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# The Effects of Exposure on the Ecology of the Magic Industry: Preserving Magic in the Absence of Law

Jared R. Sherlock

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THE EFFECTS OF EXPOSURE ON THE ECOLOGY OF THE  
MAGIC INDUSTRY: PRESERVING MAGIC IN THE  
ABSENCE OF LAW

JARED R. SHERLOCK †

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## I. INTRODUCTION

Magicians have gone to great lengths to protect the methodologies and designs of successful magic effects through the practice of secrecy. Magic is “part science and part showmanship.”<sup>1</sup> Magicians are sworn to ethical codes created by professional civic organizations that passionately urge practitioners not to reveal the science behind a piece of magic.

A vulnerable resource, magic secrets are depleted when they are abused.<sup>2</sup> Industry practitioners labor in a dead space of intellectual property law. Operating in such an unprotected space has forced industry insiders to endure a great number of domestic and international exposures. If a magician’s illusion is deceptive and original, it is eligible for protection under United States patent law. However, to earn this protection, the magician must meticulously explain how the effect is accomplished. By attempting to legally hide and protect their secrets, magicians would paradoxically make them available to the general public and other competitors. According to Professor F. Jay Dougherty, “[t]he ideas behind an illusion and the devices and useful methods used to implement it are not protectable by copyright. Words and short phrases are not viewed as sufficiently original to merit copyright protection.”<sup>3</sup> This is a challenging reality, as “[c]opyright law thus fails to protect the most common expression of magicians’

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<sup>1</sup> JIM STEINMEYER, *HIDING THE ELEPHANT: HOW MAGICIANS INVENTED THE IMPOSSIBLE AND LEARNED TO DISAPPEAR* xx–xxi (1st ed. 2003).

<sup>2</sup> See Jacob Loshin, *Secrets Revealed: Protecting Magicians’ Intellectual Property without Law*, in *LAW AND MAGIC: A COLLECTION OF ESSAYS* 123, 140 (Christine A. Corcos ed., 2010).

<sup>3</sup> F. Jay Dougherty, *Now You Own It, Now You Don’t: Copyright and Related Rights in Magic Productions and Performances*, in *LAW AND MAGIC: A COLLECTION OF ESSAYS* 101, 102 (Christine A. Corcos ed., 2010); see *infra* Parts II.D.5, V. *But see* *Teller v. Dogge*, 8 F. Supp. 3d 1228, 1233 (D. Nev. 2014) (“The mere fact that a dramatic work or pantomime includes a magic trick, or even that a particular illusion is its central feature does not render it devoid of copyright protection.”).

intellectual property—live stage performance—as well as magicians’ most highly valued intellectual creations.”<sup>4</sup> The magic secret is a distinctive kind of intangible resource that defies established economic theory of intellectual property law. Exposure reveals the secret, and thereby damages its value. This unsupportive legal atmosphere severely hinders practitioners’ incentive to invest in and cultivate new ideas when they can be easily repossessed and duplicated by a competing player in the industry without legal ramifications.

This Note proposes that protecting a magician’s performance—not the secret from disclosure—is practicable and effective in safeguarding a magician’s finances, morals, and secrets. Part II explores the nature of intellectual property law in the magic industry, its history, and its practitioners.<sup>5</sup> Part III profiles some of magic’s most influential figures in exclusive interviews.<sup>6</sup> Part IV examines United States intellectual property law and the limited protection it currently affords magic secrets.<sup>7</sup> Part V discusses a recent court ruling in favor of copyright protection for magic.<sup>8</sup> Finally, Part VI summarizes the impact of intellectual property law on the ecology of the magic industry and emphasizes the advantage practitioners preserve by attempting to protect their performances, instead of their secrets.<sup>9</sup>

## II. BACKGROUND OF INTELLECTUAL PROPERTY IN THE MAGIC INDUSTRY

### A. *Brief History*

A form of theatrical entertainment referred to as stage magic, not to be confused with paranormal activity, presents seemingly

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<sup>4</sup> Loshin, *supra* note 2, at 131.

<sup>5</sup> *See infra* Part II.

<sup>6</sup> *See infra* Part III.

<sup>7</sup> *See infra* Part IV.

<sup>8</sup> *See infra* Part V.

<sup>9</sup> *See infra* Part VI.

impossible feats called magic effects, tricks, or illusions for the pleasure of a live audience. Indeed, anthropological writers agree in titling magic a “pre-science,” and its origins can be traced to ancient tribal rituals.<sup>10</sup> Over time, magic has transformed from a practice associated with mystics to that of contemporary entertainers. Magician Teller<sup>11</sup> explains it well:

Magic is such a superb theatrical form, it’s intrinsically just about the most powerful, simple piece of theatrical language that you can use. You go to see a work of art because you want to see something that will amaze you and put you deeply in touch with someone else. But before this idea of touching someone else’s heart, there is this fundamental impulse of all art to be amazed. You go to be jarred out of the real world, and be profoundly amazed by what you are seeing.<sup>12</sup>

One could argue that magic is the art that most directly addresses that impulse. If what an audience experiences when they go to see a magic show does not look miraculous or evoke feelings of amazement, then the magic performance has failed. The late Robert-Houdin<sup>13</sup> was quoted in saying, a magician “is [just] an actor playing the part of a magician.”<sup>14</sup> Illusion inventor and

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<sup>10</sup> See MARCEL MAUSS, *A GENERAL THEORY OF MAGIC* 15, 19–21 (Robert Brain trans., Routledge, 2d ed. 2001) (1902).

<sup>11</sup> Born Raymond Joseph Teller, Teller is an American magician, writer, New York Times bestselling author, and he is the silent character in the world famous Penn & Teller show.

<sup>12</sup> Telephone Interview with Raymond Joseph Teller, Magician and Illusionist (Aug. 6, 2010).

<sup>13</sup> Jean Eugene Robert-Houdin is a renowned French magician born in 1805 and considered to be the father of modern magic. See STEINMEYER, *supra* note 1, at xiii, 6.

<sup>14</sup> *F FOR FAKE* (Janus Film 1973) (quoting JEAN EUGENE ROBERT-HOUDIN, *THE SECRETS OF CONJURING AND MAGIC: OR HOW TO BECOME A WIZARD* 43 (Louis Hoffmann ed. & trans., Cambridge Univ. Press, 2d ed. 2011) (1868)).

designer Jim Steinmeyer<sup>15</sup> says this famous line serves as an important reminder that a magic effect is a “supernatural” short play.<sup>16</sup>

Magic practitioners, much like actors, produce their work for the pleasure of an audience. Generating some level of amazement and amusing an audience directly impacts the bottom line. The ability of a magician to successfully manipulate an audience’s perception is contingent on their capacity to conceal the ideas, inventions, and methodologies behind their magic effects. Thousands of careful psychological choices and intricacies characterize and encircle a magic performance. The ideas and methods of the art that make magic possible originate from several professions within the industry. The following is an overview of the terms and introduction to the different players in the magic industry, followed by a glance at the dynamics of innovation within the business of magic.

### *B. The Players*

The four key players in the magic industry are inventors, designers, builders, and performers. Many of magic’s large stage illusions and apparatuses rely heavily on scientific principles to accomplish the desired visual. The inventor of a scientific principle employed in a magic effect is rarely a magician, but rather an engineer, psychologist, or inventor. Henry Dircks<sup>17</sup> “Pepper’s

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<sup>15</sup> The “celebrated ‘invisible man’—inventor, designer and creative brain behind many of the great stage magicians of the last quarter-century.” Teller, *‘Hiding the Elephant’: Now You See It . . .*, N.Y. TIMES (Dec. 7, 2003), <http://www.nytimes.com/2003/12/07/books/review/07TELLERT.html>.

<sup>16</sup> Telephone Interview with Jim Steinmeyer, Professional Magician (July 27, 2010).

<sup>17</sup> Born in Liverpool in 1806, Henry Dircks was a civil engineer, patent examiner, and part-time inventor whose most famous invention, the Dircksian Phantasmagoria, gave theaters the ability to create the visual of a ghost appearing onstage. STEINMEYER, *supra* note 1, at 25.



Ghost<sup>18</sup> creation perfectly differentiates the role of an inventor from the other players in the world of magic. A designer draws up a plan or model integrating the scientific principles with a custom designed apparatus<sup>19</sup> (or for close-up artists, existing materials such as playing cards) to achieve the desired visual effect.<sup>20</sup> Designers sometimes employ the same (or similar) principles and methods within different apparatuses to create very different illusions and visual dramatic works. The plan drafted by the designer is then crafted and assembled by a builder.<sup>21</sup> Lastly, a magician, actor, or production company produces or performs the magic. The four aforementioned players are most commonly individual parties contracting one another as subcontractors.<sup>22</sup>

### *C. Developing and Sharing Secrets*

Leading performers work very hard to get original material; it is not an idle luxury for them. The application of a magic effect's method (the science portion) generally originates from an illusion designer. Inspiration may or may not be provided or commissioned

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<sup>18</sup> Pepper's Ghost was originally known as the Dircksian Phantasmagoria, but was later purchased by and named after Royal Polytechnic Institution chemist and professor John Henry Pepper. Pepper's Ghost made its public debut on December 24, 1862. The resulting visual of the principle behind Pepper's Ghost can still be experienced today in Disney's "The Haunted Mansion" ride in Orlando, Florida. See STEINMEYER, *supra* note 1, at 25–43.

<sup>19</sup> For example, a cabinet that a volunteer enters which aids in the visual of solid matter of one person or object or thing penetrating the solid matter of another person, object, or thing.

<sup>20</sup> For example, the effect of production, vanishing, transposition, transformation, penetration, anti-gravity, attraction, invulnerability, creating a physical anomaly, telepathy, etc.

<sup>21</sup> Builders of magic props and equipment are generally very skilled carpenters and metal workers.

