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This is No laughing Matter: How Should Comedians Be Able to Protect Their Jokes?

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This is No laughing Matter: How Should Comedians Be Able to Protect Their Jokes?

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> The only honest art form is laughter, comedy. You can't fake it . . . try to fake three laughs in an hour—ha ha ha ha ha—they'll take you away, man. You can't.[2]
>
> – Lenny Bruce

Abstract

This note will discuss the current state of protection for jokes and comedy. As it is now, the only protection comics have is self-help, meaning comedians take punishing thefts into their own hands. This note will dive into the reasons why the current legislature and courts refuse to recognize jokes as copyrightable. Specifically, why many believe that jokes to not meet the qualifications of being an expression, as well as the fear that protecting jokes will lead to chilled speech.

Additionally, this note shall discuss the ways jokes could be protected under the current legal scheme, including trademark and state idea theft protection. This note argues why jokes are in fact expressions rather than simply ideas and suggests that ideas expressed in the form of jokes should be protected. A new standard and threshold are offered to accommodate jokes to reduce the risk of chilled speech and hindering other artists from creating their own work without being in fear of infringement.

Lastly, this note will discuss the evolving forms of social media and technology and its effect on comedians and their ability to protect their intellectual property. Right now, social media is the wild west if an artist does not have legal protection for their work. And even if the artist does

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2. *Lenny Bruce Quotes*, BRAINYQUOTE, https://www.brainyquote.com/quotes/lenny_bruce_149544.

have protection, there is a very blurry line as to whether the use of those works is infringing or fair use.

Introduction

Throughout history, humans have searched for ways to escape the drudges of day to day life. For many people, that escape was the theater, and the forms it later took, such as movies and television. Traditionally, there have been two genres of theater: drama and comedy; or in the case of Shakespeare there is a third: romance; which is a mixture of hidden identity fun and lots of death.[3] In the case of dramas and romances, there is usually a moral to the story, or a cathartic break where patrons can breathe a sigh of relief and say, "thank god that's not me."[4] Comedies on the other hand are there to create a release through laughter.[5]

As the centuries pass, the forms of comedy have split and diverged creating new ways of spreading laughter. From parody and satire to slapstick to memes to stand-up, each form of comedy is imbued with its own unique style and value. As the world evolves, new technologies emerge, and the use of social media has exploded, humans have more access to comedy than ever before. A culture has been created around sharing funny content with friends and followers. Most of the time this content comes from sites or accounts that fail to attribute credit to its creator.[6] Similarly, if someone goes to a standup show, raves about it to a friend, it is more likely than not for a version (bootleg or authorized) to be posted on YouTube or some other streaming site. With this comes comedians having access to one another's work, which could potentially lead comedians to take others work and call it their own.

One of the best ways for artists in this country to protect their art is copyright law. Under the United States Code, a copyright will be granted to "original works of authorship fixed in any tangible medium of expression."[7] But this protection does not extend to anything that would be considered an idea.[8] Once an artist has created something that fits within the definition, it is automatically given copyright protection and the rights associated with that protection, even without formal registration with the Copyright Office.[9]

3. Dr. Deborah Schwartz, *Shakespeare's Four Final Plays: The Romances* (2015).

4. *Catharsis*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/catharsis.

5. *Comedy*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/comedy.

6. Hannah Pham, *Standing Up for Stand-Up Comedy: Joke Theft and the Relevance of Copyright Law and Social Norms in the Social Media Age*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 55, 63-64.

7. 17 U.S.C. § 102(a).

8. *Id.* at § 102(b).

9. *Id.* at § 106, 113-15.

The copyright owner can then use these rights to prevent others from using their creations without their consent.[10]

Because we live in a modern age where most everything is either written down or recorded, the issue of tangibility for copyrightability of jokes is almost negligible. The main issue with the copyrightability of a joke lies within the dichotomy of an idea versus expression. Because the United States ("US") does not recognize jokes as having an expression separate from an idea, there is no legal protection for comedians against infringers or copycats. As of right now the only repercussion for stealing jokes is getting bad mouthed/blackballed by the community, or in some rare occasions being punched in the face.[11] It is hard to believe at this point in time that jokes are still considered to be simply ideas; at a minimum jokes are the expression of a comedians' specific point of view, not just ideas. Although there is overlap between an idea and expression, that is an issue for all copyrighted work, not just comedy.[12] For example, the idea of a cat cannot be copyrighted but if an artist draws a cat, the drawing is copyrightable if it contains enough originality. And once that threshold is met, anyone who has access to the work and creates another work that is substantially similar to the original work, is then in violation of copyright laws.[13] The same thought processes for infringement should also be used for jokes. Again, the idea of a cat cannot be copyrighted but a comedians' unique interpretation of a cat should be. There are so many safeguards already built into current copyright law that would ease any worries of overprotecting certain forms of art such as the doctrines of fair use, de minimis, scenes faire, independent creation, as well as the ability of the courts to decide what is or is not infringement.

There are evolving forms of technology and social media which creates new issues for those seeking copyright protection, and now more than ever joke theft is rampant and comedians deserve protection for their creativity and hard work.

Current State of Joke Protection

Nowadays there are many different forms of comedy, from movies to plays, musicals, sitcoms, sketch shows, late night shows, and comedy specials. The thing that unites them all is the *idea* of a joke. Under modern copyright law, an idea is not protectable.[14] Most courts have interpreted that

10. *Id.* at § 501-13.

11. Joe Rogan, *Joe Rogan vs Carlos Mencia*, YOUTUBE (Jan. 23. 2013), https://www.youtube.com/watch?v=gdugSUFbzws.

12. 5 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §19E.04, [B].

13. *Callhoun v. Lillenas Publ'g*, 298 F.3d 1228, 1232 (2002).

14. *Nimmer on Copyright* § 19D.01, [A].

to mean that jokes are not protected under copyright law.[15] Because of this, comedians have created their own "common law" with regards to comedians who steal the jokes of others.[16]

Lack of Legal Protection for Jokes

As of right now, there is no readily available legal protection for comedians because in the eyes of the law their jokes are not considered an expression, but rather an idea.[17] Additionally, a joke is essentially a form of speech; there is a concern that protecting jokes would have a negative effect on others creating art, and would therefor chill free speech.[18] These are valid concerns for not only jokes but for other forms of art, yet these other forms are granted legal protection.[19] There are safeguards built into copyright that eases the worry that artists would not be able to create, but also ensure that there is an incentive for artists to create.[20] There are tactics that have become custom for comedians to use to protect their material, but it is severely lacking when it is compared to the protection copyright can provide.

Although some have tried to use the legal system to protect themselves from joke thefts, such as Robert Kaseberg when Conan O'Brien allegedly stole his jokes about Dan Quayle and the Superbowl.[21] There are other situation where the legal system is proper for protecting jokes but for the most part, comedians are left to their own devices.[22] The current way comedians protect their work is through self-help, with the hope that the thief's reputation will be harmed; which is the heftiest form of punishment this protection offers.[23] Although this has worked pretty well in the past, it still does not provide the same deterrent power that copyright protection provides, and does not work well for comedians whose work is taken by

15. *See Kasberg v. Conaco, LLC*, 260 F. Supp. 3d 1026,1027 (2018); *Foxworthy v. Custom Tees*, 879 F. Supp. 1200, 1204 (1995); *see also* Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1789.

16. Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008).

17. *Nimmer on Copyrigh*t § 19E.04, [B].

18. *Id.* § 19E.04, [B][2].

19. 17 USC §102.

20. Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 274 (2004).

21. Conan O'Brien, *Conan O'Brien: Why I Decided to Settle a Lawsuit Over Alleged Joke Stealing*, VARIETY (May 9, 2019), https://variety.com/2019/biz/news/conan-obrien-jokes-lawsuit-alex-kaseberg-settlement-1203210214/.

