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## *IN BRIEF*

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### ***RESPONSE***

DOES EQUITY PASS THE LAUGH TEST?: A RESPONSE TO  
OLIAR AND SPRIGMAN

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COPYRIGHT law may not be the answer, but what is the question? Dotan Oliar and Christopher Sprigman explore an example of a norm system—the one among stand-up comedians against joke theft—and show why it is likely superior to use of copyright to protect rights in jokes.<sup>1</sup> In the course of their study they document both how formal copyright law is unsuited to protecting comedic material and what type of norm system, enforced by other comics and booking agents, has sprung up in its stead. From a property point of view, the likely bi-causal relationship between the development of the antiplagiarism norm and the rise of narrative, observational, and social commentary-style comedy out of earlier vaudeville and post-vaudeville styles is now, thanks to Oliar and Sprigman, one of the better documented cases of Demsetzian development we have.<sup>2</sup> Oliar and Sprigman also argue that for all its dangers of mob justice and extreme simplicity, the norm system does protect investments in developing comedic material and is likely more

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<sup>1</sup> 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).

<sup>2</sup> See Harold Demsetz, *Toward a Theory of Property Rights*, 57 *Am. Econ. Rev.* 347–48, 350–58 (1967) (*Papers & Proceedings*); see also Symposium, *The Evolution of Property Rights*, 31 *J. Legal Stud.* S331 (2002).

effective and desirable than an enhanced copyright law that might well crowd out the norms system.

Oliar and Sprigman's article also poses a potential challenge to property theorists. Very interestingly, they show how the anti-joke-stealing norm is far simpler than copyright law in that the norm does not allow for co-ownership of jokes and uses a first-to-publicize system. They argue that decentralized enforcement gives rise to this simplicity. The ease with which the simpler norm can be applied likely outweighs benefits from complications like divided ownership: if someone is using a bit that someone else used first, then he is a thief and subject to sanction. This is, on the face of it, somewhat unexpected in that usually norms can be more subtle and complex if they hold in a limited, close-knit group with a lot of common knowledge.<sup>3</sup> And indeed, other aspects of the anti-joke-stealing norm do look rather nuanced, such as standards of what is novel enough to be a routine, how much slack to give new, unknown comics, and, in working out a dispute, who “needs” a joke more. In these respects a lot of comedic expertise is required. Oliar and Sprigman's case study very usefully points to the need to distinguish which dimensions need to be standardized to save on third-party information costs and which do not.<sup>4</sup> In the case of the stand-up comedy business, they note that the group is more “intermediate-knit” than close-knit, which probably allows for some mixture of personal knowledge and general common sense. But they rightly point out that the method of monitoring, especially in a decentralized peer-to-peer fashion in venues across the country, powerfully shapes the need for simplicity along certain dimensions like co-ownership.<sup>5</sup> By unearthing this fascinating example of norms in a new type of community, Oliar and Sprigman have greatly enriched our understanding of the factors that push both toward and away from simplicity, and have provided another example of norms substituting for inadequate law—here copyright.

But is copyright the only alternative to decentralized norms? In this Response, I will argue that Oliar and Sprigman's case for cautious endorsement of the norm system and lack of legal protection is impressive but incomplete. They may well be correct that the current system is the best, considering the alternatives, but they have not

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<sup>3</sup> See, e.g., Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 *Stan. L. Rev.* 1105 (2003).

<sup>4</sup> Cf. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *Yale L.J.* 1, 34 (2000) (noting that some less observable dimensions are more in need of standardization than others).

<sup>5</sup> Oliar & Sprigman, *supra* note 1, at 1864–65.

considered all the alternatives. In particular, the nature of the norms involved and the types of misappropriation they target suggest that some version of misappropriation law and unjust enrichment may be a candidate to add to the institutional mix of devices to deal with joke thieves. Although the dangers of an overexpansive law of misappropriation are well known and counsel caution in any extension into the sphere of stand-up comedy, a more equitable approach—as opposed to the formal law that Oliar and Sprigman take as their baseline and foil—may avoid some of the problems with copyright, mitigate some of the problems with the norm system itself, and do less damage to the systems of norms than would an extension of copyright. Finally, and in a more speculative vein, I will consider the possibility that the expansion of intellectual property law—which partly motivates Oliar and Sprigman to seek a nonlegal alternative—might in part be driven by a lack of any way station between formal in rem property rights on the one hand and community or occupational norms on the other.

