

LEGAL PROTECTION OF THE ART OF STAND-UP COMEDY

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ABSTRACT

From films to plays, musicals, sitcoms, sketch shows, late-night shows, and comedy specials, there are several different types of comedy. However, whether this form of comedy is protected under current Intellectual Property law? Is it possible to copyright a joke? Stealing jokes is nothing new to the comedy artists. Despite this, comedians seldom use copyright infringement suits to protect their jokes due to the high costs. Furthermore, since proving “ownership” of a joke is complicated, such cases have a low success rate. The aim of this paper is to highlight problems faced by stand-up Comedians while protecting their works. The reasons why existing laws and courts fail to consider jokes as copyrightable will be examined in this paper. This paper will also look at the effect of emerging forms of social media and technology on comedians and their ability to protect the intellectual property.

Keywords: Stand-up Comedy, Intellectual Property Rights, Copyright, Joke Theft, Protection

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I. Introduction

THE MODES of comedy changed over the years, resulting in new ways of spreading laughter. Each form of comedy, from parody and satire to slapstick, memes, and stand-up, has its own distinct style and value. Humans now have more exposure to comedy than ever before as the world changes, new technologies develop, and the use of social media has exploded. Sharing funny material with friends and followers has become a way of life. The majority of the time,

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this content comes from pages or accounts that do not give credit to the original creators.¹ The internet has given the opportunity to show off humor like never before. In the last few years, India has seen unprecedented growth in the online humor industry. Many of the performances are satire or parody in nature. These types, however, do not apply to all performances. Some of the performances are entirely comedic. While the primary goal of these performances is to make the world a funnier place, as these businesses become more professionalized, it becomes necessary to investigate the Intellectual Property system that governs the jokes. It can seem strange to make a case for the protection of jokes. However, legal cases for stealing jokes are also increasing.² Plagiarism affects all facets of our lives that are artistic, and comedy is no exception. The scholarly sector has a number of mechanisms in place to ensure originality of work: writers must cite all of their sources, as well as their own name, to ensure that the hard work of people directly or indirectly involved is not overlooked. There are also many online resources that can be used to see if anyone has plagiarized content and is attempting to take unfair credit.³

In the case of comedy, however, there are no such provisions in place; once a joke is made public; it is at the mercy of its audience. Unfortunately, many people underestimate the effort that goes into writing a joke because it appears to be a simple string of words as opposed to the intensive and complicated nature of research papers, music, inventions, art, and other types of speech. Furthermore, with the increasing popularity of comics, there is no assurance that people will be able to remember the author of each joke. Owing to technological advancements, it is much more difficult to give credit where credit is due, since the same joke is repeated by many individuals, making it difficult to find the true creator. Furthermore, it is likely that more than one person would come up with the same joke. As a result, deciding who owns a joke is practically impossible, and there is a high degree of plagiarism in the comedy community.⁴

¹ Sarah Gamblin, “This is No laughing Matter: How Should Comedians Be Able to Protect Their Jokes?” 42 *Hastings Communications & Entertainment Law Journal* 141 (2020).

² Aradhya Sethia, “Jokes as Intellectual Property: Not Just Kidding!”, available at: <http://www.criticaltwenties.in/uncategorized/jokes-as-intellectual-property-not-just-kidding> (last visited on August 14, 2022).

³ Vaishnavi Kanukurti, “The Issue of Joke Theft in the World of Comedy”, available at: <https://www.indianfolk.com/joke-theft-the-issue-of-plagiarism-of-jokes-edited/> (last visited on August 14, 2022).

⁴ *Ibid.*

People who work in the comedy industry put a lot of effort and time into being funny. For example, stand-up comedians go through a series of loops in order to come up with a joke and delivery that elicits the most laughter. It is then crucial to give credit where credit is due, as well as to avoid joke theft.⁵ The basic point of all intellectual property rights is “thou shalt not steal,” and Twitter confirmed it by removing a tweet in response to a complaint from freelance writer Olga Lexell of Los Angeles. Her argument was that since it was her art (intellectual property), other people did not have a right to re-post it without giving her credit because she’s a freelance writer who earns a living making jokes. This has sparked a lot of debate on whether or not jokes can be copyrighted under copyright laws, and, more importantly, whether or not such a right would be enforceable.⁶

