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II Prize

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For the essay

*“Stand-up Comedy: Negative Space or Traditional IP Worthy?”*

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

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## I. Introduction

Josh Ostrovsky, well-known on social media as ‘The Fat Jew’, has successfully garnered over 10.9 million followers<sup>1</sup> on Instagram by stealing jokes.<sup>2</sup> Another

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<sup>1</sup>The Fat Jewish (@thefatjewish), Instagram <<https://www.instagram.com/thefatjewish/>> accessed 20 June 2020

<sup>2</sup> [Megh Wright](https://www.vulture.com/2019/02/fuck-jerry-instagram-comedians-unfollow-campaign-elliotebele.html), ‘How the #FuckFuckJerry Movement Was Born’ (*Vulture*, 6 February 2019) <<https://www.vulture.com/2019/02/fuck-jerry-instagram-comedians-unfollow-campaign-elliotebele.html>> accessed 20 June 2020 (“Wright”)

megapopular joke thief with 15.5 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 IP’s negative space, functioning through a social norms-based system.<sup>6</sup> The utilitarian justification<sup>7</sup> for intellectual property rights fails in the area of negative spaces, where despite the absence of intellectual property protection ‘competition, innovation, and investment...remain vibrant’.<sup>8</sup> The industries existing in this sphere are ‘low-IP equilibrium’<sup>9</sup> industries and they include fashion,<sup>10</sup> cuisine,<sup>11</sup> and even sports.<sup>12</sup>

The online distribution of unauthorized copies may result in a paradigm shift for the comedy industry – from its existence in intellectual property’s negative space to protection under its laws. This essay 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 United Kingdom, United States and India, in order to determine its applicability to stand-up comedy. The reasons for selection of the specific countries are – first, they are common law countries, and second, due to the opportunities available in the comedy industry and the industry’s increasing popularity.<sup>13</sup> The essay

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<sup>3</sup> FuckJerry (@fuckjerry), Instagram <<https://www.instagram.com/fuckjerry/?hl=en>> accessed 20 June 2020 (“FuckJerry”)

<sup>4</sup> Nick Statt, ‘Fuckjerry founder apologizes for stealing jokes and pledges to get creator permission’ (*The Verge*, 2 February 2019) <<https://www.theverge.com/2019/2/2/18208446/fuckjerry-elliott-tebele-meme-joke-aggregator-repost-new-policy-change>> accessed 20 June 2020

<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’ (2019) 30 *Fordham Intell. Prop. Media & Ent. L.J.* 55, 66 (“Pham(2019)”)

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

<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’ (2006) 92 *VA. L. Rev.* 1687, 1689 (“Raustiala & Sprigman”)

<sup>9</sup> Raustiala & Sprigman, 1764

<sup>10</sup> Raustiala & Sprigman, 1687-1776

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

<sup>12</sup> F. Kieff, Robert Kramer & Robert Kunststadt, ‘It’s Your Turn, but It’s My Move: Intellectual Property Protection for Sports Moves’ (2009) 25 *Santa Clara Comp. & High Tech. L.J.* 765, 766, 774-76

<sup>13</sup> Kunal Doley, ‘Laugh affair: Stand-up comedy, a serious business in India’ (*Financial Express*, 26 March 2016) <<https://www.financialexpress.com/lifestyle/laugh-affair-stand-up-comedy-a-serious-business-in-india/602611/>> accessed 23 June 2020; Ariel Shapiro, ‘The Highest-Earning Stand-Up Comedians of 2019’ (*Forbes*, 16 August 2019)

considers various solutions – in practice and proposed, for the protection of the comedians’ intellectual property. After scrutinising the different solutions, the author proposes a solution that is simple, affordable, timely and that does not require registration of 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.

