



2012

Is Bollywood Unlawfully Copying Hollywood? Why? What has Been Done About It? And How Can It Be Stopped?

Arjun Shah

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/eilr>

Recommended Citation

Arjun Shah, *Is Bollywood Unlawfully Copying Hollywood? Why? What has Been Done About It? And How Can It Be Stopped?*, 26 Emory Int'l L. Rev. 449 (2012).

Available at: <https://scholarlycommons.law.emory.edu/eilr/vol26/iss1/15>

This Comment is brought to you for free and open access by the Journals at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory International Law Review by an authorized editor of Emory Law Scholarly Commons. For more information, please contact law-scholarly-commons@emory.edu.

IS BOLLYWOOD UNLAWFULLY COPYING HOLLYWOOD? WHY? WHAT HAS BEEN DONE ABOUT IT? AND HOW CAN IT BE STOPPED?

INTRODUCTION

A popular film favorite among lawyers and law students is the 1992 Oscar-winning comedy, *My Cousin Vinny*.¹ The film features Joe Pesci as a quick-witted but hapless attorney defending two innocent New York teens from a capital murder charge in the Deep South.² It was fitting, then, that a film about law and justice would be used as a guinea pig in Hollywood's most aggressive attempt to enforce its copyrights against unauthorized Bollywood remakes of Hollywood movies.³ In the spring of 2009, Twentieth Century Fox ("Twentieth Century") took the unprecedented move of filing suit for copyright infringement in the Bombay High Court of India⁴ against the Mumbai⁵-based film production company, BR Films.⁶ BR Films was set to release *Banda Yeh Bindaas Hai* (*This Guy Is Fearless*) in June 2009.⁷ Twentieth Century alleged that the producers and director of *Banda Yeh Bindaas Hai* blatantly created a "substantial reproduction" of *My Cousin Vinny*.⁸ The Bombay High Court

¹ MY COUSIN VINNY (Palo Vista Productions 1992); *My Cousin Vinny*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0104952> (last visited Apr. 13, 2012).

² MY COUSIN VINNY, *supra* note 1; *My Cousin Vinny*, *supra* note 1.

³ See *Banda Yeh Bindaas Hai: Stuck in Copyright Row, Release on Hold for Multiplex Stir*, THE INDIAN EXPRESS (May 21, 2009, 3:35 AM), <http://www.indianexpress.com/news/banda-yeh-bindaas-hai-stuck-in-copyright-row-release-on-hold-for-multiplex-stir/463253/0>.

⁴ For an overview of the structure of Indian courts, see Rachana Desai, Note, *Copyright Infringement in the Indian Film Industry*, 7 VAND. J. ENT. L. & PRAC. 259, 265 (2005). For the history of the Bombay High Court, see *History of High Court of Bombay*, HIGH CT. BOMBAY, <http://bombayhighcourt.nic.in> (last visited Feb. 13, 2012).

⁵ In 1996, the city known as "Bombay" was renamed "Mumbai." The high court in Mumbai, however, retained the name "Bombay." *History of MCGM*, MUN. CORP. GREATER MUMBAI, <http://www.mcgm.gov.in/irj/portal/anonymous?NavigationTarget=navurl://d20cb3d618ee8cb6c3a780df7c58030c> (last visited Feb. 13, 2012).

⁶ See Hetal Vyas, *Stay Order*, MUMBAI MIRROR (June 16, 2009, 3:35 AM), <http://www.mumbaiirror.com/index.aspx?page=article§id=30&contentid=2009061620090616033535477288d7b5d> ("This is the first time that a Hollywood film studio has taken a Bollywood filmmaker to court over remaking their film.").

⁷ See *id.*

⁸ *Id.*

issued an injunction delaying the Indian film's release while litigation ensued.⁹ Both parties agreed to a settlement before the court could issue a decision.¹⁰ The settlement left unanswered the question of whether Bollywood could continue to make unauthorized remakes of Hollywood movies with impunity. Nevertheless, in October of 2010, Twentieth Century presented the Bombay High Court with another opportunity to reach a holding regarding the legality of an unauthorized Bollywood remake.¹¹ This time, the court reached a decision and found that the accused Bollywood studio was liable for copyright infringement.¹² The court's decision was the first judicial opinion in India holding a Bollywood studio liable for unlawfully copying a Hollywood film.¹³

The major player in the Indian film and entertainment industry, commonly referred to as Bollywood, has had a long tradition of taking Hollywood movies and music and remaking them to serve a primarily South-Asian audience.¹⁴ Bollywood consists of the producers, directors, actors, and others who are responsible for most of the Hindi-language based films that are produced in cinema.¹⁵ Its films are recognized for their romantic dramas and elaborate song-and-dance scenes that depart from the storyline of the script.¹⁶ Bollywood

⁹ Twentieth Century Fox Film Corp. v. BR Films & ANR, NMS/1561/2009 (Bombay H.C. 2010) (unreported consent order), available at <http://bombayhighcourt.nic.in/data/original/2009/NMS156109050809.pdf>.

¹⁰ *Id.*; see also *Bollywood Copy Case 'Is Settled'*, BBC NEWS, (Aug. 7, 2009, 1:47 PM), <http://news.bbc.co.uk/2/hi/entertainment/8189667.stm>.

¹¹ Twentieth Century for Film Corp. v. Sohail Maklai Entm't Pvt. Ltd., NM-2847 (Bombay H.C. 2010), available at <http://bombayhighcourt.nic.in/data/original/2010/NMS284710141010.pdf>.

¹² *Id.* ¶¶ 33–36; see also Naman Ramachandran, *Fox Wins Partial Ruling on Bollywood Remake*, VARIETY, (Oct. 15, 2010, 4:00 AM), <http://www.variety.com/article/VR1118025734>.

¹³ Ramachandran, *supra* note 12 (“The judgment marks the first time that an Indian court has ruled that Bollywood infringed a Hollywood copyright.”).

¹⁴ See Neelam Sidhar Wright, “*Tom Cruise? Tarantino? E.T.? . . . Indian!: Innovation Through Imitation in the Cross-cultural Bollywood Re-make*,” in CULTURAL BORROWINGS APPROPRIATION, REWORKING, TRANSFORMATION 194 (Iain Robert Smith ed., 2009). Wright also writes:

Although I mainly cite Bollywood remakes produced over the past eight years, I do not intend to fix a date-period to this phenomenon. Hollywood narrative adaptations in 1990s Bollywood cinema have been partly explored by Sheila J. Nayar (1997). Also, we can find earlier evidence of such appropriation in films such as *Mr India [sic]* (1987), which works almost as a cultural inversion of Steven Spielberg's *Indian [sic] Jones and the Temple of Doom* (1984), and in the 1950s with screen legend Raj Kapoor's involvement in reworkings of Charlie Chaplin films, Frank Capra's *It happened One night [sic]* (1934), and Vittorio De Sica's *Shoeshine* (1946).

Id. at 206 n.1.

¹⁵ TEJASWINI GANTI, BOLLYWOOD: A GUIDEBOOK TO POPULAR HINDI CINEMA 1, 2–4 (2004).

¹⁶ See *id.* at 3.

has been recognized as the world's largest film producer since the 1970s.¹⁷ The annual growth rate of India's film industry is several times the growth rate of India's gross domestic product.¹⁸ The industry's annual revenues have consistently increased over the past decade.¹⁹ Film distribution to international audiences in the forms of DVDs and satellite television has also helped Bollywood increase its profits.²⁰ In fact, approximately half of Bollywood's multi-billion-dollar annual revenues come from overseas markets like the United States where growing South-Asian communities provide for large audiences.²¹ This helps explain why "[f]ilms from India do more business in the United States than films from any other country."²² The Federation of Indian Chambers of Commerce and Industry estimated that by 2013, filmed entertainment in India will gross close to \$3.8 billion annually.²³ Bollywood's media caters to a subcontinent with over one billion people²⁴ and a growing international audience.²⁵ Bollywood's increasing popularity, both internationally and within the United States, and rising commercial value have recently attracted the attention of Hollywood producers who no longer wish to remain tolerant or apathetic toward unauthorized Bollywood adaptations of Hollywood entertainment.²⁶

¹⁷ See *id.* (stating that the Hindi-language Bollywood films, together with the feature films produced in approximately twenty other Indian languages, make India the largest feature film-producing country in the world).

¹⁸ Manjeet Kripalani & Ron Grover, *Bollywood: Can New Money Create a World-Class Film Industry in India?*, BLOOMBERG BUSINESSWEEK (Dec. 2, 2002), available at http://www.businessweek.com/magazine/content/02_48/b3810013.htm ("The huge popularity of India's film industry in emerging markets has fueled an annual growth rate of 15% for the past five years—three times that of India's 5% gross domestic product growth.").

¹⁹ *Id.*

²⁰ *Id.*

²¹ Lakshmi N. Tirumala, *Bollywood Movies and Cultural Identity Construction Amongst Second Generation Indian Americans* 5 (Aug. 2009) (unpublished M.A. thesis, Texas Tech University), available at <http://www.global.asc.upenn.edu/docs/ICA2009/LakshmiT.pdf>.

²² Anita W. Wadhvani, "Bollywood Mania" *Rising in United States*, WASH. FILE (Aug. 9, 2006), <http://www.america.gov/st/washfile-english/2006/August/20060809124617nainawhdaw0.8614466.html>. The author is referring to the volume of box office sales when stating the films "do more business." *Id.*

²³ Sanjaya Baru, *Bollywood's Global Market Beckons*, REDIFF.COM (Jan. 11, 2010, 12:17 PM), <http://business.rediff.com/column/2010/jan/11/guest-bollywoods-global-market-beckons.htm>.

²⁴ *India*, WORLD BANK, <http://data.worldbank.org/country/india> (last visited Jan. 19, 2011).

²⁵ Baru, *supra* note 23 ("While Bollywood's revenue numbers are nowhere near Hollywood's, it churns out more films and now screens them in nearly a 100 countries [*sic*] around the world.").

²⁶ See Rhys Blakely, *Hollywood Is Watching As Bollywood Loses the Plot*, TIMES (London), Aug. 7, 2009, at 33 ("It's going to be very tough to rob ideas from now on. Hollywood's suddenly looking at Bollywood very minutely.").

This Comment emphasizes the notion that enforcing film copyrights is of interest to Hollywood and the United States because legally protected creativity and originality should be given proper international recognition, and unauthorized imitations should be subject to penalties. Furthermore, this Comment reveals that the economic incentives for Hollywood to aggressively enforce its copyrights against Bollywood copycats are now stronger than they ever were before.²⁷ This Comment also suggests that effective intellectual property enforcement may provide an incentive for Bollywood to explore its own creative potential rather than implicitly concede creative inferiority by engaging in unauthorized remakes.

Part I of this Comment explores the underlying reasons driving entities in Bollywood to copy American entertainment. It then explores the nature, frequency, and extent of Bollywood's copying. The repercussions of the copies and imitations on the American and Indian entertainment industries are briefly examined. Part II introduces relevant U.S. and Indian copyright law and analyzes whether any of Bollywood's copying techniques and practices actually amount to actionable copyright infringement. It assesses the defenses and arguments raised by Bollywood's noninfringement proponents and ultimately finds that the remake and adaptation techniques used by many Bollywood filmmakers do amount to an actionable claim for copyright infringement. Part III explains the problems with enforcing Hollywood copyrights in India and tracks recent positive developments in Indian copyright law regarding Hollywood. The final part of this Comment explains how the international intellectual property enforcement mechanism under the Trade-Related Aspects of Intellectual Property Rights ("TRIPS") agreement²⁸ is effectively of little use to Hollywood plaintiffs. As a solution to the infringement, this Comment ultimately proposes a special contractual agreement between film production entities in Hollywood and Bollywood that deters unauthorized remakes and provides for transaction models to facilitate compensation for the owners of copyrighted works. Such an agreement would provide for more effective and prompt remedies and would lay a foundation for better relations and increased cooperation between the two film industry giants.

