

2019

Who Owns a Joke? Copyright Law and Stand-Up Comedy

Scott Woodard

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/jetlaw>



Part of the [Intellectual Property Law Commons](#), and the [Jurisdiction Commons](#)

Recommended Citation

Scott Woodard, Who Owns a Joke? Copyright Law and Stand-Up Comedy, 21 *Vanderbilt Journal of Entertainment and Technology Law* 1041 (2020)

Available at: <https://scholarship.law.vanderbilt.edu/jetlaw/vol21/iss4/5>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Entertainment & Technology Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Who Owns a Joke? Copyright Law and Stand-Up Comedy

Scott Woodard*

ABSTRACT

Copyright laws are touted as the highest legal authorities by which artists can protect their works against all comers. However, when an artist's work fails to fit neatly into the statutory parameters needed to acquire copyright protection, that artist could receive no safeguards to ensure that their works will not be misappropriated by others.

This article undertakes a comparative analysis of two copyright regimes—from the United States and the United Kingdom—and measures their relative similarities and differences. From this comparison, this article explains how stand-up comedians, a group of artists who have traditionally believed their work was incapable of receiving copyright protection, could receive copyright protection for their jokes in both jurisdictions.

Following an analysis of copyright law's initial requirements in both jurisdictions, this article examines the means and methods comedians could use to protect their jokes. Subsequently, this Article examines the complications comedians could face should they enlist the law's assistance. Specifically, this portion of the Article examines how comedic norms could clash with the above-mentioned jurisdictions' various statutory mandates and how comedians may falter when industry norms interact with copyright law.

This Article's goal is to provide a comprehensive comparison of US and UK copyright law and its implications for stand-up comedians' ability to own their own creations. Further, this Article is meant to act as a road map for comedians and relevant practitioners on how to successfully protect a comedian's creative product and how to successfully pursue legal remedies against alleged infringers.

* Judicial Law Clerk, the Honorable Jeffrey U. Beaverstock, United States District Court for the Southern District of Alabama; LL.M., University of East Anglia, Norwich, UK (2018); J.D., Samford University Cumberland School of Law (2017); B.A., University of Alabama (2014).

TABLE OF CONTENTS

I. INTRODUCTION..... 1042

II. COPYRIGHT REQUIREMENTS 1045

A. Originality..... 1045

B. Fixation..... 1049

C. The Idea-Expression Dichotomy 1051

III. HOW CAN COMEDIANS USE COPYRIGHT LAW TO PROTECT THEIR
JOKES? 1053

A. Literary Works 1054

B. Dramatic Works 1056

C. Sound Recordings 1060

D. Audiovisual Works and Film..... 1061

IV. COMPLICATIONS..... 1063

A. Problems with Fixation and Live Performance 1063

B. The Idea-Expression Dichotomy 1067

*C. Authorial Works, Thin Copyright, and Independent
 Creation*..... 1069

D. The Comedian’s Stage Persona 1070

V. COPYRIGHT INFRINGEMENT..... 1074

VI. MORAL RIGHTS..... 1079

VII. MOVING FORWARD 1082

VIII. CONCLUSION 1083

APPENDIX 1085

I. INTRODUCTION

In his stand-up special, *Before Turning the Gun on Himself*, comedian Doug Stanhope closed his show with a joke that included the following: “[I]f you don’t own anything else in the world, you own your own meat. If you own nothing else, you own the . . . meat that is packing your bones.”¹ Mr. Stanhope’s words, while extreme, provide an excellent framework for discussing joke ownership and copyright law. In stand-up comedy, jokes are the metaphorical meat that pack a comedian’s professional bones. These jokes, like human musculature, carry comedians from venue to venue and allow them to earn a living.² Much like a professional athlete’s physical prowess, comedians exercise their creative muscles to connect with audiences. Where successful, a

1. DOUG STANHOPE, *BEFORE TURNING THE GUN ON HIMSELF* (Roadrunner Records 2012).

2. 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, 1789 (2008).

comedian can develop a consistent fan base. If incredibly lucky, her jokes could lead to a comedy special or an album, broadening her audience and furthering her career, similar to an athlete using skills to compete at the professional level. However, without the ability to claim ownership over their jokes, comedians could miss out on career-advancing opportunities.

The comedic process involves artistic and creative endeavors—writing, performing, producing, and editing.³ By engaging in these activities, comedians become authors of potentially copyrightable material. Copyright regimes in the United States⁴ and the United Kingdom⁵ offer creators legal protections for their work. These protections are paramount for comedians, as the stand-up market is incredibly lucrative, generating over USD \$300 million in 2014.⁶ Further, in 2017, Netflix's top seven comedians made more money than the world's top seven sports stars (less endorsement deals).⁷ However, because comedians frequently create jokes on stage in moments of spontaneity, ownership issues abound. Additional complications arise when comedians attach a stage persona to their live acts. Specifically, questions regarding originality,⁸ fixation,⁹ expression,¹⁰ and categorical limitations for copyrightable works¹¹ often cause comedians to feel that the law fails to properly protect their ownership interests.¹² Because of these shortcomings, comedians often resort to private enforcement mechanisms to claim ownership over jokes in lieu of copyright.¹³ These norms, however, have the potential to lead to antisocial behavior¹⁴ and

3. See PowerfulJRE (Joe Rogan), *Joe Rogan Experience #1040: Brian Regan*, YOUTUBE (Nov. 15, 2017), <https://youtu.be/xJdyXBjMQx4> [<https://perma.cc/9VBA-L8UP>] [hereinafter PowerfulJRE (Joe Rogan), # 1040].

4. See Copyright Act of 1976, 17 U.S.C. § 101 (2018).

5. See Copyright, Designs and Patents Act 1988, c. 48 (UK) [hereinafter Copyright, Designs and Patents Act].

6. Ray Waddell, *Comedy Issue: Live Comedy Becomes a \$300 Million Punchline*, BILLBOARD (May 16, 2014), <https://www.billboard.com/articles/events/live/6091827/live-top-arena-comedy-tours> [<https://perma.cc/4EUG-Z23E>].

7. *Compare The World's Highest-Paid Comedians in 2017*, FOX BUS. (Dec. 10, 2018), <https://www.foxbusiness.com/business-leaders/the-worlds-highest-paid-comedians> [<https://perma.cc/KMC8-BFG8>], with Caitlin Murray, *The Top 25 Highest-Paid Athletes in the World for 2017 Are . . .*, N.Y. POST (June 7, 2017), <https://nypost.com/2017/06/07/the-top-25-highest-paid-athletes-in-the-world-for-2017-are/> [<https://perma.cc/CDU7-LGJ6>].

8. See 17 U.S.C. § 102; Copyright, Designs and Patents Act § 1(a).

9. See 17 U.S.C. § 101; Copyright, Designs and Patents Act § 3.

10. See 17 U.S.C. § 102; Berne Convention for the Protection of Literary and Artistic Works art. 9, Sept. 9, 1886, 331 U.N.T.S. 217 (amended July 24, 1971) [hereinafter Berne Convention].

11. See 17 U.S.C. §§ 101–102; Copyright, Designs and Patents Act § 1.

12. See Oliar & Sprigman, *supra* note 2, at 1798, 1811.

13. See *id.* at 1812–13.

14. See *id.* at 1820.

skewed views of ownership.¹⁵ These effects, combined with economic incentives, indicate that formal determinations for joke ownership are vital.

Despite their perceived shortcomings, formal determinations for copyright ownership in the United States and United Kingdom provide many opportunities for comedians to claim ownership over their jokes. These jurisdictions were chosen for comparison for two reasons. First, the US copyright system is a direct decedent of the Statute of Anne.¹⁶ As such, a comparison of the respective systems applied to an artform that formally developed over the last sixty years seems necessary, as little has been written on copyright law's interaction with stand-up comedy in either jurisdiction. The second reason these jurisdictions were chosen was due to the opportunities available to comedians from each country. The stand-up markets in the United States and the United Kingdom are incredibly lucrative and frequently crossover. In addition to the figures described above for US comedians, comedians Ricky Gervais, Peter Kay, and Jimmy Carr have a combined net worth of approximately GBP £110 million.¹⁷ Further, Gervais, Carr, and Australian Comedian Jim Jeffries each have comedy specials on Netflix available in the United States, and Jeffries hosts a prime-time television series on *Comedy Central*. These financial and professional incentives, as well as multinational fanbases, indicate that a thorough examination of copyright law is due for each so that comedians from both nations might understand how to protect their jokes wherever they perform and wherever their material is used.

By providing certainty on these issues, comedians can feel confident that their work is protected, hopefully providing more comfort to create and the ability to reach a broader audience. This Article highlights how comedians might acquire copyright protection for their jokes and their comedic personas in the above-mentioned jurisdictions in order to prevent others from infringing their work. Parts I, II, and III examine originality, fixation, and the idea-expression dichotomy, respectively, and analyze their requirements as applied to jokes in the United States and the United Kingdom. Part IV examines the categories under which comedians could protect their jokes through copyright in both jurisdictions. Parts V, VI, and VII address complications arising from the legislative nuances, how comedians

15. See Elizabeth Moranian Bolles, *Stand-Up Comedy, Joke Theft, and Copyright Law*, 14 TUL. J. TECH. & INTELL. PROP. 237, 240, 242 (2011).

16. Lyman Ray Patterson, *The Statute of Anne: Copyright Misconstrued*, 3 HARV. J. ON LEGIS. 223, 223 (1966).

17. See *5 of the UK's Highest Paid Comedians*, SPEAR'S (Aug. 14, 2017), <https://www.spearswms.com/5-uks-highest-paid-comedians/> [https://perma.cc/P2F4-D5NZ].

might assert copyright in their jokes through infringement actions, and moral rights in both jurisdictions.

II. COPYRIGHT REQUIREMENTS

Generally, copyright laws in the United States and the United Kingdom require creators to meet many of the same requirements. As this Part discusses below, after creators satisfy certain statutory criteria, copyright protection will attach to a copyrightable work.

A. Originality

As a direct descendent of the Statute of Anne, copyright law in the United States shares an underlying purpose with that of the United Kingdom: to protect creative and artistic works.¹⁸ This lineage and shared goal has led these copyright regimes to share many features. For instance, both jurisdictions require, as the first hurdle for copyright protection, that a work be original. The United States¹⁹ and the United Kingdom²⁰ statutorily emphasize this requirement. However, the United Kingdom only requires authorial works to demonstrate originality.²¹ Neither country's statute precisely defines what sort of contributions qualify as original. This has led to increased litigation in both jurisdictions where fleshing out originality's constituent elements served as the crux of each case. These cases, while resulting in different formulations, highlight how similar the United States and United Kingdom are in their approaches to originality, both emphasizing authorship and the minimum level of creativity needed for copyright protection.

The fundamental similarity between the United States and the United Kingdom is the relationship between originality and authorship. In the United States, *Feist Publications Inc. v. Rural Telephone Service Co.* created the two-step test for determining whether a work is sufficiently original for copyright purposes.²² *Feist* concerned a case involving two telephone service providers in the Kansas area. In short, both parties provided phonebooks to the northwest Kansas community. Rural refused to license its white pages listings to Feist, and Feist later extracted the listings it needed from Rural's directory without consent.

18. Patterson, *supra* note 16, at 223–24.

19. 17 U.S.C. § 102 (2018).

20. Copyright, Designs and Patents Act § 1(a).

21. See Justine Pila, *Copyright and Its Categories of Original Work*, 30 OXFORD J. LEGAL STUD. 229, 229–30, 242 n.94 (2010).

22. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

Although Feist altered many of Rural's listings, several were identical to listings in Rural's white pages.

In *Feist*, the Supreme Court held that no originality existed where Rural did not independently create the content—names, phone numbers, and addresses—in its phone book.²³ Instead, the Court found that Feist merely engaged in a fact-gathering process and published its findings, which—while costing substantial time, labor, and energy—involved no independent creation and was therefore unoriginal.²⁴ Similarly, an early UK case on the issue, *Walter v. Lane*,²⁵ established the benchmark for determining authorship in terms of originality. There, the *Times* sued the respondent for copyright infringement after the respondent published a book containing material that reporters from the *Times* wrote for the paper.²⁶ As legislation at the time contained no originality requirement,²⁷ the judgment laid the foundation for originality in UK copyright law. In that case, the House of Lords determined that the reporters who transcribed a politician's unwritten speeches were authors for purposes of the article, as the stories featuring the speeches owed their origins to the reporters.²⁸ Thus, both jurisdictions appear to require, as a baseline, that a work of authorship owe its origins to the author claiming copyright.

The second way in which the United States and United Kingdom are similar in their originality approaches relates to how much creativity is necessary in order to satisfy this requirement. In *Feist Publications*, the second prong of the Court's two-part test requires the work to display minimal creativity, in the sense that a work must be "slightly distinctive over and above any preexisting materials on which it relies."²⁹ In other words, the work must show a "modicum of creativity."³⁰ There, however, the Court found that Feist did not satisfy this requirement, as its claimed compilation merely regurgitated alphabetized facts.³¹ Similarly, *Ladbroke Ltd. v. William Hill*, a later decision in the United Kingdom,³² cemented precedent from *Walter v. Lane*, which required that a work demonstrate sufficient skill, labor,

23. *Id.* at 361.

24. *See id.* at 361, 363–64.

25. *Walter v. Lane* [1900] AC 539 (HL) (appeal taken from Eng.).

26. *Id.* at 540.

27. *Id.* at 548.

28. *See id.* at 545.

29. CRAIG NARD, MICHAEL MADISON & MARK MCKENNA, *THE LAW OF INTELLECTUAL PROPERTY* 453 (4th ed. 2014); *see also Feist Publ'ns*, 499 U.S. at 340.

30. *Feist Publ'ns*, 499 U.S. at 346.

31. *Id.* at 362.

