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# Showtime Chronicles: Legal Safeguards and Intellectual Property Rights of Live Performances

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## ABSTRACT

*Since ancient times, live shows have remained a preferred entertainment choice for audiences, transcending technological advancements. Despite the ubiquity of cinemas, LCD TVs, and streaming services like Spotify and YouTube, the visceral experience of live performances, whether it be in drama, music, or impromptu street acts, remains unparalleled.*

*Live performances, an integral part of human culture, have evolved from storytelling circles and puppetry to modern theaters, concerts, and comedy shows, presents a unique challenge in protecting intellectual property rights, especially in an era dominated by digital content. These unscripted, one-take events lack the luxury of retakes, posing a distinctive hurdle in preserving elements like choreography, scripts, and musical compositions.*

*Unlike conventional copyright laws designed for tangible content, live performances often fall outside traditional copyright laws to their intangible nature. The challenge lies in safeguarding elements such as choreography, scripts, musical compositions, and stage designs that are integral to live shows. Copyright can protect these aspects, but its application varies, and challenges arise in establishing ownership, particularly for emerging artists lacking widespread recognition.*

*Stand-up comedians, dance choreographers, puppeteers, and performers of folklore find themselves navigating the complexities of protecting their intellectual property where content spreads rapidly and attribution becomes challenging. While intellectual property laws play a crucial role in protecting artists, the existing framework, the existing copyright laws are not sufficiently strengthened or flexible to meet the unique needs of live performers. This research paper delves into the nuanced realm of intellectual property rights for stand-up comedians, dance choreographers, puppeteers, and keepers of folklore. It sheds light on the formidable challenges they encounter in preserving intellectual property within a landscape dominated by the internet and social media. The study emphasizes the urgency of fortifying and modifying existing laws to align with the unique demands of live performers, ensuring their creative contributions receive the protection they deserve in the ever-evolving entertainment panorama.*

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**Keywords:** *Intellectual Property Rights, Live Performers Rights, Copyright Protection, Legal safeguards for Live Performances.*

## **I. INTRODUCTION**

Live performances are a vibrant and integral part of the entertainment industry, encompassing various art forms such as dance choreography, stand-up comedy, folklore, puppetry, and more. These performances captivate audiences, showcasing the talent, creativity, and cultural richness of the artists involved. However, behind the scenes, there are crucial considerations regarding the protection of intellectual property rights that are essential for the sustainability and recognition of the creators and performers.

Live performances are characterized by their ephemeral nature, with each performance being a unique and fleeting experience. Unlike recorded media or digital content, live performances are often witnessed in real-time, offering a direct and immediate connection between the artists and the audience. The spontaneity and improvisation inherent in live performances make them highly valued and sought after, creating a rich tapestry of artistic expressions. Intellectual property rights for live performances primarily encompass copyright protection, which safeguards original creative works. Copyright protects various elements of a live performance, such as scripts, choreography, musical compositions, stage designs, and recorded performances. By securing copyright, performers and creators gain exclusive rights to control the reproduction, distribution, and public performance of their works, ensuring fair compensation for their efforts.

Within the realm of live performances, various art forms hold their own distinct challenges and considerations in terms of intellectual property protection. Dance choreography, for instance, involves intricate movements, choreographic sequences, and creative expressions. Stand-up comedy relies on original jokes, comedic timing, and the unique style and persona of the comedian. Folklore performances carry the weight of traditional cultural expressions and heritage, passed down through generations. Puppetry combines artistic craftsmanship with storytelling, bringing inanimate objects to life through skilled manipulation.

The protection of intellectual property rights for live performances encompasses multiple aspects. One crucial aspect is the recognition and safeguarding of the originality and creativity inherent in these performances. As the artists invest significant time, effort, and artistic vision in their work. They deserve recognition for their contributions and the ability to control and benefit from their creations. Copyright serves as a primary mechanism for protecting intellectual property rights in live performances. It grants exclusive rights to the creators,

allowing them to control the reproduction, distribution, public performance, and adaptation of their works.

The following sections will delve into specific examples of live performances and explore the laws and regulations surrounding their intellectual property rights. By examining a few live performances which were relevant back then and affected by the technology but are still popular and relevant, it will help gain insights into the legal frameworks, pre-existing laws, potential challenges that arise in protecting intellectual property rights in the context of live performances.

## **II. COPYRIGHT PROTECTION FOR STAND-UP COMEDY**

Stand-up comedy is a western art form wherein the comedic performance is for the live audience in which the performer addresses the audience directly from the stage. It has been in one of the loved forms of art since ages. It is fun narration of a story, a situation, one liner punch lines or playing a character. Stand up gigs have always attracted a huge number of audiences all over the world and has also become one of the loved performing arts in India.

Every day there is a gig of some stand-up comedy happening around specially on weekends. It is equally loved art form as the movies. As a report shows that there has been a drastic rise during the last 5-10 years in the number of comedians and stand-up shows.

As the technological advancement happened the comedy is not just limited to the live performance set but available on platforms like Netflix, Amazon Prime. With the advent of OTTs, Indian comedy specials started to gain popularity both at home and abroad. Indian comedians like Vir Das were the first Indian comic to have his own Netflix special in 2017 titled, Vir Das: Abroad Understanding. Other Indian comedian too bagged their Netflix stand-up special like Amit Tandon: Family Tandoncies, Kapil Sharma: I am Not Done Yet etc. OTTs like Amazon Prime have reality shows like Comedy Premium League and Comicstaan to bring young talent into limelight.

