

## **STAND-UP COMEDY: NEGATIVE SPACE OR TRADITIONAL IP WORTHY?**

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### **ABSTRACT**

*Social media has brought a change in the way that jokes are consumed by audiences all over the world. The social norms-based system that effectively regulated the comedy industry a decade ago no longer fulfils its objective. For an industry thriving in the negative spaces of intellectual property, the dawn of the digital era has unleashed new challenges and possibilities. The appearance of various social media platforms and extra-community players has catapulted the issue of joke theft. This article advocates the shift of the stand-up comedy industry from the negative space realm to some form of exclusivity. It discusses the means of legal protection, for the content as well as the live performance of jokes. The applicability of the copyright regime to the comedy industry is delineated under the heads of originality, fixation, idea-expression dichotomy and fair use.*

*The article submits that the absence of jurisprudence related to joke theft, despite the lack of doctrinal barriers, can be attributed to the existence of practical barriers. Further, it differentiates between the level of protection given to one-liners and point-of-view, narrative jokes. Then, it goes on to reflect upon solutions, in practice and proposed, in order to overcome the practical barriers to copyright protection. The solutions look to combine the advantages of the social norms-based system along with those of the formal intellectual property rights system. In doing so, it seeks to protect the legitimate interests of the comedians as well as the viability of the comedy industry.*

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## I. INTRODUCTION

Josh Ostrovsky, well-known on social media as ‘The Fat Jew’, has successfully garnered over 10.3 million followers<sup>1</sup> on Instagram by stealing jokes.<sup>2</sup> Another mega-popular joke thief with 15.7 million Instagram followers<sup>3</sup> is Elliot Tebele, better known as ‘FuckJerry’.<sup>4</sup> With the advent of social media, joke theft has become increasingly prevalent in the last decade.<sup>5</sup> Comedy has existed in the negative spaces of intellectual property (“IP”), functioning through a social norms-based system.<sup>6</sup> The utilitarian justification<sup>7</sup> for IP fails in the area of negative spaces where, despite the absence of IP protection, “competition, innovation, and investment...remain vibrant”.<sup>8</sup> Essentially, negative spaces are areas of IP where innovation thrives even in the absence of legal protection. The industries that exist in IP’s negative spaces are termed as “low-IP equilibrium”<sup>9</sup> industries, and they include fashion,<sup>10</sup> cuisine,<sup>11</sup> and even sports.<sup>12</sup> Certain industries fall within this category as they cannot protect their creations under the applicable law, while other industries prefer not to seek protection by choice. According to Rosenblatt, stand-up comedy falls in the category of IP forbearance within negative spaces.<sup>13</sup> IP forbearance means that the creators are eligible for IP protection, but forego their rights by refusing to register their creation or by deciding not to pursue its infringement.<sup>14</sup>

The fashion industry is an example of a low-IP equilibrium industry. Raustiala and Sprigman have explained that the “fashion cycle” is the reason behind the fashion industry’s existence in

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<sup>1</sup> Josh Ostrovsky, *The Fat Jewish* (@thefatjewish), INSTAGRAM, <https://www.instagram.com/thefatjewish/> (last visited May 10, 2021).

<sup>2</sup> Megh Wright, *How the #FuckFuckJerry Movement Was Born*, N.Y. MAGAZINE: VULTURE (Feb. 6, 2019), <https://www.vulture.com/2019/02/fuck-jerry-instagram-comedians-unfollow-campaign-elliott-tebele.html>.

<sup>3</sup> FuckJerry (@fuckjerry), INSTAGRAM, <https://www.instagram.com/fuckjerry/> (last visited May 10, 2021).

<sup>4</sup> Nick Statt, *Fuckjerry founder apologizes for stealing jokes and pledges to get creator permission*, THE VERGE (Feb. 2, 2019, 4: 38 PM), <https://www.theverge.com/2019/2/2/18208446/fuckjerry-elliott-tebele-meme-joke-aggregator-report-stand-up-policy-change>.

<sup>5</sup> Hannah Pham, *Standing Up for Stand-Up Comedy: Joke Theft and the Relevance of Copyright Law and Social Norms in the Social Media Age*, 30(1) FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 55, 66 (2019).

<sup>6</sup> Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94(8) VA. L. REV. 1787, 1790 (2008).

<sup>7</sup> *Golan v. Holder*, 565 U.S. 302, 348-349 (2012).

<sup>8</sup> Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92( 8) VA. L. REV. 1687, 1689 (2006).

<sup>9</sup> *Id.* at 1764.

<sup>10</sup> *Id.* at 1687-1776.

<sup>11</sup> J. Austin Broussard, *An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation*, 10 VAND. J. Ent. & Tech. L. 691 (2008).

<sup>12</sup> F. Scott Kieff et al., *It's Your Turn, but It's My Move: Intellectual Property Protection for Sports Moves*, 25 SANTA CLARA COMP. & HIGH TECH. L. J. 765, 766, 774-76 (2009).

<sup>13</sup> Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34(3) COLUM. J. L. & ARTS 317, 323-324 (2011).

<sup>14</sup> *Id.* at 324.

IP's negative space.<sup>15</sup> They believe that the industry benefits from a combination of two systems – “anchoring” and “induced obsolescence”.<sup>16</sup> In anchoring, trends are formed as a result of the copying of designs and induced obsolescence ensures the market is saturated with the copied designs.<sup>17</sup> This makes the designs unstylish and creates demand for new designs in the market.<sup>18</sup> In comedy, once a stolen joke has been heard by the audience, it cannot be used again and, hence, is of no value to its creator. The intellectual labour invested by the comedian is in vain and he/she does not receive any credit or money for it. The copying of designs works in favour of the fashion industry. However, the stealing of jokes discourages creativity in the comedy industry.

The online distribution of unauthorized copies may result in a paradigm shift for the comedy industry – from its existence in IP's negative space to protection under its laws. This article seeks to study the prevailing norms-based system and examine its adequacy in the social media age – within and outside the industry. The eligibility requirements for copyright protection are evaluated for the jurisdictions of the United Kingdom (“UK”), United States (“US”) and India, in order to determine their applicability to stand-up comedy. The reasons for the selection of these specific countries are – first, they are common law countries, and second, the opportunities available in the comedy industry and the industry's increasing popularity.<sup>19</sup> The article considers various solutions for the protection of the comedians' IP and proposes a solution that is simple, affordable, timely and does not require the registration of a copyright. This is done by analysing the available empirical and doctrinal literature.

## II. SOCIAL NORMS-BASED SYSTEM

The stand-up comedy industry has existed in IP's negative spaces and is regulated by an informal, social norms-based system. The author contends the efficacy of social norms in the social media age and analyses its effect within and outside the comedy industry.

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<sup>15</sup> Raustiala & Sprigman, *supra* note 8, at 1722.

<sup>16</sup> *Id.* at 1718-32.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Kunal Doley, *Laugh affair: Stand-up comedy, a serious business in India*, FIN. EXPRESS (Mar. 26, 2017, 2:54 AM), <https://www.financialexpress.com/lifestyle/laugh-affair-stand-up-comedy-a-serious-business-in-india/602611/>; Ariel Shapiro, *The Highest-Earning Stand-Up Comedians of 2019*, FORBES (Aug. 16, 2019, 6:00 AM), <https://www.forbes.com/sites/arielshapiro/2019/08/16/the-highest-earning-stand-up-comedians-of-2019/#b86ff8142fa6>.

