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RESPONSE

OF COASE AND COMICS, OR, THE COMEDY OF COPYRIGHT

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INTRODUCTION

O*RDER Without Law*, Robert Ellickson's seminal account of social norms among Shasta County cattle ranchers,¹ grew out of earlier research titled, in part, *Of Coase and Cattle*.² The shift in the title was subtle, but significant. Ellickson started out to test Ronald Coase's celebrated parable of the Rancher and the Farmer, the hypothetical that Coase used to develop the Coase Theorem,³ a major pillar of law and economics scholarship. Ellickson wanted to assess the impact of transaction costs in the real world by determining how ranchers identified trespass disputes and negotiated solutions.⁴

Ellickson found something unexpected. He learned that transaction costs were significant, but they manifested themselves not via a particular allocation of property entitlements, but instead via a robust system of social norms. The ranchers of Shasta County governed themselves and their beasts informally, according to norms that were, in Ellickson's estimation, welfare-maximizing.

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¹ See Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991).

² See Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 *Stan. L. Rev.* 623 (1986).

³ See Robert Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1 (1960).

⁴ Ellickson, *supra* note 2, at 624.

Similar case studies are needed to understand the phenomenon of cultural “order without law.” The prospect of Coasean private ordering by close-knit groups might produce many of the innovation-related benefits of patent- or copyright-driven innovation, without the costs associated with enforcement of intellectual property laws. Whether this is so in practice is an empirical question. Until recently, there have been few data sets addressing it.

Dotan Oliar and Christopher Sprigman’s *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*⁵ is one of a small number of recent case studies that supply relevant data.⁶ The major virtue of this work is that it does for the premise of Anglo-American intellectual property law what Ellickson did for Coase. It moves the discussion from theory to practice. Does intellectual property law supply incentives to produce and distribute creative goods? In some salient contexts, the answer is “no” or, at least, “not so much.” Oliar and Sprigman argue that stand-up comedians are creative and productive folks who live by a system of social norms, rather than by a system of intellectual property law.

Not only does this comic code encourage creativity, it also apparently has something to do with comedy itself. Along with an Ellicksonian tale of norm-based social ordering by a group (not an Ellicksonian close-knit group, but an identifiable loose-knit group), Oliar and Sprigman tell a related and partially Demsetzian story of the evolution of these norms. Comedy once was a commons, but social norms privatized its contents.

Here, I focus on what *There’s No Free Laugh* teaches other scholars. The challenge posed by Ellickson looms large. Ellickson went to Northern California looking for Coasean transactions, found something closer to the Balinese cockfight “thickly” described by Clifford Geertz,⁷ and had the humility to write up what he found: a combination of

⁵Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 Va. L. Rev. 1787 (2008).

⁶See Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 Org. Sci. 187 (2008) (French chefs); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 Va. L. Rev. 1687 (2006) (fashion designers); Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 Berkeley Tech. L.J. 651 (2006) (jambands and their fans).

⁷See Ellickson, *supra* note 1, at 1–11; Clifford Geertz, *Deep Play: Notes on the Balinese Cockfight*, in *The Interpretation of Cultures* 412 (2000).

economics and culture.⁸ How might Oliar and Sprigman's study form the basis for equally rich follow-on scholarship? The important lessons here may be partly what a thick version of law and economics can teach intellectual property law, and partly what a thick account of culture can teach law and economics.

I. THE LAW AND ECONOMICS OF STAND-UP COMEDY

Jokes look like public goods. A joke is non-rivalrous and non-excludable. Once a comic tells a joke in public, without some mechanism to limit joke-copying, the comic has little ability to prevent free appropriation. As a result, returns on innovation are too low to sustain an incentive to produce fresh humor. Underproduction and overconsumption of jokes, a sort of tragicomic market failure, is the probable result.⁹

Since there appears to be no shortage of commercial, public humor, and since comics appear not to be resorting to formal intellectual property law as a classic property-based solution to the market problem, Oliar and Sprigman hypothesize that an informal intellectual property regime is doing the work instead. They describe a robust system of social norms that looks and sounds altogether like a formal copyright regime without the codification: exclusive rights, trespass norms, exceptions and exclusions, enforcement mechanisms, and so on. The shift to proprietary norms apparently began with the emergence of narrative- and perspective-driven comedy in the early 1960s among a new generation of stand-up comics suffused with the political independence and social unrest that came to characterize that decade. Oliar and Sprigman align the new comic norms and content with shifts in monitoring and enforcement costs during the 1960s. As the benefits of a propertized scheme rose it seems logical to suppose—as Oliar and Sprigman do¹⁰—that the benefit/cost balance associated with enforcement of property-like interests shifted in favor of propertization. This is consistent with Demsetz. Oliar and Sprigman are appropriately cautious in suggesting a causal connection, but their argument is nonetheless straightforward.

