

# IS CHANGE ALWAYS GOOD? THE ADAPTABILITY OF SOCIAL NORMS AND INCENTIVES TO INNOVATE

*Jennifer Basch\**

*Intellectual-property law generally incentivizes the creation of new works by offering legal protections that limit the public's use of a particular work without the permission of its author for a period of time. Formal legal protections are not, however, the only means of enforcing ownership rights over creative works. In other areas where legal protections are minimal or even absent, certain groups have established informal rules that serve not only to protect intellectual property, but to promote innovation as well. Social norms are one of the informal systems that govern the relationship between creators and users. Adapting to community needs over time, social norms help establish specialized rules for intellectual-property protection.*

*While the interplay between intellectual-property laws and social norms has been thoroughly examined, this Note explores whether the adaptability of social norms promotes greater innovation and idea-sharing than would exist under a purely formal legal system. Comparing the protections offered by social norms and copyright law, I argue that depending on the nature of the group setting where the norms develop, the adaptability of social norms may actually limit innovation. Beginning with the Copyright Act of 1976, this Note demonstrates the limited nature of traditional intellectual-property law, in contrast to the development of more robust social norms. Through an examination of the social norms governing the areas of stand-up comedy and open-source software, this Note argues that loose-knit groups, in which creative control is dispersed among many members, promote greater information-sharing and innovation than close-knit groups, in which control is hierarchical and centralized.*

INTRODUCTION .....	432
I. COPYRIGHT PROTECTION UNDER THE 1976 COPYRIGHT ACT .....	434
A. Requirements for Copyright Protection .....	434
B. Affirmative Rights Conferred by the Copyright Act .....	437

---

\* J.D. 2014, New York University School of Law; Executive Editor (2013–2014), New York University Journal of Legislation and Public Policy. Special thanks to Professor Christopher Sprigman for encouraging me to pursue this topic and for his invaluable input. I am also grateful to the entire staff of JLPP, in particular Alessandra Baniel-Stark, Michael Williams, and Max Sarinsky for their help editing and revising this piece.

C.	Exceptions to the Copyright Act: The Fair-Use Doctrine . . . . .	438
D.	Music Sampling: A Demonstration of the Inflexibility of Existing Copyright Law . . . . .	439
II.	THE ROLE OF SOCIAL NORMS IN REGULATING COPYING . . . . .	442
A.	Defining Social Norms . . . . .	442
B.	The Source of Social Norms and Their Interaction with the Law . . . . .	444
C.	The Adaptation of Social Norms with Regard to IP Law . . . . .	446
III.	COMEDY AND THE EFFECT OF SOCIAL NORMS . . . . .	448
A.	A Brief History of Comedy . . . . .	449
B.	The Emergence of Social Norms Without Legal Protection . . . . .	450
C.	The Emergence of the Norms Protecting Against Joke Theft . . . . .	451
D.	Why Have Social Norms Adapted This Way in Comedy? . . . . .	453
IV.	OPEN-SOURCE SOFTWARE . . . . .	456
A.	Software and Protection Under the Copyright Regime . . . . .	456
B.	The Open-Source Movement . . . . .	458
C.	Norms Governing Open-Source Projects: Attribution and Sharing . . . . .	460
D.	Understanding Adherence to Social Norms in the Open-Source Context . . . . .	463
V.	IMPLICATIONS . . . . .	465
A.	Who's on Top? . . . . .	465
B.	How Innovations Happen . . . . .	467
C.	Technology . . . . .	468
	CONCLUSION . . . . .	469

## INTRODUCTION

The Constitution gives Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>1</sup> Importantly, the Constitution states that the purpose of such exclusive rights is “to promote the *Progress* of Science

---

1. U.S. CONST. art. I, § 8, cl. 8.

and the useful Arts”<sup>2</sup> and not an end in itself. The structure of intellectual-property (IP) rights is based on the classic belief that a limited monopoly power over a work will incentivize investment in the creation of the kind of innovative and creative works necessary to propel social, cultural, and economic progress.<sup>3</sup> Pursuant to its grant of Constitutional authority and on the understanding that IP is governed by the classical incentives theory, Congress has passed various laws regulating the protection of intellectual property. These laws generally seek to strike a balance between incentivizing creation and allowing public access to creative works.<sup>4</sup>

While the law offers formal protections to intellectual property in the areas of patents, trademarks, and copyrights, the formal legal system is not the only mechanism that enforces ownership rights over creative ventures. Informal IP protections also play an important role in spurring innovation, particularly in areas where formal legal protections are absent. There has been a tremendous focus on the role of social norms in reducing unauthorized copying among IP creators. Because norms are community-driven and -enforced, they are well suited to meeting the industry-specific need to substitute, in whole or part, for formal IP protections. Thus, norms owe a great deal of their power and effectiveness to the fact that they have adapted over time, presumably with the consent of the community they govern. This adaptability stands in stark contrast to the one-size-fits-all structure of current IP laws, which remain too little changed from their original construction nearly forty years ago.

There has not been much focus on whether the adaptability of social norms promotes the proper balance between protection and access that drives innovation, and how this balance compares with the balance provided by formal legal protections per se. This Note will argue that the adaptability of social norms does matter, but that adaptability tends to promote innovation in different ways depending on the nature of the community imposing the social norm. Focusing specifically on the protections offered in the area of copyright, I argue that the social norms developed in close-knit groups, controlled by a limited group of members at the top of a particular community, will tend

---

2. *Id.* (emphasis added).

3. Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 517 (2009).

4. See generally *Dr. Seuss Enters. v. Penguin Books U.S.A., Inc.*, 109 F.3d 1394, 1399 (9th Cir. 1997) (noting that fair-use doctrine balances the enforcement of copyright where it might “stifle the very creativity which [the] law is designed to foster” (quoting *Iowa State Univ. Research Found., Inc. v. American Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980))).

to promote a more closed system with a more limited scope of innovation. By contrast, norms formed among loose-knit groups have a more democratic effect, promoting greater sharing and thus more widespread innovations. This Note will advance this argument in five parts. In Part I, I assess the current legal protections offered by copyright law, including the limitations of this regime. Part II will attempt to define social norms, and demonstrate how they form and change over time within a group. Parts III and IV evaluate and compare social norms in stand-up comedy and open-source software in order to demonstrate how differences within each community affect the prevailing norm. Using these insights, Part V analyzes conditions that promote optimal norms for innovation and discusses mechanisms to promote greater innovation.

## I.

### COPYRIGHT PROTECTION UNDER THE 1976 COPYRIGHT ACT

#### A. *Requirements for Copyright Protection*

The Copyright Act of 1976 (Copyright Act), first passed in 1976 and since subject to limited amendment, serves as the basis for modern copyright protection. The Copyright Act protects, for a limited time, certain types of creative works. The copyright term is limited to the life of the author plus seventy years, though many have argued this is hardly a meaningful limit on duration.<sup>5</sup> Consequently, a copyright can endure for well over one hundred years. Protection is also limited in the scope of works covered by the Copyright Act. The Copyright Act protects only original works of authorship, fixed in any tangible medium of expression.<sup>6</sup>

Original works of authorship include literary, musical, dramatic, motion picture, and audiovisual works, as well as certain other media.<sup>7</sup> The bar for a qualifying level of originality is quite low, requiring only

---

5. The term of protection has been subject to numerous extensions, most recently the Sonny Bono Extension Act, which extended the previous duration from the life of the author plus fifty years to its current term under the Copyright Act. *See* 17 U.S.C. § 302(a) (2013). In the case of an anonymous work or work made for hire, the term may be even longer, lasting for 95 years from first publication or 120 years from the year of creation, whichever expires first. § 302(c); *see also* Eldred v. Ashcroft, 537 U.S. 186 (2003) (affirming the constitutionality of the Sonny Bono Extension Act against challenge that it violated constitutional requirement that copyright protection be provided for a “limited duration” since periodic extensions were essentially providing perpetual protection to certain works).

6. § 102(a).

7. *Id.*

independent creation and a “modicum of creativity.”<sup>8</sup> The Copyright Act also requires fixation, meaning simply that the work is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”<sup>9</sup> This broad definition covers all but the most fleeting creative works.<sup>10</sup>

Section 102(b) articulates perhaps the most important restriction on protection under the Copyright Act. Section 102(b) denies copyright protections to an “idea, procedure, process, system, method of operation, concept, principle, or discovery—regardless of form in which it is described, explained, illustrated, or embodied in such work.”<sup>11</sup> The limiting doctrines derived from section 102(b) not only bar protection to particular forms of expression but also serve to limit coverage of some original works of authorship that might otherwise qualify for full protection. IP encourages the dissemination of information by offering protection to certain works, thus encouraging the free flow of ideas. Section 102(b) seeks to strike a balance between offering creators protection and maintaining a public domain that is inclusive enough to provide the building blocks for future creative works.<sup>12</sup> Since the Copyright Act does not define the term “ideas,” it has been left to the courts to determine its meaning.

The result has been a number of judge-made doctrines that essentially serve as different means to distinguish ideas from protected creative expression—generally known as the “idea/expression distinction.” The idea/expression distinction aims to prevent the use of copyright to lock up ideas for exclusive use. For instance, the Supreme Court has held that facts are not copyrightable, since they are observations about the world rather than the product of creative expression.<sup>13</sup>

---

8. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.* 499 U.S. 340, 346 (1991). The Supreme Court further noted that even the selection, coordination, or arrangement of facts could be enough to meet the requisite level of creativity. *Id.* at 350–51.

9. § 101.

10. See, e.g., *MAI Sys. Corp. v. Peak Comput., Inc.* 991 F.2d 511 (9th Cir. 1993) (finding copy created when computer technician loaded software into RAM was sufficiently fixed). But see, e.g., *Cartoon Network LP v. CSC Holdings*, 536 F.3d 121 (2d Cir. 2008) (finding that a program recorded by defendant's system, kept on buffer for 1.2 seconds, was merely transitory and did not meet threshold for fixation).

11. § 102(b).

12. See *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (“[T]his idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.” Due to this distinction, every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication.” (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985))).

13. *Feist*, 499 U.S. at 344 (noting that “facts are not copyrightable”).

In essence, where the number of ways to express an idea is very limited, a creator is entitled to limited (if any) copyright protection, since granting exclusive rights in this area would be akin to granting protection to the idea itself.<sup>14</sup> One example of the doctrine created out of the idea/expression distinction is the merger doctrine, where the idea and its expression are so close that they are virtually indistinguishable, and protection to the expression would effectively grant protection to the idea.<sup>15</sup> Another is denial of protection to *scenes a faire*, defined as “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.”<sup>16</sup> These doctrines aim to prevent the protection over the basic elements of expression, which would stifle innovation and creativity in future works.

