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## Adapting Indian Copyright: Bollywood, Indian Cultural Adaptation, and the Path to Economic Development

Michael P. Goodyear

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# Adapting Indian Copyright: Bollywood, Indian Cultural Adaptation, and the Path to Economic Development

Michael P. Goodyear\*

## ABSTRACT

*Bollywood and the Indian film industry have enjoyed enormous success, being among the largest movie producers in the world. Yet, despite the bright image of Indian cinema producing over a thousand movies a year and selling billions of tickets, the industry has faced controversy over the practice of copying expression, sometimes practically scene for scene, from US and other international films and adapting them into a version that reflects Indian social and cinematic customs and mores ("Indian cultural adaptation"). A long-standing practice, Indian cultural adaptation in Bollywood has only attracted the attention of Hollywood studios in the past twenty years, but under international, US, and Indian copyright law, the legality of the practice remains in an unsettled gray area.*

*Current literature on Indian cultural adaptation remains sparse and focuses on greater enforcement by India or Hollywood studios, at least partially condemning the practice. This Article instead argues that the practice of Indian cultural adaptation at least partially aligns with other limitations on the scope of copyright, including the expression-idea distinction, fair use, and the scène à faire doctrine. Drawing on a growing trend in law and economic development literature to craft property rights on a country-by-country basis, this Article also argues that explicit legalization of limited Indian cultural adaptation would*

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*benefit India culturally and economically, ultimately assisting the Indian entertainment industry with obtaining foreign investment on more favorable terms and further develop its burgeoning talent.*

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## I. INTRODUCTION

India is a movie-mad country.<sup>1</sup> In 2009 alone, the Indian film industry produced 1,200 films, employed 420,000 people, and sold 3 billion tickets, far outstripping Hollywood on all these fronts.<sup>2</sup> In 2017, Shah Rukh Khan, one of the greatest Bollywood actors, was the second wealthiest man in India.<sup>3</sup> The Indian film industry—most synonymous

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1. See Shilpa Jamkhandikar, *Movie-Mad India Could Overtake U.S. as Top User-Base - IMDB*, REUTERS (Dec. 12, 2018, 8:43 AM), <https://www.reuters.com/article/us-movies-india/movie-mad-india-could-overtake-u-s-as-top-user-base-imdb-idUSKBN1OB1V5> [<https://perma.cc/V5ZK-K24U>].

2. Lakshmi Iyer & Namrata Arora, *Hollywood in India: Protecting Intellectual Property* (A) 1 (Feb. 25, 2011) (Harv. Bus. Sch., Case No. 9-711-017).

3. See *Shah Rukh Khan Out of Top 10 in Forbes Richest Indian Celebrities 2018 List*, INDIA TODAY, <https://www.indiatoday.in/movies/celebrities/story/shah-rukh-khan-out-of-top-10-in-forbes-richest-indian-celebrities-2018-list-1402863-2018-12-05> [<https://perma.cc/8CGV-NP54>] (Dec. 5, 2018, 1:38 PM).

with Bollywood in Mumbai but also including other regional studios throughout the country—and its successes have led to international interest in the lucrative market.<sup>4</sup> The films that are the basis of this Indian cinema market are replete with color, lights, and music. The often three-hour-long extravaganzas of Bollywood are punctuated with multiple plots and bright colors.<sup>5</sup> No matter the genre, song-and-dance numbers interspersed throughout the film are key to Bollywood success.<sup>6</sup>

Despite this bright picture of Indian film, it also has a more controversial side. The Indian film industry is frequently criticized for producing “cheap copies” of Hollywood movies.<sup>7</sup> Indian producers have copied parts of Hollywood movies and other foreign films in Bollywood movies for decades, from copying mere unprotectable plot elements and scenes to practically shot-by-shot copyrightable expression.<sup>8</sup> It is the latter adapting of copyrightable elements that is at issue in this Article. In Indian cinema, the origins of a specific expression of an idea have never been all that important nor has there been a premium on films being *sui generis*.<sup>9</sup> Instead, Indian producers that draw “inspiration” from Hollywood movies do so to substantially adapt the movie into an Indian version that speaks directly to Indian cultural norms and issues, which the Hollywood original could never do.<sup>10</sup>

This “Indian cultural adaptation”<sup>11</sup> of Hollywood movies by the Bollywood film industry has been the subject of controversy for nearly two decades, since Hollywood first entered the Indian entertainment

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4. See Hariqbal Basi, *Indianizing Hollywood: The Debate over Copyright Infringement by Bollywood*, 18 UCLA ENT. L. REV. 33, 57–58 (2010).

5. TEJASWINI GANTI, *BOLLYWOOD: A GUIDEBOOK TO POPULAR HINDI CINEMA* 84–86 (2d ed. 2013).

6. *Id.* at 96–98.

7. *Id.* at 87.

8. *Id.* at 88; see, e.g., Samarth Goyal, *Copycat?: 15 Bollywood Films That Are Way Too ‘Inspired’ from Hollywood*, HINDUSTAN TIMES, <https://www.hindustantimes.com/bollywood/copycat-15-bollywood-films-that-are-way-too-inspired-from-hollywood/story-gue1v2WOQXRNC-HMRMAKsxM.html> [https://perma.cc/3LWW-KZ4T] (Oct. 1, 2016, 9:40 AM).

9. GANTI, *supra* note 5, at 87.

10. See *id.* at 88.

11. The academic literature has frequently used the term “Indianization” to refer to this practice of adapting films to reflect Indian cultural mores and cinematic norms. See, e.g., Basi, *supra* note 4, at 47–48; Arjun Shah, Comment, *Is Bollywood Unlawfully Copying Hollywood? Why? What Has Been Done About It? And How Can It Be Stopped?*, 26 EMORY INT’L L. REV. 449, 469–70 (2012). However, since the term “Indianization” in general can have colonialist connotations, see, e.g., I. W. Mabbett, *The “Indianization” of Southeast Asia: Reflections on the Prehistoric Sources*, 8 J. SE. ASIAN STUD. 1, 14 (1977), this Article instead uses the term “Indian cultural adaptation” to reflect this concept.

market, although the practice is much older.<sup>12</sup> Yet, despite the ink that has been spilled over the issue, it remains largely unresolved. Previous legal scholarship on Bollywood and copyright has focused on either the need for Bollywood to strictly adhere to the bounds of existing rights under copyright law,<sup>13</sup> why Hollywood studios should enforce their rights more,<sup>14</sup> or the futility of Hollywood litigating copyright disputes in India.<sup>15</sup> This Article suggests that instead of strengthening copyright enforcement in India, Indian law should recognize and protect at least limited Indian cultural adaptation of expression as a carve-out from enforceable rights under copyright. This argument is grounded in US and Indian copyright law but is novel in that it also draws upon the perspective of law and economic development. While law and economic development scholarship has largely focused on the benefits of strengthening property rights, this Article joins a growing body of literature that instead suggests that optimal property rights should be determined on a country-by-country basis, especially in developing countries.<sup>16</sup>

In Part II, this Article sets the stage by explaining the current controversy over copying Hollywood films in Bollywood as well as the use of Indian cultural adaptation. Part III explains copyright under international, US, and Indian law before examining and concluding that Indian cultural adaptation is left in an unclear gray area of legality and that, due to additional factors, copyright enforcement litigation by Hollywood would be a poor tactical choice. Part IV introduces the state of property rights under law and economic development scholarship, showing that despite the strength of property rights for economic development, a growing body of scholarship favors a country-by-country application. Having set the foundation of copyright and economic development principles, Part V then develops the core analysis of this Article. This Part proffers that Indian cultural adaptation is a key principle in Bollywood's success, and makes the legal argument for why Indian cultural adaptation fits within the historical framework of copyright exceptions and would provide cultural benefits for India. The final Parts of this Article then look at the success of Bollywood versus

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12. See Iyer & Arora, *supra* note 2, at 4.