⁸ See Ellickson, *supra* note 1, at 280 (noting that the presence of transactions costs, rather than their absence, made the law irrelevant).

⁹ The standard model characterizes the problem as a tragedy of the commons.

¹⁰ See Oliar & Sprigman, *supra* note 5, at 1859–63.

Suppose that the initial question were framed more broadly, so that instead of wondering about the role of social norms in solving underproduction and overconsumption concerns, scholars wondered about the ways in which comics are motivated to create and perform. The simple law-and-economics story of comedy and copyright may have a more complex theme.

Why are comics? The odd syntax of that question hints at its breadth. This Part restates it narrowly, in standard law-and-economics terms. Are jokes really public goods? How was the failure cured? Given a rich set of social norms, to what extent do those norms solve that failure, prevent it—or cause it? In Part II, I restate the question in non-standard terms, an approach that yields a different but important set of issues. Together, the questions and issues described below define much of what might be missing in the underproduction account of intellectual property. Answering them may provide a more robust model of social ordering that scholars might use in the future.

A. Are Jokes Public Goods?

Consistent with the classic definition of a public good, “consumption” of a joke by one person does not decrease its availability to others. No one can be effectively excluded from accessing (or “getting”) the joke. But does this matter? Are jokes economically significant; that is, are they goods at all? To be sure, writers sell jokes and comics buy them. Should the question end there?

Copyright law focuses on “original works of authorship.”¹¹ When investigating alternatives to copyright, it seems natural that one should look for corresponding “things.” The history of modern humor suggests a plausible alternative explanation, grounded in the hypothesis that comic content is a type of input into stand-up comedy, rather than its output. As Oliar and Sprigman note,¹² one striking feature of the history of early twentieth-century comedy is that comedy operated as what current scholars would call a productive cultural commons,¹³ or to adapt

¹¹ See 17 U.S.C. § 102(a) (2006).

¹² See Oliar & Sprigman, *supra* note 5, at 1844–50.

¹³ See, e.g., Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment* (Working Paper 2009), available at <http://ssrn.com/abstract=1265793>.

the title of a classic law review article, a commons of comedy.¹⁴ Comics' normative system treated comic content as freely available to other comics.¹⁵ Performers distinguished themselves in ways that had little to do with the novelty of the humor. Comic bits were a form of cultural infrastructure.¹⁶

There's No Free Laugh focuses on what appears to be a late-twentieth-century shift to a set of proprietary norms that characterizes jokes as ownable "things," and a parallel shift in the content or style of stand-up comedy. Comics began to rely less on jokes and one-liners and more on narrative or perspective-oriented comedy.¹⁷

These shifts may have been more apparent than real. If comic content is a form of infrastructure or part of a commons, then the instrumental aim of stand-up comedy may be to produce something else, in fact, the same thing that comedy has always aimed to produce: laughter and the social bonding that laughter inherently and inevitably brings.¹⁸ In his classic account of comedy, Henri Bergson argued that laughter is a social corrective that allows humans to evolve with and adapt to society, to align themselves in response to the demands of artificiality.¹⁹ People are elastic and dynamic. The world around them appears to be inelastic and static. In Bergson's phrase, comedy is "[s]omething mechanical encrusted on the living."²⁰ Many people adapt well to that inelasticity, but some fail. Rather than exclude those people from society, we embrace them. Laughter is that embrace, a socially-acceptable way of recognizing socially inappropriate things, or a form of social glue.²¹

¹⁴ See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. Chi. L. Rev. 711 (1986).

¹⁵ See Oliar & Sprigman, *supra* note 5, at 1841–50.

¹⁶ See Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 Minn. L. Rev. 917, 1004–22 (2005) (describing the role of infrastructure in creating cultural value).

¹⁷ See Oliar & Sprigman, *supra* note 5, at 1850–53.

