

NOTE

Bollywood: The Unexpected Virtue of Copying Hollywood

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Introduction

The name itself suggests something treading the fine line between cinematic inspiration and a Frankensteinian creation gone wrong. Bollywood coined its name following Hollywood's success, minting the goldmine of California's neighborhood that had become synonymous with the domestic film industry.¹

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1. *Hollywood*, BRITANNICA, <https://www.britannica.com/place/Hollywood-California> [https://perma.cc/46B7-PDX4] (last visited Oct. 17, 2021).

But such a scathing criticism mistakenly presumes a strict dichotomy between the business of movies and the creative expression driving art in the first place. Borrowing material is truly at the heart of filmmaking, with some of America's most acclaimed directors economizing on their predecessor's original ideas. Repurposing undergoes a dangerous plot twist where budding talent shy away from production knowing that others will merely cut artistic corners without permission. Or perhaps the disincentive to create comes with the realization that anything that can be made has already been copyrighted.

The question then turns on Bollywood's inspiration from and use of Hollywood films considering artistic concerns bearing on copyright laws. Celebrated director Christopher Nolan, whose resumé spans masterpieces from *Following* (1998) to *The Dark Knight* (2008), is outspoken on the silver screen's future. But what are his thoughts on the fact that Bollywood's circus of a movie *Dhoom 3* (2013) robbed a key premise from Nolan's magical *The Prestige* (2006)? Surely, he must take seriously 2008's *Ghajini*, the Indian adaptation that permanently etched in ink the design and execution behind tattoo thriller *Memento* (2000).² The inquiry soon becomes less inductive and more rhetorical. Bollywood's adaptations of Hollywood films should not justify copyright infringement suits where the inspired movies reform Indian and American cinema alike, despite fears surrounding intellectual property (IP).

The Bollywood film industry is a living ecosystem, teeming with sophisticated production houses that work with all members of the film project to place the original idea on the silver screen. The word "original" takes on new meaning as the producer ideally secures an agreement with the author whose work is at the heart of the new film, transferring ownership rights to the producer.³ The distributors charged with exhibiting the film on theatrical and streaming platforms further showcase the gross revenue numbers underlying the paramount significance of ensuring justice in film.⁴ Supplementing this data are the movies themselves, such that Bollywood's adaption of acclaimed films like Charlie Chaplin's *The Adventurer* (1917) and Korea's *Oldboy* (2003) warrant a reason to share this expression of ideas more readily.⁵ That *Oldboy* falls under world cinema proves the democratization of streamlining collaborative moviemaking, especially considering the internationalization of audiences for Indian cinema.⁶ The complications arising from this global trend follow numerous propositions

2. Nandini Modi, *Hollywood v. Bollywood: Copyright Infringement*, RAJIV GANDHI NATIONAL UNIV. L. FIN. & MERCANTILE L. REV. BLOG (June 26, 2021), <https://www.rfmlr.com/post/hollywood-v-bollywood-copyright-infringement> [<https://perma.cc/GV9M-ZCKG>].

3. Ghanashyam Hegde, *Frame-work of Copyright Law in India – Proposed Changes in the Copyright (Amendment) Bill, 2010 and Impact on the Media & Entertainment Industry*, 4 INT'L IN-HOUSE COUNSEL J. 1, 2–3 (2011).

4. *India's Media & Entertainment Sector Reboots in 2020*, EY (2021), https://assets.ey.com/content/dam/ey-sites/ey-com/en_in/topics/media-and-entertainment/2021/ey-india-media-and-entertainment-sector-reboots.pdf [<https://perma.cc/4AY8-BJCM>].

5. Himanshu Gaur, *Indian Film Industry VS Copyright Laws*, EXCELO IP, [HTTPS://EXCELOIP.COM/INDIAN-FILM-INDUSTRY-VS-COPYRIGHT-LAWS/](https://EXCELOIP.COM/INDIAN-FILM-INDUSTRY-VS-COPYRIGHT-LAWS/) [<https://perma.cc/7FJQ-8XW7>] (last visited Aug. 29, 2023).

6. Timm Neu, *Bollywood is Coming! Copyright and Film Industry Issues Regarding International Film Co-productions Involving*, 8 SAN DIEGO INT'L L.J. 123, 126–127 (2006).

to change India's Copyright Act of 1957, including the parties and copyright lengths.⁷

Taking a dialectical approach to analyzing arguments in favor of and against suing for copyright infringement, this analysis will uncover the benefits of reusing material for a transformative purpose. But what is the extent to which Bollywood movies infringe on intellectual property rights in America, and how are domestic filmmakers impacted by the "authorization" for Indian directors to use Hollywood films as inspiration? Section 52 of the 1957 Copyright Act allows for such recycling under certain circumstances.⁸ The Act itself requires consent of the copyright owner; however, despite further limitations on the copyright scope such as India's fair use and *scènes à faire* doctrines.⁹ The protectionist model of TRIPS, the Agreement on Trade-Related Aspects of Intellectual Property Rights, and the prospects of granting injunctions to universalize IP laws seemingly counteract the catch-all exceptions to the Act.¹⁰

Contrary to Hollywood directors' permission to adapt and the anthropological justifications behind such uses is the illegality of a system already fraught with issues concerning posters, digital piracy, and music. Difficulties with copyright claims do not excuse the potential remedies in international courts, just as Hollywood's complacency in litigating cases cannot overshadow the benefits to India's arthouse film scene from suing Bollywood. Yet something deep within suggests a desire or perhaps need to grant artists autonomy in creating a cycle where their own work may someday find a new purpose.