Another important limitation of U.S. copyright protection is that, unlike the copyright law of many other countries, it generally does not protect moral rights.<sup>17</sup> Moral rights are generally thought of as rights of personality, as distinct from property rights.<sup>18</sup> These include prohibitions on the freedom to destroy or modify a work (commonly known as the “right of integrity”) and on the association of a work with its creator (commonly known as the “right of attribution” or “right of paternity”).<sup>19</sup> The Copyright Act does offer a limited form of protection to moral rights.<sup>20</sup> For instance, section 106A gives the creator of a work of visual art the right to claim authorship of that work, and prevents the association of the creator’s name with any work of visual art that he or she did not create.<sup>21</sup> Section 106A also provides the right to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to the creator’s honor or reputation, and to prevent the destruction of any work that is widely recognized within the artistic community (known as having

---

14. See *Kregos v. Associated Press*, 937 F.2d 700, 705 (2d Cir. 1991).

15. See *Morrissey v. Proctor & Gamble Co.*, 379 F.2d 675, 678–79 (1st Cir. 1967) (deciding that rules for a sweepstakes were not copyrightable).

16. *Murray Hill Publ’ns, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312, 319 (6th Cir. 2004) (internal quotation marks omitted) (quoting *Sturza v. Gov’t of the U.A.E.*, 281 F.3d 1287, 1295 (D.C. Cir. 2002)).

17. See Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 25 (1994).

18. See Amy Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 296–97 (2009).

19. Henry Hansmann & Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 95–96 (1997).

20. See 17 U.S.C. § 106(A) (2013) (delineating authors’ rights of attribution and integrity).

21. § 106A(a)(1).

reached a “recognized stature”).<sup>22</sup> However, the moral rights supplied by section 106A are unavailable to anything but “works of visual art.”<sup>23</sup>

### B. *Affirmative Rights Conferred by the Copyright Act*

Once a work meets the qualifications of protection under the Copyright Act, its creator is provided with certain exclusive rights governing the use and dissemination of his or her work. Section 106 of the Copyright Act lists the six exclusive rights of a copyright holder:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.<sup>24</sup>

Exclusive rights in a work vest initially in the author (or, in some cases, authors) of the work.<sup>25</sup> The owner of a valid copyright may

---

22. § 106A(a)(3). This term is not defined in the statute, and the standard for “recognized stature” has been left to the courts to interpret. *See, e.g.,* *Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999) (citing *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994), *aff’d in part, rev’d in part, and vacated in part on other grounds*, 71 F.3d 77 (2d Cir. 1995)) (requiring for a work of recognized stature that: “(1) that the visual art in question has ‘stature,’ i.e. is viewed as meritorious, and (2) that this stature is ‘recognized’ by art experts, other members of the artistic community, or by some cross-section of society,” and observing that “plaintiffs generally, but not inevitably, will need to call expert witnesses to testify” in order to make these showings).

23. A work of visual art is defined as “(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 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 200 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 200 copies or fewer that are signed and consecutively numbered by the author.” § 101.

24. § 106.

25. § 201(a). In the case of a work for hire, the author of a work may not be a single person but a corporate entity or institution. § 201(b).

transfer his exclusive rights quite easily. Ownership in a copyrighted work may be transferred, either in whole or in part, by “any means of conveyance or by operation of law,”<sup>26</sup> so long as it is executed in writing.<sup>27</sup> Additionally, the exclusive rights conveyed in section 106 of the Copyright Act may be transferred and owned separately.<sup>28</sup> Yet, as elaborated below, while the section 106 exclusive rights are broad in nature, they are not without limit.

### C. *Exceptions to the Copyright Act: The Fair-Use Doctrine*

Section 107 of the Copyright Act provides the equitable defense of “fair use” against liability for the violation of section 106. Fair use waives liability, under certain circumstances, for the use of either all or part of a copyrighted work without the consent of the work’s creator.<sup>29</sup> Fair use is considered a critical tool to balance the enforcement of IP rights while allowing others to build upon existing works. It is therefore integral to fulfilling copyright’s constitutional purpose of promoting the progress of science and the useful arts.<sup>30</sup> More generally, it gives courts the flexibility to find exceptions to copyright law where it might “stifle the very creativity which [the] law is designed to foster.”<sup>31</sup> This defense is therefore vital to the protection and promotion of innovation within the existing copyright regime.

Section 107 lists four factors for courts to consider in assessing whether a party may claim fair use:

- (1) the purpose and character of the use, including whether such use is of a commercial nature . . . ;
- (2) the nature of the copyrighted work,
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and
- (4) the effect of the use upon the potential market . . . of the copyrighted work.<sup>32</sup>

A complete review of the state of the fair use doctrine in the various circuits is beyond the scope of this Note. Suffice it to say that while this test may appear somewhat straightforward, in reality its application on a case-by-case basis has led to disparate and inconsistent

26. § 201(d)(1).

27. § 204(a).

28. § 201(d)(2).

29. § 107; *see also* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 557–58 (2008).

30. *See* Warner Bros. Entm’t Inc. v. RDR Books, 575 F. Supp. 2d 513, 539–40 (S.D.N.Y. 2008) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994)).

31. *Dr. Seuss Enters. v. Penguin Books U.S.A., Inc.*, 109 F.3d 1394, 1399 (9th Cir. 1997) (citing *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980)).

32. § 107.



results across the circuits.<sup>33</sup> Importantly, this lack of consistency creates significant uncertainty for both copyright holders and the potential users of copyrighted content who seek to assert the fair-use defense in support of their works. Seeing that fair use provides the best and in some cases only defense to unauthorized copying, the lack of consensus as to its application leaves potential creators in the dark. More importantly, this uncertainty chills innovation, as creators fear costly and time-consuming litigation potentially associated with the use of a protected work.<sup>34</sup>

*D. Music Sampling: A Demonstration of the Inflexibility of Existing Copyright Law*

To see the inability of the Copyright Act to keep up with social and cultural shifts, particularly due to the confusion caused by fair use, we need look no further than the world of popular music and the practice of musical sampling. Sampling is the practice of repurposing all or part of a song to compose a new piece of music. Though sampling has occurred since the 1940s, it wasn't until the 1980s that hip-hop artists brought the practice to the forefront of mainstream music.<sup>35</sup> Digital sampling technology allowed these artists to create a digital version of an analog recording, giving them the ability to manipulate and cut the recordings into a new piece.<sup>36</sup> This process dramatically reduces the cost of recording and producing music,<sup>37</sup> a development that has been rapidly advanced by the advent of the Internet and sophisticated technology.

Sampling runs afoul of the formal protections copyright offers to musical recordings under the Copyright Act.<sup>38</sup> Artists who wish to use protected music may seek a license from the copyright owner. Licenses must be negotiated with the copyright owner, but negotiation brings with it the risk that the owner may not wish to license the song

---

33. See Beebe, *supra* note 29, at 550 (recognizing “the extent to which lower courts either deliberately ignored or were ignorant of fair use doctrine set forth in the leading cases, particularly those from the Supreme Court”).

34. See ZOHAR EFRONI, *ACCESS-RIGHT: THE FUTURE OF DIGITAL COPYRIGHT LAW* 423 (2011)

35. David M. Morrison, *Bridgeport Redux: Digital Sampling and Audience Recording*, 19 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 75, 88 (2008); see also KEM-BREW McLEOD & PETER DiCOLA, *CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING* 37–38 (2011) (providing a brief history of music sampling).

36. Morrison, *supra* note 35, at 89–90.

37. Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 *UCLA ENT. L. REV.* 271, 276 (1996).

38. See 17 U.S.C §§ 101–102, 114 (2013) (offering protection both to the sound recording and the underlying musical composition).

or may seek a prohibitively expensive licensing fee.<sup>39</sup> Yet copying in and of itself without a license does not necessarily prove infringement. To assert a violation of the exclusive rights defined under section 106, the original owner must show the new work displays “substantial similarity” to the sampled work.<sup>40</sup> This standard creates some ambiguity, since samples may be so recontextualized as to render the original song unrecognizable to the ordinary listener.<sup>41</sup> Courts have traditionally considered whether quantitative or qualitative use of the sample renders the work substantially similar to the copyrighted work.<sup>42</sup> The courts also considered whether use of the sample itself was *de minimis* and whether the average person would not recognize it as the original.<sup>43</sup>

The longstanding approach was partially upended in 2005, when the Sixth Circuit established a new standard for sampling in *Bridgeport Music Inc. v. Dimension Films*. The court held that section 106’s derivative right gives owners the *exclusive right* to sample their own works.<sup>44</sup> In short, the court held, “Get a license or do not sample.”<sup>45</sup> The consequences of the *Bridgeport* decision have been enormous. Reliance on substantial similarity or *de minimis* use is uncertain,<sup>46</sup> especially since the sample at issue in *Bridgeport* consisted of a single three-note chord from the original work.<sup>47</sup> Some, like

---

39. Lauren Fontein Brandes, *From Mozart to Hip-Hop: The Impact of Bridgeport v. Dimension Films on Musical Creativity*, 14 UCLA ENT. L. REV. 93, 123 (2007) (explaining that in addition to the expense of licensing a sample, potential licensors must also seek out the separate copyright holders of the musical composition and sound recording who exert strong control over licensing negotiations). For a description of the negotiation process for licensing samples, see Szymanski, *supra* note 37, at 289–94.

40. See *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997) (noting that any copying that does not rise to this threshold should be considered *de minimis*). In the Second Circuit, the substantial similarity test requires two findings of similarity in order to find actionable copying. First is whether there has been actual copying or use of the plaintiff’s work, and second is whether an “ordinary observer” would consider such use to be substantially similar to the original work. See *id.*; see also *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2003) (also applying the Second Circuit’s substantial similarity test).

41. See McLEOD & DiCOLA, *supra* note 35, at 130.

42. See, e.g., *Newton*, 349 F.3d at 1193 (“[E]ven where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is substantial.”).

43. *Id.* (“[A] use is *de minimis* only if the average audience would not recognize the appropriation.”).

44. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005).

45. *Id.*

46. See McLEOD & DiCOLA, *supra* note 35, at 142 (highlighting the legal significance of the *Bridgeport* decision).

47. *Bridgeport*, 410 F.3d at 796.

Creative Commons's General Counsel Mia Garlick, have argued that *Bridgeport* represents the broader idea that technology is perceived as a threat to existing industries protected by copyright.<sup>48</sup> To date, *Bridgeport*'s new rule has not been overturned.<sup>49</sup>

The decision in *Bridgeport* highlights how stagnation in the area of copyright law—which draws from a nearly forty-year-old statute, despite enormous cultural and technological development—presents numerous challenges to innovation and creativity. First, the decision comes in conflict with the longstanding tradition surrounding the practice of remix, which provided broad leeway for artists to use an existing work to create an entirely new work.<sup>50</sup> Additionally, while it is impossible to know the full scope of any resulting chilling effect, requiring a license to sample has surely deterred some, perhaps many, potential innovators with a voice and perspective to share in the musical world.<sup>51</sup> Since the Copyright Act has not been amended to keep up with changes in technology or popular expression, it runs the risk of being at severe odds with prevailing mores of creative expression.

Advocates of licensing will no doubt point to the availability of the fair use defense to protect truly innovative works that utilize samples. However, as described in Part I.C, the state of the law is far from certain, as no one is quite sure following *Bridgeport* how much transformation is necessary to successfully claim fair use. Copyright owners “routinely attempt to prevent their intellectual properties from gradually taking on disparate and unwanted associations, and in doing so they are essentially trying to prevent the diminishing of the capacity of their work to singularly identify itself in the marketplace and/or in the mind of the individual consumer.”<sup>52</sup> This starts to look more and more like a case of moral rights assertion, which the Copyright Act explicitly rejects for musical works.<sup>53</sup>

The restrictions on sampling also raise significant liberty concerns regarding innovation in the field of music. This is not to say that no one has sampled music since the *Bridgeport* decision, but the threat

---

48. McLEOD & DiCOLA, *supra* note 35, at 143.

49. *But see* Saregama India Ltd. v. Mosley, 687 F. Supp. 2d 1325, 1338–41 (S.D. Fla. 2009) (rejecting *Bridgeport*'s brightline rule and applying a substantial similarity inquiry in opposition to circuit precedent).

