

Copyright Is a Joke: Perspectives on Joke Theft in Stand-Up Comedy, and How To Save the Punchline

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INTRODUCTION

Stand-up comedy is personal. Comics spend months to years traveling from venue to venue experimenting with audiences to create a full, polished comedy show that they can market and use to advance their careers. Maybe they get a TV special, maybe they go on tour, or maybe the set takes them nowhere. Regardless of what opportunities come of it, however, the old set must eventually be retired to make way for new material.¹ The commercial value of jokes is driven by their novelty, and comedians have to keep their audiences' attention in order to remain relevant. To try to boil down what makes something funny would be a futile task, but one theory is that "laughter results when a person discovers an unexpected solution to an apparent incongruity."² Once the logic of a joke is known, it loses both its potential to defy expectations and, as a result, its intrinsic value as something funny. And what is a comedian without funny jokes?

Generating new content is a necessary part of the job, and safeguarding that intellectual property becomes critically important. To comics, this material is an extension of themselves, bite-sized pieces of their identity and experiences fed to audiences to foster a connection with them. Kevin Hart, describing his relationship to his own material, illustrates the centrality of ownership to the profession: "Stand-up

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1. A "set" refers to a "stand-up comedy show of any length." *Comedy Terms and Phrases*, BRETT VINCENT, <https://web.archive.org/web/20230925210440/http://www.brettvincent.com:80/comedy-terms-and-phrases.html> (last visited Mar. 9, 2024).

2. Giovanni Sabato, *What's So Funny? The Science of Why We Laugh*, SCI. AM. (June 26, 2019), <https://www.scientificamerican.com/article/whats-so-funny-the-science-of-why-we-laugh/> [https://perma.cc/3F65-G9XF] [<https://web.archive.org/web/20221219111321/https://www.scientificamerican.com/article/whats-so-funny-the-science-of-why-we-laugh/>].

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comedy is mine: it's my entity; it's my brand; I own it."³ Stealing jokes, then, is not just a threat to a comic's livelihood in that it dilutes the comedic value of their material, but it is an appropriation of their personal experiences. Perhaps because of this, joke theft is treated as the greatest taboo in the industry, but deterring this appropriation is a challenging endeavor.

Copyright protections for comedians are a joke. While copyright is technically available in this context, its safeguards are very "thin" and not a practical option for the majority of comedians.⁴ Comics can procure a copyright for their jokes "if they contain at least a certain minimum amount of original expression in tangible form."⁵ In order to meet this threshold, however, a comic would need to prove that they independently created the joke by showing that it "possesses at least some minimal degree of creativity to evidence a modicum of intellectual labor with respect to the expression of that joke."⁶ The "tangibility" requirement is often incompatible with the nature of stand-up comedy, particularly in its purest form of live performance, which presents another hurdle for comedians. How can copyright be a viable tool for a profession centered around performance, something that changes night to night depending on the specific interaction between comedian and audience and therefore predominately *not* tangible? On top of this difficulty, even for jokes that qualify for copyright protection, comedians seldom ever utilize courts to settle disputes related to joke theft in court.⁷

A recent case, *Kaseberg v. Conaco, LLC*,⁸ a rare example of litigation between two comedians based on allegations of joke theft, curiously demonstrates both the limitations of copyright and its viability for individuals able to copyright their material. In the case, a freelance comic alleged that Conan O'Brien stole five of his jokes from X (formerly Twitter) to use on O'Brien's late night talk show.⁹ Kaseberg had only formally registered three of the jokes with the Copyright Office, so the allegations related to the

3. Matt Goldberg, *Kevin Hart Talks RIDE ALONG, Moving To the New Phase in His Career, Comparisons To Other Buddy Cop Action Comedies, and More*, COLLIDER (Nov. 5, 2013), <https://collider.com/kevin-hart-ride-along-interview/> [https://perma.cc/BN2Q-WLBT] [https://web.archive.org/save/https://collider.com/kevin-hart-ride-along-interview/].

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

5. U.S. COPYRIGHT OFFICE, COMPENDIUM II: COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 420.02 (1984).

6. Hannah Pham, Note, *Intellectual Property in Stand-Up Comedy: When #fuckfuckjerry Is Not Enough*, HARV. J.L. & TECH. DIG., Spring 2020, <https://jolt.law.harvard.edu/digest/when-fuckfuckjerry-is-not-enough> [https://perma.cc/R9NU-QL6F] [https://web.archive.org/save/https://jolt.law.harvard.edu/digest/when-fuckfuckjerry-is-not-enough].

7. 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 (2008) ("Despite what appears to be a persistent practice of joke stealing among stand-up comedians, there have been few lawsuits asserting copyright infringement in jokes . . . and there is also little evidence of threatened litigation or settlements.").

8. 260 F. Supp. 3d 1229 (S.D. Cal. 2017).

9. *Kaseberg*, 260 F. Supp. 3d at 1233–35 (providing a summary of the relevant timeline).

other two were summarily dismissed.¹⁰ The district judge explained that “ideas are not copyrightable,” so the fact that both parties made jokes at similar times about the shrinking of the Washington Monument was not, in itself, sufficient to show copyright infringement.¹¹ However, the plaintiff prevailed in quashing the motion for summary judgment on the copyrighted jokes by showing that (1) the defendant had access to the copyrighted material¹² and (2) the jokes themselves, and not just the ideas fueling them, were substantially similar.¹³ *Kaseberg* settled just before trial, but this case made it further than one would expect. While unique, this outcome suggests that formal legal pathways could be worth pursuing more regularly, at least for material captured by a tangible medium such as X. As comedians increasingly rely on social media to share their work and expand their audience, copyright will likely be more available for their work in general, but unless every comedian films every night’s performance, it will not be a practical solution for the bulk of stand-up comedy, which is comprised of ever-changing and inherently intangible live performance.¹⁴

Despite its potential as a viable method of protection, however, most comedians do not have the time or the resources to pursue legal action.¹⁵ In *Kaseberg*, for instance, the expensive litigation dragged on for four years.¹⁶ Davids must have patience and a lot of cash to have a shot at beating Goliaths, and even then, it is nearly impossible to show that a similar joke is the product of theft and not just parallel thinking. As O’Brien

10. *Id.* at 1236–37.

11. *Id.* at 1239.

12. *Id.* at 1240.

13. *Id.* at 1239–47. The similarity inquiry as it relates to one joke in particular is worth noting to show what is meant by “substantially similar” in this context. *Kaseberg* posted the following on X (formerly Twitter): “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.” One day later, O’Brien delivered the following joke: “Tom Brady said he wants to give the truck that he was given as Super Bowl MVP . . . to the guy who won the Super Bowl for the Patriots. Which is very nice. I think that’s nice. I do. Yes. So Brady’s giving his truck to Seahawks coach Pete Carroll.” *Id.* at 1234. *Kaseberg* also submitted an expert report establishing that there was less than a 0.01 percent chance that the show’s writers would have been able to independently write the jokes in question, which undoubtedly helped his case. Patrick H.J. Hughes, *Conan O’Brien’s Jokes May Have Violated Copyright Law, Judge Says*, WESTLAW J. INTELL. PROP., May 24, 2017, at *2.

14. *But see* Hershil Pandya, *Comedy’s Crowd-Work Clip Civil War*, VULTURE (Oct. 31, 2022), <https://www.vulture.com/article/comedy-crowd-work-clip-debate-tiktok.html> [<https://perma.cc/FB8A-NATT>] [<https://web.archive.org/save/https://www.vulture.com/article/comedy-crowd-work-clip-debate-tiktok.html>] (explaining that while many comedians use TikTok and YouTube to record portions of their sets, the material most predominately featured is crowd-work during performance). Crowd work is technically not part of the planned set material as it is an improvised interaction between the comedian and that night’s specific audience. The sets themselves do not seem to be the focus of the increased use of social media and are therefore left most vulnerable to theft.

