

Gag Orders: Comedy, Chaplin, and Copyright

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Many scholars and cultural critics have observed that we are witnessing the reemergence of an active, collaborative, and participatory form of creativity—a mode of creativity that was suppressed by the rise of mass media during the course of the twentieth century.¹ Mashup videos, remixed audio works, and Photoshopped collages are everywhere. These new forms of remix culture, critics often remark, have reawakened the everyday artistry of nineteenth-century folk culture and the collage aesthetics of avant-garde and modernist artists. But if we are in the midst of such a resurgence, what made it necessary in the first place? When and how did imitating, copying, and reusing the material of great artists move from the center of cultural production to the—often legally ambiguous—margins from which those practices have only recently returned? I look for part of the answer to this question in the interaction between copyright law and film comedy in the first decades of the twentieth century. Focusing on two cases, one from 1904 and another that stretched over much of the 1920s, we can see how courts shifted from addressing imitation and borrowing as natural forms of cultural development to seeing them as theft.

It is no accident that this is a story about comedy. A great many film copyright cases in the first half of the twentieth century involved film comedy and comedians. Charlie Chaplin, Buster Keaton, Harold Lloyd, Laurel and Hardy, the Marx Brothers, Jack Benny, and Sid Caesar, among others, were all involved in important copyright

lawsuits. Together these cases set the ground rules for the genre of film comedy and, indeed, for the entire entertainment industry. As Chaplin, the Marx Brothers and many other comedians moved from vaudeville to Hollywood, both the nature of performance and the scope of their celebrity changed; they could now, at least in theory, play in every movie theater around the globe simultaneously. Film comedy stars responded by using copyright law to redraw the boundaries of their field, blunting the culture of imitation in which they had been reared.

Why were comedians on the front lines of copyright battles? While we might dispute whether any artistic creation can be truly original, we would have to agree that comedy would certainly not exist without a referent on which to build, riff, or comment. Comedy is always about something else. It is a parody *of* another work or a joke *about* someone or something. Comedy, at its root, is about imitation, and, as a result, film comedy has consistently pushed the boundaries of copyright law.

Before Hollywood

Before the invention of film, vaudeville comedians and comic performers had all but given up on using copyright to protect their material. In a series of late-nineteenth-century cases, vaudeville performers attempted and failed to protect the copyrights in their performances. Courts found that many vaudeville acts didn't meet the constitutional criteria for copyright as it was understood at the time. Particularly in the wake of the Comstock anti-obscenity legislation of the 1870s, nineteenth-century U.S. judges were quick to dismiss obscene works as not "promot[ing] the progress of science" and therefore beneath the constitutional threshold for protection. And before the 1909

Copyright Act expanded the range of protected works, the same judges held that works lacking narrative or dramatic content failed to meet the constitutional criteria that a work be a form of “writing.”² (Today, “writing” is understood to be anything “fixed in a tangible medium.”) In this climate, vaudeville acts were regularly found to be either obscene or too loosely structured to have a story.³

When copyright law proved to be a dead end, vaudevillians began to rely on the self-policing of their industry. Performers and their managers took out ads in trade papers to call out and shame other performers who unabashedly stole their material. Vaudeville theater owners regularly pledged that they would not hire copied acts, although this may have been a sop to performers and managers rather than a real commitment. And a series of short-lived institutions arose to accept documentation about acts or arbitrate disputes. In some cases, these ad hoc copyright offices or grassroots courts would establish royalty-sharing agreements between the original performer and the copycats.⁴

But these were extreme solutions. For the most part, vaudeville performers simply permitted and expected a certain amount of imitation from their peers. Live vaudeville performers could only cover so much territory, so there was more room for duplication. It was very common, for example, for European performers to copy acts they had seen on the American vaudeville circuit and for American performers to repeat acts they had seen in Europe.⁵

Even in instances where performers sought to protect their acts, they often found the task impossible. Celebrated dancer Loie Fuller, for example, vigilantly protected her performance style. She held patents on her use of color in stage lighting and on her design for a dancer’s skirt frame. She sued lithographers, ultimately unsuccessfully, for

distributing her image. And in 1892, Fuller attempted, also unsuccessfully, to protect her signature “Serpentine Dance” from imitation in a copyright suit. *Fuller v. Bemis* is one of those cases in which a judge found a vaudeville act to lack sufficient narrative or drama to be protected by copyright.⁶ As a result of the decision, Fuller could not prevent dozens of dancers from using her Serpentine Dance routine across the United States and Europe. In the world of vaudeville, this kind of imitation not only was common but also made it possible for the originator, Fuller, and many other dancers to have successful careers. In her autobiography, Fuller recounts several instances in which she thought the presence of emulators or counterfeiters would ruin her career. But she consistently performed her original dance to sold-out crowds even when rivals were performing the Serpentine Dance at nearby theaters. There were many stages on which to perform, and audiences were willing to pay in proportion to the dancers’ levels of talent and acclaim. The Serpentine Dance eventually grew into a widely performed genre of dance rather than the property of a single performer, and it remained popular in the United States and in Europe for more than three decades.⁷

From Vaudeville to Early Film

Many of the earliest films made by Thomas Edison and others were simply records of vaudeville acts. Several different dancers, for example, performed the Serpentine Dance before Edison’s cameras, though Fuller herself never did. Unlike vaudeville performers, however, early filmmakers were not content to allow self-policing alone to govern their industry. Edison had a long history of using litigation, including intellectual property litigation, to control his other businesses (phonograph, electricity,

etc.), and he brought a litigious business culture to the early film industry. As a result of early filmmakers' efforts, legal decisions in the first years of the twentieth century began to set parameters of imitation and copying in the film industry. Although the early case law continued to preserve the culture of imitation that pervaded vaudeville, film companies would eventually prove more successful than vaudeville performers had been in convincing judges to recognize their copyrights.

