
THE KNOCKOFF ECONOMY

HOW IMITATION SPARKS INNOVATION

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INTRODUCTION

Every spring, millions of viewers around the world tune in to watch the Academy Awards. Ostensibly, the Oscars are about recognizing the year's best movies. But for many people the Oscars are really about fashion. Fans and paparazzi press against the rope line to see Hollywood stars pose on the red carpet in expensive designer gowns. The television cameras are there too, broadcasting the red carpet fashion show (and the inevitable fashion faux pas) across the globe. In the process, careers in both film and fashion are made and unmade.

For years, the designers at Faviana have been watching the Oscars as well—very closely. Faviana is an apparel firm located on Seventh Avenue in New York City. If you go to Faviana's Web site, you will see a link titled "Dress Like a Star."¹ That link leads to a collection of dresses that are direct copies of those worn by actresses on television, in movies, and, most important, at awards shows like the Oscars. In fact, the dresses are identified using photos of stars, such as Angelina Jolie and Sarah Jessica Parker, wearing the original designs.

Knockoffs like these are a significant part of Faviana's business, as its Web site somewhat immodestly makes clear: "For the past 7 years, the company's 'designer magicians' have been interpreting the red carpet looks of Hollywood's most glamorous stars." And the company does not try to hide that it

does more than “interpret” these red carpet looks; it copies them. Indeed, Faviana trumpets this fact. “Ten minutes after any big awards telecast, the Faviana design team is already working on our newest ‘celebrity look-alike gowns,’” crowed CEO Omid Moradi in an interview.*

Faviana’s creations retail for between \$200 and \$500—not cheap, but much less expensive than the multi-thousand dollar designer creations they imitate. At these prices, even Faviana’s “designer magicians” cannot replicate the expensive materials and workmanship of many of the originals. But for women who could never afford to buy the **real thing**, that does not matter. For them, a cheap facsimile is better than nothing. The company, which excels at the production of both knockoffs and PR catchphrases, refers to its work as “bling-on-a-budget.”

The existence of firms like Faviana (or ABS, Promgirl, or any of a number of similar houses) raises fascinating questions about the relationship between creativity and copying. In most creative industries, copying is illegal. We all have seen this warning as we sit back on the couch to watch our latest Netflix arrival:



“Reproducing,” or copying, a creative work like a film is against the law. Copyright law—and intellectual property law more generally—exist to prevent copying, on the theory that the freedom to copy would ultimately destroy creative industries. If others could simply copy the efforts of creators, few would bother to create in the first place. How then can a firm like Faviana get away with blatantly knocking off a dress that someone else has

* No one will be surprised that Faviana and its brethren do not stop at movie stars; detailed knockoffs of Kate Middleton’s royal wedding dress, and even sister Pippa Middleton’s bridesmaid dress, are available as well.

designed? And, even more important, why doesn't this rampant copying destroy the fashion industry?

Surprisingly, fashion designs are not covered by copyright law. What Faviana does is perfectly legal—and very common.² Fashion trademarks are fiercely policed; it is illegal to copy brand names such as Gucci or Marc Jacobs, and expensive lawyers aggressively sue those who try. But the underlying clothing designs can be copied at will. Firms both high and low in the fashion world knock off others' designs. Some merely take inspiration from or “reference” existing designs. Others copy far more blatantly. But all this copying is free and legal.

As a glance at the reliably thick September issue of *Vogue* will show, however, creativity in fashion has hardly ended. The development of new apparel designs continues every day at a dizzying pace. Indeed, the American fashion industry has never been more creative. All this copying has not killed the fashion industry. In fact, fashion not only survives despite copying; *it thrives due to copying*. This book is about why—and what the story of fashion, and of football, cuisine, finance, and a host of other unusual industries, can tell us about the future of innovation in a world in which copying is cheaper and easier than ever before.

Innovation is central to our contemporary economy. And many people believe that the rules about copying that fall under the banner of “intellectual property”—in particular, copyright and patent—are the basis of sustained innovation.* This belief in the power of intellectual property, or IP, predates the Internet, the computer, and even the lightbulb. It was also a central concern of the Framers of the U.S. Constitution. The Constitution explicitly grants Congress the power to create patents and copyrights for “limited Times” as a way to “promote the Progress of Science and useful Arts.”

In a market economy like ours, *of course*, we depend on competition to keep the price of goods and services low and their quality high. And a lot of competition involves copying. (Think of Pinkberry, whose success spawned kiwiberry, Yogurt Land, and dozens of other stand-alone shops serving tart,

* When we refer to intellectual property in this book, we principally mean patent and copyright—the two forms that are focused on providing incentives to innovate. Trademark law has a different aim: to protect consumers by ensuring that they are buying what they think they are buying. We'll say more about trademark later in the book.

frozen yogurt with mix-ins). So why do we allow prohibitions on copying, prohibitions that constrain competition?³ As the language of the Constitution suggests, we protect innovation from copying because innovation has good consequences, and restraints on copying are thought to be necessary for innovation to occur in the first place.

Some believe that these restrictions have an important moral dimension as well: copying the work of another, they say, is unfair and akin to stealing. The Framers generally took a different view.⁴ As Thomas Jefferson famously wrote, ideas are not like tables or televisions:

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea. . . . Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.⁵

In other words, if we take your car, we have it and you do not. But to copy an idea takes nothing from the creator; the creator still has it and so too does the copyist. And this makes the copying of ideas more morally ambiguous than stealing ordinary tangible property like a car.

The primary reason the American legal system regulates copying, in short, is not moral but practical. Both copyright, which protects books, songs, films, and the like, and patent, which protects useful inventions such as medicines, machines, and business methods, rest on the theory that the control of copying is necessary for innovation to occur. Innovation requires rules that allow creators to control who can make copies—either by making the copies themselves, or selling licenses to others. Creators, in short, need a monopoly over the right to make copies. In this book, we refer to this as the *monopoly theory* of innovation.⁶

Why is it thought that creators need a monopoly over their creations? Many innovations are difficult to invent but easy to copy. If copying is allowed, the monopoly theory holds, investment in new inventions and creations will be discouraged as copyists replicate the **work** of originators—and often more cheaply, since they do not bear the costs of creation. In Jefferson's terms, if everyone is constantly lighting their taper from our flame, we might not bother to light our **own** taper in the first place.

The argument that copying stifles creativity is intuitively appealing. Who is going to create if others are free to take? Proponents of this view tend to assume that it is self-evident that strong patent and copyright laws are essential to keep creative juices flowing, and that more protection is better than less.

This is one reason that the term of protection under American copyright law has increased from 28 years in 1790 to over a century today. It is also one reason the scope of patents has expanded from things like cotton gins and chemicals to cover a wide, some would say absurd, range of ways of doing business—such as the patent on “one-click” purchasing awarded to online retailer Amazon. (Only the naïve would ignore another reason for this expansion: there is a lot of money at stake in controlling innovations, and those who possess the relevant rights have every incentive to push to make them as strong as they can.)⁷ The justification for the expansion of monopoly rights is simple: more intellectual property yields more protection, which in turn produces more creativity. Or so the story goes.

This book challenges the conventional wisdom about innovation and imitation. And it does so in a new way. Most of the debate on these issues has revolved around existing industries that are major proponents of strict rules against copying, such as the music business (copyright) or the pharmaceutical industry (patent). We instead explore a variety of industries and arts, like fashion, databases, and comedy, *in which copyright and patent do not apply, or are not used*. In other words, we ask, What happens when restrictions on copying are not part of the picture?

What we find is that even though others can freely copy in these industries, creativity remains surprisingly vibrant. In the pages that follow we will explore a clutch of industries in which copying does not necessarily kill or even impair creativity. In some, copying actually spurs innovation—an effect we call the “piracy paradox.” In others, social norms protect the interests of originators and keep innovation humming. Imitation may also force innovators to structure their creativity in ways that make it less vulnerable to copying. The details vary, yet in all of these instances copying tends to lead to transformation rather than decimation.

Our main message is an optimistic one: surprisingly, creativity can often co-exist with copying. And under certain circumstances, copying can even be *good* for creativity.

This has vital implications in a world in which rapid technological advances have made copying easier and easier. Some believe we are entering an era of cultural and economic decay in which unrestrained copying by “digital parasites” destroys first one, then another, creative art.⁸ Others foresee an impending utopia of the mind in which creativity and information are set free and available to all. We think the truth is more complex, but also more interesting, than either of these views. Copying can harm creativity and some **rules** are necessary; we are not IP-abolitionists.⁹ But the effects of copying on creativity are not nearly as simple as the monopoly theory suggests. The industries we explore tell us that creativity is more resilient than commonly believed; that copying has unappreciated virtues; and that the rise of free and easy copying may, in the end, prove to be far less apocalyptic than many believe.

The industries we look at in this book are often surprisingly big and interesting. Understanding how they work, and *why* they work, is fascinating. We also want to draw out lessons for other industries, such as music and film, which increasingly struggle in the face of rampant, and rising, copying. These IP-dependent industries are certainly different from the industries we profile in the pages to follow.¹⁰ Yet there are still useful lessons about how and when prohibitions on copying are necessary. This is especially true since copying appears increasingly difficult to stop, even as innovation becomes ever more central to our economy. In this new world, a close look at those industries that *already* survive and even thrive in the face of pervasive copying can help us judge whether the future of creativity is bleak or bright. For reasons this book will explain, we think the future is brighter than many realize.