But when its dug deeper stand ups are not merely an act or performance on stage of just delivering a joke. It is the accent, way the comedian builds up a story, how artist expresses the story. Many comedians do role plays taking up different personalities. The energy of the show and the delivery of the joke is what is collectively called a performance.

## **III. LAWS RELATED TO STAND UPS**

A stand-up is a unique work and created by the intellect of comedian. It is not a mere talking on stage for audience but it requires creativity, self-ideas, editing and performance in a certain

way that joke lands and people enjoy the performance. Comedians can have scripted jokes in their back pockets but main play is real time comedy, improv according to the audience and work the room what makes a great comedy set. Unlike musicians the comedians solely rely on touring, timing of joke and element of surprise. They do not receive royalty each time the joke is heard, the performance skills are what comedians rely on for the financial rewards and recognition. Comedians spend their careers making people laugh, but the challenge of protecting a comedian's intellectual property is no laughing matter.<sup>2</sup> So, when the work is performed and is converted to particular expression of the artist the legal framework to protect the rights of the comedians i.e., copyright laws come into the play. It is important for the work to be eligible for copyright protection to be original: should be independently created by the author, should possess a degree of creativity<sup>3</sup>.

Many have argued that the jokes cannot be protected because two comedians can perform a same and joke and people can laugh. But way the Anubhav Singh Bassi tells a story of his laws school friends is completely different from Abhishek Upmanu's telling a joke about his teenage and parents. They both have basic idea of storytelling from their personal life, but their stories and the way they express it or how they talk on stage is completely unique.

Another issue that comedy industry faces is as the use of social media are increasing the jokes are getting published the minute they are told. The traditional stand-up comedy community is now equipped with an internet connection. This presents a threat to the creation and dissemination of jokes, which in turn undermines the viability of the stand-up comedy industry. This harm can include harm to the comedian's reputation, and loss of use of the affected joke. A joke is generally abandoned by the comedian as soon as joke theft occurs because in an industry where reputation and originality are key, a comedian cannot risk being perceived as a joke thief. The Internet makes intellectual property rights more valuable to comedians because the harm from appropriation has gone up.<sup>4</sup> And due to internet, the effects of jokes theft reach to the world in even shorter time frame and harm to the artist is tripled. Comedians' rights are no joke and they deserve to protect their legitimate interest when they are making most of the world laugh. The times when only social sanctions were sufficient to deter a person are gone. Comedians should be able to approach the court of law to protect joke theft and enforce their

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<sup>2</sup> Mitra Ahouraian, "Copyright Protection for Comedians is no Joke," (2022), *available at*: <https://www.forbes.com/sites/forbesbusinesscouncil/2022/06/13/copyright-protection-for-comedians-is-no-joke/?sh=311c066d15a6>

<sup>3</sup> Feist Publications v. Rural Telephone Service Co. 499 U.S. 340 (1991)

<sup>4</sup> Dotan Oliar & Christopher Sprigman, "There's No Free Laugh (Anymore): The Emergency of Intellectual Property Norms and the Transformation of Stand-up Comedy", *Virginia Law Review* (2008)

rights<sup>5</sup>.

In Supreme Court of India in the case of *Eastern Book Company v. D.B. Modak*<sup>6</sup> has laid down standard of originality in India relying on the Supreme Court of Canada's judgement in *CCH Canadian Ltd. v. Law Society of Upper Canada*<sup>7</sup> case wherein the court stated that minimal degree of creativity is more important than a novel or innovative idea in copyright law. It further held that a work should not merely be a product of labour and capital, and some level of creativity is required. Further under Section 13(1)<sup>8</sup> grants copyright protection to original literary works. Copyright laws rests on the contention that ideas are not protected but the expression of the work is protected. The same is provided under Article 9 (2) of the TRIPS Agreement and Article 2 of the WIPO Copyright Treaty. Let's take example of Romeo and Juliet, many movies, songs, drama have been created around this tale each adding their own expression to the story. The way the tale is expressed can be protected. Each one need to have their individual way of expressing this same underlying ideas. The Supreme Court in *R.G. Anand v. Deluxe Films*<sup>9</sup>, laid down a seven-step test which clearly stated that mere similarity in theme or subject matter is not enough to constitute copyright infringement, copyright protects the expression and not the idea.

The copyright protection of jokes has been acknowledged (albeit seldomly) by the courts<sup>10</sup> and is expressly noted in Compendium II of Copyright Practices Section 420(i), which states jokes and comedy routines may be registered if they contain at least a certain minimum amount of original expression in tangible form.

Therefore, in *Foxworthy v. Custom Tees*<sup>11</sup>, when the comedian starting words were someone else's ending phrase of the punchline, a question arose regarding copyright infringement and joke theft. The court held that two entertainers can tell the same joke, but neither entertainer can use the other's combination of words. Thus, while the basic idea for a joke can remain same, the expression of the comedian is always unique and cannot be copied. This affirms that originality standard coupled with individualist creativity of a performer, is a subject matter of copyright protection<sup>12</sup>.

