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Copyright Infringement in the Indian Film Industry

By Rachana Desai

On July 7, 1896, India's first cinematographic film was shown in Mumbai.¹ Today, India's mammoth film industry produces more movies than any other country in the world and employs over two million people.² In 2001, India's entertainment industry (which includes film, music, television, radio and live entertainment) was one of the fastest growing sectors of the economy, experiencing over a 30% growth.³ Cable television generated the most revenue, followed by television broadcasting, film and television production.⁴ The film

India, unlike America, has several film industries. This Note focuses on the largest of these industries: Bollywood, the center of Hindi language cinema. In recent years, nearly eight out of every ten Bollywood scripts have been "inspired" by one or more Hollywood films.⁷ Previously, this widespread problem was not visible to those outside of India. The emergence of the Internet and better global communications, however, have made Westerners more aware of the cultural copy situation in India. In 2003, best-selling fiction writer Barbara Taylor Bradford

“To date, no Hollywood studio has attempted to enforce its copyrights against Bollywood.”

brought a copyright infringement suit against Sahara Television for allegedly making a television series out of her book, *A Woman of Substance*.⁸

industry, on average, produces approximately 1,000 movies annually,⁵ sells about six billion tickets and grosses more than \$72 billion globally.⁶ Until recently, however, the Indian film industry received very little international acknowledgment. This lack of recognition may have contributed to the longstanding practice of producing "cultural copies," as opposed to original works. A cultural copy is nearly a direct copy of a movie or other work from one cultural to another.

After winding through the legal system, the Indian Supreme Court refused to uphold a lower court injunction against Sahara and allowed the television show to go on the air.⁹ Bradford, although frustrated by her loss, chose not to pursue the matter further.¹⁰

In light of this case, the following question arises: what implications does the *Bradford* case have for the protection of foreign copyrights in India? To date, no Hollywood studio has attempted to enforce its copyrights against Bollywood.¹¹ With the attention garnered by the *Bradford* case and

the increased globalization of entertainment, however, American studios are more likely to become aware of copies of their films. It is inevitable that this awareness, coupled with the financial success of many of Bollywood's copies, will lead some American film studio to bring suit in India.

Part II of this Note explores the World Trade Organization (WTO) framework for dealing with copyright and the governing laws and cases in India. The Trade-Related Aspects of

Intellectual Property Rights (TRIPS) is the current international agreement on copyright. This section explores the debate leading up to the promulgation of the agreement and the provisions of the agreement itself. It also addresses the Copyright Act of 1957, the domestic law relevant to this discussion. Finally, this section examines *Bradford v. Sahara Television*, which is the most recent case involving a foreigner attempting to enforce her copyright protections in India.¹² Part III of this Note illustrates the extent of the cultural copy problem in Bollywood and provides specific examples of possible copyright infringement. It explores possible results and roadblocks in light of the applicable domestic and international law and the implications of the *Bradford* case.

I. International Law

A. Overview of WTO

The World Trade Organization was created by the 1986-94 Uruguay Round negotiations and is comprised of 146 member nations.¹³ Its members account for nearly 97% of global trade.¹⁴ The main purpose of the WTO is "to help trade flow smoothly, freely, fairly and predictably."¹⁵ Although the

WTO is fairly new, its predecessor, the General Agreement on Tariffs and Trade (GATT) was signed in 1948.¹⁶ In contrast to the WTO, the GATT's mandate was strictly limited to trade issues.¹⁷ The WTO is controversial because it expanded upon the GATT to include services and intellectual

"if a person's copyright was violated in another country, the copyright holder would have no recourse other than enlisting their native country's help in taking the case to the International Court of Justice (ICJ)."

property agreements.¹⁸ Perhaps most distressing to its critics, however, is the fact that the WTO also covers certain health and environmental regulations that can be interpreted as trade barriers.¹⁹

The WTO makes decisions through a consensus of its member states.²⁰ Unlike other international organizations, an executive board or other type of organizational head does not control it.²¹ The member nations retain all decision-making power.²² All states have equal representation; no one state has veto power.²³ The International Monetary Fund and the World Bank, on the other hand, give weight to a nation's vote based on its standing within the international economic system.²⁴ Over three-fourths of WTO member nations are designated by the United Nations as "developing" or "least-developed" countries.²⁵ Perhaps this fact, combined with the decision-making mechanism, explains the inclusion of special provisions for these countries providing, among other things, longer time for compliance, infrastructure support and ways to increase trade opportunities in all WTO agreements.²⁶

B. The TRIPS Debate

WTO member nations are divided into three categories: developed nations,

developing/transitional nations, and least-developed nations.²⁷ The United Nations has designated forty-nine countries as being least-developed; thirty of these are WTO members.²⁸ There is no set definition for the other categories. Rather, each remaining member declares its status.²⁹

It is useful to think of the debate over TRIPS in terms of these distinctions as well. Developed states, like the United States, are generally the ones pushing for stricter international protection of intellectual property rights (IPR) because they produce and export most of the world's intellectual property.³⁰ Developing states, such as India, favor increased international protection, but also need stronger domestic protection to encourage their own industries to devote resources to intellectual property development.³¹ Finally, least-developed states, because they are net importers of intellectual property, generally attempt to weaken copyright protections.³² Thus, the debate over TRIPS juxtaposes the first two groups against the third.

