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Providing Adequate Protection for
Comedians’ Intellectual Creations:
Examining Intellectual Property
Norms and “Negative Spaces”

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Humor is infectious. The sound of roaring laughter is far more contagious than any cough, snuffle, or sneeze. When laughter is shared, it binds people together and increases happiness and intimacy.

—Anonymous

INTRODUCTION

Scholars and policymakers largely embrace the notion that society as a whole benefits when creators can prevent the unauthorized copying of their innovations.¹ This is primarily achieved by granting intellectual property (IP) rights to creators,² which generally gives them an exclusive right to prevent others from using their creations without permission.³ In exchange for this right, those innovations are shared with others, and ideally, society and the creators benefit from this exchange.⁴ However, there is increasing debate over whether intellectual property rights adequately protect innovations and incentivize others to create new works, and if not, what can be done to further those objectives.⁵ In examining that question, this Comment focuses on one industry in particular that has, in recent years, received increasing attention from legal scholars and the general public—the comedy industry.

¹ See Christopher A. Cotropia & James Gibson, *The Upside of Intellectual Property's Downside*, 57 UCLA L. REV. 921, 922 n.2 (2010) (citing *Mazer v. Stein*, 347 U.S. 201, 219 (1954), which states that “[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare”).

² Note that “intellectual property” is defined in this Comment as “any product of the human intellect that the law regulates from unauthorized use by others.” See *infra* Part III and note 52.

³ See *What Are Intellectual Property Rights?*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/trips_e/intel1_e.htm (last visited Dec. 29, 2014).

⁴ See Cotropia & Gibson, *supra* note 1, at 922.

⁵ See generally William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168 (Stephen R. Munzer ed., 2001).

The comedy industry exists in what has been coined intellectual property's "negative space"—an area in which creation and innovation seem to thrive without significant protection from formal intellectual property laws.⁶ Despite the amount of time and effort a comedian may put into creating new and successful material, or the benefits that the material provides to others, current laws struggle to adequately protect a comedian's intellectual creations.⁷ Conventional intellectual property wisdom suggests that absent this formal legal protection, creators may simply stop creating.⁸ Yet, that does not occur within the comedy industry.⁹ Instead, comedians are forced to take matters into their own hands and rely on community norms and informal sanctions, including threats and violence, to prevent the misappropriation of material.¹⁰ Much has been written in recent years about the existence of these extralegal norms within comedy, as well as within other industries.¹¹ Professors Dotan Oliar and Christopher Sprigman's piece in particular has paved the way for discussions about intellectual property norms and the comedy industry.¹² In *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, Oliar and Sprigman outline three primary norms that have emerged within the comedy industry because of the lack of effective protection provided by formal intellectual property laws.¹³ They discuss how these extralegal IP norms help comedians protect their own intellectual property, and they express doubt that formal laws can

⁶ Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317, 322 (2011) (citing Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1764 (2006)).

⁷ Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1789–91 (2008).

⁸ *Id.* at 1790.

⁹ *Id.*

¹⁰ *Id.* at 1809–11.

¹¹ See, e.g., David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093, 1094–99 (2012) (discussing the existence of IP norms amongst roller derby skaters); see also *infra* note 32.

¹² Oliar & Sprigman, *supra* note 7. This Comment also builds from a chapter in the *Knockoff Economy*, which was adapted from Oliar and Sprigman's article. See generally KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* 97–122 (2012).

¹³ See Oliar & Sprigman, *supra* note 7, at 1809–31.

offer any better protection.¹⁴ While it is likely that changes to existing copyright law may not solely prevent the misappropriation of jokes, relying on these norms alone also does not provide adequate protection for a comedian's material. Formal changes that offer better protection for comedic material need to be made within the comedy industry.

Comedians could better protect their innovations through the creation of a copyright database—or Digital Joke Exchange (DJE)—that facilitates the exchange of material, provides increased protection for that material, and even improves a comedian's ability to rely on existing U.S. copyright law. The DJE would act as an online licensing platform that connects individuals with intellectual property. Comedians may register their material with the DJE, regardless of whether it is registered with the U.S. Copyright Office. Specifically, the DJE is meant to function independently of existing copyright law. However, DJE registrants will reap several benefits, including the existence of an independent review panel (Arbitration Panel) that monitors the database and resolves disputes.

It is important to note that there have been attempts at creating governing bodies in the past within the comedy industry.¹⁵ In 1981, a comedy guild was formed in Los Angeles, but it was never really successful.¹⁶ Shortly thereafter, the Professional Comedians Association formed, which lasted from 1984 to 1990, when comedy clubs began shutting out members of the association.¹⁷ The most recent attempt appears to have been in 2004 when a comedians' association was established in New York.¹⁸ However, it was met with

¹⁴ *Id.* at 1866–67. However, the authors do admit that social norms are not always a viable alternative or superior to formal law. *Id.*

¹⁵ See Berkman Center, *William Fisher Copyright, Spring 2013: Special Event 3, Extralegal Norms* at 1:24:08–25:06, YOUTUBE (Mar. 1, 2013), <http://www.youtube.com/watch?v=8U7bUo1vChs> [hereinafter *William Fisher Copyright, Spring 2013*]. This is a recording of comedian Jim Mendrinos and Professor Oliar providing some of their thoughts on the comedy industry for students in a Harvard Copyright Law course. It is moderated by Professor William Fisher. See *infra* note 58 and accompanying text. This video, and especially the concerns Mendrinos raises, was critical in the development of this Comment.

¹⁶ *Id.* at 1:24:25–:44.

¹⁷ *Id.* at 1:24:44–:56; see also ROBERT A. STEBBINS, *THE LAUGH-MAKERS: STAND-UP COMEDY AS ART, BUSINESS, AND LIFE-STYLE* 135 (1990); Richard Haitch, *Follow-Up on the News; Comedian Unity*, N.Y. TIMES (Sept. 30, 1984), <http://www.nytimes.com/1984/09/30/nyregion/follow-up-on-the-news-comedian-unity.html>.

¹⁸ *William Fisher Copyright, Spring 2013, supra* note 15, at 1:24:56–:25:05.

great resistance from other comedians.¹⁹ In contrast to these comedy guilds, the DJE will rely more on voluntary participation through various incentives discussed throughout this Comment. In addition, the DJE Arbitration Panel is meant to act as a “last resort” to solving disputes. The DJE should primarily facilitate the simple, proper exchange of material to help reduce the occurrence of joke theft and the need to adjudicate potential infringement actions. The DJE will also compile and present information that will help comedians protect their material through existing U.S. copyright law regardless of whether they exchange intellectual property through the DJE or take advantage of the Arbitration Panel. Finally, the potential benefits of this solution would extend beyond the comedy industry and a similar model could be implemented within other industries.

The DJE would function within a more generalized informational portal—or IP Portal—that would break down intellectual property laws and then link users to the DJE. This IP Portal would initially focus on U.S. copyright law, but later it would expand to include all areas of intellectual property law, including patent, trademark, and trade secret laws. The IP Portal will eventually act as a reliable source for comedians, artists, and all individuals seeking information about intellectual property law. It will then link those users to industry-specific databases or licensing platforms that facilitate the exchange of intellectual property.

