SPORTS & ENTERTAINMENT LAW JOURNAL
ARIZONA STATE UNIVERSITY
VOLUME 10 SPRING 2020 ISSUE 1

NO LAUGHING MATTER: ENDING COPYRIGHT PROTECTION FOR JOKES

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INTRODUCTION

Copyright law plays a fundamental role in protecting artists' creative expression. However, all forms of creative expression are not protected equally.[1] Under current copyright law, comedic works receive minimal protection and comedians struggle to protect their intellectual property.[2] As a result, joke infringement is difficult to prevent.[3] In recent years, social media has made joke theft easier and widespread.[4] Additionally, greater confusion surrounding the use of another comedian's material leads to a decrease in joke production.[5]

This Note argues the best way to incentivize high-quality comedy is to eliminate copyright protection for jokes. Copyright law protection for jokes fails to serve any meaningful purpose. Razor-thin protections do not aid comedians or courts; they only

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[1] *See* Allen D. Madison, *The Uncopyrightability of Jokes*, 35 SAN DIEGO L. REV. 111, 112 (1998).

[2] *See* Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317, 332 (2011).

[3] *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, 1798—801 (2008).

[4] *See* Jennifer L. Kostyu, *Copyright Infringement on the Internet: Determining the Liability of Internet Service Providers*, 48 CATH. UNIV. L. REV. 1237, 1238 (1999) ("Creators of original works face a greater risk of violation of their intellectual property rights because of the ease with which their copyrighted material may be used in an unauthorized manner compared to publishing through traditional mediums.").

[5] *See id.* at 1240—41.

cause confusion. Instead of supplementing this confusion with more law, the best solution is to eliminate copyright protections for comedic works. This Note discusses the reasons copyright fails to adequately protect jokes. Next, the Note discusses how social norms influence comedy production and the effects of the modern internet comedian. This Note argues the absence of copyright protection will encourage creating more comedic works. Finally, this Note will discuss the mechanisms comedians can use to monetize their efforts.

I. JOKE THEFT IN *KASEBERG V. CONAN*

Robert Kaseberg is a freelance writer and comedian who has written more than 1,000 jokes for late-night talk-show host Jay Leno.[6] His material has appeared in *The New York Times* and *The Washington Post*.[7] In 2015, Mr. Kaseberg wrote several jokes based on recent news stories and posted them on Twitter and his personal blog.[8] Later that night, Conan O'Brien used almost identical jokes in his nightly monologue on the popular TBS talk-show, *Late Night with Conan O'Brien*.[9] Mr. O'Brien had not contacted Mr. Kaseberg or obtained permission to use the jokes.[10] Mr. Kaseberg sued for copyright infringement.[11]

The lawsuit centered around four jokes.[12] Mr. Kaseberg's first joke read: "A Delta flight this week took off from Cleveland to New York with just two passengers. And they fought over control of the armrest the entire flight."[13] This joke was posted to Mr. Kaseberg's personal blog on January 14, 2015 at 4:14 P.M.[14] The same day, Mr. O'Brien featured the following joke in his

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[6] Eriq Gardner, *Conan O'Brien Headed to Trial Over Claims of Stealing Jokes*, HOLLYWOOD REP. (May 15, 2017, 6:22 AM), https://perma.cc/6MMW-ULFQ.

[7] *Id.*

[8] Laura Bradley, *Conan O'Brien's Joke-Theft Trial: Everything You Need to Know*, VANITY FAIR (April 17, 2019), https://perma.cc/FMP2-MBNY.

[9] Gardner, *supra* note 6.

[10] *See* Bradley, *supra* note 8.

[11] *Id.*; Complaint ¶ 26, Kaseberg v. Conaco, L.L.C., 260 F. Supp. 3d 1229 (S.D. Cal. 2018) (No. 15-CV-01637-JLS-DHB), 2015 WL 4497791.

[12] Bradley, *supra* note 8; *see* Complaint, *supra* note 11.

[13] Complaint, *supra* note 11, ¶ 15.

[14] Bradley, *supra* note 8.

nightly monologue: "On Monday, a Delta flight from Cleveland to New York took off with just two passengers. Yet, somehow, they spent the whole flight fighting over the armrest."[15]

The second joke was published on Mr. Kaseberg's blog and Twitter account on February 3, 2015.[16] Mr. Kaseberg's version reads: "Tom Brady, said he wants to give his MVP truck to the man who won the game for the Patriots. So enjoy that truck, Pete Carroll."[17] The next night, Mr. O'Brien stated, "Tom Brady said he wants to give the truck he was given as the Super Bowl M.V.P. to the guy who won the Super Bowl for the Patriots. So Brady is giving his truck to Seahawks' Coach Pete Carroll."[18]

Mr. Kaseberg's third joke was posted on February 17, 2015.[19] It read: "The Washington Monument is 10 inches shorter than previously thought. You know the winter has been cold when a monument suffers from shrinkage."[20] Mr. O'Brien's version aired the same night, reading, "Surveyors announced that the Washington Monument is 10 inches shorter than what's been recorded. Of course, the monument is blaming the shrinkage on the cold weather."[21] The final joke referred to Caitlyn Jenner's gender reassignment and potential changes to a street named after Bruce Jenner.[22]

Mr. Kaseberg named Mr. O'Brien, Conaco, TBS, Time Warner and several producers as defendants in the suit.[23] He claimed Mr. O'Brien and the *Late Night with Conan O'Brien* production staff copied the jokes and committed copyright infringement.[24] Mr. Kaseberg demanded Mr. O'Brien pay all profits earned from the jokes' use, which he claimed exceeded $600,000.[25] He also asked for $30,000 for attorney's fees and $150,000 in statutory damages for willful infringement.[26]

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[15] *Id.*
[16] Complaint, *supra* note 11, ¶ 16.
[17] *Id.*
[18] *See* Bradley, *supra* note 8.
[19] Complaint, *supra* note 11, ¶ 18.
[20] *Id.*
[21] Bradley, *supra* note 8.
[22] *Id.*
[23] *Id.*
[24] Complaint, *supra* note 11, ¶ 26.
[25] *Id.* at ¶ B.
[26] *Id.* ¶¶ C–D.

Mr. O'Brien argued the jokes were not copyrightable.[27] Additionally, Mr. O'Brien claimed he did not commit infringement because the jokes were not substantially similar.[28] He also relied on independent creation and fair use defenses.[29]

The case was disputed for nearly four years and was set for trial in May 2019.[30] The parties settled in early May 2019 for an undisclosed amount.[31] When asked about the settlement, Mr. O'Brien responded:

> This saga ended with [Mr. Kaseberg] and I deciding to resolve our dispute amicably. I stand by every word I have written here, but I decided to forgo a potentially farcical and expensive jury trial in federal court over five jokes that don't even make sense anymore.[32]

He later added, "Four years and countless legal bills have been plenty."[33]

This is not the first occasion Mr. O'Brien has shared infringing jokes based on the news.[34] In 1995, Mr. O'Brien told a joke about Dan Quayle.[35] The joke was also used by rival late-night hosts Jay Leno and David Letterman.[36] Mr. O'Brien has

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[27] Answer to Complaint at 5, Kaseberg v. Conaco, L.L.C., 260 F. Supp. 3d 1229 (S.D. Cal. 2018) (No. 15-CV-01637-JLS-DHB).