### A. Within the Industry

The principle that ‘Thou shalt not covet thy neighbour’s jokes, premises, or bits’ is a fundamental norm of stand-up comedy.<sup>14</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 ‘Short of murder, stealing material is the worst thing any comic can be accused of’.<sup>15</sup> Reputation is an important asset in the stand-up community, the depletion of which could lead to downfall of a comedian’s career and hence the norms act as effective deterrent.<sup>16</sup>

Oliar and Springman believe that, in stand-up comedy, social norms act as an substitute to intellectual property law.<sup>17</sup> The comedians form a small community, and regulate the industry through a mechanism consisting of theft detection, negotiation

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<<https://www.forbes.com/sites/arielshapiro/2019/08/16/the-highest-earning-stand-up-comedians-of-2019/#b86ff8142fa6>> accessed 23 June 2020

<sup>14</sup> Judy Carter, *The Comedy Bible: From Stand-up to Sitcom—the Comedy Writer’s Ultimate How-to Guide* 56 (1st edition, Atria Books 2001)

<sup>15</sup> Conan O’Brien, ‘Conan O’Brien: Why I Decided to Settle a Lawsuit Over Alleged Joke Stealing’ (*Variety*, 9 May 2019) <<https://variety.com/2019/biz/news/conan-obrien-jokes-lawsuit-alex-kaseberg-settlement-1203210214/>> accessed 20 June 2020

<sup>16</sup> Oliar & Sprigman, 1815

<sup>17</sup> *Ibid*, 1790

and enforcement by means of social sanctions.<sup>18</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>19</sup> It is stressed that these norms are not ‘merely hortatory,’ and are enforced by means of extra-legal sanctions ranging from ‘simple badmouthing’ to ‘refusals to work’ to ‘actual, physical violence.’<sup>20</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 possibly could have disastrous effects on their career.<sup>21</sup> The ‘intra-community players’, which include the comedians, club owners, comedy room managers, writers and agents, are responsible for self-regulating this industry.<sup>22</sup>

An additional advantage of norms-based system is that they are cheaper and customisable, they can be changed with time according to the pace of development of the industry.<sup>23</sup> Although, there have been a few instances of joke theft, but often, it has doomed the stealing comedian’s career.<sup>24</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>25</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>26</sup> The terms ‘third parties’ refers to joke aggregators and social media

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<sup>18</sup> Ibid, 1813-1815

<sup>19</sup> Ibid, 1791

<sup>20</sup> Ibid, 1791

<sup>21</sup> Ibid, 1791

<sup>22</sup> Pham(2019), 60

<sup>23</sup> Trevor Gates, ‘Providing Adequate Protection for Comedians’ Intellectual Creations: Examining Intellectual Property Norms and “Negative Spaces” (2015) 93 Or. L. Rev. 801, 816 (“Gates”)

<sup>24</sup> Dan Nancarrow, ‘Oops. He Did It Again: Rip-Off Comic Plunders Joke About Plagiarism’ (*Sydney Morning Herald*, 29 June 2011) <<http://www.smh.com.au/entertainment/tv-and-radio/oops-he-did-it-again-ripoff-comic-plunders-joke-about-plagiarism-20110629-1gq1d.html>> accessed 20 June 2020

<sup>25</sup> Oliar & Sprigman, 1812

<sup>26</sup> Jeremy A. Schachter, ‘That’s My Joke . . . Art . . . Trick!: How the Internal Norms of IP Communities Are Ineffective Against Extra-Community Misappropriation’ (2012) 12 Va. Sports & Ent. L.J. 63, 63–64 (“Schachter”)

users who post stolen jokes online. Joke aggregators are people 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>27</sup> Social media has brought a change in the way of jokes are enjoyed by the audiences and the norms system is ineffective against outsiders as social sanctions like – a bad reputation, loss of esteem, expulsion, do not affect them to the same extent as it would a fellow comedian.<sup>28</sup> The increased popularity of social media, in addition to a bare requirement of resources – a computer and an internet connection, and its ability of reaching a worldwide audience are some of the reasons that has made the joke theft common. Thus, the extra-community players commit joke theft for popularity and money.

On social media, reputation is inconsequential, it is exposure that matters.<sup>29</sup> Comedians even started a campaign against 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>30</sup> Evidently, the reason is that extra-community players don’t have the same motivations that comedians do, they aren’t guided by the same principles and social sanctions tend to have no effect on them.

