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DEAD FROGS, DISSECTED JOKES, & THIN COPYRIGHT: ANALYZING COPYRIGHTABLE ELEMENTS AND LEGAL PROTECTION OF STAND-UP COMEDY

*Mark Edward Blankenship Jr.**

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INTRODUCTION

In 1999, the Honorable Kimba M. Wood wrote the majority opinion for *Leonard v. Pepsico*,¹ the renowned contract law case that dealt with Pepsi points, teenagers riding harrier jets to school, aviator sunglasses, and other sweepstakes prizes, and is perhaps one of the most famously taught contracts cases in one's first year of law school.² When challenged

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1. *Leonard v. Pepsico*, 88 F. Supp. 2d 116, 117 (S.D.N.Y. 1999).

2. *See Leonard v. Pepsico*, WIKI L. SCH., https://www.wikilawschool.net/wiki/Leonard_v._Pepsico [<https://perma.cc/LU44-EE5B>] (last visited Sept. 14, 2022); *see also High-Flying Contracts Case Takes Nosedive*, GLENDALE UNIV. COLL. OF L., <https://www.glendalelaw.edu/blog/high-flying-contracts-case-takes-nosedive/> [<https://perma.cc/P4MZ-N35A>] (last visited Sept. 14, 2022); *see also What Happened When a Kid Sued Pepsi for a Harrier Jet?*, OUR AM. STORIES (Jan. 26, 2022), <https://www.ouramericanstories.com/podcast/entertainment/what-happened-when-a-kid-sued-pepsi-for-a-harrier-jet> [<https://perma.cc/7UKB-CRDK>].

with the decision of whether to treat the Pepsi commercial's depiction of a Pepsi sweepstakes contestant riding a harrier jet as a serious offer for purposes of mutual assent, Wood wrote that such a challenge would "require[] the Court to explain why the commercial is funny."³ Wood went on by stating: "Explaining why a joke is funny is a daunting task; as the essayist E.B. White has remarked, 'Humor can be dissected, as a frog can, but the thing dies in the process' The commercial is the embodiment of what defendant appropriately characterizes as 'zany humor.'"⁴

The same thing can perhaps be said when considering the copyright protection of stand-up jokes. Stand-up comedy performances can serve as an embodiment of one's creative use of humor.⁵ This too requires some sort of dissection, especially when analyzing whether one has infringed upon another's copyrightable work of art.⁶ More importantly, however, is the challenge of determining whether stand-up comedy is copyrightable subject matter. While many critics may argue that stand-up comedy should be copyright protected, they sometimes make incorrect assumptions in support of their argument.⁷

3. *Pepsico*, 88 F. Supp. 2d at 128.

4. *Id.*

5. See *infra* Section II.

6. See Lewis R. Clayton, 'Tufenkian Import/Export Ventures': On 'Inexact' Copies of a Work, 225 N.Y.L.J. 105 (2003) (explaining the Second Circuit's view that "while the infringement analysis must begin by dissecting the copyrighted work into its component parts in order to clarify precisely what is not original, infringement analysis is not simply a matter of ascertaining similarity between components viewed in isolation.").

7. See generally Scott Woodard, *Who Owns a Joke? Copyright Law and Stand-Up Comedy*, 21 VAND. J. ENT. & TECH. L. 1041 (2019) (explaining that if a stand-up comedian does not immediately fix their work or inadvertently diverts from their fixed work during a performance, the stand-up comedian will not be entitled to any copyright protection); Hannah Pham, *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. 5 (2019) (arguing that outside of the realm of the comedy community, social norms do not adequately protect the work of stand-up comedians); Matthew L. Pangle, *The Last Laugh: A Case Study in Copyright of Comedy and the Virtual Identity Standard*, 28 TEX. INTELL. PROP. L.J. 183 (2020) (explaining that rigid social norms have been relied on within the comedy industry, while platforms like Netflix and Twitter have made the use of copyright protections over comedy more common); 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 (2008) (arguing that copyright law may not benefit all of the creative practices it is intended to regulate, thus practical norms systems should be permitted to supplement law); Sarah Gablin, *This is No Laughing Matter: How Should Comedians Be Able to Protect Their Jokes?*, 42 HASTINGS COMM. & ENT. L.J. 141 (2020) (explaining that the perceived ephemeral nature of jokes, along with the view that jokes are merely ideas prevent jokes from being protected under copyright law); Amy Adler & Jeanne C. Fromer, *Memes on Memes and the New Creativity*, 97 N.Y.U. L. REV. 453 (2022) (explaining that memes frustrate the principles of copyright, making copyright law inadequate for legal protection over memes).