[28] *Id.*

[29] *Id.* at 5; *see also* Bradley, *supra* note 8, (describing a memorandum released by Conanco stating that "Kaseberg's jokes are negligible and trivial variations on unprotectable, ideas, preexisting works, or public domain works, such that they do not contain the requisite amount of creative input to qualify for copyright protection.").

[30] Pretrial and Trial Scheduling Order at 2, Kaseberg v. Conaco, L.L.C., 260 F. Supp. 3d 1229 (S.D. Cal. 2018) (No. 15-CV-01637-JLS-DHB).

[31] Order Approving Joint Stipulation of Dismissal with Prejudice, Kaseberg v. Conaco, L.L.C., 260 F. Supp. 3d 1229 (S.D. Cal. 2018) (No. 15-CV-01637-JLS-DHB).

[32] Bryan Alexander, *Conan O'Brien Explains Why He Settled 'My Stupid Lawsuit' Over Alleged Joke-Stealing*, USA TODAY (May 9, 2019, 7:05 PM), https://perma.cc/PN3M-PTZF.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

noted social media is bound to increase the odds of overlap.[37] He commented, "[w]ith over 321 million monthly users on Twitter, and seemingly 60% of them budding comedy writers, the creation of the same jokes based on the day's news is reaching staggering numbers."[38]

Although the Kaseberg dispute settled, it raises several interesting questions including how jokes fit into copyright law. Moreover, the dispute highlighted how social media and the Internet affect copyright law.

II. THE COPYRIGHTABILITY OF JOKES

In general, jokes are creative expressions protected by copyright law.[39] Congress has the power "[t]o 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."[40] Congress has passed several copyright laws pursuant to this constitutional authority. Today, copyright protections are given to "original works of authorship, fixed in any tangible medium of expressions."[41] A copyrightable work must satisfy two requirements: originality and fixation.[42]

First, a work must be original.[43] Original means "the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity."[44] In *Borrow-Giles Lithographic Co. v. Sarony*, the United States Supreme Court had to decide whether a photograph was original.[45] The Court held a work was original if it represented the author's choices.[46] In *Bleistein v. Donaldson Lithographing Co.*, the Supreme Court noted the minimally

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[37] *Id.*

[38] *Id.*

[39] *See* Rosenblatt, *supra* note 2, at 332.

[40] U.S. CONST. art. I, § 8, cl. 8.

[41] 17 U.S.C. § 102(a).

[42] *See id.*

[43] *Id.*

[44] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 449 U.S. 340, 345 (1991).

[45] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 59 (1884).

[46] *Id.* at 58 ("[T]he constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author.").

creative requirement is a low bar, and courts should not determine a work's artistic merit.[47] As a result, a joke not copied from another source and exhibiting a minimal degree of creativity will be copyrightable.[48]

Fixation is the second requirement for copyright protection.[49] Fixation means a work "is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than a transitory duration."[50] Thus, a work is only copyrightable if it is captured in some form preserving the work for more than a brief moment.[51] Mere performance or verbal expression is not enough to show fixation.[52] However, writing a joke on paper, saving it in an electronic medium, such as a computer file, or posting to a website would satisfy the fixation requirement.[53] A live stand-up performance's contemporaneous recording would also satisfy the fixation requirement.[54]

A work is generally entitled to copyright protection when both the originality and fixation requirements are satisfied.[55] Registering the copyright federally is not required but is highly recommended.[56] The author receives several rights once a valid

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[47] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations . . .").

[48] Feist Publ'ns, Inc., 449 U.S. at 345.

[49] 17 U.S.C. § 102(a).

[50] 17 U.S.C. § 101.

[51] *See* H.R. Rep. No. 94-1476, at 53 (1976) ("[T]he definition of fixation would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the memory of a computer.").

[52] *See* § 102(a).

[53] *See* § 101.

[54] *See* § 102(a) (stating that fixation occurs at the moment the work is captured in a tangible medium of expression); *see also* MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 50 (Lexis Nexis, 6th ed. 2014) (providing a brief description of the fixation requirement).

[55] *See* 17 U.S.C. § 102(a) (1976).

[56] Although not required, registration is beneficial for a number of reasons. First, registration is a prerequisite to bring a suit for infringement. Second, registration also acts as *prima facie* evidence of validity. Third, registration allows for Statutory damages and attorney's

copyright is created.[57] These rights include public performance, reproducing and distributing copies, preparing derivative works, public display, and selling the work.[58] These rights are exclusive, meaning another individual may not exercise these rights without the author's permission.[59] These rights extend for a limited time, generally seventy years after a known author's death.[60] Once the limited time frame expires, the work falls into the public domain and may be used freely by the public.[61]

A. LIMITS ON THE COPYRIGHTABILITY OF JOKES

Although copyright laws generally prohibit the unauthorized use of a work, several exceptions and defenses permit others to avoid these prohibitions.[62]

1. *MERGER DOCTRINE*

The merger doctrine is an important exception to copyright law. Ideas and facts alone are not copyrightable.[63] The idea-expression dichotomy limits copyright by protecting an

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fees. Fourth, registration acts as a notice feature, and aids in stopping infringement early. *See* MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW, 285 (Lexis Nexis, 6th ed. 2014).

[57] *See* 17 U.S.C. § 106 (2002).

[58] *Id.*

[59] *Id.* There are several exceptions to these exclusive rights and under certain defenses, such as fair use, a non-author may permissibly use the work without the permission of the author. *See* 17 U.S.C. § 106 (1976).

[60] *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998). The copyright term will depend on a number of factors including the year the work was created, whether the work was published, whether the work is a "work made for hire," who the author is and whether the work was properly renewed. 70 years after death of the author is the term limit for works created today by a known author but this might not be true of every work created depending on the factors mentioned above.

[61] ALFRED C. YEN & JOSEPH P. LIU, COPYRIGHT LAW ESSENTIAL CASES AND MATERIALS 202 (3rd ed. 2016).

[62] 17 U.S.C. § 107.

[63] 17 U.S.C. § 102(b) (1976).

author's original presentation but not the underlying idea.[64] For example, if a comedian wrote an original joke about Abraham Lincoln's height, the joke might be protectable. No one else could use the joke. However, the fact Abraham Lincoln was six feet, four inches tall is not protectable. Therefore, another person could use the same fact in their own original joke.

Copyright law exists to incentivize creating new works.[65] Authors often rely on their predecessors' work to create new works.[66] Authors often combine old ideas or rearrange existing thoughts into a new expression or form.[67] The idea-expression dichotomy provides a balance between protecting authors' works and allowing access to the information and materials needed to create new works.[68]

The distinction between ideas and expression is simple in theory but difficult to apply. When does an idea become expression, and when does an expression become an idea? The idea-expression dichotomy functions along a spectrum.[69] Pure ideas exist on one end of the spectrum.[70] The exact expression of those ideas exists on the other end.[71] The use of the idea with some similar or partial use of the expression exists in the middle.[72] Disputes often arise when attempting to draw a line on this spectrum, distinguishing permissible use of ideas from the infringement of an expression.[73]

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[64] *Id. See also* Leslie A. Kurtz, *Speaking to the Ghost: Idea and Expression in Copyright*, 47 U. MIAMI L. REV. 1221, 1222 (1993).

[65] Kurtz, *supra* note 64, at 1223.

[66] *Id.*

[67] *See* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966-67 (1990) (Creating new works is "more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea . . . . [Authors] all engage in the process of adapting, transforming and recombining what is already 'out there' in some form. This is not parasitism: it is essence of authorship.").

[68] *See* Kurtz, *supra* note 64, at 1223.