The WTO's Uruguay Round of trade talks eventually culminated in several agreements, one of which was the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).³³ Signed in Marrakesh in April of 1994, TRIPS marked the first significant inclusion of IPR in a trade agreement.³⁴ The Uruguay Round agreements took effect on January 1, 1995. Developed nations had one year from that date to bring their laws into compliance.³⁵ Developing countries had five years, while the least developed countries had eleven years.³⁶ Since TRIPS is not self-executing and claims cannot be brought on the basis of TRIPS in domestic courts, all WTO member nations must pass domestic laws that comply with the agreement.³⁷ This Note examines standards, enforcement, and dispute settlement as the major facets of the agreement.

C. Standards

Among other things, TRIPS deals with copyright, trademarks, geographical indications and patents.³⁸ The agreement mandates that all WTO members create

minimum levels of protection for the IPR of other member states.³⁹ Each member state should, with respect to IPR, treat the citizens of other member states just as it would its own citizens.⁴⁰ This principle is known as "national treatment."⁴¹ The rules set forth at the World Intellectual Property Organization's Paris Convention for the Protection of Industrial Property (dealing with patents, industrial designs, etc.) and the Berne Convention for the Protection of Literary and Artistic Works (dealing with copyright) bind all of the WTO states.⁴² TRIPS incorporates Article 12 of the Berne Convention, which provides that "[a]uthors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works."⁴³ The copyright term of protection is the life of the author plus fifty years, although there are some provisions for shorter terms of protection.⁴⁴ Article 12 also provides that, when the term of protection is not based on the life of a human being (e.g., when the author is an institution or corporation), then the term of protection must be at least 50 years.⁴⁵ TRIPS, like the Berne Convention before it, protects expressions but not "ideas, procedures, methods or operation or mathematical concepts as such."⁴⁶

D. Enforcement and Dispute Settlement

TRIPS surpasses other intellectual property agreements because it has a viable enforcement mechanism. The major problem with the Paris and Berne Conventions is that they lacked the ability to enforce compliance.⁴⁷ Professor David Nimmer opines that, under the pre-TRIPS framework, if a person's copyright was violated in another country, the copyright holder would have no recourse other than enlisting the native country's help in taking the case to the International Court of Justice (ICJ).⁴⁸ This is due to the Berne Convention's failure to create a private cause of action provision.⁴⁹ Even this recourse, however, is largely illusory, since, as of the date of this Note's publication, no copyright case has ever been brought before the ICJ.⁵⁰ Instead of relying on the ICJ, TRIPS links

enforcement to judicial mechanisms within member nations and to the WTO's dispute settlement framework.⁵¹

“By tying copyright violations to the imposition of trade sanctions, TRIPS hopes to encourage the respect of global copyrights.”

Part III of TRIPS lays out civil and criminal enforcement procedure as well as available remedies.⁵² The enforcement provisions aim to ensure that all member nations have some sort of enforcement mechanism within the country that maintains due process, does not unnecessarily create trade barriers, and has some method for judicial or administrative review.⁵³ Although it mandates an internal enforcement mechanism, TRIPS is unclear as to exactly what measures a developing nation must take to facilitate internal enforcement.⁵⁴ For example, the agreement says, “nothing in this [p]art creates any obligation with respect to the distribution of resources.”⁵⁵ This indicates that developing nations need only to exercise “good faith” efforts to comply with TRIPS.⁵⁶ Also, a state is not required to create a judicial system for IPR “distinct from that [of] the enforcement of law in general.”⁵⁷ For a country whose regular judicial system is unable to provide even the minimum due process requirements, it is unclear whether it is excused from the requirement to update its judicial system in accordance with TRIPS standards.⁵⁸

Disputes arising under TRIPS between WTO members are subject to the WTO's Dispute Settlement Understanding (DSU).⁵⁹ Prior to the Uruguay Round, disputes were settled under the GATT framework.⁶⁰ Since the GATT procedures did not contain any fixed timetables, some cases languished indefinitely in the system.⁶¹ The DSU provides greater structure, setting forth a

timetable where a typical case, including appeals, should take no more than fifteen months.⁶² Under the GATT, dispute rulings

were adopted by consensus.⁶³

Thus, one dissenting vote could block a ruling, meaning the country against which the ruling was levied could simply vote it down.⁶⁴ A DSU panel's ruling,

however, is adopted unless a consensus of WTO members objects to the ruling.⁶⁵

The first step to dispute resolution under the DSU is consultation between the countries involved in the dispute.⁶⁶ A panel is appointed only if the countries cannot reach a solution on their own.⁶⁷ The panel consists of members from the Dispute Settlement Body⁶⁸ and has the power to hear the complaint, gather evidence, and issue a report.⁶⁹ Unless it is rejected by a consensus of members, the report becomes a ruling.⁷⁰ Either side has the option to make an appeal to the WTO's permanent Appellate Body.⁷¹ The losing state then has a period of time to correct the problem and bring its laws into compliance.⁷² If proper action is not taken, the complaining state may ask the WTO to allow it to impose sanctions.⁷³ Ideally, the sanctions should be in the same sector as the dispute. If the Dispute Settlement Body deems that to be ineffective, then it may authorize cross-sectorial sanctions.⁷⁴ The crucial point of the external enforcement provisions is the availability of cross-sectorial retaliation.⁷⁵ Professor Nimmer provides a useful hypothetical: “[If] Korea is adjudged a copyright violator [by the panel], then Korea must proceed to honor copyrights in the American movies. If it does not do so, the United States is permitted to slap a punitive tariff on the importation of Hyundai's from Korea.”⁷⁶