<sup>22</sup> On rare occasions, a magic practitioner will assume the role of designer, builder, and performer. For example, Daniel Summers is an American magician and illusion designer; he is widely considered one of the finest designers and builders of illusions in the world today. See DANIEL SUMMERS ILLUSION DESIGN, <http://www.danielsummers.com> (last visited Nov. 24, 2014).

by a magician or theatrical company. This idea or method is then translated to a paper draft that can be interpreted by an illusion builder, much like an architect drafting a blueprint for a construction contractor. The illusion builder then procures the necessary materials and constructs the prop or equipment as directed by the drawing. The finished product is then re-acquired by the illusion designer, inventor, or purchased by the commissioning magician. It is not unusual for this sensitive process to span months, years, and even decades.<sup>23</sup>

To further profile the innovation ecology at work in this enterprise, one must consider the various levels of how magicians share their ideas. Every magic secret has its own inherent value; this value determines the level at which the idea may be communicated from one practitioner to another.<sup>24</sup> Jim Steinmeyer brings the concept vibrantly to life:

To really understand magic, you need to nudge past the tyros at the magic shop and sidle up to the old professionals standing in the corner, who aren't interested in the five-dollar plastic envelopes stuffed with instructions, but are whispering in a weird sort of shorthand—the names of past masters, the precise moment they chose to “accidentally” drop a

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<sup>23</sup> Preeminent illusion designer Jim Steinmeyer graciously accepted naive phone calls and emails from me throughout my adolescence inquiring about his creations. In 2010, as I was an undergraduate student, he shared the interview cited in this article. *See* Telephone Interview with Jim Steinmeyer, *supra* note 16. In 2011, at twenty-two years old, I flew to Los Angeles to meet with him and express interest in performing one of his original illusions. In 2012, Mr. Steinmeyer invited me to commission one of his new creations entitled *Grand Larceny*. After I paid a royalty fee directly to Steinmeyer for the performing rights, he designated world-renowned Santa Paula-based illusion builder William Kennedy to construct the first model. As the purchaser, I paid Mr. Kennedy for his materials and labor to build the apparatus (as well as its travel road cases) on a mutually agreed upon timeline. The finished illusion was delivered to my Minneapolis residence in May of 2012.

<sup>24</sup> *See* Telephone Interview with Jim Steinmeyer, *supra* note 16.

silk handkerchief on the stage and pick it up, or the particular bend in their thumb as they cut a deck of cards in preparation for a shuffle.<sup>25</sup>

Jacob Loshin's essay in the book *Law and Magic* illustrated that secrets are shared through three channels: popular magic, common magic, and proprietary magic.<sup>26</sup> The first channel, popular magic, describes "five-dollar plastic envelopes stuffed with instructions,"<sup>27</sup> as well as beginner children's magic sets, novelty items, and magic that is affordable and accessible to most skill levels. The second, common magic, is the largest of the three channels with the widest selection of material. With materials ranging in difficulty from novice to advanced, common magic can be found in books, videos, journals, at club meetings, conventions, and it is the magic practiced by both hobbyists and working professional practitioners.<sup>28</sup> The final channel of magic, proprietary magic, is the most deceptive and innovative magic shared selectively among the world's most prolific practitioners. This material is often intended to be built and performed exclusively through permission from the inventor or designer.<sup>29</sup> Due to the level of secrecy involved, proprietary magic is the most vulnerable of the three to exposure.

The beginning of the 1900s marked the golden age for magic as a vibrant and innovative profession that was taking the world by storm. The most famous theaters in the world were advertising the next great deception by groundbreaking showmen like the Davenports,<sup>30</sup> David Devant,<sup>31</sup> Harry Kellar,<sup>32</sup> Howard Thurston,<sup>33</sup>

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<sup>25</sup> See STEINMEYER, *supra* note 1, at xix.

<sup>26</sup> Loshin, *supra* note 2, at 127.

<sup>27</sup> STEINMEYER, *supra* note 1, at xix; see Loshin, *supra* note 2, at 127.

<sup>28</sup> Loshin, *supra* note 2, at 127.

<sup>29</sup> See *id.*

<sup>30</sup> Ira Erastus Davenport (1839–1911) and William Henry Harrison Davenport (1841–1877) were "[t]wo Buffalo, New York brothers who originated the controversial cabinet séance act and presented it on stages around

and Harry Houdini.<sup>34</sup> Ideas and methodology became infectious, spreading from conjurer to conjurer in the advent of civic organizations and publications. Institutions galvanized the sharing of ideas. London's Magic Circle was founded in 1905, shortly after the founding of the Society of American Magicians in 1902.<sup>35</sup> The International Brotherhood of Magicians, now the largest magic organization in the world, opened shortly thereafter.<sup>36</sup> In the height of the vaudeville era, these organizations gave rise to an explosion of books, magic shops, organization networks, clubs, and other more exclusive networks such as Hollywood's members-only Magic Castle, home of the Academy of Magical Arts.<sup>37</sup> In addition, magic magazines were being published worldwide; ideas flowed freely and the magicians' little world was getting smaller

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the world." STEINMEYER, *supra* note 1, at xiii.

<sup>31</sup> David Devant (1868–1941), a British magician, "[r]espected among his peers for his mix of skill, creativity and . . . natural performing style on stage." *Id.* at xiv.

<sup>32</sup> Harry Kellar (1849–1922), "[a]vuncular, business-like and beloved by his audiences, this touring American magician proudly filled his program with the finest illusions from London." *Id.* at xv.

<sup>33</sup> Howard Thurston (1869–1936) was "[t]he successor to Kellar and America's favorite magician from 1908 to 1936; Thurston was known for his easy rapport with children and a wonderful speaking voice." *Id.* at xvi.

<sup>34</sup> Harry Houdini (1874–1926) was known as the "[b]rash, dynamic American vaudeville performer who started as a magician and achieved his greatest success as an escape artist; he made an elephant disappear at the New York Hippodrome in 1918." *Id.* at xiv.

<sup>35</sup> *Our History*, MAGIC CIRCLE, <http://www.themagiccircle.co.uk/about-the-club/our-history> (last visited Nov. 25, 2014); *History of the S.A.M., SOC'Y AM. MAGICIANS*, <http://magicsam.com/about-s-a-m/brief-history/> (last visited Nov. 25, 2014).

<sup>36</sup> See *History*, INT'L BROTHERHOOD MAGICIANS, <http://www.magician.org/about/history> (last visited Nov. 25, 2014) (opening in 1922).

<sup>37</sup> For more information on the Academy of Magic Arts, Inc. and the Magic Castle, interested readers can view the organization's website. *About the Academy*, MAGIC CASTLE, <http://www.magiccastle.com/ama/index.cfm> (last visited Nov. 25, 2014).

and smaller all the time.

*D. Stealing & Exposure*

The most successful practitioners became acutely sensitive to the advantages to be gained through the exclusive ownership of new ideas.

In the late 1870s, during one of Buatier deKolta's<sup>38</sup> early successes in Paris, he was performing his flower trick. He deftly twisted a large sheet of stiff paper into a cone and shook it gently, revealing that it was filled to overflowing with pastel tissue flowers, which cascaded out of the cone and into an upturned parasol. DeKolta had every intention of keeping his secrets, but one night at the Eden Theatre a slight draft from the wings wafted several of the flowers beyond the footlights, and they tumbled off the stage. A magician in the audience reached down to pick one up and rushed from the theatre with his discovery: an important key to the trick was the ingenious construction of each paper flower. For the next hundred years, the famous deKolta flowers could be purchased for a few dollars at magic shops.<sup>39</sup>

Magicians are notorious for developing greed and thirst for secrets, acquiring as many as possible, and protecting them diligently. While uncommon, deceit and espionage can be found in the roots of many successful, professional magicians and illusionists from the last two hundred years. Most practitioners agree, however, that the looting of a few secrets does not have a

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<sup>38</sup> Joseph Bautier deKolta (1848–1903) was “[a]n ingenious French magician who began his career with sleight of hand magic and later invented a number of trendsetting mechanical illusions such as The Vanishing Lady.” STEINMEYER, *supra* note 1, at xiii.

<sup>39</sup> *Id.* at 161–62.

devastating effect, as the secret—or the “scientific”—is only one half of what an audience is paying to witness. The other half is the presentation. Jim Steinmeyer emphasizes this notion by coining the description of magic as “part science and part showmanship.”<sup>40</sup> This philosophy compliments magic as an art, but it is important to remember that the magic presentation simply will not be effective if the feat does not fool its audience. Therefore, one could reasonably argue that practitioners are equally dependent on the secret and the presentation. While the industry seems to collectively agree that the pilfering of secrets has no widespread, negative fiscal effect, one could argue a different and equally damaging observation: an audience goes to see a work of art to see something fresh and new, not the same old thing again. Stealing indicates a lack of creativity in the art of conjuring; magicians who steal want all of the attention, but do not have anything to say. Teller candidly aligns with this idea:

Old wine in new bottles! It’s a lame excuse for a rampant lack of creativity, a rampant lack of courage and a rampant lack of guts. I am disgusted by the amount of imitation. The first few years of most any performer are imitative, but then you find your own voice or you get into real estate, or finance management. With magicians, the majority spend their life pursuing an imitation of the very first thing that they fell in love with, that is to say some dork in coattails producing cards, and that is a real problem. That means that these are people with no ideas, no personality, and no stage presence.<sup>41</sup>

Teller is not the first esteemed professional to passionately contribute to this perspective. Guy Jarrett, Howard Thurston’s illusion designer, was always cynical about what was happening to magic. Jarrett wrote:

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<sup>40</sup> *Id.* at xx–xxi.

<sup>41</sup> Telephone Interview with Raymond Joseph Teller, *supra* note 12.

I have spoken personally to every magician . . . and there is not a single one with the desire or ambition to become great, or famous, or to earn real money. . . . Not a single one has guts or ideas or imagination. They just got hold of a bunch of tricks and walked out on stage. So, they are only a bunch of drug store magicians.<sup>42</sup>

These responses illustrate the magic industry's sparse patience for stealing another's act, material, or secrets. Several notable incidents from magic's history seem to suggest that exposure is a greater threat to the ecology of professional conjuring. Years of practice ensure the proper performance of a routine onstage to protect the effect's secret. Magicians and illusion designers work tirelessly to see to it that their investments survive the test of time by scrupulously defending their secrets. With the belief that the prop and routine are their intellectual property, especially sensitive magician owners will retire exposed pieces of magic. A friend of the revered late nineteenth century American magician Harry Kellar once recalled an emotionally charged example of this type of behavior:

One season Kellar was using a beautifully made, expensive, trick box in his program. At one performance, a spectator from the audience happened to indicate that he knew how the box worked. After the show, Kellar took the box out to the alley behind the theatre and smashed it to pieces with an axe. "Now we'll build a new one that no one will figure out," he told his mechanics.<sup>43</sup>

Proprietary magic is expensive to replace. Only magicians with great resources and capital can react in this way. While most of the exposure takes place among the ranks of common magic, several historical incidents have placed physical and emotional stress on

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<sup>42</sup> STEINMEYER, *supra* note 1, at 214–15.