[69] Marshall A. Leaffer, UNDERSTANDING COPYRIGHT LAW 84 (Lexis Nexis, 6th ed. 2014).

[70] *Id.*

[71] *Id.*

[72] *See id.*

[73] *Id.*

In 1879, the United States Supreme Court was presented with the idea-expression conflict.[74] In *Baker v. Selden*, accountant Charles Selden created accounting and bookkeeping forms for an accounting system he devised.[75] The defendant Baker took this idea and produced his own form using a nearly identical system.[76] The Court held the form was not protectable.[77]

In *Baker*, the expression, the accounting forms, merged with the unprotected idea, the method of accounting.[78] The expression was then held unprotectable.[79] The Court reasoned the forms could not be protected because the accounting system required the accounting form.[80] If protection was granted for the form, the public use of the idea would be limited.[81] Thus, when an idea and an expression cannot be separated, the expression will lose its copyright protection.[82]

The idea-expression dichotomy is troublesome for comedians. Usually, the idea behind the joke causes people to laugh, not the expression.[83] Comedians may use another comedian's joke and rearrange it into a similar but original joke. The comedian only uses the idea, and, therefore, no infringement occurs. If a comedian writes a unique joke which can only be told one way, the joke likely merges with the idea and loses protection. Additionally, determining which elements of a joke are expression and which are ideas is difficult.

For example, in *Kaseberg*, it is difficult to determine which parts of the jokes were Mr. Kaseberg's ideas and which were his expressions. Mr. O'Brien did not retell the jokes verbatim, so the exact expressions were not copied.[84] Was Mr. Kaseberg's expression so close to the idea that the joke was never

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[74] Baker v. Selden, 101 U.S. 99, 99-100 (1880), *superseded by statute*, 17 U.S.C. § 102.

[75] *Id.*

[76] *Id.* at 101.

[77] *Id.* at 107.

[78] *Id.* at 101.

[79] *Id.* at 107.

[80] *Id.* at 102.

[81] *Id.*

[82] *Id.* at 103.

[83] Oliar & Sprigman, *supra* note 3, at 1802.

[84] *See* Kaseberg v. Conaco, No. 15CV1637, 2015 WL 4497791, ¶ 15-21 (S.D.Cal. filed July 22, 2015). *See also supra* note 8 (providing specific phrasing of the jokes written by Kaseberg and told by O'Brien).

protectable? No clear answer exists, which is why comedians and courts struggle to apply copyright law to comedic works.[85]

The short phrase doctrine is a subsection of the merger doctrine.[86] The short phrase doctrine is the long-standing rule that simple works and short phrases are not copyrightable.[87] Short works are not protected because they do not meet the minimum level of authorship or creativity.[88] Additionally, the smaller a phrase, the more likely the phrase merges with the idea.[89] A small phrase contains less expression, and thus has fewer variations of expression.[90] For example, Nike's slogan "Just do it" is not copyrightable. Although it may be original and fixed, the short phrase doctrine denies copyright protection.

For many jokes, the short phrase doctrine limits copyright protection. Many jokes are intended to be short to enhance their accessibility and maintain audience attention.[91] However, if the joke is too short, it might be a short phrase and fail to gain protection.[92] For example, a joke written as a tweet may be funny and creative, but a court might view it as too short to be copyrightable. Therefore, the short phrase doctrine may limit copyright protection for jokes.[93]

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[85] *See, e.g.,* Kaseberg v. Conaco, 360 F. Supp. 3d 1026, 1030 (S.D. Cal. 2018).

[86] *See generally* Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575 (2005) (explaining that providing copyright protection to microworks, or short phrases, would make the merger doctrine unworkable).

[87] *See id.* at 578 (*citing* 37 C.F.R. § 202.1(a) (2004)).

[88] *See* Alan LaCerra, *You'll LOL @ This Tweet: Copyright Protection for Hashtag Gamers*, 45 FLA. ST. U.L. REV. 1241, 1252 (2018).

[89] *See id.* at 1255.

[90] See *id.*

[91] *See id.* at 1258.

[92] *See generally id.* at 1252. (Alan LaCerra describes the short phrase doctrine and the Copyright Office stance on short phases. Noting that titles or books or movies are short phrases. That when a short phrase refers to something else, it merges with the idea rather than form a new expression of the idea. However, short works like poems (haikus) are protectable because they do feature creative authorship. If a work is a short phrase, protection is still available through trademark law. LaCerra also states that the short phrase doctrine also serves to protect the public domain by denying protection for common short phrase.)

[93] *Id.* at 1252.

2. *SCÈNES À FAIRE*

Scènes à faire is another doctrine related to the idea-expression dichotomy.[94] Artistic works often use similar elements that are familiar to audiences. Elements such as theme, character traits, and common plots are tools authors rely on to ensure audiences relate and understand an artistic work. The *scènes à faire* doctrine prohibits copyright protection of these common literary elements because protecting them would hinder the creation of future works.[95] The doctrine prevents protecting "incidents, characters, or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic."[96] Examples of *scénes á faire* in comedy include jokes about spouses, kids, co-workers, and other familiar characters, or joke styles, such as "knock-knock" or "walk into a bar" jokes. Although a comedian's joke may be original, he cannot prevent another comedian from making jokes involving the same common characters, situations, or styles.[97] Such elements are indispensable for creating new works.[98]

In comedy, many jokes stem from the same situations or characters.[99] Protections for certain comedic works are limited because certain elements are *scènes à faire*.[100] Other comedians can use those elements in their own version of the same joke.[101]

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[94] *See* Leslie A. Kurtz, *Copyright: The Scenes A Faire Doctrine*, 41 FLA. L. REV. 79, 89-90 (1989).

[95] *Id.*

[96] Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 979 (2d Cir. 1980).

[97] *See* Gaiman v. McFarlane, 360 F.3d 644, 660 (7th Cir. 2003) (stating "[i]t would be difficult to write successful works of fiction without negotiating for dozens or hundreds of copyright licenses, even though such stereotyped characters are products not of the creative imagination but of simple observation of the human comedy.").

[98] *Id*.

[99] *Id*.

[100] *See* Idema v. Dreamworks, Inc., 162 F.Supp.2d 1129, 1178 (C.D. Cal. 2001) (stating "[w]here a copyrighted work is composed largely of 'unprotectable' elements, or elements 'limited' by 'merger,' '*scenes a faire,*' and/or other limiting doctrines, it receives a 'thin' rather than a 'broad' scope of protection.").

[101] *Id*. at 1179 (stating "[w]hat is required is not just 'similarity,' but '*substantial'* similarity,' and it must be measured at the level of the

For example, Mr. Kaseberg's first disputed joke involved two airplane passenger's fighting over an armrest.[102] Fighting over an armrest is not a new idea. Many people have experienced or can recognize this situation. An airplane is a common place to fight over an arm rest. Airplane passengers are common characters in a joke or story. None of these elements belong to Mr. Kaseberg because they are examples of *scènes à faire*. Mere use of these elements cannot establish copyright infringement.

3. *INDEPENDENT CREATION*

A third potential limitation of joke writers' rights is the independent creation defense.[103] Copyright's originality requirement is not a novel requirement.[104] A novel work is a new creation.[105] An original work is an independent, non-copied creation.[106] If two authors create identical works, but neither author copied the other, then there is no infringement.[107] Although the works are identical, both have a valid copyright.

