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Abracadabra! - Why Copyright Protection For Magic Is Not Just An Illusion

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In early 2012, a Dutch magician did something unthinkable within the secretive and tight-knit magic community: he posted a YouTube video of himself performing a fellow magician's illusion, and offered to reveal the secret to his viewers for a $3,050 fee. The illusion, however, was not just any old trick; it was the signature move of Raymond Teller, one half of the famous magic duo "Penn & Teller." In April 2012, Teller took the unusual step of filing a lawsuit in federal court, alleging copyright infringement and unfair competition, to protect the secret behind his illusion. It is not clear, however, that magic is a copyright-protectable category of work. Neither the United States 1976 Copyright Act nor the United States' Copyright Office's working compendium addresses magic. No federal court has held magic protectable since the Copyright Act was amended in 1976. Still, magic meets the constitutional and statutory requirements for copyright-protectable work. The *Teller* court should hold that magic illusions are eligible for copyright protection, regardless of whether it finds there was infringement in this particular case.

I. INTRODUCTION

A rose in a vase sits on a table on a dark stage, its shadow projected onto a white screen behind it.[1] A man in a black vest approaches slowly,

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1. TheMagicofIllusion, *Penn & Teller - Shadows*, YOUTUBE (June 14, 2012), http://www.youtube.com/watch?v=a3oVm7gU08Y.

looking at the rose and then the shadow.[2] The dim light reflects off a knife in his hand.[3] The man turns toward the shadow, curious, and slowly raises the knife.[4] He presses it into the screen, cutting the shadow where a petal meets the stem.[5] At that moment, the real petal—the one casting the shadow—falls to the table.[6] The man turns from the shadow and looks at the real rose in amazement as the audience laughs.[7] He continues severing the petals, via the shadow of course, until only the bare stem remains.[8] Suddenly, he accidentally pricks his finger with the knife, and his shadow begins to bleed.[9]

The man in the vest is Raymond Teller, the famously taciturn member of the magic duo "Penn & Teller."[10] The illusion, called "Shadows," is his signature piece, and has been part of his act since the 1970s.[11] "Shadows" is so iconic that it has been called one of the top five magic tricks of all time.[12] Perhaps this is why, when a Dutch magician posted a YouTube video last year that showed himself performing Teller's trick and offering to explain the illusion, Teller did something no magician has done in more than a decade:[13] He filed a lawsuit seeking to enjoin the defendant from performing and revealing his trick.[14] The suit, filed in federal court in

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2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. TheMagicofIllusion, *Penn & Teller - Shadows*, YOUTUBE (June 14, 2012), http://www.youtube.com/watch?v=a3oVm7gU08Y.

8. *Id.*

9. *Id.*

10. Teller is a Las Vegas-based magician who has performed with his partner, Penn Jillette, for 35 years. *A Twisted History*, PENN & TELLER, http://www.pennandteller.com/03/coolstuff/bio.html (last visited Apr. 7, 2013). Their act is one of the longest and most well-received magic shows on the Las Vegas Strip. *Id.* The pair have also staged several world tours, hosted three television series, and appeared in numerous film and TV specials. *Id.*

11. Chris Jones, *The Honor System*, ESQUIRE, Oct. 2012, at 139, 143.

12. *Id.* at 145.

13. *See generally* Harrison v. SF Broad., No. CIV. A. 98-1107, 1998 WL 355462 (E.D. La. June 30, 1998) (demonstrating that the last copyright lawsuit involving magic was filed in 1998 when plaintiffs alleged defendants' broadcast resulted in "publication of common 'trade secrets'").

14. Complaint at 9, Teller v. Dogge, No. 2:12-cv-00591

Nevada, alleges copyright violation and unfair competition.[15]

Although magic is not an enumerated category of work eligible for copyright protection,[16] scholars and practitioners have theorized that it is protectable under the categories of pantomime and/or choreography.[17] Magicians have also tried—with mixed results—to protect their work under trade secret and fair play theories.[18] If Teller succeeds, it would be the first time since the copyright law was amended in 1976 that a court has held that a magic trick, in its entirety, is eligible for copyright protection.[19]

It is impossible to analyze the merits of Teller's case because the allegedly infringing YouTube video, called "The Rose and Her Shadow," has been removed.[20] Nonetheless, the case poses the question of whether magic is copyright protectable. Magic is distinguishable from most copyright-protectable categories because its commercial value lies, at least in part, in the continued secrecy of the trick.[21] To elaborate, if members of the public know how an illusion is accomplished, they are less likely to attend a magic show where the illusion is performed.[22] As such, a growing contingency of magicians favor the extension of copyright law to protect

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(D. Nev. Apr. 11, 2012).

15. *Id.* at 1.

16. *See* 17 U.S.C. § 102(a) (2006).

17. *See, e.g.*, 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, 112–14 (Christine A. Corcos ed., 2010); Sara J. Crasson, *The Limited Protections of Intellectual Property Law for the Variety Arts: Protecting Zacchini, Houdini, and Cirque Du Soleil*, 19 VILL. SPORTS & ENT. L.J. 73, 111–12 (2012).

18. *See, e.g.*, Goldin v. R.J. Reynolds Tobacco Co., 22 F. Supp. 61 (S.D.N.Y. 1938) (demonstrating an unsuccessful unfair competition suit).

19. Jessica McKinney, *Can Magic Be Copyrighted?: Teller's Infringement Lawsuit Against Another Magician May Reveal the Answer*, (BNA) PAT., TRADEMARK & COPYRIGHT J., June 29, 2012, at 1.

20. Jay Dougherty, *Stealing Shadows?*, SUMMARY JUDGMENTS: LOY. L. SCH., LOS ANGELES FACULTY BLOG (Apr. 19, 2012), http://llsblog.lls.edu/faculty/2012/04/stealing-shadows.html.

21. "Magic, of course, relies heavily on the element of surprise, and even the greenest conjuror knows never to repeat an effect for the same audience." *See* ALEX STONE, FOOLING HOUDINI: MAGICIANS, MENTALISTS, MATH GEEKS & THE HIDDEN POWERS OF THE MIND 11 (2012).

22. *See, e.g.*, Goldin v. Clarion Photoplays, Inc., 195 N.Y.S. 455, 456 (App. Div. 1922) ("The success of these illusions depends upon the inability of the average audience to grasp by observation the method employed by the performer, and their value, therefore, depends upon the degree of mystery in which the performer is able to envelop the means which he uses to accomplish the end.").

their illusions.[23] However, protecting these secrets at all costs prevents other magicians from expanding and innovating in the field.[24] This makes the copyright protection of magic somewhat paradoxical.

This Note argues that, despite these hurdles, copyright is, in fact, well-suited to protect the essential elements of magicians' works. Part II examines the origins of United States copyright law, summarizes the scope of its protections and what constitutes infringement, describes several federal doctrines that limit its enforceability, and discusses magic-related copyright case law. Part III discusses other legal protections for magic—namely, patent law and unfair competition—as well as internal regulations within the field of magic that serve as possible alternative to these legal protections. Part IV, however, argues that magic's internal regulations, sometimes called the "gentleman's code," contain several substantial shortcomings. Part IV further discusses the protections afforded to comparable subject matters, explains how an extension of copyright protection to magic comports with the public policy underlying copyright law, and describes the benefits magicians would derive from copyright protection.

II. BACKGROUND ON COPYRIGHT LAW

A. History of Copyright Law

American copyright law traces its roots to 1710, when the British Parliament enacted the Statute of Anne to grant authors monopoly rights over their work.[25] Several early American states adopted similar copyright laws, which were seen as both instruments of the public good and natural extensions of inherent rights to personal autonomy.[26] Recognizing the need for uniform federal intellectual property law, the Framers of the

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23. *See Copyright Protection*, THE PROTECTION OF MAGICIANS' SECRETS 28 (Glen Weissenberger ed., 2000) ("The potential value of copyright protection to the magic industry is rather substantial. Although it may not be very helpful in protecting against exposure of magic secrets, it could be very helpful in preventing unethical copying of tricks, illusions, patter, choreography, and other aspects of show design."). The work was published by the World Alliance of Magicians, Inc. to inform magicians of their potential legal remedies. Special thanks to Professor F. Jay Dougherty for sharing a copy of this publication, which is not available to the general public.

24. *See* STONE, *supra* note 21, at 31 (describing how the art of magic evolves with adaption of other people's work).

25. The Statute of Anne, 1710, 8 Ann., c. 19 § 2 (Gr. Brit.).

26. *See* CRAIG JOYCE ET AL., COPYRIGHT LAW 19 (6th ed. 2003); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.02 (2012).