Here are a few examples of the industries, and the stories, we examine in the chapters that follow.

CUISINE

Walking home one night in Los Angeles with his sister-in law, Mark Manguera had an epiphany. Mexican and Korean were two of L.A.’s street food mainstays. Could the tastes be combined? Maybe he could pull off the culinary version of a mash-up. What if he stuffed a tortilla with . . . Korean BBQ’d short ribs?

This was the birth of the now-famous “Korean taco”: a concept that fused two of L.A.’s favorite cuisines—both associated with cold beer and good

times—into one delicious combination. Within a month Manguera had teamed up with a friend and highly accomplished chef, Roy Choi. Choi took the idea and made it work. Together, they launched a business to sell Korean tacos out of a truck. They called it Kogi, a play on the Korean word for meat.

In L.A., food trucks are a common sight. But for decades trucks were limited to basic Mexican fare aimed at construction workers and residents of immigrant neighborhoods. Kogi's insight was to take the concept of a taco truck and tweak it. It was a flash of gastronomic inspiration to combine Korean BBQ with tacos, but it was also a flash of marketing inspiration to offer a more upscale and lively truck experience, one that would appeal to an entirely new demographic.

Still, Kogi's culinary mash-up was not an immediate hit. The truck parked in a busy part of West Hollywood, yet at first the team couldn't give their tacos away. But Manguera and Choi weren't deterred, and they tried some innovative strategies to get the attention of jaded Angelenos. The truck would park near offices by day, residential areas in the evening, and clubs and bars at night. Manguera would hand out free samples to the club bouncers, who loved the food and spread the word to those waiting at the rope lines. Manguera also reached out to L.A.-area food bloggers, and they reciprocated with glowing reviews. And Kogi benefited from the tech savvy of Manguera's sister-in-law, Alice Shin, who made extensive use of Twitter to help followers to know where the truck was at all times. But the overwhelming reason for their success was the creativity of the Kogi team, who cleverly combined two great tastes that had existed cheek-by-jowl in L.A. for decades, and, moreover, chose to "upscale" the plebian food truck rather than start a traditional brick-and-mortar restaurant.

The rest is food history. In 2010, Roy Choi was listed as one of *Food & Wine* magazine's 10 best new chefs, and today there are hundreds of gourmet food trucks in L.A. and nearly every other major city in the nation, offering everything from banana pudding to sushi. Inevitably, there are also many knockoffs of the Kogi taco. Even Baja Fresh, the fast-food Mexican chain, began offering one.

From an innovation perspective, cuisine is a lot like fashion. Recipes are unprotected by copyright, so anyone can copy another's recipe. Actual dishes—the "built food" you order in a restaurant—can also be copied freely. As anyone who has eaten a molten chocolate cake or spicy tuna on crispy rice knows, popular and innovative dishes do seem to migrate from

restaurant to restaurant. The bottom line is that almost anything a chef does that is creative—short of the descriptions of the food in the menu, which are at least thinly protected by copyright law—can be copied by another chef.

Copyright’s purpose is to promote creativity by stopping copying; if everyone could imitate, no one would innovate. By this logic, we ought to be consigned to uninspired and traditional food choices, since in the food world, it is easy and legal to copy. In short, the Korean taco should not exist.

But the real world does not follow this logic. In fact, we live in a Golden Age of cuisine. Thousands of new dishes are created every year in the nation’s restaurants. The quality and variety of American cuisine today is very high, and much higher than it ever has been before. The so-called molecular gastronomy or modernist cuisine movement has innovated in myriad (and often bizarre) ways that have filtered down to more modest restaurants all over the world. But so too have the ideas of many “farm to table” chefs working in cities across America. Television shows such as *Top Chef* and *Iron Chef* challenge contestants to mix and match improbable combinations of ingredients with little warning or time. Our contemporary food culture, in short, not only offers creativity, it increasingly *worships* creativity—and many of us worship it right back. So how are chefs so creative when they know others can **copy** their recipes?

STAND-UP COMEDY

Louis C.K. is a “comic’s comic,” which is one way of saying that while his fellow stand-up comedians esteem him, he is not exactly a household name. That has begun to change in the last couple of years, however, not least because of his new television show, *Louie*. The show has received adoring reviews, and viewers are beginning to notice.

Dane Cook, on the other hand, is a stand-up comedy superstar. He has recorded five best-selling comedy albums, has a burgeoning film career, and has hosted *Saturday Night Live* twice. In 2007, Cook sold out two shows at Madison Square Garden in the same night. Dane Cook is the biggest thing that the world of stand-up comedy has produced in a very long time. He is, however, not well liked by some rival stand-ups. Some of the bad feeling may just be jealousy. But some is about Cook’s credibility as a comedian. Cook has a reputation for stealing jokes. And the most persistent allegations revolve around three jokes that appear on Cook’s 2005 album *Retaliation*,

but which are remarkably similar to jokes on Louis C.K.'s 2001 album *Live in Houston*.*

Louis C.K. has never said anything publicly about the allegations against Cook. But other comedians and comedy fans certainly have. For the last six years or so, Cook's penchant for copying, and the specific allegations regarding Louis C.K., were detailed on comedy blogs and in a 2007 article in *Radar* magazine. And then there are the videos on YouTube, posted mostly anonymously, accusing Cook of imitating the routines of a number of other comedians. The allegations clearly have upset Cook. In a 2010 interview with comedian Marc Maron, an agonized Cook insisted that he "didn't steal anything from Louis C.K." "How can I really convey to people so that they understand?" Cook added. "I've never stolen anything in my life. . . . I'm not a thief."

And then, a couple of months after the Marc Maron interview, the Louis C.K./Dane Cook dispute took a fascinating turn: Cook appeared as himself in an episode of *Louie*. In the show, Louie wants to take his daughter to a Lady Gaga concert for her birthday. He approaches Cook, who shares a promoter with Gaga, for help in scoring tickets. The comedians meet in Cook's dressing room for a face-to-face discussion.

At first Cook is surprised and offended that Louie would ask him for a favor. But Cook agrees to get the tickets for Louie—on one condition: "All you have to do," Cook says, "is go on YouTube, and tell everybody that I did not steal your material."

Louie does not respond directly; instead, he denies ever accusing Cook of theft. Cook shoots back that what Louie has done is just as bad: he's allowed other people to make the accusations, without stepping in to deny them. And then Cook lays out how badly he's been hurt:

You know what?—I'm excited that you're in this room right now, because I've waited four years to tell you this. . . .

The year 2006 was the greatest year in my entire life. I had a double-platinum comedy album—first one ever to exist. I had a massive HBO special. . . . 2006—that should have been like my triumph. And I enjoyed it, Louie, for maybe two months. Two months before it started to *suck*. Because everything I started to read about me was about how I stole jokes from you. Which I didn't.

* One joke is about the strange names that parents give to their kids. A second focuses on how people get tongue-tied in moments of panic. And a third muses on the travails of having an itchy rear end.

“I kind of think you did,” Louie shoots back. And then he tells what he thinks happened:

I don’t think that you saw me do those jokes and said “I’m going to tell those jokes too.” I don’t think there’s a world where you’re that stupid, or that bad a guy. . . . I think you saw me do them—I know you saw me do them—and I think they just went in your brain; I don’t think you meant to do it, but I don’t think you stopped yourself either. And that’s why I never felt the need to help you not be hated by a lot of people.

An exasperated Cook asks Louie again for a public statement of absolution. Louie responds by asking whether Cook would be willing to admit that he did appropriate the jokes, even if inadvertently. Finally, Cook breaks down and says he’ll get Louie the tickets. Nothing has really been settled, but each comic has had the chance to say his piece.

On one level, Louis C.K. and Dane Cook are simply actors playing parts in a TV show. But the dispute they’re sparring over is real, and the on-screen confrontation also says something important about how comics behave out in the real world. When a comedian believes that a rival has used one of his jokes, he doesn’t file a copyright lawsuit. Copyright law technically covers jokes. But because copyright protects the specific expression of a joke, rather than the underlying funny idea, it is very easy to sidestep the legal rule and simply tell the joke in a slightly different way. In practice, this means copyright just does not protect the work of comedians.

But that does not mean comedians stop creating new jokes: in fact, a big part of being a successful stand-up comic is churning out fresh material, not rehashing your greatest hits. The fact that copyright is essentially unavailable to comedians has not led to a decline in the invention of new jokes and routines. Instead, comedy is more pervasive than ever, with a flourishing world of comedy clubs and bars and even Comedy Central on cable television, featuring many stand-up acts. How is it that comedians have managed, without using the law, to reconcile creativity with copying?

FOOTBALL

When football started, it was a brutal game of straight-ahead running plays—the slow grind of “three yards and a cloud of dust.” The results

weren't always pretty, and indeed they were sometimes disastrous in an age when players wore little protection. In the 1905 college season, 18 players were killed and more than 150 badly injured. After viewing a photo of a mutilated player, President Theodore Roosevelt demanded change in the rules of the game. Football responded by innovating: teams introduced the forward pass into their offensive strategies.

The pass was thought to be less dangerous to players than the run, but some wondered whether it would ever count for much. A *New York Times* writer said, "There has been no team that has proved that the forward pass is anything but a doubtful, dangerous play to be used only in the last extremity."¹¹ Yet the pass not only caught on, it became, for many teams, the first tenet of their offensive doctrine. Passing changed football forever. Size mattered less; speed, smarts, and strategy much more. The pass added a range of previously unimaginable complexities to the offense, which demanded new defensive countermeasures. The result has been a continuous wave of innovation. And a just-as-continuous wave of copying.