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<sup>5</sup> Role of IP in Stand-up Comedy, 2002, available at: <https://www.khuranaandkhurana.com/2022/06/01/role-of-ip-in-standup-comedy/>

<sup>6</sup> (2008) 1 SCC 1

<sup>7</sup> (2004) SCC 13

<sup>8</sup> The Copyright Act, 1957 (14 OF 1957)

<sup>9</sup> AIR 1978 SC 1613

<sup>10</sup> *Foxworthy v. Custom Tees, Inc.*, 879 F. Supp. 1200 (N.D. Ga. 1995); *Kaseberg v. Conaco, LLC*, 260 F. Supp. 3d 1229, 1249–50 (S.D. Cal. 2018)

<sup>11</sup> 879 F. Supp. 1200 (N.D. Ga. 1995)

<sup>12</sup> Role, *Supra* note 9, p. 16

For example, Bhuvan Bum who takes up different personalities, he plays a set of a family wherein he plays character of mother, father, himself, his 2 friends his maternal uncle and his teacher. All those roles bring out a different personality different characters or change their voice to bring about a different personality in the gig. There might be more comedians doing these multiple personality sets but if anyone copies the similar set of Bhuvan bum or copy exact characters it will lead to copyright infringement and the expression of Bhuvan Bum's family set is what must be protected under the law of copyright. It falls short in such stage-persona driven comedy and long-form narrative as protection is not only sought for jokes being used verbatim but also for the effort made to build a stage personality. In such cases, it is the expression that brings laughs and not the idea. Therefore, the test of substantial similarity should be used in these cases to determine infringement.

Although not all jokes are copyright protectable, some jokes can receive copyright protection. A joke fixed in a tangible medium is capable of copyright protection if the joke is independently created by the author (as opposed to copied from other words), and possesses at least some minimal degree of creativity<sup>13</sup> to evidence a modicum of intellectual labour with respect to the expression of that joke.

The stand-up comedy is more than delivering of jokes it consists of literary work<sup>14</sup>, dramatic work<sup>15</sup>, cinematographic films<sup>16</sup>, sound recordings<sup>17</sup>. Comedian before presenting the jokes before the live audience writes and prepares his act or jokes either on laptop or on paper<sup>18</sup>. In *University of London Press v. University Tutorial Press*<sup>19</sup>, the House of Lords defined literary work as any work that is printed or in writing, irrespective of its 'literary quality.' So, the minute a comedian prepares his jokes for the show and fixes it in writing, copyright exists automatically<sup>20</sup>. Thus, the requirement of originality will be satisfied if an act or joke originates from the comedian and the skills, judgements and labour of the comedian are proved. This under the literary work of copyright laws, a comedian can protect their jokes.

Further the stand-up comedy can be considered dramatic work as the comedians are required to perform the jokes in front of the live audience. Jokes are not just a storytelling and jokes, it is bundle of expressions, act, performance on stage to ensure efficacy of jokes. Thus, performative

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<sup>13</sup> Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991)

<sup>14</sup> Section 2(o) of The Copyright Act, 1957 (14 OF 1957)

<sup>15</sup> Section 2(h) of The Copyright Act, 1957 (14 OF 1957)

<sup>16</sup> Section 2(f) of The Copyright Act, 1957 (14 OF 1957)

<sup>17</sup> Section 2(xx) of The Copyright Act, 1957 (14 OF 1957)

<sup>18</sup> Vinson Cunningham, "Jerry Seinfeld, Craftsman and Crank, The New Yorker", 2017, *available at*: <https://www.newyorker.com/culture/culture-desk/jerry-seinfeld-craftsman-and-crank>

<sup>19</sup> (1916) 2 Ch. 601

<sup>20</sup> Role, *Supra*, note 9, p. 16

element is essential to avail dramatic work protection under the Act. Hence, performance of stand-up comedians can be protected as dramatic work.

Additionally, now a days jokes are not just limited to performance in front of live audience but now have been extended to OTT's and YouTube. Section 13(1) (b)<sup>21</sup> of the Copyright Act provides protection to the cinematograph films. The comedians record their performance and this it is considered as a cinematograph work, if recorded in an audio – visual manner and can seek protection under copyright. Thus, acts that are recorded in audio – visual format under the “originality standard” can be protected under cinematograph work.

Lastly Section 2(xx)<sup>22</sup> of the copyright act here has requirement for fixation in any medium as any sound being recorded. Comedians for their live performances often make audio recording as a method of preparation. Thus is the act or joke being original and not copied from any pre-existing work it can be protected under the sound recordings.

It is well established from copyright law's idea/expression dichotomy that copyright law will only protect “the specific expression of a joke, rather than the underlying funny idea.”<sup>23</sup> But Indian Courts have a very limited framework to support this proposition. Further court is yet to recognise that these laws won't apply to many new forms of the jokes for e.g., point of view narration which are been currently told by the stand-up comedians. A large majority of stand-up comedians have shifted from the post-vaudeville one-liner style to monologues with a more distinct narrative thread linked to the individual comedian's distinctive point of view. Therefore, the trend in court decision-making must be analysed with a grain of salt. In such circumstances courts may be likely to apply less strict “substantial similarity” test to determine the level of similarity between the jokes.

Solutions comedian have for protection of their jokes that they can utilize the notice and takedown process under Section 52(1)(c)<sup>24</sup> of Copyright Act 1957 to the intermediaries on whose website the infringed / pirated content is accessible / visible. Further Rule 75 of the Copyright Rules, 2013 set out essential of takedown and process of such notice. Upon the complaint the person responsible for storage is required to take down the pirated material with 36 hours and take further measures.