Constitution decided, in a secret proceeding on September 5, 1787, to provide economic incentive for creators through the enactment of a "Copyright Clause" in the Constitution.[27] Specifically, the "Copyright Clause" provides that Congress shall have the power to "promote the Progress of the Science and useful Arts, by securing for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries."[28] The first federal copyright act was passed in 1790 and was modeled on the Statute of Anne.[29] In 1905, President Theodore Roosevelt called for a modernization of copyright law, which resulted in the Copyright Act of 1909.[30] This resulting act was then overhauled in 1976.[31] Later amendments to the 1976 Copyright Act ("Copyright Act"), aimed primarily to address new technologies, extend copyright terms, and fulfill international obligations.[32]

B. What Copyright Protects

Generally, copyright law protects the original, tangible expression of an author's ideas.[33] More specifically, the Copyright Act states that protection subsists in "original works of authorship fixed in any tangible medium of expression, now known or later developed."[34] Subject matter that is copyright protectable, therefore, must be original—meaning not that it is novel, but that it originated with the author—and fixed.[35] The Supreme Court has also found that copyright protection requires a minimal level of creativity.[36] Copyright law does not protect any "idea, procedure,

27. JOYCE ET AL., *supra* note 26, at 19–20.

28. U.S. CONST. art. I, § 8, cl. 8.

29. JOYCE ET AL., *supra* note 26, at 20.

30. *Id.* at 21.

31. General Revision of Copyright Law, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (current version at 17 U.S.C. § 101 *et. seq*.).

32. *See* JOYCE ET AL., *supra* note 26, at 24–27 (detailing the subsequent amendments to the Copyright Act).

33. *See* 17 U.S.C. § 102(a) (2006) (illustrating that the law protects the "tangible medium of expression").

34. *Id.* § 102(a).

35. *See* NIMMER & NIMMER, *supra* note 26, §1.06.

36. *E.g.*, Goldstein v. California, 412 U.S. 546, 561 (1973) ("The word 'writings' . . . may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor."); *see also* NIMMER & NIMMER, *supra* note 26, § 2.01[B] ("[T]here is invoked at least a minimal requirement of creativity over and above the requirement of independent effort.").

process, system, [or] method of operation," even those that are original and fixed.[37] Nor does copyright law permit authors to copyright the facts they narrate.[38] It does, however, construe the word "author" in broad terms.[39] Section 102 of the Copyright Act provides that "works of authorship" include: (i) literary works; (ii) musical works; (iii) dramatic works; (iv) pantomimes and choreographic works; (v) pictorial, graphic, and sculptural works; (vi) motion pictures and other audiovisual works; (vii) sounds recordings; and (viii) architectural works.[40] Copyright law also protects compilations—works formed by collecting and assembling preexisting materials or data in an original way—provided they meet the established standards of original works of authorship.[41] Copyright protection in compilations is considered "thin" because only the selection and arrangement are protected, but not the underlying material.[42]

The House Report on the Copyright Act states that Section 102 uses the word "include" when listing categories of works of authorship in order to "make clear that the listing is illustrative and not limitative."[43] The categories do not exhaust the scope of authorship, but instead set out the general area of copyright-protectable subject matter in a way that is intended to provide the courts "sufficient flexibility" to avoid being restricted by "outmoded concepts of the scope of particular categories."[44]

Notably, the Copyright Act does not define "choreography" or "pantomime."[45] The House Report states that this was done intentionally because "pantomimes and choreographic works have fairly settled meanings."[46] These meanings can be found in the Copyright Office's publication "Compendium of Copyright Office Practices," which guides

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37. *See* 17 U.S.C. § 102(b).

38. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 344–45 (1991); Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1368 (5th Cir. 1981).

39. NIMMER & NIMMER, *supra* note 26, § 1.06[B].

40. § 102(a).

41. §103; *see also* COMPENDIUM II OF COPYRIGHT OFFICE PRACTICES § 204.3 (1984) (describing the standards for copyrightability of compilations and derivative works).

42. *Feist Publ'ns*, 499 U.S. at 348–49.

43. H.R. REP. NO. 94-1476, at 53 (1976).

44. *Id.*

45. *See* § 101 (showing the absence of the these two categories from the Act's definition); *see also* H.R. REP. NO. 94-1476, at 53.

46. H.R. REP. NO. 94-1476, at 53.

the Copyright Office's staff and the public without being legally binding.[47] Choreography is defined as "the composition and arrangement of dance movements and patterns . . . usually intended to be accompanied by music."[48] Dance is defined as "static and kinetic successions of bodily movement in certain rhythmic and spatial relationships."[49] Interestingly, pantomimes, which are distinct from choreography, constitute "the art of imitating or acting out situations, characters, or some other events with gestures and body movement . . . . Pantomimes need not tell a story."[50]

Once an author has created a copyright-protectable work, the author is afforded exclusive rights over the exploitation of the original work of authorship, assuming he or she retained the copyright.[51] To elaborate, copyright holders retain the exclusive rights to reproduce, distribute, and perform the copyrighted works.[52] Copyright protection lasts for the life of the author plus 70 years, or 95 years from publication if the author is an entity.[53]

Copyrights are "registration permissive," which means that authors can register their works with the Copyright Office, but are not required to do so in order to receive copyright protection.[54] Registration, however, creates a presumption of validity. The Copyright Act states, "In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate."[55]

C. Copyright Infringement

The Supreme Court has held that in order to establish copyright

47. COMPENDIUM II, *supra* note 41, § 450.01.

48. *Id.*

49. *Id.*

50. *Id.* § 460.01.

51. 17 U.S.C. § 106 (2006); *see also* NIMMER & NIMMER, *supra* note 26, § 13.01[A] (explaining that the plaintiff of a copyright claim is the author unless the author has transferred his or her rights).

52. 17 U.S.C. § 106.

53. *Id.* § 302.

54. *Id.* § 408(a).

55. *Id.* § 410(c); *see also Stopping Copyright Infringement*, COPYRIGHT (Apr. 2, 2012), http://www.copyright.gov/help/faq/faq-infringement.html.

infringement, "two elements must be proven: (1) ownership of a valid copyright; and (2) copying of constituent elements of the work that are original."[56] Typically, the "copying" prong is established by showing that the allegedly infringing work is "substantially similar in [its] protected elements," and that the infringing party had access to the copyrighted work.[57] The Ninth Circuit employs a two-part test, which contains an extrinsic prong and an intrinsic prong, to determine whether the two works are "substantially similar."[58] The extrinsic test is an objective analysis of "articulable similarities" between the two works, such as "plot, theme, dialogue, mood, setting, pace, character, and sequence of events."[59] By contrast, the intrinsic test is subjective; it examines an "ordinary, reasonable" audience's subjective impression of the similarities between the two works.[60] Some courts use an "inverse ratio rule," meaning they "require a lower standard of proof of substantial similarity" when the plaintiff can show a high degree of access.[61]

The federal courts have not considered the copyright implications of magic or pantomime under the amended Copyright Act.[62] The Second Circuit, however, considered "substantial similarity" of copyright violations involving choreography in *Horgan v. Macmillan, Inc.*[63] The court was tasked with determining whether still photographs of a ballet violated the author's exclusive rights in a choreographed dance routine, even though the photos could not be used to recreate the "flow" of the steps.[64] The court held that the photographs could, in fact, be deemed "substantially similar."[65] It explained that, "Even a small amount of the original, if it is qualitatively significant, may be sufficient to be an infringement, although the full original could not be recreated from the excerpt."[66]

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56. *Feist Publ'ns*, 499 U.S. at 361.

57. Metcalf v. Bochco, 294 F.3d 1069, 1072 (9th Cir. 2002); Dougherty, *supra* note 17, at 115 n. 97.

58. *Metcalf*, 294 F.3d at 1073.

59. Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 2002).

60. *Id.*

61. Rice v. Fox Broad. Co., 330 F.3d 1170, 1178 (9th Cir. 2003).

62. McKinney, *supra* note 19.

63. Horgan v. Macmillan, Inc., 789 F.2d 157, 162 (2d Cir. 1986).

64. *Id.* at 158.

65. *Id.* at 162–63.

66. *Id.* at 162.