Consider the "No Huddle Offense." In 1989, Sam Wyche, then coach of the Cincinnati Bengals, had the seemingly crazy idea of employing a "hurry-up" offense, typically used in a game's waning minutes, during the entire game. The offense became known as the "No Huddle," and it worked exactly as it sounds—Wyche's smaller and well-conditioned Bengals ran a very quick series of pre-scripted plays without huddles, all with the object of confusing and tiring the larger, less mobile players on the opposing defense. The strategy worked brilliantly and provoked anger among opposing coaches. In the days leading up to a playoff game against the Buffalo Bills, Bills coach Marv Levy angrily asserted that Wyche's innovation was equivalent to cheating. But anger soon gave way to imitation. The following season, Levy's Bills knocked off the no-huddle offense and went on to play in four straight Super Bowls.

So what does this mean? There is a lot of innovation in football. But there has been virtually no attempt to copyright or patent any of the innovations that have periodically roiled the game. There are some serious legal hurdles, but since American law already protects "choreographic works," copyrighting a football play is not as far-fetched as it may seem. Patent protection extends to new and useful "systems," and a novel football offense might be characterized this way. It might also be characterized as a "method of doing business"—a category of inventions which **is** also patentable (with some

restrictions) under U.S. law. In short, IP law might conceivably step in to prevent copying, but it never has. So why do football coaches continue to innovate, even when they know that their rivals will study their innovations and imitate them?

Fashion, food, football, and comedy are all industries in which creativity is vibrant and the patent and copyright laws are either absent or irrelevant. There are many similar examples, as this book will demonstrate. Few have been studied as a source of insights about innovation. The best known involves open-source software. The entire purpose of open source is to keep code “open”—to allow others freely to copy and modify what previous programmers have created. The use of copyright law to prevent copying or modification of the code is not permitted. And yet creativity flourishes and open-source software products, such as Linux and Firefox, have significant market shares. Others have explored the story of open source in depth. Still, we will say a few things about it in the conclusion to point out just how important the overall approach of open source is to our understanding of how imitation and innovation mix.

There are many other fields in which IP plays little or no role in incentivizing innovation. Fonts are a vibrant creative area, with literally thousands available and many new fonts created every year. Copyright law does not effectively protect new fonts against copying. And the advent of digitization has made copying very easy. Rather than slow down the growth of new fonts, however, digital technology has actually accelerated it.

The financial industry—banking, investment management, insurance—is also a fertile ground for innovation, with new investment tools and strategies deployed (for better or worse is not clear) in a ceaseless competition to maximize returns, hedge risk, and lower costs. Some of these innovations are patented, but many—and many very valuable ones—are not. As a result, financial industry innovators are often knocked off by their competitors. Still, copying does not appear to suppress incentives to innovate very much.

The computer database industry—which provides a huge range of products that collect and organize information and make it searchable using a computer—is another innovative industry where an enormous amount of new work is produced with very little IP protection. The content in some databases is copyrightable—for example, the huge collections of news articles available via Lexis-Nexis or the DowJones “Factiva” database. In many

other instances, the content of databases is composed of basic facts—like the price of houses—and under American law basic facts are uncopyrightable. This is a contrast with Europe, where factual databases *are* protected against copying. Yet the surprising thing is this: the database industry is growing on this side of the Atlantic, and stagnating on the other. The freedom to copy has not killed the U.S. database industry—if anything, it seems to have strengthened it.

These stories, and others, describe a world of robust creativity in the face of easy—and sometimes relentless—copying. These accounts are interesting in themselves. Taken together, however, they are more than just snapshots of particular settings in which innovation thrives without the incentives to create that IP is designed to provide. They raise wider questions about when, and how, restraints on copying are central to innovation in *any* setting.*

These questions are especially pressing now. Innovation is an ever more central driver of economic growth in today's economy. Rules against copying have a critical role to play in this economy.¹² Yet there are several reasons to think that having too much regulation of copying can pose as great a danger as having too little. IP rights come at a price. IP protects creators by limiting competition, and less competition means higher prices for books, films, music, drugs, and so on. They require enforcement, which is often expensive. And IP regulations can be a powerful tool for established firms and industries to squash newcomers, and new technologies, that could, if left alone, give rise to entirely new businesses and cultural products.

As this last point emphasizes, strong restraints on copying can inhibit as well as enable innovation. One of the key arguments of this book is that innovation is often an incremental, collective, and competitive process in which the ability to build on existing **creativity** is critical to the creation of new and better **things**. Apple took the idea of a mouse and an icon-based computer display from researchers at Xerox, tweaked it, and commercialized it. Disney's *Steamboat Willie* (and by extension Mickey Mouse) was a sort of proto-remix of Buster Keaton's *Steamboat Bill*. Thomas Edison's lightbulb imitated elements from over a dozen earlier bulbs. Shakespeare's *Romeo and Juliet* borrowed from earlier writers (and *Westside Story* in turn

* Smart defenders of rules against copying note—correctly—that these rules are not just aimed at creation but also at distribution. We say more about the role of intermediaries in the chapters to come.

drew heavily from Shakespeare). Since few creations are entirely new, laws that prohibit copying can block as well as spark innovation. The flipside is that open and easy copying can spark as well as block innovation.

To be sure, it is very hard to determine the optimal mix of imitation and IP in a given industry, let alone across the spectrum of our creative economy. The prevailing view, embodied in the monopoly theory, is that copying is a serious, even mortal threat to creativity. But perhaps the opposite is true: fewer restraints on copying could actually yield more innovation—or the same amount of innovation at a much lower cost. (That is the fundamental notion behind open source.) To date, there are few if any convincing tests of either of these propositions. Much of our regulation of copying, in short, is based on theory and intuition, not hard evidence.

Our central point is simply this: despite the widespread view that copying is a serious threat, when we stop and look at a broader range of creative industries, we see that imitation often co-exists with innovation. If the future is going to be one of more, rather than less, copying—and everything to date suggests that will be the case—these industries present a window on the ways in which innovation can continue to thrive.

And this has implications for how we think about the future of our increasingly ideas-based economy. Consider this example. In the 1980s the motion picture industry tried to use copyright law to eliminate a fearsome new technology—the VCR—that the industry’s chief lobbyist, the famed Jack Valenti, in a congressional hearing memorably likened to the Boston Strangler.* That bid, spurred by the fear that Americans would begin copying films and television shows at home, just barely failed—the Supreme Court voted 5–4 to permit the VCR, and one vote going the other way would have resulted in the elimination of the home video market. Contrary to Valenti’s prediction, that market became a huge moneymaker for Hollywood.¹³ In subsequent decades the VCR, and then the DVD player, poured many more dollars into the film studios’ coffers than piracy was ever able to steal away.

* Valenti did not stop there. The VCR, he predicted, would simply destroy Hollywood: “Now, we cannot live in a marketplace, Mr. Chairman—you simply cannot live in a marketplace, where there is one unleashed animal in that marketplace, unlicensed. It would no longer be a marketplace; it would be a kind of a jungle, where this one unlicensed instrument is capable of devouring all that people had invested in and labored over and brought forth as a film or a television program, and, in short, laying waste to the orderly distribution of this product.”

As this history shows, getting our policies on copying right—or wrong—can have major economic impacts. And the story of the VCR illustrates that the relationship between copying and creativity is anything but simple. The film industry feared the VCR's ability to copy, but later discovered that copying created rather than killed markets, allowing the industry to grow and fueling future creativity.

Copying is not always so benign, or so lucrative. Rules about copying have an important, even essential role to play in our economy and our world. But that role is much more nuanced than many believe. Major industries survive and even thrive in the face of copying, and in some cases copying makes them richer and more productive. If we can begin to unlock that paradox, we can learn a host of important lessons about the future of innovation.

COMEDY VIGILANTES

One day Milton Berle and Henny Youngman were listening to Joey Bishop tell a particularly funny gag. "Gee, I wish I said that," Berle whispered. "Don't worry, Milton, [said Youngman,] you will."¹

Late one Saturday night in February 2007, Joe Rogan decided to take the law into his own hands. Rogan, a well-known comedian and host of the popular reality program *Fear Factor*, was on stage at The Comedy Store, a venerated club on the Sunset Strip in Los Angeles. Rogan had heard from fellow comedians that an even more famous stand-up, Carlos Mencia, had copied a joke from one of Rogan's friends, a relatively obscure comedian named Ari Shaffir. Rogan spotted Mencia in the audience and called him out in front of the crowd—insulting him as “Carlos Menstealia” and accusing him of stealing jokes. Mencia rushed the stage to defend himself, and there began a long, loud, and profane confrontation.²

The Rogan/Mencia blow-up was caught on video, and if you can tolerate a bit of rough language, it is well worth watching.³ In the course of a high-volume duel of insults, with the angry comics standing inches from each other, Rogan laid out the details of Mencia's alleged offense, including the

joke allegedly lifted from Ari Shaffir* and other material Rogan accused Mencia of ripping from rival comedians George Lopez and Bobby Lee. Mencia angrily denied stealing, declaring that Rogan was a “whiny bitch” motivated by jealousy. As the argument grew more intense, Shaffir himself jumped on stage to support Rogan.