13. See Rachana Desai, Note, *Copyright Infringement in the Indian Film Industry*, 7 VAND. J. ENT. L. & PRAC. 259, 259–71 (2005); Jishnu Guha, Note, *Time for India's Intellectual Property Regime to Grow Up*, 13 CARDOZO J. INT'L & COMPAR. L. 225, 232 (2005); Timm Neu, *Bollywood Is Coming! Copyright and Film Industry Issues Regarding International Film Co-Productions Involving India*, 8 SAN DIEGO INT'L L.J. 123, 133 (2006).

14. See Shah, *supra* note 11, at 452.

15. See Basi, *supra* note 4, at 68–74.

16. See *infra* Part IV.

the failure of Hollywood in India, ultimately suggesting that foreign investment from Hollywood bridge the gap and that legalization of Indian cultural adaptation would provide a significant bargaining chip for Bollywood studios to negotiate on more favorable grounds.

## II. COPYRIGHT AND INSPIRATION TROUBLES IN BOLLYWOOD

The Indian film industry, headlined by the Mumbai studios of “Bollywood,” has long produced “cultural copies”—near replications of a film or other work from one culture to another.<sup>17</sup> Indeed, the Indian film industry has thrived on adapting expression from Hollywood movies into Indian cultural and cinematic norms.<sup>18</sup> Even some of Bollywood’s biggest hits, such as *Bang Bang* (allegedly a copy of the Hollywood movie *Knight and Day*), have been implicated as mere Hindi language copies of previous movies.<sup>19</sup> In the early 2000s, nearly eight out of ten scripts in Bollywood were “inspired,” to some degree, by Hollywood films.<sup>20</sup> One Indian film critic estimated that “[e]asily 60 percent of the movies—almost one film that releases every week—is either blatantly copied or inspired by some fairly big American film.”<sup>21</sup>

“Indian cultural adaptation” is defined as adding Indian elements to preexisting expression to create a new film specifically for Indian audiences.<sup>22</sup> In Indian films, the process of culturally adapting a work is threefold: (1) adding “emotions” through the addition of social life; (2) expanding the narrative by including parallel or subplots; and (3) inserting songs.<sup>23</sup> In particular, culturally adapting a film includes adding a star-studded Bollywood cast, further expanding the narrative by including additional emotional themes relevant to Indian culture, adding song-and-dance scenes, and introducing kinship ties.<sup>24</sup> Traditional Hindi films are unique from American ones: they are much

17. Desai, *supra* note 13, at 259.

18. Neha Tara Mehta, *Bollywood Thrives on Ripoffs*, INDIA TODAY, <https://www.indiatoday.in/movies/story/bollywood-thrives-on-ripoffs-46761-2009-05-07> [<https://perma.cc/L3B4-N74B>] (May 7, 2009, 9:19 AM).

19. Prachi Jain, *Bollywood and Copyright- “Infringement or Inspiration,”* SELVAM & SELVAM (Feb. 10, 2017), <https://selvams.com/blog/bollywood-copyright-infringement-inspiration> [<https://perma.cc/89BP-C4JK>].

20. Desai, *supra* note 13, at 259.

21. Rico Gagliano, *Bollywood’s Copycat Film Industry*, MARKETPLACE (Mar. 17, 2008), <https://www.marketplace.org/2008/03/17/bollywoods-copycat-film-industry> [<https://perma.cc/F3CM-W9EN>].

22. Basi, *supra* note 4, at 68. The phenomenon of Indian cultural adaptation is not limited to film. Many Indian songs similarly take inspiration from American music hits. See Gagliano, *supra* note 21.

23. GANTI, *supra* note 5, at 89–90.

24. Basi, *supra* note 4, at 47–48.

longer, include hefty doses of song and dance, plenty of color, and often combine a variety of genres, such as action, love, drama, and comedy.<sup>25</sup> In their original forms, Hollywood films would be a poor fit for audiences in India due to the lack of these three necessary elements.<sup>26</sup> Perhaps the best known aspect of Bollywood films, the spontaneous songs and accompanying dances in exotic locales are critical for Indian film success due to consumer demand for these elements that have traditionally held center stage in Indian movies; very few Hindi films without such songs become box office hits.<sup>27</sup> Indeed, this process of Indian cultural adaptation builds on what would be a poor release in India and turns it into a lucrative masterpiece. Indian film producers adapt Hollywood and other international movies on purpose, using proven successful expression and a viable candidate for successful adaptation to reduce the risks of box office failure.<sup>28</sup>

There is a long history of Indian cinema making cultural copies of Hollywood classics. To name but a few more prominent examples: *Mere Yaar Ki Shaadi Hai* (2002) is alleged to be a copy of *My Best Friend's Wedding* (1997); *Rafoo Chakkar* (1974) is a copy of *Some Like It Hot* (1959); *Dil Hain Ke Manta Nahin* (1992) is supposedly an Indian version of *It Happened One Night* (1934).<sup>29</sup> The 2002 Bollywood film *Kaante* was blasted by the press for supposedly taking too much from Quentin Tarantino's *Reservoir Dogs*: "the producers simply stole their plot."<sup>30</sup> The fact that Indian filmmakers draw on Hollywood for inspiration is not disputed; indeed, they themselves readily admit it.<sup>31</sup> Some directors even show the original American movie to their actors in order for them to properly execute the scene.<sup>32</sup> The common response of Bollywood's producers and directors is that their works were "inspired" by other works.<sup>33</sup> In the past, Hollywood's lack of interest in the Indian entertainment industry convinced Indian producers that relying on Hollywood movies for "inspiration" would not attract

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25. *Id.* at 48.

26. *Id.* at 49.

27. GANTI, *supra* note 5, at 96–98.

28. *Id.* at 88–89.

29. Desai, *supra* note 13, at 267.

30. *Kaante*, SYDNEY MORNING HERALD (Feb. 20, 2003, 11:00 AM), <http://www.smh.com.au/articles/2003/02/19/1045330662081.html> [https://perma.cc/3XF7-SY8T].

31. Basi, *supra* note 4, at 45–47.

32. Desai, *supra* note 13, at 269.

33. Jain, *supra* note 19.



copyright suits. However, with the growth of Hollywood in India, so grew Hollywood studios' awareness of Indian movies' "inspiration."<sup>34</sup>

The amount of copying can vary from mere unprotectable plots and ideas to practically scene-for-scene copies of expression. The former do not fall afoul of copyright law, but the latter are in a gray area of lawfulness that depends on the level of abstraction of the expression. In these latter cases, despite what would many times constitute clear cases of copyright infringement, Hollywood long stayed away from pursuing claims against Bollywood studios even after they became aware of likely copyright infringement.<sup>35</sup> Hollywood had previously ignored Indian film studios' copyright infringement because they did not consider it a challenge; Indian movies were traditionally distinct and the market was not seen as all that profitable.<sup>36</sup> That changed when India was opened up to foreign direct investment (FDI), and Hollywood started to invest directly in Indian film ventures at the same time that the Indian economy was growing.<sup>37</sup> There have still been few litigated cases over this issue in India,<sup>38</sup> but the number has been growing since 2008. In particular, Hollywood studios started to pursue copyright infringement litigation against Bollywood producers due to the rapid increase in Bollywood's profitability, India's overall economic boom, and the audiences of both groups of studios starting to overlap.<sup>39</sup>

Today, the question of whether Indian cultural adaptation is copyright infringement remains unsettled. There is undoubtedly some copying taking place, but there continues to be genuine disagreement on whether the added Indian cultural and cinematic norms and elements are sufficient to transform expression into an entirely new work.<sup>40</sup> No doubt there are a range of potential results, but is Indian cultural adaptation necessarily a violation of copyright law?

