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# “OH [YES], SHE BETTA [SHOULD!]”: Dolling Up Drag Queens’ Intellectual Property Rights

Carlos A. Figueroa\*

## ABSTRACT

For centuries, drag performance has persisted as a socially complicated art form inextricably tied to the LGBTQ+ community. Historically, prevailing audiences often labeled the art form and the queer community as unconventional and threatening. As a result, drag art’s sudden acceptance by the same mainstream crowd is both satisfying and precarious from an intellectual property perspective. This Comment examines the development of drag through its heightened popularity in entertainment today, where drag artists are faced with insufficient intellectual property protections unfit for dynamic queer art.

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## INTRODUCTION

As members of the LGBTQ+ community obtain more rights and privileges in the United States, the legal issues they face become inevitably nuanced when the art they have tirelessly put out for years suddenly becomes widely and favorably consumed. Well into the twentieth century, the work produced by queer artists remained deeply rooted in “enchantment [and] . . . resistance”

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due to greater society's hostile attitude toward homosexuality.<sup>1</sup> By wielding their sexual identity as artistic expression, queer artists expose themselves to legal ramifications in ways that queerness itself does not.<sup>2</sup> Fast forward to the millennium and drag queens grace the runways for designers Marc Jacobs and Jean Paul Gaultier,<sup>3</sup> are cast in Oscar-winning films,<sup>4</sup> and, of course, star in mainstream media's provocateur-of-the-moment that catalyzed it all—*RuPaul's Drag Race* (*Drag Race*).<sup>5</sup>

While drag queens benefit from this new freedom, exposure, and acceptance by mainstream audiences, intellectual property laws have provided limited guidance—particularly concerning copyright. Queer artists have learned to protect themselves in a legal arena already fraught with inconsistent or nonexistent laws for many performance artists.<sup>6</sup> Following a review of Western drag performance history, this Comment will scrutinize the ambiguities in copyright law and elucidate situations where drag artists potentially may lack ownership over their queer identities. This lack of ownership makes drag artists vulnerable to economic exploitation when their star is catapulted into the entertainment industry through television, live performances and social media. Since there is a lack of discussion and case law on drag performance's place within intellectual property,<sup>7</sup> the analysis of drag will be compared to the treatment of similar performance types, including stand-up comedy, under intellectual property law. The final portion of this Comment will scrutinize the overreliance on social norms for legal protection and the limitations of current laws. This Comment recommends applying conventional copyright laws for drag queens to definitively solidify their place in the entertainment industry.

1. Olivia Laing, *Against the Law: The LGBT Artists Branded Criminals*, GUARDIAN (Mar. 24, 2017, 8:00 AM), <https://www.theguardian.com/books/2017/mar/24/refuge-and-rebellion-how-queer-artists-worked-in-the-shadow-of-the-law> [<https://perma.cc/V5TG-Z4VU>].
2. See Hugh Ryan, *How Dressing in Drag Was Labeled a Crime in the 20th Century*, HISTORY (June 28, 2019), <https://www.history.com/news/stonewall-riots-lgbtq-drag-three-article-rule> [<https://perma.cc/4FHK-WQQE>].
3. Carolina Are, *How "RuPaul's Drag Race" Changed the Way We Speak*, QUARTZ (Oct. 2, 2019), <https://qz.com/quartz/1715788/how-rupauls-drag-race-made-lgbtq-culture-mainstream> [<https://perma.cc/A5DE-A5NE>].
4. Jude Dry, 'A Star Is Born': *Drag Queens Shangela and Willam Improvised the Film's Funniest Moment, with Bradley Cooper's Blessing*, INDIEWIRE (Oct. 12, 2018, 5:22 PM), <https://www.indiewire.com/2018/10/star-is-born-drag-queens-willam-shangela-1202011727> [<https://perma.cc/3BQZ-WERL>].
5. Colin Bertram, *The RuPaul Effect: How He Brought Drag to Mainstream Culture*, CELEBRITY BIOGRAPHY, <http://new-royal.info/?p=681> [<https://perma.cc/V54B-J6V3>].
6. Cf. Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1795–99 (2008) (discussing the lack of legal protections for stand-up comedy).
7. See Eden Sarid, *Don't Be a Drag, Just Be a Queen—How Drag Queens Protect Their Intellectual Property Without Law*, 10 FIU L. REV. 133, 133–34 (2014).

## A. Terminology

Throughout this Comment, the term “drag” will be used to succinctly reference the art of drag performance, which generally involves costuming, makeup, and performative skills.<sup>8</sup> Although drag may be performed by an individual of any sexual orientation or gender identity, the following discussion focuses solely on the “drag queen,” a performer with an “exaggeratedly female persona,”<sup>9</sup> and those intrinsically tied to the LGBTQ+ community and its political activism.<sup>10</sup>

## I. HISTORY OF DRAG PERFORMANCE

### A. Female Impersonation Into the Twentieth Century

One might think that Western drag’s heyday was on the up-and-up by the late sixteenth century due to the positive perception of *Shakespeare in Love*’s ubiquitous female impersonators,<sup>11</sup> however, in reality, “male actress[es] had been marginalized to a quick joke” by the close of the seventeenth century.<sup>12</sup> In eighteenth century Italy, in the “search for [feminine] authenticity,” theatrical roles typically filled by androgynously clad, male tenors in historic operas like *Orfeo ed Euridice* were relegated to female altos.<sup>13</sup> The search for this “authenticity” extended into various theatrical mediums in twentieth-century Western performance and often eradicated the need for men in primary roles.<sup>14</sup> Audiences grew so accustomed to the women’s growing presence that their absence in playing male characters—like Peter Pan—was resented when men took over the role.<sup>15</sup> Likewise, Eastern drag-like performance in the form of kabuki and Noh theatre attempted to differentiate itself from “Western misconceptions [of] ‘drag’” which tied itself to homosexuality.<sup>16</sup>

Drag continued to play a major role in patriarchal cultures even into the late nineteenth century. Beginning with elite universities like Harvard and Princeton, the all-male student bodies would embody male and female

8. Jordan Fraser, *What Is a Drag Queen?*, MEDIUM: BE UNIQUE (Aug. 10, 2019), <https://medium.com/be-unique/what-is-a-drag-queen-eb1e2d768a46> [https://perma.cc/ZK8R-9LR7].

9. *Id.*

10. See Daniel Villarreal, *Drag Queens Are More Political Than Ever. Can They Lead a Movement?*, VOX (Nov. 5, 2018, 12:30 PM), <https://www.vox.com/identities/2018/11/5/18056558/drag-queens-politics-activism-lgbtq-rupaul> [https://perma.cc/M9F8-MRH2].

11. See Mary Lobo, *From Shakespeare to RuPaul*, URSINUS COLL. (July 24, 2018), <https://www.ursinus.edu/live/news/2987-from-shakespeare-to-rupaul> [https://perma.cc/54G4-VNPG].

12. ROGER BAKER, *DRAG: A HISTORY OF FEMALE IMPERSONATION IN THE PERFORMING ARTS* 94 (N.Y.U. Press 1994) (1968).

13. *Id.* at 116.

