2019

Roadmap of the Paper

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ROADMAP OF THE PAPER

This paper is divided into the following sections:

1. An Initial Challenge

2. Key Terms Explained

3. The Problem of Joke Theft

4. Background and Procedural History of the O’Brien Case

5. Joke Theft in the Context of Expert Witnesses

6. Expert Witnesses and Cryptomnesia

7. Comedians as Expert Witnesses for Cryptomnesia

8. Conclusion
An Initial Challenge

Without cheating by looking at the footnotes or Googling the answer, see if you think the jokes are similar enough to be considered joke theft. In other words, did Joke B steal from Joke A? Or did Joke A steal from Joke B?

Joke A: “It’s like one of them psychic ESPN type things.”

Joke B: “I think I have ESPN or something.”

Joke A: “I love the concept of lampshades, because lampshades are proof that we are never satisfied. First we go into a room, ‘oh, it’s too dark! I can’t see, it’s too dark!’ And then someone turns on a lamp. ‘No! Now it’s too bright! Can’t you put some kind of shade thing over the lamp? It’s too biiiiight!’ That’s how the lampshade was invented. True story.”

Joke B: “Originally, humans were cold, so they built a warm enclosure. A house. Everything was fine until they realized that inside the warm enclosure, the meat tended to spoil. So they built a cold enclosure- a refrigerator- inside the warm enclosure. Then everything was fine until they realized that the butter got too hard to spread. So they built an even smaller warm enclosure- a butter warmer- inside the cold enclosure, which is already inside the larger, warm enclosure. Strange.”

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1 This joke is from a 1999 movie called *Analyze This*, starring Robert DeNiro and Billy Crystal, directed by Harold Ramis. Yes, it’s actually a good movie. And so is the sequel, *Analyze That*. Yes, that’s what they called it.
2 This joke is from a 2004 movie called *Mean Girls*. That movie is terrible. Tina Fey is so much more talented than that movie. See her spot-on impression of Sarah Palin.
3 This joke is my own creation. Thanks for laughing!
4 Can’t have a paper on jokes without including something by George Carlin!
1. **Federal Rules of Evidence** 702 defines the circumstances under which expert witnesses are appropriate: “If scientific, technical, or other specialized knowledge \(^6\) will assist the trier of fact \(^7\) to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.” Witnesses must possess at least some degree of specialized knowledge, relevant and helpful to the trier of fact. \(^8\)

2. **Cryptomnesia** is “the appearance in consciousness of memory images which are not recognized as such but which appear as original creations.” \(^9\) In other words, an individual crafting a piece, such as a joke, remembers something they had heard, seen, or read, such as another comedian’s joke, but fails to recognize the memory as a memory. Instead, the individual believes that the joke is their own, original creation.

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\(^5\) You’re welcome

\(^6\) Meaning the knowledge does not necessarily need to be derived from scientific studies or technical training; the knowledge can be based on life experience or knowledge of a particularly arcane area of study.

\(^7\) The jury


\(^9\) [https://www.merriam-webster.com/medical/cryptomnesia](https://www.merriam-webster.com/medical/cryptomnesia)
THE PROBLEM OF JOKE THEFT

The concept of joke theft raises several problems. First, into what area of the law does joke theft fit? Second, can one steal a joke in the same legal sense as song lyrics or novels? Third, what kind of jokes are covered under the umbrella of joke theft? Fourth, how does one prove joke theft? And finally, assuming joke theft is proven, what defenses exist?

Joke theft is a largely new issue within the legal arena, specifically in the realm of intellectual property and plagiarism. Its novelty means that there is a dearth of case law precedent adjudicating an exact definition of joke theft. Courts have yet to devise a precise legal test to determine whether joke theft has taken place. The lack of legal adjudication on the issue of joke theft also means that the question of how expert witnesses figure into the issue has yet to be decided.

Federal Rules of Evidence 702 states “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.” Essentially, Rule 702 contemplates two

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10 And running through all of these problems is the core issue of expert witness testimony.
11 Assuming jokes can be thought of as intellectual property (more on that later in the paper.)
12 Although, Judge Sammartino in the O'Brien case has announced criteria for determining whether the jokes were stolen in that specific case. See the section on the O'Brien case, including its footnotes, for more details.
13 The jury...I'm not going to tell you again. (Okay, I will.)
14 http://www.uscourts.gov/sites/default/files/Rules%20of%20Evidence
different types of knowledge: knowledge based on scientific or technical study and knowledge based on life experience. This paper will analyze both aspects of Rule 702. 15