Eventually, the comics left the stage, but Rogan continued to press his case against Mencia in interviews. In the following weeks a number of other comics joined in the feud, most siding with Rogan. Perhaps more important, Rogan posted video clips of the confrontation on YouTube along with examples of Mencia’s alleged joke thievery. These videos have been viewed more than 5 million times.⁴

The last number should catch your attention. *Five million views* for YouTube clips recording a public argument between two comedians over copying jokes. What’s going on here?

In this chapter, which draws on a two-year study that one of us (Sprigman) conducted with University of Virginia colleague Dotan Oliar,⁵ we look closely at how creativity and copying work in the world of stand-up comedy. The story is fascinating on its own. More broadly, the world of comedy provides important insights into how some creative communities develop informal and extra-legal rules of conduct—which we have referred to in this book as social norms—to control copying and limit the harms it may cause. For many decades copying was an accepted part of the comedy world. But since roughly the 1960s, when stand-up comedy began to move away from strings of one-liners and toward longer, more personalized routines, social norms have played an important role in regulating copying among comedians.

Comedy differs in some important ways from the worlds of cuisine and fashion we described in the previous two chapters. Much more so than chefs, comedians are fairly united in their opposition to copying. More so than the fashion industry, the comedy industry has a strong set of social norms that effectively constrain copying. But as is true of both food and fashion, legal rules about copying play almost no role in comedy. While jokes and comedy routines are technically subject to copyright protection—another area of difference with food and fashion—as a practical matter

* The joke in question was about the security wall proposed between the United States and Mexico, meant to keep out illegal immigrants. The punch line: “well, who’s gonna build that wall?” We say more about this joke later in the chapter.

copyright law is almost useless. (And patent simply does not apply.) Cuisine, clothing, and comedy, in short, are all arenas in which copying is effectively uncontrolled by the law. Yet in all three, creativity thrives.

We explain why legal rules are irrelevant to comedians and how, despite this, comics remain so creative. What the story of comedy shows is not so much that innovation can occur despite extensive imitation—though that was true in the early days of stand-up comedy—but that the law is not the only way to restrain imitation. Like fashion and food, comedy demonstrates that legal rules about copying are not always necessary for creativity to thrive.

Before we examine how comedians' system of social norms works, however, we have to pull back a bit—to the beginnings of modern stand-up comedy, and, along with it, the once very common practice of joke copying.

A VERY BRIEF HISTORY OF STAND-UP COMEDY

The roots of American stand-up comedy can be traced to variety theater and especially vaudeville, America's primary form of entertainment in the late 19th and early 20th centuries. A ticket to a vaudeville show bought a stew of singing, dancing, juggling, acrobatics, magic, animal performances, pantomime, and comedy. Comedy in vaudeville was presented in a theater format, where funny elements would be intertwined with drama or dance or singing, and occasionally with other talents such as magic or throwing lassos.

Straightforward joke telling was not unknown in vaudeville, but it was not common until the late 1920s, when vaudeville moved closer to modern stand-up by placing increasing emphasis on the character of the "master of ceremonies," or "emcee." The emcee's short jokes (they had to be brisk so as to not slow down the quick flow of the bill) set the standard for the post-vaudeville generation of "one-liner" comics. Early vaudeville performers freely borrowed funny material from other performers. Originality was not a priority.

Vaudeville declined in popularity during the 1930s for various reasons, including the impact of the Great Depression and, most important, the emergence of radio and film. Vaudeville performers began to move to these new media, as well as to independent stand-up shows in nightclubs, casinos, and resorts concentrated in areas such as upstate New York's "Borscht Belt."

Comics like Milton Berle, Henny Youngman, Jack Benny, and Bob Hope represent the transition from vaudeville, where comedians played a relatively minor role in the greater variety show, to a new form, where stand-up comedy was offered as a stand-alone performance. These performers carried with them much of the vaudeville aesthetic—fast-paced gags, wordplay, remnants of theater (song, dance, and costumes), and physical humor. This was the golden era of the one-liner. The basic unit of humor was the joke, and comedians loaded scores of them into their quiver and shot them, rapid-fire, at the audience.

Phyllis Diller, perhaps the fastest worker in the post-vaudeville cohort, could keep up for her one-hour act a constant pace of 12 punch lines a minute. Diller and her fellow post-vaudeville comics worked to master the art of timing the audience and feeding them a new zinger—or perhaps just as often a clinker—as soon as the laughs or groans from the previous joke were starting to wane. This style of stand-up, characterized by strings of jokes that ranged over a wide variety of topics and had little connection to one another, was dominant until the mid-1960s, and remains a part of the comedy world today.

Participants in this seminal era of stand-up had to have a large number of jokes at hand. Not surprisingly, many maintained significant joke archives.⁶ Phyllis Diller had over 50,000 jokes, carefully organized by topic.* (The Diller archive is now at the Smithsonian Museum.) Approximately half of the jokes in Diller's file were obtained from one of the large groups of writers she used. Looking at the file, it appears that she freely borrowed from other sources, such as comic strips. For example, a number of jokes about Diller's dysfunctional marriage to her fictional husband "Fang" seem to have been inspired by the comic strip, "The Lockhorns," which she followed obsessively. The Diller joke files contain hundreds of "Lockhorns" panels mounted on index cards⁷

In this era, straightforward copying of jokes, as well as the "refinement" of other comedians' materials, was still prevalent. A history of Borscht Belt "Toomlers," or joke-slingers, notes that "[Henny] Youngman's style of delivery

* Diller also reworked her jokes frequently. One index card in the file featured a joke about the law. "What has 18 legs, 9 heads, and 4 boobs?" she wrote. Punch line: "The Supreme Court." She then crossed out the original joke and rewrote it in pen below, reflecting changes on the Court. "What has 18 legs, 3 boobs, and one black asshole?"

kept him joke broke. Like all Toomlers his need for new, fresh material was complicated by the fact that he worked to repeater guests season after season. The usual method of obtaining material . . . was to lift from the best. Any opening day at Loew's State or the Palace found a dozen comics in the audience, pencils akimbo."⁸

Milton Berle was one of the most famous practitioners of the one-liner era, and also such a well-known joke thief that rivals referred to him as the "Thief of Bad Gags." Berle openly admitted to a penchant for copying, and even made jokes about it—for example, Berle's famous gibe, made on stage at the Beverly Hills Friar's Club, that the prior act "was so funny I dropped my pencil." As Berle explained in 1948, copying was just how business was done: "You say that I, Milton Berle . . . steal from Bob Hope? You don't understand, that's just high finance. . . . I take a joke from Bob Hope . . . Eddie Cantor takes it from me . . . Jack Carson takes it from Cantor . . . and I take it back from Carson. . . . [T]hat's the way it operates, it's called *corn exchange*."⁹

Around the time of the Kennedy presidency, however, stand-up comedy began to make a significant turn. Reflecting larger trends in society, and the growing presence of the baby boomers in American cultural life, a new generation of comics began to explore politics, race, and sex as part of a general move toward increasingly personalized humor. Many comics began to shift from one-liners and short jokes to longer monologues, with a more distinct narrative thread that reflected the individual comedian's life and point of view. Stock, shared jokes on topics like mothers-in-law were increasingly out; individual observations and peccadillos, sometimes woven into long stories, were increasingly in.

Mort Sahl and Lenny Bruce led this new wave of work. Sahl's act was explicitly political and intellectual; Bruce's profanity-laced commentary pushed at social convention, especially race, religion, and sex. Sahl and Bruce were hugely influential; their descendants comprise the majority of working comedians today. And like those seminal artists, most of the current generation—which includes comics as different as Jerry Seinfeld, Chris Rock, Zach Galifianakis, Patton Oswalt, Lewis Black, Louis C.K., Margaret Cho, and Sarah Silverman—work within well-developed comic personalities.

The mainstream of post-1960s comedy, in short, embraced a more conversational style with jokes and funny asides woven into a very personal

monologue.* One result is that there is greater variety of styles in comedy than ever before. Whereas earlier comics tended to stick to prescribed themes and types of jokes, today's combine a much greater diversity of approaches and subjects into their routines. And whether the stage personas of comedians are real or invented, routines often reflect an established personality that fans come to love and expect.

Alongside the shift in the last 50 years in how comedy is performed was a parallel shift among comedians in their views about creativity. The copying culture of Borscht Belt comedians was a victim of this new style. Copying was commonplace in the 1940s and 1950s. But it appears to be far less common today—or at least, much less accepted by comedians themselves. Today, comedians who rely on generic joke telling are often derided as “hacks.” Originality is prized—indeed, it is the first criterion by which comedians judge other comedians—and imitation is condemned. As we explain [below](#), this shift in views about copying is probably not unrelated to the shift in comedic style that occurred in the same basic period.

One other change is worth noting. As the comedy industry changed in both style and attitude from the 1960s onward, it also grew much larger. A national circuit of comedy clubs spread to most every major city and quite a few smaller towns. Comedians began to release recordings of their performances—and some of these sold massively. Comedians also gained more and more television exposure, both from late night shows and regular sitcoms. In more recent decades, this exposure accelerated, to the point that today we see not only channels like HBO carrying a lot of stand-up, but even a dedicated cable channel, Comedy Central, that features many comedians in many formats. Comedy, in short, is everywhere.*

* Of course, there remain a number of comedians who specialize in the older one-liner style. But even with modern purveyors of the one-liner, there is an emphasis on persona and the performative elements that establish persona, such as Steven Wright's monotonic delivery of nuggets of first-person surrealism. In short, contemporary stand-up tends to be pretty clearly stamped with the persona (whether real or invented) of the comedian actually on stage.

