz wrote a seminal article explaining the emergence of property systems.¹⁰⁴ Demsetz's powerful insight was that property systems emerge whenever the benefits of creating and maintaining a property rights system over a resource outweigh the costs of doing so. To illustrate his point, Demsetz used the seventeenth century emergence of property rights in land among the Montagnais Indians in the Labrador Peninsula. He related this emergence to the rising value of beavers. Before the advent of the fur trade, beavers were abundant relative to human needs, and there was no reason to allocate and enforce property rights in them. With the advent of the fur trade with Europe, however, allocating and enforcing property rights in beavers (and hunting areas) gave hunters an incentive to husband the stock and prevent the depletion that would have otherwise occurred. Generalizing from this example, Demsetz suggested that property rights are likely to emerge whenever resource value rises. A huge body of scholarship critiqued, refined, and extended Demsetz's insight.

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

Second, our case study of IP norms among comedians suggests that changes in resource value are not the only factor driving a change in resource governance. A system of property rights in a resource may be desirable to establish if the resource will be worth more under a system of property rights relative to its value under an open-access regime. A move toward propertization may happen if the benefits of governing the resource under a property regime suddenly increase (as is the case in

¹⁰⁴ See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

Demsetz's example), but also if the costs of running the resource under a property regime suddenly fall (as is the case with stand-up comedy). The emergence of proprietary norms in jokes happened alongside technological advance in the distribution of comedy, and we suggest that the two are connected.

The costs of detecting stealing in the vaudeville period were much greater than they are today. In vaudeville, comedians would often travel different circuits, and would rarely appear on the same bill (because a bill would aim for variety of acts and would feature only one comedian or emcee). It was therefore difficult for a comedian to learn that his jokes had been stolen by another comedian.¹⁰⁵ In contrast, today several comedians usually appear on a comedy club bill, such that what a comedian does at the comedy club level is observed by other comedians who know what fellow comedians are doing. As a result, it is less likely that stealing would go unnoticed.

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

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

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.C 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 just by one person at a time; they last forever; and are absolute in nature (i.e. there is no clear concept of "fair use"). Why?

¹⁰⁵ See Welkos, *supra* note 4 (quoting Carl Reiner as saying that before the current stand-up era "comedians would work on different club circuits, so it was possible that they didn't know when someone was stealing their routines").

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 example, 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 would suspect, at least initially, that the rule has shifted because comedians must be better off in a world where transactions in jokes are limited to outright transfers. 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 don't see such arrangements among comedians today. Recognizing these possible forms of ownership would be impossible – or very hard – under a norms system. Today, all that one needs in order to enforce the community's norms is to witness one comedian telling another comedian's joke. However, under a norms system that recognized joint authorship and non-exclusive licenses, detection of stealing would be difficult when the signal produced by two comedians telling the same or a similar joke is one of (a) one is stealing from the other, or (b) they are actually joint authors of the joke, or (c) one got a non-exclusive license from the other to tell the joke. With the signal muddied in this way, the observer is likely not to do anything, as the costs of fact finding would be prohibitive.

Our argument here tracks one first presented in a notable article by Thomas Merrill and Henry Smith that develops the concept of the “*numerus clausus*”, a common law principle that limits property rights to a small number of recognized forms.¹⁰⁶ 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 same.

As Merrill and Smith note, whereas the *numerus clausus* principle sharply limits the forms of ownership recognizable in real property (the fee simple, the defeasible fee simple, the life estate, and the lease), it is relatively weak in the area of intellectual property. IP rights come in a greater variety of major forms, including utility patents,

¹⁰⁶ See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *YALE L.J.* 1 (2000).

design patents, plant patents, plant variety protection certificates, federal and common law copyrights, federal sui generis rights for the design of boat hulls and microprocessor mask works, federal and common law trademarks and trade dress, common law trade secrets, and state law rights of publicity¹⁰⁷ and rights against misappropriation¹⁰⁸. Importantly, these broad forms are capable of very substantial additional diversification through licensing. Neither IP law itself nor potentially limiting external law (e.g., antitrust) imposes substantial limitations on a rightsholder's ability to sub-divide rights, whether among licensees in different geographic or product markets, or respecting different time periods, media or subject-matter. Additionally, although the law is unsettled, some courts have held, in cases involving the enforceability of copyright licenses, that parties may alter the contours of the copyright right by agreement – for example, by providing in a license agreement that the licensee surrenders his right to make fair uses that would otherwise be permitted under the copyright law. In these instances, the parties to a license effectively create a right in the licensor that differs from the right granted under the copyright law. Such agreements effectively add additional forms of the property right to the *numerus clausus*, forms which courts have for the most part recognized.