22. Elizabeth Moranian Bolles, *Stand-Up Comedy, Joke Theft, and Copyright Law*, 14 TUL. J. TECH. & INTELL. PROP. 237, 254 (2011).

23. *Id*.

television or movie writers.[24] Additionally as suggested by Elizabeth Bolles in her article, *Stand-Up Comedy, Joke Theft, and Copyright Law*, she states:

> Because of comedians' unique creative process, stronger copyright protection would also encourage the creation of more jokes. Whereas other artists can create works in private and make their own determinations about when a work is complete, a joke is only as good as its ability to make an audience laugh, which can only be gauged through public performance. Stronger copyright protections will reduce the risks associated with developing jokes, thereby allowing comics to test new material more often.[25]

Self Help

For the most part, comedians rely on their community to enforce this "common law" of joke protection.[26] As explained in an article written by Professors Oliar and Springman from the University of Virginia Law there is "prison-gang justice" when joke theft is detected.[27] As one of their interviewee's stated:

> 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.[28]

Negotiation

The Oliar and Springman article lays out the current way comedians are able to confront those that have stolen their work and how they enforce protection of their work.[29] Most of the time, comedians will be notified of another comedian preforming their work or will see it for themselves.[30] At this point, the creator of the work will reach out to the comedian who had "stolen" the work.[31] During this chat, the creator may explain when/where they first did the joke and potentially give some witnesses as to that point.[32] Sometimes these chats end amicably by either, (a) the copier admits to copying or (b) realizing they may have inadvertently copied the work,

24. *Id.*
25. *Id.* at 241-42.
26. Oliar & Sprigman, *supra* note 16 at 1813.
27. *Id*.
28. *Id*.
29. *Id*.
30. *Id*.
31. Oliar & Sprigman, *supra* note 16 at 1813.
32. *Id*.

apologizing, and discontinuing the performance of that joke.[33] But as Bolles suggests, there is little to no due process when it comes to sanctioning those who take material.[34] Although harming another comedians reputation can be effective, it is not applied equally to those who steal.

Bad Mouthing

In most cases, if the thievery continues with or without confrontation, the comedic community is quick to back the original comedian. Once a comedian is accused of stealing jokes it could cause a large detriment to the comedian's reputation, not only in the comedy community, but also in the social sphere.

As brought up in the Oliar and Springman Article, their interviewees agreed that a comedian's reputation is one of largest factors in creating success in the business.[35] One of their interviewees was the topic of one of these accusations and stated that even just the accusation of thievery, "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 from]. I have a tape of it."[36] The public accusations can lead to various forms of punishment such as: getting banned from clubs, other comedians badmouthing and/or shunning them.[37] This form of self-help can easily kill an aspiring comic's career. In fact, this can also kill a well-known comedian's career. One of the largest falls from grace has been Carlos Mencia.[38] He had been accused of stealing from multiple comedians. When it was discovered that he had stolen from Bill Cosby, he went from selling out entire theaters to falling into the void within one year.[39] As Joe Rogan states in his interview with Hannibal Buress regarding Amy Schumar's accusation of stealing jokes, "[p]eople don't like when they find out a comedian's a plagiarist. They don't like it. They get angry."[40] He continues on to say that people are not as offended when they see similar lines/jokes in television ("TV") shows and movies as opposed to seeing a comedian take material from another comedians.[41] As Rogan explains, when people go to

33. *Id.*
34. Bolles, *supra* note 22 at 255.
35. *Id.*
36. *Id*.
37. *Id.*
38. The Point with Anna Kasparian, *Talks Carlos Mencia, Robin Williams & Comedy*, YOUTUBE (Aug. 25, 2014), https://www.youtube.com/watch?v=jPhkl5aL0h0.
39. Nomencia, *Mencia Steals from Cosby?*, YOUTUBE (Mar. 20, 2007), https://www.youtube.com/watch?v=lCixAktGPlg.
40. Kaka KarrotCake, *Joe Rogan and Hannibal Buress on Amy Schumer Stealing Jokes*, YOUTUBE (Jan. 28, 2016), https://www.youtube.com/watch?v=qypQLesaKXg.
41. *Id.*

a comedian's show, they want to see the comedian's ideas or perspective on certain topics that is unique to that comedian.[42] The audience is expecting unique and intelligent commentary from that comedian, "something that is so obvious when you see it that you know it is [their] sense of humor."[43] When another person tries to pass that specific perspective on the same topic, by patching different premises together or creatively rewording someone else's work, people get offended because the audience knows that they are a "faker."[44] "You are saying 'this is the world through my eye, but it really isn't the world through my eyes."[45] When compared to other forms of art, such as music, people are also going to be less offended to find out that Jay-Z had a team of people writing his newest album than people finding out that Luis C.K. had a team writing all of his work.[46] There seems to be something ingenuine, which goes against the ideals of standup.[47]

Many comedians deal with joke theft differently. In an interview with Hannibal Buress about the accusations of Amy Schumer stealing jokes, he takes a unique approach to joke thievery:[48]

> If somebody takes a joke from me, then, I mean, they needed it way more than I do. And I'm just gonna write more jokes because, you can take one, and I'll write 20 more . . . I've seen, I've heard of comics trying my shit or trying, or doing different things but I don't really engage it cuz it's like if you, if you try my shit . . . good luck with it man.[49]

But this brings cause for concern. As Rogan mentions, there are plenty of comics out there who work on bits for ages, to hone that one bit until it finally lands the way they want it to, and maybe it will become one of their signature bits.[50] Should it matter if the comic is well or less known? Rogan and Buress joke that Hannibal's theory only really works with lesser known comics, because they assume these other comics would not make it, but they do pose a very serious question: should there be different standards of protection based on the success of the comic who is stealing material, or based on the success of the initial bit.[51]

42. *Id.*
43. *Id*.
44. *Id.*
45. Kaka KarrotCake, *supra* note 40.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. Kaka KarrotCake, *supra* note 40.
51. *Id.*

But what happens when larger names steal the material of other larger comedians? That is when the joke thief conversation reinvigorates and people take sides. Some of the most notable accusations in recent history are Carlos Mencia, Dane Cook, Conan O'Brien, and Amy Schumer.[52] Most of these higher profile instances are handled in a more civil way, such as the method mentioned above, but others can get a bit more physical. As for Dane Cook and Amy Schumer, their conflicts have been blown into the media and they have been able to use their platform to address such accusations.[53]

Dane Cook was accused of stealing material from Louis C.K.[54] Many people recognized the similarity in the materials and called Dane Cook out.[55] But Louis decided to make a big gesture and invited Cook onto his T.V. show to talk about the stolen material.[56] In that conversation Cook asked for an apology from C.K. for "letting" people hate on him and believe that he had stolen C.K.'s material.[57] C.K. followed up that he did stop people from saying Cook stole his material and wanted Cook to admit that there may have been some access to C.K.'s material and that somehow he absorbed the material, forgot that he had heard it some place and thought it was his own.[58] This is where the conversation shuts down, Cook does not want to admit to the inadvertent stealing and rebuts that he has hours of material, so why would he need to steal from someone else and risk his reputation?[59] C.K.'s claim that Cook most likely forgot he heard the material and claimed it as his own, is most likely how most comics find themselves in the position of joke thievery, and may will use this as a defense, apologize and then move on.[60]

In Amy Schumer's case, she has been accused of stealing material not only from other comedians but from other sketch shows.[61] Amy Schumer has become a large name in comedy over the last decade. She has had her own sketch show, multiple specials and movies, but with a lot of success

52. *See* Colin Patrick*, A Not-So-Funny Look at 6 Comedians Accused of Plagiarism*, MENTAL FLOSS (Jan. 21, 2016) https://www.mentalfloss.com/article/24305/not-so-funny-look-6-comedians-accused-plagiarism; *also see* Kaka KarrotCake, *supra* note 40.