D. Limiting Doctrines

Several doctrines, namely *scènes-à-faire*, merger, and fair use, limit the scope of copyright protection.[67] First, *scènes-à-faire* are scenes or sequences that "necessarily result from the choice of setting or situation."[68] They are the result of the work's theme as opposed to the author's imagination, and are often called "stock images."[69] For example, a film about police in the South Bronx would inevitably include some combination of foot chases, police morale problems, drug use and other crimes, or even the familiar and venerable "Irish cop" figure.[70] *Scènes-à-faire* are treated like ideas and, therefore, are not afforded copyright protection.[71]

The next limiting principle, the merger doctrine, states that if there is only one way to express an idea, that expression of the idea will not be protected because the idea and expression merge.[72] Since an idea is not protectable, the merged expression of that particular idea is not protectable either.[73] The merger doctrine is most often applied to computer programs,[74] but it is relevant for literary and pictorial works as well.[75]

Finally, the Copyright Act provides limited exceptions to the exclusive rights of copyright holders for "fair use" purposes— namely criticism, comment, news reporting, teaching, scholarship, and research.[76] When deciding whether use falls under the fair use exception, courts must consider:

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67. *See, e.g.*, *Rice*, 330 F.3d at 1175–76 (discussing the limiting doctrines of *scènes- à - faire* and merger).

68. JAMES G. SAMMATARO, FILM AND MULTIMEDIA AND THE LAW § 1:10, 1 (Westlaw 2012).

69. *Id.* at 3-4.

70. *Id.* at 1.

71. *Rice*, 330 F.3d at 1175.

72. Crasson, *supra* note 17, at 112.

73. *See* Michael D. Murray, *Copyright, Originality, and the End of the Scènes À Faire and Merger Doctrines for Visual Works*, 58 BAYLOR L. REV. 779, 781 (2006).

74. *See id.* at 792.

75. *See id.* at 789–91 (discussing the application of the merger doctrine in *Nichols v. Universal Pictures Corp.*, which involved "two literary works (a stage play and a screenplay) alleged to be substantially similar); *see also id.* at 853–55 (discussing the conflicting outcomes in the application of the merger doctrine for pictorials).

76. 17 U.S.C. § 107 (2006).

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[77]

Even unpublished work can be subject to fair use if the preceding criteria are met.[78]

E. Copyright Cases Involving Magic

The federal courts have not ruled on whether magic is protectable under the Copyright Act.[79] In *Glazer v. Hoffman*, a magician using the stage name "Think-a-Drink Hoffman" was able to copyright his opening monologue, but not the substance of his act: making drinks such as cocktails and ice cream soda "magically appear" from empty shakers and beakers filled with water.[80] The court, however, did not hold that sleight-of-hand was not copyright-protectable.[81] Instead, it held that this particular case invoked common-law copyright,[82] and that Hoffman had terminated his common law rights via public performance.[83] The defendant, Glazer, was allowed to continue to "magically" make drinks appear.[84] Interestingly, each party also asserted that his respective trick was superior to the other.[85] Hoffman claimed that Glazer was performing an "inferior

77. *Id.*

78. *Id.*

79. McKinney, *supra* note 19.

80. Glazer v. Hoffman, 16 So. 2d 53, 55 (Fla. 1943).

81. *See id.* at 55.

82. The court based its holding on common-law copyright that since the illusion was not a dramatic work, it was not eligible for federal copyright protection. *Id.* at 55–56. Accordingly, courts today may be more willing to uphold entire performances as copyrightable work since copyright law has been amended to include choreography and pantomime. *See* 17 U.S.C. § 102(a)(4) (2006).

83. *Glazer*, 16 So. 2d at 55.

84. *See id.* at 56 (noting that plaintiff's sleight of hand tricks is not protected by copyright).

85. *See id.* at 54, 56.

imitation" of his act,[86] while Glazer argued that, in fact, his version was better.[87]

In another copyright case, the Ninth Circuit considered *scènes-à-faire* in conjunction with magic.[88] The court in *Rice v. Fox Broadcasting* held that an "ordinary magician" character wearing the "standard magician garb" of a black tuxedo with tails, white tuxedo shirt, black bow tie, and black cape with red lining, was not protectable.[89] There, the creator of a TV special that revealed the secrets of popular magic tricks sued Fox Broadcasting for creating a second show that featured the same concept.[90] In both programs, a masked magician performed each trick once, and then performed it again while explaining how it was done.[91] The court held in part that the "later-in-time" show format did not infringe the original show's copyright because most of the similarities between the two were *scènes-à-faire*.[92] In particular, both programs possessed overall moods of "secrecy and mystery," which the court found were only generic artistic elements associated with the theme of revealing magic.[93] Others have posited that pulling a rabbit out of a hat and using a black wand with a white tip would also constitute *scènes-à-faire*.[94]

III. NON-COPYRIGHT PROTECTIONS FOR MAGIC

The small number of cases concerning copyright protection for magic tricks could be due in part to the fact that plaintiffs have sought relief under

86. *Id.* at 56.

87. *Id.* at 54.

88. *Rice*, 330 F.3d at 1177 (holding that a program about revealing the secrets behind magic tricks is subject to *scènes-à-faire*).

89. *Id.* at 1175 (explaining that characters typically must have "consistent, widely identifiable traits" to receive copyright protection). For example, courts have found that Godzilla, James Bond, and Rocky Balboa warrant copyright protection. *E.g.*, Toho Co., Ltd. v. William Marrow & Co., Inc., 33 F. Supp. 2d 1206, 1218 (C.D. Cal. 1998) (Godzilla); Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co., Inc., 900 F. Supp. 1287, 1296 (C.D. Cal. 1995) (James Bond); Anderson v. Stallone, No. 87–0592 WDKGX, 1989 WL 206431, at *7 (C.D. Cal. Apr. 25, 1989) (Rocky Balboa).

90. *Rice*, 330 F.3d at 1173–74.

91. *Id.* at 1175, 1177.

92. *Id.* at 1177.

93. *Id.*

94. *See* Crasson, *supra* note 17, at 85.

other legal doctrines.[95] Magicians have successfully obtained patents for their inventions, and have sought to protect the secrets behind their illusions via unfair competition and unfair dealing claims.[96] Although other forms of intellectual property protection do not automatically preclude copyright protection, they can limit it.[97] It is therefore prudent to address what other types of legal protection are available for magic tricks. Moreover, non-legal protections for magic also exist; members of the U.S.'s two main fraternal organizations for magicians swear to uphold an honor code that strictly prohibits public disclosure of magic effects and illusions.[98]

A. Patent

Patents provide limited monopolies over use of new products and processes, in exchange for public disclosure of those discoveries.[99] Only the Patent and Trademark Office can convey a patent.[100] It does so for anyone who "invents or discovers any new and useful process, machine, manufacture or composition of matter, or any new improvement thereof."[101] There are two types of patents relevant to magic tricks: design and utility.[102] Utility patents protect the functional features of products and processes,[103] while design patents protect the ornamental designs for manufactured goods.[104] A design patent lasts for fourteen years from the date that it is granted.[105] By contrast, the life of a utility patent extends twenty years from the date of filing.[106] The subject matter of both patent

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95. *See* Dougherty, *supra* note 17, at 105–06 (noting patent law as a legal option).

96. *See id.* at 106 n.28 (listing the patents available to magicians); *see, e.g.*, Goldin v. R.J. Reynolds Tobacco Co., 22 F.Supp. 61, 62 (S.D.N.Y. 1938) (discussing the magician's attempt to enjoin the disclosure of his illusion's secret through an unfair competition claim).

97. *See* PATRICK J. FLINN, HANDBOOK OF INTELLECTUAL PROPERTY CLAIMS AND REMEDIES § 3.02(A) (2012) (discussing a framework of claims and defenses).

98. *See Joint I.B.M. and S.A.M. Ethics Statement*, INT'L BROTHERHOOD OF MAGICIANS, http://www.magician.org/pdf/JointIBMAndSamEthics.pdf *(last visited Sept. 7, 2013*).

99. JOYCE ET AL., *supra* note 26, at 4.

100. 35 U.S.C. § 2(a) (2006).

101. *Id.* § 101.

102. *See* JOYCE ET AL., *supra* note 26, at 6.

103. *Id.* at 5.

104. 35 U.S.C. § 171.

105. *Id.* § 173.

types must be new, useful,[107] and non-obvious.[108]

Magicians have successfully obtained utility patents for their inventions.[109] Famed magician Horace Goldin obtained a patent for his "Sawing a Woman in Half" box in June 1923, almost two years after he applied for it.[110] The patent, titled "Illusion Device," is for "a box whereby a person or object can be placed within and the container cut substantially in half, giving the effect to the audience of cutting the person or object in half."[111] The patent claims as new a "comparatively deep upper box resting on a shallow lower box,"[112] each of which could conceal a person.[113] The boxes had "substantially registering trap-doors that let the person in the lower box substitute his feet for those of the person in the upper box . . . ."[114] Another patent, granted in 1930 and titled "Means for Producing Theater Effects," describes how the owner used two cylindrical mirrors to "shrink" actors on a stage.[115]

B. Unfair Competition

Unfair competition is a broad tort that entertainers have used for years to protect aspects of their performances not covered by traditional intellectual property laws.[116] In essence, it is based on the notion of fair play.[117] Originally, unfair competition law was aimed at combating producers who tried to pass their work off as that of a highly regarded

106. *Id.* § 154(a)(2).