<sup>43</sup> STEINMEYER, *supra* note 1, at 168–69.

practitioners of proprietary magic.

### *E. The Discoverie of Witchcraft*

Rather ironically, it was discovered that magic's first global exposure originated from a friend of magic, Reginald Scot, in 1584. Mr. Scot published a book entitled *The Discoverie of Witchcraft*<sup>44</sup> that offered great detail on how to accomplish a number of magic effects, including tricks such as the Cups and Balls routine that still remain popular today.<sup>45</sup> This exposure was not without reason. In the height of the Salem Witch Trials, Mr. Scot published this text to stop the inhumane persecution of magicians by the orders of religious authorities.<sup>46</sup> Mr. Scot's actions aided the rebuttal of magicians accused of being witches, and his writings arguably served as the first textbook for magicians. King James—the one that we now celebrate on our Bibles—ordered a decree that all copies be burned to extinguish the resistance against the witch-hunt.<sup>47</sup> As a result, few original printings survive today.<sup>48</sup>

#### *1. R.J. Reynolds*

The R.J. Reynolds Tobacco Company exposed more magic to a wider audience than Reginald Scot could have imagined with its Camel Cigarettes 1933 advertising campaign entitled, *It's fun to be fooled . . . it's more fun to know*. Historian Mike Caveney documents in his 1994 *Magic Magazine* contributing article “The Camel Cigarette Wars: 60 Years Later” that the R.J. Reynolds's

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<sup>44</sup> REGINALD SCOT, *THE DISCOVERIE OF WITCHCRAFT* (Reprint ed., 1972).

<sup>45</sup> See Loshin, *supra* note 2, at 128.

<sup>46</sup> MAURINE CHRISTOPHER, *THE ILLUSTRATED HISTORY OF MAGIC* 23 (1st ed. 1996).

<sup>47</sup> DANGEROUS IDEAS: CONTROVERSIAL WORKS FROM THE WILLIAM L. CLEMENTS LIBRARY, *Reginald Scot, The Discoverie of Witchcraft (1584)*, <http://clements.umich.edu/exhibits/online/bannedbooks/entry2.html> (last visited Nov. 26, 2014).

<sup>48</sup> *Id.*



advertisements ran in “full color” to over 1200 American newspapers for a duration of eight months where the graphics showed illusions followed by descriptions of how they were accomplished.<sup>49</sup> The advertisements exposed an illusion of American magician Horace Goldin,<sup>50</sup> famously recognized as “sawing a lady in half.”<sup>51</sup>

Outraged, Goldin sued R.J. Reynolds alleging ‘unfair competition,’ but the court quickly dismissed his suit. Observing that Goldin had patented his illusion, the court explained[:] “Certainly [Goldin’s patent] is a clear and detailed exposé of the secret to the public by the plaintiff himself. Any one who cares to can rightfully and lawfully procure a copy of said patent, containing a full detailed and diagramed explanation of the trick. . . .” And, it should be added, any cigarette company can then publish that explanation in the newspapers for all to see.<sup>52</sup>

## 2. *The Houdini Historical Center*

As the former home of the world’s most well-known magician Harry Houdini, Appleton, Wisconsin has become a national magic hub featuring famous annual conventions and the Outagamie County Historical Society, home to The Houdini Historical Center. In 2003, the Outagamie Society’s new director, Kimberly Louagie, shocked the magic world when she formally announced that they

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<sup>49</sup> Loshin, *supra* note 2, at 129 (citing Mike Caveney, *The Camel Cigarette Wars: 60 Years Later*, MAGIC MAG., Apr. 1994, at 28, 28).

<sup>50</sup> Horace Goldin (1874–1939): “[a]t the turn of the 20th century, this American illusionist and vaudeville star was best known for the whirlwind pace of his act; he later became famous for performing the illusion, Sawing a Woman in Half.” STEINMEYER, *supra* note 1, at xiv.

<sup>51</sup> *Id.*

<sup>52</sup> Loshin, *supra* note 2, at 131–32 (quoting *Goldin v. R.J. Reynolds Tobacco Co.*, 22 F. Supp 61, 64 (S.D.N.Y. 1938)).

would be featuring a new exhibit entitled, “A.K.A. Houdini,” that would offer the general public the ability to learn and participate in a selection of Houdini’s most coveted secrets.<sup>53</sup> Eighty-nine-year-old Houdini advisor to the worldwide organization the Society of American Magicians and Honorary Board member to the Outagamie Society, Frank Dailey<sup>54</sup> said in his letter of resignation: “I regret very much that the memory of Houdini must be so desecrated. I’m certain that his memory will live on longer than either of us, or the Outagamie County Historical Center.”<sup>55</sup> Supporters of the exhibit argued that the secrets are revealed in a way that challenges the participants to understand and appreciate the skill required to perform these feats of magic.<sup>56</sup> But magic leaders like David Copperfield<sup>57</sup> and Frank Dailey campaigned strongly to stop the exhibit, and they were not alone.<sup>58</sup> In December of 2004, a mere year and half after the opening of the exhibit, Outagamie executive director Terry Bergen announced a decision to suspend the Houdini Historical Center membership

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<sup>53</sup> Meg Jones, *Unveiling Houdini Magic Trick Causes Museum Controversy*, MILWAUKEE JOURNAL SENTINEL, Apr. 14, 2004, available at [http://www.jewishworldreview.com/0404/houdini\\_magic\\_trick.asp](http://www.jewishworldreview.com/0404/houdini_magic_trick.asp).

<sup>54</sup> Frank W. Dailey (1919–2012) was the President of the National Society of American Magicians from 1983–84 and later became the historian for the organization for many years.

<sup>55</sup> Letter from Frank Dailey to author (Nov. 6, 2003) (on file with author) (referencing Letter from Frank Daily to Outagamie County Historical Society (2003)).

<sup>56</sup> Associated Press, *Magicians Angry Over Unveiling of Houdini’s Secret*, FOX NEWS (June 2, 2004), <http://www.foxnews.com/story/2004/06/02/magicians-angry-over-unveiling-houdini-secret/> (“Museum officials . . . insist the exhibit—set to run for [ten] years—doesn’t reveal anything not already available in books and on the [I]nternet. They also say people will appreciate magic more by knowing the secrets.”).

<sup>57</sup> David Copperfield (1956–present), “[n]amed Magician of the Century and Magician of the Millenium.” See generally *David Copperfield: Biography*, DAVIDCOPPERFIELD.COM, [http://www.davidcopperfield.com/html/pdf/dc\\_biography.pdf](http://www.davidcopperfield.com/html/pdf/dc_biography.pdf) (last visited Nov. 28, 2014).

<sup>58</sup> Associated Press, *supra* note 56.

program as a result of financial challenges attributed to low patronage.<sup>59</sup> The once booming tribute to one of magic's most influential icons was now forecasting a very bleak future.

### 3. *The Masked Magician*

Interestingly enough, Outagamie representatives defended their actions through comparisons to the exposures of the wildly popular Fox Network series, *Magic, Secrets Revealed*.<sup>60</sup> Val Valentino, an alleged American magician, illusionist, and actor, gained notoriety by starring in the magic specials as the Masked Magician. Fox's specials were produced and sold successfully in large quantities, capturing worldwide interest.<sup>61</sup>

### 4. *Shadows*

The audience gazes upon a single rose resting upright in a small vase, its shadow cast upstage onto a white paper easel backdrop.<sup>62</sup> Illuminated by a single lamp, Teller begins to delicately and deliberately cut the shadows of the petals with a gleaming metallic knife.<sup>63</sup> Perfectly timed with his articulate cuts, the rose's real petals fall from the stem—petal by petal—in a

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<sup>59</sup> See generally Dean E. Murphy, *With Sadness, Houdini Artifact Collector Puts It on the Auction Block*, N.Y. TIMES (Oct. 29, 2004), <http://www.nytimes.com/2004/10/29/national/29houdini.html?pagewanted=print&position=> (discussing financial challenges for the Outagamie organization).

<sup>60</sup> For basic information on the series, please see *Breaking the Magician's Code: Magic's Biggest Secrets Finally Revealed*, IMDB, <http://www.imdb.com/title/tt0207261/?mode=desktop> (last visited Nov. 28, 2014).

<sup>61</sup> Paul Brownfield, *Fox Isn't Disillusioned as Masked Magician Series Ends*, L.A. TIMES (Oct. 31, 1998), <http://articles.latimes.com/1998/oct/31/entertainment/ca-37752> (Airing in November 1997, the first installment of the series drew 24.2 million viewers and was the highest-rated special ever on Fox).

<sup>62</sup> Penn & Teller, *Teller's Shadows Magic Trick*, YOUTUBE (Mar. 16, 2012), <https://www.youtube.com/watch?v=etuVHEHF3FM>.

<sup>63</sup> *Id.*

seemingly impossible fashion.<sup>64</sup>

Part of his original repertoire since the 1970s, *Shadows* is widely considered Teller's seminal contribution to the art of magic.<sup>65</sup> In March of 2012, a friend sent Teller a YouTube video uploaded by Dutch magician Gerard Bakardy performing his own rendition of the trick—entitled *Rose and Her Shadows*—and offering to sell the method.<sup>66</sup> When Bakardy refused Teller's settlement proposals, which offered to pay Bakardy to cease all performances and sales of the trick, Teller filed a suit in federal court in Nevada, alleging copyright violation and unfair competition.<sup>67</sup> The federal court agreed that Teller's *Shadows* was a dramatic work entitled to copyright protection.<sup>68</sup> The court granted summary judgment for Teller on all copyright claims (minus willful infringement) as it found Bakardy had copied Teller's work.<sup>69</sup> This victory for Teller marked a legal precedent, as it was the first time since the Copyright Act was amended in 1976 that a court held that a magic trick, although only through its presentation as dramatic work, is eligible for copyright protection.<sup>70</sup>

Acknowledging these and other exposures, industry practitioners do not ignore their relevance to the innovation ecology of the magic industry. However, there remains a ferocious

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<sup>64</sup> *Id.*

<sup>65</sup> Chris Jones, *The Honor System*, ESQUIRE, Oct. 2012, at 139, 143, available at <http://www.esquire.com/features/teller-magician-interview-1012>.

