Copyright Infringement in the Indian Film Industry

By Rachana Desai*

Introduction

On July 7, 1896, India’s first cinematographic film was shown in Mumbai. Today, India’s mammoth film industry produces more movies than any other country in the world and employs over two million people. In 2001, India’s entertainment industry (which includes film, music, television, radio and live entertainment) was one of the fastest growing sectors of the economy, experiencing over a 30% growth. Cable television generated the most revenue, followed by television broadcasting, film and television production. The film industry, on average, produces approximately 1,000 movies annually, sells about six billion tickets and grosses more than $72 billion globally. Until recently, however, the Indian film industry received very little international acknowledgment. This lack of recognition may have contributed to the longstanding practice of producing “cultural copies,” as opposed to original works. A cultural copy is nearly a direct copy of a movie or other work from one cultural to another.

India, unlike America, has several film industries. This Note focuses on the largest of these industries: Bollywood, the center of Hindi language cinema. In recent years, nearly eight out of every ten Bollywood scripts have been “inspired” by one or more Hollywood films. Previously, this widespread problem was not visible to those outside of India. The emergence of the Internet and better global communications, however, have made Westerners more aware of the cultural copy situation in India. In 2003, best-selling fiction writer Barbara Taylor Bradford brought a copyright infringement suit against Sahara Television for allegedly making a television series out of her book, A Woman of Substance. After winding through the legal system, the Indian Supreme Court refused to uphold a lower court injunction against Sahara and allowed the television show to go on the air. Bradford, although frustrated by her loss, chose not to pursue the matter further.

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

*By Rachana Desai

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

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

I. International Law

A. Overview of WTO

The World Trade Organization was created by the 1986-94 Uruguay Round negotiations and is comprised of 146 member nations. Its members account for nearly 97% of global trade. The main purpose of the WTO is “to help trade flow smoothly, freely, fairly and predictably.” Although the WTO is fairly new, its predecessor, the General Agreement on Tariffs and Trade (GATT) was signed in 1948. In contrast to the WTO, the GATT’s mandate was strictly limited to trade issues. The WTO is controversial because it expanded upon the GATT to include services and intellectual property agreements. Perhaps most distressing to its critics, however, is the fact that the WTO also covers certain health and environmental regulations that can be interpreted as trade barriers.

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

B. The TRIPS Debate

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

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

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

C. Standards

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

D. Enforcement and Dispute Settlement

TRIPS surpasses other intellectual property agreements because it has a viable enforcement mechanism. The major problem with the Paris and Berne Conventions is that they lacked the ability to enforce compliance. Professor David Nimmer opines that, under the pre-TRIPS framework, if a person’s copyright was violated in another country, the copyright holder would have no recourse other than enlisting the native country’s help in taking the case to the International Court of Justice (ICJ). This is due to the Berne Convention’s failure to create a private cause of action provision. Even this recourse, however, is largely illusory, since, as of the date of this Note’s publication, no copyright case has ever been brought before the ICJ. Instead of relying on the ICJ, TRIPS links
enforcement to judicial mechanisms within member nations and to the WTO’s dispute settlement framework.\textsuperscript{51}

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

Disputes arising under TRIPS between WTO members are subject to the WTO’s Dispute Settlement Understanding (DSU).\textsuperscript{59} Prior to the Uruguay Round, disputes were settled under the GATT framework.\textsuperscript{60} Since the GATT procedures did not contain any fixed timetables, some cases languished indefinitely in the system.\textsuperscript{61} The DSU provides greater structure, setting forth a timetable where a typical case, including appeals, should take no more than fifteen months.\textsuperscript{62} Under the GATT, dispute rulings were adopted by consensus.\textsuperscript{63} Thus, one dissenting vote could block a ruling, meaning the country against which the ruling was levied could simply vote it down.\textsuperscript{64} A DSU panel’s ruling, however, is adopted unless a consensus of WTO members objects to the ruling.\textsuperscript{65}