The United Kingdom is in the process of implementing a similar system designed to facilitate the exchange of intellectual property and estimates that its system will provide numerous benefits and generate approximately two billion pounds for its economy by 2020.²⁰ In addition, there has been a recent trend in legal services looking to provide more affordable information and make the law less confusing.²¹ The DJE and IP Portal would follow that trend while helping the comedy industry, the U.S. economy, and paving the way for improvement in other industries.

¹⁹ *Id.* at 1:25:02–:06.

²⁰ See *Sweeping Intellectual Property Reforms to Boost Growth and Add Billions to the Economy*, DEP'T FOR BUS. INNOVATION & SKILLS (Aug. 3, 2011, 9:00 AM), <http://news.bis.gov.uk/content/detail.aspx?NewsAreaId=2&ReleaseID=420683&SubjectId=2>; see also *infra* Part IV.

²¹ See, e.g., Peter Delevett, *Lawyer Up Online: Startups Aim to Make the Law Less Confusing, Expensive*, SAN JOSE MERCURY NEWS (Jan. 27, 2014, 5:47:06 AM), http://www.mercurynews.com/business/ci_24986990/lawyer-up-online-startups-aim-make-law-less (discussing emerging companies such as LegalZoom and Rocket Lawyer).

Part I defines extralegal norms and discusses the existence of common societal norms. Part II outlines three major extralegal IP norms that exist within the comedy industry. Part III discusses three leading theories that justify why and to what extent comedic material and other intellectual property should be protected. Part IV examines why comedians cannot rely on current U.S. copyright law to adequately protect their material. Part V discusses the positives and negatives of relying on formal intellectual property laws versus IP norms. Part VI outlines the proposed solution, which includes creation of the DJE and IP Portal. Part VII discusses potential issues with the DJE and contrasts those issues with incentives for comedians to use the DJE. Finally, Part VIII discusses potential changes to U.S. copyright law that may supplement the DJE's improved protection of comedians' intellectual creations.

I

WHAT ARE EXTRALEGAL NORMS?

While there are varying definitions,²² for the purposes of this Comment, social norms are defined as a subgroup of behavioral regularities in which deviation is accompanied by a sanction.²³ As this definition indicates, social norms generally differ from mere behavioral regularities in that norms are often accompanied by a sanction.²⁴ However, that sanction does not have to be grounded in law or formal rules. Translating this to comedy, the norms that exist within the industry are standards of conduct governed and enforced by the comedy community through the use of extralegal sanctions.

Social norms are a large part of society and consistently influence individual conduct. For example, in the academic context, plagiarism may be accompanied with punishment, such as receiving a failing grade or being suspended from school.²⁵ In the higher education context, the price of plagiarism is “really about shame.”²⁶ While some

²² See Michael Hechter & Karl-Dieter Opp, *What Have We Learned About the Emergence of Social Norms?*, in *SOCIAL NORMS* 394, 402–03 (Michael Hechter & Karl-Dieter Opp eds., 2001) (stating that there is no standard definition of “norms” and explaining different possible definitions in which some correspond with sanctions while others just refer to expected actions).

²³ ERIC A. POSNER, *LAW AND SOCIAL NORMS* 7–8 (2000); see also *id.* at 403.

²⁴ POSNER, *supra* note 23, at 8 (stating that norms are actions that are expected to happen but often must be accompanied by a sanction).

²⁵ Karoun Demirjian, *What is the Price of Plagiarism?*, *CHRISTIAN SCI. MONITOR* (May 11, 2006), <http://www.csmonitor.com/2006/0511/p14s01-lire.html>.

²⁶ *Id.*

forms of plagiarism may result in lawsuits, “at the end of the day, the author’s reputation is at stake.”²⁷ Social norms also exist in areas that appear heavily regulated by formal laws. Driving is one such area. There are certainly laws in place that govern drivers, but acceptable actions on the road often vary widely within cities, states, and countries that have similar laws.²⁸ In New York City for example, pedestrians pay little attention to traffic lights.²⁹ In the Pacific Northwest, most seem more willing to obey them. Similarly, there is often very little social stigma associated with driving five or ten miles per hour over the speed limit, and many drivers expect others to travel faster than the posted speed limit.³⁰ Despite what the law may be, if individuals in a particular area act contrary to these norms, their behavior may be seen as disruptive or antisocial.³¹

Outside of comedy, there are also other industries that seem to rely more heavily on social norms than formal intellectual property laws to protect intellectual creations.³² For example, French chefs use an informal regulatory system to prevent the misappropriation of recipes, rather than relying on existing intellectual property laws to protect those recipes.³³ Magicians also rely on informal professional rules to ensure illusions are not stolen or exposed to the public without permission.³⁴ In both of these contexts, members of the community quickly learn that it is simply unacceptable to use another’s intellectual creations without permission. Regardless of whether it

²⁷ *Id.*

²⁸ See Peter Turchin, *Drivers vs. Pedestrians: A Case Study of Social Norms*, SOC. EVOLUTION FORUM (June 17, 2012), <http://socialevolutionforum.com/2012/06/17/drivers-vs-pedestrians-a-case-study-of-social-norms/>; see also *Follow Speed Limit Norms, Say Police*, TIMES OF INDIA (Nov. 8, 2012, 7:12 AM), <http://timesofindia.indiatimes.com/city/allahabad/Follow-speed-limit-norms-say-police/articleshow/17138176.cms>.

²⁹ Turchin, *supra* note 28.

³⁰ *Id.*

³¹ *Id.*

³² See generally Fagundes, *supra* note 11 (describing areas such as cooking, magic, fashion, and roller derby as ones in which people rely on norms rather than existing intellectual property laws).

³³ See generally Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs* (MIT Sloan Sch. of Mgmt., Working Paper No. 4576-06, 2006), available at <http://lawmeme.law.yale.edu/static/a2k/a2kresources/evhippel.pdf>.

³⁴ See generally Jacob Loshin, *Secrets Revealed: Protecting Magicians' Intellectual Property Without Law*, in LAW AND MAGIC: A COLLECTION OF ESSAYS 123 (Christine A. Corcos ed. 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1005564.

may result in legal action, there are severe social sanctions for being dubbed a “thief.”³⁵

II

EXISTING NORMS IN THE COMEDY INDUSTRY

Professors Oliar and Sprigman identify three major norms within the comedy industry that work to limit the misappropriation of comedic material and structure the ownership, use, and transfer of material.³⁶ These norms exist primarily because of comedians’ dissatisfaction with existing copyright law.³⁷ The first major norm “is a strict injunction against joke stealing.”³⁸ Regardless of whether another’s material is copyrighted or otherwise protected by the law, joke stealing is considered “taboo” within the comedy community.³⁹ Allegations of joke stealing can ruin a comedian’s reputation, result in numerous social sanctions,⁴⁰ and even end a comedian’s career.⁴¹

The second major norm is actually a class of several norms relating to authorship and the transfer of jokes.⁴² For example, comedians are often on the road together—asking each other for suggestions and incorporating feedback into their jokes.⁴³ Under existing copyright law, that likely would result in joint authorship of a work.⁴⁴ However, comedians disfavor joint authorship and usually agree that the one who came up with a joke’s premise—and the person who asked the other for suggestions—would be the rightful owner of the joke.⁴⁵ Additionally, the transfer of ownership of a joke under copyright law generally requires the parties to complete the exchange in writing.⁴⁶ By contrast, jokes are often sold orally among comedians.⁴⁷

³⁵ See generally Fagundes, *supra* note 11.