¹⁸ One might put the point in the following economic terms: comedy is not a depletable resource; additional consumption yields additional economic and/or social value.

¹⁹ See Henri Bergson, *Laughter: An Essay on the Meaning of the Comic* 86–88 (Cloudesley Brereton & Fred Rothwell trans., Macmillan Co. 1914) (1900).

²⁰ *Id.* at 37. Erich Segal modernized Bergson with a gloss on the legendary catch-phrase from Segal's novel *Love Story*: "Comedy means never having to say you're sorry." I heard Segal make this statement during a lecture at Yale.

²¹ Oliar & Sprigman limit this phrase to the "communal" humor of the post-vaudeville era. See Oliar & Sprigman, *supra* note 5, at 1858.

Comic content depends not only on the comics who point to these mechanical “encrustments.” The encrustments themselves depend on the character of society at any given time. What is funny today may not have been funny before. Some humor holds up over time, and some does not. Oliar and Sprigman diagnose a shift in comic content beginning around 1960, which they connect to other, contemporaneous social and cultural changes.²² A new, young President took office. The conformity of the 1950s was giving way to a society that encouraged more individual expression.

If Bergson is correct, then what changed in that era was not the mode of ownership, but instead the formula for the glue. Laughter was (and remains) what comics produce. We began to laugh at different things because there were different things to laugh at. The shift that Oliar and Sprigman detect was not a shift from commons to a form of private property, but a shift in how the commons is governed.

A shift in governance is a significant development, but it is one with different implications for intellectual property policy. Rather than wondering about the production of novelty or about the shape of markets for comic things, we want to know where comedy comes from and how it is accessed and used.

B. Did Norms Solve a Tragicomic Market Failure?

Assume that stand-up comedy does exhibit public goods characteristics, and that comedy is subject to the standard market failure account. The fact that jokes are public goods means that conventional markets will not emerge of their own accord. Private property rights enable appropriability and sustain markets.²³ *There’s No Free Laugh* focuses on comics’ assertion of proprietary interests against one another, but discounts the role of formal intellectual property rights in favor of a system of social norms.

Formal intellectual property rights may nonetheless have played a key role in creating markets for stand-up comedy, and norms may have been relatively unimportant as incentives to create. The early 1960s, which saw the beginning of narrative and perspective-oriented comedy, also witnessed comics starting to do what authors have done for centuries,

²² See *id.* at 1850–51.

²³ Other standard solutions include government subsidies to private producers and government provisioning of the goods.

using the tools that copyright has long recognized as intrinsic to markets for creativity. They sold copies of their works.²⁴ And they sold lots of them.²⁵

LPs by a wide variety of comedians earned gold record recognition during the 1960s and 1970s (“gold” meaning certified by the Recording Industry Association of America as having sold 500,000 units). The first comic gold record was *The Button-Down Mind of Bob Newhart*,²⁶ which was released in 1960 and was certified “gold” in 1962.²⁷ Newhart’s follow-up release, *The Button-Down Mind Strikes Back*, went gold in 1967.²⁸ Other comics with gold records during the 1960s and 1970s included the Smothers Brothers (1966 and 1967), Bill Cosby (four gold records in 1966, two more in 1967, and one in 1968), Flip Wilson (1970), Cheech and Chong (four gold records during the 1970s), George Carlin (also with four gold records), Richard Pryor (four), and Steve Martin (two).²⁹ This parade of top-selling records does not account for the many other LPs released by comics during the 1960s, including notable releases by Nichols and May, Stan Freberg, Carl Reiner and Mel Brooks, Dick Gregory, and Jonathan Winters.³⁰ In the 1970s, Robert

²⁴ *There’s No Free Laugh* notes this development in passing. See Oliar & Sprigman, *supra* note 5, at 1813 n.66 (noting the role of recorded performances in monitoring joke-stealing).

²⁵ Most of the copyright-related benefits of album sales likely did not inure to the benefit of comics themselves. That is consistent with one of copyright’s basic themes. Copyright is often an incentive for publishers rather than an incentive for authors.

Current copyright law would classify these works as sound recordings. Federal statutory protection for sound recordings was added to the Copyright Act only as of 1972. Prior to that date, sound recordings were protected under state copyright or unfair competition laws.

²⁶ See Ronald L. Smith, *Comedy on Record: The Complete Critical Discography 727* (1988).