107. *Id.* § 101.

108. *Id.* § 103.

109. *See generally* Dougherty, *supra* note 17, at 105–06 (listing the patents granted to magicians).

110. Illusion Device, U.S. Patent No. 1458575 (filed Sept. 9, 1921) (issued June 12, 1923).

111. *Id.* col.1 l.10-15, at [1].

112. *Id.* col.2 l.87-88, at [3].

113. *Id.* col.2 l.92-93, at [3].

114. *Id.* col.2 l.93-97, at [3].

115. Means for Producing Theatrical Effects, U.S. Patent No. 1785347 col.1 l.l2-18, at [1] (filed Sept. 24, 1926) (issued Dec. 16, 1930).

116. Crasson, *supra* note 17, at 91.

117. 54A AM. JUR. 2D. *Monopolies, Restraints of Trade, and Unfair Trade Practices* §1066 (2009).

rival.[118] The goal was to prevent bad-faith misappropriation of another's goods in such a way that would cause confusion about the source.[119] It later was extended to outlaw "parasitism," or appropriating a competitor's investments of time, skill, and money.[120] Today, an "incalculable" variety of activity could be considered unfair competition, restricted only by "the unlimited ingenuity that overreaching entrepreneurs and trade pirates put to use."[121]

In 1922, Horace Goldin, creator of the "Sawing a Woman in Half" illusion described above, successfully blocked exposure of his illusion with an unfair competition suit.[122] Goldin had been performing a trick in the early 1900s in which he made human appendages appear to be severed from—and then rejoined to—the body.[123] He realized the illusion would be even more effective if he appeared to separate an entire body, and in 1919, he perfected "Sawing a Woman in Two" by creating and then patenting the elaborate panel box described above.[124] He began performing the illusion in theaters across the United States.[125]

Within a few years, Goldin's trick was so successful that he was forced to file injunctions against imitators in Illinois, Pennsylvania, and Ohio—all of which he won.[126] That same year, he successfully enjoined a movie company from screening a film that first showed the illusion in its entirety, and then revealed the secret behind the trick.[127] The court held that the defendants had "sought unfairly and unjustly to profit by plaintiff's success, by adopting the name, which he gave to his illusion, and by copying his methods in an unfair competition and unreasonable interference with plaintiff's rights . . . ."[128] Goldin was no doubt aided by a

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118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. Goldin v. Clarion Photoplays, Inc., 195 N.Y.S. 455, 460 (App. Div. 1922).

123. *Id.* at 456.

124. *Id.*

125. Goldin v. R.J. Reynolds Tobacco Co., 22 F. Supp. 61, 62 (S.D.N.Y. 1938).

126. *Clarion*, 195 N.Y.S. at 456.

127. *Id.* at 459–60.

128. *Id.* at 460.

deposition provided by none other than Harry Houdini, who swore, as president of the Society of American Magicians and the Magicians' Club of London, that he had never witnessed the "Sawing a Woman in Half" illusion until Goldin created it.[129]

However, in 1938, Horace Goldin brought another unfair competition suit in conjunction with his famous box, this time against a cigarette company that disclosed his method as part of an advertising campaign.[130] The defendants argued that the information was "fairly and honestly obtained" from a book about the secrets of magic tricks;[131] the court agreed, and declined to award damages or an injunction.[132]

Teller's complaint alleges unfair competition under trademark law—as opposed to bad faith dealings.[133] The complaint therefore strikes at the misappropriation aspect of the unfair competition doctrine. The Lanham Act, which governs trademark law, states that a person is liable if he:

> [U]ses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
>
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association of such person with another person, as to the origin, sponsorship, or approval or his or her goods, services, or commercial activities by another person . . . .[134]

Further, the owner of a famous, distinctive mark is entitled to an injunction against anyone who uses the mark in a way that is likely to tarnish or dilute the mark, regardless of actual confusion about the mark's source or actual economic injury.[135] It will be interesting to see how the court analyzes and ultimately rules on this aspect of the case, given that the courts have not previously considered trademark in conjunction with

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129. *Id.* at 458.

130. *R.J. Reynolds*, 22 F. Supp. at 62.

131. *Id.*

132. *Id.* at 65.

133. Complaint, *supra* note 14, at 1.

134. 15 U.S.C. § 1125(a) (2006).

135. *Id.* § 1125(c)(1).

magic.[136]

C. The Gentlemen's Code

Besides intellectual property law, a "gentlemen's code" governs disclosure of magic secrets.[137] Some scholars have argued that this gentlemen's code is more suitable than legal remedies for protecting magic.[138] This argument is due in part to "negative space," the area in art surrounding a figure that makes the figure stand out and defines the figure's dimensions.[139] Under intellectual property law, the theory of negative space states that there are certain fields in which innovation and creativity actually thrive in the absence of intellectual property laws.[140] Magic is purported to be one such field, in part because its practitioners generally follow a widely circulated code of ethics.[141]

The International Brotherhood of Magicians and the Society of American Magicians have both adopted the same six-point code of conduct.[142] The two groups agree that the very first principle that all members should adhere to is, "[o]ppose the willful exposure to the public of any principles of the Art of Magic or the method employed in any magic effect or illusion."[143] The next rule of ethics is "not interfering with or jeopardizing the performance of another magician, either through personal intervention or the unauthorized use of another's creation."[144] Third, members must "[r]ecognize and respect for rights of the creators . . . of magic concepts, effects and literature."[145] Upon being sworn into the Society of American Magicians, members take the following oath: "I do

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136. In *Glazer*, the court considered the issue of trade name but not trademark. Glazer v. Hoffman, 16 So.2d 53, 55-56 (Fla. 1943).

137. *Joint I.B.M. and S.A.M. Ethics Statement*, *supra* note 98.

138. 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).

139. Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317, 319 (2011).

140. *Id.*

141. Loshin, *supra* note 138, at 136.

142. *Joint I.B.M. and S.A.M. Ethics Statement*, *supra* note 98.

143. *Id.*

144. *Id.*

145. *Id.*

solemnly swear . . . [t]o be a member of national SAM and Parent Assembly . . . [t]o keep the secrets of magic of both organizations as secrets."[146]

Magicians also follow an informal code that resembles the moral rights that European countries grant their respective authors.[147] Magic is primarily an oral tradition that is personally transmitted from masters to students.[148] Magic radiates outward like language or culture.[149] Mentorship and lineage play a large role, with the contributions of masters being acknowledged by their students.[150] Magician and author Alex Stone wrote that a typical introduction might look like this: "'Spanish champion Woody Aragon, . . . disciple of the cunning Juan Tamariz, leader of the Madrid School, whose master was the great Arturo de Ascanio, father of Spanish close-up.'"[151] Many moves are named after their inventors and retain their surnames decades later, such as the Vernon lift and the Tenkai palm.[152] In this way, magicians' informal protections actually exceed those afforded by American copyright law.

Several authors have argued that protection of magic should be left to these internal regulations.[153] They argue that magic is a "remix culture" in which performers advance the field by combining old ideas in new ways.[154] More codified forms of intellectual property protection could "interfere disastrously with how magicians learn, work, and create new material."[155]

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146. Stone, *supra* note 21, at 28.

147. *See, e.g.*, Berne Convention for the Protection of Literary and Artistic Works art. 6bis, Sept. 9, 1886, 1161 U.N.T.S. 30 ("Independently of the author's economic rights . . . the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of . . . the said work, which would be prejudicial to his honor or reputation.").

148. Stone, *supra* note 21, at 31.

149. *Id.*

150. *Id.* at 42–43.

151. *Id.* at 43.

152. *See id.* at 145.

153. *See* Loshin, *supra* note 138, at 130 ("[T]he law fails to protect magic's most valuable intellectual property, and that traditional IP law forces magicians to make undesirable tradeoffs that they would rather avoid."); Crasson, *supra* note 17, at 126 ("[A]dding new intellectual property protections could also interfere disastrously with how magicians learn, work, and create material. There is no lack of creativity in the magic community. To the contrary, the lack of protection appears to be, on the whole, good for the art form.").

