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RESPONSE

WHO'S IN THE CLUB?: A RESPONSE TO OLIAR AND SPRIGMAN

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DOTAN Oliar and Christopher Sprigman contribute to a growing body of case study literature focused on arenas in which social norms supplement or replace formal legal mechanisms as methods of allocating rights to intellectual creations.¹ They document in fascinating detail the ways in which comedians enforce a norm of exclusive rights in jokes, using a variety of informal mechanisms to penalize “joke thieves.” They also show that this present-day norm is a relatively new development, having replaced an earlier regime in which comedians shared jokes on the vaudeville circuit.

The emphasis on “thick” description of the varied means by which creativity is governed in the world is a welcome development. Michael Madison, Brett Frischmann, and I have recently proposed a framework for systematizing such studies in the arena of “constructed cultural commons” for creating and sharing intellectual goods.² Social norms are often constitutive of such commons, exemplified by research-tool-

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¹Dotan 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 (2008).

²Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment*, University of Pittsburgh Legal Studies Research Paper No. 2008-26, available at <http://ssrn.com/abstract=1265793>.

sharing among scientists.³ In these and other situations, going back to Ellickson's famous case study of ranchers and farmers in Shasta County,⁴ social norms are often explained as mechanisms for solving collective action problems.⁵ From this rational-choice perspective, enforcement of social norms benefits group members by helping them avoid self-defeating Prisoner's Dilemma-type situations by coordinating certain activities.

For the most part, discussions of norms-based systems of intellectual creation have focused on explaining why members of a creative community might choose to share when propertization is an option. In these narratives, norms provide means to overcome the limitations of intellectual propertization so as to take advantage of non-rivalrous information sharing, while maintaining incentives for innovation. A move toward greater propertization seems the polar opposite of creating such an information commons. Perhaps for this reason, Oliar and Sprigman focus in detail on the norm against joke stealing as an alternative to employing intellectual property law as a means of incentivizing individual creativity.

The fact that exclusive rights in this instance are a matter of *social norms among comedians*, however, begs an additional question. Why do comedians cooperate with each other to enforce the joke exclusivity norm? The desire for ownership of one's creative work seems unremarkable. Individual comics naturally seek to maintain the competitive advantage that a good joke brings. It is thus no shock that Joe Rogan might punch Carlos Mencia if Mencia stole his joke. What social norm theory seeks to explain, however, is why Rogan would complain if Mencia stole *someone else's joke*. A norm of exclusivity means not only getting to keep one's own jokes, but also foregoing the potential benefits of using everyone else's jokes. Such a norm is viable only if comedians are better off on average using only their own jokes than they are if they draw from the collective joke pool. It is not immediately obvious that this is the case.

Oliar and Sprigman attempt to explain the evolution from a vaudeville-era norm of joke sharing to a norm of exclusivity in a brief section of their article.⁶ They do so in terms of the Demsetzian story of

³ See, e.g., Katherine J. Strandburg, *User Innovator Community Norms at the Boundary between Academic and Industrial Research*, 77 *Fordham L. Rev.* (forthcoming 2009).

⁴ See Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991).

⁵ See, for example, Steven A. Hetcher, *Norms in a Wired World* (2004), for an overview of social norm theories.

⁶ See Oliar & Sprigman, *supra* note 1, at 1859–63.

property rights evolving in response to increasing externalities from over-exploitation of a scarce resource.⁷ In Demsetz's canonical story, increasing demand for furs leads to overhunting, which decreases the long-term supply of fur and thus harms the overall value of the fur trade to the tribe.⁸ Property rights solve this problem by permitting property owners to internalize the long-term costs and benefits of their hunting strategies. Property rights are "worth it" to a society when the costs of enforcing them are less than the costs imposed on society by over-exploitation of a commonly held resource.

Oliar and Sprigman argue that the Demsetzian story applies to the evolution of norms against joke stealing in stand-up comedy because 1) technology gives joke thieves greater ability to (mis)appropriate the value of creative jokes, thus increasing the benefits of exclusive rights; and 2) the costs of norm enforcement have decreased due to various changes in the ability to both detect and punish joke stealing. The story as they tell it, however, is not entirely consistent and does not give a satisfying explanation of the change in norm enforcement by comedians *as a group*.