#### CUSTOM VERSUS COPYRIGHT

At every turn, Oliar and Sprigman compare the system of norms with formal copyright law.<sup>6</sup> In this they are well within the usual practice of the law and norms literature.<sup>7</sup> It is certainly most striking when norms supplement, as here, or even contradict formal law, as they do among lobster gangs in Maine in delineating their territories, or among Chicagoans claiming shoveled parking spots on the Windy City's snowy streets. But the fascination with norms as an alternative to law has displaced an older question: when and how should law incorporate norms? Or in an older formulation: when is custom law?

For custom to be enforceable as law—or in a more modern vein, to be adopted into the law—it must possess certain features. To take one oft-cited formulation, Blackstone set out seven requirements for custom to have legal force: antiquity, continuity, peaceable use, certainty, reasonableness, compulsoriness (not by license), and consistency.<sup>8</sup> It is instructive to look at the norms of stand-up comedy through this lens.

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<sup>6</sup> See, e.g., Oliar & Sprigman, *supra* note 1, at 1794, 1799–1805, 1813, 1825, 1834–38, 1840, 1858–59, 1866–67.

<sup>7</sup> See, e.g., Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991).

<sup>8</sup> 1 William Blackstone, *Commentaries* \*76–79.

Antiquity could be a problem for the norms of comedy: certainly they do not date back to 1189 or even for a very long time in the United States. They may, however, date to the beginning of the current era in stand-up comedy (that is, the era following Oliar and Sprigman's "post-vaudeville"), and the norms have probably been around long enough to know they are here to stay and are serving a purpose. Continuity and peaceable use both seem to be satisfied, notwithstanding the occasional fracas like that between Joe Rogan and Carlos Mencia, which are really examples of enforcement actions. Comics feel compelled to follow the norm, as Oliar and Sprigman amply document. As for reasonableness, Oliar and Sprigman have made a strong case that the norm serves the purpose of fostering creativity in stand-up comedy by protecting investments in developing material. Whether the norm is consistent with the law in general turns on questions of preemption and possible conflict with copyright—issues to which I return in a moment. Blackstone's remaining requirement is certainty.

As I have argued elsewhere, part of the certainty requirement involves communication of the norm to the relevant duty holders.<sup>9</sup> Customs can be vague, and this problem only worsens when a custom might be enforced outside its community of origin: what makes a spot subject to exclusive rights to work may be obvious to fellow miners in a given area but not so obvious to outsiders or to courts. Something very similar is going on here with the comics' norms. Oliar and Sprigman express concern that the norm against joke theft is too vague and might chill behavior.<sup>10</sup> The norm certainly approaches the outer reaches of copyright near the idea/expression dichotomy, the importance of which in copyright law reflects similar worries. But we would need more empirical evidence to determine whether the norm is all that vague to the participants themselves. To take an example closer to home, academics probably have a clearer sense for what is plagiarism than others do, even though it might be a little hard to articulate to a nonexpert.

So whether the norm of stand-up comedy is appropriate for incorporation into the law is really an open question, subject to further empirical work. Militating in favor of limited enforcement is that the norm itself arose in an intermediate-knit group in which the amount of background knowledge is less than among a smaller, more close-knit group. Consistent with this character of the community, the norm itself

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<sup>9</sup> Henry E. Smith, *Community and Custom in Property*, 10 *Theoretical Inquiries L.* 6 (2009).

<sup>10</sup> Oliar & Sprigman, *supra* note 1, at 1837.

is somewhat formal. The authors rightly point out that the norm shows a strong *numerus clausus*-like standardization and simplicity,<sup>11</sup> with a view towards ease of enforcement: if a joke cannot be co-owned and two people are using it, one of them is a thief. Simple priority rules interact with a more complicated social sense of working things out and getting along. There is a danger of enforcing the surrounding relationship-preserving norms in litigation, where relations have broken down. But it is the simplicity in the delineation of the entitlement itself that makes it even a candidate for some kind of enforcement.