Thus, countries are compelled to *effectively* protect copyrights of other member nations. They can no longer hide

behind inefficient or corrupt legal systems.⁷⁷ By tying copyright violations to the imposition of trade sanctions, TRIPS hopes to encourage the respect of global copyrights.⁷⁸ However, much of the system still relies on the compliance of the developed nations.⁷⁹ Inequalities among nations make it difficult at times for TRIPS to operate as envisioned.⁸⁰

For example, if the panel adjudges the United States to be in violation of a developing country's copyright and the United States refuses to comply, then even

cross-sectorial retaliation would most likely fail to suffice as an effective remedy for the developing country.⁸¹ Even though the DSU is a vast improvement over the previous system under the GATT, its legitimacy still depends on developed countries' recognition of the panel's authority and adherence to the panel's decisions.⁸²

II. The United States' Response

The United States is a party in several bilateral and international agreements dealing with IPR and trade in general.⁸³ But many in the United States, citing the importance of intellectual property to the economy, are hesitant to rely solely on international agreements for the protection of IPR. The Omnibus Trade and Competitiveness Act of 1988 ("the Trade Act") strengthened IPR protection globally by tying it to trade sanctions.⁸⁴ Under the Trade Act, the United States Trade Representative (USTR) has discretion to initiate a "Special 301" investigation,⁸⁵ which calls for the USTR to evaluate the level of intellectual property trade protections provided by other states.⁸⁶ Nations with the worst policies or practices are placed on the "Priority Foreign Countries" list and may be subject to

immediate trade sanctions.⁸⁷ States are placed on this list if they (1) "have the most onerous or egregious" policies towards IPR protection, (2) their policies "have the greatest adverse impact (actual or potential) on...United States products," and (3) the state is not participating in or making progress in negotiations with the USTR.⁸⁸

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Less harmful violators are put on the "Priority Watch List."⁸⁹ These states provide less than optimal copyright protections, but are not subject to immediate sanctions.⁹⁰

In 1991, India was placed on the "Priority Foreign Countries" list primarily due to its "denial of adequate and effective intellectual property protection...especially in the area of patent protection."⁹¹ As a result, the United States suspended duty-free privileges for \$60 million U.S. of Indian trade goods (primarily pharmaceuticals and chemical products) under the Generalized System of Preferences (GSP).⁹² During the next year, more chemicals were added to the GSP, thus increasing the benefit of suspended trade to \$80 million U.S.⁹³

A. Indian Law—Copyright Act of 1957

The "Special 301" trade sanctions prompted a response by the Indian government.⁹⁴ In 1994, the Copyright Act of 1957 was amended to include satellite broadcasting, computer software, and digital technology to the areas traditionally protected by copyright (such as original literary, dramatic, musical and artistic works, cinematography, films and sound recordings).⁹⁵ These amendments brought

the Act into full compliance with the requirements of TRIPS.⁹⁶ The International Intellectual Property Alliance (IIPA)⁹⁷ ranks India's amended 1957 Copyright Act as one of the most modern copyright statutes of any country.⁹⁸ Despite its substantial domestic *de jure* copyright protections, India remains on the "Priority Watch List" primarily because of high piracy rates and lack of appropriate enforcement measures.⁹⁹

Indian copyright laws resemble American copyright laws. In order to obtain a copyright on a film, the work must be original.¹⁰⁰ Originality is defined as "... [originating] from the producer and not a copy of some other copyrighted work."¹⁰¹ Copyright generally protects two classes of rights: exploitable rights and moral rights.¹⁰²

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Exploitable rights (also referred to as "economic rights") are those which the owner of the work may commercially develop.¹⁰³ The copyright owner has the exclusive right to make copies, adaptations or photographs of the copyrighted material and the right to license these rights to others.¹⁰⁴ Moral rights are those which the author of the work will always possess.¹⁰⁵ Included in moral rights are the right to decide when and if to publish the work, the right of authorship, and the right to prevent any alteration that may harm an author's honor or reputation.¹⁰⁶ Several cases in India and the U.K. uphold the author's exclusive right to derivative works.¹⁰⁷

Ideas, concepts, and facts cannot be copyrighted.¹⁰⁸ Only the "form, manner and arrangement, and expression of the idea" are copyrightable.¹⁰⁹ Thus, different authors are not prevented from independently developing the same idea, even if their

products have some similarities.¹¹⁰ The Indian Supreme Court upheld this concept in the seminal case of *R.G. Anand v. Delux Films*.¹¹¹ In this case, the author of the play *Hum Hindusthani* sued a production company for making a movie that was allegedly an "exact copy" of his play.¹¹² The Supreme Court held that, despite some similarities, the movie did not infringe the play's copyright because there were substantial dissimilarities between the two.¹¹³

To determine if an author's product constitutes an infringement of another's copyright, Indian courts use the "lay observer test."¹¹⁴ If a person who sees both works "is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original,"

there is a copyright violation.¹¹⁵ To constitute copyright infringement, the second work "must be [a] substantial and material" copy of the first.¹¹⁶ Simple

additions, omissions, or modifications to the original work do not defeat the infringement claim.¹¹⁷ Furthermore, substantiality is a measure not only of the *quantity* of work copied, but also of the *quality* of the work copied.¹¹⁸ Therefore, if the copied concept is especially original or novel, then the infringement action may have stronger grounds.¹¹⁹