<sup>66</sup> *Id.* at 139.

<sup>67</sup> Complaint at 1, 6, Teller v. Dogge, 8 F. Supp. 3d 1228 (D. Nev. 2014) (No. 2:12-cv-00591) (2012 WL 1259288).

<sup>68</sup> Teller v. Dogge, 8 F. Supp. 3d 1228, 1233 (D. Nev. 2014).

<sup>69</sup> *Id.* at 1235–37.

<sup>70</sup> Jessica McKinney, *Can Magic Be Copyrighted?: Teller's Infringement Lawsuit Against Another Magician May Reveal the Answer*, 84 PAT., TRADEMARK, & COPYRIGHT J. 371, 371 (June 2012); See Janna Brancolini, *Abracadabra!—Why Copyright Protection For Magic Is Not Just An Illusion*, 33 LOY. L.A. ENT. L. REV. 103, 105 (2013).

disagreement about the damage exposure ultimately has on magic as a whole. Some see it as a “minor annoyance,” stating that exposure is a catalyst of innovation obligating industry professionals to invent new effects. Or, as previously discussed, they advocate that the presentation is equally important, making the secret simultaneously valuable and valueless.<sup>71</sup> The other side vehemently argues that wrongful exposure and stealing takes away one’s competitive advantage. In other words, if someone writes a book, anyone and everyone can read and use the literary text and the value of the book is not depleted, as it is a non-rival resource. The same principal does not apply to the intangible resource of the magic secret. When the “Masked Magician” and R.J. Reynolds expose the secret of a magic effect, their intentions of using the secret conflict with the intention of the original magician, and subsequently strip the secret of its value and arguably damage the original magician’s competitive advantage.<sup>72</sup>

#### *F. Policy Goals of I.P. Law*

Article I, Section 8, Clause 8 of the Constitution empowers, yet limits, Congress to effectuate patent laws “[t]o promote the Progress of . . . useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries.”<sup>73</sup> Within these bounds, Congress determines the best way to promote society’s welfare.<sup>74</sup> A patent must be “worth to the public the embarrassment of an exclusive patent.”<sup>75</sup> Put differently, a grant of

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<sup>71</sup> See Loshin, *supra* note 2, at 130.

<sup>72</sup> *Id.*

<sup>73</sup> U.S. CONST., art. I, § 8, cl. 8.

<sup>74</sup> 1 CARL MOY, MOY’S WALKER ON PATENTS § 1:30 (4th ed. 2009), available at WestlawNext Moy’s Walker on Patents.

<sup>75</sup> *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 9–10 (1966) (“As a member of the patent board for several years, Jefferson saw clearly the difficulty in ‘drawing a line between the things which are worth to the public the embarrassment of an exclusive patent, and those which are not.’ The board on which he served sought to draw such a line and formulated several rules which are preserved in Jefferson’s correspondence.”).

patent rights should benefit the public.<sup>76</sup> When such a grant would be detrimental, it should be denied.<sup>77</sup> Congress, with its limited, discretionary power, restricts the grant of a patent to those instances best serving the public.<sup>78</sup> The requirements and restrictions serving this purpose—like disclosure, “the quid pro quo of the right to exclude”<sup>79</sup>—prove troublesome for magicians seeking protection.

### III. THE SHERLOCK STUDY

#### A. *R.J.T.*

The subject line of the email read, “Re: Sure.”<sup>80</sup> He accepted the interview. On a whim, in August of 2010, my imaginative curiosity had drafted a formal interview request to one of the most iconic and influential prestidigitators to ever touch a deck of cards. The body of his email was as direct as his interview; “I’ll speak with you” were his only words. I read the four words four times. He actually accepted my interview. Awestruck, I responded with the same terseness, “When would be best for you?” My phone rang almost instantaneously. The caller’s location: Las Vegas, Nevada.

I lunged anxiously for the phone. The first words I had ever heard him speak were addressed to me, “Hello, Jared, this is Teller.”<sup>81</sup> With sincere humility, he gently advised that I provoke him with questions.<sup>82</sup>

Exceedingly aware of both my good fortune and the finite time

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<sup>76</sup> MOY, *supra* note 74, at 1:27

<sup>77</sup> *Id.*

<sup>78</sup> *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 6 (1966).

<sup>79</sup> *Kewanee Oil Co. v. Bicorn Corp.*, 416 U.S. 470, 484 (1974) (citing *Universal Oil Co. v. Globe Co.*, 322 U.S. 471, 484 (1944)).

<sup>80</sup> E-mail from Raymond Joseph Teller, Professional Magician, to author (Aug. 6, 2010, 4:51 p.m. CST) (on file with author).

<sup>81</sup> *See* Telephone Interview with Raymond Joseph Teller, *supra* note 12.

<sup>82</sup> Teller is highly regarded by academics and critics alike for his work as a comedian, writer, and playwright and for his contributions to atheism, libertarianism, free-market economics, and scientific skepticism.

at my disposal, I attempted to evoke a candid and accessible answer to my original question. I asked, “Teller, do you believe that industry norms, relationships, codes of ethics, and self-regulating institutions are effective in preserving magic’s secrets?” He responded expeditiously, “In regard to preserving magic’s secrets in the absence of law,” Teller continued, “I truly don’t think that someone learning a magic secret is going to put anyone out of work. I think that’s the only real ethical argument that you could make.” There was a major problem with this response. At the time of this interview, I was concluding my tenth and final week of research for the business ethics fellowship that prompted this study. Worse yet, I believed him.

His words unexpectedly shifted my perspective. While magicians have very little ownership over their creations, the magic industry continues to flourish publicly. Exposure of magic secrets may be hindering job creation, but it does not seem to be causing widespread job loss in the magic industry. However, the absence of rules (laws) may be allowing the corruption of honor. Sometimes, the approach to enforcing ethical challenges is by establishing rules, when what should be considered is what type of people inventors and magicians should be.

In my final hours of collecting information on the regulation of intellectual property, Teller’s response revealed a new ethical variable concerning the notion of character of a good magician. On August 6, 2010, two years prior to his own suit against Bakardy, Teller’s response indirectly suggested that an evolution of creative copyright law might reduce performance theft and could be fiscally and morally supportive to magic’s practitioners.

### *B. Study Design*

Though patent law seemingly offers attractive protections—exclusive rights for twenty years from filing<sup>83</sup>—in reality, seeking

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<sup>83</sup> Emily M. Hinkens, *Patent Term Adjustment and Terminal Disclaimers: Are the Terms of Patents Being Decided Ad Hoc?*, 94 MARQ. L. REV. 375, 377

such protection is fraught with difficulties. Filing fees<sup>84</sup> and statutory hurdles of subject matter,<sup>85</sup> novelty,<sup>86</sup> nonobviousness,<sup>87</sup> and adequate disclosure<sup>88</sup> may act to bar magic practitioners from this avenue. Further still, if the application published before issuance, the disclosure requirement would provide enough detail for enterprising competitors to design around the claims before the inventor acquired enforceable rights.<sup>89</sup> As discussed in the next Part, patent rights fail to protect magic practitioners.

While copyright law will not protect a magician's trick for being a "procedure" or "process,"<sup>90</sup> the recent *Teller* decision suggests it will protect his or her performance. Copyright protection extends to "original works of authorship fixed in any tangible medium of expression."<sup>91</sup> Common protected works include songs, movies, and artwork, but the 1976 Act also provided for the protection of choreographic works like those created by dancers. To register their work with the U.S. Copyright

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(2010) ("In general, a patent applied for today will have a term that ends twenty years from the date on which the patent application was filed.").

<sup>84</sup> See generally *United States Patent and Trademark Office Fee Schedule*, UNITED STATES PATENT AND TRADEMARK OFFICE, <http://www.uspto.gov/web/offices/ac/qs/ope/fee010114.htm> (last updated Nov. 4, 2014) (listing fee structure associated with filing patent applications).

<sup>85</sup> See 35 U.S.C. § 101 (2012).

<sup>86</sup> See *id.* at § 102.

<sup>87</sup> See *id.* at § 103.

<sup>88</sup> See *id.* at § 112.

<sup>89</sup> See William F. Lee & Lawrence P. Cogswell, III, *Understanding and Addressing the Unfair Dilemma Created by the Doctrine of Willful Patent Infringement*, 41 HOUS. L. REV. 393, 405 (2004) (citing *Yarway Corp. v. Eur-Control USA, Inc.*, 775 F.2d 268 (Fed. Cir. 1985) ("One of the benefits of a patent system is its so-called 'negative incentive' to 'design around' a competitor's products, even when they are patented, thus bringing a steady flow of innovations to the marketplace. It should not be discouraged by punitive damage awards except in cases where conduct is so obnoxious as clearly to call for them.")).

<sup>90</sup> 17 U.S.C. § 102(b) (2012).

<sup>91</sup> *Id.* at § 102(a).



Office, dancers may present either a film recording or a precise description by way of either written text or accepted “dance notation systems such as Labanotation, Sutton Movement Shorthand, or Benesh Notation.”<sup>92</sup>

Trade secret law, too, offers no harbor for magicians, as it is broader yet weaker than patent protection.<sup>93</sup> Trade secret law maintains “commercial ethics and the encouragement of invention,” holding that “good faith and honest, fair dealing, is the very life and spirit of the commercial world.”<sup>94</sup> Protecting anything—kept in confidence—that may yield a competitive advantage,<sup>95</sup> “trade secret law does not forbid the discovery of the trade secret by fair and honest means, e.g., independent creation or reverse engineering.”<sup>96</sup> As with patents and copyrights, the limits of trade secret law do not align with the needs of magic practitioners.

As we have seen, neither copyright law, patent law, trade secret law, moral persuasion, nor industry self-regulating institutions offer significant protection for magicians’ intellectual property. The research conducted in this study is exploratory. While exposures and theft have been well documented, little has been published on the subject of ethics and intellectual property in the magic industry. The study being used is most akin to an ethnographic and interview hybrid design as the study uses historical and popular text as a foundation to interview top

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<sup>92</sup> U.S. COPYRIGHT OFFICE, FL-119, DRAMATIC WORKS: CHOREOGRAPHY, PANTOMIMES, AND SCRIPTS (2010), available at <http://www.copyright.gov/fls/fl119.pdf>.