15. Oliar & Sprigman, *supra* note 7, at 1799–1801.

16. Conan O’Brien, *Why I Decided To Settle a Lawsuit Over Alleged Joke Stealing*, VARIETY (May 9, 2019), <https://variety.com/2019/biz/news/conan-obrien-jokes-lawsuit-alex-kaseberg-settlement-1203210214/> [<https://perma.cc/SA2W-S5WN>] [<https://web.archive.org/save/https://variety.com/2019/biz/news/conan-obrien-jokes-lawsuit-alex-kaseberg-settlement-1203210214/>] (explaining that “four years and countless legal bills have been plenty” as he announces a settlement with *Kaseberg*).

himself explains in a *Variety* article about the lawsuit, when jokes are topical, similarity between them is inevitable:

The fact of the matter is that with 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. . . . This "parallel creation" of jokes is now so commonplace that Caroline Moss of CNBC and Melissa Radzimiski of the Huffington Post have given it a name: "tweet-saming."¹⁷

In addition to the impracticality of relying on lawsuits to fight joke theft, most comedians are not even aware of the copyright protections available to them, so it is no wonder that *Kaseberg* is a legal unicorn. Without an effective legal deterrent, what is stopping joke theft from being more rampant? In the same *Variety* piece, O'Brien's emphatic insistence that his writers did not steal from Kaseberg provides a clear answer: "Short of murder, stealing material is the worst thing any comic can be accused of."¹⁸ Unlike the methods of protecting ownership utilized by most industries centered around intellectual property, the world of stand-up comedy regulation is a predominately extra-legal creature. As Dotan Oliar and Christopher Sprigman explain in their seminal article on the policing of joke theft, the social norms and sanctions for violations of these norms function as equally effective substitutes for copyright protections.¹⁹ It makes sense, then, that most legal scholarship relating to the intellectual property of comedians focuses on these social norms. These academics articulate their hope that studying this informal system will unearth "a number of lessons for IP theory and policy."²⁰ One suggestion is that it would make sense for social norms to be folded into formal copyright doctrine in general as it continues to develop, for instance.²¹ If joke stealing remains a problem that we are interested in solving, however, this one-sided and theoretical interaction between the legal and comedy communities falls short.

This Note seeks to address the gap between copyright protections and the protection offered from the norms-based system currently in place, focusing not on what stand-up can do for the law but on what the law can do for stand-up. To that end, I surveyed professional stand-up comedians with the goal of discovering (1) whether comedians want more protection from joke theft and, if so, (2) what kinds of additional regulatory safeguards (either legal or non-legal) they believe would be both desirable and effective. I gathered data from twenty-one New York City-based professional stand-up comedians, each at different points in their careers. Using an online survey, I asked them standardized questions about their experiences with and perspectives on joke theft with follow-up interviews when possible. The comedians were chosen from the recent rosters of several New York City comedy clubs that exclusively feature paid

17. *Id.*

18. *Id.*

19. Oliar & Sprigman, *supra* note 7, at 1790.

20. *Id.* at 1791.

21. *Id.* at 1794.

professionals. The response format for most questions was multiple choice to frame the information in a way most compatible with this discussion, and nearly all questions offered comedians a free response section, which many employed to qualify and/or expand upon their answers. The respondents were promised anonymity regarding their identities and were asked not to provide information sufficient to identify any comedians about whom the responses were related. The responses confirmed many of the major takeaways gathered by Oliar and Sprigman from their nineteen interviews conducted in 2008 on the current state of policing joke theft with a few notable additions regarding social media's interaction with the profession and the role of the third party in the initial confrontation between accuser and accused, which will be further explored in the discussion, *infra* Part IV, about weaknesses in the comics' current system.²²

Part I will discuss the comedians' perspectives on joke stealing in their community and their interest in additional legal protections. Part II will consider existing legal avenues that do not require instigating a formal lawsuit, namely the Digital Millennium Copyright Act ("DMCA") and the Copyright Claims Board ("CCB"). Part III will summarize the system of norms currently in place and discuss its most effective components for the purpose of developing additional protections that more effectively address the current state of joke theft enforcement. Part IV will identify the three principal weaknesses of the current enforcement system—the pitfalls of uncertainty, unequal borrowing power, and overprotection—to determine the proper areas of focus in crafting fitting solutions. Part V will suggest two potential additions to the norms-based system—(1) enforcement by venues and (2) creating a comedy union—both of which received sizable support from the sampled comedians. While copyright remains an ill-suited formal supplement to the norms-based system currently in place, we can take guidance from its facilitation of thorough fact-finding and a more equitable forum for resolution in crafting additional extra-legal support for the enforcement against joke theft.

I. PERSPECTIVES AND PREFERENCES OF COMEDIANS

While about only a quarter of the surveyed New York City comics indicated that they had personally fallen victim to joke theft,²³ the majority reported having known at least one colleague whose work had been stolen.²⁴ Despite varied personal experiences

22. Unlike the Oliar and Sprigman piece, *supra* note 7, which based its analysis on nineteen interviews with comedians based all around the United States, I wanted to limit the focus of this Note to one local community to account for the variances between stand-up culture nationwide and more effectively propose solutions for the New York group in particular.

23. To be exact, 23.81% of the respondents indicated that someone had stolen a joke from them. Anonymous Survey of New York City Comedians by Jared Hopper (Dec. 2022–Feb. 2023) (on file with author) [hereinafter Hopper NYC Comedian Survey].

24. 60% of respondents indicated that they were aware of at least one joke theft in their professional circle. *Id.*

with the offense, when asked what should happen to joke thieves, a clear consensus emerged: Punishment is necessary and deserved.²⁵ One respondent went so far as to equate capacity for originality with whether one could rightfully identify as a comedian:

I don't think [people] that steal material are comics. If you can't think of jokes, then what are you doing onstage. Similarly, if your material is stolen and you can't replace it with better material then you also shouldn't be doing standup. One funny set does not a comic make!!!²⁶

While perhaps joke theft occurs less frequently than one would expect, responses from the survey confirm that it really is considered the worst thing a comic can do “short of murder.”²⁷ The possibility of either falling prey to or being accused of the sin is a near inevitability. Furthermore, because even an intentional joke thief can escape the most severe social sanctions by changing a few words, or by presenting the material in a slightly different context, or by making sure to only steal material derived from common experience, comics cannot treat their sets as precious. Rather, under the current system, they must be ready to discard the product of their labor to remain a contender in the industry and to potentially avoid being labelled a hack themselves.²⁸

A. INTEREST IN ADDITIONAL LEGAL PROTECTIONS

Do comedians even *want* more robust protection against joke theft than what currently exists? Resoundingly, yes. The most frequent course of action reportedly taken by aggrieved comedians against alleged thieves, if action was taken at all,²⁹ was to privately condemn the accused among colleagues. Of the twenty-one surveyed, however, none felt that this informal of a method was adequate to consistently enforce the taboo against joke appropriation, and over half of the respondents expressed interest in supplementary legal protection to bolster the current system.

In her article about the intersection between joke theft and copyright law, Elizabeth Bolles contends that “[r]ather than incite Armageddon, increased copyright protection for jokes will bring positive social change by creating parity among comics, [and] allowing comics to settle disputes without needlessly ruining careers for lack of due process.”³⁰ Bolles’s argument is driven, at least in part, by her concern about the

25. On the whole, the responses demonstrated just how negatively comedians perceive joke thieves. One was particularly illustrative: “Call their ass out and black ball them mofos.” *Id.*

26. *Id.*

27. O’Brien, *supra* note 16.

28. *Hack* (comedy), WIKIPEDIA, [https://en.wikipedia.org/wiki/Hack_\(comedy\)](https://en.wikipedia.org/wiki/Hack_(comedy)) [<https://perma.cc/995A-545D>] [[https://web.archive.org/save/https://en.wikipedia.org/wiki/Hack_\(comedy\)](https://web.archive.org/save/https://en.wikipedia.org/wiki/Hack_(comedy))] (last visited Mar. 9, 2024) (defining a “hack” as a comedian who uses jokes or premises “considered obvious, has been frequently used by comedians in the past and/or is blatantly copied from its original author”).

29. A quarter of respondents indicated that nothing happened in response to joke theft accusations. Hopper NYC Comedian Survey, *supra* note 23.

30. Bolles, *supra* note 4, at 257.

disparity in resources between the “upper echelon[.]” and other comics, a concern shared by the comics themselves.³¹ Even if we assume that comedians at all levels could access lawyers consistently (Bolles suggests that access is not as burdensome as we might think³²), it is not clear whether comedians would actually engage with the additional protections unless we address the problems with the current copyright system that has proven unpopular in this context.

B. INTEREST IN LITIGATION

While the surveyed comedians expressed interest in bolstering the current norms-based system, where comedians police one another through community detection and reputational punishment, with additional legal protections, the vast majority expressed hesitation when asked whether they would take legal action against a joke thief. In figuring out what effective additional legal protection would look like, then, it may be helpful to identify why comedians rarely rely on copyright.

Comedians are hesitant to resort to courts, in part, because they are unaware of the formal legal protections available to them and feel ill-equipped to utilize this method. Only one comic reported knowing “a great deal” about the state of copyright as applied to the industry, and while five of the respondents indicated knowing something about it, the remainder indicated having absolutely no knowledge on the subject.³³ This is unsurprising: It is uncommon for individuals to intimately understand the contours of the legal framework in their chosen industry. That is what lawyers are for, after all. The bulk of comics do not have the resources to hire an attorney to sue alleged thieves,³⁴ but their hesitance to engage with the current legal system also stems from the relative ease of understanding and implementing the norms-based enforcement regime. Unlike copyright, informal norms are part of the known culture of the industry and are therefore manageable. All stand-up initiates will inevitably learn that joke stealing is a serious crime in comedy. In fact, “Thou Shalt Not Steal” is the first of the “New Ten Commandments in Comedy” set forth in Judy Carter’s *The New Comedy Bible*.³⁵ Knowledge of the ins-and-outs of the norms-based system naturally follows by continuing engagement with the community, seeing what happens when theft occurs, and observing what fellow comedians do about it.

