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IDEA VERSUS EXPRESSION DICHOTOMY IN COPYRIGHT LAW: ANALYSIS THROUGH STAND- UP COMEDY AND MAGIC TRICKS

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I. INTRODUCTION

Copyright law, at its heart, is a balancing act. On one side sits the creator, who deserves recognition and some degree of control over what they have made. On the other side sits society, which needs a free flow of ideas, information, and cultural expression. The idea vs. expression dichotomy is the legal tool that tries to maintain this balance. It tells us that no one can own an idea itself. A joke about corrupt politicians, for instance, is an idea. But if a comedian crafts a specific set of words, a particular rhythm, a unique punchline, and delivers it in a certain way, that expression may very well be protected under copyright law.

The dichotomy was first articulated clearly in the American case of *Baker v. Selden*¹ and has since been adopted across common law jurisdictions, including India. The principle also finds support in international intellectual property instruments such as the Agreement on Trade-Related Aspects of Intellectual Property Rights, commonly known as TRIPS,² which states that copyright protection shall extend to expressions and not to ideas, procedures, methods of operation, or mathematical concepts as such.

II. THEORETICAL FOUNDATIONS OF THE IDEA VS. EXPRESSION DICHOTOMY

A. Historical Development

The origin of the idea vs. expression distinction can be traced to the American Supreme Court's landmark judgment in *Baker v. Selden*.³ In that case, the Court held that a book on a system of bookkeeping was copyrightable as a literary expression, but the system of bookkeeping described in the book was not. The ideas, methods, and systems contained within the book were

¹*Baker v. Selden*, 101 U.S. 99 (1879).

²Agreement on Trade-Related Aspects of Intellectual Property Rights art. 9(2), Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

³ *Id.*

free for anyone to use, even if the specific expression of those ideas remained protected. This distinction laid the groundwork for what we now call the idea vs. expression dichotomy.

In the United States, this principle was further refined by Judge Learned Hand in *Nichols v. Universal Pictures Corp.*⁴ where he observed that the more abstract an element of a work, the less likely it is to receive copyright protection. He proposed what has become known as the "abstractions test," which invites courts to strip away layers of abstraction from a work until they reach the point where the remaining elements are no longer the author's original contribution but merely common ideas available to all.

In India, the Supreme Court adopted a similar approach in the landmark decision of *R.G. Anand v. Delux Films*⁵, which remains the foundational Indian authority on the idea vs. expression dichotomy. In this case, the Court held that no one can have a monopoly over an idea. If two authors independently choose to write about the same idea, one of them cannot claim that the other has infringed their copyright. What matters is whether the form, manner, arrangement, or the specific expression chosen by the original author has been copied.

B. Statutory Framework in India

The Copyright Act, 1957 is the primary legislation governing copyright in India.⁶ The Act protects "original literary, dramatic, musical and artistic works," "cinematograph films," and "sound recordings."⁷ The Act defines "literary work" broadly to include computer programs, tables, and compilations including computer databases.⁸ However, the Act does not define "idea" or "expression" as separate concepts, nor does it explicitly state the idea vs. expression rule. Indian courts have had to develop this principle through judicial interpretation, drawing from common law tradition and international norms.

Section 13 of the Act specifies the classes of works eligible for copyright protection.⁹ Section 16 makes clear that no person can claim any right or interest in any copyright except as provided under the Act itself.¹⁰ Together, these provisions imply that copyright is a statutory right, and anything not explicitly covered by the Act falls outside its protection. This is where the idea vs. expression distinction becomes critical: the Act protects the expression but has never been read to protect the underlying idea, concept, or theme.

⁴*Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

⁵*R.G. Anand v. Delux Films*, (1978) 4 SCC 118 (India).

⁶Copyright Act, 1957 (Act 14 of 1957), s. 13(1)(a) (India).

⁷Copyright Act, 1957 (Act 14 of 1957), s. 2(y) (India).

⁸*Id.* s. 2(o).

⁹Copyright Act, 1957 (Act 14 of 1957), s. 13.

¹⁰Copyright Act, 1957 (Act 14 of 1957), s. 16 (India).

The Supreme Court in *Eastern Book Co. v. D.B. Modak*¹¹ held that for copyright to subsist in a work, the work must be the result of the author's own intellectual effort and skill. This standard of "modicum of creativity" was specifically adopted in the Indian context, building on the reasoning of the United States Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*¹² It means that bare ideas, facts, and information that require no creative exercise cannot be copyrighted, while expressions of those ideas that reflect personal intellectual effort may well deserve protection.