32. *Ladbroke Ltd. v. William Hill Ltd.* [1964] 1 All ER 465 (HL).

and judgment to acquire copyright protection.³³ There, the House of Lords determined that Ladbroke infringed William Hill's copyright, as William Hill's gambling coupons were copyright-protected compilations.³⁴ The decision demonstrated that authors could show sufficient originality without the expression of artistic thought³⁵ and that the United Kingdom has a similarly low originality bar.

Later decisions from UK courts, however, indicate some differences may exist between the United States and the United Kingdom on originality. Following the European Court of Justice's decision in *Infopaq International A/S v. Danske Dagblades Forenin*,³⁶ the *Newspaper Licensing Agency Ltd. v. Meltwater Holding BV*³⁷ decision suggested a slight detraction from the United Kingdom's traditional standard. In *Meltwater*, the court of appeal held that eleven-word newspaper headlines were copyrightable because those headlines expressed the author's intellectual creation, equating that standard with the traditional skill, labor, and judgment test.³⁸ With this slight alteration in language, this decision indicates that the necessary creativity for originality in the United Kingdom may be slightly lower than in the United States,³⁹ especially considering that originality in *Meltwater* vested in a lone sentence. However, it is unclear whether the United Kingdom will continue to follow this test in light of Brexit.⁴⁰

In application, originality in the United States and the United Kingdom operate in much the same way. Excluding works made for

33. Compare *id.* at [466], with *Walter v. Lane* [1900] AC 539, [¶ 1667] (HL) (appeal taken from Eng.).

34. *Ladbroke Ltd.*, 1 All ER at 468, 471.

35. *Id.* at 469, 472, 476.

36. Case C-5/08, *Infopaq Int'l A/S v. Danske Dagblades Forenin*, 2009 E.C.R. I-06569, [¶¶ 37–39, 45–47] (holding isolated sentences could convey originality by communicating an element of expression that constituted the author's intellectual creation).

37. *Newspaper Licensing Agency Ltd. v. Meltwater Holding BV* [2011] EWCA (Civ) 890 (Ch).

38. See *id.* [¶¶ 28, 29].

39. See Andreas Rahmatian, *Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine Under Pressure*, 44 INT'L REV. INTEL. PROP. & COMPETITION L. 4, 18 (2013). Though US courts may grant newspaper headlines copyright protection provided they demonstrate a modicum of creativity, courts have refused to protect short descriptive phrases in the past. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991); *Alberto-Culver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705, 711 (1972) (finding no ability to copyright in a short phrase describing a product: "the text is merely a 'short phrase or expression' which hardly qualifies as an 'appreciable amount of original text . . . most important, this phrase is just as descriptive as the rest of the text. The ingenuity and creativity reflected in the development of the product itself does not give appropriate descriptive language, such as 'a personal sort of deodorant,' any separate value as a composition or as an extension of a work of art.").

40. Sean Ibbetson & Theo Savvides, *Brexit and Copyright Law: Will the English Courts Revert to the 'Old' Test for Originality?*, KLUWER COPYRIGHT BLOG (Dec. 5, 2016), <http://copyrightblog.kluweriplaw.com/2016/12/05/brexit-copyright-law-will-english-courts-revert-old-test-originality/> [https://perma.cc/2L7P-8FUZ].

hire, both jurisdictions require that a work come from the author.⁴¹ While the United States requires only a modicum of creativity,⁴² copyright protection will not vest in creations that result from the sweat of the brow, a justification that finds its basis in Locke's labor theory.⁴³ However, satisfying this low threshold could involve a procedure as small as providing a unique arrangement to a set of sentences or framing a photograph in a particular way.⁴⁴ The United Kingdom also requires originality for authorial works, and satisfying this requirement does not appear to differ greatly from the US approach. While UK case law refined the language used to measure sufficient originality,⁴⁵ the requirement can still be met without expression of artistic thought. This slight reformulation, however, suggests that the United Kingdom's originality bar might be lower than that found in the United States, especially if precedent from *Ladbroke* holds true.⁴⁶ Further, both jurisdictions extend copyright to factual depictions, so long as the work is arranged in a particular way that demonstrates a minimal amount of creativity.⁴⁷ In sum, both jurisdictions seem to require very little to satisfy originality.

At first glance, originality requirements in both jurisdictions appear beneficial for comedians seeking copyright protection for their jokes. According to legislation and case law, a comedian's jokes need only originate from her and express a very small amount of creativity.⁴⁸ Therefore, if a comedian writes her own jokes—even when they relay facts from stories—those jokes could receive copyright protection, so long as she establishes small amounts of creativity. It appears that even small turns of phrase could endow a joke with sufficient expression to meet either the US or UK standard. However, because these small nuances are all a comedian may need to satisfy originality in a particular joke, copyright may not provide extensive protection, as similar jokes with just enough differentiation may impede a comedian's ability to stand out from other acts.⁴⁹ Put differently, if jokes require only the slightest amount of creativity, comedians may take on the same

41. See 17 U.S.C. § 201 (2018); Copyright, Designs and Patents Act § 11(1)–(2).

42. See *Feist Publ'ns*, 499 U.S. at 346.

43. *Id.* at 352–56; see also Adam Mossoff, *Saving Locke From Marx: The Labor Theory of Value in Intellectual Property Theory*, 29 SOC. PHIL. & POL'Y 283, 292–93 (2012).

44. See *Feist Publ'ns*, 499 U.S. at 345–48.

45. *Newspaper Licensing Agency Ltd. v. Meltwater Holding BV* [2011] EWCA (Civ) 890, [¶ 28, 29] (Ch).

46. *Ladbroke Ltd. v. William Hill Ltd.* [1964] 1 All ER 465, 468, 472 (HL).

47. See *Feist Publ'ns*, 499 U.S. at 348; Case C-5/08, *Infopaq Int'l A/S v. Danske Dagblades Forening*, 2009 E.C.R. I-06569, [¶ 45].

48. See *Feist Publ'ns*, 499 U.S. at 345.

49. See *id.* at 345–46.

market-tested concepts and successfully walk the infringement tightrope. Further, as the below Section discusses, showing originality is only the first step necessary for copyright protection.

B. Fixation

While originality is the first, and arguably most important, requirement to qualify for copyright protection, prospective copyright holders must cross another hurdle to acquire protection. This second requirement, fixation, is a statutory creature in the United States⁵⁰ and the United Kingdom.⁵¹ Under both statutes, fixation is concerned with putting a work into a perceptible medium.⁵² In other words, a copyrightable work will not receive protection unless the work is fixed in some form. However, both jurisdictions seem to provide interested parties with many options for fixing a work, considering authors can fix works using now-existing and yet-to-exist technologies.⁵³ This point is particularly important in the United States following *Williams Electronics v. Artic*, which held that fixation was satisfied where varied messages and graphics appeared when a videogame was played, as the content that created the work was fixed in code.⁵⁴

Like originality, fixation in both the United States and the United Kingdom operates in a similar fashion. Both jurisdictions require that a work be fixed⁵⁵ or recorded⁵⁶ for copyright protection to attach. Further, fixation provides immediate copyright protection in both jurisdictions, assuming all other requirements are met.⁵⁷ The major points of divergence between the two jurisdictions on fixation relate to who fixes the work and the amount of time a work must be fixed to garner protection.⁵⁸ From those points of divergence, it seems that satisfying the UK requirement for fixation may be slightly simpler than satisfying the US requirement.

The first difference between the US and the UK approaches to fixation relate to the person who fixes the work. Under the US requirement, fixation must be satisfied by the author or someone under her authority, meaning an author must be instrumental in the fixation

50. See 17 U.S.C. § 101 (2018).

51. See Copyright, Designs and Patents Act § 3(2).

52. See 17 U.S.C. § 101; Copyright, Designs and Patents Act § 3.

53. *Id.*

54. 17 U.S.C. § 101; *Williams Elecs., Inc. v. Artic Int'l, Inc.*, 685 F.2d 870 (3d Cir. 1982).

55. Copyright, Designs and Patents Act § 3(2).

56. *Id.*

57. 17 U.S.C. § 101; Copyright, Designs and Patents Act § 3(2).

58. *Id.* § 3(3).

process.⁵⁹ Conversely, the UK Copyright, Designs and Patents Act of 1988 places no emphasis on the person who fixes the work. As the statute states, “it is immaterial . . . whether the work is recorded by or with the permission of the author.”⁶⁰ Therefore, fixation in the United Kingdom differs from the United States in that a third party could fix a work without an author’s authority. This fixation could then qualify the work for copyright protection.⁶¹ Ultimately, under UK law, if anyone fixes an original and expressive work, that work could immediately receive copyright protection.

The second difference between the US and the UK fixation requirements relates to the amount of time a work must be fixed to gain protection. Under the US requirement, a work is fixed so long as “it is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁶² This temporal requirement is absent from UK legislation. Thus, it could be argued that a work that was recorded for any period of time may be fixed under UK law, whereas US law may require fixation for a more substantial amount of time.

For comedians seeking copyright protection for their jokes, satisfying fixation seems less onerous than demonstrating originality. This appears true in both jurisdictions. According to the respective legislation, a joke would only require fixation or recordation in some tangible form.⁶³ In the United States, that fixation must exist for more than a transitory period,⁶⁴ which indicates mere stage performance would not suffice for copyright protection, while UK legislation provides no temporal requirement. Thus, while only live performance of a joke would likely be insufficient to satisfy the fixation requirement for either statute, a comedian in the United Kingdom who wrote and immediately erased a joke, but later performed it, may still have satisfied fixation for copyright purposes. If a comedian in the United States, however, satisfied the fixation requirement for her joke and a later live performance of that joke differed due to audience interaction, she may still be able to claim protection for that joke because, while the resultant joke may differ slightly, a record of the original still exists.⁶⁵ However,

59. Yoav Mazeh, *Modifying Fixation: Why Fixed Works Need to Be Archived to Justify the Fixation Requirement*, 8 LOY. L. & TECH. ANN. 109, 117 (2008).

60. Copyright, Designs and Patents Act, c. 48 § 3(3).

61. CLAIRE HOWELL & BENJAMIN FARRAND, *INTELLECTUAL PROPERTY LAW* 6 (5th ed. 2017).

62. 17 U.S.C. § 101 (2018).

63. *Id.*; Copyright, Designs and Patents Act § 3(2)–(3).

64. 17 U.S.C. § 101.

65. *Williams Elecs., Inc. v. Artic Int’l, Inc.*, 685 F.2d 870, 877 (3d Cir. 1982).

this proposition may be questionable if a reviewing court distinguished altered jokes from the varied messages and graphics in *Williams Electronics, Inc. v. Artic International, Inc.* on the basis that the code containing those messages and graphics in *Artic* were recorded while joke variations may not be fixed in an underlying record.⁶⁶ Further, as mentioned above, the United States requires an author be instrumental in fixation.⁶⁷ The corresponding absence in the United Kingdom may leave comedians with some specific advantages and disadvantages, as discussed below. Thus, it appears that like originality, the United Kingdom's requirement is less onerous than that of the United States.

C. The Idea-Expression Dichotomy

Satisfying the idea-expression dichotomy is the last of copyright's initial requirements in the United States⁶⁸ and United Kingdom.⁶⁹ While neither jurisdiction has explicit statutory guidance on how this principle should be applied, both jurisdictions essentially state that copyright protection will not extend to mere ideas or facts.⁷⁰ Like the originality principle, case law in both jurisdictions highlight these similarities.

In the United States, *Baker v. Selden* serves as the preeminent case on this issue.⁷¹ There, the testator of Selden's estate alleged Baker infringed copyright in a bookkeeping method showcased in Selden's books.⁷² After failing to argue to that the alleged infringement was related to noncopyrightable material, Baker appealed to the Supreme Court. The Supreme Court held that the tables Selden used to display his book-keeping method were ineligible for protection because they only represented facts and formulas.⁷³ The Court's ruling in this case set the stage for future courts to ensure that copyright would only protect the author's expression and that ideas, separable from expression, would lie in the public domain. The United Kingdom recently addressed the idea-expression dichotomy in *Baignet v. The*

66. A reviewing court, however, may conclude that the resulting joke constituted a derivative work under Copyright Act 1976, 17 U.S.C., § 101. As the author of a joke, a comedian likely has a valid copyright in the progenitor and subsequent alterations, granting those jokes are fixed and have sufficient originality and expressive quality. See NARD, MADISON & MCKENNA, *supra* note 29, at 592, 741.

67. 17 U.S.C. § 101.

68. 17 U.S.C. § 102(b).

69. Berne Convention, *supra* note 10, art. 9(2).

70. *Baker v. Selden*, 101 U.S. 99, 104 (1880); *Baignet v. Random House Group Ltd.* [2006] EWHC (Ch) 719, [¶ 5].

71. NARD, MADISON & MCKENNA, *supra* note 29, at 741.

72. *Baker*, 101 U.S. at 100–01.

73. *Id.* at 103.

*Random House Group Ltd.*⁷⁴ There, Baignet alleged that the publishing company—Random House—was liable for copyright infringement for publishing Dan Brown's *The Da Vinci Code*.⁷⁵ The appellants argued that *The Da Vinci Code* copied the central theme of their book, *The Holy Blood and the Holy Grail*, though they could only point to the chronological series of events that served as the historical grounding for each work to support their point.⁷⁶ The Court of Appeal, articulating the idea-expression dichotomy, stated, "Copyright does not subsist in ideas; it protects the expression of those ideas, not the ideas themselves."⁷⁷ Agreeing with the lower court's assertion⁷⁸ that the Baignet's book merely expressed a number of facts and ideas at a very general level, the Court found no infringement.⁷⁹ Thus, even though the Random House published a literary work capable of protection, the supposed underlying theme that involved chronologized historical facts lacked sufficient expression to qualify for copyright protection.

In application, the idea-expression dichotomy is not as burdensome as some commentators argue.⁸⁰ According to explanations in case law, the idea-expression dichotomy in the United States and the United Kingdom operates in much the same way. Both jurisdictions refuse to protect mere ideas and facts; creative expression is required for copyright protection's attachment.⁸¹ Further, where facts are intertwined with expression, only the expression separate from those facts can receive protection.