* Indeed, whereas once the most trusted newsman in America was Walter Cronkite, today it may well be a former stand-up comedian: Jon Stewart of the *Daily Show*.

COPYRIGHT'S IRRELEVANCE TO STAND-UP COMICS

Jokes and routines are literary works, a category that copyright law clearly protects. And yet, despite the many examples of joke theft that exist, there has been only a handful of lawsuits over copying—and none that we could find in the past half-century involves a dispute between stand-up comics. There is also no evidence of threatened litigation or settlements between stand-ups.

Why does the law seem to have so little relevance in the comedy world—even back in the days when copying jokes was as common as breathing? One reason is the expense of enforcement. Comics considering a copyright lawsuit quickly discover that legal fees often mount into tens and even hundreds of thousands of dollars. Yet there are other, arguably more significant, obstacles to a successful suit. The most important of these is copyright's distinction between original expression, which is protected, and the creative ideas underlying the expression, which are not.

This idea-expression distinction is central to copyright law. What this means for comedy is that the particular wording of a bit is protected, but the underlying idea or premise that makes it funny is not. Copyright law permits a rival comedian to take that funny premise, reword it, and create his own version of the joke. This principle of copyright law leaves comedians with little practical protection, because often it is the idea or premise conveyed by a joke that causes the audience to laugh, and that premise can be expressed in several different and equally funny ways.

Another important barrier is the difficulty of proving that another comic actually engaged in copying, rather than creating his or her joke independently. Unlike patent law, which creates monopoly rights that are good against all later-comers to a patented invention (whether they copied that invention or not) copyright *only protects against actual copying*. In most creative fields, this usually isn't an issue in practice; it is virtually impossible to imagine that two authors have written the same play, or two painters produced the same painting. But it is a harder issue when the material in question is a joke. Jokes often are based on premises that are sufficiently topical that a number of comedians will come up with very closely related bits based on the same premise at about the same time.

A good example of this is the very joke over which Joe Rogan went to war with Carlos Mencia. At least four comics have told a similar joke about the

construction of a border fence between the United States and Mexico. The first, Ari Shaffir, was recorded telling the joke at a “Latin Laugh Festival” in March 2004:

[California Governor Arnold Schwarzenegger] wants to build a brick wall all the way down [to the] California/Mexico border, like a twelve-foot high brick wall, it’s like three feet deep, so no Mexicans get in, but I’m like “Dude, Arnold, um, who do you think is going to build that wall?”¹⁰

Here are three other comics telling different versions, all in 2006:

Carlos Mencia (January 2006): Um, I propose that we kick all the illegal aliens out of this country, then we build a super fence so they can’t get back in and I went, um, “Who’s gonna build it?”

D. L. Hughley (October 2006): Now they want to build a wall to keep the Mexicans out of the United States of America, I’m like “Who gonna build the motherf***er?”

George Lopez (November 2006): The Republican answer to illegal immigration is they want to build a wall 700 miles long and twenty feet wide, okay, but “Who you gonna get to build the wall?”¹¹

Comedians admit that it is often hard to say whether one comic copied another or whether both converged on the same idea—a fact that makes lawsuits unlikely to succeed. The “Mexican border fence” joke is an apt example. Inspired by events in the news, many comedians working independently could have written similar jokes based on the same premise.

The bottom line is that legal rules against copying seem like a useful tool, but in practice they hardly matter in the comedy world. Yet, while contemporary comedians often hash out funny ideas cooperatively, creating substantial scope for imitation, they value originality and oppose copying. The way they keep this all together is through an unusually well-developed system of social norms. These norms are entirely private and informal. But they restrain copying, allowing for some kinds but not others. And although there is no legal basis for these norms, they are surprisingly effective.

MODERN STAND-UP COMEDIANS AND THEIR SOCIAL NORMS

In the study that is the principal source of what we write here, one of us (Sprigman) and UVA law professor Dotan Oliar interviewed many successful

comics about originality and innovation, and especially about what comedians do when they believe that a fellow comic has lifted a bit from them.¹² In other words, the study sought to find out what the norms were and why they existed. Some of these norms mimic the rules of copyright law: for example, the major norm that prohibits publicly performing another stand-up's joke or bit. Others, however, deviate from the ordinary rules of copyright. For example, copyright protects expression but not underlying ideas, but comedians' norms protect expression *as well as ideas*.

We will dig into these norms in a moment. But it is important to note that comedians' norm system includes informal but powerful punishments. These start with simple bad-mouthing and ostracism. If that doesn't work, punishments may escalate to a refusal to work with the offending comedian. Occasionally, comedians threaten joke thieves and even beat them up. None of these sanctions depend on legal rules—indeed, when comedians resort to threatening or beating up other comics, that's obviously against the law. Yet these tactics work. Within the community of comedians, allegations of copying can cause serious harm to the reputation of a comic—remember the example involving Dane Cook from the introduction to this book?—and may even destroy a showbiz career.

The upshot is simple but profound: using informal norms, comedians are able to limit copying. They assert ownership of jokes, regulate their use and transfer, impose sanctions, and maintain substantial incentives to invest in new material. As with fashion designers and chefs, this story presents a puzzle for the monopoly theory of innovation. Since there is no effective legal protection against copying jokes or routines, the monopoly theory predicts that copying should be common and creativity should dry up. Yet thousands of stand-ups keep cranking out great new material night after night.

If you talk with comedians, they seem to agree on one thing: Carlos Mencia steals a lot of jokes. We began this chapter with one well-known example—Mencia's altercation with Joe Rogan. Here's another. On his 2006 album "No Strings Attached," Mencia performed a bit about a devoted father teaching his son how to play football:

He gives him a football and he shows him how to pass it. He shows him every day how to pass that football, how to three step, five step, seven step drop. He shows him how to throw the bomb, how to throw the out, how

to throw the hook, how to throw the corner, he shows this little kid everything he needs to know about how to be a great quarterback, he even moves from one city to the other, so that kid can be in a better high school. Then that kid goes to college and that man is still, every single game, that dad is right there and he's in college getting better, he wins the Heisman trophy, he ends up in the NFL, five years later he ends up in the Super Bowl, they win the Super Bowl, he gets the MVP of the Super Bowl, and when the cameras come up to him and say "you got anything to say to the camera?" "I love you *mom!*" Arrrrgh . . . the bitch never played catch with you!¹³

Compare this to a bit from Bill Cosby's 1983 hit album "Himself":

You grab the boy when he's like this, see. And you say, "come here boy"—two years old—you say, "get down, Dad'll show you how to do it." "Now you come at me, run through me," (boom!). "There, see, get back up, get back up—see you didn't do it right now come at me," (boom!). See, now we teach them—see now you say, "go, attack that tree, bite it, (argh!) come on back, bite it again," (argh! argh!). You teach them all that: "tackle me!" (bam!). And then soon he's bigger and he's stronger and he can hit you and you don't want him to hit you anymore, and you say, "alright son." Turn him loose on high school and he's running up and down the field in high school and touchdowns, he's a hundred touchdowns per game and you say, "yeah, that's my son!" And he goes to the big college, playing for a big school, three million students and eight hundred thousand people in the stands—national TV—and he catches the ball and he doesn't even bother to get out of the way, he just runs over everybody for a [touchdown] and he turns around and the camera's on him and you're looking and he says, "hi *mom!*" Ah . . . you don't mind that. You know who taught him.¹⁴

Mencia has denied copying Cosby's football routine—indeed, he's denied ever hearing Cosby's routine prior to performing his. But that's hard to believe. Cosby is an icon in the comedic community, and *Himself* has sold a huge number of copies and is still on sale 25 years after its release. Given these facts, it's unlikely that Mencia never heard it. And given the striking similarity of the two routines, it's a fair inference that Mencia copied. Cosby, who has denounced copyists but who has also admitted to having once copied comedian George Carlin,¹⁵ has taken no action against Mencia.

Comedian George Lopez has not been as generous. In 2005, Lopez accused Mencia of incorporating 13 minutes of his material into one of Mencia's HBO specials. And Lopez retaliated: he grabbed Mencia at the Laugh Factory comedy club, slammed him against a wall, and punched him.¹⁶

Yet if a hard punch is a legitimate response among comics to joke stealing, then perhaps Lopez should also beware. Speaking at the 2008 Grammys, Lopez noted how pleased he was to see a woman (Hillary Clinton) and an African American (Barack Obama) competing for the Democratic presidential nomination. He worried, however, that the first female or black president might be assassinated. The best thing to keep them safe, he suggested, would be to choose a Mexican vice president. "Anything bad happens," Lopez promised, "Vice President Flaco will live in the White House."

Funny, but eight years earlier, in his 2000 HBO special "Killing Them Softly," Dave Chappelle declared that he would not be afraid if he were elected the first black president, even though he knew that some people would want to kill him. The reason? Chappelle would choose a Mexican vice president "for insurance." Chappelle's punch line: "So you might as well leave me and Vice President Santiago to our own devices."¹⁷

Did Mencia copy Cosby and Lopez? Did Lopez copy Chappelle? We don't know for sure: in these, as in many other cases, it is possible that one comedian has imitated another, or that each came up with the joke independently. There are scores of examples that suggest that a joke has been copied—but the evidence is rarely definitive.