³⁶ Oliar & Sprigman, *supra* note 7, at 1809–31.

³⁷ *Id.* at 1810–11 (mentioning that comedians were generally aware of existing copyright law, but said lawsuits were typically too expensive for the ordinary comedian and unlikely to succeed).

³⁸ *Id.* at 1812.

³⁹ *Id.*

⁴⁰ *Id.* at 1812–15 (discussing common social sanctions, which include physical threats and other comedians refusing to appear on a bill at a club if an alleged joke stealer was planning to perform).

⁴¹ See *id.* at 1815.

⁴² *Id.* at 1825–28.

⁴³ *Id.* at 1825.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1825–26.

⁴⁶ See 17 U.S.C. § 204(a) (2012).

⁴⁷ Oliar & Sprigman, *supra* note 7, at 1827–28.

Finally, the third major norm is that comedians generally do not recognize any exceptions to a comedian's exclusive right to a joke.⁴⁸ Under copyright law, the doctrine of fair use may be available as a defense against a claim of infringement.⁴⁹ However, comedians do not recognize this defense or any other exceptions that would excuse the unauthorized use of another's material.⁵⁰

If there were laws or regimes in place that provided adequate protection for comedic material, comedians likely would not need to rely as heavily on these norms. However, that begs the question whether existing laws or rules should protect comedic material.⁵¹ Accordingly, this Comment first considers whether intellectual property law, and more specifically copyright law, should protect jokes.

III SHOULD JOKES BE PROTECTED?

"Intellectual property" is defined here as "any product of the human intellect that the law protects from unauthorized use by others."⁵² It comprises primarily patent, copyright, trademark, and trade secret rights.⁵³ Of these four categories, copyright law is largely considered the most likely to afford adequate protection for the comedy industry.⁵⁴

⁴⁸ *Id.* at 1828–31.

⁴⁹ See 17 U.S.C. § 107; see generally *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

⁵⁰ Oliar & Sprigman, *supra* note 7, at 1828–31.

⁵¹ It also assumes that laws should provide protection for intellectual property in the first place. See, e.g., Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771, 1822 (2006) (pointing out the debate over whether intellectual property laws should be expanded or instead cut back or abolished); see also WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* 199–258 (2004) (discussing a potential alternative that would properly incentivize the production of goods).

⁵² *Intellectual Property: Overview*, CORNELL UNIV. LAW SCH., http://www.law.cornell.edu/wex/intellectual_property (last visited Dec. 29, 2014); BLACK'S LAW DICTIONARY 395 (4th ed. 2006).

⁵³ BLACK'S LAW DICTIONARY, *supra* note 52.

⁵⁴ See Oliar & Sprigman, *supra* note 7, at 1805–09 (discussing the inadequacy of utilizing patent and trademark laws).

Copyright protection is governed exclusively by federal statute, namely the Copyright Act of 1976.⁵⁵ Article I, Section 8, Clause 8 of the U.S. Constitution grants Congress the power to create copyright law.⁵⁶ This clause states that Congress shall have the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁵⁷ While the U.S. Constitution lays the foundation for copyright protection, how judges, legislators, and others interpret this grant of power when shaping property rights may vary depending upon their underlying philosophies regarding the purpose of protecting intellectual property.

More broadly, as the importance of intellectual property increased, different philosophies emerged regarding the purpose of protecting works of the intellect. Professor William Fisher⁵⁸ has outlined four theories that explain why and to what extent intellectual creations deserve protection.⁵⁹ These theories, in order of popularity, are: utilitarian, labor, personhood, and social planning.⁶⁰ This Part briefly outlines three of those four theories.⁶¹ While Professor Fisher primarily discusses these theories in the context of what lawmakers and others consider in shaping property rights, this Comment focuses on these theories more narrowly in discussing whether intellectual property laws or other formal regimes should protect a comedian’s intellectual creations. No matter which theory a person may subscribe to, the outcome is always the same—a comedian’s material should be protected.

⁵⁵ See U.S. COPYRIGHT OFFICE, COPYRIGHT LAW OF THE UNITED STATES AND RELATED LAWS CONTAINED IN TITLE 17 OF THE UNITED STATES CODE, at v (2011), available at <http://copyright.gov/title17/circ92.pdf>.

⁵⁶ This provision is sometimes referred to as the “Intellectual Property Clause” or “Progress Clause.” Oliar, *supra* note 51, at 1772. Although, Professor Oliar points out that these terms may be improper. *See id.* at 1772–73 n.1.

⁵⁷ U.S. CONST. art. I, § 8, cl. 8. This clause also provides the foundation for patent statutes.

⁵⁸ Professor Fisher is the WilmerHale Professor of Intellectual Property Law at Harvard Law School and faculty director of the Berkman Center for Internet and Society. His knowledge and expertise in this area was instrumental in the preparation of this Comment.

⁵⁹ See Fisher, *supra* note 5, at 168–73.

⁶⁰ *Id.* at 169–73.

⁶¹ This Comment does not discuss the social planning theory because it is the least popular and is rooted in the proposition that property rights should be granted to foster a “just and attractive culture.” *Id.* at 172. However, it also would support protecting a comedian’s intellectual creations.

A. Utilitarian Theory

Under the guidance of a utilitarian theory, property rights should be shaped with an end goal of “maximiz[ing] net social welfare.”⁶² Specifically, the utilitarian theory requires lawmakers to find a balance between “the power of exclusive rights to stimulate the creation of inventions and works of art and . . . the partially offsetting tendency of such rights to curtail widespread public enjoyment of those creations.”⁶³

In shaping existing copyright law, the U.S. Supreme Court often endorses the above balancing test. The Court’s decisions support the notion that intellectual property laws should induce the production and dissemination of intellectual works so that society can benefit from innovation.⁶⁴ In other words, creators are given the exclusive right to prevent others from using their creations without permission, and in turn, those creations are shared with others. Applying this to the comedy industry, there must be a balance between granting a comedian the right to protect his or her own material and permitting public use or enjoyment of that material.

Copyright protection should be afforded to comedians, or else “copycats” would undercut the industry by offering those works in a more efficient manner, and this likely would disincentivize the production and dissemination of intellectual works.⁶⁵ Without protection, the amount of time and effort a comedian put into coming up with a joke would likely exceed the benefit, economic or otherwise, that he or she received from sharing that joke with others. Another comedian could expend less effort and simply take the material and perform it; this would be easier because the stealing comedian would have less time and effort invested into coming up

⁶² *Id.* at 169.

⁶³ *Id.*

⁶⁴ *Id.* at 174 nn.14–15 (citing *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127–28 (1932); *Kendall v. Winsor*, 62 U.S. 322, 327–28 (1858); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1151 (9th Cir. 1986); *Consumers Union of U.S., Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1048 (2d Cir. 1983)).