## A. Within the Industry

The principle that “[t]hou shalt not covet thy neighbour’s jokes, premises, or bits” is a fundamental norm of stand-up comedy.<sup>20</sup> An accusation of joke theft is taken quite seriously by comedians. Conan O’Brien immediately defended himself and explained his position after settling a case filed against him by another comedian, stating that “[s]hort of murder, stealing material is the worst thing any comic can be accused of”.<sup>21</sup> Reputation is an important asset in the stand-up community, the depletion of which could lead to the downfall of a comedian’s career and hence, norms act as effective deterrents.<sup>22</sup>

Oliar and Sprigman believe that, in stand-up comedy, social norms act as a substitute for formal IP protection.<sup>23</sup> The comedians form a small community, and regulate the industry through a mechanism consisting of theft detection, negotiation and enforcement by means of social sanctions.<sup>24</sup> This system grants them control over their jokes, allowing them to regulate its “use and transfer, impose sanctions on transgressors, and maintain substantial incentives to invest in new material”.<sup>25</sup> These norms are not “merely hortatory”, and are enforced by means of extra-legal sanctions ranging from “simple badmouthing” to “refusals to work” to, in very rare instances, “actual, physical violence”.<sup>26</sup> They argue that norms-based sanctions are enough to regulate the comedy industry, as these sanctions are capable of causing serious harm to the reputation of a comedian and could possibly have disastrous effects on their career.<sup>27</sup> The “intra-community players”, which include comedians, club owners, comedy room managers, writers and agents, are responsible for self-regulating this industry.<sup>28</sup>

In comparison to copyright law, the operation of the right to joint ownership differs under the norms-based system.<sup>29</sup> If a joke has been created by collaboration between two comedians – wherein one person has a premise and the other suggests the punchline, then under the norms -

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<sup>20</sup> JUDY CARTER, *THE COMEDY BIBLE: FROM STAND-UP TO SITCOM—THE COMEDY WRITER’S ULTIMATE HOW TO GUIDE* 56 (2001).

<sup>21</sup> Conan O’Brien, *Conan O’Brien: Why I Decided to Settle a Lawsuit Over Alleged Joke Stealing*, VARIETY (May 9, 2019, 1:30 PM), <https://variety.com/2019/biz/news/conan-obrien-jokes-lawsuit-alex-kaseberg-settlement-1203210214/>.

<sup>22</sup> Oliar & Sprigman, *supra* note 6, at 1815.

<sup>23</sup> *Id.* at 1790.

<sup>24</sup> *Id.* at 1813-1815.

<sup>25</sup> *Id.* at 1791.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Pham, *supra* note 5, at 60.

<sup>29</sup> Oliar & Sprigman, *supra* note 6, at 1825.

based system, the ownership of the joke would vest with the comedian that came up with the premise.<sup>30</sup> The reason behind comedians' preference of single ownership over joint ownership is that if two people own a joke and use it in their individual comedy acts, the other comedians would incorrectly assume that one of them has stolen the joke and the norms-based sanctions would be wrongly imposed against that comedian.<sup>31</sup> In case of jokes that have been sponsored, under copyright law, the ownership vests with the sponsoring party provided the writer and buyer have an employer-employee relationship or the buyer has commissioned the work.<sup>32</sup> However, under the norms-based system, the basis of ownership is quite simple – ownership vests with the party that has paid for the joke and the ownership would vest with the buyer irrespective of whether the conditions required for sponsorship have been fulfilled.<sup>33</sup>

The rationale for comedians' preference of norms-based system over the traditional copyright regime is that it is cheaper and customisable, i.e., the norms can be changed with time according to the pace of development of the industry.<sup>34</sup> Although there have been a few instances of joke theft, they have doomed the stealing comedian's career.<sup>35</sup> Hence, the intra-community system of norms has been successful in preventing joke theft within the industry by providing “a strict injunction against joke stealing.”<sup>36</sup>

## **B. Outside the Industry**

Evidently, social norms effectively control appropriation within the stand-up community. The challenge arises with respect to third parties existing outside the community.<sup>37</sup> The term ‘third parties’ refers to joke aggregators and social media users who post stolen jokes online. Joke aggregators are individuals or corporations who collect jokes and then distribute them online, the jokes are usually posted as “plain text or an image of the text without attribution.”<sup>38</sup> The norms system is ineffective against outsiders as social sanctions like getting a bad reputation, loss of

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 1825-1826.

<sup>32</sup> *Id.* at 1827.

<sup>33</sup> *Id.*

<sup>34</sup> Trevor Gates, *Providing Adequate Protection for Comedians' Intellectual Creations: Examining Intellectual Property Norms and "Negative Spaces"*, 93 Or. L. Rev. 801, 816 (2015).

<sup>35</sup> Dan Nancarrow, *Oops. He did it again: Rip-Off comic plunders joke about plagiarism*, THE SYDNEY MORNING HERALD (June 29, 2011, 12:22 PM), <https://www.smh.com.au/entertainment/tv-and-radio/oops-he-did-it-again-ripoff-comic-plunders-joke-about-plagiarism-20110629-1gq1d.html>.

<sup>36</sup> Oliar & Sprigman, *supra* note 6, at 1812.

<sup>37</sup> Jeremy A. Schachter, *That's My Joke . . . Art . . . Trick!: How the Internal Norms of IP Communities Are Ineffective Against Extra-Community Misappropriation*, 12 VA. SPORTS & ENT. L.J. 63, 64 (2012).

<sup>38</sup> Pham, *supra* note 5, at 57.

esteem, and expulsion do not affect them to the same extent as they would a fellow comedian.<sup>39</sup> The increased popularity of social media, in addition to a bare requirement of resources – a computer and an internet connection, along with its ability to reach a worldwide audience are some of the factors that have made joke theft common. Joke theft is usually committed by extra-community players for gaining popularity and money.

On social media, reputation is inconsequential, and it is exposure that matters.<sup>40</sup> In the comedy industry, social media can be used for making a comedian’s career but this unauthorised posting may also destroy their career.<sup>41</sup> Comedians had even started a campaign against Elliot Tabele called “#fuckfuckjerry”, urging people to unfollow him on social media, but it was unsuccessful and he still continues to have a strong social media following.<sup>42</sup> Clearly, the extra-community players do not have the same motivations that comedians do, nor are they guided by the same principles. Thus, the norms-based system is ineffective against them.

### III. COPYRIGHT PROTECTION OF JOKES

Copyright law confers upon the author(s) of IP certain economic and moral rights and the economic rights can be assigned to third parties by the author.<sup>43</sup> In *Diamond v. Chakrabarty*,<sup>44</sup> the grant of exclusive rights is justified on the basis of the underlying presumption that people need to be incentivised for their intellectual labour. The progress of civilisation is dependent upon creativity, and by providing copyright protection to creators, “an atmosphere conducive to creativity” is ensured.<sup>45</sup> IP rights are the most suitable way “to advance public welfare”.<sup>46</sup>

The eligibility for IP protection of stand-up comedy— content as well as the performance —is discussed in this part of the article. The content of jokes and routines is suitable for protection as literary work, while their performance can be protected under performers rights. The prerequisites for copyright protection are originality, fixation and satisfaction of the idea-

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<sup>39</sup> Gates, *supra* note 34, at 817.