²⁷ Two other comedy albums, Allan Sherman’s *My Son the Folk Singer* and Vaughn Meader’s *The First Family* (a celebrated parody of the Kennedy household), were both certified gold in 1962. *Id.* The recording market included not only middle class comics like Newhart but also the pacesetters Mort Sahl and Lenny Bruce. Mort Sahl released several top selling albums in the late 1950s and early 1960s. See *id.* Lenny Bruce’s *Sick Humor* was nominated for a Grammy award in 1959 in the inaugural competition for “Best Spoken Word Comedy.” It lost to *Inside Shelley Berman*. *Id.* at 723.

²⁸ Smith, *supra* note 26, at 728.

²⁹ Steve Martin’s 1978 release, *Wild and Crazy Guy*, was certified platinum, signifying 1,000,000 units sold. The platinum recognition system was initiated in 1976. Martin’s *Let’s Get Small*, released and recognized as a gold record in 1977, was certified platinum in 1978. *Id.* at 727–28.

³⁰ See *id.* at 723.

Klein, David Steinberg, and Lily Tomlin also released successful comedy albums.³¹

The comedy recordings of the 1960s and 1970s, virtually all of which were characterized by the narrative comedy that emerged at the beginning of that era, were grounded partly in technology. The LP format that emerged as a technological standard in the late 1940s gave comics more time to talk. They took advantage of that opportunity by telling stories rather than one-liners. Oliar and Sprigman situate that development in a loose Demsetzian propertization argument.³² Identifying and punishing thieves became easier. Story-telling discouraged commodification of comedy and discouraged theft. Yet comics may have turned to story-telling not to avoid appropriation of their work by others but to enable appropriation for themselves. Storytelling was not only technologically feasible, it also sold extremely well.

“The comedy album phenomenon of the 1960s”³³ was also grounded solidly in economics. The copyright system imagines that creators will appropriate the value of their work by charging consumers to access it; it imagines that the work gets shared via distribution of copies. Selling records worked for comics like it worked for musicians, and like selling books worked for authors. Higher-tier comics made a decent living. Lower-tier comics were stirred to emulate their more famous and successful colleagues. Top-selling comedians were offered starring roles on television programs and in Hollywood movies.³⁴ By the late 1970s, comedy stars “had become the popular equivalent of rock stars.”³⁵ From the standpoint of comedy fans, records made comedy accessible to audiences that could not afford to attend live shows or did not want to.

³¹ See Laurence Maslon, *Make ‘Em Laugh: The Funny Business of America* 229 (2008). The pace declined in the early 1980s. Two albums by Eddie Murphy were certified gold in 1984, and one of those (*Eddie Murphy*) was certified platinum in 1985. Several of Cosby’s and Pryor’s earlier gold records were certified platinum in 1986. See Smith, *supra* note 26, at 728.

³² See Oliar & Sprigman, *supra* note 5, at 1859–64.

³³ Maslon, *supra* note 31, at 228.

³⁴ Comics starring in television series included Bill Cosby (*I Spy*, which premiered in 1965), Tom and Dick Smothers (*The Smothers Brothers Comedy Hour*, in 1967), Flip Wilson (*The Flip Wilson Show*, in 1970), and Bob Newhart (*The Bob Newhart Show*, in 1972). See The Internet Movie Database (IMDb), available at <http://www.imdb.com> (last visited March 21, 2009).

³⁵ See Maslon, *supra* note 31, at 229.

This golden era faded during the 1980s with the rise of cable television and pre-recorded videocassettes. That means that the hypothetical market failure on which *There's No Free Laugh* is premised either has long been solved via conventional property mechanisms (if successors to LPs offered equal or better appropriability mechanisms), or that the specific combination of conventional property mechanisms and social norms that Olin and Sprigman describe emerged more recently than they hypothesize (if appropriability declined). As with a re-assessment of the public goods argument regarding jokes, this change in the historical account of markets does not make the emergence of a normative regime unimportant. But setting a system of social norms side-by-side with a conventional copyright-based appropriation regime colors the significance of both. If *There's No Free Laugh* is correct about the emergence of comedy's modern social norms during the 1960s, then it may be wrong about the source of the Demsetzian trend toward informal propertization. Copyright markets may have served comics well.