We would not suggest that the weak *numerus clausus* we find in formal IP law strikes an ideal balance between efficient customization of property rights and the information costs that customization imposes. Indeed, there are features of the formal IP law that suggest strongly that the *numerus clausus* has been pushed out of balance – for example, the wide overlap between the domains of copyright, trade dress, and design patent, and the courts' tolerance of plaintiffs asserting more than one form of IP right in the same work. That said, the norms system operating among stand-up comedians doesn't resemble any kind of optimal balance but instead imposes a "one size fits all" property regime. Comedians' norms regarding joint authorship, works made for hire, and transfer of material all work to concentrate ownership in a single rightsholder and sharply limit 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. The informal system has responded by constructing property rights as an all or nothing proposition – a joke is owned by one or none; it cannot be owned by some or many.

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

Intellectual property protection has its benefits, primarily the increase in creative output that results from the increased incentive to create. At the same time it has its costs, primarily the limitations imposed on other people's ability to copy, use and build upon intellectual property that they encounter. Perhaps the most important, and difficult, question in intellectual property policy is whether the benefits associated with intellectual property protections – in particular the patent and copyright laws,

¹⁰⁷ See generally J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* (1999) (limning the contours of the "right of publicity").

¹⁰⁸ See e.g., *Bd. of Trade v. Dow Jones & Co.*, 456 N.E.2d 84 (Ill. 1983). See also Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411, 422 (1983).

which are built on a paradigm of social welfare optimization – outweigh the concomitant cost. This is an exceedingly difficult question to address, due not least to the great diversity of subject matter – from motion pictures to shampoo bottle labels to computer software to antibiotics to photographs to expressed sequence tags (a fragment of genetic material that is sometimes useful as a marker for sequences related to disease) – that come within the domain of the copyright and patent laws. Additionally, because the patent and copyright laws each apply essentially the same rules to all creative works within their domain, scholars and policymakers are not encouraged to think of IP's cost-benefit tradeoff in terms of individual industries or creative practices, where the analysis might be more tractable.

That said, our thinking about IP's cost-benefit tradeoff has been enriched by the identification of a number of types of pecuniary and non-pecuniary incentives to create that may exist in the absence of formal IP protection.¹⁰⁹ If a non-IP incentive is active in a particular market or creative practice, the marginal benefit of legal protection would thus be only the added creativity that formal law may induce above and beyond that pre-existing baseline of incentives.

These non-IP incentives come in a variety of forms. Absent IP law, creators are sometimes able to profit during an exclusivity period enjoyed before competitor-copyers enter the market, perhaps by selling their intellectual products through contracts that include anti-copying provisions, or by employing anti-copying technological protection measures.¹¹⁰ 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,¹¹¹ or to gain prestige and celebrity.¹¹²

None of the foundational theoretical studies (as distinguished from recent studies in IP law that focus on particular creative communities¹¹³) acknowledges

¹⁰⁹ See, e.g., Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421 (1966); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEG. STUD. 325 (1989); Michelle Boldrin & David K. Levine, *The Case Against Intellectual Property*, 92 AMERICAN ECONOMIC REVIEW PAPERS AND PROCEEDINGS 209 (2002); Stephen Breyer, *The Uneasy Case for Copyright: A Study in Copyright of Books, Photocopies and Computer Programs*, 84 HARV. L. REV. 281 (1970); Fritz Machlup & Edith Penrose, *The Patent Controversy in the Nineteenth Century*, 10 J. ECON. HIST. 1 (1950).

¹¹⁰ 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).

¹¹¹ See, e.g., Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA (n.s.) 167, 168-69 (1934).

¹¹² See, e.g., LANDES & POSNER, *supra* note **Error! Bookmark not defined.**25, at 48.