53. Will Schoder, *Joke Theft and Cryptomnesia*, YOUTUBE (Dec. 23, 2016), https://www.youtube.com/watch?v=qypQLesaKXg.

54. Professor Ross, *Louie-Cryptomnesia*, YOUTUBE (Mar. 30, 2017), https://www.youtube.com/watch?v=UC1JocG-Adg.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Schoder, *supra* note 53.

60. *Id.*

61. Brandon Farley, *Amy Schumer's "Parallel Thinking" Compilation (John Mulaney, Patrice O'Neal, Jenny Slate and more) (The Jim Norton Advice Show)*, YOUTUBE (Jan. 26, 2016), https://www.youtube.com/watch?v=Qv0eWN8v_tg.

comes the need for a lot of material.[62] There has been speculation that because of her quick rise to fame, she may have inadvertently stolen work from other comedians, similar to the Dane Cook situation, but Amy has refused many, many times that is not the case.[63] She has gone on multiple talk shows to rebut the accusation, stating that she has a group of writers and when they are work-shopping material, they will "make sure" that they do not come close to anyone else's work, but she does not go into detail of that process.[64] Her ultimate claim is that her and her team of writers created the material independently of the earlier "stolen" work.[65] But when looking at the material in question, it is very hard to determine if this is true or not.[66] Some of the jokes are so nearly spot on, that it has begged the question: did she really steal?[67] But as of right now there is no other process for Schumer to try to clear her name. The community has to either take her at her word or believe her accusers.

Physical Altercations

In addition to badmouthing and refusal to work with alleged/known joke thieves as ways to deter and punish others from stealing jokes, some comedians chose to take an alternate route, such as confronting their thieves in person.[68] One of the interviewees in the Oliar and Springman article recounted confronting one of his thieves that presented 10 minutes of his set *verbatim* at the same venue where he originally performed that set.[69] He notified the club manager and subsequently interrupted the thief's set and told the audience, ". . . just to prove it, I'll do the same 10 minutes, and unlike the previous guy, I'll do it well.[70] But this is not even the most extreme reaction to joke stealing, in some instances, comedians will resort to physical violence.[71] In the rise and fall of Carlos Mencia, he had been in a few fist fights because he had stolen others material, most notably George Lopez.[72] Mencia was accused of taking about 13 minutes of George's material for an HBO special, and George admits to calling HBO to get the spot pulled from the network and give Mencia a one, two, punch.[73] Although Mencia has not

62. *Amy Schumer* (2020), https://www.amyschumer.com/.
63. Kaka KarrotCake, *supra* note 40.
64. Farley, *supra* note 61.
65. *Id.*
66. *Id.*
67. *Id.*
68. Oliar & Springman, *supra* note 16 at 1816.
69. *Id.*
70. *Id.*
71. Rogan, *supra* note 11.
72. *Id.*
73. *Id.*

been the only big name in comedy to be accused of plagiarizing material, but he has been the largest name to have gotten in a physical fight over it.

Defenses

As when anyone is accused of stealing or copying anything, they are going to put up a defense. In the land of copyright, the only full defense to infringement is independent creation.[74] In the land of comedy however, there are two options. The first is the same as copyright, a comic will defend their material and claim independent creation, meaning that they had no access, or access that is so minimal that there is no influence of the original work in the newer work, and they had come up with the material entirely on their own.[75] The second defense is inadvertent copying, or cryptomnesia, which means that the comic had heard the material in the past, absorbed it, the idea/ premise of the joke was retrenched, and they subsequently copied another comic's work without knowing it.[76] In all other forms of art that are copyrightable, this is not an acceptable defense.[77] There have been multiple cases where musical artists have created work that they believed to be their own, when in fact they have heard the melody of their new song at some point in the past. The best example of this is in the case *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, in which George Harrison's song "My Sweet Lord" was accused of stealing the melody from the Chiffon's song "He's So Fine."[78] Harrison claims that he must have internalized the progressions which made him believe that he wrote them[79] In the case against Harrison, the Chiffons were able to successfully prove infringement because Harrison's work was substantially similar to their song, and Harrison had access to their song.[80] If given copyright protection, cryptomnesia would no longer be a valid defense to stealing jokes, so this is something that is unique to the self-help comedians have employed. But before, that happens, jokes need to become recognized as an expression, rather than just an idea.

Idea vs. Expression

"Ideas are raw materials that serve as building blocks for creativity, thus enabling authors to build on previous ideas and work."[81] There are several

74. *See Calhoun v. Lillenas Publ'g*, 298 F.3d 1228, 1232 (11th Cir. 2002).

75. *See Whelan Assocs. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1224 (1986); *Calhoun*, 298 F.3d at 1228.

76. Schoder, *supra* note 53.

77. *Id.*

78. *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 178 (1976).

79. *Id*. at 180.

80. *Id.* at 181 (this is just the specific holding of the above case, it helps the claim that each case needs to be decided individually, but the opinion does not make that specific assertion).

81. *Nimmer on Copyright* §19E.04, [B].

ways the court has attempted to clear up the confusion between what is an idea and what is expression, such as the "abstraction test", the "pattern test" and the "total concept and feel" test.[82] But these tests are not fully determinative in most situations and decisions need to be made on a case by case basis.[83] The base of a joke is an idea and one of the main questions is: can a joke be an expression? And if so, when does a joke make the transition from idea to expression?

Copyright

The main reason why jokes have yet to gain legal protection, is that many believe that a joke is just an idea, and you cannot protect an idea under copyright law.[84] Traditionally, for something to be protected under copyright law, it must be an original work of authorship fixed in any tangible medium.[85] In the modern age, tangibility is not the main issue regarding joke copyrightability, but rather the biggest push-back for offering protection to jokes is the dichotomy created between idea v. expression. In the article "Who Owns a Joke? Copyright Law and Standup Comedy," Scott Woodward touches on the idea/expression dichotomy and how the change in style of stand up can bluster the shift from uncopyrightability to copyrightability such that:

> These trends show that modern jokes, if only written, would resemble memoir-style essays. Jokes in this tradition are not merely funny observations; they require individualized expression to make a joke funny and personal to that comedian. These jokes take an idea, premise, or punchline, incorporate that idea into a story, and derive humor from the idea's interaction with the comedian's personal expression.[86]

Woodward attributes this shift and change in understanding of the copyrightability of a joke to modern times as they "rely heavily on long-form narrative humor . . . [that] typically purports to be personal story-telling . . . ." which is more analogous to more traditional forms of copyrightable works, such as short stories, novels, and plays rather than the classic one-liner punchlines.[87]

82. *Id.*
83. *Id.*
84. *Nimmer on Copyright* § 19D.01, [A].
85. 17 U.S.C. § 102(a).
86. Scott Woodard, *Who Owns a Joke? Copyright Law and Stand-Up Comedy*, 21 VAND. J. ENT. & TECH. L. 1041, 1068 (2019).
87. *Id.*

Tangibility

Although the tangibility prong of the copyright requirements is not currently debated since there are many recognized forms of fixation, it is still important to understanding copyright in relation to protecting jokes. The Copyright Statute states that a work of authorship must be fixed in a way that "can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[88] For example, if you have an idea of a painting, you are expressing that idea you have through painting and is physically fixated on the canvas you have just painted on. But the term "tangible" does not necessarily mean physical.[89] If you think of a song, it is not really "fixed," it is not something you can physically touch, but it is considered "fixed" if it is written down in sheet music or recorded.[90] Once a song is either written down or recorded, it is officially fixed and therefore copyrightable, prior to that it is simply an idea.[91] This is what can cause issues for comedians. Is a joke an expression of an idea, or is it simply an idea spoken out loud? If a joke is in fact an expression of an idea, how is it fixated? There have been discussions as to whether oral conversations or presentations would fall under copyright protection, but it has been well decided by the courts that as long as the oral presentation is not based on "antecedent fixations" it cannot be copyrighted, meaning the work must be written or fixed in a tangible medium before it is presented.[92]

Subsequently, the fixed work must also be stable, meaning that it is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[93] Regarding radio and live TV shows, they are ephemeral in nature, yet under copyright, if they are being fixed (i.e. recorded) while the show is being transmitted, that is sufficient fixation for copyright.[94] Additionally, the author of the work must be in control of the recording.[95] This is why there is no copyright in bootlegs.[96] But because there are so many ways to fix a work now (i.e. video, writing, audio) this has become a minor point in the copyrightability analysis for jokes.