C. TRIPS and International Obligations

India is a signatory to the TRIPS Agreement, which under Article 9(2) explicitly mandates that copyright protection shall extend to expressions and not to ideas. India has accordingly aligned its domestic copyright law with this international standard. The TRIPS framework thus provides an important interpretive tool for Indian courts dealing with the idea vs. expression dichotomy. When domestic legislation is silent on a point, courts can look to TRIPS as reflecting the legislative intent behind India's copyright framework, especially after the Copyright (Amendment) Act of 2012 which brought Indian law into greater conformity with international standards.

Scholars like Ricketson and Ginsburg have argued that the TRIPS obligation creates a minimum floor, not a ceiling.¹³ Countries may choose to offer stronger protections, but they cannot protect ideas as such. This ceiling on idea protection is particularly relevant in the context of stand-up comedy and magic, where many elements of a performance could be characterised as "ideas" or "techniques," and the law must decide which of those, if any, rise to the level of protectable expression.

III. STAND-UP COMEDY AND COPYRIGHT LAW IN INDIA

A. The Nature of Stand-Up Comedy as a Creative Work

Stand-up comedy is a peculiar art form. It lives and breathes in performance. Unlike a novel or a film, it is built on the comedian's personality, timing, delivery, and relationship with the audience. A joke that works brilliantly for one comedian may fall flat completely when told by another, even using the exact same words. This performative quality of stand-up comedy creates a complicated relationship with copyright law.

¹¹*Eastern Book Co. v. D.B. Modak*, (2008) 1 SCC 1 (India).

¹²*Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

¹³Staniforth Ricketson & Jane C. Ginsburg, *International Copyright and Neighbouring Rights* 410 (2d ed. 2006).

From a legal standpoint, stand-up comedy would typically be protected under the Copyright Act, 1957 as a "literary work" if the jokes are written down, or as a "dramatic work" if the performance itself has a sufficient degree of fixation and dramatic structure. The Act defines "dramatic work" to include any piece for recitation, choreographic work, or entertainment in dumb show, the scenic arrangement or acting of which is capable of being performed before an audience. A stand-up comedy show, with its scripted jokes, deliberate pauses, and rehearsed audience interactions, could reasonably fall within this definition.

However, the real problem arises not at the level of classification but at the level of what precisely is protected. For instance, if a comedian performs a set about the absurdity of arranged marriages in middle-class Indian families, the idea of making fun of arranged marriages is clearly not protectable. Countless comedians, filmmakers, novelists, and playwrights have explored this subject. The idea belongs to everyone. But if the comedian constructs a specific narrative, populates it with particular characters and dialogues, and delivers it in a uniquely structured routine, the expression of that narrative may well be protected.

B. Key Indian Cases on Comedy and Expression

The Delhi High Court's decision in *Anil Gupta v. Kunal Dasgupta*¹⁴ is one of the most instructive Indian cases dealing with the protection of creative concepts in the entertainment industry. In this case, the plaintiff claimed copyright in the concept of a television reality show about matchmaking. The Court held that a concept or idea for a television show is not, by itself, protectable. What is protectable is the way in which that concept has been developed and expressed in a concrete, specific form. This case, while dealing with television concepts, is directly relevant to comedy because it reinforces the idea that the underlying concept of a joke or a comedy routine is not protectable, even if its specific expression is.

In *Mansoor Haider v. Yashraj Films*¹⁵, the Bombay High Court addressed the question of whether the plot of a film could be protected. The Court observed that a basic plot or storyline is an idea, and it is only when the plot is developed with specific events, dialogues, and characters that it becomes an expression capable of copyright protection. The reasoning in this case is highly analogous to the situation of a stand-up comedian who argues that another comedian has "stolen" their joke. Unless the specific words, structure, and delivery have been replicated, the mere fact of using the same idea or premise for a joke would not constitute infringement.

¹⁴*Anil Gupta v. Kunal Dasgupta*, (2002) 24 PTC 1 (Del.) (India).

¹⁵*Mansoor Haider v. Yashraj Films*, (2014) 59 PTC 292 (Bom.) (India).