I. Background

A. Bollywood's Name

Mumbai, formerly known as Bombay, underwent a name change for religious and political reasons. While the bustling city's names are interchangeable, "Bollywood" remains the preferred nomenclature to identify the Hindi-language film industry that began in the 1930s.¹¹ Now a goliath moviemaking empire, Bollywood's inception mirrored the success of Hollywood's silent films through experimentation at Bombay Talkies, a movie studio tracing its origins to 1934.¹² But Bollywood did more than just reflect on the success of America's filmmakers. History pieces of epic proportion were no stranger to American audiences by the time Bollywood's *Mughal-E-Azam* (1960) premiered for a

7. Hegde, *supra* note 3, at 5.

8. DEP'T FOR PROMOTION OF INDUS. & INTERNAL TRADE GOV'T OF INDIA, EXCEPTIONS TO INFRINGEMENT UNDER COPYRIGHT ACT, 1957 § 52 (1958).

9. DEP'T FOR PROMOTION OF INDUS. & INTERNAL TRADE GOV'T OF INDIA, THE COPYRIGHT ACT, 1957, 14 OF 1957, (1958); *see also* Michael P. Goodyear, *Adapting Indian Copyright: Bollywood, Indian Cultural Adaptation, and the Path to Economic Development*, 23 VAND. J. ENT. & TECH. L. 517, 527 (2021).

10. TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

11. BRITANNICA, *supra* note 1.

12. *Id.*

mesmerized audience unfamiliar to the film's enormous budget.¹³ But just as Sergio Leone's spaghetti western *Once Upon a Time in the West* (1969) would refashion a genre to become a tour de force, India's *Sholay* (1975) succeeded in its own right by adapting and crafting a "curry western."¹⁴

Bollywood's name remains a mystery, as even film scholars and industry professionals contest the origin behind "Bollywood." Perhaps the term traces back to the older "Tollywood" moniker which an American producer used in referring to the film industry of the "Tollygunge areas of Calcutta/Kolkata in the 1930s."¹⁵ In fact, many regions of the Indian subcontinent produce films in their own industry apart from the greater Bollywood scene. When the Lumière films arrived in colonial Bombay after premiering at Paris in 1895, India was already in search of independence, explaining the need for a culturally indigenous cinema separate from Hollywood.¹⁶ *The Life of Christ* (1906) was a monumental viewing experience for Dadasaheb Phalke, known as "the Father of Indian Cinema," who sought to reprise his own version using Hindu deities in shaping the medium for India¹⁷

Much like the astrologically aligned beliefs of Indian culture, Bollywood's star power shines forth, with the public craving any and all news surrounding onscreen idols. Twenty-first century Bollywood sees the release of over 1,000 films annually to international audiences who universally appreciate the standard features choreographed by formulaic stories, titanic heroes, inordinate song-and-dance, and explosive action sequences.¹⁸ But the name's currency compels even the harshest critic to question if "Bollywood" suggests an imitative and derivative act or a phenomenon that is at once united and separate from the dominant Hollywood.¹⁹ The latter meaning bestows a much-deserved favor on the Indian film industry which takes an oppositional stance in re-interpreting American cinema. That Bollywood has become synonymous with an over-the-top style ignores the fact that the term also encompasses Indian arthouse films which often portray Indian life in all its darkness and scars.²⁰

B. The Industry of Bollywood

Bollywood experienced the cinematic journey complete with exposition, midpoint, climax, and denouement, but these ups and downs culminated in the recognition of Indian cinema as an industry in May of 1998.²¹ The process itself was ridden with ups and downs as the official industry status arrived

13. *Id.*

14. *Id.*

15. Blair Orfall, *Bollywood Retakes: Literary Adaptation and Appropriation in Contemporary Hindi Cinema* 1, 7 (June 2009) (Ph.D. dissertation, University of Oregon) (ProQuest).

16. *Id.* at 8.

17. *Id.* at 8–9.

18. BRITANNICA, *supra* note 1.

19. Orfall, *supra* note 15, at 6.

20. See generally Madhava Prasad, *This Thing Called Bollywood*, UNSETTLING CINEMA SEMINAR VOL. 525 (May 2003).

21. Jigna Desai & Rajinder Dudrah, *The essential Bollywood*, in THE BOLLYWOOD READER 1, 13 (Open University Press, 2008).

three years later in 2001,²² pointing to the prestige of the title but also the difficulty involved in developing such a sophisticated operation. Beyond a mere label, the industry acknowledgment meant that filmmakers could finance their projects more expansively and expensively. Financing until this moment came from studio production houses, independent producers, business entrepreneurs, family and friends, and allegedly even the criminal underworld.²³ The industry recognition marks an important step in supplying moviemakers with capital from corporate institutions and banks, simultaneously allowing for tax breaks and lower production costs along with lending a symbolic value.²⁴

Critics soon flocked to a new crime scene in which the production process became more troublesome than the product itself. Making a film is risky business, and in a country where box office hits are overshadowed by underperforming flops, financial institutions require some assurances before taking on a new project. Consequently, many involved within this newly recognized industry have expressed concern over the creative liberties at stake when risk-averse formulas restrict directors from realizing their true imaginative potential. On the other hand, some believe in the world of opportunities that corporate funding brings regarding co-productions.²⁵ Co-production treaties promise companies foreign talent, competitive pricing, and crossover appeal to international audiences, thus enlightening the industry with fresh perspectives in an expanding market.²⁶

The micro-level inspection of Bollywood is best conducted with the structure of Hollywood in the background to highlight key differences between the two. As a brief primer on Hollywood, the studios are vertically integrated with production, distribution, and exhibition being controlled by the same company.²⁷ Horizontal integration takes form in America's theatrical exhibition where the individual sector is essentially run by a few companies.²⁸ Across seas in India, the film industry is comparatively decentralized and still retains some of the kith and kin style of production. Again, a microscopic look reveals the chaotic studio scene underlying the industry in which networks drive the workplace environment where those without contacts will find it seemingly impossible to break into the film industry.²⁹

The same holds for Bollywood's financing and distribution which at times succumbs to the black market to avoid taxation and because of the risk financial institutions face in raising capital to distribute what could become a flop.³⁰ Instead of taking a leap of faith or relying on pre-release research, Indian filmmakers might base creative decisions on commercial likelihood of success accounted for solely by the perception of audience tastes and knowledge.³¹

22. *Id.*

23. *Id.*

24. *Id.* at 14.