### III. COPYRIGHT LAW

To understand how Bollywood's cultural adaptation of films is understood in a legal context, it is first important to understand the current laws on copyright infringement. The goal of copyright is to promote new and improved works by offering authors exclusive

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34. Aayush Agarwal, Chaitanya Kansal & Pranav Garg, *Corporatization of Bollywood 6* (2018) (Indian Inst. Mgmt. Bangalore, Case No. IMB 675); Iyer & Arora, *supra* note 2, at 4.

35. Basi, *supra* note 4, at 50.

36. *Id.* at 37, 50–53.

37. *Id.* at 37.

38. *See* Desai, *supra* note 13, at 266.

39. Basi, *supra* note 4, at 53–57.

40. *Id.* at 68.

intellectual property protection over their works for a limited period of time.<sup>41</sup> First, international law, binding on both the United States and India, provides a background to the copyright enforcement obligations of both countries. This Article then summarizes the relevant provisions of US and Indian copyright law. Finally, using aspects of both countries' copyright laws, it turns to Indian cultural adaptation and determines that its legality is highly fact specific and it does have potentially viable copyright defenses.

### *A. International Law*

The primary international compliance mechanism for copyright is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The World Trade Organization's (WTO) Uruguay Round resulted in the signing of the comprehensive Marrakesh Agreement in 1994 that included the various constituent documents of the WTO Agreement, including TRIPS.<sup>42</sup> Both the United States and India are signatories.<sup>43</sup> TRIPS covers the protection of intellectual property, including copyrights.<sup>44</sup> The agreement imposes an obligation of establishing minimum levels of protection for other States Parties' intellectual property and following the national treatment principle, by which citizens of other States Parties are treated the same as a country's own citizens.<sup>45</sup>

Perhaps most importantly, TRIPS incorporates the two previous leading international intellectual property agreements, the Paris Convention and the Berne Convention, and binds WTO signatories to them.<sup>46</sup> While the Paris and Berne Conventions do not have an enforcement mechanism,<sup>47</sup> TRIPS does, mandating certain civil and

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41. U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"); Peter S. Menell & Suzanne Scotchmer, *Intellectual Property Law*, in 2 HANDBOOK OF LAW & ECONOMICS 1473, 1475–77 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

42. 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 [hereinafter TRIPS]. TRIPS was primarily pushed for by more developed countries, such as the United States and Switzerland. Menell & Scotchmer, *supra* note 41, at 1535.

43. *Members and Observers*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (July 29, 2016).

44. TRIPS, *supra* note 42, arts. 9–39.

45. *Id.* arts. 1, 3.

46. *Id.* arts. 2, 9.

47. David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385, 1393 (1995).

criminal enforcement procedures for copyright infringement.<sup>48</sup> It also creates a private cause of action for copyright violations, which allows the copyright owner to file suit directly in the State Party's courts.<sup>49</sup> Furthermore, disputes about the enforcement of TRIPS obligations are subject to international enforcement through the WTO's Dispute Settlement Understanding (DSU).<sup>50</sup> The punishment for persistent violation of a State Party's TRIPS obligations is retaliation in the form of a punitive tariff.<sup>51</sup> While there are concerns about countries refusing to comply with their TRIPS obligations,<sup>52</sup> TRIPS does establish international rules for enforcing copyright infringement by integrating the Berne Convention.<sup>53</sup>

Of particular note in the context of Bollywood, TRIPS protects the exclusive right of authors to adapt their works while rejecting the protection of ideas. Article 12 of the Berne Convention provides that "[a]uthors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works."<sup>54</sup> However, TRIPS and the Berne Convention do not protect "ideas, procedures, methods of operation or mathematical concepts as such."<sup>55</sup> While TRIPS and the incorporated Berne and Paris Conventions provide broader obligations for states rather than detailed specifics, the space between a protected adaptation under copyright and an idea is critical to understanding whether Bollywood's productions infringe Hollywood's copyrights.

### *B. United States*

Copyright law in the United States fits inside this TRIPS framework, protecting adaptations while permitting free use of ideas.

48. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]. However, this allows for substantial latitude for individual national variation of enforcement beyond these minimums. Menell & Scotchmer, *supra* note 41, at 1536.

49. See TRIPS, *supra* note 42, pmb., arts. 41–42.

50. See generally DSU, *supra* note 48.

51. *Id.* art. 22.

52. See Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPS Agreement: The Case for a European Human Rights Analogy*, 39 HARV. J. INT'L L. 357, 362 (1998).

53. See TRIPS, *supra* note 42, art. 9. It should be noted that imposing economic trade sanctions is a potentially powerful tool to force compliance, but that especially in the intellectual property sector, the WTO is more likely to be cautious in its decisions to avoid a state refusing to comply with its ruling. See Helfer, *supra* note 52, at 362.

54. Berne Convention for the Protection of Literary and Artistic Works art. 12, Sept. 9, 1886, S. Treaty Doc. No. 99-27 (1988), 828 U.N.T.S. 221.

55. TRIPS, *supra* note 42, art. 9.

US copyright law is governed by the amended Copyright Act of 1976, which is codified as Title 17 of the US Code. Under US copyright law, the copyright owner has the exclusive right to prepare derivative works of their copyrighted work.<sup>56</sup> A derivative work, like an adaptation, is one based upon a preexisting work.<sup>57</sup> But Title 17 does not provide protection under copyright for “any idea, procedure, process, system, method of operation, concept, principle, or discovery.”<sup>58</sup>

In the United States, to prove infringement, the owner of a copyrighted work must show that there was (1) copying and (2) copying of enough copyright-protected elements.<sup>59</sup> The United States uses a two-part analysis for the second prong. To determine if there was improper appropriation, courts first examine whether there was copying of copyright-protected elements rather than copying of unprotectable elements, and then they investigate whether there was enough copying for it to be substantial.<sup>60</sup> Circuit courts have employed slightly different tests for appropriation; for example, the US Court of Appeals for the Second Circuit’s test requires a heightened, more discerning observer test for determining whether there was copying of copyrighted elements and an ordinary observer test for determining whether enough of the work was copied for it to be a substantial use of the work.<sup>61</sup> The logic behind this infringement test is that unauthorized derivative works are considered dangerous to society if they are so similar to the original that they will adversely affect the demand for the original.<sup>62</sup>

In addition to the TRIPS provisions on adaptations and ideas, Title 17 also provides for the important carve-out of fair use. Fair

56. Copyright Act of 1976, Pub. L. No. 94-553, § 106, 90 Stat. 2541, 2546 (codified as amended at 17 U.S.C. § 106 (2018)).

57. *Id.* § 101.

58. *Id.* § 102(b).

59. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000) (noting that “[a]bsent direct evidence of copying, proof of infringement involves fact-based showings that the defendant had ‘access’ to the plaintiff’s work and that the two works are ‘substantially similar’”); *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 131 (2d Cir. 2003) (proving substantial similarity requires a plaintiff to show “(i) that it was protected expression in the earlier work that was copied and (ii) that the amount that was copied is ‘more than de minimis’”) (quoting *Castle Rock Ent. v. Carol Publ’g Grp.*, 150 F.3d 132, 138 (2d Cir. 1998)); see generally JULIE E. COHEN, LYDIA PALLAS LOREN, RUTH L. OKEDIJI & MAUREEN A. O’ROURKE, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 247–343 (4th ed. 2015).