### III. Copyright Protection of Jokes

Copyright law confers upon the author/s of intellectual property with certain economic and moral rights, the economic rights can be assigned to third parties by the author.<sup>31</sup> In *Diamond v. Chakrabarty*,<sup>32</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 providing copyright protection to the creators ensures ‘an atmosphere conducive

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<sup>27</sup> Pham(2019), 57

<sup>28</sup> Gates, 817

<sup>29</sup> Pham(2019), 64

<sup>30</sup> Wright; FuckJerry

<sup>31</sup> World Intellectual Property Organization, *Understanding Copyright and Related Rights* (2<sup>nd</sup> edn, WIPO 2016) 4

<sup>32</sup> 447 U.S. 303, 307 (1980)

to creativity'.<sup>33</sup> Intellectual property rights are the most suitable way 'to advance public welfare'.<sup>34</sup>

The prerequisites for copyright protection are originality, fixation and satisfaction of the idea-expression dichotomy. Additionally, it is examined if the jokes fall within the fair use exception, as this would act as a barrier for copyright protection. India, the market for stand-up comedy is emerging, while in UK and US it is well-established.<sup>35</sup> With the intention of comprehending the court's position with regard to copyright protection for jokes, relevant case laws have also been analysed.

### *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 the manner in which jokes are created – by writing it down or by recording a video, the requirement is readily fulfilled.<sup>36</sup> This section studies the standard of originality required in US, UK and India.

#### *i. United States*

The legislation governing copyright regime in the United States is 17 U.S. Code. Section 101 provides that fixation should be 'sufficiently permanent or stable' so that it can be 'perceived, reproduced or otherwise communicated' for period which is not 'transitory', while section 102 of the Code specifies the requirement of originality. In *Feist Publications v. Rural Telephone Service Co.*, 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 'minimal degree of creativity.'<sup>37</sup> For registration of 'jokes and other comedy routines', section 420.02(i) in Compendium II of Copyright Practices states that they should contain

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<sup>33</sup> Government of India, Department For Promotion of Industry and Internal Trade Ministry of Commerce and Industry, 'A Hand Book of Copyright Law' <<http://copyright.gov.in/Documents/handbook.html>> accessed 29 June 2020

<sup>34</sup> *Mazer v. Stein* 347 U.S. 201, 219 (1954)

<sup>35</sup> 'Growth of Stand up Comedy in India' (*Sleeping 8*, 15 October 2018) <<https://sleeping8.com/growth-of-stand-up-comedy-in-india/>> accessed 23 June 2020

<sup>36</sup> Pham(2019), 73

<sup>37</sup> 499 U.S. 340, 345 (1991) ("Feist")

‘at least a certain minimum amount of original expression in tangible form.’ Thus, the standard required for originality in US is a ‘modicum of creativity’.<sup>38</sup> Although, copyright registration is not required for protection under the law, it is required for bringing an action for copyright infringement.<sup>39</sup>

## ii. United Kingdom

Section 1(a) of the Copyright, Designs and Patents Act, 1988 sets out the originality requirement and section 3(2) provides for fixation. The ‘sweat of the brow’ doctrine is followed in UK. In UK, creativity is not an essential requirement for originality<sup>40</sup> and in *Walter v. Lane*,<sup>41</sup> the House of Lords held that the conditions for originality are met when labour, skill and judgement are used for creating a work.<sup>42</sup> The Court of Appeal granted copyright protection to an eleven-word newspaper headline in *Newspaper Licensing Agency v. Meltwater*,<sup>43</sup> following the ECJ’s judgement in *Infopaq International A/S v. Danske*<sup>44</sup> which harmonised the originality requirement across EU.<sup>45</sup> The UK has the lowest standard for originality requirement, when compared to US and India and the *Meltwater* case has further lowered the standard for protection. After Brexit, the UK is not required to follow ECJ’s rulings and hence it’s unclear whether this standard will continue to be followed.<sup>46</sup> Copyright attaches automatically after a work has been created and registration is not mandatory before filing a copyright infringement lawsuit.<sup>47</sup>

## iii. India

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<sup>38</sup> Ibid, 346

<sup>39</sup> David Donahue & Jason Jones, ‘USA: Copyright 2020’ (ICLG, 15 October 2019) <<https://iclg.com/practice-areas/copyright-laws-and-regulations/usa>> accessed 20 June 2020

<sup>40</sup> *University of London Press v. University Tutorial Press* [1916] 2 Ch 601 (“University Press”)