A. INTO WHAT AREA OF THE LAW DOES JOKE THEFT FIT?

While joke theft has not lead to litigation in the past16, property law may encompass areas implicated by joke theft, such as intellectual property and plagiarism. Intellectual property is defined as “any product of the human intellect that the law protects from unauthorized use by others.” 17Wrongful copying is called “plagiarism” by writers and scholars and “copyright infringement” within the legal arena. 18A 1992 article entitled “Copy Wrong: Plagiarism, Process, Property, and the Law” from the California Law Review states, “though an instance of plagiarism might seem to be the quintessential act of wrongful copying, it does not necessarily constitute a violation of copyright law.” 19The article further states that courts have had a difficult time adequately defining plagiarism within the realm of copyright law. A precise definition, “plagiarism is copying,” 20dates back to a 1944 case. 21

People may find it difficult to classify jokes as intellectually property in the sense of other, more clearly established forms of intellectual property, such as novels, song lyrics, or other original creations. These people can be easily forgiven for approaching the question of whether jokes constitute intellectual property with skepticism. Jokes have yet to be adjudicated

15 Comedians whose life experience as comedians qualifies them to give expert testimony on joke theft and cryptomnesia and academics whose scientific studies and research qualify them as expert witnesses on cryptomnesia.
16 Prior to the O’Brien case (discussed later in the paper.)
17 https://www.law.cornell.edu/wex/intellectual_property
21 Fun Fact: 1944 is also the year Danny Trejo, Sam Elliott, Michael Douglas, and Danny DeVito were born. (http://www.imdb.com/search/name?birth_date=1944-01-01,1944-12-31)
as intellectual property. Further, jokes present problems unique to the world of stand-up. Unlike songs or novels, jokes are almost universally available solely in verbal form. One can easily find the lyrics and music to a song, or copies of a novel. However, the same is not true for jokes. Transcripts of jokes are not readily available, especially since stand-up comedians have a wide variety of joke-writing methods.

In an interview with James Lipton on Inside the Actor’s Studio, stand-up comedian Chris Rock described his joke-writing method as “just writing the bullet points.” When I write jokes for my stand-up, I do not write out the entire joke. Rather, I type up the basic theme or topic of the joke. These examples show the lack of uniformity among joke writing styles and reinforce the unique nature of jokes vis-à-vis intellectual property and plagiarism.

The intellectual property issue is further complicated in the O’Brien case. O’Brien’s jokes were spoken in traditional stand-up form, but the jokes he has been accused of stealing were actually tweets. This raises the issue of whether tweets can be considered intellectual property.

By way of brief overview, Twitter affords its users two privacy settings: public and private. A user maintaining a public setting allows any of his or her followers to read the

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22 You can find jokes written out through a Google image search, but you won’t find the actual transcript of the joke: the notes the comedian wrote in preparation for the joke, for example.
23 Sadly, the full video is no longer available on YouTube (grumbles about copyright), but here is a link proving Chris Rock was on the show: http://www.imdb.com/title/tt0984541/
24 No, I’m not comparing myself to Chris Rock. Put the negative comment away.
26 Aside from Trump’s tweets, of course. Nothing he ever does can be considered “intellectual.” (covfefe)
tweets. 28Further, anyone searching the internet may view and read a public user’s tweets.

29When a user with a public setting tweets a message, that user intends the message to be heard by the public at large. 30Twitter has virtually no restraints as to what it will publish. 31

In other words, the intellectual property issues raised by jokes published on Twitter is that those jokes, depending on the setting used by the publisher, are theoretically readily available to the public at large. 32Unlike having to buy or illicitly download a book or song33, for example, virtually anyone with access to the internet can read a Tweet. Twitter therefore introduces another wrinkle in the attempt to classify jokes as intellectual property.

B. CAN ONE STEAL A JOKE IN THE SAME LEGAL SENSE AS A NOVEL?

The issue of whether jokes can be stolen goes to the distinctive character of jokes. The difficulty in assessing whether jokes can be stolen is that jokes, unlike songs or novels, are harder to quantify monetarily. If an author claims someone plagiarized his or her work, there are legal and equitable remedies theoretically available. For instance, the author claiming plagiarism can sue for unjust enrichment to disgorge the wrongful gain of the alleged plagiarizer. 34The author could sue for direct and/or indirect damages to recover losses sustained as a result of the plagiarism.35 While these damages may be seen as speculative, there is precedent for how much

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28 id.
29 id.
30 id.
31 id.
32 Which I guess explains why every American can wake up, confident in the news that the birds will be singing and President Trump will be tweeting. Speaking of singing birds, I once saw a supposedly motivational poster that said “the woods would be very silent if the only birds that sang were the best.” What?? No, the woods would be amazing if the only birds that sang were the best! Can you imagine walking into the woods and hearing this mellifluous, flawless auditory ambrosia?
33 The author of this paper does not condone illicitly downloading anything.
34 Definition and Overview of Unjust Enrichment: https://www.law.cornell.edu/wex/unjust_enrichment
35 Definition and Overview of General Damages: https://www.law.cornell.edu/wex/general DAMAGES
money novels in certain genres can be reasonably expected to make. Such records and trends are of great value to an author claiming plagiarism.

