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Standing Up for Stand-Up Comedy: Joke Theft and the Relevance of Copyright Law and Social Norms in the Social Media Age

Hannah Pham
hannah.pham@law.nyu.edu

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Cover Page Footnote

Hannah Pham is a dual-qualified Australian and New York attorney. She wrote an earlier version of this Article as an LLM candidate at New York University School of Law. Hannah would like to thank Professor Jeanne Fromer for her insight and comments. Hannah would also like to thank the editorial staff of the New York Intellectual Property Law Association and the Fordham Intellectual Property, Media & Entertainment Law Journal for their editing contributions. Finally, Hannah would like to thank her husband Ronny Chieng for the laughs and the inspiration.

Standing Up for Stand-Up Comedy: Joke Theft and the Relevance of Copyright Law and Social Norms in the Social Media Age

Hannah Pham*

This Article reveals that while social norms offer protection to stand-up comedians against joke theft within the stand-up comedy industry, they do little to prevent joke theft outside the traditional comedy community. Joke theft has risen with the increased popularity and use of social media. In particular, joke aggregators such as “The Fat Jew” take and publish on social media jokes by other comedians. In the social media world, the norms system underperforms. Norms do little to protect against joke theft by joke aggregators because they exist outside of the industry and are unaffected by norms governing stand-up comedians.

This Article will utilize the perspectives and insights of several full-time professional stand-up comedians in order to understand the creative process underlying the writing and dissemination of jokes; the effects 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 on social media. This is important because joke theft on social media harms a comedian’s pecuniary interests, a comedian’s control over his or her jokes, a

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comedian’s ability to disseminate his or her jokes and, as one comedian put it, “devalues the industry and what we do.”

This Article submits that there are no doctrinal barriers to copyright protection for jokes. Rather, comedians have not relied on copyright protection to protect against joke theft because there are practical barriers to court-enforced copyright protection for jokes (e.g., cost, complexity, and time). The Article examines two solutions in which the practical barriers to enforcing copyright protection can be reduced or removed: the existing DMCA notice-and-takedown procedure and the proposed Copyright Claims Board.

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INTRODUCTION

This Article investigates the extent to which copyright law and social norms regulate joke theft in the stand-up comedy industry in the social media age. For many years, stand-up comedians were the only people in a position to disseminate jokes widely. They form a fairly small community that regulates itself through social norms.¹ Most comedians have a strong enough respect for creativity to refrain from stealing others' jokes, or are deterred from doing so by the certainty that they would be shamed by their peers.² As Dotan Oliar and Christopher Sprigman have argued, this community self-regulation through social norms functions as a supplement or alternative to intellectual property law.³ Yet, 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.⁴

In 2008, Oliar and Sprigman found no reason to doubt that the social norms were providing adequate protection against joke theft.⁵ Fast forward to 2019: the digital landscape has changed, and social media is now ubiquitous. On social media, anyone can be a publisher and can publish a copy of anything. One does not need to be a stand-up comedian or a major corporation with an advertising budget in order to take a joke and distribute it online to a worldwide audience.

The ease with which jokes can be copied and shown to the world on social media, even without the author's authorization, has led to the rise of joke aggregators. A joke aggregator "aggregates" jokes and distributes them. 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. The joke aggregator puts it out there, you see it, you "like" it, you

¹ See 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).

² *Id.*

³ *Id.*

⁴ Trevor M. Gates, *Providing Adequate Protection for Comedians' Intellectual Creations: Examining Intellectual Property Norms and "Negative Spaces,"* 93 OR. L. REV. 801, 817 (2015).

⁵ Oliar & Sprigman, *supra* note 1, at 1791.

tag friends who you think will appreciate it, your friends see it, they “like” it, they do the same and so forth. The effect of something going “viral” on social media is that millions of people around the world will see it in a very short amount of time.

This dynamic between aggregator and audience influences the motivations of each party. As the large-scale consumption of jokes online changes the way in which audiences enjoy jokes, extra-community players who want to appeal to audiences are encouraged to partake in joke theft free from the social norms governing stand-up comedians. Indeed, joke theft by aggregators on social media has outraged stand-up comedians at all levels.

With the assistance of several full-time professional stand-up comedians,⁶ this Article 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 light of these circumstances, this Article explores the role copyright law can and should play in protecting against joke theft on social media.

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.”⁷ At all levels of the profession, comedians do not take allegations of joke theft lightly. For example, when Amy Schumer was accused of joke theft, she immediately went on Jim Norton’s SiriusXM radio show to defend her name: “I am being accused of stealing jokes and I wanted to come and talk to you about it and clear my name because I would never ever do that and I never have.”⁸ Respect and credibility are of utmost importance to a stand-up comedian. Schumer emphasized her adherence to this

⁶ There were eight full-time professional stand-up comedians interviewed for this Article who were promised anonymity. Their perspectives and insights have been invaluable.

⁷ Oliar & Sprigman, *supra* note 1, at 1812.

⁸ *The Jim Norton Advice Show* (SiriusXM radio broadcast Jan. 20, 2016).

ethos: “More than anything I want credibility as a comic I wouldn’t take a joke from someone All I care about is that the people close to me and comedians that they respect me I don’t think comedians can forgive joke stealing.”⁹

Similarly, after being sued in July 2015 by Robert Alexander Kaseberg for alleged copyright infringement of five jokes (the “Conan O’Brien case”), Conan O’Brien felt the need to explain his reasons for settling the case and ultimately to defend his reputation in an op-ed for *Variety*: “Short of murder, stealing material is the worst thing any comic can be accused of, and I have devoted 34 years in show business striving for originality What’s important to me, today, is defending the integrity and honesty of my writers. They are remarkably hard working and decent people, and this episode has been upsetting for them, and for myself.”¹⁰

Oliar and Sprigman argue that norms-based sanctions act to regulate the stand-up comedy industry: “Using 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.”¹¹ They 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.”¹² In an industry where reputation is imperative, these sanctions can end a comedian’s career.

