

# STANDING UP FOR STAND-UP: JOKE THEFT AND THE RELEVANCE OF COPYRIGHT LAW AND SOCIAL NORMS IN THE SOCIAL MEDIA AGE

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## INTRODUCTION

This paper investigates the extent to which copyright law and social norms regulate joke theft in the stand-up comedy industry in the social media age. Social norms play an important role within the stand-up comedy industry. Dotan Oliar and Christopher Sprigman demonstrate that social norms amongst comedians can serve as an alternative or supplement to intellectual property law.<sup>1</sup> Oliar and Sprigman posit at the time of their paper in 2008 that there is “no reason to suspect, absent more data, that the norms-system underperforms.”<sup>2</sup> The digital landscape has since changed with the widespread use of social media. On social media, anyone can be a publisher. Anyone can take a joke and distribute it online.

Social media has made it easier to make unauthorized copies to a worldwide audience. This has led to the rise to joke aggregators. A joke aggregator “aggregates” jokes and distributes it. Consider this example: a joke aggregator hears a stand-up comedian’s joke, writes that joke and posts it on social media either as plain text or an image of the text without attribution.

Joke theft by joke aggregators on social media has outraged stand-up comedians at all levels. While social norms offer protection to stand-up comedians against joke theft *within* the stand-up comedy industry, they do little to protect joke theft *outside* the community.<sup>3</sup> The norms that apply amongst comedians do not apply to extra-community players who are driven by different motivations. Social media is changing the way in which audiences enjoy jokes and as a corollary, the way in which extra-community players are encouraged to partake in joke theft free from the social norms governing stand-up comedians. With the assistance of several full-time professional stand-up comedians,<sup>4</sup> this paper investigates the creative process and incentives underlying the creation and dissemination of jokes in the

stand-up comedy industry, and the effect of joke theft by extra-community players on the viability of the stand-up comedy industry. The results indicate that joke theft on social media is directly affecting the stand-up comedy industry. In these circumstances, this paper explores the role copyright law can and should play in protecting against joke theft on social media.

### **PART I: SOCIAL NORMS IN THE STAND-UP COMEDY INDUSTRY**

Social norms within the stand-up comedy industry “govern[] the conduct of most stand-up comedians” by providing “a strict injunction against joke stealing.” Oliar and Sprigman argue that norms-based sanctions act to regulate the stand-up comedy industry and that “[u]nder this informal system, comedians are able to assert ownership in jokes, regulate their use and transfer, impose sanctions on transgressors and maintain substantial incentives to invest in new material.”<sup>5</sup> Oliar and Sprigman find that the stand-up comedy industry regulates joke theft through an environment conducive to joke theft detection, effective monitoring by other comedians, and the threat of social sanctions including “attacks on reputation and refusals to deal.”<sup>6</sup> In an industry where reputation is imperative, these sanctions can end a comedian’s career.

A comedian that steals another’s joke loses the respect of fellow comedians, comedy room managers, comedy writers, and comedy representatives (such as agents, managers, and publicists). These people within the comedy community are referred to throughout as “intra-community players.” Intra-community players act as gatekeepers to success in the industry. If you are known as a joke thief, comedy room managers will refuse to book you, managers and agents will refuse to represent you, and comedians will refuse to work at the same club as you or even associate with you on any level. In an industry that values honesty and originality,<sup>7</sup> it is incredibly difficult to thrive as a stand-up comedian without the respect of intra-community players and as such, the social norms within the community deter joke theft

among intra-community players.<sup>8</sup> Oliar and Sprigman convincingly argue that this intra-community system protects creativity in the industry and provides incentives to create new jokes.<sup>9</sup>

For example, Australian television show contestant Jordan Paris made headlines for performing jokes belonging to other comedians on the talent show *Australia's Got Talent*.<sup>10</sup>

When the joke theft was exposed, his stand-up comedy career immediately plummeted.

When asked why Paris' stand-up comedy career failed after the revelations of joke theft, an Australian comedy manager replied:

To me there is nothing more pathetic than someone taking credit for another person's hard work, particularly when that work is ground breaking. That is what great joke writing is; it's about putting a unique thought into a form that no one else has expressed before. I would never work with Jordan Paris in any capacity because he makes a mockery of what I consider to be a great form of personal expression by taking lines that other people have written and passing them off as his own. Moreover, as a professional who derives an income from working as a comedy booker and artist manager it would paint me in a negative light and tarnish my reputation within the industry.

Thus, social norms within the comedy community effectively provide non-legal mechanisms for protecting comedians' original works against unauthorized misappropriation by others within the community. As discussed below, however, these social norms provide little, if any, protection against misappropriation by those outside of the traditional comedy community.

## **PART II: JOKE THEFT ON SOCIAL MEDIA**

Joke theft has risen with the increased popularity and use of social media. Social media has changed the way information is shared and the way in which people consume information on a daily basis. From a publisher's point of view, it is an effective way to communicate information to a global audience. From a consumer's perspective, it is an effective way of accessing information from a multitude of sources.