Jokes, on the other hand, do not conform to the example of novels for several reasons. First, whereas novels published in certain genres have precedent to evaluate how well they will do, jokes are far more uncertain. How well a joke does is largely dependent on the audience who receives the jokes. 36 A comedian does not know whether a joke is funny until he or she tells it. 37 Second, jokes are an experience in which the comedian’s presence is much stronger than the author of a novel. Comedians tell jokes verbally and through gestures, which can often enhance or detract from the effectiveness of the joke. 38 For example, watch the facial expressions of George Carlin or listen to the tone and volume of Patton Oswalt. 39 Finally, comedians are generally paid per gig, meaning that there is no consistency to how much they will earn each time they tell jokes. It is difficult to determine how much money a comedian has lost due to joke theft. This in turn makes it difficult to recognize jokes as protected intellectual property akin to novels.

C. WHAT KIND OF JOKES ARE COVERED UNDER THE UMBRELLA OF JOKE THEFT?

Another issue is what kind of jokes are subsumed within the term “joke theft.” This is less readily clear than some people may think because, broadly speaking, there are really two

36 For example, once at college I did stand-up at a thing where they were serving pancakes or waffles with chocolate (don’t ask.) I think I did okay and I’m grateful for the opportunity, but the audience was focused much more on the food than on the comedy.
37 Said Gabriel Iglesias in his 2014 comedy special The Fluffy Movie: Unity Through Laughter (paraphrased quote), “I can’t rehearse [telling jokes] because I don’t know if they’re funny until I tell them.”
38 Mitch Hedberg’s delivery, for example.
39 Such as in Patton Oswalt’s joke about a magician being shortchanged $5.
https://www.youtube.com/watch?v=_YcFk-HAh18
kinds of jokes. There are those jokes that have been told and retold so often that their origin is essentially indecipherable. Examples of such jokes include the vast majority of “knock-knock” jokes. Proving joke theft for jokes with an unidentifiable author would be cumbersome at best.

The second kind of joke is a joke written and performed by a particular comedian. These jokes are the ones involved in accusations of joke theft. Examples include disgraced comic Louis CK accusing Dane Cook of stealing his jokes. These jokes present their own problems in accusations of joke theft.

D. HOW DOES ONE PROVE JOKE THEFT?

One way to possibly prove joke theft is to establish that the alleged offender had access to the joke. This would seem the most prudent approach. If one wishes to discover who allegedly purloined something, one should first determine who had access to that item. But this method, in itself, presents another problem. Choosing to prove joke theft by establishing that the alleged thief had access to the allegedly stolen joke raises the question of how to prove access. How do you prove that the alleged joke thief, for example, was in the comedy club the night the joke was told? How do you prove that the alleged joke thief saw the joke on social media? And even assuming those issues can be addressed in a certain case, is proving that the alleged joke thief heard or saw the joke enough to establish theft?

Another way to possibly prove joke theft is to show similarity between the allegedly original joke and the allegedly stolen joke. This raises the issue of whether the similarity of jokes

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40 Or the old joke about a mushroom wondering why nobody invited him to a party because he is “a fungi.” And by the way, that joke is wrong. “Fungi” is the plural form. So “a fung” is a grammatical faux pas. What you actually mean is that the mushroom is “a fungus.” And still not invited to the party.


42 I think that’s what Sherlock Holmes would do...just saying.
is sufficient to establish joke theft. A lay person outside the world of stand-up comedy may well assume that if two jokes are substantially similar in wording, the earlier joke is the true joke and the later joke is the illegitimate copy. The problem with this assumption is two-fold. First, “substantially similar” is a vague standard, especially for jokes. What if a few words differ but the punchline is the same? What if one joke adds something that the other joke does not? Second, although one may well think that jokes written by stand-up comedians would, by nature, have easily traceable authors, and therefore easily traceable timelines, that is not necessarily true. What if one comedian develops the joke over time, revising and editing it over a period of (for example) months? At what point is the joke finished such that we can identify it as a complete joke? If comedians do not keep records of their work on a joke, the issue of tracing becomes even more muddled.

Related to the issue of similarity is the issue of experience. Two comedians can independently experience the same thing and write jokes about it. If that happens, is that grounds for theft? Two people independently telling different people about a common experience would not be considered plagiarism. Does that change when jokes are involved?

Finally, there is the issue of jokes about commonplace items or current events. Multiple comedians have jokes about food. Countless jokes have been made about Hillary and Bill Clinton. More recently, consider how many comedians make jokes about the imbroglio that is the Trump Presidency. Seizing on current events or commonplace items in a shared world

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43 If plagiarism is “wrongful copying,” then where would the copying be in that scenario? Both people experienced the same event and are merely talking about it.
44 Jim Gaffigan has an entire book of food jokes, Food: A Love Story; see Patton Oswalt’s joke about KFC bowls: https://www.youtube.com/watch?v=tfan5Macmsl
45 https://www.youtube.com/watch?v=yMi8_7UOnTo
46 See, e.g. Last Week Tonight With John Oliver, Full Frontal With Samantha Bee
should not be grounds for joke theft. But that raises the question of how similar jokes have to be for joke theft to be legitimately claimed. Do the jokes just have to have similar wording, or do they have to touch on the same experiences?