<sup>93</sup> See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 489–90 (1974) (“Trade secret law provides far weaker protection in many respects than the patent law.”). See also *infra* Part IV.A.3.

<sup>94</sup> *Kewanee Oil Co.*, 416 U.S. at 481–82 (quoting *National Tube Co. v. Eastern Tube Co.*, 13–23 Ohio C.C. 468, 470 (1902), *aff’d*, 70 N.E. 1127 (1903)).

<sup>95</sup> See CORP COUNS GD TO PROTECTING TR SECRETS § 1:1 (“[G]enerally, a trade secret is any information that is not generally known and that could give a company a competitive advantage.”).

<sup>96</sup> *Kewanee Oil Co.*, 416 U.S. at 490.

practitioners in search of narrative based off of their experience to analyze the industry.

### C. Results of Interviews

*“Magicians are actively taught that innovation has no value. It frustrates the process.”<sup>97</sup>*

Jim Steinmeyer strongly believes that the challenges associated with preserving magic’s secrets in the absence of law is directly related to magicians themselves having no value for the magic secret itself or the art of magic.<sup>98</sup> Mr. Steinmeyer said disappointedly, “[t]he world of magicians does not teach people to value creativity. It’s weird that the world of magic does not perpetuate any value for these things.”<sup>99</sup>

Lawyer and historian David Ben agrees, “[m]agicians don’t value their own heritage and experts. . . . If we won’t pay for it, why should the public?”<sup>100</sup> Mr. Ben is speaking in reference to practitioners buying stolen rip-off illusions at a discounted rate instead of paying the originator of the idea.<sup>101</sup> Mr. Ben foreshadows a systematic harm as a result of audience dissatisfaction from witnessing less than impressive performances. Much like a class of adolescent students who see through a teacher’s false sense of authority immediately, audiences too will see through an imitative and poorly designed performance with great ease. In presenting this quality of work, these magicians cheapen the craft of magic.

Challenging the interview candidates to offer a solution produced as many theoretical ideas and solutions as there are

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<sup>97</sup> See Telephone Interview with Jim Steinmeyer, *supra* note 16.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Telephone Interview with David Ben, Attorney and Magician, Magicana, (Aug. 3, 2010).

<sup>101</sup> *Id.*

problems. Interviewees spoke humbly from their own areas of interest.

This study's legal source, Jacob Loshin (one of the earliest published authors of an academic legal exploration of the magic industry's intellectual property challenges), suggests the following ideas:

Judges ought to be more willing to heed the role of norms and idiosyncrasies in the application of IP law. . . . Yet, the issue remains a comparative one, and formal IP law does not fare well in this comparison. Even if legal protection could be strengthened, such efforts would have an unfortunate chilling effect on magic's vibrant and free-flowing marketplace of ideas. Rather than investing in lawyers, magicians might be better off investing in their own institutions.<sup>102</sup>

In agreement with Jacob Loshin, Jim Steinmeyer expresses hope that clubs at the local and national level could heavily incorporate education on the ethics of intellectual property and the value of creativity in their charter.<sup>103</sup> Teller offered a different kind of recommendation to encourage other practitioners to come up with original ideas:

Hate all other magicians. Salvador Dali said, '[t]he first step of any artist is to learn to hate all of the other artists.' And hate is a very, very, good fuel for coming up with ideas. It is a good strong emotion, and it is not difficult to get. In magic's case you only have to look at 86% of the world's performers, and the hate will be so intense that you will want to

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<sup>102</sup> See Loshin, *supra* note 2, at 140.

<sup>103</sup> See Telephone Interview with Jim Steinmeyer, *supra* note 16.

go out and react against that.<sup>104</sup>

While his suggestion is more philosophical than systematical, it readdresses the notion that the magic industry needs to approach its ethical challenges not from a basis of rules and laws, but character and values. Teller's attraction to this quote may derive from its intensity; this quote is intended to make those who adopt it burn with a desire to always be better—a quality that Teller has practiced in his professional career since the beginning. When asked whether or not an individual can teach another to be creative, Teller did not think so, but he expressed that it can at least be demanded.<sup>105</sup>

Assuming there were industry practices to provide the necessary information, is it possible to teach someone ethical behavior and creativity with the desire to generate a value for these qualities within the art of magic? Subpart C of the following section will examine the feasibility of Jim Steinmeyer, Jacob Loshin, and David Ben's ideas.

#### IV. LIMITATIONS OF INTELLECTUAL PROPERTY LAW & THE INDUSTRY'S RESPONSE

##### *A. Limitations of Existing IP Law*

The previous sections of this study have uncovered how the free transfer of ideas positively influences the magic industry's ecology and innovation. Conversely, this paper has also gone some distance to illustrate the challenges and dangers. This section will briefly outline the advantages and disadvantages of three primary forms of IP law.

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<sup>104</sup> See Telephone Interview with Raymond Joseph Teller, *supra* note 12.

<sup>105</sup> *Id.*

### 1. Patents

As discussed above, patent law sets out certain requirements to ensure a net public benefit when granting patent rights. Though a patent proffers the right to exclude others from making, using, or selling for a limited time,<sup>106</sup> a potential inventor must adequately disclose the device to the public.<sup>107</sup> The enablement provision of 35 U.S.C. Section 112 requires the patent to describe the invention in a way that that “one skilled in the art can make and use the claimed invention.”<sup>108</sup> One can quickly deduce how this protocol might be successful if it were protecting the manufacturing process of a hammer but counterproductive for the protection of a magic illusion:

In order for magicians to protect their intellectual property through patent law, they must make their secrets available to the public. They must thus be willing to destroy much of what makes that property valuable. Consequently, few magicians now patent their innovations.<sup>109</sup>

For a conjuror to patent an illusion in the interest of protecting its secret, he would first have to reveal it, which interferes with the conjuror’s original purpose of applying for patent.<sup>110</sup>

### 2. Copyright

To secure a copyright for a material is for the originator

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<sup>106</sup> 35 U.S.C. § 271 (2012) (“[W]hoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.”).

<sup>107</sup> See 35 U.S.C. § 112 (2012).

<sup>108</sup> MPEP § 2164 (9th ed. Rev. 1, Mar. 2014).

<sup>109</sup> See Loshin, *supra* note 2, at 132. *But see* U.S. Patent No. 5,354,238, filed June 7, 1993 (patenting a levitation illusion designed by John Gaughan but famously performed by David Copperfield). Gaughan reportedly filed the patent against Copperfield’s wishes.

<sup>110</sup> See Loshin, *supra* note 2, at 132.

individual or organization to acquire “the exclusive legal right . . . to print, publish, perform, film, or record literary, artistic, or musical material, and to authorize others to do the same.”<sup>111</sup> F. Jay Dougherty<sup>112</sup> explains that copyright law differs from patent law as it does not protect a work’s procedure, process, system, or operation:

The ideas behind an illusion and the devices and useful methods used to implement it are not protectable by copyright. Words and short phrases are not viewed as sufficiently original to merit copyright protection. Common scenes and expressive elements that are indispensable, or at least standard, in depicting an idea are unprotectable ‘scenes à faire.’ ‘Stock’ characters, standard character types without original creative delineation, are treated similarly. Copyright has limited application to literary and visual material that is utilitarian. Useful methods, processes and articles are all excluded from copyright protection.<sup>113</sup>

Dougherty points out that one could publish and copyright a book that reveals the process of how to accomplish or build a magic effect, but the methodology itself is still not protected.<sup>114</sup> Magic pieces occupy a grey area incapable of a pure and effective classification between expression and function, copyright and

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<sup>111</sup> NEW OXFORD AMERICAN DICTIONARY 376 (2d ed. 2005).

<sup>112</sup> F. Jay Dougherty is the Director of the Entertainment and Media Law Institute and Concentration Program, as well as a professor, at Loyola Law School in Los Angeles, California. *See F. Jay Dougherty, FAC. & ADMIN.*, <http://www.lls.edu/aboutus/facultyadministration/faculty/facultylistc-d/doughertyfjay/> (last visited Nov. 29, 2014).

<sup>113</sup> *See Dougherty, supra* note 3, at 102.

<sup>114</sup> *Id.* at 104.

patent.<sup>115</sup>

### 3. *Trade Secret*

Lastly, magicians have attempted to employ trade secret law to protect their ideas; generally, these too have been unsuccessful. Confidential information or trade secrets are formulas, processes, designs, or specific information that give an individual or organization an economic advantage over competitors.<sup>116</sup> However, this economic advantage is only protectable if strict trade secret stipulations are followed.

Trade secret law stipulates that liability for violating a trade secret is only applicable to individuals or organizations that obtain the secret through theft or an inability to maintain secrecy.<sup>117</sup> An example would be an assistant or technician who exposes the secret to another magician. Magicians are able to manage this requirement modestly through the use of secrecy agreements.<sup>118</sup> Therefore, should another party simply discover the secret or

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<sup>115</sup> *Id.* at 108.

<sup>116</sup> *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 474–75 (1974) (quoting RESTATEMENT (FIRST) OF TORTS § 757 at comment b (1939)).

<sup>117</sup> Donald M. Zupanec, *Disclosure of Trade Secret as Abandonment of Secrecy*, 92 A.L.R. 3d 138, §2(b) (1979) (“[T]here are three elements in a cause of action for the tort of misappropriation of a trade secret: (1) the existence of a trade secret; (2) disclosure of the trade secret to the defendant in confidence, or the defendant’s acquisition of the trade secret by improper means; and (3) injury to the plaintiff resulting from the defendant’s use of the trade secret.”).

<sup>118</sup> David Copperfield requires those involved with his shows to sign the following agreement: “I . . . understand that in the course of my employment I may become entrusted with the secrets of the illusions and magic in the David Copperfield Show. I realize that this is privileged information and that a great deal of time, energy, and money has been spent in the development of these illusions. I promise never to discuss these secrets and methods with any other person, relative or friend. The secrets of the Magic of David Copperfield are the proprietary rights of David Copperfield and under penalty of severe fine I agree to cooperate with my total secrecy.” DAVID COPPERFIELD, SECRECY AGREEMENT (1998) (copy on file with author); *see also* Loshin, *supra* note 2, at 133.

acquire the secret in good faith, trade secret law will no longer protect the secret.