It is very difficult to protect a joke as intellectual property. The internet has proven both a blessing and a curse in this regard, as comics rely heavily on an unspoken gentleman’s agreement not to steal each other’s jokes. On the one hand, it makes it easier to find material to steal; on the other hand, it makes it easier to spot those who do so and publicly humiliate them. Comedians, on the other hand, have limited legal choices. A joke made by a comedian during a live show cannot be copyrighted unless it is recorded or written down beforehand, according to the laws in the UK. Copyright only covers the particular type of words used to convey the joke, not really the joke’s idea.⁷ It is also impossible to say that a comedian plagiarized a joke on purpose. It is easy to say that stolen` jokes are actually the result of subconscious plagiarism, which occurs when you hear a joke from another comedian, forget it over time, and then write it down as if you came up with it yourself. There is also a case to be made about what is known as “parallel thinking.” Jokes are primarily based on common interactions such as sex and family, which are constrained in terms of what can be amusing, and there will certainly be some retreading of old ground.⁸

⁵ *Ibid.*

⁶ Nikita, “Copyright Protection for Jokes – Not a Joke Anymore?”, *available at*: <https://selvams.com/blog/copyright-protection-for-jokes-not-a-joke-anymore/> (last visited on August 14, 2022).

⁷ Rebecca Thomson, “Who Owns a Joke? Stealing from comedians is still funny”, *available at*: <https://channels.theinnovationenterprise.com/articles/who-owns-a-joke> (last visited on August 14, 2022).

⁸ *Ibid.*

II. Concept of Joke Theft

You hear that your number one comedian would perform at a specific location, and you are ecstatic that you will be able to see him/her. You purchase your ticket and wait the show's start date with great anticipation. You are all prepared to laugh the night away on the eve of the show, but a huge verbal dispute breaks out suddenly. A massive dispute between your favorite comedian and another comedian has erupted over joke-theft.⁹ The idea of inadequate copyright protection in jokes is prominent in legal research along with media coverage of joke piracy.¹⁰ Comics have traditionally relied on societal guidelines and professional norms to secure themselves from joke theft rather than taking legal action.¹¹ Despite its importance in public discourse, on social media platforms, joke stealing is rarely prosecuted in courts or academic papers.

Joke theft on social media is when someone steals or appropriates a comedian's joke and shares it on social media in its exact or transcribed form. Members outside of the conventional stand-up comedy culture that have access to the internet - joke aggregators and frequent individual users alike - may now widely distribute jokes on social media.¹² The production and distribution of jokes would be affected as a result, putting the standup comedy industry's survival in danger. This may entail damage to the comedian's credibility as well as the loss of the joke in question. When a joke is stolen, the comedian usually abandons it since they cannot risk being labeled a joke thief in an industry where integrity and originality are admired. As "the harm from appropriation has increased," the Internet has made intellectual property rights increasingly valuable to comedians. When the consequences of joke theft impact many people across the nation in a shorter period of time, the harm is exponentially compounded.¹³

⁹ Kal Raustiala & Chris Sprigman, "The Vigilantes of Comedy", *available at*: <http://freakonomics.com/2010/03/30/the-vigilantes-of-comedy-a-guest-post/> (last visited on August 15, 2023).

¹⁰ Allen D. Madison, "The Uncopyrightability of Jokes" 35 *San Diego Law Review* 111 (1998).

¹¹ Elizabeth Moranian Bolles, "Stand-Up Comedy, Joke Theft, and Copyright Law" 14 *Tulane Journal of Technology & Intellectual Property* 237 (2011).

¹² Megh Wright, "Comedy Central Stops Advertising Every Comedian's Worst Enemy", *available at*: <https://www.vulture.com/2019/02/comedy-central-fuck-jerry-instagram-ads.html> (last visited on August 15, 2022).

¹³ Dotan Oliar & Christopher Sprigman, "There's No Free Laugh (Anymore): The Emergency of Intellectual Property Norms and the Transformation of Stand-up Comedy" 94 *Virginia Law Review* 1787 (2008).

On Twitter, there are bots that steal jokes and claim them as their own, but there are also human accounts that profit handsomely from the activity. Joke theft is as common as comedy itself. Presence of Twitter has only enhanced and commercialized the system.¹⁴

III. Impact of Social Media on Stand-up Comedy

From one-to-many to one-to-one, social media has become a mainstream communication medium. According to a 2017 survey, social media is used by 71% of internet users. Advertisers previously used social media as a platform for their advertisements. With over 3 billion users on Facebook, YouTube, Twitter, and Instagram, social media is now becoming a prominent platform for customer interaction. Whereas some marketing experts have examined into how people use social networking platforms in communities and individually, others have looked into the connection between one social media platform and a type of niche entertainment referred as “stand-up” comedy.¹⁵ By use of different mediums, the comedian must keep his audience engaged because standup comedy is primarily based on audience engagement.