Stand-up comedians engage in social media to connect with their fans and to build a profile to attract potential fans. Comedians, however, are cognizant of the material they publish on social media. They understand that jokes are unique and are unlike other creative products (e.g. music), which thrive on exposure. The value of a joke lies in originality and the element of surprise. This value decreases every time a joke is heard. Stand-up comedians rarely publish on social media the current jokes used in their live performances because it decreases the value of those jokes. As one interviewee described it:

The yearly joke cycle is based around the idea of releasing a new hour of comedy every year via a video recording or audio album. When you “release” a joke in those formats, it is common convention to stop using those jokes during live performances on the presumption that your fans have already seen those jokes and they have paid money to come see you perform new material.

He goes on to explain:

It is important to control how my jokes are used on social media because parts of jokes taken out of context can be seen as offensive to some people. Also, I would not want people seeing my jokes on social media before I’m ready to formally release them in an audio or video recording at a quality of my choosing.

The problems arise when others, outside of the comedy community, publish a comedian’s jokes on social media. Enter the “joke aggregators.” A joke aggregator acts as a one-stop-joke-shop operation on social media. Take for example, joke aggregator Josh Ostrovsky who operates under the name of “The Fat Jew.” At the time of this paper, Ostrovsky has 9.5 million followers on Instagram<sup>11</sup> and almost 1 million followers on Facebook.<sup>12</sup> Ostrovsky is one among many in an online ecosystem of joke aggregators that take and publish jokes by other comedians for “likes” and cash.<sup>13</sup>

In an interview with *The Financial Times*, Ostrovsky states, “why would I fly around the world to do a stand-up show to hundreds, maybe thousands of people when I can reach far bigger numbers through my Instagram?”<sup>14</sup> In light of his internet fame, it is unsurprising

that big companies pay him well to feature their products in his posts. His business model has outraged stand-up comedians around the world.

### **PART III: THE UNDERPERFORMANCE OF NORMS IN THE SOCIAL MEDIA WORLD**

While social norms offer protection to stand-up comedians against joke theft *within* the stand-up comedy industry, they do little to protect joke theft *outside* the community.<sup>15</sup> Despite the backlash received from intra-community players over the years,<sup>16</sup> “The Fat Jew” has continued to flourish in the social media world because he is not professionally affected by social norms for one key reason: he is not part of the industry.<sup>17</sup> Joke aggregators on social media are extra-community players who can operate successfully outside of the industry, and are thus unaffected by social norms. If an extra-community player is not part of a group of members adhering to a pattern of behaviour arising from social pressures and expectations, social sanctions, such as loss of esteem and expulsion from the community, have little effect.<sup>18</sup> Extra-community players do not require the respect of intra-community players to be successful. Social media success relies purely on exposure, not community respect. Further, consumers of jokes on social media generally do not care about the origin of jokes: “Fans do not penalize copying.”<sup>19</sup> Social media users simply want funny content delivered regularly to their screens for free. Under these conditions, the stand-up comedy industry cannot effectively police and sanction joke theft on social media by extra-community players.

However, misappropriation by extra-community players is not a new problem. In 2012, Jeremy Schachter, a former stand-up comedian and current intellectual property attorney, published a paper discussing the effects of joke theft outside of the community, which he refers to as “extra-community misappropriation” or “ECM.”<sup>20</sup> He describes a personal scenario that involved theft of his own joke by a corporation for use in a television commercial and demonstrates that he, as a stand-up comedian, was left without recourse

despite detection of the misappropriation by fans and peers.<sup>21</sup> Schachter explains that this incident caused him to abandon the joke altogether because, to the many people who had seen the commercial before hearing his joke, he “might look like the misappropriator.”<sup>22</sup> Borrowing terms from trademark law, he identified himself as a senior user who had been made to look like a junior user due to the misappropriation.<sup>23</sup> Schachter argues that “if left unchecked [ECM] could potentially destroy entire IP communities. Specifically, ECM harms: (a) pecuniary interests; (b) moral rights; (c) personal incentives to create, which in turn harms society; and in some cases, (d) an entire IP community, which also harm society.”<sup>24</sup>

In the social media age, one does not have to be a corporation to steal a joke and disseminate it widely via technology. Social media makes it easy for anyone to engage in extra-community misappropriation. Even without foreseeing the impact of social media at the time of their paper, Oliar and Sprigman acknowledged that technology’s ability to disseminate jokes increased the value of property rights in jokes due to technology’s ability to create more harm to the comedian.<sup>25</sup> Social media accelerates the ease and rate of extra-community misappropriation. In this new landscape, the norms governing stand-up comedians do little to limit joke theft by extra-community players.