<sup>40</sup> Pham, *supra* note 5, at 64.

<sup>41</sup> *Id.* at 62.

<sup>42</sup> Wright, *supra* note 2; FuckJerry, *supra* note 3.

<sup>43</sup> WORLD INTELLECTUAL. PPROP. ORG., UNDERSTANDING COPYRIGHT AND RELATED RIGHTS 4 (2<sup>nd</sup> ed. 2016).

<sup>44</sup> *Diamond v. Chakrabarty*, 447 U.S. 303, 307 (1980).

<sup>45</sup> DEPARTMENT FOR PROMOTION OF INDUSTRY AND INTERNAL TRADE, MINISTRY OF COMMERCE AND INDUSTRY, GOVERNMENT OF INDIA, A HAND BOOK OF COPYRIGHT LAW (last visited May 10, 2021), <http://copyright.gov.in/Documents/handbook.html>.

<sup>46</sup> *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

expression dichotomy.<sup>47</sup> Additionally, it is examined whether the jokes fall within the fair use exception, as this would act as a barrier to copyright protection. The performers' rights would cover the timing, delivery and performance of jokes during live performances. In India, the market for stand-up comedy is emerging, while in UK and US it is well-established.<sup>48</sup> Relevant case laws have also been analysed with the intention of comprehending the courts' position with regard to copyright protection for jokes.

## A. Originality and Fixation

Originality is a fundamental principle of copyright law. However, the standard of originality required for copyright protection differs across various jurisdictions. Fixation means the expression of a work in a tangible medium and, due to the manner in which jokes are created – by writing it down or by recording a video, this requirement is readily fulfilled.<sup>49</sup> This section studies the standard of originality required in the UK, India and the US.

### 1. United Kingdom

Section 1(a) of the Copyright, Designs and Patents Act, 1988 (“CDPA”) sets out the originality requirement and Section 3(2) states that an original work would not be protected by copyright laws unless it is fixed. In the UK, creativity is not an essential requirement for originality,<sup>50</sup> and in *Walter v. Lane*, the House of Lords held that the conditions for originality are met when labour, skill and judgement are used for creating a work.<sup>51</sup> This is termed as the ‘sweat of the brow’ doctrine. In *Infopaq International A/S v. Danske Dagblades Forening*, the European Court of Justice’s (“ECJ”) found an eleven-word newspaper extract to be eligible for copyright protection.<sup>52</sup> By interpreting and clarifying the originality requirement under the InfoSoc Directive,<sup>53</sup> in *Infopaq*

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<sup>47</sup> DAVID VAVER, PRINCIPLES OF COPYRIGHT – CASES AND MATERIALS 14 (2002), [https://www.wipo.int/edocs/pubdocs/en/copyright/844/wipo\\_pub\\_844.pdf](https://www.wipo.int/edocs/pubdocs/en/copyright/844/wipo_pub_844.pdf).

<sup>48</sup> Anubhav Pal, *Let's Laugh Uncensored: The Rise and Rise of Stand-Up Comedy in India*, NEWS18 (Oct. 14, 2018), <https://www.news18.com/news/movies/lets-laugh-uncensored-the-rise-and-rise-of-stand-up-comedy-in-india-1908119.html>.

<sup>49</sup> Pham, *supra* note 5, at 73.

<sup>50</sup> *University of London Press v. University Tutorial Press*, [1916] 2 Ch 601 (Eng.).

<sup>51</sup> *Walter v. Lane*, [1900] AC 539 (HL) (Eng.).

<sup>52</sup> Case C-5/08, *Infopaq Int'l A/S v. Danske Dagblades Forening*, 2009 E.C.R. I-06569.

<sup>53</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society O.J. (L 167) 10.

the ECJ harmonised the originality threshold across the European Union (“EU”).<sup>54</sup> Additionally, the ECJ also relied on a few other Directives for its decision.<sup>55</sup> The court held that copyright applies “only in relation to a subject-matter which is original in the sense that it is its author’s *own intellectual creation*.”<sup>56</sup> Pre-Brexit, the InfoSoc Directive had been implemented by all EU member states and thus, the *Infopaq* standard replaced UK’s traditional skill and labour test. The new standard has been followed in *Newspaper Licensing Agency*<sup>57</sup> and *SAS Institute*<sup>58</sup>.

Initially, UK had the lowest standard for originality requirement when compared to the US and India, but the *Infopaq* case has probably increased that threshold.<sup>59</sup> After Brexit, the UK is not required to follow the ECJ’s rulings and hence, it is unclear whether the *Infopaq* standard will continue to be followed.<sup>60</sup> In UK, copyright attaches to a work automatically after it has been created and registration is not mandatory for filing an infringement lawsuit.<sup>61</sup>

## 2. India

In India, Section 13(1) of the Copyright Act, 1957 (“Copyright Act”) grants copyright protection to ‘original’ literary works. The standard of originality required in India can be appreciated by examining the Supreme Court’s ruling in *Eastern Book Company v. D.B. Modak*.<sup>62</sup> The Court adopted a middle path between the US’ high<sup>63</sup> and the UK’s<sup>64</sup> low standard for originality, and instead relied on the Supreme Court of Canada’s judgement in *CCH Canadian v. Law Society of Upper Canada* (“CCH Canadian”).<sup>65</sup> The Indian Court stated that “novelty or invention or

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<sup>54</sup> Scott Woodard, *Who Owns a Joke? Copyright Law and Stand-Up Comedy*, 21 VAND. J. ENT. & TECH. L. 1041, 1047 (2019).

<sup>55</sup> Directive 2006/116 on the term of Protection of Copyright and certain Related Rights [2006] OJ (L372) 12; Directive 91/250 on the Legal Protection of Computer Programs [1991] OJ (L122) 42; Directive 96/9 on the Legal Protection of Databases [1996] OJ (L77) 20.

<sup>56</sup> *Infopaq*, *supra* note 52.

<sup>57</sup> *Newspaper Licensing Agency Ltd. v. Meltwater Holding BV*, [2011] EWCA(Civ) 890 (Eng.).

<sup>58</sup> *SAS Institute v. World Programming Limited*, [2013] EWCA(Civ) 1482.

<sup>59</sup> Theo Savvides & Sean Ibbetson, *Brexit and copyright law: will the English courts revert to the ‘old’ test for originality?*, Kluwer Copyright Blog (Dec. 5, 2016), <http://copyrightblog.kluweriplaw.com/2016/12/05/brexit-copyright-law-will-english-courts-revert-old-test-originality/>.

<sup>60</sup> *Id.*

<sup>61</sup> Phil Sherrell & Abbas Lightwalla, *United Kingdom*, in COPYRIGHT 2020, 161 (6th ed. 2020), <https://www.twobirds.com/~media/pdfs/country-chapter.pdf?la=en&hash=90D9541A76B62A6945AF4A6F26DBCE535CDC9651>.

<sup>62</sup> *Eastern Book Co. v. D.B. Modak*, AIR 2008 SC 809 (2007) (India).

<sup>63</sup> *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 346 (1991).

<sup>64</sup> *University of London Press v. University Tutorial Press* [1916] 2 Ch 601 (Eng.).