31. *Id.* at 240. The power balance between most comedians and the “upper echelon” of the field is discussed in detail in *infra* Part IV.B.

32. Bolles, *supra* note 4, at 257 (“While the ability of comics to fund lawsuits may be questionable, the interviews conducted for this project suggest this may be less of a barrier than commonly thought.”).

33. One respondent marked knowing “a moderate amount” about copyright protections, and four indicated knowing “a little.” Hopper NYC Comedian Survey, *supra* note 23.

34. See Shyamkrishna Balganes, *Copyright Infringement Markets*, 113 COLUM. L. REV. 2277, 2280 (2013) (“To individual, small-business, or noncommercial actors, all of whom are intended beneficiaries of copyright, copyright litigation remains an unaffordable proposition.”).

35. JUDY CARTER, *THE NEW COMEDY BIBLE: THE ULTIMATE GUIDE TO WRITING & PERFORMING STAND-UP COMEDY 3* (2020).

In addition, to comedians, there is a concern that outsourcing enforcement will lead to undesirable consequences. Beyond the reality that litigation is often too expensive for the comics themselves to bring infringement claims,³⁶ there seems to be a reluctance to subject even a thief to legal fees. As one comic opined, “they [should] get the bad rep of being a joke stealer until they make a full and appropriate apology.”³⁷ Another expressed hesitation in public shaming, explaining that “they just need to know that it’s wrong.”³⁸ If joke thieves merely need to repent and cease the violative behavior to be forgiven, a formal lawsuit does seem like overkill. Even with greater knowledge of the current state of copyright protections, comedians would likely remain uncomfortable resorting to the courts.

Despite this hesitance to resort to the courts, it is not surprising that more comedians expressed interest in hypothetical “increased legal protections” for their material than they did for formal lawsuits. As will be discussed *infra* in Part IV, there are major flaws with the norms-based approach, and a more flexible legal or quasi-legal approach would operate as a welcome and helpful backstop for theft that proves more difficult to resolve. It is not that comics are not interested in legal avenues to protect the ownership of their material; they just do not want to pursue litigation.

II. CURRENTLY AVAILABLE LEGAL AVENUES OTHER THAN LITIGATION

What could these additional legal protections look like? Perhaps these adequate backstops already exist. Hannah Pham points to two somewhat recently created options, currently underutilized in the creative space, that could expand both access to copyright-adjacent protections and willingness to engage in the legal system: the Digital Millennium Copyright Act (“DMCA”) and the Copyright Claims Board (“CCB”).³⁹ Both options would in theory allow aggrieved comedians to use the law to resolve and remedy intellectual property disputes. However, neither quite fits the bill.

A. THE DIGITAL MILLENNIUM COPYRIGHT ACT

The DMCA contains a “notice-and-takedown” provision that “enable[s] copyright owners to have infringing online content removed without the need for litigation.”⁴⁰

36. See Balganes, *supra* note 34, at 2280 (“Litigating a copyright claim is no longer an affordable prospect for a vast majority of authors and creators.”).

37. Hopper NYC Comedian Survey, *supra* note 23.

38. *Id.*

39. Hannah Pham, Note, *Standing Up for Stand-Up Comedy: Joke Theft and the Relevance of Copyright Law and Social Norms in the Social Media Age*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 55, 78–83 (2019). At the time of Pham’s writing, the Copyright Claims Board—established very recently by the Copyright Alternative in Small-Claims Enforcement Act of 2020—was codified as 17 U.S.C. § 1502.

40. *The Digital Millennium Copyright Act*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/dmca/> [<https://perma.cc/LTE4-EJW7>] [<https://web.archive.org/save/https://www.copyright.gov/dmca/>] (last visited Mar. 9, 2024).

The DMCA places liability on internet service providers rather than the individuals who post the copyrighted work of another without permission, which encourages “copyright owners and online service providers to ‘cooperate to detect and deal with copyright infringements that take place in the digital networked environment.’”⁴¹ Many of the comedians that Pham interviewed “ha[ve] not utilized [the DMCA] . . . because they [are] unaware of its simplicity, effect, and applicability to them.”⁴² It does seem that the DMCA, at least in theory, would provide comedians with a straightforward method for taking down covered material. The content owner need only submit a notice-and-takedown request to a registered DMCA agent of the related service provider with the URL of the website that allegedly stole the material, the URL of the source material, and a description of the infringement.⁴³ After the process is initiated and the other party is given the opportunity to provide a counter-notice, the service provider then engages in a series of steps, and, depending on whether a counter notice is submitted, the provider will either keep the content down if a suit is timely filed or re-activate the content.⁴⁴ However, while content posted by the comics themselves on X (formerly Twitter) and TikTok (as is increasingly the case) would likely be covered by the DMCA, anything not posted online or posted online by another would not be protected.

While the right to publicity may protect comedians whose live performances have been filmed and posted online by audience members, the DMCA would not recognize a comic in that situation as the copyright holder. A “DMCA takedown does not always require the content to be copyrighted in order to process a takedown notice,” but the threshold to prove ownership to successfully file a complaint is quite high.⁴⁵ The U.S. Copyright Office provides a helpful example:

If you took the photo—for example, if it is a selfie—then you are likely the copyright owner and can submit a takedown notice under section 512. If you are in the photo but did not take the photo, you are most likely not the copyright owner and in that case could not send a takedown notice under section 512 to have the photo removed. You may have

41. Pham, *supra* note 39, at 79 (citing H.R. REP. NO. 105-551, pt. 2, at 21 (1998)).

42. *Id.* at 80.

43. *What Is a DMCA Takedown?*, DMCA.COM, <https://www.dmca.com/FAQ/What-is-a-DMCA-Takedown> [https://perma.cc/KS2Z-LMQJ] [https://web.archive.org/web/20240219234544/https://www.dmca.com/FAQ/What-is-a-DMCA-Takedown] (last visited Mar. 9, 2024).

44. *The DMCA Notice and Takedown Process*, COPYRIGHT ALL., <https://copyrightalliance.org/education/copyright-law-explained/the-digital-millennium-copyright-act-dmca/dmca-notice-takedown-process/> [https://perma.cc/B82E-ZDBF] [https://web.archive.org/web/20240309043340/https://copyrightalliance.org/education/copyright-law-explained/the-digital-millennium-copyright-act-dmca/dmca-notice-takedown-process/] (last visited Mar. 9, 2024). If a counter notice is not submitted, the content will also remain down. *Id.*

45. *What Is a DMCA Takedown?*, *supra* note 43.

other courses of action to seek removal of the photo under state privacy, right of publicity, or revenge porn laws.⁴⁶

Even if the DMCA did protect this kind of material, comics are generally not interested in removing fan-posted content. In fact, the filming of live sets is now more commonly welcomed by comics than condemned. As for the New York City stand-up community, audience members filming and posting sets gives the comedians an “opportunity to connect with fans more directly, get or give a boost to a wider audience, log which parts of their sets are clicking with audiences or need more work, and simply make people laugh.”⁴⁷ If it is true that uploading content to social media is “necessary unless you’re super famous,”⁴⁸ fan posts are more likely to be a boon than a threat.

Generally, only a few of the most well-known comedians are sufficiently concerned with audience members filming their sets to have actually done something about it. Perhaps most notably, in 2015 Dave Chappelle began to require those in attendance to place their phones in “smartphone-locking pouches” that would lock upon entering the theater.⁴⁹ When asked why he made this decision on *Jimmy Kimmel Live*, however, Chappelle did not indicate that he was concerned that his jokes would be stolen:

It became a thing where I was seeing a sea of cell phones, so I knew that anything I said in the room, I was saying to everybody, whether they were in the room or not. Which is not an empowering feeling as a comedian. You know, it’s like fight club rules apply: what I’m saying to you, I’d rather just keep in the room . . . I say a lot of crazy shit, man, when I’m on stage. It’s not malicious, but I have a good time.⁵⁰

46. Section 512 of Title 17: Resources on Online Service Provider Safe Harbors and Notice-and-Takedown System, U.S. COPYRIGHT OFF., <https://www.copyright.gov/512/> [<https://perma.cc/9YQC-HHKD>] [<https://web.archive.org/web/20240219235712/https://www.copyright.gov/512/>] (last visited Mar. 9, 2024).

47. Dan Reilly, *Go Ahead, Post These Comedians’ Sets on Instagram*, VULTURE (June 25, 2019), <https://www.vulture.com/2019/06/why-some-comedians-let-people-record-their-sets.html> [<https://perma.cc/B2YG-VDVS>] [<https://web.archive.org/save/https://www.vulture.com/2019/06/why-some-comedians-let-people-record-their-sets.html>].