Market leaders Edison and Biograph initiated most of the early film copyright cases. Frequent rivals in patent disputes, the two firms threatened each other with copyright lawsuits as well. All of these were settled out of court until Edison's company remade Biograph's *Personal* (1904) without permission—a standard practice at the time. Edison and other companies often made their own versions of competitors' films, which were frequently shot-for-shot copies of the original. But several factors led to the 1904 standoff. First, the case of *Edison v. Lubin* (1903) had outlawed film duping, the practice of taking a competitor's film, making a negative from that film, and then striking new prints from the new negative. Now that courts had frowned on duping, remakes became an even more important part of the film business. Also, in 1903–04, fictional narrative films began to replace reality-based genres such as travel films and films of newsworthy events. With the turn to fictional narrative, remakes suddenly had much more value, and for the first time in a copyright dispute, Biograph's lawyer, Drury Cooper, and Edison's, Frank Dyer, failed to come to an agreement after months of negotiations.

Biograph v. Edison asked whether the common practice of remaking a competitor's film violated copyright law and, if so, how courts or filmmakers could determine if and when remakes took too much from the original. Copyright law protects

original expression, while the ideas expressed remain free to be borrowed and used.⁸ At times, the distinction between ideas and expression can seem meaningless or arbitrary. We might imagine paraphrasing another author's words to express the same idea differently, but how can anyone decouple the underlying idea of an image or a musical phrase from its expression? Fortunately, like many elements of the law, the idea/expression dichotomy does not exist as a Platonic ideal. It is a living concept that changes over time—a sort of valve that responds to social context and artistic trends in order to moderate the exchange of creative ideas at a particular time. Like any valve, it can be turned to increase or decrease the flow of creativity. *Biograph v. Edison* was the first case to take up the idea/expression dichotomy in film, and, as we will see, it preserved the imitative culture that the early film industry had inherited from vaudeville.

Biograph's *Personal* tells the story of a European nobleman who takes out a personal ad asking potential brides to meet him in front of Grant's Tomb. When more than one willing prospect arrives at the assigned hour, the nobleman runs. The suitors pursue him until the fastest woman gets her man. The film merged comedy with a chase format, two very popular genres at the time. Exhibitors clamored for copies when they read the description of *Personal*, and Biograph immediately sold the film to its licensed distributors. Following their usual practice, however, Biograph refused to sell the film to Edison's distributors or other competitors. They wanted their circuit of licensees to enjoy some exclusivity.

When the Edison Company failed to obtain a copy, the head of production followed what was also standard procedure and instructed the company's top director, Edwin S. Porter, to remake the film. Edison was not the only company to remake

Personal; Siegmund Lubin and the French company Pathé also made their own versions. But Porter's quickie remake, which the Edison Company entitled *How a French Nobleman Got a Wife Through the "New York Herald" Personal Columns*, reached the market before Biograph's original version, and audiences much preferred it to *Personal*. Biograph's management was infuriated, and they petitioned the New Jersey District Court for an injunction against Edison, asking that Edison surrender all prints and negatives to Biograph.⁹ [IMAGE #1]

In a series of affidavits, Edison's staff admitted having seen and copied the Biograph film. In Edison's own testimony, he suggested that they were operating in an extralegal realm. "As far as I am aware," he told the court, "it has never been considered that a copyright upon a moving picture photograph covers the plot or theme which the exhibition of the moving picture portrays." Porter, the director, had a more nuanced interpretation of what happened. He saw the Biograph film and immediately recognized it as a genre film, a "chase picture." Moreover, *Personal* was not much more than the elaboration of a joke, something so basic that it could not be protected. "It occurred to me after seeing the exhibition of the complainant's film *Personal*," Porter stated for the record, "that I could design a set of photographs based upon the same joke, and which, to my mind, would possess greater artistic merit. My conception of the principle character representing the French Nobleman was entirely different from that of the complainant's film, as regards costume, appearances, expression, figure, bearing, posing, posturing and action."¹⁰ Porter had had his own films remade by Biograph and other companies for years. He had, in turn, remade many films. Remakes had been a standard of the industry; improving on another director's film was how an international industry of filmmakers

exchanged ideas and contributed to the growth of their art form. Porter had not duped any scenes—a practice now both illegal and unfashionable—and he felt entitled to take Biograph’s ideas as long as he expressed them differently.

In the court statements, Edison’s lawyers accused Biograph’s director of having taken the story from a newspaper cartoon, although no one involved in the case was able to produce it. Still, it was a plausible claim. *Personal* does have the quality of a live-action cartoon, setting up a situation that leads to an unexpected result and then turning into a slapstick chase. As in any other work of art, the ideas underlying jokes, gags, and other kinds of comic routines are part of the public domain, but the specific expression of a joke may be copyrighted. Comic routines, however, pose some extra difficulties when one tries to separate the original contributions from the underlying ideas.¹¹ Jokes and gags are generally short; they fall into a few broad structural categories; and they often circulate widely. Because they respond to cultural trends or political events, jokes come in waves, with different comedians creating similar jokes about similar circumstances. (Part of *Personal*’s humor, for example, came from the fact that it responded to a cultural phenomenon, the trend of European nobility marrying American money.) Comic shtick further secures its social relevance by using stock characters (“A rabbi, a priest, and a blonde walk into a bar . . .”). The attributes most basic to jokes and gags—their simple structure, stock characters, broad dissemination, and brevity—are precisely what make them difficult to protect legally.