It is important to note even though online service providers can be held liable for the content

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<sup>21</sup> The Copyright Act, 1957 (14 OF 1957)

<sup>22</sup> The Copyright Act, 1957 (14 OF 1957)

<sup>23</sup> Kal Raustiala and Christopher Sprigman, *The Knockoff Economy: How Imitation Sparks Innovation* p. 12 (OUP USA, 1st edition, 2012)

<sup>24</sup> Section 52(1)(c) - The reproduction of a literary, dramatic, musical, or artistic work for the purpose of a judicial proceeding or for the purpose of a report of a judicial proceeding



but it is very less effective for comedy artists. Joke theft is very difficult to be filtered out as unlike songs there is no library or albums published related to the jokes for the purpose of filtering. The only option the comedians have is detection monitoring by the comedian, their peers, and their fans. Further the take down notice's procedure is not simple and easy to use so that comedians can more easily use this mechanism to enforce their copyright.

Apart from that comedy clubs can restrict taking photos and videos of stand-up comedy performances. It cannot be 100 % practices but clubs could take steps to effectively enforce this prohibition.

Other threat which is joke theft on social media by various accounts on social media wherein the jokes are literally copied. If this trend continues of appropriation of joke it would lead to potentially destroying the stand-up industry. Joke theft deprives a comedian who authored the joke of the financial rewards and benefit flowing to his or her joke. It destroyed the potential of the joke as the joke is abandoned. It further destroyed the livelihood of the artist. Some may argue that artist would continue to write the joke no matter what but the market has been destroyed for that particular joke and thus artist might have to abandon the whole set. It also discourages the new budding artists to enter this industry.

Thus, it is important for the Indian laws to give rights to the artist over publishing of their work. The value of joke lies on element of surprise and not repetition, so control over publication can help in financial rewards to the comedians. For e.g. if an artist doesn't want his work to get published before his comedy special or till his touring is over, he can control the publication. The comedian may choose to release some jokes online or create special jokes for social media for marketing purposes, but the decision to publish jokes should ultimately lie with the comedian. Therefore, through copyright protection such comedians are given the assurance that their intellectual creativity is adequately protected and more are encouraged to enter this industry.

#### **IV. COPYRIGHT CONSIDERATIONS FOR DANCE CHOREOGRAPHY**

Dance, a rhythmic movement of the body, is viewed as one a fully-fledged art form, belonging to the category of performing arts, a hidden language of the soul, allowing an individual to communicate his emotions, thoughts, and experiences through expressions, steps, and gestures making it captivating to the eyes of viewers.

Currently, in this technology-driven era wherein everyone spends most of their time browsing on social media (Instagram, TikTok, etc) observing various social media influencers endorsing significant moves or trends minus originality, most of them are mere repetitions of the original

work. There does not exist any sort of creativity and is disseminated publicly without the knowledge of the original creators.

The dance forms like Ballet, Kathak and Bharatnatyam are based on a particular formation and certain standard pre-determined rules and patterns whereas various dance forms like Bhangra and freestyle do not follow any of such pattern. The copyright law safeguards a comprehensive and systematic combination of registration dance steps.<sup>25</sup> Dance is an abstract kind of art that makes it harder to obtain intellectual property, unlike a chemical or mechanical process.

#### **(A) Laws related to dance choreography**

A performing artist's choreography is their art. Choreographic works are considered a type of dramatic work for the purposes of seeking protection under the Indian Copyright Act of 1957. Section 2(h) of the Copyright Act specifies that dance belongs within the category of dramatic work, which includes an expressive form of art with emotion, a theme, scenic arrangement, acting, and entertainment. The expressions of ideas, not the ideas themselves, are protected by copyright. Section 2(qq)<sup>26</sup> of the act states that a performer includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance. Dance moves of a creator can be protected under the Copyright Act of 1957 if reduced in writing but it cannot be trademarked. However, the name and its representations are capable of being trademarked under the Trade Marks Act of 1999. The methods can be protected under the Patents Laws and the dance costumes can be protected under the Design Laws.

In the case *Institute of Inner Studies v. Charlotte Anderson and ors.*<sup>27</sup>, where it was held that simple dance steps or social routines cannot be copyrighted due to them being generic elements. However, if a specific and selective compilation has been entered involving those individual general steps, a copyright claims can sustain. This compilation although, cannot be a merely mechanical exercise and needs to involve certain selectivity and exercise of judgment in order to be protectable, under the applicable threshold of originality.<sup>28</sup> Further WIPO defines examples of fixation, such as paper work, disk, canvas-painting or graphic art. If a choreographer wants to get a copyright, it must be reduced in a stable format such as a written format or videotaping but not in movies.

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<sup>25</sup> K. Krakower, "Finding the Barre: Fitting the Untried Territory of Choreography Claims into Existing Copyright Law," *Fordham Intellectual Property, Media and Entertainment Law Journal*, volume 28, no. 3, p. 671, 2018

<sup>26</sup> The Copyright Act, 1957 (14 of 1957)

<sup>27</sup> CS(OS) 2252/2011

<sup>28</sup> *Construction Denis v. Yves Jenson* 2010 QCCA 1287

Thus it can be stipulated that if a person wants to register his/her work for copyright he must reduce it in writing; this was also said by the supreme court in *Academy of general edu, manipal and ors v. B.malini mallya*<sup>29</sup> that a new form of a ballet dance which is reproduced in a literary format is considered as a dramatic work. So, if a person wants to register the copyright in a choreographic work, he/she will be required to reduce it in writing or any other form and apply for registration in that form only.

