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# Indianizing Hollywood: The Debate Over Copyright Infringement By Bollywood

**Hariqbal Basi\***

|   |    |
|---|----|
| I. INTRODUCTION .....   | 34 |
| II. APPLICABLE COPYRIGHT LAW IN U.S. AND INDIA.....   | 38 |
| A. <i>International Standards for Intellectual Property Rights</i> ...  | 38 |
| B. <i>What U.S. and Indian Copyright Law Protect</i> .....  | 40 |
| C. <i>Defining Infringement</i> .....   | 41 |
| D. <i>Standard of Review: Ordinary Observer Test</i> .....  | 41 |
| E. <i>Fair Use Defense</i> .....  | 43 |
| III. HISTORY AND EXAMPLES OF BOLLYWOOD REMAKES OF HOLLYWOOD FILMS, INDIANIZATION ARGUMENTS AGAINST INFRINGEMENT, AND REASONS HOLLYWOOD DID NOT TAKE LEGAL ACTION..... | 43 |
| A. <i>Immigration Produces New Target Audience for Bollywood</i> .....  | 43 |
| B. <i>Publicized Infringements</i> .....  | 45 |
| C. <i>“Indianization” Defense Against Claims of Infringement</i> ...  | 47 |
| D. <i>Hollywood’s Complacency: Factors Explaining Why the West Ignored Bollywood Remakes</i> .....  | 50 |
| 1. Bollywood’s lack of profitability .....  | 51 |
| 2. India’s status as a developing nation .....  | 52 |
| 3. Relatively separate audiences .....  | 53 |
| IV. ONSET OF LITIGATION AGAINST BOLLYWOOD .....   | 53 |
| A. <i>Factors Reversed</i> .....  | 53 |
| 1. Rapid increase in the profitability of Bollywood .....   | 53 |
| 2. India’s economic boom .....  | 55 |
| 3. Overlapping audiences .....  | 56 |

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|  |    |
|--|----|
| B. <i>Hollywood Enters Mumbai</i> .....                                    | 57 |
| C. <i>Hollywood v. Bollywood (2009)</i> .....                              | 58 |
| D. <i>Viability of a Fair Use Defense by Bollywood</i> .....               | 62 |
| V. RESULTS OF LITIGATION.....  | 62 |
| A. <i>Bollywood's Response</i> .....                                       | 64 |
| B. <i>What Can Be Done About Past Infringements?</i> .....                 | 66 |
| C. <i>Why Litigation is not the Optimal Response</i> .....                 | 67 |
| VI. WHY LITIGATION WILL NOT YIELD FAVORABLE OUTCOMES FOR<br>HOLLYWOOD..... | 68 |
| A. <i>Bollywood star casts pays off</i> .....                              | 70 |
| B. <i>Music brings the people together-in cinema halls</i> .....           | 71 |
| VI. CONCLUSION.....  | 73 |

"Borrowing ideas, scripts and remaking them in different cultural contexts is a part of international cinema. But there is a right way of going about it. That will be to license the right to use for the underlying material. The wrong way is to just take the ideas."

-- Rich Taylor, vice president of public affairs at MPAA<sup>1</sup>

## I. INTRODUCTION

Ria purchases a movie ticket to see two of her favorite celebrities in a supernatural thriller. As the film begins, Ria is eagerly anticipating what the plotline of this fondly reviewed film will be. She watches intently as a couple relocates to a new home in the countryside with hopes of revitalizing their troubled marriage. Soon after settling, the wife begins to experience paranormal apparitions. She eventually learns the ghost of a mentally unstable young woman is haunting her, a young woman who had a secret affair with the wife's husband and died as a result. The ghost conveys her story to the wife through various clues, at times taking possession of the wife, and mounts vengeful attacks against the husband.<sup>2</sup>

While for Michelle Pfeiffer and Harrison Ford fans this synopsis is evocative of DreamWorks' 2000 box office success *WHAT LIES BENEATH*, Ria is actually watching a commercially successful film produced on the opposite side of the globe, the 2002 Bollywood blockbuster *RAAZ*. While *RAAZ* contains many significant similarities to the plotline of *WHAT LIES BENEATH*, it also adds colorful song and

<sup>1</sup> Aseem Chhabra, *How Original is Bollywood?*, REDIFF (Oct. 31, 2002), <http://www.rediff.com/entertai/2002/oct/31bolly.htm>.

<sup>2</sup> Synopsis of the films *RAAZ* (Bhatt Productions 2002) and *WHAT LIES BENEATH* (DreamWorks 2000).

dance sequences, Indian cultural ideals, and new settings, effectively “Indianizing” the film for a Hindi<sup>3</sup> film audience.<sup>4</sup> As will be discussed and defined in Part I, films that misappropriate enough legally protected subject matter from previously published works may be liable for copyright infringement if the subsequent film is found to be substantially similar to the initial copyrighted work. Courts have yet to determine whether this process of Indianization results in enough differences between an initial and subsequent work to avoid liability.<sup>5</sup> *Raaz* is not an isolated example; remaking Hollywood plotlines has solidified into an openly acknowledged norm in the Indian film industry for years<sup>6</sup> and is reflected in the attitudes of Indian filmmakers.<sup>7</sup>

While India has several film industries, this note focuses on the largest: Bollywood. The term is an amalgamation of “Bombay”<sup>8</sup> and “Hollywood”<sup>9</sup> and refers to the commercial Indian film industry based in Mumbai, India.<sup>10</sup> Producing more than 1,000 films annually and reaching a global audience of over 3 billion, Bollywood is currently the world’s largest film industry,<sup>11</sup> though Hollywood remains the most

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<sup>3</sup> Hindi is the official language of Bollywood films, the type of Indian cinema upon which this note focuses.

<sup>4</sup> “Indianizing” is the process of adding Indian cultural elements to films to make them commercially marketable to the Indian movie-going audience. See *infra* Part II for a discussion on Indianization.

<sup>5</sup> In order for copyright infringement claims to prevail in the U.S. or India, the two works in question must be ruled “substantially similar.” See discussion in Part I regarding legal standards applied by both countries in actions for copyright infringement. According to U.S. courts, if enough protected expression is copied from the original work, the later work is deemed substantially similar and consequently an infringing copy of the original. See *Daly v. Palmer*, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936) (the courts in both cases ruled enough random protected elements of expression were taken to constitute the taking of integral material and thus copyright infringement).

<sup>6</sup> Jishnu Guha, *Time for India’s Intellectual Property Regime to Grow Up*, 13 CARDOZO J. INT’L & COMP. L. 225, 232 (2005).

<sup>7</sup> Bollywood filmmakers acknowledge that they often copy Hollywood cinema and adapt it for the Indian movie-going audience. Chhabra, *supra* note 1.

<sup>8</sup> Bombay is the former city name of Mumbai, India.

<sup>9</sup> Bollywood (Filmi); National Geographic World Music, [http://worldmusic.nationalgeographic.com/worldmusic/view/page.basic/genre/content.genre/bollywood\\_filmi\\_695](http://worldmusic.nationalgeographic.com/worldmusic/view/page.basic/genre/content.genre/bollywood_filmi_695) (last visited Dec. 4, 2008).

<sup>10</sup> Navdeep K. Tucker, *Musical Copyright Infringement in Bollywood Music*, 26 ENT. & SPORTS LAW. 18, 18 (2008).

<sup>11</sup> Posting by Woke under Advertising and Marketing, *Bollywood, Business & Industry, Bollywood vs. Hollywood - the Complete Breakdown*, (Feb. 1, 2007), <http://mutiny.wordpress.com/2007/02/01/bollywood-vs-hollywood-the-complete-breakdown>.

profitable.<sup>12</sup> As the example of *Raaz* illustrates, Bollywood has taken more than its name from its Western counterpart.

From the remake of *THE REINCARNATION OF PETER PROUD* (1975) into the Bollywood blockbuster *KARZ* (1980) to the reincarnation of the Will Smith smash hit *HITCH* (2005) as the Bollywood blockbuster *PARTNER* (2007), Hindi films have often been accused of copying entire frames from their Hollywood predecessors, leading legal scholars to recognize this practice as copyright infringement.<sup>13</sup> In the absence of litigation, Bollywood filmmakers have continued to make unauthorized reproductions of Hollywood films. Not until 2007 did a Hollywood studio threaten legal action.<sup>14</sup> The first and only lawsuit thus far filed by a U.S. studio against an Indian film for violation of the studio's intellectual property rights was not brought until the summer of 2008, and was dismissed shortly thereafter.<sup>15</sup>

Since no court has published an opinion evaluating a claim against a Bollywood film for infringing the copyright of a Hollywood work, both sides advance arguments for why the Bollywood works are, or are not, infringing material. Previous scholarship focuses almost exclusively on why these works are infringing, and how Bollywood should purchase remake rights or Hollywood should pursue litigation against Bollywood. This note brings forth often overlooked counterarguments advanced by Indian filmmakers for why the Bollywood works should be considered original material in themselves, and contends that these arguments may very well defeat any claims of damages brought by Hollywood studios. Furthermore, because no lawsuits were brought prior to 2008, previous legal scholarship does not address effects of such litigation on the two industries or examine factors in depth as to why, after decades of complacency, Hollywood studios finally took notice of this practice

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<sup>12</sup> Hollywood is the highest grossing film industry in the world. *Entertainment and Media Growing Fastest in India: PwC*, BUSINESS STANDARD (June 25, 2007), <http://www.business-standard.com/india/storypage.php?autono=289002>.

<sup>13</sup> See generally Rachana Desai, *Copyright Infringement in the Indian Film Industry*, 7 VAND. J. ENT. L. & PRAC. 259, 259-271 (2005) (arguing that Bollywood's practice of copying Hollywood plot lines constitutes copyright infringement).

<sup>14</sup> *PARTNER*, discussed in Part III, was the first Bollywood film to face an official threat by a Hollywood studio (Sony) for infringing content. Rico Gagliano, *Bollywood's Copycat Film Industry*, Marketplace, PUBLICRADIO.ORG (Mar. 17, 2008), [http://marketplace.publicradio.org/display/web/2008/03/17/bollywood\\_copycats/](http://marketplace.publicradio.org/display/web/2008/03/17/bollywood_copycats/).

<sup>15</sup> Discussed in more detail in Part III of this note, Warner Bros. is the first Hollywood studio to actually bring suit in an Indian court against a potentially infringing Bollywood film. The suit was dismissed, but is an important first in Bollywood history nonetheless.

and pursued legal action against Bollywood. I have thus provided an in depth analysis of why Hollywood has only recently noticed and taken action against Bollywood and discuss the aftermath of litigation in the two film industries. While Hollywood's intellectual property interests may legitimately be at stake, I argue that Bollywood remakes actually cause very little market harm to the Hollywood originals, and thus, despite any showings of infringement, it would be difficult for Hollywood to show market injury and recover damages from Bollywood.

Bollywood did not surface on Hollywood's radar until recently due to three primary factors: (1) Bollywood's lack of profitability, (2) India's status as a third world nation, and (3) traditionally distinct audiences. For most of Bollywood's history, the revenues generated by even the most successful films were minimal compared to Hollywood's profits.<sup>16</sup> Now that India is reported to have the world's fastest growing media and entertainment industry<sup>17</sup> and Hollywood is increasingly relying on foreign markets to remain profitable, Hollywood studios have begun to invest in Bollywood ventures,<sup>18</sup> thus elevating Bollywood's status on Hollywood's radar.

Secondly, as a developing nation, India has been written off in the past as an insignificant actor in the global economy.<sup>19</sup> Recently, however, the country has experienced an economic boom, bringing Indian industries, including the entertainment industry, increased international attention.<sup>20</sup> Third, the audiences of the two industries

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<sup>16</sup> As late as 2002, among the most successful of Bollywood films were generating revenues of \$4-5 million, whereas as Hollywood blockbusters garnered in the hundreds of millions in U.S. dollars worldwide. Nithya Subramanian, *Hollywood Formula Clicks Better*, BUSINESS LINE (Dec. 23, 2002), <http://www.thehindubusinessline.in/2002/12/23/stories/2002122301920100.htm>.

<sup>17</sup> A study by PricewaterhouseCoopers predicted that India will have the fastest growing entertainment and media industry in the world over the next five years, at a 18.5 per cent Compound Annual Growth Rate (CAGR). The U.S. remains the largest but slower in growth, at 5.3% CAGR. *Entertainment and Media Growing Fastest in India: PwC, supra* note 12.

<sup>18</sup> Warner Brothers, Sony (Columbia Tristar), Paramount, Fox Star, and Walt Disney are investing in Bollywood films. Meena Iyer, *Hollywood Bets Big on Bollywood*, THE TIMES OF INDIA (Oct. 19, 2008), [http://timesofindia.indiatimes.com/Hollywood\\_bets\\_big\\_on\\_Bollywood/articleshow/3613651.cms](http://timesofindia.indiatimes.com/Hollywood_bets_big_on_Bollywood/articleshow/3613651.cms).

<sup>19</sup> This evidenced by the wave of outsourcing to India by U.S. companies; the same jobs done for lower wages was an appealing tactic for many corporations. Jayanth K. Krishnan, *Analyzing the Friedman Thesis Through a Legal Lens: Book Review Essay Assessing Thomas L. Friedman's The World is Flat*, 81 TUL. L. REV. 923, 929 (2007).

<sup>20</sup> *Indian Economic Growth Rate Eases*, BBC NEWS (Nov. 30, 2007), <http://news.bbc.co.uk/2/hi/business/7120343.stm>.

have traditionally been relatively distinct, a separation attributable largely to cultural differences and language barriers. In the last decade, successful Indian-themed film ventures such as *MONSOON WEDDING* (2002), *BEND IT LIKE BECKHAM* (2001), and most recently *SLUMDOG MILLIONAIRE* (2008), marketed toward crossover Indian and Western audiences have contributed to an increased Western interest in Indian culture and films. With a blurred distinction between the markets of the two industries, Hollywood has begun to keep a closer watch on its South Asian counterpart.