Comedians seeking copyright protection for their jokes could benefit from these jurisdictions' respective approaches to the idea-expression dichotomy in two ways. First, although many comedians believe that jokes are incapable of copyright protection due to the idea-expression dichotomy,⁸² this analysis shows that even when comedians use facts or topical premises, they can still receive protection in their individualized expression. As an example, the late American comedian Mitch Hedberg did not simply opine that Pringles potato chip cans were burdensome to human hands but created a two-sentence story that derived humor from that idea by using a storyline with invented

74. *Baignet*, EWHC (Ch) 719.

75. *Id.* [¶ 1].

76. *Id.* [¶ 10].

77. *Id.* [¶ 5].

78. *Id.* [¶ 92].

79. *Id.* [¶ 51].

80. Bolles, *supra* note 15, at 245.

81. *Baker v. Selden*, 101 U.S. 99, 104 (1880); *Baignet*, EWHC (Ch) 719, [¶ 5].

82. Oliar & Sprigman, *supra* note 2, at 1822.

dialogue, pacing, and delivery.⁸³ Comedians could also benefit from conceptualization because the idea-expression dichotomy leaves open the possibility that multiple comedians can create jokes about identical subject matter. Because only the expression of an idea receives copyright protection, comedians can draw from similar premises and conclusions while writing jokes, so long as they do not copy another comedian's work verbatim.⁸⁴ This allows comedians a wide berth in the creative realm and alleviates tensions those comedians could feel, should they encounter a claim of copyright infringement.

III. HOW CAN COMEDIANS USE COPYRIGHT LAW TO PROTECT THEIR JOKES?

Comedians wear many professional hats. They write jokes, perform on stage, and edit their material when needed.⁸⁵ Due to the number of tasks comedians undertake to perfect their jokes and make a living, they could conceivably protect their material in several ways. As written, jokes could be considered literary works.⁸⁶ Comedians are also, in a way, actors. They take the stage and perform their written and rehearsed material to live audiences, using recurring characters, physicality, direction, dress, pacing, and mood for emphasis.⁸⁷ As such, jokes and entire acts could receive copyright protection as dramatic works.⁸⁸ They also edit jokes to come together in a particular way for specials or albums.⁸⁹ When recorded, comedians could receive protection for jokes under the auspices of audio⁹⁰ or video recordings.⁹¹ As this Part discusses, these undertakings give comedians many opportunities to protect their work. However, due to the scope of protection afforded in those areas, comedians may need to pursue

83. See *Comedy Central Presents: Mitch Hedberg*, COMEDY CENTRAL (2018), <http://www.cc.com/video-clips/va42g9/comedy-central-presents-turtlenecks—waiting-lists—pringles> [<https://perma.cc/2QDC-RP55>]; see also *infra* App.

84. This level of protection essentially leaves comedians with a thin copyright in their jokes, as courts do not want to limit others' access to ideas in the public domain. See *Kaseberg v. Conaco, LLC*, 260 F. Supp. 3d 1229, 1244 (S.D. Cal. 2017) ("Similarities derived from the use of common ideas cannot be protected; otherwise, the first to come up with an idea will corner the market." (internal citations omitted)); *Oliar & Sprigman*, *supra* note 2, at 1806 (citing *Foxworthy v. Custom Tees, Inc.*, 879 F. Supp. 1200, 1204 (N.D. Ga. 1995)) (finding trademark infringement).

85. *PowerfulJRE* (Joe Rogan), # 1040, *supra* note 3; see also *infra* App.

86. 17 U.S.C. § 101 (2018); Copyright, Designs and Patents Act § 1(1)(a).

87. *Oliar & Sprigman*, *supra* note 2, at 1852.

88. See 17 U.S.C. § 102(a)(3); Copyright, Designs and Patents Act § 1(1)(a).

89. Further, comedians are editors and producers. Comedians take account of crowd size, venue size, and audience responses to adjust jokes for the best response possible.

90. 17 U.S.C. § 102(a)(7); Copyright, Designs and Patents Act § 1(1)(b).

91. 17 U.S.C. § 102(a)(6); Copyright, Designs and Patents Act § 1(1)(b).

multiple levels of protection in order to properly satisfy their copyright needs.

A. Literary Works

Jokes often begin in writing. Comedians draft jokes on notepads, notebooks, and laptops in order to develop material for their live performances.⁹² As this process involves a literary exercise, written jokes could qualify for copyright protection under the auspices of a literary work.

Literary works receive copyright protection in the United States⁹³ and the United Kingdom.⁹⁴ Both jurisdictions grant literary works copyright protection regardless of what form the work takes, as long as the work is not audiovisual (under the US statute)⁹⁵ or dramatic or musical (under the UK statute).⁹⁶ Therefore, granted a written joke was original, fixed, and satisfied the idea-expression dichotomy, that joke would qualify for copyright protection.

Textually, the US and UK statutes do not differ greatly. In fact, their only differences appear to be those above-mentioned exclusions. However, substantively, some differences may arise where comedians seek protection for jokes as literary works, as the United Kingdom's originality threshold may be slightly lower than the one found in the United States. As previously mentioned, *Meltwater* found originality in a mere eleven words, where they represented the author's own intellectual creation.⁹⁷ While the United States requires a modicum of creativity for satisfying originality,⁹⁸ it is unclear whether the originality threshold is quite so low. However, recent judicial decisions in the United States have held something as simple as a tweet could suffice for jokes in this arena,⁹⁹ so it is conceivable that this potential disparity may not be quite so severe.

In short, comedians could benefit considerably from protecting their jokes as literary works. While books are considered the most ordinary form of a literary work, comedians do not simply write joke

92. Vinson Cunningham, *Jerry Seinfeld, Craftsman and Crank*, NEW YORKER (Oct. 11, 2017), <https://www.newyorker.com/culture/culture-desk/jerry-seinfeld-craftsman-and-crank> [<https://perma.cc/8JMX-DJVK>].

93. 17 U.S.C. § 102(a)(1).

94. Copyright, Designs and Patents Act § 1(1)(a).

95. 17 U.S.C. § 101.

96. Copyright, Designs and Patents Act § 3(1)(a)–(d).

97. Newspaper Licensing Agency Ltd. v. Meltwater Holding BV [2011] EWCA (Civ) 890, [¶¶ 28, 29] (Ch).

98. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 362 (1991).

99. Kaseberg v. Conaco LLC, 260 F. Supp. 3d 1229, 1249 (S.D. Cal. 2017).

books or traditional memoirs to earn a living. Instead, comedians predominantly write jokes for performance purposes, frequently never publishing a conventional book. Because a literary work's form is largely insignificant in both jurisdictions, comedians' fears about the interplay of the joke writing process and copyright protection could be eased. The broad parameters of literary works are especially pertinent because they do not require comedians to write volumes of joke books or memoirs in order to protect their creations.¹⁰⁰ However, where comedians do write books to protect their jokes through this traditional medium, as some find it easier to write this way,¹⁰¹ they may receive copyright protection in both jurisdictions.¹⁰² For instance, George Carlin, who was rumored to write a new hour of jokes every year,¹⁰³ classified himself in this way.¹⁰⁴

Although protecting jokes as literary works appears possible, this method is uncommon.¹⁰⁵ Despite its lack of prevalence, literary works, especially books, could prove very useful in the event that other comedians claim identical material. The book could serve as the necessary record to prove the joke's creation date. This holds true for digital files and notebooks alike. Both methods can create evidentiary problems, however, if a notebook is undated or inaccuracies occur within a digital file's metadata.¹⁰⁶ However, these methods can provide clues, such as when digital documents store the file's creation date in metadata,¹⁰⁷ or even in undated notebooks, where a joke's location in a notebook or simply appearing in a specific notebook from a specific time period, can indicate the date a joke was written. Therefore, comedians would do well to protect their works in this method, even if it was solely to provide a useful record in a cause of action for copyright infringement.

100. *Id.*

101. See *The Doug Stanhope Podcast, Episode 262: UK Swapcast*, AUDIOBOOM (June 4, 2018), <https://audioboom.com/channels/4880830.rsswciEjBNp90k> [<https://perma.cc/W2ZF-ZMYW>]; see also *infra* App.

102. 17 U.S.C. §§ 101, 102(a)(1) (2018); Copyright, Designs and Patents Act, c. 48 § 3(1)(a)–(d).

103. PowerfulJRE (Joe Rogan), # 1040, *supra* note 3.

104. See *The Paley Center, George Carlin-Pride in Writing*, YOUTUBE (Mar. 3, 2010), <https://www.youtube.com/watch?v=T33MHBO5aOQ> [<https://perma.cc/973W-4P82>]; see also *infra* App.

105. Bolles, *supra* note 15, at 239–40.

106. See Gavin W. Manes, *When You Shouldn't Trust the Metadata: The Truth Behind Creation, Modified, and Accessed Date Information*, AVANSIC (2014), <http://author.acc.com/chapters/louis/upload/Avansic-Why-You-Shouldnt-Trust-Metadata.pdf> [<https://perma.cc/33PD-CTWC>].

107. See generally *id.*

B. Dramatic Works

When literary works prove incomplete for comedians seeking joke protection, dramatic works may offer another option. A comedian's job extends beyond writing down her jokes. Stand-up is intended for a live audience; jokes in this medium require action for efficacy and incorporate planned speech, pacing, and sometimes movement or physical gags.¹⁰⁸ Further, jokes are repeatable—comedians get on stage in front of a new audience every night and repeat their material, often using a stage persona to ensure they stand out above other comedians. Considering these elements, comedians could pursue copyright protection for their material as dramatic works.

Dramatic works receive statutory protection in the United States¹⁰⁹ and the United Kingdom.¹¹⁰ However, neither jurisdiction provides a formal definition that articulates a dramatic work's constituent elements; though both include dance and pantomimes.¹¹¹ Further, both jurisdictions seem to emphasize the performative element for this category of works. Case law in both jurisdictions highlights these differences and the requirements comedians must meet to acquire copyright protection in this area.

Under US law, few cases explain what dramatic works require for copyright protection; though these works are often characterized by characters, plot, and sequences of events.¹¹² According to other sources, dramatic works also encompass "any work in which performed actions, speech, or incident, or all three, convey theme, thoughts, or character to an audience,"¹¹³ as well as scripts and treatments that serve as supporting documents for performance.¹¹⁴ What is clear, however, is that an underlying record must exist in order for copyright to subsist in a dramatic work.¹¹⁵ Thus, the distinguishing characteristic for this category appears to be that dramatic works are intended for performance, rather than simply narration or description.

108. Bolles, *supra* note 15, at 239.

109. 17 U.S.C. § 102(a)(3) (2018).

110. Copyrights, Designs and Patents Act § 3(1)(d).

111. Copyrights, Designs and Patents Act § 3(1)(d); *see also* *Pantomimes and Choreographic Works*, US COPYRIGHT OFFICE, <https://www.copyright.gov/register/pantomime.html> [<https://perma.cc/CR7G-GEYA>] (last visited Feb. 16, 2019).

112. *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

113. PAUL GOLDSTEIN, COPYRIGHT § 2:110 (2d ed. 1996).

114. *Dramatic Works: Choreography, Pantomimes, And Scripts FL-119*, US COPYRIGHT OFFICE, <https://www.webharvest.gov/peth04/20041015130549/http://copyright.gov/fls/fl119.pdf> [<https://perma.cc/FQU6-P3Y8>] (last visited Feb. 28, 2019).

115. *Id.*

The United Kingdom's approach to this category, however, is more extensive. Before more substantial guidance came from UK courts, the *Green v. Broadcasting Corp. of New Zealand* decision shed some light on this issue. In that case, the claimants argued that their copyright was infringed when a game show in New Zealand incorporated elements of its English predecessor's scripts and dramatic format.¹¹⁶ Finding no dramatic work, the Council highlighted the fact that the claimants failed to introduce any scripts that could serve as the basis for the show as a dramatic work.¹¹⁷ The Council also held that stock catch phrases and events that occurred spontaneously during the show expressed general ideas or concepts¹¹⁸ and were incapable of copyright protection.¹¹⁹

Following *Green*, *Norowzian v. Arks, Ltd.*¹²⁰ provided additional guidance on what dramatic works require for copyright protection. In *Norwozian*, the claimant created a film showing a man dancing on a rooftop.¹²¹ During editing, the claimant used jump cutting techniques to make the dancer appear to perform physically impossible movements.¹²² The claimant argued that his underlying work that comprised the film and the film itself were both dramatic works and alleged that the respondent's advertisement infringed his copyright.¹²³ The Court found the claimant's underlying dance and the film itself constituted dramatic works worthy of copyright protection.¹²⁴ Articulating the requirements of a dramatic work, the Court stated the following: "[The work is one] of action, with or without words or music, which is capable of being performed before an audience."¹²⁵ The *Norowozian* court stated that dramatic works require human action, though works of action can be found in written scripts that serve as the predicate for that action.¹²⁶ Essentially, the Court granted the claimant copyright in his film and the underlying dance because the film served as a record (or script) upon which the dance was saved. However, the Court was unwilling to find infringement, as the elements claimant

116. See *Green v. Broadcasting Corp. of New Zealand* [1989] R.P.C. 700, 701 (UK).

117. *Id.*

118. *Id.* at 702.

119. HOWELL & FARRAND, *supra* note 61, at 9.

120. *Norowzian v. Arks, Ltd.* [2000] E.M.L.R. 67.

121. *Id.* at 70.

122. *Id.*

123. *Id.* at 70–71.

124. While Claimant's works received protection, the Court found no infringement because Claimant's infringement claims hinged on the jump-cutting techniques, not the dance or film. *Id.* at 73, 74.

125. *Id.* at 73.