#### THE MISAPPROPRIATION ALTERNATIVE

Another reason that custom is not as welcome at the table as it once was is that the customs that reflected commercial morality mainly have entered the law (or equity) through doctrines of misappropriation and unjust enrichment. These areas of the law are both underappreciated and regarded with suspicion these days. For one thing, the seeming danger of using misappropriation to deal with the appropriation of ideas makes people nervous because of its potential for overexpansion. In this Part, I call this reflexive distaste into question and even suggest that overreaction against it may have contributed to the overexpansiveness of the formal intellectual property rights that Oliar and Sprigman take as the main alternative to the norms of stand-up comics.

The cautionary tale here conventionally starts with *International News Service v. Associated Press*,<sup>12</sup> in which the Supreme Court held that the use of a competing news service's stories in one's own news service and newspapers is a misappropriation enjoinable by a court of equity. Aware of the criticism that it might be creating a property right in news, the Court declared the protected interest to be quasi-property rather than an *in rem* right. In his famous dissent, Justice Brandeis criticized the majority for doing precisely what it claimed not to be doing—creating new property rights—in an area in which legislatures are better judges of the situation. Perhaps more importantly for present IP debates, Justice Brandeis also made a strong case for a presumption that information exists in the public domain, such that where the limited IP protections provided by Congress (and to a lesser extent state law) do

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<sup>11</sup> Merrill & Smith, *supra* note 4.

<sup>12</sup> 248 U.S. 215 (1918).

not apply, information is “free as the air to common use.”<sup>13</sup> Brandeis' dissent has been taken as a clarion call for IP skeptics ever since.<sup>14</sup>

Although unfair competition is treated as an adjunct to trademark law these days, at other times and in other legal systems it has been closely associated with unjust enrichment.<sup>15</sup> Some commentators have also seen an implicit theme of unjust enrichment in intellectual property law itself.<sup>16</sup> The problem becomes how to prevent this theory from becoming too broad, both in order to protect the public domain and to avoid preemption by copyright or patent law.<sup>17</sup> Although the doctrine of misappropriation can be viewed as preventing a competitor from reaping where he has not sown, there needs to be a limit to this principle.<sup>18</sup> Such concerns apply to unjust enrichment more broadly, so that although one can speak in general terms of how one who is unjustly enriched at another's expense is liable in restitution,<sup>19</sup> the problem lies in defining what enrichment is unjust. Some see unjust enrichment as a substantive and expansive concept, while others see it as merely an organizing principle for thinking about liability, the main sources of which come from other branches of law.<sup>20</sup>

Misappropriation also connects with custom. Richard Epstein has argued that because news organizations had a norm of respecting hot news and would only use it as a tip for independent investigation, the result in *International News Service* is correct for being in accord with custom.<sup>21</sup> Whether Epstein's conclusion follows turns in part on the informational demands that the custom makes in light of the set of duty

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<sup>13</sup> Id. at 250 (1918) (Brandeis, J., dissenting); see also *Cheney Brothers v. Doris Silk Corp.*, 35 F.2d 279 (2d Cir. 1929) (Hand, J.).

<sup>14</sup> See, e.g., Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. Rev. 354 (1999).

<sup>15</sup> See, e.g., Peter Birks, *Unjust Enrichment* 3 (2d ed. 2005); Shyamkrishna Balganes, *Rethinking Copyright: Property Through the Lenses of Unjust Enrichment and Unfair Competition*, 156 U. Pa. L. Rev. PENNumbra 345 (2008).

<sup>16</sup> See Balganes, *supra* note 15; Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 Va. L. Rev. 149 (1992).

<sup>17</sup> See, e.g., *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997).

<sup>18</sup> See, e.g., Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. Chi. L. Rev. 411, 413 (1983) (noting that there is no principle allowing one to reap wherever one has sown, and in particular not on land one does not own).

<sup>19</sup> Restatement (Third) of Restitution & Unjust Enrichment § 1 (Discussion Draft 2000); see also Restatement of Restitution § 1 (1937).

<sup>20</sup> See, e.g., Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 Tex. L. Rev. 2083 (2001).

<sup>21</sup> Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 Va. L. Rev. 85, 101–02 (1992).

holders. Limiting the duty holders to direct competitors helps. If anything, the custom among stand-up comics is less vague than the one in *International News Service* governing “hot news.” The anti-joke-stealing norm does not require defining what is hot (or what is funny, for that matter). But it is much more expansive, because it has no time limit at all, although some temporal limitation might appropriately be grafted onto a misappropriation claim, whether under the doctrine of laches or otherwise.