To demonstrate how the Bollywood remakes of Hollywood films might constitute copyright infringement, I detail the applicable US and Indian copyright laws and standards for finding copyright infringement in Part I of this note. Part II provides examples of the Bollywood practice of copying Hollywood plotlines and posits factors suggesting why, despite being openly acknowledged within the industry, the West ignored it for decades. I also present the counterargument many Bollywood filmmakers advance in arguing their actions do not constitute infringement since they make their own creative and original contributions to the remakes. Part III details the recent onset of litigation by Hollywood studios against Bollywood filmmakers for the infringement of intellectual property rights, and examines factors explaining why Bollywood only recently emerged on Hollywood's radar. Part IV analyzes some changes in industry practice that have occurred as a result of this litigation, but recognizes that to a large extent industry practice remains constant. In Part V I analyze the commercial value added to a Bollywood film by the Indianization process, and set forth reasons why Hollywood would not benefit from pursuing litigation since showing market harm to the Hollywood original product would be very difficult.

## II. APPLICABLE COPYRIGHT LAW IN U.S. AND INDIA.

### A. *International Standards for Intellectual Property Rights*

The United States and India are direct signatories of the 1866 Berne Convention for the Protection of Literary and Artistic Works, as revised by the Paris Act of the Convention in 1971.<sup>21</sup> This convention serves as the basis of current international standards regarding intellectual property rights.<sup>22</sup>

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<sup>21</sup> Desai, *supra* note 13, at 261.

<sup>22</sup> Timm Neu, *Bollywood is Coming! Copyright and Film Industry Issues regarding International Film Co-Productions Involving India*, 8 SAN DIEGO INT'L L.J. 123, 133 (2006); Tucker, *supra* note 10, at 20.

As member states<sup>23</sup> of the World Trade Organization (“WTO”),<sup>24</sup> India and the United States are bound by the Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) agreement of 1994.<sup>25</sup> TRIPS<sup>26</sup> provides that all WTO member states are required to comply with the provisions set forth by the Berne Convention and Paris Act<sup>27</sup> and incorporates intellectual property rights into the world of trade. TRIPS protects expressions but not “ideas, procedures, methods of operation or mathematical concepts,”<sup>28</sup> and this is reflected in the laws of both the United States and India. Creating a private cause of action for copyright violations, the agreement allows the owner of a copyright to bring suit directly within the courts of member nations where the infringement is occurring,<sup>29</sup> <sup>30</sup> and requires member nations to accord the same rights to nationals of other member states as given to their own.<sup>31</sup> Thus, since Hollywood and Bollywood films are marketed in

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<sup>23</sup> India and the US are among the 145 member nations to the WTO. Desai, *supra* note 13, at 260.

<sup>24</sup> The World Trade Organization is the international organization whose purpose is to open trade for all. According to the WTO’s mission statement, the WTO’s founding and guiding principles remain the pursuit of open borders, the guarantee of most-favored-nation principle and non-discriminatory treatment by and among members, and a commitment to transparency in the conduct of its activities. WORLD TRADE ORGANIZATION (WTO) [http://www.wto.org/english/thewto\\_e/whatis\\_e/wto\\_dg\\_stat\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm) (last visited Jan. 20, 2009).

<sup>25</sup> This allows for enforcement if Berne convention provisions. The Berne convention was missing enforcement mechanisms. Desai, *supra* note 13, at 261

<sup>26</sup> TRIPS: A More Detailed Overview of the TRIPS Agreement, [http://www.wto.org/english/tratop\\_e/TRIPS\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/TRIPS_e/intel2_e.htm) (last visited Jan. 20, 2009).

<sup>27</sup> Desai, *supra* note 13, at 261.

<sup>28</sup> *Id.*

<sup>29</sup> Article 15 of the Berne Convention entitles authors of copyrighted works to “institute infringement proceedings in the countries of the Union.” Desai, *supra* note 13, at 261; Before TRIPS introduced new enforcement provisions, if a person’s copyright was violated in a foreign nation, the author would have to enlist their native country’s assistance in taking the case to the ICJ. Berne Convention for the Protection of Literary and Artistic Works, art. 33(1), Sept. 9, 1886, *available at* [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html#P380\\_69962](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P380_69962). TRIPS allows claims to be brought in the domestic courts of member nations where infringement is occurring. Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9, sec. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Part III, LEGAL INSTRUMENTS: RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement], *available at* [http://www.wto.org/english/tratop\\_e/TRIPS\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/TRIPS_e/intel2_e.htm).

<sup>30</sup> In addition to recourse in domestic courts, the TRIPS agreement provides member nations access to the WTO’s dispute settlement procedures. TRIPS agreement, *supra* note 29.

<sup>31</sup> See Berne Convention for the Protection of Literary and Artistic Works, art. 5, September 9, 1886, *available at* [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html#P380\\_69962](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P380_69962). This requirement is in compliance with the WTO’s goal of guaranteeing most-favored nation status to member



both the U.S. and India, claims of infringement may be brought in either nation's domestic legal system.

### B. *What U.S. and Indian Copyright Law Protect*

For the purposes of copyright infringement involving films in Hollywood and Bollywood, the relevant provisions of the Berne Convention that TRIPS makes binding recognize the exclusive rights of authors to authorize reproductions and adaptations of their original work, including cinematographic work.<sup>32 33 34 35</sup> When a film recognizably borrows the storyline and protected content from a previous work, it is considered a "derivative work."<sup>36</sup> Unauthorized derivative works are considered harmful if society as a whole perceives the derivative as so similar to the original that it adversely affects demand for the original.<sup>37</sup>

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countries and non-discriminatory treatment by and among members.

<sup>32</sup> Article 5 provides that authors in member states other than the country of origin shall enjoy the same rights the country affords its own nationals; articles 9 and 12 give the author the exclusive right to authorize reproduction and adaptation of the work, respectively; and article 14 grants the same rights to cinematographic works as original works retain and provides for authors of the original work to have exclusive rights in authorizing adaptations and reproductions, as well as the distribution rights of the adaptations and reproductions. *Id.* at art. 5, 9, 12, 14. Both the United States and India are Berne Convention compliant in their standard for derivative works. Article 2(3) of the Berne convention defines derivative works to include adaptations. *Id.* at art. 2. 17 U.S.C. § 102(a) protects "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a) (2005). The Indian Copyright Act of 1957 extends protection to cinematographic films. COPYRIGHT ACT, ch. III, § 13(1)(b) (India 1957), available at <http://www.ircc.iitb.ac.in/webnew/Indian%20Copyright%20Act%201957.html>.

<sup>33</sup> In the U.S., the Copyright Act provides motion pictures with protection for 95 years from publication. This protection is extended to works for hire, and section 101 of the act includes motion pictures under "work for hire." 17 U.S.C. § 302 (2005).

<sup>34</sup> Since its inception in 1957, the Indian Copyright Act has been amended several times, in 1983, 1984, 1992, 1994, and most recently in 1999. Tucker, *supra* note 10, at 20.

<sup>35</sup> The Indian Copyright Act provides copyrights in cinematographic films that last until 60 years from the beginning of the calendar year following the year in which the film was published. COPYRIGHT ACT (India 1957), available at <http://www.ircc.iitb.ac.in/webnew/Indian%20Copyright%20Act%201957.html>.

<sup>36</sup> 17 U.S.C. § 106 states that the copyright owner has exclusive rights to prepare derivative works based upon the copyrighted work. 17 U.S.C. § 106 (2005). The Indian Copyright Act provides that a copyright owner has the exclusive right to authorize adaptations of the work. COPYRIGHT ACT, §(14)(a)(vi) (India 1957), available at <http://www.ircc.iitb.ac.in/webnew/Indian%20Copyright%20Act%201957.html>. 17 U.S.C. § 101 defines a derivative work to be one based upon one or more preexisting works. 17 U.S.C. § 101 (2005). The Indian Copyright Act defines an adaptation as: "in relation to any work, the use of such work involving its rearrangement or alteration." COPYRIGHT ACT, §2(a)(v) (India 1957).

<sup>37</sup> Guha, *supra* note 6, at 228.

### C. *Defining Infringement*

Infringement in both the U.S. and India takes place when a party engages in actions reserved for the copyright owner.<sup>38</sup> In the U.S., a plaintiff must show ownership of the copyright and demonstrate that copying of protected material actually occurred, and that the copying was so extensive as to render the subsequent work substantially similar to the first.<sup>39</sup> In India, copyright infringement takes place if the chronologically second work is a substantial and material copy of the first.<sup>40</sup> Substantiality is measured by weighing both quantity and quality of the work copied.<sup>41</sup>

### D. *Standard of Review: Ordinary Observer Test*

In determining whether there is substantial similarity between two works, Indian and U.S. courts employ some variation of the “ordinary observer” test.<sup>42</sup> Essentially, the “ordinary observer” test states that two works are substantially similar if an ordinary viewer of reasonable attentiveness would conclude that the defendant unlawfully appropriated the plaintiff’s protected expression.<sup>43</sup>

The “ordinary observer” standard in U.S. courts originates from the audience test, first set forth in *Daly v. Palmer* (C.C.S.D.N.Y. 1868).<sup>44</sup> In *Daly*, the court examined whether a playwright’s basing of the climax scene of his play on the highly successful climax of another play constituted copyright infringement.<sup>45</sup> Both scenes involve the protagonist tied to railway tracks by the villain and then saved by a friend who breaks free from imprisonment, rescuing the protagonist seconds before a train approaches.<sup>46</sup> In analyzing this case, the court held that the creative elements of the original scene were the same in the defendant’s scene. If the appropriated series of events conveys substantially the same impressions and emotions in the same sequence,

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<sup>38</sup> Tucker, *supra* note 10, at 19.

<sup>39</sup> *Id.*

<sup>40</sup> Desai, *supra* note 13, at 264.

<sup>41</sup> *Id.*

<sup>42</sup> Tucker, *supra* note 10, at 19.

<sup>43</sup> *Id.* For examples of the U.S. “objective observer” test, see *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960); see also *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

<sup>44</sup> *Daly v. Palmer*, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3552).

<sup>45</sup> *Id.* at 1138.

<sup>46</sup> *Id.* at 1133.

then the subsequent work can be said to be substantially similar to, and an infringement of, the first.<sup>47</sup> Though the standard has been further defined in its present-day application,<sup>48</sup> all in all, the copied elements must be substantial and original.<sup>49</sup> If enough original elements are copied, even if individually insubstantial, they may constitute copyright infringement in the aggregate.<sup>50</sup>

Indian Courts have a similar standard of review. In *R.G. Anand v. Delux Films* (1978),<sup>51</sup> the Supreme Court of India established that, in order to be actionable, a copy must be substantial and material that immediately demonstrates that an infringement has occurred.<sup>52</sup> The court went on to say that one of the best determinants for whether there has been a violation of copyright is “to see if the reader, spectator or viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.”<sup>53</sup> While simple additions, omissions, or modifications to the original work do not defeat the infringement claim,<sup>54</sup> if the similarities between the two works appear coincidental and enough dissimilar elements exist to negate the intention to copy the original, infringement cannot be said to have occurred.<sup>55</sup> Courts in both countries thus analyze the quantity as well as quality of the copying in applying their respective versions of the ordinary observer tests.

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<sup>47</sup> *Id.* at 1138.

<sup>48</sup> Notably, most courts now recognize a test based on the two-prong substantial similarity inquiry set forth by the Ninth Circuit Court of Appeals in *Sid & Marty Krofft Television Prod., Inc. v. McDonald's Corp.* 562 F.2d 1157 (9th Cir. 1977). The first prong, the extrinsic test, relies on expert opinion and analysis, whereas the second prong, the intrinsic test, relies on the response of the ordinary reasonable observer in assessing whether the allegedly infringing work has copied the “total concept and feel” of the original work. Kristen Klick, *The Maryland Survey 2000-2001, Recent Decisions: The United States Court of Appeals for the Fourth Circuit*, 61 Md. L. REV. 1162, 1162 (2002).

<sup>49</sup> See *Fiest Publ'ns v. Rural Tel. Serv.*, 499 U.S. 340, 361 (1991); *Lahiri v. Universal Music & Video Distrib.*, 513 F. Supp. 2d 1172 (C.D. Cal. 2007).

<sup>50</sup> See *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936).

<sup>51</sup> See *R.G. Anand v. Delux Films* 4 S.C.C. 118 (India S.C. 1978).

<sup>52</sup> Justice P.S. Narayana, *Intellectual Property Law in the New Technological Age*, PL WEBJOUR 6 (2002), [http://www.ebc-india.com/lawyer/articles/607\\_1.htm](http://www.ebc-india.com/lawyer/articles/607_1.htm).

<sup>53</sup> *Id.*

<sup>54</sup> Desai, *supra* note 13, at 264, citing *R.G. Anand*.

<sup>55</sup> See Narayana, *supra* note 52, quoting *R.G. Anand* at 140-41. Also, where two works possess the same theme but treat it differently so that the subsequent work becomes a completely new work, no infringement is said to have occurred.

### E. *Fair Use Defense*

A fair use defense may defeat a claim of copyright infringement. Determining whether the subsequent work's appropriation of the original work is a fair use involves weighing several factors. After presenting examples of potential infringements and the arguments Indian filmmakers make to deny copyright infringement in Part II, I will address the viability of such a defense if utilized by Bollywood filmmakers in Part III.<sup>56</sup>

### III. HISTORY AND EXAMPLES OF BOLLYWOOD REMAKES OF HOLLYWOOD FILMS, INDIANIZATION ARGUMENTS AGAINST INFRINGEMENT, AND REASONS HOLLYWOOD DID NOT TAKE LEGAL ACTION

The Indian film industry has come a long way since the first Indian cinematographic film was shown over a century ago in Mumbai.<sup>57</sup> Now the largest film industry in the world,<sup>58</sup> Bollywood has continuously evolved to increase audience appeal and developed films with the intention of obtaining maximum ticket sales from the movie-going audience.<sup>59</sup> This audience is not limited to India's domestic market; it encompasses the growing number of persons of Indian origin living abroad.