50. *See* Lawrence Lessig, *Free(ing) Culture for Remix*, 2004 UTAH L. REV. 961, 963–64 (2004).

51. *See, e.g.*, CHILLING EFFECTS CLEARINGHOUSE, <http://www.chillingeffects.org> (last visited Apr. 4, 2015) (compiling millions of cease-and-desist letters containing requests to remove online content).

52. Morrison, *supra* note 35, at 128.

53. *See supra* note 23 and accompanying text.

of litigation in light of the decision has significantly increased the risk associated with sampling. The licensing requirement that the court articulated in *Bridgeport* has the potential to make musical creation increasingly concentrated among those with the money to either purchase licenses or with the goodwill and following to confidently avoid litigation.<sup>54</sup> As one scholar argues, “to the extent that the mass of cultural products from which individuals draw out their sense of the aesthetic becomes increasingly dominated by large multimedia conglomerates, diversity of expression becomes increasingly susceptible to homogenization.”<sup>55</sup> More and more, the law seems to serve the interests of the big players in the music industry over the individual creator or listener, as restrictions on sampling create additional barriers to entry that limit options for music consumers.

Ultimately, this examination demonstrates that the Copyright Act’s treatment of changing technology and styles is often like trying to fit a square peg in a round hole. While laws are not entirely fixed, change requires either legislative action or a challenge to the law before the courts. More specifically, the law may be capable of adaptation to changing technologies and popular expression, but courts are ultimately tied to the text of any law. As such, it should be no surprise that *Bridgeport* demonstrates the downside of relying on statutes to promote and protect social or cultural evolution. No matter how ambiguous the statute, there exists a most narrow reading: this was the one taken by the Sixth Circuit in *Bridgeport*. While some might argue that this is a misinterpretation or too narrow a reading, the court was faced with making a change in how music is made fit with a statute that never contemplated its now ubiquitous nature. Whether one considers sampling to be innovative or theft, much of modern hip-hop resulted from, and continues to be driven, by sampling. Due to the law’s inherent disapproval of this major cultural shift, we might never know what new genre or hit song we may be missing.

## II.

### THE ROLE OF SOCIAL NORMS IN REGULATING COPYING

#### A. *Defining Social Norms*

Copyright law does not cover all areas of artistic or creative expression. Consequently, a number of creative communities have de-

---

54. See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 332 (1989) (noting that extensive copyright protection “raise[s] the cost of creating new works”).

55. Morrison, *supra* note 35, at 122–23.

veloped informal rules, also known as social norms, to fill the void created by the lack of formal legal protections. These rules impose firmer and more industry-specific boundaries for copying than would be available under the limited protection of federal law. These “social norms,” and their ability to informally regulate behavior, have been the subject of considerable academic discussion. There are various definitions of what constitutes a “social norm,” but for the purposes of this Note, I define social norms as widely adhered to patterns of behavior that reflect a particular group’s attitude of approval or disapproval of a particular action outside a legal obligation to perform such action.<sup>56</sup> Social norms are common and pervasive within society, from giving birthday presents to offering applause after a performance.

Norms serve to create social order by ensuring that individuals will act in a manner consistent with social approval.<sup>57</sup> Compliance is not driven by a “centralized norm enforcer,” such as the police, but rather through social pressures and expectations.<sup>58</sup> The result is that the regulatory effect of norms is derived from something “interpretive,” rather than physical or behavioral, relying on one’s perceptions of social acceptance within a particular group or community.<sup>59</sup> Acting consistently with social norms may increase esteem for an individual among society or group members, or provide other positive externalities.<sup>60</sup> On the other hand, social norms also serve as a form of extra-legal regulation that punishes and constrains certain undesirable behavior via social sanctions.<sup>61</sup> Sanctions can take various forms, including ostracism or loss of esteem among group members.<sup>62</sup>

Membership may be so valuable that the looming threat of expulsion from the group may significantly affect whether an individual conforms to prevailing social norms.<sup>63</sup> The actual or perceived size of

---

56. This definition is generally consistent with that applied by Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996); see also Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 537 (2003).

57. Amitai Etzioni, *Social Norms: Internalization, Persuasion, and History*, 34 L. & SOC’Y REV. 157, 159 (2000).

58. See Raghu Seshadri, *Bridging the Digital Divide: How the Implied License Doctrine Could Narrow the Copynorm-Copyright Gap*, 2007 UCLA J.L. & Tech. 3, 3 (2007).

59. Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 680 (1998).

60. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 364, 410 (1997) (discussing “The Esteem Norm”).

61. See Lessig, *supra* note 59, at 662–63 (1998); Sunstein, *supra* note 56, at 915.

62. Strahilevitz, *supra* note 56 at 537.

63. Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 CHI.-KENT L. REV. 1537, 1545 (2000).

a group can affect the influence of the norm over group members.<sup>64</sup> The identity of the membership matters as well—whether other group members are peers or strangers may have significant effects on the strength and influence of norms.<sup>65</sup>

*B. The Source of Social Norms and Their Interaction with the Law*

Social norms do not arise in a vacuum. Rather, they are formed “to enforce a state of affairs that is favorable for a critical mass of the community to which they apply.”<sup>66</sup> Norms need not form over long periods; they may form quite quickly, even within a single interaction between strangers.<sup>67</sup> Norms may arise in conformance with surrounding circumstances, adapting to the needs of a particular group. Preferences are not necessarily given and fixed, but rather take shape and are refined over time to reflect behaviors the group seeks to encourage or discourage at a particular time.<sup>68</sup> Flexibility, or adaptability, is an inherent quality of social norms, which lack the stability of formal legal regimes.<sup>69</sup> As such, norms may change if the “underlying conditions of their maintenance change.”<sup>70</sup> Such changes in norms are due to “an internalization” of obligations or social norms, whereby an individual follows the norms via such “nonrational processes as identification with authority figures and affective attachments.”<sup>71</sup> In understanding how social norms function, it is important to consider which groups or individuals can exert the kind of social pressure that will achieve the critical mass necessary to produce such norms.

Norms do not generally function entirely independently of the law; rather, they may in fact influence one another. For instance, Lawrence Lessig argues for the centrality of the law’s effect on behavior, both directly as well as indirectly through its effect on social norms.<sup>72</sup> Additionally, formal law may serve a kind of expressive function, telling individuals what the society holds to be social norms to be en-

---

64. See Mark F. Schultz, *Copynorms: Copyright and Social Norms*, in 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH 201, 208 (Peter K. Yu ed., 2007).

65. See generally *id.* at 208–09.

66. Elizabeth L. Rosenblatt, *A Theory of IP’s Negative Space*, 34 COLUM. J.L. & ARTS 317, 340 (2011).

67. Rachlinski, *supra* note 63, at 1548–49 (2000).

68. Etzioni, *supra* note 57, at 166 (critiquing neoclassical economists who assume that personal preferences are fixed).

69. Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1892 (2009).

70. *Id.* (noting this change can be either positive or negative depending on whether flexibility is used to further desirable policy goals, or “nefarious private interests”).

71. Etzioni, *supra* note 57, at 167.

72. Lessig, *supra* note 59, at 666.

forced by the community.<sup>73</sup> Alternatively, norms may also cause individuals to act contrary to existing legal structures in an effort to conform with the social expectations of a particular group.<sup>74</sup> For instance, in Robert Ellickson's seminal case study of ranchers in Shasta County, California, he observed that the ranchers adhered to informal social norms in their practices rather than relying on "legally established entitlements."<sup>75</sup> Norms also serve to fill voids created by formal legal systems.<sup>76</sup> This includes the two areas that this Note will explore in further depth: stand-up comedy and open-source software.

Scholars have drawn distinctions as to the functions of norms within groups of different sizes. In his work in Shasta County, Ellickson hypothesized that "members of a *close-knit group* develop and maintain norms whose content serves to maximize the aggregate welfare that members obtain in their workaday affairs with one another."<sup>77</sup> Ellickson's hypothesis relies on an assumption that individuals who interact regularly will rationally choose to abide by a collectively beneficial set of rules. However, Ellickson noted that such a hypothesis might not be useful in predicting the types of norms that might arise among loose-knit groups, typically composed of members who do not repeatedly interact and whose reputations are not well known to other group members,<sup>78</sup> or intermediate-knit groups, where members of a group are known to some but not to others.<sup>79</sup> In these types of environments, group members are not so strongly incentivized to act to the group's benefit. Some scholars have considered the so-called "conditional cooperation hypothesis" to explain cooperation in loose-knit groups. Under this theory, members of loose-knit groups cooperate based on reciprocation of behavior that benefits the group's collective interests.<sup>80</sup> However, this area of literature is relatively underdeveloped, particularly in the area of intermediate-knit

---

73. See Sunstein, *supra* note 56, at 964–65.

74. Lessig, *supra* note 59, at 665–66.

75. ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* 4 (1991).

76. See Hetcher, *supra* note 69, at 1875 (citing ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* 132 (1991)).

77. ELLICKSON, *supra* note 75, at 167 (emphasis added).

78. Lior Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359, 360–61 (2003) (citing ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* 167–69, 180–81 (1991)).

79. See *id.* at 366 ("An individual is likely to participate in all of these social settings accompanied by people he knows, yet the vast majority of the people near him will be strangers.").

80. *Id.* at 364 (quoting Dan M. Kahan, *The Logic of Reciprocity: A Theory of Collective Action and Law* 2 (unpublished manuscript)).

groups, and thus is not entirely conclusive as to the formation of social norms under such impersonal circumstances.

C. *The Adaptation of Social Norms with Regard to IP Law*

There has been relatively little discussion dedicated to whether the adaptability of social norms, compared with the rigidity of the formal legal system, actually produces greater benefits in terms of innovation. Jennifer Rothman has made a major contribution to the discourse in her work regarding the role of custom in IP law.<sup>81</sup> Rothman questions the adoption of custom, both by IP owners and courts, within the framework of the formal legal structures governing IP. Rothman is particularly critical of the fact that custom has in some cases assumed the role of evidence of market effects, commerciality, and damages.<sup>82</sup> Her work rejects the idea that custom should necessarily serve as a proxy for what should be done or what is generally done when a court assesses whether a practice is reasonable.<sup>83</sup> Rothman also warns that incorporation of customs by the law creates a “lock-in effect,” which serves to entrench both beneficial and detrimental customs.<sup>84</sup> In essence, she takes issue with the adoption of custom as a kind of *de facto* IP law. Rothman examines two kinds of customs that influence IP rights: customs to avoid litigation in the face of uncertain legal outcomes, and customs that create an ideal or aspirational allocation of IP rights for the group generating the custom.<sup>85</sup>

With regard to litigation-avoidance customs, Rothman points to one custom in particular—known as the “clearance culture”—that continually drives potential litigants to avoid filing suit. This firmly entrenched customary practice encourages users of protected works to license or seek permission for use, even where they might otherwise have a strong legal defense for using without authorization.<sup>86</sup> Additionally, Rothman points to other issues generated by the clearance culture: licensing negotiations may be too costly for some artists (particularly those seeking to use highly valuable works), or an owner may choose not to license at any price (for instance, because the owner disapproves of how the work will be used).<sup>87</sup> Consequentially, the per-

---

81. See Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007) (describing customs to include social and communal norms).

