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RESPONSE

CUSTOM, COMEDY, AND THE VALUE OF DISSENT

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PROFESSORS Dotan Oliar and Christopher Sprigman's new article on quasi-intellectual property norms in the stand-up comedy world provides yet another compelling example of the phenomenon that I have explored in which the governing intellectual property regime takes a backseat to social norms and other industry customs that dominate the lived experiences of many in creative fields.¹ Their insightful treatment of the microcosm of comics reinforces my concern that customs are being used to expand IP law both inside and outside the courtroom.² I am particularly appreciative of the editors of the *Virginia Law Review* for inviting this brief response, which allows me to build upon my work on the use of customs and norms in IP.

Although Oliar and Sprigman do not use the term “custom,” I think it is important to recognize that custom includes not only industry practices, but also the social norms that interest Oliar and Sprigman.³ Oliar and Sprigman make few specific recommendations as to how the law should engage with the norms they document. Nevertheless, they

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¹ See Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 *Va. L. Rev.* 1787 (2008); Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 *Va. L. Rev.* 1899, 1903, 1906 (2007).

² *Id.* at 1906.

³ *Id.* at 1900 n.1.

suggest that lawmakers and judges should “consider” seriously the existence of such norms.⁴ This leaves too much room for such norms to be incorporated into the law as governing customs—something I have resoundingly criticized except in the most narrow of circumstances.⁵ Oliar and Sprigman suggest that Congress should consider the norms of stand-up comedy because those norms provide incentives to create without reliance on the formal legal structure of copyright law. Accordingly, they suggest that Congress should resist expanding IP law because the social norms already fill the legal gaps.

I will organize this response as follows: First, I will consider why the existence of social norms does not adequately challenge the incentive rationale, and therefore does not provide a compelling basis for Congressional restraint. Second, I will consider whether the norms that have developed in the stand-up community are worthy of judicial or legislative deference (without regard to their incentive effect). Finally, I will consider what, if anything, the law should do to interrupt the restrictive norms that Oliar and Sprigman identify.

CHALLENGING COPYRIGHT'S INCENTIVE RATIONALE

Oliar and Sprigman challenge the traditional story that without copyright protection there would be no incentive to create. Professor Sprigman has already convincingly made this point in the context of the fashion industry.⁶ What is particularly interesting about stand-up comedy, in contrast to fashion, however, is that Oliar and Sprigman have identified a field where copyright law actually does apply (albeit not as robustly as some comics might like), but is generally not utilized. Oliar and Sprigman contend that the norm system provides quasi-IP protection for jokes and thereby furnishes incentives for comics to produce jokes and indeed, to become comics in the first place.

Oliar and Sprigman convincingly argue that where the law is absent—either by design or choice (and in comedy it seems both apply)—norms may step in to provide incentives to create. I think Oliar and Sprigman are absolutely correct that social norms are an “overlooked source of

⁴ Oliar & Sprigman, *supra* note 1, at 1794, 1833–34.

⁵ Rothman, *supra* note 1, at 1902–03, 1906, 1930–67.

⁶ Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 *Va. L. Rev.* 1687 (2006); see also Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19(2) *Org. Sci.* 187 (2008).

incentive[s] to create.”⁷ This conclusion, however, does not call into question the traditional incentive-based justification for copyright law. One might even contend that the norms-based incentive story in the stand-up world justifies *more* robust federal copyright protection for jokes. After all, if the norms are great at encouraging production, wouldn't delineating such norms more clearly (through precedent or legislation) lead to the production of even more jokes? Although I don't think that is what Oliar and Sprigman had in mind, it is a reasonable conclusion from their findings.

A second reason that the stand-up comedy norms do not call into question the copyright system's traditional role is that the norms have developed in tandem with the copyright system itself. Comics are aware of copyright law's existence; in fact, the stand-up world is largely supported by works robustly protected by copyright law, such as television shows, cable specials, and movies, which are the primary vehicles by which comics achieve fame and fortune. Oliar and Sprigman note that some of the norms specifically relate to such media—for example, the first-to-TV joke ownership norm.⁸ This reality leaves me skeptical that the norms do as much work as Oliar and Sprigman suggest that they do.

Finally, one could question whether the norms have any role in encouraging creation. Oliar and Sprigman concede as much by noting that it is difficult to disentangle socio-cultural and personal incentives to create from a norm-driven incentive system.⁹ Of course this critique is one that I and others, including Sprigman, have given credit to elsewhere, and it applies with equal force to norms and the overall copyright system.