#### A. *Immigration Produces New Target Audience for Bollywood*

Over the last few decades, there has been a surge of immigration from India to Western nations.<sup>60</sup> With the Diaspora rapidly assimilating to the cultures of the nations it now inhabits, Bollywood has continued to find new ways to appeal to this demographic for an

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<sup>56</sup> See part III for a discussion on the viability of a fair use defense presented by Bollywood. Scholars argue that the Berne convention, to which both U.S. and Indian laws conform, calls for some level of an international fair use defense. See Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75 (2000).

<sup>57</sup> GORDON JOHNSON, *A CULTURAL ATLAS OF INDIA* 180 (1996). The first cinematographic Indian film was shown on July 7, 1896 in Mumbai. *Id.*

<sup>58</sup> Bollywood is the largest film industry in the world in terms of output and audience. *Bollywood vs. Hollywood - the Complete Breakdown*, *supra* note 11.

<sup>59</sup> Sheila J. Nayar, *The Values of Fantasy: Indian Popular Cinema through Western Scripts*, 31 J. POPULAR CULTURE 73, 75 (1997), available at <http://www3.interscience.wiley.com/cgi-bin/fulltext/119145617/PDFSTART>.

<sup>60</sup> Ally Ostrowski, *Found in Translation: From Hollywood Hits to Bollywood Blockbusters*, 11 J. RELIGION & FILM (2007), available at <http://www.unomaha.edu/jrf/vol11no2/OstrowskiHollyBolly.htm>.

expanded audience base.<sup>61</sup> Bollywood viewed Hollywood films favorably; their themes appease the increasingly diverse and westernized Indian audience.<sup>62</sup> The United States began to experience an influx of immigrants from India after the passage of the Immigration and Naturalization Act in 1965.<sup>63</sup> As an increasing number of previously Indian nationals began to call the United States home, Bollywood recognized it could further expand its audience by appealing to non-resident Indians (NRIs).<sup>64</sup>

Bollywood's trend of developing films based on Hollywood themes in the last three decades<sup>65</sup> coincides with this wave of immigration. The Bollywood film *Karz* (1980) has been acknowledged in reviews as a remake of the Hollywood film *THE REINCARNATION OF PETER PROUD* (1975).<sup>66</sup> 1986's *JAANBAAZ* took inspiration from the 1946 Hollywood venture *DUEL IN THE SUN*.<sup>67</sup> As the Indian audience abroad has continued to grow, so has the number of Hindi films inspired by Hollywood movies. In 1993, nearly 90% of Bollywood films in production were reported to be remakes of earlier Hindi, Hollywood, or other foreign films.<sup>68</sup>

Notable Bollywood box office success stories remade from Hollywood films include *YEH DILLAGI* (1994), inspired by *SABRINA* (1954)<sup>69</sup>; *RAAZ* (2002), inspired by *WHAT LIES BENEATH* (2000); and *SALAAM NAMASTE* (2005), inspired by *NINE MONTHS* (1995)<sup>70</sup>. These films are not under the radar copies of Hollywood films; they are lucrative ventures that readily acknowledge their Hollywood counterparts and attain commercial success despite their admittedly

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<sup>61</sup> VINAY LAL & ASHIS NANDY, *FINGERPRINTING POPULAR CULTURE: THE MYTHIC AND THE ICONIC IN INDIAN CINEMA xi-xxvii* (New Delhi: Oxford University Press 2006).

<sup>62</sup> Nayar, *supra* note 59.

<sup>63</sup> Prema Kurien, *Religion, Ethnicity and Politics: Hindu and Muslim Indian Immigrants in the United States*, 24 *ETHNIC & RACIAL STUDIES* 263, 266 (2001), available at <http://www.clas.ufl.edu/users/kenwald/pos6292/kurien.pdf>.

<sup>64</sup> NRI is a term used to describe persons of Indian origin living outside the United States. Ostrowski, *supra* note 60.

<sup>65</sup> Ostrowski, *supra* note 60.

<sup>66</sup> See IMDB synopsis of *KARZ* (Mukta Arts Ltd. 1980), <http://www.imdb.com/title/tt0214841>.

<sup>67</sup> In *JAANBAAZ*, Anil Kapoor plays Gregory Peck's role as the womanizer who falls in love with the orphaned female lead, played by Dimple Kapadia in *JAANBAAZ* and Jennifer Jones in *DUEL IN THE SUN*. *Bollywood Movie Inspirations*, <http://www.akhilesh.in/life/india/bollywoodinspirations.php> (last visited Feb. 20, 2009).

<sup>68</sup> This is likely because the original films had themes that had already proven successful with either the Indian or Western audiences. See Nayar, *supra* note 59.

<sup>69</sup> See Ostrowski, *supra* note 60.

<sup>70</sup> See *Bollywood Movie Inspirations*, *supra* note 67.

plagiarized story lines. Film reviews on the popular Bollywood website “Planet Bollywood” often begin by noting which successful Hollywood venture has served as the source of inspiration for the Bollywood film being reviewed.<sup>71</sup> The widespread recognition of these films as copies of protected foreign work indicates the lack of fear of legal repercussions within the industry as the vast majority of these potential infringements have been ignored.

### B. Publicized Infringements

In applying the audience test for substantial similarity recognized by U.S. and Indian courts and laid out in Part I, a vast number of these Bollywood remakes of Hollywood films might be deemed infringing material. *YEH DILLAGI* (1994), a highly successful Bollywood film with well-known Bollywood celebrities, has noticeable similarities to the 1954 Hollywood classic *SABRINA*. The female lead in *YEH DILLAGI*, played by Kajol, is the daughter of a wealthy family’s chauffeur who has her eyes set on the family’s younger son, played by Saif Ali Khan. Khan is a playboy who pays little mind to Kajol until she undergoes an extensive makeover. Khan’s older brother in the film, played by Akshay Kumar, intervenes, and falls in love with Kajol. Kumar and Kajol end up together in the climax of the film.<sup>72</sup> All of these elements are present in *SABRINA* if the Bollywood star cast is exchanged for Audrey Hepburn, Humphrey Bogart, and William Holden.<sup>73</sup> Thus, many substantial and assorted similarities to *Sabrina*, indicated by nearly identical character roles and development, would likely have led courts in either India or the US to rule that the Bollywood film was an infringing copy of the original work.

As discussed in the introduction, *RAAZ* (2002), one of the highest grossing Bollywood films of 2002,<sup>74</sup> has been acknowledged within the Bollywood industry as an adaptation of the Hollywood thriller *WHAT LIES BENEATH* (2000).<sup>75</sup> Both films involve the ghost of a mentally

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<sup>71</sup> 2002’s box office success *RAAZ* was reviewed by Planet Bollywood as a retelling of *WHAT LIES BENEATH* (2000). The web site further mentioned the director of *RAAZ*, Vikram Bhatt, has been known to completely rip off Hollywood storylines in his past films. Alok Kumar, *Raaz Film Review*, PLANET BOLLYWOOD, <http://www.planetbollywood.com/displayReview.php?id=041706035839> (last visited Feb. 27, 2009).

<sup>72</sup> *YEH DILLAGI* (Aditya Films 1994).

<sup>73</sup> *SABRINA* (Paramount Pictures 1954).

<sup>74</sup> Chhabra, *supra* note 1.

<sup>75</sup> Kumar, *supra* note 71.

unstable young girl haunting a couple and trying to inform the wife of a secret love affair the girl had with the husband and how she died as a result.<sup>76</sup> Once again, the two films are likely to be seen as substantially similar, since enough varied elements were copied to warrant a finding that *Raaz* infringed on the copyright held by DreamWorks and 20th Century Fox for *WHAT LIES BENEATH*.

Other Bollywood films may only copy a small, but arguably integral, portion of a Hollywood film. The 2001 Bollywood film *KASOOR* had an almost entirely original plotline with one notable exception - the climax scene is nearly a direct copy of the climax of *WHAT LIES BENEATH*, with the male lead attempting to kill the female lead by administering a paralysis-inducing drug and then leaving her to drown in a bathtub so that she would not expose his murderous past.<sup>77</sup> Though the scene comprises a short segment of the film in terms of quantity, the scene is arguably integral to *WHAT LIES BENEATH* by its creativity and memorability, carrying more weight in a court's assessment of the quality of copying, which would still constitute infringement.<sup>78</sup>

Infringements of this sort have not only been acknowledged within Bollywood, but have also been reported to Hollywood.<sup>79</sup> When asked about the issue by the *Daily Variety*<sup>80</sup>, Vikram Bhatt, director of *RAAZ* and *KASOOR*, went on record stating that films are “not about creativity, originality, or vision. They are about entertaining audiences across the board. Once you understand that an idea always existed before you did, then you look at the whole aspect of ‘copying’ in a different light.”<sup>81</sup> Furthermore, the producer of the film, Mahesh Bhatt, was dismissive of the idea that this should be a matter worth litigating.

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<sup>76</sup> In *RAAZ*, the girl committed suicide upon rejection by her lover, whereas in *WHAT LIES BENEATH*, the husband murdered the girl and tried to cover up her death. The resolution of the films is the only main difference between the two works. The spirit succeeds in seeking vengeance against the husband in *WHAT LIES BENEATH*, thwarting him in his attempt to kill his wife and instead killing him, whereas the couple in *RAAZ* succeed in cremating the body of the spirit, which rids them of the haunting. *RAAZ* (Bhatt Productions 2002).

<sup>77</sup> *KASOOR* (Bhatt Productions 2001).

<sup>78</sup> The U.S. Supreme Court, recognizing both quantity and quality of copying as factors to consider in infringement, has ruled that even copying a small portion of a work, if integral to the original, can be copyright infringement. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) (recognizing that copyright infringement can occur even if the amount appropriated is small so long as it is integral, and therefore substantial, to the original work).

<sup>79</sup> Chhabra, *supra* note 1.

<sup>80</sup> *Daily Variety* is a popular Hollywood daily newspaper. *VARIETY*, Home Page, <http://www.variety.com/Home/>.

<sup>81</sup> Chhabra, *supra* note 1.

“It’s only entertainment...not some high art form to be worshipped with incense and hymns,” he told *Daily Variety*.<sup>82</sup> Having acknowledged Bollywood’s copying of Hollywood storylines to a widely circulated entertainment newspaper in the United States, Indian filmmakers inevitably drew attention to this phenomenon in India to the extent that the West had previously ignored it. Bhatt’s statements might likely be representative of a cultural divide in how intellectual property is viewed in India. As discussed below in subsection C, many Indian filmmakers disagree with the contention that their work, though inspired by Hollywood cinema, constitutes infringing material.

### C. “Indianization” Defense Against Claims of Infringement

Many Indian filmmakers argue that when they adopt a Hollywood film to remake for an Indian audience, the film undergoes the transitory process of “Indianization” and results in an inherently distinct product from the original.<sup>83</sup> The Bollywood feature, as a whole, has a look and feel entirely distinct from its Hollywood source of inspiration; it cannot be said that the Bollywood remake is infringing on the copyright of the Hollywood work.<sup>84</sup> The Bollywood work should constitute a new, original work because of these inherent differences.<sup>85</sup> This view is at least to some extent supported by scholars of the field who view Bollywood copies of Hollywood films as tailored to different societal and cultural issues.<sup>86</sup> In “Indianizing” a film, filmmakers add a

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<sup>82</sup> In addition to attention drawn to Bollywood remakes by the Dailey Variety, Miramax Films, a Hollywood studio, also received notice of a potential infringing Bollywood copy of their film *RESERVOIR DOGS*. *Id.* Matthew Hiltzik, senior vice president at Miramax’s corporate communication department, was quoted as saying that Miramax did not “anticipate a problem, but obviously... reserve[s] the right to do something when [they] see the film.” *Id.* Miramax did not pursue the matter further. *Id.* I advance three primary factors for Miramax’s, and other studios’, lack of action in Part II, subsection D.

<sup>83</sup> Bollywood director Mahesh Bhatt has gone on record as stating “when you take an idea and route it through the Indian heart, it changes entirely. Desai, *supra* note 13, at 269. Another Bollywood filmmaker, Abbas Mustan, supports this viewpoint of how Bollywood’s product is changed from the original Hollywood film by noting “whenever we’ve adapted a film we’ve completely Indianized the story.” Subhash K. Jha, *Abbas Mustan to Remake Italian Job!*, Bollywood Hungama News Network, <http://www.bollywood.com/abbas-mustan-remake-italian-job> (last visited Feb. 22, 2009). Referring to a future project, he stated “we want to make it better than the original.” *Id.* See also TEJASWINI GANTI, *BOLLYWOOD: A GUIDEBOOK TO POPULAR HINDI CINEMA* (Routledge 2004).

<sup>84</sup> Desai, *supra* note 13, at 269. The view that Bollywood films address different societal and cultural concerns than their Hollywood counterparts implies that no cultural or “Indianized” copy would be an infringement.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*



Bollywood star cast, expand the narrative of the film to broaden the genre, add song and dance sequences, and add a romantic plotline in the absence of one.<sup>87</sup>

Expanding the narrative involves adding “emotions” tailored to Indian culture, such as the addition of familial and social relations more akin to eastern communitarian ideals and often missing from plotlines of the individualistic U.S.<sup>88</sup>, and broadening the genre of the film.<sup>89</sup> Commercial Indian films are typically not genre-specific, like Hollywood films are, and will encompass elements of musicals, comedies, dramas, action ventures, and love stories as they aim for a more holistic appeal.<sup>90</sup> While Western audiences appreciate single genre features, Indian audiences typically reject such single-track films.<sup>91</sup> For Bollywood, this expanded genre would at least to some extent undercut claims of substantial similarity to single genre Hollywood films.