126. *Id.* at 72.

alleged were infringed—the specific cutting techniques—were unprotectable.¹²⁷

Regarding the requirement that the work have the capability of being performed, courts have said copyright will be satisfied where, “[it has] sufficient unity to be capable of performance and that the features claimed . . . being unrelated to each other except as accessories to be used in the presentation of some other dramatic or musical performance, lack that essential characteristic.”¹²⁸ Thus, this element appears to be twofold, requiring the possibility that the acts be capable of actual human performance¹²⁹ and that the acts be unified and essential to the work. Without addressing the unity issue, the *Norowzian* claimant’s argument for a dramatic work in the dance succeeded because the Court found that a film could be performed before an audience, thus satisfying the requirements for a dramatic work.¹³⁰

It seems that, in comparing approaches to dramatic works, both jurisdictions place significant emphasis on a work’s record and predictable elements. While the US statute does not explicitly require that a work be capable of human performance, additional interpretation highlights the importance of a work’s performative elements.¹³¹ Those interpretations appear to show that the United States closely matches the United Kingdom’s requirements for dramatic works. This is especially true when observing that both jurisdictions extend protection to works where scripts and other records serve as a performance’s foundation.¹³² However, without further guidance from US courts, it is unclear whether these perceived similarities are overstated.

Bearing in mind modern comedic trends, comedians could benefit from dramatic work protection in both jurisdictions. In the United States, comedians could benefit from this mode of protection where they utilize stage personas that incorporate mannerisms, styles of dress, stage movements, and speech patterns.¹³³ For instance, the US comedian Emo Philips is widely known for appearing onstage with a pageboy haircut and ill-fitting clothes, using onstage movements to appear fidgety, nervous, possibly mentally disturbed, and highly

127. *Id.*

128. *Green v. Broadcasting Corp. of New Zealand* [1989] R.P.C. 700, 702.

129. *HOWELL & FARRAND, supra* note 61, at 8.

130. PAUL TORREMANS, *HOLYOAK AND TORREMANS INTELLECTUAL PROPERTY LAW* 70 (8th ed., 2016).

131. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

132. *Id.*; see also *Norowzian v. Arks, Ltd.* [2000] E.M.L.R. 67, 73 (Eng.).

133. Bradford Evans, *Stand Up Comedians and Their Alternate On-Stage Personas*, *VULTURE* (Aug. 7, 2012), <http://www.vulture.com/2012/08/stand-up-comedians-and-their-alternate-on-stage-personas.html> [https://perma.cc/3HZN-HSQV].

intelligent.¹³⁴ This persona, embodied in jokes and a comedian's essence, gives credence to the idea of jokes as dramatic works, as that persona is the character through which a comedian delivers her lines. Further, those jokes often culminate into a larger act with a closing joke, thus creating a larger plot capable of repetition and multiple performances.¹³⁵

Comedians could also benefit from dramatic work protection in the United Kingdom. Jokes are often written down in a quasi-script fashion, providing structure and the predicate for their telling. These written jokes provide the script necessary for kick-starting a performance. Further, jokes in a stand-up setting are works of action. Stand-up shows necessarily involve speaking before a live audience¹³⁶ and often involve movement. While movement may be a mere idea,¹³⁷ incorporating planned stage movement into a joke when writing in a notebook to prepare for live performance could indicate that the movement is more than a general concept. Additionally, jokes are also capable of human performance, unified, and essential to a stand-up's act. Jokes spoken and acted out are essential to an act, as they provide the necessary material for a comedian's livelihood. Further, the joke's structure, setups, and punchlines are not mere ancillary stage pieces but serve as the foundation for performance. This could mean that individual jokes that comprise part of a comedian's set, as well as the set overall, could qualify for copyright protection as a dramatic work. Considering these elements, comedians would be wise to pursue copyright protection for jokes in this medium, as the protection they receive may extend beyond the words that make up an individual joke.

134. Melissa Rossi, *Extraterrestrial Comic? Nerd God? Or Less?*, SPIN MAG. (Oct. 1985), <https://books.google.com/books?id=W-XEPcqeKMC&pg=PA13#v=onepage&q&f=false> [<https://perma.cc/5C35-LQ2H>].

135. John Mulaney's stand-up special, *New in Town*, provides an excellent example of this feature. See JOHN MULANEY: NEW IN TOWN (Netflix 2012). As suggested by the special's title, the special showcases Mulaney reflecting on his past and connecting those moments to his present inability to confront the demands of the unknown in everyday life. See *id.* Mulaney frequently references his adolescent run-ins with alcohol and irresponsible behavior. *Id.* In one of this special's more notable callbacks, Mulaney mentions a doctor's appointment prompted by a desire to receive a prescription for anti-anxiety medications under false pretenses, showing he still retains tinges of that teenage-irresponsibility. *Id.* Believing that he could receive the prescription if he told his doctor that he "sometimes get[s] nervous on airplanes," Mulaney suffers through several procedures without getting his desired prescription. *Id.*

136. Bolles, *supra* note 15, at 241, 242.

137. HOWELL & FARRAND, *supra* note 61, at 8.

C. Sound Recordings

Comedians may also protect their jokes through technological measures—means they may already use in order to record and perfect their material. In order to edit or document their jokes' successes, comedians often use audio recording when performing.¹³⁸ Comedians listen to these recordings to determine which jokes received positive reactions, which jokes fell flat, where jokes could be rearranged, and which jokes could be cut from an act.¹³⁹ Comedians also use audio recordings to sell their works. They record their jokes and make albums available to the public through physical mediums, online, and through streaming services.¹⁴⁰ Individual jokes in this format usually comprise track listings like ordinary albums and are skippable and repeatable just like ordinary music recordings.

Sound recordings are protected by copyright in both the United States¹⁴¹ and the United Kingdom.¹⁴² Under their respective statutes, a recording's content and fixation method are largely irrelevant.¹⁴³ Both approaches also differentiate between the copyright in the recording, the underlying copyrightable material that the recording holds, and which party owns which copyright interest.¹⁴⁴ In this way, the sound recording copyright is distinct from the underlying copyrightable work that the sound recording holds. Here, actual recordings of copyrighted works typically embody two copyrighted works simultaneously. The author of the underlying copyrightable work owns the underlying composition, while the producer owns the sound recording.¹⁴⁵

While US and UK law have numerous similarities in their sound recording requirements, one distinct difference separates them. Under US law, the originality requirement must be met for copyright to vest in a sound recording.¹⁴⁶ UK law, however, does not require originality for copyright to vest; rather, the labor expended in bringing about the

138. See PowerfulJRE (Joe Rogan), *Joe Rogan Experience # 1096–Todd Glass*, YOUTUBE (Mar. 27, 2018), https://youtu.be/2_acNtmiiY [<https://perma.cc/L8LM-ED6U>] [hereinafter PowerfulJRE (Joe Rogan), # 1096].

139. *Id.*

140. See *Comedy Albums*, ITUNES, <https://itunes.apple.com/us/genre/music-comedy-standup-comedy/id1171> [<https://perma.cc/5QUL-5PY3>] (last visited Feb. 16, 2019).

141. 17 U.S.C. § 102(a)(7) (2018).

142. Copyright, Designs and Patents Act § 1(1)(b).

143. 17 U.S.C. § 101; Copyright, Designs and Patents Act § 5A.

144. 17 U.S.C. § 202; Copyright, Designs and Patents Act §§ 5A, 11.

145. *Copyright Registration of Musical Compositions and Sound Recordings*, US COPYRIGHT OFFICE, <https://www.copyright.gov/register/pa-sr.html> [<https://perma.cc/E4PT-36LP>] (last visited Feb. 27, 2019).

146. 17 U.S.C. § 102(a)(7).

work must be the right kind and must bring about a material change in the work.¹⁴⁷

Because modern technology simplifies recording and decreases production costs, comedians could simultaneously use sound recordings for copyright protection and a direct revenue stream in both jurisdictions.¹⁴⁸ As comedians frequently use audio-recording technology to record their own sets,¹⁴⁹ they would qualify as the producer of that sound recording, so long as they set the recording into motion and controlled it. Comedians would also be authors of this underlying creative work, as they wrote the piece performed. However, where third parties undertake these recordings, their ownership interest as producer vests in that recording, meaning a producer could possibly also have rights in the work. Additionally, because a number of technologies could be used to fix a sound recording, comedians could conceivably protect their jokes and acts through any means of recording, even where done on something as commonplace as a smartphone.¹⁵⁰ Therefore, comedians should utilize this method of protection, especially when accounting for financial considerations. However, should a comedian want complete control over their joke and its recording, she needs to ensure that she self-produces, lest she lose substantial rights and possible compensation to other producers.

D. Audiovisual Works and Film

Much like sound recordings, comedians often use video equipment to record live performances to assess their jokes' success and as a revenue stream.¹⁵¹ Where a comedian reviews these videos for editing, she can decide to incorporate different gestures, change stage direction, revise joke placement within her act, or rework a joke's structure. If a comedian thought an individual joke or her entire set went over well with an audience and wanted more professional exposure, she could upload her self-recorded videos to a video-hosting site or sell the video of the entire performance as a self-produced comedy special.

147. *Interlego AG v. Tyco Indus. Inc.* [1989] AC 217 (PC) (appeal taken from H.K.).

148. See, e.g., *Craigfoxcomedy Is Creating Stand Up Comedy*, PATREON, <https://www.patreon.com/craigfoxcomedy> [<https://perma.cc/R6HB-VJ6Q>] (last visited Feb. 27, 2019); *Lisa Corrao Is Creating Comedy*, PATREON, <https://www.patreon.com/lisacorrao> [<https://perma.cc/98ER-SXNU>] (last visited Feb. 27, 2019); *Robyn Schall Is Creating Comedy*, PATREON, <https://www.patreon.com/robynschallcomic> [<https://perma.cc/HRM2-R7T7>] (last visited Feb. 27, 2019).

149. *PowerfulJRE (Joe Rogan)*, # 1096, *supra* note 138.

150. 17 U.S.C. § 101; Copyright, Designs and Patents Act § 3(2)–(3).

151. *PowerfulJRE (Joe Rogan)*, # 1040, *supra* note 3.

Although the jurisdictions refer to these categories by different names, this general category of works is protected in US (audiovisual works)¹⁵² and UK (films)¹⁵³ copyright law. Much like sound recordings, these provisions give wide latitude for the character of the content recorded and has little regard for fixation methods.¹⁵⁴ Further, both jurisdictions treat the sound that accompanies the visual component as part of the overall audiovisual work or film.¹⁵⁵ However, these similarities appear to be the only features these jurisdictions share, as the United States and the United Kingdom differ on questions of originality and the overlap between film and dramatic work protection.

The United States treats audiovisual works like any other authorial work when it comes to originality.¹⁵⁶ The United Kingdom, on the other hand, treats films as entrepreneurial works.¹⁵⁷ Like sound recordings, they need not satisfy originality, but the labor must be of the right kind and bring material change in the work.¹⁵⁸ With regard to dramatic works, the United States makes no mention that a film would necessarily have overlap with dramatic works for purposes of copyright protection. However, protecting scripts as dramatic works may imply some overlap, since those scripts could be performed and fixed on film. Differing slightly, UK courts have expressly announced that some overlap may take place in copyright protection for films and dramatic works.¹⁵⁹ Thus, under UK law, comedians could explicitly acquire copyright protection in more than one category of works, unlike under the US law.¹⁶⁰ These provisions—similar to sound recordings—offer comedians another inexpensive way to acquire copyright protection for their jokes. Like sound recordings, the recorded content and the fixation method are largely irrelevant.¹⁶¹ Thus, comedians are free to use any means to capture their work on video, even in cramped comedy clubs where many comedians enjoy working.¹⁶² The key difference between the jurisdictions' respective provisions, however, is

152. 17 U.S.C. § 102(a)(6).

153. Copyright, Designs and Patents Act § 5B.

154. 17 U.S.C. § 101; Copyright, Designs and Patents Act § 5B.

155. 17 U.S.C. § 101; Copyright, Designs and Patents Act § 5B(2).

156. 17 U.S.C. § 102(a)(6).

157. Jason Haynes, *Subject Matter of Copyright Protection in the UK: A Road Map to Effectuating Statutory Reform*, 39 COMMONWEALTH L. BULL., 319, 322 (2012).

158. See *Norowzian v. Arks, Ltd.* [1999] EWCA (Civ) 3018 (Eng.); see also *Newspaper Licensing Agency, Ltd. v. Meltwater Holding BV*, [2011] EWCA (Civ) 890, [26] (Ch).

159. See *Norowzian*, [1999] EWCA (Civ) 3018.

160. See *id.*

161. See 17 U.S.C. § 101; Copyright, Designs and Patents Act § 5A(1).

162. See *infra* App. (Beer Hall Putsch); see also *infra* App. (Thinky Pain).

that the United Kingdom does not consider film an authorial work.¹⁶³ Therefore, the film need not satisfy the originality requirement.¹⁶⁴ Regardless, where properly recorded, these works give comedians another opportunity to acquire copyright in their jokes.

IV. COMPLICATIONS

While comedians could fit their jokes into the types of works mentioned above to protect them, using only one category may not provide comedians with enough protection. This is particularly apparent when considering fixation and live performance, nuances in original expression, and thin copyright. In light of these considerations, the following Section suggests that jokes possess the requisite expression needed for copyright protection, but comedians would do well to protect their work through multiple copyright channels. Further, both jurisdictions should consider amending their laws to inculcate needed respect for comedians and their work.

A. Problems with Fixation and Live Performance

While fixation appears simple in both jurisdictions, recording every performance—or failing to record at all—could cause problems for comedians. When comedians fix every performance, too many jokes or incarnations of one joke could receive protection, limiting creative space for other comedians.¹⁶⁵ Likewise, comedians who do not immediately fix their work receive no copyright protection for those jokes, leaving that material vulnerable for other comedians to co-opt without consequence. Therefore, comedians in both jurisdictions should worry about joke over- and underprotection.