#### **PART IV: THE EFFECT OF SOCIAL MEDIA JOKE THEFT ON THE STAND-UP COMEDY INDUSTRY**

To examine the effect of joke theft on the stand-up industry, it is necessary to explore the incentives underlying the creation and dissemination of jokes. After conducting several interviews with full-time professional stand-up comedians, it is apparent that the incentives underlying the creation of jokes are not easily delineated. There can be multiple co-existing incentives. Further, what incentivizes a stand-up comedian to *enter* the industry tends to differ from what incentivizes a stand-up comedian to *stay* in the industry. In general, it

appears that many comedians enter the industry for non-pecuniary reasons (*e.g.*, they enjoy making people laugh and jokes are a mode of creative expression), but they stay in the industry to continually create and disseminate jokes due largely to pecuniary incentives.

When asked about the incentives underlying the creation of jokes, three professional stand-up comedians replied as follows:

Money and creative expression are at the top of the list for me when it comes to writing. It's an opportunity to share my thoughts with the world and hopefully bringing an opportunity to bring more people to my shows and make more money. Money helps. But it will never be the sole reason that I do this. If you're doing this solely for the money, then an emptiness in your material will surface to the top.

The main reason I started creating jokes is because I liked making people laugh. It's the reason I continue to write jokes. If I couldn't earn a living writing jokes, I would still do it, I just wouldn't have as much time to do it.

Originally it was the enjoyment from performing that fueled my desire to write jokes. More recently, it has been fueled by the need to provide my fans with a new reason to buy tickets to my show each year.

The responses suggest that joke theft on social media may not necessarily curtail the *creation* of jokes altogether because many comedians are intrinsically motivated to create jokes for the love of the art. However, the responses overwhelmingly indicate that joke theft on social media would affect *dissemination* of a joke; the affected comedian is forced to abandon the stolen joke, ceasing to perform or publish it. In an industry where reputation and originality are key, a comedian will abandon a stolen joke because he or she cannot risk being perceived as a joke thief. As three interviewees described succinctly:

Any time a joke you create is shared and not attributed to you—it makes it difficult to continue using that joke. If you tell it at a stand up show and the audience has already seen it on social media—at best: the impact of the joke is lessened; at worst, the audience may believe you stole it off social media (your own joke). Comedians need a certain number of jokes to perform a live show, perform on television, record a stand up special etc., and those jokes have to be of a high enough quality that people are actually interested in buying what they are putting out. So if a comedian's joke is stolen—their income stream from that joke is stolen as well. And it's not always a matter of 'writing new jokes.' Like a brilliant song, it's not always possible for an artist to have the same level of success with each song they create.

A joke stolen from a live performance and shared online adversely affects stand-up comedy as performers would be wary of repeating a joke that has received internet popularity uncredited. If people know a joke from an internet meme and then see a comic perform the joke, then it damages a craft that relies on originality and point of view.

This happened to one of my jokes. It basically means you can't do that joke anymore. If the audience thinks you've copied jokes from the internet, it makes them question your authenticity. They lose trust in you because they think you don't write your own material.

What about a joke that is used without the comedian's permission but is nevertheless attributed to the comedian? Does extra-community misappropriation *with attribution* harm the industry? The interviewees' responses to this question varied. Some interviewees indicated that attribution would provide an acceptable solution because it could raise the comedian's profile through widespread exposure on the internet. This type of profile raising was experienced by U.S. comedian Russell Peters in 2004. His career took off when clips of his stand-up comedy were uploaded on YouTube by an anonymous user without his authorization.<sup>26</sup> In an interview with Tom Green, Peters indicated that had they not been uploaded, his career would not have happened or happened differently, concluding "I'm not mad at it, that's for sure."<sup>27</sup> This type of beneficial unauthorized distribution generally concerns material that has already been published by the comedian in its original medium in circumstances where it is clear who is the author of the jokes. While Peters may not have received direct compensation for the unauthorized distribution, there were significant effects for him, and he has become one of the highest paid comedians in the world.<sup>28</sup>

In contrast with the Peters' example, however, joke theft on social media often involves a joke taken from a show and transcribed into a different medium before it is ready for distribution. There were some interviewees who explained that while attribution helped to minimize the damage, it can—in some instances—exacerbate the damage to the comedian. As one interviewee explains:

If one of your jokes is being shared and it is attributed to you—it's a much more preferable outcome than it being shared without it being attributed to you—but there is still the issue of your art being shared without your permission. If all of your jokes were shared on social media before your stand up special was released, it would lessen the impact of them—and potentially hamper sales of the special. The argument could be made that it's raising the comedian's profile—but some jokes simply do not work as well written down. Without the comedian's tone/delivery a joke can fall flat. Further, if a section of joke is shared, or written down incorrectly and attributed to a comedian - it can actually hurt that comedian's reputation.

Further, attribution after-the-fact does little to minimize the damage to the comedian.

One interviewee discussed his experience with social media joke theft and explained that after continual efforts to seek an outcome with the multimillion-dollar joke aggregator (to which he received no direct reply), he contacted the media who reported on the matter, and the joke aggregator finally credited him on Facebook three weeks after publishing the post. When asked about the outcome, he replied: “The outcome did virtually nothing. When it was credited, it was weeks old and literally 1000's of posts old. The Twitter accounts can't edit their tweets so it was never compensated on that medium.” In the social media world where users do not dwell on “old” material, but rather expect new material to be delivered to their screens every day, retrospective attribution provides little relief.