25. *Id.* at 15.

26. *Id.*

27. TEJASWINI GANTI, *BOLLYWOOD: A GUIDEBOOK TO POPULAR HINDI CINEMA* 1, 233 (ROUTLEDGE 2004).

28. *Id.*

29. *Id.* at 55.

30. *Id.* at 56.

31. *Id.* at 62.

The production process matches this absence of front-end work as decisions turning on face-to-face meetings overshadow the craft of screenwriting, explaining the complaints surrounding screenplays never make their way to directors.³² Returning to the industry status, however, hope for a more organized system is well within reach, and the competition for telecast rights on satellite television reveals the increasingly streamlined connection between production, distribution, and exhibition. Yet another shift is underway with the industry as streaming platforms have taken over and democratized the content and context behind which Bollywood films are now being made.

As if the industry were not changing enough, COVID-19 unwittingly heralded a progression that both destroyed and reformed Bollywood's film industry. The pandemic's devastation impacts everyone, but India faces its own trauma without the infrastructure or regulations to combat the coronavirus. The cinematic medium adapted to these trying times by transitioning from the big screen to the small screen, with stars taking their talents to Netflix, Amazon Prime Video, and Disney+ Hotstar. The format is already influencing movie content as film critic Saibal Chatterjee notes, "[y]ou may see more intimate dramas, more pared back content – the cinema could end up mirroring streaming content to help sustain the business."³³ The leaner budgets and evolving scripts, not to mention the overall need to introduce more realism, is a step forward despite the setbacks of the times.

While lockdowns and social distancing mandated an 80% decline in domestic and international theatrical revenues for Bollywood's filmed entertainment, the 86% growth in digital rights on Over the Top (OTT) platforms compensated producers for lost revenue.³⁴ There is hope for theatres after all states permitted multiplexes (a movie theatre complex with multiple screens) to re-open at 50% seating capacity starting October 2020.³⁵ The last quarter of 2020 was particularly noteworthy for its theatrical releases of Bollywood movies in addition to Christopher Nolan's much-anticipated *Tenet* (2020) that executed on its promise in Indian box offices.³⁶ Looking forward, the film segment is expected to rebound to Rs153.2 billion in 2021 (roughly \$2.06 billion USD) and reach Rs243.8 billion by 2023 (roughly \$3.3 billion USD), subject to the COVID situation.³⁷ Industry experts believe direct-to-digital releases will complement but not substitute the theatre experience that uniquely captures "larger-than-life extravaganzas."³⁸

The series of adjustments is further propelled by the recent maneuver by streaming platforms to individually produce movies, taking production,

32. *Id.* at 67.

33. Krutika Pathi, *Bollywood bets on the small screen as Covid shuts cinemas*, BBC (Sept. 22, 2020), <https://www.bbc.com/news/world-asia-india-54187040> [<https://perma.cc/E6CY-BQSH>].

34. Ernst & Young Associates LLP, *India's Media & Entertainment sector reboots in 2020* 1, 144 (Mar. 2021), https://assets.ey.com/content/dam/ey-sites/ey-com/en_in/topics/media-and-entertainment/2021/ey-india-media-and-entertainment-sector-reboots.pdf [<https://perma.cc/JD3W-395G>].

35. *Id.* at 148.

36. *Id.*

37. *Id.* at 149.

38. *Id.* at 150.

distribution, and exhibition into their own hands. Despite valid concerns that the newfound emphasis on streaming will hurt the film industry when spectators have the option to stay at home instead of going to the theatre, there is good reason to adapt to audience tastes and preferences in a democratic fashion. HBO Max, Netflix, Amazon, and many others have succeeded critically and commercially in this regard, and unsurprisingly Bollywood has followed the trend. T-Series, a Bollywood production company and record label, teamed up with Anil Ambani's Reliance Entertainment Ltd. to develop 10 feature films over the span of 36 months.³⁹ When moviemakers can learn to join industry leaders to not only help art survive but thrive in ways never before imagined, a new world of possibilities emerges.

C. Internationalization & Co-Productions

India's rise as a global power requires concomitant responsibility in managing western interest in the social and economic developments of a country that has already captured the world's attention with a hypnotic culture. The expanding demand for Indian content from commercial production companies, as well as co-productions with government agencies and independent producers, is met with a supply that proves worthy of an international collaboration. Outsourcing films proves worthwhile in India where the robust movie industry, cheap labor, and technological know-how allow for a quantitative and qualitative advantage over government-sponsored studios in the U.S., Canada, and Europe.⁴⁰ The same goes for animation features that rely on cutting-edge and affordable technology, a product that India develops with sufficient expertise to stay ahead of the constant engineering feats in cartooning including 3-D productions.⁴¹ Indian producers also make for enticing business partners because of the increasingly western aesthetic of many Bollywood releases that perhaps follows from the progressive movements throughout India over generations.

Bollywood has also travelled wide for the sake of film, scouting locations in foreign lands that serve the exotic desires of Indian audiences just as other nations set scenes in India for the striking appeal. The mutuality here thus creates a "bilateral interest in the co-production market," explaining agreements between India and other countries like France, Italy, and Britain.⁴² The benefits of these treaties include subsidies for the film in the nation(s) where filming occurs, status for those working for the film who can remain in the country while the production lasts, and tax breaks for the import and export of filming equipment.⁴³ France is particularly renowned for its artistic contribution

39. Chris Kay, *Bollywood Seeks to Move Past Covid With a \$135 Million Film Deal*, Bloomberg (Sept. 21, 2021), <https://www.bloomberg.com/news/articles/2021-09-12/bollywood-seeks-to-move-past-covid-with-a-135-million-film-deal> [<https://perma.cc/J2ZL-UWD7>].