48. Whitney Friedlander, *Is Social Media the New Comedy Club? Stand-Up Comics on How Digital Media Differs from Live*, VARIETY (July 22, 2023), <https://variety.com/2023/digital/actors/is-social-media-new-comedy-club-1235671674/> [<https://perma.cc/9P68-55QG>] [<https://web.archive.org/save/https://variety.com/2023/digital/actors/is-social-media-new-comedy-club-1235671674/>] (quoting comedian Taylor Tomlinson).

49. Seth Abramovitch, *How Dave Chappelle Is Creating a “No-Phone Zone” for His Chicago Shows (Exclusive)*, HOLLYWOOD REP. (Dec. 1, 2015), <https://www.hollywoodreporter.com/business/digital/how-dave-chappelle-is-creating-844886/> [<https://perma.cc/R5QP-SUGV>] [<https://web.archive.org/web/20240309044446/https://www.hollywoodreporter.com/business/digital/how-dave-chappelle-is-creating-844886/>].

50. Jimmy Kimmel Live, *Dave Chappelle Reveals Why He Has a No Phone Policy*, YOUTUBE (Mar. 22, 2017), <https://www.youtube.com/watch?v=M7Ev4N-2Zjw> [<https://perma.cc/JB9C-GVG8>] [<https://web.archive.org/web/20240323184516/https://www.youtube.com/watch?v=M7Ev4N-2Zjw>].

Chappelle, whose “good time” routinely sparks public outrage, seems only worried that his jokes will be taken out of context; he is not concerned that his jokes will be stolen but that they will get him “cancelled.”⁵¹

As for comics performing stolen material, the primary focus of this Note, the DMCA would not provide aggrieved comedians with a solution unless their goal were to take down a recording of the stolen set *that they themselves had filmed*.⁵² This, of course, is an unlikely, even ridiculous, situation. While the notice-and-takedown provision of the DMCA might grow in importance as it relates to appropriation of content initially posted by the source comedian, the increased risk of joke theft that might ensue by making one’s content more widely available seems outweighed by the notoriety that it can bring and therefore not a pressing problem for comedians. The DMCA, then, is not an ideal solution for the plight of comedians in the industry’s current state.

B. THE COPYRIGHT CLAIMS BOARD

Pham also hopes that small copyright infringement claims brought before the CCB could provide an effective avenue for redress, but comics are not likely to bite. The adjudicatory body, which only began accepting claims in June 2022, is composed of three officers who adjudicate copyright claims seeking up to \$30,000 in damages for those who do not wish to engage with the federal courts.⁵³ Two of the officers “have substantial experience in evaluation, litigation, or adjudication of copyright infringement claims” and the third, also well versed in copyright law, has a background in alternative dispute resolution.⁵⁴ Its extra-judicial nature carries both pros and cons

51. See, e.g., Aja Romano, *What Dave Chappelle Gets Wrong About Trans People and Comedy*, VOX (Oct. 23, 2021), <https://www.vox.com/culture/22738500/dave-chappelle-the-closer-daphne-dorman-trans-controversy-comedy> [https://perma.cc/QPW2-YCNN] [https://web.archive.org/save/https://www.vox.com/culture/22738500/dave-chappelle-the-closer-daphne-dorman-trans-controversy-comedy] (explaining the ongoing battle between trans activists and Chappelle over his habit of making trans identity the punchline of jokes); Megh Wright, *Louis C.K. Jokes About Masturbation and ‘Retarded’ Kids at San Jose Show*, VULTURE (Jan. 17, 2019), <https://www.vulture.com/2019/01/louis-ck-leaked-stand-up-set-masturbation-jokes.html> [https://perma.cc/TTM5-JJQX] [https://web.archive.org/save/https://www.vulture.com/2019/01/louis-ck-leaked-stand-up-set-masturbation-jokes.html] (discussing an example of leaked footage of an A-listers’ set prompting online outrage and “cancellation”). *Cancel*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cancel> [https://perma.cc/E6SP-23K5] [https://web.archive.org/save/https://www.merriam-webster.com/dictionary/cancel] (last visited Mar. 9, 2024) (defining “cancel” as “to withdraw one’s support for (someone, such as a celebrity, or something, such as a company) publicly and especially on social media”).

52. Since the DMCA, as discussed, only covers online media, the actual content of the set would not be subject to its protections; only the recording of the set by the person who filmed the set would be.

53. *About the Copyright Claims Board*, U.S. COPYRIGHT OFF., <https://www.ccb.gov/about/> [https://perma.cc/Q4WP-JLZC] [https://web.archive.org/save/https://www.ccb.gov/about/] (last visited Apr. 4, 2024).

54. *Frequently Asked Questions*, COPYRIGHT CLAIMS BD., <https://ccb.gov/faq/> [https://perma.cc/28TE-4ZG4] [https://web.archive.org/save/https://ccb.gov/faq/] (last visited Mar. 9, 2024); Pham, *supra* note 39, at 84.

for potential claimants. On the one hand, the CCB offers a streamlined, and therefore cost-effective, procedure designed to adjudicate disputes without the need for lawyers. With its ease, however, comes a few drawbacks. Its summary decisions can only be appealed in limited circumstances, and using the body forecloses bringing the same claim or related counterclaims later in federal court.⁵⁵

In proposing the CCB as a potentially promising legal solution for joke theft, Pham correctly identifies another disadvantage of the body: It requires the consent of both parties.⁵⁶ While federal courts are still available if the alleged joke thief does not consent to CCB adjudication, this, as discussed *supra* Part I.B, is not a viable option for most comics. After all, “one of the main goals” of the CCB is “to provide a simpler venue to those *who need it the most*.”⁵⁷ Those who need it most cannot afford to use the courts. Without real threat of litigation, furthermore, it is hard to imagine that respondents would willingly make it easier for the claimant to take legal action against them. Refusing to appear before the CCB is a surefire way to foreclose any currently available legal avenue for most aggrieved comedians.

As it relates to stand-up comedians, moreover, the CCB does not help them clear one of the main hurdles of copyright protection for their work: the “tangibility” requirement.⁵⁸ It is true that claims can be brought despite not having first registered material with the Copyright Office if claimants “have submitted an application to register the work(s) either before or simultaneously with filing the claim.”⁵⁹ The stolen material, however, must still qualify for copyright protection for the comedian to submit an application in the first place. The reality is that the “nature of the art sometimes makes this requirement difficult to meet . . . Unless the comedian is meticulous in fixing jokes as they change, the fixation requirement may not be met, and the joke would remain unprotected against copying until fixed.”⁶⁰ The CCB fails as a tenable addition to the enforcement against the appropriation taboo, in part, because of the ever-changing nature of a comic’s act. Comics try out variances in jokes night after night to discover what works best prior to finalizing a set, and even when finalized, perhaps even if written down, a set is not actually “set” because the comic is not the sole creator of their material; comedians inevitably stray from the script to

55. *Id.*

56. *Id.*

57. William Honaker, *The New Copyright Small Claims Board Presents Problems for Copyright Owners and Small Businesses*, IPWATCHDOG (Mar. 2, 2021) (emphasis added), <https://ipwatchdog.com/2021/03/02/new-copyright-small-claims-board-presents-problems-copyright-owners-small-businesses/id=130343/> [<https://perma.cc/MD7J-3Z4B>] [<https://web.archive.org/web/20240309230755/https://ipwatchdog.com/2021/03/02/new-copyright-small-claims-board-presents-problems-copyright-owners-small-businesses/id=130343/>].

58. 17 U.S.C. § 102(a) (“[A work must be] fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).

59. *Frequently Asked Questions*, *supra* note 54.

60. Oliar & Sprigman, *supra* note 7, at 1801–02.

match the response of that night's audience, making each show different. Matt Ruby, a New York-based comic, illustrates this interdependent relationship:

They tell you every night if you're being authentic or if you're just reciting some lines. They shrug at things that excite you. They lose it at the things you think are nothing. They make you question yourself all the time. They're right. Even when they're wrong, they're right. They are your partner in creation.⁶¹

Although both the DMCA and CCB may be viable alternatives for those comedians with content published online who seek redress beyond that provided by the norms-based system, neither option seems particularly suited to the stand-up industry as a whole. Unless copyright availability changes drastically, the current legal solutions will continue to serve as an enforcement mechanism for only a small subset of joke theft allegations.

It seems that while comics are interested in using the law to enforce against joke theft, no legal mechanism currently exists that would apply in a meaningful way to the intangible and ever-changing nature of performed comedic material. Perhaps the realities of the stand-up comedy industry are incompatible with a purely legal solution, and it would be better to get creative, break down the norms-based system, and determine how best to import components of legal redress in a way that not only preserves the efficacy of the current approach but also addresses some of the pitfalls leading to inconsistent enforcement. In attempting to bolster the protections against joke theft while respecting the preferences of comedians, *learning from* the law might be better than *leaning on* the law.