In the case of *Bikram's Yoga Coll. Of India, L.P. v. Evolation Yoga, LLC*<sup>30</sup>, it was held that since yoga sequence is a form of systematic bodily movement, it is not covered under the Copyright Act of 1957. Thus, it is important that dance not just consist of movement of body but a certain level of creativity and originality to be registered under the Act. It is important that dance choreography to have systematic dance steps or a pattern. Social dance, discrete dance movements and simple routines, ordinary motor activities, and physical skills are excluded from the purview of choreography works.

For example, the classic Michal Jackson Moonwalk dance which is now done by dancers on live platforms. It can be seen since it is a singular dance step rather than a sequence of steps it cannot be copyrighted as they lack the prerequisite of originality, they are unequivocally not covered under the ambit of copyright law.

The dance choreography the routine can be protected under the cinematography work under the act. But Section 2(h) and Section 2(f) are quite ambiguous since a video capture is not the result of theatrical labour but rather the result is a cinematographic film. So, the author of that work is not entitled if he makes a video of his/her dance, as defined in Section 2(xx) of the act that specifies "visual recording." It does not showcase hard work and labour of the artist or the creator.

The law related to copyright protection of dance sequences remains in its infancy nevertheless, due to the proliferation of platforms such as TikTok and games such as Fortnite, numerous lawsuits alleging copying of popular dance movements are coming to the fore. Many artists are becoming aware of their rights and are striving to defend them. Surprisingly, even though dancing is quite pacific in nature, its protection is very litigious.

After Remo D' Souza, case for wanting to copyright his dance choreography of the movie ABCD for the song Bezubaan more and more artists are coming up to seek protection as a result, dance is becoming more of a business professional than a once worshiped form of art.

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<sup>29</sup> AIR 2009 SC 1982

<sup>30</sup> 803 F.3d 1032 (9th Cir. 2015)

With the increase in this new era, there is a need to enlarge the scope of protection of the work of the dancer or creator. There are still several dancers and choreographers who are ignorant of the protections available to their work, so there is a mandatory need to spread awareness amongst them.<sup>31</sup> One of the most important elements which are highly required at this point is more awareness and exposure of creativity in dance among choreographers which will not only lead to safeguarding of their rights but also an expansion in the application of copyright for choreographic works.

Choreography should be given a fair interpretation, and performers should have easier access to courts and the legal justice system to assert their copyright. Hopefully, such acts will have a domino effect, and many more dancers or choreographers would come out to seek legal protection for their renowned dances, resulting in a more established legal position not just in India but also worldwide.

## **V. COPYRIGHT ISSUES IN FOLKLORE AND TRADITIONAL PERFORMANCES**

India is a country with a vast ancient history. It is a very diverse country with a very rich culture and heritage. Indian literature and folklores are a precious asset of the country. In some areas folk means native or rural and some describe folk as from the heart. In general folklores are orally narrated or performed in small group and spread amongst the community and passed on through the generations. Each culture has its own exclusive folklores which include stories related to their culture, literature, warrior stories.

Majority of these inhabitants are the indigenous communities whose efforts and creative works contribute enormously to the cultural heritage of the country, growth, and development of medicinal and technological fields. The culture of these traditional communities has played a major role in the social evolution of the mankind.<sup>32</sup>

India is a land of diversity when it comes to folk and ethnic culture with hundreds of ethnic, linguistic, and religious groups with diverse origins and lifestyles that, over time, intermingled in part and remained untouched in parts over centuries. Perception about folklore differs in India, mainly associated with tribals and simple rural people, rather crude and elemental in comparison to higher art forms.

Folklores include:

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<sup>31</sup> “Copyrightability and the Art of Dance”, *available at*: <https://legalserviceindia.com/legal/article-9284-copyrightability-and-the-art-of-dance.html>

<sup>32</sup> “Intellectual Property – A Way to Protect the Expressions of Folklore”, *available at*: <https://ijalr.in/intellectual-property-a-way-to-protect-the-expressions-of-folklore/>

1. Folk Arts which include Madhubani paintings from Bihar, Kangra painting from Himachal Pradesh and Warli painting from Maharashtra.
2. Performing art like Garba and Dandiya Raas of Gujarat, Ghoomar dance of Rajasthan and Haryanvi, Bhangra and Gidda of Punjab.
3. Folk lore / Folk tales like Mahabharata and Ramayana
4. Folk music like Kesariya Balam – Rajasthan

In this era of globalization, one can easily find in the market, music records by the companies or dance performances by the artists, carpets or t-shirts with traditional art, being distributed as original products by various companies without any gratitude or economic benefit to the communities which are the original creators of these arts, musical instruments or songs. This commercial exploitation has led to a devastating effect on the indigenous people. However, the protection of the folklore expressions is commonly debated because of its inherent nature and intricacies associated with it. One of the accommodative fields of law under which they can be guaranteed protection is the intellectual property regime.