40. Neu, *supra* note 6, at 128.

41. Steven Schwankert & Bryan Pearson, *India Draws 'em in for Toons*, VARIETY (Dec. 18, 2005), <https://variety.com/2005/digital/features/india-draws-em-in-for-toons-1117934815/> [<https://perma.cc/PL56-CT47>].

42. Neu, *supra* note 6, at 138.

43. *Id.*

to film, and now the French government seeks to make India's stay more comfortable by offering assisting agencies, picturesque locations, and even Indian food for cast and crew.⁴⁴ Language is no barrier for co-productions when the universal language of shooting a film stands firm across borders, and subtitles alone cannot restrict Bollywood's qualification for the world-renowned Cannes Film Festival.

One problem that arises in international co-productions is the failure to foresee the desires of audiences that become blurred and sometimes forgotten when different nations come together to create a new product. The difficulty in reshooting retrospectively on foreign soil means filmmakers might contract for possible alterations to the final cut, or even opt to shoot more B-roll or secondary footage to anticipate substantial editing.⁴⁵ Versioning becomes essential when Indian audiences, for instance, generally require song-and-dance sequences to escape reality,⁴⁶ which may not translate as well with other audiences seeking to critically examine the text. Censorship is yet another consideration, as jurisdictions will differ in how restrictive films can be in displaying sex, violence, language, and religious acts.⁴⁷ India's somewhat stringent regulation of certificates by the Central Board of Film Censors (CBFC) is enough to limit international co-productions, yet the progressive and democratic pace at which India grows promises more lax rules in the near future.⁴⁸

Politics is already a highly sensitive topic in India, where even prominent reporters like Arnab Goswami find it difficult to educate viewers without introducing some showmanship in painting controversial issues. While Goswami does so successfully, Bollywood films suffer under the cold grip of censors such that even Iranian filmmakers, who themselves understand the oppression of government control over movies, express disfavor over Bollywood's dearth of depth.⁴⁹ The risks involved in making a movie discourage directors from creating content on political problems when the censor board will likely shut down projects that do not follow the formulaic clichés that keep audiences in the dark over the dirty realities plaguing Indian society. British cinema faced the same problem years before when the British Board of Film Classification (BBFC)'s stringent rules inhibited Hollywood sensations like *On the Waterfront* (1954) starring the masterful Marlon Brando as the underdog dockworker.⁵⁰ It was only after the BBFC introduced an "X" certificate for more explicit films that films like the controversial but revolutionary *A Clockwork Orange* (1971) could touch on extreme subject matter, which legendary Stanley Kubrick did with society's good in mind.⁵¹

44. Agencies, *France attracts Hollywood, Bollywood*, THE ECON. TIMES (Oct. 25, 2008), <https://economictimes.indiatimes.com/business-of-bollywood/france-attracts-hollywood-bollywood/articleshow/3638478.cms> [https://perma.cc/93DR-C5DQ].

45. Neu, *supra* note 6, at 148.

46. *Id.*

47. *Id.*

48. *Id.* at 152.

49. Arpan Banerjee, *Political Censorship and Indian Cinematographic Laws: A Functionalist-Liberal Analysis*, 2 DREXEL L. REV. 557, 611 (2010).

50. *Id.* at 618.

51. *Id.*

D. Propositions in Indian Entertainment Law

The rapid pace at which technology and business develops requires a legal framework that can keep up the pace, and India's amendments within entertainment law ensure that the industry is heading in the right direction. In a series of recent suggestions, the Ministry of Information Broadcasting (MIB) sought to require title, casting, and credit sequences displayed in the film's native language instead of showing them in English only.⁵² The rationale behind this decision rests on Rule 22(3) of the Cinematograph (Certification) Rules, 1983's deprivation of important information on the film's production to audiences unfamiliar with English who saw a movie's dialogue in Hindi or some other regional language.⁵³ Another development is the MIB's decision to set up the "Film Facilitation Office" in National Film Development Corporation (NFDC) to clear domestic and foreign filmmakers to shoot in India.⁵⁴ The choice to greater facilitate film shoots by streamlining a web portal for submissions means that India is positioning itself as a sought-after filming destination which will promote international co-productions going forward.⁵⁵

India's OTT platforms have increasingly blossomed in part thanks to the proliferation of smartphone use in India that greatly supports the number of jobs and overall livelihoods in a country with an enormous population divided between rich and poor. The Information Technology Act of 2002 governs the audiovisual and text content shared on OTT platforms and penalizes obscene material, overriding other statutes.⁵⁶ But recent strides indicate a shift from government regulations to a self-regulatory system which the Internet and Mobile Association of India (IAMAI) conducted by releasing the Digital Content Complaint Forum (DCCF) to air out user complaints.⁵⁷ OTT platforms providing third party content on demand could consider categorizing sensitive content by age group and possibly make this information available to parents who can restrict accessibility for children.⁵⁸ The democratization of information and how it is communicated necessitates this delicate balance between promoting entertainment and moderating access.

E. Propositions in Indian IP Law

Copyright law in India still derives from the Copyright Act of 1957, but the confusion that persists suggests the need for innovations on several creative and technical levels to protect films from infringing activity. One proposition is amending the role of the "author" to include producer and director alike in a joint co-ownership so that producers do not exploit the film by nominating

52. *Entertainment Law Book 2020*, FED'N INDIAN CHAMBERS OF COM. & INDUS. 1, 15, (Apr. 2020), <https://ficci.in/spdocument/23237/FICCI-CAM-Entertainment-Law-Book-2020.pdf> [<https://perma.cc/HCT6-VQFV>].