The first step to dispute resolution under the DSU is consultation between the countries involved in the dispute.\textsuperscript{66} A panel is appointed only if the countries cannot reach a solution on their own.\textsuperscript{67} The panel consists of members from the Dispute Settlement Body\textsuperscript{68} and has the power to hear the complaint, gather evidence, and issue a report.\textsuperscript{69} Unless it is rejected by a consensus of members, the report becomes a ruling.\textsuperscript{70} Either side has the option to make an appeal to the WTO’s permanent Appellate Body.\textsuperscript{71} The losing state then has a period of time to correct the problem and bring its laws into compliance.\textsuperscript{72} If proper action is not taken, the complaining state may ask the WTO to allow it to impose sanctions.\textsuperscript{73} Ideally, the sanctions should be in the same sector as the dispute. If the Dispute Settlement Body deems that to be ineffective, then it may authorize cross-sectorial sanctions.\textsuperscript{74} The crucial point of the external enforcement provisions is the availability of cross-sectorial retaliation.\textsuperscript{75} Professor Nimmer provides a useful hypothetical: “[I]f Korea is adjudged a copyright violator [by the panel], then Korea must proceed to honor copyrights in the American movies. If it does not do so, the United States is permitted to slap a punitive tariff on the importation of Hyundai’s from Korea.”\textsuperscript{76}

Thus, countries are compelled to effectively protect copyrights of other member nations. They can no longer hide...
behind inefficient or corrupt legal systems.\textsuperscript{77} By tying copyright violations to the imposition of trade sanctions, TRIPS hopes to encourage the respect of global copyrights.\textsuperscript{78} However, much of the system still relies on the compliance of the developed nations.\textsuperscript{79} Inequalities among nations make it difficult at times for TRIPS to operate as envisioned.\textsuperscript{80} For example, if the panel adjudges the United States to be in violation of a developing country’s copyright and the United States refuses to comply, then even cross-sectorial retaliation would most likely fail to suffice as an effective remedy for the developing country.\textsuperscript{81} Even though the DSU is a vast improvement over the previous system under the GATT, its legitimacy still depends on developed countries’ recognition of the panel’s authority and adherence to the panel’s decisions.\textsuperscript{82}

\section*{II. The United States’ Response}

The United States is a party in several bilateral and international agreements dealing with IPR and trade in general.\textsuperscript{83} But many in the United States, citing the importance of intellectual property to the economy, are hesitant to rely solely on international agreements for the protection of IPR. The Omnibus Trade and Competitiveness Act of 1988 (“the Trade Act”) strengthened IPR protection globally by tying it to trade sanctions.\textsuperscript{84} Under the Trade Act, the United States Trade Representative (USTR) has discretion to initiate a “Special 301” investigation,\textsuperscript{85} which calls for the USTR to evaluate the level of intellectual property trade protections provided by other states.\textsuperscript{86} Nations with the worst policies or practices are placed on the “Priority Foreign Countries” list and may be subject to immediate trade sanctions.\textsuperscript{87} States are placed on this list if they (1) “have the most onerous or egregious” policies towards IPR protection, (2) their policies “have the greatest adverse impact (actual or potential) on...United States products,” and (3) the state is not participating in or making progress in negotiations with the USTR.\textsuperscript{88}

\begin{quote}
“Despite its substantial domestic de jure copyright protections, India remains on the “Priority Watch List” primarily because of high piracy rates and lack of appropriate enforcement measures.”
\end{quote}

Less harmful violators are put on the “Priority Watch List.”\textsuperscript{89} These states provide less than optimal copyright protections, but are not subject to immediate sanctions.\textsuperscript{90} In 1991, India was placed on the “Priority Foreign Countries” list primarily due to its “denial of adequate and effective intellectual property protection...especially in the area of patent protection.”\textsuperscript{91} As a result, the United States suspended duty-free privileges for $60 million U.S. of Indian trade goods (primarily pharmaceuticals and chemical products) under the Generalized System of Preferences (GSP).\textsuperscript{92} During the next year, more chemicals were added to the GSP, thus increasing the benefit of suspended trade to $80 million U.S.\textsuperscript{93}

\subsection*{A. Indian Law—Copyright Act of 1957}

The “Special 301” trade sanctions prompted a response by the Indian government.\textsuperscript{94} In 1994, the Copyright Act of 1957 was amended to include satellite broadcasting, computer software, and digital technology to the areas traditionally protected by copyright (such as original literary, dramatic, musical and artistic works, cinematography, films and sound recordings).\textsuperscript{95} These amendments brought
the Act into full compliance with the requirements of TRIPS. The International Intellectual Property Alliance (IIPA) ranks India’s amended 1957 Copyright Act as one of the most modern copyright statutes of any country. Despite its substantial domestic de jure copyright protections, India remains on the “Priority Watch List” primarily because of high piracy rates and lack of appropriate enforcement measures.