III. THE MECHANISM BEHIND NORMS-BASED ENFORCEMENT

For the most part, the current system of norms-based enforcement is effective. Its informal, in-house character allows for case-by-case flexibility regarding both the approach to dispute resolution and the punishment for joke thieves, ensuring redress without necessarily ruining careers. It is also free. In determining additional mechanisms to effectively bolster protections against appropriation, we should deconstruct how the norms-based regime functions, identifying the ways it works well in order to discern more acutely the weaknesses that a law-oriented approach might address.

A. DETECTION

Career opportunities for stand-up comedians are largely driven by their reputation. Steal a joke, and other comics will privately shame the thief within the community, and

61. Matt Ruby, *What I've Learned from 10 Years of Doing Standup Comedy*, MEDIUM (Nov. 30, 2016), <https://medium.com/sandpapersuit/10-years-1-hour-594afc510141> [https://perma.cc/8C9T-X87W] [https://web.archive.org/save/https://medium.com/sandpapersuit/10-years-1-hour-594afc510141].

the thief will lose work as a result. As one of Oliar and Sprigman's interviewees explains, "If you steal jokes, [other comedians] will treat you like a leper, and they will also make phone calls to people who might give you work."⁶² Joke thieves are most often caught by fellow comedians at comedy clubs who are either also performing or simply observing.⁶³ This "community project" of watching colleagues that enables the appropriation taboo to be enforced, as Oliar and Sprigman note, is "motivated in part by curiosity and the desire to see new talent, but also for the purpose of detecting joke stealing from themselves, from their friends, or from the classics."⁶⁴ That local communities are small and tight-knit also aids in the effective functioning of this mechanism. For instance, because of the frequency of gigs and the time it takes to build a complete set, comedians often know the material of their colleagues well enough to notice a knockoff.⁶⁵

B. POTENTIAL RESOLUTION

It is atypical for a comedian accused of joke theft to be immediately sanctioned. Oliar and Sprigman report that the initial step for a comedian who believes that their work has been stolen is usually to directly confront the alleged joke thief:

The aggrieved comedian will state his claim and provide evidence by detailing the similarities between the jokes and how long he has performed the joke. He might also state where the joke was performed and name potential witnesses. The accused party would then respond. Although these are charged situations, the parties generally sort out their differences amicably.⁶⁶

Because of the high probability that similarities between jokes are the result of independent creation and not theft, occasional dispute over ownership is inevitable in these initial negotiations.⁶⁷ Even then, however, comedians often reach a compromise that will avoid future conflict.⁶⁸

Since this norms-based regulation is community driven, often a joke thief will be confronted not by the aggrieved party but instead by a colleague who knows the material well enough to notice a potential theft. It seems that whether an unaffected,

62. Oliar & Sprigman, *supra* note 7, at 1815 (alteration in original).

63. *Id.* at 1813.

64. *Id.*

65. *Id.*

66. *Id.* at 1814.

67. Bolles, *supra* note 4, at 252 (noting that "[t]he comedy industry professionals surveyed for this project were each asked: 'In general, how often do you think comics create jokes that could not be independently created by another comic?' All offered the same response: 'sometimes[,]'" which suggests independent creation should be the default assumption); Oliar & Sprigman, *supra* note 7, at 1814 ("[Independent creation] often happens—and the possibility of independent creation is more believable—when jokes plow common themes . . . or relate to events of the day.").

68. Oliar & Sprigman, *supra* note 7, at 1814 (writing that in the case of independent creation, "comedians often work cooperatively towards a solution").

third-party comedian chooses to intervene, however, depends not as much on the degree of observed similarity between two jokes but more on the extent to which there is evidence that the theft was intentional. The majority of surveyed comedians who knew that one set was identical to that of another comedian indicated difficulty in determining whether the theft was accidental, a subconscious copying of the language, or purposeful. In some cases, when the set was copied “verbatim” or there existed a “blatant similarity” between the material, the comedians had no qualms definitively saying that one had stolen from another and that the thief should face the full force of social sanction.⁶⁹ In less extreme cases, however, a third-party comedian will not typically act unless there is clear evidence of intentionality and certainty in who came up with the material first. One comic explained how in such cases, inaction is the default even if theft clearly occurred:

I saw one comic do my friend’s set so blatantly I was amazed but I honestly didn’t know whose bit it was first so didn’t say anything. Someone stole somebody’s set though. Have seen absolutely no repercussions and the girl [and] my friend continue to constantly get booked (PS—the bit’s not even worth stealing).⁷⁰

Because of the severity of the appropriation taboo, even a private confrontation of joke theft is a big deal. When uncertainty is in the mix, negotiation is still a more likely first step than reputational attack, but acting to enforce against joke theft, in general, seems to operate on a sliding scale that, as one surveyed comic put it, “depend[s] on the intention and impact behind the stolen material.”⁷¹ The informality of this approach to resolution provides aggrieved comedians and involved third parties tremendous flexibility in how to tailor a confrontation to appropriately address intentional and unintentional theft.

C. CONSEQUENCES

If private negotiation fails, the comedian will likely be accused of stealing material within the community, and their reputation will, in turn, suffer severe damage. Social sanction is the main vehicle for punishment, and loss of work seems to be the most common consequence of that reputational stain. However, other consequences occur with enough frequency to warrant mention here. Even if the offense does not result in the direct loss of work, many of the comedians surveyed emphasized alternative enforcement mechanisms against those who steal within the community. For instance, comedians, upon learning of the theft, might refuse to work with that thief again. Because any given night at a comedy club will feature several comedians, a venue that hires a known joke thief would face the difficult decision of choosing between the thief

69. Hopper NYC Comedian Survey, *supra* note 23.

70. *Id.*

71. *Id.*

and the holdouts to remain on the night's lineup.⁷² As Oliar explained in an interview on the subject, "People are not going to be willing to work with you on a comedy bill . . . and if you can't find other people who are willing to share the stage with you, you're pretty much gonna be out of work."⁷³

IV. WEAKNESSES OF THE EXTRA-LEGAL, NORMS-BASED APPROACH

Despite its efficacy, the norms-based regime has three primary faults: (1) the high probability that similarity between sets is the product of independent creation and not theft; (2) the unequal power to borrow material from others between budding and "upper echelon" comedians; and (3) the overprotection resulting from public involvement.

A. THE PITFALL OF UNCERTAINTY

A central problem with policing joke theft is figuring out whether a theft actually occurred. Parallel thinking very frequently leads to the independent creation of similar jokes. This is the case particularly when jokes stem from universal experience or recent news, but independent creation is a widespread problem regardless of the jokes' content.⁷⁴ One surveyed comedian explained just how difficult it is to discern theft from mere similarity: "I'm not sure how to determine [that] a joke was stolen versus a result of parallel thought unless the wording was just about verbatim."⁷⁵ Even then, as was the case with a few jokes in dispute in *Kaseberg*,⁷⁶ an exact match between language does not constitute proof of ownership.

Of course, catching joke theft depends on how we define ownership, and independent creation becomes irrelevant when we focus on the central importance of origination to the appropriation taboo. As Jennifer E. Rothman suggests, "the comedy norms do not appear to be driven by interest in a fair allocation of rights. Instead, they seem one-sided, focused solely on a joke's originator, without consideration of the potential needs of users or independent creators of similar or related jokes."⁷⁷ If Rothman is right that ownership in the norms-based system depends on whoever

72. See Oliar & Sprigman, *supra* note 7, at 1817.

73. Bolles, *supra* note 4, at 254–55 (quoting *Take My Joke, Please: Transcript*, WNYC STUDIOS (Apr. 9, 2010), <https://www.wnycstudios.org/podcasts/otm/segments/132742-take-my-joke-please?tab=transcript> [<https://perma.cc/R55S-BCFH>] [<https://web.archive.org/web/20240217192411/https://www.wnycstudios.org/podcasts/otm/segments/132742-take-my-joke-please?tab=transcript>]).

74. Dotan Oliar & Christopher Sprigman, *Intellectual Property Norms in Stand-Up Comedy*, in *MAKING AND UNMAKING OF INTELLECTUAL PROPERTY: CREATIVE PRODUCTION IN LEGAL AND CULTURAL PERSPECTIVE* 385, 385 (Mario Biagioli et al. eds, 2011).

75. Hopper NYC Comedian Survey, *supra* note 23.

76. See *Kaseberg v. Conaco, LLC*, 260 F. Supp. 3d 1229, 1243–47 (S.D. Cal. 2017).

77. Jennifer E. Rothman, *Custom, Comedy, and the Value of Dissent*, 95 VA. L. REV. IN BRIEF 19, 22 (Apr. 20, 2009).

developed the joke “first-in-time,” a common conception of ownership in property law,⁷⁸ then knowing *when* a joke was first created could provide a heuristic to, or at least supplement, the detection of joke theft. As it stands, however, the informality of the detection mechanism in the norms-based system makes it nearly impossible to know who came up with the material first. Comic A might see Comic B doing a set the week after Comic A saw Comic C perform the same set, but without having data about every single one of both comics’ recent performances, there is no way to know for sure who originated the joke.