<sup>41</sup> [1900] AC 539 (HL)

<sup>42</sup> Ibid, 1667

<sup>43</sup> [2011] EWCA (Civ) 890 (Ch)

<sup>44</sup> Case C-5/08, *Infopaq Int’l A/S v. Danske Dagblades Forening*, 2009 E.C.R. I-06569

<sup>45</sup> Scott Woodard, ‘Who Owns a Joke? Copyright Law and Stand-Up Comedy’ (2019) 21:4 Vand. J. Ent. & Tech. L. 1041, 1047 (“Woodard”)

<sup>46</sup> Sean Ibbetson & Theo Savvides, ‘Brexit and Copyright Law: Will the English Courts Revert to the ‘Old’ Test for Originality?’ (*Kluwer Copyright Blog*, 5 December 2016)

<<http://copyrightblog.kluweriplaw.com/2016/12/05/brexit-copyright-law-will-english-courts-revert-old-test-originality/>> accessed 25 June 2020

<sup>47</sup> Phil Sherrell & Abbas Lightwalla, ‘United Kingdom: Copyright 2020’ (ICLG, 15 October 2019) <<https://iclg.com/practice-areas/copyright-laws-and-regulations/united-kingdom>> accessed 20 June 2020



In India, section 13(1) of the Copyright Act, 1957 grants copyright protection to ‘original’ literary works. The standard of originality required in India can be appreciated by examining the Supreme Court’s judgement in *Eastern Book Company v. D.B. Modak*.<sup>48</sup> The court adopted a middle path between US’ high<sup>49</sup> and UK’s<sup>50</sup> low standard for originality requirement, and instead relied on Supreme Court of Canada’s judgement in *CCH Canadian Ltd v Law Society of Upper Canada*.<sup>51</sup> The court stated that ‘novelty or invention or innovative idea’ is not required for copyright protection, but ‘*minimal degree of creativity*’<sup>52</sup> is required and it further held that a work should not be ‘*the product of merely labour and capital*.’<sup>53</sup> This effectively discarded, the English doctrine of ‘sweat of the brow’ that was being followed previously. The other prerequisite for copyright protection is fixation<sup>54</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>55</sup>

The 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>56</sup> This principle was recognised in the case of *R.G. Anand v. Deluxe Films*<sup>57</sup> in India, in *Baker v. Selden*<sup>58</sup> in the US and in *Baigent v. Random House*<sup>59</sup> in the UK. The

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<sup>48</sup> 2008 (36) PTC 1 (SC) (“D.B. Modak”)

<sup>49</sup> *Fiest*, 346

<sup>50</sup> *University Press*

<sup>51</sup> 2004 SCC 13

<sup>52</sup> D.B. Modak, 60

<sup>53</sup> *Ibid*, 57, 60

<sup>54</sup> Aprajita Nigam & Dheeraj Kapoor, ‘India: Copyright 2020’ (*ICLG*, 15 October 2019)

<<https://iclg.com/practice-areas/copyright-laws-and-regulations/india>> accessed 20 June 2020

<sup>55</sup> *Ibid*

<sup>56</sup> Article 9(2), The Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994

<sup>57</sup> AIR 1978 SC 1613

<sup>58</sup> 101 U.S. 99, 104 (1880)

<sup>59</sup> [2006] EWHC (Ch) 719

satisfaction of the idea-expression dichotomy is essential for a joke to be protected under copyright law.

Woodard referring to Olliar and Springman<sup>60</sup> observes that even when comedians utilise facts, they can protect their ‘individualized expression.’<sup>61</sup> He suggests that the comedians’ work could be protected under the idea-expression dichotomy by ‘conceptualisation’, it is when comedians take a common idea and make their own story based on that idea, and created their own dialogue, pacing and delivery.<sup>62</sup> In *Foxworthy v. Custom Tees*, 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>63</sup> This solves the problem of meeting the doctrinal barrier of idea-expression dichotomy.