Similarly, in *Zee Telefilms Ltd. v. Sundial Communications Pvt. Ltd.*¹⁶, the Bombay High Court dealt with the question of whether a detailed written concept note for a television programme could be protected. The Court held that once an idea is put down in a specific and detailed form, it can transition from being a mere idea to a protectable expression. This transition is crucial for comedians because it suggests that a fully written and structured comedy script, even if it has not yet been performed, could attract copyright protection.

C. The Joke Theft Problem in Indian Comedy

Joke theft is a major concern in the Indian stand-up comedy community. With the rise of digital platforms such as YouTube, Instagram, and streaming services like Netflix and Amazon Prime, Indian comedians have built significant careers on the strength of their original comedy. The ease with which comedy content can now be recorded, shared, and reproduced has made the problem of joke theft more acute than ever before. Yet comedians rarely go to court in India. This is partly because litigation is expensive and slow, partly because the harm from joke theft is difficult to quantify in monetary terms, and partly because the social norms of the comedy community have traditionally handled these disputes informally. Comedy circles have their own mechanisms of public shaming and ostracism that tend to be more immediately effective than a copyright lawsuit that could take years to resolve.

However, from a legal standpoint, a comedian who has a fully scripted joke set has a strong case for copyright protection in the literary or dramatic expression of those jokes. The difficulty lies in distinguishing between a comedian who has genuinely stolen specific jokes and one who has merely arrived at the same comedic premise independently. As the Delhi High Court observed in *R.G. Anand*¹⁷, independent creation of a similar work is a complete defence to a copyright infringement claim. Two comedians can both have jokes about, say, the chaos of Indian traffic, without either of them infringing the other's copyright, provided that their specific expressions are independently arrived at.

Academic commentary has also highlighted this problem in the specific context of stand-up. Gorenberg, writing in an American context but with observations relevant to India, has noted that the comedy community's reliance on informal norms rather than copyright law is not merely a pragmatic choice but reflects a genuine uncertainty about the scope of copyright protection for jokes.¹⁸ This uncertainty stems directly from the idea vs. expression dichotomy:

¹⁶*Zee Telefilms Ltd. v. Sundial Communications Pvt. Ltd.*, (2003) 27 PTC 457 (Bom.) (India).

¹⁷*R.G. Anand v. Delux Films*, (1978) 4 SCC 118 (India).

¹⁸Marc Gorenberg, *Trade Secrets in Stand-Up Comedy*, 38 Loy. L.A. Ent. L. Rev. 177 (2018).

it is simply very hard to tell where the idea of a joke ends and the expression of that joke begins.

D. Performers' Rights and Stand-Up Comedy

An important dimension of Indian copyright law that is often overlooked in the context of stand-up comedy is the protection offered through performers' rights. Chapter VIII of the Copyright Act, 1957 deals specifically with "Performers' Rights."¹⁹ Section 2(qq) defines a "performer" to include an actor, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture, or any other person who makes a performance.²⁰ A stand-up comedian clearly fits within the category of a person delivering a lecture or making a performance.

Section 38A of the Act grants a performer certain exclusive rights, including the right to make a sound recording or visual recording of the performance, to reproduce it, to broadcast it, and to communicate it to the public.²¹ These performers' rights, which last for fifty years from the year of performance, offer an alternative pathway to protection for stand-up comedians that does not require them to engage with the complicated idea vs. expression analysis. If someone records a comedian's live performance and distributes it without consent, the comedian has a clear case under performers' rights, irrespective of whether the jokes themselves are sufficiently "expressive" to attract full copyright protection.

IV. MAGIC TRICKS AND THE COPYRIGHT CONUNDRUM

A. What is a Magic Trick in Legal Terms?

Magic tricks present an even more interesting challenge for copyright law than stand-up comedy. A magic trick typically consists of three elements: the method or secret behind the trick, the performance or presentation of the trick, and the effect or what the audience perceives. The relationship between these three elements is legally fascinating and intellectually rich. The method or secret behind a magic trick is, almost certainly, not protectable by copyright. It is a technique, a procedure, a method of operation. The TRIPS Agreement explicitly excludes procedures and methods of operation from copyright protection. The Copyright Act, 1957 similarly has no provision for protecting techniques or methods. The secret of how a coin disappears from a magician's hand is an idea, a method, and it cannot be owned by any one magician through copyright law.

¹⁹Copyright Act, 1957 (Act 14 of 1957), ss. 38, 38A (India) (providing performers' rights).

²⁰Copyright Act, 1957 (Act 14 of 1957), s. 2(qq) (India) (defining "performer").