THE LIMITED VALUE OF CUSTOMS IN STAND-UP COMEDY

Although Oliar and Sprigman suggest that Congress and courts should consider the value of norms, they provide no framework for evaluating whether norms are deserving of such consideration. As I have discussed elsewhere, courts do not currently engage in a sophisticated analysis of when customs should be considered and instead often incorporate them into the law without reflection.¹⁰ To combat this

⁷ Oliar & Sprigman, *supra* note 1, at 1831.

⁸ *Id.* at 1826.

⁹ See *id.* at 1818 (quoting a performer who describes his primary motivation as the “love of the craft”); *id.* at 1855 (describing potential cultural factors in the evolution of stand-up comedy).

¹⁰ Rothman, *supra* note 1, at 1902–03, 1906, 1930–67.

problem, I have offered a theoretical framework for determining whether a custom provides useful information worthy of some judicial consideration. This framework situates customs along six main vectors: the certainty of the custom, the motivation for the custom, the representativeness of the custom, how the custom is applied (both against whom and for what proposition), and the implications of the custom's adoption.¹¹

Before embarking on a vector-by-vector analysis of the comedy norms, it is worth noting that although comedy norms may superficially seem similar to those of the fan fiction and haute cuisine chef worlds that I have considered elsewhere, they are different in some important ways.¹² Unlike the chef and fan fiction norms, the comedy norms do not appear to be driven by interest in a fair allocation of rights. Instead, they seem one-sided, focused solely on a joke's originator, without consideration of the potential needs of users or independent creators of similar or related jokes. The norms of the fan fiction and high-end chef communities are more adapted to balancing the interests of creators with those of users. In each of those communities, an attribution norm—rather than a prohibition norm—is the standard. While comics try to shut down second-comers, chefs and fan fiction authors encourage use of their creations by others so long as appropriate attribution is given.

One could argue that comedy is different—any use by another of a similar joke could destroy the value of the joke—and therefore the more even-handed, open-access approach of haute cuisine and fan fiction would not work. This might be correct, but these highly restrictive customs suggest great caution should be taken in incorporating comedy norms into the law and, particularly, in applying them outside of comedy.

Certainty

To have any value, a custom must be certain.¹³ Oliar and Sprigman's description of the comedy norms suggests that there is agreement and some uniformity with regard to their substance and scope. Nevertheless, the sample for their study, nineteen comics, is quite small; before concluding that there is no dissent on the dominant norms I would want

¹¹ Id. at 1907–08, 1967–80.

¹² Id. at 1924–26.

¹³ Id. at 1968.

to see more conclusive evidence. Additionally, they provide some prominent examples of comics who reject the norms, including Robin Williams. Such high profile rejections suggest that there are active dissenters from the purportedly “uniform” norms. Moreover, it appears that more powerful and successful comics may not need to follow the norms. Such power inequities in the development and application of the norms raise red flags about the value of those customs. Given the frequency of joke theft—as evidenced by the examples that Oliar and Sprigman provide—there cannot be said to be universal conformity with the norms. At best, one could say the norms are somewhat certain, but hardly unanimously accepted. They are therefore of some, but not great, value in establishing an appropriate allocation of quasi-property and use rights in the comedy world.

Motivation

Customary practices or norms that develop with the express purpose of formulating an aspirational set of practices should be given more weight than those that develop simply to avoid litigation or to preserve relationships.¹⁴ Although the comedy norms have an implicit deontological component that suggests what comics think is just, the comics' practices are also largely driven by reluctance to engage in a poorly understood and prohibitively expensive legal regime. I have contended elsewhere that when such litigation-avoidance strategies drive industry practices and norms, they should be disfavored as legal standards or rules governing IP rights because they are driven by risk aversion rather than aspirational motives.¹⁵ Moreover, even the more normative components of the comedy norms are hardly aspirational in the sense that I have used that term to implicate preferred customs. The comics' norms do not try to delineate what are legitimate versus illegitimate uses—something that requires balancing the interests of owners and users—but instead only protect the first comic to publicly perform a premise for a joke. As such, the comedy norms have little to offer courts or legislative bodies in interpreting or developing IP.

Representativeness

Customs that develop with a diverse representation of interests should be given more credence than those that are driven by self-interested

¹⁴ *Id.* at 1970–72.