Joke overprotection could result because fixation is so easy to satisfy in both jurisdictions. Specifically, the joke-writing process and technology's omnipresence could lead to too much material being recorded, even when comedians did not intend to make a record of a joke.¹⁶⁶ Excluding slight differences in the United States, both

163. See Haynes, *supra* note 157, at 322.

164. See Copyright, Designs and Patents Act § 1(1); Norowzian, [1999] EWCA (Civ) 3018.

165. Some commentators also argue that the merger doctrine may limit comedians' abilities to adequately protect their jokes because ideas can only be expressed so many ways. See, e.g., ALFRED C. YEN & JOSEPH P. LIU, COPYRIGHT LAW: ESSENTIAL CASES AND MATERIALS 4 (2008). However, as analyzed by Elizabeth Moranian Bolles, jokes and the interplay of language leave open vast possibilities for comedians to escape this conundrum. See Bolles, *supra* note 15, at 251–52.

166. Comedians could, however, to allow one to perform a joke instead of the other where one comedian had no intention of performing the joke and the second comedian had the same or similar joke in her repertoire. See Olliar & Sprigman, *supra* note 2, at 1814.

jurisdictions require mere recordation of a work.¹⁶⁷ Therefore, a comedian could immediately receive copyright protection for a joke on a laptop or notepad, granting the joke was original and satisfied the idea-expression dichotomy. However, should she divert from the written structure, set-up, or punchline during a live performance while recording, she could create a new joke for copyright purposes. This sort of behavior is consistent with the joke-writing process, as comics require an audience to determine whether a joke is complete.¹⁶⁸ Comedians have also expressed this concern, as well as the issue of getting live material to audiences within a pertinent time frame so that jokes remain relevant.¹⁶⁹ As these examples illustrate, the joke-writing process is not complete when a comedian writes a punchline's final sentence on paper. Instead, audience reactions can dictate where a joke needs work or if it is successful. However, where a joke is fixed at each stage during its evolution, comedians could over-protect material, effectively owning a joke, its progeny, and other related jokes. This could limit or dissuade other comedians from approaching similar material out of fear of infringement actions or other retribution.¹⁷⁰

Even with these similarities, joke overprotection could be of greater concern in the United Kingdom than in the United States. Because the United States requires fixation by or under an author's direction, copyright will only subsist in a joke when a comedian, or someone directed by her, fixes her joke.¹⁷¹ Therefore, if a comedian in the United States performs an unfixed joke during its developmental stages, no copyright would attach. In the United Kingdom, however, anyone could fix a comedian's joke, regardless of their authority.¹⁷² This means that an audience member's surreptitious recording during a performance could fix a joke for copyright purposes. Here, the United Kingdom's flexibility on fixation may leave other comedians who perform similar jokes to those secretly recorded hesitant to perform those jokes for fear of backlash,¹⁷³ limiting others from indulging in creative exercises. However, if a joke was unfinished, unpolished, or constituted a throw-away line, copyright protection could extend to a joke fixed by an audience member where that comedian had no desire

167. See 17 U.S.C. § 101 (2018); Copyright, Designs and Patent Act § 3(3).

168. See Bolles, *supra* note 15, at 241–42. On a recent podcast, renowned American comedians Joe Rogan and Brian Regan discussed this point. See PowerfulJRE (Joe Rogan), # 1040, *supra* note 3; *infra* App.

169. See *infra* App.

170. See Oliar & Sprigman, *supra* note 2, at 1791.

171. See Mazeh, *supra* note 59, at 117.

172. See Copyright, Designs and Patents Act § 3(3).

173. See Oliar & Sprigman, *supra* note 2, at 1791.

to protect it. Even more troubling, prolific recording practices could result in consequences beyond overprotection, as a comedian's reputation could be damaged from material she wished had no record and later regretted.¹⁷⁴ As a result, many performers adopt policies prohibiting cell phone use during performances in the United Kingdom.¹⁷⁵

Comedians in the United States are wary of this activity as well.¹⁷⁶ However, due to fixation's specifications in the United States, comedians likely would not have a similar avenue of redress against others who fix their jokes without permission—leaving the problem of superstitious recording one of underprotection. As US law dictates that the author or someone under her direction must fix the work, comedians who fail to fix a joke and perform it live run the risk of jokes being recorded and placed online without consequence. This leaves comedians with unfixed jokes open to losing material if an audience member records those jokes and places them online. As noted by Laura Heymann:

[T]he development of recording and photographic technology and the ability to distribute such recordings over the Internet to a worldwide audience have redrawn the boundary between public and private. Events that formerly would have receded into the darkness of the past are now captured on mobile phones and uploaded to YouTube.¹⁷⁷

Therefore, a comedian in the United States who had no copyright protection in the joke performed could not claim infringement against an unauthorized recorder who uploaded the joke and shared it online. The possibility that this exact scenario could occur has resulted in comedians banning cell phones during live performances in the United States as well.¹⁷⁸

174. See *Artie Lange Talks Using Gay Slurs and How Comedy Has Evolved*, HUFFPOST (Nov. 11, 2013, 3:08 PM), https://www.huffingtonpost.com/2013/11/11/artie-lange-gay-slurs_n_4255898.html [<https://perma.cc/7342-V8MV>].

175. See, e.g., Clarisse Loughrey, *Kevin Hart Fans Kicked Out of UK Gigs for Using Phones*, INDEPENDENT (Sept. 4, 2018, 11:58 AM), <https://www.independent.co.uk/arts-entertainment/comedy/news/kevin-hart-mobile-phone-ban-uk-gigs-02-arena-us-comedian-a8522016.html> [<https://perma.cc/KAE5-TVEC>]; Sean Morrison, *Chris Rock Enforces Complete Ban on Mobile Phones During London Gigs*, EVENING STANDARD (Jan. 28, 2018, 6:45 PM), <https://www.standard.co.uk/news/london/chris-rock-enforces-complete-ban-on-mobile-phones-during-london-gigs-a3751681.html> [<https://perma.cc/5JJ6-NBNS>].

176. See David Menconi, *Comedian Joe Rogan Wants You to Leave Your Phone at Home. He's Not the Only Entertainer to Go Phone-Free*, NEWS & OBSERVER, (Jan. 26, 2018, 12:54 PM), <http://www.newsobserver.com/entertainment/article196825124.html> [<https://perma.cc/V68T-YMZP>].

177. See Laura Heymann, *How to Write a Life: Some Thoughts on Fixation and the Copyright/Privacy Divide*, 51 WM. & MARY L. REV. 825, 828 (2009).

178. See Menconi, *supra* note 176.

Joke underprotection further poses a problem for comedians in both jurisdictions if they fail to immediately fix their joke in some form and perform it on stage. This practice is prevalent during the writing process, as joke writing does not fit neatly into copyright's fixation mold. Oftentimes, comedians write on stage, without parsing out what they plan to say to an audience.¹⁷⁹ Many comedians employ this method of stage writing,¹⁸⁰ sometimes going so far as to fabricate jokes whole-cloth while onstage recording a stand-up special.¹⁸¹ However, when comedians write nothing down nor record their performances, this process leaves their material vulnerable. In essence, when comedians perform wholly unfixed jokes, they fail to satisfy a key element for copyright protection. Thus, other comedians could take those jokes for their own, leaving the original comedian without any possibility to sue for copyright infringement.

Although these jurisdictions share similarities on joke underprotection, their slight differences are also of import. Specifically, UK case law regarding artist intention may limit the ways comedians can protect their jokes.¹⁸² In *Lucasfilm v. Ainsworth*,¹⁸³ the Supreme Court of the United Kingdom held that a creator's intent when creating a work could control the category under which a copyrightable work could receive protection.¹⁸⁴ There, the Court found that helmets the respondent made for the appellant during the first *Star Wars* movie were not sculptures as defined by statute because they were utilitarian objects made for the underlying film.¹⁸⁵ Under *Lucasfilm*, comedic norms could conflict with UK law if comedians only protect their jokes as literary works. While the fixation's purpose may be to guard against infringement—stealing the words that form the joke—the underlying purpose of the literary work category is to protect only the printed word.¹⁸⁶ Comedians, however, may want to protect not only the words of their joke but also the entire performance, such as movement or intonation. In the event that this material did not receive protection

179. See PowerfulJRE (Joe Rogan), # 1040, *supra* note 3; see also *infra* App. at *Episode 1040: Featuring Brian Regan, The Joe Rogan Experience*. During the same interview referenced above, Regan and Rogan discussed Regan's writing process, which followed that model. See PowerfulJRE (Joe Rogan), # 1040, *supra* note 3; see also *infra* App.

180. See PowerfulJRE (Joe Rogan), # 1096, *supra* note 138.

181. See *infra* App.

182. See Anthony Misquitta, *What Is Art: Artistic Craftsmanship Revisited*, 14 ART ANTIQUITY & L. 281, 286–87 (2009).

183. See *Lucasfilm, Ltd. v. Ainsworth*, [2011] UKSC 39, [2012] 1 AC 208 (appeal taken from U.S.).

184. See *id.* at 44–45.

185. See *id.* at 45.

186. See *id.* at 44.

beyond a literary work, comedians could underprotect their own creations. However, where jokes are written as quasi-screen plays meant for live audiences, comedians could receive other forms of protection. Therefore, for protection purposes, comedians should consider more than one copyright avenue to ensure that their jokes are safe.

B. The Idea-Expression Dichotomy

The most popular and frequently cited problem for comedians seeking copyright protection is that jokes do not satisfy the idea-expression dichotomy. In their Article, *There's No Such Thing as a Free Laugh (Anymore)*, Professors Dotan Oliar and Christopher Sprigman surveyed comedians and found that comedians were frequently discouraged from asserting copyright claims for their jokes (as noted by the authors, comedians frequently changed jokes to "write around" another's joke to avoid copyright problems).¹⁸⁷ Some commentators have strenuously argued that jokes are incapable of satisfying the idea-expression dichotomy, despite the US copyright registry permitting joke registration.¹⁸⁸ Operating under this belief, many critics argue that protecting jokes runs counter to copyright law, claiming jokes merely recite ideas, not protectable information and, thus, they lack the requisite expression for copyright protection.¹⁸⁹ This view, however, seems to confuse ideas that constitute comedic premises or conclusions with jokes that contain individuated original expression.

Under the idea-expression dichotomy's conceptualization in the United States¹⁹⁰ and the United Kingdom,¹⁹¹ copyright protection does not extend to mere ideas or facts. Instead, both require original expression for copyright to attach to a given work.¹⁹² To combat the argument that jokes are bare ideas undeserving of copyright, one need only realize that humor invoked from a joke is a direct result of individuated expression that comedians apply to ideas. While traditional one-liner jokes provide support for this premise,¹⁹³ current stand-up trends add further support to push back against this criticism.

187. See Oliar & Sprigman, *supra* note 2, at 1803.

188. See Bolles, *supra* note 15, at 239–40.

189. See *id.* at 245.

190. See 17 U.S.C. § 102(b) (2018).

191. See Berne Convention, *supra* note 10, art. 9(2).

192. See *Baker v. Selden*, 101 U.S. 99, 100–03 (1880); *Baigent v. Random House Group Ltd.*, [2007] EWCA (Civ) 247, [¶ 92] (Ch).

193. See Bolles, *supra* note 15, at 250.

As noted by Oliar and Sprigman, comedians are in the business of expressing themselves through personal stories:

Modern comics tend to rely heavily on long-form narrative humor and establish persons through what typically purports to be personal story-telling . . . Modern stand-up reflects a greater emphasis . . . on comedic narrative; that is, on longer, thematically linked routines that displace the former reliance on discrete jokes.¹⁹⁴

These trends show that modern jokes, if only written, would resemble memoir-style essays. Jokes in this tradition are not merely funny observations; they require individualized expression to make a joke funny and personal to that comedian. These jokes take an idea, premise, or punchline, incorporate that idea into a story, and derive humor from the idea's interaction with the comedian's personal expression. Here, a comedian's expression would receive protection, (i.e., his or her manner in addressing a particular topic), while leaving concepts upon which the joke was formed (i.e., a premise) available for other comedians. In this way, comedians do not merely state ideas, but apply their own expression to an idea to imbue it with humor. As an example, US comedians Doug Stanhope¹⁹⁵ and Maria Bamford¹⁹⁶ recently released comedy specials where each used long-form storytelling narratives to tell jokes about personal experiences with mental illness. Both comedians told jokes that highlighted the shortcomings and misunderstandings of mental illness healthcare in the United States.¹⁹⁷ If written down, this work would surely qualify for copyright protection as a literary work. Writers who do not claim the title of comedian undertake similar endeavors. For example, US and English memoirists use similar humorous devices to overcome personal tragedies akin to those described by Stanhope and Bamford.¹⁹⁸ Considering the protection given to other mediums that utilize this method of story-telling, denying comedians the same opportunity seems counter to one of copyright law's underlying premises—that qualifying works will receive protection regardless of perceived merit.¹⁹⁹

194. See Oliar & Sprigman, *supra* note 2, at 1852.

195. DOUG STANHOPE: THERE'S NO PLACE LIKE HOME (Comedy Dynamics 2016) [hereinafter THERE'S NO PLACE LIKE HOME].

196. MARIA BAMFORD: OLD BABY (Comedy Dynamics 2017).

197. See *id.*; THERE'S NO PLACE LIKE HOME, *supra* note 195.

198. See David Sedaris, *Now We Are Five*, NEW YORKER (Oct. 28, 2013), <https://www.newyorker.com/magazine/2013/10/28/now-we-are-five> [https://perma.cc/ZKM4-XU4G] (United States); see also STEPHEN FRY, *MORE FOOL ME* (2016) (United Kingdom).