88. 17 U.S.C. §101(a).
89. *Id.*
90. *Id.* § 114.
91. *Id.*
92. *Nimmer on Copyright* § 2.03 n. 13.
93. *Id*. at n. 32.
94. *Id.*
95. *Id.*
96. *Id*. at n. 45.

Originality

There are many different categories of copyrightable works such as literary works, dramatic works, choreography, audiovisual, and even architectural works.[97] But the Copyright statute explicitly states that "[i]n no case does copyright protection for an original work of authorship extend to any idea, . . ., concept, principle, or discovery regardless of the form which it is described, explained, illustrated, or embodied in such work."[98] It is not clear that jokes would cleanly fall underneath any of the recognized categories of copyright protected works or would be explicitly ruled out of protection as an idea or concept. A joke, in a way, is a mixture of different copyrightable works and elements, but still needs to be clearly distinguished from an idea by proving that a joke is in fact an expression of an idea and is fixated in a tangible medium.

As stated in the classic case *Bleistein v. Donaldson Lithographing Co.*, the standard of originality was discussed and that the judiciary should not be the ones to determine the originality of a work, and any "distinguishable variation" of a prior work should constitute sufficient originality.[99] In the words of Justice Holmes: "Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible which is one man's alone. That is something he may copyright unless there is a restriction in the words of the act."[100]

Although *Bleistein* discusses posters used for advertising purposes, the same could be said about jokes. Comedians today are presenting unique, original content, and as stated in the court in *Bleistein*, the judiciary should not be the ones deciding whether or not a work is sufficiently original to be copyrighted.

Adversely, even if a work is sufficiently original, if it is only a short phrase or a minimal contribution, that cannot be copyrighted. The 1909 Copyright Act, explicitly lays out that short phrases like names or slogans cannot be copyrighted.[101] But in the case *Heim v. Universal Pictures Corp., Inc.,* it is suggested that if a short phrase is sufficiently creative, it could none the less be copyrighted such as, "Twas brillig and the slithy toves."[102] Additionally, as suggested by Nimmer, "the smaller the effort (e.g., two words) the greater must the degree of creativity in order to claim copyright protection."[103] So in terms of comedy, the shorter the joke the more creative it has to be to even attempt to claim protection under copyright.

97. 17 U.S.C. 102(a).
98. *Id.*
99. *Nimmer on Copyright* § 2.01 [B][1].
100. *Id*. citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).
101. *Nimmer on Copyright* § 2.01 at [3].
102. *Id*. citing *Heim v. Universal Pictures Co.*, 154 F.2d 480, 487 n. 8 (2d Cir. 1946).
103. *Nimmer on Copyright* § 2.01.

On the flip side, because copyright does not protect facts, there are many elements within copyrighted works that are not protected, such as scenes-a-faire, which are elements of a story that are standard to a genre, place, person, profession, etc. . . .[104] For example, in *Williams v. Crichton*, the court discussed whether Crichton's book and movie "Jurassic Park" infringed William's children's book, "Dinosaur World," with a similar premise of children going to a dinosaur zoo.[105] Before the court can compare the protectable elements of each story, they first have to identify the elements of the story that are not protectable, such as scenes a faire elements. In this case, the scenes-a-faire elements would be elements of a zoo, attributes of children, and attributes of dinosaurs.[106] Once these unprotectable elements are determined, the remaining elements are compared for substantial similarity based off of the total concept and feel of the work.[107]

If the scenes-a-faire doctrine is applied to comedy, this doctrine could hinder the protectability of jokes as there are many jokes that are based off of everyday observation. Elements of these observations are going to be particular to a place, thing, or person, and those elements, of an already short work, will be cut from the protection of that joke. But this is true of any literary work and there is enough protectable content in them to still be copyrightable. Jokes are not so unique from other forms of protectable work, but the shorter the work, the less protectable content there will be.

Idea Theft

In the instances where copyright has not been able to assist people who believe their works have been stolen, there are some states in which people can bring actions for idea theft. In California, contract law can serve as a vehicle for a person who submits ideas for movies, TV shows, plays, etc., and has an understanding that they will be paid for submitting that idea.[108] In *Jordan-Benel v. Universal City Studios, Inc.*, Plaintiff uses a breach of implied-in-fact contract to allege an "idea theft" claim.[109] To successfully make this claim, a plaintiff must allege that:

> (1) he submitted the screenplay for sale to the defendants; (2) he conditioned the use of the screenplay on payment; (3) the defendants knew or should have known of the condition; (4) the

104. *Williams v. Crichton,* 84 F.3d 581, 589 (1996).
105. *Id.* at 589-90.
106. *Id*. at 588.
107. *Id*. at 589.
108. *Jordan-Benel v. Universal City Studios, Inc.*, 859 F.3d 1184, 1186 (2017).
109. *Id*. at 1191.

> defendants voluntarily accepted the screenplay; (5) the defendants actually used the screenplay; and (6) the screenplay had value.[110]

This case ultimately arose out of a failure to pay claim.[111] Plaintiff wanted this movie to be made, but the fact that the studio did not pay for the screenplay was a breach of the understanding that he had when he initially submitted the work.[112] The court in this case agreed with Plaintiff that his idea had been stolen, and breach of implied contract was the correct way to bring this case.[113]

Although comedians do not submit their jokes to television shows or movies, the elements used in proving idea theft could be used to create a new standard of which jokes could be protected (which will be discussed later on).

Trademark

Although less common for creative works, trademark may be an option for those seeking protection of a phrase or word that is signature to themselves or their brand. There are certain requirements that a mark must meet for it to be recognized by the United States Patent and Trademark Office such as actual use of the mark in commerce, the mark has to either be arbitrary or suggestive (or descriptive if the mark has acquired secondary meaning).[114] The mark has to be easily attributable to the source.[115] To this end, a comedian may trademark a signature phrase, or joke that is associated with that comedian, such as Jeff Foxworthy with "you might be a redneck" or Rodney Dangerfield, "no respect, no respect at all."[116] When you hear these classic lines, you automatically attribute that to its original source. But this is really only an option for those comedians who have already made a name for themselves and have the platform to create this connection to a phrase.

How Should Jokes Be Protected?