²⁷ See Baru, *supra* note 23; Wadhvani, *supra* note 22.

²⁸ Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, *done* Apr. 15, 1994, 1867 U.N.T.S. 3 [hereinafter TRIPS].

I. BOLLYWOOD'S COPYING: WHY, HOW, AND WHAT ARE THE CONSEQUENCES?

A. *Reasons for Copying*

It is helpful to understand why and how Bollywood copies Hollywood entertainment before assessing the need for remedies or the legal aspects of the copying in order to determine what the appropriate legal actions are. This Part identifies and discusses some of the underlying reasons behind Bollywood's proclivity for copying and explains what their significance to Hollywood is. First, this Part looks at some of the different cultural attitudes in India and the United States regarding the ethics and legality of copying. The legal implications of these cultural differences are evident in some of the Indian case law regarding copyright infringement and are addressed later in this Comment. Second, Part I looks behind the scenes of Bollywood to reveal several financial pressures that play a substantial role in driving Bollywood studios to copy Hollywood films. It shows that while some of the pressures on Bollywood are less relevant today than they were in the past, the general pressure to increase box-office revenues remains constant, and is often seen by the industry as being most easily answered through copying. Next, this Part briefly explains the roles globalization and Westernization play in Bollywood's imitations. This Part concludes by emphasizing that, in addition to helping Hollywood identify the best mode of legal recourse, an understanding of the underlying reasons can help Hollywood bring about uniformity in Indian and U.S. copyright laws and open new channels of financial opportunity.

1. *Culture Clash*

Until recently, filmmakers and producers in Bollywood were often very candid in admitting that some of their works are remakes or adaptations of Hollywood movies or some other forms of American entertainment.²⁹ Their openness can be attributed in part to their understanding of what does and does

²⁹ See Kanchana Banerjee, *Cloning Hollywood*, HINDU (Aug. 3, 2003), <http://www.hindu.com/thehindu/mag/2003/08/03/stories/2003080300090400.htm>. In 2003, Bollywood director Vikram Bhatt boldly shared his view on remaking Hollywood movies in an interview with *The Hindu* magazine: "If you hide the source, you're a genius. . . . I would rather trust the process of reverse engineering (remaking a film) rather than doing something indigenous. Financially, I would be more secure knowing that a particular piece of work has already done well at the box office." *Id.* (quoting Vikram Bhatt) (internal quotation omitted); see also GANTI, *supra* note 15, at 75 ("Hindi filmmakers are quite open about their sources of inspiration.").

not belong in the public domain.³⁰ A shared belief among many Bollywood filmmakers is that “once something is in the public domain, it is fair game.”³¹ Many of them “think nothing wrong of being ‘inspired’ by a particular film.”³² However, the concept of the public domain and its scope “is much more expansive in India than it is in the [United States].”³³ Although Western perceptions of the public domain and intellectual property, since their imposition by British colonialists,³⁴ have woven their way into India’s jurisprudence, “the prevalent cultural attitude [in India] is that borrowing cinema plotlines, musical tunes, or even patented technologies is not so egregious a violation as to warrant legal sanction.”³⁵ Thus, filmmakers in India have historically lacked an incentive to pursue licenses or express written authorizations before making remakes or adaptations because they have held a much broader conception of what is considered in the public domain and not protected by law.

2. *Money, Money, Money*

Aside from different interpretations of the public domain, several financial factors have pushed and continue to push Bollywood filmmakers to copy American movies. As mentioned earlier, Bollywood is recognized as the world’s largest film producer.³⁶ In the past, a typical Bollywood studio’s financial success was more contingent on the quantity of films produced than on the quality or originality of the films.³⁷ Historically, most Bollywood movies made a profit even if they were poorly reviewed.³⁸ The films were generally low-budget productions, especially in comparison to Hollywood

³⁰ In intellectual property law, the public domain is defined as “[t]he universe of inventions and creative works that are not protected by intellectual-property rights and are therefore available for anyone to use without charge.” BLACK’S LAW DICTIONARY 1349 (9th ed. 2009).

³¹ GANTI, *supra* note 15, at 76. While this statement is correct, the problem is that Bollywood filmmakers misconceive the scope of the public domain, particularly when it comes to understanding what constitutes a publicly available idea versus a protected expression. *See infra* Part II.B.1.

³² GANTI, *supra* note 15, at 76.

³³ *Id.*

³⁴ *See* Jishnu Guha, *Time for India’s Intellectual Property Regime To Grow Up*, 13 CARDOZO J. INT’L & COMP. L. 225, 247 (2005) (“[I]n India, a Western-style IP tradition is a relative newcomer, largely imposed upon it by English colonialists.”).

³⁵ *Id.* at 248.

³⁶ GANTI, *supra* note 15, at 3.

³⁷ *See id.* at 37 (suggesting that it was easier to have average-earning films before the 1990s because it was easier to attract customers to the theaters).

³⁸ *Id.*

movies.³⁹ A modest attendance by India's immense film-hungry population at the theaters was usually sufficient for the studio to make some form of profit.⁴⁰ Thus, copying was seen as a time-efficient tool for producing a large volume of films that amounted to substantial profits in the aggregate.

Although Bollywood budgets have increased markedly from the past and box-office failures are more commonplace, many Bollywood filmmakers continue to copy because they operate under the assumption that an Indian remake of a financially or critically successful Hollywood film will also be successful, provided that the American movie can be remade to conform to Indian culture.⁴¹ Studios are hesitant to invest in original works because they believe such works involve high financial risks in comparison to films that have already proven to be successful.⁴² Studios are unwilling to take financial risks for a number of reasons. Competition among film studios is stiff.⁴³ A Bollywood film's popularity is often as fleeting as a few short weeks.⁴⁴ Thus, the push for new releases is a constant pressure on Bollywood filmmakers if they wish to generate a steady stream of revenues. The sheer volume of movies released by Bollywood results in screenwriters faced with demanding deadlines.⁴⁵ The pressure on the screenwriters from studio executives to churn up new screenplays crushes the writers' incentives to experiment with novel and original scripts.

Additionally, financing of Indian films has a long, corrupt history.⁴⁶ Before the Indian government granted Bollywood "industry status"⁴⁷ in 2001, organized crime entities in Mumbai financed much of the production capital for Indian films.⁴⁸ A studio's failure to generate a positive box-office return on a film meant that filmmakers would be indebted to organized crime bosses.⁴⁹

³⁹ *Bollywood vs. Hollywood*, BUSINESSWEEK, http://www.businessweek.com/magazine/content/02_48/art02_48/a48tab37.gif (last visited Feb. 15, 2012).

⁴⁰ GANTI, *supra* note 15, at 37; *see also* Tirumala, *supra* note 21 (stating that 14 million Indians go to the cinema every day).

⁴¹ *See* Banerjee, *supra* note 29.

⁴² *See id.*

⁴³ *See generally* *Competition Among Bollywood Heros*, BHARATWAVES.IN (June 6, 2006, 11:42 AM), <http://bharatwaves.com/news/Competition-among-Bollywood-Heros-1623.html>.

⁴⁴ *See* GANTI, *supra* note 15, at 85–95.

⁴⁵ *Id.* at 77.

⁴⁶ *Id.* at 50.

⁴⁷ The Indian government's grant of "industry status" meant that banks were no longer prohibited from lending to film producers. *Bollywood Rising*, ECONOMIST, Feb. 9, 2008, at 72.

⁴⁸ GANTI, *supra* note 15, at 50.

⁴⁹ *Id.*

Stories of extortion and even murder taking place behind the scenes of a Bollywood movie's set before Bollywood received industry status were commonplace.⁵⁰ Even after receiving governmental recognition, stories of underworld influence continued to make headlines every so often.⁵¹ Thus, the threat of violence was enough for the studios to persuade filmmakers to copy in the hopes of duplicating Hollywood's financial success.

Although the pressure from organized crime has subsided to a certain extent, the pressure for studios to continue to bring in large revenues remains constant. Therefore, in an effort to maximize the probability of box-office success, Bollywood studios routinely look to copy successful American movies.⁵² Some recent examples of Bollywood films that have been accused of copying successful Hollywood pictures include *Partner* (2007), *Chocolate* (2005), *Phir Milenge* (2004), and *Kaante* (2002).⁵³ The movies these films were accused of copying were *Hitch* (2005), *The Usual Suspects* (1995), *Philadelphia* (1993), and *Reservoir Dogs* (1992), respectively.⁵⁴

3. Globalization, Westernization, and What It Means to Hollywood

Globalization and Westernization have influenced Bollywood into assuming that imitating Hollywood can translate to financial success. Western culture has had a large role in shaping the stories and themes of Bollywood movies.⁵⁵ A comparative examination of Bollywood films from the 1960s and 1970s to contemporary films reveals substantial differences in plots, style, and dialogue among other things.⁵⁶ Contemporary Bollywood movies feature far more Western or American influences than the prior art.⁵⁷ These influences can be seen in everything from the clothes to the set of moral values depicted in the

⁵⁰ See Leela Jacinto, 'Bollywood' Produces Real-Life Drama, ABC NEWS (May 4, 2001), <http://abcnews.go.com/International/story?id=81141>.

⁵¹ Rakesh Roshan, Bollywood director and father of the popular Bollywood actor Hrithik Roshan, was shot in an assassination attempt in early 2000. Nitasha Natu, *Rakesh Roshan Gets Mafia Threats*, TIMES INDIA (Dec. 18, 2004, 2:14 PM), <http://timesofindia.indiatimes.com/india/Rakesh-Roshan-gets-mafia-threats/articleshow/963285.cms>. Roshan claimed he continued to receive death threats well into 2004. *Id.* Police suspected the involvement of South-Asian organized crime factions in the attempt on Roshan's life. *Id.*

⁵² See Banerjee, *supra* note 29.

⁵³ *Bollywood and Plagiarism: List of Bollywood Movies Copied from Hollywood*, BOLLYWOOD TRENDS, <http://www.bollywoodtrends.net/2009/04/bollywood-and-plagiarism-list-of.html> (last visited Feb. 15, 2012).

⁵⁴ *Id.*

⁵⁵ Sharmistha Acharya, *Bollywood and Globalization* (Mar. 15, 2004) (unpublished M.A. thesis, San Francisco State University), available at <http://www.dishumdishum.com/BollyPresentation/GLOBALIZATION.PDF>.

⁵⁶ *Id.*

⁵⁷ *Id.*

films.⁵⁸ The increase in the volume of Western themes in Bollywood movies is also a consequence of growing South-Asian populations in North America and Europe.⁵⁹ Further, Bollywood assumes that having substantial Western influences in their movies will appeal to South-Asian Americans and Americans in general and therefore help in bringing in more revenues from the United States.⁶⁰

An understanding of the reasons for copying identified above will help Hollywood bridge cultural gaps in Indian and U.S. copyright laws when litigating and lobbying for legal reform. Cultural perspectives that view copying as innocuous or “fair game” are likely to evolve in light of contrary legal mandates. Also, because much of the copying is due to adulation for Hollywood and Western culture, it behooves Hollywood to explore financial opportunities in a market that it has already influenced heavily, albeit unknowingly.

B. Extent and Nature of Copying

At first glance, a non-Hindi speaking audience may find a Bollywood remake to bear little resemblance to its Hollywood source. Filled with outbreaks of song and dance and colorful garments, most Bollywood movies are certainly distinguishable from any form of contemporary entertainment generated by Hollywood. However, the imitations are far more noticeable to South-Asian populations familiar with Hollywood entertainment. While the musical routines and fashion may be unique to Bollywood, the plotlines and dialogues are often mere translations.⁶¹ The extent of the copying ranges from lifting a few scenes from Hollywood movies to rewording entire plots into Hindi.⁶²

Proponents of noninfringement often dismiss charges of copyright infringement because some Bollywood films lift only certain brief scenes as opposed to entire plotlines. For example, Tejaswini Ganti, a professor of anthropology at New York University whose research interests include Indian

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See Wadhvani, *supra* note 22.