¹¹³ See note ____, above ¹¹⁴ See Stephan Pantjer, Non-Legal Sanctions, in *ENCYCLOPEDIA OF LAW AND ECONOMICS* 1018-19 (Bouckaert & De Geest, eds.), available at <http://encyclo.findlaw.com/0780book.pdf> (summarizing literature that suggests that the introduction of legal sanctions may crowd out norm-based motivations to act). See also Ernst Fehr & Simon Gächter, Do Incentive Contracts Crowd Out Voluntary Cooperation?, (Inst. for Empirical Research in Econ., Univ. of Zurich, Working Paper No. 34, 2002), available at http://papers.ssrn.com/abstract_id=229047; <http://encyclo.findlaw.com/0780book.pdf> (an experiment in which the introduction of legal sanctions was shown to lessen reciprocity and performance between buyers and sellers); RICHARD EPSTEIN,

meaningfully the possibility that social norms can provide incentives to create. If an examination of comedians' practices suggests anything, it is that the failure to more fully explore the effect of social norms on incentives to create is a substantial elision. Comedians' social norms appear to affect incentives in a number of ways. First, they may provide (or enhance) non-pecuniary incentives to create. Such incentives may include the gratification of seeing people laugh and of having one's thoughts heard and appreciated, esteem from a comedians' professional community (peer comedians, club owners, booking agents, etc.), and enhanced public reputation and fame through media coverage and interviews. Social norms may also provide a pecuniary incentive, as higher esteem and reputation, and peer and public recognition of being original and funny often translate to commercial opportunities, ranging from working the stand-up circuit, to performing in resorts and corporate events, to writing for other comedians, sit-coms, speech-givers and movies, among others.

That social norms may provide substantial non-legal pecuniary and non-pecuniary incentives to create is not only of academic significance. Lawmakers should keep this factor in mind when they make IP policy decisions. For example, when lobbying groups approach Congress with complaints about rampant copying and demands to beef up legal protections, legislatures should examine how the ratcheting up of legal protections is likely to interact with, strengthen, or perhaps (and more worrisomely) weaken, existing social norms governing appropriation – or, indeed, how legal protections might either encourage or interfere with the formation of new social norms favoring or disfavoring appropriation. Our examination of comedians' social norms system makes clear that protection based on social norms has its costs (i.e. reputational or social sanctions may be ineffective against beginning, soon-to-retire, famous or misanthropic appropriating comedians; and aggrieved parties who must depend on community enforcement may sometimes be obliged to wait until the appropriating comedian had more than an occasional stealing habit), but legal protection has its costs too (costs that are at present prohibitively high for almost all comedians, and which include, for example, litigation costs, enforcement and administrative costs, and limitations on widespread use and improvement of comedic materials). In addition, legal protections are not guaranteed to work, a fact demonstrated by the widespread infringement that has played such a substantial role in the market for recorded music in the past decade.

Intellectual property scholars have analyzed at considerable length the growing gap in recent years between formal copyright law and informal norms relating to the propriety of appropriation – namely the fact that the law regards many activities that individuals ordinarily engage in, such as forwarding an email, as copyright infringements. 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 – for example, one might fear such a development if comedians began to use the formal law in an attempt (redolent of the RIAA's

litigation campaign against file-sharers) to “sue their customers” for sharing copyrighted jokes on the internet or even for telling them in public.

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

In short, policy makers would be wise to keep in mind that a norms-based system regulating the ownership and exchange of creative material may be superior to one that is exclusively law-based. It is especially important to understand how social norms may act to limit appropriation in light of the existing research suggesting that at least in some cases, the introduction of legal protections and sanctions reduces the probability that individuals will impose and abide by social norms.¹¹⁴ Currently, the social norms foundation of property rights in jokes recruits the community in the process of enforcement: comedians who are present in a comedy club performance look for “infringement” not only of their own material, but of others in the community and report and police violations. Sometimes comedians may even incur personal costs to enforce community norms and the “rights” of others, as the Rogan/Mencia incident demonstrates and as several of our interviewees also suggested.