Bollywood films are also considerably longer than Hollywood films, largely due to the addition of song and dance sequences. Hindi films dedicate on average approximately 40 minutes of a two to three hour Bollywood venture to song sequences, and music has thus become inextricably linked with Bollywood cinema.<sup>92</sup> Songs are seen as essential to the promotion, marketing, financing, distribution, and exhibition of Bollywood films.<sup>93</sup> Song and dance sequences in popular cinema often define and propel plot development.<sup>94</sup> Hindi filmmakers spend considerable time and energy devising song sequences that have a wide variety of functions within the film’s narrative.<sup>95</sup> The amount of time allotted to song sequences in films themselves adds significant original and creative expression to an adaptation of a Hollywood film.

Another notable transformation that takes place during the process

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<sup>87</sup> GANTI *supra* note 83, at 77; Film critic Jerry Pinto calls the process “Indianization” and describes it as: “adding songs and dances, scooping in hot splashes of rage and large helpings of tears and clearing out shades of gray.” Leela Jacinto, *‘Bollywood’ Produces Real-Life Drama: Indian Film Industry gives Hollywood a Run for its Melodrama*, ABC NEWS (May 4, 2001), <http://abcnews.go.com/International/story?id=81141>.

<sup>88</sup> “Since individualism and social alienation are not themes that sit well with Bollywood audiences, ‘Indianizing’ films often mean stripping characters of their individualistic personae and adding dense kinship patterns.” *Id.*

<sup>89</sup> GANTI, *supra* note 83, at 77-78.

<sup>90</sup> *Id.* at 84

<sup>91</sup> Jacinto, *supra* note 87.

<sup>92</sup> GANTI, *supra* note 83, at 83.

<sup>93</sup> *Id.* at 84.

<sup>94</sup> *Id.* at 80

<sup>95</sup> *Id.*

of Indianization is the deletion of sex scenes from the Hollywood originals.<sup>96</sup> India's Central Board of Film Certification has the legal power of censorship, and certifies films for exhibition in India.<sup>97</sup> In order to be approved for unrestricted viewing, Indian films cannot have nudity or sex scenes.<sup>98</sup> As such, the process of Indianization also involves the removal of such scenes when Hollywood films are remade into Bollywood films.<sup>99</sup>

With the amount of creative energy and work that goes into the process of "Indianizing" a film, many Bollywood filmmakers see their contributions as original creative work that substantially alters the Hollywood original and thus does not infringe on the former work's copyright.<sup>100</sup> This view is reflective of cultural differences between Eastern and Western notions of intellectual property, as noted by legal scholars such as William Alford.<sup>101</sup> While the Western approach is much more focused on protecting individual intellectual property rights from misappropriation, Eastern cultures have traditionally considered the copying of creative works a valuable form of disseminating knowledge as well as a great honor showing recognition and appreciation of the works.<sup>102</sup> As Bhatt's statements to *Daily Variety* demonstrate, some Indian filmmakers have less stringent notions of what constitutes infringement, and consider film plotlines ideas not necessarily warranting a monopoly on usage. Such filmmakers may consider their remakes positive ways of promoting ideas that may otherwise not have been given an Indian audience.

As explored in more detail in Part III, Bollywood cinema remains far more profitable than Hollywood cinema in India.<sup>103</sup> The Indian audiences may therefore prefer to see the Indianized version of a film due to the Indian cultural elements that are added in. Such elements

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<sup>96</sup> *Id.*

<sup>97</sup> Central Board of Film Certification, [www.cbfcindia.tn.nic.in](http://www.cbfcindia.tn.nic.in) (last visited Jan. 30, 2009).

<sup>98</sup> GANTI, *supra* note 83, at 83.

<sup>99</sup> Indian films still tend not to have even kissing in them. Elham Khatami, *Is Bollywood Coming to Hollywood?*, CNN NEWS (Feb. 23, 2009), [http://www.cnn.com/2009/SHOWBIZ/Movies/02/23/bollywood.hollywood/index.html?eref=rs\\_topstories](http://www.cnn.com/2009/SHOWBIZ/Movies/02/23/bollywood.hollywood/index.html?eref=rs_topstories).

<sup>100</sup> GANTI, *supra* note 83, at 76.

<sup>101</sup> See generally WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* (Stanford University Press 1995); See also Chun-Hsien Chen, *Explaining Different Enforcement Rates of Intellectual Property Protection in the United States, Taiwan, and the People's Republic of China*, 10 TUL. J. TECH. & INTELL. PROP. 211, 215-16 (2007).

<sup>102</sup> *Id.*

<sup>103</sup> See *infra* Part III.B.

may make these films more relatable for Indian moviegoers, and may do little to affect sales of the Hollywood original. According to Bollywood producer Viveck Vaswani, successful Indian films have repeat audiences.<sup>104</sup> Audience members seeing a film on multiple occasions are not likely coming back for the plotline, since they would be well aware of what occurs in the film upon returning to the theatre. This suggests that audiences return to the cinema halls to experience the Indianized elements of films, such as the star cast and song and dance sequences. If this is the case, the Indianized elements add considerable value to the success of a film. In Part V, I will approximate the value of these Indianized elements to Bollywood cinema, laying the foundation for an appropriate measure of the contributions of the appropriated plotline and Indianized elements to the success of a film.

#### D. *Hollywood's Complacency: Factors Explaining Why the West Ignored Bollywood Remakes*

Even after the aforementioned instances in which the potential infringements were brought to the attention of Hollywood, major studios refused to pursue any litigation against the Indian film companies. Hollywood producer Ashok Amritraj points out that a number of Indian films either directly steal or take inspirations from Hollywood plotlines, but such films have traditionally been unlikely to create much controversy within the wealthy Los Angeles studios.<sup>105</sup> Indian movies have been under the radar, and even when Hollywood executives were notified of possible infringement, they did not pursue legal action.<sup>106</sup>

Praveen Anand, a prominent Indian intellectual property lawyer, has also recognized that, despite the strength of Indian intellectual property laws and their compliance with international standards, no Indian filmmakers have been taken to court despite making films that copy concepts and detail and are likely clear cases of infringement.<sup>107</sup>

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<sup>104</sup> In an interview I conducted with Bollywood producer Viveck Vaswani, he noted that the more successful Bollywood films are those that audiences go to see multiple times. Films thus try to incorporate elements that would attract audiences to the cinema halls on more than one occasion.

<sup>105</sup> Chhabra, *supra* note 1.

<sup>106</sup> *Id.*

<sup>107</sup> Anand notes that “there are lots of [Bollywood films] that have copied concepts and a lot of detail—clear infringements of Hollywood films. But somehow, Hollywood producers have not come forward to file cases and test the proposition.” Gagliano, *supra* note 14.

Given the wide publicity,<sup>108</sup> why has Hollywood ignored this practice of potential copyright infringement for so long? Bollywood has historically been on the periphery of Hollywood's radar for three reasons: (1) Bollywood's profitability has historically been quite low compared to Hollywood; (2) India's status as a third world country has led to it chiefly being seen as a source of cheap products and labor; and (3) audiences for the two film industries have traditionally been largely distinct.

### 1. Bollywood's lack of profitability

Until recently, Bollywood was not a highly profitable industry by Western standards. RAAZ, discussed above<sup>109</sup>, was the second highest grossing Bollywood venture of 2002, earning approximately Rs.<sup>110</sup> 42 crore<sup>111</sup> worldwide, roughly equivalent to \$9.5 million.<sup>112</sup> Its Hollywood counterpart, WHAT LIES BENEATH, grossed nearly \$300 million worldwide.<sup>113</sup> Pursuing litigation in a foreign legal system over a film that grossed a small fraction of the type of revenue Hollywood is used to may not have seemed worthwhile for wealthy Hollywood media conglomerates.<sup>114</sup>

Moreover, ticket prices for Indian films in the domestic market have historically been low, based upon the low average household income of Indian moviegoers.<sup>115</sup> Until the late 1990s, films were

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<sup>108</sup> *India Today*, the most widely read weekly news magazine in South Asia, has published lists of Bollywood films and the foreign films, including Hollywood films, they borrow storylines from, further publicizing this phenomenon; <http://www.indiatodaygroup.com/itoday>; Prashant Reddy, *Hollywood v. Bollywood- 'Partner' in Crime*, SPICY IP (Oct. 6, 2007), <http://spicyipindia.blogspot.com/2007/10/hollywood-v-bollywood-partner-in-crime.html>.

<sup>109</sup> See *supra* Part III (B).

<sup>110</sup> Rs. is the abbreviation for rupee, the national Indian currency.

<sup>111</sup> Crore is an Indian numbering unit; 1 crore is equivalent to the figure 10 million. The rupee typically fluctuates between 40 and 50 rupees equaling one American dollar. Exchange Rates Graph (American Dollar, Indian Rupee), <http://www.x-rates.com/d/INR/USD/graph120.html> (last visited Feb. 10, 2009).

<sup>112</sup> Box Office 2002, BOXOFFICEINDIA.COM <http://www.boxofficeindia.com/showProd.php?itemCat=208&catName=MjAwMg==> (last visited Feb. 10, 2009); The film's net revenue was just over \$4 million. *Id.*

<sup>113</sup> Entertainment Editors, *Director Robert Zemeckis Becomes First to Helm Two \$100 Million Grossing Pictures in Same Calendar Year; Oscar Winning Filmmaker directed 'Cast Away' and 'What Lies Beneath'*, BUSINESS WIRE (Jan. 16, 2001), [http://findarticles.com/p/articles/mi\\_m0EIN/is\\_2001\\_Jan\\_16/ai\\_69234495](http://findarticles.com/p/articles/mi_m0EIN/is_2001_Jan_16/ai_69234495).

<sup>114</sup> Hollywood producer Ashok Amritraj suggested in an interview that unless a film makes between \$25 and \$30 million, it goes without notice in Hollywood. Chhabra, *supra* note 1.

<sup>115</sup> *New Wave Markets - Screen International: Country Markets*, The Economist Intelligence Unit, Business India Intelligence (July 24, 2008),

screened in single-screen, poorly maintained theatres across India.<sup>116</sup> 13,000 such theatres were locally operated with little investment in improved technology.<sup>117</sup> As television gained popularity, these run-down theatres experienced a drastic loss of business, which consequently had negative effects on revenues for Hindi films.<sup>118</sup>

Furthermore, though Bollywood has been an established and thriving industry in India for a good portion of the last century, the Indian government did not grant Bollywood official industry status until 2001.<sup>119</sup> Thus, producers often resorted to illegitimate sources of funding from the informal sector or underworld to complete their projects, resulting in little consistent investment in Bollywood films.<sup>120</sup> With disorganized sources of funding, low movie ticket prices, and run-down cinema halls, Bollywood was not yielding the financial success necessary to attract attention from the multi-billion dollar U.S. film industry that likely did not consider the costs of distant foreign litigation justifiable in such instances.

## 2. India's status as a developing nation

Bollywood's lack of profitability on a global scale was reflective more of India's status as a developing nation than the film industry itself. Ticket prices are based on what the public can afford to pay. With low household incomes combined with the large output of Bollywood films, ticket prices remained low.

In the mid 1990s, less than 0.005 percent of Indian households had average annual incomes exceeding \$4,800.<sup>121</sup> India has been an attractive source of cheap labor and cost efficiency to the West, which led American companies to employ labor in India and sell the products manufactured to Western consumers. Large U.S. corporations have not hesitated to utilize the skilled Indian workforce to outsource jobs, paying the Indian workers a small fraction of what U.S. workers are

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[http://newwavemarkets.com/country\\_markets/india/screen\\_international](http://newwavemarkets.com/country_markets/india/screen_international).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Conal Walsh, *Bollywood Focuses on Opening Up the West*, THE OBSERVER (March 19, 2006), <http://www.guardian.co.uk/business/2006/mar/19/bollywood.india?INTCMP=ILCNETTXT3487>.

<sup>120</sup> *Id.*

<sup>121</sup> Nikhil Sinha, *Doordarshan, Public Service Broadcasting and the Impact of Globalization: A Short History*, 5 CARDOZO J. INT'L & COMP. L. 365, 365 (1997).

willing to accept for comparable employment.<sup>122</sup> Viewing India as a developing nation that had little to offer aside from cheap labor and goods, Hollywood likely had little incentive to closely examine the Indian film industry as a threat to its intellectual property interests.

### 3. Relatively separate audiences

Perhaps the most significant reason Hollywood ignored Bollywood's actions involves the different markets the industries have targeted. For most of the two industries' history, the respective audiences have been largely distinct. Due to the language barrier and the differences in culture between the home countries of the industries, there has been little overlap in market. Before the last decade, India was one of the least profitable markets for major Hollywood studios.<sup>123</sup> The audience for Indian films was chiefly Indian, whether in the domestic market or the Indian Diaspora abroad,<sup>124</sup> while Hollywood enjoyed a more global market.<sup>125</sup> Bollywood films, released in Hindi, did not appeal to Western audiences who did not understand the language and had little familiarity with Indian culture. Therefore, their production did not threaten the market share of the movie going audiences Hollywood sought. An unprofitable industry in a distant, foreign culture seen as a source of cheap goods has thus not been a target for Hollywood's copyright infringement suits.<sup>126</sup>

## IV. ONSET OF LITIGATION AGAINST BOLLYWOOD

### A. *Factors Reversed*

#### 1. Rapid increase in the profitability of Bollywood

Though the U.S. may have traditionally viewed India as a third-

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<sup>122</sup> Krishan, *supra* note 19, at 929.

<sup>123</sup> Uday Singh, Managing Director of Columbia Tristar Films of India Ltd., said India was among the lower markets for the studio until the last few years. *See* Subramanian, *supra* note 16.

<sup>124</sup> Ashok Amritraj recognized that the audience for Bollywood films is chiefly Indian. Chhabra, *supra* note 1.

<sup>125</sup> Hollywood obtains nearly half of its generated sales from the overseas market. *See* Kevin Lee, "The Little State Department": *Hollywood and the MPAA's Influence on U.S. Trade Relations*, 28 *Nw. J. INT'L L. & BUS.* 371, 371 (2008).