⁶¹ AshleyAshley, *Bollywood ♥ Hollywood* = ©, COPYRIGHT, COMM. & CULTURE (May 3, 2010), <http://copyrightcommerceandculture.com/2010/05/03/bollywood-hollywood-%C2%A9>.

⁶² *The Bollywood List of Plagiarism, Remakes and Inspirations (2008)*, MANISHWA.COM (Jan. 11, 2009), <http://www.manishwa.com/2009/01/the-bollywood-list-of-plagiarism-remakes-and-inspirations-2008>.

cinema,⁶³ held the position that accusations of infringement are often exaggerated.⁶⁴ For example, she explained that the Bollywood movie *Darr (Fear)* (1993) “is consistently described as a ‘copy’ of *Cape Fear* despite the vast differences in plot, characterization, and theme, because it portrays a dramatic fight sequence on a storm-swept boat.”⁶⁵ Although some films may lift only a brief sequence from another movie, copyright infringement may still be found for a substantially similar and unauthorized remake of a single scene or plotline from a copyrighted film.⁶⁶ Also, while some Bollywood films lift only certain brief sequences from a Hollywood movie, many other Bollywood films are composed of several copied scenes from multiple movies merged into a single film.⁶⁷ If the particular scenes that are lifted from Hollywood movies are removed from the Bollywood film, the Bollywood film may lack any meaningful substance and fail to stand on its own.⁶⁸ Thus, the amount of originality that goes into a Bollywood work is heavily criticized as far too insubstantial.⁶⁹

Although some Bollywood studios employ a strategy of compiling various scenes from multiple Hollywood movies in an attempt to evade copyright infringement charges, the example cited by Ganti is not representative of the industry’s practice of copying. Several websites monitor and report incidents of Bollywood copying Hollywood.⁷⁰ One source estimates that, in 2008, forty-six percent of Bollywood films copied Hollywood films.⁷¹ Of those 2008 copies, “only [two] were authorized ‘adapted’ screenplays.”⁷² Another source

⁶³ Tejaswini Ganti, DEP’T ANTHROPOLOGY | NYU, <http://anthropology.as.nyu.edu/object/tejaswiniganti.html> (last visited Feb. 15, 2012) (CV of Ganti).

⁶⁴ GANTI, *supra* note 15, at 75–76.

⁶⁵ *Id.* at 75.

⁶⁶ *See infra* Part II.B.2.

⁶⁷ *See The Bollywood List of Plagiarism, Remakes and Inspirations, supra* note 62.

⁶⁸ In Twentieth Century’s suit for copyright infringement of *Phone Booth*, Judge Dalvi noted that absent the copied scenes and plots, the defendant’s accused film, *Knock Out*, would become “meaningless” and would not stand on its own. Twentieth Century for Film Corp. v. Sohail Maklai Entm’t Pvt. Ltd., NM-2847, ¶ 28 (Bombay H.C. 2010) (Dalvi, J.), *available at* <http://bombayhighcourt.nic.in/data/original/2010/NMS284710141010.pdf>.

⁶⁹ *See* Blakely, *supra* note 26, at 33 (quoting Chander Lall, a lawyer representing two major American studios, as saying, “Audiences now want new stories. The problem is, Bollywood has no tradition of producing original screenplays.”).

⁷⁰ *See, e.g., The Bollywood List of Plagiarism, Remakes and Inspirations, supra* note 62.

⁷¹ *Id.*

⁷² *Id.*

states that “[i]n recent years, nearly eight out of every ten Bollywood scripts have been ‘inspired’ by one or more Hollywood films.”⁷³

Due in part to globalization, Bollywood’s audience is becoming increasingly familiar with Hollywood entertainment. While Bollywood’s popularity continues to grow internationally, so too does Hollywood’s popularity with South-Asian communities across the world.⁷⁴ It is more common now for a fan of both cinemas to get a sense of déjà vu while watching a Hollywood or Bollywood movie and then notify the public by blogging, tweeting, or using other forms of the internet’s social media. Therefore, public notice, and more specifically, notice to Hollywood about the nature and extent of Bollywood’s copying is almost instantaneous.

C. *Repercussions of Copying*

The audiences’ prompt notice to Hollywood about the instances of copying has drawn more attention to understanding the repercussions of the copying for both Hollywood and Bollywood. This Subpart first addresses some of the repercussions the copying has on Hollywood. It explains how the consequences of the copying are largely financial in nature. Next, the consequences for Bollywood are discussed. This Subpart reveals how Bollywood suffers both reputational and financial consequences as a result of the copying.

1. *What the Copying Means for Hollywood*

The repercussions of Bollywood’s copies on Hollywood are primarily financial in nature. Under both Indian and U.S. copyright laws, the owner of a copyrighted work retains the exclusive control to make copies and prepare derivatives⁷⁵ of his work. For the purpose of discussing the financial consequences, let us assume that Bollywood’s remakes and adaptations are either infringing copies or infringing derivative works of underlying Hollywood films. Even if the original Hollywood author did not contemplate entering the Bollywood market, he is entitled to a portion of the proceeds from that market if a derivative of his work is released there.⁷⁶ Although the

⁷³ See Desai, *supra* note 4, at 259 (citing Subhash K. Jha, *Whose Movie Is It Anyway?*, REDIFF.COM (May 19, 2003, 2:18 PM), <http://www.rediff.com/movies/2003/may/19copy.htm>).

⁷⁴ See Radhika Sachdev, *It Is Raining 3D Hollywood Movies*, TEHELKA (Nov. 23, 2010), http://www.tehelka.com/story_main47.asp?filename=Ws231110ENTERTAINMENT.asp.

⁷⁵ See *infra* Part II.A.

⁷⁶ *Id.*

exclusive right to prepare derivative works has been criticized for extending the scope of a copyright owner's protection too far,⁷⁷ both the United States and India grant copyright owners such protection.⁷⁸ The policy and economic rationale for such protection is that providing exclusive rights for derivative works incentivizes creativity because authors may still be able to profit from their creativity when their works are translated into different forms.⁷⁹

When the derivative remakes and adaptations are distributed in Bollywood's markets with legal impunity, Hollywood filmmakers are denied the opportunity to exploit these markets. Although Hollywood may not have been able to capitalize off Bollywood's market without the remakes or adaptations, Hollywood retains a right to collect from the market when its copyrighted works are transformed.⁸⁰ Therefore, Hollywood copyright owners are legally entitled to some portion of the profits generated from the remakes and adaptations. Absent such copyright enforcement, the economic incentives for Hollywood filmmakers to develop new works and explore new markets, such as India, are likely to be substantially diminished.

Hollywood has good reason to pursue economic opportunities in what has traditionally been Bollywood's market. As mentioned earlier, Bollywood revenues exceed billions of dollars a year.⁸¹ The gross revenues for films continue to rise year by year.⁸² A substantial portion of Bollywood's income comes from outside of India, namely, the United States.⁸³ Therefore, the financial incentive for Hollywood filmmakers to enforce copyright protection is compelling.

⁷⁷ See ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 563 (5th ed. 2010) ("From a strict incentive perspective, should we reward authors in markets they did not originally enter? . . . The economic rationale for derivative works may break down where the derivative right is used to preclude defendants from developing their own creative works in a market the plaintiff has not herself exploited, but which depends somehow on the plaintiff's work.").

⁷⁸ 17 U.S.C. § 106(2) (2006); The Copyright Act, No. 14 of 1957, INDIA CODE (2011), available at <http://indiacode.nic.in>.

⁷⁹ Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 216 (1982).

⁸⁰ See 17 U.S.C. § 106(2); The Copyright Act, No. 14 of 1957, INDIA CODE (2011), available at <http://indiacode.nic.in>.

⁸¹ Saikat Chatterjee, *Hollywood Goes Bollywood As Studios Target India Filmgoers*, BLOOMBERG (May 19, 2010, 11:37 AM), <http://www.bloomberg.com/news/2010-05-18/hollywood-crashes-bollywood-as-disney-enters-land-of-three-billion-tickets.html>.

⁸² *Id.*

⁸³ *Id.*

2. *What the Copying Means for Bollywood*

The repercussions of copying on Bollywood relate more to damage to reputation; however, financial detriments are also integrated into the consequences. When Bollywood filmmakers and screenwriters habitually copy and imitate Hollywood movies, styles, and culture, they are effectively conceding creative inferiority. What is really unfortunate is that some Bollywood filmmakers are content with being branded unoriginal and even go so far as to embrace copying and plagiarism.⁸⁴ Mahesh Bhatt, a prominent Bollywood director and producer,⁸⁵ proclaimed: “It’s only entertainment, for God’s sake, not some high art to be worshipped with incense sticks and hymns. *Films aren’t about creativity, originality or vision.* They are about entertaining audiences across the board.”⁸⁶ Director Vikram Bhatt took a rather disturbing position when he explained: “I’ll never forget what Mahesh Bhatt said. If you hide the source, you’re a genius. . . . There’s no such thing as originality in the creative sphere.”⁸⁷

Fortunately, not all Bollywood directors and producers embrace the call for copying and conceding lack of creative talent. Directors Amol Palekar and Kalpana Lajmi expressed disgust with the rampant copying and lack of originality. They explained:

It’s insecurity that drives people to plagiarism and not lack of material. We have a plethora of fascinating literature. It’s only blind faith that makes people believe that Hollywood is the last word in filmmaking. We neither read our classics nor do we keep in touch with our literature. We see only what stares us in the face and i.e. Hollywood with its gloss and glamour. . . . We have lost our vision and guts to experiment. We only want to see on [the] big screen what we have seen in video. New ideas are risky experiments. So all those who can make original films are home without any work.⁸⁸

Continuing to make unauthorized adaptations of Hollywood films may also impede the progress of recent efforts for cooperation between Hollywood and

⁸⁴ See Banerjee, *supra* note 29.

⁸⁵ See *The Saraansh of Mahesh Bhatt’s Life*, TIMES INDIA (Jan. 13, 2003, 5:38 PM), <http://timesofindia.indiatimes.com/city/delhi-times/The-Saraansh-of-Mahesh-Bhatt's-life/articleshow/34774326.cms>.

⁸⁶ Banerjee, *supra* note 29 (emphasis added) (quoting Mahesh Bhatt).

⁸⁷ *Id.* (quoting Vikram Bhatt).

⁸⁸ *Id.* (quoting Kalpana Lajmi).

Bollywood in the filmmaking industry.⁸⁹ The menacing positions on copying taken by some Bollywood directors, such as those discussed above, are likely to repulse prospective licensees or other Hollywood entities interested in venturing into the Indian entertainment business. Potential business partners are likely to be averse to the idea of investing in Bollywood when its filmmakers are disturbingly candid about their propensity and desire to commit intellectual property theft. Additionally, the recent slew of copyright infringement suits and enforcement mechanisms launched by Hollywood⁹⁰ could likely mean that the profitability of copying may no longer be so robust, thanks to litigation costs and adverse court judgments.

II. COPYRIGHT INFRINGEMENT OR NOT?

While the discussion above demonstrates that copying is a frequent occurrence in Bollywood, the relevant inquiry for entities in Hollywood is whether any of the copying amounts to copyright infringement. Although Bollywood has had a long tradition of remaking Hollywood films, some commentators, including an academic,⁹¹ a law professor,⁹² and an intellectual property attorney,⁹³ argue that Bollywood's remakes and copies are not unlawful.⁹⁴ This Part deconstructs the commentators' noninfringement arguments and reveals their flaws based on applicable copyright law doctrines.

⁸⁹ See Michael Martinez & Andreena Narayan, *Hollywood, Bollywood Sign Cooperation Pact*, CNN (Nov. 11, 2010), http://articles.cnn.com/2010-11-11/entertainment/hollywood.bollywood_1_indian-studios-hollywood-and-bollywood-indian-production.

⁹⁰ See Blakely, *supra* note 26, at 33.

⁹¹ Professor Tejawini Ganti of New York University dismissed allegations laid against Bollywood for copyright infringement in her book, *Bollywood: A Guidebook to Popular Hindi Cinema*. GANTI, *supra* note 15, at 74–76.