In sum, joke theft on social media harms a comedian's pecuniary interests, a comedian's control over his/her jokes, a comedian's ability to disseminate his/her jokes, and as one comedian put it, “devalues the industry and what we do.”

#### **PART V: THE RELEVANCE OF COPYRIGHT LAW IN THE STAND-UP COMEDY INDUSTRY**

A constitutional underpinning of copyright law is to “promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>29</sup> Elizabeth Bolles considers that

[m]ore robust copyright protection for jokes is fully in line with this utilitarian framework, because it will result in a higher quantity and wider variety of materials being created by comics, thus promoting culture creation in general, and the growth and maturation of the relatively young art form of stand-up comedy in particular.<sup>30</sup>

She goes further to say that “[e]nhanced copyright protection for jokes would also support the Lockean and Hegelian philosophical approaches to intellectual property law, by allowing comics to control creative works that they passionately want to protect from unauthorized misuse.”<sup>31</sup>

The Copyright Act protects “original works of authorship fixed in [a] tangible medium of expression.”<sup>32</sup> This paper submits that there are no doctrinal barriers to copyright protection of jokes. Jokes can be subject to copyright protection because they are capable of satisfying the fixation requirement, the originality requirement, and expression requirement. Many commentators suggest that there are doctrinal barriers to copyright protection of jokes, but that view fails to carefully consider the intricacies of the joke writing process.

Jokes can take a considerable amount of time to write. In many cases, every word, every pause, and every emphasis is entirely scripted and heavily rehearsed. Inevitably, during a comedy set, there may be some audience interaction and some “fillers” between the rehearsed comedy bits, but most bits follow a script to ensure that the jokes are expressed in a particular, pre-determined way. As one interviewee pointed out, “a joke can take a long time to write and even longer to ‘get right.’” Another interviewee stated, “comedy is a trial and error process—meaning it often takes weeks/months/years to edit a joke down to its best iteration through countless performances.” Given that many jokes are meticulously crafted and prepared, they are capable of being fixed in a material form either in writing or on an audio file.

Many commentators have suggested that the key to a joke is the idea,<sup>33</sup> but this view disregards the amount of effort that goes into crafting a joke’s expression. Bolles recognizes this distinction: “A seemingly simple joke actually involves complex, creative choices about expression.”<sup>34</sup> Bolles posits that while “protection may be stronger for some jokes than for

others,”<sup>35</sup> “copyright law is capable of assessing an individual work’s idea/expression dichotomy.”<sup>36</sup>

In addition, a factor that supports the copyright protection of jokes is that modern day comedians tend to “invest in new original and personal content.”<sup>37</sup> There has been a shift away from merely “reworking . . . pre-existing genres like marriage jokes, ethnic jokes, mother-in-law jokes, or knock-knock jokes” to point-of-view narrative content.<sup>38</sup> This shift is due to the natural evolution of comedy as an art form and may also be triggered by external forces. As one interviewee explained, “memes are having a huge effect on my desire to write observational comedy because you just assume someone has made a meme about it already. So I really focus more now on talking about personal experiences that are unique to me.” Jokes based on personal experiences are less likely to have been independently created by someone else.

Although seldom litigated, courts have acknowledged that jokes can be eligible for copyright protection.<sup>39</sup> Further, the Compendium II of Copyright Practices § 420.02(i) states that “[j]okes and other comedy routines may be registered if they contain at least a certain minimum amount of original expression in tangible form.”<sup>40</sup>

In circumstances where social norms cannot effectively govern the conduct of extra-community players on social media, comedians should rely on existing copyright law to prevent against joke theft on social media, but they do not. This is because there are practical barriers to court-enforced copyright protection for jokes. This paper submits that invocation of copyright law by the comedian is absent not by design, but by choice. The choice not to pursue copyright protection is largely due to three main reasons: (1) norms have operated successfully to prevent joke theft by intra-community players; (2) a lack of common knowledge regarding copyright protection of jokes; and (3) enforcement via the courts has

not provided comedians with a practical and accessible way to protect content against joke theft.

## **PART VI: HOW CAN COPYRIGHT LAW PROVIDE RELIEF TO COMEDIANS?**

Copyright law can play a greater role in protecting against joke theft in the social media world. Trevor Gates considers that a “meaningful solution to comedians’ lack of protection for their intellectual creations requires creating a system that (1) facilitates the proper exchange of comedic material, (2) provides increased protection for that material, and (3) improves a comedians’ ability to rely on existing U.S. copyright law.”<sup>41</sup> To protect against joke theft in the social media world, it follows that a meaningful solution would be one in which the practical barriers to copyright protection (*e.g.*, cost, complexity, and time) are reduced or removed. It is not the purpose of this paper to reveal an all-encompassing solution to the problem of joke theft on social media. Rather, this paper will briefly highlight ways in which comedians can enforce existing copyright laws. This paper considers the advantages and disadvantages of two enforcement methods as a platform for further research and discussion.

