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REPLY

FROM CORN TO NORMS: HOW IP ENTITLEMENTS AFFECT WHAT STAND-UP COMEDIANS CREATE

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IN *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*[1] we explored how, why, and what stand-up comedians have created at different points in the history of stand-up comedy. From this study, we offered insights into how intellectual property ("IP") law affects human motivation to create, how legal and non-legal motivations interact, and how the emergence of IP entitlements (in comedians' case, norm-based entitlements) may change creative practices. Our analysis is set out in two parts.

First, we began our paper with a static analysis of stand-up as we know it today. Rather than turn to IP law to protect the fruits of their creative labors, present day comedians employ a rich set of social norms that regulate the ownership, use, and transfer of rights in jokes and comedic routines. We described these norms and showed how comics enforce them informally using reputational sanctions, refusals to work, and threats of (rarely used) physical violence.[2] In doing so, we followed an established literature studying the interaction between law and social norms and joined an emergent one in IP.

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[1] 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).

[2] Oliar & Sprigman, supra note 1, at Section II.

We then added a second layer of dynamic analysis showing that these norms did not always exist, but rather came into being over the last half century. Initially, taking someone else's joke was not considered wrong. What is now called joke-stealing was once accepted among comedians as the "corn exchange." In the early 1960s we see the growth of stronger anti-appropriation norms. Contemporaneous to the emergence of IP norms was a change in the nature of stand-up comedy itself. In the earlier, free-for-all era, comedians invested heavily in an attractive and unique delivery—that is, in performance style and mechanics that others could not easily copy; they invested less in textual originality. Jokes plowed and re-plowed well-worn themes: ethnic jokes, mother-in-law jokes, one-liners and other rim-shot jokes. The rise of norms was accompanied by a dramatic change in the nature of stand-up comedy. Stand-up gradually took its present form: material turned toward original, personal, observational, point-of-view driven narrative, and most (albeit not all) comedians began to devote less effort to the performative elements of their craft.[3]

This second, dynamic analysis is, we believe, our core contribution. We describe the shift from an open-access regime to IP norms using Harold Demsetz's model for the emergence of property rights.[4] As we will discuss below, however, we believe our case extends Demsetz's model. At least as far as our present study is concerned, economic shifts do not drive changes in property rights unidirectionally. Instead, legal rules (or property forms) and economic forces move together in ways that are interdependent and (in comedians' case) mutually reinforcing.

We consider ourselves very fortunate to have received four insightful responses to our paper by scholars who each have done great work on IP and social norms. We thank each of them for commenting on our work. Reading their responses made us think again about the boundaries of our project, and about the implications of our findings and arguments. Their critiques are both internal to the paper—taking issue with our findings and logic—and external, suggesting possible extensions and noting questions for future research. We cannot, given the breadth and depth of the response papers and the time and space allotted to us, give each of the critiques the full attention they deserve. We will focus our reply on what we see as the core issues identified in each of the responses.

[3] Oliar & Sprigman, supra note 1, at Sections III.B, III.C.
[4] Harold Demsetz, Toward a Theory of Property Rights, 57 Am. Econ. Rev. 347 (1967).

I. MICHAEL MADISON: THE LIMITS OF LAW AND ECONOMICS

Michael Madison notes first that our Article employs a conventional law and economics framing—that is, we're telling a story about how law fails to structure incentives, but norms step in—and then argues that the narrowness of our framing means that we cannot tell the entire story.[5] In part, we agree. We do not claim to have the entire story. But in part, we disagree. We think we do a little bit more than what Madison suggests we do. A central focus in our study—the dynamic analysis that traces changing norms within stand-up—goes beyond merely suggesting that in some cases norms can substitute for or supplement law. We offer a fuller explanation of the law-norm interface, and we show that, whereas law never played a very significant role in providing incentives in this market, two very different equilibria existed over time and each incentivized the production of a different type of comedy. We believe that this is an important contribution, but of course we have only taken a first step, and Madison points out several areas where further research would be helpful. Madison's comment is rich and interdisciplinary, connecting themes from law, economics, culture, technology, anthropology, and American history. Synthesizing all these in one paper is above our current pay grade. But if our work eventually leads to a community effort to ask deeper questions, and uncover better answers, we are content.

Madison also suggests an alternative explanation for how stand-up comedy has succeeded without heavy reliance on formal IP law. Madison refers to the advent of the long-playing record (LP) in the 1960s and the popularity of comedy recordings during that period. He points out that comedy recordings are an important part of the market, and that they are protected by formal copyright law.