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

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

Ideas, concepts, and facts cannot be copyrighted. Only the “form, manner and arrangement, and expression of the idea” are copyrightable. Thus, different authors are not prevented from independently developing the same idea, even if their products have some similarities. The Indian Supreme Court upheld this concept in the seminal case of R.G. Anand v. Delux Films. In this case, the author of the play Hum Hindusthani sued a production company for making a movie that was allegedly an “exact copy” of his play. The Supreme Court held that, despite some similarities, the movie did not infringe the play’s copyright because there were substantial dissimilarities between the two.

To determine if an author’s product constitutes an infringement of another’s copyright, Indian courts use the “lay observer test.” If a person who sees both works “is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original,” there is a copyright violation. To constitute copyright infringement, the second work “must be [a] substantial and material” copy of the first. Simple additions, omissions, or modifications to the original work do not defeat the infringement claim. Furthermore, substantiality is a measure not only of the quantity of work copied, but also of the quality of the work copied. Therefore, if the copied concept is especially original or novel, then the infringement action may have stronger grounds.

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

Although Bradford was unsuccessful in her copyright infringement claim, the case is momentous because it represents one of the few times the Indian entertainment industry has been sued for its alleged plagiarism.
to infringe on a copyright is not a requisite element of the claim, as the infringement may be subconscious. Substantial objective similarity between the two works may be used to infer a causal connection. With all of these tests, the plaintiff has the burden of proving the infringement by “clear and cogent” evidence. In the end, there is no bright line rule. The Indian copyright rules are applied on a case by case analysis because “much will depend on… the extent of the similarity and whether the labour and effort bestowed upon one film has been appropriated by the producer of another film.”

B. Structure of Indian Courts

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

Below the Supreme Court are eighteen High Courts. Each court has original and appellate jurisdiction over cases arising in its territory. The President, after consulting with the Chief Justice of the Supreme Court and the governor of the state, appoints the High Court Chief Justice. Then, in consultation with the High Court Chief Justice, the President appoints the other justices of the court. The President retains the power to transfer the justices at will. The High Courts supervise all of the lower non-military courts in their jurisdiction and have the power to transfer constitutional issues to itself from the lower courts.

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

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

C. Bradford v. Sahara TV

Romance novelist Barbara Taylor Bradford was surprised to learn that one of her best selling books, *A Woman of Substance*, was being made into a 260-part television series in India, *Karishma – Miracles of Copyright Infringement in the Indian Film Industry*
Destiny. Bradford did not receive any payment, nor had she authorized the television series. A Woman of Substance is a rags-to-riches story chronicling a woman’s rise from a servant to the head of an international corporation. Karishma – Miracles of Destiny is a rags-to-riches story chronicling a woman’s rise from a street sweeper to the head of an international corporation. Both are told from the point of view of the main character, an old woman looking back on her life. Karishma is the most expensive series produced for Indian television, costing nearly 600 million Rupees ($13 million U.S.). Bradford, offended by the unauthorized use of her work, flew to India and filed suit in the Kolkata High Court in early May of 2003. Judge Pinaki Chandra Ghosh issued an ad interim injunction against Sahara Media Entertainment, the network set to air Karishma. Sahara appealed the decision, citing the incredible amount of money already invested in the project and the fact that Bradford had earlier filed a similar suit in the Mumbai High Court. On May 12, the very day on which the series was set to premiere, Justices A.K. Ganguly and D.P. Sengupta, sitting on the division bench, vacated the stay. Bradford immediately filed a special leave petition with the Indian Supreme Court to block the airing of the program. The Court reinstated the injunction, but not before Sahara had already aired the first episode.