My purpose here is not to argue for extending *International News Service* to jokes. Indeed, Oliar and Sprigman advert to some of the problems such an approach could present. One, just noted, is that the custom may be too expansive, and this is always a concern with incorporating industry customs into IP law.<sup>22</sup> Too expansive use of custom, particularly as the set of duty holders grows, would pose large information costs and subvert the *numerus clausus*.<sup>23</sup> Would such a misappropriation claim in the realm of stand-up comedy derogate from the public domain more or less than copyright? The set of duty holders is far smaller than in copyright, which is in rem. Would misappropriation threaten to displace the existing norm and its informal enforcement mechanism as much as copyright would? It is hard to say, but unlike copyright, a misappropriation regime would dovetail substantively with the comedians' norm because a large amount of the content of the misappropriation regime would derive from the norm itself. Would use of equity-style judicially-managed misappropriation law invite less rent seeking than would industry-specific statutory IP regimes, which Oliar and Sprigman rightly view as rife with rent-seeking possibilities?<sup>24</sup> Finally, would use of the norm in the law make it less certain than would informal enforcement or arbitration within the stand-up world? The fact that, at least in contractual disputes, parties in the same business often prefer what appear to the outsider as formal bright line rules should give us pause.<sup>25</sup> But although Oliar and Sprigman very convincingly argue that the norm system is probably

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<sup>22</sup> See, e.g., Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 Va. L. Rev. 1899 (2007).

<sup>23</sup> Smith, *supra* note 9, at 35–36.

<sup>24</sup> See Oliar & Sprigman, *supra* note 1, at 1840.

<sup>25</sup> See, e.g., Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 Mich. L. Rev. 1724 (2001); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. Pa. L. Rev. 1765 (1996).

better than any version of formal copyright, they leave unaddressed the question whether the norm should be supplemented with an equity-style misappropriation theory based on unjust enrichment.

The larger question here is whether an ex post equity-style standard based on morality and existing norms would be better or worse than formal law and norms alone. This is a difficult question in general but might be easier to assess in a given business like stand-up comedy. At the very least, misappropriation and the law of equity do pass the laugh test.

#### LAW AND EQUITY IN INTELLECTUAL PROPERTY

Finally, we might entertain a hypothesis about the nature of law and equity in intellectual property. What if our fears of equity and the “Chancellor's foot”<sup>26</sup> and of expansive readings of *International News Service*—which was itself an equity case—have led to the kind of overexpansiveness in the formal law of IP that troubles Oliar and Sprigman (and many others)? There has always been a suspicion of equity and the need to keep it cabined (for example, only acting in personam, and only when the legal remedy is inadequate and not in derogation of property rights) but after the fusion of law and equity, our view of formalism versus context-based discretion has become polarized. Some want to banish judicial discretion and others want contextualized decisionmaking to be available at all times.

In IP there has been, in reaction to *International News Service*, a tendency to use formal IP law where once misappropriation might have served. Might some of the impetus for business method patents and expansive uses of copyright have been somewhat dulled if the most egregious problems of freeriding in violation of existing industry custom could have been addressed through suits for misappropriation and unjust enrichment? Again, it is hard to say because it has hardly been tried. The dangers inherent in *International News Service* should not rule out misappropriation as a safety valve that might prevent even worse approaches. It is a testament to the richness of their study of stand-up

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<sup>26</sup> See John Selden, *Equity*, in *Table-Talk: Being the Discourses of John Selden, Esq.* 43, 43–44 (London, J.M. Dent & Co. 2d ed. 1689) available at <http://books.google.com/books?id=9QtKAAAIAAJ&hl=en> (“Equity is a Roguish thing: for law we have a measure, know what to trust to; Equity is according to the Conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the Standard for the measure we call a Foot, a Chancellor's Foot; what an uncertain Measure would be this. One Chancellor has a long Foot, another a short Foot, a Third an indifferent Foot: 'Tis the same thing in the Chancellor's Conscience.”).



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comedy that Oliar and Sprigman cast these long-buried issues in such sharp relief.