Another stipulation of trade secret law that furthers the magic industry is that it requires secret-holders to make efforts to maintain secrecy. Should a secret be revealed within the confines of an industry, the courts no longer qualify it as a secret. If the secret is published in magicians' trade journals, books, or if it has been shared informally among circles of magicians, it is likely to lose its protection through trade secret law.<sup>119</sup> Jacob Loshin explains the magic industry's incompatibility with traditional trade secret law in greater detail:

The fundamental difficulty with trade secret law rests on the fact that courts tend to view intellectual property as inhering in individuals or in firms, but not in industries. This stems from the traditional conception of trade secret law as a means of incentivizing innovators by giving them a competitive advantage over their direct competitors in the industry. Yet, the magic community's innovation ecology works differently. The threat of exposure results primarily from competition by industry outsiders, not by insiders. Disclosure of secrets to insiders—[that is], to fellow magicians—thus does not void the intention to keep something secret.<sup>120</sup>

Should the magic industry desire to seek full protection under trade secret legislation, practitioners must be willing to sacrifice the valuable widespread sharing of ideas between peer magicians and designers to reduce the chance of ideas leaking to outsiders. The harsh reality of protecting intellectual property in the magic industry is that no single method of legal protection is wholly

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<sup>119</sup> See Loshin, *supra* note 2, at 133.

<sup>120</sup> *Id.* at 134.



effective. Trade secret protection requires the industry to undergo drastic changes to its already established innovation ecology, patent law protects intellectual property from theft but not exposure, and copyright law can protect sufficiently original routines but not the method, devices, or operations within the routines.<sup>121</sup>

Yet, the lack of legal protection has only stood as a minor obstacle for professional magicians as they innovate and develop their unique craft. Outside the purview of the law, scholars have observed how magicians have developed an informal set of industry norms that have a positive effect on controlling exposure, limiting industry access to secrets and punishing violations. The following sections will explore various ways industry practitioners have gone some distance in protecting magic's secrets without the assistance of the law.

### *B. Industry Norms*

Magicians quickly gain awareness of informal industry norms that help control exposure of secrets. The industry's informal intellectual property norms are fairly successful at controlling usage and exposure. In a 2010 essay, Mr. Loshin states that the first set of norms exists to credit the inventors: "(1) The first person to publish or prominently perform a trick gets credit for inventing it, [and] (2) [p]eople are encouraged to publish improvements and new versions of previously shared work, but derivative works should acknowledge and credit the original."<sup>122</sup>

The importance of the above industry norms is to promote sharing for a rich innovation ecology in the magic industry. Honor and popularity often come with the invention of a new piece of magic; many conjurors seek to cultivate their reputation through the invention of new routines, methodologies, and presentations. The second set of industry norms Jacob Loshin summarizes

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 136.

governs the usage of new ideas after their conception and creation:

(1) If a secret method or dramatic presentation has not been widely shared, published, or sold, nobody else can use it.

(2) If a secret method has been widely shared, published, or sold, it may be used freely.

(3) If a dramatic presentation has been widely shared, published, or sold, it may be used, but it will be considered bad form to do so without creative adaptation.

(4) If a trick was originally published or shared but has not been used for a long time, the person who re-discovers it should be treated as if she invented it.<sup>123</sup>

The norms that govern a new idea allow the creator to control whether they will perform the piece exclusively, as well as promoting the discovery of old, dormant ideas. Finally, all practitioners understand the most steadfast rule is to protect secrets from exposure to the general public.

Loshin argues that any exposure at all damages the value of the secret as an intangible resource. Incidents such as the Outagamie Historical Society in Appleton Wisconsin<sup>124</sup> illustrate these intellectual property norms being enforced informally. When the museum chose to reveal its secrets, board members, historians, museum property owners, and patrons associated with industry organizations resigned in great numbers echoing the vow to disassociate themselves from anyone who betrayed the code of ethics. Financial trouble as a result of failing patronage threatened the museum in a way that intellectual property laws could not.

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<sup>123</sup> *Id.* at 136–37.

<sup>124</sup> *See supra*, Part II.E.2.

There is widespread disagreement about whether or not moral persuasion, such as the aforementioned industry norms, is effective and valuable to protecting the craft of magic. Narratives from the pages of trade journals, discovered stories by amateur magician writers, and private correspondence between practitioners offers evidence that moral persuasion and industry norms can occasionally govern and punish improper use of a magic secret.

Admired American illusionist, and past president of The Society of American Magicians, Walter “Zaney” Blaney<sup>125</sup> shares a personal account of intellectual property theft:

“[A] company in England, Illusions Plus, was selling still another rip-off of my illusion. When I protested to the owner, James Antony, he told me there was no court in the world, which could stop him from what he was doing. I explained I had no intention of going to court. I instead simply told my many friends in [London’s] Magic Circle about it . . . . When the word spread, soon Mr. Antony ‘had a problem.’ As things turned out, there was indeed a court which promptly put him out of business . . . . the bankruptcy court.”<sup>126</sup>

Often, the top illusion builders make their income solely on the sale of intellectual property. They profit nothing from the performance or the creation of the prop, only the design, process, or device methodology. Mr. Blaney’s reputation alone commanded the attention of professional magic practitioners worldwide. In this particular case (possibly coincidentally), practitioners sought affordable creations from alternative reputable dealers. James Antony’s bankruptcy halted the manufacturing of his rip-off

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<sup>125</sup> See WALTERBLANEY.COM, <http://www.walterblaney.com/illusions/bio.html> (last visited Nov. 19, 2014).

<sup>126</sup> Open Letter from Walter Blaney to the Magic Community (Nov. 2002) (on file with author).

illusions and subsequently drove magician consumer interest looking to purchase Mr. Blaney's creations back to its original source, Mr. Walter Blaney himself.

The *Chinese Linking Rings* are a classic of magic. In the traditional presentation of the effect, a set of solid metal rings appear to link and unlink, seamlessly passing through one another forming chains and patterns. A few years ago, a very innovative and respected comedy magician (who will remain unidentified) seeking to re-design the effect for contemporary audiences, created a new variation entitled *The Linking Coat Hangers*. This modified variation on the classic Chinese ring routine accomplishes the same visual effect, but is made with coat hangers. After a popular reception from audiences and magicians alike, this unidentified magician began manufacturing and selling the routine for approximately \$100 (generally an accepted value for a highly entertaining seven minutes of entertainment). The routine was a hit, and sales were high. Shortly thereafter, a Midwest magic dealer began creating and selling the same routine, defending his decision to do so by claiming that the respected comedy magician did not invent the linking coat hangers. While this is partly true, the linking coat hangers previously existed; it is also partly false as the new linking coat hanger routine employed a completely different method. The inventive magician urged the dealer to stop without success. What finally forced the dealer to stop was a phone call from now deceased magic legend Jay Marshall.<sup>127</sup> The

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<sup>127</sup> Jay Marshall (1919–2005) was an American magician known as the “Dean of American Magicians.” His sixty-year career highlights include being a regular on the Ed Sullivan Show as well as the first person to open for Sinatra in Las Vegas. Douglas Martin, *Jay Marshall, 85, the Dean of Magic, is Dead*, N.Y. TIMES (May 13, 2005), <http://www.nytimes.com/2005/05/13/arts/13marshall.html>.

The phone call with Marshall was reportedly brief and gentle. Jay explained to the dealer that he had a problem. The unsuspecting dealer's attention was now piqued as he asked what the problem was. Jay went on to casually tell the dealer that he was both friends with him (the dealer) and with the unidentified comedy magician, but that at that moment Jay couldn't be a friend with both of them.

pressure of losing Jay Marshall as a friend quickly ended the sale of the rip-off coat hanger routine. This story reveals the strong social pressure that remains active in the magic community. But like the norms and legal methods mentioned previously in this study, social pressure as an industry norm is unreliable. Violators looking to expose the secret or its manufacture would not be subject to the same social pressure or industry norms; one such example would be a person that is not part of a fraternity of magicians uploading a rip-off of the routine on the Internet.

But respected magic historians like David Ben, Teller, and Jim Steinmeyer argue that the moral authority presented above doesn't mean much of anything.<sup>128</sup> Ben confidently addresses the subject stating that the moral persuasion that exists in the magic industry is unreliable and that the "stakes are so low" that it does not matter.<sup>129</sup> "Most of the large pieces," he says, "are protected from the industry by the dollar value that's assigned to actually create or perform them correctly."<sup>130</sup>

The wildly popular *Masked Magician* FOX special aided in the magic industry's realization that neither law nor industry norms are entirely successful.<sup>131</sup> New institutional and administrative strategies in the realm of self-regulation were born.

Self-regulating institutions are popular in industries that

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The dealer responded quickly and humbly that only two more coat hanger routines remained in his shop, and that once they sold, he would never manufacture one again. Jay Marshall thanked the dealer, and shortly after the coat hangers were once again exclusively sold by the comedy magician. Telephone Interview with Stan Allen, Founding Editor of MAGIC Magazine (Aug. 4, 2010).

<sup>128</sup> E.g., T.A. Waters, *Jim Steinmeyer: Deviser of Illusions*, MAGIC MAGAZINE (Sept. 1996), <http://www.jimsteinmeyer.com/profile/magic.html>.

<sup>129</sup> Telephone Interview with David Ben, *supra* note 100.

<sup>130</sup> *Id.*

<sup>131</sup> Paul Brownfield, *Fox Isn't Disillusioned as Masked Magician Series Ends*, L.A. TIMES (Oct. 31, 1998), <http://articles.latimes.com/1998/oct/31/entertainment/ca-37752>.

operate outside the purview of the law, such as the culinary and fashion industries.<sup>132</sup> The magic industry has only given rise to one such institution: the World Alliance of Magicians (W.A.M.).<sup>133</sup> Founded in response to the most recent major exposure on the FOX network, *The Masked Magician*, W.A.M. founder Walter Blaney recruited some of the brightest minds in magic in an effort to protect the secrecy of magic effects worldwide.<sup>134</sup> The organization saw limited success. Most notably, W.A.M. members persuaded major corporate sponsors of the FOX magic revealed special, such as American Airlines, Coca-Cola, Kellogg, and 3M, to pull their ads from the programming.<sup>135</sup> This action proved financially frustrating for FOX executives in the production of the fourth season.<sup>136</sup> In the end there were only three sponsors remaining, and the rest of the ads were FOX programming commercials.<sup>137</sup>

The members also assembled a book that summarized all of the legal theories that might be used to protect secrecy with the purpose to help the performers, creators, and manufacturers of magic secrets understand and appreciate the choices available to them. W.A.M. unexpectedly folded shortly after the FOX network cancelled programming of the *Masked Magician* show.<sup>138</sup> In response to why the organization folded, Walter Blaney said

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<sup>132</sup> *E.g.*, U.S. FASHION INDUSTRY ASSOCIATION, <http://www.usfashionindustry.com> (last visited November 19, 2014).