This Article will be broken into two parts. Part I will dive into what comedy truly is. Part II will analyze both the copyrightability of stand-up jokes as to their subject matter and the complexity of copyright infringement in relation to stand-up comedy.

I. DEFINING STAND-UP COMEDY

Let us start by asking this essential question: what defines stand-up comedy? Society recognizes that stand-up comedy is a performance of jokes that are tied in and organized in a peculiar way by the performer. But when is something a joke? Many might argue that stand-up comedy consists of jokes that are comedic, humorous, hilarious, comical, and/or witty. Certainly, these qualities are determinative factors in the performance's creative value, but they are subjective characteristics taken from the perspective of the observer.⁸

However, there are other factors that can also affect the creative value of a joke and the stand-up comedic performance, that are implemented by the performer. This may include the performer's prose, affect, tone, flamboyance, stage presence, and the use of props or other materials during the performance.⁹ Stand-up comedy is also similar to music and certain forms of drama in that it sometimes leaves room for improvisation. So, for instance, when a heckler disturbs the scripted flow of the performance, the comedian can add material to his or her work in response.¹⁰

8. See generally Laura E. Little, *Regulating Funny: Humor and the Law*, 94 CORNELL L. REV. 1235, 1239–44 (2009) (explaining common categories and theories found in a human despite difficulty in objectively defining humor); Todd McGowan, *The Barriers to a Critical Comedy*, 3 CRISIS & CRITIQUE 200 (2014) (arguing that the politics behind comedy are dependent on the image of social order being portrayed); Ben Healy, *What Makes Something Funny?*, THE ATL. (Mar. 2018), <https://www.theatlantic.com/magazine/archive/2018/03/funny-how/550910/> [<https://perma.cc/9CAW-56Y9>] (explaining the difficulties in conceptualizing humor); Whitney Phillips, *Dissecting the Frog*, THE NEW INQUIRY (Apr. 8, 2013), <https://thenewinquiry.com/dissecting-the-frog/> [<https://perma.cc/5ATS-ZEXM>] (explaining group humor dynamics within online spaces).

9. See generally TEDx Talks, *Dissecting Stand up Comedy | Yousef Bayomy | TEDxUIdaho*, YOUTUBE (Oct. 20, 2016), <https://www.youtube.com/watch?v=gWPihEL4RDU> [<https://perma.cc/RNG3-L87H>] (hereinafter TEDx Talks) (explaining that stand-up comedy is made by creating expectations and then subverting those expectations); Jeannine Schwartz, *Linguistic Aspects of Verbal Humor in Stand-up Comedy* (May 19, 2010) (Dissertation, Saarland University) (on file with ResearchGate) (explaining how different comedians approach comedy by developing different stage personas); Lawrence E. Mintz, *Standup Comedy as Social and Cultural Mediation*, 37 AM. Q. 71 (1985) (examining the role of stand-up comedy in promoting social aims like social harmony and social catharsis); Justyna Wawrzyniuk, *Identifying Humor in Stand-Up Comedy: A Preliminary Study*, 7 LINGUISTICS BEYOND & WITHIN 86 (2021) (examining how a stand-up comedy audience approaches humor by analysis).

10. But see TEDx Talks, *supra* note 9 (making the distinction between improv comedy and stand-up comedy).

As audience members or listeners of stand-up performances, many have experienced comedians taking narrative stances in their jokes.¹¹ While this is a very common tactic, it is not the only method of performance, which is a critical assumption that should be avoided. Below are a few alternative methods in which a joke is performed.

A. Description

Sometimes, a comedian can create humor by illustrating descriptive details of the world around him. This can include the people the performer sees, the attitudes and statements of these people, and the location in which he or she is present. For example, comedian Sebastian Maniscalco has been notorious about telling jokes about the descriptive characteristics of TJ Maxx discount stores,¹² the customer service and the complexity of burrito-making at Chipotle restaurants,¹³ and the social dynamics of growing up in an Italian family.¹⁴

Such illustration can be done through visual effects or the use of props, a common style that comedian Carrot Top implements.¹⁵ Ventriloquists like Jeff Dunham often take this approach by using puppets.¹⁶

11. See Storytelling in Stand-Up Comedy, FRONTROW (Nov. 23, 2021), <https://frontrow.co.in/guides/storytelling-in-stand-up-comedy/> [<https://perma.cc/8NSR-BQRD>]; see also Gwen Moran, *How to Tell A Captivating Story Like A Stand-Up Comedian*, FAST CO. (Sept. 2, 2014), <https://www.fastcompany.com/3035042/how-to-tell-a-captivating-story-like-a-stand-up-comedian> [<https://perma.cc/4XS2-P76K>].