60. The Second Circuit employs a more discerning observer-ordinary observer test for determining improper appropriation. *Boisson v. Banian, Ltd.*, 273 F.3d 262, 272 (2d Cir. 2001). The Ninth Circuit instead uses the extrinsic-intrinsic test. *Skidmore v. Led Zeppelin*, 905 F.3d 1116, 1125 (9th Cir. 2018).

61. *Boisson*, 273 F.3d at 272.

62. *Basi*, *supra* note 4, at 40.

use is the most significant defense to copyright infringement in US law. To determine if a use is fair, the test under § 107 looks at four factors: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use upon the potential market.<sup>63</sup> The Supreme Court has also placed particular emphasis on the transformativeness of fair use, which is considered under the first factor, noting that the transformativeness of works “lie[s] at the heart of the fair use doctrine” and “the more transformative the new work, the less will be the significance of other factors . . . that may weigh against a finding of fair use.”<sup>64</sup> While transformativeness is the primary consideration,<sup>65</sup> all of the factors are weighed in determining fair use on a case-by-case basis.<sup>66</sup>

The other important principle in US copyright law for the purpose of evaluating Bollywood is the *scène à faire* doctrine. Under US copyright law, common tropes or elements are not copyrightable and can be used by everyone.<sup>67</sup> Under this doctrine, there is no copyright protection for “those expressions that are standard, stock, or common to a particular topic or that necessarily follow from a common theme or setting.”<sup>68</sup> Perhaps the most conspicuous example of a *scène à faire* would be the star-crossed lovers theme of Romeo and Juliet.<sup>69</sup> The *scène à faire* argument has thus far been inadequately explored in connection to Bollywood.<sup>70</sup> However, *scène à faire* is critical to understanding whether Bollywood impermissibly copies Hollywood movies, as many plots could be so common as to be considered *scènes à faire*.

63. 17 U.S.C. § 107 (2018).

64. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). The Supreme Court in *Campbell* pulled from the scholarship of Judge Pierre Leval, who first coined the idea of transformative use. *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 105, 111 (1990).

65. *See Campbell*, 510 U.S. at 579. One recent study found that transformativeness is rapidly approaching a level of determinativeness in US fair use cases. *See generally* Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163 (2019).

66. *Campbell*, 510 U.S. at 577–78.

67. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980) (describing *scènes à faire* as “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic”) (quoting *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978)); *see also* *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991).

68. *Gates Rubber Co. v. Bando Chem. Indus.*, 9 F.3d 823, 838 (10th Cir. 1993).

69. *See Matthews v. Freedman*, 157 F.3d 25, 27 (1st Cir. 1998) (“[T]he underlying idea (e.g., the travails of two star-crossed lovers), even if original, cannot be removed from the public realm.”).

70. *See, e.g., Shah, supra* note 11, at 468 (merely concluding with little analysis that it “requires toying with different levels of abstraction”).

### C. India

Also a signatory of TRIPS, India, like the United States, protects adaptations but not ideas. India's copyright laws are codified in the Copyright Act of 1957.<sup>71</sup> The Indian Copyright Act of 1957, after it was amended in 1999, is in full compliance with TRIPS's copyright law obligations.<sup>72</sup> Under the Copyright Act of 1957, copyright owners have the exclusive right to make copies and adaptations of their work, among other rights.<sup>73</sup> Akin to the US definition of a derivative work, India defines an adaptation as "in relation to any work, the use of such work involving its rearrangement or alteration."<sup>74</sup> Unlike US copyright law and TRIPS, Indian copyright law also grants authors moral rights, which include the right of authorship and the right to prevent alterations that would harm the author's reputation.<sup>75</sup> The Indian Copyright Act also protects only the original expression of an idea, not the idea itself.<sup>76</sup>

In its seminal copyright decision, *R.G. Anand v. Delux Films*, the Indian Supreme Court upheld the expression-idea distinction.<sup>77</sup> The author of a play sued a production company for making a movie "entirely based" on his play. However, the Supreme Court held that "mere similarities by themselves are not sufficient to raise in [sic] inference of colourable imitation [and] on the other hand, there are quite a number of dissimilarities."<sup>78</sup> Using this balancing test, the

71. Copyright Act, 1957 (Act No. 14/1957) (India); see also Priti H. Doshi, Note, *Copyright Problems in India Affecting Hollywood and "Bollywood,"* 26 SUFFOLK TRANSNAT'L L. REV. 295, 301 (2003). In response to the United States placing India on its "priority foreign country" list for poor intellectual property-protecting countries, the Indian government enacted the Copyright Act of 1994, amending the Copyright Act of 1957 to better enforce intellectual property rights. *Id.* at 303–04. The Copyright Act of 1957 was most recently amended in 2012 to address challenges posed by the internet. For a summary of the changes most recently added in 2012, see Zakir Thomas, *Overview of Changes to the Indian Copyright Law*, 17 J. INTELL. PROP. RTS. 324 (2012).

72. Navdeep Kour Sasan, *TRIPS and Copyright Protection in India: An Overview*, PARIPEX – INDIAN J. RSCH., Sept. 2012, at 98, 101–02.

73. Copyright Act, 1957 (Act No. 14/1957) § 14 (India). The Indian Supreme Court has also interpreted this to include the right to prepare derivative works. See *E. Book Co. v. D.B. Modak*, AIR 2008 SC 809, ¶ 13–14 (2007) (India).

74. Copyright Act, 1957 § 2(a)(v).

75. *Id.* § 57; P. NARAYANAN, COPYRIGHT LAW § 7.05, at 74–75 (1986).

76. *R.G. Anand v. Delux Films*, (1979) 1 SCR 218, 248 (1978) (India) ("There can be no copyright in an idea, subject matter, themes, plots or historical or legendary facts."); GANTI, *supra* note 5, at 87–88; see also *A Hand Book of Copyright Law*, MINISTRY OF HUM. RES. DEV., GOV'T OF INDIA, <http://copyright.gov.in/Documents/handbook.html> (last visited Feb. 3, 2020); Tanuja V. Garde, *India's Intellectual Property Regime: A Counterbalance to Market Liberalization?* 32 (Ctr. on Democracy, Dev., & the Rule of L., Working Paper No. 99, 2009).

77. *R.G. Anand*, (1979) 1 SCR at 260–61; see also Garde, *supra* note 76, at 32.

78. *R.G. Anand*, (1979) 1 SCR at 258.

Supreme Court determined that the movie did not infringe on the play's copyright.<sup>79</sup> The court particularly focused on six dissimilarities in the works that were different cultural themes such as dowries, which it held rendered the film noninfringing.<sup>80</sup> While the Indian Supreme Court held that "[t]here can be no copyright in an idea, subject matter, themes, plots or historical or legendary facts," it also emphasized that "violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyright[ed] work."<sup>81</sup>

Indian courts have adopted the "lay [or ordinary] observer" test for copyright infringement, wherein "after having read or seen both the works [the observer] is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original."<sup>82</sup> The similarity in the "copy must be a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy."<sup>83</sup> Even after passing the lay observer test for similarity, a copyright infringement suit must still prove a causal connection of intended or subconscious reliance.<sup>84</sup> One example of such a finding was in *Zee Telefilms*, where the Bombay High Court held that there was copyright infringement in the theme of a television show about the deity Kanhaiyya coming down to Earth.<sup>85</sup> This case was between two Indian parties and involved an obscene amount of access, as the plaintiff had met with and sent ideas and a pilot episode to the defendant on multiple occasions.<sup>86</sup> The sheer degree of access made it impossible for the court "to accept that the similarities in two works were mere coincidence."<sup>87</sup>

India also has both fair use and *scène à faire*. Indian fair use, or "fair dealing" as it is called in India, differs from US fair use in that specific uses are exempted under the Copyright Act of 1957.<sup>88</sup> The definition of fair dealing includes three specific purposes, and is included in a list of thirty exceptions, many of which are also included

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79. *Id.* at 260–61.

