

HORIZONTAL AND VERTICAL PROTECTION OF COPYRIGHT IN STAND-UP COMEDY

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ABSTRACT

In today's day and age, with numerous streaming platforms present online, stand-up comedy remains one of the most watched categories of entertainment. Additionally, stand-up comedy in live performances and theatres has also gained extensive support and grown to an enormous extent in the country. With such great popularity of this field, there arises a great need for recognising and regulating the rights and duties vested in the parties involved in the making of such stand-up comedy videos and performances. However, with the lack of any special law for stand-up comedy, recourse has to be sought to the existing legal framework within the copyright laws of India, i.e., the Copyright Act, 1957, and the subsequent jurisprudence. This article aims to venture into this exercise of placing stand-up comedy within the Copyright Act, 1957 and its subsequent precedents, along with precedents from different jurisdictions, particularly the United States. This article adopts two methods of viewing this issue,

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firstly, in a horizontal manner, i.e., copyright issues between stand-up comedians copying each other's work, and secondly, in a vertical manner, i.e., copyright issues between producers of stand-up comedy shows and the stand-up comedians themselves, who not only write material for their show but also perform the same. The latter perspective is taken particularly in the light of the recent controversy surrounding the complaint lodged against Vir Das by his former producer for alleged copyright infringement from a previous show. This article adopts a comparative analysis with the United States and suggests a way forward for the stand-up comedy industry.

Keywords: *Stand-up comedy, Copyright Act, 1957, horizontal and vertical protection, performer's rights, extra-legal norms*

I. INTRODUCTION

Stand-up comedy is one of the emerging fields of art and performance in India, as can be witnessed in the number of stand-up shows and Netflix specials coming up.¹ Even the number of stand-up comedians has increased with some being, Kenny Sebastian, Saurabh Pant, Kapil Sharma, etc.² Netflix has also stated that Indian viewers are more likely

¹Jyotirmoy Biswas Priyadarshini, 'Indian standup comedy has a bright future, even in these times of intolerance' (*The Print*, 07 July 2021) <<https://theprint.in/campus-voice/indian-standup-comedy-has-a-bright-future-even-in-these-times-of-intolerance/691545/>> accessed 05 December 2022.

²Deutsche Welle, 'Why stand-up comedy is gaining popularity in India' *Hindustan Times* (29 December 2021) <<https://www.hindustantimes.com/lifestyle/art->

to watch stand-up comedy than others around the world.³ Due to this growing popularity, there is bound to arise the need for protecting the rights that are associated with the field of art.

This is because, in creating any form of a stand-up comedy act, substantial amounts of work go into the process, the most important of which is the intellect and effort of the comedian.⁴ In addition, there is a large amount of business attached to this art,⁵ in the form of ticket sales for stand-up shows, subscriptions and pre-order on Netflix and Amazon Prime, etc.⁶ Therefore, this calls for protection and recognition of this work and effort of the comedians and their subsequent economic benefits, in the form of intellectual property rights, with copyright being the most applicable form.

The creativity, innovations and investments are all safeguarded through this. This becomes particularly important in the backdrop of numerous allegations of joke theft and violations of copyrights among stand-up comedians throughout the world. The recent allegations against Vir Das for infringing the copyright of the producer of his previous show is an example of such news in the Indian scenario,⁷ and the incidents

culture/why-stand-up-comedy-is-gaining-popularity-in-india-101640743474599.html> accessed 05 December 2022.

³John Sarkar, 'Comedy is serious biz for many Indians' *The Times of India* (07 July 2017) <<https://timesofindia.indiatimes.com/business/india-business/comedy-is-serious-biz-for-many-indians/articleshow/59482534.cms>> accessed 05 December 2022.

⁴Sampada Kapoor, 'Copyright Protection In Stand-Up Comedy' (*The IP Press*, 05 May 2022) <https://www.theipress.com/2022/05/05/copyright-protection-in-stand-up-comedy/#_ftn1> accessed 05 December 2022.

⁵Preetam Kaushik, 'Made In Mumbai: Indian Comedy Industry Is Thriving' *Business Insider* (16 December 2014) <<https://www.businessinsider.in/made-in-mumbai-indian-comedy-industry-is-thriving/articleshow/45532619.cms>> accessed 18 March 2024.

⁶'Comedy has become serious business for many post-pandemic' *The Tribune* (17 October 2021) <<https://www.tribuneindia.com/news/features/comedy-has-become-serious-business-for-many-post-pandemic-325612>> accessed 05 December 2022.

⁷'Mumbai: Comedian Vir Das and Netflix booked for copyrights violation, Producer Ashvin Gidwani says they stole jokes from an old show' *OP India* (09 November 2022) <<https://www.opindia.com/2022/11/mumbai-comedian-vir-das-netflix->

of Josh Ostrovsky⁸ and Elliot Tebele⁹ stealing jokes of other comedians remain as one of the biggest incidences of joke theft on the global front. In light of all these, this article aims to analyse the legal and extra-legal frameworks available for comedians to protect their works.

To that effect, this article is divided into three sections. *Firstly*, this article aims to highlight the ineffectiveness of the traditional modes of copyright protection in the field of copyright due to a peculiar internal working of the industry. *Secondly*, this article aims to delve into two forms of horizontal protection of the copyrights of stand-up comedians, which is, through the legal concept of performer's rights and extra-legal norms which exist in the industry. *Thirdly*, this article aims to take up a case study on the recent allegations against Vir Das and analyse the mechanism in a vertical application of copyrights between stand-up comedians and the producers of their shows.