Our response to this point is twofold. First, it is true that comedy recordings are protected by copyright law, but as we have noted, practical difficulties, such as the cost of suit, and doctrinal barriers, such as the idea-expression distinction, will make it hard to sue and win (at least in cases where a comedian does not take word-for-word, or a fan does not reproduce and distribute copies of the recording in a way that is likely to be detected). Madison is right that there is a sphere of conduct where copyright law might kick in—that is, where words are fixed and

[5] Michael J. Madison, Of Coase and Comics, or, The Comedy of Copyright, 95 Va. L. Rev. In Brief 27 (2009), http://www.virginialawreview.org/inbrief/2009/04/30/madison.pdf.

of great market value, where copying is literal, and the defendant has a deep pocket. In providing protection in these circumstances, however, the law leaves everything else largely unregulated. And this is the terrain in which the norms operate. Second, releasing a comedy recording—at least one that will receive the promotion necessary for commercial success—is an option available almost exclusively to well-known comics. But comedians cannot start at the top; rather, they need to work out their material and build their careers to the point where a comedy record is a possibility. They do so within an environment—the comedy clubs that are the focus of our Article—where formal law plays little role and the norms system governs.

We should emphasize, moreover, that comedians did not discover recording technology in the 1960s. Sound recording has been around since the late nineteenth century, and as we noted in our paper, one of the first records ever to sell over a million copies was a comedy album called *Cohen on the Telephone*.[6] So by the time the spike in comedy album sales happened during the 1960s, comedy records had been around for more than fifty years, and all the while stand-up was conducted within an open-access regime where jokes were treated as part of a commons.

Madison posits that the change to the current form of humor may be attributable to the capacity of LPs to record longer comic performances. But we do not see how this alone can be an adequate explanation: the result of this technology shift equally might have been longer recorded strings of rim-shot jokes. It seems more likely to us that the comedy record boom of the 1960s was the result of the changing nature of comedy accompanied by the changing norms, rather than their cause. As we learned in our research, by the 1950s, there was a sense that the post-vaudeville form of comedy had run its course. People were tired of hearing variations on the same old corn. The ”new” type of personal, point-of-view driven comedy reflected something different that the public flocked to see—and also to listen to on LPs.

II. JENNIFER ROTHMAN AND HENRY SMITH: DUELING COMMENTS ON INCORPORATION

In their separate comments, Jennifer Rothman and Henry Smith connect our paper to a venerable debate—to which they are major

[6] Oliar & Sprigman, supra note 1, at 1844–45.

contributors—regarding whether and when the law should incorporate extra-legal norms.[7] They agree in principle: law should incorporate norms only when these norms meet a list of traditional criteria. They disagree in application: whereas Rothman argues that law should almost never incorporate IP norms, Smith is more open to incorporation. They would each have us take a clearer stand on this question—although Rothman would prefer we take an anti-incorporation stand and Smith a pro-incorporation one. For the reasons below, we cannot presently accept their invitations.

Regardless of whether Rothman or Smith's approach to the incorporation debate is correct, our case study makes us wonder whether "incorporation" is necessarily an important question to answer in all cases involving law and social norms (although it is, no doubt, important in many). There is a social norm of spouses giving gifts on anniversaries—does it make sense to ask whether law should incorporate this norm? The six factors that Rothman has laid out in previous work[8] would likely suggest that an anniversary gift-giving norm should be incorporated into law: it is clear and longstanding, aspirational at least in part, represents all those involved, applies only to the couple, may be asserted for the proposition of what is fair and reasonable between the spouses, and is unlikely to lead to any "slippery slope." But what would happen if spouses had a legal right to sue each other for non-performance? Some customs are best left unincorporated not because they are bad in any sense, but rather because they are good. In any event, for us, and as far as IP is concerned, the major question is not whether law should or should not incorporate norms. Rather, the major question is what normative environment would result in the best creative practice. Sometimes the answer is that creativity is best served through reliance on norms alone, in which case incorporation would be neither needed nor desirable.

Second, despite their disagreements, Rothman and Smith still agree that law can incorporate norms. Their disagreement is primarily about whether this would be a good idea in the IP context. But we are not sure

[7] Jennifer E. Rothman, Custom, Comedy, and the Value of Dissent, 95 Va. L. Rev. In Brief 19 (2009), http://www.virginialawreview.org/inbrief/2009/04/20/rothman.pdf; Henry E. Smith, Does Equity Pass the Laugh Test?: A Response to Oliar and Sprigman, 95 Va. L. Rev. In Brief 9 (2009), http://www.virginialawreview.org/inbrief/2009/04/20/smith.pdf.