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

one of their own as the “director” and taking credit from the true director.⁵⁹ Protection also follows from the reformed definition of “communication to the public” that would include communication from multiple sources as well as from individual times and spaces, thus broadening the scope of new technology and media.⁶⁰ Converging authorship and communication technology, another amendment to the legislation, would provide authors of artistic works the exclusive right to electronically store creations in any medium.⁶¹ These propositions demonstrate the pleas for recognition and flexibility in appreciating creators and communications that have both gone ways since 1957.

The seemingly inconsequential name changes prove noteworthy in the grand scheme of Bollywood’s copyright discussion. Inspiration from Hollywood movies can still fall within these guidelines if done carefully and in consideration of the original author and the nature of changing times. After all, Bollywood’s name itself has undergone iterations and interpretations that stay true to its intention, all while keeping pace with innovations over time.

II. Analysis

A. Fair Dealing Exception

The temptation to compare Indian laws with more familiar U.S. doctrine should not interfere with the analysis of copyright infringement; however, doing so when dealing with the exception under the Indian Copyright Act of 1957 proves useful. That not all four of the following factors must be satisfied to use a copyrighted work without permission or royalty payments is suggestive of the provision’s significance in maneuvering around litigation. In determining if a reproduced work is ‘fair,’ courts will consider the (1) dealing’s purpose and character, (2) nature, (3) amount and substantiality, and (4) effect on the potential market.⁶² The American counterpart applies its fair use doctrine to any work, whereas Indian law stipulates that for fair use doctrine to apply, the work must satisfy one of the limited list enumerated purposes, including criticism and reviews amongst others.⁶³ The rapid advancement of technology in India warrants the need to follow America’s initiatives in ensuring fair use can be carried out efficiently and with precision, rather than wait for courts to rule on how to apply the analysis.⁶⁴

The arguments in favor of fair use are plentiful, as restoring the confidence in creativity by permitting use of copyrighted works without consent builds upon public knowledge in a manner consistent with First Amendment values. Returning to the four factors mentioned above, Indian courts have eschewed neat categorizations but instead oscillated in classifying copies as carbon copies of cinematograph films⁶⁵ to those that would be meaningless without

59. Hegde, *supra* note 3, at 5.

60. *Id.* at 6.

61. *Id.*

62. Ayush Sharma, *Indian Perspective of Fair Dealing under Copyright Law: Lex Lata or Lex Ferenda*, 14 NATIONAL L. INST. J. INTEL. PROP. RTS 523, 525–528 (2009).

63. *Id.* at 523.

64. *Id.* at 524.

65. *Star India Pvt. Ltd. v. Leo Burnett (India) Pvt. Ltd.*, 2003 (27) PTC 81 (Bom).

the allegedly infringing material.⁶⁶ The subjective tests used to determine fair dealing, if modified, can allow creators to curate content without fear of infringement and with the higher purpose of inspiring and educating audiences in ways that build upon past efforts.

B. Idea/Expression Dichotomy

While the exceptions to copyright infringement may seem beneficial in terms of maintaining the original intention of filmmaking, India's Copyright Act of 1957 seemingly overrides such departures and perhaps for good reason. Much like the classification of a cinematograph film as content expressed through visual and aural recordings from Section 2(f) of the Act,⁶⁷ the expression of the idea rather than the idea itself is protected. The protection of an abstract idea, not materialized in tangible form, would seriously limit the flow of creativity,⁶⁸ which points to the sacred nature of copyright grants. In keeping with this high standard by which copyrights should be respected, Indian courts have also been careful to limit excessive suits through decisions stipulating that similarities must form a crucial part of the new work's expression.⁶⁹ The 'Lay Observer Test' provides an objective baseline to this somewhat subjective issue in asking whether a reasonable viewer would view a secondary movie as a copy of the first or is unable to distinguish between the two.⁷⁰

Still, one must not forget that Bollywood inherently infuses source material with Indian culture and arguably transforms Hollywood films with those elements that allowed Bollywood to blossom in the first place. The cultural differences would accordingly counteract claims of substantial similarity with the position that the adapted film holds a new meaning or purpose, and accordingly Bollywood filmmakers would be within the legal boundaries in copying Hollywood. The Merger Doctrine takes this blurred line to another level with the acknowledgement that a work cannot be copyrighted when the idea merges with the expression such that the two are indistinguishable.⁷¹ Looking at the definition of "copyright," the essential features of an idea and expression are ambiguous enough to bypass rigid comparisons with derivative works that overlook the qualitative nature of films themselves. Returning to the need to abide by the Copyright Act that was in part fashioned after the regulation of secondary uses that financially exploit original material, the tension between the Act and exceptions to the Act remains.

C. Scènes À Faire

Yet another exception to India's Copyright Act of 1957, and one that finds a partner in U.S. law, is the *scènes à faire* doctrine. The law states that stock elements common to a particular theme or style do not deserve copyright

66. *Zee Telefilms Ltd. v. Sundial Communications Pvt. Ltd.*, 2003 (27) PTC 457 (Bom).

67. *Goodyear*, *supra* note 9.

68. *Modi*, *supra* note 2.

69. *Id.*

70. *Id.*

71. *Id.*

protection,⁷² which itself might be too broad to encompass several possibilities. For instance, the moment of transformation in a coming-of-age film is part and parcel of the genre but also covers other genres under the realm of entertainment which likewise includes the plot turn to divert audiences. And still the necessity of *scènes à faire* is best understood when considering the litigation that could follow innumerable uses of romantic tropes that are in fact indispensable to certain films and not too general to discount having such an exception in the first place. The commonality factor reaches across nations as India adopts a fact-specific approach to the analysis much like U.S. courts, with much of the dialectical concerns above holding little significance in how decisions are finally rendered.⁷³

The level of specificity regarding the copying in question turns on whether a mere archetype or the entire expression of scenes is common to the copyrighted and potentially infringing work, keeping in mind that some elements are simply crucial to a film. A case in point is the wittily satirical narration in a black comedy that transcends even the borders of the world cinema category, but similarities in such a narrator's exposition, crisis, climax, descent, and denouement would be cause for concern. The degree of "abstraction and added elements"⁷⁴ all contribute to an unsettled question that is only satisfied with factual queries into the extent to which elements are indeed clichés. All the while, *scènes à faire* remains a convincing argument as to why suing in courts over something as general as antiheroic personas in a crime drama would prove futile when inspiration happens almost unconsciously at times.