#### **(A) Laws related to the folklores**

Folklores are basically productions with an artistic approach consisting of traditional concepts which include verbal expressions such as folktales, poetries, or riddles; musical expressions such as folksongs or instrumental music; expressions by actions such as folk dances, plays, acts; tangible expressions such as creation of folk art, drawings, paintings, sketches and many more<sup>33</sup>. It is important that the folklores are adapted and made relevant to the current generation so that folklores are not lost and forgotten. Everyone is allowed to interpret the folklores and bring a creativity in it but it is certainly important to make sure that it is done without losing the true essence of the cultural representation. The classic tales, be it Jane Austen's Emma or Louisa May Alcott's Little Women, have been renewed many a times and adapted under different names. But these adaptations also have diluted the original work and created confusion therefore many countries are now wanting to protect their culture with the concept of copyright.

The globalised world today has made exploitation of folklore easier without making any recompense to the concerned community. Not only is their culture marketed heavily to obtain pecuniary benefits, but it is also adapted in a restructured way which undermines the identity of a civilisation. IP protection in the form of copyright, related rights or local legislations not only obviates such chances of adulteration and diminution by preventing unauthorised adaptations and

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<sup>33</sup> "IPR and Folklore, Folk-tale, and Folk Songs", (2021), available at: <https://www.iralr.in/post/ipr-and-folklore-folk-tale-and-folk-songs>

reproductions but will also guarantee economic rights to the concerned community<sup>34</sup>.

However, if folklore is to be given recognition and protection under the copyright laws, it must fulfil certain benchmarks that is, it should be original, it should be independently created, nationality of the author should be clear and it should allow fixation in a tangible medium.

The presence of these conditions precedent for granting copyright protection negates the chances of folklore getting protection as with regards to the author, there is no single author, as it belongs to the community, though original it has absorbed social change over the years and the present version cannot be said to be original for the sake of protection and finally not all folkloric expressions such as drama, dance, tales etc can be fixed in a tangible form. Another major hurdle before folkloric expressions is the duration for protection and if it were even possible to identify a single author, it would be protected for their lifetime and a limited period thereafter before falling into the public domain<sup>35</sup>.

Copyright protection is the most suitable to protect the folklore expressions in comparison to other forms of protection available in form of trademark or geographical indications. Even though the trademark law can grant protection to the traditional cultural expressions, however such protection would only be limited. One of the reasons beings that the indigenous communities are unlikely to register the trademark in goods and services which are not related to “general area of their folkloric activity.” The use of the trademark can only grant protection in the concerned activities or products and do not extend to all the sectors which are not related to the folkloric activity of these communities.

Further, trademark or geographical indications would require compliance to various formalities and procedures related to registration and payment of required fees. However, this process would prove to be daunting task owing to the lack of awareness on the part of indigenous communities. Contrary to this, traditional expressions can be easily protected under copyright law; folk dances, tales, drama as literary work; folk paintings, designs, sculptures, pottery, et cetera as artistic works; folk music and songs as musical works; and even as cinematograph film or sound recording.

There is no standard basis yet in India as to determine the size of the traditional community whose work can be bestowed the copyright protection. The questions like which group would be considered as traditional community to be granted protection remains unsettled. There is a

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<sup>34</sup>Arijit Sanyal, “IP Protection for Folklore: A Need?” (2020), available at: <https://www.mondaq.com/india/copyright/1008458/ip-protection-for-folklore-a-need>

<sup>35</sup> Ibid.

wide debate on whether the small tribal groups should be also granted protection. There is no answer to the question whether the work of a sub-group which has separated from a large community can be granted copyright protection.

Therefore, in India, all the indigenous communities should be identified and their folklore expressions should be maintained under a central depository system. A competent authority should be given the responsibility of penalising the people who commercially exploits the interest of the indigenous community in an illegal manner. Besides all these measures, everyone should take the responsibility of preserving the traditional heritage and prevent its ruthless commercialisation just to satisfy the bellies of the exploiters.

Under the Indian Constitution, the basic law of the land has not directly addressed the issue of protection of folklores, although Article 29<sup>36</sup>, which provides for the protection of the culture of minorities, is defined as a Fundamental Right (Part III). Article 29 states that any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same, which makes protection of the folklore of the distinct groups in India possible. On the contrary, majority of the folklores existing and misused presently in India belong to small communities who do not come within the scope of the aforementioned constitutional provision and no legislation has been inculcated to protect the same. The only other general provision in the Constitution that can be recognized as a source to protect folklore is Article 51A (f)<sup>37</sup> which provides for the fundamental duty of every citizen of India to value and preserve the rich heritage of our composite culture. There is no legislation based on this provision as well for translating this constitutional objective into reality.

The UNESCO and the WIPO have incorporated a long-lasting solution through a mechanism for protection and preservation of folklore. Considering the sentiments of the member countries, WIPO launched certain new initiatives, as reflected in its program and budget for the biennium (1998- 1999), for exploration of the issues relating to intellectual property rights of holders of indigenous knowledge. This further extended to protection offered through laws on copyright and related rights, other laws on intellectual property, and non-IP laws like the laws relating to biodiversity issues and rights of indigenous people<sup>38</sup>.

Cultures are dying out faster than the people associated with them. Developing countries that have rich and diversified folklores must take steps to protect their cultural heritage and ensure

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<sup>36</sup> The Constitution of India 1950

<sup>37</sup> Ibid.

<sup>38</sup> IPR, supra note 38, p. 25

the prevention of degradation and exploitation of folklores. They should also make sure that certain communities are not being deprived of their economic and cultural rights.