As of now, there is no formal protection of jokes under state or federal law, but comedians should have access to legal remedies against those that have stolen their material. This could be achieved in a multitude of ways,

110. *Id*. citing *Benay v. Warner Bros. Entm't, Inc.*, 607 F.3d 620, 629 (9th Cir. 2010).
111. *Jordan-Benel,* 859 F.3d at 1187-90.
112. *Id.* at 1191.
113. *Id*. at 1193.
114. 15 U.S.C. § 1051.
115. *Id.*
116. Rodney Dangerfield, *Jeff Foxworthy at Rodney's Place (1989)*, YOUTUBE (Nov. 13, 2017), https://www.youtube.com/watch?v=nbx9em1VzSA; Danny, *Rodney Dangerfield No Respect (1970)*, YOUTUBE (Aug. 29, 2017), https://www.youtube.com/watch?v=tvfO8W05kHc.

but this note offers the following options that would be best for comedians to get the legal support that they deserve. In line with Bolles, this note agrees that affording comedians copyright protection would incentivize comedians to create, "rather than incite Armageddon," with destroying comedians' careers who are accused of stealing jokes.[117] Protecting jokes under copyright can streamline protection as well as give those accused of stealing a way to prove their innocence, because right now, the only way someone accused of stealing can clear their name is by overly denying that they copied and try their best to prove independent creation. At this point in time the community is judge, jury, and executioner for those accused of stealing. Although this can be effective, it does not offer the same remedies for infringement that copyright protection can.

There have been many other suggestions on the best way to help comedians protect their work ranging from keeping the current industry standard of self-help, full copyright protection, or something in between. Oliar and Springman express their concern for legal protection in addition to the current state of self-help by stating that granting legal protection will "deaden comedians' current sense of responsibility for policing appropriation" because they see it as someone else job.[118] But as Hannah Pham argues in her article *Standing Up for Stand-Up Comedy: Joke Theft and the Relevance of Copyright Law and Social Norms in the Social Media Age*, the actual risk of comedians completely giving up the community norms of protection and solely relying on the legal system to enforce their rights, is slim to none.[119] As Pham explains, extending copyright protection to comedians would bolster their current protection methods rather than inhibit them.[120] Because comedian social norms and copyright have been co-existing for a long time, using copyright law would help enforce the protecting norms of the comedic community.[121] Pham concedes that offering protection to jokes also comes with its challenges, as it could still be easy for other comedians to steal material by just changing the wording of the joke.[122]

Pham asserts two different ways that comedians can enforce their intellectual property rights: (1) using the DMCA Notice-and-Takedown Procedure, or (2) creating a copyright claims board.[123] If jokes are given protection under copyright law, the DMCA ("Digital Millennium Copyright Act") would aid in the current state of self-help enforcement as its notice and take down procedures would go hand in hand with current self-help

117. Bolles, *supra* note 22 at 257.
118. Oliar & Springman, *supra* note 16 at 1800.
119. Pham, *supra* note 6 at 82.
120. *Id.*
121. *Id.* at 86.
122. *Id.* at 87.
123. *Id.* at 77-85.

practice.[124] But this can only take a comedian so far, and for this to even work, comedians would need their work to meet the qualifications of copyright. As for her second option, use of the Copyright Claims Board which is a voluntary alternative to bringing a claim in federal court.[125] This would not only be efficient for comedians trying to enforce their rights, but also cost efficient.[126] But as Pham herself brings up, this Copyright Claims Board has not yet been enacted and if comedians had access to it, would they even use it if they have other options?[127] Although the options presented by Pham are plausible, they would require jokes to have copyright protection, which they currently do not. Because there is hesitation to grant full copyright protection to jokes, there either needs to be a shift in how jokes are perceived regarding the idea versus expression dichotomy, or there needs to be a different threshold or standard for jokes, which this note offers.

As mentioned previously, there are a few cases that point to a thin level of protection of creative works that are ephemeral in nature or may be too short to be traditionally protected under copyright law.[128] These instances are the basis of this note's proposal. It should be generally recognized that it takes an obscene amount of creativity and wit to make a name for oneself in the comedy industry, and that work should not go unnoticed and unprotected. Most modern stand-up comedians use observational comedy to create their material, meaning that they take what they see in their everyday lives and narrow aspects of that day and make it funny. Each comedian has their own style and their own perspective unique to themselves, it is the definition of original content.

One flaw in the current argument against giving copyright protection to jokes is that they are ephemeral, once the joke is said, the audience has laughed, the joke is gone, presumably not to be repeated again. This may be true for comedians just getting their start, but not for those comedians who have made this their livelihood, they do stand-up tours or they have their own shows. Under copyright law, the shows that are written and recorded are protected because they have been fixed in multiple tangible mediums and can be reproduced. The same can be said for comedians who tour shows. Night after night they present the same material. The phrasing may be a bit different here and there, and there may be some improvisation/interaction with the audience, but other than that, a comedian's set is workshopped, written, planned, and performed. Similar to workshopping a Broadway show, not everything stays the same from beginning to end. Songs and scenes are edited, cut, added, re-arranged, but throughout that process each

124. Pham, *supra* note 6 at 80.
125. *Id.* at 82.
126. *Id.*
127. *Id.*
128. *Nimmer on Copyright* § 2.03.

creative element is technically copyrightable as it is fixed in a script or a score. Why should this not apply to comedians?

The biggest argument against protecting jokes is that they are only ideas and not an expression. This could not be further from the truth. Yes, the premise of the joke is an idea, but the premise is *not* the joke. A comedian takes a premise, and through their own unique point of view, they craft a joke; that is what should be protected. In literature there are many, many books written about dystopian futures, yet each one is able to be copyrighted. They all contain the same premise, but also contain a different view of what a dystopian future would look like, unique to the point of view of that one author. This is similar to comedians. Many comedians have jokes about having a significant other, or lack thereof, but each comedian's experience is expressed in a different way, different set ups, different punch lines. The issue with joke theft comes into play when two jokes are substantially similar to each other. Stand-up comedians use just as much creativity as any other writers, yet somehow their work is not protected equally based on the insufficient argument that a joke is only an idea spoken out loud, not an original expression of an idea.

To bring a copyright infringement case, the plaintiff must prove that the two works are substantially similar and that the defendant had access to the original work.[129] These two factors do not need to be completely fulfilled, meaning that the more substantially similar the works, the less access the plaintiff has to prove the defendant had and the more access the defendant had, the less substantially similar the works need to be.[130] But, no matter how substantially similar the works are, there must always be access, because there is always the possibility of independent creation.[131]

There are many tests already used by courts to decide whether works are substantially similar.[132] The Ninth Circuit uses the "total concept and feel" test which separates unprotectable content from the protectable content.[133] This test has two parts: (1) the intrinsic test in which the expressive elements are compared objectively for similarities; and (2) the extrinsic test in which the works, as a whole, are subjectively compared on the basis of "whether the ordinary, reasonable audience" would find the works substantially similar on the total concept and feel of the works[134] This is the best test for comparing two jokes. Initially the premise of the joke, such as: airplane food, going to the dentists, hanging out a bar; and the scenes-a-faire elements would be eliminated, theoretically preserving the

129. *Callhoun*, 298 F.3d at 1232.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Cavalier v. Random House, Inc.*, 297 F.3d 815, 823 (9th Cir. 2002).
134. *Id.* at 822.

expressive elements of the joke for an objective comparison of jokes. Second, the jokes would be submitted as whole to the jury, preferably through video or audio, or even in person if the situation calls for it. Once those two tests are submitted and analyzed, the jury should be able to decide if the two jokes are substantially similar.

As for access, generally just because something is published on the internet, or any other form of being out there in the world, it does not automatically mean that someone had access to the material.[135] The standard of proof for access is that the defendant had "an opportunity to view or to copy the plaintiff's work."[136] Additionally, the access has to be reasonable, meaning that there has to be more than the "bare possibility" the infringer accessed the work, and cannot be inferred from "mere speculation or conjecture."[137] This means the more popular and widely disseminated a comedian's work is, the more likely an infringer had had access to the material.[138] This creates a disparity between more successful comedians and those who are just starting out. If a traditional copyright infringement case is brought against a joke thief, it would be much easier for a large comedian to prove that the defendant had access to their work, and therefore be more likely to win their case.