<sup>65</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 399 (Can.).



innovative idea” is not required for copyright protection, but a “ *minimal degree of creativity*”<sup>66</sup> is required. It further held that a work should not be “*the product of merely labour and capital*”.<sup>67</sup> This effectively discarded the English ‘sweat of the brow’ doctrine that was being followed previously. The other prerequisite for copyright protection is fixation,<sup>68</sup> although it is not statutorily recognised in India. The copyright is vested automatically in the author and the non-registration of a work does not cause any impediment in a copyright infringement lawsuit.<sup>69</sup>

### 3. *United States*

The legislation governing the copyright regime in the United States is Title 17 of the US Code. Section 101 of the Code provides that fixation should be “sufficiently permanent or stable” so that it can be “perceived, reproduced or otherwise communicated” for a period which is not “transitory”. Section 102 of the Code specifies the requirement of originality. In *Feist Publications v. Rural Telephone Service*, the Supreme Court of United States specified a two-step test for originality – first, the author should independently create the work and second, the work should possess a “minimal degree of creativity.”<sup>70</sup> For registration of “jokes and other comedy routines”, section 420.02(i) in Compendium II of Copyright Practices states that they should contain “ *at least a certain minimum amount of original expression in tangible form.*” Thus, the standard required for originality is a ‘modicum of creativity’.<sup>71</sup> In US, although copyright registration is not required for protection under the law, it is necessary for bringing a suit for copyright infringement.<sup>72</sup>

In US, the threshold for originality is higher than the threshold in India. The Court in *CCH Canadian* found the US standard of originality to be high, as the standard implies that a work should be novel or non-obvious.<sup>73</sup> The Indian Supreme Court agreed with the *CCH Canadian* judgement, and held that a work would be eligible for copyright protection if it is not the result

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<sup>66</sup> Eastern Book Co., *supra* note 62.

<sup>67</sup> *Id.*

<sup>68</sup> Aprajita Nigam & Dheeraj Kapoor, *India, in* COPYRIGHT 2020 48 (6th ed. 2020), [https://www.lexorbis.com/pdf/COP20\\_Chapter-9-India.pdf](https://www.lexorbis.com/pdf/COP20_Chapter-9-India.pdf).

<sup>69</sup> *Id.*

<sup>70</sup> Feist Publications, *supra* note 63.

<sup>71</sup> *Id.*

<sup>72</sup> David Donahue & Jason Jones, *USA, in* COPYRIGHT 2020, 167 (6th ed. 2020).

<sup>73</sup> *CCH Canadian, supra* note 65.

of only capital and labour, but involves the exercise of skill and judgement.<sup>74</sup> In essence, the level of creativity required for a work to be considered original in India is lower than the US.

Comedians' jokes are eligible for copyright protection as they are capable of fulfilling the originality and fixation requirement. Hence, there exists no doctrinal barrier to copyright protection.

## **B. Idea-Expression Dichotomy**

The idea-expression dichotomy is a fundamental principle of copyright law. It means that “copyright protection shall extend to expressions and not to ideas.”<sup>75</sup> This principle was recognised in the case of *Baigent v. Random House*<sup>76</sup> in the UK, in *R.G. Anand v. Delux Films*<sup>77</sup> in India and in *Baker v. Selden*<sup>78</sup> in the US. The satisfaction of the idea-expression dichotomy is essential for a joke to be protected under copyright law.

Woodard, referring to *Oliar and Sprigman*,<sup>79</sup> observed that, even when comedians utilise facts, they can protect their “individualized expression”.<sup>80</sup> The comedians' work could be protected under the idea-expression dichotomy by “conceptualisation”.<sup>81</sup> This occurs when comedians take a common idea and make their own story based on that idea along with the creation of their own dialogue, pacing and delivery.<sup>82</sup> In *Foxworthy v. Custom Tees* (“Foxworthy”), while referring to the idea-expression dichotomy, the Court explained that “...two entertainers can tell the same joke, but neither entertainer can use the other's combination of words” and held that the arrangement of words by the plaintiff is enough to constitute the plaintiff's expression.<sup>83</sup> This judgement brings out the point that each comedian can protect their jokes due to their individualised expression, even when there are other jokes with a similar premise. The copyright protection of jokes with a similar premise should not be a problem within the comedy community, as generally comedians themselves refrain from stealing another comedians' jokes due to fear of reputational

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<sup>74</sup> *Eastern Book Co.*, *supra* note 62.

<sup>75</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights art. 9(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

<sup>76</sup> *Baigent v. Random House Group Ltd.*, [2006] EWHC (Ch) 719 (Eng.).

<sup>77</sup> *Anand v. M/s Delux Films*, [1979] 1 SCR 218 (1978) (India).

<sup>78</sup> *Baker v. Selden*, 101 U.S. 99, 104 (1880).

<sup>79</sup> *Oliar & Sprigman*, *supra* note 6, at 1822.

<sup>80</sup> Woodard, *supra* note 54, at 1052-1053.

<sup>81</sup> *Id.* at 1053.

<sup>82</sup> *Id.*

<sup>83</sup> *Foxworthy v. Custom Tees, Inc.*, 879 F. Supp. 1200, 1218-19 (N.D. Ga. 1995).

loss. If two comedians independently create jokes with a similar premise, their jokes would both be protected under copyright law. Thus, protection of individualised expression solves the problem of meeting the doctrinal barrier of the idea-expression dichotomy.

Pham<sup>84</sup> refers to *Kaseberg v. Conaco* [“Kaseberg”], wherein it was stated with respect to the jokes in question, that they were “constrained by their subject matter and the conventions of the two-line, setup-and-delivery paradigm”<sup>85</sup> and hence, entitled to a thin copyright protection.<sup>86</sup> The standard of “virtual identity” is applied when there is a narrow range of expression,<sup>87</sup> such as in case of two-line jokes. Virtual identity means that either the reproduction is verbatim or a close paraphrase.<sup>88</sup> Thus, in case of jokes with a narrow range of possible expression, thin copyright protection would be given, i.e., infringement would only be found when the copy is closely paraphrased or verbatim.

So far, courts have only had the opportunity to apply copyright law to “one-liner” and “two-liner” jokes but “point-of-view narrative” jokes that are more prevalent today are yet to be examined by them. They would probably be entitled to a broader protection under copyright law, as the range of possible expression is wider.<sup>89</sup> Protection for point-of-view narrative jokes could extend to jokes that have not been copied verbatim and Pham hopes that the “substantial similarity” test will be applied for the determination of joke theft.<sup>90</sup> Substantial similarity is a difficult, fact-intensive inquiry and there are various tests for ascertaining it, such as the Lay Observer test, Extrinsic-Intrinsic test, Abstraction-Filtration-Comparison test. In case of comedy, the determination of substantial similarity might be further complicated due to the existence of both literary and performance aspects.

Appropriation of jokes on social media is usually verbatim and hence, the courts’ present application of copyright law to jokes in a narrow manner would probably be adequate for the prevention of joke theft among extra-community players.<sup>91</sup>

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<sup>84</sup> Pham, *supra* note 5, at 75.

<sup>85</sup> *Kaseberg v. Conaco, L.L.C.*, 260 F. Supp. 3d 1229, 1245 (S.D. Cal. 2017).

