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Mass Media and the Law

**Jokes and Copyright**

“My girlfriend gets mad when I use her toothbrush, but I ask you: how else am I meant to get dog shit out of the carpet?”- Jimmy Carr

“My friend got mad at me the other day when I borrowed his hair brush, but how does he expect me to scrub the cat crap off of the floor?” – Sam Gilroy

If you were in a comedy club and you heard two separate comedians tell these jokes, would you think that one of them had taken his ideas from the other? Although these jokes are virtually the same, in the eyes of the law they are substantially different. They both share a central idea, yet they express that idea in two separate ways. Jimmy Carr, the original writer of the joke, is a brilliant comedian whose livelihood depends on his ability to be able to “sell” his jokes to an audience. When his jokes are taken and “resold” by a different comedian, however, both his credibility and his success as a professional are put in jeopardy.

While American copyright laws protect a comedian’s material to a point, comedians today are not sufficiently protected under the current copyright laws. “Comics typically rely on the enforcement of community standards and professional norms to protect against joke theft, as opposed to legal action.” (Bolles, 2011) Joke appropriation is far more rampant than most people are aware of.

This paper will focus on the accusations made against comedian Dane Cook in 2007 that he had stolen material from fellow comedian, Louis C.K., and used those jokes in his own act. First, this paper will provide a brief overview of the history of stand-up comedy and explain why joke appropriation is so rampant and hard to combat. Next, it will discuss the facts about the specific case in question, and draw from similar cases to further illustrate the issues at hand. Then, it will move onto a discussion of the law, and its shortcomings in protecting stand-up comedians. Finally, this paper will provide my own judicial opinion on the matter.

**I. Introduction: A Brief History of Stand-Up Comedy and Contemporary Barriers to Legal Action**

***Part I:***

Modern day stand-up comedy is a descendent of Vaudeville. Comics would build a repertoire by appropriating material from a myriad of sources, including other comics. (Hladki, 2014) These jokes were less sophisticated and less elaborate than those of comedians today, as a standard repertory would be mainly comprised of one-liners. For example:

* “There was a beautiful young woman knocking on my hotel room door all night! I finally had to let her out.” (Hladki, 2014)
* “A car hit an elderly Jewish man. The paramedic says, 'Are you comfortable?' The man says, 'I make a good living.'” (Hladki, 2014)
* “I just got back from a pleasure trip. I took my mother-in-law to the airport.” (Hladki, 2014)

***Part 2:***

As movies and radio developed across the country, Vaudeville subsided and comedians became solo performers. Stand-up comedy was not a respected art form at this time, and comedians generally were not the headliners at any given venue. Instead, they were allotted very minimal time and space to perform, so it was crucial that they found ways to stand out with what little opportunity they had. During this time, much of their material was still being recycled from the vaudeville era or appropriated from other sources, (including other comedians.) (Hladki, 2014) Milton Berle, one of television’s first stars, was notorious for appropriating material from other comedians. It has been said “Bob Hope held a long-standing grudge against Berle for jokes stolen from him during their vaudeville days.” (Getlen, 2007)

During the 1950s and 1960s, stand-up comedy was evolving into the medium we know it as today. Comedians began gravitating away from one-liners and were more inclined to use monologue-style material. “Modern stand-up reflects greater emphasis, relative to the vaudeville and post-vaudeville periods, on comedic narrative; that is, on longer, thematically linked routines that displace the former reliance on discrete jokes.” (Hladki, 2014) By the 1970s, this form of expression was becoming a major staple of American entertainment, with comedians like Richard Prior and George Carlin at the forefront of the scene. Even though this new style of joke telling relied heavily on the individuality of the comedian to properly execute the material, however, jokes were still being appropriated; this has continued to this today.

***Part 3:***

Today, many comedians choose not to pursue legal action to protect their material for a myriad of reasons. One major deterrent is the cost. “Copyright law is a complex specialty area of federal, rather than state law which restricts the number of lawyers one might engage.” (Oliar & Sprigman, 2008) As most jokes are only worth about $50 to $200 to a comedian, employing the services of a lawyer who would cost anywhere from $150 to $1,000 per every billable hour is not necessarily a wise investment. (Oliar & Sprigman, 2008)

In addition to that, there are several doctrinal hurdles that a comedian would have to overcome if he/she is to successfully pursue legal action. “Because jokes vary widely in their length, structure, and dependence on stock versus original elements, it is difficult to provide an exhaustive account of the application of copyright (or trademark) doctrine in this area…” (Oliar & Sprigman, 2008) For one thing, comedy acts are generally not scripted, unchanging performances. Many of them involve audience participation and improvisation, so jokes are constantly morphing and being reworked by performers. “…jokes and comedic routines often are perfected over dozens of performances, in which the joke changes its form, and new ideas and expressions are added to or subtracted from it.” (Oliar & Sprigman, 2008) With each new expression of the joke, the copyright protection allotted to the original form would be thinned and ineffective.