¹⁵ *Id.*

subgroups.¹⁶ From Oliar and Sprigman's description, it seems that the stand-up norms have developed with a broad-base of comics' involvement and, accordingly, are fairly representative. They note, however, that comics are hardly a close-knit group, but instead an "intermediate-knit" one.¹⁷ Moreover, their findings suggest that the norms may not apply, or may apply differently, to very successful comics. The norms also seem to have formed with little formality or opportunity for discussion or objection, making true evaluation of representativeness challenging. Overall, however, the customs seem somewhat representative.

Application: Against Whom

A custom should generally only be applied against parties who participated in its development or, at least, who were adequately represented in the development of that custom.¹⁸ While the stand-up community is fairly small, not all comics know one another. Accordingly, the norms involved do not rise to the level of a negotiated contract that should be enforced against all comics. Nevertheless, when the norms are applied *within* the stand-up community in the *context* of stand-up they have the most value. Applying such limiting norms to newcomers, comics outside of stand-up, other creators, or the public, however, would be troubling. Oliar and Sprigman do not describe enforcement of the norms in these contexts, but further study about whether there have been efforts to enforce these norms outside of the stand-up circuit might be illuminating.

Application: For What Proposition

When customs are motivated by aspirational goals they may have some value for determining what is fair or reasonable. When applied for nonnormative propositions, customary practices developed for nonnormative reasons may also have some value. Custom also may provide relevant information when used to interpret contracts and agreements between parties.¹⁹

¹⁶ Id. at 1972–73.

¹⁷ Oliar & Sprigman, *supra* note 1, at 1794.

¹⁸ Rothman, *supra* note 1, at 1974.

¹⁹ Id. at 1975–76.

Given the motivations for the development of stand-up norms discussed above, the norms should have the most value when used to interpret express contracts. The norms are also potentially useful evidence in trademark cases. The example that Oliar and Sprigman give of Jeff Foxworthy being able to protect his redneck jokes is in keeping with this analysis: the fact that comics customarily give a comedian a wide territory of joke ownership suggests that the public might be confused by another person or comic using Foxworthy's redneck shtick.

Implications

One of the dominant and most troubling norms of the comedy circuit is the norm against joke stealing. Oliar and Sprigman frame this in a normative fashion—no doubt adopting the terminology of the culture—as “stealing.” The impact of the use of this term should not be lost on us; let me take a moment to unpack what joke “stealing” is all about and to delineate its parameters. Oliar and Sprigman describe the prohibition on joke stealing as including prohibitions on independently created but similar jokes, jokes with similar premises, or broadly similar ideas or concepts. Those parameters make the joke stealing prohibition a prohibition on anything that comedians perceive as similar to, even if not originating with, a joke that another comic has told. Joke “stealing” is really a misnomer then—joke resemblance would be more accurate. Enforcing the joke resemblance ban in the stand-up comedy circuit might not be tragic—though it would limit jokes and perhaps prevent the best jokes from developing. But prohibiting the use of similar ideas, whether independently derived or not, is highly problematic. It shuts down free speech, free expression, and free will. It far exceeds what is barred by copyright law and—unless there is likely confusion as to origin or sponsorship—trademark law as well. In addition, comedy norms reject principles of fair use and put no limitation on the duration of protection. Accordingly, adopting the comedy norms either within or outside comedy via court precedents or congressional legislation would have severe drawbacks.

In sum, the application of these vectors to the norms developed in stand-up comedy suggests that while the customs have some value, they should not be viewed as particularly valuable customs deserving of either legal deference or adoption by Congress. Moreover, they should certainly not be applied to those outside of the comedy in-group.

THE VALUE OF DISSENT

As I have said elsewhere, we “cannot abdicate the boundaries of IP rights to delineation by privately developed customary practices.”²⁰ Nevertheless, I am hesitant to advocate direct intervention by the formal legal regime to disrupt restrictive norms. The legal system should, however, support challenges to these norms by standing guard for those individuals who want to dissent. In fact, this is an important counterpoint role that courts should serve. Rather than enforcing customs, courts could begin to reject customs that overly limit users rights by, for example, preventing any enforcement of idea-theft claims in the comedy world.

Encouraging dissent will allow more movement of norms within a field, and prevent the norms themselves from shutting down creativity and expression. Those comics who currently have reputations as joke-stealers—like Robin Williams—might try to rehabilitate themselves as dissenters from the restrictive comedy norms, as comics who think independent creation is impossible, ideas are “free as the air,” and creativity paramount. Courts and Congress should provide space for such dissenters, and the comedy community should keep an open mind, in addition to its open mic.

²⁰ *Id.* at 1982.