C. Do Social Norms Cure Market Failure Among Stand-up Comics?

That speculation about timing leads to further speculation about causal relationships. It raises the possibility that *There's No Free Laugh* implicitly reverses cause and effect, or aligns the rise of social norms with a market failure when the two may have little to do with one another. Assume that there was a market failure in stand-up in the early 1960s. Consider several possible scenarios: First, as *There's No Free Laugh* suggests, narrative comedy and informal property in jokes might have emerged to solve it. Or, second, a market for comedy (the record market, described in the last section) might have emerged in response to emerging comedy norms that defined appropriate comic content and regulatory norms. Comic content might have evolved for social or cultural reasons independent of appropriability concerns, and the resulting narrative performance mode was especially well suited to a technological format—the long-playing record—that recently had become popular. Or, third, the comic market might have functioned well until the mid-1980s, and then failed, to be supplanted by a system of informal norms. Narrative and perspective-oriented comedy might have been the victim of its own success, especially for performers whose style was especially “visual.” Compared to LPs (and compact discs), cable television and pre-recorded video formats offered consumers superior

substitutes for live story-based performances. Those media offered important appropriation opportunities to comics, but their growing ubiquity also enhanced both opportunities to detect appropriation by competitors, and to punish theft. Did a Demsetzian trend emerge in response?

To test any of these hypotheses, one would need to talk to both consumers (including consumers from different eras) and comics (including older ones still living). The questions to ask and the information to gather would not focus only on markets and objects and incentives. The questions and information would deal with patterns and practices as well as incentives to produce and interests in the new. When, how, and why did video formats supplant records as the dominant form of comedy consumption outside of live performance? It would be the anthropologist Geertz sketching the comedy of copyright and the commons of comedy, a content-based cultural infrastructure with governance and norms described as they relate to law, LPs, and history. Scholars often assume that a tragedy of the commons predicts the rise of intellectual property law, or intellectual property norms. A thick law and economics inquiry could ask which came first, and why.

II. THE CULTURE OF COMEDY

The point of Part I was to suggest that law and economics can be richer than it appears. Social norms need not align with the expectations defined by the legal system, and even the expectations defined by the legal system may be characterized in multiple ways.

In this Part I suggest that future case studies of artistic communities might couple the law and economics framework with a perspective grounded in descriptive social science. If Ellickson's Coasean analysis of Shasta County cattle ranchers came to embrace an ethnographic account of how those ranchers live, then there is no reason why ethnography or something like it should not form part of the investigation in the first place. There are potentially important aspects of the comic context that a Coasean or Demsetzian approach does not call out. *There's No Free Laugh* suggests at least three lines of questioning.

A. Where Do Comics Come From?

The proposition that stand-up comedy is a communal activity defined by an evolving set of social norms begs an obvious but crucial question: Who are stand-up comics?

First, it would be useful to know more about the internal dynamics of the comic community. There are local comics and national comics, comics who score television appearances and comics who work the comedy club circuit exclusively. There are famous comics and workaday comics. Some of these distinctions emerge in *There's No Free Laugh* when the question of sanctions comes up. Famous comics are less likely to be punished for violating comic norms.³⁶ Does the strength of other stand-up comic norms vary across this community, and if so, how?

Given that stand-up norms have evolved over time, related questions of internal communal structure could be asked for each relevant period. What did the community of comics look like in the late 1950s and early 1960s, the moment when the shift to more propertization seems to have begun? How had that structure changed since the vaudeville and post-vaudeville eras, when the content of comedy was apparently more self-consciously communal?

It would also be useful to know how one becomes a member of the stand-up “tribe,” and also how one loses one’s place. In Part I, I pointed out that record albums by Bob Newhart inaugurated the gold-record era of comedy LPs. Newhart, who has the self-consciously bland demeanor of a stereotypical accountant, was a real accountant before he took the stage.³⁷ It seems unlikely that the stand-up community embraced him immediately, or that he felt the pull of the community’s norms right away. Tribes often have initiation rituals and symbols that mark tribal status. How are norms of stand-up comedy passed from current members to new members? Who decides who is a member of the tribe, and who is not? Is it comics themselves? Audiences? Do intermediaries such as comedy club owners play a role?

It seems likely that norms against joke-stealing, like any communal norms, might serve as barriers to entry. *There's No Free Laugh* makes this point indirectly, when it describes how reputational sanctions for violating comic norms may keep thieving comics from working.³⁸

³⁶ See Oliar & Sprigman, *supra* note 5, at 1824.