12. Sebastian Maniscalco, *The TJ MAXX Nightmare*, YOUTUBE (Dec. 8, 2020), <https://www.youtube.com/watch?v=08XpLbfkaM&t=18s> [<https://perma.cc/2D6C-7ELT>].

13. Sebastian Maniscalco, *Chipotle | Sebastian Maniscalco: Aren't You Embarrassed?*, YOUTUBE (Jan. 26, 2015), <https://www.youtube.com/watch?v=KijAPjXjg8c> [<https://perma.cc/A3BH-YRGV>].

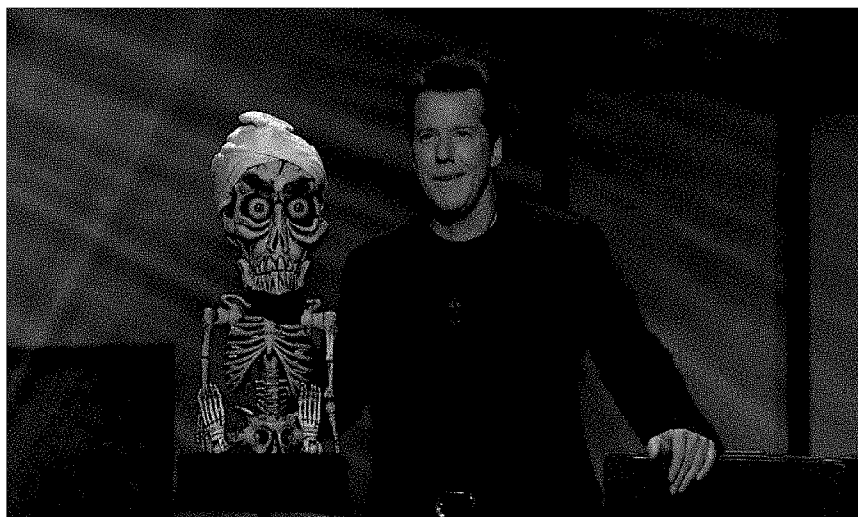
14. See NYA COMEDY, *Sebastian Maniscalco - Old World Upbringing*, YOUTUBE (Apr. 22, 2019), <https://www.youtube.com/watch?v=4jKiq6WGjtY> [<https://perma.cc/E8VH-VFAW>]; see also Sebastian Maniscalco, *Sebastian Maniscalco - Italians Keep A Lot Of Things Private (Stay Hungry Clip)*, YOUTUBE (Mar. 25, 2021), https://www.youtube.com/watch?v=Dv7L9_nTSJw [<https://perma.cc/837J-6S7Z>].

15. See, e.g., The Stories of Craig, *Carrot Top doing Hilarious Prop Comedy on The Late Late Show!*, YOUTUBE (Jan. 10, 2018), <https://www.youtube.com/watch?v=EGV6A1J8sfY> [<https://perma.cc/L7KC-YREV>]; Zee G. Hunter, *Carrot Top on the Tonight Show with Jay Leno*, YOUTUBE (Dec. 31, 2021), <https://www.youtube.com/watch?v=byhzsQ0AzYI> [<https://perma.cc/R8HJ-CNGS>]; Keegan Kelly, *Carrot Top: The Most Successful Comedian No One Will Admit To Liking*, CRACKED (May 28, 2022), https://www.cracked.com/article_34083_carrot-top-the-most-successful-comedian-no-one-will-admit-to-liking.html [<https://perma.cc/KK77-AC4Z>].

16. See, e.g., Michael Schneider, *Jeff Dunham Returns to Comedy Central This Month with New Special, Featuring One Puppet's Joe Biden Makeover (EXCLUSIVE)*, VARIETY (Nov. 3, 2022, 2:14 PM PT), <https://variety.com/2022/tv/news/jeff-dunham-comedy-central-special-joe-biden-1235422677/> [<https://perma.cc/7PKB-PPSM>]; *The Best Jeff Dunham Puppets & Characters*, RANKER, <https://www.ranker.com/list/jeff-dunham-puppets-list/reference> [<https://perma.cc/8N34-5HQA>] (last updated Oct. 28, 2021).



Carrot Top on the *Tonight Show with Jay Leno* (1995)



Jeff Dunham with Achmed the Dead Terrorist

B. Retelling of Current Events

Another method of presenting jokes is through the retelling of factual circumstances or current events. Like the descriptive method, this too provides an illustration of the world where the performer is immersed, though there is a limitation in the subjectivity of the performer's observations. For example, comedian Dave Chappell made a joke about

the factual circumstances of Jussie Smollett's alleged assault.¹⁷ While he seemed to intentionally mispronounce Jussie Smollett's name ("Juicy Smoo-yay") on stage and took a few creative liberties in terms of commentary,¹⁸ Chappell maintained a factual retelling of the events that took place, while also highlighting discrepancies of such events.¹⁹

C. One-Liners

Several comedians have done stand-up performances with very short and witty quips, either à la carte or through musical accompaniment. Examples of such comedians include Nick Thune,²⁰ Mitch Hedberg,²¹

17. Netflix Is A Joke, *Dave Chappelle on the Jussie Smollett Incident | Netflix Is A Joke*, YOUTUBE (Aug. 30, 2019), <https://www.youtube.com/watch?v=wZXoErL2124> [<https://perma.cc/K5YV-Q2EP>].