82. See *id.* at 1931–44 (describing the incorporation of custom into IP law).

83. *Id.* at 1946–67 (offering a critique of the widespread use of custom in IP law).

84. *Id.* at 1955.

85. *Id.* at 1909.

86. *Id.* at 1911–12.

87. See *id.* at 1916.



ceived need for clearance creates an extra-legal barrier to building on existing works. These barriers may lead users initially seeking to use protected works to profoundly alter their intentions, or even to abandon their project altogether for fear of possible litigation.<sup>88</sup>

Rothman also considers areas in IP where groups may disfavor the enforcement of formal IP law in favor of norms. Where traditional IP laws are difficult to enforce, community norms arise to fill the legal vacuum.<sup>89</sup> According to Rothman, these norms often reflect the “preferred distribution of rights in intangible goods” among group members.<sup>90</sup> Yet this does not always lead to a fair distribution of IP rights. Rothman stresses that custom within IP is driven by the most powerful owners, and generally neglects the interests of less powerful owners and the public.<sup>91</sup> When social norms are perpetuated from the top-down, reliance on these norms may lead to a suboptimal balance between innovation and access on the one hand, and enforcing the rights of creators on the other. Furthermore, Rothman argues that any industry custom will necessarily exclude the interests of the public in accessing such works.<sup>92</sup> Customs to avoid litigation or conflict ignore legal entitlements or optimal distribution of resources, instead reflecting a cost-effective and risk-averse view of repeat players.<sup>93</sup>

Not all customs are bad, according to Rothman. She offers six “vectors” along which to judge whether a particular custom is likely to promote fairness and reasonableness: (1) The certainty of the custom, or whether the practice is identifiable and the custom is widely accepted or practiced;<sup>94</sup> (2) the motivation for the custom, including whether a custom is motivated by litigation avoidance, relationship preservation, non-normative considerations, or aspirational purposes (which Rothman favors);<sup>95</sup> (3) the representativeness of the custom, or how wide a spectrum of interests the custom takes into account;<sup>96</sup> (4) how the custom applies in practice; (5) to whom the custom applies;<sup>97</sup>

---

88. *Id.* at 1912.

89. *Id.* at 1924.

90. *Id.*

91. *Id.* at 1957.

92. *See id.* at 1948 (noting that “[t]he ultimate justification for the protection is to produce works that the public can enjoy,” but that “[i]f IP ownership rights were absolute, then this constitutionally protected goal would be thwarted”).

93. *Id.* at 1951–52.

94. *Id.* at 1968.

95. *Id.* at 1970–71.

96. *Id.* at 1972 (“[W]hen a custom develops with input and participation of both IP owners and users and large and small players in the IP industries, it is more meaningful.”).

97. *Id.* at 1974–76.

and (6) the implications of the custom's adoption, i.e., the question of whether it would result in the reasonable allocation of use and ownership rights.<sup>98</sup>

Richard Epstein has offered a defense of custom in response to Rothstein. He argues that IP law should favor certain customs, particularly negotiated licenses or other clearance culture practices, which offer a beneficial efficiency.<sup>99</sup> Epstein emphasizes the need for "stable institutional arrangements to deal with mass transactions."<sup>100</sup> Rather than reject custom altogether, Epstein suggests waiting for systematic industry dissatisfaction with the current system of customs, by either or both small and large IP players. Instead of eliminating custom from IP law, the focus should be on clarifying the bounds of custom.<sup>101</sup> Epstein points out that while Rothman's concerns are real, they are somewhat overstated in their preference for the complete abolition of custom from IP law.

Despite such critiques, there is still much to be gleaned from Rothman's work on custom and its contribution to the discussion on the adaptability of social norms. For one thing, her work demonstrates how customs may grow to fill legal voids or uncertainty in undesirable ways. Adaptability may sometimes work against the best interest of the vast majority of group members. The attention that Rothman draws to the lack of public input in the formation of custom leads to an interesting question of whether this is always the case, or if this matters at all. While Rothman's discussion is couched in terms of custom's role within a formal legal structure, her observations of the potential downsides of how custom might adapt in these settings are useful in determining whether norms formed in groups outside or tangential to the law do indeed strike an optimal balance between innovation and protection of the creator's rights. The following Parts consider the role of custom and social norms in specific industries to determine in what ways informal rules against copying affect group members and their creative expression.

### III.

#### COMEDY AND THE EFFECT OF SOCIAL NORMS

Due in part to the ambiguity surrounding the scope of the Copyright Act, social norms have taken hold over the past several decades

---

98. *Id.* at 1976–77.

99. Richard A. Epstein, *Some Reflection on Custom in the IP Universe*, 93 VA. L. REV. IN BRIEF 207, 210 (2008).

100. *Id.* at 211.

101. *Id.* at 213.

in a number of creative communities. In the remainder of this Note, I explore these social norms in two important areas—stand-up comedy<sup>102</sup> and open-source software. In doing so, I address some of the unresolved debates about the value of the adaptability of social norms in regulating behavior. I start here by discussing stand-up comedy, beginning with its roots and proceeding to social norms in the present day.

### A. *A Brief History of Comedy*

Today's stand-up tradition can be traced to the vaudeville, minstrel, and burlesque shows of the late nineteenth and early twentieth centuries.<sup>103</sup> In the 1920s and 1930s, vaudeville performers moved their acts from the stage to the emerging forms of media: radio and film.<sup>104</sup> With these transitions, comics went from minor players in variety shows to headline performers.<sup>105</sup> These acts also transitioned to live and full-form stand-up shows in nightclubs, hotels, and casinos.<sup>106</sup> The style of these first stand-up acts consisted of the comic delivering joke after joke, covering a variety of subjects without narrative or thematic ties to one another.<sup>107</sup> Timing was key, and jokes were drawn from large archives written by the comic as well as hired writers.<sup>108</sup> Notably, during this early period joke theft was common, as was reusing material.<sup>109</sup>

This rapid-fire delivery remained the dominant form of stand-up comedy until mid-century. Starting in the 1950s, acts shifted from long strings of jokes to a more individualized narrative, usually delivered in the form of a monologue.<sup>110</sup> Some of these comics, particularly Lenny Bruce, openly rejected the old form of comedy, opting instead for less family-friendly acts that reflected the shifting social,

---

102. Dotan Oliar and Christopher Sprigman have conducted an extensive study defining and explaining the effect of the social norm system governing stand-up comics. See Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008). As such, much of what they have discovered will serve as the basis for this Note's analysis of the adaptability of social norms and whether this fluidity allows for greater innovation.

103. *Id.* at 1842.

104. *Id.* at 1846.

105. *Id.* at 1847.

106. *Id.* at 1846–47.

107. *Id.* at 1847.

108. *Id.* at 1848.

109. *Id.* at 1849–50 (noting that some comics admitted to, and joked about, stealing other comics' material).

110. *Id.* at 1850.

racial, and sexual boundaries of the time.<sup>111</sup> The focus on individualized storytelling, strongly connected to the comic's (performance) identity, remains the predominant form of stand-up comedy today.<sup>112</sup> Another important shift in the comedy world is the premium that comedians place on originality, as joke theft is now strongly condemned within the community.<sup>113</sup> Changes in technology have also accompanied the evolution in popular comedic style. These changes in technology—such as television and eventually the Internet—meant that a comedian's material could quickly and easily reach millions of viewers or listeners. The ease of dissemination and access means that a joke thief can easily infiltrate the marketplace, rendering a joke valueless to the originator.

*B. The Emergence of Social Norms Without Legal Protection*

The potential harm posed by joke theft means that comedians place a high value on protecting their material. It is possible to protect some aspects of jokes and stand-up routines under the Copyright Act. While no provision is made for comedic material specifically, it is possible to fix individual jokes or routines in a tangible medium of expression—such as in a book or performance. However, comedic material runs into doctrinal barriers that prevent robust protection. Most notable is the idea/expression distinction. To many comics, the idea of the joke is more important than the joke itself.<sup>114</sup> Copyright law only offers protection to the actual expression of that idea—for stand-up material, it likely only protects the comic's precise expression.<sup>115</sup> Since there is more than one way to tell a joke about a given idea, the possibility of independent creation is quite high.<sup>116</sup> From current affairs to even the most mundane topics, it does not seem unusual for comedians to come up with similar, if not almost identical, jokes.<sup>117</sup>

---

111. *Id.* at 1850–51.

112. *Id.* at 1852.

113. *Id.* at 1853.

114. For example, when asked whether the expression or underlying idea of a joke was more important, comedian Jeff Foxworthy stated, “Well, I mean the idea is key in coming up with the wording. You need—the idea comes first and then you play with it to get the wording correct.” *Foxworthy v. Custom Tees, Inc.*, 879 F. Supp. 1200, 1219 (N.D. Ga. 1995).

115. See *supra* notes 13–16 and accompanying text.

116. See *Oliar & Sprigman*, *supra* note 102, at 1804 (“Copyright in jokes will sometimes be difficult to enforce because of the difficulty of proving copying rather than independent creation.”).

117. For example, comic Patton Oswalt discussed coming up with a joke about Hot Pockets, only to find out later that fellow comedian Jim Gaffigan already told a rather

Even if stand-up routines receive some limited protection from the Copyright Act, few if any comedians rely on litigation as a means to enforce ownership over comedic material.<sup>118</sup> Comedians are likely aware of the possible protection the law could provide, and much of their industry relies on copyright protection—for instance, of TV broadcasts of routines, comedy records, and book deals. However, there are a few practical and quite substantial barriers to using the copyright system. The sheer expense associated the copyright system is quite daunting, especially for a comic just starting his or her career.<sup>119</sup> Litigation is not only expensive, but also time-consuming, and it involves a complex area of federal law requiring specialized knowledge.<sup>120</sup> At base, as Dotan Oliar and Christopher Sprigman note, the potential return in terms of damages is too small to justify the enormous expense of litigation.<sup>121</sup> This combination of little legal protection and substantial practical barriers to bringing litigation means that comedians generally do not rely on formal legal protections to prevent joke theft. Rather, they rely on informal protections.

### C. *The Emergence of the Norms Protecting Against Joke Theft*

To fill the void in formal legal protections, comedians have come to rely on a system of self-regulation to prevent the unauthorized copying of their material. Through an extensive study of the norms governing copying in the stand-up comedy world including interviews

---

well-known joke about the same microwaveable snacks. See Patton Oswalt, *Thievery, Heckling, and Rape Jokes*, SLATE (June 16, 2003), [http://www.slate.com/articles/arts/culturebox/2013/06/patton\\_oswalt\\_on\\_rape\\_jokes\\_joke\\_stealing\\_and\\_heckling.html](http://www.slate.com/articles/arts/culturebox/2013/06/patton_oswalt_on_rape_jokes_joke_stealing_and_heckling.html). Even more recently, Jimmy Fallon and Jimmy Kimmel told virtually the same joke, on the same night, about singer Miley Cyrus following her performance at the MTV European Music Awards:

[Fallon:] Most people were like, “Well, at least she kept her tongue in her mouth.”