D. TRIPS and Injunctive Relief

All these exceptions do not necessarily mean that Hollywood directors have no remedy in the face of stated loopholes in legislation, because TRIPS broadens the scope of law to a universal level. The cross-cultural agreement enables "adequate compensation" for those at the mercy of infringing activity such that member nations can recover profits or some pre-established payment, even if the infringing party did not have reason to know of the infringement.⁷⁵ This relatively lax standard, while beneficial to the harmed party, contrasts with the possibility for injunctive relief that places a film's release on hold and essentially forces said movie's filmmaker and producer to settle instead lest they face heavy damages in court.⁷⁶ Given the last-resort style by which injunctions operate, the plaintiff must prove four factors that generally, despite differences based on the kind of injunction, weighs the irreparability of harm if the injunction were not granted against the damages resulting from a granted injunction.⁷⁷ That TRIPS is strict in permitting compulsory licenses for copyrights,

72. Goodyear, *supra* note 9, at 527.

73. Vaibhavi Pandey, *India: The Relevance of Doctrine of Scène À Faire in Copyright Law*, MONDAQ (Jan. 8, 2015), <https://www.mondaq.com/india/copyright/365210/the-relevance-of-doctrine-of-sc%C3%A8ne-%C3%A0-faire-in-copyright-law> [<https://perma.cc/3HTN-NZHS>].

74. *Id.* at 534.

75. TRIPS Agreement, *supra* note 10, at 340.

76. *Id.* at 339.

77. Injunctive Relief, *Legal Information Institute*, LEGAL INFO. INST. (June 2020), https://www.law.cornell.edu/wex/injunctive_relief [<https://perma.cc/MX3W-4PEC>].

or allowing others to produce a copyrighted work without consent from the original owner,⁷⁸ shows that the number of limitations act in conjunction with injunctive relief to restrict infringing activity.

E. Quentin Tarantino's Consent

Consent and authorization play a significant role in deciding if adaptations can avoid the above repercussions, but even without the copyright owner's permission there are reasons why inspired works should escape litigation attempts. A noteworthy example is Quentin Tarantino's awe in favor of *Kaante* (2002) despite its brazen copying of the American auteur's monumental *Reservoir Dogs* (1992). In fact, Tarantino praised the Bollywood remake for its flexibility in reimagining elements of his own film that he could not include in the final edit, in addition to Amitabh Bachchan's worthy performance in keeping with the movie's strong character development.⁷⁹ Tarantino appreciated *Kaante's* musical and comedic relief accompanying action sequences so much that he screened it alongside *Reservoir Dogs*, recognized for its glitz and gore, in his New Beverly Cinema.⁸⁰ Tarantino's own career is characterized by pastiche and homage.⁸¹ As a cinephile with eclectic taste, he even referenced the stylish *8 1/2* (1963) in his Palme d'Or winning powerhouse *Pulp Fiction* (1994)'s iconic dance sequence.

F. Bollywood Movie Posters

The limit to the inspiration should ideally have no end, but the sky certainly demarcates the extent to which Bollywood can take from Hollywood, such that the merchandise of movies reaches beyond the films themselves but even into the realm of posters. Movie posters are within the bounds of protected art and can also be sued for infringement, with the difference perhaps lying in the ability for talented lawyers to point out with specificity the exact similarities and differences to a jury. In contrast to a film which is considered in its entire runtime, the poster can reveal to an ordinary viewer from a mere first impression whether the piece is unlawful, delivering a more immediate and impressionable reaction. The catalogue of such movie posters is extensive to say the least, with the poster for *Aitraaz* (2004) standing out as a nearly identical version of the instantly recognizable poster matching the aesthetic of *The Graduate* (1967),⁸² pointing to the difficulties that arise when promotional content and creative art meet.

78. TRIPS Agreement, *supra* note 10, at 333.

79. Subhash K Jha, *Tarantino likes the cop-y & robber tale*, TIMES OF INDIA (May 11, 2007), <https://timesofindia.indiatimes.com/lucknow-times/Tarantino-likes-the-cop-y-robber-tale/articleshow/2029668.cms> [<https://perma.cc/Q583-KMSQ>].

80. Manish Gaekwad, *'Kaante' goes to Hollywood, where it always wanted to belong*, SCROLL (Mar. 23, 2017), <https://scroll.in/reel/832509/kaante-goes-to-hollywood-where-it-always-wanted-to-belong> [<https://perma.cc/6C5C-BZEV>].

81. *Id.*

82. *9 Times Bollywood Shamelessly Copied Posters From Other Films*, HUFFPOST (July 30, 2019), https://www.huffpost.com/archive/in/entry/bollywood-film-poster-copied-judgementall-hai-kya_in_5d401c7ce4b0d24cde059288 [<https://perma.cc/G82V-7YY2>].

G. *Slumdog Millionaire* Case Study

In 2008, a year already star-studded with an impressive catalogue of films, Danny Boyle's *Slumdog Millionaire* took the Oscars by surprise, amassing numerous awards in a manner not dissimilar from Alejandro González Iñárritu's magnum opus *Birdman or (The Unexpected Virtue of Ignorance)* in 2014. As a loose adaptation of literary text in addition to Western and Bollywood cinematic styles, the praise for *Slumdog Millionaire* points to the need to reimagine adaptations as not a binary relationship but one that exists within a richly intertextual world.⁸³ In keeping with the film's complexity in satisfying mainstream audiences while maintaining a critical dominance, anthropological and sociological readings of the film from a multitude of backgrounds, both ideologically and culturally, suggest the film's deviation from simplistic infringement suits. Film critics and theorists defend the picture from harsh scrutiny as too idealistic, from an American perspective, and too darkly serious, from an Indian one.⁸⁴ The gritty yet glamorous film escapes easy categorizations.