Frequently, comedians independently create highly similar jokes.[108] Independent creation often occurs when jokes reference popular news stories. For example, in 2006, several comedians made similar jokes regarding a proposal to build a wall along the United States and Mexico border.[109] Ari Shaffir stated in 2004:

> [Governor Schwarzenegger] wants to build a new wall all down the California-Mexico border, like a twelve-foot high brick wall, it's like three feet deep, so no Mexicans get in. But I'm like "Dude,

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concrete 'elements' of each work, rather than at the level of the basic 'idea,' or 'story,' that it conveys.").

[102] *See* Kaseberg v. Conaco, LLC, 260 F. Supp. 3d 1229, at 1233 (S.D. Cal. 2017).

[103] Allison S. Brehm, *What's the Use? A Primer on the Defense of Independent Creation to Combat Allegations of Idea Theft*, 1 ARIZ. ST. SPORTS & ENT. L.J. 94, 97 (2011).

[104] *See* H.R. REP. NO. 94-1476, at 51 (1976).

[105] *See* Baker v. Selden, 101 U.S. 99, 102 (1879).

[106] *See* Alfred Bell & Co. v. Catalina Fine Arts, Inc., 191 F.2d 49, 54 (2d Cir. 1951).

[107] *See* Baker v. Selden, 101 U.S. at 100.

[108] *See* Oliar & Sprigman, *supra* note 3, at 1802.

[109] *Id.* at 1804.

> Arnold, um, who do you thinks going to build that wall?"[110]

Other comedians, like Carlos Mencia and George Lopez, referenced the same news story and told similar jokes:

> Carlos Mencia: Um, I propose that we kick all the illegal aliens out of this country, then we build a super fence so they can't get back in. And I went, um, "Who's gonna build it?"[111]

> George Lopez: The Republican answer to illegal immigration is they want to build a wall 700 miles long and twenty feet wide, okay, but "Who you gonna get to build the wall?"[112]

How these comedians developed their material is unclear, but it is hard to disprove independent creation. Comedians plausibly develop similar yet independent jokes, especially if the jokes are simple and based on widespread news.

In *Kaseberg*, the jokes were based on relevant news stories.[113] Mr. O'Brien argued he and his writers independently created the jokes.[114] This may have been true. Many late-night shows base monologues on relevant news. Further, a limited number of jokes can be made about a news story. In an age of social media, internet comedians are constantly posting witty comments about the news. Because many internet comedians exist, jokes are bound to overlap and be similar.[115]

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[110] *Id.* (quoting deadfrogcomedy, *Whose Joke Is It? Carlos Mencia? D.L. Hughley? George Lopez?*, YOUTUBE (Feb. 19, 2007), http://www.youtube.com/watch?v=kPuu_VE7KOA at 0:14-0:27 (Last visited Nov. 8, 2019).

[111] *Id.*

[112] *Id.*

[113] Kaseberg, LLC, 260 F. Supp. 3d at 1242.

[114] *Id.* at 1241.

[115] *See* Alexander, *supra* note 33.

4. *FAIR USE*

The most common defense in copyright infringement claims is fair use.[116] Fair use allows non-copyright holders the right to reasonably use a copyrighted work in specific instances.[117] For example, a book critic might need to use a portion of a book to provide context to the audience.[118]

Fair use gives courts an equitable alternative when rigid application of copyright statutes would undermine promoting creation.[119] Several commonly-touted policy justifications for the fair use doctrine exist, including promoting free speech and subsequent authors' expression, promoting ongoing progress of authorship, and promoting furthering research and learning.[120]

Fair use was developed in 1841 when the Circuit Court of Massachusetts decided *Folsom v. Marsh.*[121] In *Folsom*, the defendant used 353 pages of George Washington's unpublished writings in his publication.[122] The court held the use was infringement.[123] The court established four factors for analyzing valid uses of another's work.[124] The court considered: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use upon the potential market or value of the

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[116] *Copyright Infringement*, DIGITAL MEDIA LAW PROJECT, http://www.dmlp.org/legal-guide/copyright-infringement (last visited Sept. 7, 2020).

[117] Rich Stim, *What Is Fair Use?*, STANFORD UNIV. LIBR., https://fairuse.stanford.edu/overview/fair-use/what-is-fair-use/(last visited Sept. 7, 2020).

[118] *See, e.g.*, Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1264 (11th Cir. 2001) (stating that use of characters from the book "Gone with the Wind" was fair use because the use of the characters was needed to effectively criticize the book).

[119] *See* Iowa State Univ. Rsch. Found., Inc. v. Am. Broad. Cos., Inc., 621 F.2d 57, 60 (2d. Cir. 1980).

[120] Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2544 (2009).

[121] Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

[122] *Id.* at 345.

[123] *Id.* at 349.

[124] *Id.* at 348—49.

copyrighted work.[125] The first and fourth factors have had the greatest effect on cases' outcomes.[126] Fair use was further defined and codified by Congress in 1976.[127]

In *Kaseberg*, Mr. O'Brien argued his use of Mr. Kaseberg's jokes was fair use.[128] The issue was never decided because the case settled before trial.[129] If the case had gone to trial, the court would have analyzed the four *Folsom* factors to determine whether Mr. O'Brien had a valid fair use defense.

When evaluating the purpose and character of the use, a court examines the way the infringed work was used in the new work.[130] A court will consider whether the infringed work was transformed into a new work and whether the work was for commercial or nonprofit educational use.[131] In *Kaseberg*, Mr. O'Brien did not transform the joke into something new and the joke was for commercial use.[132] The court would likely view this factor in favor of Mr. Kaseberg.

When considering the nature of the copyrighted work, a court recognizes certain works, like scientific articles and historical works, as more valuable to the public.[133] The fair use doctrine favors greater access to works that contribute to society.[134] In *Kaseberg*, a joke about two airplane passengers was minimally informative and minimally valuable. Thus, this factor weighs against fair use and favors Mr. Kaseberg.

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[125] Along with the four factors for determining fair use, Congress has named several uses that are often considered fair use. These uses include criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. 17 U.S.C. § 107 (1976); *see also* Rosemont Enters., Inc. v. Random House., Inc., 266 F.2d 303, 306 (2d Cir. 1966); Leaffer, *supra* note 54, at 501-02.

[126] Leaffer, *supra* note 54.

[127] *See* 17 U.S.C. § 107 (1976).

[128] Answer to Comp. at 6, Kaseberg v. Conaco, LLC, 260 F. Supp. 3d 1229 (S.D. Cal. 2017) (No. 15-CV-01637-JLS-DHB).

[129] Order Approving Joint Stipulation of Dismissal with Prejudice, Kaseberg v. Conaco, LLC, 260 F. Supp. 3d 1229 (S.D. Cal. 2017) (No. 15-CV-01637-JLS-DHB).

[130] Leaffer, *supra* note 54, at 503.

[131] *Id.*

[132] Kaseberg, 260 F. Supp. 3d at 1246—47.

[133] Leaffer, *supra* note 54, at 505.

[134] *Id.*

When evaluating the amount and substantiality of the portion used in relation to the copyrighted work as a whole, courts try to determine whether the alleged infringer used more than necessary to accomplish a fair use purpose.[135] For example, book critics might use a quote from a book to make a specific point. Using a small portion of the book would likely be permissible. However, completely reproducing an entire chapter from the book likely would exceed what is needed for criticism. In *Kaseberg*, the jokes were similar but not verbatim.[136] A court may side with either party but would likely favor Mr. Kaseberg because a large portion of each joke was replicated.