A comedian who steals another’s joke loses the respect of “intra-community players.” This term is used in this Article to describe

⁹ *Id.*

¹⁰ Conan O’Brien, *Conan O’Brien: Why I Decided to Settle a Lawsuit Over Alleged Joke Stealing*, *VARIETY* (May 9, 2019, 1:30 PM), <https://variety.com/2019/biz/news/conan-obrien-jokes-lawsuit-alex-kaseberg-settlement-1203210214/> [<https://perma.cc/J6M5-FB-TX>]. This lawsuit involves the allegation of joke theft by comedy writer Robert Alexander Kaseberg against Conan O’Brien and his team for the use of five jokes on the late-night television show *Conan*. *See id.* These jokes concerned topical news events and followed the format of a factual sentence followed by a punchline. *Id.* Kaseberg alleged that these jokes were taken from his blog and/or Twitter account and performed by Conan on the late-night television show. *Id.* *See also infra* text accompanying notes 75-76, 179-80.

¹¹ Oliar & Sprigman, *supra* note 1, at 1791.

¹² *Id.* at 1815.

the various people within the comedy community such as comedians, comedy room managers, comedy writers, and comedy representatives such as agents, managers and publicists. Intra-community players act as gatekeepers to success in the industry. In an industry that values honesty and originality,¹³ the intra-community players make it very difficult for known joke thieves to flourish. Comedy room managers will refuse to book them, managers and agents will refuse to represent them, and comedians will refuse to work at the same club as them or even associate with them on any level. Social norms thus function through the agency of intra-community players to deter joke theft.¹⁴ Oliar and Sprigman convincingly argue that this intra-community system protects creativity in the industry and provide incentives to create new jokes.¹⁵

These norms are not limited to the United States. For example, Australian television contestant Jordan Paris made headlines for performing jokes belonging to other comedians on the talent show *Australia's Got Talent*.¹⁶ When the joke theft was exposed, his stand-up comedy career immediately plummeted. On June 28, 2011, Paris attempted to make light of the situation by posting on his Twitter page: "If every comedian in the world donates one joke to the Jordan Paris Appeal, my career can survive. Please give

¹³ Michael J. Madison, *Of Coase and Comics, or, the Comedy of Copyright*, 95 VA. L. REV. BRIEF 27, 38 (2009).

¹⁴ 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 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."). See also 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.").

¹⁵ Oliar & Sprigman, *supra* note 1, at 1833.

¹⁶ Dan Nancarrow, *Oops. He Did It Again: Rip-Off Comic Plunders Joke About Plagiarism*, SYDNEY MORNING HERALD (June 29, 2011, 12:22 PM), <http://www.smh.com.au/entertainment/tv-and-radio/oops-he-did-it-again-ripoff-comic-plunders-joke-about-plagiarism-20110629-1gq1d.html> [<https://perma.cc/N726-EF57>].

generously #JordanParis.”¹⁷ Needless to say, Paris has not posted an update since that date. 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 groundbreaking. 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.¹⁸

This manager’s condemnatory view of Jordan Paris demonstrates how social norms within the comedy community effectively provide non-legal mechanisms for protecting comedians’ original works against unauthorized misappropriation by others within the community. However, in Part II we shall see that these social norms provide little, if any, protection against misappropriation by those outside of the traditional comedy community.

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, social media is an effective

¹⁷ Jordan Paris (@JordanParisLOL), TWITTER (June 28, 2011, 5:20 AM), <https://twitter.com/JordanParisLOL/status/856840509045760?lang=en> [<https://perma.cc/2KYB-J6WW>].

¹⁸ E-mail Interview with Anonymous Comedy Manager (Dec. 14, 2016) (on file with author).

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.

Social media represents a paradox for stand-up comedians, because it can be used both to advance and to damage a comedian's career. Stand-up comedians engage in social media to attract potential fans. However, they carefully select the material they publish on social media. They understand that jokes are unlike many other creative products (e.g. music), which thrive on exposure. The value of a joke lies in its originality and the element of surprise. This value decreases every time a joke is heard. Once a joke is heard, it cannot be unheard.

Stand-up comedians rarely publish on social media the jokes they are currently using on stage, in order to preserve the impact these jokes will have on live audiences. Instead, many stand-up comedians develop separate jokes suitable for social media. 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.¹⁹

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.²⁰

¹⁹ E-mail Interview with Anonymous Interviewee 8 (Dec. 20, 2016) (on file with author).

²⁰ *Id.*

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." Ostrovsky is one among many in an online economy of joke aggregators who take and publish jokes by other comedians in exchange for "likes" and cash.²¹ As of March 2019, Ostrovsky had 10.5 million followers on Instagram²² and over one million followers on Facebook.²³ In light of his internet fame, it is unsurprising that big companies pay him well to feature their products in his posts. However, his business model has outraged stand-up comedians around the world. Comedy writer Maura Quint went on social media to describe "The Fat Jew":

For those of you who don't know, this guy, The Fat Jew, is someone whose entire career is simply stealing jokes from tumblr, twitter, etc. He is making a living off of the hard work of other people. The people he steals from are struggling writers, comedians, etc. They would love to be able to profit from THEIR OWN WORK but can't because this complete waste of a person is monetizing their words before they even have a chance to. When called out on his continued theft, he either ignores it, says "whoops" or says "geez I guess an intern stole it!" This man makes nothing, contributes nothing,

²¹ See The Fat Jew (@thefatjewish), INSTAGRAM, <https://www.instagram.com/thefatjewish/> [<https://perma.cc/S4YL-NNF5>] (last visited Mar. 2, 2019); see also 9GAG (@9GAG), TWITTER, https://twitter.com/9GAG?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor [<https://perma.cc/8VHU-ZETZ>] (last visited Sept. 25, 2019); Elliot Tebele (@fuckjerry), INSTAGRAM, <https://www.instagram.com/fuckjerry/?hl=en> [<https://perma.cc/A2M5-8N9X>] (last visited Sept. 25, 2019); Jessica Anteby Tebele (@beigecardigan), INSTAGRAM, <https://www.instagram.com/beigecardigan/?hl=en> [<https://perma.cc/PFS3-RC7M>] (last visited Sept. 25, 2019); Men's Humor (@MensHumor), TWITTER, https://twitter.com/MensHumor?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor [<https://perma.cc/S9LL-72S8>] (last visited Sept. 25, 2019).

²² See The Fat Jew (@thefatjewish), *supra* note 21.

²³ See The Fat Jew, FACEBOOK, <https://www.facebook.com/THEFATJEWISH/> [<https://perma.cc/CP42-34Q3>] (last visited Mar. 2, 2019).

originates nothing, he is a leech, he is a virus, he is what is wrong with the world. Please please please do not support him.²⁴

Quint's post tries to persuade social media audiences to buy into the comedy community's social norms in order to hold Ostrovsky accountable to that standard. This indirect strategy is her best option because, by Ostrovsky's own admission, he is not a stand-up comedian and he does not wish to be one: "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?"²⁵ This attitude drains the comedy community's social norms of much of their coercive power. As we shall explore further in Part III, if Ostrovsky and joke aggregators like him are not motivated to join the stand-up community, the threat of being excluded from that community is unlikely to deter them from stealing jokes.