<sup>86</sup> *Id.* at 1257.

<sup>87</sup> *Apple Computer, Inc. v. Microsoft Corp.*, 821 F. Supp. 616, 625 (N.D. Cal. 1993).

<sup>88</sup> *Id.*

<sup>89</sup> Hannah Pham, *Intellectual Property in Stand-Up Comedy: When #Fuckfuckjerry is not Enough*, 33 HARV. J. OF L. & TECH. 1, 3-4 (2020).

<sup>90</sup> *Id.* at 3-5.

<sup>91</sup> *Id.* at 4.

### C. Fair Use Exception

A common defence to copyright infringement is fair use or fair dealing. Fair dealing and fair use are not synonymous and fair dealing is narrower than fair use. Fair use defence is available in the US, while fair dealing is followed in the UK and India.<sup>92</sup> In the UK, fair dealing is dealt with in Sections 29 and 30 of CDPA and it is stipulated that the use of a literary work for criticism or review, reporting current events or for private use constitutes fair dealing. The factors that the courts found relevant for the determination of fair dealing are – first, whether the use of a work affects the market in such a way that the owner loses revenue, and second, whether the amount of work that has been taken is reasonable.<sup>93</sup> In India, Section 52(1)(a) of the Copyright Act<sup>94</sup> contains fair dealing provisions and they are similar to that of the English copyright law. A two-pronged test was prescribed in *Blackwood v. Parasuraman* [“Blackwood”] for determining whether an act amounted to copyright infringement – first, the intention to derive financial benefits from the use of the work, and second, the motive of the infringer being improper.<sup>95</sup>

In the US, Section 107 of Title 17 of the US Code,<sup>96</sup> provides for<sup>97</sup> the four-factor test for determination of copyright infringement – purpose and character of use, nature of work, quantity and substantiality of the part used and its effect on the potential market for the work. Joke theft generally affects the financial incentives of the comedian and hence, the fair use defence should fail because of the unfulfillment of the fourth factor. Similarly, in India, the defence of fair use would fail on the grounds specified in *Blackwood* and in the UK, due to the fulfilment of the first condition regarding the effect on the owner’s revenue.

### D. Performers’ Rights

Performers infuse life into the works that they are performing and that entitles them to rights in their individual interpretations. Performers’ rights protect the performative aspects of a work and in stand-up comedy, that would be the timing, delivery and performance. Performers’ rights that

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<sup>92</sup> Ishan Sambhar, *India: Concept Of Fair Use And Fair Dealing In Copyright*, MONDAQ (May 13, 2020), <https://www.mondaq.com/india/copyright/930556/concept-of-fair-use-and-fair-dealing-in-copyright>.

<sup>93</sup> INTELLECTUAL PROPERTY OFFICE, *Exceptions to copyright*, GOV.UK (June 12, 2014), <https://www.gov.uk/guidance/exceptions-to-copyright#:~:text=An%20exception%20to%20copyright%20exists,access%20to%20the%20work>).

<sup>94</sup> The Copyright Act, 1957, No. 27, Acts of Parliament, 1957 (India).

<sup>95</sup> *Blackwood. & Sons Ltd. v. Parasuraman*, AIR 1959 Mad. 410 (1958) (India).

<sup>96</sup> Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2012).

<sup>97</sup> *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (the factors were laid down in this case).

would be particularly advantageous for comedians are the exclusive right of authorising fixation of a live performance and prevention of communication of live performances to the public.

In the UK, Part II of the CDPA deals with performer's rights. Section 180(2) of CDPA defines the term 'performance' and a stand-up comedy performance could be protected under the category of "recitation of a literary work". The economic rights of performers are listed in Chapter 2 of Part II of CDPA. In India, performers rights are set out under Section 38A of the Copyright Act. Section 2(qq)<sup>98</sup> of the Act defines the term 'performer' and a comedian could be granted legal protection under it as "any other person who makes a performance". In the US, performers have not been conferred with any statutory protection, but in *Garcia v. Google*,<sup>99</sup> the Court of Appeals stated that original performances would be entitled to copyright protection. Thus, performers rights are adequately protected, albeit in different ways, under copyright law in the US, and as related rights in the UK and India.

In plays and movies, there are multiple rights involved. The writer, director and performers are all vested with different rights with respect to the same performance. However, in comedy, the same individual writes the content and performs it on stage, which essentially means that the comedian holds the rights for the content as well as the performance. Comedians might be granted weaker protection for their performance as there are not any distinctive performative aspects that would help in differentiating one comic's performance from another.<sup>100</sup> Most comedians wear casual clothes and deliver their jokes in front of the mic without moving around much on the stage.<sup>101</sup> Today's point-of-view, narrative jokes reflect the comedian's personality<sup>102</sup> and comedy that is original, creative and personal, might be granted stronger protection for content than performance.

The author believes that it would be wiser for comedians to pursue copyright protection for content rather than performers' rights with respect to their jokes, provided the jokes have already been fixed in some form. Copyright protects the actual work while performers' rights are only capable of protecting the recording of a performance. Also, in US, UK and India, the duration of copyright protection is longer than the duration of protection granted for performers' rights.

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<sup>98</sup> The Copyright Act, 1957, No. 27, Acts of Parliament, 1957 (India).

<sup>99</sup> *Garcia v. Google*, 786 F.3d 733 (9th Cir. 2015).

<sup>100</sup> *Oliar & Sprigman*, *supra* note 6, at 1854.

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

<sup>102</sup> *Id.* at 1852.

Nonetheless, in case of improvisations in a live performance, protection of the content might not be possible as it would not have been already fixed and, under those circumstances, performers' rights might be a better solution. Performers' rights would also be a great option for certain forms of comedy such as character comedy, wherein a comedian acts as a certain character that they have created. In this kind of comedy, the comedians generally dress in a costume, speak in a different manner and move around the stage a lot.

### **E. Jurisprudential Analysis of Joke Theft**

Indisputably, there is no doctrinal barrier to copyright protection of jokes. Yet, there are only a few copyright infringement lawsuits in the US and no lawsuits in UK and India. Through the analysis of case laws, this section will facilitate the understanding of the extent of protection that has been granted to jokes by the courts.

In *Hoffman v. Le Traunik*, the court refused the grant of a preliminary injunction and held that the defendant's misappropriation of the plaintiff's monologue did not amount to copyright infringement, as the plaintiff could not prove that the monologue was "original with him".<sup>103</sup> The court did not comment upon the copyrightability of jokes in general, it merely adjudicated upon the specific monologue in question.

In the case of *Marvin Worth Productions v. Superior Films Corp.*, the question was regarding the copyrightability of certain passages from two books that were authored by Lenny Bruce.<sup>104</sup> The court did not find them eligible for copyright protection and observed that the jokes "involve[d] stock situations" and lacked originality.<sup>105</sup> Additionally, the court also held that the remainder of Bruce's concerned books that consisted of jokes, commentaries and routines, was protected under copyright law.<sup>106</sup>

In *Foxworthy*, the defendant had reproduced the plaintiff's jokes on t-shirts for the purpose of selling them; the sole difference was that the plaintiff started his jokes with the phrase "You might be a redneck if..." while the defendant ended with the particular phrase.<sup>107</sup> The judge held

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<sup>103</sup> *Hoffman v. Le Traunik*, 209 F. 375, 379 (N.D.N.Y. 1913).