<sup>126</sup> India has, however, remained on the U.S.'s watch list for piracy and its weak enforcement of IP laws. In 2004, U.S. companies lost over \$500 million in sales due to piracy in India of copyrighted works. Sonia Baldia, *Knowledge Process Outsourcing to India: Important Considerations for US Companies*, 1587 *PLI/CORP.* 171, 185 (2007).

world country with cheap labor and an unprofitable film industry, India's rise on the global economic and cultural map has induced a prompt response from the West. The Indian film industry as a whole grew at an annual rate of 17% between 2004 and 2007, according to a joint study by the Federation of Indian Chambers of Commerce and Industry (FICCI) and PricewaterhouseCoopers.<sup>127</sup> The growth is illustrated by the rapid increase in profitability of Bollywood films. *Raaz* raked in approximately \$9 million as one of the highest grossing films of 2002; *Race*, one of the biggest blockbusters of 2008, grossed over \$20 million,<sup>128</sup> indicating doubled profits. Higher investment levels from financial institutions along with improved film exhibition have contributed to the increased profitability of Hindi cinema.

When the government of India granted Bollywood official industry status in 2001, film producers were able to raise money from banks and other financial institutions instead of relying on informal or illegitimate sources of funding.<sup>129</sup> A centralized, legitimate system of film financing stabilized the industry and allowed for profitable growth.<sup>130</sup> Now a government sanctioned industry, funds began to flow in from ambitious firms with organized corporate structures.<sup>131</sup> Domestic as well as international companies began to invest more money in Bollywood.

Air-conditioned, multi-screen cinema complexes have sprung up throughout the country, replacing many of the old run-down theatres. Multiplexes are able to show a variety of films in the same building, adjusting theatre size, prices, and show times for different films.<sup>132</sup> Technological advancements, such as the digital broadcasting of films and improved acoustics, have also enhanced the movie-going

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<sup>127</sup> See *New Wave Markets*, *supra* note 115.

<sup>128</sup> RAAZ grossed approximately 37 crores, equivalent to about \$9 million. Box Office 2002, BOXOFFICEINDIA.COM <http://www.boxofficeindia.com/showProd.php?itemCat=208&catName=MjAwMg==> (last visited Feb. 10, 2009); RACE grossed over Rs. 90 crore, equivalent to over \$20 million. *Box Office: Race grosses Rs. 900 million worldwide*, BUSINESSOFCINEMA.COM (Apr. 6, 2008), <http://businessofcinema.com/news.php?newsid=7740>.

<sup>129</sup> See *Bollywood Rising: UTV Motion Pictures is using Hollywood methods to modernize Indian film, Business & Finance*, THE ECONOMIST (Feb. 7, 2008), <http://www.economist.com/node/10657215>.

<sup>130</sup> Schulyer Moore addressed successful film financing techniques of which stable investments are recommended. See generally Schuyler M. Moore, *Financing Drama: The Challenges of Film Financing Can Produce as Much Drama as Takes Place on the Screen*, 24 LOS ANGELES LAW 2, 2 (2008).

<sup>131</sup> See *New Wave Markets*, *supra* note 115.

<sup>132</sup> *Id.*

experience.<sup>133</sup> These new multiplexes cost significantly more to develop and operate than the single-screen cinema halls did. As a result, exhibitors adjusted ticket prices accordingly to finance the expense. More expensive tickets led to higher revenues not only for the multiplex but for the film distribution company as well.

## 2. India's economic boom

In the past, theatres struggled to keep ticket prices high enough to stay in business but low enough to attract enough of an audience.<sup>134</sup> The recent economic boom in India has led to rising household incomes, and the Indian populace now has greater discretionary income to spend on its favorite pastime: watching films.<sup>135</sup> Between 2005 and 2008, the twenty Indian cities with the strongest economic growth experienced an 11.2% annual rise in household income.<sup>136</sup> In a number of these cities, average annual household income has crossed \$8,500,<sup>137</sup> nearly double what many families in the highest income bracket of India earned a decade earlier.<sup>138</sup> Outsourcing and India's own developing industries have led to an economic boom that has made India one of the fastest growing economies on the globe and increased disposable income for the average Indian national.<sup>139</sup> As a result, Indian film buffs willingly spend more to enjoy their favorite celebrities on the big screen in modern theatres.

The rest of the world has taken notice of India as an emerging global economic power.<sup>140</sup> Each time manufacturing and services are outsourced to India, so are knowledge, technology and skills that India

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> India is a movie-mad country. More than three billion tickets are sold a year. Anupama Chopra, *Stumbling Towards Bollywood*, N.Y. TIMES (Mar. 20, 2009), [http://www.nytimes.com/2009/03/22/movies/22chop.html?\\_r=1](http://www.nytimes.com/2009/03/22/movies/22chop.html?_r=1).

<sup>136</sup> Shailesh Dobhai, *Top 20 Cities Hold Keys to Urban Growth*, THE ECONOMIC TIMES (Aug. 8, 2008), <http://www.ncaer.org/downloads/MediaClips/Press/ECotimes-top20citieshold.pdf>.

<sup>137</sup> These cities include Mumbai, Delhi, Chandigarh and Surat. *Id.*

<sup>138</sup> In the previous section of this article, I noted that in the mid 1990s, less than 0.005% of Indian households had average annual incomes exceeding \$4,800.

<sup>139</sup> John Williamson, *The Rise of the Indian Economy*, Talk at a Conference for History Teachers (May 11, 2006), [http://www.unc.edu/depts/diplomat/item/2006/0406/will/williamson\\_india.html](http://www.unc.edu/depts/diplomat/item/2006/0406/will/williamson_india.html).

<sup>140</sup> Time magazine identified India as a major factor in the global economy and estimated its annual GDP growth for the next decade to be at 7%. Marc Faber, *Wealth on the Wing*, TIME (Apr. 17, 2006), <http://www.time.com/time/magazine/article/0,9171,501060424-1184116,00.html>.



has been able to use in its economic growth.<sup>141</sup> With India's 7% annual economic growth rate, it is projected to surface as a first-world nation in the not too distant future.<sup>142</sup>

### 3. Overlapping audiences

In addition to India's booming economy and Bollywood's increased profitability, audiences for Hollywood and Bollywood are increasingly overlapping. As noted above, India was a low-priority market for Hollywood studios until recently. Within the last few years, India has risen to one of the top 15 markets for major Hollywood studios.<sup>143</sup>

Since the dawn of the new millennium, audiences in the West have had greater exposure and an increased appreciation for Eastern cinema.<sup>144</sup> The Bollywood film *LAGAAN* (2001) was nominated in the Best Foreign Film category in 74th Academy Awards.<sup>145</sup> Though it lost the Oscar to French favorite *AMELIE* (2001), it did garner Western interest in Bollywood, prompting Sony Pictures Classics to release the film for a crossover audience in the U.S.<sup>146</sup> That same year, the Indian film *MONSOON WEDDING* received a Golden Globe nomination for Best Foreign Language Film.<sup>147</sup> Gurinder Chadha's *BEND IT LIKE BECKHAM* (2002), a British film chronicling the life of a teenage soccer player reconciling her ambitions to play professionally with her Indian family's traditional values, amassed not only international acclaim, but topped the U.K. box office for weeks.<sup>148</sup> *SLUMDOG MILLIONAIRE* (2008), an inspirational rags to riches story of a boy who grew up in the slums of Mumbai, was hailed the big winner at the 2009 Academy

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<sup>141</sup> *Id.*

<sup>142</sup> Williamson *supra* note 139.

<sup>143</sup> Subramanian, *supra* note 16.

<sup>144</sup> Films like *CROUCHING TIGER HIDDEN DRAGON* and *HERO* attained commercial success and critical acclaim for Asian cinema. Kuldip R. Rampal, *Cultural Imperialism or Economic Necessity?: The Hollywood Factor in the Reshaping of the Asian Film Industry*, 4 GLOBAL MEDIA JOURNAL, issue 6 (2005), available at <http://lass.calumet.purdue.edu/cca/gmj/sp05/gmj-sp05-rampal.htm>

<sup>145</sup> *LAGAAN*, India's official submission to the Oscars in 2001, was the third Bollywood film to be nominated for Best foreign language film in the Oscars, the other two being *MOTHER INDIA* (1957) and *SALAAM BOMBAY* (1988). *Lagaan Fails to Make It at Oscar*, Planet-Bollywood News, PLANET BOLLYWOOD, <http://www.planetbollywood.com/News/s032502-100753.html> (last visited Feb. 20, 2009).

<sup>146</sup> Chhabra, *supra* note 1.

<sup>147</sup> *MONSOON WEDDING* (2001 IFC Productions), Awards, IMDB, <http://www.imdb.com/title/tt0265343/awards> (last visited Feb. 10, 2009).

<sup>148</sup> *Beckham Film Shoots to Number One*, BBC NEWS (Apr. 16, 2002), <http://news.bbc.co.uk/2/hi/entertainment/1933721.stm>.

Awards and Golden Globes ceremonies, receiving eight Oscars and four Golden Globes.<sup>149</sup> The success of these films demonstrates the existence of a substantial crossover Indian-American audience to produce commercially successful ventures.

Facets of Bollywood style have entered Western cinema as well. *MOULIN ROUGE* (2001) director Baz Lurman indicated he aimed to apply the 'Bollywood masala' formula in the film,<sup>150</sup> and Bollywood director Shekhar Kapur used the vibrant visual feel of Bollywood films in his debut Hollywood venture *ELIZABETH* (1998).<sup>151</sup> *THE GURU* (2002), starring Heather Graham, is replete with Bollywood style song and dance sequences.<sup>152</sup> Moreover, Bollywood films have been known to enter the U.S. top 20 films list in recent years despite being screened in limited theatres.<sup>153</sup> Indian company UTV also broke into the top 20 U.S. distributors list based on the strength of several Bollywood successes.<sup>154</sup> The audiences and markets for the two industries are no longer as distinct as they once were, and have begun to blend together in way that has brought Bollywood out of Hollywood's periphery and into prominent visibility.

### B. *Hollywood Enters Mumbai*

Hollywood has not been left behind in taking note of the Indian public's increased spending power, and has instituted efforts to cash in. Though Hollywood films have gained popularity and exhibition within India, Bollywood films remain the most profitable.<sup>155</sup> Bollywood films also surpassed Hollywood films in terms of a global viewership in

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<sup>149</sup> Elham Khatami, *Is Bollywood Coming to Hollywood?* CNN NEWS (Feb. 23, 2009), [http://www.cnn.com/2009/SHOWBIZ/Movies/02/23/bollywood.hollywood/index.html?eref=rs\\_s\\_topstories](http://www.cnn.com/2009/SHOWBIZ/Movies/02/23/bollywood.hollywood/index.html?eref=rs_s_topstories); David Germain, *'Stundog' Wins 4 Golden Globes*, CBS NEWS (Jan. 11, 2008), <http://www.cbsnews.com/stories/2009/01/11/entertainment/goldenglobes09/main4713247.shtml>.

<sup>150</sup> Luram used a popular Bollywood song in the film, which he acquired the rights for from Tips, the company that held the rights in India. *'Chamma Chamma' charms Nicole Kidman*, THE TIMES OF INDIA (Apr. 29, 2001), <http://timesofindia.indiatimes.com/articleshow/39845921.cms>.

<sup>151</sup> Rampal, *supra* note 144.

<sup>152</sup> *Id.*

<sup>153</sup> Lavina Melwani, *Hollywood's Plot for Bollywood*, LITTLE INDIA (Nov. 2, 2007), <http://www.littleindia.com/news/127/ARTICLE/1917/2007-11-02.html>.

<sup>154</sup> Patrick von Sychowski, *Who Lost Spielberg, UTV cracks US Top 20 and Snoop goes to Bollywood* (July 30, 2008), <http://mydigitalcinema.blogspot.com/2008/07/who-lost-spielberg-utv-cracks-us-top-20.html>.

<sup>155</sup> Foreign films account for only 5% of the market in India. Chopra, *supra* note 135.

2004.<sup>156</sup> In Arab countries, fans prefer Bollywood films to Hollywood movies, and Egyptian cinema critic Ahmed Kamal has noted that Indian films have become a part of Arab culture.<sup>157</sup> Wanting to crack into this market, Hollywood studios have made their way into Mumbai, financing Indian cinema.

Within the last two years, Sony, Warner Brothers, Disney, and Turner International have begun investing in and funding Bollywood cinema.<sup>158</sup> As the PricewaterhouseCoopers study found, Bollywood's revenue of \$1.3 billion in 2004 grew to nearly \$2.2 billion in 2007, and is estimated to top \$3.8 billion by 2011.<sup>159</sup> Hollywood studios have moved in to finance Bollywood filmmakers and grab a share of the hefty profits.<sup>160</sup> As a result, these studios are paying greater attention to what is being produced in Bollywood. Employing Indian nationals for their Mumbai offices,<sup>161</sup> these studios are now likely able to more readily identify infringing Bollywood films, and have a monetary interest in pursuing litigation when those infringements are identified.

### C. *Hollywood v. Bollywood (2009)*

With Hollywood's increasingly watchful eye on the horizon, Bollywood should have become more cautious with its high-profile infringements. Yet, in 2007, Eros International, in conjunction with K Sera Sera Entertainment, produced the fourth highest grossing Bollywood film of the year: *PARTNER*.<sup>162</sup> *PARTNER* is the story of a love guru approached by a friend for advice on how to romance the girl he loves. The film bears striking similarities to the Will Smith starred

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<sup>156</sup> Hollywood films have an audience of about 2.6 billion worldwide, whereas the Bollywood global audience is estimated to be at about 3 billion. *Bollywood vs. Hollywood*, *supra* note 11.

<sup>157</sup> Carolyn Hyun-Kyung Kim, *Building the Korean Film Industry's Competitiveness: Abolish the Screen Quota and Subsidize the Film Industry*, 9 PAC. RIM L. & POL'Y J. 353, n.206 (2000).