199. See *Ladbroke Ltd. v. William Hill Ltd.* [1964] 1 All ER 465, 472 (HL).

C. Authorial Works, Thin Copyright, and Independent Creation

Although protecting jokes under the auspices of authorial works in the United States and the United Kingdom appears possible, the most pressing problems for comedians seems to be the limited amount of protection jokes might receive in light of thin copyright and independent creation. Both concepts leave the door open for other comedians to perform eerily similar jokes to those already protected by copyright.

As noted in *Feist*²⁰⁰ and *Meltwater*,²⁰¹ copyright can subsist in a work where the words expressing ideas are placed in a particular arrangement or selection. Where a specific joke is only protected in one linguistic formulation and one specific incarnation, only that specific selection of words written, performed, or recorded receive copyright protection.²⁰² For instance, comedians who only protect their joke as a literary work could encounter problems, as each jurisdiction's statute seems open to protect jokes with similar expression that do not copy a work verbatim.²⁰³

Where other comedians address the same topics and do not copy a joke word for word, an infringement suit may prove unsuccessful, as only the earlier comedian's particular arrangement was protected. In this way, another comedian could basically write around another's joke and benefit from the original comedian's creativity.²⁰⁴ This could cause problems for comedians, as these alternatively arranged jokes could be used by other comedians, leaving the original author with little recourse.²⁰⁵

On top of the thin copyright problem, comedians must also deal with the independent creation principle.²⁰⁶ Independent creation concerns how an author created a work.²⁰⁷ In copyright infringement cases, defendants can avoid an adverse ruling by affirmatively proving an independent creation defense.²⁰⁸ This is because copyright law

200. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

201. See *Newspaper Licensing Agency, Ltd. v. Meltwater Holding BV*, [2011] EWCA (Civ) 890, [¶¶ 19, 26–29] (Ch).

202. See *Feist Publ'ns*, 499 U.S. at 365; *Newspaper Licensing Agency*, [2011] EWCA (Civ) 890 at [¶¶ 19, 26–29].

203. See *Feist Publ'ns*, 499 U.S. at 365; *Newspaper Licensing Agency*, [2011] EWCA (Civ) 890 at [¶¶ 19, 26–29].

204. See Heymann, *supra* note 177, at 857.

205. See *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 600 (1985) (finding copyright does not preclude a second author's use of information and ideas).

206. See *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 486 (9th Cir. 2000).

207. See *id.* at 484.

208. See *Feist Publ'ns*, 499 U.S. at 345.

recognizes the possibility that multiple authors can independently produce identical expressive works, and that if they do, each may independently demonstrate the necessary originality to support a copyright.²⁰⁹ Therefore, if a comedian expresses an idea in an identical joke without any exposure to another comedian's work,²¹⁰ she may perform that joke without any legal consequences. However, the members of the comedy community may create non-legal consequences for an infringer, by making life for that comedian very difficult.²¹¹ For comedians using copyright to protect their jokes, this means that protection is moot; their joke may be protected, but a person performing the same—independently created—joke will not face any legal repercussions.

D. The Comedian's Stage Persona

A comedian's persona is part and parcel of her act. Comedians use stage personas as a device to deliver their jokes, stand out among other performers, and add personal twists to premises tackled by others. An effective stage persona can unlock the door to greatness as a stand-up comedian.²¹² Where some comedians invent entirely new people in their notebook pages and on stage, others exaggerate their own personal attributes to absurdity, while others craft their persona into an image that resembles the best version of themselves.²¹³ Much like developing a joke, developing a persona can take a significant amount of time.²¹⁴ As original, expressive, and intellectual creations, these personas, like jokes, deserve a form of protection. Neither the US nor the UK copyright statute provides direct protection for literary or dramatic characters. However, this point of similarity stands alone when comparing these jurisdictions.

Protecting literary and dramatic characters via copyright has precedent in US courtrooms. The United States has two tests available for determining whether literary and dramatic characters are deserving of copyright protection.²¹⁵ The first test appeared in Judge Learned

209. See *id.* at 353.

210. See *Francis Day & Hunter Ltd. v. Bron*, [1963] 2 All ER 16, 21 (Eng.).

211. *Oliar & Sprigman*, *supra* note 2, at 1820.

212. See *Evans*, *supra* note 133.

213. *Id.*

214. *Id.*

215. Presently, the US Court of Appeals for the Second Circuit follows the Character Delineation Test. The US Court of Appeals for the Ninth Circuit, on the other hand, follows the Story Being Told Test. The US Court of Appeals for the Seventh Circuit follows its own test which requires only that a character have a specific name and a specific appearance. See *Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496, 502–03 (7th Cir. 2014).

Hand's opinion in *Nichols v. Universal Pictures Corp.*²¹⁶ There, Judge Hand was asked to determine whether copyright infringement existed where two plays utilized similar archetypal characters.²¹⁷ Finding no infringement, Judge Hand used this case to develop the character delineation test.²¹⁸ Under this test, characters in literary and dramatic works receive copyright protection where they "possess physical and conceptual attributes. The character must be sufficiently delineated to be identified as the same character across multiple occasions. He must therefore show consistent traits; and . . . the character must contain some unique elements of expression."²¹⁹ Here, a character's consistent traits and attributes are normally the key factors when determining qualification for copyright protection.²²⁰ Where a character's traits are consistent and sufficiently delineated from universal constructs and stock characters, they are capable of copyright protection.²²¹

The second test used for determining character copyrightability, which is now consistently followed by the US Court of Appeals for the Ninth Circuit,²²² is the story being told test.²²³ Under this test, characters acting as a mere vehicle that carry the story forward receive no copyright protection.²²⁴ However, copyright protection has been granted to characters where the character takes precedence over plot development²²⁵ and where the character's name appeared in the title of the work.²²⁶ Put another way, the larger the role character development takes within the work, the more likely a court will be to grant that character copyright protection.²²⁷

On the other hand, UK judicial precedent creates a less than favorable position on this issue. It appears that protecting characterizations—a character's attributes, personality, eccentricities,

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

217. *Id.* at 122.

218. Michael Heitman, *Have You Seen Sam Spade? How Literary Characters Are Denied Proper Copyright Protection*, 794 SETON HALL L. SCH. STUDENT SCHOLARSHIP 1, 8 (2015), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1810&context=student_scholarship [<https://perma.cc/9AV3-JWLF>].

219. *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008).

220. *DC Comics v. Towle*, 989 F. Supp. 2d 948 (C.D. Cal. 2013); see also Tze Ping Lim, *Beyond Copyright: Applying a Radical Idea-Expression Dichotomy to the Ownership of Fictional Characters*, 21 VAND. J. ENT. & TECH. L. 95, 109 (2018).

221. Heitman, *supra* note 218, at 7, 8. This is analogous to a point raised by Elizabeth Moranian Bolles, who acknowledged that weaker copyright protection would attach to jokes that rely on common themes or stock concepts. See Bolles, *supra* note 15, at 237, 241.

222. Heitman, *supra* note 218, at 8.

223. *Id.* at 11.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

and distinctive features—is unavailable per se.²²⁸ In *Kelly v. Cinema Houses*, Kelly sued a production company for copying her book adaptation of a play originally written by another author.²²⁹ Kelly argued that, in adapting the play, the filmmakers also copied her novel's plot and characters.²³⁰ On characters, the court declared that copyright protection was unavailable by stating:

[W]ould it be an infringement if another writer, one of the servile flock of imitators, were to borrow the idea and to make use of an obvious copy of the original? I should hesitate a long time before I came to such a conclusion . . . the plaintiff has to show that the . . . events in the infringing work have been taken from the like situations in the plaintiff's work.²³¹

In so holding, the court appeared to foreclose the possibility of copyrighting a character separate from the literary or dramatic work in which that character exists. Thus, unlike the US approach, the UK approach seems incredibly resistant to the possibility that a comedian could protect her stage persona as a literary or dramatic character.

For comedians seeking copyright in their stage persona, it seems certain that the United States would offer more opportunities than the United Kingdom. Under the United States' older character delineation test, comedians could seemingly satisfy this test where they maintain an established persona on the page and stage. As an example, the late comedian Bill Hicks was known for his stage persona, which carried particular attributes.²³² In *each* taped special, Hicks's physical appearance was marked by black clothing, long hair, and manic delivery.²³³ His stage movements were characterized by jagged strutting, punctuated by waving his cigarette and frequently incorporated outlandish sound-effects for emphasis on what he found to be absurd points and punchlines.²³⁴ Aside from these physical characteristics, conceptually, Hicks was the ultimate contrarian, decrying US consumer culture, foreign intervention, and what he felt were outdated value systems.²³⁵ Because Hicks used these specific character traits to emphasize his stage persona from the late 1980s

228. Andrew Williamson, *Copyright in Literary and Dramatic Plots and Characters*, 14 MELB. L. REV. 300, 306 (1983).

229. *Kelly v. Cinema Houses Ltd.* [1932] MacG. C.C. 362 (cited in EVAN JAMES MACGILLIVRAY, *COPYRIGHT CASES: 1901-1949* (Wildy 1969)).

230. *Id.* at [60].

231. *Id.* at [68-69].

232. *RELENTLESS* (Tiger Aspect Prods. 1992); *REVELATIONS* (Tiger Aspect Prods. 1993); *SANE MAN* (Sacred Cow Productions 1989).

233. See sources cited *supra* note 232.

234. See sources cited *supra* note 232.

235. *RELENTLESS* (Tiger Aspect Prods. 1992); *REVELATIONS* (Tiger Aspect Prods. 1993); *SANE MAN* (Sacred Cow Productions 1989).

until his death, he likely could have received copyright protection for that character. Hicks's frequent utilization of this character, and its delineation from the average prophetic-cynic archetype, provide additional support for this assertion. Further, Hicks, like other comedians, could have benefitted from this protection when this persona, as well as his actual jokes, were allegedly co-opted by another comedian.²³⁶

The story being told test could also prove extremely useful for protecting a stage persona. Because comedy albums and specials feature a comedian's name in the title, one factor proves simple enough.²³⁷ The more difficult question comes when examining whether the work focuses on the persona and its development over and above the plot. However, because comedians use persona-driven narratives, and the expression in their jokes focuses on them as characters, comedians could still satisfy this test. This is because albums and specials are usually structured in a particular way, having less to do with an overall plot and more with building into stronger jokes designed to extract more enthusiastic responses from audiences. Because the stage persona as a character is the focal point of performance, that device takes precedence over any overarching storyline formed in a comedian's act; the character is a necessary player to relay their jokes. Because of this focus on the stage persona character, it seems possible that a comedian could satisfy this test and receive copyright protection for her stage persona as a literary or dramatic character.

In the United Kingdom, however, comedians could encounter situations where their works receive protection, but the character that acts as the voice for that work does not. Where comedians have no protection in their stage personae as characters, other comedians could adopt those personas and use them to their own benefit. Permitting this sort of activity seems to subvert the nature of copyright's requirement of original expression for authorial works, as the comedic persona taken by one comedian²³⁸ from another neither originated from nor constituted a work of expression from the co-opting party. Despite

236. Doug Stern, *Profile: Bill Hicks*, AUSTIN COMEDY NEWS (Apr. 1993), <https://www.gavinsblog.com/probill.htm> [<https://perma.cc/WG77-6QLT>].

237. This would be fairly easy for comedians, as their names feature prominently in the titles of their specials and albums. See, e.g., GEORGE CARLIN: YOU ARE ALL DISEASED (George Carlin CD-ROM, 1999).

238. For instance, comedians often admit that in the beginning of their careers, they "did" other comedians, meaning they coopted the on-stage personas of other, more famous comics. Comedians Tom Segura and Christina P recently admitted on their podcast to "doing" Chris Rock and Roseanne Barr early in their careers. See YourMomsHousePodcast, *Episode 483: Your Mom's House Podcast with Neal Brennan and Pete Holmes*, YOUTUBE (Jan. 23, 2019), <https://www.youtube.com/watch?v=yXtxWpteWUs> [<https://perma.cc/6GJ4-RWB4>].

these concerns, recent decisions on the idea-expression dichotomy²³⁹ may offer comedians some relief in this area. Comedians could raise the issue and succeed where courts are satisfied that a stage persona was an author's own intellectual creation.²⁴⁰ Further, comedians could find solace in the fact that their names, and by association their stage personae, could receive intellectual property rights through trademark.²⁴¹

V. COPYRIGHT INFRINGEMENT

Copyright infringement claims are statutory guarantees in the United States²⁴² and the United Kingdom.²⁴³ Under these actions, authors and rightsholders are guaranteed the ability to protect their creative works. For comedians, copyright infringement claims could provide an opportunity to stop multiple forms of infringement. This legal remedy could prove invaluable where comedians want to stop others who steal their jokes. This Part focuses on comedians who want to pursue a copyright claim against other comedians who perform their jokes, rather than comedians going after fans accessing material without authorization.²⁴⁴ This Part examines what comedians must show in the absence of direct copying.

Infringement actions in the United States and the United Kingdom require, preliminarily, that a claimant show valid copyright in a work.²⁴⁵ Following this demonstration, both jurisdictions undertake a similarity analysis, which begins with a question of access. Though the United States and the United Kingdom share certain similarities on how access can be determined and how similarities can be shown, case law demonstrates articulable differences between them.

Absent evidence of direct copying, the United States requires "fact-based showings that the defendant had access to the plaintiff's work and that the two works are substantially similar."²⁴⁶ To prove access, US courts require plaintiffs to show that a defendant had "an

239. *Newspaper Licensing Agency Ltd. v. Meltwater Holding BV* [2011] EWCA (Civ) 890, [¶ 28, 29] (Ch).

240. *Id.*

241. Trademarks Act 1994 § 1(1) (UK).

242. 17 U.S.C. § 501 (2018).

243. Copyright, Designs and Patents Act §§ 17–26.

244. See stanhopetv, *Episode 257: Drunks Down Under, The Doug Stanhope Podcast*, YOUTUBE (May 2, 2017), <https://www.youtube.com/watch?v=wciEjBNp90k> [<https://perma.cc/J375-QYKW>] [hereinafter Stanhope, *Episode 257*]; see also *infra* App.