[Kimmel:] I’m just thankful she found something to keep her tongue in her mouth for a few seconds.

*Jimmy Fallon & Jimmy Kimmel Told the Same Miley Cyrus Joke*, HUFFINGTON POST (Nov. 12, 2013), [http://www.huffingtonpost.com/2013/11/12/jimmy-fallon-jimmy-kimmel-miley-cyrus-joke\\_n\\_4261955.html](http://www.huffingtonpost.com/2013/11/12/jimmy-fallon-jimmy-kimmel-miley-cyrus-joke_n_4261955.html).

118. See Oliar & Sprigman, *supra* note 102, at 1798.

119. Allan D. Madison, *The Uncopyrightability of Jokes*, 35 SAN DIEGO L. REV. 111, 113–14 (1998) (noting the sheer expense that would result from attempting to copyright every single joke or routine, and the fact that by the time a litigation is resolved, a comedian’s career might be over). The cost of registering a copyright today is \$85, or \$35 if done online. See U.S. COPYRIGHT OFFICE, CIRCULAR 4: COPYRIGHT OFFICE FEES 2 (2014), <http://copyright.gov/circs/circ04.pdf>.

120. Oliar & Sprigman, *supra* note 102, at 1799.

121. *Id.* at 1799–1800.

with nineteen comics, Oliar and Sprigman revealed three generally accepted norms that govern the protection of comedic material. The first is a norm against the appropriation of jokes, routines, or ideas.<sup>122</sup> This is broader than a precise, word-for-word copying; the norm also protects against the plagiarism of ideas regardless of attribution.<sup>123</sup> It is important to note that as of now, this norm seems to ensure the indefinite protection of such ideas.<sup>124</sup> Second, the originator of a joke's premise owns that joke.<sup>125</sup> Despite the fact that more than one comedian might have worked to come up with the final joke, there is no joint authorship.<sup>126</sup> Finally, exclusive ownership is given to the comedian who first performs the joke on television, and other comedians performing the same or similar jokes in their non-televised routines will usually cease using the performed joke.<sup>127</sup>

Like any system of social mores these norms function as a method of regulation through community enforcement. Among comedians, detection is carried out not only by the joke's creator, but also by other comedians.<sup>128</sup> Once the creator is alerted to the fact that another comedian is performing the same or similar jokes, there is usually a "negotiation" in which one comedian, sometimes even the creator, agrees to drop the joke.<sup>129</sup> If no agreement can be reached, an alleged joke thief may face a number of community sanctions. Confrontations between a creator and an accused joke thief may result in the threat or use of violence, an enforcement mechanism that while rare, appears to be accepted by the community.<sup>130</sup> More frequently, the alleged thief might be publicly shamed, by other comedians or savvy fans, to other comics or the public.<sup>131</sup> Other comedians might

---

122. *See id.* at 1812.

123. KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* 105–06 (2012).

124. Oliar & Sprigman, *supra* note 102, at 1823–24.

125. *Id.* at 1825.

126. *Id.*

127. *Id.* at 1826.

128. *Id.* at 1813.

129. *See id.* at 1814.

130. *See id.* at 1819–20.

131. For example, Patton Oswalt took to his blog at length to publicly shame an almost unknown comedian by the name of Nick Madson for lifting his jokes almost verbatim in his routines, referring to Madson numerous times as (among other things) a "thief," and stating that other comedians performing at the same benefit as Madson alerted Oswalt to the use of his material. *See ASSHOLERY!*, PATTON OSWALT (May 1, 2010, 1:01 AM), <http://www.pattonoswalt.com/index.cfm?page=spew&id=144>. Additionally, the now-famous instance of Dane Cook allegedly stealing jokes from Louis C.K. received so much attention that C.K. wrote a confrontation into his television series *Louie*. *See* Sean L. McCarthy, *Dane Cook Confronts Louis CK in an Honest Way About Joke Theft*, COMIC'S COMIC (Aug. 5, 2011), <http://thecomicscomic.com/>

refuse to work with an accused joke thief, or those in charge of booking talent in comedy clubs might refuse to book an accused thief.<sup>132</sup> There is consistency in terms of which norms govern the stand-up community, and none of Oliar and Sprigman's interviewees could point to an exception or limitation within the norms system.<sup>133</sup>

While effective at limiting joke theft, the norms system does result in some inequities in terms of enforcement. It is almost impossible to escape the label of joke thief once it has been leveled, whether or not the label is accurate.<sup>134</sup> Some comics note that enforcement can be difficult when the appropriator is much more well-known than the originator; thus, "Fame, in short, is at least a partial escape from the norms system."<sup>135</sup> Another difficulty for enforcement arises from the fact that those outside the group can escape social sanction. This stems in part from the fact that audience members generally do not care from whom a funny joke originated,<sup>136</sup> and also from the fact that comedy writers outside the stand-up community—such as television or film writers—often steal jokes without attribution.<sup>137</sup>

#### D. *Why Have Social Norms Adapted This Way in Comedy?*

The norms system provides a far broader scope of protection than that which is offered by copyright laws. The norms protect the ideas behind a joke from appropriation indefinitely and function as highly restrictive rules on the use of ideas, imposing dire sanctions on accused violators. But does the formation of norms to protect against copying among members of the stand-up community create the optimal balance between public access and protection to incentivize innovation? In examining the balance struck by any norms system, it is essential to consider whom the norms favor and who the main enforcers are. As Jennifer Rothman argues in her response to Oliar and Sprigman's findings, "comedy norms do not appear to be driven by

---

2011/08/05/dane-cook-confronts-louis-ck-in-an-honest-way-about-joke-theft-read-the-transcript-watch-the-video/ (including video and a transcript of the clip).

132. Oliar & Sprigman, *supra* note 102, at 1815–16.

133. *Id.* at 1828.

134. For example, famed comedian and actor Robin Williams admitted to avoiding comedy clubs because of the backlash attached to being accused of joke theft more than a decade ago. *Id.* at 1838. Elizabeth Bolles also discusses originators who have been labeled joke thieves and "blackballed" after being accused by the thieves. This is a situation in which, she argues, the norms system fails to provide any kind of "due process." Elizabeth Moranian Bolles, *Stand-Up Comedy, Joke Theft, and Copyright Law*, 14 TUL. J. TECH. & INTELL. PROP. 237, 254–55 (2011).

135. RAUSTIALA & SPRIGMAN, *supra* note 123, at 115.

136. *Id.* at 115.

137. Bolles, *supra* note 134, at 255.

interest in a fair allocation of rights,” as they focus solely on the creator of the joke rather than “the potential needs of users or independent creators of similar or related jokes.”<sup>138</sup>

This intense focus on originality in the development of stand-up norms has considerable effects on the type and distribution of creative output within the community. First, the norms limit creativity by favoring truly original material over variations on familiar themes. This in turn limits how much and how quickly material is produced, since original stand-up routines take far longer to write than any one-liner.<sup>139</sup> In essence, the market is artificially limited by stand-up norms. Rothman also takes issue with the characterization by group members that appropriation, even of only a similar joke concept, is “stealing” or “joke theft.” She characterizes the norm on appropriation as a “prohibition on anything that comedians perceive as similar to, even if not originating with, a joke that another comic has told.”<sup>140</sup> Thus, according to Rothman’s view, appropriation is not so much “theft” as it is a crime of being too similar. As a result, the norm does not protect the comedian who can tell a joke best, but rather who told the joke first.<sup>141</sup> In this light, the norm looks less like a protection against the kind of copying that the IP system seeks to disincentivize through protection, and more like a source of the kind of idea/expression problem that copyright law disfavors on the ground that it inhibits innovation. This is not to suggest that there is no innovation or creativity in the stand-up world; in fact there is quite a lot. However, the existence of this limitation suggests that the world of stand-up is made artificially smaller, both in terms of material that can be written about and those who can participate.

This leads to the broader question: who in the comedy world really benefits from the norms system? Comedians work in what Lior Strahilevitz would refer to as an “intermediate-knit group,” consisting of members both known and unknown to one another.<sup>142</sup> However, this is not a complete description of the comedian community. One of the defining characteristics of this community, which is not necessarily present in all intermediate-knit groups, is that the members are familiar to the public and other comedians. Moreover, the loudest proponents of the anti-copying norms are arguably some of the most well-

---

138. Jennifer E. Rothman, *Custom, Comedy and the Value of Dissent*, 95 VA. L. REV. IN BRIEF 19, 22 (2009).

139. RAUSTIALA & SPRIGMAN, *supra* note 123, at 124.

140. Rothman, *supra* note 138, at 25.

141. *See* Bolles, *supra* note 134, at 256.

142. *See* Strahilevitz, *supra* note 78, at 365.



known in the stand-up community.<sup>143</sup> Importantly, the norms system has the greatest effect not on the most well-known comics, who can potentially escape sanctioning,<sup>144</sup> but rather on lesser-known comics who are sometimes accused of using more well-known comics' work.<sup>145</sup> Oliar and Sprigman suggest that such a stringent norms system is a result, at least in part, of how jokes are delivered by modern stand-up comedians. Technological changes in mass communication, such as television and the Internet, have made the potential for market saturation vastly broader than in the days of radio and vaudeville.<sup>146</sup> In essence, once a joke has been told publicly, its value diminishes greatly due to the wide audience that has already heard the material. According to Oliar and Sprigman, this drives comedians to establish property rights in their material early and vigorously.<sup>147</sup> They argue that without the prevailing norms system, a free-for-all would result: there would be reduced incentives to write good jokes or perfect material, and comedians would instead revert to retelling jokes or using unfinished material.<sup>148</sup> Yet there is reason to question this conclusion. Oliar and Sprigman point to numerous examples of jokes, perhaps almost identical jokes, being retold by separate comedians, arguably without devaluation by the marketplace.<sup>149</sup> In fact, it is possible that without their study, we, as the audience, might not even know such appropriation ever took place.

Ultimately, an examination of social norms in stand-up comedy leaves the impression that it has adapted in a way that has resulted in a less-than-optimal arrangement. A full analysis of how this came to be is beyond the scope of this Note, but it is possible to offer some brief considerations. Adaptability has created a fairly closed system of innovation that forbids not only direct copying, but also the appropri-

---

143. Well-known comics like Joe Rogan, Patton Oswald, and George Lopez have all publicly accused others of joke theft. See Oliar & Sprigman, *supra* note 102, at 1796–97, 1821 (discussing Rogan and Lopez); *THIEVERY!*, PATTON OSWALT (Apr. 30, 2010), <http://www.pattonoswalt.com/index.cfm?page=spew&id=143> (Oswalt's accusations of joke theft).

144. Dane Cook, for instance, emerged from allegations of plagiarism largely unscathed. He recently completed a national tour and voiced a character in the 2013 Disney film *Planes*.

145. See generally *supra* note 138 and accompanying text.

146. Dotan Oliar & Christopher Sprigman, *From Corn to Norms: How IP Entitlements Affect What Stand-Up Comedians Create*, 95 VA. L. REV. IN BRIEF, 57, 64 (2009).