III. THE UNDERPERFORMANCE OF NORMS IN THE SOCIAL MEDIA WORLD

Despite the backlash received from intra-community players over the years,²⁶ "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.²⁷ Joke aggregators on social media are extra-community players who can operate successfully outside of the industry, and thus are 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

²⁴ Maura Quint, FACEBOOK (Aug. 15, 2015), <https://www.facebook.com/MauraQuintEssence/posts/891704754253894> [<https://perma.cc/FN2K-L5RT>].

²⁵ John Sunyer, *Lunch with the FT: The Fat Jew*, FIN. TIMES (July 24, 2015), <https://www.ft.com/content/15fe6c4a-3127-11e5-8873-775ba7c2ea3d#axzz3gihYYZUB> [<https://perma.cc/468M-5QL8>].

²⁶ See Megh Wright, *Comedy vs. The Fat Jew*, VULTURE (Aug. 17, 2015), <https://www.vulture.com/2015/08/comedy-vs-the-fat-jew.html> [<https://perma.cc/22FQ-6J6G>].

²⁷ See Oliar & Sprigman, *supra* note 1, at 1817.

and expulsion from the community have little effect.²⁸ Extra-community players do not require the respect of intra-community players to be successful. In fact, social media success relies purely on exposure, not respect. Further, consumers of jokes on social media generally do not care about the origin of jokes: “Fans do not strongly penalize copying.”²⁹ 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.

Despite the robustness of the stand-up community’s respect for creativity, 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 an article discussing the effects of joke theft outside of the community.³⁰ He does not use the term “theft,” but instead refers to the unauthorized copying of jokes as “extra-community misappropriation” or “ECM.”³¹ He describes a personal scenario that involves misappropriation 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.³² Schachter explains that this incident caused him to abandon the joke altogether.³³ He feared that he “might look like the misappropriator” to the many people who had seen the commercial before hearing his joke.³⁴ 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.³⁵ Schachter argues that ECM, “if left unchecked,

²⁸ See 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, 453 (2015).

²⁹ Katherine J. Strandburg, *Who’s in the Club?: A Response to Oliar and Sprigman*, 95 VA. L. REV. BRIEF 1, 5 (2009).

³⁰ See 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).

³¹ *Id.*

³² *Id.* at 72–75.

³³ *Id.* at 74.

³⁴ *Id.*

³⁵ *Id.* A senior user is someone who uses the trademark first, while a junior user is a subsequent user. *See id.* at 78.

could potentially destroy entire IP communities.”³⁶ ECM affects a number of incentives to create. In particular, “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 harms society.”³⁷

In the social media age, anyone can easily engage in ECM because no distribution infrastructure is needed beyond an internet connection. The regular, individual social-media user can steal a joke and, depending on the user’s privacy settings, disseminate it to hundreds, thousands, or millions of people. Even in 2008, Oliar and Sprigman foresaw the impact social media would have a decade later, when they acknowledged that the internet makes intellectual property rights more valuable to comedians; the scale and swiftness of the harm comedians suffer when unauthorized copies of their jokes are distributed online is much greater than the harm that could arise from offline copying.³⁸ In this new environment of easy and rapid copying and distribution, the norms governing the stand-up comedy community underperform and do little to limit joke theft by extra-community players.

IV. THE EFFECT OF SOCIAL MEDIA JOKE THEFT ON THE STAND-UP COMEDY INDUSTRY

Does the rise of joke theft on social media threaten the viability of the stand-up comedy industry? Does joke theft affect a comedian’s incentive to create and disseminate jokes and does the result depend on attribution? Before we can answer these questions and come to understand the effects of joke theft on the stand-up comedy industry, we must first 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, the factors that incentivize a stand-up comedian to *enter* the industry tend to differ from the factors that

³⁶ *Id.* at 71.

³⁷ *Id.*

³⁸ Oliar & Sprigman, *supra* note 1, at 1860.

incentivize a stand-up comedian to *stay* in the industry. Initially, many comedians enter the industry because they enjoy making people laugh or find jokes to be an appealing mode of creative expression, not because they are trying to make money. In contrast, financial incentives appear to play a larger role in keeping comedians in the industry of creating and disseminating jokes. When asked about the incentives underlying the creation of jokes, three professional stand-up comedians replied as follows:

Interviewee 6: 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.³⁹

Interviewee 2: 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.⁴⁰

Interviewee 4: 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.⁴¹

To the extent that many comedians are, like these respondents, intrinsically motivated to create jokes for the love of the art, because they enjoy exercising this skill, or simply in order to make people laugh, joke theft on social media may not necessarily curtail the *creation* of jokes altogether. However, the interviewees are not

³⁹ E-mail Interview with Anonymous Interviewee 6 (Dec. 13, 2016) (on file with author).

⁴⁰ E-mail Interview with Anonymous Interviewee 2 (Dec. 11, 2016) (on file with author).

⁴¹ E-mail Interview with Anonymous Interviewee 4 (Dec. 12, 2016) (on file with author).

entirely typical in that they all enjoyed success as established comedians, which may inform their ability to put money in perspective.⁴²

In contrast, these three comedians' responses overwhelmingly indicate that joke theft on social media would affect *dissemination* of the joke, because the affected comedian would feel forced to abandon the stolen joke, neither performing nor publishing 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. The effect of joke theft on the potential market for the joke or the value of the joke is devastating, in that it usurps the market for stand-up comedy.⁴³ Because the joke will be abandoned by the comedian as soon as the joke theft occurs, the market for that joke is destroyed, as is the value of that joke to the comedian. Further, the loss of reputation to the comedian means the loss of potential audience members to that comedian's live comedy show. Consequently, joke aggregators not only steal the joke, but also take the audience away from the comedian, and that directly affects the livelihood of that comedian and the wider stand-up comedy industry. As three interviewees described succinctly:

Interviewee 2: 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

⁴² See Schachter, *supra* note 30, at 78 ("It is new creators and creators-to-be that are most vulnerable to ECM and yet it could be their loss that is most damaging to society. If ECM forces creators to abandon the communities they longed to be part of and prevents creators-to-be from ever even starting, that particular form of IP will grow stale and eventually become extinct.").