<sup>133</sup> W.A.M. was an organization dedicated to preserving the wonder and amazement of the Magical Arts for the general public, protecting the secrets of the magic profession from exposure, and reinforcing the positive contributions of the Magical Arts to society. WORLD ALLIANCE OF MAGICIANS, [http://www.geniimagazine.com/magicpedia/World\\_Alliance\\_of\\_Magicians](http://www.geniimagazine.com/magicpedia/World_Alliance_of_Magicians) (last visited November 29, 2014).

<sup>134</sup> Telephone Interview with Walter Blaney (Aug. 4, 2010).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

simply that in regard to the FOX network, “The need was gone.”<sup>139</sup> He added that the second purpose was to protect the inventors, but individual industry practitioners were not interested in supporting the organization financially. Mr. Blaney concluded, “W.A.M. members just ran out of gas in their attempts to solicit capital to sustain the organization’s operations.”<sup>140</sup>

Developing an industry self-regulation system raises several concerns for professionals who make their living off the sale of intellectual property. Questions arise as to who will legislate, how this legislation will take place, and how the rules will be enforced. W.A.M.’s lack of support from individual practitioners indicated concerns shared presently by some of the most recognized names in magic. Jim Steinmeyer stated candidly in an interview:

It’s only the intellectual property that I make money on. So the notion that [ten] people decide whether I should make money on a creation is frightening to me. I look at the list of names, of the grey beards of our industry, and I say I don’t trust them. I don’t trust them as a group, I don’t trust them to cast judgment on my work. I know my part of this industry very well. I know the history, I know how ideas were developed, and I think I know more about it than those people do.<sup>141</sup>

Lawyer, Toronto University professor, and world-renowned sleight of hand artist David Ben seconds Jim Steinmeyer’s anxiety:

I don’t think there are enough people, if there is anyone, who can actually speak with enough authority—from true knowledge—of how ownership of credit should be allocated. I can’t imagine it being

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Telephone Interview with Jim Steinmeyer, *supra* note 16.

done. The whole history is so intertwined.<sup>142</sup>

But intricacies of an invention's origin are not the only reason magic's top practitioners are opposed to a self-regulating institution. Professionals feared that a representative body of magicians emotionally (and publicly) opposed to the show would only drum up further interest for the network's specials. As the old adage goes, any publicity is good publicity. Hollywood television tabloids seemed to agree as the notorious TMZ broadcast included coverage of the W.A.M. versus FOX controversy in their programming. Los Angeles illusion designer and manufacturer John Gaughan<sup>143</sup> opposed W.A.M.'s public relations strategy.<sup>144</sup> In a left-handed way, W.A.M.'s efforts may have put fuel on the fire. But ultimately, the FOX network specials lost their audience along with their motivation to continue pursuing the project, and so did the World Alliance of Magicians.

Eight out of the nine interviewees for this study, who all hold reputations as one of the industry's top sources of innovative magic and historical analysis, regretfully conceded that they simply have no idea how an industry institution or system that regulates ownership of magic's intellectual property could work. All eight admitted that while they had come to this conclusion, they had done so selfishly. The optimism has simply faded.

Skepticism of who would govern, legislate, and enforce new

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<sup>142</sup> See Telephone Interview with David Ben, *supra* note 100.

<sup>143</sup> John Gaughan is an American illusion builder who has spent a career building large-scale illusions for artists like Jim Morrison, Elton John, Michael Jackson, Alice Cooper, Cher, and more. See generally Stephanie Rosenbloom, *Magicians Ask What's Up His Sleeve?*, N.Y. TIMES (May 18, 2008), <http://www.nytimes.com/2008/05/18/fashion/18magic.html?pagewanted=all>.

<sup>144</sup> Telephone Interview with John Gaughan, Illusion Builder and Inventor (Jul. 5, 2010). Gaughan recalled a story of a strip club's grand opening in a rural area of Glendale, California. The club's management made placards complaining about the club in local neighborhoods, and they hired people to picket outside the building. John remarks with a tone of obviousness that he recognizes is long overdue, "It was free publicity, and everyone bit on it."



industry regulations emanate from a time-honored mistrust of other practitioners. Thirst for magic's secrets breeds a dangerous self-interest, even in the most seemingly innocuous conjuror. Jim Steinmeyer adds with a quality of resolve:

The notion of forming some kind of grand alliance to protect these things within the industry is doomed, because the industry itself wants to steal these things constantly and wants every justification to do that.<sup>145</sup>

Steinmeyer describes an unethical mentality seemingly unique to professionals in the magic industry. In music there are people and organizations that take it upon themselves to protect their work, in magic it is the same people that want to take the ideas.

While there is strong disagreement as to whether or not keeping a secret from the public, or from other industry insiders, prevents or provokes systematic harm to the industry's ecology. Everyone enthusiastically agrees that they are in the same business, the business of producing shows so audiences might be amazed and entertained:

Magic is an art. People work a very long time to invent, create, and perfect the music, choreography, costumes, staging, and assistant work to create a theatrical experience. And when you abuse the one Achilles heel of magic, the secret, everything else is forgotten—it was all for nothing.<sup>146</sup>

While surely an exaggeration, his statement gracefully acknowledges the bigger picture. If there is truth in Teller's belief that someone learning a magic effect is not going to put anyone out of work, and the great majority of practitioners are ultimately under the opinion that their work is about the final presentation, the intangible magic

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<sup>145</sup> See Telephone Interview with Jim Steinmeyer, *supra* note 16.

<sup>146</sup> See Telephone Interview with Walter Blaney, *supra* note 134.

secret becomes only a portion of the overall production value and audience experience. However, as this study suggests, the audience's experience at a magic show is enhanced with their inability to understand how a trick works. Should a conjuror aspire to both protect magic's secrets and entertain, one could argue that it would require the individual to have a fidelity to the art of magic. As a result of this faithfulness, the practitioner would benefit professionally from satisfied audiences and the industry would benefit systematically from an ethically healthier ecology.

As illustrated within this study, preserving magic's secrets requires discipline and astounding audiences demands creativity, not imitation. Interviews with the industry's top practitioners suggest that imitators, and their lack of creativity, are to blame for damages to intellectual property and the entire innovation ecology of the magic industry. Teller said in his interview that while imitators can be successful, he points out a dangerous side-effect: "The result however, is that because people are at least amazed by their imitation, they credit these magicians as being participants in an art form; meaning that often the people that get into magic are the scum of entertainment."<sup>147</sup> If this is true, there exists a direct correlation between a magician or inventor's creativity and an audience's satisfaction.

### *C. Difficulties in Applying/Regulating a Professional Code of Ethics*

The idea that analysis would help a magician or inventor acquire value for creativity and the magic secret, who does not already possess it to some degree, is a highly questionable one. In the interest of applying this theory, the following discussion section will offer a few thoughts and criticisms to the suggestions of the interview subjects; but please note the observations will be shallow. A comprehensive and philosophical exploration of honor and character is beyond the scope of this Note.

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<sup>147</sup> Telephone Interview with Raymond Joseph Teller, *supra* note 12.

This study suggests that in the absence of law, practitioners' attempts to govern intellectual property by controlling theft and exposure while motivating creativity are polluted by an overwhelming self-interest and complicated by practitioners who allegedly do not value the art of magic or the secret itself. If internal institutions followed one of Mr. Steinmeyer's suggestions to include ethics education in magician's civil society club meetings, the complication remains whether or not it is even possible to communicate these values, and furthermore, see them put into practice.

*1. Feasibility of Ethics Education Governed by Industry Group*

Using history as a tool to determine whether this theory is feasible, Teller suggested an examination of Aristotle and Socrates.<sup>148</sup> Aristotle wrote arguably the most lucid analysis that has ever been written about the theater. In the *Poetics*, the theories about drama that he describes are about as accurate as one could be about theories scholars present today about playwriting and theater. But when one looks through his works, they do not include a single play. Similarly, Socrates in *The Symposium* talked about his frustration with finding people who actually knew what they were talking about. Socrates went to the poets, thinking that since they created amazing poems, they would therefore be wise. But since the poets were unable to explain their poems, he concluded that they were unwise. But then again, they were able to compose those poems and Socrates could not.<sup>149</sup> Just as a screenwriter teaches expensive and thought-provoking classes on the theory of screenwriting while having never written a major motion picture, these stories of Aristotle and Socrates serve as a reminder that the actual process of teaching a subjective quality or skill is terribly challenging.

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

Contemporary comparisons might be the tasks of teaching someone how to be funny, or perhaps harder yet, how to be a good father. There is no quick list to teach either of these qualities; one could offer an individual some rules but mechanically the rules or suggestions would not work. To be funny one must watch comedians, and to be a good father one must watch and experience a good father.<sup>150</sup> To be an honorable magician or inventor, one must watch and experience magicians and inventors who practice their craft with an unwavering fidelity to the art of magic as a theatrical medium.

## 2. *Creating a Code of Honor*

When Jim Steinmeyer expressed his desire for magicians to value the magic secret and the art itself,<sup>151</sup> he talked about magicians having an intrinsic commitment to the art of magic, a fidelity to the magic secret, and ultimately a sense of honor. Honor is, more than anything, a standard of conduct and an adherence to what is right. Professor of Philosophy at the College of Saint Benedict and Saint John's University Anthony Cunningham says, "When we talk about honor, there is your honor, there is my honor, and then there is just honor. Honor is much bigger than any of us."<sup>152</sup> This idea implies that when thinking about what type of people inventors and magicians should be, having a strong sense of honor for one's craft demands that one quit at the point where they need to sell out to survive. If Mr. Antony adhered to a code of honor to the art of magic, he would have electively gone out of business before resorting to stealing Walter Blaney's intellectual property.<sup>153</sup>

The complicated temptation, for those that attempt to adhere to

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<sup>150</sup> *Id.*

<sup>151</sup> See Telephone Interview with Jim Steinmeyer, *supra* note 16.