<sup>104</sup> *Marvin Worth Productions v. Superior Films Corp.*, 319 F.Supp. 1269, 1270 (S.D.N.Y. 1970).

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

<sup>106</sup> *Id.*

<sup>107</sup> *Foxworthy*, *supra* note 83, at 1204.

that the plaintiff's work was entitled to copyright protection and that Custom Tees was liable for copyright infringement for the exact replication of those words.<sup>108</sup>

In *Kaseberg*, Kaseberg filed a suit against Conan for the infringement of five jokes. The jokes started with a factual statement about a current event and ended with a punchline about it.<sup>109</sup> It was stated that the jokes could only be granted thin copyright protection as "although the punchlines of the jokes are creative, they are nonetheless constrained by the limited number of variations that would (1) be humorous (2) as applied to the specific facts articulated in each joke's previous sentence and (3) provide mass appeal".<sup>110</sup> The parties arrived at a settlement before the trial.<sup>111</sup>

These cases demonstrate that the level of protection afforded to different jokes is different – thin and broad copyright protection. The comedians' lack of recourse to courts in cases of copyright infringement, despite the absence of doctrinal barriers, suggests that it is by choice rather than by design that they prefer not approaching the courts.<sup>112</sup>

#### IV. JOKE THEFT: SOLUTIONS

The absence of doctrinal barriers in the enforcement of copyright does not signify the absence of practical barriers. The cost of registration of a single joke is quite prohibitive. The U.S. Copyright Office charges USD 45 dollars for the registration of a work.<sup>113</sup> In the UK, the cost for registration per work is GBP 42.50 for 5 years or GBP 72.50 for 10 years<sup>114</sup> and in India the cost of registration of a literary work is INR 500.<sup>115</sup> The amount for registration of each joke is huge, especially when the number of jokes a comedian makes over his lifetime is taken into consideration. Comedians do not prefer approaching the courts because lawsuits are expensive and cumbersome. Another reason is the lack of knowledge about copyright protection.

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<sup>108</sup> *Id.* at 1218–19.

<sup>109</sup> Kaseberg, *supra* note 85, at 1231.

<sup>110</sup> *Id.* at 1245.

<sup>111</sup> Bill Donahue, *Conan O'Brien Joke Copyright Case Settles On Eve Of Trial*, LAW 360 (May 9, 2019), <https://www.law360.com/articles/1158339>.

<sup>112</sup> Pham, *supra* note 5, at 77.

<sup>113</sup> Fees, U.S. COPYRIGHT OFFICE, <http://copyright.gov/about/fees.html>.

<sup>114</sup> Price List, UK COPYRIGHT SERVICE, [https://copyrightservice.co.uk/services/price\\_list](https://copyrightservice.co.uk/services/price_list).

<sup>115</sup> Fee Details, COPYRIGHT OFFICE, <https://copyright.gov.in/frmfeedetailsshow.aspx>.

Joke theft by extra-community players has an adverse impact on the comedians' "pecuniary interests", "moral rights" and "personal incentives to create".<sup>116</sup> Thus, protection of jokes is essential, and this section explores the different remedies, proposed or available, for preventing joke theft.

### A. Copyright Claims Board

In 2020, the Copyright Alternative in Small-Claims Enforcement Act, 2020 was passed in the US and it introduced a Copyright Claims Board. The Board consists of a three-member tribunal and is a great online alternative to approaching the courts for small copyright claims that do not exceed \$ 30,000.<sup>117</sup> A claim can only be filed before the Board within three years from the date of copyright infringement.<sup>118</sup> This remedy is cost-effective, provides for monetary damages and also allows the filing of a claim before the Board if an application has been filed for the registration of the concerned work.<sup>119</sup> In comparison, an infringement suit can be only be filed before a court, if there is a copyright registration for the concerned work. As the remedy is voluntary, opposing parties with deep pockets might refuse to consent to appear before the Board. Infringers have the option to opt out of proceedings within 60 days.<sup>120</sup>

A major concern with the Board is that it can refuse claims filed against persons or companies residing outside the US.<sup>121</sup> This limitation is problematic as, considering the very nature of the Internet, it is quite possible that online infringement may have been done by a person or entity residing abroad. Although no time limit has been set for the disposal of cases, it can be assumed that the resolution would be much faster than in courts. The Board will become operational from December 2021<sup>122</sup> and at present, it is difficult to predict how effective it will be in safeguarding the comedians' interests.

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<sup>116</sup> Schachter, *supra* note 37, at 71.

<sup>117</sup> *Copyright Claims Board Frequently Asked Questions*, U.S. COPYRIGHT OFF., <https://copyright.gov/about/small-claims/faq.html> (last visited May 8, 2021).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

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

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

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



UK has a small claims track under its Intellectual Property Enterprise Court for dealing with IP disputes where the amount of damages claimed is GBP 10,000 or less.<sup>123</sup> Thus, the UK already has an IP court for dealing with small claims. In the case of India, it would be impractical to consider the establishment of a separate small claims court for dealing with copyright disputes. The reason behind this is the lack of success of the Intellectual Property Appellate Board (“IPAB”). The IPAB did not function effectively, had many vacancies and also, it did not have a Chairperson for a total of 1,130 days.<sup>124</sup> The IPAB has recently been abolished through an Ordinance.<sup>125</sup> Agreed, the IPAB is not a small claims tribunal, however, based on the issues that plagued the IPAB, a conclusion can be safely reached about the feasibility of the establishment of specialised IP tribunals and courts in India.

### **B. Notice-and-Takedown Procedure**

The notice-and-takedown procedure remedy can be presently availed in the US under Section 512 of the Digital Millennium Copyright Act, 1998. In accordance with this provision, a takedown notice is sent by the copyright holder to the online service provider (“OSP”) hosting the infringing content and the provider promptly takes it down. In India<sup>126</sup> and UK<sup>127</sup> also takedown notices can be issued by rights owners to intermediaries hosting infringing content. Some platforms like Amazon, eBay have standard online forms for requesting takedown of content, while in other cases notices have to be individually created.<sup>128</sup>

During Pham’s interviews with comedians, she found that this solution was underutilised, as the interviewees were unaware of its applicability and invocation procedure.<sup>129</sup> This procedure is simple, effective, does not require registration of copyright and the OSPs are required to follow a strict policy against “repeat infringers”.<sup>130</sup> However, the problem with the remedy is that it does not provide for monetary damages, is not timely and puts the burden of theft monitoring on the

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<sup>123</sup> *Intellectual Property Enterprise Court*, GOV. UK, <https://www.gov.uk/courts-tribunals/intellectual-property-enterprise-court>.

<sup>124</sup> Prashant Reddy, *The Case for Shutting Down the Intellectual Property Appellate Board (IPAB)*, SPICYIP (Apr. 15, 2020), <https://spicyip.com/2020/04/the-case-for-shutting-down-the-intellectual-property-appellate-board-ipab.html>.

<sup>125</sup> Tribunal Reforms (Rationalisation and Conditions of Service) Ordinance 2021.

<sup>126</sup> Vikrant Rana and Akshay Gupta, *India: Takedown Notice Of Infringing Content Over Internet*, MONDAQ (Mar. 10, 2017), <https://www.mondaq.com/india/copyright/575576/takedown-notice-of-infringing-content-over-internet>.