⁴³ Effect of the use on a potential market for, or the value of, the copyrighted work is one of the factors a court will consider in determining whether the use made of a work in any particular case is fair use. See 17 U.S.C. § 107 (2012). It is interesting to note that any defendant's argument for fair use of a joke is likely to fail due to the effect that joke theft has on the potential market for that joke or the value of that joke. As mentioned above, the value of a joke diminishes every time a joke is heard. This is to be contrasted to the copyright infringement of music, which may not ultimately usurp the potential market for a song or diminish a song's value, due to the unique experience provided by the live performance of music.

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.⁴⁴

Interviewee 3: 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.⁴⁵

Interviewee 4: This [joke theft] 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.⁴⁶

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

⁴⁴ E-mail Interview with Anonymous Interviewee 2, *supra* note 40.

⁴⁵ E-mail Interview with Anonymous Interviewee 3 (Dec. 11, 2016) (on file with author).

⁴⁶ E-mail Interview with Anonymous Interviewee 4, *supra* note 41.

YouTube by an anonymous user without his authorization.⁴⁷ In an interview with talk show host Tom Green, Peters indicated that, had the videos not been uploaded, his career would not have happened or would have happened differently.⁴⁸ “I’m not mad at it, that’s for sure,” he concluded.⁴⁹ This type of beneficial, unauthorized distribution generally concerns material that has already been published by the comedian in its original medium in circumstances where the authorship of the jokes is clear. 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.⁵⁰

In contrast with 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. This premature dissemination and unauthorized re-contextualizing of the joke harms the comedian who wrote it in two ways. First, this type of joke theft changes the form and delivery of the joke. Second, this type of joke theft is untimely and can be particularly harmful to a comedian who has chosen not to distribute the joke outside of the comedy room just yet. There were some interviewees who explained that while attribution helped minimize the damage, it can in some instances have the opposite effect for the comedian. As one interviewee explained:

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

⁴⁷ 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> [<https://perma.cc/BFD6-9SNT>].

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See Madeline Berg, *The Highest-Paid Comedians 2016: Kevin Hart Dethrones Jerry Seinfeld as Cash King of Comedy with \$87.5 Million Payday*, FORBES (Sept. 27, 2016, 9:00 AM), <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> [<https://perma.cc/R6KG-BTZZ>].

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 [a] joke is shared, or written down incorrectly and attributed to a comedian—it can actually hurt that comedian's reputation.⁵¹

Moreover, 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 a multimillion-dollar-earning joke aggregator refused to reply directly to his repeated efforts to seek a resolution, the interviewee turned to the media for help. After the media reported on the matter, the joke aggregator finally credited him on Facebook. Yet this attribution was posted three weeks after the original post was published. When asked about the outcome, he replied: “The outcome did virtually nothing. When it was credited, it was weeks old and literally thousands of posts old. The Twitter accounts can't edit their tweets, so it was never compensated on that medium.”⁵² 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.

One comedian pithily summed up the impact of joke theft on social media: it “devalues the industry and what we do.”⁵³ It deprives a comedian who authored the joke of the financial rewards and benefit to his or her reputation flowing from his or her own use of the joke and from properly attributed uses. Moreover, the comedian loses control over the manner in which his or her artistic creation is shared with the public. This loss inflicts psychological and emotional harm on the comedian, and properly incites his or her moral indignation.

⁵¹ E-mail Interview with Anonymous Interviewee 2, *supra* note 40.

⁵² E-mail Interview with Anonymous Interviewee 5 (Dec. 12, 2016) (on file with author).

⁵³ *Id.*

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.”⁵⁴ Elizabeth Bolles argues that:

More 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.⁵⁵

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.”⁵⁶

This Article submits that there are no doctrinal barriers to copyright protection of jokes.⁵⁷ The Copyright Act protects “original works of authorship fixed in [a] tangible medium of expression.”⁵⁸ Many commentators suggest that there are doctrinal barriers to copyright protection of jokes,⁵⁹ but that view fails to consider carefully the intricacies of the joke writing process. Once this process is understood, it will become clear that jokes are capable of satisfying the three essential requirements of copyright eligibility: fixation, originality, and expressiveness.⁶⁰ First, the work must be “sufficiently permanent or stable to permit it to be perceived,

⁵⁴ U.S. CONST. art. I, § 8, cl. 8.

⁵⁵ Bolles, *supra* note 14, at 241.

⁵⁶ *Id.* at 258.

⁵⁷ For examples of cases holding that jokes are copyrightable, see *Foxworthy v. Custom Tees*, 879 F. Supp. 1200, 1218–19 (N.D. Ga. 1995); *Kaseberg v. Conaco, LLC*, 260 F. Supp. 3d 1229, 1249–50 (S.D. Cal. 2018) (granting in part and denying in part defendants’ motion for summary judgment).

⁵⁸ 17 U.S.C. § 102(a) (2012).

⁵⁹ *See, e.g.*, Allen Madison, *The Uncopyrightability of Jokes*, 35 SAN DIEGO L. REV. 111, 112 (1998).

⁶⁰ *See id.*

reproduced or otherwise communicated for a period of more than transitory duration.”⁶¹ Second, the work must be minimally original, in that it requires only independent creation of a work that “possess[es] some creative spark, ‘no matter how crude, humble or obvious’ it might be.”⁶² Third, “[c]opyright is concerned with the originality of the expression, not the subject matter.”⁶³

Jokes are readily capable of being fixed in a tangible medium, and often are in fact fixed in one or more medium, because the craft that goes into creating a joke usually involves writing the joke down or recording it in some audio-visual format. 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. Professional stand-up comedians have the ability to make comedy look effortless, and it is conceivable that some audience members may think that being a comedian merely involves getting up on stage and having an impromptu chat with the audience. Inevitably, during a comedy set, there may be some audience interaction and improvisation between the rehearsed comedy, but for the most part, jokes follow a script to ensure that the jokes are expressed in a particular, predetermined way. As one interviewee pointed out, “a joke can take a long time to write and even longer to ‘get right.’”⁶⁴ Another interviewee stated that “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.”⁶⁵ Given that many jokes are meticulously crafted and prepared, they are capable of being fixed in a material form.⁶⁶

⁶¹ *Id.* at § 101.

⁶² *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (quoting 1 DAVID NIMMER & MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 1.08[C][1] (1990)).

⁶³ *Foxworthy*, 879 F. Supp. at 1219.

