

Not right to copy – it's copyright

Next time you tell a joke make sure you put your individual stamp on it – or the only guys laughing would be the lawyers

Rob Batty and Nicola McCarthy

It's fair to say we all probably copy jokes and claim them as our own. In fact, most anecdotal jokes receive a far better reception when adapted to the first person or told about a "friend." However, for professional comedians, a good joke is often the product of significant hard work and creativity – not to mention, a valuable source of income. As the New Zealand International Comedy Festival hits Auckland this month, we look at whether jokes are capable of protection under copyright law and whether comedians can stop others from filching their material.

Are there any original jokes left?

To establish copyright in a joke it must be original. However, originality in copyright law does not mean novelty.

Originality is the skill and effort that goes into the particular expression or way in which the joke is told. Even a relatively short joke may potentially attract copyright protection. Originality also requires that the joke is the product of a person's own independent efforts, and not copied from another source. Thus, copyright is more likely to be relevant where a comedian's material is a personal anecdote or based on his or her personal observations.

Jokes in thin air

The usefulness of copyright for comedians is tempered by the requirement that a joke must be recorded in some form. Writing the joke down on a piece of paper would suffice. As many stand-up comedians ad-lib material and alter their jokes depending on the audience's reaction, each delivery of the joke may vary slightly. If the particular way in which a joke is expressed is not recorded, it may escape the protection of copyright law.

There is no copyright in an idea

To establish infringement of copyright, someone must have taken a substantial part of your joke. Copyright does not protect ideas – it protects

the originality of expression. Many stand-up gigs will start with a basic plot or premise, for example, "why did the chicken cross the road?" Another comedian is generally free to take the same idea and make it his or her own by adding certain eccentricities and quirks. For example, "why did the red, robotic chicken roller skate across the road?" This has a certain degree of logic in comedy as it's often the particular way a joke is told – the particular choice of words, rather than the idea itself that gets the laughs.

Whose line is it anyway?

To succeed in a claim of infringement it is also necessary to show the joke was copied. Given the fluidity of humour, it may be difficult to prove that a comedian copied the joke rather than independently created it. Jokes inspired by current events or famous people will have the same ideas and the particular words chosen by comedians in delivering the joke may be formulated in a similar way. For example, given the number of George Bush jokes in circulation, it could be hard to show that a comedian has copied their joke from the comedian

alleging ownership, rather than creating it themselves or even copying from a different comedian.

The shame factor

'Copying other comedians' material appropriates the hard work and often painstaking process of formulating a humorous routine. It is no surprise that comedians will often not be amused when their jokes are reused or made publicly available without permission. In many ways, social norms provide a more effective mechanism for policing the industry than copyright law. It appears generally accepted that you should not publicly perform someone else's joke – the fear of being heckled or publicly shamed should be enough to discourage most potential copiers. In an industry built on reputation and public reviews, no comedian wants to become known for filching material. While the law may not be best placed to deal with these infringers, in the end the comedy community may still get the last laugh.

Rob Batty, comedian, and Nicola McCarthy, solicitor, are in the Singapore Division Intellectual Property team. Email: rob.batty@inspireangerson.com, nicola.mccarthy@inspireangerson.com