14. *Id.*

15. *Id.*

16. LAURENCE SENELICK, *THE CHANGING ROOM: SEX, DRAG AND THEATRE* 84 (2002).

characters alike within their theater troupes in Shakespeare adaptations, new comedies, and even burlesque shows “devoid of censure.”<sup>17</sup> To these crowds, “[t]here[] [was] something inherently funny about a guy putting on a dress.”<sup>18</sup> Drag was seen as acceptable because it was rooted in boys’ club-culture and not intentionally homosexual.<sup>19</sup> In the mainstream nineteenth and twentieth century, especially around the World War II era, educational and military institutions broadened their acceptance of women into their classes, which resulted in the same dilution of the campy, female impersonation-based performances that occurred during the Renaissance’s end.<sup>20</sup>

Still, drag performance persisted among those truly seeking it out in large cities, such as New York and Chicago, where speakeasy-like gatherings “skirting legality” promulgated female impersonators within the underground club scene.<sup>21</sup> These performances defied laws like Section 888 (7) of the Code of Criminal Procedure, which prosecuted the “vagrancy” of “impersonation in public of the opposite sex by male or female[s]” with imprisonment.<sup>22</sup> To avoid legal repercussions, an intentionally campy signature often accompanied drag performances to “stress the performance element”—like drag performer La Monte whose go-to crepe paper costume satisfied the comical element for audiences without being too subversive.<sup>23</sup>

During the mid to late twentieth century, “outlandish[] costume[s]” and the concept of “gender ambig[ui]ty”<sup>24</sup> became notoriously popular with the success of drag-heavy musicals like *La Cage aux Folles*<sup>25</sup> and *The Rocky Horror Picture Show*.<sup>26</sup> These expressions became increasingly acceptable offstage through celebrities as well. Boy George, who has front-lined Culture Club since the early 1980s, created a “simultaneously sexy and reassuring” persona to fans internationally as an “androgynous star,” along with similarly fluid stars like Michael Jackson, David Bowie, and Annie Lennox.<sup>27</sup> Performance pieces featuring female impersonation had finally begun to openly feature the sexualization of their characters in an often sadomasochistic and grotesque fashion

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17. *Id.* at 361.

18. *Id.*

19. *See id.*

20. *See id.* at 360, 367, 369–70; BAKER, *supra* note 12, at 94.

21. *See* SENELICK, *supra* note 16, at 382.

22. *Id.* at 381.

23. *See id.* at 382.

24. *Id.* at 418.

25. *For the Original Stars of La Cage aux Folles, Playing Gay Roles Was a Bold Move*, PLAYBILL (Aug. 21, 2017), <https://www.playbill.com/article/for-the-original-stars-of-la-cage-aux-folles-playing-gay-roles-was-a-bold-move> [<https://perma.cc/4YZU-ABNR>].

26. Tara Nash, *Rated “R” for Resistance*, MEDIUM: QUEERER THINGS (Nov. 30, 2017), <https://medium.com/thinking-about-queer-art-performance/rated-r-for-resistance-c6e21611a0fa> [<https://perma.cc/AWX5-S5X5>].

27. John Izod, *Androgyny and Stardom: Cultural Meanings of Michael Jackson*, S.F. JUNG INST. LIBR. J., Autumn 1995, at 63, 63.

analogous to the obscenities of avant-garde.<sup>28</sup> Divine, a proven drag icon best known for acting in John Waters's *Pink Flamingos* and *Hairspray*,<sup>29</sup> illustrated this movement rather perfectly. As a member of "The Cockettes," an unconventional performance troupe based in San Francisco during the early 1970s, Divine participated in gender binary-critical performances couched in bizarre presentation and spontaneous nudity.<sup>30</sup> During that same period, Divine performed a "mock-incest blow job" with their character's son and ate real dog feces—all while in drag for the film *Pink Flamingos*.<sup>31</sup>

Just as drag art's fixation in the public eye waned during the Elizabethan era and with the integration of women into male institutions in the twentieth century, drag was similarly turned away again by mainstream audiences when the AIDS epidemic began in the 1980s.<sup>32</sup> Illustrations of AIDS and simulated sex onstage seemed to highlight the heteronormative voices' distasteful perspective of drag by associating queer culture with lustfully dangerous behavior.<sup>33</sup>

#### B. *The Twenty-First Century's New Obsession*

On the heels of television shows like Showtime's *Queer as Folk* which began to show LGBTQ+ characters as multidimensional and sexually charged,<sup>34</sup> an already-famous singing drag queen of the 1990s, RuPaul Charles, landed her own show on Logo in 2009: *RuPaul's Drag Race*. Each season, RuPaul slowly eliminates a dozen drag performers for a cash prize involving weekly competitions such as "creating haute-couture runway looks from scratch or starring in music videos" much like the Tyra Banks-led show *America's Next Top Model*.<sup>35</sup>

28. See SENELICK, *supra* note 16, at 418–19.

29. Mitchell Sunderland, *Divine Was the Judi Dench of Drag Queens*, VICE (Sept. 21, 2013, 5:56 AM), <https://www.vice.com/en/article/3b7zb5/divine-was-the-judi-dench-of-drag-queens> [https://perma.cc/P29T-YESN].

30. See Miss Rosen, *The Cockettes: San Fran's Legendary Sex Anarchists*, HUCK MAG. (Apr. 29, 2020), <https://www.huckmag.com/art-and-culture/photography-2/the-cockettes-san-frans-legendary-sex-anarchists> [https://perma.cc/VUK6-U36Q].

31. Cole Smithey, *Pink Flamingos*, RIOT MATERIAL (Nov. 1, 2016), <https://www.riotmaterial.com/pink-flamingos> [https://perma.cc/77JZ-TL3S]; see also Jennifer Schuessler, *Shock Me if You Can*, N.Y. TIMES (Sept. 14, 2012), <https://www.nytimes.com/2012/09/16/arts/shock-me-if-you-can.html> [https://perma.cc/NYC4-7RRP] (providing more information about Divine).

32. Vincent Chabany-Douarre, *From Fanny and Stella to Ru Paul's Drag Race: A Short History of Drag*, HIST. EXTRA (Jan. 19, 2021, 10:05 AM), <https://www.historyextra.com/period/20th-century/history-drag-queens-rupaul-race-evolution-gay-rights> [https://perma.cc/8KYF-9CHY].

33. See SENELICK, *supra* note 16, at 431–33.

34. See Tom Shales, *Showtime's 'Queer as Folk': True to the End*, WASH. POST (May 22, 2005), <https://www.washingtonpost.com/archive/lifestyle/style/2005/05/22/showtimes-queer-as-folk-true-to-the-end/74d1a4ca-7ea8-44a3-938e-25e84370fb9b> [https://perma.cc/H4BR-MNKU].

35. Jenna Wortham, *Is 'RuPaul's Drag Race' the Most Radical Show on TV?*, N.Y. TIMES

Coinciding with the liberal optimism following President Obama's election,<sup>36</sup> the show went from niche to must-see over the span of more than fifteen seasons.<sup>37</sup> The show spawned several international spinoffs,<sup>38</sup> was spoofed on *Saturday Night Live*, and featured superstars like Lady Gaga as guest judges.<sup>39</sup> Even after achieving international attention from streaming on larger digital platforms like Netflix and Hulu, *Drag Race* remains “the only show on TV that consistently features gay people from different ethnic, religious, and socioeconomic backgrounds.”<sup>40</sup> Audiences are continuously exposed to legitimate issues plaguing the LGBTQ+ community through *Drag Race*—including revelations of certain queens on the show living with HIV, struggles with coming out to their families, and discussions of eating disorders<sup>41</sup>—and they are still watching.