Another theory is that joke idea theft could be brought as breach of contract action. The factors necessary for bringing a successful breach of implied contract for idea theft are laid out in the case *Jordan-Benel v. Universal City Studios, Inc*, stated earlier.[139] There are two elements of breach in that case that would be impossible for comedians to prove, as they are phrased now: (1) that the comedian had submitted the work to someone; and (2) that the comedian expected payment in return for that submission.[140] If a comedian did not intentionally submit their joke to a specific person or entity, when they put their work out into the world, they are submitting their original material to everyone. Although the comedian may not have an expectation of being monetarily compensated for their material, they will accept someone not stealing their material as consideration. This would be an implied contract between the comedian and observer. The comedian provides entertainment, and in return it is understood that the observing party will not appropriate the comedian's material.

In some cases, there is a monetary element to comedians submitting their work. At many comedy clubs there is a cover charge, or a drink

135. *Three Boys Music Corp. v. Michael Bolton* 212 F.3d 477, 482 (9th Cir. 2000).

136. *Id.* citing *Sid and Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977).

137. *Id.*

138. *Id.*

139. *Jordan-Benel*, 859 F.3d at 1191.

140. *Id*.

minimum, or even both in order to see a show, and these comedians are compensated for presenting their work.[141] No person can reasonably expect that when they present any creative material, not limited to jokes, it will be copied, stolen or plagiarized. There is currently no basis in the law that allows for this specific interpretation of breach of implied contract, but that does not mean that this could not be a proper interpretation.

If neither of these options are viable, there is a third option: limited copyright, more than thin copyright, but less than full copyright protection. There are certain works that the court has recognized as protected by thin copyright.[142] For example, maps receive thin copyright where only the creative elements of the map are protected, such the font, the color choices, the symbols used in the legend.[143] On their own, each of these elements are not protected, but when the map is taken as a whole with those elements included, it is protected from exact copying.[144] This idea of limited copyright was created to promote certain necessary industries, such as cartography and other factual works.[145] The more protection one can receive on a work, the more likely they are to create.[146] Comedy is similarly situated. There is a need for comedy in this world, it is hard to imagine life without laughter, or at least a happy one. It is in society's interest to promote art, specifically comedy. As mentioned before, stand-up seems to be the only form of art that is not formally protected by law.[147] If full copyright protection cannot be achieved for jokes, maybe a limited form of copyright protection that finds its happy place in the middle of complete copyright protection and thin copyright protect. It can be debated, but a majority of the country would consider comedy a more creative profession than cartography, and somehow the latter has more protection that the former. So, in addition to being protected from direct/verbatim copying, the substantially similar standard would be modified to a higher form of scrutiny and then applied. For example, if two comedians have a joke about naming children strange things, that concept would not be protected, but the specific expression of that concept would be.[148]

Although the premise/idea behind a joke cannot be protected, the comedian's point of view, or interpretation of the idea should be. Access

141. *See* FAQ, COBBS COMEDY CLUB, http://www.cobbscomedy.com/faq; FAQ, PUNCHLINE COMEDY CLUB, http://www.punchlinecomedyclub.com/faq.

142. 17 U.S.C. § 102; *see Walker & Zanger, Inc. v. Paragon, Indus*., 549 F. Supp. 2d 1168 (N.D. Cal. 2007).

143. *Streetwise Maps v. VanDam, Inc.,* 158 F.3d 739, 478 (2nd Cir, 1998); *see slso Nimmer on Copyright* § 2.08.

144. *VanDam, Inc.,* 158 F.3d 739, 478 (2nd Cir, 1998); *see also Nimmer on Copyright* § 2.08.

145. *Nimmer on Copyright* §§ 2.08, 2.11.

146. *Id*. at § 2.11

147. *Id*. at § 2.13.

148. Schoder, *supra* note 53.

should still be a requirement to prove infringement, but substantial similarity may be too low of a bar. As in civil court the burden of proof is preponderance of the evidence, and for criminal court the burden of proof is beyond a reasonable doubt.[149] In some situations, there is a middle ground burden of proof: clear and convincing evidence.[150] Comparatively, with proving similarity in a copyright case, substantial similarity is to preponderance of the evidence, as verbatim plagiarism is to beyond a reasonable doubt. Jokes deserve a middle ground between substantial similarity and plagiarism, they need their own version a clear and convincing standard. This standard will be hard to determine, but a court/jury should look at the two jokes, and if the works are more than 75% similar, and the plaintiffs can prove access the material, they should find that the defendant copied the plaintiff's material.

As for remedies for such infringement, it should follow the same rules as copyright. There should be an opportunity to ask for injunctive relief as well as monetary reimbursement for the revenue the defendant made off of the plaintiff's materials.

All of the options presented for joke protection for comedians are all based on an interpretation of current statutory and common law. With the proper situation and circumstances, a comedian could be successful with these claims.

Although requirements for copyrightability are a main reason jokes have not been protected, there is also the concern that such protection will chill speech. Because free speech is a pillar of our society, it would be against the government's and citizen's interest to limit that right. But, when deciding to grant intellectual property legal protection, the legislature agreed that the benefit of granting a monopoly of rights over intellectual property to its creator outweighed the detriment to free speech and other rights, thus creating copyright, trademark, and patent laws.[151] There is one doctrine, fair use, that applies to all forms of intellectual property rights which allows for the continuation of creation without infringing on rights of others.

Free Speech, Fair Use, and The De Minimis Doctrine

Another reason legal protection has not been granted to jokes is the fear that doing so will chill free speech. As the First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . .".[152] It has long been established that for society to thrive

149. RICHARD T. FERRELL, PRINCE, RICHARDSON ON EVIDENCE § 3-204 (11th ed. 2019); GEORGE E. GOLOMB ET AL., Federal Trial Guide § 90.85 (2019).

150. *See* GEORGE E. GOLOMB ET AL., Federal Trial Guide § 90.85 (2019).

151. Nachbar, *supra* note 20.

152. U.S. Const. amend. I.

there needs to be a "marketplace of ideas" and that is why copyright right only protects expression rather than ideas.[153] There is a dichotomy regarding idea versus expression. Regarding ideas in reference to free speech, it is not limited to the form of speech, like whether it is an "abstract concept or a fixed expression", but is based on different elements.[154] For the most part, all speech is protected speech unless it falls under the minimal exceptions including, but not limited to, obscenity.[155] Basically, one can say, or create anything you want without interference from the government.[156] Some consider copyright law to be a government interference on speech as it stops people from using other's expressions, therefore chilling speech.[157] And that is where the Fair Use exception/defense to copyright infringement comes into play.