245. The United States also requires registration of a work with the U.S. Copyright Office Copyright Act 1976. 17 U.S.C. § 411.

246. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000).

opportunity to view or to copy plaintiff's work."²⁴⁷ This is often described as having a reasonable opportunity and must be "more than a bare possibility."²⁴⁸ Access can be shown by evidence that the alleged infringer actually came into contact with the claimant's work, or that the work was so popular that access can be assumed,²⁴⁹ following the age-old adage, "of course you've seen it, everyone has." On this point, juries in the United States have found access in an infringement case where one artist merely applauded another's entire catalog.²⁵⁰ However, it is unclear whether UK courts would be as receptive to this sort of evidence.²⁵¹

The United Kingdom also follows an access approach but incorporates another element to determine whether access can be inferred.²⁵² There, when a claimant cannot demonstrate direct access, she can succeed on showing a causal connection between the works at issue by demonstrating similarities between the works that could not be coincidental.²⁵³ However, in many cases, all a claimant can do is demonstrate strong similarities between her work and the alleged infringing work. While this showing has evidentiary value, it is not conclusive; but these similarities, coupled with evidence that the defendant had an opportunity to know the claimant's work, however, often result in most judges accepting that the claimant met her burden for proving access.²⁵⁴ After demonstrating access, either directly or through inference, both jurisdictions undertake a similarity analysis, though these approaches differ slightly.

In the United States, federal courts follow competing approaches for determining copyright infringement.²⁵⁵ The Ninth Circuit, which hears the majority of copyright cases,²⁵⁶ tends to follow the substantial similarity test, also known as the intrinsic/extrinsic test.²⁵⁷ After showing access, a plaintiff must show that the defendant's work is substantially similar to her own, which requires an extrinsic and

247. *Id.*

248. Pamela Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 *Nw. U. L. Rev.* 1821, 1827 (2013).

249. *Bolton*, 212 F.3d at 482.

250. *Id.* at 483.

251. TORREMANS, *supra* 130, at 259.

252. *Id.*

253. *Id.*

254. *Id.* at 260.

255. See Samuelson, *supra* note 248, at 1824–37.

256. Heitman, *supra* note 218, at 8.

257. See Samuelson, *supra* note 248, at 1827.

intrinsic analysis.²⁵⁸ The extrinsic portion is objective and dissects the works' similarities and the "actual concrete elements that make up the total sequence of events" focusing on "articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events" in the works at issue.²⁵⁹ The intrinsic portion examines an ordinary person's subjective impressions of the similarities between two works and is often a jury question.²⁶⁰ The trier of fact examines whether the alleged infringing work "captured the total 'concept and feel' of the plaintiff's work."²⁶¹

In the United Kingdom, after a similarity analysis is conducted on the question of access, a subsequent and separate similarity analysis occurs.²⁶² There, the reviewing court compares the works at issue and notes their similarities and differences.²⁶³ The purpose of the examination is not to see whether the overall appearance of the works are similar but to judge whether the specific similarities relied on are sufficiently close, numerous, or extensive to be more likely a result of copying than of coincidence.²⁶⁴ In this stage, the court will disregard similarities that may be commonplace, unoriginal, or consist of general ideas.²⁶⁵ If the claimant demonstrates sufficient similarity in the features she alleges were copied from her work and established the defendant's prior access, the burden then passes to the defendant to show that, despite the similarities, her joke did not result from copying.²⁶⁶

Following this initial similarity demonstration, UK courts require claimants to show that the defendant copied either the whole work or substantial parts of her work.²⁶⁷ This is separate from simply showing copying,²⁶⁸ and focuses on the original expression allegedly taken. Here, courts use a qualitative approach to see whether an alleged infringer copied a substantial amount of original expression.²⁶⁹ While the quantitative amount of a work copied may have some significance, especially in light of recent decisions finding substantiality

258. *Funky Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d 1072, 1077 (9th Cir. 2006).

259. *Id.*

260. *Williams v. Crichton*, 84 F.3d 581, 588 (1996).

261. *See Samuelson, supra* note 248, at 1830.

262. *Designers Guild Ltd v Russell Williams Textiles, Ltd* [2000] UKHL 58; [2001] 1 All ER 700; [2000] 1 WLR 2416, per L.J. Bingham, ¶ 4–6.

263. *Id.* ¶ 4

264. *TORREMANS, supra* note 130, at 59

265. *See, e.g., id.*

266. *Id.*

267. Copyright, Designs and Patents Act § 16(3)(a).

268. *Case C-5/08, Infopaq Int'l A/S v. Danske Dagblades Forenin*, 2009 E.C.R. [¶ 16].

269. *Ladbroke Ltd. v. William Hill Ltd.* [1964] 1 All ER 465, 469 (HL).

in small sections of text,²⁷⁰ it is not determinative.²⁷¹ This portion of analysis appears to incorporate elements of the extrinsic and intrinsic “overall concept and feel” dissection in the Ninth Circuit, as objective features and the work’s feeling are examined. This appears true when looking at cases such as *Temple Island Collections Ltd. v. New English Tea Ltd.*, where both works at issue contained identical elements with slight differences and the Court found infringement.²⁷² Thus, where a claimant can show that the elements taken were key to what made the work unique apart from similar works, she may be able to prove a case of copyright infringement.²⁷³

Considering the similarities between the United States and the United Kingdom, comedians could likely receive successful verdicts by pursuing their cases in similar manners of proof. Further, these tests appear beneficial for comedians generally, as they center on individualized expression. By focusing specifically on elements that are unique to the expression in a work, comedians appear to have the option to create jokes using similar ideas, as only a comedian’s individuated expression receives protection.

Applying these infringement tests to the Hicks-Leary scenario²⁷⁴ shows that comedians could carry a copyright infringement claim successfully in the United States and the United Kingdom. Under this analysis, Hicks could make a showing that Leary copied his material by showing the following: Leary addressed the same topics with a stage persona indistinguishable from Hicks’s character and its ideological slant; Leary used near identical language in his set-ups and punchlines; and Leary the same verbal cues, pacing, and idiosyncrasies for delivering the joke on stage.

Granting that Hicks’s jokes were protected by copyright, he would satisfy the first requirement for infringement, demonstrating ownership. He could then demonstrate access with evidence that he and Leary were friends²⁷⁵ and performed together, granting Leary access to Hicks’s material. When extending the infringement test to Leary stealing Hicks’s jokes, Hicks would have to prove that those jokes were substantially similar to his own.

270. *Newspaper Licensing Agency Ltd. v. Meltwater Holding BV* [2011] EWCA (Civ) 890, [¶ 55] (Ch).

271. *Id.* [¶ 58].

272. *Temple Island Collections Ltd. v. New English Tea Ltd.* [2012] EWPCC (Pat) 1, [¶ 58] (Eng. & Wales).

273. *Id.* [¶ 63].

274. See Stern, *supra* note 236.

275. *BILL HICKS: REFLECTIONS* (Netflix 2015) [hereinafter *REFLECTIONS*].

Under the US extrinsic similarity analysis, judges could see in writing and video recording that the comedians focused on the same themes, used near-identical language, delivered jokes in the same mood with similar mannerisms, and at an almost identical pace.²⁷⁶ Further, in the intrinsic analysis, jurors could see the jokes performed by Hicks and Leary. In determining whether Leary co-opted Hicks's jokes' overall "concept and feel," jurors could watch and listen to Hicks's performance compared to Leary's, similar to other copyright infringement cases.²⁷⁷ When reviewing those performances, jurors would see both men clad in black, pacing the stage, cigarettes in hand, telling jokes that decried modern society in substantially similar language.²⁷⁸ Applying the similarity analysis following the access question in the United Kingdom would likely yield the same results.

For other comedians, demonstrating these elements could be comparable to the Hicks-Leary scenario. As many comedians knew Hicks and Leary were friends and worked together,²⁷⁹ access could easily be proven. Others could easily prove access, since comedians frequent comedy clubs to see each other perform.²⁸⁰ Further, even where comedians do not see each other directly, word of mouth in the comedy community²⁸¹ and hours of stand-up on streaming services and online platforms could provide probative evidence for access. Further, because jokes are now frequently more personal, comedians could use those features to clearly establish infringement where objective features and subjective feel are brought into question. Where comedians deliver jokes that incorporate specific language and themes in their jokes, infringement would likely be easier to prove when examining whether original expression was taken. Additionally, because many comedians have a particular delivery style and mood, establishing infringement could be easier than in the past, where many comedians could use the same joke, but different delivery styles,²⁸² which could have caused problems in the overall "concept and feel"

276. *Id.*

277. Pamela A. MacLean, *Former Creedence Clearwater Revival Musician John Fogerty Played His . . .*, UNITED PRESS INT'L (UPI) ARCHIVES (Nov. 1, 1988), <https://www.upi.com/Archives/1988/11/01/Former-Creedence-Clearwater-Revival-musician-John-Fogerty-played-his/2471594363600/> [<https://perma.cc/Y5C2-J5C5>].

278. See BILL HICKS: RELENTLESS (Aspect Prods. 1992) (transcript available at <https://scrapsfromtheloft.com/2017/05/03/bill-hicks-relentless-1992-transcript/>) [<https://perma.cc/2FVC-RVG4>]; DENIS LEARY: NO CURE FOR CANCER (A & M Records 1992) (transcript available online at <http://endor.org/leary>) [<https://perma.cc/566J-7PDY>]; *infra* App.

279. See REFLECTIONS, *supra* note 275.

280. Oliar & Sprigman, *supra* note 2, at 1813.

281. *Id.* at 1817.

282. *Id.* at 1853–1854.

portion analysis. Thus, comedians could successfully carry infringement actions, so long as they articulate what makes their expression original and unique to them.

VI. MORAL RIGHTS

Comedians care about legitimacy and authenticity.²⁸³ In the past, where comedians felt members in their ranks took from others without permission or proper attribution, they responded with actions that crossed into criminal territory.²⁸⁴ Further, even where comedians recognize that their jokes are being used by others outside comedy clubs, they still want to have the chance to claim ownership over their material.²⁸⁵ Thus, moral rights could provide comedians the chance to receive the recognition they desire, possibly advancing their career in the process.²⁸⁶

The United States and the United Kingdom share few similarities on moral right protection. The United Kingdom protects moral rights for various works via statute.²⁸⁷ The United States, however, offers limited protection in this area,²⁸⁸ only allowing authors of visual works of art²⁸⁹ to assert moral rights claims.²⁹⁰ In the United States, dicta from *Campbell v. Acuff-Rose Music*²⁹¹ provides an excellent

283. *Episode 231: ATC Comedy Fest Live Podcast with Jamie Kilstein, Bert Kreischer, & Morgan Murphy, The Doug Stanhope Podcast*, AUDIO BOOM (Oct. 28, 2017), <https://audioboom.com/channels/4880830.rss> [<https://perma.cc/4B9C-RMDL>] [hereinafter *Episode 231: ATC Podcast*].

284. As noted by Oliar & Sprigman, some comedians have gone as far as to engage in physical altercations with alleged joke thieves. Carlos Mencia was allegedly attacked by comedian George Lopez, though Mencia attributed the altercation to Lopez's jealousy, and Boston comedian Dan Kinno was assaulted by several comedians. Oliar & Sprigman, *supra* note 2.

285. See *Episode 231: ATC Podcast*, *supra* note 283.

286. Scott Brown, *Norm Macdonald Gives Budding Vancouver Comic a Boost on Twitter*, VANCOUVER SUN (July 25, 2018), <https://vancouversun.com/entertainment/celebrity/norm-macdonald-gives-budding-vancouver-comic-a-boost-on-twitter> [<https://perma.cc/22BN-PMXB>].

287. Copyright, Designs and Patents Act § 77(1).

288. Visual Artists Rights Act (VARA), 17 U.S.C. § 106A(a) (2018).

289. *Id.* Under 17 U.S.C. § 106A, authors of *visual* works of art may assert claims similar to those found in the U.K. For instance, authors of works in this category can require attribution, prevent misattribution, and protect the integrity of her name and authored work. However, these claims are limited in light of 17 U.S.C. § 107, the Fair Use defense.

290. Under 17 U.S.C. § 101, a visual work of art only includes the following: (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of two hundred copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of two hundred or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of two hundred copies or fewer that are signed and consecutively numbered by the author.

291. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 569 (1994).

example of this fact. There, hip-hop group 2 Live Crew sampled Roy Orbison's hit, "Oh, Pretty Woman," in their parodic interpretation, "Pretty Woman."²⁹² In the relevant dicta, the Supreme Court acknowledged the plaintiffs' attribution of credit to the song's original performer and writer,²⁹³ as well as the derogatory treatment of the original work.²⁹⁴ There, the Court implied that providing attribution would not save an alleged infringer against an infringement claim, but suggested that attribution was unnecessary and that mistreating a work, going so far as to "destroy" its viability through harsh criticism, was incapable of redress in a copyright infringement case.²⁹⁵

UK law, however, provides moral rights to authors, directors, and commissioners of copyrightable works.²⁹⁶ This group of rights permits those designated to require identification and prevent misattribution,²⁹⁷ derogatory treatment of a work,²⁹⁸ and public access to certain photographs and films.²⁹⁹ Under these rights, comedians could command more control over their work where they want more than a favorable copyright infringement verdict. Paramount among these rights for comedians are the rights to proper attribution and to prevent public access.³⁰⁰ Similar to other forms of publicity, requiring attribution for jokes could grow a comedian's popularity. This seems pertinent considering the amount of money online personalities make through social media accounts, especially those accounts accused of joke theft that command thousands of dollars for sponsored speech.³⁰¹ In addition to this right, comedians in the United Kingdom could prevent others from releasing video recordings that contain their jokes.³⁰² Permitting comedians to pursue these actions against those who upload their jokes without permission could help comedians fight against possible commercial loss. Where a comedian did not authorize publication of their jokes online and individuals see a video of that joke, that prospective audience member may feel less inclined to attend a live

292. *Id.* at 573.