⁶⁵ Fisher, *supra* note 5, at 169.

with the joke.⁶⁶ Ultimately, the original comedian would likely be disincentivized to innovate or share those innovations with others.⁶⁷

B. Labor Theory

The labor theory originates from the writings of John Locke and states that a person who labors upon resources that are not owned has a natural property right to the “fruits of his or her efforts.”⁶⁸ This theory offers a strong incentive for protecting intellectual property; IP generally exists because individuals exert labor on unowned materials, such as facts and concepts, to develop them into a final product.⁶⁹ Without the efforts of the individual, the creative work likely would not exist, and thus the individual should be rewarded.⁷⁰

Within the comedy industry, many jokes are developed just that way—from common materials such as well-known facts or situations.⁷¹ Comedians then take those materials and expend significant time and effort perfecting unique jokes and routines.⁷² Under the labor theory, this expense of time and effort is of the kind that should be rewarded through the grant of exclusive rights. Without that work, the final material likely would not exist.

C. Personhood Theory

The personhood theory states that private property rights are critical to the “satisfaction of some human needs.”⁷³ Specifically, under the guidance of this theory, a system of property rights would concentrate on affording legal protection to highly expressive activities and extensions of an individual’s “persona.”⁷⁴ In addition, it

⁶⁶ See *id.* at 169–70 (stating the infringer would only bear the cost of production as opposed to the creator who would bear the cost of the time and effort in creating the new work, as well as the cost of production).

⁶⁷ Unfortunately, the comedy industry currently functions this way. Some comedians do steal material from others and get away with it. This has resulted in a system in which comedians often avoid sharing material with audiences and other comedians. See *William Fisher Copyright, Spring 2013, supra* note 15, at 7:00–:35.

⁶⁸ See *Fisher, supra* note 5, at 170.

⁶⁹ *Id.* at 170–71.

⁷⁰ See *id.* at 171.

⁷¹ See *William Fisher Copyright, Spring 2013, supra* note 15, at 8:22–:49.

⁷² See *Oliar & Sprigman, supra* note 7, at 1789.

⁷³ *Fisher, supra* note 5, at 171. Those needs include: peace of mind, privacy, self-reliance, self-realization as a social being, self-realization as an individual, security and leisure, responsibility, identity, citizenship, and benevolence. *Id.* at 189–90.

⁷⁴ *Id.*

would allow creators to earn “respect” and “money” from the selling and distribution of their work, but prevent others from misattributing their work.⁷⁵

Quite often, jokes are created from a comedian’s personal life experiences.⁷⁶ When one comedian steals a joke from another, the stealing comedian is likely taking more than just a joke, but rather an experience that was part of the original comedian’s life.⁷⁷ Accordingly, the law should protect comedic material because of its highly expressive and personal nature, and the law should allow creators to benefit from the distribution of their work.

IV BARRIERS TO COPYRIGHT PROTECTION

With the understanding of why a comedian’s intellectual creations should be protected, this Part considers whether copyright law can adequately afford that protection. The Copyright Act outlines the requirements for attaining copyright protection. Specifically, copyright protection is afforded to “original works of authorship fixed in [a] tangible medium of expression.”⁷⁸ Generally, this provision is read to require two elements: fixation and originality.⁷⁹

Doctrinal and practical barriers prevent these elements from being easily applied to the comedy industry.⁸⁰ The first doctrinal barrier relates to the fixation requirement, which mandates that copyrightable material must be sufficiently permanent in a tangible medium.⁸¹ Jokes could be written down and fixed in a tangible medium, but generally they are performed orally or told as part of a performance.⁸² Additionally, many comedy routines are ad-libbed and depend on audience interaction.⁸³ Because of this, they may often be told in different forms on different nights, making it difficult to protect the varying forms of expression.

⁷⁵ *Id.* at 171–72.

⁷⁶ See William Fisher *Copyright, Spring 2013*, *supra* note 15, at 5:55–6:17.

⁷⁷ *Id.*

⁷⁸ 17 U.S.C. § 102(a) (2012).

⁷⁹ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 355 (1991) (stating that “[t]he two fundamental criteria of copyright protection [are] originality and fixation in tangible form” (citation omitted)).

⁸⁰ See Oliar & Sprigman, *supra* note 7, at 1799–1805.

⁸¹ 17 U.S.C. § 102(a).

⁸² Oliar & Sprigman, *supra* note 7, at 1801–02.

⁸³ See *id.*

The second doctrinal barrier exists because of the idea-expression dichotomy, which states that copyright law only protects the expression of something, not the underlying idea.⁸⁴ For example, suppose a musician wanted to copyright a song about love. Assuming the work was copyrightable, the musician could receive protection for that particular song. However, the protection would be limited to the musician's particular expression—the song itself. The musician would not gain an exclusive right to prevent others from writing any song about love.⁸⁵

Similarly, most jokes are told in the form of a story, even though audiences may focus only on a particular punch line. Because of this, two jokes may be told in a different manner despite having the same overall premise. Just like the musician example above, consider a joke about the weather. One comedian may develop a joke about the weather and could seek protection of that joke under copyright law. However, he or she could only protect the actual expression of that joke, not the general premise of a “joke about the weather.” If another comedian hears that joke, he or she may still be able to express a similar joke in a slightly different manner, and the original comedian would likely have no available legal action to prevent that from happening.

The third doctrinal barrier for applying copyright law to the comedy industry exists because of the doctrine of independent creation. This doctrine is a defense to liability under copyright law in which the alleged infringer may escape liability if he or she developed the disputed material on his or her own.⁸⁶ Returning to our previous example, many jokes revolve around ordinary happenings, such as the weather.⁸⁷ It is fairly conceivable for different comedians to, at some point, independently create the same material, and it may be difficult to determine when such a situation has occurred.⁸⁸

⁸⁴ See 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea . . .”); see also *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930); *Oliar & Sprigman*, *supra* note 7, at 1802–03.

⁸⁵ Cf. *Oliar & Sprigman*, *supra* note 7, at 1806–07 (citation omitted) (noting that different painters can paint the same scene, reporters can write about the same event, and entertainers can tell the same joke, as long as their expression is different).

⁸⁶ *Id.* at 1804.

⁸⁷ See *William Fisher Copyright, Spring 2013*, *supra* note 15, at 8:22–:49.

⁸⁸ See, e.g., *Dead-Frog, Whose Joke Is It? Carlos Mencia? D.L. Hughley? George Lopez?*, YOUTUBE (Feb. 19, 2007), http://www.youtube.com/watch?v=kPuu_VE7KOA. This video shows an example of a very similar joke performed by four different comedians over several months in 2007. Given the circumstances, it was likely the joke was

In addition to these doctrinal barriers, there are practical barriers that prevent copyright law from being easily applied to the comedy industry. The primary practical barrier is the high cost of attaining intellectual property protection and excluding others from that right. The cost of registering a joke online with the U.S. Copyright Office is usually thirty-five dollars.⁸⁹ Considering the number of jokes a comedian creates over a lifetime and the industry being severely under-monetized, even these costs are likely prohibitive.⁹⁰ Additionally, there is a high cost of retaining an attorney, a low chance of successfully bringing a claim, and most comedians do not have the financial assets to make pursuing damages worthwhile.⁹¹

V

FINDING THE RIGHT PROTECTION FOR COMEDIANS: IP RIGHTS VERSUS IP NORMS

Because comedians generally cannot and do not rely on copyright law, the comedy industry is said to reside in intellectual property's "negative space."⁹² The term "negative space" refers to an area in which creation and innovation thrive without significant protection from intellectual property law.⁹³ These spaces likely evolved because formal laws treat different industries the same.⁹⁴ For example, similar laws apply to music, books, movies, photography, and software.⁹⁵ Perhaps in an ideal system, the law would be more adaptable to differing industries. However, there likely would be high costs and an inefficient use of resources associated with that approach.⁹⁶

independently created by at least one of the comedians, rather than stolen from the comedian who first performed the joke.