<sup>127</sup> Harper James Solicitors, *Copyright infringement and takedown notices* (Apr. 16, 2020), <https://hjsolicitors.co.uk/article/copyright-infringement-and-takedown-notice/>.

<sup>128</sup> *Id.*

<sup>129</sup> Pham, *supra* note 5, at 80.

<sup>130</sup> *Id.* at 79-80.

comedians.<sup>131</sup> This remedy merely supplements the formal copyright regime. If this remedy is properly utilised by the comedians and enforced by the OSPs, it could result in the reduction of joke theft to a certain extent.<sup>132</sup> This remedy is not very practical, as an individual comedian cannot possibly monitor multiple social media platforms and websites for infringement on a regular basis.

### C. Copyright Hub and Digital Joke Exchange

Gates has proposed the creation of a database for joke exchange for the US called “Digital Joke Exchange” (“DJE”)<sup>133</sup> based on the Copyright Hub in the UK.<sup>134</sup> In the Copyright Hub model, creators attach an identifier to their work and then, record this with Copyright Hub, resulting in the linking of the identifier to the information about the work and its owner.<sup>135</sup> Basically, a plug-in has to be downloaded on the Internet browser and whenever a user wishes to use a certain picture, the plug-in allows them to immediately find out about the owner of the picture, as well as a license can be purchased for it.<sup>136</sup>

Copyright Hub is a non-profit organisation that connects the owners and the buyers and acts as a digital platform for secondary licensing of copyright-eligible work.<sup>137</sup> At present the licensing through the platform seems to be limited to images and music.<sup>138</sup> If an owner grants a license to a licensee, such as when an author licenses his book to a publisher for publishing purposes, it is termed as primary licensing. When a licensee grants a further sub-license, it is termed as secondary licensing. Copyright Hub automates the licensing process; for example, if a person finds an image on Google and wishes to use it on their blog, they can just pay the license fees for its usage via Copyright Hub.

It supplements the formal copyright regime in the UK by making the process of licensing for lower-value transactions easier. One of the important reasons for the creation of Copyright Hub was because ownership data was not easily available, as many users “wishing to reuse copyright

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<sup>131</sup> *Id.* at 81.

<sup>132</sup> *Id.* at 80.

<sup>133</sup> Gates, *supra* note 34, at 818.

<sup>134</sup> Richard Hooper, *UK’s Copyright Hub: a license to create*, WORLD INTELL. PROP. ORG.: WIPO MAG. (2016), [https://www.wipo.int/wipo\\_magazine/en/2016/02/article\\_0007.html](https://www.wipo.int/wipo_magazine/en/2016/02/article_0007.html)

<sup>135</sup> *FAQ*, THE COPYRIGHT HUB, <http://www.copyrighthub.org/about/faq/>.

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

<sup>137</sup> Hooper, *supra* note 134.

<sup>138</sup> *Supra* note 135.

content cannot find the rights owner so they either do not reuse the work or they pirate it.”<sup>139</sup> The platform is not for large transactions involving thousands or millions of pounds, rather it is for the large number of licensing transactions where the licensing fee is not more than a few pounds.<sup>140</sup> The initiative was intended to bridge the data gap and provide a licensing platform connecting the buyer and the owner. The Copyright Hub also seeks to promote copyright education.<sup>141</sup>

Copyright Hub is not a policing technology.<sup>142</sup> It is a voluntary platform that provides an opportunity to those who illegally download songs or images, because they cannot find the information regarding the owner. Even Open Access content can be linked to the Copyright Hub.

In the UK, the Copyright Hub should also start the licensing of jokes on its platform, wherein jokes could be linked to its owner in various formats like text, video and sound. It should also educate comedians about their rights. The Copyright Hub could help well-intentioned people who wish to license comedic material, but are unable to do so because they cannot find its owner. The platform would certainly help comedians earn additional income. Since this technology does not police joke aggregators, it would help reduce joke theft but only to a limited extent.

Gates has suggested a platform called DJE specifically for comedy that would exist within a larger framework, called the ‘IP Portal’. The DJE is similar in some aspects to the Copyright Hub. The IP Portal would provide information about IP and industry-specific copyright information and it would also function as a gateway for linking users to industry-specific databases.<sup>143</sup> DJE would allow the registration of comedic material in various formats such as text, video or sound and its primary purpose would be to provide comedians with a licensing platform for the exchange of that material.<sup>144</sup> For a work to be registered under DJE, it should be eligible for copyright protection under the applicable law, i.e., it should fulfil the originality and fixation requirements, and the material could be registered with DJE before, or at most, a year

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

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

<sup>141</sup> *Id.*

<sup>142</sup> *Supra* note 135.

<sup>143</sup> Gates, *supra* note 34, at 818, 824-825.

<sup>144</sup> *Id.* at 819-820.

after its public dissemination.<sup>145</sup> The manner in which this database would function is that the comedians would register their jokes in various formats and each joke would be given “ a unique identifying number.”<sup>146</sup> An important part of Gates’ suggestion is that copyright protection should be given by DJE for a period of twenty-five years, rather than the usual author’s life plus seventy years and the reason for this is that when resolving disputes the Arbitral Panel “could take into consideration other factors and circumstances that are generally beyond the scope of U.S. copyright protection.”<sup>147</sup> DJE would not replace the copyright regime, but supplement it and, like Copyright Hub, it would also be controlled by a non-profit organisation.<sup>148</sup> He believes that the information portal would be helpful to comedians even if they decide against using DJE.<sup>149</sup>

The IP portal could be a good way for making the comedians aware of their legal rights and, additionally, it could provide information on all the legal routes available to the comedians. The success of a portal such as DJE or Copyright Hub depends upon the number of comedians willing to register their works with it as well as the good intentions of those copying or reproducing the comedians’ work. If introduced, the DJE might be successful in the US. This assumption has been made on the basis of the fact that case laws for copyright infringement of jokes have only been filed in the US. The case laws demonstrate that US comedians are probably more aware of their IP rights and willing to sue in order to defend them.

Additionally, it would be smart to introduce a portal similar to the Copyright Hub and DJE in India, provided the initiative for its creation is undertaken by a well-funded non-profit organisation. In the US, UK and India, a licensing platform could create a lot of value for the comedians. The licensing fee from small transactions tends to add up and more importantly, it would inform the owners and buyers about the comedians’ IP rights.

#### **D. Physical Institutions**

Certain US clubs prohibit the members of the audience from photographing or filming stand - up comedy performances in their clubs.<sup>150</sup> A New York club has put up signs as well as declared on

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<sup>145</sup> *Id.* at 821-823.

<sup>146</sup> *Id.* at 822.

<sup>147</sup> *Id.* at 823.

<sup>148</sup> *Id.* at 819-820.

<sup>149</sup> *Id.* at 819.