Both Edison’s and Porter’s testimony indicates that an interpretation of the idea/expression dichotomy guided many early filmmakers’ creative decisions. But that fact did not make the judge’s job any easier. It is always difficult—especially when a

medium or genre is new—to separate the generic tropes of an art form from the nuances and individual contributions of a particular work. In 1868, just for example, playwright and producer Augustin Daly successfully defended his copyright in the last-minute rescue from an oncoming train. How could the judge in the Daly case have known that such scenes would become a stock fixture of professional and amateur plays around the world and eventually the stuff of children’s cartoons?¹²

Chase films and comedies were already common by 1904. Although filmmakers remade each other’s films regularly, there was no legal or normative consensus about acceptable and unacceptable borrowing—about which comic elements were stock “ideas” and which were protectable “expressions.” In the absence of such a consensus, Judge Lanning made his decision by closely analyzing the two films; he even requested a shot-by-shot description of *Personal* from Biograph. In Judge Lanning’s reading, “the two photographs [as he referred to the films] possess many similar and many dissimilar features.” The plot lines were uncannily similar, but the framing and some of the backgrounds were different. Despite the similarities, Judge Lanning concluded, Porter’s remake, “is not an imitation . . . [he] took the plaintiff’s idea, and worked it out in a different way.”¹³ Moreover, the two films had significantly different titles, so exhibitors and audiences were unlikely to mistake one for the other from the advertisements. An appeals court agreed with Lanning, and as a result remakes remained a common practice of production companies during the early years of narrative film.¹⁴

The high judicial tolerance for remakes fostered an international culture of creative exchange among filmmakers. This open creative environment, as Jay Leyda and others have shown, allowed the nascent art of narrative film to develop extremely rapidly.

In one example, suggested by Leyda and elaborated by Tom Gunning and Charles Musser, D. W. Griffith's great masterpiece of cross-cutting, *The Lonely Villa* (1909), turns out to have been the result of an international dialogue among writers, dramatists, and filmmakers. Pathé Frères made a film, *A Narrow Escape* (1908), inspired by a French Guignol play, *Au Téléphone*, about a man who receives a phone call and listens to his family being attacked by robbers. Six months later, Edwin S. Porter made a film, *Heard Over the Phone* (1908), based either on the English version of *Au Téléphone* or on the Pathé film. The narrative, now too widely circulated to pinpoint the exact chain of influence, was remade and altered by Griffith and, five years later, by Russian filmmaker Yakov Protazanov. Griffith's version, at least, remains a touchstone of film history.

Biograph v. Edison had sanctioned an environment of creative exchange in which plots and themes could be repeated, and this environment helped to solidify early film genres. More than twenty years after *Biograph v. Edison*, Buster Keaton remade *Personal*—or perhaps he remade Porter's remake of *Personal*—as a feature-length comedy, *The Seven Chances* (1925). Some of the simple ideas in Biograph's film became the building blocks of film comedy; they were ideas that no one could own.¹⁵

“Legally Unique”: *Chaplin v. “Aplin”*

Vaudeville and early film comedians accepted the liberal legal standards of ownership. In the mid-1910s, however, the loose conglomeration of small film companies began to merge into vertically and horizontally integrated film studios (i.e., Hollywood), with more rationalized models of production, distribution, exhibition, and marketing. The star system was one such form of rationalized marketing, and when some of the

vaudeville comedians emerged as slapstick film stars in the 1910s, they began to push for much greater protection of their images and their material. Several of the new stars turned to copyright law, and they fought to redefine the idea/expression dichotomy. The case that transformed comic authorship for the age of mass media and finally broke with the imitative cultures of vaudeville and the early film industry involved Charlie Chaplin.

Chaplin had been an unexceptional member of the British musical hall and vaudeville troupe Karno's Speechless Comedians before Mack Sennett invited him to perform in a film in 1911. But Chaplin's star rose quickly in Hollywood, and only six years later, he enjoyed an almost unparalleled degree of creative autonomy, having established his own studio where he wrote, produced, directed, and starred in all of his films. After co-founding United Artists in 1919, the multi-talented Chaplin had a hand in distributing his films as well and even began scoring them after the adoption of sound. In a collaborative medium, Chaplin enjoyed a degree of individual authorship that only a few other filmmakers have ever achieved.

Chaplin helped to redefine the idea of the filmmaker, giving rise to a mythic conception of the director as lone artist. According to one story, he was known to go off on a short fishing trip in the middle of shooting a film just to look for inspiration in the stillness of a lake or stream. Art and film theorist Rudolf Arnheim helped propagate the Chaplin-as-solitary-genius myth, describing him as "a man who, in the middle of the Hollywood film industry, where every day in the studio costs thousands and art is produced with a stopwatch, sometimes disappears suddenly and for days paces in solitude with his plans."¹⁶ Indeed, it became a rite of passage for every modernist cultural theorist in the 1920s and '30s to write a profile of Chaplin as the exception within the commercial

sphere of mass culture, as the artist who could work within the capitalist machine of mass production, at the pinnacle of the system, yet remain apart from it. The Frankfurt School theorists, in particular, seemed determined not to break ranks in their unified defense of Chaplin as the last vestige of a Romantic authenticity. Walter Benjamin, building on an essay by Surrealist writer Philippe Soupault, called Chaplin the “poet of his films.”¹⁷ Siegfried Kracauer, in his own obligatory Chaplin portrait, performed great contortions to argue that money and success had not changed Chaplin. “Rather than letting himself be changed by money, like the majority does,” Kracauer wrote, “he changes it; money loses its commodity character the moment it encounters Chaplin, becoming instead the homage which is his due.”¹⁸ Even the Frankfurt School’s severest critic of Hollywood, Theodor Adorno, who elsewhere described laughter as “a disease” of “the false society,” made Chaplin an exception by celebrating the actor’s imitative genius.¹⁹ As many admirers claimed, Chaplin was simply able to become the characters he mimicked. Only the American cultural critic Gilbert Seldes contested Chaplin’s singularity by putting him “wholly in the tradition of the great clowns” and tracing the origins of his style to his film apprenticeship in Mack Sennett’s Keystone studio. The “Keystone touch,” Seldes wrote “remains in all [Chaplin’s] work.”²⁰