⁸⁹ Oliar & Sprigman, *supra* note 7, at 1800 (noting that comedians may be able to register a number of jokes at once); *see also* U.S. COPYRIGHT OFFICE, COPYRIGHT OFFICE FEES 6 (2014), *available at* <http://copyright.gov/docs/fees.html> (providing a list of current fees).

⁹⁰ Oliar & Sprigman, *supra* note 7, at 1800–01.

⁹¹ *Id.* at 1799–1801.

⁹² Rosenblatt, *supra* note 6, at 319–22 (discussing different industries that reside in IP's "negative space").

⁹³ *Id.* at 322.

⁹⁴ *See* Michael W. Carroll, *One for All: The Problem of Uniformity Cost in Intellectual Property Law*, 55 AM. U. L. REV. 845, 846–49 (2006).

⁹⁵ Oliar & Sprigman, *supra* note 7, at 1840.

⁹⁶ *Id.* at 1840–41 (stating that it would be extremely costly to give the proper amount of detailed information to Congress to enact supposedly correct laws, and that "correct" may just be defined by those companies or individuals that have the most influence).

Most commentators seem to agree that copyright law is not sufficiently adapted to protect the comedy industry.⁹⁷ However, there is significant debate over whether norms are adequate substitutes for formal law, and if so, what can be done to improve protection for comedians.⁹⁸ In seeking a solution, this Comment first considers some notable benefits and negatives of relying on IP norms as opposed to IP rights (IPRs) within the comedy industry.

A. Benefits and Negatives of Intellectual Property Rights (IPRs)

The primary negatives of relying on IPRs in the comedy industry were largely discussed above and include: the difficulties of protecting intellectual property because of the fixation requirement, the idea-expression dichotomy, and the doctrine of independent creation, as well as the high cost of securing IP protection and excluding others from that right.⁹⁹ In contrast, the primary benefit of relying on IPRs is the grant of a legally recognized protection backed by the state, regardless of the status of the individual.¹⁰⁰ In other words, a comedian could protect his or her material and generally enforce that right against another, regardless of either party's status or reputation.

B. Benefits of IP Norms

There are two significant benefits of relying on IP norms for comedians. First, IP norms can be and generally are enforced by the community. As opposed to formal law in which a single fact finder would likely have to rule on the enforcement of one comedian's rights against another, IP norms allow for enforcement by the comedy community as a whole. Second, IP norms are cheaper and more customizable. They are cheaper because, unlike IPRs, they generally do not require someone to bring a lawsuit against another and incur the expensive costs of litigation.¹⁰¹ They are more customizable

⁹⁷ See *id.* at 1805–07.

⁹⁸ See, e.g., *Copyright and Wrongs*, ECONOMIST (May 5, 2009), <http://www.economist.com/debate/days/view/310> (Professors William Fisher and Justin Hughes debate whether existing copyright law does more harm than good.).

⁹⁹ See *supra* Part IV.

¹⁰⁰ This also includes automatic protection under copyright law, which means that protection exists from the moment a work is created.

¹⁰¹ See Shyamkrishna Balganesh, *Copyright Infringement Markets*, 113 COLUM. L. REV. 2277, 2280 (2013) (stating that the average cost of litigating a copyright infringement case through trial ranged from \$384,000 to \$2 million (citation omitted)).

because IP norms often emerge in small, homogenous communities, and it is likely easier for that community to gradually change the standards of conduct than it would be to alter existing formal laws.¹⁰²

C. Negatives of IP Norms

In contrast to these benefits, there are three considerable negatives of relying on IP norms. First, IP norms do not prevent misappropriation by third parties who are not part of the comedy community.¹⁰³ For example, if a company wanted to take part of a comedian's routine and use it for a commercial, the fear of a negative reputation within the comedy community likely would not prevent misappropriation to the same extent as it might for one comedian stealing another comedian's material.¹⁰⁴ Second, IP norms often require enforcement of standards in a crude manner that may be seen as uncivilized. For example, comedians usually have to enforce standards on their own, often through threats or violence. In cases of alleged joke theft, comedian Jim Mendrinis stated that sometimes the best remedy is "a punch to the side of the head."¹⁰⁵ However, those comedians who are unwilling to take such actions may be left with no remedy at all. Finally, IP norms are less likely than formal law to provide uniform protection for all comedians. Enforcement of norms-based sanctions often varies depending on a comedian's success or reputation. Those that are more successful may garner the benefit of any doubt regarding alleged joke theft.¹⁰⁶ This is partly due to the fact that audiences see comedy as a form of entertainment rather than art.¹⁰⁷ If a famous comedian steals material from a comedian who is not as successful, society tends to believe the more successful comedian, and either way, audiences likely do not mind if they are

¹⁰² See Oliar & Sprigman, *supra* note 7, at 1794.

¹⁰³ See 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, 63–64 (2012).

¹⁰⁴ *Id.* There are of course other protections from a company overtly stealing a comedian's routine, but a bad reputation within the comedy industry, or threats from other comedians, likely will not have the same effect on the company as it might on another comedian.

¹⁰⁵ William Fisher *Copyright, Spring 2013*, *supra* note 15, at 6:17–:26; see also *id.* at 6:47–:56, 22:15–:31.

¹⁰⁶ *Id.* at 7:36–:47, 10:35–:48.

¹⁰⁷ Oliar & Sprigman, *supra* note 7, at 1824.

entertained, and comedy clubs may be more interested in what generates revenue.

VI FINDING A SOLUTION

A meaningful solution to comedians' lack of protection for their intellectual creations requires creating a system that (1) facilitates the proper exchange of comedic material, (2) provides increased protection for that material, and (3) improves a comedian's ability to rely on existing U.S. copyright law.

Comedians could better protect their innovations through the creation of a copyright database that utilizes a licensing platform to facilitate the exchange of comedic material. This database, or Digital Joke Exchange (DJE), would exist within a more generalized informational portal that provides resources and summarizes existing intellectual property laws and then links individuals to the DJE. The informational portal, or IP Portal, would initially focus on copyright law as it applies to everyone, not just comedians. It would then connect users to the DJE, where they could gather more specific information about protecting comedic material and also exchange their material through the DJE's licensing platform. Eventually, the IP Portal would expand to provide information on all areas of intellectual property law and act as a reliable resource for intellectual property matters. It would then link users to a variety of industry-specific databases as those are established over time. This setup would help comedians protect their intellectual property through the DJE, but also pave the way for improvement in other industries.