### **A. ENFORCEMENT VIA DMCA NOTICE-AND-TAKEDOWN PROCEDURE**

At present, copyright owners can enforce their copyright by utilizing the notice-and-takedown process set up by the Digital Millennium Copyright Act (“DMCA”).<sup>42</sup> The DMCA was enacted in 1998 to address widespread piracy in the digital age. Section 512 of the DMCA was designed to protect online service providers from liability for copyright infringement if they comply with a notice-and-takedown procedure to remove infringing content upon a takedown notice issued by the copyright owner.<sup>43</sup> This provided strong incentives for copyright owners and online service providers to “cooperate to detect and deal with copyright infringements that take place in the digital networked environment.”<sup>44</sup>

To invoke this process, a copyright owner must satisfy six simple requirements. On a very general level, these include identification of the copyright work; identification of the infringing work; a statement of good faith belief; contact details; a statement confirming accuracy of the information; and a signature of the copyright owner or a person authorized to act on behalf of the owner.<sup>45</sup> In practice, social media platforms streamline this aspect of the notice process by offering online forms for reporting copyright infringement under the DMCA.<sup>46</sup> Once a takedown notice is issued, an online service provider must “take reasonable steps promptly to notify the subscriber (i.e., the original poster) that it has removed or disabled access to the material.”<sup>47</sup> Users can dispute the takedown request by filing a counter notice with the online service provider.<sup>48</sup> If a counter notice is filed, the material will be restored (i.e., republished) unless court proceedings are commenced by the copyright owner within a specified time frame. To safeguard against abuse of the procedure, there are sanctions for misrepresenting information under the notice-and-takedown procedure.<sup>49</sup>

As copyright owners, comedians can currently utilize this procedure to request takedown of jokes stolen by joke aggregators on social media. Section 512 of the DMCA does not require a copyright owner to register their work before using the procedure. Interviewees indicated that, while vaguely aware of the procedure, they had not utilized it in the past because they were unaware of its simplicity, effect, and applicability to them. One interviewee stated, “I have heard of it but I have no idea how to formally invoke it.” This may also be attributed to the lack of common knowledge regarding ownership of copyright in jokes. However, interviewees indicated that armed with full knowledge, they would use the notice-and-takedown procedure.

The advantages of this process include its simplicity, accessibility, and effectiveness in promptly removing infringing content. Further, under the DMCA, online service providers

are required to adopt a policy to terminate “repeat infringers” in “appropriate circumstances.”<sup>50</sup> This has the potential to shut down joke aggregators who base their profit-driven business model on stealing jokes by others.

The use of the notice-and-takedown procedure is not without its limitations. First, the remedy is limited to takedown of the material and does not extend to monetary damages. Second, takedown of the material may have little effect once the joke has been quickly and widely disseminated around the internet. Third, the procedure places the burden of policing infringement on comedians, who unlike companies that invest a lot of money in automated processes, may lack access to sophisticated tools for monitoring infringing use.<sup>51</sup>

Notwithstanding these concerns, the notice-and-takedown procedure offers a simple method of getting content removed in an efficient manner, but perhaps more importantly, it provides a general deterrence effect on repeat infringers. Repeat infringers include existing joke aggregators and potential joke aggregators who wish to turn joke theft into a business. If social media companies do operate effectively to terminate accounts of repeat infringers, the DMCA notice-and-takedown procedure can provide a mechanism by which that business model fails.<sup>52</sup>

#### **B. ENFORCEMENT VIA COPYRIGHT CLAIMS BOARD**

Currently, copyright owners can also resort to private litigation, but “[l]itigating a copyright claim is often not an affordable prospect for a vast majority of authors and creators.”<sup>53</sup> Due to the prohibitive expense of litigation, comedians rarely resort to litigation. The practical barriers, such as cost and time, to copyright enforcement through the courts have been recognized by Congress. In a letter to the United States Copyright Office in 2011, Congress stated that it has a “responsibility to ensure that authors, photographers and other copyright owners—many of whom rely upon the promise of exclusive rights associated with the grant of copyright to earn a living and provide for their families—have a realistic ability

to enforce those rights when they have a comparatively modest claim for damages” and requested that the U.S. Copyright Office examine and report on, and provide recommendations with respect to, the challenges of resolving small copyright claims.<sup>54</sup>

In September 2013, the Copyright Office provided a report recommending the creation of a “centralized tribunal within the Copyright Office, which would administer proceedings through online and teleconferencing facilities without the requirement of personal appearances” as a “voluntary alternative to federal court.”<sup>55</sup> The tribunal would be adjudicated by three members with significant experience in copyright law.<sup>56</sup> The tribunal would hear claims valued at no more than \$30,000 in damages.<sup>57</sup> Actual or statutory damages would be capped at \$30,000.<sup>58</sup> The registration requirements would be relaxed with claimants needing only to file an application to register the works before bringing an action.<sup>59</sup> The procedure would involve streamlined proceedings and limited discovery with determinations of the claim being binding on the parties, but not having any precedential effects.<sup>60</sup> The Copyright Office’s report largely formed the basis of a bill introduced by Representative Hakeem Jeffries in July 2016 entitled *Copyright Alternative in Small-Claims Enforcement Act of 2016*.<sup>61</sup> If the bill becomes law, there would exist a Copyright Claims Board within the Copyright Office, which would serve as an optional alternative forum to litigation.