II. INEFFECTIVE COPYRIGHT PROTECTION IN STAND-UP

A. *Placing stand-up in Section 13*

Avenues for protecting copyrights in stand-up comedy are very valuable because of the increase in the amount of appropriation.¹⁰ Moreover, with the prevalence of social media and the internet, the harm caused due to such appropriation gets exacerbated. Under Section

booked-for-copyrights-violation-producer-ashvin-gidwani/> accessed 05 December 2022.

⁸Alex Abad-Santos, 'The Fat Jew's Instagram plagiarism scandal, explained' *Vox* (19 August 2015) <<https://www.vox.com/2015/8/19/9178145/fat-jew-plagiarism-instagram>> accessed 05 December 2022.

⁹Nick Statt, 'Fuckjerry founder apologizes for stealing jokes and pledges to get creator permission' (*The Verge*, 03 February 2019) <<https://www.theverge.com/2019/2/2/18208446/fuckjerry-elliott-tebele-meme-joke-aggregator-repost-new-policy-change>> accessed 05 December 2022.

¹⁰Hannah Pham, 'Intellectual Property In Stand-Up Comedy: When #fuckfuckjerry Is Not Enough' (2020) 33 *Harvard Journal of Law & Technology* 1.

13 of the Copyright Act, 1957 (“**the Act**”), for any work to be copyrighted, it has to meet the Indian standard of originality, which is that there needs to be a minimum amount of creativity in the work, and it is not enough that the work is merely innovative/novel and/or a product of capital/labour.¹¹ Such creative works can then be placed under any of the six categories mentioned in Section 13 of the Act read with Section 2(y) which defines “work”. These include: (1) literary work, (2) dramatic work, (3) musical work, (4) artistic work, (5) cinematographic work, and (6) sound recording.

Stand-up comedy can qualify under this threshold as there is some form of creativity involved in the process of preparing a show or performance.¹² Within the categories under this provision, stand-up comedy jokes can only be placed under dramatic works or cinematographic work and not literary work. This is because, it has been held that literary work under the statute may include anything expressed in writing, or in print, or in any form of symbols or notation.¹³ In the field of stand-up comedy, majority of the act is instantaneous and improvisational.¹⁴ Most stand-up comedians very rarely rely on scripts for the entirety of their performance.¹⁵

Therefore, using certain scripts or written paper to claim copyright over an actual performance which may not even be entirely according to the script (in which case it will be considered as distinct from the script) is

¹¹*Eastern Book Company & Ors. v D.B. Modak & Anr.* (2008) 1 SCC 1.

¹²Vaibhav Gupta, ‘The Copyright Conundrum In Stand-Up Comedy Scenario In India’ (*mondaq*, 18 April 2022) <<https://www.mondaq.com/india/copyright/1184344/the-copyright-conundrum-in-stand-up-comedy-scenario-in-india>> accessed 05 December 2022.

¹³*University of London Press Ltd. v University Tutorials Press Ltd.* (1916) 2 ChD 601.

¹⁴Tobyn Demarco, ‘Improvisation and Stand-Up Comedy: Demarco’ (2020) 78(4) *Journal of Aesthetics and Art Criticism* 419.

¹⁵James D Creviston, ‘Is Stand Up Comedy Scripted’ (*Comedypreneur*) <<https://www.comedypreneur.com/is-stand-up-comedy-scripted/>> accessed 05 December 2022.

a very weak claim.¹⁶ As regard to dramatic work, stand-up comedy qualifies the Section 2(h) requirements entirely even when we talk about the requirement of fixation.¹⁷ This can be met through the performance of the act before a live audience in the form of the comedian's demeanour, facial expressions, etc.¹⁸ Moreover, if this entire performance is video recorded, then the same can even be protected as a cinematographic work under Section 2(f).¹⁹

B. Uncertain idea expression dichotomy

The idea of copyright has been understood to only protect the expression of an idea and not the idea itself.²⁰ On the international front, this has been iterated in Article 9(2) of the Agreement on Trade Related Aspects of Intellectual Property Rights (“**TRIPS**”)²¹ and Article 2 of the World Intellectual Property Organisation (“**WIPO**”) Copyright Treaty.²² This has been reiterated by the courts that even if two works are similar in their subject matter, idea or theme, the one made later in time would not be infringing the copyright of the original.²³ Apart from this, attempts made at suing artistic works based on similar premises have failed.²⁴ This greatly impedes the protection of copyright in the stand-up arena because conceptually, it is only the individualised expression of the joke which will be protected and not

¹⁶Poulomi Chatterjee, ‘The Price of Laughter: Stand-Up Comedy and Intellectual Property Law’ (*International Journal of Advanced Legal Research*) <<https://ijalr.in/the-price-of-laughter-stand-up-comedy-and-intellectual-property-law/>> accessed 05 December 2022.

¹⁷The Copyright Act, 1957 (14 of 1957) s 2(h).

¹⁸‘Stand-Up Comedy and Intellectual Property Rights: No Jokes There!’ (*Jus Corpus Law Journal*, 26 August 2021) <<https://www.juscorpus.com/stand-up-comedy-and-intellectual-property-rights/>> accessed 05 December 2022.

¹⁹The Copyright Act, 1957 (14 of 1957) s 2(f).

²⁰*R.G. Anand v Delux Films* (1978) 4 SCC 118.

²¹The Agreement on Trade Related Aspects of Intellectual Property Right, art 9(2).