<sup>158</sup> Anusha Subramanian, *Hollywood in Bollywood*, BUSINESS TODAY (Oct. 18, 2007), [http://businesstoday.digitaltoday.in/index.php?issueid=41&id=2178&option=com\\_content&task=view](http://businesstoday.digitaltoday.in/index.php?issueid=41&id=2178&option=com_content&task=view).

<sup>159</sup> *Id.* Although Bollywood has become increasingly profitable, its total revenue in 2006 of \$1.75 billion equaled just half of the revenue of Walt Disney that year. See Posting of Passionate Ashtu to Hub Pages, *Bollywood in Comparison with Hollywood* (January 2011), <http://hubpages.com/hub/Bollywood-giving-tough-competition-to-Hollywood>

<sup>160</sup> *Id.* Sony's first Indian venture, *SAAWARIYA*, released in 2007. Warner's first Indian film is due for release in 2008, titled *CHANDNI CHOWK TO CHINA*.

<sup>161</sup> Melwani, *supra* note 153.

<sup>162</sup> "Box Office Results Top Grosses by Decades and Years - 2007," International Business Overview Standard, <http://www.ibosnetwork.com/asp/topgrossersbyyear.asp?year=2007> (last visited Feb. 28, 2009).

HITCH (2005). Sony, holding the copyright to HITCH,<sup>163</sup> alleged PARTNER was a direct lift from its film and threatened a \$30 million suit against Eros and K Sera Sera in either the U.S. or the U.K.<sup>164</sup> A rare instance of a Hollywood-inspired Bollywood product being threatened with legal action,<sup>165</sup> the possibility of such high-stakes litigation came as an unpleasant surprise to the industry. Since this widely accepted practice of remaking Hollywood films had not been called into question by legal repercussions for decades, Bollywood producers had little reason to think Hollywood would bring suit now. Regardless of whether they thought Hollywood failed to notice, did not care, or had acquiesced to the practice, the Indian film industry was taken aback by the first threat of litigation from a Hollywood studio.

Now investing in Bollywood films, Sony is potentially seeking to remake its Hollywood success stories in Hindi, adapted for a Bollywood audience—essentially, what Bollywood has done for years without legal permission.<sup>166</sup> It is no surprise, then, that Sony would be disgruntled by filmmakers producing unauthorized derivative works and cashing in on Sony's rights without appropriately compensating the production house. Though the threat of the suit made headlines throughout the Indian film industry, Sony did not actually follow through with the claim.<sup>167</sup> Trade-insiders feel Sony may have been reluctant to file suit since the company is now in India, making and distributing films. As such, it may not want to take on the very industry with which it is fortifying a relationship.<sup>168</sup> Had the suit gone forward with Sony being awarded the full amount of damages it was seeking, the makers and distributors of PARTNER would have been liable for a sum over twice PARTNER's net gross.<sup>169</sup> With the threat of

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<sup>163</sup> Sony owns Columbia Pictures and therefore the rights to HITCH. Nancy J. Perry, *Will Sony make it in Hollywood*, CNN NEWS (Sept. 9, 1991), [http://money.cnn.com/magazines/fortune/fortune\\_archive/1991/09/09/75453/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/1991/09/09/75453/index.htm).

<sup>164</sup> Eros and K Sera Sera are both registered entities in the U.S. and the U.K. Sonali Krishna, *Partner May Face \$30 mn Hitch*, THE ECONOMIC TIMES (Aug. 8, 2007), [http://economictimes.indiatimes.com/Infotech/Partner\\_may\\_face\\_30\\_mn\\_Hitch/articleshow/2264000.cms](http://economictimes.indiatimes.com/Infotech/Partner_may_face_30_mn_Hitch/articleshow/2264000.cms).

<sup>165</sup> Shaikh Ayaz, *Steal Factory*, HINDUSTAN TIMES (Aug. 22, 2007), <http://www.hindustantimes.com/StoryPage/StoryPage.aspx?id=318a6d77-8a28-40cb-95c059545d4d9928&&Headline=Steal+Factory>.

<sup>166</sup> Krishna, *supra* note 164.

<sup>167</sup> Reportedly, Ronnie Screwvala, head of UTV (an Indian production and distribution company) intervened and convinced Sony to not pursue litigation. Ayaz, *supra* note 165.

<sup>168</sup> Gagliano, *supra* note 14.

<sup>169</sup> PARTNER's net gross was approximately Rs. 61 crores, equal to about \$13.5 million. Box Office 2007, [BOXOFFICEINDIA.COM](http://BOXOFFICEINDIA.COM),

the Sony suit dissipating, the question remained whether this was an isolated occurrence or if Hollywood was becoming serious about protecting its intellectual property interests in India.

In August 2008, Hollywood gave an answer. As the eagerly anticipated Bollywood film, *HARI PUTTAR: A COMEDY OF TERRORS*, was nearing worldwide release, Warner Bros. filed suit against the producers of the film, claiming the title was too similar to the \$14 billion *HARRY POTTER* brand, the film rights of which are owned by Warner Bros.<sup>170</sup> The protagonist in *HARI PUTTAR* has no magical powers, is not orphaned, and does not attend a magical school of wizardry, unlike the title character in J.K. Rowling's work.<sup>171</sup> Warner Bros. thus decided not to pursue a claim of copyright infringement over the plot of the film and instead sought a permanent injunction to restrain infringement and dilution of their trademarks in the *HARRY POTTER* brand name, as well as damages calculated by profits the filmmaker and co-parties earned from improper use of the trademarked title.<sup>172</sup> Mirchi Movies, the production house for *HARI PUTTAR*, argued that "Hari," a common Indian name particularly for Punjabis,<sup>173</sup> and "puttar," which means "son" in Punjabi, was a title arrived at by entirely independent and legitimate means.<sup>174</sup> Though the suit, which pushed back the release date of *HARI PUTTAR* until a verdict was announced,<sup>175</sup> was actually a claim over trademark rather than copyright infringement, it affirmed Hollywood producers' intention to enforce their intellectual property rights in Bollywood.

In ruling in favor of the defendants, Delhi High Court Judge Reva Khetrpal based her decision largely on Warner Bros.' delay in filing the suit, their suppression of facts, and the unlikelihood that target

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<http://www.boxofficeindia.com/showProd.php?itemCat=214&catName=MjAwNw==> (last visited Feb. 20, 2009).

<sup>170</sup> Rhys Blakely, *Hari Puttar? It's a Wizard Idea, but Hollywood Claims It's a Rip Off*, *THE TIMES* (Aug. 25, 2008), [http://entertainment.timesonline.co.uk/tol/arts\\_and\\_entertainment/film/bollywood/article4608340.ece](http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/film/bollywood/article4608340.ece).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* .See also Divya Subramanian, *India: "Hari Puttar" Succeeds: Warner' Injunction Plea in Vain*, *Mondaq Intellectual Property* (Oct. 20, 2008), <http://www.mondaq.com/article.asp?articleid=68032>.

<sup>173</sup> The film was based on a Punjabi family.

<sup>174</sup> *Id.* Mirchi Movies, the production house of *HARI PUTTAR*, bought the film from London-based director Harinder Kohli. He wanted "Hari" as the name of the protagonist because it's part of his name. Since he is Punjabi, "puttar," meaning "son," was included in the title.

<sup>175</sup> *HARI PUTTAR* was due to be released in India on September 12, but did not release until September 26 because of the pending lawsuit. *Warner Bros Lose Hari Puttar Case*, *BBC NEWS* (Sept. 22, 2008), [http://news.bbc.co.uk/2/hi/south\\_asia/7628948.stm](http://news.bbc.co.uk/2/hi/south_asia/7628948.stm).

audiences would experience any initial interest confusion between the two titles.<sup>176</sup> The court noted that plaintiffs had prior notification of Mirchi Movies' use of this title from 2005,<sup>177</sup> and did not pursue litigation at that time, nor when they had notice that defendant's were attempting to register their film with the MPAA in 2007<sup>178</sup>; instead, they watched "the defendants' progress step by step towards [the defendants'] goal... their belated attempt to trip up the defendants at the finishing line is a course of conduct which... cannot be countenanced by a Court bound to take into consideration legal as well as equitable considerations."<sup>179</sup>

This case represents cultural arguments set forth by Indian filmmakers in another sense; "Hari Puttar" is an Indian cultural name, and the court accepted the name as different from Harry Potter. Since it does not address cultural elements in the plot of a remade film, however, it is difficult to predict whether similar cultural arguments made on behalf of a filmmaker remaking a Hollywood film with Indian cultural elements would be accepted. Though unsuccessful and not a claim over the plot of a film, the Warner Bros. suit hit home in the Indian film industry more than any previous intellectual property related litigation had,<sup>180</sup> and at the very least alerted industry leaders that intellectual property infringements, actual or potential, were under

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<sup>176</sup> Warner Bros. Entm't Inc. v. Harinder Kohli and Ors. [IA No.9600/2008 in CS(OS) 1607/2008], <http://delhicourts.nic.in/Sep08/WARNER%20BROS%20ENTERTAINMENT%20VS.%20HARINDER%20KOHLI.pdf>.

<sup>177</sup> Anil Sinanan, *Hari Puttar Free to Cast its Spell at Indian Box-Office*, TIMES BOLLYWOOD (Sept. 25, 2008), [http://entertainment.timesonline.co.uk/tol/arts\\_and\\_entertainment/film/bollywood/article4820747.ece](http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/film/bollywood/article4820747.ece).

<sup>178</sup> Warner Bros., *supra* note 176, at ¶ 24.

<sup>179</sup> *Id.* at ¶ 36. Since Warner Bros. failed to take action when initially notified of the title and again when Mirchi Movies attempted to register the title with the MPAA, they timed the lawsuit when substantial effort and monetary investment had gone into the development and promotion of the film. In paragraph 30 of the opinion, the court relied on the doctrine of acquiescence and acknowledged principles in law establishing that if the plaintiffs knowingly stood by and watched as the defendants enriched their business with money and labor, then the plaintiffs "would be estopped by their acquiescence from claiming equitable relief." While the court noted that delay by itself may not be grounds for refusing injunction, it was highly relevant in a scenario such as this, and is always fatal where equitable relief is concerned. *Id.* at ¶ 30 & 35.

<sup>180</sup> Sinanan, *supra* note 177 (explaining that in 2003, Barbara Taylor Bradford brought a suit against the Indian TV serial "Karisma- A Miracle of Destiny" for allegedly ripping off her best selling novel *A Woman of Substance*). Though both plot lines were strikingly similar in that they were about a woman from servant status to the head of an international corporation, the case was dismissed and did not ring the necessary warning bells in Bollywood.

close scrutiny.

#### D. *Viability of a Fair Use Defense by Bollywood*

Having noted examples of potentially infringing films, arguments why they may not be infringing, and the litigation that has occurred over intellectual property interests of the two film industries, I will now address the possibility that Bollywood remakes may constitute fair use. The U.S. Supreme Court has noted that, in certain cases, enough transformation of the original work may be considered fair use.<sup>181</sup> At least in the U.S., Indian filmmakers may attempt to argue that the process of Indianizing a film is enough of a transformation to render the subsequent work fair use. Transformation has been largely been understood to apply primarily to parodies and adding substantial originality to the subsequent work.<sup>182</sup> Depending on how much original work is present in the Bollywood remakes, these filmmakers may have a viable fair use defense. However, fair use is normally applied on a case-by-case basis, and considerable weight is given to the purpose of the use.<sup>183</sup> Bollywood films are a commercial use and do not constitute a parody; this is a heavy factor against a finding of fair use.<sup>184</sup> Bollywood filmmakers will thus likely have difficulty asserting the fair use defense under current doctrine, despite their transformation of the original work, because their films are commercial in nature.

#### V. RESULTS OF LITIGATION

Since the threat of litigation over Bollywood copies of Hollywood films has only come about within the last two years,<sup>185</sup> there is no legal precedent in India for addressing how “substantially similar”<sup>186</sup> a Bollywood film has to be to its foreign source of inspiration for a

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<sup>181</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). In *Harper & Row Publishers, Inc.*, the Court cites the most relevant factors in determining whether appropriation of protected material is fair use as: the purpose and character of the use; the nature of the copyrighted work; the substantiality of the portion used in relation to the copyrighted work as a whole; and the effect on the potential market for or value of the copyrighted work. *Harper & Row, Publishers Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

<sup>182</sup> *See Campbell*, 510 U.S. 569 (1994).

<sup>183</sup> David Nimmer, “*Fairest of Them All*” and Other Fairy Tales of Fair Use, 66 *LAW & CONTEMP. PROBS.* 263 (2003).

<sup>184</sup> *Id.* This is so unless the work appropriating material from the original is a deemed to be a parody. As serious commercial ventures, Bollywood films will not qualify as parodies.

<sup>185</sup> See discussion in Part III about Sony’s threat to pursue a lawsuit against PARTNER in 2007.

<sup>186</sup> This is the legal test that Indian courts apply to determine whether copying has occurred. *See R.G. Anand v. Delux Films*, *supra* note 51.

ruling to declare it an infringing copy; the only litigated case in India of a Hollywood studio claiming infringement by a Bollywood film is an unsuccessful one over a movie title, not content.<sup>187</sup> With what turned out to be an empty threat of a lawsuit by Sony against one of the most successful Bollywood films of 2007,<sup>188</sup> and the dismissal of the first lawsuit to be brought by a Hollywood studio claiming protection of their rights against Bollywood's plagiarism in India,<sup>189</sup> does Bollywood have enough incentive to cease the production of unauthorized Hollywood remakes,<sup>190</sup> or does it have little reason to relinquish a well-established practice a definitive court ruling against it?<sup>191</sup>

If Bollywood continues to produce unauthorized remakes of copyrighted work, it is likely going to be confronted with an increasing amount of litigation. The emergence of the internet and better global communications make Bollywood's infringements more visible,<sup>192</sup> and now India's economic growth, Bollywood's soaring profitability, and overlapping audiences provide additional incentives to litigate for foreign entities whose intellectual property rights have been infringed by the Indian entertainment industry. The presence of major Hollywood studios in India's film capital makes close monitoring of Bollywood cinema possible. Further, with many Indian lawyers of the belief that the *Warner Bros.* case was decided incorrectly<sup>193</sup> and international attention focused on Bollywood's copyright infringement, future litigation may or may not yield such favorable outcomes for

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<sup>187</sup> Warner Bros. v. Kohli, et al., *supra* note 176.