India, being a developing country and having a rich folklore must take steps to protect the diverse cultural heritage spread across the provinces in order to prevent adulteration of the same and to ensure that the concerned groups are not alienated from their economic rights having a nexus with such folkloric works. India in furtherance of protecting the cultural heritage must learn from her eastern neighbour.

Irrespective of the constitutional provisions envisaging protection and preservation of distinct cultural groups, there is no special law prohibiting the exploitation of folklore of these communities without permission. The Indian Copyright Act does not provide any provision for the protection of folklore or expressions of folklore. There is also no other legislation along the lines of the Model Provisions, to serve the purpose of granting legal protection to expressions of folklore.

There exists an incompatibility between the criteria which needs to be fulfilled for copyright protection and nature of folklore, it is still the most suitable way out, until there comes into existence a uniform sui-generis system. However, substantial amendments need to be made to the statutory legislations to adapt it to the nature of folklore expressions in order to protect them effectively. The proponents of sui-generis system advocates that amending laws would not be sufficient because the intellectual property laws strive to protect the individual and economic rights and not the cultural or communal rights. However, the development of another system to grant protection would lead to wastage of resources which most countries, especially the non-developed ones may not be able to afford. Further, the copyright law in place of sui-generis system would ensure uniformity in the means of protecting the folklore expressions worldwide. Therefore, required changes should be made to the copyright laws to make it suitable for the protection of folkloric expressions.

If folklore is to be given identification and shielding under the copyright laws, it must fulfil certain standards, i.e. It must be original work, it should be an independent and unaided creation, the nationality of the author should be clear and it should be in a tangible medium. The existence of these standards and conditions for granting copyright protection annihilates the possibility of folklore getting any kind of protection because, though it is original it has been through social changes over the years and there are many versions of the same work and the present version cannot be said to be original, as the said works belong to the whole community. There is no single author of the work. Expressions such as dance, tales, etc cannot be fixed in a tangible



form.

Despite granting such rights to the performers of indigenous arts, they only provide limited protection and there are few drawbacks. Firstly, this right is only granted to individuals or groups of performers and not to the whole community. Secondly, the right is only permitted only for a limited period i.e., twenty-five years and after that, it can be used by everyone in the public realm and they can use it in whatever manner they choose.

So, there is a pressing need to resolve various issues regarding the concept of copyright before it aims to provide protection to folklore.

## **VI. PRESERVING CREATIVE OWNERSHIP AND RIGHTS IN PUPPETRY PERFORMANCES**

Puppetry is a very old traditional art and craft form found in many countries. Since time immemorial, it has been a popular and appreciated form of entertainment in rural are. The tradition of puppetry is not just ancient in almost all civilized countries of the world; puppetry has been present in different forms and has been used for various purposes since ancient ages. In India the stylist vocabulary of puppet theatre carries a relevant message of social awareness, historical and traditional identity, and moral value system. Its relative isolation and distinct style of improvising has made it a powerful medium of mass communication. Not only in rural areas but also in urban places puppet shows are very popular and powerful tool of communication with the mass. Even in the modern medium of communication like television and films – puppet shows are quite popular.

### **(A) Laws related to puppetry**

Traditional handicrafts are images of the cultural heritage of any country. In India, the importance of traditional handicrafts becomes more appealing because of its rich heritage and diverse culture. In India, the Constitution, through Article 29<sup>39</sup>, guarantees the fundamental right to the individual to shield his culture and heritage. Traditional handicrafts play an important role in serving this purpose and thus, they need to be protected. Puppets / Katputli are given protection as a Geographical Indication and two acts which give protection are Copyright act 1957 and The Design Act 2000.

The kathputlis if they meet the standard of being a part of a ‘fragment of creativity’. But, if the

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<sup>39</sup> The Constitution of India 1950

puppets are common and of ‘run-of-the-mill variety,’ they will not be fit to be original<sup>40</sup>.

In respect of handicrafts, it is vital to possess the excellence between traditional and technical handicrafts. The protection can only be provided to traditional handicrafts as they are a significant source of the custom of any society and it is the responsibility of the legislature to provide protection to the rich custom of India. The status of traditional handicrafts is deduced from the following statutes and Acts:

### **Copyright Act 1957**

Under Section 2 (c)<sup>41</sup> of the Act artistic works include:

1. A painting, a scripture, a drawing (including a diagram map, chart, or plan) on engraving or a photograph, whether or not such work possesses an artistic quality,
2. A work of architecture,
3. Any other work of artistic craftsmanship.

### **Geographical Indications of Products Act 1999**

According to the TRIPS Agreement, popular handiworks were sought to be protected by way of Geographical Implications under national laws.

### **The Design Act 2000**

Section 2(d) of the Designs Act, 2000 and Section 2(c) of the Copyright act, 1957 should be read together and thoroughly to differentiate the design of the article and the object itself. It is significant to note here that designs act awards rights only to non-functional features of a design, so if a particular design is predominantly working then it cannot be qualified for a design right.