Was Chaplin a Romantic poet of the screen whose inspiration came only from his own genius? Or was he more like Homer, fixing on film a comic performance style that had been developed over decades or even centuries by court jesters, traveling comics, and vaudeville performers? The question of Chaplin’s originality grew increasingly important as his films gave rise to thousands of professional and amateur Chaplin imitators. Were

the imitators taking and remixing the same ideas that Chaplin had himself lifted from other comics, or were they looting his individual expression?

[IMAGE #2] In July 1915 alone, more than thirty New York City movie theaters sponsored Chaplin look-alike competitions.²¹ Future professional comedian Bob Hope won one such competition, and Walt Disney, who would draw heavily on Chaplin to create Mickey Mouse, entered dozens of Chaplin impersonation contests, eventually being ranked the second best in Kansas City.²² Professional imitators were also plentiful. The well-known Chaplin imitator Billy West made over fifty films as a Chaplin-like character. Actress Minerva Courtney made three films cross-dressing as Chaplin, and former Chaplin understudy Stan Laurel developed a Chaplin stage act years before his success with the film duo Laurel and Hardy. The Russian clown Karandash ultimately had to give up his Chaplin routine because he was overwhelmed by competition from other Chaplin imitators.²³ There were both authorized and unauthorized Chaplin cartoons; the most prominent, *Charlie*, was animated by future *Felix the Cat* creator Otto Messmer and had an unofficial nod of approval from Chaplin, who sent ideas to Messmer. Even superstar silent comedian Harold Lloyd began as a Chaplin imitator, making fifty-seven films as a Chaplin-like character named Lonesome Luke. Some companies took Chaplin's image more directly than the imitators, selling dupes of Chaplin films or taking excerpts from his films and mixing them with stock footage, creating "mashups" (to use an anachronistic term). Other Chaplin mashups mixed footage from Chaplin films with footage of imitators.²⁴ **[IMAGE #3]**

Modernist and avant-garde writers, artists, and performers were also obsessed with Chaplin. The Dadaists, the Surrealists, Fernand Léger, T. S. Eliot, James Joyce,

Gertrude Stein, and countless other writers, artists, and performers copied Chaplin and his Tramp character in a variety of ways. Critics have made strong cases that Joyce's Leopold Bloom and several Wyndham Lewis characters were, at least in part, explicitly modeled on Chaplin.²⁵ Eastern European poets used Chaplin and the Tramp character as figures in their poetry during the 1920s and 1930s. The tradition included poems by German-French writer Yvan Goll and Russians Osip Mandelstam and Anna Akhmatova, the latter imagining herself sitting on a bench in conversation with Chaplin and Kafka. Cubist painter Fernand Léger, who had a deep obsession with Chaplin, illustrated an edition of Goll's "Chaplinade." Léger went on to animate a dancing Charlot—the French diminutive for Chaplin—in his 1924 avant-garde film *Ballet mécanique*, which premiered in New York on a program with Chaplin's *The Pilgrim* (1923).²⁶ **[IMAGE #4]**

Neither Chaplin nor his attorney, the legendary copyright and entertainment lawyer Nathan Burkan, was happy about the massive proliferation of imitators and derivative works. Their first attempt to contain the spread of Chaplin's image was to go after a company that mixed footage from Chaplin's film *The Champion* (1915) with footage of an undersea film to create a new Chaplin film. (It is difficult to imagine how boxing footage might have been mixed with undersea shots, but that is what the accounts describe—the film isn't extant.) Chaplin had made *The Champion* for the Essanay Film Manufacturing Company, and he did not own the copyright. When Essanay failed to take action, Burkan sued the company responsible for the new film, claiming that the filmmakers had unfairly adopted Chaplin's Little Tramp character.

It was a novel argument at the time, but one would expect no less of Burkan, a pioneering lawyer and lobbyist who had organized composers in 1908 and led the

campaign for compulsory licensing in the 1909 revision of the Copyright Act. The judge in the first Chaplin case eventually rejected the argument that one performer could own a character independent of a particular work, but he did force the Crystal Palace Theatre in New York to stop misleading the public by advertising the film as if it were a real Chaplin film.²⁷ It is not clear, however, that the decision accurately assessed the situation or that it had the intended effect. According to Terry Ramsaye, writing in 1926, the Crystal Palace's attendance dropped by half when it attempted to pass off a Chaplin imitation as an original, which suggests that filmgoers were not as susceptible to misleading advertising as the judge thought. And if audiences knew the difference between Chaplin and his imitators, devoted fans were nonetheless willing to watch imitators' work in between the star's sporadic releases. Despite Chaplin and Burkan's partial victory, Chaplin biographer Joyce Milton notes, the decision led to even more imitators, who could now legally borrow the Tramp character as long as they did not mislead the public through advertising.²⁸