Pham<sup>64</sup> refers to *Kaseberg v Conaco*, wherein it was stated, with respect to the jokes in question, that they are ‘constrained by their subject matter and the conventions of the two-line, setup-and-delivery paradigm’<sup>65</sup> and hence entitled to a thin copyright protection.<sup>66</sup> She states that for thin copyright infringement the standard is ‘virtual identity’, i.e., exact replication, while for broad copyright infringement the standard is higher.<sup>67</sup> She notes that, 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 and they would probably be entitled to broad copyright protection.<sup>68</sup> She expects that protection for point-of-view narrative jokes could extend to jokes that *have not been copied verbatim*, and hopes that the ‘substantial similarity’ test can be applied for determination of joke theft.<sup>69</sup> She further states that, appropriation of jokes on social media is usually verbatim and hence, the courts’ present application of copyright law

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<sup>60</sup> Olliar & Sprigman, 1822

<sup>61</sup> Woodard, 1052-1053

<sup>62</sup> Ibid, 1053

<sup>63</sup> 879 F. Supp. 1200, 1218,19 (N.D. Ga. 1995) (“Foxworthy”)

<sup>64</sup> Pham(2019), 75

<sup>65</sup> 260 F. Supp. 3d 1229, 1245 (S.D. Cal. 2017) (“Kaseberg”)

<sup>66</sup> Ibid, 1257

<sup>67</sup> Pham(2019), 75-76

<sup>68</sup> Hannah Pham, ‘Intellectual Property in Stand-Up Comedy: When #Fuckfuckjerry is not Enough’ (2020) 33 Harvard J. of Law & Tech. 1, 3-4 (“Pham(2020)”)

<sup>69</sup> Ibid, 3-5

to jokes in a narrow manner would be adequate for prevention of joke theft among extra-community players.<sup>70</sup>

### *C. Fair Use Exception*

A common defence to copyright infringement is fair use or fair dealing. Fair dealing is narrower than fair use and is followed in the UK and India.<sup>71</sup> In India, section 52<sup>72</sup> stipulates that the use of a literary work for criticism or review, reporting current events or for private use constitutes fair dealing and a two-pronged test was prescribed in *Blackwood. v. Parasuraman* for determining whether an act amounted to copyright infringement – lack of intention to derive financial benefits from the use of the work and motive of infringer should not be improper.<sup>73</sup>

In UK, fair dealing is dealt with in sections 29 and 30,<sup>74</sup> these provisions are similar to section 52 in the Indian copyright statute. The other factors that the courts found relevant for the determination of fair dealing are – first, does the use of a work affect 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>75</sup>

In US, Section 107<sup>76</sup> codifies<sup>77</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. Pham suggests that an adjudicator will find that joke theft has affected the financial incentives of the comedian and the fair use exception will fail because of it being inconsistent with the fourth factor.<sup>78</sup> Similarly, in India the defence will fail on both the grounds specified in *Blackwood* and in UK, due to the fulfilment of the first condition regarding effect on owner's revenue.

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<sup>70</sup> Ibid, 4

<sup>71</sup> Ishan Sambhar, 'India: Concept Of Fair Use And Fair Dealing In Copyright' (*Mondaq*, 13 May 2020) <<https://www.mondaq.com/india/copyright/930556/concept-of-fair-use-and-fair-dealing-in-copyright>> accessed 29 June 2020

<sup>72</sup> Copyright Act, 1957

<sup>73</sup> AIR 1959 Mad. 410

<sup>74</sup> Copyright, Designs and Patents Act, 1988

<sup>75</sup> Intellectual Property Office, Guidance, 'Exceptions to copyright' (*GOV.UK*, 12 June 2014) <<https://www.gov.uk/guidance/exceptions-to-copyright#fair-dealing>> accessed 29 June 2020

<sup>76</sup> Copyright Act, 1976

<sup>77</sup> *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (the factors were laid down in this case)

<sup>78</sup> Pham(2019), 78

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

Evidently, 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 the UK and India. By analysing case laws, this section will facilitate the understanding of the extent of protection that has been granted to jokes by the courts.