<sup>150</sup> Pham, *supra* note 89, at 13.

the seating cards that if anyone is found recording the performance, they will have to leave the club promptly and no arguments will be entertained.<sup>151</sup> It also requires patrons to put their phones in a sealed bag when attending a show.<sup>152</sup> Another US comedy club notified the ticket holders that, if anything is recorded, the recorders would “be subject to all available legal remedies”.<sup>153</sup> Although not enforceable under the law,<sup>154</sup> this might prove to be more practical in terms of cost-effectiveness and ease than the other options discussed above. The author agrees with Pham in her belief that policies like this would encourage respect for ‘the comedian and the art form’.<sup>155</sup> This solution could be easily introduced in the UK as well as in India. The author submits that this method can only supplement and not replace other remedies, as once a stolen joke has been uploaded online, a separate recourse such as the notice-and-takedown process would have to be undertaken. However, this remedy in conjunction with other remedies will certainly deter joke theft.

## V. ANALYSIS

In this section of the article, the author seeks to find a solution for the problem of joke theft by extra-community players. The solution should be capable of preventing a situation of joke theft like the one faced by comedian Jen Lewis, where Tebele was assumed to be the creator of a picture Jen made and gained popularity as well as money from its non-attribution.<sup>156</sup> Although the problem of joke theft is not documented in India and the UK to the same extent as the US, the proposed solution will prevent, to a large extent, the future possibility of such theft. The prevention of joke theft is imperative to ensure that the creators are incentivised for their original work and to protect broader societal interests.

Just like the fashion industry, the comedy industry also exists within the negative space of IP. However, as discussed previously, IP theft affects both industries differently. It works in favour of the fashion industry by creating demand for new designs, it works against the comedy industry

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<sup>151</sup> *Id.*

<sup>152</sup> *New York’s Comedy Cellar Using Phone Lock Up Bags in Regular Shows*, THE INTERRO BANG (Feb. 13, 2019), <https://theinterrobang.com/new-yorks-comedy-cellar-using-phone-lock-up-bags-in-regular-shows/>.

<sup>153</sup> Reggie Ugwu, *Louis C.K. Is Trying to Outlaw Leaks. Can He Do That?*, N.Y.TIMES (May 9, 2019), <https://www.nytimes.com/2019/05/09/arts/louis-ck-leaks-threat.html>.

<sup>154</sup> *Id.*

<sup>155</sup> Pham, *supra* note 89, at 14.

<sup>156</sup> Vaishnavi Kanukurti, *The Issue of Joke Theft in the World of Comedy*, INDIANFOLK (June 12, 2019), <https://www.indianfolk.com/joke-theft-the-issue-of-plagiarism-of-jokes-edited/>.

as it creates zero value for the creator. The creator neither receives money, nor credit. Jokes need to be granted some sort of protection in order to ensure the viability of the stand-up industry.

Uniform copyright law is applied across industries though they are affected differently by innovation incentives.<sup>157</sup> While industry-specific IP law may seem like a solution to it, alteration of existing law would be difficult and unfeasible. An effective solution cannot be based solely on seeking enforcement under copyright law. Rather, it needs to be in conjunction with extra-legal remedies. Well-known comedians can afford to take legal recourse for joke theft. However, amateur comedians neither have the resources, nor the awareness to seek protection for their IP. These practical barriers would disincentivise the industry for amateur comedians, though it would only slightly affect the incentives of well-earning comedians. Thus, the considerations that need to be kept in mind while determining a solution are – it should be simple, timely, affordable, provide for monetary damages, and should not require registration of copyright. This would ensure that amateur comedians get an equal opportunity to protect their interests and consequently, would encourage creativity.

The most important part of the answer to the joke theft problem would be the creation of awareness among the comedians of their IP rights and informing them of all the legal means that are available to them. One of the ways to prevent joke theft could be making fans aware of the IP rights of the comedians,<sup>158</sup> but the author believes that it might be ineffective considering the failure of the #fuckfuckjerry campaign.

Article 17 was introduced by the EU Directive on Copyright in the Digital Single Market, and it requires online content-sharing service providers such as YouTube, Vimeo to filter and prevent the upload of copyrighted material.<sup>159</sup> It mandatorily requires commercial content sharing services which cross a certain threshold in terms of revenue and visitors, to obtain a license from the copyright owner for the use of any copyrighted content.<sup>160</sup> The exceptions to copyright

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<sup>157</sup> O'liar & Sprigman, *supra* note 6, at 1840.

<sup>158</sup> Pham, *supra* note 89, at 10.

<sup>159</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC O.J. (L 130) 92, 119-121.

<sup>160</sup> *Id.* at 120.

infringement for online content-sharing service providers are “(a) quotation, criticism, review; (b) use for the purpose of caricature, parody or pastiche.”<sup>161</sup>

In case of filtering of jokes, the upload filter would fail in detecting the jokes that are protected by copyright because of non-registration.<sup>162</sup> The author proposes that the most appropriate solution that seems to address most of the problems, would be the implementation of a law similar to Article 17, in conjunction with DJE or Copyright Hub and physical institutions. The success of DJE is dependent upon the willingness of joke aggregators to use the platform, but Article 17 mandatorily requires the filtration of content. Thus, jokes aggregators would be forced to stop the stealing of jokes and actually pay licensing fees for it.

This solution will work in all three countries – the US, UK and India. The proposed DJE would not require a joke to be registered, but only require it to be eligible for copyright protection under the law of the relevant country. Under DJE, jokes could be registered before or up to one year after the performance, i.e., they can be registered even after the infringement takes place. A DJE could be created in the US and India, and the Copyright Hub already exists in the UK. Art. 17 provides a timely remedy to joke theft as it requires the OSPs to filter the content before posting it online. It is also affordable and practical, as it transfers the burden of policing and monitoring from the comedian to the OSPs. Additionally, a provision for monetary damages could be added for cases where the infringement has already been committed.

A provision similar to Article 17 can be introduced in India’s statute that governs intermediaries.<sup>163</sup> UK has not implemented the new Copyright Directive,<sup>164</sup> and both the US and the UK could consider introducing a provision like Article 17. This filter should be easy to implement in UK, US and India, now that companies have already adopted automated filtering systems to comply with the EU Directive. Since Article 17 has been implemented in European countries, their experience could be studied by the three nations when framing a similar provision and the problems faced by EU member states could be easily avoided. Thus, the author submits that by linking the database of jokes to the uploading filter required under Article

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<sup>161</sup> *Id.*

<sup>162</sup> Pham, *supra* note 89, at 12.

<sup>163</sup> Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India).

<sup>164</sup> Kristina Ford, *Article 17 Of The EU Copyright Directive*, NELSONS (Mar. 5, 2020), <https://www.nelsonslaw.co.uk/article-17/>.

17 and combining it with the physical institutions remedy, the joke theft problem can be resolved or at the least, alleviated.

## VI. CONCLUSION

The comedians deserve to have their legitimate interests protected and incentivising them is also crucial for the preservation of the comedy industry. Respect for the art form would be helpful, but that alone is not enough to prevent joke theft. In the short term, the effectiveness of spreading awareness about the IP rights of comedians among fans and users of social media is doubtful. However, in the long term, it could prove to be beneficial. The comedians should consider enforcing their rights via courts, although, its effect on social media joke thieves is difficult to predict. It is probable the court cases might be more efficient in deterring joke aggregators than the notice-and-takedown procedure practised in the US. The times when *only* social norms were enough for the protection of jokes are over. Today's complex world requires solutions that take into consideration the unique nature of social media, such as its fast pace of dissemination and its capability of instantly reaching a worldwide audience.