⁶⁴ E-mail Interview with Anonymous Interviewee 2, *supra* note 40.

⁶⁵ E-mail Interview with Anonymous Interviewee 3, *supra* note 45.

⁶⁶ In *Foxworthy v. Custom Tees*, the plaintiff’s jokes were fixed in a comedy album entitled *You Might be a Redneck If . . .*, on a calendar, and on T-shirts. See *Foxworthy*, 879 F. Supp. at 1204. In the Conan O’Brien case, the plaintiff’s jokes were fixed in his blog and Twitter account. See *Kaseberg v. Conaco, LLC*, 260 F. Supp. 3d 1229, 1233 (S.D. Cal. 2017). While there is no precise legal jurisprudence on the fixation of jokes performed live at a comedy venue, this Article contends that due to the way in which jokes are meticulously crafted and prepared, it is highly likely that jokes are written or recorded in a way that satisfies the fixation requirement for copyright eligibility.

Many commentators have suggested that the key to a joke is the idea,⁶⁷ 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."⁶⁸ In the context of jokes, the expression of an idea is through the comedian's choice and arrangement of words. The court in *Foxworthy v. Custom Tees* highlighted this view:

It must be stressed that, because ideas are not the stuff of copyrights, copyrights inhere in the expression used. Two painters painting the same scene each own a copyright in their paintings. Two news organizations covering the same event each own a copyright in the stories written by their reporters. As the *Feist* Court put it, "[o]thers may copy the underlying facts from the publication, but not the precise words used to present them." In the same way, two entertainers can tell the same joke, but neither entertainer can use the other's combination of words.⁶⁹

In the *Foxworthy* case, the plaintiff was a comedian who wrote jokes prefixed with "You might be a redneck if . . ." and the defendant produced T-shirts with replications of the plaintiff's jokes except in a slightly different format.⁷⁰ The plaintiff demonstrated that while he received ideas for the jokes from other sources, the jokes were his own expression because he put them in his own arrangement of words.⁷¹ The court accepted that the plaintiff's arrangement of words was enough to be the plaintiff's own expression.⁷²

Nonetheless, it must be made clear that not all jokes merit copyright protection. A joke fixed in a tangible medium is capable of copyright protection only if the joke is "independently created by

⁶⁷ See Madison, *supra* note 59, at 117.

⁶⁸ Bolles, *supra* note 14, at 248.

⁶⁹ *Foxworthy*, 879 F. Supp. at 1218–19 (N.D. Ga. 1995) (quoting *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991)).

⁷⁰ *Id.* at 1204.

⁷¹ *Id.* at 1218.

⁷² *Id.* at 1219.

the author (as opposed to copied from other works), and . . . possesses at least some minimal degree of creativity”⁷³ to evidence a “modicum of intellectual labor.”⁷⁴ This is a low threshold requirement.⁷⁵

However, the jokes that do merit copyright protection may differ in the level of protection. This was evident in the Conan O’Brien case, in which comedian Robert Alexander Kaseberg sued Conan O’Brien and his show’s production company and writing team for alleged copyright infringement of five jokes.⁷⁶ In an order responding to a motion for summary judgment, U.S. District Judge Janis L. Sammartino held that the jokes in question were only entitled to a thin copyright protection because they were “constrained by their subject matter and the conventions of the two-line, setup-and-delivery paradigm . . . although the punchlines of the jokes are creative, they are nonetheless constrained by the limited number of variations that would (1) be humorous (2) as applied to the specific facts articulated in each joke’s previous sentence and (3) provide mass appeal.”⁷⁷ A thin copyright protection means that the standard of infringement is “virtual identity,” which requires that the infringing work reproduce the original verbatim, paraphrase it very closely, or appropriate the body of the original expression.⁷⁸ Nevertheless, Bolles correctly states that while “protection may be stronger for some jokes than for others[,]”⁷⁹ . . . copyright law

⁷³ *Feist Publ’ns*, 499 U.S. at 345.

⁷⁴ *Id.* at 347.

⁷⁵ In *Feist*, the court found that factual compilations may be copyrightable:

Factual compilations . . . may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws . . .

Id. at 348.

⁷⁶ *Kaseberg v. Conaco, LLC*, 260 F. Supp. 3d 1229, 1232 (S.D. Cal. 2017) (granting in part and denying in part defendants’ motion for summary judgment).

⁷⁷ *Id.* at 1245.

⁷⁸ *See Apple Computer, Inc. v. Microsoft Corp.*, 821 F. Supp. 616, 623 (N.D. Cal. 1993), *aff’d*, 35 F.3d 1435, 1442 (9th Cir. 1994).

⁷⁹ Bolles, *supra* note 14, at 250.

is capable of assessing an individual work's idea/expression dichotomy."⁸⁰

In addition, a factor that supports the copyright protection of jokes is modern day comedians' tendency to "invest in new original and personal content."⁸¹ 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.⁸² This shift is due to the natural evolution of comedy as an art form and is also triggered by external forces. As one interviewee explained, "[m]emes 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."⁸³ Jokes based on personal experiences are more likely to receive broader copyright protection⁸⁴ and are less likely to have been independently created by someone else.⁸⁵ Similarly, a visual artist who paints a painting based on their own personal experiences (for example, Monet painting a portrait of his wife in their garden) is unlikely to have this painting independently created by someone else. This reduces the likelihood of claims alleging copyright infringement and/or claims disputing copyright eligibility.

Although seldom litigated, courts have acknowledged that jokes can be eligible for copyright protection.⁸⁶ Further, the Compendium II of Copyright Practices § 420.02(i) states that "jokes and other

⁸⁰ *Id.* at 251.

⁸¹ Oliar & Sprigman, *supra* note 1, at 1854.

⁸² *Id.*

⁸³ E-mail Interview with Anonymous Interviewee 4, *supra* note 41.

⁸⁴ *See* Rice v. Fox Broad. Co., 330 F.3d 1170, 1175 (9th Cir. 2003) ("[S]imilarities derived from the use of common ideas cannot be protected; otherwise, the first to come up with an idea will corner the market.") (internal citation omitted).