²²The World Intellectual Property Organization Copyright Treaty, art 2.

²³*R.G. Anand v Delux Films* (1978) 4 SCC 118.

²⁴Prashant Reddy, ‘Hollywood v. Bollywood – ‘Partner’ In Crime’ (*spicy IP*, 05 October 2007) <<https://spicyip.com/2007/10/hollywood-v-bollywood-partner-in-crime.html>> accessed 05 December 2022.

the idea or subject matter of the joke. This is the complex arrangement and choice of the comedian's words.²⁵

This becomes particularly important in the field of narrative/observational stand-up comedy. In this form of stand-up, the comedian usually gives their perspective, observations and opinions about a particular situation, incident, or fact.²⁶ Comedians have even accused other comedians of plagiarising their joke only on the fact that both talked about the same topic.²⁷ In such cases, there can be no true claims of infringement. The two jokes, even though being based on the same premise, would have separate copyrights over the individualised expression of both the jokes, as long as they are expressed in different words.²⁸ Therefore, the idea-expression dichotomy greatly limits the copyright protection accorded to stand-up comedians and their jokes.

C. *Inadequate jurisprudence by courts*

Due to the insufficient legal and conceptual frameworks for protecting copyrights in stand-up, courts have also not been able to establish adequate jurisprudence in this regard. The case laws on jokes and comedy have been very limited, with most arising only in the United States, and almost none in India.²⁹ The cases have also been only about one or two liner jokes, and not about the more popular and prevalent narrative/observational stand-up. In the case of *Foxworthy v. Custom*

²⁵Elizabeth Moranian Bolles, 'Stand-Up Comedy, Joke Theft, and Copyright Law' (2011) 14 Tulane Journal of Technology and Intellectual Property 237.

²⁶Scott Woodard, 'Who Owns a Joke? Copyright Law and Stand-Up Comedy' (2019) 21(4) Vanderbilt Journal of Entertainment and Technology Law 1041.

²⁷'Stand-up comedian Abijit Ganguly accuses Kapil Sharma of plagiarising his joke' *Hindustan Times* (05 June 2017) <<https://www.hindustantimes.com/tv/stand-up-comedian-abijit-ganguly-accuses-kapil-sharma-of-plagiarising-his-joke/story-egsAT53iXsW8mL5BHyAacO.html>> accessed 05 December 2022.

²⁸Dotan Oliar & Christopher Jon Sprigman, 'There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy' (2008) 94(8) Virginia Law Review 1787.

²⁹Varsha Jhavar, 'Stand-Up Comedy: Negative Space Or Traditional IP Worthy?' (2021) 5(2) Journal of Intellectual Property Studies 21.

Tees,³⁰ the judge had held that the use of a single line by the comedian as a prefix to his sentence could be copyrighted and the use of the same by the defendant's company in producing T-shirts would be an infringement of his copyright.³¹

In another US case of *Kaseberg v. Conaco LLC*,³² the court had held that in the case of copyright afforded to jokes (specifically punchlines), there is only a thin and broad protection which are constrained by (i) humour, (ii) application to the particular facts articulated in every joke's preceding sentence, and (iii) provision of mass appeal.³³ Therefore, there is much uncertainty regarding the scope of copyright protection which such narrative/observational jokes get. However, considering India's affinity to the welfare model of copyright³⁴ (because of its aim of promoting the interests of the whole society and ensuring the system does the greatest good to the greatest number),³⁵ there is a chance of promising jurisprudence arising in this arena. Moreover, the striking similarity test which was laid down in *Raja Pocket Books v. Radha Pocket Books*,³⁶ if extended to stand-up comedy, could be used to safeguard narrative/observational stand-up (even though the idea-expression dichotomy would still not be satisfied).³⁷ However, the application of this test may also be further

³⁰*Foxworthy v Custom Tees* 879 F. Supp. 1200 (N.D. Ga. 1995).

³¹Andrew Greengrass, 'Take My Joke... Please - Foxworthy v. Custom Tees and the Prospects for Ownership of Comedy' (1997) 21 Columbia-VLA Journal of Law & the Arts 273.

³²*Kaseberg v Conaco LLC* 260 F. Supp. 3d 1229.

³³Wook Hwang & Kyle Petersen, 'Kaseberg v. Conaco, LLC' (*Loeb & Loeb*, 12 May 2017) <<https://www.loeb.com/en/insights/publications/2017/05/kaseberg-v-conaco-llc>> accessed 05 December 2022.

³⁴Ankita Singhania, 'Copyright Laws in India and Maintenance of a Welfare State' (2006) 11 Journal of Intellectual Property Rights 43.

³⁵Jessica Meindertsma, 'Theories of copyright' (*The Ohio State University Copyright Corner*, 09 May 2014) <<https://library.osu.edu/site/copyright/2014/05/09/theories-of-copyright/>> accessed 05 December 2022.

³⁶*Raja Pocket Books v Radha Pocket Books* 1997 (40) DRJ 791.

³⁷Hannah Pham, 'Standing Up for Stand-Up Comedy: Joke Theft and the Relevance of Copyright Law and Social Norms in the Social Media Age' (2019) 30 Fordham Intellectual Property, Media and Entertainment Law Journal 55.

complicated or even made inapplicable due to both performance and literary aspects being present for the activity.