[8] Jennifer Rothman, The Questionable Use of Custom in Intellectual Property, 93 Va. L. Rev. 1899 (2007).

that their joint assumption is always right. We believe that the case study of comedians shows that a change in the normative environment regulating a practice may affect the nature of the practice itself. The anniversary gift example is telling, we believe. Law cannot always "incorporate" norms without changing them and the underlying practice. We doubt that wedding anniversary gift-giving would have the same social meaning if it were enforced via a legal rule. Turning back to stand-up comedy, the law might shift its liability standards toward industry norms, bringing copyright enforcement closer to the expectations of the stand-up community. But even if law were to conform to industry norms, there is good reason to doubt whether it can always replicate them. In particular, even if law can adopt a norm and allocate entitlements to people accordingly, it probably cannot fully incorporate the enforcement mechanism of social norms. Law cannot punish joke-stealing by ordering badmouthing of comedians, by requiring comedians to refuse to associate with joke-thieves, by directing some comedians to frown at others, or by ordering aggrieved comedians to punch thieves, and it seems likely to us that if the law adopted comedians' norms against joke-stealing, then community enforcement via these informal sanctions might disappear.

In our Article, we hypothesized what would happen if stand-up comedy were regulated by law.[9] We suggested that introduction of formal law would affect the scale of the comedic enterprise—that is, that the market for stand-up might shift from individual proprietors to comedy corporations because of efficiencies of scale in litigation and clearing legal rights. We suspected that stand-up's content would shift as well, away from the cutting edge and toward more restrained and family-friendly material. One may like this future or not, but it is certainly different from stand-up as we know it now. Law, we think, cannot—at least not always—simply "incorporate norms."

We wanted to respond briefly to Henry Smith's careful suggestion that incorporation of stand-up's norms system might be accomplished via a reformed common law action for misappropriation. Smith noted that there are gains to be had from such an approach, but also costs—which he explored thoroughly—and suggested that, in the end, whether misappropriation is worth employing would be an empirical matter. Subject to any such findings and our reservations above

[9] Oliar & Sprigman, supra note 1, at 1858–59.

notwithstanding, if we had to choose between incorporation via misappropriation doctrine and one via copyright law, we would likely prefer the latter. Misappropriation law is inherently unclear, and it is not obvious to us how to reform the law in ways that make it predictable and yet retain its flexibility. Turning to misappropriation law also involves the risk of overprotection. Copyright law, by contrast, includes not only a bundle of exclusive rights, but also balancing doctrines such as fair use, idea/expression, and a durational limit. It is unclear whether misappropriation doctrine can or would express a similar balance.

We should make clear, however, that we share Smith's broader goal, which we take to be the structuring of both statutory and common law IP rules to produce proper innovation incentives. We have no particular allegiance to norms, copyright law, or common law misappropriation doctrine as a tool for achieving this objective. Our ultimate question is what environment would afford wide public access to creative works while allowing creative people to flourish within a vibrant creative practice. We view law—IP or otherwise—as a means subservient to this higher end. Although our assessment of the costs and benefits of using misappropriation doctrine is less optimistic than Smith's, we agree that it is generally worth considering.

III. KATHERINE STRANDBURG: A DEMSETZIAN COMEDY

Katherine Strandburg takes on our suggestion that the rise of IP norms among stand-up comedians fits Demsetz's theory about the emergence of property rights.[10] Before we get to her critique, we would like to clarify how we see our Article's relation to Demsetz's theory.

Demsetz posits a unidirectional causality: economics drive the law. Economic changes—including shifts in relative prices and technological change—cause changes in property rights. Property rights arise when economic shifts make the internalization of externalities worthwhile. This is all straightforward, but our study of the emergence of intellectual property norms among stand-up comedians makes us doubt that the unidirectional causation element of Demsetz's theory applies in our case. We do not think that causality runs in only one direction; rather, as we have argued in our paper, causality runs both ways. Legal rules and

[10] Katherine J. Strandburg, Who's In the Club?: A Response to Oliar and Sprigman, 95 Va. L. Rev. In Brief 1 (2009), http://www.virginialawreview.org/inbrief/2009/04/20/strandburg.pdf.

economic forces change together, and together move from one equilibrium to another. The coincident shift affects the nature of the comedy being produced in the market. So, our observation is not simply an application of Demsetz's theory about how property rights emerge, but rather about how economics and law affect each other and what gets produced as property.[11]

On to Strandburg's critique. We suggested that the emergence of IP norms was, in part, driven by technological change: before the widespread adoption of mass communication, thieves' ability to saturate the market was limited. If a joke-thief heard a joke off the vaudeville stage and traveled east, the originator could still tell it traveling west. Today, if a joke is stolen and leaked to radio, TV, or a heavily trafficked website, the fraction of the joke's social value that its originator would be able to appropriate would be miniscule. Thus, we suggest, the benefit of establishing property rights in jokes is greater today than it previously was.