E. WHAT DEFENSES EXIST TO JOKE THEFT

Finally, the issue arises as to whether defenses can be asserted against a claim of joke theft. As joke theft is an untapped issue in property law, assuming of course it can be said to be under the umbrella of property law, there is no case-law precedent of affirmative defenses against allegations of joke theft. However, one defense that has been asserted outside the courtroom is that of cryptomnesia.

The question of cryptomnesia as an affirmative defense to joke theft arose during the controversy surrounding Dane Cook and disgraced comic Louis CK. Dane Cook had long been accused of stealing CK’s jokes. In a 2011 episode of his former FX show *Louie*, CK and Cook discussed the accusations. While CK was willing to acknowledge that Cook did not intentionally lift his jokes and knowingly use them, he refused to exonerate Cook completely. Ultimately, CK opined, “I don’t think you meant to [steal my jokes], but I don’t think you stopped yourself either.” Essentially, CK claimed that the alleged joke theft occurred due to cryptomnesia. Assuming cryptomnesia was the actual cause, the question becomes whether cryptomnesia should be available as an affirmative defense to joke theft.

48 Id.
49 Id.
50 Id.
51 Id.
52 Id.
An affirmative defense is a defense in which the defendant introduces evidence whose credibility will negate criminal or civil liability. Affirmative defenses work to eliminate liability even if the defendant is proven to have committed the alleged acts.  

With cryptomnesia as an affirmative as a defense, assuming it is proven to have occurred, the alleged joke thief will be released from liability, consistent with how affirmative defenses work. The problem with releasing a joke thief from liability, even an unintentional joke thief, is that the comic from whom the joke was stolen ends up losing the case. This could be remedied by making cryptomnesia very difficult to prove. Courts could announce a stringent, multi-part test which must be satisfied in order for a defendant to avail him or herself of cryptomnesia as an affirmative defense.

Without a stringent test, cryptomnesia could be a defense too easily fulfilled and too readily available, such that comics alleging that they have been wronged by joke theft will have no recourse and will lose to the alleged joke thieves. Therefore, cryptomnesia should only be an affirmative defense within meticulously defined boundaries so as to prevent comics from getting away with joke theft.

53 https://www.law.cornell.edu/wex/affirmative_defense
54 Id.
BACKGROUND AND PROCEDURAL HISTORY OF THE O’BRIEN CASE

On February 4, 2015, Conan O’Brien told a joke in the opening monologue of his late-night talk show in which he said that Tom Brady wants to give his MVP truck to “the man who won the Superbowl for the Patriots: Seahawks Coach Pete Carroll.” The day before, Robert “Alex” Kaseberg tweeted, “Tom Brady is going to give his MVP truck to the guy who won the game for the Patriots. So enjoy that truck, Pete Carroll.”

On February 17, 2015, O’Brien told a joke in the opening monologue of his show in which he said that surveyors have found the Washington Monument to be ten inches shorter than previously recorded. “The monument is blaming the shrinkage on the cold weather,” said O’Brien. That same day, Kaseberg tweeted, “Washington Monument is ten inches shorter than previously thought. You know the winter has been rough when a monument suffers from shrinkage.”

On June 9, 2015, O’Brien told a joke about renaming streets after Bruce Jenner to reflect his sex change and made a pun about how cul-de-sacs would follow this renaming. That same day, Kaseberg tweeted that two towns in Texas with streets named for Bruce Jenner would have to consider changing the names to “Caitlyn.” Kaseberg’s tweet also made a pun regarding cul-de-sacs, although the exact wording differs from O’Brien’s joke.

For sources and information about this case, see the following:

Apparently, “talk show” isn’t one word. Huh.

A truck? That’s what NFL MVPs get? Really? I’m sure they can buy their own trucks.
In July 2015, Kaseberg filed suit against O’Brien, his writing staff, Turner Broadcasting, and Time Warner alleging joke theft and damages in the amount of $600,000. O’Brien and his fellow defendants deny joke theft and moved for a dismissal.

On May 12, 2017, U.S. District Court Judge Janis Sammartino ruled that the case can go to a jury to decide whether O’Brien and his writers stole the Brady, Jenner, and Washington Monument jokes from Kaseberg’s social media feed. Comedian Patton Oswalt is an expert witness for the defense.

Judge Sammartino added, however, that jokes based on current events are entitled to minimal copyright protection. The jokes in question would have to be “virtually identical” for a defendant to be found guilty of copyright infringement. Further, a jury would have to conclude that the defendant had access to the jokes and intentionally copied them. 58

A Handy Visual Comparison of the Three Jokes 59

The Tom Brady joke

- Kaseberg: “Tom Brady said he wants to give his MVP truck to the man who won the game for the Patriots. So enjoy that truck, Pete Carroll.”