18. *Id.*

19. *Id.* Such discrepancies were key at Jussie Smollett's trial in determining whether Smollett committed five counts of disorderly conduct for making false reports to police that he was the victim of a hate crime in January of 2019, where Smollett alleged that two men, one of whom was wearing a red hat, had attacked him, shouted racial and homophobic slurs at him, poured bleach on him, and threw a noose around his neck. A jury eventually found him guilty on all charges, each of which were Count 4 felonies. *See also* Don Babwin & Sara Burnett, *Jussie Smollett Guilty Verdict Latest in Polarizing Case*, AP NEWS (Dec. 10, 2021), <https://apnews.com/6bacee833936ed9dbb0784cc0ee1df89> [<https://perma.cc/Y7TE-TMTC>]; *see also* Melissa Mahtani & Fernando Alfonso III, *Jussie Smollett Found Guilty of Falsely Reporting a Hate Crime*, CNN, <https://www.cnn.com/us/live-news/jussie-smollett-trial-verdict-watch-12-09-21/index.html#:~:text=A%20Chicago%20jury%20found%20Jussie%20Smollett%20guilty%20of,three%20years%20in%20prison%20and%20a%20%202425%2C000%20fine> [<https://perma.cc/2MPL-AQDR>] (last updated Dec. 9, 2021, 9:46 PM ET); *see also* Jussie Smollett: A Complete Timeline from Actor's 2019 Arrest to Jail Time, BBC (last updated Mar. 11, 2022), <https://www.bbc.com/news/newsbeat-47317701> [<https://perma.cc/2EWQ-UMAF>]; *see also* Deepa Shivaram & Jonathan Franklin, *Jussie Smollett Will Serve 150 Days in Jail for Lying About an Attack on Him*, NPR, <https://www.npr.org/2022/03/10/1085718072/jussie-smollett-sentence> [<https://perma.cc/K4NP-AP8Q>] (last updated Mar. 10, 2022, 7:45 PM ET).

20. *See* Nick Thune, WIKIPEDIA, https://en.wikipedia.org/wiki/Nick_Thune [<https://perma.cc/4XNM-HCR5>] (last visited Oct. 10, 2022); *see also* Nick Thune, IMPROV, <https://improv.com/milwaukee/comic/nick+thune/#:~:text=Nick%20Thune%20comedian%20%2F%20actor%20hails%20from%20the,8%20times%20and%20on%20each%20occasion%20he%20won> [<https://perma.cc/Z7H2-5N59>] (last visited Oct. 10, 2022).

21. "Hedberg's standup comedy was distinguished by the unique manner of speech he adopted later in his career, his abrupt delivery, and his unusual stage presence. His material was based on wordplay, non sequiturs, paraprosochians, and object observations. His act usually consisted equally of compact one- or two-liners and longer routines, often with each line as a punchline. Many of his jokes were inspired by everyday thoughts or situations." Mitch Hedberg, WIKIPEDIA, https://en.wikipedia.org/wiki/Mitch_Hedberg [<https://perma.cc/H9GA-7W8C>] (last visited Oct. 10, 2022). A paraprosochian is defined as "a figure of speech in which the latter part of a sentence, phrase, or larger discourse is surprising or unexpected in a way that causes the reader or listener to reframe or reinterpret the first part. It is frequently used for humorous or dramatic effect, sometimes producing an anticlimax." *Paraprosochian*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Paraprosochian> [<https://perma.cc/BCW6-2MAC>] (last visited Oct. 18, 2022).