There are many advantages to this type of forum for artists with modest claims for damages. Comedians would have access to a cost effective and efficient means for enforcing their rights. Through this forum, comedians could have copyright disputes adjudicated before neutral and experienced fact finders. It is unclear how the proceedings would specifically be conducted, but the bill indicates that the three Copyright Claim Officers would have discretion to require submissions,<sup>62</sup> require limited discovery,<sup>63</sup> and conduct a hearing to receive oral presentations.<sup>64</sup> An additional advantage of this type of forum is the availability

of statutory damages. For works that were not timely registered before infringement, copyright owners would be eligible for limited statutory damages of up to \$7,500 per infringed work or a total of \$15,000 in each proceeding.<sup>65</sup> This overcomes the difficulties and/or expense of proving actual damages especially given that many comedians do not register their works. Oliar and Sprigman point out that a “factor contributing to copyright law’s irrelevance is the law’s requirement, as a predicate to the award of statutory damages and attorney fees, that the author registers the work, prior to the commencement of the infringing conduct.”<sup>66</sup> Further, utilization of this forum by comedians would assist in establishing general awareness and knowledge regarding the ownership of copyright in jokes.

One major disadvantage of the Copyright Claims Board would be that it would require the agreement of the respondent to the proceeding. Under the proposed bill, a respondent served with a notice and claim would have a right to opt out of the proceeding within 30 days. The rationale behind this right to opt out lies in the “Seventh Amendment of the U.S. Constitutions [which] guarantees a right to a jury trial in federal proceedings.”<sup>67</sup> There would be, therefore, a possibility that the alleged infringer would decide not to participate in this low-cost, streamlined process and risk being sued in the federal courts. One can imagine that joke aggregators with deep pockets may refuse to participate in this process for tactical reasons. Where the bargaining positions of the parties are unequal, this risk is heightened.

It is also unclear whether comedians would actually use this forum. While almost all interviewees indicated that they would consider using it, there were a small number who “fear[ed] it would be more trouble than it’s worth.” Another comedian also claimed he would use it but acknowledged he was “also very lazy” so he “might not be that motivated to do the admin.” The motivation to enforce rights may depend on the simplicity and efficiency of the process in practice, the extent of damage caused by the joke theft and the likelihood of obtaining monetary damages (some joke aggregators are multi-million dollar companies who

are not judgment proof). One can only hope that this forum will prove useful to those comedians wishing to resolve their copyright disputes in a low cost and accessible forum.

#### **PART VII: INTERPLAY OF NORMS AND COPYRIGHT LAW**

Bolstering the enforcement methods provided by copyright law will strengthen and reinforce the existing social norms. For a scenario concerning the introduction of strengthened formal rules into the community, Oliar and Sprigman expressed concern that this may work to “deaden comedians’ current sense of responsibility for policing appropriation” because it “may make control of appropriation someone else’s job.”<sup>68</sup> In relation to bolstered enforcement methods, this risk is remote. If there are better means of enforcing copyright, policing would still occur as per usual within the industry and outside the industry. As one interviewee explained, “comics will usually take it upon themselves to police whether they are asked to or not.” If policing of infringement continues on and off social media, this will reduce monitoring and detection costs for the comedian and assist the comedian in pursuing enforcement methods. Further, norms and copyright law have co-existed alongside each other for a long time: “norms have developed in tandem with the copyright system.”<sup>69</sup> If comedians can more easily resort to existing copyright laws, this will “help to create or reinforce agreement within the creative community that appropriation of a creative product is unethical or immoral.”<sup>70</sup>

In the event that comedians do not wish to rely on copyright protection, the norms exist and still play a role, albeit a less effective one. Schachter was contacted for the purposes of this paper, and he indicated that “while norms don’t provide an enforcement mechanism for going after a non-comedian infringer, the norms do provide some comfort when the infringement does happen.”<sup>71</sup> He stated that this was because fellow comedians will contact the affected comedian to inform, empathize, and commiserate: “Ultimately, that’s all a comedian really needs to be made whole again—the recognition and respect of his

or [her] peers.”<sup>72</sup> This is an interesting point and it is worth acknowledging that there may be some comedians who do not need to resort to formal copyright protection when faced with joke theft in the social media world. However, the comedians interviewed for this paper have strongly indicated that joke theft on social media theft is a problem and more needs to be done to make them whole again.