Dave Chapelle, the famous American stand-up comedian and actor says, “Comedy is like magic.” The whole room full of people breaks out laughing, when you say something. The fact that people come and see it and engage in it is almost magical. For the growth, maintenance, and rebirth of the comedienne brand, thorough observation suggests using all social media platforms. The ability to have instant conversations with entertainers wherever and whenever they want is one of the most exciting aspects of a digitally connected world. Organizations can use social media to build confidence, reputation, and personal interactions at scale, in addition to enhancing their brand.¹⁶

When comedians make a joke on stage, it often becomes a popular meme that circulates on social media. This isn't a new idea in comedy, but “stealing” from there creates a massive

¹⁴ Soraya Nadia McDonald, “Joke theft isn't new. Joke theft via Twitter? That's just the latest wrinkle”, *available at*: <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/07/28/joke-theft-isnt-new-joke-theft-via-twitter-thats-just-the-latest-wrinkle/> (last visited on August 15, 2022).

¹⁵ Nidhi Shah, “Use of Social Media Apps in Stand-Up Comedy with Special Focus on Instagram” 5 *International Journal of Management Studies* 20 (2018).

¹⁶ *Id.*, at 20.

credibility gap, and on social media, which thrives on outrage, it spreads to a global audience. It was easier to say who plagiarized jokes in the past because comedians used to make one-line jokes. But, as art progresses and more comedians experiment with art, they are beginning to draw inspiration from their own lives and are attempting to narrate events that they have encountered and use it as a premise, blurring the lines of plagiarized material.¹⁷

Joke theft has become more common as social media has grown in popularity and use. As a result of social media, the way information is communicated and on a regular basis, how people interpret information has changed. From the perspective of a publisher, social media is a powerful tool for disseminating content to a global audience. From the standpoint of the user, it is a simple way to collect information from a variety of sources. For stand-up comedians, social media is a double-edged sword since it can be used to support or hurt their careers. Stand-up comics use social media to reach out to new audiences.

They do, however, choose the content they share on social media with caution. They recognize that, unlike many other artistic items (such as music), jokes do not thrive on exposure. The originality and concept of surprise decide the importance of a joke. Each time a joke is revealed, this value decreases. If you've heard a joke, you can't unhear it. Stand-up comedians seldom post jokes they're currently performing on stage to social media in order to maintain the effect of the jokes on live audiences. Rather, a number of stand-up comedians make different jokes that are social media friendly.¹⁸

For comedians, the internet increases the importance of intellectual property rights; the size and speed at which illegal copies of comedians' jokes are distributed online far outweighs the potential damage caused by offline copying. The rules regarding the stand-up comedy industry fall short in this modern world of simple and efficient copying and sharing, and they do little to stop joke stealing by non-community players.¹⁹ Growth on social media is focused primarily on exposure, not on respect. Consumers of social media jokes are usually unconcerned about the

¹⁷ “The sad case of 'joke theft' in comedy”, *available at*: <https://www.wionews.com/photos/the-sad-case-of-joke-theft-in-comedy-shows-632#abijit-ganguly-vs-kapil-sharma-108763> (last visited on August 15, 2022).

¹⁸ 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 Intellectual Property Media & Entertainment Law Journal* 55 (2019).

¹⁹ *Id.*, at 66.

source of jokes: “Fans do not punish copying harshly.” Social media users just want free daily doses of entertaining content delivered to their phones. The stand-up comedy community is unable to efficiently regulate and sanction joke theft on social media under these circumstances.²⁰

IV. Issues faced by Stand-Up Comedians

Since the early nineteenth century, stand-up comedy has always been a popular source of entertainment, and its popularity has grown over time. Given its long history, there is a dearth of case law addressing the problems that these artists face under the Copyright Act. Aggrieved stand-up comedians are unlikely to ever step foot in a courtroom to pursue legal recourse due to the absence of protection under the existing Act and practical financial barriers.²¹ The following are various issues faced by stand-up comedians with regard to their joke protection.