How then could an adaptation as nuanced as this possibly step on the toes of its predecessors or sources of inspiration if the product is one which flies above the heads of experts in the industry unable to pinpoint the meaning or intention of the movie? The answer lies in the fact that adaptations cannot and should not be subject to litigation when the new work builds upon the former, even irrespective of the end result's renown.

H. Digital Piracy in Bollywood

The optimism underlying the dizzying prospect of new creations should be qualified when considering the proliferation of piracy accompanying technological advancements in India's film presentation, with file streaming websites such as 123Movies acting against the interests of film production. Dispelling any defenses relating to the increased demand for films via such 'democratic' sources first mandates a thorough economic analysis of unpaid movie consumption that blossomed between 1985 and 2000 alongside India's VCR and cable television boom.⁸⁵ As a result of digital piracy, movie revenues have fallen due to several factors including the hit to theatre box office earnings, with the weaker demand for theatrical releases causing lower creative incentives to produce movies in the first place on the supply side.⁸⁶ This evidence in support of more effective copyright protection is not simply an endorsement for theater-going over streaming, but rather a testament to the film industry's bright future if illegal streams of revenue can be limited. Following COVID-19's alterations to the movie landscape, streaming has taught the film industry how to better present and curate films to capture more audiences, and maybe the

83. Cherri Buijk, *Slumdog Millionaire: Politics of Representation and Global Culture* 1, 13 (2010) (B.A. thesis, University of Michigan).

84. *Id.* at 16–21.

85. Rahul Telang, *Piracy and New Product Creation: A Bollywood Story*, 43 INFO. ECON. & POL'Y 0 (June 2018).

86. *Id.*

higher resolution and speeds of legal streaming on subscription platforms will further reduce piracy.

I. Bollywood's Critically Acclaimed Films

The debate for and against copyright infringement suits seems to vary based on the success of the film in question, with the more masterful ones convincing the public and perhaps courts that copying for the sake of such art is worthwhile after all. While the story of Bollywood has focused on crowd-pleasers that soar at the box office, the spotlight also shines on visionary filmmakers, of whom Anurag Kashyap has defined a definitive space with sensations like *Black Friday* (2004) and *Gangs of Wasseypur* (2012), amongst others. Such pieces represent the theoretical underpinning of the discussion that presumes a distinction between content and form⁸⁷ where adaptations must adequately re-fashion a shared plot or idea to escape litigation. While Kashyap's films do not pose copyright issues, even though they are often subject to censoring for their treatment of 'extreme' themes,⁸⁸ they highlight the fact that movies cannot be broken down into simplistic dichotomies because the topic of fidelity to some text or norm is completely shattered by ingenuous tactics. More specifically, the ordinary viewer comparing movies as per copyright law would arguably be unable to detect similarities in Kashyap's films that apply cinematic techniques which perplex even the most seasoned critic, whereas a reading of mainstream Bollywood would lend to easier findings.

J. Suing Bollywood to Save Independent Cinema

Satyajit Ray is responsible for the global recognition of South Asian cinema as a cinematic threat to be reckoned with, as his claim-to-fame *Pather Panchali* (1955) brought the world to tears and secured its place at number six on British Film Institute's greatest films of all time.⁸⁹ Ray would also go on to win numerous accolades at major film festivals including the Berlin Film Festival and Venice Film Festival, yet some of Bollywood's most prominent actors denounced Ray for garnering all the credit and leaving them to explain to others that India is not the bleak portrait illustrated in *Pather Panchali*.⁹⁰ The rationale behind such comments suffers because India truly is glamourized in Bollywood, and their existence means that independent Indian cinema adopts a space that is not only different but mutually exclusive from Bollywood.⁹¹ Ray and Kashyap are known for pointed realism but are relatively unknown compared to Bollywood's larger-than-life personas, so one remedy to alter this balance in favor of the former is the encouragement of suits against Bollywood

87. Orfall, *supra* note 15, at 34.

88. Neeru Saluja, *I Want my Audience to be Provoked and Disturbed: Anurag Kashyap*, THE INDIAN DOWN UNDER (Feb. 14, 2017), <https://indiandownunder.com.au/2017/02/i-want-my-audience-to-be-provoked-and-disturbed-anurag-kashyap/> [<https://perma.cc/G82V-7YY2>].

89. Arpan Banerjee, *How Hollywood Can Sue Bollywood for Copyright Infringement and Save Indian Cinema*, 32 EUR. INTELL. PROP. R. 1, 3–4 (2010).

90. *Id.*

91. *Id.*

films as a means of auto-correction.⁹² Granted, the preference for more high-brow films over ‘masala’ movies that blend archetypal tropes is not universally accepted, but the independent and regional pictures typically do not borrow from Western material and support a more innovative, intellectual appeal.⁹³

K. Difficulties with Copyright Claims

Convincing rationales aside, the importance of convincing an Indian judge stands in the way of reaching copyright claims’ full potential in that the courts often construe the law in such a way that hinders successful suits against Bollywood. Returning to the merger doctrine, Indian judges tend to treat an original film’s idea with a low level of abstraction, thus making the case that the idea and expression are indistinguishable given the concept’s generic nature.⁹⁴ But Indian courts have gone further to even interpret the Copyright Act of 1957 to constrict infringement on the language of ‘reproduction,’ so that an infringing work must be a physical copy of the original to constitute illegality.⁹⁵ In other words, the secondary movie cannot infringe on the original even if there are resemblances between the two because the secondary work needs to have been reproduced from the original’s recorded medium to trigger the legal language.⁹⁶ While this evaluation may seem perverse, the reason behind this narrow interpretation derives from the absence of an originality requirement in film, which is necessary for other dramatic or artistic works.⁹⁷

The question of whether a film constitutes as a dramatic work is still in the works as the Indian judicial branch is split on whether the fact that films are culminations of technical editing and accordingly unable to be recreated in reality means that they are not dramatic works.⁹⁸ Others disregard this gap between reality and fantasy and believe that movies are dramatic works themselves even without depicting dramatic works,⁹⁹ further confounding the boundaries around virtual technology and feeding fire to the classic copyright debate. That copyright, and intellectual property law in general, deals with such complex issues deeply rooted in philosophical and artistic questions means suing in courts over such concerns might not prove worthwhile.