Fair Use

When something is copyrighted, it is protected by law against people infringing the copyright owners' rights to exploit their work. But there are instances when taking that work and using it without a license from the owner can be considered legal under the fair use doctrine.[158] There are four factors when considering whether the use of a work is fair use. First, the judge will look at "the purpose and character of the use of the copyrighted work, including whether such use is of a commercial nature or is for nonprofit educational purposes;" although there are no strict black letter laws on what amount of use is okay but judges have tended to be more lenient on nonprofit/educational uses and to scrutinize commercial use.[159] This factor leans on the purpose of the work. For example, if there is a song playing in the background shot of a documentary, the use of the song is incidental to the purpose of the shot and is more likely to be considered fair use. On the other hand, if there is a song that has been added to a scene in post, it is highly likely that his will not be considered fair use. Once that factor is determined, the judge will then look to "the nature of the copyrighted work" from the copied works.[160]

As stated in the article in the *UCLA Law Review* "Adapting Fair Use To Reflect Social Media Norms: A Joint Proposal" by Lauren Levinson, there has been a shift in "user-generated" content to "user found" content, or in

153. *Nimmer on Copyright* § 19.
154. *Id.* § [2].
155. U.S. Const. amend. I.
156. *Id*.
157. *See Eldred v. Ashcroft*, 537 U.S. 186, 266 (2003).
158. Brian Sites, *Fair Use and the New Transformative*, 39 COLUM. J.L. & ARTS 513, 514 (2016).
159. *Id*.
160. *Id*.; 17 U.S.C. §101(2).

essence, reposting.[161] There are many accounts on various social media platforms that collect and repost others original content, and this is now widely accepted due to the collaborative culture that has been building over the past decade.[162] Levinson attributes this change from the old form of "user-generated" media to "user-found" media to the intent of the social media consumers.[163] Back in the day when Tumblr and Instagram were still in their infancy, the majority of the content was "user-generated", but the culture surrounding social media now "encourages taking the works of others" due to the ease of finding others works and platforms that have interactive features, i.e., like buttons.[164] The simple act of resharing or reposting others work is not what harms those who create the content, but the fact that there are no fees paid to the content creators for their efforts.[165] A big question that has to be asked at this point is, what is stealing and what is fair use?

Recently, the Ninth Circuit has been viewing more transformative use of the work as fair use. This has created tension with the traditional notion of derivative works.[166] A derivative work is considered any work that is "based upon one or more preexisting works, such as a . . . dramatization, fictionalization, motion picture version, sound recording . . . abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."[167] This is what causes issues. The more transformative the use, the more likely that a judge will consider it fair use. Does the use of work pass the line between fair use and infringing the right to derivative works?[168] Next, the court will look at "the amount and substantiality of the portion used in relation to the copyrighted work as a whole;" so the more of the work that is taken and the more important or integral the taken work is to the original work, the less likely the use would be considered fair.[169] Lastly, the court will look at the effect the use of the work will have on the "potential market for or the value of the copyrighted work."[170] So the bigger the effect on the market or the value of the work, the weaker the defendants fair use argument will be.

The Levinson article also touches on the transformative defense and brings up cases involving celebrity blogger Perez Hilton and the website

161. Lauren Levinson, *Adapting Fair Use to Reflect Social Media Norms: A Joint Proposal*, 64 UCLA L. REV. 1038, 1047 (2017).

162. *Id*.

163. *Id*.

164. *Id*. at 1054.

165. *Id*.

166. *See Cariou v. Prince*, 714 F.3d 694, 698 (2013); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1173 (2013); *see also* Sites, *supra* note 158.

167. 17 U.S.C. § 101.

168. *See* Sites, *supra* note 158.

169. 17 U.S.C. §101(3).

170. *Id*. § 101(4).

Buzzfeed.[171] In one of the lawsuits against Buzzfeed, a photographer sued over the unlicensed use of his work depicting a soccer player being hit in the face that was used in the Buzzfeed article titled, "The 30 Funniest Header Faces."[172] A majority of Buzzfeed's "listicles" contain both licensed and unlicensed photos, and the founder of Buzzfeed, Jonah Peretti claims that because the images used are user-found, that they are protected under the fair use doctrine because they are transformative in nature, meaning that the "sequencing" and "framing" that is used in creating the "listicles" is "inherently transformative."[173] Although, this may seem like a bit of a weak argument, it seems to stay in line with what the Ninth Circuit has been stating is a transformative use defense to infringement.[174]

De Minimis Use

Another area of fair use that is much more tailored is the de minimis doctrine, which allows for a small amount of copying to the extent it can be shown to not be harmful.[175] In Kara Podraza's article, *When Is A Little Too Much?: The De Minimis Doctrine And Its Implications for Online Communication Tools*, she explores the extent to which the de minimis doctrine can be used to shield copying from an infringement suit.[176] The main difference between the more broad fair use defense and the de minimis defense is the type of copying done. Both fair use and de minimis defenses admit to the copying of work, but for de minimis the argument is that the use of the work is so minimal that there is no detriment to the work or to the creator of the work.[177] There is a split between circuits regarding the de minimis use of copyrighted works.[178] The precedent for the split in the Sixth Circuit is *Bridgeport Music, Inc. v Dimension Films* in which there were unlicensed samples of one song used in another.[179] The Sixth Circuit applied a bright line rule that created strict liability for sampling sound recordings as there are other, more creative means that do not involve directly copying another artist's work.[180] The court explains that there should be a license acquired for sound recording samples because anything that is copied from

171. Levinson, *supra* note 161 at 1057.
172. *Id*. at 1058.
173. *Id*.
174. Sites, *supra* note 158.
175. Kara Podraza, *When is a Little Too Much? The De Minimis Doctrine and Its Implications for Online Communication Tools*, 25 GEO. MASON L. REV. 550, 553 (2018).
176. *Id*.
177. *Id*. at 554.
178. *Id*. at 561.
179. *Id*.
180. Podraza, *supra* note 175.

a sound recording is something of value, and that can never be fair use or de minimis use.[181]

The Ninth Circuit on the other hand directly counters the Sixth Circuit opinion in the case *VMG Salsoul, LLC v. Ciccone*, where the plaintiff claims to hold the copyright to the horn sample that Madonna used in her song "Vouge."[182] The Court agreed with Plaintiff that there was sampling, but because the sample was so short (.23 seconds), the sample was slightly modified for use in "Vogue," and there were other instruments used at the same time as the horns, the use of the sample was de minimis.[183] The Ninth Circuit also finds the holding in the Sixth Circuit as "unpersuasive" because Congress had never made an express declaration that the de minimis doctrine should apply to different works of authorship over others.[184]

Podraza analyzes the pitfalls of the Sixth Circuit decision and sides with the Ninth Circuit's analysis for the de minimis use of samples of sound recordings[185] The Ninth Circuit eliminates the bright line rule suggested by the Sixth Circuit and applies the substantial similarity test that would be used for any other form of authorship that has been allegedly infringed.[186] Podraza does state that there is a slight flaw with the Ninth Circuit's reasoning, as it severely limits the application of the de minimis doctrine.[187] The Ninth Circuit only uses the de minimis doctrine as part of a fair use analysis.[188] Podraza correctly points out that the de minimis doctrine is in place to deter petty infringement cases from going to trial, and if something is declared to be a de minimis use, it is not considered copying and should not be used as stepping stone in a fair use analysis.[189] The argument that Podraza makes for the de minimis doctrine to be used across all copyrightable works, current and future, should also apply to comedy and its many forms.[190]

Fair Use and De Minimis Applied to Comedy

If jokes become protected under copyright, fair use is a good way to protect free speech but still give comedians a way to keep their joke their own. Speech is not limited by what form of expression it takes, as even expressive conduct is considered as protected speech under the First

181. *Id*.
182. *Id*. citing *VMG Salsoul, Ltd. Liab. Co. v. Ciccone*, 824 F.3d 871, 874 (9th Cir. 2016).
183. Podraza, *supra* note 175 at 565; citing *VMG Salsoul*, 842 F.3d at 879.
184. *Id*. citing *VMG Salsoul*, 842 F.3d at 882.
185. Podraza, *supra* note 175 at 569.
186. *Id*. a. 570.
187. *Id.* at 571.
188. *Id.*
189. *Id.*
190. Podraza, *supra* note 175 at 572-73.

Amendment.[191] Art is both free speech and copyrightable but at some point, there was a determination that jokes do not deserve the same protection as other art forms. If the fair use defense can be used for other art, why should it not also be used for comedy? Comedians can still have their works protected to bar others from using their jokes for personal or professional gain while still allowing the use of the jokes by those who are not out to claim the work as their own. For an example, this would give larger comedians to protect their work from thieves who try to pass others work off as their own but would allow friends to share and enjoy the work privately. If the fair use defense is enough for traditional copyright protection to not infringe free speech, then this defense should be enough to help jokes gain legal protection.