293. *Id.*

294. *Id.* at 591–92.

295. *Id.* at 592.

296. Copyright, Designs and Patents Act § 2.

297. *Id.* §§ 77, 84.

298. *Id.* § 80.

299. *Id.* § 85.

300. *Id.*

301. John Sunyer, *Lunch with the FT: The Fat Jewish*, FIN. TIMES (July 24, 2015), <https://www.ft.com/content/15fe6c4a-3127-11e5-8873-775ba7c2ea3d> [https://perma.cc/G9H8-W9M4].

302. As joke authors, comedians would have the right to prevent this sort of activity under the CDPA. Copyright, Designs and Patents Act § 85(1).

show, considering the material exists online for no cost. However, by preventing access to content uploaded without her permission, a comedian could ensure that her joke remains within the confines of the comedy club, hopefully encouraging audiences to attend her performances.

For comedians, these differences could lead to extremely disparate outcomes depending on where the alleged violation took place. For comedians in the United States, the unavailability of moral rights claims to attribution or unauthorized publication could lead to trouble. This is especially pertinent where comedians hope to maintain commercial prospects, but others post their jokes online or to a social media page. While comedians could pursue a copyright infringement claim against others who use their jokes, the damage from another's failure to attribute their work would be done, as the joke thief will likely have already attained material benefit.³⁰³ Even more problematic for the original comedian, her joke's novelty would be lost. This problem regarding proper attribution, alleged mistreatment of works, and privacy are especially prescient when considering internet meme culture, where social media pages may be operated by anonymous persons who take jokes and superimpose them on images, providing no source credit. These page operators could, if enough jokes are taken, co-opt a comedian's character-persona and use their visual and text-based mediums to free ride on a comedian's work.³⁰⁴ However, due to the reach of comedic extralegal norms, it is possible that comics could use online shaming to ensure that others will not profit from their work.³⁰⁵ Despite these possible solutions outside the courtroom, it is unclear whether a comedian could actually stand to benefit from this sort of shaming once another takes her jokes.

303. Carl Chen, *The Creation and Meaning of Internet Memes in 4chan: Popular Internet Culture in the Age of Online Digital Reproduction*, 3 HABITUS 6, 7 (2012), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.363.7029&rep=rep1&type=pdf#page=6> [<https://perma.cc/BC2M-TQ8W>].

304. For instance, comedian John Mulaney recently voiced his support for users to "unfollow" the Instagram account "fuckjerry" by posting an image of the hashtag "#fuckfuckjerry" to his page. The account at issue is notorious for creating photos using comedians' jokes, posting them to Instagram, and generating ad revenue from the posts' popularity. Mulaney's post featured a message from Mulaney, accusing the fuckjerry account holder, Elliot Tebele, of using his jokes without providing him attribution. John Mulaney (@johnmulaney), INSTAGRAM (Feb. 2, 2019), <https://www.instagram.com/p/BtYrImYhJW3/> [<https://perma.cc/AA3G-Z8WN>].

305. Joe Veix, *The Fat Jew Is Still Stealing Everyone's Jokes*, BUS. INSIDER (Sept. 9, 2015, 11:11 PM), <http://uk.businessinsider.com/fat-jew-still-stealing-everyones-jokes-2015-9?r=US&IR=T> [<https://perma.cc/ER7Y-NKZT>].

VII. MOVING FORWARD

As documented above, it appears that comedians in the United States and the United Kingdom have several channels through which they can pursue copyright protection for their jokes. However, an analysis of each country's respective legislation reveals some serious gaps that could leave comedians' work vulnerable if they remain unfilled. Specifically, the lack of robust moral rights protection in the United States leaves comedians little to no options for joke attribution, while comedians in the United Kingdom appear to have no formal ability to protect their stage personae. Fortunately, each jurisdiction offers the other some guidance on how to address their respective shortcomings. Accordingly, this Part analyzes both how the United States could look to the United Kingdom's moral rights legislation to increase protections for comedians and how the United Kingdom could look to character protection in the United States for examples of how comedians could protect their stage personas.

As noted earlier, the United States offers incredibly limited moral rights protection for copyrighted works.³⁰⁶ These protections provide comedians almost nothing in the way of copyright protection, as comedians are not ordinarily concerned with creating visual works of art or photographs in small quantities. Instead, comedians frequently create works that fall into the categories of sound recordings or audiovisual works available for digital download, effectively creating a limitless quantity of copies. Thus, if a comedian wanted some sort of attribution where someone else used her joke, and then her joke did not fall within the ambit of the Visual Artists Rights Act (VARA), making such a claim would prove useless. However, should the United States look to the moral rights legislation in the United Kingdom and its present regime, adopting such measures would not prove overly burdensome on creators and could help comedians achieve greater notoriety.³⁰⁷ The United Kingdom permits the same sort of moral rights claims presently available under VARA for all types of copyrighted works.³⁰⁸ Should the United States follow suit from the United Kingdom's example and extend its moral rights protections (now available under VARA) to other works, comedians would be able to, at least, receive acknowledgment from others who use their jokes. This could help comedians acquire a larger fanbase, as such attribution

306. 17 U.S.C. § 106A(b) (2018).

307. Brown, *supra* note 286.

308. Copyright, Designs and Patents Act §§ 77–85.

would provide greater exposure than simply performing jokes in comedy clubs or releasing their material through their own social media outlets.

Similarly, the United Kingdom could look to the character protection offered in the United States as a possible remedy to cure its current conundrum on the issue. As noted above, explicit copyright protections for characters in the United Kingdom are lacking almost entirely.³⁰⁹ Previous concerns about protecting an idea that a character holds specific attributes, however, may be cured by implementing the story being told test from the Ninth Circuit. As explained earlier, under this test, a character must take such a large role in a performance that it supersedes plot development in order to merit copyright protection.³¹⁰ As a comedian's stage persona is not a mere idea but envelops something so expressive that it supersedes a story's plot, comedians could argue that protection is warranted under the United Kingdom's formulation of the idea-expression dichotomy and that it would not run afoul of precedent.³¹¹ Granting such protections could ensure that comedians could identify and secure part of what identifies them among other comedians and ensure protection against later comedians who attempt to free ride on previous successful characters.

VIII. CONCLUSION

Like other artists, comedians need legal protection for their work. Tradition in the legal sphere led comedians to believe that their jokes were not protectable, especially when concerns around the idea-expression dichotomy arose.³¹² However, copyright law in the United States and the United Kingdom offers comedians viable avenues for protection in authorial and entrepreneurial works. Authorial works in both jurisdictions allow comedians to protect their jokes on the page and stage, while entrepreneurial works offer comedians the ability to protect their works with precision and ease their commodification. New technology and recording methods provide comedians with previously unavailable means for fixing these works and distributing them to their audiences.³¹³ With these protections, comedians can utilize every means of protection at their disposal to give their jokes the widest berth of protection possible. Further, copyright infringement claims in both

309. *Kelly v. Cinema Houses Ltd.* [1932] MacG. C.C. 362.

310. Heitman, *supra* note 218, at 8.

311. *Kelly*, MacG. C.C. 362, [¶ 60].

312. Bolles, *supra* note 15, at 257 n.3.

313. See, e.g., *Standup Comedy Creators*, PATREON (Sept. 20, 2018), <https://www.patreon.com/search?q=standup%20comedy&t=creators&p=3> [<https://perma.cc/2VJD-GQ49>].

jurisdictions allow comedians to prevent others from using their works for unfair commercial advantage and to create formal avenues of redress that respect present industry norms.³¹⁴

While these regimes offer protective measures and paths for infringement actions, they remain imperfect. Where comedians in the United States have no ability to require proper attribution or prevent misattribution, comedians in the United Kingdom seemingly lack the ability to protect the onstage persona that acts as the driving force behind their live performances. Moving forward, both regimes could and should consider learning from each other's advantages and expanding respective protections in these areas. Should both jurisdictions adopt these perspectives where they presently do not exist, the comedy industry could continue to flourish, and comedians could feel more secure to create new works.

314. Oliar & Sprigman, *supra* note 2, at 1812.

APPENDIX

Footnote 83:	"I think Pringles's initial intention was to make tennis balls, but on the day that the rubber was supposed to show up, a big truckload of potatoes arrived. And Pringles is a laid-back company: they said, 'Fuck it. Cut 'em up.'"
Footnote 101:	"I like the set I have right now, and I've played it to almost every English-speaking place I could bring it. And it's gonna fucking die after this, and it's that threat of writing a new hour. It's almost easier to write a book." (21:30–22:06)
Footnote 104:	"I began to notice that what I was really doing was . . . I was a writer. There was a point where I said, "Wait a minute, I'm writing, I'm a writer," and I started doing the books, and I thought, I write for two destinations. I write for books and I write for my stage shows, that's all. HBO is just a way of taking pictures of things and sending them to your house It was a revelation that I was more of a writer than a performer. And, I started describing myself as a writer who performs his own material, and that was a way of confirming it to myself and cementing the idea because I had . . . the weight had shifted."
Footnote 162: (Beer Hall Putsch)	Stanhope: We are downstairs in Dante's greenroom here in Portland, Oregon, shortly before

	<p>we start taping the new special . . . So, it's nice to be able to film here. It's dark, it's creepy, it has a history with us. It just . . . it just has a good feel. And I fucking hate doing theaters. I wish all comedy specials were filmed in fucking seventy-five -seaters, like old Lenny Bruce. Smokey room, low ceiling . . . but it's got the feel.</p>
Footnote 162: (Thinky Pain)	<p>Maron: I like that we did this in a small space. This is the way to do it. Part of me . . . I think this is the way comedy is best. Because all those specials . . . with nine hundred people . . . comedy isn't meant to be done like this [imitates man yelling to crowd]: "Hey! How are you doing! What do you say? Funny time!"</p>
Footnote 168:	<p>Rogan: Yeah, it's a weird art form. I was talking to a musician friend about this. I said, "You can come up with an amazing album in the studio and tweak things and go over things, but we kind of have to do it in front of people. I write, but what I write down—just like what you were saying—is a lot of times very different than how you say in front of a live audience, because once you say it in front of a live audience, you immediately start trimming it and moving things around on it.</p> <p>Regan: I think it would be interesting if somebody tried to create a comedy hour but without ever trying it in front of an audience. Just, create the hour</p>

	<p>the best you can—just on the computer or whatever—and go, “This is a good hour of comedy, and then the first time you ever do it is in front of the audience as the hour. I just want to know how much of a disaster that would be.</p>
Footnote 169:	<p>Stanhope: And I’m off the road, finally for a year and a half, I’ve been working on this bit trying . . . and it made this bit finally work . . . and now I’m done. I’m not on the road for another five months I’m like “It’s working now!” And I’m dying as a person . . . it kills me . . . but now the bit is there, and I’m not on the road, and it’s not over yet.</p>
Footnote 179:	<p>Regan: I always feel . . . some of the best writing takes place on stage When you’re on stage, there’s a piece of you that says, “Take this and say this.”</p> <p>Rogan: 100 percent, 100 percent, I completely agree.</p> <p>Regan: This is way too wordy, and when you’re on a legal pad or a computer, you throw a lot of adjectives—I think you can get too conceptual; where you’re onstage something takes over</p>
Footnote 181:	<p>Maron: I didn’t anticipate doing that story at all Honestly, though, I didn’t prepare that well because that just the way I do it. I don’t like believe in preparing. I personally don’t really like preparers . . . you’re a coward.</p>

Where's your sense of adventure?

...

Clearly, I'm rationalizing because that's my system ... It's right there on the floor. Why did I bring notebooks out here? What, am I going to look at notebooks? It's ridiculous: I'm more professional It's to prove a point I choose to write on hotel stationary. This is how I write. This is the process. Can you read that? I can't read that. That's also part of my process is be sure to impulsively write quickly with a borrowed writing instrument in a cursive that is unreadable

The second phase is decoding—understanding the text. Sure, write smaller and underline occasionally. That's good too. Or perhaps ... you can get to the final part and type it up. Right there, that's an almost finished joke, and over here, written is a punchline. I can't read it. See?

... The reason I'm illustrating it to you is that my system sort of looks like this. When I write, I don't write jokes, I write thoughts, and I think the action of actually doing the writing is what's important to me. It's not whether or not I remember it or anything So that piece of paper goes onto a stack of pieces of paper that look a lot like it—napkins and stuff. Now, the problem is, if I get too far away from those things, I don't know what I was thinking. . . .

Footnote 244:	Stanhope: When Napster was falling down, I was the first and only featured comedian, and I was finally getting known on the internet, and they got shit-canned . . . pirating shit The whole idea of pirating stuff—if I already put it out, and you can't afford it, steal it.
Footnote 278 (Hicks):	"Last year in the States—I don't know if you've ever heard this story? This was a great one. I love this one; this kills me. You know the story about the two kids that were big fans of this group Judas Priest . . . and they committed suicide? And the parents of these two kids sued the band, Judas Priest? OK, first of all, two kids, big fans of Judas Priest, commit suicide . . . Ouaou . . .two less gas station attendants in the world, you know. What? I don't mean to sound cruel here, but I don't think we lost the cancer cure here, you know? Look, there's gonna be no delays in the shuttle launch because of this, you understand? They weren't an intricate part, I know, 'Bill, you sound so cruel,' fuck them they were idiots, get it?"
Footnote 278 (Leary):	"Let me make sure I'm crystal clear on this issue, OK? Heavy metal fans are buying heavy metal records, taking the records home, listening to the records, and then blowing their heads off with shotguns? Where's the problem! That's an unemployment solution right there, folks! It's called

	<p>natural selection. It's the bottom of the food chain, ok? I say we put more messages on the records. Kill the band, kill your parents, then yourself, ok! Make sure you get your whole head in front of the shotgun. Thank you for calling! Thank you for calling!"</p>
--	--