Strandburg doubts the internal logic of this last suggestion. Rather, she suggests that technological advances may enable a comedian to reap a greater portion of the economic value of her joke: she can herself use mass media in order to saturate the market by being the first to tell the joke on TV or radio. Although Strandburg's suggestion seems reasonable, it does not translate completely into the context of stand-up. What makes stand-up different from other IP-based industries such as movies, music and software is that the author must have substantial user input to complete a work—it is not comedy if people do not laugh. Movies, music, and software can be created in relative isolation, and later simply released. Comedians, on the other hand, work out their jokes night after night on the stand-up circuit, see what works, change, drop, improve, and perfect. Under a free-for-the-taking norm, the ability of a comedian to go on national TV and tell a joke for the first time is mostly theoretical. But at the margin, absent anti-appropriation norms, comedians would tend to rush to TV compared to a world in which there is a stable anti-stealing norm. They would do so for fear that if they did not, someone else would. The result might be worse jokes and an overall smaller pie for comedians and audience alike. Assuming equal ability to write jokes and to steal jokes, the norm against stealing allows each comedian to husband her jokes and distribute them via a larger platform

[11] Oliar & Sprigman, supra note 1, at 1855–57.

after their net value is maximized. Under a free joke-stealing regime, people would harvest jokes prematurely, before they have achieved their full potential. Thus, under reasonable assumptions, the effect of technological change is not indeterminate; rather, it favors the emergence of property rights.

The greater but, as will be explained below, also related problem that Strandburg sees in our Article is that we do not explain why exclusive rights have become more valuable to comedians as a group. Since comedians can steal and can be stolen from, Strandburg suggests that we do not explain why comedians would prefer exclusive rights over "anything goes" competition. Strandburg believes that the solution to this problem lies in the fact that exclusivity norms constrain membership in the group of working stand-up comedians. Also, the norm against joke stealing deters reuse of old jokes, and thus helps stand-up comedy compete with other art forms. Strandburg suggests that for these reasons the anti-theft norm both increases the size of the comedy pie and reduces the number of participants, thereby providing each comedian with a larger slice.

We believe that the answer to this puzzle is a straightforward application of the Demsetzian idea. Let us consider the example that Demsetz himself uses in setting out his theory: why are Montagnais Indians better off in a world with property rights in beavers than without? With property rights, the Montagnais have an incentive to husband the resource, and let beavers grow to optimal size before hunting them. Without property rights, individuals have no reason to husband the resource, which would be depleted. The same principle applies to jokes: without property rights, comedians would have lesser incentive to write good jokes, and to husband jokes until optimally harvested. They would, instead, be tempted to tell pre-existing jokes (perhaps with slight variations) or rush to tell jokes prematurely. Comedy's overall pie is larger if a comedian is induced to perfect her jokes without interference, assured of the ability to reap their benefits.

As for Strandburg's explanation, we cannot see how a norm against joke stealing necessarily erects barriers to entry and limits the number of stand-up comedians. Although such a norm makes entry harder for some people, it facilitates entry by others. In the old world of free appropriation, one limit on entry was the ability to perform well—to time the audience, to memorize a long inventory of jokes and string them together. People who weren't good performers faced barriers. With

the move to current stand-up comedy, entry is easier for indifferent performers who are good writers. Many comedians today do not invest greatly in performance—they dress simply and do nothing much but talk. We cannot be as sure as Strandburg is that entry today is harder than it once was. It is simply that the nature of the comedic product changed, and this also affects who is likely to enter and exit the industry. Further, although we share Strandburg's observation that the norms encourage investment in original material, and thus raise the social value of comedy and draw more audience to stand-up venues rather than competing media, we do not see how this translates into the erection of barriers to entry. The improved comedic product should make people want to watch more stand-up. Profits in the industry should rise. This should make more suppliers enter—indeed, we might imagine stand-up drawing people away from adjacent creative communities (dramatists? performance artists?) to become comedians. Entry should continue until the rate of return equalizes across industries. In any event, we cannot see how the requirement of being able to write good jokes acts as a real barrier to entry, at least relative to the previous regime of free appropriation. It is more accurate, perhaps, simply to note that the mix of talents suitable for entry has shifted.

CONCLUSION

We want to close our reply by saying again how grateful we are that Professors Madison, Rothman, Smith, and Strandburg have taken the time to engage with our work. Over the past year we have spent a great deal of time talking to stand-up comedians, and reading about and watching stand-up comedy. In the process, we came to know something about the history of the art form, and also about the personal characteristics that allow and even compel comedians to pick up a microphone, step in front of an audience, and either "kill" or "die." This has been a fun and fascinating project, and we look forward to further exploration of how legal entitlements and social norms structure creative practices and motivate individuals.