On July 21, 2003, the case came before the Kolkata High Court. The Court ruled in favor of Sahara and found no proof of plagiarism. As mentioned above, Indian copyright law protects expressions, not ideas. Upon reading a summary of Bradford’s novel and listening to the evidence presented, Justice A.N. Roy said, “In [the court’s] opinion, this is just an idea. The plaintiff cannot have a monopoly on a woman making it from rags to riches.” The Court fined Bradford about $30,000 U.S. ($3,000 for every week that the show was delayed) and ordered her to pay Sahara’s court costs. Bradford again appealed to the Supreme Court. On August 4, the Supreme Court upheld the lower court’s substantive decision but reversed its damage award. Although Bradford was unsuccessful in her copyright infringement claim, the case is momentous because it represents one of the few times the Indian entertainment industry has been sued for its alleged plagiarism.

III. Analysis
As a result of international agreements like the Berne Convention and TRIPS, domestic copyright laws are generally uniform and offer a high level of de jure copyright protection. As discussed earlier, Indian law has provisions for protecting IPR that comply with international standards. Inadequate enforcement of these laws remains the primary problem for India. Therefore, the question arises—why do there seem to be so many blatant, but unlitigated, copyright violations in the Indian movie industry?

The first and easiest answer to this is that Hollywood studios have yet to enforce their copyrights against Bollywood studios. The Bradford case, however, garnered a great deal of legal and media attention. Could it be a preview of similar cases to come?
Barbara Taylor Bradford thinks there is a greater possibility that people will seek to enforce their copyrights internationally. She says, “[w]e have become a global village. Nobody in the past knew what was going on in India but now with websites and the Internet,” it is much easier to discover. Once a Hollywood studio becomes aware of Bollywood taking “inspiration” from one of its films, can the studio enforce its copyright against a cultural copy?

Hollywood producer Ashok Amritraj believes that “Indian movies are so far under the radar [that] no Hollywood executive is aware” of the copying. This lack of awareness, however, will likely not continue for long. The United States Census Bureau reports that the number of Indians living in the United States increased by nearly 106% from 1990 to 2000. In its opening weekend, Kabhi Khushi Kabhie Gham, a popular Hindi film, was shown on only seventy-three screens in the United States. Even with its limited screening, the film still managed to take in over one million dollars during its first weekend. In fact, some Bollywood movies get 25-30% of their proceeds from overseas sales, with most of the exports going to the United States, Canada, and the U.K. Bollywood films are also gaining popularity among non-Indians. In 2002, the Hindi movie Lagaan was nominated for a “Best Foreign Language” Academy Award. Even non-Indian artists recognize the emerging popularity of Bollywood in the West. Famous director Baz Luhrmann, inspired by a trip to India, paid tribute to Bollywood in Moulin Rouge with his over-the-top plot sequences, music, and costuming. Also, theater mogul Andrew Lloyd Webber scored a hit in London with Bombay Dreams, his stage production of a Bollywood love story. Almost eight out of every ten Bollywood scripts were recently “inspired” by one or more Hollywood films. There are screenwriters who are so adept at plagiarizing that they can have a cultural copy of a Hollywood movie ready by the very same day as that film’s North American premier. In fact, many producers and directors prefer cultural copies because the stories have proven box office appeal.

A. The Copies

Yash Raj Films’ Mere Yaar Ki Shaadi Hai (which literally translates to “My Friend’s Wedding”) is said to be a cultural copy of My Best Friend’s Wedding. The director, Sanjay Gadhvi, takes exception to this, saying “you can only draw a parallel with the title and the plot.” The copying is not limited to recent blockbusters, nor is it a recent Bollywood phenomenon. In 1974, Narinder Bedi’s Rafoo Chakkar cleverly copied the story of 1959’s Some Like it Hot. The 1934 classic romantic comedy, was allegedly “Indianized” into the 1992 box office hit Dil Hain Ke Manta Nahin. The copycatting does not stop with film, as Karishma demonstrates; it has seeped into the small screen as well. For instance, Amitabh Bacchan, a well known Hindi film star, is the host of a popular game show called “Kaun Banega Crorepati” which is almost a direct copy, both in name and in substance, of “Who Wants to be a Millionaire.” Arguably, 2002’s Kaante, shot in Los Angeles, is a copy of Quentin Tarantino’s Reservoir Dogs. The New York Times gave this “delirious Bollywood reimagining of Reservoir Dogs” “no points for originality.”
Similarly, the Los Angeles Times called it “a singing and dancing Reservoir Dogs.” The roughest review, from the Sydney Morning Herald, opined, “forget method acting, the Bollywood film Kaante is an example of method filmmaking...the producers simply stole their plot.” The paper was careful to point out, however, that Tarantino borrowed the plot line from Ringo Lam’s City On Fire (Long Hu Feng Yun). Another Australian reviewer described Kaante as “derivative to Hollywood...in nearly every way possible in terms of plot, style, direction and music.”