The "Mexican Vice President" joke helps to explain why there are fewer lawsuits over imitation than one might otherwise expect. It can be hard to figure out who is an originator. But it's still a puzzle why there are none, since not all—or even most—comedy is based on topical issues like elections. The utter absence of suits is not just a result of copyright's poor fit. It is also a consequence of comedians' social norms system. Let's get more specific about what these norms are.

Thou Shalt Not Covet Thy Neighbor's Jokes, Premises, or Bits

The most important norm is a basic one: a widely shared taboo against copying. This norm is so fundamental that a popular guide for new stand-ups, *The Comedy Bible*, puts the following as the first of its Ten Commandments

to the novice: “Thou shalt not covet thy neighbor’s jokes, premises, or bits.” Other “how to” guides convey the same message.¹⁸

One obvious question is what exactly this norm prohibits. Does it apply only to exact copying, or all the way to imitating another comic’s funny idea? As we’ve seen, standard rules of copyright prohibit the use of expression that is “substantially similar” to a protected work, but do not protect the underlying idea. The social norms of comedy do not draw the same distinction. They protect both expression *and* ideas.

One comedian illustrated this with an example of a joke about a person having sex in a church. The idea is so general, the comic said, that it should remain open to rival comics. Add, however, even a minor bit of specificity (the comedian posited a joke about a person having sex in a church who is caught by a priest) and both the particular joke embodying that idea, and the idea itself, are off limits to anyone else. Along these same lines, many comedians say that borrowing even general premises—anything that is not “stock” or “commonplace”—is objectionable.

In other words, comedians’ norms system extends to the type of behavior usually thought of as *plagiarism*. From a legal perspective, copyright infringement and plagiarism are quite different. Copyright infringement involves the unauthorized copying of protected expression. Plagiarism is a broader concept: it means either the unattributed copying of another’s expression (which may also violate copyright law), or unattributed copying of another’s *ideas* (which would not violate copyright or, in the vast majority of cases, patent). Of course, copying ideas without proper citation is regarded as a serious offense by certain institutions, such as universities and publishing companies, and certain social groups, such as writers or academics. But these rules against plagiarism are not legal rules—no one can be sued for plagiarizing an idea. Rather, the punishments for this sort of plagiarism are either found in institutional rules **like** university codes of academic conduct, or they are part of the informal norms of some particular professional group (**such as** journalists).

Many comedians use the word “plagiarism” to refer to the copying of funny ideas. And, interestingly, they do this whether the idea is attributed to its creator or not. That is a significant step further than the usual approach to plagiarism, which applies only where the original author *is not credited*. Think of academic writing, where it is fine to copy another idea

as long as the author is credited in the text or even in a footnote. (Indeed, academics like us love when someone copies our ideas—as long as we get the citation).

Why would comedians take this extra step and bar even the copying of attributed ideas? Maybe it is because audiences want new, fresh material every time they see a favorite comic, and so a comic who tells another comic's joke, even if credited, hurts the originator by over-exposing the material. And maybe (and a related point) it is because comics are committed, as a community, to originality as the defining characteristic of a comic. A person who makes a living telling other people's jokes is simply not a stand-up comedian—at least according to other stand-ups.

But as we explained earlier in this chapter, it hasn't always been this way. In an earlier era, funnymen regularly reworked, recycled, and simply stole jokes from their rivals. No one thought it was particularly unusual or wrong to do so, and many—no surprise—joked about it. We are not sure what led to the change in views over the merits of copying. Certainly technological changes have made it easier for audiences to notice copying. In the Borscht Belt days, audiences were all live. Today, there are television specials, comedy albums, and of course YouTube. Whatever the precise reason, however, comedians today are far more vigilant against copying underlying ideas and expressions.

Own the Premise, Own the Joke

Jokes are often produced collaboratively. Comics spend a lot of time together in clubs and on the road, and often they work out new material while hanging out with other comics. It is not uncommon for a comedian with a great premise to probe another for punch lines, or to try out new jokes on a friend and replace a punch line with one suggested by a peer. Under the rules of copyright law, the comedian originating the premise and the comedian originating the punch line would be joint authors and co-owners of the resulting joke. Comedians, however, adhere to a different rule: *the comedian who came up with the premise owns the joke*. The comedian who offered the punch line would know that she has in effect donated her services.

Why do comedians reject the legal rules governing joint authorship? Because **they are** incompatible with effective enforcement of the norm against copying. If two comedians were true joint authors, both would own equal

rights in the joke. But if both told the same joke, fellow comedians and audience members would think one copied the other.

Joint ownership of a joke, in short, would frustrate enforcement of the cardinal anti-copying norm. Today, all that one needs to enforce the norm is to witness two comedians telling a similar joke. However, under a norms system that recognized joint authorship, detection of stealing would be more difficult, because two comedians telling the same joke can indicate either theft or co-ownership. With the signals muddled in this way, the norm system might well break down.

The same basic concern drives a separate norm governing how comedians buy and sell jokes. Copyright law says that to license or purchase a work, the buyer must have a signed, written agreement. But again, comedians follow their own rule. Jokes are usually sold with a handshake. And whatever the law may say, it is clear to comedians that an oral deal is binding and that the seller has transferred all of his rights in the joke. The transfer of rights in the joke is so complete that the originator cannot even identify himself publicly as the joke's writer. As one comedian explained: "[When I buy a joke,] it's mine, lock, stock and barrel. [My] oral agreement with my writers is you can't even tell anybody that you wrote the joke. You can say on a resume that you write for me but you cannot say specifically what jokes you have written for me."

Who's on First?

In copyright law, "firstness," or "priority" of authorship, has little relevance to the validity of a copyright. If a second author happened to *independently* create a work that is identical to a previous work, the second creator still has a valid copyright. But comedians' norms system favors those who get there first. Also, comedians agree that as a practical matter, when two comedians have been performing a similar joke, the first to perform the joke on television owns it exclusively. The act of doing a joke or routine on TV is, in many senses, a bit like filing for patent protection: it grants exclusive title to a joke publicly.

Firstness also has a role in determining who owns jokes submitted to late-night talk shows. Hosts like Jay Leno and David Letterman maintain email addresses (initially these were fax lines) that comedians use to submit material for the nightly monologue. If the jokes are aired, the lucky writer gets a

check in the mail. It sometimes happens, however, that two comedians send in the same basic joke; many are topical and regard the events of the day. If that happens, the first to email gets paid, and the comedian who saw his jokes aired but did not see a check following knows that she was simply too late.

Enforcement

A central issue with all social norms is how to enforce them. Comedians say that despite feuds like those between Joe Rogan and Carlos Mencia, copying is not very prevalent today. That makes intuitive sense: there are thousands of comics performing regularly, and each show might contain several routines, plus various scattered funny asides. Given this volume, copying does seem infrequent. But it happens. And when a comedian believes she has been copied, she's likely to confront the suspected offender. These confrontations are, for the most part, brief, civil, and effective. Persistent copying is limited to a few bad actors who are identified as such in the community.

To make the norms system work, though, comedians must have a reliable way to detect copying. And they do: detection is, for stand-up comedians, a community project. On the typical bill in a stand-up club there are usually several (sometimes as many as eight or ten) comedians. These comedians are often performing several nights a week, and watching other comedians. Given such wide exposure to their peers' material, comedians are well placed to detect imitation. As one comedian put it,

They police each other. That's how it works. It's tribal. If you get a rep as a thief or a hack (as they call it), it can hurt your career. You're not going to work. They just cast you out.

So what happens when a comedian thinks a rival has taken one of his jokes? The first step is to try to get a settlement. An aggrieved comic may confront the suspect, detail the similarities, and describe how long he has performed the joke. He might also state where the joke was performed and name witnesses. Sometimes the accused comedian admits fault and promises to stop doing the bit in question. This may happen, for example, in cases where the accused recognizes that he has borrowed from a rival without realizing it—something that the copyright law refers to as “subconscious appropriation.”

Or the two comics may conclude that they had each come up with the joke independently. If so, the comics might agree that they will simply not perform the same joke on the same bill, or that they will each tell it in different ways or in different parts of the country. One might volunteer to drop the joke as a courtesy. Maybe the joke fits one of the comedians' acts better, or one of them is more passionate about the joke, "needs" the joke more, or simply tells it better.¹⁹

If an aggrieved comedian does not successfully settle a dispute and decides to pursue the matter, in most cases he will seek to impose two types of sanctions: *attacks on reputation* and *refusals to deal*. Two comedians described the process and the consequences:

The guy [who thinks he's been copied] is going to try to get the [other comedian] banned from clubs. He's gonna bad mouth him. He is gonna turn other comics against him. The [other comedian] will be shunned.

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. You want to get a good rep coming up so that people will talk about you to the bookers for the TV shows and club dates. Comics help other comics get work on the road.

Although these sanctions are informal, they are powerful. Credible allegations may impair or destroy a comic's reputation among his peers, an asset that most comedians prize. Many comedians indicated that appreciation by their peers is very important. There are perhaps 3,000 working comedians in the United States. Still, many interviewees referred to stand-ups as members of a "tribe." In this context, a reputation for imitation can be a barrier to career success* :

* Robin Williams, who has faced long-standing and repeated allegations of joke stealing, described the experience in an interview in *Playboy* magazine in 1992: "Yeah, I hung out in clubs eight hours a night, improvising with people, playing with them, doing routines. And I heard some lines once in a while and I used some lines on talk shows accidentally. That's what got me that reputation and that's why I'm fucking fed up with it. . . . To say that I go out and look for people's material is bullshit and fucked. And I'm tired of taking the rap for it. . . . I avoid anything to do with clubs. People keep saying, "Why don't you do The Comedy Store?" I don't want to go back and get that rap again from anybody. . . . I got tired of [other comics] giving me looks, like, what the fuck are you doing here?"