But Chaplin and Burkhan were not deterred. In a lawsuit against Mexican actor Charles Amador who made several films under the name "Charlie Aplin," they reprised the argument that Chaplin owned his Little Tramp character. Burkhan spent three years trying to settle with Amador before the case went to trial. But Amador and his lawyers were stubborn, maintaining that they had a right to use the comic elements that Chaplin used too. Hollywood insiders and movie fans paid close attention to the case, which dragged on for six years, garnering dozens of op-ed pieces and occasionally making front-page news.²⁹

When the trial court heard testimony in the case in 1925, Amador's lawyers bravely let the charismatic celebrity take the stand and discuss his creative method. In a later copyright case involving the 1918 film *Shoulder Arms*, the opposition's attorney would try to stop Chaplin from swaying the court with his charm and wit.³⁰ But in the Amador case, Chaplin's testimony may not have helped him. Chaplin adopted an aloof and aristocratic tone. "My inspiration," he explained to the court, "was from the whole pageantry of life. I got my walk from an old London cab driver, the one-foot glide that I use was an inspiration of the moment. A part of the character was inspired by Fred Kitchen, an old fellow-trouper of mine in vaudeville. He had flat feet." When Amador's lawyer, Ben Goldman, cross-examined Chaplin about his costume, Chaplin was dismissive. "Where did you get that hat?" Goldman asked.

"Oh, I don't know. I just conceived the idea of using it," replied Chaplin.

"Did you ever see anyone wear pants such as you wear?" Goldman continued.

"Sure," replied Chaplin, "the whole world wears pants."³¹

Chaplin's answers had both a dismissive and a mystical quality: ideas just came to him, he suggested, or else he extracted them from his observations of life.

Goldman and Amador, however, had another theory. Goldman called a vaudeville reviewer, Joseph Pazen, to the stand, and asked him if Chaplin imitated any of the comics who had preceded him. Pazen named dozens of performers who had used similar elements in their routines. George Beban, for instance, had a similar moustache; Chris Lane had a similar hat; Harry Morris had baggy pants; Billy Watson used the same combination of baggy pants, big shoes, and glide-walk. One of the Les Petries Brothers used the same makeup and a similar costume in his Tramp character. This actor had even

performed as a tramp in a film for Chaplin's old employer, Mutual. As later critics have noted, Chaplin's costume also invoked circus clowns and real tramps who rode railway cars and took odd jobs.³²

When Amador took the stand he was as unsympathetic as his opponent, shiftily claiming that his contract engaged him to imitate the Chaplin look-alike Billy West, not Chaplin. Amador, however, did have one powerful argument: if Chaplin won, the precedent would create a new monopoly on performance. Amador's team made the case that Chaplin was only the most famous in a long tradition of comic tramps, and he could not be given a proprietary right in staples of the trade.³³

When Burkan attempted to respond to the specifics of Amador's criticisms, he fell into rhetorical quicksand, fumbling in the attempt to name Chaplin's original inventions. Reporters following the case had the same problem as they combed the testimony for some element that Chaplin had contributed to the art of comedy. "Chaplin Pants Real Issue," read one headline.³⁴ But Burkan stuck to his larger strategy by insisting that Chaplin was a unique genius, endowed with an ineffable quality that people could see for themselves. Chaplin's genius, Burkan maintained, could not be described or broken down into distinct elements. In one show of courtroom theatrics, he claimed that a clip from a Chaplin film would have to be placed in the court's decision, because words could not describe him.³⁵ The Romantic vision of the solitary artist is always compelling, but it was a particularly powerful part of the Chaplin myth. In addition to the German theorists mentioned earlier, everyone from Winston Churchill and Graham Greene to Edmund Wilson and Dwight Macdonald had perpetuated the myth of Chaplin as an individual

genius—perhaps the sole individual genius—working in the collaborative and commercial Hollywood system.

But the prevailing argument would end up being a humbler, more pragmatic one. In addition to calling for the protection of Chaplin's unique genius, Burkan argued that the Charlie Aplin name and appearance confused potential filmgoers because they resembled Chaplin's own name and iconic image too closely. This argument carried more weight with Judge John Hudner, who enjoined the distribution of Amador's film *The Race Track* and prohibited Amador from further misleading the public by advertising his films as if Chaplin had made them. By focusing not on the proprietary right in character but instead on the confusion that imitators unleashed in the market, Judge Hudner's decision itself sowed confusion: the press and the film industry were not sure who had won this round of the case. *The Los Angeles Times* declared "Chaplin Legally Unique." The *New York Times* agreed at first, running the headline "Chaplin Wins Suit to Protect Make-Up." But after revisiting Judge Hudner's final ruling with its limited emphasis on Amador's deceptive intent and advertising, the paper re-evaluated its conclusion and ran a new headline, "Chaplin Loses Fight on Exclusive Make-Up." Chaplin had successfully prevented Amador from using his image, but he had failed to protect his character from imitation.³⁶

Amador's lawyer, Goldman, claimed victory: "we can continue to produce pictures featuring Amador in the characterization as long as we specifically state in the titles that Amador is playing the character . . . [Chaplin] has no patent or copyright on the character."³⁷ The decision raised more questions about originality and ownership than it answered. While Chaplin waited for an appeals court to rule on the Amador case, he was

himself sued for copyright infringement—twice. The legal skirmish over the exchange of comic ideas had begun to heat up.