Despite the fact that Hollywood studios have yet to take action against the Indian film industry, it is apparent that there is a problem. A studio will likely try to enforce its copyright in the near future. The United States entertainment industry as a whole is becoming increasingly aware of possible copyright infringements and increasingly litigious as it is forced to respond to new technologies. For example, the Recording Industry Association of America (RIAA) has intensified its efforts to curb internet file-sharing, a relatively new phenomenon. From the onset of its lawsuit campaign in September 2003 through mid-June 2004, RIAA sued well over 3,000 individual file-swappers for copyright infringement. As Bollywood films gain more prominence in America, movie studios are similarly bound to try to enforce their copyrights. Additionally, the United States government has a considerable economic interest in protecting intellectual property. American copyright industries employ more people than any one manufacturing sector; in 2001, they made up about 5.24% of the Gross Domestic Product (GDP). In the same year, exports from copyright industries exceeded those of all other major industry sectors, estimating $88.97 billion (U.S.). In light of the recent developments in the Bradford case, what enforcement options are open to American studios?

**B. Sue in India**

Since TRIPS is not self-executing, a Hollywood studio seeking to enforce its copyright in India cannot bring a claim directly under TRIPS. The studio must utilize Indian copyright law. One of the first problems the studio would encounter is Indian producers’ different cultural view of copyright. The director of Raaz and Awara Paagal Deewana Vikram Bhatt told the Daily Variety “films are not about creativity, originality or vision. They are about entertaining audiences across the board. Once you understand and accept that an idea always existed before you did, then you look at the whole aspect of ‘copying’ in a different light.”

If, for example, Artisan, one of the rights holders of Reservoir Dogs, chose to sue the producers of Kaante in India, the court would apply the lay observer test. Artisan would first have to show that there is enough of a similarity between the two films that an ordinary person would recognize Kaante as a copy. Would people watching Kaante and Reservoir Dogs feel that one was a copy of the other? Although there are some plot differences and the inclusion of several song and dance numbers, Kaante is unmistakably based on the Tarantino film. The plots are largely parallel and there are nearly identical scenes, characters, and even dialogue.
In addition to substantial similarity, Artisan would need to show a causal connection. The court would most probably find that the similarities are substantial enough to infer a connection. Sometimes, the copying is so blatant that directors actually play the Hollywood DVD for their actors to show them how to execute a scene. Kalpana Lajmi, a renowned Indian director in opposition to the Hollywood imitation trend, feels that “[s]ometimes the regurgitation is so literal that it is difficult to digest.” Armed with this type of evidence, it seems that Artisan would be successful in its efforts to protect its copyright.

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

Karishma director Akashdeep confessed, “I don’t know why Indians make such a fuss over originality. There are three books by Barbara Taylor Bradford, including A Woman of Substance, Hold the Dream and To Be the Best. We have Indianized [them]. I didn’t want to take a chance with a new script.” Many in the Bollywood community agree with writer-director Mahesh Bhatt’s view that, “when you take an idea and route it through the Indian heart, it changes entirely.” Philip Lutgendorf, Associate Professor of Hindi and Modern Indian Studies at the University of Iowa concurs that Bollywood copies of American films address different societal and cultural concerns. Thus, this narrow view of copyright implies that no cultural or “Indianized” copy could be a violation of copyright laws. Aabad Ponda, a lawyer for several Bollywood celebrities, does not think many American studios will even try to mount a copyright infringement case in India because “[f]or litigation in India, you need a terrific amount of time, money and energy and most people are not ready to spend that kind of time.” This leaves little hope for American studios hoping to protect their copyrights through the Indian legal system.