147. See *id.*

148. *Id.* at 65.

149. See Oliar & Sprigman, *supra* note 102, at 1804 (describing an instance in which four different comedians told very similar jokes involving the planned fence along the United States-Mexico border).

tion of similar ideas. I argue this can be attributed partly to technological changes and the unique makeup of the stand-up community. Protection is broad, perhaps overly so, and controlled mainly by a small group of fairly successful and well-known male comics. The fewer people at the top of a particular industry, the greater the incentive to set limits to police the works produced within the industry to their benefit, even to the detriment of others. A parallel may be drawn here to the discussion in Part I.D regarding limited control of music sampling. Tight control, in the hands of few, dictates the type of innovation and the degree of innovation. While this does not mean innovation comes to a screeching halt, we might question whether the adaptability of social norms in this context properly incentivizes the full scope of creativity that intellectual property frameworks seek to ensure. For now, it is enough to suggest that even intermediate-knit groups may be subject to norms systems put in place to benefit a smaller group of close-knit members who, through their notoriety and influence in the group, can impose restrictive norms with little dissent.

#### IV.

##### OPEN-SOURCE SOFTWARE

###### *A. Software and Protection Under the Copyright Regime*

Unlike comedic material, the Copyright Act explicitly protects software. Amendments passed to the Copyright Act in 1980 provide protection to a computer program, which is defined as “a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.”<sup>150</sup> Computer programs can be divided into two distinct types of code, each protected by the Copyright Act. Copyright protection includes both source code (i.e., the high-level, human-readable language of a program) and object code, (i.e., the binary language of “1s” and “0s” that is readable only by the computer).<sup>151</sup> However, lines of code are protected only “to the extent that they embody an author’s original creation,” thus the scope of protection is left to the interpretation of courts.<sup>152</sup> Perhaps consequently, there is little consensus among courts as to the scope of this copyright protection, and the protection courts have found is offered is generally

---

150. 17 U.S.C. § 101 (2013).

151. *See* *Apple Comput., Inc. v. Franklin Comput. Corp.*, 714 F.2d 1240, 1243, 1249 (3d Cir. 1983).

152. Brett Frischmann & Dan Moylan, *The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and Its Application to Software*, 15 BERKELEY TECH. L.J. 865, 904 (2000) (citing NAT’L COMM’N ON THE NEW TECH. USES OF COPYRIGHTED WORKS, FINAL REPORT 1 (1980)).

quite weak. For instance, in *Computer Associates International, Inc. v. Altai, Inc.*, the Second Circuit noted:

To be frank, the exact contours of copyright protection for non-literal program structure are not completely clear. We trust that as future cases are decided, those limits will become better defined. Indeed, it may well be that the Copyright Act serves as a relatively weak barrier against public access to the theoretical interstices behind a program's source and object codes. This results from the hybrid nature of a computer program, which, while it is literary expression, is also a highly functional, utilitarian component in the larger process of computing.<sup>153</sup>

Courts have been hesitant about applying copyright protection to computer code because the Copyright Act is meant to protect creative works of authorship. It is not immediately clear whether computer code, which serves the more utilitarian function of providing a set of instructions to a human or computer, fits this definition.

In order to address this uncertainty, courts have responded by incorporating the idea/expression distinction into their analyses.<sup>154</sup> This generally involves a process of abstraction and filtration. Abstraction requires that the code be broken down into its requisite elements, such as its main purpose, the program structure, modules, algorithms and data structures, source code, and object code. Then the court filters out the non-protectable aspects of the software, such as the unoriginal elements, *scenes a faire*, elements dictated by efficiency, functionality, compatibility, or target industry practices. Finally, the court looks to the remaining elements to see if infringement has in fact occurred.<sup>155</sup> This process generally yields very little purely copyrightable material. This is largely due to the fact that copying is essential to the nature of software.<sup>156</sup> As one commentator explained, “[T]o use a computer you have to copy. You have to copy to screen. You make a backup copy to start. Everything you do is copying. So it seems ridiculous to have a copyright law that is applied to something in which you really want to encourage copying.”<sup>157</sup> As such, formal copyright offers limited protection to software.

---

153. *Comput. Assocs. Int'l v. Altai, Inc.*, 982 F.2d 693, 712 (2d Cir. 1992).

154. Benjamin I. Narodick, *Smothered by Judicial Love: How Jacobsen v. Katzer Could Bring Open Source Software Development to a Standstill*, 16 B.U. J. Sci. & TECH. L. 264, 268 (2010).

155. *See id.* (citing *Cavalier v. Random House, Inc.*, 297 F.3d 815, 823 (9th Cir. 2002)); *see also Comput. Assocs. Int'l*, 982 F.2d at 706.

156. *See Narodick, supra* note 154, at 269.

157. *Id.* (quoting Anne W. Branscomb et al., *Panel One: Information Issues: Intellectual Property, Privacy, Integrity, Interoperability, and the Economics of Informa-*

### B. *The Open-Source Movement*

While open-source is generally associated with software, it can be used to describe any number of collaborative and shared productions. Since software is protected—though thinly—under the Copyright Act, its protectable aspects can be licensed for use under section 201(d)(1)'s broad allowance for transfers.<sup>158</sup> Yet, open-source licensing turns copyright protection on its head. Unlike other areas of copyright, where licenses seek to promote exclusivity and prevent modification of the original work, an open-source software license provides users with broad license to copy and modify software, with a limited set of conditions. These licenses generally allow for free use, copying, modification, and redistribution of both the original and modified versions of the software by making the original source code freely and easily accessible.<sup>159</sup> One important limitation is that any modified code must be made available under the terms of the original license of the source code from which the modified version is derived, limiting the modifier's ability to place restrictions on the use of redistributed versions of the original code.<sup>160</sup>

The origins of the open-source movement lie in the software industries of the 1970s and 1980s, when private companies developed software to be licensed under extremely broad terms.<sup>161</sup> Under traditional intellectual property incentives, companies were generally interested in keeping their codes secret to maintain value.<sup>162</sup> In the pre-open-source software industry:

Software development has traditionally been conducted in acute secrecy and subject to strict confidentiality, development, proprietary and non-disclosure agreements. Source code, always considered the “crown jewel,” has been vigorously protected. Most source code

---

*tion*, 48 FED. COMM. L.J. 5, 16 (1995) (transcript of remarks of Anne W. Branscomb, Senior Scholar in Residence at the University of Pennsylvania).

158. See 17 U.S.C. § 201(d)(1) (2013).

159. See generally *The Free Software Definition*, GNU OPERATING SYS., <http://www.gnu.org/philosophy/free-sw.html> (last visited Apr. 6, 2015) (explaining the concept of “free software”).

160. See *The Open Source Definition*, OPEN SOURCE INITIATIVE, <http://opensource.org/docs/osd> (last visited Apr. 6, 2015).

161. See Timothy K. Armstrong, *Shrinking the Commons: Termination of Copyright Licenses and Transfers for the Benefit of the Public*, 47 HARV. J. ON LEGIS. 359, 368 & n.46 (2010) (offering the example of the widely used Unix operating system developed in 1969, under “quite liberal licensing terms”).

162. See Greg R. Vetter, *The Collaborative Integrity of Open-Source Software*, 2004 UTAH L. REV. 563, 596.

disclosures occur only after a narrowly defined source code escrow release condition has been triggered.<sup>163</sup>

It wasn't until 1998 that the term "open-source" was coined,<sup>164</sup> coinciding with faster and cheaper Internet access. Whereas legal and technological constraints had previously limited the pool of software developers, broad Internet access created an environment for innovation where most of the world constituted a possible talent pool by allowing the inexpensive and quick flow of information between users.<sup>165</sup> The open-source movement sought to capitalize on this pool to create code that would be superior to closed-source code, or code written by commercial developers, while simultaneously enabling the creator to retain some control over the developmental and distribution process.<sup>166</sup>

There are significant advantages to structuring a license to promote rather than discourage dissemination. It encourages progress based on uses that generally would be considered infringement under the formal copyright regime.<sup>167</sup> Additionally, it significantly reduces transaction costs among potential users and copyright owners by offering works under a uniform set of terms without the need for individualized bargaining, and also reduces the time and sophistication required of a potential user in understanding the license's requirements.<sup>168</sup> Most importantly, these licenses promote the free access to information, regardless of exclusive rights. This freedom of access promotes innovation by encouraging the "tweaking" of existing software to create smoother and more efficient programs.<sup>169</sup> Developing code in a regime of open access allows users of all skill levels to

---

163. Harry Rubin & Jason Isaacs, *The Myths and Realities of Open Source Code Licensing: Business and Legal Considerations*, CYBERSPACE LAW. (Glasser LegalWorks, Little Falls, N.J.), May 2003, at 2.

164. *History of the OSI*, OPEN SOURCE INITIATIVE, <http://opensource.org/history> (last revised Sept. 2012).

165. See ERIC S. RAYMOND, *THE CATHEDRAL & THE BAZAAR* 51 (2001) (noting that Linux was the first effort to utilize the scope of the Internet as a base to promote open-source participation).

166. Kristina N. Spencer, *Using Copyright Remedies to Promote Efficiency in the Open Source Regime in Wake of Jacobsen v. Katzer*, 6 J.L. ECON. & POL'Y 63, 64 (2009).

167. See Armstrong, *supra* note 161, at 356 ("Absent authorization (or other legal excuse such as fair or de minimis use), reproducing, distributing, or modifying a work infringes the author's copyright. Open-content licenses make such otherwise infringing activities lawful and thereby facilitate uses of works that federal law would ordinarily prohibit.").

168. See *id.*; discussion *supra* Part I.D (summarizing the major copyright issues in music licensing, specifically those involved in sampling).

169. See RAUSTIALA & SPRIGMAN, *supra* note 123, at 190 (noting the transparency and quality of open-source leads tweekers to improve on existing code); accord RAY-

create improvements faster and more efficiently than any single software copyright holder could achieve.<sup>170</sup>

While some might doubt that making software freely available can generate substantial monetary incentives to contribute to open-source projects, the success of open-source software demonstrates otherwise. For instance, the Linux operating system is run in about 25 percent of all corporate servers, and it is estimated that \$1.4 billion would be required to cover the development of the Linux kernel alone.<sup>171</sup> The open-source model provides opportunities to monetize other aspects of the software industry aside from the code itself. For instance, Red Hat, a contributor to the continuous development of Linux, also offers consulting services related to Linux operations.<sup>172</sup> Red Hat has reportedly earned over \$1 billion in annual revenues in recent years.<sup>173</sup> An additional motivation important in the creation of open-source software projects is competition with existing firms.<sup>174</sup> For instance, IBM invests millions in open-source development in order to prevent market monopolization by Microsoft's Windows Server Operating system.<sup>175</sup>

### C. Norms Governing Open-Source Projects: Attribution and Sharing

While open-source software is primarily governed by licenses, the community of contributors to open-source software is also governed by a set of norms. These include the norm of attribution and the norm of sharing. These norms are reflected in open-source licenses, which are violated when code is used in such a way as to attempt to gain exclusive control over its use or through misattribution.<sup>176</sup> These norms attempt to address a particularly serious threat to the open-

---

MOND, *supra* note 165, at 24 (“Good programmers know what to write. Great ones known what to rewrite (and reuse).”).