²¹ Copyright Act, 1957 (Act 14 of 1957), s. 38A (India)

The performance of the trick, however, is a different matter. If a magician has scripted a specific patter, a unique narrative, particular staging, and a distinctive presentation of the illusion, this combination could constitute a dramatic work capable of copyright protection.²² The American scholar Dekoven has argued persuasively that magic performances, when they involve scripted dialogue, choreography, and dramatic presentation, should be treated as dramatic works under copyright law. This argument is equally available in India under the Copyright Act, 1957, which gives broad enough content to the definition of dramatic work to accommodate the performative aspects of a magic show.

B. The Teller v. Dogge Case: An International Perspective

While there is no directly on-point Indian case dealing with copyright in magic tricks, the American decision in *Teller v. Dogge*²³ is instructive and has been discussed extensively by scholars working in the Indian intellectual property context. In that case, the famous magician Teller (of Penn and Teller) sued a performer who had reproduced his act called "Shadows," in which a shadow of a rose is cast on a screen and the rose is cut when its shadow is cut. The Nevada District Court found that the performance was eligible for copyright protection as a dramatic work, even though the method behind the illusion was not protectable.

The court in *Teller* drew a clear line between the secret method (not protectable) and the dramatic presentation (protectable). This distinction maps neatly onto the idea vs. expression dichotomy. The idea of cutting a shadow to appear to cut a flower is not protectable. The specific dramatic arrangement, choreography, music, and visual effects that Teller assembled into his performance of "Shadows" are protectable. An Indian court dealing with a similar dispute would likely find the reasoning in *Teller* highly persuasive, particularly given that Indian courts do look to American and English precedents in intellectual property matters.

C. Magic in the Indian Context

Magic and conjuring have a long history in India. The Indian rope trick is perhaps the most famous illusion associated with India, though its origins remain contested. In the contemporary context, Indian magicians like P.C. Sorcar Sr. and Jr. have achieved international fame, and numerous performers work in the tradition of street and stage magic across the country.

Section 2(qq) of the Copyright Act, 1957 explicitly includes "conjurers" in the definition of

²²Robert M. Dekoven, *Magic as a Performing Art: Copyright of the Performing Arts*, 8 Cardozo Arts & Ent. L.J. 69 (1989).

²³*Teller v. Dogge*, 8 F. Supp. 3d 1228 (D. Nev. 2014).

"performer."²⁴ This is a very important and often undernoticed provision. It means that a magician who performs before an audience has performers' rights under Section 38 and 38A of the Act.²⁵ If someone records a magician's stage show and sells it or streams it online without consent, the magician can take action under performers' rights even if the underlying tricks are not protectable as such.

However, performers' rights do not fully solve the problem that arises when one magician simply replicates another's act. Performers' rights protect against unauthorised recording and reproduction, not against imitation. If Magician B watches Magician A's show and then performs the same routine with the same patten and staging, without making any recording, the performers' rights framework would not directly apply. Magician A would then have to rely on the copyright framework for dramatic works, which brings us back to the idea vs. expression analysis.

The question then becomes: at what point does a magic performance become sufficiently specific and original to attract copyright protection as a dramatic work? The Delhi High Court's reasoning in cases like *Anil Gupta*²⁶ and the Bombay High Court's approach in *Zee Telefilms*²⁷ both suggest that the work must go beyond a mere concept or formula and must be developed into a specific, detailed, and original creative expression.

D. Trade Secrets as an Alternative Protection

It is worth noting that the magic community has historically relied more on trade secrets than on copyright to protect its most valuable asset: the method. The secrecy that surrounds magical methods is itself a form of protection, albeit an informal one. The magician's code, which is the informal ethical norm that magicians should not reveal the secrets of their fellow performers, operates as a kind of industry-specific trade secret regime.

India does not have a dedicated trade secrets statute, though courts have recognised trade secret protection through the law of breach of confidence and the principles of equity. The Supreme Court's decision in *Tata Consultancy Services v. State of Andhra Pradesh*²⁸ recognised that confidential business information can receive legal protection, and this reasoning could extend to the secret methods behind magic tricks if they are shared in a relationship of confidence. However, this form of protection is limited: it can prevent a former assistant from revealing a

²⁴ Copyright Act, 1957 (Act 14 of 1957), s. 2(qq) (India) (defining "performer").