D. Practical barriers to enforcement

Considering the workings of the field of narrative/observational stand-up, limiting the premise of jokes through copyright could put the entire field in mayhem.³⁸ It would become highly impractical for comedians to change the entire premise of all their jokes to something which no previous comedian has talked about in fear of infringing someone's copyright.³⁹ The enormous amounts of creativity prevalent in the field would be curtailed, hence, ruining the entire field. Considering the popularity and pervasiveness of stand-up in the social media age, any joke made by a comedian can more often than not be only used once or twice, after which most tend to consider the joke as being retired from the stand-up show.⁴⁰

If used more often, then tags of the comedian being *repetitive* may be brought up diminishing the comedian's reputation.⁴¹ Therefore, litigating over one or a few jokes would be of no value to the comedian. Moreover, considering the cumbersome Indian judicial procedural system, no comedian could even be willing to sue someone for

³⁸Poulomi Chatterjee, 'The Price of Laughter: Stand-Up Comedy and Intellectual Property Law' (*International Journal of Advanced Legal Research*) <<https://ijalr.in/the-price-of-laughter-stand-up-comedy-and-intellectual-property-law/>> accessed 05 December 2022.

³⁹Vaibhav Gupta, 'The Copyright Conundrum In Stand-Up Comedy Scenario In India' (*mondaq*, 18 April 2022) <<https://www.mondaq.com/india/copyright/1184344/the-copyright-conundrum-in-stand-up-comedy-scenario-in-india>> accessed 05 December 2022.

⁴⁰Varsha Jhavar, 'Stand-Up Comedy: Negative Space Or Traditional IP Worthy?' (2021) 5(2) *Journal of Intellectual Property Studies* 21.

⁴¹Gursimran Kaur Banga, 'Is The Kapil Sharma Show getting repetitive and losing its charm?' *The Times of India* (08 February 2017) <<https://timesofindia.indiatimes.com/tv/news/hindi/is-the-kapil-sharma-show-getting-repetitive-and-losing-its-charm/articleshow/57040851.cms>> accessed 05 December 2022.

infringing their copyright over a particular joke.⁴² In addition to this, enormous amounts of time, effort and money would also be wasted for a few jokes. Additionally, many comedians even lack knowledge regarding the copyrightability of their jokes, due to which they do not pursue any legal action, even if their copyrights are infringed.⁴³

III. HORIZONTAL PROTECTION OF COPYRIGHT IN STAND-UP

A. Performer's right

It has been argued by many authors that one aspect of the Indian copyright law through which stand-up comedy can be protected is as a dramatic work and subsequently, the performer's rights accrued to the comedian.⁴⁴ As previously mentioned, in narrative/observational stand-up, it is the performance of the comedian, their improvisation, personas, crowd work methods, etc., which make them distinctive from the rest,⁴⁵ and hence, capable of being registered as copyright. In this way, there can be a much broader protection being given, instead of it being just reserved for the one or two-line joke, as was done in the *Foxworthy* case.⁴⁶

⁴²Vidhi Doshi, 'India's long wait for justice: 27m court cases trapped in legal logjam' *The Guardian* (05 May 2016) <<https://www.theguardian.com/world/2016/may/05/indias-long-wait-for-justice-27-million-court-cases-trapped-in-a-legal-logjam>> accessed 05 December 2022.

⁴³Varsha Jhavar, 'Stand-Up Comedy: Negative Space Or Traditional IP Worthy?' (2021) 5(2) *Journal of Intellectual Property Studies* 21.

⁴⁴Dotan Oliar and Christopher Jon Sprigman, 'From Corn to Norms: How IP Entitlements Affect What Stand-Up Comedians Create' (2009) 95 *Virginia Law Review* In Brief 57.

⁴⁵Bradford Evans, 'Stand Up Comedians and Their Alternate On-Stage Personas' (*Vulture*, 07 August 2012) <<https://www.vulture.com/2012/08/stand-up-comedians-and-their-alternate-on-stage-personas.html>> accessed 05 December 2022.

⁴⁶Sampada Kapoor, 'Copyright Protection In Stand-Up Comedy' (*The IP Press*, 05 May 2022) <https://www.theipress.com/2022/05/05/copyright-protection-in-stand-up-comedy/#_ftn1> accessed 05 December 2022.

A stand-up comedian can qualify as being a performer under Section 2(qq) of the Act, as his stand-up is a performance under Section 2(q) of the Act for being a ‘visual or acoustic presentation made live’ before an audience.⁴⁷ The author’s original expression and conceptualisation of the stand-up act through his peculiar combination and arrangement of words as well as his demeanour, timing, tone, etc. would be receiving protection under the performer’s rights under Section 38 and Section 38A of the Act.⁴⁸ However, this is a limited protection being offered to the comedian, as it only prevents others from making a recording of the comedian’s performance or broadcasting it any way in social media platforms like Instagram, YouTube, etc.⁴⁹ It allows other comedians to use the same material but present it in another tone or arrangement of words or timing. Due to this, these provisions of the Act would only be effective in the realm of social media or video platforms, and not particularly for joke theft between comedians.

B. Norms against appropriation

The most effective method of protecting the rights of comedians with regard to their jokes, is already existent within the field of stand-up itself, i.e., through the social-norms based system. Comedy, as a field of art, exists in intellectual property’s negative space.⁵⁰ This means that creativity or innovation prevails in the industry, with the works of the comedians receiving protection, despite there being no formal intellectual property rights application. Therefore, these are termed as

⁴⁷The Copyright Act, 1957 (14 of 1957) s 2(q) & s 2(qq).

⁴⁸The Copyright Act, 1957 (14 of 1957) s 38 & s 38A.