- O’Brien: “Tom Brady said he wants to give the truck that he was given as Super Bowl MVP ... to the guy who won the Super Bowl for the Patriots. Which is very nice. I think

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58 This could be the nascent stage of an eventual legal standard for adjudicating joke theft. As it stands now, however, this is not an officially announced legal test, but rather instructions from one judge in one specific case that may wind up settling out of court. Whatever the outcome of the case, it will be interesting to see whether future courts adopt the language of Judge Sammartino in subsequent joke theft cases.

that’s nice. I do. Yes. So Brady’s giving his truck to Seahawks coach Pete Carroll.”

The Caitlyn Jenner joke

- Kaseberg: “Three towns, two in Texas, one in Tennessee, have streets named after Bruce Jenner and now they have to consider changing them to Caitlyn. And one will have to change from a Cul-De-Sac to a Cul-De-Sackless.”

- O’Brien: “Some cities that have streets named after Bruce Jenner are trying to change the streets’ names to Caitlyn Jenner. If you live on Bruce Jenner Cul-de-sac it will now be Cul-de-no-sack.”

The Washington Monument joke

- Kaseberg: “The Washington Monument is ten inches shorter than previously thought. You know the winter has been cold when a monument suffers from shrinkage.”

- O’Brien: “Yesterday surveyors announced that the Washington Monument is ten inches shorter than what’s been previously recorded. Yeah. Of course, the monument is blaming the shrinkage on the cold weather.”
JOKE THEFT IN THE CONTEXT OF EXPERT WITNESSES

I. Can there be expert witnesses within the meaning of Federal Rules of Evidence 702 on joke stealing?

Federal Rules of Evidence 702 states “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.” Essentially, Rule 702 contemplates two different types of knowledge: knowledge based on scientific or technical study and knowledge based on life experience. This paper will analyze both aspects of Rule 702.

The relevant aspect of 702 for comedians potentially serving as expert witnesses on joke theft is “other specialized knowledge.”

Since this case concerns alleged joke theft, an expert witness could be one who has experience in stand-up comedy or knows how joke theft works. In an interview with Vice News, Patton Oswalt, the expert witness for the defense in the O’Brien case, recounted a time when, as a young comic, he inadvertently told a joke that had already been told by comic Carol Leifer. This experience gives Oswalt first-hand knowledge about joke theft, having been embroiled in the issue himself. Analogously, an author who had experienced copyright infringement litigation...
would be useful as an expert witness in a copyright infringement case. First-hand knowledge of joke stealing gives witnesses the benefit of insight and this can be a form of specialized knowledge sufficient under 702.

However, an expert witness on joke theft will need to rely on more than first-hand knowledge of joke theft derived from having been accused of joke theft in the past. An expert witness must also be able to explain how the joke-writing process works. In the context of the O'Brien case, Oswalt should testify as to how likely it is that two people will have similarly worded jokes on similar topics. Moreover, how likely is it that there would be multiple jokes that are both similarly worded and discuss similar topics? And, how likely is it that there would be multiple jokes, both similarly worded and discussing similar topics, told either the same day or the next day?

These are issues in the O'Brien case. The suspicion of joke theft undoubtedly arises not solely from the similar wording of the jokes, but also from the timing of the jokes and that the jokes all discuss similar topics. An expert witness must be able to give clear insight into the world of joke writing so as to elucidate whether such occurrences are commonplace, rare, or rare but explainable as the result of something other than joke theft.

II. If such expert witnesses exist, are they necessary for the trier of fact?

Under 702, an expert witness is needed to assist the trier of fact, either in understanding a piece of evidence or an issue in controversy.\(^66\) The question for this part of the analysis thus becomes: what, if anything, can an expert witness on joke stealing help the trier of fact understand?

As an expert witness for the defense, Oswalt will undergird the argument that O’Brien and his writers did not steal Kaseberg’s jokes. This means that Oswalt must help the trier of fact understand what constitutes joke theft and how similar jokes can be before accusations of joke theft become at least supportable.

In response, those opposed to Oswalt as an expert witness, or the idea of expert witnesses for joke theft cases in general, are probable to argue that the trier of fact is capable of discerning the similarity of jokes for themselves and drawing a reasonable conclusion therefrom. However, the idea of joke theft is not as simple as many people may think.