Finally, courts must determine whether the infringer's use would cause harm to the value or market for the infringed work.[137] This is arguably the most important factor because it most closely affects the financial incentive an author might have for creating the work.[138] If fair use harms the value of the infringed work, it is likely to hinder further creation.[139] In *Kaseberg*, Mr. Kaseberg would have to show a market existed for his tweet and that the value was harmed by Mr. O'Brien's use. This factor is fact-intensive.[140] A court could find this factor favors either party. Looking at the four factors in *Kaseberg*, a fair use defense would likely be denied because most factors favor Mr. Kaseberg.[141]

Today, most original jokes are copyrightable.[142] However, the practical scope of protection is exceedingly thin because of merger, *scènes à faire*, independent creation, and fair use. Moreover, each of these doctrines are highly subjective and fact-intensive, making predictions about disputed protection difficult. Increasing legal uncertainty likewise increases potential litigation and transaction costs. Therefore, the benefits of thin copyright protection for jokes is outweighed by the increased costs of determining and enforcing those rights.

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[135] *Id.* at 507.

[136] Kaseberg, 260 F.Supp. 3d at 1236.

[137] Leaffer, *supra* note 54, at 508.

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] The analysis above is given as an example to illustrate the fair use factors. Fair use was never decided in this case. Because of the fact intensive nature of fair use determinations, it is possible that a court could determine that Conan's use of Kaseberg's jokes constituted fair use.

[142] Kaseberg, 260 F.Supp. 3d at 1245.

B. TRADITIONAL COPYRIGHT POLICY JUSTIFICATIONS DO NOT APPLY TO JOKES

Copyright protection provides authors a limited monopoly for their works.[143] Copyright laws seek to incentivize creating new works by providing an economic benefit to authors.[144] Unlike physical property, intellectual property is non-rivalrous and non-appropriable.[145] Non-rivalrous means a good is not diminished by its use or consumption.[146] For example, an apple is a rivalrous good. Once it is consumed, it is gone and cannot be used again. A movie, on the other hand, is a non-rivalrous good. Once a movie is produced and distributed, one viewer's enjoyment does not diminish the viewing experience of another audience member. The film can be shown again and again, without being diminished or consumed. Similarly, a joke can be told again and again, without being consumed or diminished.[147]

A non-appropriable good is a good that is difficult to exclude others from using, such as a lighthouse.[148] One ship owner may pay to build a lighthouse, but once it is built and operating, it is difficult to exclude other ships from also using it.[149] Similarly,

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[143] Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1503 (2020).

[144] U.S. COPYRIGHT OFFICE, AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 30, (2019), https://www.copyright.gov/policy/moralrights/full-report.pdf.

[145] Leaffer, *supra* note 54, at 23.

[146] *See* Robert Cooter & Thomas Ulen, *Law and Economics*, 114 (6th ed. 2012).

[147] Some might argue that a joke is diminished when it is used or told. A joke's value or hilarity is most effective when the audience is first exposed to the joke. Any subsequent interaction with the same joke by the same audience member may not have the same effect as the first interaction. In their book *The Humor Code*, Peter McGraw and Joel Warner explain that a joke is funny when "something seems wrong, unsettling, or threatening (a kind of violation), but simultaneously seems okay, acceptable, or safe." When an audience interacts with a joke a second or third time, that joke loses its unsettling or threatening effect, and thus becomes boring, or too safe. *See* Joe Berkowitz, *This is Why You're Not Funny: A Professor's Scientific Approach to Dissecting Humor*, FAST COMPANY (Apr. 8, 2014), https://perma.cc/C9H7-S8PG.

[148] Cooter & Ulen, *supra* note 146, at 114.

[149] *Id*.

as in *Kaseberg*, anyone with access to a page where one posts jokes may benefit from it.

Copyrights exist in part to prevent free riders.[150] Free riders are consumers who do not pay for consumption but wait for another to bear the costs.[151] In the lighthouse example, if the lighthouse operator required a payment before turning on its light, everyone would wait for another person to pay. Once the first person pays, the lighthouse operator would be forced to turn on the lighthouse. However, those individuals who did not pay could still use the lighthouse, even though they did not make payments to the operator. Absent a control method for delivering the goods to certain customers, paying customers provide a free ride for everyone else.[152]

Because of these characteristics, a market failure in producing intellectual property exists. Absent copyright protections, many authors would not create new works.[153] Instead, they would wait for others to expend their time and money to produce new works. After the works are created, free riders would use the works without having to invest their own time or money. For example, J.D. Salinger and Margaret Michell took ten years to write *Catcher in the Rye* and *Gone with the Wind* respectively.[154] However, without copyright protection, anyone could copy those books quickly and compete with, or out-compete, the original authors. In theory, Mr. Salinger and Ms. Michell could only sell a handful of copies before free riders could make their own copies and saturate the market. Authors would struggle to make enough money to support their ten-year efforts. As a result, a suboptimal level of new works would be produced and the goal of promoting "the [p]rogress of [s]cience and the useful [a]rts" would be frustrated.[155] For this reason, copyright law grants authors a limited monopoly for their works.

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[150] Peter S. Menell, *Rise of the API Copyright Dead?: An Updated Epitaph for Copyright Protection of Network and Functional Features of Computer Software,* 31 HARV. J.L. & TECH. 305, 334 (2018).

[151] Cooter & Ulen, *supra* note 146, at 103.

[152] *Id.* at 104.

[153] Laura A. Heymann, *A Tale of (At Least) Two Authors: Focusing Copyright Law on Process Over Product*, 34 WM. & MARY FACULTY PUBLICATIONS 1009—10 (2009).

[154] *Infographic: How Long Did Famous Novels Take to Write?,* ELECTRIC LITERATURE (Sept. 8, 2016), https://perma.cc/D8S8-QC9E.

[155] U.S. CONST. art. I, § 8, cl. 8.

Conversely, if the author's monopoly was absolute, then diminished access to those works would also frustrate the progress of science and useful arts. A work inaccessible to the public provides no benefit to the public.[156] Essentially, an inaccessible work is the same as a nonexistent work. For this reason, the U.S. Constitution grants authors exclusive rights "for limited [t]imes"[157] and sets forth other limitations on the rights during the copyright term. Generally, a copyright protects works for a known author's life, plus seventy years after the author dies.[158] Critics debate and disagree about the optimal duration for copyright protection.[159] Regardless, copyright protections eventually terminate, thereby providing public access to the works.[160]

1. *COMEDY AND THE NEGATIVE SPACE*

Not every creative work needs a monopoly. Comedic works are not necessarily reliant on a limited monopoly.[161] Comedic works exist in a "negative space."[162] A negative space is defined as "encompassing any 'substantial area of creativity' in which intellectual property laws do not penetrate or provide only very limited propertization."[163] In negative spaces, creation continues or thrives despite little to no intellectual property protection.[164] Examples of creation within a negative space include fashion, cuisine, magic tricks, and sports moves.[165] These areas have little protection for creators.[166] However, professionals continue to create and profit from their works in these areas.

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[156] Robert A. Kreiss, *Accessibility and Commercialization in Copyright Theory*, 43 UCLA L. REV. 1, 2 (1995).

[157] U.S. CONST. art. I, § 8, cl. 8.

[158] *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. § 302).

[159] *See generally* Arlen W. Langvardt, *The Beat Should Not Go On: Resisting Early Calls for Further Extensions of Copyright Duration*, 112 PENN ST. L. REV. 783 (2008).

[160] *Id.* at 785.