⁴⁹Megha Rathore, ‘Significance of Performers’ Rights in India: Identifying the Vacuum in times of Digitisation’ (*Excelon IP*) <<https://excelonip.com/significance-of-performers-rights-in-india-identifying-the-vacuum-in-times-of-digitisation/#:~:text=It%20was%20in%20the%20Amendment,be%20taken%20from%20the%20performer.>> accessed 05 December 2022.

⁵⁰Dotan Oliar and Christopher Jon Sprigman, ‘Intellectual Property Norms in Stand-Up Comedy’ (2010) *The Making and Unmaking of Intellectual Property*.

low *IP equilibrium* industries.⁵¹ Primary examples of industries coming under this category are fashion, culinary and luxury goods.⁵²

Stand-up falls under this category because of the forbearance of comedians to protect their jokes through the formal copyright registration system.⁵³ Instead, the industry relies on social norms for the said protection. This is because reputation exists as a major element in this industry.⁵⁴ It has been stated by numerous comedians that stealing jokes and material is one of the worst accusations against a comedian.⁵⁵ Therefore, stand-up comedy exists as a closely-knit industry wherein the comedians are regulated through an informal mechanism of detecting joke theft, deliberation and taking action through extra-legal or social norms and sanctions.⁵⁶

These norms can include refusing to work with the comedian, refusing to host the comedian, bad mouthing of the comedian, etc., and this has even extended to physical altercations with the offender as well.⁵⁷ This is because reputation exists as a very important element in the stand-up industry and any bad reputation can result in the derailment of the entire career of the offending comedian.⁵⁸ Not only the comedians, but also

⁵¹Kal Raustiala and Christopher Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (2006) 92(8) *Virginia Law Review* 1687.

⁵²*ibid.*

⁵³Elizabeth Rosenblatt, 'A Theory of IP's Negative Space' (2010) 34(3) *Columbia Journal of Law & the Arts* 317.

⁵⁴Dotan Oliar & Christopher Jon Sprigman, 'There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy' (2008) 94(8) *Virginia Law Review* 1787.

⁵⁵Sonia Rao, 'Conan O'Brien settles lawsuit over alleged joke theft, calls it 'the worst thing any comic can be accused of' (*The Washington Post*, 09 May 2019) <<https://www.washingtonpost.com/arts-entertainment/2019/05/09/conan-obrien-settles-lawsuit-over-alleged-joke-theft-calls-it-worst-thing-any-comic-can-be-accused/>> accessed 05 December 2022.

⁵⁶Allen D Madison, 'The Uncopyrightability of Jokes' (1998) 35(11) *San Diego Law Review* 111.

⁵⁷Jennifer E Rothman, 'Custom, Comedy, and The Value of Dissent' (2009) 95 *Virginia Law Review In Brief* 19.

⁵⁸James Robinson, 'The comedy (stealing) club: How James Corden joins a list of stand-ups accused of pinching skits - from Robin Williams to Amy Schumer and

other intra-industrial players, such comedy room managers, club owners, agents, etc., also engage in this practice which greatly helps in regulating any bad conduct.⁵⁹

Moreover, with social media and the internet, detecting and verifying any such joke theft is much easier and the audience also plays a role in protecting the original works of comedians because of the social backlash which those engaged in copying can face on social media and public.⁶⁰ Hence, such social norms based system works as an effective method of regulating the making, use and copying of jokes within the industry, thereby, protecting the efforts or creativity of the comedians and incentivises comedians to come up with new material for their acts.⁶¹

Ricky Gervais' *Daily Mail* (03 November 2022) <<https://www.dailymail.co.uk/news/article-11385711/The-comedy-stealing-club-James-Corden-joins-list-stand-ups-accused-pinching-skits.html>> accessed 05 December 2022.

⁵⁹Hannah Pham, 'Standing Up for Stand-Up Comedy: Joke Theft and the Relevance of Copyright Law and Social Norms in the Social Media Age' (2019) 30 *Fordham Intellectual Property, Media and Entertainment Law Journal* 55.

⁶⁰Aya Yehia, 'Celebrities Who Went from Being Adored to Being Hated' (*The Things*, 09 December 2022) <<https://www.thethings.com/celebrities-who-went-from-being-loved-to-hated/>> accessed 05 December 2022.

⁶¹Siena Stanislaus, 'How Much Does a Laugh Cost? Comedians' Rising Demand for Royalty Payments for the Composition of Jokes' (*The Colombian Journal of Law & Arts*, 08 April 2022) <<https://journals.library.columbia.edu/index.php/lawandarts/announcement/view/516>> accessed 05 December 2022.

IV. VERTICAL PROTECTION OF COPYRIGHT IN STAND-UP

A. Case study of Vir Das

Recently, renowned stand-up comedian Vir Das has had an FIR registered against him under Section 51 and Section 63 of the Act.⁶² Section 51 of the Act lays down the instances where the copyright of an author is infringed, and Section 63 is the criminalisation principle laying down punishments to be awarded in instances of copyright infringement. It has been alleged by Ashwin Gidwani, the producer of Vir Das's 2010 show, *History of India VIRitten*, that in his latest Netflix special *Virdas for India*, the comedian has copied 12 jokes from the 2010 show.⁶³ This incident raises numerous questions regarding the application of copyright law in a vertical manner between a comedian and a producer of the show.