80. *Id.* at 258–60.

81. *Id.* at 248–49.

82. *Id.* at 249; Desai, *supra* note 13, at 264.

83. *R.G. Anand*, (1979) 1 SCR at 249.

84. Desai, *supra* note 13, at 264–65.

85. *See Zee Telefilms Ltd. v. Sundial Commc'ns Priv. Ltd.*, (2003) 27 PTC 457, ¶ 32 (Bom) (India).

86. *Id.* at ¶¶ 3–5, 20.

87. *Id.* at ¶ 20.

88. Copyright Act, 1957 (Act No. 14/1957) § 52 (India).

in separate provisions in Title 17 of the US Code.<sup>89</sup> The most relevant to Bollywood is the first exception: “a fair dealing with a literary, dramatic, musical or artistic work for the purposes of—(i) research or private study; (ii) criticism or review, whether of that work or of any other work.”<sup>90</sup> The Indian courts have adopted the *scène à faire* doctrine as well, along the same lines as in the United States.<sup>91</sup>

#### *D. Is Indian Cultural Adaptation an Infringement?*

Like many legal answers, the answer to whether Indian cultural adaptation is copyright infringement is “it depends.” While there are minor differences between US and Indian copyright law, as detailed above, they are substantially similar in regard to the three primary considerations when looking at whether Indian cultural adaptation is copyright infringement: (1) the expression-idea distinction; (2) fair use; and (3) *scène à faire*.

First, both US and Indian law leave open the question of where exactly the line between mere plot inspiration and too much copying (i.e., copying expression) lies. Indian courts have held that being a cultural copy of another work is not necessarily copyright infringement.<sup>92</sup> The discrepancy comes in how far one can take the idea down a similar expression path without violating copyright law. The Indian Supreme Court has drawn a distinction between idea and expression, noting that “you can borrow the idea of another author, but not the expression.”<sup>93</sup> The court further noted that “even if the plot is copied, the person who copies it, be it consciously or unconsciously, must also weave into the plot sufficient creations of his own imagination and literary skill, to make the work his own.”<sup>94</sup> In India, culturally adapting another work to make it fit within Indian cultural and cinema conventions is commonly accepted by the public as valid under copyright.<sup>95</sup> Of course, it is important to note that the lay observer test in Indian courts is from the perspective of a lay *Indian* observer. Would the average Indian, seeing two movies, one American and one culturally

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89. *Id.* § 52(1)(a)–(zc).

90. *Id.* § 52(1)(a).

91. *See* NRI Film Prod. Assocs. v. Twentieth Century Fox Film Corp., (2004) ILR 54 Kar 4530, ¶¶ 15–17 (India) (quoting R.G. Anand v. Delux Films, (1979) 1 SCR 218, 248–49, 259–60 (1978) (India)). This case actually involved an Indian studio claiming a Hollywood studio was infringing its movie copyright. *Id.* at ¶ 1. The Hollywood studio won. *Id.* at ¶ 25.

92. Desai, *supra* note 13, at 269.

93. Bradford v. Sahara Media Ent. Ltd., (2004) ILR 1 Cal 15, ¶ 74 (2003) (India).

94. *Id.* at ¶ 78.

95. GANTI, *supra* note 5, at 88.



adapted to Indian culture, think they are similar enough for one to be a copy?<sup>96</sup> Bollywood producers have been confident that the Indian public would not, given the centrality of Indian cultural elements in films to Indian moviegoers. For example, in the first threatened copyright infringement suit by Hollywood against Bollywood, Sony claimed that Bollywood's *Hitch* was a copy of its earlier movie *Partner*.<sup>97</sup> The production company that produced *Hitch*, K Sera Sera, responded that while it had been "inspired" by *Partner*, it had culturally adapted *Partner*, and therefore *Hitch* could not be a copy.<sup>98</sup>

Yet, under an ordinary observer test, there is little doubt that some of these Bollywood productions would be found to have infringed copyrights in Hollywood films, even in the eyes of an Indian observer. For example, *Yeh Dillagi* has practically the same elements as Hollywood's *Sabrina*, with almost identical characters and plot development, just with different actors—the expression is almost completely the same.<sup>99</sup> In another example, both the Bollywood *Raaz* and the Hollywood *What Lies Beneath* tell the story of a ghost of a young girl haunting a couple after she died due to a love affair with the husband.<sup>100</sup> The copying of all of these elements makes it much more likely that a court would find copying of expression and not just ideas.

The battle between expression and idea finally came to a head in 2010, when 20<sup>th</sup> Century Fox sued Sohail Maklai Entertainment for making the movie *Knockout*, which it claimed was an unlawful remake of their film *Phone Booth*.<sup>101</sup> Both films centered around a hostage in a phone booth conversing with their captor.<sup>102</sup> For the first time, an Indian court held that this "inspiration" was copyright infringement.<sup>103</sup> Using the lay observer test, the court found that "[t]here is little doubt that a person seeing both the films at different times would come to the unmistakable conclusion that the Defendants' film is a copy."<sup>104</sup> One Indian law firm predicted that this decision would obliterate the veneer

96. See Desai, *supra* note 13, at 268.

97. Basi, *supra* note 4, at 59; Manisha Bugwande-Doorasamy & Ferosa-Fae Hassan, *Bollywood: A Little Too Much Inspiration*, LEXOLOGY (Mar. 8, 2017), <https://www.lexology.com/library/detail.aspx?g=ad7ffefe-f0cb-4cbd-a101-973d7caafec6> [https://perma.cc/MC7J-QMEJ]; Iyer & Arora, *supra* note 2, at 6.

98. Iyer & Arora, *supra* note 2, at 6.

99. Basi, *supra* note 4, at 45.

100. *Id.* at 46.

101. Twentieth Century Fox Film Corp. v. Sohail Maklai Ent. Priv. Ltd., (2010) 44 PTC 647, ¶ 1 (India).

102. *Id.* at ¶ 12.

103. *Id.* at ¶ 34.

104. *Id.* at ¶ 29.

of “inspiration.”<sup>105</sup> But despite this prediction, and the number of increasing copyright infringement cases, Bollywood’s utilization of Hollywood inspiration has continued. For example, the aforementioned Indian hit *Bang Bang*, an Indian cultural adaptation of Hollywood’s *Knight and Day*, was released in 2014, four years after the decision in *Twentieth Century Fox*.<sup>106</sup>

Next, fair use is more favorable in the United States than in India to Indian cultural adaptation of movies. Culturally adapted Hollywood films would hardly qualify as criticism, the most likely category under India’s fair use test. But US courts, on the other hand, look at each dispute on a case-by-case basis, so it is difficult to predict the outcome of Bollywood infringement suits with any certainty. The four factors in the US fair use test appear to weigh against a finding of fair use for Indian cultural adaptations of Hollywood movies.<sup>107</sup> The purpose is not directly commentary, but is telling the same story, and the Indian movies are commercial in nature; these facts weigh strongly against transformative use.<sup>108</sup> However, the work is placed in a new context and for a new purpose—reaching a different audience—which could be transformative as creating “new expression, meaning, or message.”<sup>109</sup> The amount taken is usually substantial, and, at the very least, the central plot and associated expression—the most important parts of a film—are taken from Hollywood movies.<sup>110</sup> The effect of the use upon the potential market is likely the most beneficial factor for Bollywood directors, as they could show that their film is aimed at the

105. See Jain, *supra* note 19.

106. *Id.* Examples of Bollywood copying South Indian films’ stories have also proliferated, such as the notable case of Bollywood hit *Om Shanti Om*. Aparajita Lath, *Om Shanti Om: Copyright Dispute*, SPICY IP (June 28, 2013), <https://spicyip.com/2013/06/om-shanti-om-copyright-dispute.html> [<https://perma.cc/C382-75MX>].