In *Foxworthy*, the defendant had reproduced the plaintiff's jokes on t-shirts for the purpose of selling it, 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 phrase.<sup>79</sup> The judge held 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>80</sup>

In *Kaseberg*, Kaseberg filed a suit against Conan for infringement of five jokes, the jokes started with a factual statement about a current event and ended with a punchline about it.<sup>81</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>82</sup> The parties arrived at a settlement before the trial.<sup>83</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>84</sup>

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<sup>79</sup> *Foxworthy*, 1204

<sup>80</sup> *Ibid*, 1218–19

<sup>81</sup> *Kaseberg*, 1231

<sup>82</sup> *Ibid*, 1245

<sup>83</sup> 'Conan O'Brien Joke Copyright Case Settles On Eve Of Trial' (*Law360*, 9 May 2019)

<<https://www.law360.com/articles/1158339>> accessed 29 June 2020

<sup>84</sup> Pham(2019), 77

#### IV. Joke Theft: Solutions

The absence of doctrinal barriers in the enforcement of copyright, does not signify the absence of practical barriers. Comedians do not prefer approaching the courts because lawsuits are expensive and cumbersome, and also, due to the lack of knowledge about copyright protection. Joke theft by extra-community players has an adverse impact on the comedians' 'pecuniary interests', 'moral rights' and 'personal incentives to create.'<sup>85</sup> Thus, protection of jokes is essential and this section explores the different remedies – proposed or available, for preventing joke theft.

##### *A. DMCA 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 this, 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. During Pham's interviews with comedians, she found that this solution was underutilised, as the interviewees were unaware about its applicability and invocation procedure.<sup>86</sup> She observes that this process is simple, effective, does not require registration of copyright and the OSPs are required to follow a strict policy against 'repeat infringers'.<sup>87</sup> This remedy does not provide for monetary damages, is not timely and puts the burden of theft monitoring on the comedians.<sup>88</sup> Pham believes that, if properly utilised by the comedians and enforced by the OSPs, this remedy can successfully prevent joke theft.<sup>89</sup>

##### *B. Copyright Claims Board*

A US Copyright Office report, recommended an online alternative to approaching court for copyright owners – a centralised three-member tribunal within the Copyright Office, wherein the claims would be limited to USD30,000.<sup>90</sup> Pham finds that this remedy is cost-effective, provides for monetary damages and requires an

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<sup>85</sup> Schachter, 71

<sup>86</sup> Pham(2019), 80

<sup>87</sup> Ibid, 79-80

<sup>88</sup> Ibid, 81

<sup>89</sup> Ibid, 80

<sup>90</sup> U.S. Copyright Office, 'Copyright Small Claims: A Report Of The Register Of Copyrights' (2013) 27

application to register instead of actual registration.<sup>91</sup> She notes that a major shortcoming of this solution is that it is voluntary, if the opposing party has deep pockets and decides to not provide consent, then the matter will go to court and prove to be prohibitive for the comedian.<sup>92</sup> Based on the report, a bill has been proposed for providing relief to copyright owners<sup>93</sup> and until it is passed and implemented, determining its effectiveness is difficult.

### *C. Digital Joke Exchange (“DJE”)*

Gates has proposed the creation of a database for joke exchange for US called ‘Digital Joke Exchange’,<sup>94</sup> based on the ‘Copyright Hub’ in the UK.<sup>95</sup> Copyright Hub is a digital platform focused on secondary licensing of copyright-eligible work and promotion of copyright education.<sup>96</sup> He suggests that the DJE would exist within a larger framework, called the ‘IP Portal’, this portal would provide information about IP and industry-specific copyright information.<sup>97</sup> It will also function as a gateway for linking users to industry-specific databases.<sup>98</sup> DJE would also have an arbitration panel.<sup>99</sup> For a work to be registered under the DJE, it should be eligible for copyright protection under the law and the material could be registered with DJE before or maximum a year after its public dissemination.<sup>100</sup> DJE will not replace the copyright regime, but supplement it.<sup>101</sup>

### *D. Physical Institutions*

Pham has proposed a solution based on the practices of certain US clubs, she suggests not only the prohibition of photographing or filming of performances in clubs, but also, advocating for its enforcement.<sup>102</sup> A New York club, has put up signs as well as declared on the seating cards that if anyone is found recording the performance, they will have to leave the club promptly and no arguments will be

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<sup>91</sup> Pham(2019), 84