Copyright law also requires that an artist register his/her work prior to its infringement from an outside source to claim statutory awards. Although the cost and time involved at registering the material would be insignificant to most people, “Perfecting routines and developing shows, however, takes much time and many club performances, during which the constituent jokes and bits would remain unregistered.” (Oliar & Sprigman, 2008) This process is not compatible with the way in which most comedians operate.

Other barriers comedians face when pursuing effective protection for their work include: the inability of an individual to copyright (and ultimately monopolize) their own ideas; as well as the claim that the same jokes can be created independently of each other by two separate minds.

**II. Facts About the Case:**

Louis C.K. is no stranger to joke appropriation. In the 1980s, C.K. had fallen victim to this crime when Denis Leary appropriated material from him and used that material to write his trademark song, “I’m an Asshole.” (Blackburn, 2014). In 2007, C.K.’s material was appropriated a second time. He claimed that fellow comedian, Dane Cook, had stolen jokes from a show he did in Texas. This was also not the first time Cook had been accused of stealing material from another comedian. In 1997, Joe Rogan made claimed that Cook had appropriated material about bestiality that had taken Rogan months to create, and then went on to use it during a show that aired on Comedy Central. Cook reworded the jokes, however, and spoke about them in the context of rhinos, shifting Rogan’s original intentions away from tigers. (Getlen, 2007) As he was not duplicating the original work verbatim, Cook was able to pass this material off as his own.

When the incident between C.K. and Cook transpired in 2007, a highly publicized feud between the two comedians developed. In one show, Cook had allegedly used three bits of C.K.’s material. [Cook’s] “‘Struck by a Vehicle,’ ‘Itchy Asshole,’ and ‘My Son Optimus Prime’—sound remarkably similar to [C.K.’s] ‘Guy on a Bike,’ ‘Itchy Asshole,’ and ‘Kid's Names,” all of which are featured on C.K.'s CD *Live in Houston*.” (Getlen, 2007) Cook repeatedly denied that he had stolen any material, but the allegations against him persisted.

“Listening to the two albums, there's no denying certain similarities. ‘Guy on a Bike’ and ‘Struck by a Vehicle’ both wonder how to warn someone in a split second that they're about to be hit by a car. C.K. yells ‘Bad thing!’ while Cook sputters ‘Uuuuuuuhh!’ In ‘Kid's Names’ and ‘My Son Optimus Prime’ both men discuss giving children weird names, with C.K. choosing ‘Fffffffffffffffffffffffffff’ to Cook's ‘Rrrrrrrrrrrrrr.’” (Getlen, 2007)

Internet forums fueled the tensions between the two comedians. Cook’s critics persisted that he had *intentionally* appropriated C.K.’s material. C.K. did not personally hold a grudge against Cook per se, nor did he ever confront Cook directly over the matter, but he acknowledged the wrongdoing nonetheless. “Okay, this kid is stealing from me. And making lots of money… Just so you know, guys, I'm not going to do anything about this.... I'm not going to court over a bit called ‘Itchy Asshole.’” (Getlen, 2007)

Although this case pertains to the intellectual property of an artist, Cook vs. C.K. was never brought before a court of law. In fact, there has never been a formal case between two comedians that was brought before court. Generally speaking, these issues are normally settled out of court. The case most pertinent to the protection of a comedian’s intellectual property rights was heard before the Georgia federal district court in the early 1990s.

Jeff Foxworthy, who is renown for his unique brand of “redneck humor,” has made his entire livelihood around branding his redneck persona. He is most famous for the “redneck tests” he gives his audiences, in which he begins with the line “you might be a redneck if…” and ends with a clever observation about some aspect of redneck culture (examples given by the court in the case to follow include “your two-year-old has more teeth than you do,” and “you've ever financed a tattoo”). (Greengrass, 1997)

In 1994, Foxworthy learned that a tee-shirt manufacturing company was printing shirts with the “you might be a redneck if…” phrase on them. This was being done without his consent or approval. Although it was never discussed whether or not the resolution of the joke printed on the shirts was also directly derived from Foxworthy’s material, they were still similar enough that Foxworthy insisted on filing a law suit against the company.

The suit was filed in a Georgia federal district court, where it was ruled that “regardless of whether the substance of the tee-shirts’ jokes was the same as any of Foxworthy's jokes, the ‘you might be a redneck if’ phrasing belonged to Foxworthy under a common law trademark.” (Greengrass, 1997) Citing his merchandise, the court ruled the phrase was already commercially in Foxworthy’s possession, and it was “indelibly associated with him in the public mind.” (Greengrass, 1997) To date, this is the most substantial case for the protection of intellectual property of comedians.