There is no infringement where similarities seem coincidental and there are "broad dissimilarities which [negate] the intention to copy the original."¹²⁰ If the two works have the same theme, but are developed differently, then there is no copyright infringement because the second work constitutes a new work.¹²¹ Even after the plaintiff (i.e., the party seeking to enforce the copyright) passes the similarity bar, he must still prove a causal connection: that the defendant actually relied, either directly or indirectly, on the plaintiff's work.¹²² Intent

to infringe on a copyright is not a requisite element of the claim, as the infringement may be subconscious.¹²³ Substantial objective similarity between the two works may

“...why do there seem to be so many blatant, but unlitigated, copyright violations in the Indian movie industry?”

be used to infer a causal connection.¹²⁴ With all of these tests, the plaintiff has the burden of proving the infringement by “clear and cogent” evidence.¹²⁵ In the end, there is no bright line rule. The Indian copyright rules are applied on a case by case analysis because “[m]uch will depend on...the extent of the similarity and whether the labour and effort bestowed upon one film has been appropriated by the producer of another film.”¹²⁶

B. Structure of Indian Courts

The Indian Judiciary is similar to the United States court system in that it is an equal and independent branch of the government.¹²⁷ However, Indian courts operate in one integrated system as there is no division between questions of state law and federal law.¹²⁸ The Supreme Court of India has original jurisdiction over disputes between the states or between the central government and a state.¹²⁹ The Court has appellate jurisdiction over all substantial issues of constitutional interpretation.¹³⁰ Additionally, the Court may hear a special appeal on any matter from any non-military court.¹³¹ One Chief Justice and twenty-five associate justices sit on the Court.¹³² The President appoints the Chief Justice.¹³³ After consulting with the Chief Justice, the President also appoints the associate justices.¹³⁴

Below the Supreme Court are eighteen High Courts.¹³⁵ Each court has original and appellate jurisdiction over cases arising in its territory.¹³⁶ The President, after consulting with the Chief Justice of the Supreme Court and the governor of the state,

appoints the High Court Chief Justice.¹³⁷ Then, in consultation with the High Court Chief Justice, the President appoints the other justices of the court.¹³⁸ The President retains the power to transfer the justices at will.¹³⁹ The High Courts supervise all of the lower non-military courts in their jurisdiction and have the power to transfer constitutional issues to itself from the lower courts.¹⁴⁰

The district courts are subordinate to the High Courts.¹⁴¹ Each Indian state is divided into districts.¹⁴² Each district has a session judge to preside over criminal matters and a district judge to preside over civil matters.¹⁴³ The Governor of the state, in conjunction with the state’s High Court, appoints the judges.¹⁴⁴ A plethora of subdistrict courts and people’s courts handle lesser criminal cases and smaller village disputes.¹⁴⁵

Over the years, the Indian Judiciary has developed a reputation for inefficiency and ineffectiveness.¹⁴⁶ Since the 1970s, the judicial system has lost some legitimacy because of the view that the branch has become increasingly politicized.¹⁴⁷ Furthermore, Indian society is considered highly litigious, thus contributing to an already substantial backlog. In 1990, the Supreme Court had a backlog of more than 150,000 cases; almost two million cases were pending in the High Courts.¹⁴⁸

C. Bradford v. Sahara TV

Romance novelist Barbara Taylor Bradford was surprised to learn that one of her best selling books, *A Woman of Substance*, was being made into a 260-part television series in India, *Karishma – Miracles of*

Destiny.¹⁴⁹ Bradford did not receive any payment, nor had she authorized the television series. *A Woman of Substance* is a rags-to-riches story chronicling a woman's rise from a servant to the head of an international corporation.¹⁵⁰ *Karishma – Miracles of Destiny* is a rags-to-riches story chronicling a woman's rise from a street sweeper to the head of an international corporation.¹⁵¹ Both are told from the point of view of the main character, an old woman looking back on her life.¹⁵² *Karishma* is the most expensive series produced for Indian television, costing nearly 600 million Rupees (\$13 million U.S.).¹⁵³

Bradford, offended by the unauthorized use of her work, flew to India and filed suit in the Kolkata High Court in early May of 2003.¹⁵⁴ Judge Pinaki Chandra Ghosh issued an ad interim injunction against Sahara Media Entertainment, the network set to air *Karishma*.¹⁵⁵ Sahara appealed the decision, citing the incredible amount of money already invested in the project and the fact that Bradford had earlier filed a similar suit in the Mumbai High Court.¹⁵⁶ On May 12, the very day on which the series was set to premiere, Justices A.K. Ganguly and D.P. Sengupta, sitting on the division

of plagiarism.¹⁶¹ As mentioned above, Indian copyright law protects expressions, not ideas.¹⁶² Upon reading a summary of Bradford's novel and listening to the evidence presented, Justice A.N. Roy said, "In [the court's] opinion, this is just an idea. The plaintiff cannot have a monopoly on a woman making it from rags to riches."¹⁶³ The Court fined Bradford about \$30,000 U.S. (\$3,000 for every week that the show was delayed) and ordered her to pay Sahara's court costs.¹⁶⁴ Bradford again appealed to the Supreme Court.¹⁶⁵ On August 4, the Supreme Court upheld the lower court's substantive decision but reversed its damage award.¹⁶⁶ Although Bradford was unsuccessful in her copyright infringement claim, the case is momentous because it represents one of the few times the Indian entertainment industry has been sued for its alleged plagiarism.¹⁶⁷