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

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

But the opposite might be true as well, and the tendency of formal copyright law toward overprotection may even be exacerbated under the norms system we see operating among stand-up comedians. For example, under stand-up’s norms system the term of protection afforded to jokes is perpetual – the comedians with whom we spoke suggested it would never be permissible to use someone else’s joke. Current

copyright law at least allows one to repeat another comedian's joke verbatim after the expiration of the (admittedly very long) statutory term. Another advantage of formal copyright law is that the rules are written down and publicly available. It would be a stretch to suggest that current copyright rules are readily understandable – the contours of the fair use doctrine, for example, are mysterious even to copyright experts. Yet, with formal law there is at least the promise of predictability – a copyright law reformed to provide clear rules to ordinary people might allow users to understand with some precision in advance where the line lies between permitted “taking inspiration” and proscribed appropriation. In contrast, norms systems are inherently indistinct. The exact shape and strength of comedians' norm against appropriation is difficult to know, and this uncertainty may spur risk-aversion. Comedians' unwillingness to risk their reputation on material that may conceivably be perceived as a norms violation is likely further magnified by the absence, in comedians' norms system, of any concept of fair use.¹¹⁵

Another worrisome aspect of the norms-based property system in stand-up is the occasional resort to violence as a means of enforcement. An advantage of legal protections is that disputes are channeled to courts and adjudicated by an impartial judge or jury. We generally believe that people should not take the law into their own hands, and certainly not physically harm others. Sometimes we hear about enforcement efforts by comedians that sound uncomfortably like mob justice.¹¹⁶ And even in the absence of violence, the ways in which norms are enforced by comedians does not always conform to our notions of due process. There is no neutral fact-finder in the norms system, and there are no appeals (although one incident in which a joke-thievery charge was retracted with an apology was reported¹¹⁷). 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

¹¹⁵ We had hints in our interviews of one aspect of the norms system that had fair-use-like characteristics. This has to do with appropriation by young comedians. A variety of sources, including several interviewees and comedy “how-to” manuals, suggested that young comedians need some greater space to experiment on their way to finding their own voice: i.e., many comedians start out by appropriating material and aspect of persona from other, more accomplished, comedians until they find the comedic voice and original material that works best for them. We heard from several interviewees that there is some tolerance for this practice, and that established comedians tend to excuse and not pursue too vigorously violations by novices. The rationale offered was consistent – no one will be able to build a career on only copying, and so unless the novice succeeds in finding his own voice and material, his career will end of its own accord.

¹¹⁶ See James Sherwood, *Is stealing punch lines worth a punch-up?*, *The Guardian* (July 26, 2007), available at http://blogs.guardian.co.uk/theatre/2007/07/is_stealing_punch_lines_worth.html (warning against “mob justice”); Brownfield, *supra* note ____ (“Accusing someone of stealing is a popular blood sport among comics.”).

¹¹⁷ See Steve Bennett, *You thieving bast- oh, my mistake* (May 23, 2005), available at <http://www.bbc.co.uk/comedy/news/2005/05/23/19513.shtml> (reporting that U.K. comedian Mac Star, who had publicly accused fellow comedian Dara O'Brian of stealing a Hitler rock-paper-scissors gag, later conceded the possibility of independent creation and apologized).

Grammy awards for best comedy album¹¹⁸ and an outstanding performer, 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 over-deters.

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

Conclusion

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

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

Is norms-based ordering superior to any conceivable legal regime that might apply to stand-up comedy? That question does not admit of a definitive answer. Our description of comedians’ norms system suggests, however, that before recommending the reconfiguration of legal doctrine we must compare the costs and benefits of the two modes of regulation, or any combination thereof. We could readily think up copyright reforms that would make the formal law more attractive to comedians,¹¹⁹ but we are not sure that any such reforms would result in a system of formal property rules superior to the informal rules that the currently-operating norms system provides.¹²⁰ The tale of stand up comedy at least cautions against the careless expansion of legal protections without consideration of the informal norms operating

¹¹⁹ Among other things, we could reduce the cost of copyright registration, award attorneys’ fee as a matter of course, increase statutory and other damages, require judges to use a higher-than-usual level of generality in applying the idea/expression dichotomy for non-literal infringement of plot lines, or abolish the “independent creation” defense.

within a particular creative community, and without a good idea of the effect that legal protections would have on the norms system. Bolstering formal protections might reinforce comedians' existing norm against appropriation. Alternatively, it might erode norms that currently do much of the work in governing appropriation. Contrast the regulation of appropriation in stand-up comedy with that in popular music. Owners of music copyrights rely heavily on formal rights yet face a widespread appropriative ideology and practice. Stand-up comedians have little legal recourse, yet operate within a norms system that punishes thievery. We do not suggest that what works for stand-up can necessarily work for the rest of copyright law. We only suggest that formal IP law is not necessarily right for stand-up, or for every creative practice.

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