L. Potential Remedies in International Courts

The means of enforcement and dispute settlement is not entirely lost; however, because India’s membership with TRIPS ties enforcement to dispute settlement under the World Trade Organization (WTO).¹⁰⁰ Operating under the

92. *Id.* at 2.

93. *Id.* at 3.

94. Sreyoshi Gua, *Bollywood’s ‘Raabta’ with Copyright Infringement*, SPICYIP (June 3, 2017), <https://spicyip.com/2017/06/bollywoods-raabta-with-copyright-infringement.html> [<https://perma.cc/4CNC-943C>].

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Rachana Desai, *Copyright Infringement in the Indian Film Industry*, 7 VAND. J.

Dispute Settlement Understanding (DSU), the framework provides for structure and a timetable to ensure a streamlined process beginning with a consultation between the disputing nations.¹⁰¹ A panel acts as mediator if the initial negotiation does not work, after which both parties can appeal and even impose trade sanctions if global copyrights are not respected.¹⁰² While TRIPS is not bulletproof in its approach to guaranteeing the protection of rights, the availability of intermediate protections to combat backlog and inefficiencies provides a hopeful stage for copyright protection where Hollywood can take comfort in remedial options.¹⁰³

M. Hollywood's Complacency

With all the tools at its disposal, Hollywood's major studios have still resisted the urge to litigate copyright issues, but perhaps such inaction is not misplaced given the fact that executives are unconcerned with such copycatting.¹⁰⁴ Despite Bollywood's unparalleled importance to viewers at home for cultural and fiscal reasons, Hollywood remains the most profitable on a global scale and has found little reason to justify foreign litigation when the industry has enough resources on its own.¹⁰⁵ America's reliance on India's cheap labor supply in outsourcing jobs is yet another incentive to incentivize litigation against India, especially when India's status as a developing nation poses no harm to Hollywood executives who need not harm India in return.¹⁰⁶ That audiences for Hollywood and Bollywood do not overlap is yet another reason for this complacency, because Bollywood's more local spread did not threaten Hollywood's global outreach especially given the Western audiences' unfamiliarity with Indian culture.¹⁰⁷ The shift toward world cinema where the one-inch barrier of subtitles does not stifle the potential rewards; however, might introduce the need for Hollywood to litigate considering the popularity of South Asian talent like Riz Ahmed in films that do not shy away from their roots.

N. Entertainment & New Media

Today's entertainment landscape is undergoing rapid changes, with limited TV series taking on the production quality of films and adapting to the new reality of streaming, not to mention the talent and directors oscillating between each medium type and transforming the theatrical and television space. The same goes for music and gaming, both immensely popular and profitable in their own right, where the means of delivery for the two is complementing and supplementing the content itself for an audience that demands entertainment that distracts from or immerses into reality. The entertainment industry

ENTM'T & TECH. L. 259, 261–262 (2005).

101. *Id.* at 262.

102. *Id.* at 269.

103. *Id.*

104. Hariqbal Basi, *Indianizing Hollywood: The Debate Over Copyright Infringement by Bollywood*, 18 UCLA Entm't L. Rev. 33, 51 (2011).

105. *Id.* at 52.

106. *Id.*

107. *Id.* at 53.

also reaches across media formats dealing with bodily senses, in which books, podcasts, and virtual reality encompass the whole range of ideas and activities, to the point that each segment incorporates some aspect of another. This rings true for the music industry, and Bollywood is no exception given the conflation with music and the fact that top hits are almost always derived from films, not to mention Bollywood's newfound entrance into the realm of television series.

Where industries collide, so do the copyright claims that fail to discriminate against media type, with the Indian music industry taking from Hollywood including the main theme from *The Godfather* (1972).¹⁰⁸ This conversion from American hegemony to homogenization was made possible by the accessibility of Hollywood to Indian audiences after cable television made its entrance into Indian households.¹⁰⁹ Perhaps this conflation is but a natural course by which the industry will thrive, building on the principle that each medium ultimately intends to entertain its audience.

Conclusion

Taking inspiration from the alternate title of *Birdman or (The Unexpected Virtue of Ignorance)*, this paper places a premium on ignorance with respect to policing Bollywood's adaptation of Hollywood movies. The background of Bollywood's inception to its status as an industry and treatment of legal issues going forward marks its place as a self-sufficient business but one which continues to grow because of its teamwork with America's filmmaking expertise. While "teamwork" naturally conjures up the need for consent, the analysis of copyright issues proceeds for and against Bollywood's copying of Hollywood beginning with the exceptions to and language of India's Copyright Act of 1957. Hollywood's opportunity to find relief on the global legal field falls short of the fact that major directors have approved Bollywood's takings, yet piracy and widespread borrowing threatens this truce. But even considering the pros and cons of taking up these issues in court, the focus first and foremost on entertainment and the quality of film presents a partnership within legal boundaries that encourages the inspiration sustaining movies in the first place.

108. Kedar Maddali, *Once Upon a Time in Bollywood*, HONI SOIT (Aug. 8, 2019), <http://honisoit.com/2019/08/once-upon-a-time-in-bollywood/> [<https://perma.cc/CZM8-VJVV>].

109. *Id.*