107. 17 U.S.C. § 107 (2018).

108. Commenting on, criticizing, or using a work for another purpose is a transformative use, but mere copying for the same purpose is not. See, e.g., *Ferdman v. CBS Interactive Inc.*, 342 F. Supp. 3d 515, 542 (S.D.N.Y. 2018) (“[A] wholly untransformative and unaltered copy of Plaintiff’s photographs [weighs strongly against fair use.]” (citing *BWP Media USA, Inc. v. Gossip Cop Media, Inc.*, 196 F. Supp. 3d 395, 407 (S.D.N.Y. 2016))).

109. *Cariou v. Prince*, 714 F.3d 694, 699–703 (2d Cir. 2013).

110. A mere fleeting use of a copyrighted work in a film would weigh in favor of fair use. *Sandoval v. New Line Cinema Corp.*, 973 F. Supp. 409, 413–14 (S.D.N.Y. 1997), *aff’d*, 147 F.3d 215 (2d Cir. 1998) (finding that the appearance of photographs in the back of a movie scene that lasted for one and a half minutes was fair use). However, this factor has not been found dispositive. See, e.g., *Adjmi v. DLT Ent. Ltd.*, 97 F. Supp. 3d 512, 535 (S.D.N.Y. 2015) (finding that the play in question “is a highly transformative parody of the television series that, although it appropriates a substantial amount of *Three’s Company*, is a drastic departure from the original[,]” and is therefore fair use).

Indian movie market while the original Hollywood film was not, but this outcome is far from certain.<sup>111</sup>

Conversely, one scholar has argued that “adaptations of Hollywood films barely [resemble the original screenplay] as they have been transformed, or ‘Indianized.’”<sup>112</sup> It is undoubtedly true that adding Indian cultural elements such as songs, dances, cultural motifs, fashion, and colors changes the basic Hollywood expression of a plot. The question is whether this change is enough to be considered transformative under US law. This is part of the wider scholarly debate about Indian cultural adaptation. Some legal scholars have recognized the copying of Hollywood movie ideas and reproducing them in Indian films as copyright infringement.<sup>113</sup> But several Indian legal experts have argued that Bollywood’s inspiration from Hollywood films does not constitute copyright infringement.<sup>114</sup>

Finally, whether the copying would count as a *scène à faire* is also highly fact specific. If general themes were used, like in *R.G. Anand*, the work would almost certainly count as a *scène à faire*. But the degree of copying runs the gamut between the mere plot to wholesale expression of scenes.<sup>115</sup> Ultimately, whether a film that draws on elements of a preexisting work will be considered infringing depends on the level of specific copying; using all the underlying elements would almost certainly be copying but merely pulling a few general plot ideas would more likely be unprotected *scène à faire*.<sup>116</sup> The main Indian case to address the *scène à faire* doctrine with Bollywood copying was *Bradford v. Sahara Media*.<sup>117</sup> In 2004, author Barbara Taylor Bradford sued Sahara Media for allegedly infringing the copyright in her book, *Woman of Substance*, in their new television series, *Karishma – The Miracles of Destiny*.<sup>118</sup> The two works are both

111. The fourth factor was the most important factor for courts to consider in the United States following the Supreme Court’s decision in *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985), which stated that the fourth factor was “undoubtedly the single most important element of fair use,” but this factor has been partially tempered following the Supreme Court’s decision in *Campbell v. Acuff-Rose*, 510 U.S. 569, 578 (1994), which stressed that “[a]ll [factors] are to be explored, and the results weighed together, in light of the purposes of copyright.” See generally Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 616–17 (2008) (finding that 59.0 percent of opinions between 1985 and 1994 cited the proposition in *Harper & Row*, but only 26.5 percent did between 1994 and 2005).

112. GANTI, *supra* note 5, at 89.

113. See, e.g., Desai, *supra* note 13, at 259–71.

114. GANTI, *supra* note 5, at 87–90; K. M. Gopakumar & V. K. Unni, *Perspectives on Copyright: The ‘Karishma’ Controversy*, 38 ECON. & POL. WKLY. 2935, 2935 (2003).

115. Shah, *supra* note 11, at 457.

116. See *id.* at 467.

117. *Bradford v. Sahara Media Ent. Ltd.*, (2004) ILR 1 Cal 15 (2003) (India).

118. *Bradford*, (2004) ILR 1 Cal at ¶¶ 2–3; see also Desai, *supra* note 13, at 259, 265–66.

raggs-to-riches stories that chronicle a woman's rise from the bottom of society to become the head of an international corporation.<sup>119</sup> The case eventually appeared before the Indian Supreme Court, but the court refused to uphold an injunction against the television show.<sup>120</sup> The court determined that "the plaintiffs have no copyright over the central theme of a woman rising to power, or there being characters about her, like an old and sticking friend . . . a lover from the house where she was working, an Army [*sic*] husband and some other person whom she might have married or might have fallen in love with at sometime."<sup>121</sup> The Indian Supreme Court determined that all of these things were common elements and thus not protected under copyright, closely in line with the US *scène à faire* doctrine.

While US and Indian copyright law allow for a degree of copying, it is unclear where Indian cultural adaptation falls. Whether Bollywood's inspiration from Hollywood movies would count as copyright infringement remains unsettled and depends on case-by-case determinations rather than a clear, black-and-white answer.<sup>122</sup> Contrary to what some scholars have argued,<sup>123</sup> the fact that aspects of the film are copied does not necessarily mean that there is copyright infringement—that depends on the level of abstraction and added elements to determine if this adaptation is of an idea or expression, fair use, or merely using a *scène à faire*. For now, this uncertainty is considered worth the risk by Bollywood studios, with Indian cultural adaptation continuing even after *Sohail Maklai*.

### *E. Difficulties with Copyright Enforcement*

Even if Hollywood studios brought copyright infringement suits against Bollywood, they would face numerous challenges that might make them unsuccessful. Indian courts face substantial delays, their enforcement of copyright is sometimes lacking, and, perhaps most importantly, they offer limited avenues for recovery for copyright owners.

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119. *Bradford*, (2004) ILR 1 Cal at ¶ 67; *see also* Desai, *supra* note 13, at 259, 266.

120. *Bradford*, (2004) ILR 1 Cal at ¶ 211; *see also* Desai, *supra* note 13, at 259.

121. *Bradford*, (2004) ILR 1 Cal at ¶ 209.

122. *See* Shah, *supra* note 11, at 465–73 (arguing that Bollywood's usage of Hollywood stories is clear copyright infringement).

123. *Id.* at 464.

First, India is known for substantial delays in its courts.<sup>124</sup> As of June 2018, there were thirty-three million pending cases in Indian courts.<sup>125</sup> This problem is not limited to the lower courts; as of June 2019, there was a backlog of 58,669 cases in the Supreme Court.<sup>126</sup> Some cases take up to a decade to be resolved.<sup>127</sup> One Indian lawyer concluded that copyright infringement suits by Americans would be an uphill battle: “you need a terrific amount of time, money, and energy.”<sup>128</sup> While Hollywood is not lacking in any of these, it still poses a daunting challenge, even to the mightiest of Hollywood studios.