[161] Oliar & Sprigman, *supra* note 3, at 1790.

[162] Rosenblatt, *supra* note 2, at 319—20.

[163] *Id.* at 322.

[164] *Id.* at 319.

[165] *Id.* at 319—20.

[166] *Id.* at 319.

Within the negative space, comedy is prone to intellectual property forbearance.[167] Intellectual property forbearance occurs when traditional intellectual property protection is available to creators, but creators commonly opt out of protection or choose not to pursue infringers.[168]

Comedians may choose to forgo protection because reinvestment in creation might be more beneficial than protection or enforcement.[169] Many comedians and writers may decide the cost of vindicating their rights exceeds the benefit and that their time would be better spent writing new jokes.[170]

Bringing an infringement claim can be expensive.[171] Copyright law is litigated in federal court and requires a certain degree of specialized knowledge.[172] The lawyers a comedian could hire are limited.[173] If a comedian does hire a lawyer, it may cost between $150 and $1,000 per hour.[174] However, jokes' typical market value is between $50 to $200.[175] It is better for a comedian to write new material and not lose money enforcing rights in a joke which may not be relevant or funny later.[176]

Additionally, before a copyright infringement suit can be filed, the author must register the work with the United States Copyright Office.[177] To register, the author must pay a registration fee between $35 and $85, depending on the application method.[178] When each joke might only earn the comedian up to $200, registration cost, attorney's fees, and time involved exceeds the

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[167] *Id.* at 332.
[168] *Id.* at 330.
[169] *Id.* at 351.
[170] *Id.*
[171] Oliar & Sprigman, *supra* note 3, at 1799.
[172] *See id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *See id.* at 1800.
[177] 17 U.S.C. § 411 (2008); Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, L.L.C., 139 S. Ct. 881, 887 (2019).
[178] Although a writer can combine several jokes into a single book or document and register a collection of jokes under the same registration fee, this requires a lot of up-front work. *Office Fees,* U.S. Copyright Office, https://perma.cc/HC9S-MPEF; Oliar & Sprigman, *supra* note 3, at 1800.

asset's value.[179] The comedian would benefit from reinvesting the time and money into a new joke.[180]

Even if a comedian brings a suit and wins, he may not recover a judgement against the infringer. The average comedian makes roughly $40,000 a year and has few assets.[181] Therefore, if the infringer is another comedian, a judgment in favor of the creator might not result in a payment. Mr. O'Brien is a rare example of a comedian who can afford to pay, which may be the reason Mr. Kaseberg brought the suit; he likely knew it would be worth his time and money.

Second, intellectual property forbearance might occur when the incentive to create is not connected to exclusivity.[182] For some creators, public recognition rather than financial gain is motivation to create.[183] For example, the *Tonight Show with Jimmy Fallon* frequently runs a bit called "Hashtags."[184] In the week leading up to the bit, Jimmy Fallon selects a hashtag and asks Twitter users to provide their best story or joke using the hashtag.[185] For instance, in preparation for Halloween, Mr. Fallon introduced the hashtag "#MyWorstCostume."[186] The audience was given a few days to post on Twitter about their worst costume.[187] Mr. Fallon selected the funniest posts and read them during the show.[188] For example, viewer Jodie Colombo responded, "My grandmother wrapped my cousin up in tinfoil for Halloween and said he was a 'Hershey's Kiss.' Everyone thought

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[179] *See* Oliar & Sprigman, *supra* note 3, at 1799.

[180] *See* Rosenblatt, supra note 2, at 352.

[181] PAYSCALE, https://perma.cc/QK63-6FZJ (last visited Jan. 23, 2020); *see also* Oliar & Sprigman, *supra* note 3, at 1800.

[182] *See* Rosenblatt, *supra* note 2, at 342.

[183] *Id.* at 343.

[184] *See* NAT'L BROAD. CO., https://www.nbc.com/the-tonight-show/exclusives/hashtags (Aug. 29, 2020, 12:42 AM).

[185] *See* Jimmy Fallon (@jimmyfallon), TWITTER (Oct. 21, 2019, 1:47 PM), https://twitter.com/jimmyfallon/status/1186383409968566274.

[186] The Tonight Show Starring Jimmy Fallon, *Hashtags: #MyWorstCostume*, YOUTUBE (Oct. 23, 2019), https://www.youtube.com/watch?v=N9pchm3ATjw.

[187] Dustin Nelson, *Fallon Cracked Up Over People's Terrible Costume Stories*, THRILLIST (Oct. 23, 2019), https://www.thrillist.com/news/nation/jimmy-fallon-hashtags-my-worst-halloween.

[188] *See id.*

he was leftovers. #MyWorstCostume."[189] For some, having a joke read by Jimmy Fallon on national television is reward enough. It is a win-win: the contributor is excited to have his joke on national television, and *The Tonight Show* benefits from an entertaining bit which generates thousands of dollars for the show.[190]

For comedians, branding and name recognition can also be appealing, especially if they are new and trying to build a reputation.[191] The benefits of gaining recognition as a good comedian and writer can be more advantageous than immediate financial gain. Many internet comedians do not create content for direct financial gain; they use the internet and social media platforms to establish and maintain a fan base throughout the world.[192]

Finally, creators may thrive in the negative space because they capitalize on first-mover advantages.[193] A first-mover advantage occurs when an author or creator can create enough benefit or revenue from the introduction of a new product so it is not harmed by later copyists.[194] These advantages often exist when a product or idea is relatively inexpensive to develop or create, the reputational advantage outweighs the harms from imitators, and the product will become obsolete before it is copied.[195] Comedians often benefit from first-mover advantages. Jokes are usually funny the first time you hear them or while they

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[189] *Hashtags: #MyWorstCostume*, *supra* note 186.

[190] *The Tonight Show* generates its revenue from commercial advertising. A commercial spot during a prime time can cost an advertiser between $50,000 and $80,000. *The Tonight Show* generated $113.4 million a year in ad revenue, not considering the revenue they generate from YouTube and other media sites. *See* Kimberly Gedeon, *Money Made at Midnight! The Business of Late Night Talk Shows… By the Numbers*, MADAMENOIRE (Apr. 7, 2014), https://perma.cc/Q362-WPSL.

[191] *See* Benjamin Lindsay, *How to Become a Standup Comedian*, BACKSTAGE (Jan. 8, 2018, last updated Aug. 27, 2019), https://perma.cc/89SE-KCUS (noting new comedians must work hard to establish a reputation and build a name).

[192] *See* Erik Deckers, *Personal Branding for a New Comedian*, PERSONAL BRANDING BLOG (June 2, 2012), https://perma.cc/F54J-UKS4 (recommending that young comedians use Twitter to practice their ability to deliver quick punchlines and build an audience).

[193] *See* Rosenblatt, *supra* note 2, at 347.

[194] *See id.*

[195] *See id.*

are relevant. However, hearing an old joke does not have the same effect as hearing an original joke. If a comedian is the first to tell a joke, he will reap the benefits of being the first-mover and will build a reputation as an original comedian. Even if others steal the joke, audiences will recognize the first comedian as the creator and will discredit the second. Additionally, jokes based on the news are usually only relevant if the news story is relevant. By the time a joke is stolen and used, the news's relevance has changed and the joke's effectiveness has diminished.