⁸⁵ *See* Kaseberg v. Conaco, LLC, 260 F. Supp. 3d 1229, 1232–35 (S.D. Cal. 2017). In the Conan O'Brien case, each joke began with a factual sentence about a public news event and concluded with a punchline about the preceding facts. The court offered these jokes only thin copyright protection. *See id.*

⁸⁶ *See* Foxworthy v. Custom Tees, 879 F. Supp. 1200, 1220 (N.D. Ga. 1995); *see also* Kaseberg, 260 F. Supp. 3d at 1233.

comedy routines may be registered if they contain at least a certain minimum amount of original expression in tangible form.”⁸⁷

In circumstances where social norms cannot effectively govern the conduct of extra-community players on social media, comedians should be able to rely on existing U.S. copyright law to prevent against joke theft on social media. However, they do not, due to practical barriers to court-enforced copyright protection for jokes. This Article 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 motivated by three reasons: (1) norms have operated successfully to prevent joke theft by intra-community players; (2) there is a lack of common knowledge among comedians 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.

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. As demonstrated above, the copyright framework can be applied to jokes because jokes qualify for copyright protection. Further, a defendant’s argument under the affirmative defense of fair use is likely to fail.⁸⁸ An adjudicator considers four factors in determining whether a defendant qualifies for immunity under the fair use doctrine:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

⁸⁷ U.S. COPYRIGHT OFF., COMPENDIUM II OF COPYRIGHT OFFICE PRACTICES § 420.02(i) (1984); *see also* Bolles, *supra* note 14, at 239–40.

⁸⁸ *See* 17 U.S.C. § 107 (2012) (“[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”).

(4) the effect of the use upon the potential market for or value of the copyrighted work.⁸⁹

In the case of joke aggregators on social media, it is likely that an adjudicator would find that such joke theft harms a comedian's financial incentives to create and distribute new work, and accordingly would use the fourth factor of the fair use analysis to conclude that this form of joke theft does not constitute fair use.⁹⁰ Thus, copyright law has a place in the stand-up comedy industry and should be used to provide relief to comedians.

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 comedian's ability to rely on existing U.S. copyright law."⁹¹ 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 Article to reveal an all-encompassing solution to the problem of joke theft on social media. Rather, this Article will briefly highlight ways in which comedians can protect their jokes utilizing existing copyright laws. This Article 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 copyrights by utilizing the notice-and-takedown process set up by the Digital

⁸⁹ *Id.*

⁹⁰ With respect to: (1) the purpose and character of the use: joke aggregators generally steal jokes for commercial gain; (2) nature of the work: as described above, a joke is a literary work with protectable elements; (3) amount and substantiality of portion used: joke aggregators tend to take the whole joke verbatim, but in any event, an adjudicator would consider whether there was a qualitative taking that has taken the heart of the joke; and (4) effect on potential market: there is a detrimental effect on the potential market because the joke is likely to be abandoned by the comedian as soon as the joke theft occurs. Further, the loss of reputation to the comedian means loss of potential audience members to that comedian's live comedy show.

⁹¹ Gates, *supra* note 4, at 818.

Millennium Copyright Act (“DMCA”).⁹² The DMCA was enacted in 1998 to address widespread piracy in the digital age.⁹³ 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.⁹⁴ 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.”⁹⁵

To invoke this process, a copyright owner must satisfy six simple requirements. On a very general level, these include: identification of the copyrighted work; identification of the infringing work; a statement of good-faith belief; contact details; a statement confirming the accuracy of the information; and a signature of the copyright owner or a person authorized to act on behalf of the owner.⁹⁶ In practice, social media platforms streamline this aspect of the notice process by offering their own online form for reporting copyright infringement under the DMCA.⁹⁷ 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.”⁹⁸ Users can dispute the takedown request by filing a counter notice with the online service provider.⁹⁹ 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

⁹² Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

⁹³ See U.S. COPYRIGHT OFF., EXECUTIVE SUMMARY: DIGITAL MILLENNIUM COPYRIGHT ACT SECTION 104 REPORT (2001), available at https://www.copyright.gov/reports/studies/dmca/dmca_executive.html [<https://perma.cc/SX2T-Z4JW>].

⁹⁴ See Notice of Inquiry, Section 512 Study: Notice and Request for Public Comment, 80 Fed. Reg. 81,862, 81,864 (Dec. 31, 2015).

⁹⁵ H.R. Rep. No. 105-551, pt. 2, at 21 (1998).

⁹⁶ See 17 U.S.C. § 512(c)(3)(A) (2012).

⁹⁷ See *Reporting Copyright Infringements*, FACEBOOK, <https://www.facebook.com/help/400287850027717/> [<https://perma.cc/3S8C-LUJ5>] (last visited Oct. 22, 2019) (Facebook’s online form for reporting copyright infringement pursuant to the DMCA).

⁹⁸ 17 U.S.C. § 512(g)(2)(A) (2012).

⁹⁹ See *id.* at § 512(g)(3).

sanctions for misrepresenting information under the notice-and-takedown procedure.¹⁰⁰

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.”¹⁰¹ This unfamiliarity may also be attributed to the lack of common knowledge in the stand-up community regarding ownership of copyright in jokes. However, interviewees indicated that, armed with full knowledge, they would use the notice-and-takedown procedure. Copyright owners in other industries have frequently invoked the notice-and-takedown procedure.¹⁰² Google’s Transparency Report shows that as of July 20, 2019, it had received 4,215,965,415 takedown notices under the DMCA for allegedly infringing material.¹⁰³

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.”¹⁰⁴ 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 infringing

¹⁰⁰ See *id.* at § 512(f).

¹⁰¹ E-mail Interview with Anonymous Interviewee 8, *supra* note 19.

¹⁰² See *Requests to Delist Content Due to Copyright*, GOOGLE, <https://transparencyreport.google.com/copyright/overview?hl=en> [<https://perma.cc/3QHP-BJYD>] (last visited Aug. 19, 2019). The majority of the copyright owners invoking the notice-and-takedown procedures work in the entertainment industries such as music and media. See *id.*

¹⁰³ *Id.* It must be noted that most of the copyright owners invoking the notice-and-takedown procedure are corporations and therefore well-equipped with the resources to deal with this process. See *id.*

¹⁰⁴ 17 U.S.C. § 512(i)(1)(A) (2012).

material and does not extend to monetary damages.¹⁰⁵ 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 large amounts of money in automated processes, may lack access to sophisticated tools for monitoring infringing use.¹⁰⁶ Fourth, online service providers may not, in practice, strongly exercise their right to terminate repeat infringers given the Ninth Circuit's recent guidance on implementation of a repeat infringer termination policy: "Safe harbor eligibility does not require perfection, just 'reasonable' implementation of the policy 'in appropriate circumstances.'"¹⁰⁷

Notwithstanding these concerns, the notice-and-takedown procedure offers a simple method of getting content removed in an efficient manner. With greater awareness of the mechanism and its simplicity, comedians within the stand-up comedy industry may be able to effectively and timely remove infringing content. Moreover, and perhaps more importantly, it provides a general deterrence effect on repeat infringers.¹⁰⁸ Repeat infringers include existing joke aggregators and potential joke aggregators who wish to turn joke theft into a business.¹⁰⁹ 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 the joke aggregator's business model fails.