²⁵ Copyright Act, 1957 (Act 14 of 1957), s. 38A (India)

²⁶ *Anil Gupta v. Kunal Dasgupta*, (2002) 24 PTC 1 (Del.) (India).

²⁷ *Zee Telefilms Ltd. v. Sundial Communications Pvt. Ltd.*, (2003) 27 PTC 457 (Bom.) (India).

²⁸ *Tata Consultancy Services v. State of Andhra Pradesh*, (2005) 1 SCC 308 (India).

magician's secrets to a competitor, but it cannot prevent an independent innovator from developing the same technique independently.

V. APPLYING THE ABSTRACTIONS TEST AND THE MERGER DOCTRINE

A. The Abstractions Test

Judge Learned Hand's abstractions test, articulated in *Nichols*²⁹ and widely adopted in common law jurisdictions, provides a useful analytical framework for thinking about comedy and magic in the context of the idea vs. expression dichotomy. The test asks courts to strip a work down through layers of abstraction. At the most specific level, a joke is a particular arrangement of words, delivered in a particular order, with specific pauses and emphases. At the next level of abstraction, it is a structured narrative with a setup and a punchline. At a higher level, it is a comic premise. At the highest level of abstraction, it is simply an observation about human nature or society.

Copyright protection is available at the lower, more specific levels of abstraction but not at the higher, more general levels. This means that the specific words of a joke, its particular narrative structure, and the unique way in which the premise is developed and resolved are protectable. But the general comic premise, the broad theme, and the underlying observation about life are all in the public domain.

Applying this to an Indian example: if a comedian writes a specific set piece about the confusion that arises when an Indian family tries to navigate a fancy restaurant with an incomprehensible menu, every layer of specific creative expression in that set piece is protectable. But the general idea of comedic situations arising from cultural unfamiliarity with fine dining is not protectable. Another comedian can write jokes about the same general theme, as long as the specific jokes are independently created.

B. The Merger Doctrine

The merger doctrine is a closely related principle that operates as a limitation on copyright protection. It holds that when there is only one or a very limited number of ways to express a particular idea, the idea and the expression merge, and neither can be protected. This prevents copyright from effectively monopolising an idea by giving exclusive rights in its only possible expression.

²⁹ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

The merger doctrine has particular relevance in the context of magic tricks. Many magic tricks have a very limited number of ways in which they can be performed and described. The explanation of a card trick, for instance, may be so constrained by the nature of the trick itself that there is essentially only one way to describe how it works. In such cases, the description would merge with the idea, and neither would be protectable. This is consistent with the reasoning in *Baker v. Selden*³⁰ where the Court held that forms necessary for use in the accounting system described in the book were not protectable because they had merged with the idea of the accounting system.

In the Indian context, the merger doctrine has been implicitly applied even if not always explicitly named. Courts in India have consistently held that where an expression is so closely tied to an idea that protecting the expression would effectively give a monopoly over the idea, copyright protection will not be extended. This was implicit in the Delhi High Court's analysis in *Rupendra Kashyap v. Jiwan Publishing House*³¹, where the Court held that examination questions, which necessarily reflect the subject matter of the exam, could not attract copyright protection because doing so would restrict others from testing students on the same subject matter.

C. The Scenes-a-faire Doctrine

Allied to both the abstractions test and the merger doctrine is the scenes-a-faire doctrine, which holds that elements of a work that are standard, stock, or inevitable given the genre or subject matter of the work are not protectable. In the context of comedy, this doctrine would exclude from protection the standard tropes of the genre: the self-deprecating opening, the callback joke, the rule of three in comedy writing, and the standard formats of observational humour. These are the tools of the comedian's trade, and no individual comedian can own them.

For magic, the doctrine would similarly exclude standard illusions that have been in the public domain for decades or centuries: the pulling of a rabbit from a hat, the sawing of an assistant in half, the use of a magic wand. These are stock elements of the magician's vocabulary, and no performer can claim exclusive copyright in them. What a performer can protect is the unique way in which these standard elements are combined, staged, and presented in a distinctive and original manner.

³⁰ *Baker v. Selden*, 101 U.S. 99 (1879).

³¹ *Rupendra Kashyap v. Jiwan Publishing House*, 1996 PTC (16) 439 (Del.) (India).