Demetri Martin,²² and Steven Wright.²³ As Nick Thune said, “I like to BCC Stevie Wonder in every email that I send . . . C-Sections are like the Di’Giorno of pregnancy, because it [is] not delivery.”²⁴

II. COPYRIGHT LAW ANALYSIS ON COMEDY

Under Article I, Section 8 of the U.S. Constitution, “Congress shall have Power . . . [t]o promote the Progress of Science and the useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁵ The incentive behind the Copyright Clause is an economic welfarist one, in that Congress’ bestowed authority in granting copyrights encourages individual artistic efforts in such a way that advances public welfare.²⁶

A. *Subject Matter Considerations*

Under Section 102 of the Copyright Act, the term “works of authorship include sound recordings, sculptures and visual works, dramatic works, musical works, pictorial works, and literary works.”²⁷ Section 102(a) of the Copyright Act states that in order for a work to obtain a valid copyright, the work must be an original work of authorship that is fixed in a tangible medium of expression and is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.²⁸ A work is original if it is independently created by the author, as opposed to copied from another’s work, and it possesses some minimal degree of creativity.²⁹ There are however several aspects of subject matter that copyright law does not protect.

Stand-up comedy can involve different types of writings under Section 101. Without a doubt, the audio and video recordings of these stand-up performances can be protected by copyright law.³⁰ It is harder to consider whether the jokes themselves can be protectable. The problem with arguing that stand-up comedy should fall as a literary work of art is the assumption that all stand-up comedy is narrative.³¹

22. *Demetri Martin*, WIKIPEDIA, https://en.wikipedia.org/wiki/Demetri_Martin [https://perma.cc/B76U-D55B] (last visited Oct. 10, 2022).

23. *Steven Wright*, WIKIPEDIA, https://en.wikipedia.org/wiki/Steven_Wright [https://perma.cc/Y8UV-WTKV] (last visited Oct. 10, 2022).

24. *HeadlineActs, Comedian Nick Thune*, YOUTUBE (Aug. 11, 2011), <https://www.youtube.com/watch?v=aQ-XlkJOgTQ&t=357s> [https://perma.cc/8EL4-8PVH].

25. U.S. CONST. art. I, § 8, cl. 8.

26. *See Mazer v. Stein*, 347 U.S. 201, 219 (1954).

27. 17 U.S.C. § 102.

28. *See* § 102(a).

29. *See Burrow Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

30. *See Woodard, supra* note 7, at 1054–63.

31. *See id.* and accompanying text.

1. Fixation

To receive copyright protection, a work must be fixed in any tangible medium of expression and capable of being communicated or reproduced.³²

In *Williams Electronics, Inc. v. Artic International, Inc.*,³³ the Third Circuit held that an audiovisual copyright on a computer program that involves user interaction meets the requirement under the Copyright Act, 17 U.S.C. § 101, that the copyrighted material be fixed.³⁴ There, the court analyzed the copyrightability of three separate attributes of the *Defender* videogame: (1) the computer program, which was stored in read-only memory (ROM) computer chips; (2) the game's attract-mode feature, which displayed on the console screen when the game was not in use; and (3) the game's play-mode audiovisual effects, including how a player interacted with the game.³⁵ The defendant argued that the play-mode was not fixed because each player plays a different game and has an interaction with it that is different from before.³⁶ However, the court disagreed, and indicated that although each user may interact with the game in a different way, the game's software produces a set of symbols and visual and audio outputs that are sufficiently repetitive and predictable to nonetheless count as fixation.³⁷

In *Kelley v. Chicago Park District*,³⁸ the Seventh Circuit held that the plaintiff could not acquire a copyright for his garden.³⁹ The court viewed the garden as not being sufficiently repetitive and predictable for it to be considered a fixed work of art because the garden is susceptible to changes in nature, including growth, wilting, degradation, and death.⁴⁰

The fixation requirement is a simple one to accomplish because stand-up comedy performances, similar to musical lyrics and acting lines, are written, outlined, and rehearsed before being performed.⁴¹

32. See 17 U.S.C. § 102(a).

33. *Williams Elecs., Inc. v. Artic Int'l, Inc.*, 685 F.2d 870 (1982).

34. *Id.* at 874.

35. *Id.* at 872.

36. *Id.* at 874.