No legal protection for Jokes- Currently, there is no widely available legal protection for comedians because their jokes are not regarded an expression, but rather a concept in the eyes of the law. Furthermore, since a joke is basically a form of speech, there is fear that protecting jokes would have a detrimental impact on those who create art, thereby chilling free speech. There are legitimate issues not only for jokes, but also for other types of art, but these other forms of art are protected by law.²² There are protections built into copyright that alleviate concerns that artists will be unable to create, while also ensuring that artists will be motivated to do so.²³ There are several techniques that comedians have embraced to protect their content, but they pale in comparison to the protection that copyright can offer.²⁴

Negotiated settlement- The majority of the time, comedians will be informed or have their work performed by another comedian.²⁵ At this stage, the creator of the work will approach the

²⁰ *Id.* at 65.

²¹ Joseph Hladki, “Copyright is Not a Laughing Matter in Stand-Up Comedy” 494, *available at*: https://scholarship.shu.edu/student_scholarship/494 (last visited on August 22, 2022).

²² *Supra* note 1 at 144.

²³ Thomas B. Nachbar, “Intellectual Property and Constitutional Norms”, 104 *Columbia Law Review* 272 (2004).

²⁴ *Supra* note 1 at 144.

²⁵ *Supra* note 13 at 1813.

comedian who had “stolen” the work.²⁶ During this conversation, the creator could clarify when and where they first performed the joke, as well as provide some witnesses.²⁷ Often these discussions end amicably when either (a) the copier admits to copying or (b) the copier discovers they may have accidentally copied the job, apologizes, and the joke is discontinued.²⁸ However, as Elizabeth Bolles in her article, *Stand-Up Comedy, Joke Theft, and Copyright Law* points out, when it comes to sanctioning those who take stuff, there is little to no due process.²⁹ While it is effective to ruin another comedian’s dignity, it is not applicable equally to those who steal.³⁰

Bad Mouthing- One of the most critical factors in a comedian’s success is his or her reputation. The public allegations can result in a variety of consequences, including club bans, badmouthing, and/or shunning by other comedians.³¹ This type of self-help can easily derail the career of a budding comic. In reality, a well-known comedian’s career could be jeopardized as a result of this. Carlos Mencia has had one of the most dramatic falls from grace.³² He was accused of stealing from a number of comedians. He went from selling out entire theaters to collapsing into the void just a year after it was revealed that he had stolen from Bill Cosby.³³ When a comedian is found to be plagiarizing, the public is outraged. When people see similar lines/jokes in television shows and movies, they are less annoyed than when they see a comedian steal material from another comedian.³⁴ When people go to a comedian’s show, they expect to see the comedian’s unique ideas or viewpoint on certain matters.³⁵ The audience expects the comedian to have original and insightful commentary, “something that is so evident when you see it that you know it is their sense of humor.”³⁶

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Supra* note 11 at 255.

³⁰ *Supra* note 1 at 146.

³¹ *Supra* note 11 at 255.

³² The Point with Anna Kasparian, “Joe Rogan Talks Carlos Mencia, Robin Williams & Comedy”, *available at*: <https://www.youtube.com/watch?v=jPhk15aL0h0> (last visited on August 23, 2022).

³³ Nomenclia, “Mencia Steals from Cosby?”, *available at*: <https://www.youtube.com/watch?v=ICixAktGPIg> (last visited on August 22, 2022).

³⁴ Kaka Karrot Cake, “Joe Rogan and Hannibal Buress on Amy Schumer Stealing Jokes”, *available at*: <https://www.youtube.com/watch?v=qypQLesaKXg> (last visited on August 24, 2022).

³⁵ *Ibid.*

³⁶ *Ibid.*

Economic Issues- Though not specifically related to copyright law, the expense of actual litigation is a significant obstacle at the onset (advocate`s fees, court fees, etc.).³⁷ This is a deterrent in and of itself for many lesser-known, non-wealthy comics that lack the time or resources to take legal action.³⁸ Furthermore, since “the statute requires the author to register the work prior to the commencement of the infringing conducts as a precondition to the payment of statutory damages and attorneys` fees,” the legal framework creates a significant economic barrier.³⁹ To register each joke or skit would be a tremendous economic outlay for a joke that might possibly be famous. “Routines and jokes take a long time to be perfect and several club shows to perform, during which the individual jokes and pieces go unnoticed.”⁴⁰