Comics are very hesitant to step in to enforce social norms without certainty that a fellow comedian’s joke has been stolen, and the likelihood of independent creation (which seems more important to some than others) exacerbates uncertainty. Furthermore, regardless of whether we choose to discount independent creation’s relevance to the question of theft and proceed with the “first-in-time” heuristic to ownership, there is no reliable fact-finding mechanism currently available to determine who originated a joke.

B. THE PITFALL OF UNEQUAL BORROWING POWER

The punitive force of individual comedians refusing to share the stage with joke thieves, one of the primary methods of social sanction, discussed *supra* in Part III.C, loses its strength “if the monetary rewards of booking a particular comedian are great enough.”⁷⁹ The disparity in treatment between amateurs and the “upper echelons,” as Bolles describes the most marketable comedians of the industry, reveals another central problem to a norms-based approach.⁸⁰ If hiring decisions in the world of stand-up are driven by the extent to which comedy can be commercialized, as it seems to be, then the punishment of more famous joke thieves may be more effective if it is done out in the open. In the era of “canceling” public figures through social media, it should be no surprise that comedians increasingly turn to X (formerly Twitter) to punish the “upper echelon” of comedians often immune to the typical consequences of joke theft.⁸¹

One of the most recent examples of this phenomenon is the slew of accusations against comedian Amy Schumer.⁸² After Schumer reached ultimate mainstream status

78. See Lawrence Berger, *An Analysis of the Doctrine that “First in Time is First in Right,”* 64 NEB. L. REV. 349 (1985).

79. Oliar & Sprigman, *supra* note 7, at 1818.

80. Bolles, *supra* note 4, at 240.

81. See Aja Romano, *Why We Can’t Stop Fighting About Cancel Culture*, VOX (Aug. 25, 2020), <https://www.vox.com/culture/2019/12/30/20879720/what-is-cancel-culture-explained-history-debate> [<https://perma.cc/SH2H-V9AY>] [<https://web.archive.org/save/https://www.vox.com/culture/2019/12/30/20879720/what-is-cancel-culture-explained-history-debate>].

82. Alex Abad-Santos, *Amy Schumer’s Alleged Joke Stealing, Explained*, VOX (Jan. 27, 2016), <https://www.vox.com/2016/1/27/10839856/amy-schumer-joke-stealing> [<https://perma.cc/UH8B-XTK3>] [<https://web.archive.org/save/https://www.vox.com/2016/1/27/10839856/amy-schumer-joke-stealing>].

with the theatrical release of her movie *Trainwreck*,⁸³ at least three comedians tweeted that Schumer had stolen their work.⁸⁴ In response, non-comedians began to speculate online, creating compilation videos on YouTube comparing Schumer's material side-by-side with that of other comedians, and it was not long before Schumer was widely associated with stealing jokes.⁸⁵ Sarah Gamblin seems to be correct when she argues that "when looking at the material in question, it is very hard to determine if [her innocence] is true or not But as of right now there is no other process for Schumer to try to clear her name. The community has to either take her at her word or believe her accusers."⁸⁶ This example demonstrates that while public condemnation of the upper echelon is possible, it may not have the desired effect of stopping these comedians from stealing the work of others or concretely punishing them in any way. For instance, there is no evidence that Schumer lost any work or a significant portion of her fanbase despite the reputational stain caused by these accusations.⁸⁷

C. THE PITFALL OF OVERPROTECTION

If comedians like Schumer are wrongly accused, the reputational injury that follows from their public condemnation certainly would be a step too far. Elizabeth Bolles sees the potential for disproportionate or unjust punishment as "overprotect[ion]," a "lack of due process" that "grant[s] comics a monopoly in not only the expression of a joke, but also in relatively novel ideas."⁸⁸ In Schumer's case, although the original accusers have all since removed their tweets accusing Schumer,⁸⁹ one even walking back her

83. TRAINWRECK (Universal Pictures 2015).

84. Abad-Santos, *supra* note 82.

85. See, e.g., The Tangerine Show, *Amy Schumer Joke Stealing Compilation – All Examples*, YOUTUBE (Apr. 15, 2017), <https://www.youtube.com/watch?v=4eDxjxV18S0> [<https://perma.cc/XU9H-LA4Q>] [<https://web.archive.org/web/20240404150627/https://www.youtube.com/watch?v=4eDxjxV18S0>] (presenting a twenty-six-minute-long compilation video, which compares some of Schumer's jokes with that of the original accusers as well as many other well-known stand-up comedians, showing striking similarities).

86. Sarah Gamblin, *This Is No Laughing Matter: How Should Comedians Be Able To Protect Their Jokes?*, 42 HASTINGS COMM. & ENT L.J. 141, 149 (2020).

87. In fact, Schumer's career has continued to progress despite the controversy. Since the initial allegations of joke stealing, she has had three stand-up specials, her own Hulu show, and an HBO Max documentary, and was a co-host for the 2022 Academy Awards, for example. *Amy Schumer*, WIKIPEDIA, https://en.wikipedia.org/wiki/Amy_Schumer#cite_note-129 [<https://perma.cc/4Q69-7PEL>] [https://web.archive.org/save/https://en.wikipedia.org/wiki/Amy_Schumer#cite_note-129] (last visited Apr. 4, 2024). She also has hosted *Saturday Night Live* twice since the controversy and, in 2022, was the sixth-watched host of season forty-eight out of eighteen other hosts. *Saturday Night Live Season 43*, WIKIPEDIA, https://en.wikipedia.org/wiki/Saturday_Night_Live_season_43 [<https://perma.cc/D88S-4MAZ>] [https://web.archive.org/web/20240421160932/https://en.wikipedia.org/wiki/Saturday_Night_Live_season_43] (last visited Apr. 21, 2024); see *Saturday Night Live Season 48*, WIKIPEDIA, https://en.wikipedia.org/wiki/Saturday_Night_Live_season_48#cite_note-23 [<https://perma.cc/4NMK-L53T>] [https://web.archive.org/web/20240413031821/https://en.wikipedia.org/wiki/Saturday_Night_Live_season_48#cite_note-23] (last visited Apr. 4, 2024). Suffice it to say, her career has not slowed down.

88. Bolles, *supra* note 4, at 255–56 (citing Oliar & Sprigman, *supra* note 7, at 1822–23).

89. See Abad-Santos, *supra* note 82.

allegation on a radio talk show,⁹⁰ and Schumer took a polygraph test to prove her innocence,⁹¹ the reputational stain remains.⁹² When non-comedians take investigations into their own hands, there is a “danger of airing such things too publicly, of broadcasting such grievances too widely and inviting certain parties (like the media!) in on the conversation.”⁹³ Thus, “the aggrieved parties are better off going one-on-one with the alleged offenders” in cases where the potential for widespread publicity is high.⁹⁴

The overprotection of the norms-based system impacts the community beyond unjust reputational damage. For instance, there are fewer incentives to create new material or even showcase pre-existing material: Tweet-happy comedians ready to accuse a colleague, even though they seem to be in the minority, intimidate others from regularly appearing at comedy clubs, the breeding ground for most allegations. This fear impacts amateurs and “upper echelon” comedians alike, particularly if a comedian has been previously accused of joke theft, illustrated by Oliar and Sprigman’s discussion of Robin Williams:

Reputational harm may also last forever and be out of proportion to the violation. Comedian Robin Williams has admitted that he avoids entering comedy clubs because he does not want to ever again be subject to a charge of joke stealing. If Williams, winner of three Grammy awards for best comedy album, is unable to enter comedy clubs ten years after he has been accused of joke stealing, then we might worry that, on occasion, the norms system overdeters.⁹⁵

Despite its wide sweep, overdeterrence is not a purely equitable force. One surveyed comic expressed concern that the norms-based system, again, favors the “upper echelon”: “I don’t know how you would know who originated a joke. I could see [people] who are more influential in the comedy scene abusing their power to make

90. Emma Nolan, *Amy Schumer Takes Lie Detector Test Years After Joke-Stealing Claims*, NEWSWEEK (Apr. 6, 2022), <https://www.newsweek.com/amy-schumer-takes-lie-detector-test-joke-stealing-1695600> [<https://perma.cc/B9RC-5QF9>] [<https://web.archive.org/save/https://www.newsweek.com/amy-schumer-takes-lie-detector-test-joke-stealing-1695600>] (writing that the polygraph confirmed Schumer’s “no” answer to the question of whether she “had ever stolen jokes” was the truth).

91. Ree Hines, *Amy Schumer Vows To Take a Polygraph Test To Prove She Doesn’t Steal Jokes*, TODAY (Jan. 21, 2016), <https://www.today.com/popculture/amy-schumer-vows-take-polygraph-test-prove-she-doesn-t-t68206> [<https://perma.cc/G87E-UY74>] [<https://web.archive.org/save/https://www.today.com/popculture/amy-schumer-vows-take-polygraph-test-prove-she-doesn-t-t68206>].