Additionally, because there can be a lot of cross-over between the premises of jokes, allowing for the de minimis use doctrine as a complete defense to be copying would aid with deterring frivolous suits from entering the court. Similar to the sampling cases discussed in the Podraza article, allowing for the use of the de minimis doctrine across all copyrightable works would be a benefit not only to the court system but also to the people who are trying to create new works of authorship.

Fair use and the de minimis doctrine are important to protecting free speech, but also to help others create new art, including jokes. But there comes a point where the fine line between infringement and fair uses becomes even blurrier than it currently is. When determining infringement for jokes, the court should fist consider whether the copied part of the joke was de minims, and if so, end there and dismiss the case. If it is not de minimis use, then the substantial similarity and fair use tests should be implemented to first see if there is infringement and if the use of the infringed work is fair or not. But this world and the new technology that never ceases to stop for the laws to catch up to, create more and more issues for copyright owners trying to protect their intellectual property. For example, people use social media to share a plethora of ideas and creativity, but what happens when work is taken from small fish and used by big fish to increase their clout without giving reference to the original creator? That is the newest of issues that has come to light on social media platforms such as Instagram and TikTok[192]

191. *See Tex. v. Johnson*, 491 U.S. 397,399 (1989); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1055 (9th Cir, 2010).

192. TIKTOK, https://www.tiktok.com/discover?lang=en.

Emerging Forms of Comedy

As technology changes so does the way people consume media, more specifically comedy. One of the largest new forms of comedy are memes.[193] For those who are unfamiliar with memes, it's pronounced "me-em" not "me-me" and they have taken the internet by storm[194] Usually memes are created by taking a picture and adding text. Each meme builds of the base picture, like evil Kermit the Frog, Spongebob's mocking face, screen shots from Drake's music video from the song "One Dance", or four panels of an evolving mind.[195] Each base picture has a theme for what kind of joke the meme will present. For example, the evil Kermit meme usually shows a person trying to make a good decision, and then the evil Kermit telling them to do the opposite.

Memes bring up a plethora of legal issues. As Stacey M. Lantagne states in her article, *Famous On The Internet: The Spectrum Of Internet Memes And The Legal Challenge Of Evolving Methods Of Communication*, "[t]he flourishing of meme culture seems to exist in direct opposition to the tradition of copyright law."[196] Lantagne could not be more accurate. And because of this complete side step of the law, many of those who are the creators of the memes do not believe that they have standing to go court.[197] Not only are they using copyrighted material as the base for their expression, would the new meme be considered a derivative work and therefore infringe the creator's rights? Or would use of the underlying work be considered fair use because the purpose of the use is to share ideas not for monetary gain, the amount of the original work that is taken is minimal, there would be little to no effect on the television or music industry from these memes, but as for the nature of the copyrighted work, that is something that would need to be decided on a meme to meme basis. Additionally, the culture surrounding memes is based on copying the underlying work and placing it in different

193. *See* David A. Simon, *Culture Creativity & Copyright*, 29 CARDOZO ARTS & ENT L.J. 279, 286 (2011); Thomas F. Cotter, *Memes and Copyright*, 80 TUL. L. REV. 331, 332 (2005); Lee J. Matalon, *Modern Problems Require Modern Solutions*: Internet Memes and Copyright*, 98 TEX. L. REV. 405, 413; Stacey M. Lantagne, *Famous on the Internet: The Spectrum of Internet Memes and the Legal Challenge of Evolving Methods of Communication*, 52 U. RICH. L. REV. 387, 395 (2018).

194. *Pronunciation Of The Word Meme*, GOOGLE, https://www.google.com (search "how to pronounce meme").

195. *See Evil Kermit Meme*, GOOGLE, https://www.google.com (follow "Images" hyperlink; then search "evil Kermit meme"); *Mocking Memes Spongebob*, GOOGLE, https://www.google.com (follow "Images" hyperlink; then search "mocking memes spongebob"); *Drake Meme*, GOOGLE, https://www.google.com (follow "Images" hyperlink; then search "drake meme"); *Evolving Brain Meme*, GOOGLE, https://www.google.com (follow "Images" hyperlink; then search "evolving brain meme").

196. Lantagne, *supra* note 193 at 395.

197. *Id.* at 403.

situations.[198] So again, would using the base meme as a vehicle for creating a new meme be considered fair use, or would it be infringement? As Lantage suggests, there may be some uses of the underlying memes that could fit more under a fair use exception to infringement.[199] For example, if a meme is used "as a vehicle to discuss other things . . . imbued with a separate symbolic meaning divorced from the original copyrighted work" it may have more standing to claim fair use, and even more so if it is satirical.[200] Currently the US has not commented on the effect of memes on copyright owners, but across the pond in the European Union, Article 13 was passed, which effectively bans memes that contain copyrighted material.[201]

Another form of comedy that is even newer than memes is a phone app called TikTok.[202] This application ("app") has flooded the social marketplace for teens and young adults. It has become so popular that celebrities have started to join the app. A lot of the content on this app is teenagers dancing and lip syncing to music (usually provided by the app, but some "create" their own sounds using unlicensed music)[203] Some of the content, though, is original. There are blogger and comedy accounts on this app that get a lot of traction, and once a sound is made and used on the app, anyone else can use it, and will usually lip sync to the audio. There are even cases where a person lip syncing to a comedic audio will get more traction than the original poster, thus effectively stealing the comedian's joke. Joke theft is rampant on TikTok, but as earlier discussed, there is no real remedy for these comedians other than to bad mouth those who are stealing their content. But until courts recognize that some forms of jokes should have legal forms of action against those who steal, this will continue to happen.

Conclusion

Comedy plays a vital part to a functioning society. It can be used to lift our spirits when we are low, laugh at the absurdities of everyday life, and even point out the flaws in society and the world. Should the creators behind these works not be able to protect their material? Ultimately, they should,

198. Simon, *supra* note 193 at 322.

199. Lantagne, *supra* note 193 at 403.

200. *Id*. at 403-04.

201. Andrew Griffin, *Article 13: What Just Happened To the E?U 'Meme Ban' and Why Are People So Angry?*, INDEPENDENT (Mar. 26, 2019, 3:00 PM) https://www.independent.co.uk/life-style/gadgets-and-tech/news/article-13-vote-eu-meme-ban-copyright-law-rule-explained-a8841016.html; Victor Tangermann, *European Parliament Approves Controversial "Meme Ban"*, FUTURISM (Feb. 14, 2019), https://futurism.com/the-eu-agreed-on-the-final-text-of-a-meme-ban.

202. TIKTOK, https://www.tiktok.com/discover?lang=en.

203. *See* Charli D'Amelio (@charliedamelio), TIKTOK, https://www.tiktok.com/@charlidamelio?lang=en; Lil Boat (@88GLAM), TIKTOK, https://www.tiktok.com/music/Lil-Boat-6716113199697120005?lang=en; Panic Room (@Au/Ra), TIKTOK, https://www.tiktok.com/music/Panic-Room-6607763383277652741?lang=en.

but our current legal system does not allow for such protection. The copyright regulations would create the most efficient and extensive form of protection, but because courts refuse to see a joke as anything more than an ephemeral idea that floats in the wind once it has been said, it will not qualify for the protection of copyright. Free speech and the idea/expression dichotomy are the main deterrents for not granting jokes protection under copyright, but if fair use defense for copyrighted work is enough to keep the balance between free speech and copyright, why should that also be enough to balance protection of jokes and free speech? It is time for change, whether it be the legislature establishing a higher standard/threshold for joke infringement or the courts holding that jokes are expressions rather than ideas, something needs to happen.

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