Efficiency of Norm System- It can be seen that how social norms, such as fear and social rejection, can effectively restrict joke theft. Furthermore, comedians have threatened joke thieves with violent acts such as breaking their car mirrors if they steal their joke. Disciplining a comedian who does not care for the goodwill of the comedy community, on the other hand, may be challenging. Furthermore, since court battles can take a long time, improving the informal framework of joke regulation is necessary if it is to replace the currently inadequate formal system. Although, so far, these norms have been effective in reducing joke stealing in the comedy world and investment in the production of new jokes has increased significantly. As a consequence, the presence of these social norms has stopped comedy from being a market failure.⁴¹

As a result, copyright law is not used by comedians to protect their content. However, this would not imply that stand-up comedians are unconcerned regarding joke theft. Modern comics are solely concerned with protecting ownership rights. They do so, though, by imposing social norms, which are unwritten but effective laws that comedians impose on their peers. Many creative communities depend on unwritten codes of conduct rather than legal provisions to maintain enough ability to produce new work, as comedians illustrate.⁴² So, what do such social

³⁷ *Supra* note 13 at 1799.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Id.* at 1800.

⁴¹ *Supra* note 3.

⁴² *Supra* note 9.

norms imply? Comedians have a set of rules that all comics must adhere to; otherwise, they would be shunned, rejected, and sometimes worse. Such norms resemble copyright laws at times: for example, one of the most relevant norms prohibits from performing someone else's stand-up's joke or portion in front of an audience. The norms, on the other hand, often differ from copyright: copyright, for example, protects expression but not ideas, while comedians' norms protect both expression and ideas. In the case of authorship, under copyright law, two people who share in the creation of a work are referred to as joint owners of the work.

According to comedians' ownership norms, if one comedian comes up with a joke idea and another comes up with the punch line, the first owns the joke and the second has none. It is worth noting that comedians' norms are not just "suggestions." They can involve unofficial but effective sanctions. These begin with simple defamation and exclusion. If it fails, sanctions could include a prohibition on working with the offending performer, which could hold the convicted joke-thief off comedy club rosters. Punishments may sometimes become aggressive. None of these penalties are based on the law; in fact, it is against the law for comedians to threaten or physically assault joke thieves.

Despite the fact that the rules and punishments are unwritten, they are powerful. In the comedy world, being accused of stealing a joke is embarrassing. Allegations that are made repeatedly can be fatal to a performer's career. The tale of stand-up comedy demonstrates that, similar to the fashion industry, the law isn't always needed to foster innovation. Comedians can regulate joke-stealing by enforcing informal community norms and penalties. Without the intervention of copyright law, comedians can claim ownership of jokes, restrict their usage and transfer, impose fines on joke-thieves, and retain significant incentives to spend money on new material.⁴³

V. Legal protection to Jokes and Comedians

While joke stealing is not common, it does happen frequently enough to be a source of concern. Despite this, comedians are not suing their competitors for allegedly stealing their content. This is not because comedians are heroes who reject lawsuits on principle. They also do not consider

⁴³ *Ibid.*

their job to be public property. Comedians put in a lot of effort to build and perfect original content, and they are not amused when it is stolen.⁴⁴ Comedians do not take advantage of the legal system because Copyright law does not offer a cost-effective way for comedians to protect their expression. Court litigation is too costly, and the intended advantages of copyright cases are inadequate. The Copyright law protects original expression but not ideas, and a lot of suspected joke theft includes telling the same joke in a different way. Copyright claimants must also show that the defendant stole their word rather than inventing it on their own. Since jokes and comedic routines often rely on personal experience or current events, it would be difficult for comedians to dismiss the possibility of independent creation (also known as “parallel thinking” among comedians). Instead of formal law, comedians choose a set of social norms to claim ownership of jokes and comedic routines, restrict their use and transfer, and punish those who break the laws. Badmouthing, refusals to collaborate, and threats of (rarely used) physical assault are among the penalties.⁴⁵

The main explanation for the lack of legal protection for jokes is that many people feel that a joke is just an idea, and that an idea cannot be protected by copyright laws. Traditionally, everything must be an original work of authorship fixed in some tangible medium to be covered under copyright law. In today`s world, tangibility is not the most pressing concern when it comes to joke copyrightability; rather, the dichotomy formed between idea and expression is the greatest roadblock to providing protection to jokes.⁴⁶ Jokes with textual originality will be protected by copyright law, which will increase understanding of intellectual property rights in jokes, strengthen anti-appropriation norms, and promote further originality and creativity in jokes.⁴⁷ Despite the fact that judicial research in this aspect has shown minimal promise in terms of the extent of copyright protection granted to “one liner” or “two liner” jokes, the writer is hopeful to the potential judicial scope of copyright protection to jokes often shared by stand-up

⁴⁴ Dotan Oliar and Christopher Sprigman, “Intellectual Property Norms in Stand-Up Comedy”, *available at*: <https://ssrn.com/abstract=1635023> (last visited on August 22, 2022).