## CONCLUSION

Joke theft in the social media world is a fairly recent phenomenon that directly affects the viability of the stand-up comedy industry and will continue to affect the industry as technology continues to advance. In the social media world, the norms system underperforms. Norms do little to protect against joke theft by extra-community players because those players are outside of the industry and unaffected by norms governing stand-up comedians. This paper has utilized the perspectives and insights of several full-time professional stand-up comedians to understand the creative process underlying the creation and dissemination of jokes; the effect of joke theft on a comedian’s incentives to create and disseminate; and to consider how copyright law can play a greater role to protect against joke theft in circumstances where norms cannot govern as effectively outside the industry as they do inside the industry.

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<sup>1</sup> 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, 1794 (2008).

<sup>2</sup> *Id.* at 1791.

<sup>3</sup> Trevor M. Gates, *Providing Adequate Protection for Comedians’ Intellectual Creations: Examining Intellectual Property Norms and “Negative Spaces,”* 93 OR. L. REV. 801, 817 (2015).

<sup>4</sup> There were eight full-time professional stand-up comedians interviewed for this paper who were promised anonymity. Their perspectives and insights have been invaluable.

<sup>5</sup> Oliar & Sprigman, *supra* note 1, at 1791.

<sup>6</sup> *Id.* at 1815.

<sup>7</sup> Michael J. Madison, *Of Coase and Comics, Or, The Comedy of Copyright*, 95. VA. L. REV. In Brief 27, 38 (2009).

<sup>8</sup> Note that there are limitations to the norms system in the stand-up comedy industry. In particular, the effectiveness of the norms system may depend on the comedian’s status in the industry. See Jennifer Basch, *Is*

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*Change Always Good? The Adaptability of Social Norms and Incentives to Innovate*, 18 N.Y.U.J. LEGIS & PUB. POL'Y 431, 455 (2015) (“Importantly, the norms system has the greatest effect not on the most well-known comics, who can potentially escape sanctioning, but rather on lesser known comics who are sometimes accused of using more well-known comics’ work.”); Elizabeth M. Bolles, *Stand-Up Comedy, Joke Theft, and Copyright Law*, 14 TUL. J. TECH. & INTELL. PROP. 237, 257 (2011) (“Because the ability to enforce community norms against misappropriation largely relies on the wronged comic’s ability to convince others in the industry to ostracize the alleged thief, comics are at a disadvantage if they are new to the business because they lack professional contacts and social clout.”).

<sup>9</sup> Oliar & Sprigman, *supra* note 1, at 1833.

<sup>10</sup> Dan Nancarrow, *Oops. He did it again: Rip-off comic plunders joke about plagiarism*, THE SYDNEY MORNING HERALD (Jun. 29, 2011), <http://www.smh.com.au/entertainment/tv-and-radio/oops-he-did-it-again-ripoff-comic-plunders-joke-about-plagiarism-20110629-1gq1d.html>.

<sup>11</sup> See The Fat Jew (@thefatjewish), INSTAGRAM (last visited Dec. 16, 2016), <https://www.instagram.com/thefatjewish/>.

<sup>12</sup> *Id.*

<sup>13</sup> See also 9GAG, LadBible, Fuck Jerry, Kanye Doing Things, Funny Status, Silly Facebook Statuses, Sickipedia, Status Stalker, FavStar, Mens Humor, WolfpackAlan.

<sup>14</sup> John Sunyer, *Lunch with the FT: The Fat Jew*, FINANCIAL TIMES (Jul. 24, 2015), <https://www.ft.com/content/15fe6c4a-3127-11e5-8873-775ba7c2ea3d#axzz3gihYYZUB>.

<sup>15</sup> Gates, *supra* note 3, at 817.

<sup>16</sup> See Megh Wright, *Comedy vs. The Fat Jew*, SPLITSIDER (Aug. 17, 2015), <http://splitsider.com/2015/08/comedy-vs-the-fat-jew/>.

<sup>17</sup> Gates, *supra* note 3, at 817.

<sup>18</sup> Jennifer Basch, *Is Change Always Good? The Adaptability of Social Norms and Incentives to Innovate*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 431, 443 (2015).

<sup>19</sup> Katherine J. Strandburg, *Who's In The Club?: A Response to Oliar and Sprigman*, 95. VA. L. REV. In Brief 1, 5 (2009).

<sup>20</sup> Jeremy A. Schachter, *That's My Joke...Art...Trick!: How the Internal Norms of IP Communities are Ineffective Against Extra-Community Misappropriation*, 12 VA. SPORTS & ENT. L.J. 63, 63 (2012).

<sup>21</sup> *Id.* at 72.

<sup>22</sup> *Id.* at 74.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 71.

<sup>25</sup> Oliar & Sprigman, *supra* note 1, at 1860.

<sup>26</sup> ASX TV, *Russell Peters Talks About His Break Out YouTube Video on Tom Green Live*, YOUTUBE, (Nov. 26, 2013), <https://www.youtube.com/watch?v=so-W554hm9w>.