Second, while the Copyright Act of 1957 is in full compliance with TRIPS, potentially inadequate enforcement arises in the implementation of this law.<sup>129</sup> The heavy docket discourages some courts from seriously addressing certain issues, such as copyright. As one Indian lawyer explained, “Indian judges, inundated with a wide range of civil criminal cases, were not always sympathetic to cases involving an intangible asset like copyright.”<sup>130</sup> Even if there is bona fide copyright infringement, there is a risk, especially given the case-by-case nature of copyright infringement determinations, that Indian courts will not see it as such or might even be opposed to non-Indian plaintiffs suing Bollywood.<sup>131</sup>

Finally, relief for copyright infringement can be rather limited in India. Relief for copyright infringement in India can take the form of (1) an injunction, (2) damages, (3) forfeiture of infringing copies, or (4) account of profits.<sup>132</sup> Damages are meant as a compensatory remedy

124. See generally Arnab Kumar Hazra & Maja B. Micevska, *The Problem of Court Congestion: Evidence from Indian Lower Courts*, in JUDICIAL REFORMS IN INDIA: ISSUES AND ASPECTS 137 (Arnab Kumar Hazra & Bibek Debroy eds., 2007).

125. 3.3 Crore Cases Pending in Indian Courts, Pendency Figure at Its Highest: CJI Dipak Misra, BUS. TODAY, <https://www.businesstoday.in/current/economy-politics/3-3-crore-cases-pending-indian-courts-pendency-figure-highest-cji-dipak-misra/story/279664.html> [https://perma.cc/8BQV-HPTV] (June 28, 2018, 8:44 AM).

126. Out of 43 Lakh Cases Pending in High Courts, Over 8 Lakh a Decade Old, ECON. TIMES, <https://economictimes.indiatimes.com/news/politics-and-nation/out-of-43-lakh-cases-pending-in-high-courts-over-8-lakh-a-decade-old/articleshow/69974916.cms> [https://perma.cc/E87J-UQ49] (June 27, 2019, 5:08 PM).

127. *Id.*

128. Ramola Talwar Badam, *Is Bollywood a Hollywood Clone?*, CBS NEWS (June 4, 2003, 5:05 PM), <https://www.cbsnews.com/news/is-bollywood-a-hollywood-clone> [https://perma.cc/3T3D-FE3J].

129. Desai, *supra* note 13, at 270.

130. Garde, *supra* note 76, at 33 (noting the lack of certainty on judicial respect for copyrights); Iyer & Arora, *supra* note 2, at 5.

131. See Shah, *supra* note 11, at 473–80.

132. Copyright Act, 1957 (Act No. 14/1957) §§ 55, 58 (India); see also Sumedh Kumar Sethi, *Remedies for Infringement of Copyright in India: The Adequacy or Inadequacy Thereof*, J. LEGAL STUD. & RSCH., Feb. 2017, at 115, 115–126.

to give the copyright owner whatever they lost, which is usually what the license would have cost or lost sales.<sup>133</sup> Indian courts could also award punitive damages in extraordinary cases.<sup>134</sup> Account of profits is where the court, at its discretion and in combination with an injunction, awards actual profits from the copyright infringement to the copyright owner.<sup>135</sup>

While these options seem on par with recovery for copyright infringement in the United States, the recovery of damages is extremely curtailed. While Indian copyright law does not have statutory damages like in the United States,<sup>136</sup> if the infringement suit was successful, the infringer would still have to disgorge their profits, which could be an enormous amount in the film context.<sup>137</sup> But it would be incredibly difficult to determine the damages created through the Indian cultural adaptation of a Hollywood movie and what that process took from the market of the original work.<sup>138</sup> Profits are based on the percentage of profits derived from the actual copyright infringement,<sup>139</sup> not added material. This makes it difficult to calculate the exact profits from the copied underlying Hollywood expression in Bollywood movies, discounting the added Indian elements and their market power in India. In addition, Indian courts have generally been reluctant to award large amounts of damages. The highest amount of damages for copyright infringement in India was in *Microsoft v. Yogesh Popat*, where the court only awarded 1.97 million Indian rupees (INR), or 28,500 US dollars (USD).<sup>140</sup> The same is true for settlements. In 2009, 20<sup>th</sup> Century Fox sued India's BR Films for *Yeh Bindass Hai* allegedly being a copy of *My Cousin Vinny*.<sup>141</sup> The case ultimately settled out of court for USD 200,000, even though BR Films had approached 20<sup>th</sup> Century Fox about

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133. Sethi, *supra* note 132, at 123–24.

134. *Id.* at 124.

135. *Id.* at 125.

136. See Pamela Samuelson, Phil Hill & Tara Wheatland, *Statutory Damages: A Rarity in Copyright Laws Internationally, but for How Long?*, 60 J. COPYRIGHT SOC'Y U.S.A. 529, 531 (2013). Under US copyright law, copyright owners are entitled to set statutory damages, ranging from USD 750 to USD 150,000 in damages per infringement, depending on whether the infringement was willful or not, if the author meets the copyright filing deadlines. 17 U.S.C. § 504 (2018).

137. Copyright Act, 1957 (Act No. 14/1957) § 55 (India).

138. See Basi, *supra* note 4, at 69.

139. Sethi, *supra* note 132, at 125; see, e.g., *Mohanlal Gupta v. Bd. of Sch. Educ., Haryana*, 1976 SCC Online Del 101 (India).

140. DPS Parmar, *India: Calculating Punitive Damages in Infringement*, MONDAQ (June 25, 2019), <https://www.mondaq.com/india/Intellectual-Property/818286/Calculating-Punitive-Damages-In-Infringement> [<https://perma.cc/62L6-F2MZ>].

141. Iyer & Arora, *supra* note 2, at 6.

making an Indian version of *My Cousin Vinny* originally, which would have been extremely persuasive proof of infringement.<sup>142</sup>

Given these limitations, pursuing copyright infringement suits is likely not the best use of Hollywood's time and resources. Simply put, litigation is likely not the optimal way to end Bollywood's copying.<sup>143</sup>

#### IV. PROPERTY, LAW, AND ECONOMIC DEVELOPMENT

Despite the difficulties of litigating these copyright cases, there are benefits to clarifying the intellectual property standard for Indian cultural adaptation from a law and development perspective. This Article turns to those benefits in the following Part, but it is first important to understand the academic literature on property rights in relation to law and economic development. The overriding norm in economic and legal theory is that private property rights are essential to economic development. However, these norms are coming under siege in the contexts of both private and intellectual property.

The idea that property rights greatly influence economic development extends back to Adam Smith's *Wealth of Nations*.<sup>144</sup> This argument was embedded in economic understandings of development by Ronald Coase and the scholars that followed his Coase theorem—the idea that once property rights are defined, if there is competition, the market will best allocate that property towards the most economic use.<sup>145</sup> The literature often takes it as a given that property rights are essential to economic development.<sup>146</sup> Guaranteed property rights were seen as essential to preventing a despotic ruler from arbitrarily seizing assets.<sup>147</sup> Economic development needs fixed capital, which will only happen if one's property interests are secure and cannot be taken on a

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142. See *id.*; Shalini Dore, *Bollywood 'My Cousin Vinny' Suit Settled*, VARIETY (Aug. 15, 2009, 3:27 PM), <https://variety.com/2009/biz/news/bollywood-my-cousin-vinny-suit-settled-1118007320> [<https://perma.cc/JXF4-4XL3>].

143. See Shah, *supra* note 11, at 482.

144. Guangdong Xu, *Property Rights, Law, and Economic Development*, 6 LAW & DEV. REV. 117, 117 (2013).

145. *Id.* at 117–18; see also YORAM BARZEL, ECONOMIC ANALYSIS OF PROPERTY RIGHTS (1997); Armen A. Alchian, *Some Economics of Property Rights*, 30 IL POLITICO 816, 816, 820 (1965); Louis De Alessi, *The Economics of Property Rights: A Review of the Evidence*, 2 RSCH. L. & ECON. 1 (1980); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 349 (1967); Eirik G. Furubotn & Svetozar Pejovich, *Property Rights and Economic Theory: A Survey of Recent Literature*, 10 J. ECON. LITERATURE 1137, 1143 (1972).