170. Spencer, *supra* note 166, at 64.

171. Amanda McPherson et al., *Estimating the Total Development Cost of a Linux Distribution*, LINUX FOUND. 1 (2008) <http://www.linuxfoundation.org/sites/main/files/publications/estimatinglinux.pdf>.

172. RAUSTIALA & SPRIGMAN, *supra* note 123, at 187.

173. Robert McMillan, *Red Hat Becomes Open Source's First \$1 Billion Baby*, WIRED (Mar. 28, 2012, 6:30 AM), <http://www.wired.com/2012/03/red-hat/>.

174. See RAUSTIALA & SPRIGMAN, *supra* note 123, at 188; Ronald J. Mann, *Commercializing Open Source Software: Do Property Rights Still Matter?*, 20 HARV. J.L. & TECH. 1, 23 (2006) (describing the “kill Microsoft” motivation).

175. RAUSTIALA & SPRIGMAN, *supra* note 123, at 188.

176. Joseph Eng, Jr., *From Software to Life Sciences: The Spreading of the Open Source Production to New Technological Areas*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 419, 427 (2005).

source community, which may create disincentives for the contributions and cooperation essential to the functioning of volunteer-based innovation.<sup>177</sup>

Social norms “govern ‘ownership’ of open source code: owners are those recognized by the community to have the exclusive right to distribute modified versions.”<sup>178</sup> Original code is generally distributed with the names of the original creator or creators as well as a history of contributors to the code, and removal of any person’s name from the project or its history is “absolutely not done without that person’s explicit consent.”<sup>179</sup> It may seem unusual for a regime that spurs exclusivity to revere the norm of attribution; yet the importance of the right of attribution among open-source participants is obvious when one considers the ease of copying and communication accompanied by the Internet.

There is a big problem for those who wish to attach their name to code that is distributed many hundreds or thousands of times between users. Thus, as Greg Vetter has noted, “it is difficult to keep an attribution fingerprint on the work as copies of it propagate across the internet.”<sup>180</sup> As an initial matter, attribution ensures a kind of reputational reward for participation. Credit in an open-source project has certain “business value,” including increased status among others in the programming community, which in some cases has more value than any pecuniary reward for participation.<sup>181</sup> Attribution also seeks to properly allocate credit for beneficial modifications to the modifier and prevent allocation of blame to the code’s originators for ineffective or detrimental modifications.<sup>182</sup> This serves to prevent any programmer from laying overly broad credit to as many files as possible.<sup>183</sup> It is important to note that despite the fact that attribution is a norm based in moral rights, and thus an extension of formal copyright protection, this norm does nothing to deter the use and modification of the code itself. Moreover, each modifier is entitled to attach his own

---

177. *Id.*

178. Catherine L. Fisk, *Credit Where It’s Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 89 (2006).

179. *Id.* (quoting Eric S. Raymond, *Homesteading the Noosphere*, FIRST MONDAY (Oct. 5, 1998), <http://firstmonday.org/ojs/index.php/fm/article/view/621>).

180. Vetter, *supra* note 162, at 663–64.

181. Fisk, *supra* note 178, at 90; accord Lior J. Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Sharing Networks*, 89 VA. L. REV. 505, 546–47 (quoting Stephen M. McJohn, *The Paradoxes of Free Software*, 9 GEO. MASON L. REV. 25, 42 (2000)).

182. Fisk, *supra* note 178, at 90.

183. *Id.* at 90–91.

name to the code, thus sharing the benefits associated with modification with everyone before and after himself.

The second norm that serves to regulate in the open-source world is the norm of sharing. Sharing is essential not only to dissemination, but also to innovation itself. The norm of sharing is also referred to as a “copynorm,” or norms permitting the copying, distribution, and use of expressive works.<sup>184</sup> Sharing in the open-source software world means promoting “code availability, collaboration among project leaders, developers and users, and a continuing legacy that the source code remain freely useable, modifiable, and shareable.”<sup>185</sup> In addition to the business value potentially associated with participating in open-source projects, community members also seek a reputation for sharing within the group.<sup>186</sup> Therefore, a modifier who keeps his modified version of the code for his exclusive use or who refuses to distribute the code freely is in violation of not only the open-source license, but the copy norms, as well.

These norms are also governed by the same kind of community sanctioning seen in the stand-up comedian community. Following the norms is an important aspect of membership in the open-source community. Sanctions range from informal badmouthing to formal exclusion from the group.<sup>187</sup> However, the norms need not serve as the primary method for regulating compliance within the open-source community due to the existence of open-source licensing. However, these licenses turn the idea of intellectual property protections on their head. Rather than preventing copying, they encourage it, and a violation of license occurs when the license holder refuses to share their work for use by others. The fact that the open-source community has found a way to integrate their extralegal norms into an existing legal framework speaks to the role of informal methods as a means of further incentivizing cooperation with the law.

---

184. Seshadri, *supra* note 58, at 17.

185. Vetter, *supra* note 162, at 699.

186. *Id.* at 630–31 & n.199 (noting that one account of the open-source community is as a gift culture, where esteem in the community is earned according to what members give away).

187. Eng, *supra* note 176, at 427 (citing one example in which patentees sought to assert a patent on open-source code, in response to which community members not only expressed outrage over the Internet, but also submitted prior art to the PTO to be used in the patent litigation).



*D. Understanding Adherence to Social Norms in the Open-Source Context*

Widespread adherence to the norms of attribution and sharing reflect the power of the open-source software movement. Unlike in the past, when software was proprietary information maintained in the hands of a few firms, sharing and attribution now represent a break from privatization and a move towards a more democratic view of innovation. The norms emphasize freedom for programmers to do “things which have been denied them by the status quo of traditional software development.”<sup>188</sup> It also reflects a unique adaptation toward information sharing and protection for creators. Thus, the open-source software norms reflect what Rothman would refer to as an “aspirational” motivation,<sup>189</sup> based on free access and the promotion of innovation, which takes into account the broader community’s interests in sharing.

The openness of these norms also reflects the group from which it was born. Programmers are somewhere between an intermediate- and loose-knit group. They are not all strangers, but there are a vast number of coders around the globe, “most of whom have never met each other.”<sup>190</sup> Importantly, members of the community have worked to create the so-called “hacker ethic.”<sup>191</sup> Group members are strongly committed not only to the free flow of information via sharing, but also to earning the reputational rewards associated with their participation.<sup>192</sup> Community leaders have stressed the importance of building trust among members by emphasizing the importance of reputational standing.<sup>193</sup>

While one might argue that leaders of this community are beneficiaries of a system that relies on non-monetary incentives—indeed, many do gain significant financial advantages from their participation in open-source projects—the inherent lack of hierarchy within the community suggests a “reasonable degree of participation and equality in defining when and how credit will be given in open source as com-

---

188. Vetter, *supra* note 162, at 699.

189. See Rothman, *supra* note 81, at 1971.

190. David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 274 (2010).

191. Dan Burk et al., *Open Source Genomics*, 8 B.U. J. SCI. & TECH. L. 254, 256 (2002).

192. *Id.*

193. Ardia, *supra* note 190, at 274 (“Equally important, open source software developers have created sophisticated systems for building trust among disparate contributors. They have done this by creating protocols that leverage reputation, allowing other developers to evaluate contributors and the pieces of software they create.”).

pared to for-profit software development firms.”<sup>194</sup> The emphasis on reputation also explains the moral right aspects of the norms governing open-source software. Where reputation is valued so highly, attribution signals more than identity to community members; it also serves as an indicator as to the trustworthiness of other participants in any given project. This trust in other community members is essential to a network that can connect users instantaneously across the globe.<sup>195</sup>

Reputation among open-source software users has influenced other communities, particularly in the academic area, to adopt an open-source model of information sharing as opposed to more restrictive traditional IP protections.<sup>196</sup> However, incentives to share do not always lead to incentive to innovate. A study conducted by Mark Lemley and Ziv Shafir found that users of the open-source version of a program were not appreciably more likely than those of proprietary software to report or fix program bugs.<sup>197</sup> The study also found that improved software generally was distributed to the improver’s existing customer base rather than to the broader public.<sup>198</sup> Though this study examines a fairly limited sample, it raises important questions about the strength of the sharing norm and the scope of innovation encouraged in general by open-source software.

Using open-source over proprietary software has additional consequences on the scope of innovation under an open-source system. The wide and frequent distribution of code over the Internet means creators have less control over the trajectory of a work once it has left their hands. It also means less potential value for any single contribution. Despite the fact that a modification might be a great innovation, the norms of attribution and sharing mean the inability to take full credit for any single contribution. In fact, it might be necessary that for a project’s success a “sufficiently large” number of contributors are required for any significant progress.<sup>199</sup> Open-source projects work best when participants are charged with discrete and finite tasks,

---

194. Fisk, *supra* note 178, at 91–92.

195. See Ardia, *supra* note 190, at 274.

196. Rothman, *supra* note 81, at 1930.

197. Mark A. Lemley & Ziv Shafir, *Who Chooses Open-Source Software?*, 78 U. CHI. L. REV. 139, 151 (2011).

198. *Id.* at 151–52 (2011) (reporting on their study that focused on users of software manufactured by a single company to analyze DNA-based laboratory tests conducted using microarrays sold by the same company).

199. See Yochai Benkler, *Coase’s Penguin, or Linux and the Nature of the Firm*, 112 YALE L.J. 369, 434 (2002) (“Given a sufficiently large number of contributions, direct monetary incentives necessary to bring about contributions are trivial.”).

which can be accomplished at their own convenience. Thus, “[p]eer production is limited not by the total cost or complexity of a project, but by its modularity, granularity, and the cost of integration.”<sup>200</sup>

The reliance of open-source projects on voluntary participation by programmers at various levels of expertise requires small tasks that can be completed independently or asynchronously, at a low cost to integrate into the final completed version of any project.<sup>201</sup> Consequently, this limits the successful application of an open-source system to a subset of creative enterprises. It would be hard to imagine completing a book or painting through such disparate and varied participation. These tasks rely on more linear and generally uniform contributions by a single individual. Thus, whether the open-source model promotes a fairer distribution of rights depends on the medium through which information is gathered and shared. As Lemley and Shafir’s study demonstrates, norms that adapt toward a more open regime are not in themselves a cure-all for the problems associated with balancing creators’ rights with promoting innovation.<sup>202</sup> Rather, the adaptation of norms reflects the expansiveness of the medium through which participations and the innovations are made.

## V. IMPLICATIONS

This Note has closely examined the adaptation of social norm systems governing two very different spheres of creativity that lie largely beyond the purview of copyright law. These norms in stand-up comedy and open-source software reflect not only the material produced by their respective creators but also the changes in technology that have made copying substantially easier. Yet, the adaptations in each industry look remarkably different, particularly in terms their views on sharing and copying. Whereas open-source software relies on copying and dissemination, stand-up relies on strictly enforced norms that prevent expressing even similar ideas. These differences can be explained primarily by three factors: group hierarchy, the nature of innovation, and the role of technology.

### A. *Who’s on Top?*

As discussed earlier in this Note, systems of social norms rely on the fact that membership in a group is highly valued by individuals

---

200. *Id.* at 435.