Spinoff events like convention DragCon with thousands of attendees annually—many of whom do not identify as LGBTQ+—result in profits exceeding multimillions of dollars.<sup>42</sup> While drag performance may have previously been relegated to underground or niche venues, bars of all kinds are demanding the presence of *Drag Race* alumni; this has allowed some drag queens to often—and suddenly—earn six figures a year as a result of their exposure.<sup>43</sup>

The disparity in regular income pre- and post-*Drag Race* exposure highlights the irregular pay structures and poor treatment the queens had at local venues preceding their airtime on television and, historically, before drag fit into a “commercial framework.”<sup>44</sup> Yet, many of these venues have become par-

MAG. (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/magazine/is-rupauls-drag-race-the-most-radical-show-on-tv.html> [<https://perma.cc/8UA2-JHD6>].

36. Maria Elena Fernandez, *Behind the Rise of RuPaul's Drag Race*, VULTURE (Aug. 22, 2017), <https://www.vulture.com/2017/08/behind-the-rise-of-rupauls-drag-race.html> [<https://perma.cc/3WFF-XWCV>] (“We enjoyed and paralleled the Obama years and the opening up of our nation and of our government and inclusiveness and *Drag Race* hand in hand—no coincidence.”).
37. Joey Nolfi, *RuPaul's Drag Race All-Stars 5, Season 12 Officially Sashaying to VH1*, ENT. WKLY. (Aug. 19, 2019, 12:00 PM), <https://ew.com/tv/2019/08/19/rupauls-drag-race-all-stars-5-season-12-announcement> [<https://perma.cc/NW2E-MUVR>]. *RuPaul's Drag Race All-Stars* is a spinoff of the main *Drag Race* series.
38. Mikelle Street, *There's a Lot More Drag Race on the Way*, OUT MAG. (Aug. 26, 2019, 8:57 AM), <https://www.out.com/television/2019/8/26/theres-lot-more-drag-race-way> [<https://perma.cc/KX5H-6MAN>].
39. Fernandez, *supra* note 36.
40. *Id.*
41. Luke Gardner, *Drag Has Moved Up, but It Needs to Move Left*, WUSSY MAG. (July 1, 2019), <https://www.wussymag.com/all/2019/7/1/opinion-drag-has-moved-up-but-it-needs-to-move-left> [<https://perma.cc/C5S2-2325>].
42. Dearbail Jordan, *Why RuPaul's Drag Race Is Big Business*, BBC NEWS (June 1, 2018), <https://www.bbc.com/news/business-44335007> [<https://perma.cc/4JBX-U5FQ>].
43. *Id.*
44. Sam Chapman, *The Economics of Drag: No Contracts, Unresponsive Bookers, and Unreliable Payments*, STRANGER (Oct. 9, 2018, 11:54 AM), <https://www.thestranger.com/>

tially dependent on *Drag Race* viewing parties for their success, as certain bars have seen a 25 percent increase in their sales.<sup>45</sup> Even in the face of heightened instability during the COVID-19 pandemic, drag queens have proven their worth by hosting livestream performances on Instagram and receiving tips through Venmo, all while the physical bars—their original homes—remain closed.<sup>46</sup> Their independent worth thus becomes more evident.

The drag industry's propelled notoriety with *Drag Race* has become even more evident with Showtime's recent acquisition of the intellectual property for its future *All Stars* season.<sup>47</sup> All previous seasons had been airing on the less prominent VH1 and Logo channels—signaling the entertainment industry's watchful green eyes on drag performance's growing fanbase.<sup>48</sup> Drag queens and the greater queer community practically worked in different circles from mainstream entertainment, with heteronormative talent taking up the majority of space on silver screens and televisions.<sup>49</sup> Despite a growing amount of LGBTQ+ characters, including transgender, nonbinary, and asexual characters, by 2017, they only amounted to 6 percent of all fictional characters on television.<sup>50</sup>

However, when organizations like the Gay and Lesbian Alliance Against Defamation (GLAAD) fixate on fictional characters to demonstrate the lack of representation of the LGBTQ+ community in television,<sup>51</sup> it allows society to underestimate the growing impact and prevalence of the drag industry in media. Perhaps these conversations around fictional character representation lessen the legal industry's willingness to recognize new standards for protecting drag art compared to the other traditional and less conventional mediums. That is an understandable perspective to have when RuPaul both propels and constricts their queens within the RuPaul Universe—particularly

slog/2018/10/09/33568853/the-economics-of-drag-no-contracts-unresponsive-bookers-and-unreliable-payment [https://perma.cc/NWM9-FFLB].

45. Jimmy Im, *How 'RuPaul's Drag Race' Helped Mainstream Drag Culture—and Spawned a Brand Bringing in Millions*, CNBC: MAKE IT (May 31, 2019, 9:19 AM), <https://www.cnbc.com/2018/09/28/rupauls-drag-race-inspired-multimillion-dollar-conference-drag-con.html> [https://perma.cc/3XC7-LB4N].
46. See Miz Cracker, *The Coronavirus Pandemic Has Forced Drag to Sashay Online*, SLATE (Mar. 24, 2020, 4:58 PM), <https://slate.com/human-interest/2020/03/drag-queen-performance-online-coronavirus-struggle.html> [https://perma.cc/W27K-WCHY].
47. Dino-Ray Ramos, 'RuPaul's Drag Race All Stars' *Sashays into Showtime with Special Edition*, DEADLINE (Feb. 20, 2020, 6:15 AM), <https://deadline.com/2020/02/rupauls-drag-race-all-stars-showtime-vh1-viacomcbs-1202864025> [https://perma.cc/QD4S-BQWE].
48. See *id.*
49. See Lizzie Plaugic, *A Record-Breaking Number of LGBTQ Characters Appeared on TV in 2017*, VERGE (Nov. 9, 2017, 1:09 PM), <https://www.theverge.com/2017/11/9/16628754/glaad-study-tv-lgbtq-characters-diversity> [https://perma.cc/JU8N-6AAN].
50. *Id.*
51. See *id.* (using all regular characters on TV to derive the denominator for its findings).



through the creation of the WOW Presents Plus streaming service.<sup>52</sup> Priced at a mere \$3.99 a month, RuPaul's production company, World of Wonder (WOW), has squeezed out exclusive scripted and reality content involving the endless amount of drag queens initially recruited through *Drag Race*.<sup>53</sup>

On just one show, *Weekend Playlist with PEG Records*, for example, RuPaul snagged two past competition winners alone, while six other shows involving numerous queens were renewed on the streaming platform.<sup>54</sup> Although WOW widely publicizes the voices and representation of drag queens, the shows are admittedly "cheap and easy to produce," which allows for a low monthly cost to audiences, yet comes at the expense of the drag queens' ability to strategically increase their worth post-*Drag Race*.<sup>55</sup> Many of WOW's shows are essentially "virtual podcast[s]," but makeup and hairstyling features, animated series, and documentaries fill up the WOW library as well—more or less ensuring that the queens remain within the comforts and limitations of the RuPaul brand.<sup>56</sup>

Perhaps the self-contained, underground atmosphere drag performers felt safest in throughout the twentieth century<sup>57</sup> encouraged these relatively successful drag queens to remain within the RuPaul-owned streaming platform to share their art because it was so familiar. However, at this point, drag queens are demanding to be taken seriously outside of WOW's intellectual property protections, the first step towards expanding into more mainstream spaces. Drag queens have transitioned from being bar staples and niche television under the RuPaul label into independent moneymakers. They can and will give mainstream artists a run for their money.