⁹² Professor V K Unni is a faculty member at the Indian Institute of Management Calcutta. *V K Unni*, IIMC FAC., <http://www.iimcal.ac.in/faculty/facpage.asp?ID=unniv&tab=2> (last visited Mar. 6, 2012). He co-authored the article, *Perspectives on Copyright: The 'Karishma' Controversy*, in which he opined that Bollywood's copying only amounts to a "perfectly legal" appropriation of unprotected Hollywood ideas. K M Gopakumar & V K Unni, *Perspectives on Copyright: The 'Karishma' Controversy*, 38 *ECON. & POL. WKLY* 2935, 2935 (2003).

⁹³ K M Gopakumar, an intellectual property attorney in India, joined Professor Unni in authoring *Perspectives on Copyright: The 'Karishma' Controversy*. Gopakumar & Unni, *supra* note 91; see also *INDIA: Patenting Ayurveda, Yoga*, AUGUST AYURVEDA, <http://www.augustayurveda.com/showarticles.asp?id=116> (last visited Mar. 6, 2012).

⁹⁴ See GANTI, *supra* note 15, at 76; Gopakumar & Unni, *supra* note 91, at 2936 ("[T]he action of a Bollywood screenplay writer/producer of lifting the idea from Hollywood and using creative talent to make another original expression is perfectly legal under copyright law. Such lifting may be a wrong practice from the point of morality and ethics but not in law. As a result lifting of an idea does not give rise to a cause for action under the copyright law.").

Subpart A introduces relevant general copyright laws of India and the United States. Then, Subpart A briefly explains what can be copyrighted, what a derivative work is, and what constitutes infringement. Subpart B lays out some of the common noninfringement arguments and explains how they conflict with fundamental copyright law doctrines. It also shows how some doctrines have been incorrectly applied by the Indian judiciary and provides examples of correct application. Subpart B concludes by highlighting how copyright law doctrines are favorable to Hollywood and support claims of copyright infringement against Bollywood.

A. *Copyright Law in India and the United States*

Copyright law doctrines in India and the United States are similar. Copyright law in India is governed by the Copyright Act of 1957.⁹⁵ The provisions of the act protect literary, dramatic, musical, and cinematographic works, among others.⁹⁶ Copyright owners enjoy exclusive rights to reproduce, perform, translate, adapt, and issue copies of their protected works.⁹⁷ Similarly, in the United States, “[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression.”⁹⁸ As in India, works of authorship available for copyright protection in the United States include literary works, musical works, and motion pictures, among others.⁹⁹ The copyright statutes and laws in both the United States and India grant copyright protection only to the original expression of an idea—not the idea itself.¹⁰⁰ According to U.S. copyright law, “[i]n no case does copyright protection for an original work of authorship extend to any idea.”¹⁰¹ Similarly, the Indian Copyright Act states that “copyright shall subsist throughout India in . . . *original* literary, dramatic, musical, and artistic works.”¹⁰² Furthermore, the Supreme Court of India has held that “an idea . . . cannot be the subject matter of copyright. . . . It is always open to any person to choose an idea as a subject matter and develop it in his own manner and give expression to the idea by treating it differently from others.”¹⁰³

⁹⁵ The Copyright Act, No. 14 of 1957, INDIA CODE (2011), *available at* <http://indiacode.nic.in>.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ 17 U.S.C. § 102 (2006).

⁹⁹ *Id.* § 102(a).

¹⁰⁰ *Id.* § 102(b); *Anand v. Deluxe Film*, A.I.R. 1978 S.C. 1613 (India).

¹⁰¹ 17 U.S.C. § 102 (b).

¹⁰² The Copyright Act, No. 14 of 1957, INDIA CODE (2011) (emphasis added), *available at* <http://indiacode.nic.in>.

¹⁰³ *Anand*, A.I.R. 1978 S.C. 1613.

Furthermore, the copyright laws of both countries provide a copyright owner the exclusive right to prepare derivative works based on the copyrighted work.¹⁰⁴ A derivative work is defined as a “work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted.”¹⁰⁵ While the Indian Copyright Act does not mention derivative works, India is a party to the Berne Convention¹⁰⁶ and TRIPS, which provide copyright owners the right to prepare derivative works.¹⁰⁷ In addition, the Indian judiciary has recognized the right to prepare derivative works.¹⁰⁸

Because Bollywood remakes are films based on preexisting Hollywood films, many of the remakes should be considered derivative works. Some Bollywood remakes should also be considered “copies” of the underlying Hollywood films in the traditional sense, despite differences in language, because they exhibit substantial similarities to the Hollywood films. Regardless of whether the remake is deemed a derivative work or a copy, the standards for proving infringement are similar.

The two countries’ respective laws regarding copyright infringement are analogous. In the United States, to prove infringement, one must have actually copied the work of another.¹⁰⁹ There is no infringement if an author independently creates a work similar to a copyrighted work.¹¹⁰ However, direct proof of copying (e.g., eyewitness testimony) is not necessary to prove actual copying.¹¹¹ Actual copying can be inferred based on substantial similarities between the accused and copyrighted works when the copyrighted work was made before the accused work and was widely available.¹¹² Second, the accused infringer must have “appropriated sufficient protected material to

¹⁰⁴ 17 U.S.C. § 103; The Copyright Act, No. 14 of 1957, INDIA CODE (2011), available at <http://indiacode.nic.in> (providing that, although derivative works are not specifically mentioned in the Indian Copyright Act, “adaptations” are treated as derivative works).

¹⁰⁵ 17 U.S.C. § 101.

¹⁰⁶ Berne Convention for the Protection of Literary and Artistic Works, *opened for signature* Sept. 9, 1886, *as amended* 1161 U.N.T.S. 3.

¹⁰⁷ TRIPS, *supra* note 28.

¹⁰⁸ *See* E. Book Co. v. D.B. Modak, A.I.R. 2008 S.C. 809 (India).

¹⁰⁹ MERGES ET AL., *supra* note 77, at 520.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

violate a copyright owner's rights."¹¹³ The case law in India recognizes these general laws governing infringement.¹¹⁴

B. The Noninfringement Arguments and Their Errors

Copyright infringement laws and doctrines are convoluted and full of various permutations. Therefore, given all of the subtle complexities in the law, the arguments posited by the noninfringement proponents can have some superficial appeal. Nevertheless, when these arguments are analyzed in light of the proper copyright doctrines, their flaws are evident. This Subpart outlines some of the common noninfringement arguments advocated by commentators such as Professor Ganti. First, the noninfringement arguments pertaining to the idea-expression dichotomy and related doctrines in copyright law are analyzed and deconstructed, and an example of the Indian judiciary's failure to correctly address the dichotomy in a copyright infringement action is critiqued. Next, noninfringement arguments pertaining to substantial dissimilarities are judged in light of Indian and U.S. copyright laws and some of the policies behind the laws. This Subpart concludes by emphasizing that copyright infringement doctrines favor Hollywood plaintiffs given the nature of Bollywood's copying techniques.

1. Drawing the Right Line Between an Idea and an Expression

As mentioned earlier, copyright protection is available only for the original expression of an idea. An idea cannot be the subject of copyright protection. A work does not infringe on a copyrighted work if it only appropriates the copyrighted work's idea. To illustrate this concept in the abstract, imagine that a certain movie (M1) is about idea X. M1 uses A, B, and C to express idea X. A subsequent movie (M2) is also about idea X. However, M2 uses D, E, and F to express idea X. In this example, M2 does not infringe on M1 because it expresses a shared, but unprotectable, idea differently than M1. Although this concept may seem simple enough, what constitutes an idea and what constitutes an original expression is a complicated inquiry that is at the heart of the debate over whether Bollywood's copies amount to copyright infringement.

¹¹³ *Id.*

¹¹⁴ *See Anand v. Deluxe Film*, A.I.R. 1978 S.C. 1613 (India).

a. *The Merger Doctrine*

Bollywood's noninfringement proponents argue that Bollywood merely uses Hollywood's ideas—not the protected expressions of the ideas. They explain:

[T]he action of a Bollywood screenplay writer/producer of lifting the idea from Hollywood and using creative talent to make another original expression is perfectly legal under copyright law. Such lifting may be a wrong practice from the point of morality and ethics but not in law. As a result[,] lifting of an idea does not give rise to a cause for [sic] action under the copyright law.¹¹⁵

Noninfringement proponents take the position that Bollywood movies are unique expressions of Hollywood ideas that fall outside the realm of copyright infringement.¹¹⁶

The problem with this argument is that the noninfringement advocates effectively merge the original expressions of Hollywood films with the underlying ideas. Under the merger doctrine, when an idea merges with its expression, it renders the expression unprotectable.¹¹⁷ “Logically, the doctrine takes the form: ‘Categories (genuses) are unprotectable; instances (or species) are protectable.’ The game then becomes to define what is the category or genus to which the work belongs.”¹¹⁸

The lower the level of abstraction, the more likely it is that the idea will merge with the expression. The higher the level of abstraction, the more likely it is that the idea can be separated from the expression. Take the following example to illustrate this concept: A highly abstract idea—a film about an underdog defying expectations—can be expressed in countless original ways. An idea at a lower level of abstraction—a film about an underdog boxer

¹¹⁵ Gopakumar & Unni, *supra* note 92.

¹¹⁶ *Id.*

¹¹⁷ *Morrissey v. Procter & Gamble*, 379 F.2d 675, 678–79 (1st Cir. 1967) (“When the uncopyrightable subject matter is very narrow, so that ‘the topic necessarily requires,’ if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance. In such circumstances it does not seem accurate to say that any particular form of expression comes from the subject matter. However, it is necessary to say that the subject matter would be appropriated by permitting the copyrighting of its expression.” (citations omitted)); *Servewell Products Pvt Ltd & Anr v. Dolphin*, IA Nos. 383/2010 & 1119/2010 in CS(OS) 49/2010 (Delhi H.C. 2010) (India), available at <http://www.indiankanoon.org/doc/272656> (“When the ‘idea’ and its ‘expression’ are thus inseparable, copying the ‘expression’ will not be barred, since protecting the ‘expression’ in such circumstances would confer a monopoly of the ‘idea’ upon the copyright owner.”).

¹¹⁸ MERGES ET AL., *supra* note 77, at 462.

defying expectations and becoming world champion—can also be expressed in many original ways, but in fewer ways than the generic idea of an underdog defying expectations. An idea at a much lower level of abstraction—a film about an underdog Italian–American Philadelphia club fighter who gets a shot at the heavyweight championship and falls in love with an awkwardly shy woman who works at the local pet store—can be expressed in substantially fewer original ways than the generic idea about an underdog defying expectations. As the idea continues to be defined at a lower level of abstraction, it becomes more difficult to distinguish it from the expression.

Bollywood's noninfringement proponents characterize the ideas of Hollywood movies at a very low level of abstraction. For example, a Bollywood studio sued for copying the Hollywood movie *Phone Booth*, effectively defined *Phone Booth*'s idea as about a sniper that holds an unfaithful publicist hostage in a phone booth and demands the hostage confess his infidelity to his wife.¹¹⁹ By defining the film's idea at such a low level of abstraction, the studio merges the idea of the movie with its protected expressions (i.e., plotlines, dialogues, scenes, character portrayals, etc.). However, defining a film's idea in such a manner is not appropriate in the context of copyright law. The application of the merger doctrine is not appropriate in the context of films or other works that require a high level of originality.¹²⁰ Courts have typically used the merger doctrine to preclude copyrights on subject matter that can be expressed only in a very limited number of ways. For example, sets of rules for contests or games have been precluded from copyright protection under the merger doctrine because such rules can be expressed only by a few possibilities.¹²¹ A copyright over a set of rules would essentially amount to a monopoly over an idea, because distinguishing the expression of the rules from the idea of the rules is an exercise in futility. Therefore, noninfringement arguments that suggest Bollywood movies simply appropriate unprotectable ideas are suspect because they improperly characterize ideas so that they merge with protectable expressions.