The questionable part of Oliar and Sprigman's analysis has to do with the supposed benefits of the norm of joke exclusivity. They argue that technological advances permitting rapid dissemination of jokes over a wide geographical area increased the harm inflicted by joke stealing and hence the benefits of property rights. To put it another way, the argument relies on a claim that technology has decreased the extent to which a joke creator can appropriate a joke's value by virtue of a first-mover advantage.

There are two weaknesses to this argument. First, the net effect of improvements in communication and transportation on the fraction of a joke's value that its creator can recoup is not obvious. The vaudeville era was a time of geographical separation and slow communication for both comics and audiences. All shows were live. Any particular comic could give only so many live performances and audiences could attend only nearby performances. Competition between comics was unavoidably muted since a given comic could serve only a limited

⁷ See Harold Demsetz, *Toward a Theory of Property Rights*, 57 *Am. Econ. Rev.* 347 (1967).

⁸ See *id.* at 351–55.

audience. There was a natural limit on the portion of the value of an original joke that its creator could recoup.

Technological changes destabilized this situation. Broadcast media and other communications technology, along with rapid transportation, drastically increased both the number of audience members a given comedian could reach with a particular joke and the speed with which a joke could be disseminated to the audience. Any comedian, whether joke creator or joke “thief,” could now hope to reach a much larger—indeed virtually unlimited—share of the potential audience and to reach that audience relatively quickly. Contrary to Oliar and Sprigman’s assertion, however, it is unclear how these technological changes affected the relative value of enforceable exclusive rights to a joke.

The value of enforced exclusivity depends on the effectiveness of natural first-mover advantage. Particularly for jokes, which are essentially “used up” once everyone has heard them, if first-mover advantage is sufficiently great because the joke creator can reach most of the audience before the joke can be “stolen,” exclusive rights add little to a creator’s take. Technology cuts both ways here. Faster communication and transportation increase not only the speed at which a joke can be copied and used by another comic, but also the rate at which a joke’s creator can “push” it out rapidly to gain a large audience share. It seems entirely possible that a joke creator can appropriate as much or more of the value of a joke through first-mover advantage in the new era as she would have been able to appropriate in the old days. It is thus questionable whether enforceable exclusive rights increase the fraction of the social value of a particular “invention” (here, joke) that a creator can recoup.

Moreover, Oliar and Sprigman make somewhat contradictory arguments in this regard. On the one hand, they argue that technology makes it easier to appropriate the value of a creative joke, but on the other hand, they argue that comedians have made it more costly to copy their jokes through the self-help mechanism of personalization. While this seems correct, personalization also inflates first-mover advantage (a thief either has to change the joke to fit his personality or will be significantly less effective in telling it) and thus decreases the value added by exclusive rights.

The second—and more important—problem is that Oliar and Sprigman’s argument does not explain why exclusive rights have become more valuable to comedians *as a group* in their dual potential roles as joke creators and joke thieves. Since every comedian can potentially benefit from using other people’s jokes (and apparently even the most famous comedians do so from time to time) it is surely not

obvious why comedians as a group should enforce an exclusivity norm rather than engage in “anything goes” competition.

To understand how a social norm benefits a group, the first question to ask is: Who are the members of the group? Abstracting from Olliar and Sprigman, the “no stealing” norm both applies primarily to and is enforced primarily by a group of experienced working comics. Fans do not strongly penalize copying, while intermediaries sometimes do, but often do not. For our purposes, then, it seems reasonable to view the norm as one maintained within a community of established comedians.

How might the exclusivity norm increase the welfare of this group? A comedian’s success depends on the size of her audience. Since jokes become less and less funny the more often one hears them, success over time depends on either finding new audience members or finding new jokes. Roughly speaking, then, there are two ways to increase average returns: 1) increase the size of the audience for each comedian; and 2) increase the amount that each audience member is willing to pay for comedy entertainment. A plausible way in which the norm against joke stealing accomplishes both of these objectives is by constraining membership in the group of working stand-up comedians.