154. Crasson, *supra* note 17, at 126.

155. *Id.*

Further, informal protections come from within the community and are enforced by its members, who are knowledgeable and committed to the craft.[156] Some artistic communities even choose to impose tighter intellectual property norms on their members than the law requires.[157] In stand-up comedy, for example, performers are discouraged from copying one another's ideas, whereas copyright law would only prohibit infringing on the expression of those ideas.[158]

IV. COPYRIGHT LAW SHOULD BE ANOTHER FORM OF PROTECTION AVAILABLE TO MAGICIANS

A. The Honor Code's Failings

The honor code espoused by the International Brotherhood of Magicians and the Society of American Magicians does not adequately protect working magicians from one another.[159] One recent article described how thievery in magic has reached an all-time high.[160] It has reached such an egregious level that some of the best inventors in the field can no longer support themselves by creating and licensing equipment for new tricks.[161] Instead of developing and building their ideas, they have found that writing books is more profitable.[162] One author observed that, "Because some venerable tricks, like the Zig-Zag Girl [in which a woman seems to be sliced into thirds], have become so commonplace . . . many magicians have convinced themselves that every trick is fair game so long as they're able to crack its code."[163]

Further, honor codes do not protect magicians from third parties outside of the magic community who might have an interest in revealing the secrets of their trade.[164] In 1998, a group of magicians tried to stop a

156. *Id.* at 131.

157. Rosenblatt, *supra* note 139, at 339.

158. *Id.*

159. *See generally* Jones, *supra* note 11, at 144 ("There have always been thieves in magic, but thievery has never been so bad as it is now.").

160. *Id.* at 144.

161. *See id.*

162. *Id.*

163. *Id.*

164. *See, e.g.*, Harrison v. SF Broad., No. 98-1107, 1998 WL 355462, at *4 (E.D. La. June 20, 1998).

broadcasting company from airing a special that explained how various illusions were performed.[165] They claimed the show, called "Breaking the Magicians Code: Magic's Biggest Secrets Finally Revealed," fell within the scope of Louisiana's "abuse of rights" doctrine because it resulted in the publication of common trade secrets shared among the class.[166] The district judge dismissed the suit, noting that the plaintiff's "redress [of] the betrayal of the honor code among magicians . . . is not available [in court] because no legal rights have been violated."[167]

Even when community norms adequately protect members of their own community, due process problems can arise.[168] This has been an issue, for example, in the world of stand-up comedy, another creative art that does not fit neatly into intellectual property law and therefore relies heavily on self-regulation.[169] Elizabeth Moranian Bolles, a stand-up comedian and intellectual property law fellow at Tulane University Law School, explained that stealing jokes is highly stigmatized and can lead to being "blackballed," or being denied the opportunity to perform at various venues.[170] Sometimes, though, "a comic who is the victim of joke theft is actually accused of stealing his own material. . . ."[171] One comic told Bolles that he is "sure there are owners and bookers who have blackballed the wrong comic."[172] The resulting stigma can last for years.[173]

Indeed, the magic community can also be ruthless when it comes to perceived creative theft.[174] When magician Walter "Zaney" Blaney realized a company in England was selling what he called a "rip-off" of one of his illusions, he asked the owner to stop.[175] "[H]e told me there was no court in the world which could stop him from doing what he was doing,"

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165. *Id.* at *1.

166. *Id.* at *1, *4.

167. *Id.* at *4.

168. *See* Elizabeth Moranian Bolles, *Stand-Up Comedy, Joke Theft, and Copyright Law*, 14 TUL. J. TECH. & INTELL. PROP. 237, 255 (2011).

169. *Id.* at 254.

170. *Id.* at 254–55.

171. *Id.* at 255.

172. *Id.*

173. *Id.*

174. *See* Loshin, *supra* note 138, at 138.

175. *Id.*

Blaney explained in a 2002 open letter to the magic community.[176] He continued:

> I explained I had no intention of going to court. I instead simply told my many friends in [London magicians' association] Magic Circle about it. . . . When the word spread, soon [the owner] 'had a problem.' As things turned out, there was indeed a court which promptly put him out of business . . . the bankruptcy court.[177]

Perhaps not surprisingly, Blaney helped create the "World Alliance of Magicians" in 1998 to shame unscrupulous manufacturers and protect magicians' secrets from the public.[178]

But what if Blaney's accusations had targeted the wrong person? What if the "rip-off" had been debatable, or the company had used Blaney's idea but expressed it completely differently? What if the creative theft was not so severe as to warrant bankruptcy? In 1932, one of the founding members of London's Magic Circle, magician David Devant, fell into "dire financial straits" and published a book revealing the secrets behind a collection of magic tricks, most of which he had personally developed.[179] Devant was not only one of the field's most accomplished and well-respected members at the time, but also he had served as the Magic Circle's first president and had donated his library to the group.[180] This, however, did not stop the group from revoking Devant's membership to the club he himself had helped found.[181] The implication was that the tricks were not only Devant's intellectual property; they also belonged to the field collectively.[182] These examples show that magicians view their methods as quasi-communal intellectual property— something that belongs to the individual but is subject to internal regulation.[183]

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176. *Id.*

177. *Id.*

178. *Walter "Zaney" Blaney: World Class Entertainer*, WALTERBLANEY.COM, http://www.walterblaney.com/illusions/bio.html (last visited Apr. 7, 2013).

179. Loshin, *supra* note 138, at 138–39.

180. *Id.* at 139.

181. *Id.*

182. *See id.* at 137.

183. *See generally* Stone, *supra* note 21, at 146 ("[A]ny form of exposure—even of one's own material—undermines the art. Exposure is seen as a form of vandalism. It deadens the mystery and tarnishes the brand, shrinking all the grandeur in magic to the scale of an intellectual puzzle.").

The magic community's treatment of Devant also proved to be short-sighted. Devant's book, *Our Magic*, is now considered a landmark magic text.[184] In fact, "[T]he highest honor in British magic is the David Devant award."[185] Other evidence further shows that magicians might not always keep these revelatory transgressions in perspective.[186] When the Masked Magician series discussed above first aired, a member of the board of directors at the Magic Castle in Hollywood compared the show to the iceberg that sank the Titanic.[187] When the Masked Magician's identity was revealed, he was not only blacklisted from the community, but he also received death threats.[188] In reality, though, many magicians reported that the show generated interest in magic and led to more bookings.[189] Not long after the shows aired, Criss Angel signed a 10-year, $100 million contract at the Luxor, even though the secrets to several of his illusions were revealed.[190]

While magicians would undoubtedly argue that they should be solely responsible for overseeing their quasi-communal intellectual property,[191] the public has a stake in the matter too.[192] Overprotective norms can be detrimental to the creative art "because the market becomes less competitive."[193] Art exists not only for the benefit of its creators and performers, but also for the greater good of society.[194] Therefore, the audience also plays an integral role in the creative process. This is especially true in the fields of comedy and magic, which are audience-

184. *Id.* at 142.

185. *Id.*

186. *See generally* Loshin, *supra* note 138, at 138 (describing punishments for exposing magicians' secrets as "swift[] and merciless[]").

187. Stone, *supra* note 21, at 143.

188. *Id.*

189. *Id.* at 150.

190. *Id.*

191. *See generally* Loshin, *supra* note 138, at 135 (explaining that the magic community has created its own set of intellectual property norms).

192. Bolles, *supra* note 168, at 256.

193. *Id.*

194. *See* NIMMER & NIMMER, *supra* 26, § 1.03 ("The primary purpose of copyright is . . . to secure the general benefits derived by the public from the labors of authors.").

participatory arts.[195] The public has an interest in being part of artistic regulatory mechanisms, especially if internal regulations end up stifling the field.[196] Further, intellectual property law takes the pressure off of artists to police one another, i.e. by helping comedy club owners determine where particular jokes originated.[197] Magicians might actually come to feel more comfortable if the burden of determining origin did not rest entirely with them.

B. The Case for Copyright

In 1976, Teller created a trick called "Shadows" that he had actually dreamed up as a teenager.[198] A few years later, in 1983, he obtained a copyright registration for the trick,[199] essentially submitting a storyboard of the performance.[200] The registration describes the piece as "Dramatic Work and Music; or Choreography," with "Notes: Pantomime."[201] In a 2012 interview, Teller said that he was not trying to protect "Shadows" as a magic trick; he sought to protect it as a work of performance art.[202] He had read that Houdini tried to shield his tricks from copyists by writing them as one-act plays,[203] which were protectable as dramatic works under older versions of the copyright law.[204] Teller's filing includes illustrations and descriptions of the various steps, and captures the dramatic mood of the

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195. *See* JASON RUTTER, STAND-UP AS INTERACTION: PERFORMANCE AND AUDIENCE IN COMEDY VENUES 65–66 (1997) (describing the importance of audience participation in stand-up comedy); *see generally* Loshin, *supra* note 138, at 123 (stating that magic is for the audience's enjoyment).

196. *See* Bolles, *supra* note 168, at 256 ("Overprotective norms are ultimately detrimental to the art of standup comedy because the market becomes less competitive.").

197. *Id.* at 243.