¹¹⁹ *Twentieth Century for Film Corp. v. Sohail Maklai Entm't Pvt. Ltd.*, NM-2847, ¶ 34 (Bombay H.C. 2010), available at <http://bombayhighcourt.nic.in/data/original/2010/NMS284710141010.pdf>.

¹²⁰ Cf. *MERGES ET AL.*, *supra* note 77, at 459–62.

¹²¹ *Morrissey*, 379 F.2d 675–79 (holding that a set of rules for a sweepstakes promotional contest is uncopyrightable subject matter); *Mattel Inc. v. Agarwalla*, IA No. 2352/2008 in CS(OS) 344/2008 (Delhi H.C. 2008) (India), available at <http://www.indiankanon.org/doc/300797> (holding that the rules for the game “Scrabble” are not eligible for copyright protection).

b. *Scenes à faire*

A doctrine related to merger that noninfringement proponents effectively rely on is “*scenes à faire*.”¹²² Under *scenes à faire*, “any ‘expressions’ that are standard, stock, or common to a particular topic are excluded from copyright protection For example, in the realm of film, certain plots are considered so common that they are no longer protectable.”¹²³ Like the application of the merger doctrine, application of *scenes à faire* requires toying with different levels of abstraction that can ultimately result in rendering an expression uncopyrightable because it may be “indispensable,” “standard,” or “too common” to a particular topic.

c. *Indian Court Fails To Draw the Right Line Between an Idea and an Expression*

Improperly characterizing the idea behind a work can lead to an erroneous finding of noninfringement. The merger and *scenes à faire* doctrines were improperly applied by the Kolkata High Court in *Bradford v. Sahara Media Entertainment*.¹²⁴ In *Bradford*, the English novelist Barbara Bradford¹²⁵ alleged that an Indian television series entitled *Karishma—The Miracle of Destiny* set for release in 2003 was an unauthorized adaptation of her novel, *A Woman of Substance*.¹²⁶ The court held that Bradford did not have copyright protection over the subject matter that was common to both works because the material was “too common” to the topic at issue.¹²⁷ More specifically, the court held:

[T]he plaintiff . . . has no monopoly in the idea of a poor woman making good in life, being burdened early in life with an illegitimate child, having a life long friend who is an ordinary worker, marrying an army officer, and then making a devise of her fortunes, required [sic] through a chain of stores, to her successors. It might, be the theme of ‘A Woman of Substance’, but if only this is copied, then

¹²² According to the doctrine of *scenes à faire*, “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic” are not eligible for copyright protection. *Atari, Inc. v. N. Am. Philips Consumer Elecs.*, 672 F.2d 607, 616 (7th Cir. 1982) (citation omitted).

¹²³ *Copyright Infringement Law*, COPYRIGHT L. CENTER, <http://www.copyright-laws.com/pgs/protect-rights.html> (last visited Jan. 19, 2011).

¹²⁴ *Bradford v. Sahara Media Entm’t Ltd.*, 2004 (28) PTC 474 Cal (Calcutta H.C. 2003), available at <http://www.indiankanoon.org/doc/757852>.

¹²⁵ For more information on Barbara Taylor Bradford, see *Barbara’s Biography*, RANDOM HOUSE, <http://www.randomhouse.com/features/bradford/bio.html> (last visited Mar. 6, 2012).

¹²⁶ *Bradford*, 2004 (28) PTC 474 Cal.

¹²⁷ *Id.*

nothing is copied. It is common to both the works, but it is *too common*. There can be no monopoly in something which is too common, because it would prevent free exercise of artistic skill.¹²⁸

The court inappropriately characterized the idea behind Bradford's novel at a very low level of abstraction. No copyright infringement was found because the court merged the inappropriately characterized idea behind the novel with the novel's expression (i.e., the plotline), rendering the plotline uncopyrightable. Although the court identified a substantial number of specific components in the novel's plot, it incredibly concluded that the plaintiff's novel did not meet a sufficient level of originality to qualify as an original expression of an idea.

Instead of defining the novel's idea as the novel's plot, the court should have defined the novel's idea more abstractly—a poor woman trying to make good in life. Had this been done, there would not have been an improper merger of idea and expression. The plot would also not have been improperly dismissed as “too common” under *scenes à faire*. The court's reasoning was inapposite to both domestic and international copyright law doctrines and was likely an example of Indian judicial disdain for Western intellectual property claimants.¹²⁹

2. Arguments Regarding Dissimilarities

In addition to arguments stemming from a misunderstanding of the idea-expression dichotomy, another commonly invoked noninfringement argument is that Bollywood movies do not violate copyright law because they are vastly different from their Hollywood inspirations. Professor Ganti takes the position that “[o]nly when a writer copies an entire story or a substantial number of plots word for word from another work is copyright violated.”¹³⁰ She further explains that “adaptations of Hollywood films barely [resemble the original screenplay] as they have been transformed, or ‘Indianized.’”¹³¹ Her position, along with other noninfringement proponents, is that the insertions of song-

¹²⁸ *Id.* (emphasis added).

¹²⁹ See *supra* Part II.B.1; *infra* Part III.A.

¹³⁰ GANTI, *supra* note 15, at 76.

¹³¹ The term “Indianized,” as used in the context of Bollywood remakes of Hollywood movies, refers to the addition of Indian culture, fashion, and signature Bollywood film elements, such as elaborate song-and-dance sequences that deviate from the storyline of a film and strong emotional overtones. *Id.* at 77.

and-dance routines, Indian culture, and Indian fashion result in a distinct and, more importantly, lawful film creation.¹³²

Despite the appeal in identifying Indianized Bollywood remakes as distinct and unique works, copyright law does not exculpate such remakes from copyright infringement as easily as some of Bollywood's noninfringement proponents argue. Both U.S. and Indian copyright laws refute the notion that there is no violation of copyright when only a small portion of a film is adapted or when a remake contains substantial dissimilarities and additions.¹³³ In the United States, policy concerns about providing plagiarists a conduit for escaping liability have led courts to hold that a copyright owner's rights are not limited only to the literal text of a work.¹³⁴ Furthermore, the legislative history of § 106 of the U.S. Copyright Act provides that a copyrighted work is infringed "by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation. *Wide departures or variations from the copyrighted works would still be an infringement as long as the author's 'expression' rather than merely the author's 'ideas' are taken.*"¹³⁵

Various tests have been adopted by U.S. courts for determining what constitutes an improper appropriation of an author's expression.¹³⁶ For example, according to the "objective and subjective" test, the plaintiff's work is first deconstructed into the objective components of creativity (i.e., plots, themes, dialogue, characters, etc.) to determine what components are subject to copyright protection.¹³⁷ The second part of the test asks the trier of fact to subjectively determine whether the defendant's work improperly copies any of the protected creative components.¹³⁸ The objective and subjective test is

¹³² *Id.* at 75–76; *see also* Gopakumar & Unni, *supra* note 91.

¹³³ *See* Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936); Twentieth Century for Film Corp. v. Sohail Maklai Entm't Pvt. Ltd., NM-2847 (Bombay H.C. 2010), *available at* <http://bombayhighcourt.nic.in/data/original/2010/NMS284710141010.pdf>.

¹³⁴ Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) ("It is of course essential to any protection of literary property, whether at common-law or under the statute, that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations.").

¹³⁵ H.R. REP. NO. 94-1476, at 61 (1976) (emphasis added).

¹³⁶ For example, in the sliding scale and virtual identity test, courts require a high degree of similarity when the copyrighted work embodies limited creative expression and less similarity when the copyrighted work embodies a high degree of creative expression. *See generally* Incredible Techs., Inc. v. Virtual Techs., Inc., 400 F.3d 1007 (7th Cir. 2005).

¹³⁷ Shaw v. Lindheim, 919 F.2d 1353, 1357–58 (9th Cir. 1990).

¹³⁸ *Id.*

similar to the “lay observer” test used by Indian courts.¹³⁹ In the lay observer test, a determination of substantial similarity is made from the perspective of an ordinary person who has viewed both works.¹⁴⁰

In determining how much must be taken to amount to an improper appropriation, the copyright owner is not obliged to “prove that all or nearly all of his or her work has been appropriated to establish infringement.”¹⁴¹ Contrary to the copyright theories advocated by noninfringement proponents, “[e]ven a small amount of the original, if it is *qualitatively significant*, may be sufficient to be an infringement.”¹⁴²

The significance of dissimilarities and the meaning of qualitatively significant copying are key issues in “fragmented literal similarity” cases.¹⁴³ Some Bollywood remakes fall in the realm of fragmented literal similarity. *Nimmer on Copyright* provides guidance in determining infringement in fragmented literal similarity cases:

The question in each case is whether the similarity relates to matter that constitutes a substantial portion of plaintiff’s work—not whether such material constitutes a substantial portion of defendant’s work. . . . The quantitative relation of the similar material to the total material contained in plaintiff’s work is certainly of importance. However, even if the similar material is quantitatively small, if it is qualitatively important the trier of fact may properly find substantial similarity. . . . In general under such circumstances, the defendant *may not claim immunity on the grounds that the infringement ‘is such a little one.’* If, however, the similarity is only as to nonessential matters, then a finding of no substantial similarity should result.¹⁴⁴

a. Fragmented Literal Similarity and How Dissimilarities Do Not Automatically Vindicate

The Indian judiciary was recently presented with the issue of improper appropriation in a fragmented literal similarity case in *Twentieth Century for*

¹³⁹ *Id.* (“Indian copyright laws resemble American copyright laws.”); Desai, *supra* note 4, at 264.

¹⁴⁰ *Shaw*, 919 F.2d at 1357–58.

¹⁴¹ MERGES ET AL., *supra* note 77, at 532.

¹⁴² Horgan v. Macmillan, Inc., 789 F.2d 157, 162 (2d Cir. 1986) (emphasis added).

¹⁴³ Fragmented literal similarity refers to when a “defendant has copied distinct literal elements of the plaintiff’s work and incorporated them into a larger work of his or her own.” MERGES ET AL., *supra* note 76, at 532.

¹⁴⁴ 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §13.03[A][2][a] (2011) (emphasis added) (citations omitted).

*Film Corp. v. Sohail Maklai Entertainment.*¹⁴⁵ Sohail was accused of unlawfully copying and remaking Twentieth Century's 2002 thriller *Phone Booth*.¹⁴⁶ *Phone Booth* is premised around a sniper that holds an unfaithful publicist hostage in a phone booth and demands that the publicist confess his infidelity to his wife.¹⁴⁷ The sniper toys with his hostage and threatens to kill the hostage if he does not obey the sniper's commands.¹⁴⁸ The accused film, *Knock Out*, is also premised around a sniper that holds an unfaithful man hostage in a phone booth.¹⁴⁹ However, *Knock Out* incorporates a political conspiracy plot into the script along with song-and-dance sequences.¹⁵⁰

The court rejected the defendant's argument that *Knock Out* does not infringe because of the various dissimilarities and distinct additions.¹⁵¹ Citing *Sheldon v. Metro-Goldwyn Pictures Corp.*,¹⁵² the court said "it is enough that substantial parts were lifted; no playwright can excuse wrong for showing how much of his work he did not pirate."¹⁵³ The court noted that the defendant was free to "exhibit or broadcast such dis-similar work," however, such dissimilarities did not exculpate the defendant of copyright infringement for the substantial similarities.¹⁵⁴ The court also rejected the defendant's argument that their film does not infringe because only a small portion of the plaintiff's film was appropriated.¹⁵⁵ The defendant argued that the subject matter at issue was trivial with respect to the film as a whole.¹⁵⁶ The court held that under the objective lay person test, the substantially similar subject matter was qualitatively significant to both the plaintiff's and defendant's works.¹⁵⁷ Contrary to the arguments of noninfringement proponents, the court held that copyright infringement could be found even when a small part is substantially similar to the copyrighted work.¹⁵⁸ The court concluded that *Knock Out* did

¹⁴⁵ Twentieth Century for Film Corp. v. Sohail Maklai Entm't Pvt. Ltd., NM-2847 (Bombay H.C. 2010), available at <http://bombayhighcourt.nic.in/data/original/2010/NMS284710141010.pdf>.