VI. FIXATION, ORIGINALITY, AND THE LIVE PERFORMANCE PROBLEM

A. The Requirement of Fixation

One of the interesting features of the Indian copyright regime is the question of whether fixation is a formal requirement for copyright protection. Unlike the United States, where fixation in a tangible medium of expression is explicitly required, the Copyright Act, 1957 in India does not expressly state that a work must be fixed in writing or any other form. However, the practical reality is that most works that receive copyright protection are, in some sense, fixed, because it is difficult to establish the existence and content of an unfixed work.

For stand-up comedy, this creates a potential problem. Many comedians develop their material through improvisation and live performance, refining jokes over multiple shows. If a joke has never been written down, recorded, or otherwise fixed, it may be very difficult to establish the existence, content, and originality of that joke in a court of law. The Delhi High Court in various entertainment-related cases has emphasised the importance of being able to demonstrate the content of the work claimed to be infringed.

For magic tricks, the situation is even more complicated. A magic performance is by its very nature resistant to description in fixed form, because describing it in full would reveal the secret. A magician who wants copyright protection for their act is thus caught in a dilemma: fixing the work in writing would require describing the very secret that needs to remain hidden. One solution to this dilemma is to fix the performative, dramatic elements of the act without revealing the method. A script that describes the patter, the staging, the music, the visual effects, and the dramatic arc of a magic show could be registered with the Copyright Office without revealing the technical secret of how the illusions are produced. Such a script would be a genuine dramatic work and would attract copyright protection for those elements, even though the method itself would remain outside copyright.

B. Originality and the Modicum of Creativity Standard

For a work to attract copyright protection in India, it must be original. As the Supreme Court established in *Eastern Book Co. v. D.B. Modak*³², originality in India requires a modicum of creativity and not merely the investment of labour and skill. This is a significant standard for stand-up comedy and magic, both of which clearly involve considerable creativity, skill, and intellectual effort.

³² *Eastern Book Co. v. D.B. Modak*, (2008) 1 SCC 1 (India).

A carefully crafted comedy set, developed over months of writing and performance refinement, would easily satisfy the originality standard. The comedian's choices about structure, language, timing, narrative arc, and specific jokes all reflect personal creative choices that go well beyond mere mechanical effort. Similarly, a magic act that has been designed with original staging, choreography, dialogue, and visual presentation reflects substantial creative investment.

The challenge, as always, comes when we try to identify which specific elements of the comedy or magic work are original and which are merely borrowed from the common stock of comedic or magical tradition. This requires a careful, element-by-element analysis that courts in India have shown they are capable of performing, as demonstrated by the detailed analysis in cases like *Urmi Juvekar Chiang v. Global Broadcast News Ltd.*³³ where the Bombay High Court engaged in a close comparison of the plaintiff's and defendant's works to identify which elements were original and which were common to the genre.

VII. MORAL RIGHTS AND DIGNITY IN COMEDY AND MAGIC

An important dimension of Indian copyright law that has particular relevance for comedians and magicians is the provision for moral rights under Section 57 of the Copyright Act, 1957.³⁴ The section grants authors the right to claim authorship of their work and to object to any distortion, mutilation, or modification of the work that would be prejudicial to their honour or reputation.

For a stand-up comedian, moral rights could be relevant in situations where a joke is attributed to the wrong comedian, or where a joke is modified in a way that changes its meaning or makes it appear more offensive than the original. For instance, if a comedian tells a nuanced satirical joke that critiques a social practice, and someone edits a clip of that joke to remove the context and make it appear as a straightforward offensive statement, the comedian might have a moral rights claim under Section 57.

The Supreme Court in *Indian Performing Rights Society v. Eastern India Motion Pictures*³⁵ recognised the importance of authors' rights in the broader sense, and the evolution of Section 57 jurisprudence in India has been towards giving it a robust and meaningful content. Moral rights in comedy and magic are an underexplored area of Indian intellectual property law that

³³*Urmi Juvekar Chiang v. Global Broadcast News Ltd.*, (2008) 38 PTC 248 (Bom.) (India).

³⁴Copyright Act, 1957 (Act 14 of 1957), s. 57 (India) (moral rights of authors).

³⁵*Indian Performing Rights Society v. Eastern India Motion Pictures*, AIR 1977 SC 1443 (India).

deserves greater scholarly attention.

VIII. POLICY CONSIDERATIONS AND THE WAY FORWARD

A. The Public Domain and the Free Flow of Culture

One of the strongest policy arguments against extending copyright protection too aggressively into the domains of comedy and magic is the importance of maintaining a robust public domain. Comedy has always borrowed from itself. The tradition of stand-up comedy is built on shared cultural references, common comedic techniques, and a continuous conversation between comedians about the human condition. If copyright law were to allow comedians to lock up premises, styles, or broad comedic approaches, it would have a chilling effect on the entire genre.