This particular aspect has not been discussed much as almost all of the previous literature has only focused on the horizontal protection of jokes amongst comedians and not vertical protection. This section of the article aims to delve into this discussion regarding the existence of copyrights over jokes or stand-up acts, and whether they lie with the comedian or the producer. To this effect, the article will mainly be

⁶²Vir Das, Netflix among four booked for copyright infringement' *The Indian Express* (Mumbai, 17 November 2022) <[https://indianexpress.com/article/cities/mumbai/vir-das-netflix-fir-mumbai-copyright-infringement-8255052/#:~:text=Actor%20and%20stand%20Dup%20comedian,2010\)%E2%80%9D%20by%20using%20concept%20and](https://indianexpress.com/article/cities/mumbai/vir-das-netflix-fir-mumbai-copyright-infringement-8255052/#:~:text=Actor%20and%20stand%20Dup%20comedian,2010)%E2%80%9D%20by%20using%20concept%20and)> accessed 05 December 2022.

⁶³Mumbai: Comedian booked for violation of copyright by theatre producer' *The Times of India* (08 November 2022) <<https://timesofindia.indiatimes.com/city/mumbai/mumbai-comedian-booked-for-violation-of-copyright-by-theatre-producer/articleshow/95367030.cms>> accessed 05 December 2022.

relying upon arguments and conceptions of the operation of copyrights in the fields of theatre, cinema and music.

*B. Resolving copyright ownership between comedians
and producers*

a) For cinematographic film

As previously mentioned, if any stand-up show of a comedian is recorded, as it happens with Netflix and Prime special, then such a recording would qualify as being a *cinematographic work* under Section 2(f) of the Act. So, for these forms of shows, when any form of dispute arises with regard to the copyrights of the show, the first argument which any producer would rely on would be the *ratio decidendi* of the case, *Indian Performing Rights Society v. Eastern India Motion Pictures Association* (“**IPRS case**”).⁶⁴ According to this, the producer of a cinematographic film would be the first owner of the copyright in all works involved in the film. This argument mainly relies on the fact that, *firstly*, the definition under Section 2(d) specifies the producer to be the author of a cinematographic film,⁶⁵ and *secondly*, according to Section 17(b)⁶⁶ and Section 17(c),⁶⁷ the rights of a producer would trump the individual rights of the comedian (who might have both written the script and acted it out in the recording). Such a construction of the producer’s rights in a cinematographic film, as per the *IPRS* case, has been upheld in various subsequent cases as well.⁶⁸

⁶⁴*Indian Performing Rights Society v Eastern India Motion Pictures Association* (1977) 2 SCC 820.

⁶⁵The Copyright Act, 1957 (14 of 1957) s 2(d).

⁶⁶The Copyright Act, 1957 (14 of 1957) s 17(b).

⁶⁷The Copyright Act, 1957 (14 of 1957) s 17(c).

⁶⁸*International Confederation of Societies of Authors and Composers v Aditya Pandey and Ors.* (2017) 11 SCC 437; *Saregama Ltd. v The New Digital Media & Ors.* (2018) 73 PTC 329; *International Confederation of Societies of Authors and*

However, this construction of the rights of the authors of different works in a cinematographic film is flawed in the sense that it does not take into account the different dimensions of Section 17 while invoking the same.⁶⁹ This flawed understanding has been slightly alluded to in the footnotes of Justice Krishna Iyer's opinion in the *IPRS* case.⁷⁰ Firstly, on a closer analysis of Section 17(b), it is observed that this provision is closely worded. There is a clear subject-matter limitation being imposed here, which is that, it only applies for photographs, paintings or portraits, engravings and cinematographic films. There is no mention of literary work or dramatic work in this provision, which is where the script and performance of the stand-up comedian fall under.⁷¹ With respect to a cinematographic film, as per Section 14(d), copyright only exists for protecting the actual recording of the film, i.e., it prevents others from making copies of the cinematographic film recording. As regards communication to the public, this means, playing or displaying the film recording to the public. It does not cover the other works involved in the cinematographic film, like the script (literary work) or the composition (musical work) or the performance (dramatic work). Therefore, the producer of a recorded stand-up comedy show cannot claim to be the first owner of the script used in the show (cinematographic film).⁷²

Composers v Aditya Pandey (2017) 11 SCC 437; *Indian Performing Right Society v Aditya Pandey*, 2011 SCC OnLine Del 3113.

⁶⁹Vasundhara Majithia, 'Extinguishing the Rights of Lyricists and Composers: *IPRS v Aditya Pandey*' (*Spicy IP*, 04 November 2016) <<https://spicyip.com/2016/11/extinguishing-the-rights-of-lyricists-and-composers-iprs-v-aditya-pandey.html>> accessed 26 June 2023.

⁷⁰Aqa Raza, 'Theoretical Underpinnings of Copyright and Design Laws: Decisions of the Supreme Court of India' (2021) 26 *JIPR* 220.

⁷¹Adyasha Samal, 'Delhi HC Order Cripples Authors' Royalty Rights in Underlying Works' (*Spicy IP*, 29 January 2021) <<https://spicyip.com/2021/01/delhi-hc-delivers-order-crippling-authors-royalty-rights-in-underlying-works.html>> accessed 27 June 2023.

⁷²Prashant Reddy T, 'The Background Score to the Copyright (Amendment) Act, 2012' (2012) 5 *NUJS Law Review* 469.