Entertaining the notion that the trier of fact could figure out whether jokes were stolen, the question then is by what metric. The trier of fact may decide that the similarity in wording of jokes is a reasonable measure of whether jokes were stolen. In reality, however, similarity in wording may not be sufficient. For example, comedians Ralphie May and Gabriel Iglesias both independently told a joke about underestimating the potency of Cuban coffee. Judged by wording alone, both jokes are quite similar. A trier of fact without the benefit of an expert witness to guide them may decide that whichever joke came first was stolen by the author of the second joke. However, both jokes ostensibly recount real events in the lives of the comedians. It is entirely possible, in fact quite likely, that two people could experience the same event, unwittingly drinking a powerful dose of coffee, independently of one another. And if one person decides to tell a joke about the event, would it be fair to bar the second person from doing so? Expert witnesses are not needed to tell the trier of fact that multiple people can independently

67 Imagine *Twelve Angry Men* remade into a joke theft case.
68 To satisfy Judge Sammartino’s “virtually identical” criteria (see section discussing the O’Brien case).
69 Both available on YouTube
have the same experience, but rather whether or not comedians regard similarity in wording as a viable means to adjudicate accusations of joke theft.

Additionally, the trier of fact may determine that the similarity of wording is less relevant to accusations of joke theft and the subject matter of jokes is the dispositive issue. Here, too, the trier of fact would find difficulty. For example, both comedians Jim Gaffigan and Lewis Black have jokes involving milk. Gaffigan jokes about the endless cycle of new varieties of milk, touted by the health-conscious, only to discover that those types of milk are not healthful.

Black’s joke is about the inability of society to decide on whether milk in general is healthful or not. Of course, the trier of fact does not need an expert witness to explain that comedians can joke about the same topic, but expert witnesses may be needed to explain to the trier of fact how comedians tend to view jokes on similar topics, even with different wording.

Wording and subject matter are relevant considerations in this case because the trier of fact will likely be shown the jokes by O’Brien and Kaseberg and tasked with determining, based on a side-by-side comparison, the likelihood of joke theft. Based on Judge Sammartino’s pronouncement, the similarity of the jokes is a key issue in the case. Both men told jokes on topical events: Caitlyn Jenner, Tom Brady, and the cold weather in February 2015. An expert witness experienced in stand-up comedy would thus be useful in helping the trier of fact understand how many jokes and permutations of jokes can be told on these topics that have not already been told.

70 Both available on YouTube
71 “You should drink rice milk...then they found out drinking rice milk is like drinking carbs.”
72 “Is milk good for you or bad for you...see, you don’t know.”
73 See the section discussing this case in full for citations
74 See the section discussing this case in full for citations
Finally, the trier of fact in this case may determine that O’Brien and his writers are guilty of joke theft by virtue of the number of jokes allegedly stolen and the closeness in timing between Kaseberg posting his jokes to twitter and O’Brien telling them in his monologue. The repetition of alleged joke theft, that O’Brien told at least three jokes similar to ones posted by Kaseberg on twitter, is likely to be detrimental to O’Brien’s case in the eyes of the trier of fact. Here, an expert witness may be needed to help the trier of fact understand aspects of the joke-writing process relevant to the timing and repetition issues, such as how long it takes to write a joke.

In sum, comedians can be very helpful to the trier of fact as expert witnesses on the issue of joke theft.

**EXPERT WITNESSES AND CRYPTOMNESIA**

Federal Rules of Evidence 702 states “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.” Witnesses must possess at least some degree of specialized knowledge, relevant and helpful to the trier of fact. 76

For expert witnesses on cryptomnesia, the relevant aspect of 702 is “scientific/technical knowledge.” 77

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75 Still the jury.
77 This section of the paper discusses academics who have conducted scientific research on cryptomnesia.
I. Can there be expert witnesses within the meaning of Federal Rules of Evidence 702 on cryptomnesia, a possible affirmative defense to accusations of joke stealing?

In a 2016 New York Times article entitled “The Accidental Plagiarist in All of Us,” four purported experts are cited for their work on cryptomnesia. Each will be discussed in turn.

**A. Dr. Amanda C. Gingerich**

In the New York Times article, Dr. Amanda C. Gingerich, associate professor of psychology at Butler University, said of cryptomnesia, “[y]ou might be certain the idea was yours, when in reality, you had a lapse in memory.” Says Dr. Gingerich, “If you think about it, it’s not very cognitively efficient to remember every single detail of everything that happens to us” and thus cryptomnesia “may actually be a byproduct of an otherwise efficient memory system.” Would Dr. Gingerich qualify as an expert witness under 702 regarding cryptomnesia?

Expert witnesses under 702 must possess “scientific, technical, or other specialized knowledge” pertinent to a legitimate issue in controversy. The first question is thus whether Dr. Gingerich has specialized knowledge. Dr. Gingerich has published at least seven academic articles, all of which relate to the human brain generally and how the human brain processes information specifically. For example, Dr. Gingerich published an article entitled, “Claiming

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79 See the following regarding Dr. Gingerich:

1. [https://works.bepress.com/amanda_gingerich/](https://works.bepress.com/amanda_gingerich/)


80 For her scientific and technical knowledge of cryptomnesia.

Hidden Memories As One’s Own Ideas: A Review of Inadvertent Plagiarism” in the Journal of Cognitive Psychology. Quoting from the article, “Inadvertent plagiarism, or cryptomnesia, occurs when an individual claims another’s idea as his or her own with no recollection of having been exposed to the idea before.” Claiming hidden memories as one’s own ideas is the very definition of cryptomnesia. A witness who has written and published an article on that topic has knowledge of that topic.