92. The Tangerine Show, *supra* note 85. Comments appear daily on the most popular YouTube compilation video, which has 8.8 million views, and nearly all express the belief that Schumer is in fact a joke thief, despite the height of the controversy being well in the past.

93. Oliar & Sprigman, *supra* note 7, at 1822 (quoting Brian McKim & Traci Skene, *Who Steals from Whom? Who Cares?*, SHECKYMAG. (Nov. 2, 2007), <https://sheckymagazine.com/2007/11/who-steals-from-whom-who-cares/>) [<https://perma.cc/5PTX-FTX2>] [<https://web.archive.org/save/https://sheckymagazine.com/2007/11/who-steals-from-whom-who-cares/>]).

94. *Id.*

95. *Id.* at 1838 (citation omitted).

any kind of ‘comedy justice’ biased and could really damage the reputation of less influential comics.”⁹⁶ In a dispute between comedians at different levels of success, more people might believe an “upper echelon” comedian claiming ownership of a joke than they would a less successful one. For instance, for a period of four years, fans of Louis C.K. accused Dane Cook, far less established at the time, of stealing C.K.’s jokes. Although the accusations did not come directly from C.K., Cook explained that C.K. “let other people say it,” which he believed had the same effect.⁹⁷ In order for the reputational attacks of Cook to finally cease, C.K. had to bring Cook onto his show, *Louie*, and explicitly dismiss the allegations. This suggests that the default in such cases is that the public sides with the more popular figure, regardless of proof of joke theft.⁹⁸

V. PROPOSED SOLUTIONS

In determining solutions to confront these problems with the norms-based enforcement system, borrowing key features from legal avenues may be a good start. In particular, the facilitation of effective fact-finding may help address the pitfall of uncertainty, and the presence of a neutral fact-finder may, to a certain degree, address the pitfall of unequal borrowing power.⁹⁹ As for the pitfall of overprotection, the concern for disproportionate punishment that arises from delegating enforcement to a group outside of the stand-up community cautions us from vesting decision-making power in a non-comedian. All things considered, an ideal solution that most completely bolsters the current regime would likely be extra-legal in nature but would borrow from the law in the ways discussed.

While only half of those surveyed were interested in additional legal protection, all who found the current system inadequate were in favor of additional non-legal protection. The proposed solutions that garnered the most interest were venue-by-venue joke theft reporting with corresponding bans on joke thieves and unionizing to ease resolution of disputes. A stand-up comedy union, if practicable, might also be a neat solution to the problem of incentives presented by the first proposed venue-led mechanism. I will address the potential of each in turn.

96. Hopper NYC Comedian Survey, *supra* note 23.

97. Sean L. McCarthy, *Dane Cook Confronts Louis CK in an Honest Way About Joke Theft*, THE COMIC’S COMIC (Aug. 5, 2011), <https://thecomicscomic.com/2011/08/05/dane-cook-confronts-louis-ck-in-an-honest-way-about-joke-theft-read-the-transcript-watch-the-video/> [https://perma.cc/B66W-G8LT] [https://web.archive.org/save/https://thecomicscomic.com/2011/08/05/dane-cook-confronts-louis-ck-in-an-honest-way-about-joke-theft-read-the-transcript-watch-the-video/].

98. *Id.*

99. A copyright infringement lawsuit, in particular, facilitates for the most part, liberal sharing of discovery between parties. In addition, a lawsuit is decided in a neutral forum, preventing the problem of public cancellation growing out of proportion.

A. VENUES AS REPOSITORIES FOR FACT-FINDING

Comedy clubs already have a hand in policing joke theft. As discussed *supra* Part IV.C, the venues have most of the power when it comes to deciding whether or not to ban a comedian. Since the current system relies on loss of work and not just reputational damage to deter joke appropriation, venues are critical in giving social sanction force. Comedians can spread the word or refuse to work with the accused all they want, but unless venues have opted-in to hiring only those with clean records, the system would fail. The problem is that venues are most often motivated by ticket sales and not reputation in isolation, so it is not necessarily the case that they share the values central to making the norms-based enforcement system work.¹⁰⁰ This disconnect is apparent when we look at the exploitative fee-sharing agreements between comics and clubs:

There's little incentive for the club owners and PR managers to pay more when there is a "glut of comics willing to work [for] nothing, sleep on couches, and keep day jobs. . . . Running the clubs has become more expensive and with willing comics, [club owners] justify [paying very little] by saying that their profit margin is down, denying that, yes, it's more expensive for everyone."¹⁰¹

For venue regulation to protect comedians more adequately, we must align the incentives of comics and clubs.

If clubs would be willing, implementing joke-detection methods venue-to-venue might aid with the fact-finding process missing in joke theft disputes and, in turn, might further deter instances of the taboo. Much of the difficulty in detecting joke theft arises from the absence of any objective and reliable information from which to support an allegation. One proposition is that venues record all shows and keep the dated and labeled footage solely for the purposes of answering such questions between the accused and the accuser. Before resorting to perhaps unwarranted reputational damage, individuals could request the footage from the venues where the comedians performed the similar sets in question to determine who came up with the material first.

At least some venues seem willing to play a larger role in the enforcement against joke theft. As a representative of West Side Comedy Club explained, "[u]nfortunately we have nothing in place and in fact [joke theft] is almost impossible to prevent. . . . I suspect it would be impossible to prove. I do stand up and have seen multiple comedians do identical jokes to mine. . . . [b]ut curious if you come up with anyone trying."¹⁰² A "perfect comedy club" is one with an owner who "know[s] what good comedy is and

100. See *supra* Part V.B for a discussion of how "upper echelon" comedians are more likely to evade the consequences of joke theft in a norms-based system.

101. Rebecca Rush, *The Comedy Industry Is Flirting with an Uprising*, MIC (May 31, 2022) (quoting comedian Jackie Kashian), <https://www.mic.com/impact/comedians-low-wages-comedy-strike> [<https://perma.cc/7LWN-SBKP>] [<https://web.archive.org/save/https://www.mic.com/impact/comedians-low-wages-comedy-strike>].

102. Email from West Side Comedy Club to Author (Jan. 13, 2023) (on file with author).

what is required to help it thrive,” and the comedy industry cannot thrive with hacks running amok, zapping it of the originality that provides its value.¹⁰³ Without most venues opting in to such a system, however, it would be too easy for joke thieves to avoid the clubs interested in helping out. It is important, then, to think about how we might convince the holdouts.

At least some venues may not want to invest time and money into creating and maintaining such a system, but it could be in the holdouts’ best interest to do so. The clubs decide which comics to hire, but comics give the venues their value. For example, the Comedy Cellar in New York City achieved national fame only after Louis C.K. mentioned the venue in a set.¹⁰⁴ This popularity and respect that easily follow from the clubs’ association to respected comics, however, can be taken away by changing the perceptions of these same comics. After Louis C.K. admitted to allegations of inappropriate sexual behavior, he performed a surprise comeback set at the very same Comedy Cellar, “thrusting [the] club into the limelight” and “substantially affecting” the life of the club’s owner, whose reputation took a severe hit.¹⁰⁵ In addition to the negative press, a few other famous comedians refused to work at the club, deepening its reputational wound and resulting in commercial losses.¹⁰⁶ For a period, going to or performing a show at the Comedy Cellar, to some, was the equivalent of actively supporting C.K., regardless of whether he was expected to perform on any given night. This anecdote makes clear that comedians, at least those who do not need the exposure, want to work at venues that share their values. For clubs that seem primarily concerned with revenue, however, the values held by the *patrons* matter more.

Even if we assume that patrons care about the personal offenses of comedians, how can we make audiences care more about joke theft to the point where the venues would need to respond? Fans follow their favorite comics, so a boycott by the “upper echelon,”

103. Olivia Cathcart, *The Do's and Don'ts of Running a Comedy Club*, PASTE (Oct. 22, 2019), <https://www.pastemagazine.com/comedy/comedy-clubs/what-does-the-perfect-comedy/> [<https://perma.cc/W9VG-ERYM>] [<https://web.archive.org/save/https://www.pastemagazine.com/comedy/comedy-clubs/what-does-the-perfect-comedy/>].

104. John Wenzel, *The 15 Best Comedy Clubs in North America*, VULTURE (Apr. 20, 2016), <https://www.vulture.com/2016/04/the-15-best-comedy-clubs-in-north-america.html> [<https://perma.cc/24JB-YT6F>] [<https://web.archive.org/web/20240309070042/https://www.vulture.com/2016/04/the-15-best-comedy-clubs-in-north-america.html>].