³⁷ Maslon, *supra* note 31, at 228.

³⁸ See Oliar & Sprigman, *supra* note 5, at 1816–19.

Alternatively, if norms against joke stealing encourage comics to develop and rely on their own perspectives and narratives, comics' social norms might promote entry. Anyone with a story to tell could get up on stage and try their hand. Exactly how to measure competition in this market would be difficult, and distinguishing the role of social norms may be impossible. Yet it would be worthwhile to investigate the impact of the normative system on the shape of the group.

As comics come in, they may also leave. Is that possible? Or is it the case that once a stand-up comic, always a stand-up comic, regardless of the performance context? Do norms follow the individual, or do they stay within the community? To take a salient current example, is Robin Williams still subject to comics' norms now that he has been a television and movie star for 30 years? Williams still performs on stage, yet he claims to have opted out of the stand-up community.³⁹

B. Expressive Norms

The story told in *There's No Free Laugh* is ultimately only partly a story about solving an incentives problem among stand-up comics. Audiences appear to care little for new comic works,⁴⁰ though it seems likely that they lust for new comics.⁴¹ Comics' own attitude toward novelty seems to be less important than their attitude toward thievery. Given the vehemence of norm-based sanctions against plagiarism, comics themselves seem to value honesty at least as much as they value creativity, and perhaps more.⁴² Mostly, therefore, *There's No Free Laugh* reads as a story about ethics. Stand-up comics live by a kind of code, a way of realizing a form of the good life, measured partly by honor that prevents most thievery, an attribution norm that fills gaps in the code of honor, and frontier justice meted out infrequently but flamboyantly.

A system of social norms that operates as an ethical regime opens the door to asking more broadly about the functions and meanings of participating in that system. *There's No Free Laugh* reminded me of Lawrence Lessig's account of social norms among gentlemen in the

³⁹ See *id.* at 1816.

⁴⁰ See *id.* at 1824.

⁴¹ It is possible that comics' system of antiplagiarism norms acts as a proxy for audience interests in new content. Similarly, professional journalists prize a first-to-publish system of norms that focuses on "scooping" the competition.

⁴² See Oliar & Sprigman, *supra* note 5, at 1815–19.

antebellum American south, which encouraged dueling as a method of resolving offenses against honor and marking membership in the social elite.⁴³ The rituals of dueling were highly elaborated, in order to manufacture prestige at different levels of society and to ensure that the ultimate sanction for an offense to honor—death—was meted out only after an intricate dance.⁴⁴ Whether the comparison is to antebellum dueling or Balinese cockfights, the norms of stand-up comics may have expressive meanings and functions of their own. Some of these may be the markers of tribal belonging to which the last section referred. It seems self-evident but noteworthy, for example, that only a stand-up comic gets pummeled (literally) for joke-stealing.⁴⁵

C. *Comic Content*

There's No Free Laugh carefully tiptoes around a third and perhaps most tantalizing question. Oliar and Sprigman argue convincingly that the content of the law (and the content of corresponding or complementary social norms) influences not only the amount of creative content that is produced, but its type.⁴⁶ They also conclude that their evidence suggests that social norms should be considered by policymakers when deciding when and how to adjust the default rules of copyright law.⁴⁷ This suggests a further question: Do the norms of the stand-up comic community make comedy better, or do they make it worse? How should policymakers deal with social norms? Ellickson ultimately concluded that Shasta County cattle ranching norms were welfare-maximizing. What of Coase and comics?⁴⁸

Evaluative judgments of this sort are speculative and may be dangerous. Mainstream copyright scholarship avoids questioning the value of expressive content, for reasons best expressed in the so-called “anti-discrimination principle” articulated by Justice Holmes in *Bleistein*

⁴³ See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Chi. L. Rev. 943, 968–72 (1995).

⁴⁴ See *id.* at 968–70.

⁴⁵ See Oliar & Sprigman, *supra* note 5, at 1820–21.

⁴⁶ See *id.* at 1853–59.

⁴⁷ See *id.* at 1793–94.

⁴⁸ This form of the question is irresistible, even though it does not quite track the argument of *There's No Free Laugh*.