<sup>92</sup> Pham(2019), 84

<sup>93</sup> Copyright Alternative in Small-Claims Enforcement Act, 2019

<sup>94</sup> Gates, 818

<sup>95</sup> Richard Hooper, ‘UK’s Copyright Hub: a license to create’ (2016) 2 WIPO Magazine

<[https://www.wipo.int/wipo\\_magazine/en/2016/02/article\\_0007.html](https://www.wipo.int/wipo_magazine/en/2016/02/article_0007.html)> accessed 29 June 2020

<sup>96</sup> *Ibid*

<sup>97</sup> Gates, 824-825

<sup>98</sup> Gates, 818

<sup>99</sup> Gates, 822-823

<sup>100</sup> Gates, 821-823

<sup>101</sup> Gates, 819

<sup>102</sup> Pham(2020), 13

entertained.<sup>103</sup> It also requires patrons to put their phones in a sealed bag when attending a show.<sup>104</sup> Another US club, notified the ticket holders that if anything is recorded, they shall 'be subject to all available legal remedies'.<sup>105</sup> Although not enforceable under the law,<sup>106</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>107</sup> 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 like the notice-and-takedown process will have to be undertaken.

## V. Analysis

In this section, 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 Jen Lewis, where Tebele was assumed to be the creator of a picture she made and gained popularity as well as money from its non-attribution.<sup>108</sup> Although, the problem of joke theft does not exist in India and UK, to the same extent as the US, but the proposed solution will prevent any possibility of theft in the future. The prevention of joke theft is imperative in order to ensure that the creators are incentivised for their original work and broader societal interests are protected. An effective solution cannot be based solely on seeking enforcement under copyright law, it needs to be in conjunction with extra-legal remedies. The considerations that need to be kept in mind while determining a solution are –

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<sup>103</sup> Pham(2020), 13

<sup>104</sup> 'New York's Comedy Cellar Using Phone Lock Up Bags in Regular Shows' (*The Interro Bang*, 13 February 2019) <<https://theinterrobang.com/new-yorks-comedy-cellar-using-phone-lock-up-bags-in-regular-shows/>> accessed 25 June 2020

<sup>105</sup> Reggie Ugwu, 'Louis C.K. Is Trying to Outlaw Leaks. Can He Do That?' (*N.Y. TIMES*, 9 May, 2019), <<https://www.nytimes.com/2019/05/09/arts/louis-ck-leaks-threat.html>> accessed 25 June 2020

<sup>106</sup> Ibid

<sup>107</sup> Pham(2020), 14

<sup>108</sup> Vaishnavi Kanukurti, 'The Issue of Joke Theft in the World of Comedy' (*Indianfolk*, 12 June 2019) <<https://www.indianfolk.com/joke-theft-the-issue-of-plagiarism-of-jokes-edited/>> accessed 28 June 2020

should be simple, timely, affordable, provides for monetary damages, not require registration of copyright.

Pham has suggested that making fans aware of the intellectual property rights of the comedians is one of the ways that joke theft can be stopped,<sup>109</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 OSPs to filter and prevent the upload of copyrighted material.<sup>110</sup> It mandatorily requires commercial content sharing services, which cross a certain threshold for revenue and visitors, to obtain a license from the copyright owner for the use of any copyrighted content.<sup>111</sup> This is problematic in case of jokes as the upload filter will fail in detecting the jokes that should be protected by copyright but haven't been registered.<sup>112</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 Art. 17, in conjunction with DJE and physical institutions.

DJE does not require a joke to be registered, it only requires it to be eligible for copyright protection under the law of the country. Under DJE, jokes can be registered before or up to one year after the performance, i.e., it can be registered even after the infringement takes place and it would also be simpler to use. 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. Thus, the author submits that by linking the database of jokes to the uploading filter required under Art. 17 and combining it with the physical institutions remedy, the joke theft problem can be resolved or at the least alleviated.

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<sup>109</sup> Pham(2020), 10

<sup>110</sup> Directive 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 OJ L130/92, 119-121

<sup>111</sup> Ibid, 107

<sup>112</sup> Pham(2020), 12



## 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 for prevention of joke theft. The effectiveness of spreading awareness about the IP rights of the comedians among fans and users of social media at present, 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. Probably, 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, like its fast pace of dissemination and its capability of reaching a world-wide audience.