<sup>27</sup> *Id.*

<sup>28</sup> Madeline Berg, *The Highest-Paid Comedians 2016: Kevin Hart Dethrones Jerry Seinfeld as Cash King of Comedy with \$87.5Million Payday*, FORBES (Sep. 27, 2016), <http://www.forbes.com/sites/maddieberg/2016/09/27/the-highest-paid-comedians-2016-kevin-hart-out-jokes-jerry-seinfeld-with-87-5-million-payday/#18ca70861a62>.

<sup>29</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>30</sup> Elizabeth M. Bolles, *Stand-Up Comedy, Joke Theft and Copyright Law*, 14 TUL. J. TECH. & INTELL. PROP. 237, 241 (2011).

<sup>31</sup> *Id.* at 258.

<sup>32</sup> 17 U.S.C § 102(a) (2012).

<sup>33</sup> See Allen D. Madison, *The Uncopyrightability of Jokes*, 35 SAN DIEGO L. REV. 111, 117 (1998).

<sup>34</sup> Bolles, *supra* note 30, at 248.

<sup>35</sup> *Id.* at 250.

<sup>36</sup> *Id.* at 251.

<sup>37</sup> Oliar & Sprigman, *supra* note 1, at 1854.

<sup>38</sup> *Id.*

<sup>39</sup> See *Foxworthy v Custom Tees*, 879 F. Supp. 1200 (N.D. Ga. 1995).

<sup>40</sup> Compendium II of Copyright Office Practices § 420.02(i) (1984).

<sup>41</sup> Gates, *supra* note 3, at 818.

<sup>42</sup> Pub. L. 105-304, 112 Stat. 2860 (1998).

<sup>43</sup> Notice of Inquiry, *Section 512 Study: Notice and Request for Public Comment*, 80 Fed. Reg. 81,862 (Dec. 31, 2015).

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- <sup>44</sup> H.R. Rep. No. 105–551, pt. 2, at 21 (1998).
- <sup>45</sup> 17 U.S.C. § 512(c)(3)(A) (2010).
- <sup>46</sup> See for example Facebook’s online form for reporting copyright infringement pursuant to the DMCA. See FACEBOOK, COPYRIGHT REPORT FORM, <https://www.facebook.com/help/contact/1758255661104383> (last visited Sept. 15, 2017).
- <sup>47</sup> 17 U.S.C. § 512(g)(2)(A) (2010).
- <sup>48</sup> *Id.* § 512(g)(3).
- <sup>49</sup> *Id.* § 512(f).
- <sup>50</sup> *Id.* § 512(i)(1)(A).
- <sup>51</sup> Notice of Inquiry, *Section 512 Study: Notice and Request for Public Comment*, 80 Fed. Reg. 81,864 (Dec. 31, 2015).
- <sup>52</sup> It is beyond the scope of this paper to consider the effectiveness of the DMCA notice-and-takedown procedure, but it is acknowledged that in practice, accounts may not be as readily terminated given the uncertainties surrounding the meaning of “repeat infringers” in the DMCA. See Andres Sawicki, *Repeat Infringement in the Digital Millennium Copyright Act*, 73 U. CHI. L. REV. 1455 (2006).
- <sup>53</sup> Shyamkrishna Balganesh, *Copyright Infringement Markets*, 113 COLUM. L. REV. 2277, 2278 (2013).
- <sup>54</sup> Letter from Lamar Smith, Chairman, U.S. House Judiciary Committee, to the Honorable Maria A. Pallante, United States Copyright Office, at 1 (Oct. 11, 2011).
- <sup>55</sup> MARIA A. PALLANTE, UNITED STATES COPY RIGHT OFFICE, COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS, at 4 (Sept. 2013).
- <sup>56</sup> *Id.*
- <sup>57</sup> *Id.*
- <sup>58</sup> *Id.*
- <sup>59</sup> *Id.*
- <sup>60</sup> *Id.*
- <sup>61</sup> H.R.5757, 114<sup>th</sup> Cong. (2016).
- <sup>62</sup> *Id.* at 1405(l).
- <sup>63</sup> *Id.* at 1405(m).
- <sup>64</sup> *Id.* at 1405(o).
- <sup>65</sup> *Id.* at 1403(e).
- <sup>66</sup> Oliar & Sprigman, *supra* note 1, at 1800.
- <sup>67</sup> PALLANTE, *supra* note 55, at 58.
- <sup>68</sup> Oliar & Sprigman, *supra* note 1, at 1836.
- <sup>69</sup> Jennifer. E. Rothman, *Custom, Comedy, and the Value of Dissent*, 95 VA. L. REV. 19, 21 (2009).
- <sup>70</sup> Oliar & Sprigman, *supra* note 1, at 1835.
- <sup>71</sup> E-mail from Jeremy Schachter to Hannah Pham (Dec. 7, 2016, 3.11PM EST) (on file with author).
- <sup>72</sup> *Id.*