⁴⁵ *Ibid.*

⁴⁶ *Supra* note 1 at 151.

⁴⁷ Hannah Pham, “Intellectual Property In Stand-Up Comedy: When #FuckFuckJerry Is Not Enough”, 33 *Harvard Journal of Law & Technology Digest* 1 (2020).

comedians, though he admits that realistic obstacles to court compliance exist. Comedians are afraid of using copyright law in a systemic manner.⁴⁸

The issues mentioned in the previous section put the standard economic claim for intellectual property rights to the challenge. The standard argument is that without legal protection, few artistic works will be produced because creators and inventors will be unable to recover their production costs, so they will not try to create in the first place. Against joke theft, there is no appropriate legal protection, as we have seen. Thousands of comedians, on the other hand, continue to produce new material night after night. Anti-theft norms provide comedians with a significant opportunity to invent in the absence of regulation.⁴⁹

Idea/Expression Dichotomy

Because of the idea/expression dichotomy of copyright law, it is well understood that copyright law can only cover “the basic expression of a joke, rather than the underlying funny idea.”⁵⁰ “It is very straightforward to sidestep the legal rule and simply say the joke in a slightly different way,” Sprigman and Raustiala claim within this system.⁵¹ This is supported by the limited case law in this field. However, two points are overlooked in this argument. Firstly, the kinds of jokes which are currently circulated in the stand-up comedy industry are point-of-view narrative jokes, and the copyright regime has yet to be applied. Copyright infringement cases of jokes has been rarely litigated, and the minimal case law in the field focuses on “one liner” or “two liner” jokes which are not representative of the jokes currently circulated in the stand-up comedy industry. It remains to be seen if courts can implement copyright law to the more traditional point-of-view narrative jokes presently being performed by stand-up comedians.

As a result, we do not presume that in the future, courts would need exact replications of jokes in order to find a copyright infringement. Secondly, on social media, joke theft almost always takes the form of near-exact replications. Outside of the comedy world, rewriting jokes to redesign the

⁴⁸ *Ibid.*

⁴⁹ *Supra* note 9.

⁵⁰ Kal Raustiala and Christopher Springman, *The Knockoff Economy: How Imitation Sparks Innovation* 12 (Oxford University Press, 2012).

⁵¹ *Ibid.*

expression of a humorous concept is rare. This is in contrast to the appropriation that takes place among stand-up comics. “Comics appropriate not by actual copying, but by rewriting,” according to stand-up comedians.⁵² Joke thieves on social media are known for literally copying jokes. While actual copying is the most common form of appropriation on social media, the copyright regime’s new application to jokes is enough to discourage joke theft.⁵³

Performer’s Right

Jokes shared by comedians/stand-up comedians in recorded Television programs or stage performances can be tricky, since Performer’s Rights apply if the comedian is classified as a performer under the Act. An actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, person delivering a lecture, or any other person who makes a performance is referred to as a “performer.” This means that the artist retains economic rights for the next fifty years after the performance.⁵⁴

Right of Publicity

Individuals have a property-like privilege in their name, image, voice, signature, or other personal characteristics being used in commerce or advertisement, and this right extends to them. For comedians, this doctrine is of little use. It can protect a comedian from appropriation of his appearance or voice, but not from joke theft. It may also protect a comedian from having their unique performative elements appropriated, although most of the elements comedian’s uses are not unique to them. The best that a comedian’s right of publicity law will do is protecting him from the comic equivalent of an Elvis impersonator. This form of appropriation hasn’t yet proven to be a serious threat to comedians, in which case right-of-publicity litigation might be useful.⁵⁵

⁵² *Supra* note 13 at 1811.

⁵³ *Supra* note 47 at 3-4.

⁵⁴ *Supra* note 6.

⁵⁵ *Supra* note 13 at 1809.