Technological changes since vaudeville times overturned the limits on the ability of a single comedian to meet the demand of a widespread audience for entertainment. The accessibility of alternative forms of entertainment also ballooned, putting the entire comedy world into heightened competition with other forms of entertainment. These changes turned audience ears into a heavily contested “resource.” The norm against joke stealing simultaneously increases the overall value of comedy relative to other forms of entertainment (increasing the comedy revenue pie) and constrains the number of working comedians (increasing the size of the average slice).

From this perspective, the function of the anti-joke-stealing norm is less to incentivize the creation of individual jokes than to structure the comedic enterprise. Consumers do not purchase individual jokes after examining their quality. Instead, audiences make their entertainment choices “sight unseen” based on the reputations of particular comedians and comedy venues. Because jokes burn up quickly once audience members have heard them, the comedy enterprise needs to produce a stream of ever-changing funny material in order to compete with other entertainment options.

The norm against joke stealing ensures that any working comedian is able to produce such a stream. The novelty requirement serves as a barrier to entry, keeping the number of working comedians relatively low and reining in competition. Comedians as a group benefit from this reduction in competition, making it worth their while to enforce the norm. Presumably, there is some number of comedians that maximizes average return to successful comics.

Limiting entry to the comedy profession using a norm against joke stealing also increases overall quality and, as a result, the competitiveness of comedy vis-à-vis other forms of entertainment. The relatively larger market share available to the now-constrained number of comedians produces incentives to produce quality material. As long as the ability of professional comedians to attract audience members away from other entertainment offerings is interdependent, there is a shared benefit from the resulting high quality comedy stream. (If there were no such interdependence, then the size of an individual comedian's audience would be independent of that of any other). The importance of comedy clubs, comedy TV shows, a comedy channel, and so forth suggests that there is an interdependent comedic enterprise.

To recap, talented comedians have a long-term shared interest in maximizing the average revenue per comic available from stand-up comedy, in tension with short-term individual interests in appropriating a higher-than-average revenue share by joke stealing. In the long-term, limiting the number of working comics to some optimal number and providing incentives for those comics to produce high quality work so that comedy is a preferred entertainment option maximizes average revenue. A norm against joke stealing suits both of these long-term goals.

This perspective gives some insight into the alleged transgressions of comedians such as Carlos Mencia and Robin Williams. A comedian's interest in the general audience for comedy declines if he or she can "go it alone" in competition with other entertainment. Very famous comedians may not benefit enough from the shared infrastructure of the comedic enterprise to outweigh the benefits of using other comics' jokes. Alternatively, the enforcement mechanisms of the comedy community may be ineffective against such big names. This suggestion is consistent with Williams' statement that he avoids clubs nowadays—his livelihood is likely independent of the good will of other comedians.

If the norm against joke stealing serves primarily to control entry into the comedy market, is it socially desirable? Professional associations have long played similar roles, combining quality assurance with constraints on market entry, and have also been suspected of setting

unnecessarily high barriers to entry so as to constrain competition. Is this a concern with comedy? Perhaps not. Unlike medical services or legal representation, stand-up comedy has many close substitutes, which will constrain the potential for exercise of monopoly power. Moreover, customers for comedy may benefit from the credentialing function of the joke novelty norm. For example, fans apparently face collective action problems of their own, as evidenced by the fact that they do not appear inclined to “punish” joke stealers by avoiding their shows.

Admittedly, this brief attempt to provide a plausible explanation for the development of a social norm among stand-up comedians is a bit of a “Just So Story.” It is hard to know whether such a plausible explanation is correct. As Oliar and Sprigman’s detailed exposition of this case demonstrates, the behavior of real-world communities is multi-textured and complex. The important contribution of Oliar and Sprigman’s work is thus not the explication of social norms among comedians per se, fascinating though this particular case may be. If complex regimes of informal and private ordering of intellectual production and dissemination are at least as common and important as either an abstract public domain or any intellectual property law regime, then we need many such case studies. A dialogue of thick case studies with attempts to interrogate those case studies so as to identify relevant aspects of a variety of creative communities is the necessary path to developing a framework for evaluating such communities with an eye to the public interest.