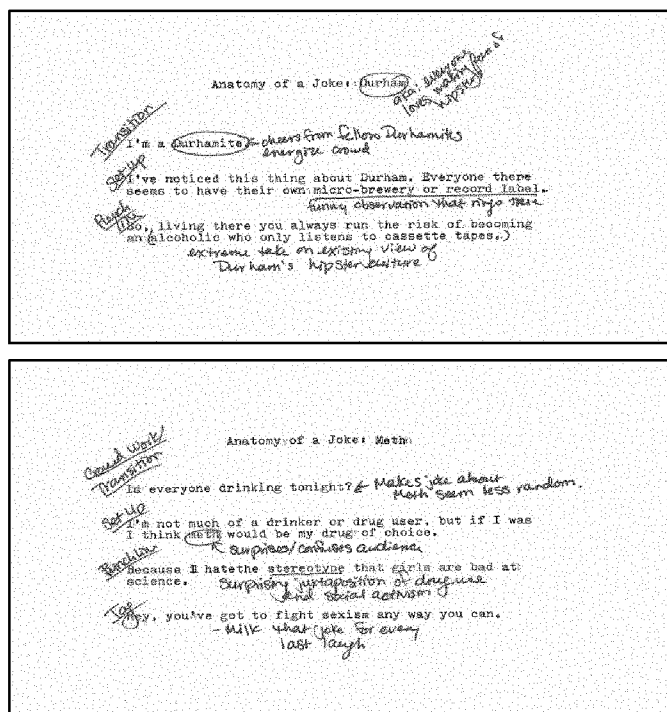
37. *Id.*

38. *Kelley v. Chi. Park Dist.*, 635 F.3d 290 (7th Cir. 2011).

39. *Id.* at 306.

40. It is also important to note that merely the garden as a sculpture is at issue, not the photograph of said garden. *Id.* at 303–06.

41. See Mintz, *supra* note 9; see also *How to Write Stand-Up Comedy in 6 Easy Steps*, MASTERCLASS, <https://www.masterclass.com/articles/how-to-write-stand-up-comedy-in-6-easy-steps> [<https://perma.cc/384M-EPKL>] (last updated Aug. 23, 2021); see also Jason Rutter, *Rhetoric in Stand-up Comedy: Exploring Performer-Audience Interaction*, 10 *STYLISTYKA* 307, 308 (2001); CAROLINE MONDAY, <http://www.carolinemonday.com/stand-up-comedy> [<https://perma.cc/M2ZH-C39A>] (last visited Dec. 1, 2022).



Caroline Monday, *Anatomy of a Joke*

2. Facts of the World

Originality also requires that the work entails some minimal degree of creativity. The Court in *Feist Publications v. Rural Telephone Service, Co.*⁴² held that facts are not copyrightable and although compilations of facts may be, facts are not copyrightable per se.⁴³ Take the “Juicy Smoo-yay” bit, for example. Being able to copyright facts in order to exclude others from retelling the same facts would mean that an individual would not be able to gain a monopoly over the use of the retelling of the allegations and incidents involving Jussie Smollett.⁴⁴

3. Idea-Expression Dichotomy

Under Section 102(b), copyright protection does not extend to ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries.⁴⁵ Expressions of those ideas, procedures, and

42. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

43. *Id.* at 345, 357.

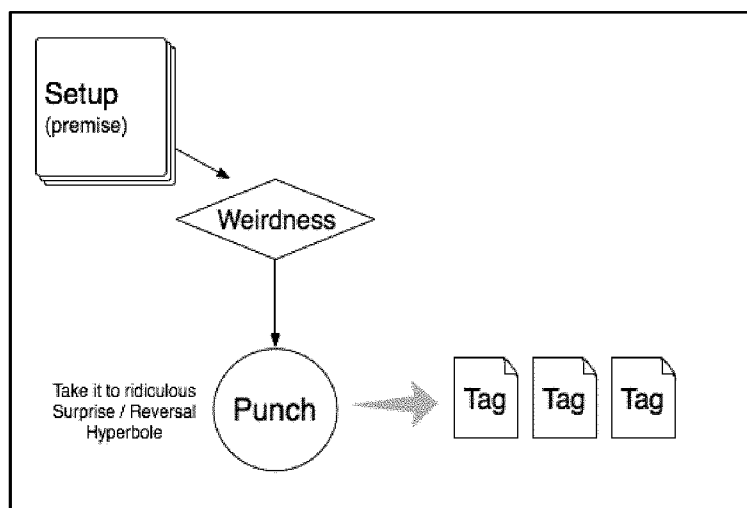
44. *But see Int'l News Serv. v. Associated Press*, 248 U.S. 215, 247 (1918) (holding that a quasi-property right exists in published news such that appropriating the published news gathered by another for further commercial purposes constitutes unfair competition in trade).

45. *See* 17 U.S.C. § 102(a).

the like, however, can be protectable.⁴⁶ The distinction between an idea and expression falls along a continuum; the various doctrines surrounding idea and expression point to originality, including the process-expression distinction, historical fact-expression distinction, merger, and *scènes à faire*.⁴⁷

In *Baker v. Selden*,⁴⁸ the Court held that while the description of the system is an expression of Selden's system, which was copyrightable, the visual representations of that system were not copyrightable because they represented Selden's idea itself.⁴⁹ The visual representations however could have been patented.⁵⁰ This is true if the process was conceived with at least some aesthetical considerations in mind.⁵¹

In the context of stand-up comedy, the practices of overlapping, imagery, comparison, and misdirection are essential components of stand-up bits, particularly within the one-liner style of comedy. These methods of operation by themselves are not protectable under copyright law.⁵²



Robert Richman Diagram (2021)

46. *See id.*

47. 17 U.S.C. § 102(b).