On direct examination, counsel proposing Dr. Gingerich as an expert witness for cryptomnesia should emphasize her academic career and background in psychology. Counsel should depict Dr. Gingerich as a highly qualified professor with a deep understanding of the intricacies of human cognitive function. Dr. Gingerich published an article in a journal of psychology about cryptomnesia. Her credentials and article should be the focus of direct examination.

On cross examination, counsel seeking to challenge Dr. Gingerich as an expert witness for cryptomnesia should question the process of writing the article. The article was co-written by Meaghan C. Sullivan. The collaboration between the two, including what portions were written by Dr. Gingerich and which by Ms. Sullivan, could be crucial in discrediting Dr. Gingerich as an expert witness.

Ultimately, however, Dr. Gingerich having an academic article published on cryptomnesia and being able to define and explain the complex concept in a way which assists the trier of fact is determinative of whether she would qualify as an expert witness. At least from the words in the New York Times article, Dr. Gingerich appears well-versed in cryptomnesia and able to explain the concept in clear, simple language. Therefore, she could be a valuable expert witness.
B. Alan S. Brown and Dana R. Murphy

In an article entitled, “Cryptomnesia: Delineating Inadvertent Plagiarism,” published in the Journal of Experimental Psychology, Brown and Murphy defined cryptomnesia, briefly recounted famous examples, and described three experiments they conducted involving cryptomnesia.

The first experiment was conducted as follows. Twenty-four undergraduate students at Southern Methodist University comprised the testing subjects. These subjects were randomly assigned to one of six total groups. Each group was tested separately by a different proctor. Subjects were informed they would take turns generating examples aloud from four different categories: sports, musical instruments, clothing, and four-legged animals. According to the article, Brown and Murphy selected these categories because, “they were sufficiently large and required no obvious temporal or spatial strategy in the retrieval process.” In the generation task, each subject produced aloud one additional example of the current category. When the last subject spoke, the order restarted from the beginning. After each category, the subjects were reassigned seat positions and the experiment continued. When the generation stage concluded, “subjects were handed a recall sheet with four category labels and eight blank spaces under each label.”

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82 See for Brown and Murphy

83 A dog wearing a poncho, playing the flute, and kicking a field goal...all four in one!
84 Anyone can think of something for each category
The results of the first experiment are as follows. When asked to recall the four responses they had previously generated in each category, 75% of the subjects, 18 out of 24, used at least one item that someone else had given during the group generation stage. When asked to generate four new items from each category, 70.8% of the subjects, 17 out of 24, used at least one item that had been generated by another subject during the generation stage.

The second experiment was conducted as follows. Four subjects participated in each generation group, and two separate groups were tested under each of the eight conditions of the design, resulting in a total of 16 different subject groups. Subjects were divided into whole, quarter, and single groups. After the generation stage, subjects performed recall tasks akin to those used in the first experiment with one difference: subjects were asked to indicate their confidence in the correctness of each response. Confidence was designated by one of three possible choices: “P” for “positive”; “SS” for “somewhat sure”; or “G” for “guess.” Brown and Murphy included complex tables and clarifications to analyze the results of the second experiment.

The third and final experiment was conducted as follows. Twenty-one subjects from Introductory Psychology courses at Southern Methodist University participated, with extra course credit as an incentive. Experiment three used the same categories as the first two experiments. Subjects were shown 12 examples from each category. Subjects were tested separately. Each received a stack of cards at the start of the experiment and were told that the stack contained 12 members from each of the different categories. There was a blank card on which subjects were told to write their own, original example from each category. Once the

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85 Which is also how I feel about basic math, multiplication without a calculator, and quantum physics, respectively.
subject finished, the cards were removed and replaced with a recall sheet on which subject had to recall their own four responses and the four new responses for each category.

Brown and Murphy say of the results of these three experiments, “the outcome of this series of investigations...supports the existence of unconscious plagiarism [cryptomnesia].”

On direct examination, counsel proposing Brown and Murphy as expert witnesses for cryptomnesia should cite this article and the three experiments they conducted. Brown and Murphy conducted three separate experiments and recorded and analyzed the results. Each of the three experiments focused exclusively on cryptomnesia and the time spent in setting up, carrying out, and deciphering the results of these experiments establishes their expertise in the field. These experiments give Brown and Murphy “specialized knowledge” within 702 to discuss cryptomnesia. 86

On cross examination, counsel seeking to challenge Brown and Murphy should ask whether they have conducted other experiments regarding cryptomnesia. Examples of questions include the following. Have you conducted other experiments on cryptomnesia? Have you read about other experiments on cryptomnesia? How do the results of each experiment differ from each other and from other experiments on cryptomnesia? What background do you have in psychology? What background do you have in plagiarism?