This transcendence into more conventional mediums is best illustrated through the careers of Trixie Mattel, Detox Icunt, and Bianca Del Rio—among others—who are ranked as some of the most powerful drag queens in the United States.<sup>58</sup> After being crowned the winner for the third season of *RuPaul's Drag Race All Stars*, Trixie Mattel broke out into various areas of entertainment beyond the caged nature of the RuPaul Universe. While she maintains a comedy web series under RuPaul's WOW banner with her

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52. Matt Lopez, *Wow Presents Plus Beefs Up Content Library With 4 New Originals*, WRAP (Oct. 15, 2018, 12:52 PM), <https://www.thewrap.com/wow-presents-plus-beefs-up-content-library-with-the-addition-of-four-new-originals-exclusive> [https://perma.cc/89N3-7HJU].

53. *Id.*

54. *See id.*

55. Bobby Box, *Is the WOW Presents Plus Subscription Worth the Fee?*, INTO (Jan. 11, 2019), <https://www.intomore.com/culture/is-the-wow-presents-plus-subscription-worth-the-fee> [https://perma.cc/4DBR-3DKP].

56. *Id.*

57. *See* SENELICK, *supra* note 16, at 386–87.

58. *The Most Powerful Drag Queens in America*, VULTURE (June 10, 2019), <https://www.vulture.com/2019/06/most-powerful-drag-queens-in-america-ranked.html> [https://perma.cc/6VKS-KC8L].

on- and off-screen drag best friend, Katya Zamolodchikova,<sup>59</sup> she also shares in the more homogenously heteronormative areas of media. Trixie had a web series on Viceland,<sup>60</sup> released several original country music hits,<sup>61</sup> coauthored a book,<sup>62</sup> maintains a personal makeup line called Trixie Cosmetics,<sup>63</sup> hosts yet another web series on Netflix, and recently, had her feature-length documentary released by Netflix focusing on her post-*Drag Race* success.<sup>64</sup> *Drag Race*'s season six winner, Bianca Del Rio, similarly catapulted into mainstream media through a host of films, books, and comedy tours across the world, all separate from the RuPaul umbrella.<sup>65</sup> Meanwhile, Detox Icunt focused their newfound fame with success in fashion,<sup>66</sup> starring roles in independent films,<sup>67</sup> and producing parody-based music through the now-defunct pop group DWV comprised with Willam Belli and Vicky Vox<sup>68</sup>—famous for singles such as “Silicone,” parodying “Dancing on My Own” by Robyn.<sup>69</sup> Beyond just these three drag queens' success, the creation and notoriety of shows like *AJ and the Queen* on Netflix—starring RuPaul and over twenty other drag queens—demonstrates

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59. Joey Nolfi, *Trixie Mattel and Katya Announce UNHhhh Season 5 Premiere Date*, ENT. WKLY. (Jan. 8, 2020, 3:30 PM), <https://ew.com/tv/2020/01/08/trixie-katya-unhhhh-season-5-premiere-date> [https://perma.cc/VLS8-GK9L].
60. *Id.*
61. Nathaniel Hagemaster, *Trixie Mattel's Queening of Country Music*, MEDIUM (May 25, 2018), <https://medium.com/@nathanielhagemaster90/trixie-mattels-queening-of-country-music-9fd80fb22c12> [https://perma.cc/D73F-6PHZ].
62. Nolfi, *supra* note 59.
63. Michael Love Michael, *Doll Yourself Up with Trixie Mattel's New Makeup Line*, PAPER (Aug. 28, 2018), <https://www.papermag.com/doll-yourself-up-with-trixie-mattels-new-makeup-line-2599851154.html?rebellitem=5#rebellitem5> [https://perma.cc/KD53-9QRQ].
64. Brett White, *Oh Honey, the Trixie Mattel Doc 'Moving Parts' Is Coming to Netflix*, DECIDER (Mar. 16, 2020, 11:30 AM), <https://decider.com/2020/03/16/trixie-mattel-moving-parts-on-netflix> [https://perma.cc/6MD8-7WTG].
65. Joey Guerra, *Bianca Del Rio Doesn't Want You to Put Her on a Pedestal and Isn't Going to Do a Death Drop*, HOUS. CHRON. (Nov. 7, 2019, 10:51 AM), <https://www.houstonchronicle.com/entertainment/music/article/Bianca-Del-Rio-doesn-t-want-you-to-put-her-on-a-14811291.php> [https://perma.cc/8E9H-ZSQX].
66. See Gerald Tan, *The Dress that Changed My Life: Detox from RuPaul's Drag Race*, HARPER'S BAZAAR (Feb. 1, 2019), <https://www.harpersbazaar.com.sg/life/celebrities/the-dress-that-changed-my-life-detox-from-rupauls-drag-race> [https://perma.cc/8VZA-975D].
67. Glenn Garner, *Bob the Drag Queen Leads Drag-Studded Cherry Pop Cast*, OUT MAG. (May 18, 2017, 4:03 PM), <https://www.out.com/popnography/2017/5/18/bob-drag-queen-leads-drag-studded-cherry-pop-cast> [https://perma.cc/2TK9-KNMX].
68. Matthew Tharrett, *Drag Group DWV Splits Amid Social Media Shade, Toss Each Other Under the Bus*, QUEERTY (June 18, 2014, 12:06 PM), <https://www.queerty.com/drag-group-dwv-splits-amid-social-media-shade-toss-each-other-under-the-bus-20140618> [https://perma.cc/C9FH-EM8G].
69. Andy Towle, *Drag Racers Detox and Willam Sing an Anthem to 'Silicone' Set to Robyn's 'Dancing On My Own'*, TOWLEROAD (May 7, 2013), <https://www.towleroad.com/2013/05/silicone> [https://perma.cc/RC5S-2LQQ].

to society that drag art is here to stay and has, arguably, cemented itself into over 183 million homes, and garnered attention from the most powerful of the streaming services.<sup>70</sup>

## II. REVIEW OF INTELLECTUAL PROPERTY AND SIMILAR ART FORMS

### A. *Background: Copyright Infringement and Fair Use*

Modern copyright protections are derived from the Copyright Act of 1976 (the Act), which federally protects musical works, dramatic works, audiovisual works, and sound recordings among many other “works of authorship fixed in any tangible medium of expression.”<sup>71</sup> Federal copyright laws have remained considerably unchanged for nearly two hundred years despite the “revolution[ized]” nature of art, which is only further emphasized by the creation of the internet.<sup>72</sup> The Act also does not protect mere ideas, concepts, or abstractions.<sup>73</sup> Foundational cases began to develop in response to the Act which underscored its ambiguities with respect to the scope of protection a work might receive.<sup>74</sup> In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the U.S. Supreme Court discussed how meeting the threshold level of originality for protection under the Act required a “modicum of creativity” in the work through its selection, coordination, and arrangement, differentiating the work enough from any previously existing facts or art.<sup>75</sup>