¹⁴⁶ *Id.* ¶ 1.

¹⁴⁷ *Id.* ¶ 12.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* ¶ 16.

¹⁵¹ *Id.* ¶ 31.

¹⁵² *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936).

¹⁵³ Twentieth Century, 1 NM-2847, ¶ 27 (internal quotations omitted).

¹⁵⁴ *Id.* ¶ 12.

¹⁵⁵ *See id.* ¶ 31.

¹⁵⁶ *Id.* ¶ 30.

¹⁵⁷ *Id.* ¶¶ 28–29.

¹⁵⁸ *See id.* ¶¶ 22, 28–31.

infringe on *Phone Booth*.¹⁵⁹ Furthermore, in determining the threshold for infringement, the court's reasoning was in accord with the infringement guidelines on fragmented literal similarity.¹⁶⁰ The court noted that "it is the quality of the copied work and not the quantity that would determine infringement of the work or substantial part thereof."¹⁶¹

Applying this holding to Professor Ganti's *Cape Fear* example, despite the "vast differences" in plot and characters in the Bollywood remake, the dissimilarities and additions do not necessarily preclude a finding of infringement.¹⁶² If substantial similarity exists between the storm-swept boat scenes, and the scene is qualitatively significant, the remake, despite its differences and Indianized components, may still be an infringing work.

The discussion above demonstrates that the commonly invoked noninfringement arguments are grounded in misconceptions about the idea-expression dichotomy and delusions about how Indianization exculpates Bollywood of infringement. Given the nature and extent of Bollywood's copying,¹⁶³ Hollywood should take notice of the fact that there is ample legal room for it to pursue actionable claims of copyright infringement against Bollywood imitators.

III. ENFORCEMENT OF HOLLYWOOD COPYRIGHTS IN INDIA AND RECENT DEVELOPMENTS

Although the nature of Bollywood's copying and the laws governing such behavior provide Hollywood with actionable claims of infringement, proper enforcement of intellectual property laws is contingent upon the willingness of plaintiffs to bring suit and the willingness of the Indian judiciary to objectively apply the laws. Part III discusses issues concerning the enforcement of Hollywood's copyrights in India and how recent changes in the copyright dynamic of India have spelled success for Hollywood plaintiffs. Subpart A addresses why, despite having the force of law in its favor, Hollywood has not brought many legal actions against Bollywood infringers. Reasons related to lack of notice, procedure, cost, ineffective copyright enforcement, and judicial hostility are discussed in the context of underlying policies. Subpart B

¹⁵⁹ *Id.* ¶¶ 33–35.

¹⁶⁰ *See id.* ¶¶ 28–31.

¹⁶¹ *Id.* ¶ 22.

¹⁶² *See supra* Part I.B; GANTI, *supra* note 15, at 75.

¹⁶³ *See supra* Part I.B.

elaborates on the incidents of Indian judicial prejudice against Westerners and contends that Hollywood was unsuccessful in its initial efforts to find remedies through the Indian legal system because of judicial prejudice. First, this Subpart cites examples of the Indian judiciary's hostility toward Westerners and its economic biases. Next, Hollywood's initial failures to find redress through the Indian legal system are discussed against the backdrop of Indian judicial prejudice. Subpart C highlights how recent changes in Hollywood's interests and the intellectual property dynamic of India have resulted in favorable outcomes for Hollywood. This Part concludes by predicting that Hollywood's recent success in enforcing its copyrights will likely result in a marked increase in the number of international intellectual property related claims in India.

A. *Why Hollywood Has Not Laid Down the Law on Bollywood*

One of the reasons why Hollywood took little action against Bollywood in the past is because it was largely unaware of the copying. Prior to the twenty-first century, news about Hollywood taking legal action against Bollywood studios was generally unheard of. Hollywood's response to unauthorized remakes typically ranged from ignorance to apathy.¹⁶⁴ Before South Asians began immigrating to the United States and Europe, Bollywood's influence in the entertainment business was largely confined to the South-Asian subcontinent and, to a smaller extent, former Soviet republics and Middle Eastern countries.¹⁶⁵ Therefore, given Bollywood's limited audience, Hollywood had little notice of any unauthorized remakes.

Although Hollywood is now far more cognizant of Bollywood's copying, it must still overcome procedural hurdles while being mindful of international policy considerations.¹⁶⁶ While some Hollywood studios have sought protection of their works against foreign infringement by filing suit in India, such an option may not be available to all unless essential conditions of international copyright law are satisfied.¹⁶⁷ Further, comity principles and

¹⁶⁴ See Desai, *supra* note 4, 259–60.

¹⁶⁵ Vijay Mishra, *Bollywood Cinema: A Critical Genealogy* 7 (Asian Inst., Working Paper No. 20, 2006), available at www.victoria.ac.nz/slc/asi/publications/17-bollywood.pdf (“There has been an overseas market for Indian popular cinema from at least the early '30s, largely in the old Indian diaspora, but also in the Middle East, parts of Africa, Southeast Asia and the Soviet Union. In the western world, including white settler states, it is safe to say that Indian cinema for a long while did not exist and that the market for it was absent.”).

¹⁶⁶ See generally Jane L. Volz & Roger S. Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 WM. MITCHELL L. REV. 867 (1996).

¹⁶⁷ MERGES ET AL., *supra* note 77, at 718–19.

diplomatic policy considerations call for restraint in aggressive litigation when it may interfere with the sovereignty interests of other countries or state relations.¹⁶⁸

Some Hollywood studios are disinterested because the revenues generated by the Indian entertainment industry pale in comparison to Hollywood's revenues.¹⁶⁹ If favorable judgments are awarded, they may be trivial in comparison to international litigation costs.¹⁷⁰ It should be noted however, that Bollywood's heightened popularity and projected earnings growth have garnered the interest of multiple Hollywood studios in recent years and may convince others in Hollywood to follow.¹⁷¹

Another reason explaining the dearth of Hollywood legal actions against Bollywood is poor copyright law enforcement in India. Part of the reason for this ineffective enforcement is the paucity of India's administrative resources.¹⁷² Looking at judicial costs comparatively, the United States spends approximately 1.7% of its annual federal budget on its judiciary system.¹⁷³ India on the other hand, spends approximately 0.27% of its budget on its judiciary system.¹⁷⁴ Furthermore, legal attitudes toward copyright infringement in India are also different. The attitude is that "[i]n the context of filmmaking, copyright laws in India are called upon primarily to protect the distribution and circulation of films and music from piracy," not on protecting U.S. films from unauthorized remakes.¹⁷⁵ The paucity of resources combined with legal attitudes prioritizing combating piracy over other forms of infringement helps explain why there have been few legal responses to unauthorized Hollywood remakes in India.¹⁷⁶

India's natural desire to continue its economic growth and nurture its industries free of interference from foreign interests has also been presented as a reason for ineffective intellectual property enforcement.¹⁷⁷ India desires "to

¹⁶⁸ *Id.*

¹⁶⁹ See Kripalani & Grover, *supra* note 18.

¹⁷⁰ BARTON LEGUM, INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE 41 (2005).

¹⁷¹ See Blakely, *supra* note 26, at 33.

¹⁷² Guha, *supra* note 34, at 241.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ GANTI, *supra* note 15, at 76.

¹⁷⁶ See *Bradford v. Sahara Media Entm't Ltd.*, 2004 (28) PTC 474 Cal (Calcutta H.C. 2003), available at <http://www.indiankanoon.org/doc/757852> (noting that Indian intellectual property law is "singularly devoid of reported decisions in copyright actions, at least up to the present day").

¹⁷⁷ Guha, *supra* note 34, at 248–52.

nurture and protect infant domestic industries from larger, better-funded and better organized foreign competitors, and this desire leads to conflicts with the entreaties of foreign governments and businesses for better [intellectual property rights] protection.”¹⁷⁸

Finally, Hollywood may be deterred from invoking the Indian judiciary to punish Bollywood because developing countries like India may house a general feeling of disdain against more powerful Western complainants.¹⁷⁹ One commentator explains:

Few things touch the delicate nerve of national sovereignty more than the autonomous capacity of states to administer their domestic laws in conformity with their own legal philosophies. States that have only recently achieved economic and political independence will especially resent other, more powerful states sitting in judgment of the way they exercise their sovereignty in this respect.¹⁸⁰

B. Indian Judicial Prejudice and Its Consequences on Hollywood

The Indian judicial forum also houses a certain degree of contempt for Western complainants. This Subpart first identifies incidents of Indian judicial prejudice and economic biases that have harmed the intellectual property interests of Westerners. It then takes note of several unsuccessful Hollywood attempts to enforce its intellectual property through the Indian legal system and contends that Hollywood was unsuccessful in its initial efforts because of judicial bias.

1. Prejudicial Incidents

Indian judicial disdain for Western claimants and economic protectionist policies likely played a role in the Kolkata High Court’s scathing dismissal of Barbara Bradford’s copyright infringement suit over her novel.¹⁸¹ Prior to Twentieth Century’s suit against BR Films in 2009,¹⁸² the *Bradford* case was recognized as one of the most aggressive attempts of copyright enforcement by

¹⁷⁸ *Id.* at 244–45.

¹⁷⁹ *Id.* at 240.

¹⁸⁰ J.H. Reichman, *Enforcing the Enforcement Procedures of the TRIPS Agreement*, 37 VA. J. INT’L L. 335, 339–40 (1997).

¹⁸¹ *Bradford*, (28) PTC 474 Cal.

¹⁸² Twentieth Century Fox Film Corp. v. BR Films, NMS/1561/2009 (Bombay H.C. 2010) (unreported consent order), available at <http://bombayhighcourt.nic.in/data/original/2009/NMS156109050809.pdf>.

a Western artist in India.¹⁸³ Although an injunction was ordered by a lower court preventing the airing of *Karishma* (the Indian television series alleged to have infringed on Bradford's novel), the Kolkata High Court vacated the injunction.¹⁸⁴ The court's contempt for the English novelist and bias in favor of the domestic defendant can be inferred from its dismissal of Bradford's claim under a grossly deviant application of idea-expression copyright principles.¹⁸⁵

In a rather harsh and scathing dismissal, Justices Ray and Banerjee held that "the scanty materials of the plaintiffs brought to light so far, do not get the case of infringement of copyright off the ground even one millimetre."¹⁸⁶ Furthermore, the court imposed upon the plaintiffs "both costs for the Court below and before us as well as damages for every week of delay of telecast which the respondents have suffered because of the wrongful order of injunction obtained."¹⁸⁷ Barbara Bradford was fined close to \$3,000 for every week *Karishma* was delayed from airing as a result of the injunction order.¹⁸⁸ Although the Supreme Court of India reversed the award for damages on appeal, the finding of noninfringement was affirmed.¹⁸⁹

The Indian judiciary's economic protectionist policies in favor of Bollywood can also be inferred from the Kolkata High Court's decision in *Shree Venkatesh Films v. Vipul Amrutlal Shah*.¹⁹⁰ In *Shree Venkatesh Films*, the makers of the Bollywood film, *Namaste London*, successfully sued the makers of a Bengali¹⁹¹ film entitled *Poran Jaye Joliya Rae* for copyright infringement.¹⁹² Bengali films are colloquially known in India as cinema of "Tollywood" because Bengali film studios are based in Tollygunge, Kolkata.¹⁹³ Tollywood movies operate on a much smaller budget and generate

¹⁸³ *Author Loses India Plagiarism Case*, BBC NEWS (July 21, 2003, 3:00 PM), <http://news.bbc.co.uk/2/hi/entertainment/3084401.stm>.

¹⁸⁴ *Bradford*, (28) PTC 474 Cal.

¹⁸⁵ *See supra* Part II.B.1.iii.

¹⁸⁶ *Bradford*, (28) PTC 474 Cal.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Author Loses India TV Appeal*, BBC NEWS (Aug. 4, 2003, 2:11 PM), <http://news.bbc.co.uk/2/hi/entertainment/3123315.stm>.