2. *THE POWER OF NORMS IN COMEDY*

Copyright law generally fails to protect comedians. Despite this failure, comedians continue to write new jokes, and thrive doing so.[196] Social norms may substitute for, and are often stronger than, copyright protection.[197]

In *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, Dotan Oliar and Christopher Sprigman report interviews with comedians and writers.[198] In the interviews, they identify three sets of social norms which help regulate comedy infringement.[199] The three norms are: (1) norms against appropriation; (2) norms regarding authorship; and (3) norms that limit ownership.[200]

Norms against appropriation is the most beneficial.[201] A strict injunction against joke stealing exists within the comedy community.[202] If a comedian is thought to be stealing jokes, the originator may ask them to stop using the material.[203] If the alleged thief continues to use the joke, more severe actions are taken.[204] Other comedians might attack the thief's professional reputation, or they might refuse to work with the comedian.[205] For

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[196] Oliar & Sprigman, *supra* note 3, at 1790.
[197] *Id.*
[198] *Id*.
[199] *Id.*
[200] *See id* at 1812, 1825, and 1828.
[201] *Id.* at 1812.
[202] *Id.*
[203] *Id.* at 1814.
[204] *Id.* at 1815.
[205] *See generally id.* at 1815—21.

stand-up comedians, comedy club owners might refuse to book the thief at future shows.[206]

Under copyright law, only expression is protected; the underlying idea is not.[207] However, under the first social norm, both the expression and idea are protected.[208] Complete protection lasts indefinitely.[209] Additionally, under this norm, the first comedian to use a joke has priority, regardless of when it was created or whether the creation was independent.[210]

The second set of norms are norms regarding authorship and joke transfers.[211] Under this norm, the comedian who devises the joke's premise receives exclusive use of the entire joke.[212] Unlike copyright law, where two comedians who work together might be joint authors, the comedian who comes up with the joke's premise informally owns the whole joke, even if the punchline was contributed by another comedian.[213]

The final set of norms are norms limiting ownership.[214] Although each comedian has exclusive rights to his jokes and the ideas behind them, a comedian may receive forgiveness for occasional use of another's jokes.[215] This would be comparable to the fair use doctrine in copyright law.[216] This norm is only permitted for new comedians who may not understand the norms, or are still trying to find their style.[217] Because they are new, their threat to other comedians is minimal.[218] If a well-known comedian uses another's joke, he may correct the error by paying the owner a fee, comparable to a compulsory license.[219]

Even though copyright protections may fail to stop infringement, norms fill the gap and provide the needed protection

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[206] *See generally id.*

[207] *Id.* at 1790.

[208] *Id.*

[209] *Id.* at 1823—24.

[210] *Id.* at 1826.

[211] *Id.* at 1825.

[212] *Id.*

[213] *See Id.* (noting this norm can be set aside if there is a separate agreement to share or give the joke to the creator of the punchline.).

[214] *Id.* at 1828.

[215] *Id.* at 1829.

[216] *Id.* at 1829.

[217] *Id.*

[218] *Id.*

[219] Robin Williams had been known to send checks in the mail when confronted about use of another comedian's material. See *id.* at 1830.

for serious comedians and writers. However, the norms' effectiveness may diminish as social media creation and consumption replaces more traditional forms of comedy creation.

II. SOCIAL MEDIA HAS CHANGED HOW JOKES ARE CREATED, DISTRIBUTED, AND CONSUMED

The ability to disseminate information, including copyrighted works, has grown tremendously because of the Internet. The Internet's use for sharing jokes is two-fold. First, the Internet provides a new medium to share jokes and generate revenue. Every individual with access to a computer or smartphone can share their comedic works with anyone in the world. If comedians are talented enough, they can generate revenue through advertising. For example, if a comedian becomes popular on a social media site, a company will reach out to the comedian. The company might offer to pay the comedian in exchange for the comedian's endorsement or a product mention in a social media post.[220] The amount the company is willing to pay often depends on the comedian's subscriber or follower numbers.[221] Those with more followers receive bigger payouts.[222] Currently, a sponsored tweet will generate about two dollars for every 1,000 followers the user has.[223] The arrangement's value does not come from a particular joke's hilarity but the followers' relationship and goodwill. The company is paying for access to an audience. A single joke on Twitter earns nothing, but a good joke builds the Twitter user's reputation. The better the reputation, the more followers the user acquires, leading to larger payouts from sponsors.

Unfortunately, copyright infringement is now easier to commit and harder to manage because of the Internet. The Internet's speed and breadth allows users to share a funny comment to millions of people in seconds.[224] Every person who

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[220] *Influencer Marketing Pricing: How Much Does it Cost in 2020*, WEBFX (last visited Jan 23, 2020), https://perma.cc/JLN6-J6R2.

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] Ali Siddiqui, *What Happens in a Single Minute on the Internet?*, DIGITAL INFORMATION WORLD (Apr. 2, 2019, 5:44 AM), https://www.digitalinformationworld.com/2019/04/what-happens-online-in-60-seconds.html.

sees the shared comment also has the option to share the comment, which disseminates the content at an unprecedented pace. Features like "share" or "retweet" make copyright infringement possible with a click.[225] While quickly sharing content may be convenient, it makes tracking copyright infringement challenging. In seconds, a single work may be infringed by millions of individuals. Even if the author knows the infringers' identities, the mere number of infringers may make enforcement too burdensome. Although the internet provides many benefits for comedians, copyright laws have failed to adapt, offsetting the benefits with unbridled infringement.

III. THE END OF COPYRIGHT FOR JOKES

Copyright law fails to adequately protect comedic works. In response, some argue copyright law should change to provide greater protection for jokes.[226] Some argue existing law should be clarified and revised.[227] Others advocate for the creation of new databases and mechanisms facilitating joke sharing.[228] However, eliminating copyright protections for jokes is a better solution.

No copyright protection would be beneficial for several reasons. First, jokes already exist in a negative space and function without protections.[229] Second, courts would be relieved of

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[225] *Terms of Service*, TWITTER: *Terms and Services*, https://twitter.com/en/tos (last visited Jan. 23, 2020) (stating that "[b]y submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display, and distribute such Content in any and all media or distribution methods now known or later developed… This license authorizes us to make your Content available to the rest of the world and to let others do the same." Although creators still retain the copyright, there is a license for Twitter and all other Twitter users to use your content as they see fit).

[226] LaCerra, *supra* note 88, at 272.

[227] Hani Gazal, *"I Used to [Steal Jokes]. I Still Do, but I Used to, Too": A New Test for Providing Copyright Protection to Stand-Up Comedians*, 45 AIPLA Q. J. 759, 781 (2017).

[228] Trevor M. Gates, *Providing Adequate Protection for Comedians' Intellectual Creations: Examining Intellectual Property norms and "Negative Spaces"*, 93 ORE. L. REV. 801, 819—20 (2015).

[229] *Id.* at 803.

difficult and burdensome copyright claims. Third, the lack of protection would actually promote more works and encourage higher quality jokes. Fourth, the law of ideas may act as a monetization tool for writers. Finally, the current Internet compensation model would be unaffected by the lack of protection.

A. THE NEGATIVE SPACE NEGATES THE NEED FOR COPYRIGHT PROTECTION

As aforementioned, comedic works exist in a negative space.[230] In the absence of legal protection, creation still occurs. Excluding jokes from copyright protection does not hinder creation. Rather, the public would benefit from greater access and use of creative material. The comedy industry has long operated without meaningful copyright protection.[231] Social norms develop overtime and serve as an effective means of governing comedic works.[232] In the absence of formal protections, social norms will continue to provide needed protection for jokes. Additionally, social norms are easily adaptable to a rapidly changing technological world. Formal copyright laws developed by Congress lag behind the changing environment. However, social norms can adapt faster to changing circumstances, making small changes as the comedy community deems necessary. Eliminating copyright protection for jokes would not limit joke creation because social norms would continue to govern joke protection.