<sup>188</sup> See Ayaz, *supra* note 165.

<sup>189</sup> Divya Subramanian, *supra* note 172.

<sup>190</sup> Although Hollywood studios have not successfully litigated claims against Bollywood, Indian courts have recently recognized copyright infringement and required the payment of damages when Bollywood films misappropriate work of Indian authors without giving due credit. See *Bollywood Producer Pays \$5M for Copyright Infringement*, BILLBOARD.BIZ (Apr. 14, 2008), [http://www.billboard.biz/bbbiz/content\\_display/industry/news/e3i841feb193b81360fcd7b5de73a7250](http://www.billboard.biz/bbbiz/content_display/industry/news/e3i841feb193b81360fcd7b5de73a7250)

<sup>191</sup> See Guha, *supra* note 6, at 232 ("Plagiarism is the norm in Bollywood with countless Hindi films following plotlines from the latest Hollywood blockbusters.").

<sup>192</sup> Desai, *supra* note 13, at 259.

<sup>193</sup> In a poll conducted by SPICYIP.COM, the vast majority of consumers thought *Hari Puttar* to be reminiscent of HARRY POTTER. Indian IP lawyers have also expressed their disagreement with the court's reasoning. Sumathi Chandrashekar, *Warner Loses the Hari Puttar Plot*, SPICY IP (Sept. 23, 2008), <http://spicyipindia.blogspot.com/2008/09/warner-loses-hari-puttar-plot.html>; Also, Mirchi Movies had to initially (even before the threat of lawsuit) deny claims that the movies had any similarities and that the title was based on the Warner Bros. film series, indicating they anticipated confusion. Divya Subramanian, *supra* note 172.



Indian film companies.

A. *Bollywood's Response*

Recent developments within the Bollywood film industry reflect the effect of this litigation on industry practice. Bollywood producers Nikhil Advani and Mukesh Talreja of Orion Pictures have legally obtained the rights to remake Warner Bros.' 2005 blockbuster WEDDING CRASHERS.<sup>194</sup> This marks the first time a Bollywood production company has legally obtained rights to remake a Hollywood film,<sup>195</sup> indicating the impact the threat of potential litigation has had within the Indian film industry. With the current rates of profitability for Bollywood films, Indian filmmakers have found it preferable to be safe rather than potentially face multi-million dollar lawsuits.

Now, with Hollywood studios setting up offices in Mumbai, collaboration and legally obtaining rights has become easier for Bollywood filmmakers than they were previously.<sup>196</sup> In the case of the WEDDING CRASHERS remake, the Orion producers did not have to pay any money for the rights; rather, Warner is reaping its benefits by retaining presentation and worldwide distribution rights to the film.<sup>197</sup> Indian studios may thus obtain licenses not solely out of the fear of litigation, but in order to build and maintain relations with U.S. studios.

Other Bollywood filmmakers have similarly played it safe. Producer Ravi Chopra acknowledged that his forthcoming film BANDA YEH BINDAAS HAI is inspired by Hollywood's 1992 film MY COUSIN VINNY.<sup>198</sup> Though he claims his film barely resembles the original, Chopra "went out of [his] way to acquire the original's rights" and would "advise other Bollywood directors to do the same before remaking a film."<sup>199</sup> The rights were reportedly obtained for less than one percent of the total budget of MY COUSIN VINNY, and purchasing them was worthwhile for Chopra so no one would "point a finger" at

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<sup>194</sup> *Copyright Makes Copying Hollywood*, Rediff iShare, <http://ishare.rediff.com/filevideo-Copyright%20makes%20copying%20Hollywood-id-191171.php>; <http://bollywoodbuzz.in/its-official-wedding-crashers-to-be-remade-in-bollywood/> (last visited Feb. 20, 2009).

<sup>195</sup> *Id.*

<sup>196</sup> Dhillon, *supra* note 190.

<sup>197</sup> *See It's Official: Wedding Crashers to Be Remade in Bollywood*, Bollywood Buzz (May 7, 2008), <http://bollywoodbuzz.in/its-official-wedding-crashers-to-be-remade-in-bollywood/>.

<sup>198</sup> *Rights for Govinda Film Legally Obtained*, Radiosargasm (Mar. 10, 2008), <http://www.radiosargam.com/films/archives/11197/rights-for-govinda-film-legally-obtained.html>.

<sup>199</sup> *Id.*

his production house.<sup>200</sup>

Filmmakers are seemingly less and less likely to risk lawsuits, even if that means shelving their projects. Accomplished Bollywood filmmaker Vishal Bhardwaj dropped the idea of adapting the play *THE SAME TIME NEXT YEAR* into a film when the right holders quoted too high a price for assigning film rights.<sup>201</sup>

These few incidents may be isolated examples of Bollywood filmmakers attempting to remake films the legally safe way. *DOSTANA*, a successful 2008 Bollywood film, is reportedly a remake of the 2007 Adam Sandler starrer *I NOW PRONOUNCE YOU CHUCK AND LARRY*.<sup>202</sup> There have been no reports that Karan Johar, the producer of the film, made efforts to obtain any remake rights from Universal Pictures. The film opened among the top 20 films in the US in terms of gross revenue.<sup>203</sup>

Another, even more high-profile example is that of *GHAJINI* (2008), reportedly the Bollywood remake of the Academy Award winning Hollywood film *MEMENTO* (2000).<sup>204</sup> The blockbuster was the highest grossing Bollywood film of 2008,<sup>205</sup> yet no efforts were made to obtain remake rights from the producers of *MEMENTO*. In fact, the star of *GHAJINI* dismissed the idea that the film should be considered a remake of *MEMENTO*, but admitted that he felt *GHAJINI* was inspired by *MEMENTO*.<sup>206</sup> Other reviews have indicated that *GHAJINI*'s storyline, while harboring substantial similarities to *MEMENTO*, including the vengeful protagonist suffering from anterograde amnesia who tattoos himself and keeps polaroids to aid his memory, the director of the film has also added in a full romantic narrative of how the protagonist met and fell in love with the murder victim, replete with songs and

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<sup>200</sup> *Id.*

<sup>201</sup> See Ayaz, *supra* note 165.

<sup>202</sup> Nita Jatar Kulkarni, *Dostana Review*, NOWRUNNING.COM, (Nov. 14 2008), <http://www.nowrunning.com/movie/5202/bollywood.hindi/dostana/1905/review.htm>.

<sup>203</sup> Rotten Tomatoes, *Box Office History*, <http://www.rottentomatoes.com/m/10010229-dostana/numbers.php> (last visited Sept. 17, 2009).

<sup>204</sup> Rajiv Masand, *Masand's Verdict: Ghajini is Dumb and Celebrates It*, IBN LIVE (Dec. 26, 2008), <http://ibnlive.in.com/news/masands-verdict-ghajini-is-dumb-and-celebrates-it/81344-8.html>.

<sup>205</sup> Box Office 2008, BOX OFFICE INDIA, <http://www.boxofficeindia.com/showProd.php?itemCat=215&catName=MjAwOA==> (last visited Sept. 17, 2009).

<sup>206</sup> '*Ghajini*' is Not a Remake of 'Memento': Aamir, ApunkaChoice, (July 2, 2007), <http://www.apunkachoice.com/scoop/interviews/20070702-0.html>.

dances.<sup>207</sup> The romantic narrative and song sequences are elements of Indianization, discussed in Part II, that Bollywood filmmakers often use to justify why their remake should be considered an original product, distinct from the film used as the source of inspiration. Thus, while some filmmakers have decided to go the precautionary route, many filmmakers still continue the decades-old practice of adopting successful Hollywood ventures for the Indian audience, and the threat of legal repercussions has done little to deter them.

### B. *What Can Be Done About Past Infringements?*

While Bollywood appears to have finally begun remaking foreign films the legal way, what about Hollywood production houses that take notice of past infringements of their films? What would prevent them from bringing suit in Indian, and U.S., courts for past infringements?

The Statute of Limitations (“SoL”)<sup>208</sup> for bringing forth a copyright infringement claim is three years in both the U.S. and India.<sup>209</sup> <sup>210</sup> Since these unofficial remakes have been acknowledged readily within the industry, and the infringing films have been high profile, mainstream Bollywood projects marketed and released in the United States, the SoL for most of these potentially infringing films will most likely have expired. Even if the SoL has not yet expired, U.S. courts and Indian courts recognize some form of the equitable defense of laches,<sup>211</sup> which may prevent the copyright owner from bringing suit if the owner has unreasonably delayed action to the point where the defendant can claim a reliance interest and change in position because

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<sup>207</sup> Raja Sen, *Hum Do, Humaare (Memento)* (Dec. 24, 2008), <http://www.rediff.com/movies/2008/dec/24hum-do-humaare-memento.htm>.

<sup>208</sup> SoL refers to the statutory time limit one has to bring forth legal proceedings after an infringement has occurred. These time limits are designed to prevent plaintiffs from sitting on claims for too long of a period. *Statute of Limitations in Copyright Law*, PLAGIARISMTODAY (Mar. 30, 2006), <http://www.plagiarismtoday.com/2006/03/30/statute-of-limitations-in-copyright-law/>.

<sup>209</sup> *Id.*, The Indian Limitation Act of 1963, which provides statutory limitation periods for bringing forth legal claims provides a three year statute of limitation for all suits for which it does not specifically prescribe a period. Copyright Infringement is one such category. The Limitation Act, div. I, part X (India 1963), available at <http://www.vakilno1.com/bareacts/limitationact/limitationact.htm>.

<sup>210</sup> The period begins to run when a reasonable person would, by exercising ordinary prudence, be able to find out their copyright was being infringed. *Statute of Limitations*, *supra* note 208.

<sup>211</sup> Guha, *supra* note 6, at 230; Judge Khetrpal relied heavily on this defense and the changed position of the defendants in writing the court’s opinion in the *Hari Puttar* case. *Warner Bros. Entm’t Inc. v. Harinder Kohli and Ors.*, *supra* note 176.

of the delay.<sup>212</sup>

### C. *Why Litigation is not the Optimal Response*

The examples of WEDDING CRASHERS and MY COUSIN VINNY suggest a greater collaboration between the two largest film industries of the world, and demonstrate willingness on behalf of both parties to agree on remake terms that profit both industries. As U.S. studios are developing ventures with Indian filmmakers, they may not want to stifle relationships with these filmmakers by pursuing litigation.<sup>213</sup> In reference to the threatened suit by Sony against PARTNER, the editor of the trade publication Film Information<sup>214</sup> stated “I think Sony decided against it in the end probably because they probably didn’t want to antagonize people they need long-term relationships with.”

Not only are Hollywood studios funding and creating Indian film ventures, but Indian companies have also begun to pour into Hollywood mainstream cinema. The entertainment branch of India-based corporate giant Reliance closed a \$500 million deal with DreamWorks in September 2008, allowing DreamWorks to split from Paramount Pictures and form an independent studio.<sup>215</sup> Moreover, India-based distribution company UTV teamed up with 20th Century Fox to co-produce M Night Shyamalan’s THE HAPPENING (2008).<sup>216</sup> These recent developments signal increased cooperation between the two industries, a dynamic calling for a workable solution of obtaining remake rights in lieu of litigation.

Furthermore, I have discussed the differing views of both industries with regard to their intellectual property interests. While Hollywood studios may consider Bollywood remakes infringing material, many Bollywood filmmakers consider their works to possess enough

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<sup>212</sup> Since it is an equitable defense, it is generally not permissible where the infringement has been found to be willful and the defendant is aware that her conduct constitutes copyright infringement. See GABRIEL PERLE, MARK A. FISHER & JOHN TAYLOR WILLIAMS, PERLE & WILLIAMS ON PUBLISHING LAW 20-27 (Aspen Publishers 1995).

<sup>213</sup> Gagliano, *supra* note 14.

<sup>214</sup> “Film Information” is a Bollywood industry trade publication. Dhillon, *supra* note 190.

<sup>215</sup> Anne Thompson & Tatiana Siegel, *DreamWorks, Reliance Close Deal: Pact Completes Paramount Exit*, VARIETY (Sept. 19, 2008), <http://www.variety.com/VR1117992505.html>; The deal, having been contingent on DreamWorks raising \$700 million on its own, has run into trouble because of the credit crisis and DreamWorks’ subsequent inability to secure enough funds. Sharon Waxman, *Universal-DreamWorks Distribution Deal Falls Apart*, THE WRAP (Feb. 6, 2009), <http://www.thewrap.com/article/1296>.

<sup>216</sup> Patrick Frater, *UTV Sees Shyamalan’s ‘Happening’*, VARIETY (Mar. 14, 2007), <http://www.varietyasiaonline.com/content/view/951/53/>;

originality due to the Indian elements they contribute. Though Hollywood filmmakers may have a legitimate basis for litigation, the outcome of such litigation may result in one culture's interpretation of intellectual property rights receiving favor over another.

Even if Hollywood studios were to pursue litigation against Bollywood, they may not receive the favorable remedies they hope for. Monetary recovery for copyright infringement is based on the actual damages to the original copyright holder,<sup>217</sup> or in the alternative, if damages cannot be computed and the original copyright holder can show irreparable harm, an injunction may be issued against the defendant to bar distribution of the defendant's work.<sup>218</sup> As I will detail in the next section, Hollywood filmmakers will have a difficult time proving damages to their original work, largely due to the application of the Indianization defense.

## VI. WHY LITIGATION WILL NOT YIELD FAVORABLE OUTCOMES FOR HOLLYWOOD

As discussed in Part II, Indianization involves adding a number of Indian elements to produce a new film for the Indian audience. Taken in the aggregate, Bollywood filmmakers argue this produces a different product from the original work. Hollywood executives are understandably frustrated by the position that liability should be avoided when Bollywood filmmakers Indianize a film.<sup>219</sup> The possibility of foreign filmmakers being able to appropriate certain expressive elements from original films but avoid liability for copyright infringement by making their films representative of a different culture is unnerving to proponents of protecting original creative expression.