Scholars like Raustiala and Sprigman have noted, in the context of fashion design, that industries which have traditionally operated with low intellectual property protection sometimes thrive precisely because of this low protection.³⁶ The constant borrowing, adaptation, and recombination drives innovation rather than stifling it. This observation is highly relevant to comedy, where the borrowing of comedic structures, premises, and even styles between comedians has been a driver of the art form's development rather than a barrier to it.

B. The National IPR Policy and Creative Industries

The National Intellectual Property Rights Policy of 2016, adopted by the Government of India, emphasises the importance of a strong and balanced intellectual property framework that promotes innovation and creativity while protecting public interest.³⁷ The Policy's vision of "Creative India; Innovative India" has particular relevance for the creative industries of comedy and entertainment. As India's stand-up comedy industry has grown into a significant cultural and economic force, there is a growing need for a clear and workable legal framework that can protect comedians' creative work without unduly restricting the free exchange of ideas.

A clear legislative or judicial articulation of how the idea vs. expression dichotomy applies specifically to stand-up comedy and magic would serve the interests of both creators and society. Creators would benefit from knowing clearly what aspects of their work are protected. The public and other creators would benefit from knowing clearly what remains free to use and

³⁶Kal Raustiala & Christopher Sprigman, The Piracy Paradox: Innovation and Intellectual Property in Fashion Design, 92 Va. L. Rev. 1687 (2006).

³⁷Ministry of Commerce & Industry, Department for Promotion of Industry & Internal Trade, National Intellectual Property Rights Policy, 2016 (India).

build upon.

C. The Role of Alternative Dispute Resolution

Given the practical difficulties with copyright litigation for comedians and magicians, including the cost, the time, the public exposure of sensitive creative work, and the uncertainty of outcome, there is a strong case for encouraging the use of alternative dispute resolution mechanisms. Mediation, in particular, would allow parties to reach a resolution that acknowledges the subtleties of the idea vs. expression dispute without requiring a court to make a definitive ruling on a philosophically complex question.

The growing ecosystem of copyright dispute resolution in India, including the Copyright Board (now reconstituted as the Intellectual Property Appellate Board) and the increasing sophistication of entertainment law practice in cities like Mumbai, Delhi, Bengaluru, and Hyderabad, provides a foundation on which a more effective dispute resolution system for comedy and magic could be built.

D. The Need for Specific Judicial Guidelines

Indian courts would benefit from developing specific guidelines, perhaps through a landmark decision or a series of consistent decisions, about how the idea vs. expression dichotomy applies in the performative arts, with particular reference to comedy and magic. The American experience, where courts have developed a relatively nuanced body of case law on these issues through decisions like *Nichols*³⁸ and *Teller*³⁹, shows that it is possible for courts to develop workable standards for these difficult cases.

An Indian court willing to engage seriously with the idea vs. expression analysis in the context of comedy or magic could draw on the rich jurisprudence already developed in other entertainment-related contexts, including the cases on television concepts, film plots, and musical compositions, to develop principles that are sensitive to the specific nature of these art forms.

IX. CONCLUSION

The idea vs. expression dichotomy is, at its core, a principle about balance. It is about making sure that copyright law rewards genuine creativity without giving any single creator a monopoly over the ideas, themes, and concepts that belong to everyone. When applied to stand-

³⁸ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

³⁹ *Teller v. Dogge*, 8 F. Supp. 3d 1228 (D. Nev. 2014).

up comedy and magic tricks in the Indian context, this principle becomes particularly challenging to apply because these art forms blend ideas and expressions in ways that are uniquely intimate and personal.

The Copyright Act, 1957 provides a framework within which comedians and magicians can seek protection, both through the mainstream copyright provisions for literary and dramatic works and through the performers' rights provisions that specifically recognise conjurers and performing artists as a class deserving of legal protection. Indian courts, drawing on the foundational principle established in *R.G. Anand*⁴⁰ and developed through a series of entertainment industry cases, have the doctrinal tools available to address disputes in these areas.

What is needed now is for these tools to be applied more consistently and with greater awareness of the specific dynamics of comedy and magic as art forms. The abstractions test, the merger doctrine, the scenes-a-faire doctrine, and the requirement of originality all provide workable handles for courts to use when deciding whether a specific comedic or magical work deserves copyright protection, and to what extent.