¹⁰⁵ See *id.* at § 512(b)(1).

¹⁰⁶ See Notice of Inquiry, Section 512 Study: Notice and Request for Public Comment, 80 Fed. Reg. 81,862, 81,864 (Dec. 31, 2015) (explaining that "[m]any smaller copyright owners . . . lack access to third-party services and sophisticated tools to monitor for infringing uses, which can be costly, and must instead rely on manual search and notification processes . . .").

¹⁰⁷ *Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d 597, 618 (9th Cir. 2018).

¹⁰⁸ It is beyond the scope of this Article 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, e.g., Andres Sawicki, *Repeat Infringement in the Digital Millennium Copyright Act*, 73 U. CHI. L. REV. 1455, 1456 (2006).

¹⁰⁹ Jokes aggregators are likely to be terminated from online platforms if they are repeat infringers. See, e.g., *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109 (9th Cir. 2007) (holding that a reasonable policy must provide a mechanism to terminate "users who repeatedly or blatantly infringe copyright").

B. Enforcement via Copyright Claims Board

Currently, although copyright owners can also resort to private litigation, litigating a copyright claim is not an affordable option for a vast majority of authors and creators.¹¹⁰ Due to the prohibitive expense of litigation, comedians rarely resort to litigation.¹¹¹ The practical barriers, such as cost and time, to enforcing copyright in courts have been recognized by Congress. In a letter to the U.S. 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.¹¹²

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.”¹¹³ The tribunal would be adjudicated by three people, “two of whom would have significant experience in copyright law.”¹¹⁴ The tribunal would hear claims valued at no more than \$30,000 in damages.¹¹⁵ Actual or statutory damages would be capped at \$30,000.¹¹⁶ The registration requirements would be relaxed with claimants needing only to file an application to register their works

¹¹⁰ See Shyamkrishna Balganesh, *Copyright Infringement Markets*, 113 COLUM. L. REV. 2277, 2280 (2013).

¹¹¹ See U.S. COPYRIGHT OFF., COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS 27 (2013).

¹¹² Letter from Lamar Smith, Chairman, U.S. House Judiciary Comm., to Maria A. Pallante, Register of Copyrights, U.S. Copyright Off. (Oct. 11, 2011), *reprinted in* U.S. COPYRIGHT OFF., *supra* note 110.

¹¹³ U.S. COPYRIGHT OFF., *supra* note 111, at 4.

¹¹⁴ *Id.* The third adjudicator would have a background in alternative dispute resolution. *See id.*

¹¹⁵ *See id.*

¹¹⁶ *See id.*

before bringing an action.¹¹⁷ 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.¹¹⁸ 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*.¹¹⁹ 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.¹²⁰

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,¹²¹ limited discovery,¹²² and a hearing to receive oral presentations.¹²³ 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.¹²⁴ This statutory scheme 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 to [most comedians] is the law’s requirement, as a predicate to the

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ See H.R. 5757, 114th Cong. (2016).

¹²⁰ On July 18, 2019, the Senate Judiciary Committee passed S. 1273, the Copyright Alternative in Small-Claims Enforcement Act of 2019 (Case Act), but the full Senate has not yet voted on it. See *Copyright Small Claims*, COPYRIGHT ALLIANCE, <https://copyrightalliance.org/news-events/copyright-news-newsletters/copyright-small-claims/> [<https://perma.cc/BJ6A-5PZH>] (last visited Sept. 18, 2019).

¹²¹ See H.R. 5757 § 1405(l).

¹²² See *id.* at § 1405(m).

¹²³ See *id.* at § 1405(o).

¹²⁴ See *id.* at § 1403(e).

award of statutory damages and attorney fees, that the author registers the work, prior to the commencement of the infringing conduct.”¹²⁵ 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 consent of the respondent to participate in 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 thirty days. The rationale behind this right to opt out lies in the “Seventh Amendment of the U.S. Constitution [which] guarantees a right to a jury trial in federal proceedings.”¹²⁶ 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 of interviewees who “fear[ed] it would be more trouble than it’s worth.”¹²⁷ One comedian who expressed a sincere desire to use it, acknowledged he was “also very lazy” so he “might not be that motivated to do the admin.”¹²⁸ 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 financial resources of the joke aggregator, on which the ability of a victorious plaintiff to recover damages would depend.¹²⁹ One can only hope that this forum will prove useful to

¹²⁵ Oliar & Sprigman, *supra* note 1, at 1800.

¹²⁶ U.S. COPYRIGHT OFF., *supra* note 111, at 58 (internal citation omitted).

¹²⁷ E-mail Interview with Anonymous Interviewee 5, *supra* note 52.

¹²⁸ E-mail Interview with Anonymous Interviewee 4, *supra* note 41.

¹²⁹ See Ashley Carman, *Comedians Are Coming for One of Instagram’s Biggest Joke Aggregators*, VERGE (Feb. 1, 2019, 5:15 PM), <https://www.theverge.com/2019/2/1/18206914/fuckjerry-jerry-media-comedian-backlash-joke-stealing-vulture> [<https://perma.cc/WRY4-FS4H>] (noting that some joke aggregators are multi-million dollar companies, e.g., Fuck Jerry).

those comedians wishing to resolve their copyright disputes in a low-cost and accessible forum.

VII. INTERPLAY OF NORMS AND COPYRIGHT LAW

A. *How Copyright Law Strengthens Existing Norms*

Bolstering the enforcement methods provided by copyright law will strengthen and reinforce the existing social norms. Oliar and Sprigman expressed concern that the introduction of strengthened formal rules into the community may work to “deaden comedians’ current sense of responsibility for policing appropriation” because it “may make control of appropriation someone else’s job.”¹³⁰ 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.”¹³¹ 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. In addition, if online service providers actively design their platforms to encourage use of the notice-and-takedown procedure (for example, by making it easier for other users to report instances of joke theft to the copyright owner), this can heighten a fellow comedian’s sense of responsibility for policing joke theft on social media.