¹⁹⁰ *Shree Venkatesh Films Pvt Ltd v. Vipul Amrutlal Shah* (Calcutta H.C. 2009), available at <http://www.indiankanoon.org/doc/1286774>.

¹⁹¹ Bengali is an Indo-Aryan language native to eastern South Asia. *See* E. Annamalai, *Contexts of Multilingualism*, in *LANGUAGE IN SOUTH ASIA* 223, 223-34 (Braj B. Kachru et al. eds., 2008).

¹⁹² *Shree Venkatesh Films*, available at <http://www.indiankanoon.org/doc/1286774>.

¹⁹³ ASWIN PUNATHAMBEKAR, *GLOBAL BOLLYWOOD* 24 (Anandam Kavoori ed., 2008).

far less revenue than their more powerful Bollywood cousins.¹⁹⁴ They also appeal to a much smaller audience, primarily Bengali speakers.¹⁹⁵

The Kolkata High Court upheld a finding of prima facie infringement without providing much analysis.¹⁹⁶ The court's bias in favor of the more powerful Indian entertainment entity can be inferred from the fact that the court applied idea-expression principles to this case in stark contrast to the way it did in *Bradford*. In fact, the court made no mention of *Bradford* or the rigorous standards of infringement the court vehemently articulated in that case.¹⁹⁷ Further, unlike *Bradford*, here the court characterized the idea in the Bollywood movie at a very high level of abstraction. Had the court in this case applied the idea-expression principles as it did in *Bradford*, the Bollywood movie would have been rendered uncopyrightable.

2. *Hollywood's Initial Legal Actions Impeded by Prejudice*

The above examples of judicial bias have affected Hollywood's enforcement efforts. Hollywood's first attempts to enforce its copyrights against Bollywood copycats were hampered by judicial prejudice and economic bias sometimes masked in the form procedural impediments. For example, in 2005, Twentieth Century Fox sued Zee Telefilms in the Delhi High Court for copyright infringement.¹⁹⁸ Twentieth Century alleged that *Time Bomb*, a television series produced by Zee, was an unlawful remake of Twentieth Century's popular television series *24*.¹⁹⁹ Representatives of Zee had met with Fox to negotiate purchasing the rights to *24*; however, Fox was reportedly not interested in selling.²⁰⁰ Zee continued with the production of *Time Bomb* and was hit with a lawsuit before the show's scheduled premiere.²⁰¹ Twentieth Century moved for an injunction preventing *Time Bomb* from airing.²⁰² Despite their timely efforts to obtain injunctive relief, *Time Bomb* aired on June 20, 2005.²⁰³ Due to a series of adjournments and

¹⁹⁴ *Id.* at 79–95.

¹⁹⁵ *Id.*

¹⁹⁶ *Shree Venkatesh Films*, available at <http://www.indiankanoon.org/doc/1286774>.

¹⁹⁷ *Id.*

¹⁹⁸ *Zee Dragged to Court on 'Time Bomb'*, HINDU (Jun. 18, 2005), <http://www.hindu.com/2005/06/18/stories/2005061817630300.htm>.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Status of Cases*, HIGH CT. DELHI, http://delhihighcourt.nic.in/dhc_case_status_list_new.asp (last visited Feb. 20, 2012).

²⁰³ *Zee Dragged to Court on 'Time Bomb'*, *supra* note 198.

procedural complications concerning joinder, the Delhi High Court has not yet heard the case.²⁰⁴ A decision at this point would likely be moot since *Time Bomb* went off the air after a single season.²⁰⁵

In 2007, following Twentieth Century's unsuccessful suit in Delhi, Overbrook Entertainment, along with Sony Pictures, contemplated a \$30 million lawsuit against the producers of *Partner* (2007), a Bollywood remake of Sony's comedy *Hitch* (2005).²⁰⁶ Although cease-and-desist letters were sent to the makers of *Partner*, talks of a lawsuit soon faded.²⁰⁷ Sony likely did not file suit because, at the time, *Bradford* was the only case where an Indian court had had the opportunity to hear copyright infringement charges from foreign entities.²⁰⁸ Because *Bradford* screamed bias, finding an objective forum in India to bring charges would have seemed unlikely.

Finally, in 2008, following the failure of Twentieth Century and the inhibitions of Sony, Warner Brothers tried its luck with India's biased judiciary to no avail. Warner Brothers sued Mirchi Movies for trademark infringement of its *Harry Potter* franchise.²⁰⁹ Mirchi Movies was set to release *Hari Puttar: A Comedy of Terrors* in the fall of 2008.²¹⁰ The Delhi High Court dismissed Warner Brothers' suit, noting that "Hari" is a common name in India and that "Puttar" means son in Punjabi.²¹¹ The court held that "in the local language and dialect 'Hari Puttar' is not readily associated with 'Harry Potter.'"²¹² The court also noted that aside from the similarities in the titles, *Hari Puttar* is "completely different to the Harry Potter books or films which are fictional thrillers with a high quotient of magic thrown in."²¹³ Further, the court

²⁰⁴ *In the High Court of Delhi at New Delhi*, HIGH CT. DELHI (June 17, 2005), http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=6365&yr=2005.

²⁰⁵ *Time Bomb 9/11 (TV Serial)*, CONNECT.IN.COM, <http://connect.in.com/time-bomb-911-tv-serial/biography-542684.html> (last visited Feb. 20, 2012).

²⁰⁶ Sonali Krishna, *Partner May Face \$30 Million Hitch*, ECON. TIMES (Aug. 8, 2007, 3:47 AM), http://economictimes.indiatimes.com/Partner_may_face_30_mn_Hitch/articleshow/2264000.cms.

²⁰⁷ Elizabeth Flock, *Forbes India: Who Will Bell the Copycat*, IBN LIVE (July 22, 2009, 2:56 PM), <http://ibnlive.in.com/news/forbes-india-who-will-bell-the-copycat/97669-8.html>. Although the case never went to trial, Sony "acquired the global exclusive satellite broadcasting rights of *Partner*." *Id.*

²⁰⁸ See *Bradford v. Sahara Media Entm't Ltd.*, 2004 (28) PTC 474 Cal (Calcutta H.C. 2003), available at <http://www.indiankanoon.org/doc/757852>.

²⁰⁹ *Warner Bros. Entm't Inc. v. Kohli*, (2008) 9600 I.A. 1607, available at <http://www.indiankanoon.org/doc/395839>.

²¹⁰ *Id.* ¶ 4.

²¹¹ *Id.* Punjabi is an Indo-Aryan language native to the Punjab region of South Asia. Annamalai, *supra* note 191, at 223–34.

²¹² *Warner Bros.*, 9600 I.A. 1607, ¶ 21.

²¹³ *Id.* ¶ 11.

chastised Warner Brothers for the amount of time it took to file suit against Mirchi Movies.²¹⁴ The Delhi High Court decision suggested that the Indian judiciary would not be a successful venue for U.S. entities seeking remedies for intellectual property infringement.

C. Recent Favorable Developments for Hollywood and Its Copyrights

Despite the uncertainty and all of the judicial opposition, some Hollywood studios, most notably Twentieth Century Fox, decided to invest more in their efforts to protect their intellectual property from Bollywood misuse. In 2009, two major Hollywood studios retained the services of Lall & Sethi,²¹⁵ a prominent Indian intellectual property law firm with offices across the South-Asian subcontinent.²¹⁶ Chander Lall, senior partner at Lall & Sethi, sent a slew of cease-and-desist letters to Bollywood studios seeking to remake several blockbuster Hollywood hits such as *Ghostbusters*, *Jerry Maguire*, *The Curious Case of Benjamin Button*, *The Departed*, and *The Hangover*.²¹⁷ The efficacy of the cease-and-desist correspondence seemed unpromising because of the lack of a strong judicial mandate in favor of Hollywood from the Indian courts.

In the spring of 2009, Twentieth Century Fox took the bold initiative to supplant its cease-and-desist strategy by actually filing suit for copyright infringement in the Bombay High Court.²¹⁸ Twentieth Century alleged that an Indian courtroom comedy, *Banda Yeh Bindas Hai (This Guy Is Fearless)*, by BR Films was an unlawful remake of Twentieth Century's 1992 hit *My Cousin Vinny*.²¹⁹ Twentieth Century originally sought \$1.4 million in damages.²²⁰ The case received substantial coverage from both the Indian and American entertainment news media, because it was the first time a major Hollywood studio brought legal action against a major Bollywood film studio for copying a Hollywood movie.²²¹ BR Films denied infringement, claiming that they

²¹⁴ *Id.* ¶ 30.

²¹⁵ Blakely, *supra* note 26, at 33.

²¹⁶ LALL & SETHI, <http://www.indiaip.com> (last visited Feb. 20, 2012).

²¹⁷ Blakely, *supra* note 26, at 33.

²¹⁸ Vyas, *supra* note 6.

²¹⁹ Twentieth Century Fox Film Corp. v. BR Films, NMS/1561/2009 (Bombay H.C. 2010) (unreported consent order), available at <http://bombayhighcourt.nic.in/data/original/2009/NMS156109050809.pdf>.

²²⁰ Flock, *supra* note 207.

²²¹ See Emily Wax, *Paying the Price for Hollywood Remakes*, WASH. POST (Aug. 26, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/25/AR2009082503104.html?hpid=topnews>; Vyas, *supra* note 6.

received the rights from Twentieth Century for the remake.²²² Twentieth Century said that “no terms were agreed [to].”²²³

In August 2009, BR agreed to settle with Twentieth Century for \$200,000.²²⁴ Although a judicial finding of infringement may have served as a stronger statement to copycat Bollywood studios, the settlement was nevertheless significant because “[i]t was the first time a Bollywood studio had been forced to pay out for borrowing from Hollywood.”²²⁵ Several commentators speculated that the settlement might mean the beginning of the end of Bollywood’s tradition of copying with impunity.²²⁶

Twentieth Century’s assault on Bollywood did not end with a mere settlement agreement. In late 2010, Twentieth Century filed another infringement lawsuit against the Bollywood production company, Sohail Maklai Entertainment.²²⁷ Twentieth Century alleged Sohail’s film, *Knock Out*, set for release in late October 2010, was an unlawful remake of Twentieth Century’s 2002 thriller, *Phone Booth*.²²⁸ This time, however, no settlement agreement was reached and the Bombay High Court issued an opinion on October 14, 2010 after hearing arguments from both parties.²²⁹

The court found that the defendant’s film, *Knock Out*, did amount to an infringement of *Phone Booth* under the Indian Copyright Act.²³⁰ The court’s opinion regarding the idea–expression dichotomy and the scope of what is protected by copyright differed from the Kolkata court’s anti-Western opinion in *Bradford*. Unlike in *Bradford*, the court in *Sohail* did not engage in an unreasonable manipulation of the idea–expression, merger, and *scenes à faire* doctrines.²³¹ Due to the dearth of good copyright case law in India, the court relied on U.S. copyright cases in its analysis.²³² The court concluded: “There is little doubt that a person seeing both the films at different times would come to

²²² *Bollywood Copy Case ‘Is Settled,’ supra* note 10.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ See Anupreeta Das, *Bollywood to Plagiarism: Bye Bye?*, REUTERS (Aug. 26, 2009), <http://blogs.reuters.com/mediafile/2009/08/26/bollywood-to-plagiarism-bye-bye>.

²²⁷ Twentieth Century for Film Corp. v. Sohail Maklai Entm’t Pvt. Ltd., NM-2847 (Bombay H.C. 2010), available at <http://bombayhighcourt.nic.in/data/original/2010/NMS284710141010.pdf>.

²²⁸ *Id.* ¶ 2.

²²⁹ See generally *id.*

²³⁰ *Id.* ¶ 35.

²³¹ *Id.* ¶ 27.