Further, counsel conducting cross examination could ask whether Brown and Murphy had the opportunity to conduct experiments on subjects other than students at Southern Methodist University and whether the incentive of extra course credit could have influenced the results of the third experiment.

Ultimately, however, Brown and Murphy’s work in the field of cryptomnesia is quite extensive and they will therefore serve well as expert witnesses on cryptomnesia.

C. Professor Gayle Dow

In 2015, Gayle Dow, professor of psychology at Christopher Newhart University, published a study in which participants were instructed to draw a picture of an alien creature. Professor Dow concluded that if she first showed the subjects an illustration, they were more likely to include elements of the drawing in their own drawing than if they had not been shown any drawing prior to crafting their own illustration.

On direct examination, counsel should focus on this study and have Professor Dow take the court through a clear, step-by-step analysis of how it was done and how the results explain what cryptomnesia is.

On cross examination, counsel should focus on how soon the participants of the experiment had to draw their own illustration after being shown the illustration. This is crucial because the time between two jokes being told, one allegedly stolen from the other, is often a factor in joke theft allegations. Time was one of the bases upon which Kaseberg predicated his allegation of joke theft against O’Brien. Further, it may not be impressive to a jury if Professor Dow testifies that people are more likely to remember something after having just been shown what they are remembering.

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87 See for Professor Dow:
88 See section discussing the case for citations
In sum, each of these experts has conducted experiments on cryptomnesia or published academic articles detailing their research on the subject. Cryptomnesia is a relatively new, unsettled topic and its role in joke theft has never been tested in a courtroom under 702. 

II. If such expert witnesses exist, are they necessary for the trier of fact?

Under 702, expert witnesses are necessary for the trier of fact where their specialized knowledge can assist the trier of fact in understanding a piece of evidence or determining an issue in controversy. With respect to cryptomnesia, the piece of evidence or fact in question would be what cryptomnesia is, how it works in general, and how it works specifically regarding joke theft. The complex nature of cryptomnesia means that it would be helpful for the trier of fact to have qualified experts, such as ones who have conducted extensive research into cryptomnesia, testifying. These experts should provide a clear, concise definition of cryptomnesia.

COMEDIANS AS EXPERT WITNESSES FOR CRYPTOMNESIA

Federal Rules of Evidence 702 states “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.” Witnesses must possess at least some degree of specialized knowledge, relevant and helpful to the trier of fact.

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91 With high scientific/technical knowledge.
92 Yes, this still refers to the jury.
The preceding discussion examined expert witnesses for cryptomnesia who are academics and researchers. While 702 certainly does not preclude the use of academically or scientifically inclined expert witnesses, the rule likewise fully permits expert witnesses with “other specialized knowledge.”

The question therefore becomes whether comedians have “other specialized knowledge” so as to qualify them as expert witnesses under 702 for cryptomnesia. This is especially crucial because cases of joke theft really implicate two kinds of experts: experts on the joke-writing process and experts on cryptomnesia.

A comedian who serves as an expert witness on cryptomnesia must be able to testify as to how the phenomenon comes into play during joke writing. How often have comedians found themselves the victims of cryptomnesia? Are there any recognizable patterns to cryptomnesia influencing joke writing? Could a comedian look at O’Brien’s jokes and say definitively, “In my experience of writing jokes, it is unlikely that three jokes could be so close without plagiarism occurring, either deliberately or through cryptomnesia”?

A comedian purporting to be an expert witness on cryptomnesia would therefore have to testify as to how cryptomnesia figures in the joke-writing process. What does cryptomnesia look like for those writing jokes? Is there a way to tell whether cryptomnesia has taken place in joke-writing? How often does cryptomnesia occur in the joke-writing process?

Such testimony demands an inside knowledge of joke writing, and only an actual joke writer can possess such inside knowledge. It is easy to see how inside knowledge is equivalent to

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94 Whose specialized knowledge is scientific and technical
96 This knowledge would be the life experience of being a comedian and being able to testify as to how cryptomnesia fits into the world of joke writing and stand-up.
"specialized knowledge." Therefore, comedians can also qualify as expert witnesses for how cryptomnesia works in the world of composing jokes.

CONCLUSION

In sum, expert witnesses for accusations of joke theft and for the possible affirmative defense of cryptomnesia, assuming they exist, are invaluable to the trier of fact and can be admitted under both types of knowledge within 702.

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97 The fields of joke writing and stand-up are specialized fields. Just as auto repair, surgery and cooking are specialized skills, meaning that not everyone can achieve equal mastery in those areas, so too with joke writing and stand-up.
98 Based on their highly specialized knowledge of how the world of stand-up works
99 Such as Patton Oswalt in the O'Brien case
100 Scientific/technical for the cryptomnesia researchers and the other specialized knowledge of life experience for the comedians.