III. Analysis

As a result of international agreements like the Berne Convention and TRIPS, domestic copyright laws are generally uniform and offer a high level of *de jure* copyright protection.¹⁶⁸ As discussed earlier, Indian law has provisions for protecting IPR

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that comply with international standards. Inadequate enforcement of these laws remains the primary problem for India.¹⁶⁹ Therefore, the question arises—why do

there seem to be so many blatant, but unlitigated, copyright violations in the Indian movie industry?

bench, vacated the stay.¹⁵⁷ Bradford immediately filed a special leave petition with the Indian Supreme Court to block the airing of the program.¹⁵⁸ The Court reinstated the injunction, but not before Sahara had already aired the first episode.¹⁵⁹

On July 21, 2003, the case came before the Kolkata High Court.¹⁶⁰ The Court ruled in favor of Sahara and found no proof

The first and easiest answer to this is that Hollywood studios have yet to enforce their copyrights against Bollywood studios. The *Bradford* case, however, garnered a great deal of legal and media attention. Could it be a preview of similar cases to come?

Barbara Taylor Bradford thinks there is a greater possibility that people will seek to enforce their copyrights internationally.¹⁷⁰ She says, “[w]e have become a global village.

Nobody in the past knew what was going on in India but now with websites and the Internet,” it is much easier to discover.¹⁷¹

Once a Hollywood studio becomes aware of

Bollywood taking “inspiration” from one of its films, can the studio enforce its copyright against a cultural copy?

Hollywood producer Ashok Amritraj believes that “Indian movies are so far under the radar [that] no Hollywood executive is aware” of the copying.¹⁷² This lack of awareness, however, will likely not continue for long. The United States Census Bureau reports that the number of Indians living in the United States increased by nearly 106% from 1990 to 2000.¹⁷³ In its opening weekend, *Kabhi Khushi Kabhie Gham*, a popular Hindi film, was shown on only seventy-three screens in the United States.¹⁷⁴ Even with its limited screening, the film still managed to take in over one million dollars during its first weekend.¹⁷⁵ In fact, some Bollywood movies get 25-30% of their proceeds from overseas sales, with most of the exports going to the United States, Canada, and the U.K.¹⁷⁶ Bollywood films are also gaining popularity among non-Indians.¹⁷⁷ In 2002, the Hindi movie *Lagaan* was nominated for a “Best Foreign Language” Academy Award.¹⁷⁸ Even non-Indian artists recognize the emerging popularity of Bollywood in the West. Famous director Baz Luhrmann, inspired by a trip to India, paid tribute to Bollywood in *Moulin Rouge* with his over-the-top plot sequences, music, and costuming.¹⁷⁹ Also, theater mogul Andrew Lloyd Webber scored a hit in London with *Bombay Dreams*, his stage production of a Bollywood love story.¹⁸⁰

Almost eight out of every ten Bollywood scripts were recently “inspired” by one or more Hollywood films.¹⁸¹ There are screenwriters who are so adept at

“The United States entertainment industry as a whole is becoming increasingly aware of possible copyright infringements and increasingly litigious as it is forced to deal with new technologies.”

plagiarizing that they can have a cultural copy of a Hollywood movie ready by the very same day as that film’s North American premier.¹⁸² In fact, many producers and directors prefer cultural copies because the stories have proven box office appeal.¹⁸³

A. The Copies

Yash Raj Films’ *Mere Yaar Ki Shaadi Hai* (which literally translates to “My Friend’s Wedding”) is said to be a cultural copy of *My Best Friend’s Wedding*.¹⁸⁴ The director, Sanjay Gadhvi, takes exception to this, saying “you can only draw a parallel with the title and the plot.”¹⁸⁵ The copying is not limited to recent blockbusters, nor is it a recent Bollywood phenomenon. In 1974, Narinder Bedi’s *Rafoo Chakkar* cleverly copied the story of 1959’s *Some Like it Hot*.¹⁸⁶ *It Happened One Night*, the 1934 classic romantic comedy, was allegedly “Indianized” into the 1992 box office hit *Dil Hain Ke Manta Nahin*.¹⁸⁷ The copycatting does not stop with film, as *Karishma* demonstrates; it has seeped into the small screen as well. For instance, Amitabh Bacchan, a well known Hindi film star, is the host of a popular game show called “Kaun Banega Crorepati” which is almost a direct copy, both in name and in substance, of “Who Wants to be a Millionaire.”¹⁸⁸

Arguably, 2002’s *Kaante*, shot in Los Angeles, is a copy of Quentin Tarantino’s *Reservoir Dogs*.¹⁸⁹ The New York Times gave this “delirious Bollywood reimagining of *Reservoir Dogs*” “no points for originality.”¹⁹⁰

Similarly, the Los Angeles Times called it “a singing and dancing *Reservoir Dogs*.”¹⁹¹ The roughest review, from the Sydney Morning Herald, opined, “forget method acting, the Bollywood film *Kaante* is an example of method filmmaking...the producers simply stole their plot.”¹⁹² The paper was careful to point out, however, that Tarantino borrowed the plot line from Ringo Lam’s *City On Fire* (*Long Hu Feng Yun*).¹⁹³ Another Australian reviewer described *Kaante* as “derivative to Hollywood...in nearly every way possible in terms of plot, style, direction and music.”¹⁹⁴