198. Jones, *supra* note 11, at 143.

199. *See* Exhibit 1, Complaint at 2, Teller v. Dogge, No. 2:12-cv-00591 (D. Nev. Apr. 11, 2012); *see also* Public Catalog, U.S. COPYRIGHT OFF., http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First (last visited Apr. 22, 2013). Enter Pau000469609 into "Search for" field and select "Registration number" from the "Search by" drop down menu to find the registration.

200. Jones, *supra* note 11, at 144.

201. Exhibit 1, *supra* note 199.

202. Jones, *supra* note 11, at 144.

203. *Id.* at 143–44.

204. *See* An Act to Amend and Consolidate the Acts Respecting Copyright, § 5(d) (1909), *repealed by* General Revision of Copyright Law, Pub. L. No 94-553, 90 Stat. 2541 (1976).

piece.[205] It does not, however, reveal the secret behind the illusion.[206] Teller has performed the trick thousands of times and considers it not only his principal contribution to the field of magic, but the signature piece that the public associates with him.[207]

1. What Would a Magic Copyright Protect?

Copyright protection for magic would protect a magician's creative expression—not the secret behind his or her illusions.[208] Copyright law does not protect ideas, but the "physical rendering of the fruits of creative intellectual or aesthetic labor."[209] As a result, the underlying idea and the basic concept of an illusion would not be protectable.[210] Copyright also fails to protect processes, which means that the method of achieving certain illusions would probably not be protectable.[211] Beyond those caveats, though, courts would engage in a standard copyright analysis based on the individual illusion in question: The illusion would have to be an original work of authorship fixed in a tangible medium of expression.[212] The court would examine the extent to which the illusion originated with the plaintiff,

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205. Complaint, *supra* note 14, at 3–4.

206. *See* Exhibit 1, *supra* note 199, at 4–5.

207. Complaint, *supra* note 14, at 4.

208. *See* NIMMER & NIMMER, *supra* note 26, § 2.03[D].

209. Goldstein v. California, 412 U.S. 546, 561 (1973); *see* NIMMER & NIMMER, *supra* note 26, § 2.03[D] (providing a deeper exploration of the difference between idea and expression).

210. *See* Mazer v. Stein, 347 U.S. 201, 217 (1954) ("Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself."); *see also* Apple Computer, Inc. v. Franklin Computer, Co., 714 F.2d 1240, 1252–53 (3d Cir. 1983) (explaining that in a computer program, the expression adopted by the programmer is a copyrightable element, whereas the actual processes or methods embedded in the code are "not within the scope of copyright law").

211. *See* Dougherty, *supra* note 17, at 102 (noting that copyright only protects "original expressions of authorships," while trademark may protect the magician's process through an unfair competition claim). Although the Copyright Act's prohibition on protecting processes would probably limit protection for magic tricks, its preclusion of useful articles probably would not. *See id.* at 104, 107 ("[T]o be a 'useful article' a magic devise must have some other 'utilitarian function,' and it may be difficult to articulate exactly what that is, other than 'portraying the appearance' of something."). Items used to evoke emotion serve an aesthetic function, not a utilitarian one, for the purposes of copyright law. *See, e.g.*, Masquerade Novelty, Inc. v. Unique Indus, Inc., 912 F.2d 663, 671 (3d Cir. 1990). For a general discussion on the elements of magic production that may qualify for copyright as "useful articles," see Dougherty, *supra* note 17, at 105–08.

212. 17 U.S.C. § 102(a) (2006); *see also* Dougherty, *supra* note 17, at 103.

and if part of the illusion already existed, only the plaintiff's new contribution would be protectable.[213] If the illusion were just a compilation of pre-existing techniques, it would only be entitled to the "thin" protection afforded compilations.[214] The court would also look for a minimum degree of creativity, although it would refrain from evaluating the illusion on its artistic merits.[215]

Teller has publicly stated that he is not trying to use copyright to protect the method behind "Shadows"; he is trying to protect its artfulness.[216] Over the years, he has actually used three different methods to achieve the illusion: one used an elaborate web of fishing wire, one relied on precise choreography, and the current method has never been revealed.[217] He is confident that although the defendant has seen the show, he does not use the same method.[218] Teller is therefore asking the court to do a fairly straightforward copyright analysis.[219] He wants to protect his narrative: a knife-wielding murderer maims a rose by attacking its shadow, then watches as the tables turn.[220] Copyright protects the tangible expression of an idea,[221] and the show is Teller's expression of several

213. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) (noting that the protectable elements in a work are the "constituent elements of the work that are original [to the author]"). To be original, these elements must originate with the author and have a *de minimis* quantum of creativity. *Id.* at 345, 363.

214. *Id.* at 348–49. The Court in *Feist* explained that copyright protection for factual compilations "is not a tool by which a compilation author may keep others from using the facts or data he or she has collected." *Id.* at 359. *See* Dougherty, *supra* note 17, at 118–19 (explaining that magicians would not be able to use long, complex routines to try to enjoin others from using any non-original constituent elements contained in the routine). See also David E. Shipley, *Thin But Not Anorexic: Copyright Protection for Compilations and Other Fact Works*, 15 J. INTELL. PROP. L. 91 (2007) for a general discussion on this copyright protection.

215. *See, e.g.*, Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and move obvious limits"); Dougherty, *supra* note 17, at 103 ("[S]ome minimal degree of creativity is implied by the word author and some small degree of human creativity is required for copyright protection."). See NIMMER & NIMMER, *supra* note 26, § 2.01[B] for a lengthy analysis on creativity and the quantum of originality.

216. *See* Jones, *supra* note 11, at 144.

217. *Id.* at 145.

218. *Id.*

219. *See* Complaint, *supra* note 14, at 6-8; *see also* Dougherty, *supra* note 17, at 103.

220. TheMagicofIllusion, *supra* note 1.

221. 17 U.S.C. § 102(a) (2006).

ideas.[222] It is a mechanical idea: manipulating a physical object by interacting with its shadow.[223] It is also a philosophical idea: a "cautionary tale" that we should be grateful that this is not the way the world works, and that while the bounds of our physical reality might seem to be oppressive at times, in fact we would not want to live in a world without the protection these physical constraints offer.[224] These ideas would not be protected under copyright law, but Teller's expression of them could be.[225]

Many magicians agree that the performance, artfulness, and showmanship of magic—in other words, its expression—are as important as the underlying concepts.[226] Take, for example, the famous "Metamorphosis" illusion first popularized by Harry Houdini and his wife Bess.[227] Bess would tie up Houdini, put him in a cloth sack, and lock him in a trunk.[228] Next, she would pull a curtain around the trunk, walk behind the curtain, and clap three times.[229] The curtain would fall, revealing Houdini standing where his wife had been, and Houdini would open the trunk to reveal his wife tied up inside.[230]

Houdini took about three seconds to "metamorphose" into Bess, but by the 1980s, a former husband-and-wife duo called the Pendragons were able to do it in a millisecond.[231] During their "Metamorphosis" act, Charlotte Pendragon would tie up her husband Jonathan in a trunk and stand on top of it.[232] She would then throw a curtain in front of her, and before the curtain had fallen a few feet toward the floor, she had already "morphed" into Jonathan.[233] Thus, "What began as a pleasing curiosity in Houdini's hands became a downright miracle in the hands of the

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222. *See* TheMagicofIllusion, *supra* note 1.

223. *See* Jones, *supra* note 11, at 143.

224. *Id.* at 145.

225. *See* NIMMER & NIMMER, § 2.03[D].

226. *See* Loshin, *supra* note 138, at 125.

227. *Id.* at 127.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* For a 1986 video clip of the Pendragons' act, see AllAboutMagicians, *Pendragons — Metamorphosis*, YOUTUBE (Nov. 7, 2010), http://www.youtube.com/watch?v=_wmHQ0s7cgU.

232. Loshin, *supra* note 138, at 127.

233. *Id.*

Pendragons," according to lawyer and former semi-professional magician Jacob Loshin.[234] Regardless of whether or not the Pendragons used all or some of Houdini's method to morph, copyright law would protect the unique artfulness of their illusion.[235]

2. Magic Should Be Protectable by Copyright

Although neither the 1976 Copyright Act ("Copyright Act") nor the Copyright Compendium refer to magic or illusions, an analysis of the copyright status of comparable subject matter reveals that magic should be copyright protectable even though it is not an enumerated category of authorship in the Copyright Act.[236] Comedy provides a contemporary analogy, while choreography provides a historical one.

a. Comedy

According to the world's best magicians, a good magic trick is like a good joke.[237] It has a plot with a twist at the end that is unexpected but makes "perfect sense."[238] If it is a great trick, and not only a good one, it has a point of view expressed with beauty and elegance; it is art.[239] However, this is not all that magic and comedy have in common. Both are largely oral traditions; both have a large diversity of creative content;[240] and both can blur the lines between idea and expression.[241] The Copyright

234. *Id.*

235. Flinn, *supra* note 97, § 3.02 ("The fact that an invention is patented does not, by itself, negate the possibility of copyright protection.").