B. NO COPYRIGHT MEANS RELIEF FOR COURTS

Eliminating copyright protection for jokes will also relieve courts from adjudicating difficult cases. *Kaseberg* took more than four years and 250 motions to settle the use of four jokes. If an infringement lawsuit was not an option, neither Mr. O'Brien nor Mr. Kaseberg would worry about lost time or money. The clarity of eliminating copyright for jokes will reduce transaction and litigation costs.[233]

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[230] *Id.*

[231] Gates, *supra* note 228, at 816.

[232] *Id.*

[233] Eliminating copyright protection for jokes would not eliminate litigation altogether. There would still be issues involving the

C. NO COPYRIGHT ENCOURAGES MORE COMEDIC WORKS

Lack of protection for jokes incentivizes creating more comedic works and entertaining performances. If every comedian knows his joke is subject to copying after its first presentation to the public, comedians will continually write new material to remain relevant and groundbreaking. This will result in more comedic works.

Additionally, comedians will likely shift to more creative and unique jokes. Like the early days of radio and Vaudeville, a comedian will emphasize the joke's performance over its writing. [234] If anyone could easily use any comedic work, comedians will have to distinguish themselves through their performance, selection, or material presentation. One can steal a joke, but presenting it in the same manner or style as another comedian is more difficult.

For comedians like Mr. Kaseberg, who do not perform their jokes, but post them online, the focus would be on their selection and style. The internet comedian would become like a chef with a cookbook. Although a recipe is not copyrightable, thousands of cookbooks are produced every year.[235] The chef's reputation and their recipe selection sets them apart from the rest. The same effect would occur with comedians and their jokes. Although the jokes would not be copyrightable, the comedian could earn a living based on their reputation for style and joke selection. Most people want to be entertained and will go to the

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definition of a "joke" and whether a work was a joke. However, in many cases, such as *Kaseberg*, this would be easy to determine. Additionally, many comedians would be discouraged from even litigating this issue because of the ligation costs.

[234] During the Vaudeville era, comedians would share or re-use the same joke. There was less emphasis on the written joke itself, but on the delivery and performance of the joke. Two comedians would present the same joke but have varying reactions based on the way they delivered the joke. A comedian's fame came not from the joke but from their ability to present the joke in a comedic manner. *See* Oliar & Sprigman, *supra* note 3, at 1845.

[235] Statistica Research Department, *Number of New Books and Editions Published in the United States in the Category "Cookery" from 2002 to 2013*, STATISTICA (Aug 5, 2014), https://perma.cc/ZW5J-3H6U.

source consistently providing comedy matching their tastes.[236] Value does not come from a single joke, but from the selection, style, and presentation of multiple jokes.

D. THE LAW OF IDEAS FOR UNPROTECTED JOKES

The law of ideas may help effectively monetize creation in the absence of copyright.[237] Unlike copyright, the law of ideas is based on contract law.[238] The law of ideas states an idea has value.[239] Because it has value, the idea may be the basis for contractual consideration, so long as it has not been disclosed to the other party.[240] Two or more parties may negotiate a deal where the idea will be shared in exchange for a price. Even though ideas are not copyright-protected, the idea's possessor may monetize and benefit from its discovery or formulation.[241] However, if the idea is disclosed before a contract is created, the idea is public knowledge and may be used by the other party without payment.[242]

To illustrate, if a writer has an idea for a new television show, the writer may go to a producer and offer to share the idea for a fee. The producer may need a new show, so the idea may be valuable to him. The writer agrees to share the idea with the producer but for an up-front fee. The producer agrees and pays to hear the idea. The writer does not own the idea because ideas are not copyrightable. However, the idea has potential value to the producer and serves as consideration for a contract.[243] The writer gets paid, and the producer gets a potential idea. In the event the idea is bad, the next time the producer pays for another idea from the writer, the price will go down because the writer's reputation was diminished by the initial bad idea.

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[236] Gord Hatchkiss, *The Psychology of Entertainment: Our Need for Entertainment,* WORDPRESS (Jan. 19, 2010), https://outofmygord.com/2010/01/19/the-psychology-of-entertainment-our-need-for-entertainment/.

[237] Lionel S. Sobel, *The Law of Ideas, Revisited*, 1 UCLA. ENT. L. REV. 10, 33 (1994).

[238] Desny v. Wilder, 299 P.2d 257, 266 (Cal. 1956).

[239] *Id.* at 265.

[240] *Id.* at 266.

[241] *Id.*

[242] *Id.* at 270.

[243] *Id.* at 269.

Comedic writers trying to make a living can secure profit by contracting with studios, producers, publishers, or club owners to provide the unprotected jokes in exchange for a certain price. Once a contract is in place, the comedian will receive payment for their jokes, even though he would receive no copyright protection. A major driving force in these contracts is the comedian's reputation. If the comedian has a strong reputation, then the contracting party will be willing to pay higher fees for the comedian's ideas. If the reputation is weak, the fee will decrease because the contracting party is uncertain about the value of the comedian's idea.

Under the law of ideas, judicial proceedings will also be easier. The debate will shift to contract law and its application. Although contract law is never immune from litigation, it can often be more predictable. Instead of worrying about every Twitter-user suing a television show, a television producer will only have to worry about the parties with which they have contracted. Without a contract, no claim may be brought against the producer. Additionally, the idea exchange will be governed by a negotiated contract, which can be tailored to a specific situation to provide clarity. The law of ideas is an efficient way to monetize jokes without the confusion of copyright law.

E. CURRENT INTERNET COMPENSATION MODELS ARE UNAFFECTED

Finally, internet comedians like Mr. Kaseberg may continue to generate revenue from their social media sites, despite a lack of copyright protection. A social media comedian earns revenue based on their follower or subscriber numbers.[244] A joke online is valuable in generating followers but not direct revenue.[245] Removing copyright will not affect this dynamic. Even if a comedian has no joke protection, a funny joke will still generate followers. This will benefit the comedian when companies reach out for marketing. The comedian will still generate revenue based on reputation and followers, as he always has.

Although counterintuitive, eliminating copyright protection for jokes will result in a greater volume of quality jokes.

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[244] Kash Jones, *How Social Media is Changing Comedy*, BBC NEWS (Apr. 15, 2015), https://www.bbc.com/news/entertainment-arts-46871021.

[245] *Id.*

Due to the negative space jokes will continue to thrive and comedians will be incentivized to create more jokes. Moreover, courts will be relieved of confusing copyright applications and comedians may receive financial gain based on the law of ideas.

CONCLUSION

Copyright law fails to protect jokes, yet jokes continue to thrive. Because of many non-monetary incentives, jokes are still created and shared with the public. If copyright protection for comedic works was eliminated, producers and studios would worry less about legal action over a few jokes. Existing social norms will help to limit joke-copying. Comedians will be forced to generate more jokes and place more emphasis on presentation and selection. The law of ideas may also help monetize unprotected jokes for writers. Finally, Twitter comedians may continue to create and share comedic material, and generate revenue from followers. Copyright protections are necessary for many works, but for jokes, the law fails to add clarity or value. As a result, copyright protections for jokes should be eliminated, which in turn, will lead to higher quality comedy and entertainment.