Judicial Perspective

A. *Foxworthy v. Custom Tees*

The plaintiff in *Foxworthy v. Custom Tees*⁵⁶ was Comedian popular for jokes that begin with “You might be a redneck if...”⁵⁷ and his T-shirts, a comedy album, and a calendar were all printed with these jokes. Custom Tees, reproduced the plaintiff’s jokes for sale on t-shirts by changing the format of the jokes. According to the judge, the plaintiff’s combination of words would be his own expression and hence entitled to copyright protection.⁵⁸ As a result, the judge determined that Custom Tees’ use of certain words constituted copyright infringement. Apart from reasserting that jokes can be subject to formal copyright protection, this case doesn’t really shed much insight on what constitutes copyright infringement since the replications were essentially identical replications.⁵⁹

B. *Conan O’Brien case*

In *Kaseberg v. Conaco, LLC*,⁶⁰ Robert Alexander Kaseberg sued Conan O’Brien, his show’s production company, and his writing staff for alleged copyright infringement of five jokes from the late-night television show Conan. The jokes began with a factual sentence about a recent public incident and ended with a punch line about the facts that preceded it. The judge ruled that the jokes in question were only entitled to a limited copyright protection because they were “constrained by their subject matter and the conventions of the two-line, setup-and-delivery paradigm,”⁶¹ and that “despite the punch lines’ creativity, Nonetheless, they are limited by the number of variations that are (1) comedic (2) when added to the specific facts listed in the previous sentence of each joke, and (3) cover a wide audience.”⁶² Since the jokes had just a sliver of copyright protection, the infringement requirement was “virtual identity.”⁶³ These two cases show that for copyright infringement to occur in the case of short jokes with very little protectable content, the jokes must be remarkably similar. The jokes that were subjected to judicial scrutiny, on the other hand, are not indicative of what is

⁵⁶ 879 F. Supp. 1200, (1995).

⁵⁷ *Id.* at 1204.

⁵⁸ *Id.* at 1218–19.

⁵⁹ *Supra* note 47 at 4.

⁶⁰ 260 F. Supp. 3d 1229, (2018).

⁶¹ *Id.* at 1245.

⁶² *Ibid.*

⁶³ *Ibid.*

actually circulated throughout the stand-up comedy circuit. The jokes in the above cases are referred to as “one liner” or “two liners.” In today’s stand-up comedy, these jokes are rarely told.⁶⁴

Protection to Stand-up Comedy under Existing Laws

Stand-up comedy is a distinctive kind of artistic expression that society is embracing more and more. The stand-up comedy industry is directly impacted by joke theft in the social media sphere, which will continue to have an impact on the profession as technology develops.⁶⁵ The spread of a joke would be impacted by joke theft on social media because the offended comedian would feel compelled to give up the joke, neither performing it nor publicising it. A comedian will drop a stolen joke because they can’t risk being seen as joke thieves in a field where reputation and originality are crucial. Joke stealing has a disastrous impact on the joke’s value or potential market since it displaces the stand-up comedy market.⁶⁶ The market for that joke is destroyed, as well as the comedian’s value in that joke, because the comic will drop it as soon as the joke is stolen. Additionally, the comedian’s live comedy performance will lose potential listeners if their reputation suffers. As a result, joke aggregators not only steal the joke but also steal the comedian’s audience, which negatively impacts both the comedian’s livelihood and the larger stand-up comedy industry.⁶⁷

Since it is apparent that the existing Copyright Act does not adequately protect stand-up comedy, it might be necessary to consider a new strategy for obtaining Copyright Act protection for stand-up comedy. It is the known fact that Copyright law somehow does not protect ideas, the mixing of ideas and expression, the fair use of publicly available material, or scene fair elements.⁶⁸

***Sui generis* protection-** Copyright laws cover the art form of stand-up comedy, as previously mentioned. Stand-up comedy is a type of comedy that relies on ideas, which the new Copyright Act does not seem to protect. In reality, despite its identification as a protected form of art, stand-

⁶⁴ *Supra* note 47 at 5.

⁶⁵ *Supra* note 18 at 88.

⁶⁶ *Id.* at 68.