Secondly, while it can be said that Section 17(c) has no subject-matter limitation like Section 17(b), for invoking the same, there has to be a relationship of *employment* through a *contract of service* between the producer and the comedian (script-writer). For establishing this, a perusal of Chitty on Contracts can be done. The eight factors mentioned in this book for establishing a contract of employment are: (1) Degree of control, (2) Prospect of loss or profit for the worker, (3) Worker being a part of the employer's organisation, (4) Business of worker or business of employer, (5) Ownership of equipment, (5) Incidence of tax and insurance, (6) Parties' view of relationship and (7) Traditional structure of the concerned trade or profession.⁷³

In the context of stand-up comedy, between the producer and the comedian (script-writer), there is little to no degree of control exercised by the producer over the comedian on how to write their script. However, with regard to the profit or loss, it may be stated that the comedian has no prospect of this because of the fixed sum which they are paid. Nevertheless, the comedian cannot be said to be a part of the producer's organisation. Moreover, the script-writing is not a business of the producer. It is the business of the comedian. The question of equipment and tax incidence does not arise in this case. And with respect to the penultimate factor, the comedians would always tend to view themselves as independent workers and not employees of the producer. Lastly, in such forms of cinematographic works, the scriptwriters and the actors are never traditionally considered as a part of the producer's establishment. Moreover, this is heightened in the case of a stand-up comedian who has written their own script. Therefore, this relationship between the producer and the comedian is at most a relationship of principle-independent contractor, and not that of an employer-employee.⁷⁴

⁷³Hugh Beale, *Chitty on Contracts* (Vol 2, 33rd edn, Sweet & Maxwell 2020).

⁷⁴RK Dewan & Co, 'Copyright in Music: Producer v. Composer' (*Lexology*, 23 September 2022) <<https://www.lexology.com/library/detail.aspx?g=6f6ac53e-add0-4686-9946-452120704054>> accessed 27 June 2023.

Finally, by a direct application of Section 13(4), it can be clearly gleaned that in any form of cinematographic work (like a stand-up show in the present case), separate copyrights exist for the individual works within a cinematographic film. It cannot be said that the copyright of the producer has subsumed the copyrights of all the constituent works.⁷⁵ Therefore, the presumption made in the *IPRS* judgement by Justice Jaswant Singh, that the right of the producer over all the works involved in a cinematographic film will be covered under either Section 17(b) or Section 17(c), is incorrect. The same has even been iterated in the Parliament during discussion on the Copyright (Amendment) Act, 2012, as stated in the 227th Report on the Copyright (Amendment) Bill, 2010 presented to the Rajya Sabha, and laid on the table of the Lok Sabha on 23rd November 2010.⁷⁶ Additionally, even various High Court have recognised this and have gone along with the line of reasoning laid down by Justice Krishna Iyer in his footnotes.⁷⁷

Hence, it can be said that even by the application of Section 17(b) and Section 17(c), the producer of a stand-up comedy show (cinematographic film) will not be able to claim a copyright over the script which was written and used by the comedian. In the case of Vir Das, the same analogy can be extended, wherein, the producer of his previous show (if that was recorded and qualified as a cinematographic film) cannot claim any form of copyright over the script used in that show under these sections of the Act, unless a valid and legal agreement to the contrary has been entered into by the parties.

⁷⁵Mohan Dewan, 'Music Composers v. Music Producers' (*Mondaq*, 23 July 2019) <<https://www.mondaq.com/india/copyright/828194/music-composers-v-music-producers>> accessed 27 June 2023.

⁷⁶Sundara Bharathi, 'When you Compose it But Not Own it – Copyright Infringement in Indian Music Industry' (2021) 1(3) *De Jure Nexus L. J.* 1.

⁷⁷*MRF Ltd. v Metro Tyres Ltd.* (2019) SCC OnLine Del 8973; *Novex Communications (P) Ltd. v DXC Technology (P) Ltd.* (2021) SCC OnLine Mad 6266; *Vendhar Movies v Joint Director* (2019) SCC OnLine; *Saregama Ltd. v New Digital Media* (2017) SCC OnLine Cal 16610.

b) For dramatic works

Additionally, if the previous stand-up show of Vir Das was not recorded and did not qualify as a cinematographic film, then it would qualify as a dramatic work under Section 2(g) of the Act.⁷⁸ In such a case, such shows are closer in their operation to theatre drama than cinematographic work.⁷⁹ Therefore, the application of copyright in theatre drama could be imported into live stand-up comedy shows. In theatre, the producer of any shows would not statutorily have any copyright vested in him over the copyrights of the involved artists because as per Section 2(d) and Section 2(uu) of the Act, producers are only recognised for cinematographic films (requiring visual recordings) and sound recordings, neither of which are present in live theatre dramas.⁸⁰

Moreover, theatre operates in a manner different from films.⁸¹ Playwrights are usually engaged by the producer as independent contractors, upon which the playwright gives the producer certain limited rights for producing the play.⁸² Therefore, in the case of live stand-up shows, which was the case of Vis Das's 2010 show, there is also no visual or sound recording. So, the copyrights over the substance of the show, including the script, jokes, performance, etc., lie with the creators of those works. In Vir Das's case, he would hold a copyright

⁷⁸Sebanti Sarkar, 'No Copyright for Playwright' (*Telegraph India*, 09 November 2008) <<https://www.telegraphindia.com/west-bengal/no-copyright-for-playwright/cid/1255378>> accessed 05 December 2022.

⁷⁹Holly Cameron, 'Copyright Laws for Playwrights' (*Legal Beagle*) <<https://legalbeagle.com/12719373-copyright-laws-for-playwrights.html>> accessed 05 December 2022.