Star Power

When the appeals court heard the case, it refined Judge Hudner's decision, giving more weight to the idea that Chaplin owned the Tramp character. As Judge H. L. Preston stated plainly in his decision, "the record reveals that Charles Chaplin . . . originated and perfected a particular type of character on the motion picture screen." Elements of Chaplin's character may have been in the public domain, free to be used by other comics. But Chaplin owned this particular expression of the Tramp character; he was the first to use it on screen; and he could prevent others from confusing the public by adopting his look and actions.³⁸

The appeals court in *Chaplin v. Amador* did not entirely adopt Burkan and Chaplin's model of Romantic authorship, but Chaplin had succeeded in forging a new and greatly expanded legal definition of comic authorship and, indeed, of authorship and performance in general. The stated goal of both the trial and the appellate decision was to protect the public from confusion, and both decisions used copyright to control unfair competition. In his decision in the Chaplin appeal, for example, Judge Preston made it clear that Chaplin had the right to protect his character from "the fraudulent purpose and conduct of [Amador]" and "against those who would injure him by fraudulent means; that is by counterfeiting his role."³⁹ There is no indication, however, that the existence of counterfeit Chaplins injured the original, at least by deceiving his audience into mispending their ticket money. In a statement that Chaplin submitted ostensibly in

support of his case, Lee Ochs, the former president of the Motion Picture Exhibitors League of the State of New York, told the court that Amador's film "is very poor and failed to embody the elements of comedy and pathos that so aptly distinguish the Chaplin pictures. Nevertheless, to the casual observer, it might readily be mistaken for a Chaplin picture." Yet as we saw in the wake of the trial-court decision, audiences were not easily deceived. On the contrary, vaudeville had taught theater owners and audiences of popular amusement to expect repetition and imitation. The box office dips when imitators' films were shown at the Crystal Palace movie theater demonstrate that audiences were well aware of the differences between Chaplin and pseudo-Chaplin films. The limits that *Chaplin v. Amador* placed on imitation did not serve to clarify the options available to audience members; it only limited their choices.⁴⁰

By protecting Chaplin the great artist from cooptation by average screen comics, both the 1925 and the 1928 decisions made unprecedented levels of protection the reward for reputation and standing. Although the courts did not announce this innovation explicitly in their decisions, it became clear in the cases that adopted *Chaplin v. Amador* as precedent. Lawyers began to invoke the case, often successfully, to protect performers from defamation, trademark infringement, unfair competition, and lower echelon imitators who tarnished their clients' reputations. The Chaplin precedent emerged as a tool for policing performers' reputations rather than for protecting their originality.⁴¹

Chaplin v. Amador also inaugurated the development of character protection in copyright law, but Chaplin's Tramp character didn't resemble the kinds of characters that copyright has since come to protect. As Judge Learned Hand would write in 1930, character copyright protects the specific traits of "sufficiently developed" characters.

Chaplin, however, used a stock vaudeville figure, the tramp, and made it his own. Although the individual elements of Chaplin's Tramp remained part of the public domain, Chaplin's global celebrity so identified him with the figure of the Tramp that it became impossible for other performers to play a tramp without evoking Chaplin. As a result, the new precedent of character protection gave a significant advantage to pioneering media stars who drew, as Chaplin did, on centuries of stage tradition to create their characters.⁴²

Chaplin v. Amador signaled a cultural shift from vaudeville to Hollywood, from live to recorded performance, and from local celebrity to global stardom. Many other vaudeville performers, especially comics, were confounded by the new limits on imitation. Former vaudeville stars the Marx Brothers, for example, were mired in lawsuits over comic authorship after they made the transition to film.⁴³ Because film fixed performances permanently on celluloid and circulated exact copies rapidly and globally, the nature of imitation had undoubtedly changed. The vaudeville model of peer policing and tolerance for some degree of imitation no longer provided enough control and protection to satisfy performers, and the courts responded with new tools that constricted the flow of ideas between artists. The casualties of this change were future Bob Hopes, Stan Laurels, and Harold Lloyds, who were no longer free to learn their trade through emulation. The vaudeville circuit could house droves of clowns and tramps, but on film there was room for only one.

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¹ See for example Henry Jenkins, *Convergence Culture: Where Old and New Media Collide* (New York: New York University Press, 2006); Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven: Yale University Press, 2007); and Lawrence Lessig, *Remix: Making Art and Culture Thrive in the Hybrid Economy* (New York: Penguin Press, 2008).

² See Act of Mar. 4, 1909, ch. 320, § 5. According to the 1909 Act, copyright inhered in the following non-exhaustive list of work classifications: “(a) Books, including composite and cyclopaedic works, directories, gazetteers, and other compilations; (b) Periodicals, including newspapers; (c) Lectures, sermons, addresses (prepared for oral delivery); (d) Dramatic or dramatico-musical compositions; (e) Musical compositions; (f) Maps; (g) Works of art models or designs for works of art; (h) Reproductions of a work of art; (i) Drawings or plastic works of a scientific or technical character; (j) Photographs; (k) Prints and pictorial illustrations.”

³ See *Broder et al. v. Zeno Mauvais Music Co.*, 88 F. 74 (C.C.N.D. Cal. 1898); *Martinetti v. Maguire*, 16 F. Cas. 920 (C.C.Cal 1867) (No. 9173); Edward S. Rodgers, “Copyright and Morals,” *Michigan Law Review* 18 (1920): 390-404; Jean Thomas Allen, “Copyright and Early Theatre, Vaudeville, and Film Competition,” in *Film Before Griffith*, ed. John Fell (Berkeley: University of California Press, 1983), 176-87; Even when vaudeville copyright cases were decided on different grounds, the question of moral censorship was always present; see for example *Barnes v. Miner et al.*, 122 F. 480 (C.C.S.D.N.Y. 1903).