C. WTO Dispute Resolution

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

Many critics of TRIPS allege that it is a product of western imperialism. At the time of TRIPS’ enactment, developed nations wanted an international agreement protecting copyrights because a substantial amount of their gross domestic product came from copyright industries. Regardless, Indian law complies with TRIPS requirements. The problem, however, is one of enforcement. Indian movie producers have been creating cultural copies of American films and remaking old Hindi films for decades. This has proven to be a difficult practice to limit. The Indian judicial system is notorious for its inefficiency and corruption. Although India is taking steps to correct the problem, an adequate solution is still far from the present. It is important to note, however, that TRIPS “does not create any obligation to put in place a judicial system for the enforcement” of IPR, nor does TRIPS mandate any specific allocation of resources.
for the judiciary. TRIPS does ask that “each member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property,” and India meets this standard. Although the domestic resolution of a case may take a significant amount of time, the Indian Embassy says there are several intermediate measures available to litigants seeking to protect their IPR.

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

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

IV. Conclusion

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

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

It is important for the global community to take action not only against states that have insufficient legal frameworks for IPR protection, but also against states that have ineffective enforcement measures. It may be true that developing countries need some leeway when it comes to certain IPR, such as allowing poorer nations to buy patented medicines at lower prices. There is no compelling need, however, to copy American movies. The cultural copy phenomenon hurts not only the copyright owner but also the viability of the Indian entertainment industry. Hollywood is script driven, while Bollywood is star driven. In
other words, because directors know that they can get away with copying a tried-and-true American script, they are less willing to invest money in Indian screenwriters. Big name actors are paid astronomical amounts, while the writers are given meager sums to “Indianize” American movies. The writers who create original concepts are often shunned by directors in favor of the cheaper, proven success of a cultural copy. Unless something changes, Indian filmmakers will continue to “Indianize” Hollywood films. The famous opening song in the classic Bollywood hit Shri 420, properly captures this Indian view of copyright:

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

ENDNOTES

* J.D. Candidate, Vanderbilt University Law School, 2005.


2 Id.

3 UK Film Council, The Indian Media and Entertainment Industry, at http://www.ukfilmcouncil.org.uk/filmindustry/india/(Apr. 2002) (The UK Film Council is a governmental agency aimed at developing the film industry and film culture in the UK.).

4 Id.


9 Id.

10 Id.

11 Id.

12 Bradford v. Sahara Television (India 2003)


14 Id.


16 Id.


18 Id.

19 Id.


Id.

Moore, supra note 17.

Id.

Moore, supra note 17.


Id.


Id. at Part I, arts. 2.1–2.2. However, member states are not bound by the Berne Convention's provision on moral rights. Id. at Part II, art. 9.1.


Id. (India falls into the developing nation category); FAQ About TRIPS in the WTO: Which Countries Are Using the General Transition Periods?, World Trade Organization, at http://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm#Transition (last visited Jan. 11, 2005).

Hanson, supra note 30.


TRIPS Agreement, supra note 38, at Part I, art. 3.1.

Id.


TRIPS Agreement, supra note 38, at art. 12.

Laurence Helfer, Adjudicating Copyright Claims Under the TRIPS Agreement: The Case

47 Patry, supra note 37, at 2.


49 Id.

50 Id.

51 See TRIPS Agreement, supra note 38.

52 Id. at Part III.

53 Id. at Part III §1, art. 41; Overview: the TRIPS Agreement, World Trade Organization, at http://www.wto.org/english/tratop_e/trips_e/intel2b_e.htm#enforcement (last visited Jan. 11, 2005).


55 TRIPS Agreement, supra note 38, at art. 41.5.

56 Gana, supra note 54, at 770.

57 Id. at Part III §1, art. 41.5.

58 Gana, supra note 54, at 770.

59 Id. at Part III §1, art. 41.5.


61 Id.

62 Id.

63 Id.

64 Id.

65 Id.

66 Id.

67 Id.

68 The WTO in Brief: Part 2, supra note 15 (Explaining the WTO organizational structure as follows: The Ministerial Conference, the highest decision-making entity, meets every two years. The General Council is one step below the Ministerial Conference. This body also convenes as the Trade Policy Review Body and the Dispute Settlement Body. The General Council oversees the Goods Council, Services Council and the Intellectual Property (TRIPS) Council.).