Cases with foundational copyright discussions, like *Anderson v. Stallone*, inform society of the extent to which a copyright owner—oftentimes the actual creator of the work except for works made for hire<sup>76</sup> or joint works<sup>77</sup>—has control over derivative works.<sup>78</sup> On the surface, a case like *Anderson*, involving macho film star Sylvester Stallone, may not seem appropriately analogous to the intellectual property protections of feminine drag queens. However, it illustrates how appropriating already-copyrighted works into a new, mostly independent work can be considered infringement and not within the realm of copyright protection even when significant labor is invested in the new work.<sup>79</sup>

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70. See Steven Zeitchik, *Netflix Adds a Whopping 16 Million Subscribers Worldwide as Coronavirus Keeps People Home*, WASH. POST (Apr. 21, 2020, 4:02 PM), <https://www.washingtonpost.com/business/2020/04/21/netflix-adds-whopping-16-million-subscribers-worldwide-coronavirus-keeps-people-home> [https://perma.cc/3H2M-D6FF].

71. 17 U.S.C. § 102.

72. Catherine J. Cameron, *Reinvigorating U.S. Copyright with Attribution: How Courts Can Help Define the Fair Use Exception to Copyright by Considering the Economic Aspects of Attribution*, 2 BERKELEY J. ENT. & SPORTS L. 130, 135 (2013).

73. See 17 U.S.C. § 102.

74. See, e.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

75. *Id.* at 362–63.

76. 17 U.S.C. § 101 (defining works made for hire).

77. *Id.* (defining joint works).

78. See *Anderson v. Stallone*, No. 87-0592, 1989 WL 206431, at \*6 (C.D. Cal. Apr. 25, 1989).

79. See *id.* at \*6–11.

In *Anderson*, a screenwriter wrote a treatment for a *Rocky* film sequel and provided it to the interested studio, which then independently turned it into *Rocky IV*.<sup>80</sup> These types of “derivative works,” including both the treatment and the film, may only be created by the copyright holder or with their authorization.<sup>81</sup> Here, the court was willing to extend the scope of copyright protection to include pieces of art—like fictional characters in the *Rocky* film series—given their sufficient detail and differentiation from stock characters.<sup>82</sup> This area of law implicates the potential protections drag artists would hold or potentially infringe on with respect to parodying or satirizing mainstream art—including their lip sync, parody, or satire performances.

To protect one’s copyright successfully like in *Anderson*,<sup>83</sup> a plaintiff-copyright holder must prove both their ownership of the “allegedly infringed work” and show that the defendant-infringer copied at least some of the original work’s “protected elements.”<sup>84</sup> Illustrating the defendant’s copying is feasible even in the absence of direct evidence when there is circumstantial evidence that the defendant “had access” to the plaintiff’s original work prior to creating their own, and there is “substantial similarity of . . . general ideas and expression” between the two works.<sup>85</sup> To assess the substantial similarity between the copyrighted work and potentially infringing work, the Ninth Circuit has adopted a two-part test for this heavily fact-dependent inquiry.<sup>86</sup> The influence of this multifaceted and subjective two-part test has led further federal courts—including the Fourth and Eighth Circuits—to apply similar measures.<sup>87</sup>

In *Unicolors, Inc. v. Urban Outfitters, Inc.*, the Ninth Circuit described the “extrinsic test” as “show[ing an] overlap of ‘concrete elements based on objective criteria’” while the “intrinsic test” demanded “whether the ordinary, reasonable person would find ‘the total concept and feel of the works’ to be substantially similar.”<sup>88</sup> The copyright dispute in *Unicolors* involved a fabric design allegedly infringed by Urban Outfitters, and necessitated application

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80. *Id.* at \*3.

81. 17 U.S.C. § 103.

82. *Anderson*, 1989 WL 206431, at \*6–7.

83. *Id.* at \*18.

84. *Unicolors, Inc. v. Urb. Outfitters, Inc.*, 853 F.3d 980, 984 (9th Cir. 2017) (quoting *Pasillas v. McDonald’s Corp.*, 927 F.2d 440, 442 (9th Cir. 1991)).

85. *Id.* at 984 (citing *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1977 (9th Cir. 1977), *overruled by Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020)).

86. *Id.* at 985.

87. *See Copeland v. Bieber*, 789 F.3d 484 (4th Cir. 2015); *Humphreys & Partners Architects v. Lessard Design, Inc.*, 790 F.3d 532 (4th Cir. 2015); *Nelson v. PRN Prods., Inc.*, 873 F.2d 1141 (8th Cir. 1989).

88. *Unicolors*, 853 F.3d at 985 (first quoting *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000), *overruled by Skidmore*, 952 F.3d 1051, and then quoting *Pasillas*, 927 F.2d at 442)).

of the aforementioned tests.<sup>89</sup> The Ninth Circuit recognized the overwhelming similarities between the two designs' various "shapes, motifs, arrangements, spacing and colors" under the extrinsic test, which prevented any "reasonable juror [from] conclud[ing] under the intrinsic test that the works [were] not substantially similar in total concept and feel."<sup>90</sup>

Still, simply because one's art falls within the scope of copyright law does not mean artists are incapable of creating some form of protectable art rooted in the already-existing work of others. For example, the fair use doctrine allows one to use another's copyrighted work and is indispensable to any drag art's defense to infringement.<sup>91</sup> Federal law explicitly provides that there is no infringement when an individual utilizes a copyrighted work "for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research" through an analysis of four factors that are not, on their own, more dispositive than any other.<sup>92</sup> Section 107 of the Act lists the four factors: (1) "the purpose and character of the use," (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."<sup>93</sup>

The Supreme Court interprets the first purpose and character factor to include an assessment of whether the potential infringer's new work is "transformative"—perhaps a work of art that is significantly additive or different in its purpose relative to the original work of art.<sup>94</sup> In *Campbell v. Acuff-Rose Music, Inc.*, the Court further clarified that works of art like parodies have an "obvious claim to transformative value" and thus may fall under fair use if a "parodic character may reasonably be perceived."<sup>95</sup> The Court noted that the confines of a parody limit it "as a 'literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule.'"<sup>96</sup> The parody "needs to mimic [an] original" work to advance its own purposes.<sup>97</sup> The Court distinguished the scope of fair use even further by noting that—unlike a parody—a satire's "borrowing" of the original work "requires justification" because its purpose does not depend fundamentally on the original work.<sup>98</sup> For the second factor assessing the copyrighted work's nature, the Court noted that lesser copyright protection should apply to facts as opposed to fiction, news broadcasts as opposed to movies, and "bare factual compilations" as

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89. *Id.* at 984–85.

90. *Id.* at 987.

91. *See* 17 U.S.C. § 107.

92. *Id.*

93. *Id.*

94. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

95. *Id.* at 579, 582.

96. *Id.* at 580 (quoting AMERICAN HERITAGE DICTIONARY 1317 (3d ed. 1992)).

97. *Id.* at 580–81.