⁸⁰Sudhanva Deshpande, 'Note on Copyright and Creative Commons in Theatre' (*Mumbai Theatre Guide*, 15 November 2008) <https://www.mumbaitheatreguide.com/dramas/features/08/dec/19_feature_note_on_copyright.asp#> accessed 05 December 2022.

⁸¹Wei-Ling Chan, 'The Writer is King: Copyright in Devised Theatre' (*Arts Law*, 30 June 2004) <<https://www.artslaw.com.au/article/the-writer-is-king-copyright-in-devised-theatre/>> accessed 05 December 2022.

⁸²Beth Freemal, 'Theatre, Stage Directions & (and) Copyright Law' (1996) 71(3) *Chicago Kent Law Review* 1017.

over the script (i.e., in the form of original literary work) and a performer's right over his performance at the show.⁸³

The producer would not have any copyright, unless there was an explicit assignment of the copyright to the producer in their agreement. If such a valid and legal assignment was not there, then if Vir Das has used some material from his 2010 show for his new Netflix special, there has been no infringement, and the FIR lodged against him is baseless. This same understanding can also be extended to stand-up shows performed in comedy clubs which are not recorded. The copyrights would lie with the comedian provided no contract to the contrary has been signed by the parties.

C. Policy considerations for future cases

The main policy consideration that courts and the legislature have to keep in mind for either adjudicating or legislating on such matters of copyright ownership between producers and stand-up comedians should be the great imbalance in power and position between the two parties. Cases involving stand-up shows as cinematographic work can directly be decided according to previously established precedents. In such cases, there is most likely to exist agreements wherein the stand-up comedians are paid decent consideration for their performance and art. Moreover, it is mostly more established stand-up comedians who land such shows with digital media production companies. So, the imbalance of power and position between the stand-up comedian and the producer in such instances is much less, where the former will not be able to exploit the talent and skill of the latter without paying due consideration.

However, the situation changes when we talk about independent stand-up comedians giving live performances in comedy clubs and other theatrical centres. They earn barely a fraction of what big production

⁸³John Weidman, 'Protecting the American Playwright' (2007) 72(2) Brooklyn Law Review 639.

companies, like Amazon and Netflix, offer to stand-up comedians of their shows. Unlike established stand-up comedians, it is more of the upcoming, unestablished stand-up comedians, without financial and reputational backing who start off in such comedy clubs and live theatres.⁸⁴ Moreover, there is almost always no formal contract or agreement giving due consideration to the stand-up comedians for their skill and effort. So, there are much greater chances of producers of such live shows exploiting the stand-up comedians by giving them barely any remuneration.⁸⁵

This wide gap in position and power between the stand-up comedian and the producer should be taken into account by the courts and the legislature while framing new jurisprudence and laws regarding copyright protection of the material, skill and performance of the stand-up comedians. This is also bolstered by the fact that India follows the *Welfare Theory of Intellectual Property Rights protection*, wherein IP laws should aim for the greatest benefit and welfare of the public or the people under consideration. So, by tightening the copyright protection of such stand-up comedians in comedy clubs and theatres, court and legislatures should end up doing the greatest benefit and welfare to the group of individuals under consideration.

V. CONCLUSION

This article has analysed the copyright protection available to stand-up comedians in India, both horizontally and vertically. Horizontally, it is seen that traditional copyright law is largely ineffective in protecting jokes and performances of stand-up comedians. The idea-expression

⁸⁴Justin Caffier, 'Comedians Reveal What the L.A. Stand-up Scene Actually Pays' (*vulture*, 20 June 2018) <<https://www.vulture.com/2018/06/comedians-reveal-what-the-l-a-stand-up-scene-actually-pays.html>> accessed 10 January 2022.

⁸⁵Lipi Roy, 'If Laughter Is The Best Medicine, Why Are So Many Comedians In Poor Health?' *Forbes* (14 November 2019) <<https://www.forbes.com/sites/lipiroy/2019/11/14/if-laughter-is-the-best-medicine-why-are-so-many-comedians-in-poor-health-and-dying/?sh=59805c615925>> accessed 10 January 2022.

dichotomy, lack of jurisprudence, and practical difficulties make formal copyright enforcement unsuitable. Instead, informal industry norms play a pivotal role. Social sanctions like refusal to work with or host offending comedians, act as deterrents.

Vertically, ambiguities exist regarding copyright ownership between comedians and producers, especially for live or theatrical shows. Judicial precedents establish producers as first copyright owners for cinematographic works. But, statutory construction and policy considerations demonstrate that these cannot be blindly applied where power imbalances exist. Separate copyrights vest in constituent works like scripts and performances. Unless validly assigned, comedians retain ownership. Hence, accusations against Vir Das seem legally untenable.

Overall, while horizontal joke theft can be regulated informally, ambiguities in vertical protection necessitate legislative or judicial clarification. Courts must note stand-up's welfare dimension and prevent exploitation of upcoming comedians by producers through stringent copyright enforcement. The legislature must correspondingly amend definitions of *authorship* under the Act to unambiguously vest ownership in comedians for their creative inputs.

Progressive jurisprudence and legislation balancing varied interests will stimulate creativity among stand-up comedians. It will ensure fair compensation and prevent illegitimate free-riding by powerful intermediaries. This will spur growth of stand-up comedy as an industry, enhancing incomes, reputation and job opportunities for artistes. Simultaneously, consumer interest will also be secured by ensuring continued creation and dissemination of qualitative stand-up content. Such legislative-judicial synergy, respecting industry dynamics while preventing exploitation, can enable healthy growth of stand-up comedy in India.