It's a pretty small fraternity of people who make their living telling jokes. And so we kind of run into each other and see each other on TV and pass each other in clubs and hang out in New York together and you know, so there's nothing more taboo in the comedy world, there's no worse claim to make against somebody than "oh, he's a fucking thief."

You know, there are a handful of guys [who] just have a reputation for being thieves and for the most part it's amazing to me, actually if you think about it, how rarely it happens, because it's so professionally useful. A joke is such—it's hard to really explain this—but, it's a series of words that makes a room full of strangers laugh out loud consistently: it's such a beautiful little gem. It comes along so rarely and it hopefully reveals something and it connects with them and it fits the voice and it's short and concise and relatable and gut-laugh funny and it has to be a lot of different things at the same time.

So the development of those little phrases is a lot of work and when someone comes along and sort of lifts that idea from you and uses it, it's aggravating—it can't be described how aggravating it is. The thing that's amazing to me about it is it doesn't happen more often. Because the fraternity of comedy and the people who book comedy, they feel like a vested interest and so they also don't want to book someone who would steal jokes. Even once you're already really famous you really can't successfully run around and steal jokes and have a career. It's amazing that there's enough sort of self-policing within the system.

If shunning and bad-mouthing fail to work, there is a second level of sanction. Comedians can make clear to booking agents that they will not appear in the same night's lineup with someone they believe is a copyist. Intermediaries—club owners, booking agents, agents, and managers—may also refuse to deal with copyists. In particular, at least some booking agents, many of them former comedians themselves, disdain those who copy:

The guys who book clubs, with a few exceptions . . . they don't want to book a guy who has stolen a joke. Very often, people associated with the comedy business either used to be comics or they think of themselves as funny people and they like the business. . . . And so for the most part those people do it for the love of the craft. And so again, there's sort of a built in network of folks who are trying to do the right thing. I mean if

it's a clear reputation [as a thief] and he's trying to book himself as the middle at the Funny Bone in Omaha, [the agent] who books the Funny Bone in Omaha is likely to have heard of this and not take his calls. It could very directly hurt his career. It might end his career if he's famous enough for doing it. It certainly will keep him down below the middle at Funny Bone level. Then he's going to end up telling jokes at [low-class] bars and one-nighters who have a comedy night on a Tuesday, you know. And then it's karaoke and the next night it's trivia night. Some guys wind up in that sort of a circuit.

Reputational sanctions and refusals to deal are the most common retaliatory strategies. But if nothing else works, aggrieved comedians may retaliate with violence. As one comedian recounted, a comic may go up to another, who he thinks lifted a joke, and say "Hey, that's my material, and here's the freshness date—when I wrote it. I've been doing it for years and suddenly it's in your act and it has to be removed.' About 90% of the comics will say, 'OK, fine.' But there is 10% out there who will say, 'Oh yeah? Well, it's mine now.' And then the only copyright protection you have is a quick upper cut."²⁰

This kind of violence is rare. Yet many comedians support or at least refuse to condemn violent retribution. George Lopez did not try to hide the fact that he punched Carlos Mencia—in fact, he boasted about it on *The Howard Stern Show*. An article on the attack on Boston comedian Dan Kinno at the hands of several rival comedians hints at the identities of some of the attackers, who seem to have contributed to bringing the story to print.²¹ Kinno's reaction is also telling: the accused comic is apologetic regarding the use of others' material and at no point suggests that the violent "intervention" was out of bounds. Perhaps most important, the comedy community seemed to accept it. A comedy blog commenting on the Kinno incident suggested that "it's refreshing to see the boys in Boston stand up for their intellectual property. . . . It's admirable that they look out for each other and it's entirely appropriate that they brought the hammer down on someone who so blatantly ignored the unwritten laws."²²

Social norms are certainly not a perfect means of controlling copying. For one, many comedians say that enforcement is difficult when the imitator is significantly more well known than the originator. Attempting to enforce the norms by refusing to appear on a club bill is not likely to work. Also, intermediaries are less likely to enforce the norms or refuse to deal when the

imitator is a famous comedian. Fame, in short, is at least a partial escape from the norms system.

There is another limit to the effectiveness of the anti-copying norm: it is not widely shared by the general public. Like consumers who don't hesitate to purchase a cheap knockoff of an expensive dress, many comedians say that audience members do not care about originality or copying; the audience is there to drink, laugh, and have a good time. Not all comedians agree, though, and some suggest that a small slice of the audience is composed of aficionados who care about originality. Several comedians noted that these aficionados can be useful in enforcing the norm against joke stealing. Running afoul of them can hurt: fans talk, especially online, and a reputation for copying can spread to the more casual consumer of stand-up. And of course there are the comic "shaming" videos on YouTube, such as the video of Joe Rogan shaming Carlos Mencia that we began this chapter with, that work to spread accusations far and wide. In short, social norms are not always effective regulators. But of course legal protection is not always effective either.*

ANTI-COPYING NORMS AND INNOVATION IN COMEDY

That comedians have developed their own private, extra-legal system of social norms about copying is fascinating. But this norms system also sheds light on the central question of this book: how does imitation influence innovation? Three points jump out.

First, the comedy world illustrates that, at least in some instances, social norms can be an effective stand-in for legal rights. The behavior of chefs we described in our chapter on cuisine is certainly guided, to some extent, by social norms, yet with the exception of the high-end Parisian chefs studied by von Hippel and Fauchart, the norms among chefs about copying and ownership are relatively weak and loose. In comedy, by contrast, the norms are much stronger and more widely shared. Social norms about copying appear to be weakest of all in the fashion world.

We suspect this may reflect something about the organization of creativity in these three fields. Comedians are essentially sole proprietors, typically working alone; chefs work as part of small teams; and fashion

* Just ask the music industry—the topic of this book's Epilogue.

designers are (usually) embedded in firms that range from a dozen people to hundreds or even thousands of employees. Social norms about creativity probably work best, and are most likely to take root, in contexts that are most social—that is, where individuals are the key actors and where they rub up against each other frequently. This notion is at least consistent with the pattern we observe in the three fields we have explored so far in this book.

The success of social norms in comedy does not mean that intellectual property rules are unnecessary to stem copying in other creative arenas. Yet it does show that these rules are not necessary in *all* creative arenas. Like fashion and food, legal rules on copying are, as a practical matter, absent in comedy. Yet creativity is thriving.

Second, the fact that comedians have created their own—and often quite different—system of rules suggests that even if the practical barriers to litigation over jokes could be overcome, the existing rules of copyright are not so attractive to comedians. Earlier we detailed several areas where the norms of comedy deviate substantially from the basic structure of copyright. We think this underscores a broader point about good policy: existing IP law is a one-size-fits-all system, and a more focused, industry-specific set of rules might be more effective.

Indeed, we will go one step further: some industries, like fashion and food, do very well with no real rules about copying. We will describe more such industries later on in this book. And that is one reason these industries have neither developed powerful norms system nor successfully convinced Congress to change the law to bar copying. (As we noted in Chapter 1, however, there have several such efforts over the years with regard to fashion—none successful.)

Third, comedians' norms suggest that rules about ownership often have an important effect on *what kind* of creativity is produced, as well as on *how much* is produced. In other words, the rules don't just regulate copying; they shape the kinds of works that get created. These observations raise not just economic but cultural questions.

Consider the history of stand-up recounted in this chapter. During the postwar heyday of the one-liner, there was no strong norm against imitating another comedian. In fact, comedians copied one another shamelessly, joking about it as they did so. And the type of comedy prevalent then permitted and even encouraged this practice. Comedians were telling largely

interchangeable generic jokes that a wide audience could appreciate. Comics differentiated themselves by their performance style: who delivered the joke better, timed the audience better, was able to compile and assemble from a repository of jokes a subset that fitted the particular audience. Many comedians based their acts on a blend of stock jokes, purchased jokes, and copied jokes. There was not much investment in the kind of personalized material that dominates today. Given the system at the time, this made sense. One-liners were easy to copy; delivery, however, was relatively more difficult to steal. Post-vaudeville comedians were incentivized to invest in their delivery, not in writing new jokes.

Now compare those comedians with their modern counterparts. Contemporary comics invest far more in original and personal content. The medium is no longer focused on reworking preexisting genres like mother-in-law jokes. Nor is it just about slinging one funny joke after another. Comedy today is more personal, devoted more to storytelling than to one-liners, and more consistent with a real or assumed stage persona. In short, comedians in the post-Lenny-Bruce era invest in a personality. They create a comedic brand of sorts. And to protect that investment and that brand, they have developed a system of social norms that punishes copying. At the same time, comedians invest less in some of the performative aspects of their work: many today stand at a microphone, dress simply, and move around very little, with none of the more elaborate costuming, mimicry, musicianship, and play-acting that characterized the post-vaudeville comics.

The way in which comedy is produced has also changed. Fewer present-day comedians purchase jokes than in the past. This also makes sense, because the risk inherent in buying and selling has likely gone up. From the comedian's perspective, she has to look for writers who can write well for her unique persona. There are fewer writers who can do that than can write generic jokes. And from the writer's perspective, he must now spend time to get to know his client's act before writing for her (which also raises cost) and has a much lower chance of recouping his investment if the deal falls through (since few other comedians are likely to be interested in a joke tailor-written for another).