⁴ Kerry Segrave, *Piracy in the Motion Picture Industry* (Jefferson, N.C.: McFarland & Co., 2003), 6, 15, 17, 18, 19.

⁵ Segrave, *Piracy in the Motion Picture Industry*, 17.

⁶ *Fuller v. Bemis*, 50 F. 926, (C.C.S.D.N.Y. 1892). Mary Louise Fuller, “Garment for Dancers,” U. S. Patent 518347 (April 17, 1894).

⁷ Loie Fuller, *Fifteen Years of a Dancer’s Life* (Boston: Small, Maynard, and Co., 1913), 41-42, 55-56; Richard Nelson Current and Marcia Ewing Current, *Loie Fuller: Goddess of Light* (Boston: Northeastern University Press, 1997), 40-44, 62.

⁸ As Supreme Court Justice Louis Brandeis once famously put it “the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use.” Another Justice, Sandra Day O’Connor, explained years later that the disentangling of ideas from their expression keeps copyright law from hampering free speech. *International News Service v. Associated Press*, 248 U.S. 215 (1918) (Justice Brandeis dissenting). *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985). Also see Yochai Benkler, “Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain,” 74 *N.Y.U. Law Review* (1999): 354.

⁹ David Robinson, *From Peep Show to Palace: The Birth of American Film* (New York: Columbia University Press, 1996), 122.

¹⁰ *Thomas A. Edison Papers: A Microfilm Edition* (Frederick, Md.: University Publications of America, 1987–), reel 223, frames 810, 813.

¹¹ For a great recent assessment of comedy and copyright see Dotan Oliar and Christopher Sprigman, “There’s No Free Laugh (Anymore): The Emergence of

Intellectual Property Norms and the Transformation of Stand-Up Comedy,” *Virginia Law Review* 94 (2008): 1787-1867.

¹² *Daly v. Palmer*, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3552).

¹³ *American Mutoscope & Biograph v. Edison Mfg. Co.*, 137 F. 262 (C.C.D.N.J. 1905).

¹⁴ Charles Musser, *Before the Nickelodeon: Edwin S. Porter and the Edison Manufacturing Company* (Berkeley: University of California Press, 1991), 282. See also Jennifer Forrest, “The ‘Personal’ Touch: The Original, the Remake, and the Dupe in Early Cinema,” in Jennifer Forrest and Leonard R. Koos, eds., *Dead Ringers: The Remake in Theory and Practice* (Albany: SUNY University Press, 2001).

¹⁵ See Jay Leyda, “A Note on Progress,” *Film Quarterly* 21 (1968): 28-33; Jay Leyda, “Waiting Jobs,” *Film Quarterly* 16 (1962–63): 29-33; Tom Gunning: “Heard Over the Phone: *The Lonely Villa* and the de Lorde Tradition of the Terrors of Technology,” *Screen* 32 (1991); and Musser, *Before the Nickelodeon*, 424.

¹⁶ Rudolph Arnheim, “Chaplin’s Early Films,” 1929, rpt. in “Walter Benjamin and Rudolf Arnheim on Charlie Chaplin,” trans. John MacKay, *The Yale Journal of Criticism* 9 (1996): 312.

¹⁷ Theodore Huff, *Charlie Chaplin* (New York: Arno Press, 1972), 125; Walter Benjamin, “A Look at Chaplin,” 1929, rpt. in “Walter Benjamin and Rudolf Arnheim on Charlie Chaplin,” 310.

¹⁸ Siegfried Kracauer, “Two Chaplin Sketches,” trans. John MacKay, *The Yale Journal of Criticism* 10 (1997): 115-20.

¹⁹ Theodor W. Adorno, “Chaplin Times Two,” trans. John MacKay, *The Yale Journal of Criticism* 9 (1996): 57-61. Adorno’s remarks about laughter appear in *The Dialectic of Enlightenment* and are quoted in MacKay’s “Translator’s Introduction,” 57. MacKay points out that Adorno defended his admiration for Chaplin—and at the same time may have explained the soft approach reserved for this Hollywood star—with a personal anecdote: “Perhaps I may justify my speaking about him by recounting a certain privilege which I was granted, entirely without my having earned it. He once imitated me, and surely I am one of the few intellectuals to whom this happened” (Adorno, “Chaplin Times Two,” 60).

²⁰ Gilbert Seldes, *The Seven Lively Arts* (New York: Harper and Bros., 1924), 41-42. For more essays on Chaplin as artist see Richard Schickel, ed. *The Essential Chaplin: Perspectives on the Life and Art of the Great Comedian* (Chicago: Ivan R. Dee, 2006).

²¹ Charles Maland, *Chaplin and American Culture: The Evolution of a Star Image* (Princeton: Princeton University Press, 1989), 10-11.

²² Kathy Merlock Jackson, “Mickey and the Tramp” Walt Disney’s Debt to Charlie Chaplin” *The Journal of American Culture* 26 (2003): 439-44.

²³ John McCabe, *Charlie Chaplin* (Garden City, NY: Doubleday, 1978): 88-89; Joyce Milton, *Tramp: The Life of Charles Chaplin* (New York: Da Capo Press, 1998): 123-24.

²⁴ Terry Ramsaye, *A Million and One Nights: A History of the Motion Picture Through 1925* (New York: Simon and Schuster, 1926), 732; Ulrich Ruedel, “Send in the Clones,” *The BFI Charles Chaplin Symposium* (July 2005),

<http://chaplin.bfi.org.uk/programme/conference/pdf/ulrich-ruedel.pdf> (accessed July 31, 2009).