The United Kingdom is in the process of creating a similar system known as the Copyright Hub.¹⁰⁸ The Copyright Hub is a user-friendly online gateway to information about copyright law in the United Kingdom, and it also acts as a platform for exchanging or gaining permission to use copyrighted material.¹⁰⁹ It is led by an organization working in collaboration with music, publishing, and other industries to link together this information on copyright protection and aid in the exchange of intellectual property.¹¹⁰ The Copyright Hub recently completed its alpha version of its licensing platform, which will allow

¹⁰⁸ *Welcome to the Copyright Hub*, COPYRIGHT HUB, <http://www.copyrighthub.co.uk/> (last visited Dec. 30, 2014).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

it to work with a number of businesses to enable the licensing of simple pictures.¹¹¹ In addition to facilitating the licensing of intellectual property within different industries, the United Kingdom estimates the Copyright Hub will generate approximately two billion pounds for its economy by 2020.¹¹²

This same sort of model could be applied within the United States and specifically to the comedy industry. The DJE would act as a licensing platform to facilitate the exchange of intellectual property. It would also provide industry-specific information that helps comedians protect their material through existing copyright law, regardless of whether users actually exchange intellectual property through the DJE. Those that register their material with the DJE would recognize several benefits, including the existence of an independent review panel that would monitor the DJE and resolve conflicts between users. Comedians could register their material with the DJE regardless of whether the material is already registered with the U.S. Copyright Office. Simply put, the DJE would provide an additional layer of protection for comedic material, but it is not meant to supplant existing copyright law. The DJE's primary focus would be facilitating the simple, proper exchange of material to help reduce the occurrence of joke theft.

A. The Digital Joke Exchange (DJE)

The DJE would provide additional information about protecting comedic material through existing U.S. copyright law. Much of this information is already available through free resources, but not in a collective, easily accessible format. More importantly, the DJE would act as a licensing platform to facilitate the exchange of material. Individuals could register their material with the DJE as text, recordings, or videos, regardless of whether that material is registered with the U.S. Copyright Office. Those that register material with the DJE would benefit from the existence of an independent review panel (Arbitration Panel) that monitors the DJE and resolves disputes. This would provide an additional layer of protection for comedians. However, as noted, the DJE is only meant to supplement existing

¹¹¹ *Copyright Hub and the Digital Catapult Announce Next Phase of Development*, DIGITAL CATAPULT (Dec. 9, 2014), https://digital.catapult.org.uk/news-template/-/asset_publisher/tQc3cRegag35/ConnectEvent/id/17140107.

¹¹² See *Sweeping Intellectual Property Reforms to Boost Growth and Add Billions to the Economy*, *supra* note 20.

laws and would function independently of current U.S. copyright law. Finally, the DJE would be controlled and funded by a not-for-profit organization comprised of individuals with extensive knowledge of the comedy industry that could adapt its guidelines to better suit the industry.

1. Providing Information on Existing U.S. Copyright Law

Outside of facilitating the exchange of intellectual property, the DJE would provide information to comedians on how they can better protect their material and enforce their rights through existing U.S. copyright law. This would include highlighting the notable doctrinal and practical barriers described above, such as the fixation requirement and the high costs of attaining protection and enforcing those rights.¹¹³ It would also include providing information on how to register material with the U.S. Copyright Office and the benefits of doing so. For example, in the event of an infringement action, statutory damages of up to \$150,000 may be available to owners of registered material, but only if that material is registered within three months of publication of the material or one month of learning of an alleged infringement, whichever occurs first.¹¹⁴ While this information may be beneficial to many industries, its significance heightens with respect to the comedy industry because actual damages from joke theft may be minimal or difficult to calculate.¹¹⁵ Most of this information is generally available through the U.S. Copyright Office or other free resources and often may already be known by comedians. However, the DJE would present this information in a collective, easily understandable format and in a manner that is tailored for the comedy industry and its problems.

2. Facilitating the Exchange of Material

More importantly, the DJE would act as a licensing platform in which individuals could exchange comedic material. It would allow the exchange of material that is registered with the DJE and provide several additional benefits, including reviewing and monitoring of the material by the DJE Arbitration Panel.

¹¹³ See *supra* Part IV.

¹¹⁴ 17 U.S.C. § 412 (2012).

¹¹⁵ See Oliar & Sprigman, *supra* note 7, at 1799–1801.

a. Registering with the DJE

Generally, the DJE would allow registration of material that would likely qualify as copyrightable under current U.S. copyright law.¹¹⁶ Specifically, it must be an “original work[] of authorship fixed in [a] tangible medium of expression.”¹¹⁷ However, the DJE would function independently of existing U.S. copyright law, and registration with the DJE would not assure that the material is copyrightable. For those comedians that did not want to participate in the DJE, existing copyright law would likely still be available to them. However, registering with the DJE would provide important benefits.

Registration with the DJE would bring comedic material under the province of the DJE Arbitration Panel, which would monitor the DJE and resolve disputes. Assuming a comedian’s material could be properly registered with the DJE, there are several aspects of registration that would establish the foundation for how the Arbitration Panel would resolve potential disputes. First, the DJE Arbitration Panel would award priority of authorship in a manner similar to U.S. patent law and grant protection to the first author to file a joke.¹¹⁸ In the event of a disagreement over the ownership of a joke, this first-author-to-file system would also allow some interpretation from the Arbitration Panel as to who was an actual author of a particular joke, and it would largely keep intact the doctrine of independent creation.¹¹⁹

Second, the DJE would offer protection of a joke for twenty-five years, as opposed to the life of the author plus seventy years as is the case under existing copyright law.¹²⁰ This proposal of a shortened period is due largely to the fact that the Arbitration Panel may and likely will consider additional factors beyond the rights granted under existing copyright law.¹²¹ Third, the DJE would grant a one-year grace period for filing which would allow comedians leeway for

¹¹⁶ See *supra* Part IV.

¹¹⁷ 17 U.S.C. § 102(a).

¹¹⁸ See *America Invents Act (AIA) Frequently Asked Questions*, U.S. PATENT AND TRADEMARK OFFICE, http://www.uspto.gov/aia_implementation/faqs_first_inventor.jsp (last visited Dec. 30, 2014) (discussing the recent change to the U.S. patent system from a first-to-invent to a first-inventor-to-file system under the Leahy-Smith America Invents Act).

¹¹⁹ See *supra* Part IV.

¹²⁰ 17 U.S.C. § 302(a).

¹²¹ See *infra* Part VI.A.2.b.

registering their material with the DJE, such as while they are on tour. Similar to U.S. patent law, public dissemination of a comedian's own material would start the one-year grace period and would prevent another comedian from registering that material.¹²² For example, suppose comedian Louis C.K. spent months preparing new material for a performance on *The Tonight Show* with Jimmy Fallon. Louis C.K. would be able to register that material with the DJE prior to his appearance on *The Tonight Show*, or within one year of that performance, and still be protected by the DJE. If Louis C.K. did not register that material within one year, he would be barred from registering it with the DJE. However, being barred from registration would not mean other comedians are free to use his jokes, it would simply mean he could not rely on the DJE Arbitration Panel to resolve a dispute about that joke. Instead, he would have to resort to other means, such as existing copyright law.