Despite the fact that Hollywood studios have yet to take action against the Indian film industry, it is apparent that there is a problem. A studio will likely try to enforce its

copyright in the near future. The United States entertainment industry as a whole is becoming increasingly aware of possible copyright infringements and increasingly litigious as it is forced to respond to new technologies.¹⁹⁵ For example, the Recording Industry Association of America (RIAA) has intensified its efforts to curb internet file-sharing, a relatively new phenomenon. From the onset of its lawsuit campaign in September 2003 through mid-June 2004, RIAA sued well over 3,000 individual file-swappers for copyright infringement.¹⁹⁶ As Bollywood films gain more prominence in America, movie studios are similarly bound to try to enforce their copyrights. Additionally, the United States government has a considerable economic interest in protecting intellectual property. American copyright industries employ more people than any one manufacturing sector; in 2001, they made up about 5.24% of the Gross Domestic Product (GDP).¹⁹⁷ In the same year, exports from copyright industries exceeded those of all other major industry sectors,

estimating \$88.97 billion (U.S.).¹⁹⁸ In light of the recent developments in the *Bradford* case, what enforcement options are open to American studios?

B. Sue in India

Since TRIPS is not self-executing, a Hollywood studio seeking to enforce its copyright in India cannot bring a claim directly under TRIPS.¹⁹⁹ The studio must utilize Indian copyright law. One of the first problems the studio would encounter is Indian producers’ different cultural view of

“...a Hollywood studio seeking to enforce its copyright in India cannot bring a claim directly under TRIPS. The studio must utilize Indian copyright law.”

copyright. The director of *Raaz* and *Awara Paagal Deewana* Vikram Bhatt told the *Daily Variety* “films are not about creativity, originality or vision. They are about entertaining audiences across the board. Once you understand and accept that an idea always existed before you did, then you look at the whole aspect of ‘copying’ in a different light.”²⁰⁰

If, for example, Artisan, one of the rights holders of *Reservoir Dogs*, chose to sue the producers of *Kaante* in India, the court would apply the lay observer test. Artisan would first have to show that there is enough of a similarity between the two films that an ordinary person would recognize *Kaante* as a copy. Would people watching *Kaante* and *Reservoir Dogs* feel that one was a copy of the other? Although there are some plot differences and the inclusion of several song and dance numbers, *Kaante* is unmistakably based on the Tarantino film.²⁰¹ The plots are largely parallel and there are nearly identical scenes, characters, and even dialogue.²⁰²

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In addition to substantial similarity, Artisan would need to show a causal connection. The court would most probably find that the similarities are substantial enough to infer a connection. Sometimes, the copying is so blatant that directors actually play the Hollywood DVD for their actors to show them how to execute a scene.²⁰³ Kalpana Lajmi, a renowned Indian director in opposition to the Hollywood imitation trend, feels that “[s]ometimes the regurgitation is so literal that it is difficult to digest.”²⁰⁴ Armed with this type of evidence, it seems that Artisan would be successful in its efforts to protect its copyright.

However, Indian courts have held that a work “inspired” by another copyrighted work is not necessarily a copyright infringement.²⁰⁵ Copyright infringement hinges on whether a substantial portion of the original work has been copied; as long as the theme of the “inspired” work is treated differently from its inspiration, there is no violation.²⁰⁶ In the *Bradford* case, the court based its decision on the fact that, while the rags-to-riches idea may have been copied, the expression had not.²⁰⁷ Therefore, although the director even admitted in an interview that *Karishma* was based on *A Woman of Substance*,²⁰⁸ the Supreme Court refused to uphold an injunction against the network.²⁰⁹ The *Reservoir Dogs* case is stronger because *Kaante* does not just borrow the general theme or idea, but actually presents the same scenes, characters, and plot devices. The only major differences are the language and the addition of a few musical numbers. *Kaante* is basically an adaptation or derivative work of Tarantino’s movie.

Karishma director Akashdeep confessed, “I don’t know why Indians make such a fuss over originality. There are three books by Barbara Taylor Bradford, including *A Woman of Substance*, *Hold the Dream* and *To Be the Best*. We have Indianized [them]. I didn’t want to take a chance with a new script.”²¹⁰ Many in the Bollywood community agree with writer-director Mahesh Baht’s view that, “when you take an idea and route it through the Indian heart, it changes entirely.”²¹¹ Philip Lutgendorf, Associate Professor of Hindi and Modern

Indian Studies at the University of Iowa concurs that Bollywood copies of American films address different societal and cultural concerns.²¹² Thus, this narrow view of copyright implies that no cultural or “Indianized” copy could be a violation of copyright laws. Aabad Ponda, a lawyer for several Bollywood celebrities, does not think many American studios will even try to mount a copyright infringement case in India because “[f]or litigation in India, you need a terrific amount of time, money and energy and most people are not ready to spend that kind of time.”²¹³ This leaves little hope for American studios hoping to protect their copyrights through the Indian legal system.

C. WTO Dispute Resolution

Since copyright industries are vital to the United States economy and private litigation in India will probably not result in success, the United States government may want to avail itself of the WTO’s dispute resolution framework. Under the WTO framework, the United States and India would first enter talks to attempt to resolve the problem. If they were unable to reach a solution, then a panel is convened pursuant to the DSU.²¹⁴ Once the panel issues a report, both parties have the opportunity to appeal.