105. Anne Victoria Clark, *The Owner of the Comedy Cellar Is Upset with Louis C.K.: My Life Has Been Substantially Affected*, VULTURE (Sept. 7, 2018), <https://www.vulture.com/2018/09/club-owner-upset-louis-c-k-substantially-affected-his-life.html> [<https://perma.cc/65HA-BVCX>] [<https://web.archive.org/save/https://www.vulture.com/2018/09/club-owner-upset-louis-c-k-substantially-affected-his-life.html>].

106. Megh Wright, *Leslie Jones Stopped Performing at the Comedy Cellar in Protest of Louis C.K.*, VULTURE (Jan. 16, 2020), <https://www.vulture.com/2020/01/leslie-jones-comedy-cellar-louis-ck.html> [<https://perma.cc/5LWC-ALGM>] [<https://web.archive.org/save/https://www.vulture.com/2020/01/leslie-jones-comedy-cellar-louis-ck.html#>] (explaining that Leslie Jones, former *Saturday Night Live* cast member and famous stand-up comedian, chose instead to become a regular at another club that “took [Louis C.K.’s] picture down”).

like in the Comedy Cellar example, would generally be effective to some degree, but it is hard to say whether a venue would consistently take a commercial hit absent such a boycott. True fans are extraordinarily forgiving, after all. As Elahe Izadi writes, although “C.K. may no longer be celebrated as an auteur, he still has an audience,” responding to the fact that two years after his “cancellation,” the comic was back to performing to sold-out theaters.¹⁰⁷ If, at the end of the day, fans do not care enough about a comedian’s confessed sexual predation to stop buying tickets, the chances that they would do so upon hearing allegations of joke theft seem low. Furthermore, it is unlikely that the reputational ebb and flow of lesser-known comedians would move the needle at all on the holdouts’ choice to opt in to a venue-led system of enforcement because the clubs simply would not hire those who present even a remote risk of decreased ticket sales; for the non-C.K.s of the industry, comedians rely more on venues for exposure rather than the reverse.

Ultimately, solving the incentive problem for venues would likely require a major shift in the power dynamic between comics and comedy clubs. The discussion of the interplay between the venues and the artists they showcase is worth thinking about in its potential to incite change, but until comedians at all levels can effectively impose their values on these institutions, we cannot necessarily expect venues to increase their cooperation in policing the appropriation taboo.

B. A COMEDIANS’ UNION

If punishing joke thieves is already a community-based project, why not take it a step further and form a union? Assuming that enough comedians would be willing, collectively refusing to perform at venues that do not implement additional mechanisms would carry more force than individual demands. Almost every artistic profession has unionized at this point, but the comedy industry has only ever created short-lived *coalitions*, not unions. Even these “fledgling” groups, however, have indicated the potential for effecting meaningful change; in response to threats of “picket lines and protests, complete with a giant inflatable rats,” four hundred stand-up comedians succeeded in securing raises from several New York comedy clubs (including the powerful Comedy Cellar).¹⁰⁸ The group behind this, the Comedians Coalition, is no longer in operation, but its success here is notable. It suggests a general

107. Elahe Izadi, *Louis C.K.’s Sexual Misconduct Tanked His Career. Now He’s Selling Out Theaters*, WASH. POST (Mar. 11, 2020), <https://www.washingtonpost.com/arts-entertainment/2020/03/11/louis-ck-new-standup/> [https://perma.cc/B7WS-AJBM] [https://web.archive.org/web/20240309071135/https://www.washingtonpost.com/arts-entertainment/2020/03/11/louis-ck-new-standup/].

108. David Segal, *Comedians Coalition Finally Gets a Little Respect*, WASH. POST (Feb. 11, 2005), <https://www.washingtonpost.com/archive/lifestyle/2005/02/12/comedians-coalition-finally-gets-a-little-respect/cb22bedc-36a2-4c7e-9f50-503b9ce47fae/> [https://perma.cc/NEC6-JRQ7] [https://web.archive.org/save/https://www.washingtonpost.com/archive/lifestyle/2005/02/12/comedian-s-coalition-finally-gets-a-little-respect/cb22bedc-36a2-4c7e-9f50-503b9ce47fae/].

willingness on the part of the New York comedy clubs to negotiate. If clubs are willing to negotiate fees and arrangements, it stands to reason that even holdouts might be willing to invest in a system like that previously proposed *supra* in Part V.A, among others, if threatened with a strike.

A union could also enforce the appropriation taboo among its membership by facilitating resolution of disputes. Although many performers' unions collect dues from their members to negotiate contracts with venues to ensure fair wages, safe working conditions, and other relevant protections, none have a mechanism that would police the intellectual property theft *among* their memberships as would be needed here.¹⁰⁹ These unions have not, however, turned a blind eye to safeguarding intellectual property. The Writers' Guild of America West, for instance, supplements the copyright protections available to writers by allowing them to register early scripts, concepts, and even slightly fleshed-out ideas in a database for only ten dollars for members in good standing and twenty dollars for everyone else, creating immediate evidence of ownership.¹¹⁰ Such a system is centralized, unlike a venue-to-venue repository of performances, and, unlike copyright, would offer a low-cost paper trail of a comic's ideas to use as an evidentiary sword and shield for possible disputes down the line. Of course, a union registry would not ease the difficulty in proving that similarities between sets or jokes are the result of joke theft and not independent creation, but it would at least catch instances of blatant copying. A registry would certainly provide a way to decide who came up with the disputed material first. Additionally, some sort of neutral arbitration provided by the union could be implemented. However, comedians might prefer to proceed with the current, informal system of resolution and hash it out themselves to keep the extreme flexibility that norms-based enforcement provides. Instant registration of jokes or ideas would not be a panacea, but the system would, at the very least, give comedians more objective data with which to fairly proceed.

There is no way to know for sure whether the creation of a comedy union would be feasible. Although many surveyed comedians expressed general interest in joining one if created, the feeling was far from unanimous, and something close to unanimity would be needed for a union to realistically strengthen protections against joke theft. That establishing a comedians' union is *possible*, however, is unquestionable. In the summer of 2022, for instance, a UK-based performing arts union created a charter for comedians and has begun using the resources of the preexisting union to encourage

109. See Alex Ates, *Everything You Need To Know About Actors' Unions*, BACKSTAGE (Sept. 18, 2023), <https://www.backstage.com/magazine/article/unions-101-everything-you-need-to-know-70119/> [<https://perma.cc/G7KW-PGWT>] [<https://web.archive.org/web/20240310004359/https://www.backstage.com/web/20240310004359/https://www.backstage.com/magazine/article/actors-unions-101-70119/>].

110. *Registration Details*, WGA WEST REGISTRY, <https://www.wgawregistry.org/regdetails.aspx> [<https://perma.cc/64P2-9MJW>] [<https://web.archive.org/web/20240309072301/https://www.wgawregistry.org/regdetails.aspx>] (last visited Mar. 9, 2024).

venues across the country to adopt the charter.¹¹¹ While the United States does not have a union for performers in general, perhaps the UK union's efforts could inspire the Actors' Equity Association, which represents professional stage actors and stage managers, to expand their membership.¹¹² Comedy is a personal art, but enforcement against the appropriation taboo only works when comedians work together. However they go about it, it might be time for comedians to collectivize and strengthen this community project into something that more effectively protects their work.

VI. CONCLUSION

There is no perfect, ready-made legal solution to the problem of joke theft. The DMCA and CCB are promising steps in copyright's evolution toward a practical solution for content creators, but they apply only to a small subset of comedians' material. Comics are clear in their consensus that litigation is not a feasible avenue for them, and the remedies available through litigation can be disproportionately punitive. Despite—or perhaps because of—this, comedians want more from the law. The difficulty is determining whether the law has something more to give.

At bottom, the nature of stand-up comedy refuses to be pinned down in a way that can be captured, and therefore protected, by formal copyright law. In looking for gap-fillers to the norms-based enforcement regime, we should be guided primarily by the perspectives and preferences of comedians. The task is a complex one. There is no way of knowing how comics will respond to increased protections, even if those implemented really do make enforcement more manageable. One thing is clear, however: The current social norms have staying power as a deterrent force. Bolstering the system properly, then, would be to amplify what makes it work so well, like flexibility in resolution, while adding legal-*esque* mechanisms where norms come up short, like reliable methods of fact-finding and fora for equitable dispute resolution. The value of additional legal protection outside the court system, such as the intervention of performance venues or the creation of a comedians' union, remains to be seen, but thinking creatively is key in protecting these creatives.

111. *Equity Union Launches Working Practices Charter for Comedians*, THE GUARDIAN (Aug. 7, 2022), <https://www.theguardian.com/politics/2022/aug/07/equity-union-launches-comedians-charter-safety-working-practices> [https://perma.cc/WUS7-KMFN] [https://web.archive.org/save/https://www.theguardian.com/politics/2022/aug/07/equity-union-launches-comedians-charter-safety-working-practices].

112. ACTORS' EQUITY ASS'N, <https://www.actorsequity.org/> [https://perma.cc/D73P-XGRM] [https://web.archive.org/save/actorsequity.org] (last visited Mar. 9, 2024).