Both sides agree that some copying and taking is occurring; the disagreement lies in whether what is added and transformed in the Bollywood film is sufficient to render it an inherently different product and allow the Bollywood filmmaker to avoid punitive liability for any copying. To Hollywood, it does not seem fair to allow this practice to

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<sup>217</sup> MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.01 (Matthew Bender, Rev. Ed. 2011).

<sup>218</sup> *Id.* at § 14.06.

<sup>219</sup> Richard Taylor, vice president of public affairs at the Motion Picture Association of America, does not consider the addition of song and dance sequences as a credible method of avoiding liability for infringement. Taylor states that a film's copyright can be tampered with in multiple ways, including adding musical numbers to a script that inspires the making of another film. Chhabra, *supra* note 1.

continue, particularly where Hollywood studios themselves are now interested in remaking their successful films for Indian audiences. For Bollywood, it does not seem fair to face the possibility of having to pay hefty damages for a work to which the filmmakers contributed effort and creativity. However, since no case law has actually determined for what damages, if any, Bollywood filmmakers would be liable, I argue that ascertaining actual damages would be difficult, if not impossible, for Hollywood filmmakers, thus rendering chances of recovery minimal.

As detailed in Part I, the current standard for copyright infringement in US and Indian courts requires that the infringing copy take either a substantial or significant amount from the original work so as to render the two works substantially similar, and that an ordinary trier of fact would conclude the second work to be a copy of the first. Minor differences do not defeat claims of infringement. The addition of song and dance sequences serves to merely surround the infringing material, rather than treat the material differently. For Indian filmmakers copying significant and varied elements such as character development, as noted in examples listed in Part II, a Hollywood studio would have little trouble establishing that the copy is substantial with integral expressive portions taken.

Assuming Hollywood studios successfully prove copyright infringement by Bollywood filmmakers, they would have to demonstrate market injury to their copyrighted work in order to collect damages.<sup>220</sup> The awarded damages would represent the extent to which the infringement has injured or destroyed the market value of the copyrighted work at the time of infringement.<sup>221</sup> The Hollywood producers may go after the Bollywood defendants' profits, but only to the extent that such profits have not already been taken into account in computing actual damages the Hollywood films suffered.<sup>222</sup> To determine how much a Bollywood remake actually damages the Hollywood original, the commercial value of the process of Indianization needs to be determined.

In remaking Hollywood films for Indian audiences, filmmakers cast Bollywood actors, alter the narrative, create song and dance sequences, and add other Indian cultural elements to complete the Indianization of the film.<sup>223</sup> Each of these elements adds something to

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<sup>220</sup> NIMMER, *supra* note 217, at § 14.02(A).

<sup>221</sup> *Id.*; Design v. K-Mart Apparel Corp., 13 F.3d 559, 563 (2d Cir. 1994).

<sup>222</sup> NIMMER, *supra* note 217, at § 14.01 (A).

<sup>223</sup> See Part II for a discussion on the process of Indianizing a film.

the commercial value of the film. From the Indian filmmaker's perspective, the addition of Indian elements requires creativity and adds independent value to the film irrespective of the plot. The copied plot of a Hollywood film, hence, does not account for the entire or even significant portion of the success of a Bollywood film. Original Indianized elements, such as a Bollywood star cast and the song and dance sequences, are arguably more important to the success of a Bollywood film than the storyline. Both of these elements have been shown to be significant contributors to films' box office revenue.

#### A. *Bollywood star casts pays off*

As in Hollywood, casting a popular star remains the best way of guaranteeing initial box office returns for a Bollywood film.<sup>224</sup> Kishore Lulla, chief executive of Bollywood's largest overseas distributor, Eros International, indicates that a prominent Bollywood celebrity "guarantees the first weekend box office, and it is this business which decides all the other revenue streams. Without a star it's too risky."<sup>225</sup> The largest film distribution companies in India will thus favor films with a prominent Bollywood star cast, comprised of celebrities with a proven box office success record, in deciding which films are likely to garner the most revenue.<sup>226</sup> Star salaries will typically constitute about 60 percent of a Bollywood film's production budget,<sup>227</sup> an investment willingly made to rope in names that will draw opening-weekend audiences.<sup>228</sup> Though not fool proof, having a successful Bollywood star in a project has been linked to at least initial box office returns and success, indicating the independent value a Bollywood star adds to the film.

#### B. *Music brings the people together-in cinema halls*

Bollywood cinema is perhaps most often recognized by its colorful

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<sup>224</sup> Moore, *supra* note 130, at 27; Anupama Chopra, *Flush with Cash, Bollywood Grows*, N.Y. TIMES (Aug. 24, 2008), <http://www.nytimes.com/2008/08/24/movies/24chop.html?pagewanted=print>.

<sup>225</sup> *Id.*

<sup>226</sup> In an interview I conducted with Bollywood producer Viveck Vaswani, he stated that casting the right celebrities will guarantee a distributor willing to provide a national opening.

<sup>227</sup> Shaikh Azizur Rahman, *Bollywood Falls Victim to Economic Slowdown*, THE NATIONAL (Nov. 16, 2008), <http://www.thenational.ae/article/20081116/FOREIGN/501981469/1041/NATIONAL>.

<sup>228</sup> Rohit Dave, *Bollywood in the US: The Movie Business's Most Prolific Producer Meets its Biggest Market*, (May 2007), [http://w4.stern.nyu.edu/emplibary/Rohit\\_Dave\\_honors\\_2007.pdf](http://w4.stern.nyu.edu/emplibary/Rohit_Dave_honors_2007.pdf) (also citing star power as a factor significantly influencing a Bollywood's film success in the United States).

song and dance sequences, another essential element to Bollywood box office success and one that must be added by Indian filmmakers when remaking any Hollywood venture. A Bollywood film's position at the top of the album charts is correlated with a very significant increase in total revenue for the film.<sup>229</sup> Film music accounts for nearly 80% of music sales in India.<sup>230</sup> Hindi films need songs to do well at the box office, and distribution companies have been known to pressure filmmakers to add more songs when the amount seems to be low in order to enhance prospects at the box office.<sup>231</sup> Marketing and promotions of films are done almost exclusively through the soundtrack, with 30-40% of soundtrack sales occurring before the release of a film and often strongly indicating audience interest in a film.<sup>232</sup>

As a result of the value song and dance numbers add to a film, audio companies vying for top production house projects are often willing to pay as much as 25% of a film's budget for music rights.<sup>233</sup> When adapting a Hollywood film for Indian audiences, restructuring the narrative to include such song sequences is imperative to the success of a Bollywood film and thus constitutes a considerable degree of original and creative effort on the part of the film director and creative team, including composers, choreographers, set designers, and costume designers. Such original Indian elements add significant commercial value to a film in the aggregate.

The argument, then, that the Bollywood product is inherently different from the Hollywood source of inspiration is thereby an understandable source of contention between Hollywood filmmakers wanting to enforce their intellectual property rights and Bollywood filmmakers wanting to retain rights in their own creative contributions to cinema. As noted in Part II, successful Bollywood films have repeat audiences. These audiences are likely not coming back for the story line of the film, since they already would be familiar with it after watching the film for the first time. The cinemagoers are likely

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<sup>229</sup> *Id.* at 12. According to an analysis, a Bollywood film's position at first place on the album charts predicts a gain of over \$2 million at the US Box office alone.

<sup>230</sup> GANTI, *supra* note 83, at 78.

<sup>231</sup> *Id.* Indian filmmaker Ram Gopal Verma admitted to having been "lured" into putting songs in three of his films because of "the publicity the songs gave [him] on the television channels." Subhash K. Jha, *No More Songs For Ran Gopal Varma*, Rediff (Feb. 15, 2003), <http://www.rediff.com/movies/2003/feb/15ram.htm>. Audio companies offered him significant sums of money for music soundtracks. *Id.*

<sup>232</sup> GANTI, *supra* note 83, at 85.

<sup>233</sup> *Id.*



returning to see the Bollywood spectacle—their favorite Indian celebrities dancing to popular Indian music, and the entire Bollywood treatment of the plotline. If this is the case, then the supposedly infringed plot line is contributing very little to the entire success of the Bollywood venture, and the actual market harm to the Hollywood film would be difficult to show.

Furthermore, since major Hollywood studios tend to release their films worldwide, Indian audiences are offered the Hollywood product well before the film is remade into the Bollywood version. While India has risen into the top 15 markets for Hollywood films,<sup>234</sup> domestic Bollywood cinema remains by far the most popular and profitable in India.<sup>235</sup> Thus, Indian audiences seemingly tend to prefer the Bollywood remakes to the Hollywood originals, since Hollywood films do not gross nearly as much as Bollywood films do in India.<sup>236</sup> Though the Hollywood product is available before the Bollywood product, the difference in box office collections demonstrates that audiences in India prefer the latter.

As noted in Part III, Sony and other Hollywood studios are seeking to remake their own successful Hollywood ventures for Indian audiences, which is another reason why these studios want to pursue litigation against unauthorized remakes.<sup>237</sup> Their desire to remake Hollywood films demonstrates their realization of how much more profitable the Indianized Bollywood product is compared to the Hollywood original. Having to Indianize their own product to yield desired profits, these studios are conceding in effect the very little market harm that occurs to the Hollywood original by a Bollywood remake.

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<sup>234</sup> Subramanian, *supra* note 16.

<sup>235</sup> An analysis of the top earning films every year on [BoxOfficeIndia.com](http://www.boxofficeindia.com) will show that Bollywood films are consistently the top earners. An example of an early 2011 earnings chart demonstrates this: <http://www.boxofficeindia.com/cpages.php?pageName=earnings>. *FAST AND THE FURIOUS 5* is considered to be a major success from Hollywood in India, and expected to only earn about Rs. 12 crore (approximately \$2.6 million), (*Fast & Furious 5 Is First Major Hollywood Success Of 2011*, BOX OFFICE INDIA (May 11, 2011), [http://www.boxofficeindia.com/boxnewsdetail.php?page=shownews&articleid=2872&nCat=box\\_office\\_news](http://www.boxofficeindia.com/boxnewsdetail.php?page=shownews&articleid=2872&nCat=box_office_news)) whereas the top ten films in India in 2010 earned anywhere from Rs. 40 - 140 crore (\$9 million-\$31 million). Box Office 2010, BOX OFFICE INDIA, <http://www.boxofficeindia.com/showProd.php?itemCat=318&catName=MjAxMA==> (last visited May 11, 2011).

<sup>236</sup> The immensely successful *INDIANA JONES AND THE KINGDOM OF THE CRYSTAL SKULL* grossed nearly \$800,000 million worldwide, but grossed only \$3.5 million in India. *Indiana Jones and the Kingdom of the Crystal Skull*, BOX OFFICE MOJO (last updated Jan. 4, 2009) <http://www.boxofficemojo.com/movies/?page=intl&id=indianajones4.htm>. These collections wane in comparison to figures of the box office collections of successful Hollywood ventures.

<sup>237</sup> See *infra* Part III.

Therefore, because the Indianized elements contribute significantly to the commercial value of a film, and because the Hollywood product is not as profitable in the same market that Bollywood targets, showing actual damages will be difficult for Hollywood filmmakers. Absent a showing of market harm to the Hollywood original, damages may be nominal, and litigation, while potentially justified from a moral rights perspective that protected story-lines should not be reproduced without authorization, may yield little remedy for Hollywood studios seeking to enforce their intellectual property interests.

While other scholars have argued that Bollywood should shape up and begin to purchase rights to remake films or face more litigation by Hollywood,<sup>238</sup> for the foregoing reasons I argue that Hollywood's attempts to pursue litigation and efforts to recover damages would likely prove futile. The difference in box office success between Hollywood and Bollywood films in India, the lack of demonstrable harm to Hollywood films, and the profitability of the Indianized elements of films would appear to undercut any claims of actual damages Bollywood remakes pose to Hollywood cinema. Unless TRIPS begins to define foreign cultural remakes of films as infringements, it is unlikely Hollywood producers will be able to recover damages by pointing solely to market harm for their product.

## VI. CONCLUSION

After decades of remaking Hollywood films without obtaining formal rights, Bollywood filmmakers have finally been subject to litigation or the threat thereof by Hollywood studios seeking to enforce their intellectual property rights against Bollywood. A number of factors have likely contributed to Hollywood's decision to file suit, including the rapid rise in the profitability of Bollywood films, India's fast-growing economy, and the increased overlap of audiences for Hollywood and Bollywood films. Positing that their remade films should be regarded as original products because of the creative work required to Indianize the remakes, many filmmakers in Bollywood do not perceive their practice of remaking foreign works as copyright infringement. Regardless of whether such argument would actually

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<sup>238</sup> See generally Rachana Desai, *Copyright Infringement in the Indian Film Industry*, 7 VAND. J. ENT. L. & PRAC. 259, 259-71 (2005) (arguing that Bollywood's practice of copying Hollywood plot lines constitutes copyright infringement); Timm Neu, *Bollywood is Coming! Copyright and Film Industry Issues regarding International Film Co-Productions Involving India*, 8 SAN DIEGO INT'L L.J. 123, 133 (2006); Jishnu Guha, *Time for India's Intellectual Property Regime to Grow Up*, 13 CARDOZO J. INT'L & COMP. L. 225, 232 (2005).

defeat claims of copyright infringement, the profitability of Bollywood films with Indianized elements has been demonstrated to be well beyond that of their Hollywood counterparts in India. This being the case, it will be difficult for Hollywood studios to demonstrate that their original films are suffering market injury because of the Bollywood remakes, as the Hollywood films are not even close to reaching the levels of success of Bollywood films in India. With actual damages difficult to show and likely being determined to be nominal, any efforts to litigate or collect profits from Bollywood films by Hollywood will likely prove futile.