*v. Donaldson Lithographing Co.*⁴⁹ I question it anyway, with due humility. Whether and how law and/or norms maximize welfare is an important question, and no useful answers come from not considering all of its angles. This seems especially important if subconscious or implicit biases about what is “good” content and “bad” content might affect public policy. Those biases should be exposed and assessed.

One possibility is that if comics use norms to discipline the profession and are satisfied with the results (Oliar and Sprigman do not present evidence to the contrary), then neither law nor society should second-guess their judgment. One need not adopt the comic perspective to reach that conclusion. I have suggested elsewhere that normative communities may tend to be welfare-promoting from the standpoint of the copyright system, because they tend to be productive and creative.⁵⁰ Stand-up comics’ norms may signal the presence of an inherently welfare-promoting group.

There are less sanguine alternatives. One is that antiplagiarism norms developed by stand-up comics run contrary to what might be called the OTSOG tradition, borrowing the acronym that Robert Merton used in his retracing of Newton’s restatement of the cumulative nature of creativity: “If I have seen further, it is by standing On the Shoulders of Giants.”⁵¹ The collaborative current flows swiftly in contemporary copyright scholarship, which often argues that creativity is cumulative and collective; that borrowing from forbears is inevitable, necessary, and right; and that laws that resist the practice are impediments to progress.⁵² Stand-up comics appear to have internalized the notion of the “romantic author” that some scholars suggest has warped popular and policymaker perceptions of law and policy,⁵³ and that has interfered with the production of new and better creative content.

⁴⁹ 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”).

⁵⁰ See Michael J. Madison, A Pattern-Oriented Approach to Fair Use, 45 Wm. & Mary L. Rev. 1525, 1677–87 (2004).

⁵¹ Robert K. Merton, On the Shoulders of Giants: A Shandean Postscript (Univ. of Chi. Press 1993) (1965) (initial capitals added to clarify the source of the acronym).

⁵² See, e.g., Michael D. Birnhack, The Idea of Progress in Copyright Law, 1 Buff. Intell. Prop. L.J. 3 (2001) (rethinking copyright’s notion of progress in light of the OTSOG principle).

⁵³ See Peter Jaszi, Toward a Theory of Copyright: The Metamorphoses of “Authorship,” 1991 Duke L.J. 455. The “romantic author” critique has itself been criticized recently. See Oren Bracha, The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values

A final hypothesis is more acutely negative. To ask whether comics' norms make comedy better or worse is not merely to ask whether one-liners are better or worse than personal reflections. It is to ask about relationships between stand-up comedy and other forms of comedy, and between stand-up comedy and theatrical performance, and orality in general. The evolution of comic content and social norms described in *There's No Free Laugh* may be consistent with "the death of comedy" over the course of the twentieth century. That phrase comes from the classics scholar Erich Segal, who diagnoses the demise of comedic theater at the hands of individualistic and self-indulgent twentieth-century modernists (Beckett) and absurdists (Ionesco).⁵⁴ Classic comedy has a happy ending, and happiness is social. Men and women pair off and form communities. Twentieth-century theatrical comedy is solipsistic and cynical. Segal concludes that the change is a bad thing. As Oliar and Sprigman describe comics' norms, those norms seem to reinforce it.

III. CONCLUSION

A short Response can only hint at the possibilities for further research here. My main points can be summarized briefly. Case studies, such as the one that *There's No Free Laugh* presents, offer precisely the kind of raw material that intellectual property scholars and policymakers need to develop. Undertaking a case study requires making some key choices regarding the kinds of questions to be asked. The study might be framed in the relatively narrow terms given by the received understanding of intellectual property law as an incentive to create. Highlighting the contrasts between the predictions of the legal system and the actions of actors in the relevant case can highlight the strength or weakness of the law in action. That is the approach that *There's No Free Laugh* largely takes. In highlighting the existence of a relevant set of social norms, that approach pays off. The narrowness of that approach also means that the policy payoff may be less valuable than it appears, because the framing did not create opportunities to describe the case in full. The research question for further cases is not only whether social norms offer a substitute for law. Future case studies should characterize and interpret

in *Early American Copyright*, 118 *Yale L.J.* 186 (2008) (describing copyright's historical conceptions of authorship).

⁵⁴ See Erich Segal, *The Death of Comedy* (2001).

the patterns and meanings that define and emerge from a social domain and use those findings to build a robust foundation for law and other forms of social order.