236. *See* 17 U.S.C. § 102(a) (2006).

237. *See* Jones, *supra* note 11, at 145.

238. *Id.*

239. *Id.*

240. *See generally* Stone, *supra* note 21, at 31 ("[M]agic school[s] . . . [have] a distinct set of values and belief systems; they are schools of thoughts. Because magic is primarily an oral traditional organized around great masters, new ways of thinking about the craft tend to radiate outward much in the same way that languages and cultures do. Descendants of one tradition in turn migrate away from their school, exporting the school's teachings in the process."); *see also* Bolles, *supra* note 168, at 241–42 (discussing the importance of copyright protection for the unique material created by comics).

241. *See generally* Stone, *supra* note 21, at 58 ("Historically, some of the best ideas in magic were concocted out of a desire to beat the house, and many great masters honed their skills in the underground gambling world."); Bolles, *supra* note 168, at 245–46 ("One common argument against strong copyright protection for comedians is that jokes are little more than bare ideas . . . . As with works in other artistic genres individual jokes can assign different weight to ideas and expressions.").

Compendium expressly states that jokes are eligible for registration as long as "they contain at least a certain minimum amount of original expression in a tangible form. Short quips and slang expressions consisting of no more than short phrases are not registrable."[242] Given the similarities between comedy and magic, the Copyright Office should also accept magic tricks for registration.

Comedy and magic are also both diverse creative fields.[243] Loshin argues that magic can be classified using a three-tiered system: popular magic, common magic, and proprietary magic.[244] "Popular magic" consists of the cheap plastic tricks and basic card tricks sold in shops and revealed in novelty books.[245] One example would be the classic "cup and balls" trick in which the magician displays three cups and three balls; by covering the balls with the cups, he or she can make the balls disappear, multiply, and re-appear.[246] The finale often involves something totally unexpected, like making a live animal, such as a chick, appear under one of the cups.[247] "Common magic" is the vast array of tricks and techniques shared among magicians, both amateur and professional, that is performed for the public but not widely revealed to it.[248] The secrets of common magic are well known within the magic community but not outside it.[249] "Proprietary magic" would be acts like "Shadows," the top-shelf illusions that world-class performers might share with one another or might keep to themselves.[250] All of these types are further broken down into "close-up magic," which is performed up close, and "stage magic," which is seen from a distance.[251]

It might be easy to dismiss something like the cup and balls illusion as undeserving of copyright protection, but good popular magic is

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242. COMPENDIUM II, *supra* note 41, § 420.02.

243. *See* Loshin, *supra* note 138, at 127; *see also* Bolles, *supra* note 168, at 248–49.

244. Loshin, *supra* note 138, at 127.

245. *Id.*

246. *Id.* at 126–27.

247. *Id.* at 127.

248. *Id.*

249. *Id.*

250. Jacob Loshin, *Secrets Revealed: Protecting Magicians' Intellectual Property without Law*, *in* LAW AND MAGIC: A COLLECTION OF ESSAYS 123, 127.

251. Stone, *supra* note 21, at 294, 296.

analogous to a good one-liner, and a good one-liner can be deceptively complex, as Bolles has pointed out.[252] Bolles used the following one-liner by Rita Rudner to illustrate this point:[253] "My mother's mother, she's a very tough cookie. Really. She buried three husbands. Two of them were just napping."[254] On its own, the idea that Rudner's grandmother murdered two of her husbands in their sleep is not funny; the delivery is what makes it funny.[255] Bolles deconstructed the joke as follows:

> Rudner communicates the idea in three distinct parts, presented in a specific order, and delivered in a particular rhythm. First, she communicates information about her character. Rudner establishes a personal, relatable connection by introducing the character as her grandmother, but she simultaneously creates tension by describing her with some distance as "my mother's mother."[256]

Second, Bolles explained, Rudner describes the grandmother as a "tough cookie," since she "buried three husbands," and relies on the audience's colloquial understanding of the word "buried".[257] "Tough cookie" even suggests that she might have had a strong personality that caused the men to expire prematurely.[258] Third, however, the line: "Two of them were just napping," reveals that the word "buried" is quite deliberate—and that sweet, tough Granny is actually a murderer.[259] In other words, a simple joke with a simple premise can actually be a sophisticated expression of the underlying idea.[260]

Likewise, an overtly dramatic magic trick such as "Shadows" is not the only type of illusion that conveys complex ideas about the nature of

252. Bolles, *supra* note 168, at 248.

253. *Id.*

254. *Id.* at 247.

255. *Id.* at 248.

256. *Id.*

257. *Id.*

258. Elizabeth Moranian Bolles, *Stand-Up Comedy, Joke Theft, and Copyright Law*, 14 TUL. J. TECH. & INTELL. PROP. 237, 248 (2011).

259. *Id.*

260. *Id.*

life, death and the laws of nature.[261] Magic's equivalent of the one-liner might be the "Ambitious Card" trick.[262] The basic concept— that a playing card returns to the top of the deck after being placed in the middle—is more than 100 years old, but most magicians create their own Ambitious Card routines, almost as a rite of passage.[263] In 1982, a magician presented an Ambitious Card routine that won gold at the Magic World Championships; the card escaped from a deck that had been wrapped in three feet of rope.[264] Yet, a much simpler version—in which a signed card returned to the top of the deck—is reportedly the only trick ever to fool Houdini.[265] Stone writes, "At its core, the Ambitious Card is metaphor for liberation, a tale of triumph told in miniature. Imprisoned in the deck, the card breaks free, defying our every attempt to pin it down. It's the close-up equivalent of a Houdini escape."[266] All of these different versions of the trick—no matter how large or small in scale— represent a different way of expressing that idea.

b. Choreography

In enacting the Copyright Act, Congress noted that the history of copyright law "has been one of gradual expansion in the types of works accorded protection."[267] The House Report explains that this widening protection has typically applied to two types of expression: expression based on new technologies, and expression that has existed for decades or centuries but that "only gradually come to be recognized as creative and worthy of protection."[268] One example of the latter form is choreography.[269]

The 1909 Copyright Act did not enumerate choreography as a

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261. Quoting Wes, one of his teachers, Stone writes: "Magic is not about selling your prowess . . . . It's about the effect you create—a profound violation of the natural laws of the universe." Stone, *supra* note 21, at 56.

262. *See id.* at 50.

263. *Id.*

264. *Id.*

265. *See id.* at 11.

266. *Id.* at 240.

267. H.R. REP. NO. 94-1476, at 51 (1976).

268. *Id.*

269. NIMMER & NIMMER, *supra* note 26, § 2.07 ("[T]he present Copyright Act for the first time accords full protection to . . . choreographic works.").

protectable category of work; it only stipulated protection of "dramatic composition."[270] This, however, did not mean that all dances were denied copyright protection.[271] Instead, dance pieces that "told a story, developed or characterized an emotion, or otherwise conveyed a dramatic concept or idea," were protected.[272] Abstract modern ballet, for example, was not protectable.[273] Some choreographers were able to obtain copyright protection for their work, but many people in the field argued that the "'economic remuneration of choreographers' had not kept pace 'with their creative achievements.'"[274] In 1976, Congress added choreography as a work of authorship warranting copyright protection.[275]

This statutory history reveals two important points. First, the courts protected some forms of dance even though choreography was not an enumerated protectable category.[276] Today, the courts could likewise protect some types of illusions even though magic is not an enumerated category.[277] Second, imperfect coverage does not have to constitute a total absence of protection.[278] Allowing copyright protection for some forms of magic could be a step on the path to someday copyrighting all forms of magic—just as copyrighting dramatic dance was ultimately a step toward protecting all forms of dance.[279]

3. Protecting the Expression of Magic but Not Its Secrets Comports with the Spirit of Copyright Law

Intellectual property law is useful to magicians for two separate but

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270. Horgan v. Macmillan, Inc., 789 F.2d 157, 160 (2d Cir. 1986).

271. *See id.*

272. *Id.*

273. *See id.*

274. *Id.* at 160–61.

275. 17 U.S.C. § 102(a)(4) (2006).

276. *See* An Act to Amend and Consolidate the Acts Respecting Copyright, § 5(d) (1909), *repealed by* General Revision of Copyright Law, Pub. L. No 94-553, 90 Stat. 2541 (1976).

277. *See* 17 U.S.C. § 102 (listing the enumerated categories).