201. *Id.*

202. See Lemley & Shafir, *supra* note 197, at 154.

such that members choose to follow the governing norms rather than risk ostracism.<sup>203</sup> Group makeup is an essential influence on how membership and standing in the group is controlled and how norms evolve. This is especially true in the context of sanctions, which are essential to the effective regulation within a norms system.<sup>204</sup> In closer-knit groups, the effect of sanctions, particularly reputational ones, is arguably stronger than in looser-knit groups; this is because close-knit groups have the distinct feature of group members being widely familiar to one another.<sup>205</sup> While reputation may serve an important function in all types of groups, its role is therefore especially important in close-knit groups. Ellickson hypothesized that in close-knit groups members would abide by norms that collectively benefited the group,<sup>206</sup> yet this doesn't seem to tell the whole story. As Rothman points out in her argument against the use of custom as de facto law, norms do not always adapt to enforce an optimal distribution of rights among group members, but rather the preferred distribution of rights among the group's most powerful members.<sup>207</sup>

In fact, close-knit groups may promote far less egalitarian norms because the effects of hierarchy are much more acutely felt in closer-knit groups. Where reputation means everything, members may be less willing to stray from accepted norms of behavior, which would risk top-down sanctions enforced by more prominent members. This is less problematic in looser-knit groups, where identities are not only unknown but may even be quite fluid, in the case of open-source software for instance. Rights controlled by few will be suboptimal both in terms of their distribution and their openness. This is due in part to greater and more effective enforcement, which has already been discussed.<sup>208</sup> The more stringently anti-copying norms are enforced, the less copying there will be, in any form. Perhaps more importantly, however, those at the top of the hierarchy have every incentive to protect against copying. As Rothman argues, these norms are likely to ignore the benefits of distribution to lesser-known members or the public in general in favor of cost-effective or risk-averse customs.<sup>209</sup> This also means that norms in close-knit groups are in some ways protected against dissent, regardless of disagreement with

---

203. See discussion *supra* Part II.A.

204. *Id.*

205. See generally Strahilevitz, *supra* note 78, at 360.

206. ELICKSON, *supra* note 75, at 4.

207. Rothman, *supra* note 81, at 1957.

208. See, e.g., *supra* notes 134–37 (discussing inequities in the enforcement of social norms among comedians).

209. Rothman, *supra* note 81, at 1957.

the norms among group members due to the effectiveness of sanctions against perceived defectors. This is essentially the case in the world of stand-up comedy, where the label of “joke thief” is almost impossible to shake and can lead to the death of a comic’s career.

On the other hand, loose-knit groups are often too large to really enforce any sort of hierarchy among its members, and sanctions have much less substantial effects. Where norms must encourage compliance among a large and dispersed group of individuals, enforcement and sanctions pose a challenge. Under these circumstances, norms must encourage sufficient participation so that the system becomes somewhat self-enforcing. Norms among loose-knit groups must be more carefully drawn, to encourage vast participation as well as adherence to the norms. Norms encouraging greater sharing offer small rewards for small contributions, without the need for much surveillance. In the open-source software community, enforcement of social norms relies—arguably entirely—on reputation among other community members. But a programmer whose identity is not known among group members is difficult to punish for lack of adherence to the norms. Less emphasis on hierarchy in looser-knit groups also means more openness not only in terms of copy norms, but also in terms of membership generally. While there are certainly programmers who control many of the most valuable works generated in the open-source world, the open-source world is open to anyone with a computer and an idea.

### B. *How Innovations Happen*

Adaptation of social norms can also affect innovation depending on the nature of innovation. This is closely linked to hierarchy within groups, and the role of individual creation. In close-knit groups, the creative process generally relies on significant individual creations. Conversely, innovation within loose-knit groups often relies on the coordination of small and discrete tasks among group members to achieve innovation.<sup>210</sup>

In groups that produce more individualized forms of expression, members may seek help from one another in producing innovations, but innovative works may be created entirely independently of the larger group. The lack of group cooperation on any particular project means that works may take greater time and effort to produce. For

---

210. See, e.g., Benkler, *supra* note 199, 384 (discussing the success of the NASA Clickworkers experiment, in which volunteers marked craters on a map of the Mars landscape).

instance, comedians today tend to write longer, more narrative, jokes for their routines, tailoring each joke unique to their comedic persona.<sup>211</sup> Individualization not only acts as a kind of inherent anti-copying mechanism, but emphasizes the necessity of preventing copying among group members. The more material is copied, the less individual and recognizable it becomes, and thus the greater incentive to adhere to stricter norms against copying.<sup>212</sup> When greater individual creation is necessary, copying means greater loss for any creator who is copied, particularly if the copier mistakenly receives full recognition for the routine. Since individuals in groups that produce individualized forms of expression have more at stake if their creative material is appropriated and distributed, it makes sense that they would enforce a more closed system of information-sharing.

This is a problem that is virtually absent in the kinds of creative works originating from looser-knit groups. In fact, as demonstrated by the open-source example, reputation is essentially dependent on copying and sharing material with others. It is only through widespread dissemination in these groups that any kind of innovation can be realized. As Yochai Benkler has observed, the very nature of these groups means that successful innovation will be dependent on coordination and sorting through a great number of contributions to achieve any goal.<sup>213</sup> Creativity among these groups is most successful when members perform discrete tasks as part of the larger project.<sup>214</sup> As such, individual contributions are important, but no single contribution is of paramount importance. This is reflected in the attribution norms in the open-source context, where modifiers can take credit for only individual contributions while giving credit to the code's originator as well as all the other previous modifiers. The less individualized the creation, and the less valuable any particular contribution becomes, the greater incentive among members to share with one another to produce mutually beneficial innovations.

### C. *Technology*

Present in the background of the above discussion is the role of technology and its effect on copying. The openness of governing so-

---

211. See e.g., RAUSTIALA & SPRIGMAN, *supra* note 123, at 118 (As one comedian notes: "now my jokes are longer too. . . . They generally are two or three minutes long and made up of several paragraphs and so if someone were to steal it word for word it would be quite obvious.").

212. See *id.*

213. See generally Benkler, *supra* note 199.

214. *Id.* at 379 n.18 (discussing the importance of "modularity and granularity" in promoting participation in peer production projects).

cial norms is closely tied to the role of technology, and the ease of information dissemination required for innovation. In groups that rely on individualized creation, the ease of dissemination may decrease the value of each member's expression, while in groups that rely on more discrete, less individualized tasks, it underlies innovation itself.

For individualized creation, particularly in the setting of close-knit groups, copying and widespread dissemination through new technologies risks threatening the reputational, and often the monetary, reward associated with the work. In the case of stand-up comics, many live by travelling to various parts of the country, often performing the same routine.<sup>215</sup> Few comics reach the level of fame that brings widespread dissemination of their material, which generally happens through a television special or appearance.<sup>216</sup> Dissemination is bad for business in the comedy world: the more people know a joke, the less funny it becomes, thus necessitating that a comedian prepare new material. Consequently, due to the inherent cost associated with the creation of new works, members of these types of close-knit group will adhere to norms that prevent widespread copying and dissemination via technology in order to preserve the greater reputational and monetary rewards associated with more highly valuable individual creations.

Alternatively, since innovation relies on the ease of copying and sharing, groups that focus less on the importance of individual expression embrace technologies that make these processes easier. This is clearly demonstrated in the examples of open-source software and open-source projects in general. The development of open-source software coincided with the world's greatest information-sharing technology: the Internet. The faster and more cheaply that information could be shared, the more quickly solutions to problems and other innovations could also be shared. Thus, technologies that enable copying are not anathema, but rather essential to progress and innovation in loose-knit groups that rely on participation by a large community.

#### CONCLUSION

Adaptability matters, and it influences how innovation happens among groups governed by extralegal social norms. How norms

---

215. See Jason Zinoman & Megan Angelo, *Clever, How They Earn That Laugh*, N.Y. TIMES (Nov. 2, 2012), [http://www.nytimes.com/2012/11/04/arts/stand-ups-and-their-salaries.html?\\_r=0](http://www.nytimes.com/2012/11/04/arts/stand-ups-and-their-salaries.html?_r=0) (describing the difficulties that new comedians face in attempting to make their careers lucrative, and reporting on how a handful of such comedians have handled these challenges).

216. *Id.*

change over time to fit the needs of a particular group based on hierarchy, type of expression, and the role of technology has huge consequences for future innovation. Though this Note is limited to a comparison of two very different industries, it can still shed light on the importance of adaptation within any norms system. The big questions that remain are whether this assessment of copying and anti-copying norms holds true in other areas of intellectual property not governed, either in whole or in part, by formal copyright law. Though these questions require further exploration, the foregoing observations offer some insights into how norms adapt and why adaptation matters.

Adaptability brings with it certain costs and benefits. Norms' ability to change means that they can fit new technological developments and changing societal views with regard to copying more easily than can formal law. Norms can encourage innovation by harnessing the power of group membership without creating such rigid rules of conduct, leading to more flexibility than a stagnant legal regime. However, the reliance on group enforcement can also lead certain norms to become entrenched to the benefit of some group members over others. Moreover, these norms can limit creative output based on the incentives created by the norms system.

Additionally, relationships between community members are important in determining what kind of copying norms arise. When the community relies on a sense of collectivity in creation, both the works created and the norms in play tend to be more open in favor of copying. On the other hand, when work is primarily individual rather than cooperative, norms will arise to prevent appropriation. This reflects the nature of creative contributions in different types of groups. Creators will seek stronger protection for more individualized works, as opposed to small, discrete tasks with little standalone value.

What do these insights mean for copyright law? Depending on the group in which the norms arise, norms may be even less tolerant of copying than under the formal law. More closed norms systems, which protect entrenched interests, could actually benefit from formal legal rights, which might create greater acceptance for copying and building on the works of others. Additionally, norms are not ever-changing, but like the law pose the potential for a "lock-in" effect, in which dissent is minimized and change difficult to impose. Thus, the emergence of social norms should not be thought of as a magic bullet that cures all the deficiencies of formal copyright law.

Nonetheless, the formation of social norms to prevent certain kinds of copying further demonstrates the limits of formal copyright law. This does not necessarily imply that copyright must be extended



to such areas, as there are some industries that reject the protections afforded to them in favor of information-sharing. Rather, as Congress considers updates to the current copyright law,<sup>217</sup> legislators should consider how adaptability can encourage innovation and where it can stifle it. Rather than serving as a one-size-fits-all solution, the law should provide greater flexibility to those areas already protected by its reach. It should account for changes in expression and technology, particularly the ease of dissemination allowed by the Internet, and provide for greater certainty with regard to the exceptions to copying it already allows. Whatever form this takes, the law must evolve to meet the current creative landscape to ensure the broad reach of future innovations.

---

217. On March 20, 2013, the Register of Copyrights called for suggested updates to federal copyright laws. *The Register's Call for Updates to U.S. Copyright Law: Hearing Before the H. Subcomm. on Courts, Intellectual Prop. & the Internet*, 113th Cong. 6 (2013) (statement of Maria A. Pallante, Register of Copyrights of the United States), <http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg80067/pdf/CHRG-113hhrg80067.pdf>.