98. *Id.* at 581.

opposed to creative works, given their lack of creativity or of a “core . . . protective purpose[,],” allowing an alleged infringer to utilize a fair use defense.<sup>99</sup>

While the third factor measuring the “amount and substantiality”<sup>100</sup> of copying done in the new work may seem self-explanatory, the Court in many other instances—like in *Harper & Row, Publishers, Inc. v. Nation Enterprises*—has grappled with determining such a subjective component.<sup>101</sup> The key question is the vitality of the portion copied and whether or not it reflects the heart of the copyrighted work.<sup>102</sup> The final factor in weighing a fair use defense considers any market effects due to a clash between the original work and a new work in a commercial context, including potential harm to derivative works.<sup>103</sup> This factor is generally considered “the single most important element of fair use.”<sup>104</sup> Moreover, the presumption of such market effects may be negated should the new work be sufficiently “transformative” under the first fair use factor<sup>105</sup>—a notable intersection of two vital factors considered integral by courts to newly developing drag art.

#### B. *Protections in Stand-up Comedy*

While no art may be a perfect comparison to the campy and raunchy excessiveness of drag, stand-up comedy is adequately similar due to its often live and relatively spontaneous form.<sup>106</sup> Its unconventional style is evidently different from the more grounded mediums of painting or music composition, which enjoy clearer applications of copyright laws. Stand-up comedy reconciles these intellectual property failings through social norm practices rather than through litigation.<sup>107</sup> Current discussion of stand-up comedy amid a rise in comedy venues suggests that these failings—rather, omissions from inclusion in overarching intellectual property laws—are not harmful to comedians’ performance art because social norms involving “gossip, social and commercial exclusion, and violence” adequately protect their art.<sup>108</sup> The complexity of “legal intervention” is, instead, only sought out by stand-up comedians when they are “dissatis[fied]” with the efficacy of social norms protections.<sup>109</sup>

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99. *Campbell*, 510 U.S. at 586 (first citing *Stewart v. Abend*, 495 U.S. 207, 237–38 (1990), then citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984), and then citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348–51 (1991)).

100. 17 U.S.C. § 107.

101. *E.g.*, *Campbell*, 510 U.S. at 587; *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564–66 (1985).

102. *See Harper & Row*, 471 U.S. at 564–65.

103. *Campbell*, 510 U.S. at 590.

104. *Harper & Row*, 471 U.S. at 566.

105. *Campbell*, 510 U.S. at 591.

106. *Cf. Oliar & Sprigman*, *supra* note 6 (considering the application of intellectual property law to stand-up comedy).

107. *Id.* at 1789–90.

108. *Id.* at 1791.

109. *Id.* at 1791–92.

Dotan Oliar and Christopher Sprigman, scholars discussing the evolution of intellectual law in the stand-up comedy space,<sup>110</sup> note that jokes and comedic routines themselves are privy to general copyright protections pursuant to Section 102 of the Act so long as “they are original and fixed in a tangible medium,” while actual lawsuits concerning stand-up comedians’ jokes are relatively nonexistent.<sup>111</sup>

Notably, recent case law involving joke theft in the setting of intellectual property rights—when it exists at all—is primarily concerned with big players in financially lucrative situations rather than local stand-up comedians.<sup>112</sup> When litigated, they are subject to analysis of federal intellectual property statutes and case law. For example, in *Kaseberg v. Conaco, L.L.C.*, a Twitter user posted a Tom Brady–based joke, among other jokes, on his page.<sup>113</sup> The joke was later performed on the late-night *Conan* talk show without the author’s consent, so he brought an intellectual property action in the U.S. District Court for the Southern District of California.<sup>114</sup>

The court first assessed, like in *Anderson*,<sup>115</sup> whether Conan’s writers had access to the online jokes based on their interactions with the plaintiff, as well as the likelihood of the independent creation of significantly overlapping comedy material.<sup>116</sup> Then, the court signaled the use of the extrinsic and intrinsic tests to determine the similarity in content between the plaintiff’s jokes and those featured on Conan<sup>117</sup>—much like the comparison of fabric designs in *Unicolors*.<sup>118</sup> While the preceding analysis may seem familiar, the court clarified that in assessing the similarity of two jokes, the alteration of the original joke’s expression, the proper noun at the center of the joke, or the perspective of the joke-teller preclude any “objective . . . virtual identity.”<sup>119</sup> This suggests that subjectively slight alterations to a joke’s technical content may prevent its appropriation from being illegal in a courtroom<sup>120</sup>—perhaps a different, less just result than what social norms might lead to for comedians.

Besides the unattractive costs associated with pursuing litigation for copyright infringement,<sup>121</sup> the substantive difficulty in proving appropriation

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110. *See id.* at 1789.

111. *Id.* at 1798 (footnote omitted).

112. *See, e.g., Kaseberg v. Conaco, L.L.C.*, 260 F. Supp. 3d 1229, 1233 (S.D. Cal. 2017) (suing a major talk show).

113. Alex Kaseberg (@AlexKaseberg), TWITTER (Feb. 3, 2015, 8:49 AM), <https://twitter.com/AlexKaseberg/status/562654007504539648> [<https://perma.cc/TYX7-NQ5L>].

114. *Kaseberg*, 260 F. Supp. 3d at 1233–34.

115. *Anderson v. Stallone*, No. 87-0592, 1989 WL 206431, at \*11 (C.D. Cal. Apr. 25, 1989).

116. *Kaseberg*, 260 F. Supp. 3d at 1241–43.

117. *See id.* at 1245–47.

118. *Unicolors, Inc. v. Urb. Outfitters, Inc.*, 853 F.3d 980, 985–87 (9th Cir. 2017).

119. *Kaseberg*, 260 F. Supp. 3d at 1246.

120. *See id.*

121. Oliar & Sprigman, *supra* note 6, at 1799.

among stand-up comedians is also rooted in their jokes' inherently intangible medium of existence.<sup>122</sup> In contrast to the fabric designs analyzed in *Unicolors* via a "substantial similarity test,"<sup>123</sup> comedians' jokes are everchanging to the point that they are "perfected over dozens of performances" and end up entirely different on separate nights.<sup>124</sup> The nature of jokes is too different from easily-adjudicated fixed fabrics that, frankly, are either quite similar—or are not—to anyone looking at them.<sup>125</sup> Perhaps general ideas behind stand-up jokes are vague enough to permit an overlap in their substance, just like how abstract ideas themselves are not protectable unless sufficiently developed to constitute expression of the idea.<sup>126</sup>

For example, Oliar and Sprigman compared the significant similarities of the dad-teaching-son-football jokes performed by Bill Cosby and Carlos Mencia more than twenty years apart.<sup>127</sup> While the realized expression of their jokes was not exactly identical, Mencia's later performed routine involved "the same animating idea, narrative structure, . . . plotline, and . . . punchline" and yet resulted in no litigation against Mencia or harm to his career.<sup>128</sup> This result, although harmless to Cosby and Mencia, is by no means necessarily the dominating perspective or outcome of the "norm system" when jokes are that similar.<sup>129</sup> According to Oliar and Sprigman's discussion with interviewed stand-up comedians, the protection of jokes is even stricter than what regular copyright laws might feasibly allow pursuant to the abstraction-idea spectrum.<sup>130</sup> Appropriation of "fairly abstract comedic ideas" is taken seriously in the community even if overlap is inevitable since only a finite amount of daily routines can be joked about.<sup>131</sup>

Moreover, the way in which stand-up comedy's landscape changes informs which kinds of social norms are used to satisfy intellectual property protections—mainly how and what the performers convey to their spectators.<sup>132</sup> Oliar and Sprigman point to a disparity in audience participation, from the older "post-vaudeville" comedians of the 1920s–1960s<sup>133</sup> involving physical

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122. *See id.* at 1802.