⁶⁷ *Ibid.*

⁶⁸ *Supra* note 21 at 29.

up comedy exists beyond the scope of copyright law, with minimal to no protection. Stand-up comedy flourishes since its business is to make people laugh by using popular themes and elements, as well as the expression of those ideas. Nonetheless, the areas in which stand-up comedy thrives are also the areas where Copyright protection is restricted. As a result, Stand-Up Comedy is distinct from Copyright and needs a Sui Generis form of protection.⁶⁹

Moral Rights Protection- The purpose of the Copyright Act is to protect authors' exclusive rights, based on the economic theory that consumers benefit from author incentives to create copyrighted works.⁷⁰ Many other countries and Berne Convention signatories, on the other hand, acknowledge the authors' moral right, which considers the authors' work as an inalienable, natural right and an extension of the artist's personality, rather than just a commercial interest. "Moral rights imply that the artistic method of author creates not only a tangible asset subject to market demands and flexibility, but also a reflection of the author's personality and "self," indeed, her creative soul."⁷¹ In certain cases, moral rights protect authors in the areas of disclosure, attribution, and integrity.⁷²

Furthermore, since Moral Rights concentrate on personal rights of author rather than his or her economic rights, the support obtained by Moral Rights is analogous to that gained by Stand-Up community norms.⁷³ Whenever it comes to resolving questions of "Joke-Theft," stand-up comics do not pursue monetary compensation right away.⁷⁴ All that appears to be required of the thief is for him or her to either stop using the joke or openly confess that the joke was created by him or her during the norms' enforcement phase.⁷⁵ Although copyright offers an economic remedy for infringement, the Stand-Up comedian relies on the norm scheme to ensure attribution and fairness of his or her work, which is the same remedy provided by Moral Rights. Unlike the relief offered by copyright law, the relief given through Moral Rights is a much better choice for the relief that stand-up comedians have already sought and obtained.⁷⁶

⁶⁹ *Id.* at 32.

⁷⁰ Ilhyung Lee, "Toward an American Moral Rights in Copyright", 58 *Washington & Lee Law Review* 795 (2001).

⁷¹ *Supra* note 70 at 801.

⁷² *Ibid.*

⁷³ *Id.* at 804-805.

⁷⁴ *Supra* note 13 at 1812.

⁷⁵ *Id.* at 1814-1821.

⁷⁶ *Supra* note 21 at 34.

VI. Conclusion

Comedy is essential to a well-functioning society. It can be used to cheer us up when we are sad, to make us laugh at the absurdities of daily life, and even to point out the shortcomings in society and the universe. The authors of these works are able to protect their work in the end, but our existing legal framework does not have such protection. The copyright laws will offer the most effective and thorough means of protection, but a joke would not qualify for copyright protection because courts fail to see it as anything more than an ephemeral concept that floats in the wind after it has been said. The key deterrents for not granting jokes copyright protection are free speech and the idea/expression dichotomy, but if fair use defense for copyrighted content is enough to maintain the balance between free speech and copyright, then it should also be enough to keep the balance between jokes and free speech. Everything has to improve, whether it's the legislature setting a higher standard/threshold for joke infringement or the courts finding jokes to be expressions rather than ideas.

Stand-up comedy is indeed a special form of art which is rising in popularity, but joke stealing on social media is putting the industry's survival at risk. Stand-up comedy is unlike any other art form, and understanding its complexities is necessary before taking effective action against joke theft. While comedians have legal access to copyright law, and the author is enthusiastic that copyright law will be applied to jokes typically told by stand-up comedians, realistic obstacles to court enforcement (such as time and cost) still exist. If such obstacles are greatly diminished, society must do more to protect comedians and also the art form as a whole by instilling a greater sense of appreciation for them.

This necessitates an awareness of what types of material comedians' value, as well as how to prevent unauthorized joke recordings, recognize and regulate joke theft on online sites, and also what types of actions benefit comedians. Joke theft can still be regulated in the social media age by raising awareness and coordinating the efforts of various players of society (both online and physical institutions). In the end, this will lead to more original jokes being written and distributed, all of which are important for a successful stand-up comedy industry. Comedians become unintentional victims because of the essence of Copyright law. There is very little case

law on the copyrightability of jokes, probably because attorneys are hesitant to take these cases to court because jokes are difficult to copyright.

Stronger copyright laws to protect jokes would result in increased comedy production and development. Since jokes that depend on popular themes or common ideas would have less copyright protection, widespread acceptance of stronger copyright protection for jokes will commercially encourage comedians capable of creating a large body of original material, as the *scenes á faire* doctrine demonstrates. The comics industry as a whole would benefit from the extension of copyright protection for jokes. The purpose of the law was to expand to stand-up comedy the exclusive rights given to any copyright holder in other art forms. Furthermore, effective copyright protection to stand-up comedy will cause it to be controlled in a courtroom rather than in comedy shows or on the radio. Stand-up comedians would be able to showcase their grievances and seek redress without having to adhere to industry norms that could result in rejection or perhaps even misuse of the art form. The art of stand-up comedy will benefit from further protection.