Fourth, material on the DJE would be cataloged based on general topics and would become available for other DJE registrants to view. It would not be available for the general public to view until one year after registration, unless the registrant chose to publish the material before the one-year period expires. This one-year period may help comedians protect their material and perform it without it becoming immediately available to the public. However, in this age of technology, it is likely that material posted on the DJE would become available to the public anyway. Despite this, audiences generally only care about the delivery of a joke,¹²³ making it less likely that allowing others to view a comedian's material would negatively affect that comedian's future ability to perform the material, especially if the material is only registered as text.

Fifth, comedians could register their jokes with the DJE in several different formats, including text, recordings, and videos, and each registered joke would be given a unique identifying number.¹²⁴ Finally, the DJE would allow for audience and social media interaction. Continuing with our Louis C.K. example, individuals in the audience at *The Tonight Show* when Louis C.K. performed could

¹²² See 35 U.S.C. § 102(b) (2012).

¹²³ See generally Oliar & Sprigman, *supra* note 7; see also William Fisher *Copyright, Spring 2013*, *supra* note 15, at 19:14–53.

¹²⁴ See FISHER, *supra* note 51, at 203 (In discussing a potential alternative compensation system that may properly incentivize the production of goods, Professor Fisher states that one aspect of registration under such a system would be the use of a unique identifier to track digital copies of songs and movies.).

post about the performance, upload a video of it, and tweet about it. Keeping documentation of this in one centralized location would help audiences and other comedians know who may have come up with a particular joke first.

b. The DJE Arbitration Panel

Registration with the DJE would offer increased protection for a comedian's intellectual material and bring that work under the province of the DJE Arbitration Panel. Specifically, registering one's material with the DJE would require an agreement for disputes to be handled by the Arbitration Panel. The Arbitration Panel should be comprised of members of the comedy and legal communities, and those individuals would have some discretion in laying the foundation for how disputes will be resolved. While each decision by the Arbitration Panel could be handled differently, there would be a general set of standards that each registrant would agree to upon registration.¹²⁵ For example, a decision by the DJE Arbitration Panel would generally preclude further legal action on the same issues within U.S. federal courts. However, the specific rules that ultimately govern DJE-registered material should be adapted by those that have more experience in the comedy and legal communities.

Additionally, decisions by the Arbitration Panel would not have to be grounded in existing copyright law. The Arbitration Panel could take into consideration other factors and circumstances that are generally beyond the scope of U.S. copyright protection. For example, the Arbitration Panel could consider factors such as whether the alleged thief took the joke's punchline, copied its general premise, or told it in a similar way. Those more experienced within the industry likely would have more success properly resolving disputes than a court might.¹²⁶ As noted previously,¹²⁷ the Arbitration Panel's ability to consider additional criteria is partially why material would

¹²⁵ See, e.g., *International Dispute Resolution Procedures: Including Mediation and Arbitration Rules*, AM. ARBITRATION ASS'N (June 1, 2009), http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_002037&revision=latestreleased.

¹²⁶ However, many of the barriers that prevent comedians from relying on existing copyright law to protect their material would still exist regardless of whether a comedian was looking to enforce his or her rights under copyright law or through the DJE. See *supra* Part IV. The Arbitration Panel would have more discretion and would function differently, but in general it would likely still face some of the difficulties that exist for comedians looking to protect their material under existing copyright law. See *supra* Part VI.

¹²⁷ See *supra* Part VI.A.2.a.

be protected for a shorter time period. In other words, the rights granted to DJE-registered material could be broader than those rights under existing copyright law. The Arbitration Panel could find that a registrant of the DJE has infringed another's DJE-registered material, even if that infringement action would likely be unsuccessful if brought under existing copyright law. Because these rights would be broader, they should not be granted for the same time period as more limited rights are under U.S. copyright law. Finally, the Arbitration Panel and the parties could choose to publicize evidence. This could help eliminate repeat offenders and separate out those individuals who seemingly appear in many disputes.

3. Controlling and Funding the DJE

Just like the U.K.'s Copyright Hub, the DJE would likely be controlled by a not-for-profit organization, and the DJE Arbitration Panel would function as part of this organization. This organization should be comprised of members of the comedy and legal communities. However, the exact hierarchical structure could be determined at a later time. Beyond traditional funding methods,¹²⁸ the DJE could also be funded by registration fees or royalties from the exchange of intellectual property. Registering with the DJE would cost much less than the cost of registering with the U.S. Copyright Office.¹²⁹ The exact price would depend on other factors, such as the number of individuals that have to run the DJE and the existence of outside funding. In addition, the DJE could receive royalties from licensing deals that either occurred directly through the DJE, or through the use of a licensing organization that partners with the DJE. Finally, the DJE could also generate revenue through deals that allow attorneys to advertise their services to users. These considerations are certainly important, but they are beyond the scope of this discussion. Rather, this Comment focuses primarily on whether this type of solution could improve a comedian's ability to protect his or her own material.

B. The IP Portal

The DJE would function within a more generalized informational portal, or IP Portal, which provides pertinent intellectual property information and then links users to the DJE. The IP Portal would

¹²⁸ See, e.g., *infra* note 131 and accompanying text.

¹²⁹ See *supra* note 89 and accompanying text.

initially focus on copyright law as it applies to everyone, not just comedians, and later it could expand to include all areas of intellectual property law, including patent, trademark, and trade secret laws. This type of information is in large part already available through the U.S. Copyright Office and other free resources, but not in a simple and comprehensive online format.¹³⁰ Ideally, the IP Portal will turn into a reliable resource for all individuals seeking information about their intellectual property.

The IP Portal would then connect users to the DJE allowing them to gather more specialized information about protecting and exchanging comedic material. Eventually, the IP Portal could link users to a variety of industry-specific databases or licensing platforms as those are established over time. Finally, the IP Portal could also be controlled by a not-for-profit organization, but likely a different organization other than the DJE.¹³¹ This is primarily because the DJE should be controlled by an organization that has a better understanding of the comedy industry, while the IP Portal should be controlled by an organization with a broader understanding of copyright and intellectual property laws.

As mentioned, the IP Portal is only meant to be a gateway website that provides generalized, but important, intellectual property information, and then directs individuals to industry-specific resources or databases. This would allow for easy implementation of this part of the solution because it gives more freedom for different industries to choose if they want to participate. Industries that are not able to successfully rely on current intellectual property laws may create a platform similar to the DJE without largely disrupting current regimes. This would help adapt existing laws to specific industries and diminish the number of industries that are unable to rely on current intellectual property laws.¹³²

¹³⁰ See, e.g., U.S. COPYRIGHT OFFICE, COPYRIGHT BASICS (2012), available at <http://www.copyright.gov/circs/circ01.pdf> (last updated May 2012).

¹³¹ It could be funded through federal and state grants, donations, foundation funding, and the like. See Caron Beesley, *How to Start a Non-Profit Organization*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/blogs/how-start-non-profit-organization-0> (last updated Dec. 30, 2013); see also *How to Find Grants for Your Nonprofit Organization*, ENOCH PRATT FREE LIBRARY, <http://www.prattlibrary.org/locations/ssh/?id=3130> (last visited Dec. 30, 2014).

¹³² See *supra* Part V.

VII

ISSUES WITH THE DJE: WILL COMEDIANS USE IT?