**III. Discussion of the Law**

Comedy copyright lawsuits are few and far between, and the courts “treat humor the same way they treat almost any other subject matter, and apply standard intellectual property principles.” (Greengrass, 1997) The problem with that mentality, however, is that “the aspect that differentiates one piece of humor from another is not the aspect which is protected by intellectual property law.” (Greengrass, 1997)

Historically speaking, there are three basic, recurring trends which most “comedy copycat” court cases have followed. The first trend is, unfortunately for this paper, the least common trend. This is when the originator of the material claims that their material was plagiarized and used by a rival in the same field, (i.e. two rival stand-up comedians.) (Greengrass, 2014) The second trend, which has been more frequently seen in recent decades, is when the originator of the material claims their material was plagiarized and used in a different medium, (i.e. quotes from a comedian reprinted on shirts.) (Greengrass, 2014) The third trend is the most common trend, and it is when the originators of material have claimed that their (generally unpublished) material was plagiarized and used in television, movies, books, or other *published mediums*. (Greengrass, 2014) For example, in the 1990s, comedian Jay Mohr transcribed a comedy set he had heard comedian Rick Shapiro perform at a comedy club word-for-word, then submitted it as his own work to the producers of *Saturday Night Live.* (Getlen, 2007) Mohr admitted to the wrongdoing, but this was never brought to court. When comedians have taken cases with this trend to court, the legal test is as follows:

1.) The author who had allegedly infringed on the original material must have had access to the alleged infringed material. 2.) ‘Substantial similarity’ must exist between the two works. (Greengrass, 2014)

It should be clarified that comedy *is qualified* to have copyright protection, just as all other forms of intellectual property are. As per the 1976 Copyright Act, in order to be copyrightable, a work needs to be “substantially original.” The definition of what constitutes “originality,” however, was never fully defined. Courts have interpreted it to mean “a work independently created by its author, one not copied from preexisting works, and a work that comes from the exercise of the creative powers of the author’s mind.” (Trager, Russomanno, & Dente Ross, 2012) Comedy is unique, however, in that traditional forms of protection are ineffective at protecting it.

Copyright only extends so far as to protect the way in which an artist expresses an idea, not the underlying idea itself. As per current copyright laws, “…ideas may not be protected. Protection is only granted to the *expression* of idea. This ‘dichotomy’ of idea and expression disallows an individual from monopolizing an idea through copyright… Ideas cannot be copyrighted because the goal of copyright protection is to promote ‘the progress of science and useful arts.’” (Madison, 1998) When this concept is applied to other mediums, a free flow of expression is made possible. In journalism, for instance, “A reporter’s description of an accident is original… However, a reporter may not successfully claim that he or she was first on the scene and therefore no other journalist can write about the accident.” (Trager et al., 2012) By preventing one person from controlling an idea, many people can weigh in on the same subject and add to it their own unique perspectives. Art is able to evolve and develop because a single person cannot control specific ideas.

A comedian relies heavily on a clever idea as the foundation for his/her work, however, and this is what differentiates comedy from other forms of expression. It is often overlooked that the wording of a joke is merely secondary. Jokes can be reworded and still have the same underlying meaning. “With a joke or other comedy matter…there is often a central idea that makes it funny.” (Greengrass, 2014) But alas, said comedian has no legal capability to copyright an entire idea. For that reason, rival comedians can legally take the original ideas from their peers, with the stipulation they find ways to rework the ideas they have appropriated. Although some may consider this to be plagiarism, it technically is legal.

In that case, a joke should at least be conceivably protectable for its *original qualities* under the copyright statute. Without needing to monopolize the idea, one can claim that another comedian blatantly stole from their work, and site its unique qualities as proof. Originality in comedy is an easy claim to defeat, however, as one could claim they fell victim to the “parallel thinking” phenomenon. This frequently occurs “when comics write the same or similar jokes independently.” (Getlen, 2007) Cook could easily argue that he coincidentally concocted the same jokes on his own accord, completely independent of C.K. After all, “Comedians view the world through a similarly honed comic prism and often produce identical premises or punch lines.” (Getlen, 2007)

Given the quantity of jokes that overlapped between the two comedians, it may be unrealistic to believe that all of them were created completely independently from each other. Since these jokes differed substantially in their wording, however, Cook can still use his own originality as his defense. By merely rewording the material, he provided a new form of expression to the previously established ideas. As was stated earlier, ideas are not copyrightable. This defense is strong enough to allow him to pass the work off as his own. This is a vicious cycle that many comedians have been faced with and cannot easily break out of. Humor is not comparable to other forms of expression, and therefore it needs it’s own unique form of protection in the eyes of the law.

**IV. My Judicial Ruling**

It is reasonable to say thatCook, more likely than not, drew from C.K.’s material when he recorded his album, *Retaliation.* There seem to be too many similarities between the two comedians’ material for it to be mere coincidence. Cook most likely appropriated those jokes and ultimately profited off of them. He did, however, find his own way to express the underlying ideas behind the material. He did not recite C.K.’s sets verbatim, and therefore he did not outright plagiarize C.K.’s work. C.K. does not have the ability to claim those ideas as exclusively his own, so Cook therefore is legally well within his bounds to draw from them.

**V. Conclusion**

Modern copyright laws are not strong enough to protect comedians effectively. So long as a comedian can find a unique way to express an idea, he/she is legally allowed to draw from the ideas of their peers without their consent. At the present, copyright law does not sufficiently protect the intellectual property of comedians, nor will it ever. Comedians depend on clever ideas for their material to work, but the “pool” of ideas that fellow comedians would legally be allowed to draw from would be exceptionally shallow if those ideas were to be monopolized by single performers. What Cook did, just as so many of his peers do, is completely legal. It does not mean, however, that it was right.

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