Many critics of TRIPS allege that it is a product of western imperialism.²¹⁵ At the time of TRIPS’ enactment, developed nations wanted an international agreement protecting copyrights because a substantial amount of their gross domestic product came from copyright industries.²¹⁶ Regardless, Indian law complies with TRIPS requirements.²¹⁷ The problem, however, is one of enforcement. Indian movie producers have been creating cultural copies of American films and remaking old Hindi films for decades. This has proven to be a difficult practice to limit. The Indian judicial system is notorious for its inefficiency and corruption.²¹⁸ Although India is taking steps to correct the problem, an adequate solution is still far from the present.²¹⁹ It is important to note, however, that TRIPS “does not create any obligation to put in place a judicial system for the enforcement” of IPR, nor does TRIPS mandate any specific allocation of resources

for the judiciary.²²⁰ TRIPS does ask that “each member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property,”²²¹ and India meets this standard. Although the domestic resolution of a case may take a significant amount of time, the Indian Embassy says there are several intermediate measures available to litigants seeking to protect their IPR.²²²

The decision will be difficult for the panel to make.²²³ India provides sufficient *de jure* protection of copyrights, but the *de facto* protection is sub-par. If the panel rules in favor of the United States, India will then have to bring its system in line with the panel’s recommendations. One difficulty is that India’s problems of backlog and judicial inefficiencies cannot be solved overnight. Furthermore, the laws are TRIPS-compliant and Indian courts are the preeminent authority on Indian law; therefore, this raises the question as to whether the WTO mandates a different legal interpretation.²²⁴ If India is unable to comply in the requisite amount of time, then sanctions may be imposed. Cross-sectorial trade sanctions are likely to have the most impact. In 2002, India’s merchandise exports to the United States increased over the previous year by 21.4%.²²⁵ India is also the top exporter of small to medium sized diamonds, exporting \$2.6 billion.²²⁶

India has taken some steps to remedy the situation. Although most of the measures address the larger piracy problem, they nonetheless indicate India’s willingness to address IPR issues. India has implemented a special copyright enforcement advisory council with a judiciary commissioner who is charged with developing and coordinating IPR policy.²²⁷ Since India is trying to be a bigger player in the global market place, trade sanctions are likely to have the greatest effect.²²⁸ Additionally, sanctions have succeeded in the past. Wthe United States initiated a “Special 301” investigation on India and ultimately suspended some duty-free privileges, for instance, the Indian government responded by making changes in their laws to increase patent protections.²²⁹

IV. Conclusion

This discussion, unfortunately, ends on an unsettled note. Clearly there is a problem with cultural copies in India. Remaking and borrowing ideas from other countries is nothing new and is not altogether a bad phenomenon, so long as proper authorization is obtained from the right holder. Rich Taylor, the Vice President of Public Affairs for the Motion Picture Association of America, concedes, “[b]orrowing ideas, scripts and remaking them in different cultural contexts [are] a part of international cinema” but the right way to do it is to obtain the proper license.²³⁰

India has, by most accounts, fully complied with TRIPS, which is widely believed to be a successful means for protecting IPR. Furthermore, on its face, the amended Copyright Act of 1957 provides adequate protection of domestic and foreign copyrights. The uncertainty arises in the implementation of these laws. The prevalence of corruption and inefficiency in the Indian judiciary makes it very difficult for foreigners to pursue litigation in India. Additionally, the Indian courts are so backlogged that it takes an enormous amount of time for a case to come to trial. Therefore, India may have adequate *de jure* domestic copyright protection and may be compliant with TRIPS standards, but without some kind of judicial reform, India will not be able to adequately protect the IPR of its citizens and citizens of the world.

It is important for the global community to take action not only against states that have insufficient legal frameworks for IPR protection, but also against states that have ineffective enforcement measures. It may be true that developing countries need some leeway when it comes to certain IPR, such as allowing poorer nations to buy patented medicines at lower prices. There is no compelling need, however, to copy American movies. The cultural copy phenomenon hurts not only the copyright owner but also the viability of the Indian entertainment industry. Hollywood is script driven, while Bollywood is star driven. In

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other words, because directors know that they can get away with copying a tried-and-true American script, they are less willing to invest money in Indian screenwriters. Big name actors are paid astronomical amounts, while the writers are given meager sums to "Indianize" American movies.²³¹ The writers who create original concepts are often shunned by directors in favor of the cheaper, proven success of a cultural copy. Unless something changes, Indian filmmakers will continue to "Indianize" Hollywood films. The famous opening song in the classic Bollywood hit *Shri 420*, properly captures this Indian view of copyright:

Mera joota hai Japani
My shoes are Japanese
Meh padloon Englishstani
My trousers (are) English
Sarpeh lal topi Russi
On top (a) red Russian hat
Phir bi dil hai Hindustani
Still my heart is Hindustani²³²

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¹⁹⁰ Dave Kher, *Film Review; Shot in Los Angeles, But Bombay All the Way*, N.Y. TIMES: MOVIE SECTION, available at http://movies2.nytimes.com/gst/movies/review.html?title1=&title2=Kaante%20%28Movie%29%20%20&reviewer=Dave%20Kehr&v_id=279423 (Dec. 20, 2002).

¹⁹¹ Thomas, *supra* note 189.

¹⁹² Sacha Molitorisz, *Kaante*, SYDNEY MORNING HERALD, at <http://www.smh.com.au/articles/2003/02/19/1045330662081.html> (Feb. 20, 2003).

¹⁹³ *Id.*

¹⁹⁴ Ching Yee, *Kaante: Movie Review*, HEROIC CINEMA, at <http://www.heroic-cinema.com/review.php?ID=kaante> (last visited Jan. 11, 2005).