48. *Baker v. Selden*, 101 U.S. 99, 107 (1879).

49. *Id.* at 107.

50. *Id.* at 107.

51. *See Bikram's Yoga College of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032 (9th Cir. 2015).

52. *See What I Learned About Culture From Stand-Up Comedy*, ROBERT RICHMAN (Apr. 13, 2021), <https://robertrichman.com/what-i-learned-about-culture-from-stand-up-comedy/>. Copyright law does not protect ideas or procedures for doing, making, or building things, scientific or technical methods or discoveries, business operations or procedures, mathematical principles, formulas or algorithms, or any other concept, process, or method of operation. Compare Section II.A.3, with Section I.

B. Infringement

A plaintiff can establish infringement by providing circumstantial evidence of (1) ownership of a valid copyright, and (2) actionable copying by the defendant of constituent elements of the work that are original.⁵³ There are two types of copying that serve as constituent elements of the infringement analysis: (1) copying in fact and (2) copying in law.⁵⁴

1. Copying in Fact

Copying in fact is established by showing that the defendant actually used some elements of the plaintiff's work in making the defendant's allegedly infringing work.⁵⁵ Absent direct evidence of copying, proof of infringement may involve fact-findings demonstrating that (1) the defendant had access to and actually copied plaintiff's work and (2) probative similarity exists.⁵⁶ Proof of access is defined as a reasonable opportunity or reasonable possibility of viewing or copying the plaintiff's work.⁵⁷

In *Three Boys Music Corp. v. Bolton*,⁵⁸ the court considered a variety of different ways to prove the access requirement, such as obtaining an actual tangible copy, access due to widespread distribution or dissemination of the plaintiff's work, or a particular chain of events which is established between the plaintiff's work and the defendant's access to that work (such as through dealings with a publisher or record company).⁵⁹

2. Copying in Law

After demonstrating copying-in-fact, an assessment of copying in law or substantial similarity should be conducted.⁶⁰ This considers whether the defendant copied a copyrightable expression in such a way that liability should follow. Unlike the factual copying-in-fact inquiry, this assessment requires a judgment call—it is a question of how much and of what kind rather than a simple yes-or-no question. Proving substantial similarity does not require exact replication but can instead be shown

53. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

54. JEANNE C. FROMER & CHRISTOPHER JON SPRIGMAN, *COPYRIGHT LAW: CASES AND MATERIALS* 214 (3d ed. 2021).

55. *Id.* at 214.

56. See MARSHALL A. LEAFFER, *UNDERSTANDING COPYRIGHT LAW* 420-24 (5th ed. 2010).

57. See, e.g., *Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984); see also *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167 (7th Cir. 1997).

58. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000).

59. *Id.*

60. See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

where portions of the later work are recognizably based on the infringed work to a lay observer.⁶¹

Additionally, although ideas and *scènes à faire* cannot be protected, the expression of those items can be.⁶² But if portions of the original work are taken from the public domain, the substantial-similarity test for copyright infringement requires a more discerning analysis.⁶³ Although the elements of a work that are in the public domain do not receive copyright protection, the more discerning analysis of the substantial-similarity standard does not require each element of a work to be analyzed on its own.⁶⁴

There is also the concept of “thin copyright.”⁶⁵ In *Skidmore v. Led Zeppelin*,⁶⁶ the court emphasized that similarities are required for infringement if the range of protectable expression is narrow, because the similarities between the two works are likely to cover public domain or other unprotectable content.⁶⁷ Essentially, when there is a narrow range of available creative choice, the defendant’s work would necessarily have to be identical to the plaintiff’s in order to be substantially similar.⁶⁸ By contrast, the more original the plaintiff’s work is, the broader the plaintiff’s copyright to protect against other work copies.⁶⁹

In the *Led Zeppelin* case, the plaintiffs were not claiming the melody of the song as a whole was copyrighted, the way in which the notes proceed through the chromatic scale going down the scale.⁷⁰ The Katy Perry “Dark Horse” dispute also dealt with something similar, involving a descending 8-note motif.⁷¹ By limiting the scope of the copyright regarding such works, this prevents authors from attempting to copyright common musical progressions if not “basic building blocks” of music composition.⁷² Rather, it is the particular way in which the author realized or expressed the use of these musical phrases, motifs, or progressions,

61. *Id.*; see also *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706 (S.D.N.Y. 1987).

62. See *Boisson v. Banian, Ltd.*, 273 F.3d 262, 268 (2d Cir. 2001).

63. *Id.* at 272.

64. *Id.*

65. See Woodard, *supra* note 7, at 1069–70.

66. *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020).