²⁵ See, for example, Susan McCabe, “‘Delight in Dislocation:’ The Cinematic Modernism of Stein, Chaplin, and Man Ray” *Modernism/Modernity* 8 (2001): 429-52; Anthony Paraskeva, “Wyndham Lewis v. Charlie Chaplin” *Forum for Modern Language Studies* 43 (2007): 223-34; Austin Briggs, “Chaplin’s Charlie and Joyce’s Bloom” *Journal of Modern Literature* 20 (1996): 177-86; David Chinitz, *T. S. Eliot and the Cultural Divide* (Chicago: University of Chicago Press, 2003), 87-88, 101; Haim Finkelstein, “Dalí and *Un Chien andalou*: The Nature of a Collaboration” in *Dada and Surrealist Film*, ed. Rudolf E. Kuenzli (New York: Willis Locker & Owens, 1987), 129-30; Paul Hammond, ed., *The Shadow and Its Shadow: Surrealist Writings on the Cinema*, 3rd ed. (San Francisco: City Lights Books, 2000).

²⁶ Matthew S. Witkovsky, “Surrealism in the Plural: Guillaume Apollinaire, Ivan Goll and Devětsil in the 1920s,” *Papers of Surrealism* 2 (2004): 1-14; Clare Cavanagh, “Rereading the Poet’s Ending: Mandelstam, Chaplin, and Stalin,” *PMLA* 109 (1994): 71-86; Susan Delson, *Dudley Murphy: Hollywood Wild Card* (Minneapolis: University of Minnesota Press, 2006), 60.

²⁷ Milton, *Tramp*, 124; Maland, *Chaplin and American Culture*, 317.

²⁸ Milton, *Tramp*, 124. Terry Ramsaye reports that the box-office receipts at the Crystal Hall dropped fifty percent when they showed Chaplin imitators rather than Chaplin himself. Ramsaye, *A Million and One Nights*, 732, 737.

²⁹ See, for example, “Charlie Chaplin Protests,” *Los Angeles Times* (March 8, 1922); *Los Angeles Times* (March 12, 1922); “Delay of Chaplin Suit,” *Los Angeles Times*

(April 7, 1922); “Chaplin Papers Here,” *Los Angeles Times* (April 23, 1922); “Chaplin Injunction,” *Los Angeles Times* (January 5, 1924).

³⁰ “Chaplin to Testify in Loeb Film Suit,” *New York Times* (May 6, 1927), 20.

³¹ “Charlie Chaplin Sues Chaplin Imitator,” *Los Angeles Examiner* (February 20, 1925).

³² “Chaplin Garb is Called Old,” *Los Angeles Times* (February 21, 1925), A1.

³³ “Chaplin Garb is Called Old,” A1; “Fears Monopoly in Acting,” *Los Angeles Times* (March 24, 1925), A10; “Aplin Will Call Chaplin,” *Los Angeles Times* (February 26, 1925), A1.

³⁴ “Chaplin Pants Real Issue,” *Los Angeles Times* (February 25, 1925), A1.

³⁵ *Chaplin v. Western Feature Prods., No. 103571 (Cal. Super. Ct. July 11, 1925)*, *aff’d sub nom. Chaplin v. Amador, 269 P. 544 (Cal. Dist. Ct. App. 1928)*; “Chaplin Trial Ends Today,” *Los Angeles Times* (February 28, 1925), A11.

³⁶ “Challenges Title of Film Comedian,” *Los Angeles Times* (May 20, 1925), A1; “Chaplin Loses Fight on Exclusive Make-Up,” *New York Times* (July 12, 1925), E2; “Chaplin Legally Unique,” *Los Angeles Times* (July 12, 1925), B16; emphasis added.

³⁷ “Chaplin Legally Unique,” B16.

³⁸ “Chaplin to Testify in Loeb Film Suit,” 20; “Sues Chaplin For \$100,000,” *New York Times* (November 15, 1928), 25; *Charles Chaplin v. Charles Amador*, 93 Cal. App. 358, 69 P. 544 (1928); *Kustoff v. Chaplin*, 120 F.2d 551 (9th Cir. 1941) and *Roy Export Company Establishment of Vaduz, Liechtenstein, et al. v. Columbia Broadcasting System*, 672 F.2d 1095 (2nd Cir. 1982).

³⁹ *Chaplin v. Amador* (1928).

⁴⁰ Affidavit of Lee A. Ochs, *Chaplin v. Western Features* (1925).

⁴¹ See for example: *Bert Lahr v. Adell Chemical Co.*, 300 F.2d 256 (1st Cir. 1962); *Lone Ranger v. Cox*, 124 F.2d 650 (4th Cir. 1942).

⁴² *Nichols v. Universal* (1930); Robert C. Osterberg and Eric C. Osterberg, *Substantial Similarity in Copyright Law* New York: Practising Law Institute, 2004), ch. 5. Both the trial and appellate decision carefully noted that Chaplin was, “the first person to use the said clothes, as described herein and as described in the complaint, in his performing as an actor *in motion pictures*” (*Chaplin v. Amador* [1928], emphasis added). This is a dubious claim—there were many other screen tramps before Chaplin—but it also reveals the great advantage of performers adapting characters to a new medium.

⁴³ The Marx Brothers copyright lawsuits include: *Henry Barsha v. Metro-Goldwyn-Mayer*, 32 Cal. App. 2d 556, 90 P.2d 371 (1939); *Marx Bros. v. United States*, 96 F.2d 204 (9th Cir. 1938); *Clancy v. Metro-Goldwyn Pictures Corp. et al.*, 37 U.S.P.Q. (BNA) 406 (S.D.N.Y. 1938).