The norms in the stand-up comedy industry against unauthorized use of jokes are stronger than norms in other creative communities. The reporting and policing of joke theft is second nature to intra-community players. There is a clear agreement between intra-community players that joke theft is wrong and unacceptable. In contrast, there is a lack of agreement in the visual arts industry about infringement. For example, when installation artist Collette Maison Lumiere alleged that Lady Gaga had copied her designs to use in Lady Gaga’s holiday window displays at Barney’s in 2011, the artistic community did not support her infringement claims,

¹³⁰ Oliar & Sprigman, *supra* note 1, at 1800.

¹³¹ E-mail Interview with Anonymous Interviewee 8, *supra* note 19.

leaving Lumiere disappointed with the lack of support and needing to fend for herself via protest.¹³²

Further, norms and copyright law have coexisted alongside each other for a long time.¹³³ 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.”¹³⁴ At present, it is not common knowledge in either the social media community or the wider stand-up comedy community that joke theft is an infringement of intellectual property rights. If concerted action is taken by comedians, this fact will be made known to the public, which in turn will publicize and reinforce the norm that it is wrong to appropriate jokes from others, not only from a social perspective, but also from a legal perspective.

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. Schachter¹³⁵ was contacted specifically for this Article, 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.”¹³⁶ 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.”¹³⁷ 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 other comedians interviewed for this Article have

¹³² See Colleen Nika, *Video: Did Lady Gaga Rip Off French Artist Collette?*, ROLLING STONE (Jan. 6, 2012, 3:00 PM), <https://www.rollingstone.com/culture/culture-news/video-did-lady-gaga-rip-off-french-artist-colette-241810/> [<https://perma.cc/G9YG-RK4E>].

¹³³ See Jennifer. E. Rothman, *Custom, Comedy, and the Value of Dissent*, 95 VA. L. REV. 19, 21 (2009) (“[N]orms have developed in tandem with the copyright system . . .”).

¹³⁴ Oliar & Sprigman, *supra* note 1, at 1800.

¹³⁵ Schachter is a former stand-up comedian and current intellectual property attorney. See *Jeremy Schachter*, SEYFARTH SHAW LLP, <https://www.seyfarth.com/people/jeremy-schachter.html> [<https://perma.cc/3DBT-6XUF>].

¹³⁶ E-mail from Jeremy Schachter to Hannah Pham (Dec. 7, 2016, 3:11 PM) (on file with author).

¹³⁷ *Id.*

strongly indicated that joke theft on social media is a problem and more needs to be done to make comedians whole again.

B. How Copyright Law Is in Tension with Existing Norms

Integration of copyright law alongside norms in the stand-up comedy industry is not without its challenges. This is particularly the case for certain jokes that only attract thin copyright protection. Under copyright law, if a joke is only entitled to thin copyright protection, a joke thief may be able to escape liability for copyright infringement by slightly changing the words of the joke. This thin protection is due to the Ninth Circuit's determination that "virtual identity" is the appropriate standard for evaluating the level of similarity between the works.¹³⁸ In the Conan O'Brien case, one of the plaintiff's jokes was as follows: "The University of Alabama-Birmingham is shutting down its football program. To which the Oakland Raiders said 'Wait, so you can do that?'"¹³⁹ On the other hand, the defendant's joke was as follows: "Big news in sport. University of Alabama-Birmingham has decided to discontinue its football team. Yeah. When they heard the news, New York Jets fans said, 'Wait can you do that? It's something you can do?'"¹⁴⁰ The judge found that due to the "extremely limited amount of protectable content," the jokes needed to be virtually identical for any finding of copyright infringement.¹⁴¹ Given that the jokes were not virtually identical based on the differences in "expression to fans (rather than team members) of a different team—the New York Jets," the judge found no copyright infringement.¹⁴² Under the norms system, comedians would most likely condemn this behavior unless it was proven that each joke was independently created. Therefore, this type of copyright law analysis is at odds with norms in the stand-up comedy community which go further to protect particular ideas as opposed to precise expression.

¹³⁸ Kaseberg v. Conaco, LLC, 260 F.Supp.3d 1229, 1244 (S.D. Cal. 2017) (citing Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435, 1439 (9th Cir. 1994)).

¹³⁹ *Id.* at 1233.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1244.

¹⁴² *Id.* at 1246.

However, the tension between copyright law and existing norms is heavily reduced when applied to jokes that have more protectable content because there is greater agreement regarding what is unacceptable from both a social and legal perspective. As mentioned earlier, there has been a shift in jokes in the stand-up comedy community to point-of-view narrative content, which is more easily protected under copyright law.¹⁴³ Also stated previously, norms generally provide greater protection than the protection currently given under copyright law, but as content for stand-up comedy jokes becomes more innovative, the level of protection provided by copyright law to jokes increases and becomes more aligned with the type of protection provided by norms.¹⁴⁴ In these circumstances, comedians will be motivated to create jokes with more originality and protectable content. In this way, the integration of copyright law alongside norms further incentivizes greater creativity and originality in the stand-up comedy industry.

CONCLUSION

Stand-up comedy is a unique form of creative expression, which is becoming increasingly popular and embraced by society. This Article has utilized the perspectives and insights of several full-time professional stand-up comedians in order to understand the creative process underlying the writing and dissemination of jokes; the effect of joke theft on a comedian's incentives to create and disseminate; and how copyright law can play a greater role in protecting against joke theft in circumstances where norms cannot govern as effectively outside the industry as they do inside the industry. 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 advances. In the social media world, the norms system governing the stand-up comedy industry underperforms. Norms do little to protect against joke theft by extra-community players because those players are outside of the industry and unaffected by intra-community norms governing stand-up comedians. In these circumstances, there is a

¹⁴³ See *supra* notes 81–82 and accompanying text.

¹⁴⁴ See *supra* Parts VI, VII.

greater need to reduce the practical barriers to copyright protection for jokes.

This Article has examined two possible mechanisms for stand-up comedians to enforce their intellectual property rights: enforcement via the existing DMCA notice-and-takedown procedure, which provides comedians immediate relief; and the potential implementation of a copyright small claims board to adjudicate copyright infringement disputes in the stand-up comedy world. These mechanisms will provide greater empowerment to stand-up comedians and allow them to stand up against joke theft on social media. If comedians have access to such methods of controlling what happens to their creations and take the initiative to use them, the stand-up comedy industry will be able to flourish and thrive in the digital age.