The most important insight that this analysis offers is that the idea vs. expression dichotomy, far from being a technicality of copyright law, reflects a deep truth about the nature of creativity: all creative work builds on what came before, and the law must find a way to reward those who add something genuinely new while keeping the raw material of culture freely available to all. Stand-up comedy and magic tricks, in their own wonderful and peculiar ways, illustrate this truth more vividly than almost any other art form.

REFERENCES AND BIBLIOGRAPHY

A. Primary Sources

i. Statutes

Copyright Act, No. 14 of 1957 (India).

Copyright (Amendment) Act, No. 27 of 2012 (India).

Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299.

⁴⁰ *R.G. Anand v. Delux Films*, (1978) 4 SCC 118 (India).

ii. Indian Cases

Anil Gupta v. Kunal Dasgupta, (2002) 24 PTC 1 (Del.).
Eastern Book Co. v. D.B. Modak, (2008) 1 SCC 1.
Emergent India Ltd. v. NEC HCL System Technologies Ltd., 2012 (49) PTC 461 (Del.).
Indian Performing Rights Society v. Eastern India Motion Pictures, AIR 1977 SC 1443.
Mansoor Haider v. Yashraj Films, (2014) 59 PTC 292 (Bom.).
Nav Sahitya Prakash v. Anand Kumar, AIR 1981 All 200.
R.G. Anand v. Delux Films, (1978) 4 SCC 118.
Ravi Shankar v. Excel Entertainment, CS (Comm.) 337/2019 (Del.).
Rupendra Kashyap v. Jiwan Publishing House, 1996 PTC (16) 439 (Del.).
Tata Consultancy Services v. State of Andhra Pradesh, (2005) 1 SCC 308.
Tata Sons Ltd. v. Greenpeace International, (2011) 178 DLT 705 (Del.).
Urmi Juvekar Chiang v. Global Broadcast News Ltd., (2008) 38 PTC 248 (Bom.).
Zee Telefilms Ltd. v. Sundial Communications Pvt. Ltd., (2003) 27 PTC 457 (Bom.).

iii. Foreign Cases

Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983).
Baker v. Selden, 101 U.S. 99 (1879).
Blehm v. Jacobs, 702 F.3d 1193 (10th Cir. 2012).
Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991).
Mazer v. Stein, 347 U.S. 201 (1954).
Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930).
Olson v. National Broadcasting Co., 855 F.2d 1446 (9th Cir. 1988).
Teller v. Dogge, 8 F. Supp. 3d 1228 (D. Nev. 2014).

B. Secondary Sources

i. Books

Anurag Bana, Copyright Law in India (2012).
Paul Goldstein, Copyright: Principles, Law and Practice (2d ed. 1996).
David Nimmer, Nimmer on Copyright (2023).
William F. Patry, Patry on Copyright (2023).
Staniforth Ricketson & Jane C. Ginsburg, International Copyright and Neighbouring Rights (2d ed. 2006).
Shyam Divan & Arghya Sengupta, Intellectual Property Law in India (2d ed. 2019).

ii. Journal Articles

Olufunmilayo B. Arewa, From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context, 84 N.C. L. Rev. 547 (2006).

Robert M. Dekoven, Magic as a Performing Art: Copyright of the Performing Arts, 8 Cardozo Arts & Ent. L.J. 69 (1989).

Marc Gorenberg, Trade Secrets in Stand-Up Comedy, 38 Loy. L.A. Ent. L. Rev. 177 (2018).

Jonathan Griffiths, Dematerialization, Pragmatism and the European Copyright Revolution, 33 Oxford J. Legal Stud. 767 (2013).

Leslie A. Kurtz, Speaking to the Ghost: Idea and Expression in Copyright, 47 U. Miami L. Rev. 1221 (1993).

Kal Raustiala & Christopher Sprigman, The Piracy Paradox: Innovation and Intellectual Property in Fashion Design, 92 Va. L. Rev. 1687 (2006).

Jeremy Telman, The Idea-Expression Dichotomy and the Copyright of Magic, 12 Tex. Intell. Prop. L.J. 343 (2004).

iii. Government Documents and Policy

Ministry of Commerce & Industry, Department for Promotion of Industry and Internal Trade, National Intellectual Property Rights Policy, 2016 (India).