<sup>152</sup> Interview with Anthony Cunningham, Professor of Philosophy, Coll. of St. Benedict & St. Johns Univ., in Collegeville, Minn. (Aug. 11, 2010).

<sup>153</sup> See Telephone Interview with Walter Blaney, *supra* note 134.

this intrinsic commitment, is how a new professional magician with limited resources balances the need to make money while simultaneously retaining a fidelity to the art. The pursuit to honor the art of magic must always overcome moments of weakness where a magician might be filled with a begrudging envy of another magician's performance or creation.

The martial arts have accomplished the feat of educating participants in a standard of conduct. Fighters in the martial arts bow before they begin, an act that reminds the participants that they are merely a conduit, a way that the art can be expressed. "In the martial arts you study a code of honor, as the art you are learning could be deadly. The code implicitly states that you will use martial arts only for good."<sup>154</sup>

Should a martial arts master have a fatal move, it is unlikely that she would share the move with her students right away; first she must determine if the students are trustworthy.<sup>155</sup> Once she reveals the methodology to accomplish the move, she must trust the recipient, as she is now unable to prevent the recipient from using the move.<sup>156</sup>

Furthermore, the martial arts comparison might be applied to the relationship between an innovative illusion designer, a magician, and the magic secret or creation. The magician must be trustworthy for the inventor to reveal the methodology to accomplish the new illusion, as the inventor is now unable to prevent the magician from using or protecting the secret improperly or ensure that the resale of an apparatus will include the builder's royalty or the illusion's performance rights. Likewise, magicians adhering to honor would be required to embrace the idea that they are merely participants in an art form that is much larger than they are.

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<sup>154</sup> See Interview with Anthony Cunningham, *supra* note 152.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

### 3. *Challenges*

#### a. *Peer Criticisms*

Illusion builder and inventor John Gaughan, who believes the magic industry's ethical challenges are much worse in Europe and China, raises a practical concern about excommunicating those who unethically acquire and rip-off intellectual property.<sup>157</sup> Mr. Gaughan shared, reluctantly, “[a] few years ago, I discovered an amusement park in Germany that was using some of my creations. My portfolio revealed that half were properly acquired, and the other half of the props were not obtained from designated builders, nor had they acquired the appropriate performing rights.”<sup>158</sup>

Illusion design is a business that generates a very lumpy income from project to project. Mr. Gaughan questions the sanity of turning away such a large client that may produce future business.<sup>159</sup> Daniel Summer<sup>160</sup> agrees, citing a similar story where he ultimately conceded to an unlicensed<sup>161</sup> European builder, by allowing him to continue building substandard reproductions of Mr. Summer's apparatus in return for his full royalty and performance rights.

#### b. *Consumer Perspective*

Jim Steinmeyer offers practitioners of magic the following motivation to protect their secrets:

[M]agicians are notoriously close-mouthed, but the real reason we guard our secrets is not to protect them from being known by the audience, but to protect the audience from the secrets. The methods used by magicians are simple and uninteresting.

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<sup>157</sup> See Telephone Interview with John Gaughan, *supra* note 144.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> See *supra* note 22.

<sup>161</sup> And in this author's humble opinion: shady.

Magicians prize basic, dependable techniques for their illusions, but they also realize the corrosive effect when an audience understands those crude secrets. These bare technical details are terribly deflating.<sup>162</sup>

A magician's craft is created for an audience. They perform for the pleasure of their audience, and the audiences are the people purchasing tickets to their shows. Failure to always act with an audience's interests in mind is not only complacent, but will likely lead to financial instability. Teller argues that there is no value in protecting magic's secrets from an audience, "[e]veryone else in the world will learn magic from a book or from a person. Every person in your audience knows something about magic, and that is whom you are performing for."<sup>163</sup>

Conversely, audiences attend under the pretense that they are to be fooled. Should a magician diligently protect his or her secrets, the audience member's experience will be as they expected. The ethical challenges of preserving magic's secrets appear to affect external consumers very little.

Revealing the secret to an audience has often been compared to the experience of reading a story, getting toward the end of the story, and then someone unexpectedly reveals the ending. Left without details but with knowledge of the ending, the reader has a feeling of the ending having been ruined. Discovering the ending before arriving there on one's own effectively pulls the rug out from the experience. But as this study has illustrated, industry practitioners agree that the secret is only part of the theatrical experience. There is merit in both perspectives. A fictional story has similar qualities. When you tell a child a story, they may say,

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<sup>162</sup> JIM STEINMEYER, *THE GOLORIOUS DECEPTION: THE DOUBLE LIFE OF WILLIAM ROBINSON, AKA CHUNG LING SOO, THE "MARVELOUS CHINESE CONJURER"*, at x (2005).

<sup>163</sup> See Telephone Interview with Raymond Joseph Teller, *supra* note 12.

“that’s not true!”<sup>164</sup> They may want to verify the story.<sup>165</sup> Other people who hear the same story won’t care; they will be swept up and captivated, provided you can tell it well.<sup>166</sup>

The only question is how many metaphorical television sets should conjurers be expected to have hiding in their home? After all, Teller would lose his competitive advantage if he could not continue producing bigger and better tricks.

#### V. TELLER WINS

In 1983,<sup>167</sup> Teller registered *Shadows* with the United States copyright office.<sup>168</sup> “The registration describes the piece as ‘Dramatic Work and Music; or Choreography,’ with ‘Notes: Pantomime.’”<sup>169</sup> The registration included detailed notes of how the trick was to be *performed*, similar to how choreographic notations<sup>170</sup> register a dance performance itself.<sup>171</sup>

Gerard Dogge, a Dutch performer, created two YouTube

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> Teller started to perform *Shadows* seven years before registering the work, meaning the registration was not *prima facie* evidence of copyright validity. Still, enough evidence was brought forward to prove Teller the rightful owner of the performance. *Teller v. Dogge*, 8 F. Supp. 3d 1228, 1231 (D. Nev. 2014).

<sup>168</sup> Eriq Gardner, *Teller Wins Lawsuit Over Copied Magic Trick Performance*, HOLLYWOOD REP. (Mar. 21, 2014), <http://www.hollywoodreporter.com/thr-esq/teller-wins-lawsuit-copied-magic-690347>.

<sup>169</sup> See Brancolini, *supra* note 70, at 105; see also Complaint at ex. 1, *Teller*, 8 F. Supp. 3d 1228 (No. 2:12-CV-00591), 2012 WL 1259288, at \*3.

<sup>170</sup> See Bethany M. Forcucci, *Dancing Around the Issues of Choreography & Copyright: Protecting Choreographers After Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.*, 24 QUINNIPIAC L. REV. 931, 942 (2006).

<sup>171</sup> The court notes that while “magic tricks are not copyrightable” the dramatic performance surrounding the trick is copyrightable. *Teller*, 8 F. Supp. 3d at 1233.



videos of his own version<sup>172</sup> of the trick, which he entitled *The Rose and Her Shadow*. Additionally, Dogge offered to sell the secrets to Teller's illusions to "customers in various countries."<sup>173</sup> Teller sued Dogge, claiming copyright infringement and unfair competition.<sup>174</sup> Teller then motioned for summary judgment on both claims.<sup>175</sup> The defendant argued that his secret to performing the magic differed from Teller's. The presiding judge responded:

By arguing that the secret to his illusion is different than Teller's, Bakardy implicitly argues about aspects of the performance that are *not perceivable by the audience*. In discerning substantial similarity, the court compares only the *observable* elements of the works in question. Therefore, whether Bakardy uses Teller's method, a technique known only by various holy men of the Himalayas, or even real magic is irrelevant, as the performances appear identical to an ordinary observer.<sup>176</sup>

This analysis is made stronger by the fact that Teller himself admits to using two other methods to accomplish the same visual effect in previous years.<sup>177</sup> Accordingly, Judge Mahan granted the motion for summary judgment on copyright infringement and awarded Teller attorney fees, but denied summary judgment on the determination of damages and unfair competition.<sup>178</sup> Damages were later contested, but ultimately the court granted Teller permanent injunction for the videos, and \$15,000 in damages,

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<sup>172</sup> Dogge added a second illusion, where the vase's water was subsequently poured into a drinking glass to be consumed by the performing magician.

<sup>173</sup> *Teller*, 8 F. Supp. 3d at 1231.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 1230–31.

<sup>176</sup> *Id.* at 1236.

<sup>177</sup> See Jones, *supra* note 65.

<sup>178</sup> *Teller*, 8 F. Supp. 3d at 1238.

\$30,000 in costs, and \$500,000 in attorney fees.<sup>179</sup> While it is uncommon for a court to grant an award for attorney fees, the infringing magician's many years of delaying this lawsuit compelled the court to award fees in this case.

## VI. CONCLUSION

The complexities of magic's ecology and process appropriately occupy a negative space of intellectual property law and the competitive advantages that accompany its protections.<sup>180</sup> But Teller's successful protection of his performance's copyright, while preserving the illusion's secret, marks an important shift in copyright's ability to provide theft protection for magicians.<sup>181</sup> The evidence shows that protecting a magician's performance—not the secret from disclosure—is practicable and effective in safeguarding a magician's finances, morals, and secrets.

Meanwhile, magic continues to flourish as prominent magicians headline productions from Broadway to Las Vegas, and thousands of other amateur and professional magicians perform and invent new ideas in the absence of law. Despite many ethical concerns, magicians will continue using their unique theatrical medium to share an intangible beauty that evokes a sense of wonder from their audiences.

*Listen for the brief pause between the end of the  
trick and the start of the applause—the split second*

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<sup>179</sup> The court has broad discretion in awarding damages, and even though the plaintiff's actions were arguably willful, making the infringement eligible for statutory damages up to \$150,000, the court that since the video had very little exposure and a permanent injunction was granted, the court found a "maximum statutory award unnecessary." *Teller v. Dogge*, No. 2:12-CV-591 JCM (GWF), 2014 WL 4929413, at \*4 (D. Nev. Sept. 30, 2014).

<sup>180</sup> See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991) (discussing goals between protecting authors' work and promoting innovation).

<sup>181</sup> See Brancolini, *supra* note 70, at 105 (discussing spirit of copyright law and performance theft).

*when the entire audience shares a gasp of genuine amazement, at that moment there's always been an honorable quality in illusion.*<sup>182</sup>

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<sup>182</sup> See STEINMEYER, *supra* note 1, at 331.