¹⁹⁵ See *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002) (where record companies sued an online file-sharing site for copyright infringement); *Elvis Presley Enters. v. Passport Video*, 2003 U.S. App. LEXIS 26863 (9th Cir. 2003) (where Elvis's estate sued a video documentary producer for unauthorized use

of video clips). Recently, RIAA sued a flea market owner because his vendors were selling "illegal" CDs and DVDs. *NewsWatch*, Grammy.com, at <http://www.grammy.com/news/newswatch/2004/0219.aspx> (Feb. 19, 2004).

¹⁹⁶ *RIAA at it Again: 482 More Sued*, WIRED NEWS, at http://www.wired.com/news/business/0,1367,63945,00.html?tw=wn_tophead_7 (June 22, 2004).

¹⁹⁷ Press Release, Motion Picture Association of America, Study Shows Copyright Industries as Largest Contributor to the U.S. Economy (Apr. 22, 2002), available at <http://www.mpa.org/copyright/>.

¹⁹⁸ *Id.*

* This note will not examine what would happen if the studio attempted to sue in the U.S.

¹⁹⁹ PATRY, *supra* note 37, at 3.

²⁰⁰ Chhabra, *supra* note 172.

²⁰¹ KAAANTE (Raju Patel/Sanjay Gupta/Pritish Nandy Communications 2002); RESERVOIR DOGS (Artisan Entertainment 1992).

²⁰² *Id.*

²⁰³ Kanchana Banerjee, *Cloning Hollywood*, THE HINDU, at <http://www.hinduonnet.com/thehindu/mag/2003/08/03/stories/2003080300090400.htm> (Aug. 3, 2003).

²⁰⁴ *Id.*

²⁰⁵ Kapoor & Shaw, *supra* note 102 ("Copyright is concerned with the arrangement of content...not the novelty of the content."); see also *id.*

²⁰⁶ *Id.*

²⁰⁷ *Author Loses India Plagiarism Case*, *supra* note 8.

²⁰⁸ Supreme Court Order, May 12, 2003, ¶ 1.

²⁰⁹ *Author Loses India Plagiarism Case*, *supra* note 8.

²¹⁰ Vijay Dutt, *A Landmark Setback for all Authors: Barbara Bradford*, HINDUSTAN TIMES, Aug. 19, 2003.

²¹¹ *Is Bollywood a Hollywood Clone?*, *supra* note 184.

²¹² Chhabra, *supra* note 172.

²¹³ *Is Bollywood a Hollywood Clone?*, *supra* note 184.

²¹⁴ The panel selection and procedure is discussed above in External.

²¹⁵ Michael W. Smith, Note, *Bringing Developing Countries' Intellectual Property Laws to TRIPS Standards: Hurdles and Pitfalls Facing Vietnam's Efforts to Normalize an Intellectual Property Regime*, 31 CASE W. RES. J. INT'L L. 211, 226 (1999).

²¹⁶ STEPHEN E. SIWEK, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY (2002), at http://www.iipa.com/pdf/2002_SIWEK_FULL.pdf (In 2001, the core copyright industries contributed an estimated \$535.1 billion to the U.S. economy, accounting for approximately 5.24% of GDP. The real annual growth rate of the core copyright industries (adjusted for inflation) has been more than double the growth rate of the economy as a whole. Over the last 24 years (1977-2001), the core copyright industries grew at an estimated compound annual growth rate of 7.0% while the rest of the U.S. economy grew at an annual rate of 3.0%).

²¹⁷ *Intellectual Property Rights in India*, *supra* note 95.

²¹⁸ P.P. Rao, *Combating Corruption in the Judiciary*, PEOPLE'S UNION FOR CIVIL LIBERTIES BULLETIN, at <http://www.pucl.org/Topics/Law/2003/corruption.htm> (July 2003).

²¹⁹ *Id.*

²²⁰ TRIPS Agreement, *supra* note 38, at art. 41.5.

²²¹ *Id.* at art. 3.1.

²²² *Copyright Law and Related Issues*, Embassy

of India, at <http://www.indianembassy.org/special/ipr/ipr.htm#copyright> (last visited Jan. 11, 2005) (suggesting the use of "Anton Pille" orders and preliminary injunctions).

²²³ Helfer, *supra* note 46.

²²⁴ Cf. find WTO patent case against India involving agricultural and pharmaceutical patent protection.

²²⁵ Press Release, Embassy of India, India-US bilateral trade zooms in 2002 (Mar. 4, 2003), available at http://www.indianembassy.org/press_release/2003/mar/04.htm.

²²⁶ *Id.* (India is also the top exporter of knotted and woven carpets (\$384 million), linen (\$366 million), large/medium sized frozen shrimp with shell-on (\$220 million), cashew nuts (213 million), antibiotics (\$138 million), woven silk fabrics (\$85 million), pepper (\$32 million), opium (\$31 million), guar gum (\$23 million), psyllium seed husk (\$22 million), woven jute fabrics (\$14 million), and niger seed (\$10 million).).

²²⁷ U.S. TRADE REPRESENTATIVE, NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 174 (2003), available at <http://www.ustr.gov/reports/ntr/2003/india.pdf>.

²²⁸ Press Release, Indian Embassy, *supra* note 226.

²²⁹ See above section on U.S. Response.

²³⁰ Chhabra, *supra* note 172.

²³¹ Najmi, *supra* note 182.

²³² Chute, *supra* note 180.