278. *See Horgan*, 789 F.2d at 160 (explaining that although choreography was not an enumerated category of protection, dance that conveyed a dramatic concept or idea was protected, while abstract and modern dance was not).

279. *See, e.g.*, *id.* at 160 (indicating that choreography was not always afforded complete protection). *But see* 17 U.S.C. § 102 (indicating that choreography is now an enumerated category that is afforded complete protection).

related reasons, both of which are illustrated by the Teller case. Magicians want to (1) enjoin other magicians from performing their illusions, and (2) prevent their secrets from being revealed to the public.[280] The former is much more in line with the philosophy of copyright law because it benefits the field of magic by making it an economically feasible profession.[281] By contrast, using copyright law to keep information secret is possible but frowned upon because promoting disclosure is another aim of copyright.[282] Copyright is not intended to provide a monopoly on knowledge.[283]

The Copyright Clause of the Constitution embodies the economic theory of copyright law, which encourages innovation by giving creators limited monopoly rights over the expression of their ideas, thereby creating financial incentives to innovate and reducing pressure to hide their work.[284] Copyright law benefits the creator in the short-term with the end goal of benefitting the public; ultimately it promotes the twin aims of innovation and distribution.[285]

Besides the magic community, one other major group has sought to use copyright to promote secrecy: religious organizations.[286] The Church of Scientology in particular has brought a spate of cases seeking to keep their teachings private by filing copyright infringement suits against parties

280. *See, e.g.*, Complaint, *supra* note 14, at 9.

281. The Supreme Court has stated that "[t]he primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts,'" as defined by the Copyright Clause. *Feist Publ'ns*, 499 U.S. at 349. The economic benefits afforded to magicians via copyright in their works would therefore be intended to ultimately benefit progress in the field of magic.

282. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 216-17 (2003) (explaining that copyright law is distinguishable from patent law in part because disclosure is a *quid pro quo* of patent law, meaning that immediate disclosure is the price paid for the exclusivity that patents grants. Copyright law does not extract disclosure because copyright runs from creation, not publication, but disclosure is the desired objective of copyright law.). See NIMMER & NIMMER, *supra* note 26, § 1.03 for a general discussion about the goals of copyright law.

283. *Eldred*, 537 U.S. at 217.

284. *See* U.S. CONST. art. I, § 8, cl. 8; David A. Simon, *In Search of (Maintaining) the Truth: The Use of Copyright Law by Religious Organizations*, 16 MICH. TELECOMM. & TECH. L. REV. 355, 377–78 (2010).

285. NIMMER & NIMMER, *supra* note 26, § 1.02.

286. *See* Simon, *supra* note 284, at 396.

revealing the contents of their religious texts.[287] The Church's goal was to censor writings critical of its practices—thereby preventing negative publicity, criticism and dissent—and to stifle competition from former members who wanted to establish offshoots of the Church.[288]

The Church of Scientology's use of copyright is somewhat ironic given that the Statute of Anne was originally enacted in 1710 to destroy copyright censorship.[289] Prior to its enactment, the British Crown held the entire country's "printing privilege," which it used to grant an exclusive book-printing monopoly to a stationers' guild.[290] The guild decided, with the Crown's oversight, what books were fit to print; no other manuscripts could be reproduced.[291] This was the first copyright, and it was designed as a mechanism for content control, not to protect author's rights.[292] Therefore, the Statute of Anne was enacted to protect the public interest by destroying the censorship copyright and breaking up the printing monopoly.[293]

Since its inception, the United States' copyright statute has been an extension of the Statute of Anne and has been intended to promote public good.[294] As a result, the Church of Scientology's use of the copyright statute to promote secrecy and censorship was "seriously misguided" in the words of one scholar.[295] Magicians should not be encouraged to do so either.

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287. The Church of Scientology unsuccessfully sued several individuals who allegedly stole and sought to reveal the contents of confidential Church scriptures. *See* Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986). The 9th Circuit held that defendants' use of confidential documents was fair use. *Id.* at 1077. It also sued a defendant who scanned Church documents and posted them to the Internet. Religious Tech. Ctr. v. Lerma, No. 95-1107-A, 1996 WL 633131, at *1 (E.D. Va. Oct. 4, 1996). The court held that the defendant's "wholesale copying and and republication of copyrighted material" infringed on the Church's copyright. *Id.* at *5.

288. Simon, *supra* note 284, at 396.

289. *Id.*

290. *Id.* at 391.

291. *Id.*

292. *Id.* at 392.

293. *Id.* at 393-94.

294. *See* U.S. CONST. art. I, § 8, cl. 8; *see also* JOYCE ET AL., *supra* note 26, at 19–20; NIMMER & NIMMER, *supra* note 26, § 1.02.

295. Simon, *supra* note 284, at 396.

4. For Magicians, the Benefits of Copyright Outweigh Its Limitations

Although copyright would be of little use in protecting the secrets behind magic illusions, the benefits of copyright outweigh its limitations for magicians. This is because the commercial value of secrecy seems to have been historically over-stated. The Golden Age of Magic in the 19th Century was also a Golden Age of Exposure.[296] In the late 18th and early 19th centuries, magicians repeatedly exposed one another's tricks to compete for performance bookings.[297] One magician would debut an illusion only to have his rival publish a pamphlet on it the following month.[298] This exposure drove innovation.[299] As it turns out, the real commercial value lies in performance rights.[300] It could very well be worth exposing the secret of an illusion if it meant obtaining an injunction blocking unauthorized performances.[301] The fact that copyright exists just by virtue of an author's expression—and not due to any formal procedures—should also make it that much more attractive to magicians.

Litigating copyright likely does require disclosure of magicians' secrets, which magicians have been loath to do even in the context of trials.[302] The court in *Glazer* explained:

> When the plaintiff below, Mr. Hoffman, was on the witness stand, counsel for the defendant below, on cross-examination, propounded the question, viz.:
>
> "What I mean is, is the act performed by means of mechanical contrivance or equipment, or use of sleight of hand?"
>
> A. "I think if I told you that I would be telling my trade secret."[303]

However, the benefits of disclosure could easily outweigh the costs.

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296. Stone, *supra* note 21, at 146–47.

297. *Id.*

298. *Id.* at 147.

299. Loshin, *supra* note 138, at 125.

300. *See* Crasson, *supra* note 17, at 128.

301. For example, Criss Angel secured a ten-year, $100 million contract at the Luxor following a leak of some of his tricks. Stone, *supra* note 21, at 150.

302. *See, e.g.*, Glazer v. Hoffman, 16 So. 2d 53, 55 (Fla. 1943).

303. *Id.*

The Copyright Act gives holders the exclusive right to perform the copyrighted work publicly and to reproduce copies of the work.[304] In her article, "Intellectual Property Law for the Variety Arts," commercial litigation lawyer Sara Crasson, who has also practiced magic for 30 years, described how most variety artists, including magicians, support themselves: "Most variety artists make their living from live performances, rather than appearing on television or selling recordings of their shows. Therefore, variety artists tend to be more interested in protecting their acts and material from other performers than in exploiting recordings of their performances."[305]

V. CONCLUSION

Magicians have come a long way, from being distrusted during the days of Plato, to being persecuted during the Inquisition, to gaining in-demand status as entertainers during the late nineteenth century, to finally achieving prestige and exclusivity today.[306] Still, magic occupies a unique space among the competing aims of intellectual property law.[307] Its "remix culture" and its incorporation of both expression and process make some question whether magic is amenable to intellectual property protection—particularly copyright—or whether legal protections would be of value to magicians.[308] Copyright, however, is well suited to address the creative, complex, and varied nature of the field of magic.[309] Further, such protection would be within the spirit of the law, and could be of significant financial value to magicians.[310] The evidence shows that it is performance theft—not disclosure—that jeopardizes magicians' financial wellbeing.[311]

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304. 17 U.S.C. §§ 106(1), (4) (2006).

305. Crasson, *supra* note 17, at 97.

306. Loshin, *supra* note 138, at 125-26; EDWARD PETERS, THE MAGICIAN THE WITCH AND THE LAW 175 (1978).

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

308. *See* NIMMER & NIMMER, *supra* note 26, § 1.02 (discussing the goals of copyright law).

309. The large variety of works covered by copyright law—ranging from books to music to computer programs—demonstrate that courts are prepared to accommodate the idiosyncrasies of magic while applying copyright analysis. 17 U.S.C. §§ 101, 102, 117.

310. *See Feist Publ'ns*, 499 U.S. at 349 ("Primary objective of copyright is not to reward the labor of authors, but to 'promote the Progress of Science and useful Arts as defined by the Copyright Clause.'") (citing U.S. CONST. art. I, § 8, cl. 8).

311. *See* Crasson, *supra* note 17, at 127.