It is important to pause here to clarify that we think it is probably impossible to prove that the shift to personal, narrative stand-up comedy *caused* the rise of the norms system (or for that matter whether the causal arrow points in the other direction). But this does not mean that the changing

style of comedy and the rise of norms about copying are not linked. The norms system emerged and won increasing adherence alongside the growing transformation of comedy toward personal, point-of-view driven humor. Each probably contributed to the evolution of the other.

One comedian captured this in a way that illustrates a view many others espoused in interviews:

Yes, I must say I got at least three occurrences where I've seen people do one of my jokes and it happens less frequently now because I've become a comedian who's hard to copy. As I've grown as a comedian myself I have become more and more original. So if someone were to steal it nowadays it would be more obvious . . . The number one reason that I think I did it was, well, maybe two reasons, was to be unique. Because in order to be successful in standup comedy when you're fighting against a thousand other guys . . . I needed to start talking about things that not everyone was talking about. And as a side effect that also makes it more difficult for people to steal from me, and made it more difficult for someone to accuse me of stealing some topic.

[N]ow my jokes are longer too. . . . They generally are two or three minutes long and made up of several paragraphs and so if someone were to steal it word for word it would be quite obvious. It would be incredibly obvious that they had stolen three paragraphs out of my act.

The more entrenched the norms system becomes, the more it makes sense for comedians to do this. And the more unique their material is, the easier it is to enforce and maintain a norms system.

Now, it may be that in the past creativity in jokes was more limited, but comedy was also more accessible and communal. Mother-in-law jokes, one-liners, and puns were the types of jokes that all kinds of listeners found easy to appreciate and retell to others. This kind of comedy may have been less personal and inventive, but it was more social. Today, stand-up is more innovative and personalized, but it is also less inclusive and not as easy to recount at your cocktail party.

In short, rules about copying are not just about promoting more or less innovation; they also shape *what kind of innovation* occurs. And this suggests that when we think about the rules governing creativity, we also have to think about what sort of innovation we really want.

CONCLUSION: THE MAGIC OF NORMS

Comedians copying jokes are not the only group of creative performers to worry about rivals imitating their routines. Nor are they the only ones to develop norms to regulate them. There is another group of performers—one that’s been around much longer than stand-up comedians—that relies heavily on norms as a way of protecting their creativity. A study by a young lawyer, Jacob Loshin, reveals how *magicians* use social norms to help keep the secrets behind their tricks from being disclosed.²³

The story of magicians is different from that of comedians. Magicians worry less than do comedians about borrowing: they are, on the whole, much more willing to share their secrets with other magicians, whom they view more as colleagues than rivals. Indeed, magicians often publish instructions for performing specific tricks in trade journals such as *Genii*, *Magic*, and *The Linking Ring*, and magicians who invent and share tricks enjoy a special cachet within the fraternity. And because their needs are different, their norms are also different.

Perhaps not surprisingly, given how long magicians have been developing their craft, a lot of creativity in magic is of the tweaking variety—some of the most skilled and inventive magicians gained fame by refining the execution of tricks that have been known for decades, or sometimes centuries.²⁴ Nevil Maskelyne, one of magic’s old masters, claimed that “the difficulty of producing a new magical effect is about equivalent to that of inventing a new proposition in Euclid.”²⁵ Whether it’s because there’s little that’s completely new, or for some other reason, magicians seem to worry less than comedians do about imitation.

They do, however, worry a lot about *traitors*—those magicians who expose the secrets behind a trick to the public. Once a trick is exposed in this way, its value as “magic” is destroyed, and this harms everyone in the industry. For this reason, magicians’ norms are focused mostly on punishing magicians who expose tricks to the public—even if the trick is the exposers’ own invention.

Exposure is certainly harmful to the world of magic, though normally we think of the exposure and spread of ideas as a good thing. Indeed, usually the law tries to encourage it. A good example is patent, where part of the bargain in obtaining a patent is revealing the “secret” that makes the invention work. With magic tricks, however, exposure can destroy the secret and reduce or

even eliminate the value of the trick. Tricks must be mysterious to work as magic.

So why don't magicians use the law to prevent exposure of their tricks? The answer is simple: as a practical matter, IP law is no friendlier to magicians than it is to comedians. The procedure describing the way a trick or illusion is performed is simply not copyrightable. Like the recipe for *crème brulée*, the recipe for making a lady disappear is a set of facts and processes. Both are excluded from copyright protection under copyright's distinction between unprotectable ideas and protectable creative expression. A few creative magicians have tried to sue for copyright infringement, but so far without success. In 2003, a federal court rejected a suit brought by a magician who claimed that a television program infringed his act by revealing the secret behind his magic trick.²⁶ Very recently Teller, of the famous magical duo Penn and Teller, broke his longtime silence to file a copyright suit in Nevada. Teller's suit seeks damages against an Australian magician who posted a video on YouTube imitating a Penn and Teller trick, and who offered to sell the secret behind the trick for just over \$3000.²⁷ While Teller's suit is pending as of this writing, it aptly illustrates the limit of copyright protection for magic. Teller is not actually claiming copyright in the way the trick works; he is asserting a copyright in the elaborate (and unusual) pantomime that accompanies the trick. Most magic tricks do not require an elaborate pantomime, and so the suit, even if ultimately successful, has little relevance to the community of magicians.²⁸

Patent offers no help either. In theory a magic trick may, if it is novel and nonobvious, be patentable. But given that most magic tricks are tweaks of well-established routines, few are likely to meet that high threshold. Even for those that do, there is an overwhelming problem. Patent protection is granted only where the patentee adequately *discloses* the idea to the public—and that's exactly what magicians don't want.

There is another form of IP—trade secret—which provides some limited protection to carefully guarded tricks. Trade secret law was once useful to magicians. For example, magician Horace Goldin used a trade secret lawsuit in 1922 to block a film company from exposing his “sawing a lady in half” illusion.²⁹ However, cases like Goldin's have little continuing relevance, because modern trade secret law is much narrower than it was in the early 20th century.

This is true for two reasons. First, the law today is effective only in cases where the secret is revealed by “improper” means, such as theft or breach

of a contract. Thus the law can still provide remedies to a magician for disclosure by a former assistant, but it does not reach the most common form of disclosure—reverse engineering by a rival magician or audience member. In other words, anyone witnessing a trick can legitimately recreate it, if they can deduce how it works. Second, and perhaps most important, modern trade secret law requires that the holder of a secret make reasonable efforts to prevent its disclosure. But magicians operate in a culture of sharing among one another, and in many cases disclosure—even just to other magicians—is likely to eliminate protection. In sum, trade secret law is a weak tool for magicians.

As with comedians, when the law fails magicians, their norms step in. The exposure of tricks doesn't occur often. But when it happens, the magic community retaliates. In the 1997–98 television season, Fox broadcast a four-part show titled *Breaking the Magician's Code: Magic's Biggest Secrets Finally Revealed*. In the show a character identified only as the “Masked Magician” performed a series of small tricks and large-scale illusions before revealing the secrets that made them possible. The turncoat magician was ultimately revealed to be a relatively obscure Las Vegas performer named Val Valentino.

The magic community's response was swift and pitiless. Valentino was branded a traitor and shunned by magicians everywhere. “I'm sort of excommunicated now from the magic fraternity's world,” Valentino admitted.³⁰ Largely shut out of work in the United States, Valentino spent a lot of time performing abroad. In subsequent years, he helped to produce a reprise of *Breaking the Magician's Code*, which aired in the United Kingdom and on US TV stations connected with Fox affiliate MyNetworkTV.

It's been more than a decade since the first appearance of the Masked Magician, but the magic community's dislike of Valentino persists. In the fall of 2010, well-known magician Criss Angel spotted Valentino in a Las Vegas casino and had him removed by security. Valentino told the press that Angel “looked at me and yelled, ‘Get that piece of [expletive] out of here.’ It was bizarre, so unprofessional. I was so disappointed in him.” When Valentino and his companion went to a different lounge in the casino, Angel found them and had them removed again.³¹

What can we learn from stories such as these? Magicians need protection, but not the sort that legal rules against copying are likely to provide. Magicians' social norms provide a sort of “super-trade-secret” protection, where

magicians are subject to community sanction for disclosing secrets in situations that the formal law would ignore. Exposing tricks is rarely against the law, yet the norms system punishes those who do so. And while the law does not distinguish between sharing with fellow magicians and with ordinary people, the norms system treats the two as entirely different.

And like comedy, the world of magic offers some important lessons about innovation. Social norms can serve as an alternative or supplement to legal protection, especially when legal rules are costly or cumbersome to use. And these norms can evolve, as the story of comedy shows. Is a private, norms-based system preferable to a legal system of copyright, patent, and trade secret rules? This question is impossible to answer as a general matter. Each system comes with its own costs and benefits. On the one hand, the norms system is cheap to enforce and appears to incentivize plenty of innovation. We don't lack for comedy or magic today, either in terms of quantity or variety. But on the other hand, the system presents the danger of mob justice (including gossip and the inability to appeal), does not recognize the full range of forms of ownership and transfer found in the formal law, and lacks a clear fair use standard and reasonable time limitations on the right of ownership.

Of course, all weaknesses are relative. Ordinary IP law offers comedians and magicians little help, and it is unclear whether rewriting legal rules would be possible. More to the point, it does not seem necessary to rewrite the legal rules to better serve comedians and magicians: they are thriving without it.