Also, any alteration of the traditional *kathputli* puppet is also likely to invite an infringement action, albeit under Geographical Indications of Goods (Registration and Protection) Act, 1999 (GIGA). Considering that *kathputlis* are registered as a GI, Section 22(4) of GIGA would come into play to hold any ‘impairment of goods after being put in the market’ as infringement. India is yet to tackle cases related to the copyrightability of the toys but there are few foreign cases which can shed light:

*Gay Toys Inc. v. Buddy L. Corp*<sup>42</sup>: The court held that the toy plane wasn’t a ‘useful object’ possessing useful and functional features. It was held that toys don’t have any intrinsic function

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<sup>40</sup> Sonia Balhara , “Are kathputlis protected under the Copyright Act”, (2021), available at: <https://blog.ipleaders.in/kathputlis-protected-copyright-act/>

<sup>41</sup> The Copyright Act 1957

<sup>42</sup> 703 F.2d 970 (6th Cir. 1983)

apart from the portrayal of the important item and are protectable by copyright.

*LEGO A/S v. Best-Lock Construction Toys Inc., D. Conn.*<sup>43</sup>: Minifigures of LEGO usually have movable torsos and hands. This was imagined to be a functional element by the best lock. Refusing this claim, the US district court said that LEGO torso shapes were a resourceful element and strengthened them more.

Therefore, it can be said that kathputli or puppets, being toys, cannot be considered utilitarian and their creative components can be considered as artwork if copyright is found to be original. Simply put, it seems that whether it is a purchase of the traditional kathputli or a simple puppet which is a copyrightable subject matter as an artistic work – the rights that the purchaser has in them are quite limited, some even dubious. Whether the owner of rights in those puppets would be eager to vindicate them or even have the means to achieve that, is a different matter altogether. For instance, coming back to the Bhaat community to which kathputli making is now confined, it is safe to assume that given their socio-economic status, illiteracy, and lack of zeal to establish their rights, it is unlikely that any such infringement as above would ever come to light.

Few questions are still unanswered either by laws or legal provision is that, Section 15(2) of the Copyright Act, 1957 creates a definite linkage with the Designs Act, 2000. It states that copyright in any design which is capable of being registered under the Designs Act, 2000 but which has not been registered shall cease as soon as any article to which the look has been applied or reproduced over fifty times by a process by the owner of the copyright or, along with his license, by the other person. So, the question which is raised here is, if the outer appearance of the puppets is replicated quite 50 times, the copyright which could have subsisted within the puppets' artistic work ceases. This may leave them unprotected under both copyright law and design law.

Apart from that laws are not clear for adaption rights, distribution rights. It is yet to answer what happens if someone buys a kathputli and d few altercations and start doing shows and earning money. What role will royalties and licencing play here. Although since the puppetry is now very limited to very communities and more specific to rural area there is a great chance, these issues may never come up given their knowledge about the laws is very less.

## VII. CONCLUSION

In conclusion, the protection of intellectual property rights is crucial for the sustainability,

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<sup>43</sup> 3:11-CV-1586 (CSH) (D. Conn., 2012)

recognition, and creative autonomy of artists and performers in the live performance domain. Throughout this discussion, we have explored the significance of IPR in various live performance categories, including stand-up comedy, folklore, puppetry, dance choreography, and more. While these examples provide insight into the challenges and considerations of IPR in live performances, it is important to recognize that the broader live performance landscape encompasses a wide range of art forms and creative expressions.

Stand-up comedy, known for its reliance on original jokes and comedic timing, faces challenges related to the unauthorized use or replication of jokes and performances. Comedians must assert their rights to control the reproduction, distribution, and public performance of their comedic material. This includes addressing issues such as joke theft and unauthorized recordings of live performances.

Folklore performances, rooted in cultural traditions and heritage, require careful attention to the protection of traditional expressions. While folklore is often passed down through generations, it is crucial to respect the intellectual property rights of the communities and individuals who hold and perform these cultural treasures. Measures must be taken to prevent misappropriation and exploitation, while also allowing for the continued cultural transmission and appreciation of folklore.

Puppetry, with its unique blend of craftsmanship and storytelling, presents its own set of challenges in intellectual property protection. Puppet designs, manipulation techniques, and original storylines require safeguarding to ensure that the creative efforts of puppeteers are acknowledged and respected. Copyright protection plays a significant role in preserving the distinct elements of puppetry performances.

Dance choreography, characterized by intricate movements and expressive compositions, demands recognition and protection of choreographers' original works. The ability to control the reproduction, adaptation, and public performance of choreographic sequences is crucial for choreographers to retain creative ownership and secure their economic rights.

While stand-up comedy, folklore, puppetry, and dance choreography have been highlighted in this discussion, it is important to acknowledge that live performances encompass a broader spectrum of art forms, including theatre, music concerts, street performances, and more. Each art form carries its own unique challenges and considerations in terms of intellectual property rights, which necessitate tailored approaches and legal frameworks.

Moving forward, continued efforts should be made to raise awareness about intellectual property rights in live performances, provide guidance and support to artists and performers,

and establish clear legal frameworks that address the specific challenges faced within the live performance industry. By doing so, we can foster an environment that encourages innovation, creativity, and the preservation of cultural heritage while safeguarding the rights of those involved in the vibrant world of live performances. Educational initiatives, workshops, and guidance on legal frameworks can help equip performers with the knowledge and tools to protect their creative works effectively.

In this rapidly evolving digital era, where new platforms and technologies reshape the way live performances are created, distributed, and consumed, it becomes even more crucial to adapt intellectual property frameworks to meet the changing landscape. By embracing innovation, striking a balance between protecting the rights of creators and promoting artistic freedom, and fostering a culture of respect for intellectual property, we can ensure the continued vitality and growth of the live performances and the artists.

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