²³² *Id.*

the unmistakable conclusion that the Defendants film is a copy of [*Phone Booth*].”²³³ The court awarded Twentieth Century injunctive relief until Sohail Entertainment paid \$340,000 in damages.²³⁴ Twentieth Century was also awarded a portion of *Knock Out*’s box office revenues.²³⁵ Twentieth Century’s victory marked “the first time that an Indian court has ruled that Bollywood infringed a Hollywood copyright.”²³⁶

Given the recent success of Twentieth Century Fox in Indian courts, a marked increase in the volume of copyright infringement claims from international plaintiffs would not be surprising. The media attention the cases garnered is sure to put copycat directors on notice that the days of copying with impunity may be over. The Bollywood directors that only a few years ago defiantly boasted their practice of stealing intellectual property to reporters are sure to be considerably less candid in their future interviews.

IV. AN INTERNATIONAL AGREEMENT THAT DETERS INFRINGEMENT AND ENHANCES GROWTH AND COOPERATION BETWEEN HOLLYWOOD AND BOLLYWOOD

Although recent developments in Indian copyright law suggest that Hollywood may now be able to successfully find remedies for copyright infringement through Indian courts, litigation may not be the optimal solution to ending Bollywood’s copying. Part IV suggests a broad international agreement between major film entertainment entities in Hollywood and Bollywood aimed at deterring unauthorized copying as a solution. Such an agreement would also have the added benefits of increasing dialogue between Hollywood and Bollywood and promoting cooperation between the two entertainment powerhouses. First, Subpart A discusses why Hollywood would not find the international intellectual property enforcement mechanism under TRIPS an effective tool for enforcing its copyrights. Finally, Subpart B proposes a contractual agreement between Hollywood and Bollywood that incorporates some of the procedures of the dispute resolution mechanism in TRIPS and provides for remedial relief procedures. This Subpart explains why the agreement would be beneficial to improving relations between both industries and promoting future cooperation.

²³³ *Id.* ¶ 29.

²³⁴ Ramachandran, *supra* note 12.

²³⁵ *Id.*

²³⁶ *Id.*

A. *Why TRIPS Is of Little Use to Hollywood*

The United States and India are both parties to TRIPS.²³⁷ The aim of TRIPS is to set minimum international legal standards on matters related to copyrights, patents, and trademarks.²³⁸ All member countries are obliged to enforce a set of agreed-upon intellectual property rights.²³⁹ TRIPS requires all members to afford all authors (both domestic and foreign) the same protections offered to the “authors from the ‘most favored nation.’”²⁴⁰ TRIPS also adopts all the requirements of the Berne Convention,²⁴¹ including the provisions that require that “member nations afford exclusive rights to make and authorize translation, reproduction, public performance, and adaptation of their works.”²⁴² Although subject to substantial criticism for inadequate enforcement,²⁴³ India’s intellectual property laws are compliant with the minimum provisions set forth in TRIPS.²⁴⁴

While national enforcement standards are not uniform, there are detailed enforcement mechanisms in place in the event of disputes between member countries. The enforcement mechanisms of TRIPS provide for a “Dispute Settlement Understanding” (“DSU”).²⁴⁵ The DSU may be appealing because it sets forth a timetable for resolution. “[A] typical case, including appeals, should take no more than fifteen months.”²⁴⁶ Such a timeframe is certainly an advantage to the Indian judiciary given the system’s backlogs and delays.²⁴⁷

The process of invoking the DSU begins with a consultation between the countries home to the parties in dispute.²⁴⁸ The provisions for invoking the DSU do not allow Hollywood to directly bring a cause of action under TRIPS.²⁴⁹ Hollywood must convince the U.S. government to intervene on its

²³⁷ TRIPS, *supra* note 28.

²³⁸ *Id.*

²³⁹ *Id.* art. 1.

²⁴⁰ MERGES ET AL., *supra* note 77, at 717–18.

²⁴¹ *Id.*

²⁴² *Id.* at 717.

²⁴³ *See* Desai, *supra* note 4, at 260–63.

²⁴⁴ *Id.* at 263–64.

²⁴⁵ TRIPS, *supra* note 28, art. 64.

²⁴⁶ Desai, *supra* note 4, at 262.

²⁴⁷ *See Courts Will Take 320 Years To Clear Backlog Cases: Justice Rao*, TIMES INDIA (Mar. 6, 2010, 6:05 PM), <http://timesofindia.indiatimes.com/india/Courts-will-take-320-years-to-clear-backlog-cases-Justice-Rao/articleshow/5651782.cms>.

²⁴⁸ TRIPS, *supra* note 28, art. 64.

²⁴⁹ *See id.*

behalf.²⁵⁰ If the consultation fails to yield an agreeable solution, a panel comprising of members from a “Dispute Settlement Body” is appointed to hear the claims.²⁵¹ The panel hears arguments, collects evidence, and issues a report that functions as a ruling.²⁵² Countries may appeal the ruling to an appellate body.²⁵³ The losing country is given a specific time frame to cure the defects in their intellectual property laws or potentially face sanctions such as punitive tariffs.²⁵⁴

The DSU enforcement mechanism under TRIPS is of little use to Hollywood because it would be difficult for Hollywood to convince the United States to bring a dispute over Bollywood’s copying unless there was a uniform problem of Bollywood studios infringing with impunity under Indian law. Recent Indian copyright case law in favor of Hollywood shows that not all Bollywood studios infringe with impunity. Dispute settlement typically addresses broad issues like a country’s inadequate intellectual property statutory protections.²⁵⁵ India’s statutory protections meet all the requirements of TRIPS.²⁵⁶ Therefore, unless India’s copyright laws deteriorate to a point below minimum international standards, Hollywood has little use for TRIPS.

B. A Hollywood–Bollywood Agreement That Solves the Problem of Unauthorized Copying

Instead of arguing in court or trying to convince their respective host states to intervene under TRIPS, Hollywood and Bollywood should come to the negotiation table and outline an agreement that deters unauthorized copying. Notwithstanding Twentieth Century’s recent victory in its infringement case against a copycat Bollywood studio, a drawback to filing infringement suits in the courts of India is that the lawsuits are likely to sour relations between Hollywood and Bollywood and discourage cooperation. The two industries have recently indicated their intentions to improve relations and promote cooperation.²⁵⁷ Repeated litigation over every incident of actionable infringement will likely set back relations between Hollywood and Bollywood.

²⁵⁰ *See id.*

²⁵¹ Marrakesh Agreement Establishing the World Trade Organization, Annex 2 art. 2, *done* Apr. 15, 1994, 1867 U.N.T.S. 3.

²⁵² *Id.* art. 11.

²⁵³ *Id.* art. 1.

²⁵⁴ TRIPS, *supra* note 28, art. 59.

²⁵⁵ Desai, *supra* note 4, at 261–63.

²⁵⁶ *Id.* at 263–64.

²⁵⁷ *See* Martinez & Narayan, *supra* note 89.

The agreement should outline acceptable and unacceptable forms of film adaptations and remakes. The parties to the agreement should be major Hollywood and Bollywood film studios along with trade organizations such as the Motion Picture Association of America (“MPAA”) and its international counterparts. Despite Hollywood being unlikely to find relief through TRIPS, the TRIPS model for resolving intellectual property disputes should be emulated in some form when devising an international agreement between Hollywood and Bollywood. The pact should provide for a binding dispute resolution mechanism, similar to the DSU under TRIPS.²⁵⁸ A panel comprising of members of the MPAA can function to mediate and resolve allegations of infringement and plagiarism. Because U.S. and Indian copyright laws are similar and have analogous standards for finding infringement, determining what laws should apply is not likely to be a hurdle when negotiating contractual provisions. Also, because both countries are parties to TRIPS, the copyright laws agreed to in TRIPS can be used to govern the agreement.

The panel should also be conferred powers to determine and order appropriate remedies. Authoritative powers to order injunctive relief, monetary damages, reasonable royalties, and compulsory licenses should be granted to the mediating body. A grant of such authority will substantiate the agreement’s legitimacy.

The idea of having the two entertainment powerhouses enter into an agreement addressing the issues of remakes and adaptations is both plausible and feasible in light of two recent coalitions Hollywood and Bollywood have entered into. First, in March 2010, “the two industries came together in Mumbai to launch the Alliance Against Copyright Theft (“AACT”), a Bollywood–Hollywood content protection coalition in India.”²⁵⁹ The AACT was founded by Reliance Big Entertainment, UTV Motion Pictures, Eros International, and the Motion Picture Distribution Association (representing six major Hollywood studios).²⁶⁰ According to its official website, the AACT “is an initiative to address piracy in India—launched jointly between the Hindi and Hollywood studios.”²⁶¹

²⁵⁸ TRIPS, *supra* note 28.

²⁵⁹ A S Mitra, *Hollywood Formalizes Pact with Bollywood*, BOLLYWOODTRADE.COM (Nov. 11, 2010, 12:29 PM), <http://www.bollywoodtrade.com/trade-news/hollywood-formalizes-pact-with-bollywood/index.htm>.

²⁶⁰ *Why AACT?*, ALLIANCE AGAINST COPYRIGHT THEFT, <http://www.aact.in/WhyAACT.php> (last visited Feb. 31, 2012).

²⁶¹ *Id.*

In November 2010, entities in Hollywood and Bollywood signed a “historic cooperation pact.”²⁶² A press release from the MPAA announced that “[a]fter several years of co-productions and joint investment, the two most prominent global film industries came together today for the signing of an historic declaration between the city of Los Angeles and the Indian film industry at Paramount Pictures Studios in Hollywood.”²⁶³ The agreement is aimed at “develop[ing] and strengthen[ing] motion picture production, distribution, technology, content protection and commercial cooperation between the two filmmaking communities.”²⁶⁴ Mayor of Los Angeles Antonio Villaraigosa and Paramount Picture Chairman and CEO Brad Grey were among the guests in attendance in support of the “strategic partnership.”²⁶⁵

CONCLUSION

A contractual agreement aimed at addressing the legality of unauthorized remakes may encounter reluctance from Bollywood entities that would much rather continue copying with impunity. However, the recent coalitions Bollywood entered into with Hollywood suggest Bollywood is serious about enforcing its own copyrights from the growing threat of piracy and in improving relations with Hollywood. Bollywood should recognize that entering into an agreement that serves to protect intellectual property interests will help it carry out its recent intentions to improve and develop better relations with Hollywood. Such an agreement will also limit litigation costs and diminish Bollywood’s likelihood of being tied up in court fighting contentious lawsuits. Bollywood has much to gain from ending its copycat ways. The industry’s appeal is no longer limited to the South-Asian subcontinent.²⁶⁶ Bollywood’s international appeal is on the rise. The success of recent movies pertaining to South-Asian themes and culture such as *Slumdog Millionaire* and *Bend It Like Beckham*, while not Bollywood productions, have helped Bollywood receive more international attention.²⁶⁷ Therefore,

²⁶² Mitra, *supra* note 259.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ See Wadhvani, *supra* note 22.

²⁶⁷ See Jyothi Prabhakar, *B'wood Waking Up to Copyright Infringement*, TIMES INDIA (May 16, 2009, 12:19 AM), <http://timesofindia.indiatimes.com/entertainment/bollywood/news-interviews/Bwood-waking-up-to-copyright-infringement/articleshow/4533917.cms> (“[W]hat *Slumdog*’s success did was . . . to make the big daddies of Hollywood curious about the ‘Bollywood type’ of movies. They began . . . to watch Bollywood films. . . . They realised that not some . . . but far too many [Bollywood] films were scene-by-scene rip-offs of their films.”).

Bollywood's reputation and viewership among international audiences will benefit from original scripts and productions. Originality will ultimately lead Bollywood to greater revenues than copying does.

ARJUN SHAH*

* Managing Editor, *Emory International Law Review*; J.D. Candidate, Emory University School of Law (2012); B.A., *cum laude*, Rutgers University (2009). The Author would like to thank Professor Timothy R. Holbrook, whose advice and guidance greatly contributed to the development of this Comment. The Author would also like to thank the *Emory International Law Review* staff for their hard work and dedication in bringing this Comment to publication.