69 Nimmer, supra note 48, at 1396; Understanding the WTO: Settling Disputes, supra note 60.

70 Id.

71 Id.

72 Id.

73 Id.

74 Id.

75 Id.

76 Id.

77 Id.

78 Id.

79 Id.

80 Id.

81 Gana, supra note 54, at 773.

82 Id.


87 Id.


89 International Intellectual Property Alliance, supra note 86.

90 Id.


92 Id. at 179.

93 Id.

94 Id.


96 Id. (Note, however, that the IIPA maintains that the 1999 amended version lowers the level of protection for computer programs and thus does not comply with TRIPs levels); International Intellectual Property Alliance, 2003 Special 301 Report: India 123, available at http://www.iipa.com/rbc/2003/2003SPEC301INDIA.pdf (2003) [hereinafter Special 301 Report].

97 Description of the IIPA, International Intellectual Property Alliance, at http://www.iipa.com/aboutiipa.html (last visited Jan. 11, 2005) (In 1984, six trade association representing different sections of America’s copyright-based industry came together to form the IIPA. This private sector coalition monitors copyright law developments in more than 80 nations and works closely with the USTR.).

98 Special 301 Report, supra note 96, at 122.

99 U.S. Trade Representative, supra note 91 (In 2003 alone, India suffered a trade loss of over $468 million).

100 P. Narayanan, Copyright Law 60, § 5.06 (Eastern Law House 1986).

101 Id.


103 Id.

104 Copyright Act of 1957 §14(1) (India).

105 Kapoor & Shaw, supra note 102.

106 Narayanan, supra note 100, § 7.05, at 75 (Moral rights are not included in TRIPS but can be found in the Berne convention (Article 6bis.)).

107 Id. § 1.28 (citing Chaplin v. Leslie Frewin Ltd. (1956) Ch. 71; Frisby v. BBC (1967) Ch. 932 (holding that a small change in a play for the purpose of broadcasting is a copyright infringement); Joseph v. National Magazine (1959) Ch. 14 (holding that substantial rewrites are copyright violations)); see also Narayanan, supra note 100 § 1.28 (U.K. cases are instructive because Indian copyright law was largely copied from British law).


Id.

Id.

Id.

Id.

Id.

Narayana, supra note 109.


Id.

Id. § 14.11 (citing Gopal Das v. Jagannath A.I.R. 1938 SC 266).

Id. §§ 14.28–29.

Id.

Id.


Id.

NARAYANAN, supra note 100, §§ 14.10, 14.16.

Id. § 14.16.

Id.

Narayana, supra note 109.


Id.


Id.

Id.

Id.

Id.

Id. at 137.

FEDERAL RESEARCH DIVISION, supra note 129, at High Courts Section.

Id.

Id.

Jain, supra note 127, at 134–35.

Id.

Id.

Jain, supra note 127, at 139.

FEDERAL RESEARCH DIVISION, supra note 129, at High Courts Section.

Id. at Lower Courts Section.

Id.

Id.

Id.

Jain, supra note 127.

FEDERAL RESEARCH DIVISION, supra note 129, at High Courts Section.

Id. at Lower Courts Section.

Id.

Id.

Author Loses India Plagiarism Case, supra note 8.

Id.

Id.


Note that the British named “Calcutta” is now properly referred to as “Kolkata.”


Id.

Id.

Bhaumik, supra note 156.

Author Loses India Plagiarism Case, supra note 8.

Id.

Mazmdar, supra note 111; Narula, supra note 108.

Id.

Narula, supra note 108.


Id.

Id.


Id.

Oger, supra note 155.

Id.


Indian American Center for Political Awareness, Indian American Center for Political Awareness, at http://www.iacfp.org/apop.htm (last visited Jan. 11, 2005).

Id.


U.K FILM COUNCIL, supra note 3.

Id.


Jha, supra note 7.


Id.
Copyright Infringement in the Indian Film Industry


Id.


Id.


Thomas, *supra* note 189.


Id.


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

Patry, *supra* note 37, at 3.

Chhabra, *supra* note 172.

Kaante (Raju Patel/Sanjay Gupta/Prithi Nandy Communications 2002); Reservoir Dogs (Artisan Entertainment 1992).

Id.


Id.

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

Id.

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

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

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

223 Helfer, supra note 46.

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


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


228 Press Release, Indian Embassy, supra note 226.

229 See above section on U.S. Response.

230 Chhabra, supra note 172.

231 Najmi, supra note 182.

232 Chute, supra note 180.