67. *Id.* at 1089 n.13.

68. *Id.*

69. *Id.*

70. *Id.* at 1058.

71. See *Gray v. Perry*, No. 2:15-CV-05642, 2020 WL 1275221 (C.D. Cal. Mar. 16, 2020).

72. See *id.* at *15–16; see also *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1069 (9th Cir. 2020). See generally Marisa C. Schutz, *Is Gray v. Perry The One That Got Away? The Idea Expression Dichotomy and Music Copyright Infringement*, 20 UIC REV. INTELL. PROP. L. 290 (2021). (explaining how music copyright disputes are fought and argues that *Gray* was correct in its conclusion that the basic music building blocks are not copyrightable)

such as the coordination of these phrases, the complex instrumentation, and the degree of ostinato implemented for example.⁷³

Like music or drama, stand-up comedy falls into the same problem; while comedy has been compared to various forms of music, it incorporates less notation and pedagogy.⁷⁴

a. More Discerning Ordinary Observer Analysis

The total-concept-and-feel locution functions as a reminder that, “while the infringement analysis must begin by dissecting the copyrighted work into its component parts in order to clarify precisely what is not original, an infringement analysis is not simply a matter of ascertaining similarity between components viewed in isolation.”⁷⁵

When a work is comprised of creative and original adaptations of elements taken from works in the public domain, it is capable of copyright protection. However, the extent of such protection is limited to the creative and original components of the adaptation, or the original expression.⁷⁶ Under the Second Circuit’s more discerning ordinary observer test, a plaintiff must prove unlawful appropriation by demonstrating that the alleged infringing work has copied protectable elements of the plaintiff’s work.⁷⁷ While the copying does not have to be exact, infringement can still occur if the creator mimics the structure or arrangement of the existing work’s artistic elements.⁷⁸ In determining whether an inexact copy of a work infringes upon the work, the overall look and feel of each work must be considered, including the structural and artistic decisions.⁷⁹ While isolated public-domain elements should be excluded from a determination of infringement, the selection, arrangement, and adaptation of such elements should still be considered.⁸⁰

b. Extrinsic-Intrinsic Analysis

By contrast, the Ninth Circuit uses a two-part standard to determine whether the defendant’s work is substantially similar to the plaintiff’s

73. *See Perry*, 2020 WL 1275221, at *24.

74. *Compare supra* notes 65–73 and accompanying text, *with* TEDx Talks, *supra* note 9. (notes 65–73 explain musical copyright disputes and how music is built on common building block and note 9 also explains that stand-up comedy is built on common building blocks).

75. *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134–35 (2003).

76. *See Boisson v. Banian, Ltd.*, 273 F.3d 262, 268 (2d. Cir. 2001).

77. *Id.* at 267–68.

78. *Id.* at 273.

79. *Id.*

80. *Id.* at 268.

copyrighted work.⁸¹ The first part, the extrinsic test, compares the objective similarities of specific expressive elements in the two works.⁸² Crucially, because only substantial similarity in protectable expression may constitute actionable copying that results in infringement liability, “it is essential to distinguish between the protected and unprotected material in a plaintiff’s work.”⁸³ The second part, the intrinsic test, “test[s] for similarity of expression from the standpoint of the ordinary reasonable observer, with no expert assistance.”⁸⁴ Furthermore, the Ninth Circuit has held that a combination of unprotected elements in a work can be granted copyright protection so long as the work adds original aspects to features in the public domain.⁸⁵

Essentially, the Ninth Circuit recognizes that authors borrow from predecessors’ works to create new ones, so giving exclusive rights to the first author who incorporates an idea, concept, or common element would frustrate the purpose of the copyright law and curtail the creation of new works. In lieu of this understanding, the Ninth Circuit’s approach seems to favor future authors and leave room for originality.⁸⁶

CONCLUSION

With regard to the debate on whether stand-up comedy should be protected by copyright law, it is important to emphasize what exactly a plaintiff is attempting to copyright. There seems to be a tendency to blur the distinction between a recorded performance and the jokes themselves. Additionally, critics also err in creating the assumption that stand-up comedy is a one-size-fits-all method, and as a result, jokes can be copyright protectable literary works. Thus, perhaps copyrighting stand-up jokes à la carte is as valuable as dissecting a frog, especially when considering the interests of authors, consumers, and subsequent creators.

81. *See Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977).

82. *Id.*

83. *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004).

84. *See Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020).

85. *Id.* at 1169.

86. *See Rentmeester v. Nike, Inc.*, 883 F.3d 1111 (9th Cir. 2018); *see also Cavalier v. Random House, Inc.*, 297 F.3d 815 (9th Cir. 2002); *see also Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003).