It is important to note that no solution will solve all of the problems in the comedy industry. The DJE is only meant to address some of the issues and create an opportunity for continued improvement in this industry and others. One of the primary concerns with implementing the DJE is whether comedians will actually use it to facilitate the buying and selling of material. However, there are other benefits to this solution than just the exchange of intellectual property. For example, the IP Portal and industry-specific information provided within the DJE would be beneficial to all comedians looking for better ways to protect their intellectual property through existing copyright law.

There are also incentives for comedians to use the DJE in addition to those outlined above. This centralized database of material can help bridge the gap between writers and comedians. There are already numerous writers that are paid to come up with jokes for other comedians that could benefit from this type of database.¹³³ In the current system, if a stand-up comedian wanted to license a joke from a writer or another comedian, those exchanges are often done orally or through other informal means.¹³⁴ That word-of-mouth system may make it difficult for some comedians to find success in the industry or for experienced writers and comedians to find new talent. The DJE platform would help facilitate this exchange by allowing the licensing of material from all types of comedians in different geographic locations—similar to YouTube, but tailored for the comedy industry. One could argue that providing all this material in a centralized database may make it easier to steal material from others and actually hinder the exchange of intellectual creations. However, with the growing presence of technology and online sharing, the DJE would not be providing much of an increase in the public availability of material. Further, just because content is available online does not mean people will not attend events or shows in person.¹³⁵ This makes

¹³³ See, e.g., Peter J. Fogel, *Writing Jokes for Stand-Up Comics*, WRITERS WKLY. (Sept. 4, 2002), http://writersweekly.com/this_weeks_article/000562_09042002.html (stating that Rodney Dangerfield, Joan Rivers, and David Brenner purchase or purchased jokes from other writers).

¹³⁴ Oliar & Sprigman, *supra* note 7, at 1827–28.

¹³⁵ See, e.g., Everett Rosenfeld, *Future of Concerts: Social Wearables and Interactive Light Shows*, NBC NEWS (July 21, 2014), <http://www.nbcnews.com/tech/innovation/future-concerts-social-wearables-interactive-light-shows-n161396> (discussing that “[o]ne

it less likely that allowing others to access a comedian's material will negatively affect that comedian's ability to perform the material in the future, or that the DJE would provide greater access to material than is already available through the Internet. Perhaps more importantly, the DJE would also help facilitate the simple and proper exchange of comedic material, or at least draw more attention to this issue and a need for a solution. This should help incentivize use of the DJE. Joke theft is a recognized problem within the industry and comedians are looking for solutions. The DJE would extend more formalized protection to all comedians and work to solve this problem.

Notably, the DJE would likely provide little recourse for those instances in which one comedian registered a joke, and another individual stole that joke but was not a registrant of the DJE or had no interest in licensing the material. Ideally, all comedians will eventually rely on the DJE, but that of course will take time. In addition to the incentives described above, there are other steps that can be taken. For example, the comedy community could apply forms of pressure for others to use the DJE. Comedians that participate in the DJE could refuse to perform at comedy clubs that hire comedians who choose not to participate. In addition, society as a whole could pressure comedians to join the DJE. Whether audiences think it is wrong to steal a joke because of harm to the comedian, or simply for reasons of morality, people seem willing to help deter joke theft.¹³⁶ Also, by allowing some audience and comedian interaction, it will likely become more obvious and publicized which comedians are most frequently accused and found guilty of stealing others' material.

VIII POTENTIAL LEGAL CHANGES

As previously discussed, comedians seem to rely on extralegal IP norms because copyright law inadequately protects their intellectual creations.¹³⁷ However, significantly altering existing law to primarily benefit a single industry may prove difficult and inefficient. This is partially why the creation of the IP Portal and DJE would be so

in five millennials attended a music festival in the past year"); *see also William Fisher Copyright, Spring 2013, supra* note 15, at 19:32--54 (Mendrinós stating that comedy is a performance medium in which fans want to see their favorite comedian perform regardless of whether the comedian's material is original).

¹³⁶ *See generally* Oliar & Sprigman, *supra* note 7.

¹³⁷ *See supra* Part IV.

beneficial, as it provides a tailoring effect without radically changing existing laws. Despite this, there are legal changes that could help comedians enforce their copyrighted material under existing U.S. copyright law, or at least help deter joke theft.

The comedy industry is constantly changing and is a largely under-monetized area.¹³⁸ Because of that, providing increased legal protection that results in more lawsuits would likely be disfavored by those in the comedy industry. This is probably because many comedians do not have excess financial resources, and the costs of going through litigation would likely be too burdensome, or the costs would exceed the damages the comedian would receive even if he or she prevailed.¹³⁹ Therefore, providing increased damages in infringement actions within the comedy industry could help offset this downside. These increased damages could range anywhere from five to ten times what may normally be awarded¹⁴⁰ and also should include the potential to award attorneys' fees to the prevailing party in more instances.¹⁴¹ Unfortunately, providing increased damages or attorneys' fees may only help those instances in which the losing comedian has the financial assets necessary to pay those amounts. However, because of the rarity of lawsuits,¹⁴² the primary goal of these changes is not to increase lawsuits and monetary damages, but rather to deter joke theft in the first place.¹⁴³ Additionally, these increased damages would not resolve issues regarding the noted doctrinal barriers to receiving copyright protection on jokes because they would not make it easier to protect intellectual property. This is where the DJE would step in and aid in the protection of comedians' intellectual property, primarily through the use of the Arbitration Panel to help enforce a comedian's rights.

¹³⁸ See *William Fisher Copyright, Spring 2013*, *supra* note 15, at 15:28–34.

¹³⁹ See generally Oliar & Sprigman, *supra* note 7 (noting that joke stealing, which could result in a lawsuit, is rare).

¹⁴⁰ The highest statutory damage penalty, which is discretionary to the judge, is \$150,000. 17 U.S.C. § 504(c)(2) (2012); see also *supra* Part VI.B.

¹⁴¹ Attorneys' fees are available in some copyright actions. See 17 U.S.C. § 412.

¹⁴² Oliar & Sprigman, *supra* note 7, at 1798.

¹⁴³ Mendrinós stated that between getting \$150,000 in damages or someone not stealing his joke, he would rather someone just not steal his joke. *William Fisher Copyright, Spring 2013*, *supra* note 15, at 1:23:44–56.

CONCLUSION

The DJE will aid the comedy industry by (1) facilitating the proper exchange of comedic material, (2) providing increased protection for a comedian's intellectual creations, and (3) improving a comedian's ability to rely on existing U.S. copyright law. While it cannot solve every issue, the DJE is a more formalized solution that supplements existing U.S. copyright law, but it allows for the Arbitration Panel to consider existing norms within the comedy industry when reaching its decisions. Ideally, the Arbitration Panel will rarely be utilized. Instead, the increased ability to properly exchange comedic material through the DJE's licensing platform will help reduce the occurrence of joke theft and the need to adjudicate issues. At the very least, this approach will help draw attention to the need for a solution within the comedy industry, as well as other industries in intellectual property's "negative space." The DJE and IP Portal have the potential to benefit the U.S. economy and these other industries that struggle to rely on existing intellectual property laws.