123. *Unicolors*, 853 F.3d at 985.

124. Oliar & Sprigman, *supra* note 6, at 1802.

125. *Unicolors*, 853 F.3d at 987 ("The objective similarities between the works are stark . . . each design [is] nearly identical.").

126. *See* Oliar & Sprigman, *supra* note 6, at 1802–03.

127. *Id.* at 1795–96.

128. *Id.* at 1796.

129. *See id.* at 1823 (interviewing comedians about joke-theft and finding that "appropriation of even very general comedic premises . . . was objectionable" to them).

130. *See id.*

131. *Id.*

132. *See id.* at 1857.

133. *Id.*



humor and gags<sup>134</sup> to the more rigid, textual spirit of modern comedians formulating jokes “tailored to an individual persona.”<sup>135</sup> In modern times when personality and culture are infused into jokes and integral to how they are performed, appropriation of jokes is easily detectable.<sup>136</sup> The stolen jokes are not successfully appropriated because the infringers are simply not believable when combining the jokes of unique performers like Sarah Silverman and Larry the Cable Guy under the guise of another person.<sup>137</sup>

Considerations for detection and enforcement of stand-up comedy protections are further solidified by recent technological advancements allowing for spontaneous art to be captured permanently, rendering the art applicable to standard intellectual property laws irrespective of the comedians’ desire to pursue litigation.<sup>138</sup> Regardless of the historical reliance on social norms, stand-up comedians’ protections are growing more robust through the upload of performances of jokes to websites like YouTube and discussions of “joke stealing” on blogs.<sup>139</sup> Overall, the discussion of stand-up comedy’s intellectual property concerns indicates that reliance on social norms is still preferred over formal intellectual copyright laws with respect to joke theft.<sup>140</sup>

### III. RECENT DRAG ART DISCUSSIONS AND REFLECTIONS

Because of the minor changes made to intellectual property statutes over the past two centuries<sup>141</sup> and the unique nature of drag performance, which makes comparing it to most art relatively impractical, determining how to treat drag art moving forward depends on the peripheral literature concerning stand-up comedy<sup>142</sup> and the little-present discussion involving drag queens’ position in intellectual property law.<sup>143</sup> In arguably the only existing discussion of drag queen copyright issues, Eden Sarid’s study of the Israeli drag scene beginning in Tel-Aviv through 2014 gives an overview of how drag queens protect their intellectual property rights without the existence of inclusive laws.<sup>144</sup>

In its development, the Israeli drag scene was advanced by a nationally televised drag-band in the 1990s along with regularly occurring club performances in Jerusalem and Tel-Aviv,<sup>145</sup> not entirely unlike the scene in the United

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134. *Id.* at 1847.

135. *Id.* at 1861.

136. *Id.*

137. *See id.*

138. *Id.* at 1861–62.

139. *Id.* at 1862.

140. *Id.* at 1867.

141. Cameron, *supra* note 72, at 135.

142. *See* Olliar & Sprigman, *supra* note 6.

143. *See* Sarid, *supra* note 7.

144. *Id.* at 138–40.

145. *Id.* at 139.

States.<sup>146</sup> In reviewing how social norms are implicated for drag queens rather than stand-up artists, Sarid explains that drag art realizes its supreme economic benefits with mainstream audiences and not when constricted within “the pink ghetto.”<sup>147</sup> Yet drag art’s social norms (and capital) are derived from the LGBTQ+ community whose presence in the audience is considered most sought after.<sup>148</sup> Moreover, the social norms of the Israeli queens’ art are not just created by its LGBTQ+ spectators, but also by “related service providers” that functionally support drag as an institution during any given club performance.<sup>149</sup> These providers include the DJs, venue owners, and makeup artists who are generally part of the Israeli LGBTQ+ community and socially connected with the drag queens.<sup>150</sup>

Given the importance of “the drag persona,” “drag name,” and jokes for a drag queen’s career, it is particularly troublesome that these components—attributes of a stock-like character and random words—represent mere ideas on the idea-expression intellectual property scale, thereby making it difficult to protect them from infringement.<sup>151</sup> Even in the common instance when a drag queen performs a signature song to her spectators, the protection already exists for the original artist, and a queen’s cover may be legally vulnerable.<sup>152</sup>

Still, Sarid expresses that the Israeli drag community ignores the legal parameters of intellectual property for these vital components and protects each of them because of how much of a microcosm the local drag scene is in Israel: stricter protections allow for less overlap in an already marginalized community of close friends and for the queens’ individual success.<sup>153</sup> Because of the all-inclusive nature of social norm protections—including social protections of a mere idea—and an apparent “distrust” queens have of the “legal process,” Sarid opines that continuing to focus intellectual property protections through the concept of social norms is preferred.<sup>154</sup>

However, the drag art landscape has changed drastically since Sarid’s commentary was published in 2014 and even more so in the United States, with *RuPaul’s Drag Race* acting as a catalyst.<sup>155</sup> Intellectual property’s more recent

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146. Cf. SENELICK, *supra* note 16, at 439 (noting, albeit critically, how RuPaul’s TV show has “enhance[d] the talents of others”).

147. See Sarid, *supra* note 7, at 142.

148. *Id.*

149. *Id.*

150. See *id.*

151. See *id.* at 149–50.

152. See *id.*

153. See *id.* at 151.

154. See *id.* at 155, 179.

155. See Katie Kilkenny, *Hollywood Is “Finally Catching On” to the Booming Drag Queen Economy*, HOLLYWOOD REP. (Dec. 3, 2019, 6:00 AM), <https://www.hollywoodreporter.com/news/hollywood-is-finally-catching-booming-drag-queen-economy-1258829> [<https://perma.cc/G5NV-F8VG>].

intersection with art and technology has allowed for drag art to be promoted more easily, such as Vanessa Vanjie Mateo's popular catchphrase "Miss Vanjie" becoming a viral hit instantaneously after her elimination in *Drag Race*'s tenth season.<sup>156</sup> Mainstream audiences created several memes using the phrase, and the memes often overlapped with different intellectual property entities like *The Simpsons*.<sup>157</sup> In this modern example of drag art being showcased worldwide, how would the social norms suggested in previous legal discussions of stand-up comedy<sup>158</sup> and drag art<sup>159</sup> even remotely protect drag queens like Miss Vanjie and their art? If the social norms protecting the art belonging to drag queens are mere creations of their immediate social surroundings—the LGBTQ+ community and audience members at clubs and bars<sup>160</sup>—then these norms shrink in efficacy when battling online, anonymous meme-creators watching drag queens from their home television.<sup>161</sup> These norms are no longer an effective deterrent because the LGBTQ+ community cannot protect its drag artists from strangers they cannot socially ostracize—the ultimate punishment through norms.

On a separate note, the strict protections that social norms endorse against any kind of copying among drag queens<sup>162</sup> is suggestive of yet another problematic facet to its application in the modern drag scene—the necessity of fair use.<sup>163</sup> There is such a thing as being too protective of one's art, and part of being a mainstream work of art is recognizing that people should be allowed to appropriate original art<sup>164</sup> to both encourage creativity and add validity to the original's popularity as something worth emulating. For example, the creation of the Miss Vanjie meme and its subsequent popularity, arguably, heightened viewership for *Drag Race* and was a primary factor in bringing back Miss Vanjie for a second season.<sup>165</sup> How would social norms, if intended to restrict appropriation, reward or treat unequivocally positive forms of copying meant to show admiration or heighten a drag queen's fame? Thus, "[t]he cumulative impact of this communication [between audiences' fair use and the drag art]

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156. Brian Murphy, *Miss Vanjie! Miss Vanjie!: What RuPaul's Drag Race Can Teach Us About Fair Use Under Copyright*, FRANKFURT KURNIT KLEIN & SELZ: ADVERT. L. UPDATES (Mar. 15, 2019), <https://advertisinglaw.fkks.com/post/102fgq4/miss-vanjie-miss-vanjie-what-rupauls-drag-race-can-teach-us-about-fair-use-un> [<https://perma.cc/5QW3-CLPU>].

157. *Id.*

158. See Oliar & Sprigman, *supra* note 6.

159. See Sarid, *supra* note 7.

160. See *id.* at 143.

161. See Murphy, *supra* note 156.

162. See Sarid, *supra* note 7, at 148–50 (noting for example that some queens will claim "complete ownership" of all songs performed by a famous singer).

163. See Murphy, *supra* note 156.

164. See 17 U.S.C. § 107 (providing that fair uses are "not an infringement of copyright").

165. See Murphy, *supra* note 156.

is hugely important, and threatening to suppress it through copyright enforcement hurts society.”<sup>166</sup>

Even the codification of federal intellectual property law in Section 107 was intended by Congress to allow for fair use to develop organically throughout the years,<sup>167</sup> so the opportunity to recognize this moment as one for drag art to be more vulnerable, even normal, is vital. The reluctance as drag queens to conform to the socioeconomic pressures of capitalism (and the intellectual property laws built around this structure) is, fittingly, similar to the progression RuPaul took herself many years ago.<sup>168</sup> Her journey is predictive of the eventual willingness to forego underground culture and fixate on mass appeal,<sup>169</sup> and represents a steppingstone to embracing general copyright laws and finding oneself within their confines more comfortably. The times when “audacity and a willingness to upend social conventions . . . [were] essential to the form” are fading, and RuPaul’s own “resist[ance] [to] conformity” is as well,<sup>170</sup> soon to be joined by current drag queens navigating formal industry channels to offer their work.

## CONCLUSION

With the advent of mainstream drag art through the likes of *RuPaul’s Drag Race*,<sup>171</sup> various queens’ success across entertainment mediums,<sup>172</sup> and the advancement of physical technology,<sup>173</sup> merely accepting that the drag community’s art is too unconventional for conventional intellectual property laws is too old fashioned. Breaking into mainstream entertainment as a niche art inevitably dilutes the togetherness and “close-knit” nature of the drag community.<sup>174</sup> The less interconnected and underground the drag community becomes, the less viable its social norms are in effectuating sufficient protections for their art. Drag queens and their expected covers of songs may be increasingly threatened by litigation from copyright holders of the original songs<sup>175</sup> as the

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166. *Id.*

167. *Id.*

168. See E. Alex Jung, *Drag Race Inc.: What’s Lost When a Subculture Goes Pop?*, VULTURE (June 11, 2019), <https://www.vulture.com/2019/06/drag-race-inc-whats-lost-when-a-subculture-goes-pop.html> [<https://perma.cc/Z339-APGB>].

169. See *id.*

170. *Id.*

171. See Bertram, *supra* note 5.

172. See *The Most Powerful Drag Queens in America*, *supra* note 58.

173. Cf. Oliar & Sprigman, *supra* note 6, at 1861–62 (observing how YouTube and social media have made joke theft more difficult).

174. Sarid, *supra* note 7, at 151.

175. See Daniel Kreps, ‘Mickey’ Singer Toni Basil Sues Disney, Viacom Over Song Use, ROLLING STONE (Sept. 2, 2017, 1:33 PM), <https://www.rollingstone.com/music/music-news/mickey-singer-toni-basil-sues-disney-viacom-over-song-use-126151> [<https://perma.cc/PWR8-NZT8>].

rest of the world realizes drag is a real player in the economy now and not a trivial outcast.<sup>176</sup>

With the availability of technology to record drag performances—like stand-up comedians do with their jokes<sup>177</sup>—and place them into “tangible” forms to fit the scope of federal copyright protections,<sup>178</sup> drag queens will gradually shift into the realm of conventional copyright laws. As a result, social norms will not always be necessary to protect their original works or parodied copyrighted material within the scope of a fair use defense. Yet, social norms will not be futile in every context, and the yearning to keep them as a basis for nonlegal intellectual property protections is telling.<sup>179</sup> Legal discussions of stand-up comedy and drag art that praise the concept of social norms and laud their sustainability over many decades are shortsighted to the inevitable integration and legal vulnerabilities drag queens will face as they become even more popular in years to come.

Perhaps there is an underlying fear of accepting social and legal constructs that are too normal when the LGBTQ+ community has been historically ostracized, harmed, or used by them.<sup>180</sup> When several famous artists with mainstream agency appropriate their unique culture—as Madonna did in the 1980s when she appropriated “voguing” from drag ballroom culture—there is an understandable amount of resentment for the exploitation and tokenism of art that was once just their own.<sup>181</sup> The LGBTQ+ community and its drag queens would much rather “elude, resist, and throw a middle finger to the people in power.”<sup>182</sup> Or maybe there is an insecurity in exposing these emotionally artistic vulnerabilities at such a macroscale because a greater risk of failure, criticism, or rejection will exist now that drag queens are taken seriously. If that is the case, proponents of social norms–based protections should take a closer look at themselves, accept the inevitable overlap with conventional laws and the laws’ clearer protections for drag artists in modern times, and realize: “If you can’t love yourself, how in the hell you gonna [sic] love [mainstream audiences]?”<sup>183</sup>

176. See Kilkeny, *supra* note 155.

177. See Oliar & Sprigman, *supra* note 6, at 1861–62.

178. 17 U.S.C. § 101.

179. See Sarid, *supra* note 7, at 155–56 (describing Israeli queens’ reluctance to use intellectual property laws).

180. See SENELICK, *supra* note 16, at 472.

181. See Sarah Lison, *Appropriation (?) of the Month: Drag Queens and Femininity*, IPINCH (Apr. 10, 2015), <https://www.sfu.ca/ipinch/outputs/blog/aotm-drag-queens-and-femininity> [<https://perma.cc/N2SM-9TMS>].

182. See Jung, *supra* note 168.

183. RuPaul’s Drag Race (@RuPaulsDragRace), TWITTER (Feb. 4, 2013, 6:59 PM), <https://twitter.com/RuPaulsDragRace/status/298626899360505856> [<https://perma.cc/N23T-LWA6>].