146. See, e.g., Joshua Getzler, *Theories of Property and Economic Development*, 26 J. INTERDISC. HIST. 639, 639 (1996); Douglass C. North, *Institutions*, 5 J. ECON. PERSPS. 97, 98 (1991); Michael Trebilcock & Paul-Erik Veel, *Property Rights and Development: The Contingent Case for Formalization*, 30 U. PA. J. INT'L L. 397, 399 (2008).

147. North, *supra* note 146, at 101.

capricious whim.<sup>148</sup> Indeed, the development of more complex economic systems can be linked to increasing protection for property rights on a local, national, and then international level.<sup>149</sup> Ultimately, private property rights were seen as essential to attracting investment and thus increasing economic performance.<sup>150</sup>

Yet, while the importance of property rights for economic development is still largely upheld, it is starting to weaken. Outside factors such as poor or nonexistent related markets, initial costs, and different local and national customs can all undermine the significance of property rights in developing countries for economic growth.<sup>151</sup> The adoption of private property rights can risk substantial monetary, social, and security costs.<sup>152</sup> There is also proof that the framing of property rights can produce disparate outcomes for different developing countries.<sup>153</sup> Given the dissimilarities between societies, some have argued that the best outcome of property rights for a society is highly dependent on local context.<sup>154</sup>

The efficacy of intellectual property rights for economic development has also been taken as a given—albeit less sanctified than with private property—but recent literature has also threatened this notion.<sup>155</sup> In the realm of intellectual property protection, increased intellectual property right enforcement has been linked to increased international trade flows,<sup>156</sup> increased rates of foreign direct

148. *Id.*

149. *See id.* at 102–06.

150. *See* Daron Acemoglu, Simon Johnson & James A. Robinson, *Reversal of Fortune: Geography and Institutions in the Making of the Modern World Income Distribution*, 117 Q.J. ECON. 1231, 1235 (2002); Trebilcock & Veel, *supra* note 146, at 407.

151. Xu, *supra* note 144, at 128–37.

152. *See generally* Trebilcock & Veel, *supra* note 146, at 443–55.

153. *See* Xu, *supra* note 144, at 124–27 (comparing successful findings on the use of private property rights in Asia and Latin America with more mixed results in Africa).

154. *See, e.g.,* Trebilcock & Veel, *supra* note 146, at 479.

155. *See* Menell & Scotchmer, *supra* note 41, at 1477 (“Whereas the earlier economics literature proceeded as if intellectual property protection was the self-evident solution to the incentive problem, a more recent literature . . . has tried to understand when that is true, and when other incentive mechanisms might dominate.”).

156. Carsten Fink & Carlos A. Primo Braga, *How Stronger Protection of Intellectual Property Rights Affects International Trade Flows*, in INTELLECTUAL PROPERTY AND DEVELOPMENT: LESSONS FROM RECENT ECONOMIC RESEARCH 19, 19–20 (Carsten Fink & Keith E. Maskus eds., 2005).



investment,<sup>157</sup> and greater levels of tech transfer.<sup>158</sup> But a more recent study shockingly found that stricter intellectual property rights had not helped developing countries, and loose and limited intellectual property rights were actually more conducive to both knowledge accumulation and technological growth.<sup>159</sup> This same study made the critical point that the best intellectual property system for the United States is not necessarily the best one for a developing country like India.<sup>160</sup> Indeed, developing countries are encouraged to “outsmart the high-protectionists by fashioning intellectual property regimes that match their own needs and capacities without violating international IP norms.”<sup>161</sup> Similarly, it is important to consider cumulative innovation: how innovation can build off prior creations to create even greater benefits, knowledge, or entertainment for society.<sup>162</sup>

Transitional structures that relax property rights are also necessary in many developing countries to create a more robust legal enforcement structure later in time. Often, unorthodox transitional structures are created in the short term to move from a complete lack of regulation to something that more robustly ensconces legal rights.<sup>163</sup> This may similarly be the case for copyright. Currently, overall copyright protection in India is abysmal. In a ranking of intellectual property protections in the world’s most important economies, the

157. Keith E. Maskus, *The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer*, in INTELLECTUAL PROPERTY AND DEVELOPMENT: LESSONS FROM RECENT ECONOMIC RESEARCH 41, 41–42 (Carsten Fink & Keith E. Maskus eds., 2005); Beata Smarzynska Javorcik, *The Composition of Foreign Direct Investment and Protection of Intellectual Property Rights: Evidence from Transition Economies*, in INTELLECTUAL PROPERTY AND DEVELOPMENT: LESSONS FROM RECENT ECONOMIC RESEARCH 133, 133–34 (Carsten Fink & Keith E. Maskus eds., 2005).

158. Maskus, *supra* note 157, at 41.

159. See Leonardo Burlamaqui & Mario Cimoli, *Industrial Policy and IPR: A Knowledge Governance Approach*, in INTELLECTUAL PROPERTY RIGHTS: LEGAL AND ECONOMIC CHALLENGES FOR DEVELOPMENT 477, 494 (Mario Cimoli et al. eds., 2014).

160. Jerome H. Reichman, *Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?*, in INTELLECTUAL PROPERTY RIGHTS: LEGAL AND ECONOMIC CHALLENGES FOR DEVELOPMENT 111, 124–25 (Mario Cimoli et al. eds., 2014).

161. *Id.* at 125.

162. See Menell & Scotchmer, *supra* note 41, at 1499–1500.

163. See, e.g., GORAN HYDEN, JULIUS COURT & KENNETH MEASE, MAKING SENSE OF GOVERNANCE: EMPIRICAL EVIDENCE FROM SIXTEEN DEVELOPING COUNTRIES 171–72 (2004) (noting that in Nigeria, despite having a formal court system, 80–90 percent of local disputes in southwestern Nigeria are still brought before the local rulers); Vikramaditya S. Khanna, *Law, Institutions and Economic Development: Examining the Development of the Home Mortgage Market in India – Can Two Wrongs Make a Right?* 6 (Sept. 5, 2017) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3032632](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3032632) (discussing the use of Section 138 bounced check cases to start to create a home mortgage market in India, which ultimately developed into a more robust home mortgage market).

US Chamber International IP Index ranked India forty-three out of forty-five.<sup>164</sup> No doubt this partially has to do with the Indian government's attitude towards copyright, as it does not see the right as a significant priority.<sup>165</sup> Indian cultural adaptation could operate as a transitional structure where copyright lines are relaxed and Indian cultural adaptation is explicitly carved out as an exception, allowing more economic development, with intellectual property rights strengthened further at a later time. This would serve the purpose of adjusting the cultural norms in India gradually to more broadly recognize restrictions from copyright, even without Indian cultural adaptation.

An alternative transitional structure would be to pass a law banning Indian cultural adaptation, but simply not enforce it for a given period of time. This would strike a balance between outside investors who want greater copyright protection and locals who want less protection. It sends a signal to investors that the government is serious, but at the same time it signals to locals that they can keep creating new content as they have previously. This has been used in other contexts in India as a transition mechanism.<sup>166</sup> But, as discussed later in this Article, such a dual-signal strategy would not provide as many financial advantages.<sup>167</sup> If Indian cultural adaptation was prohibited by law, Indian productions would lose leverage in negotiating investment deals with foreign investors.<sup>168</sup> For this reason, a transitional structure that allows Indian cultural adaptation would be more favorable from a law and economic development perspective.

A significant notion from the literature for both private property and intellectual property is that there is not a uniform system for property that will be optimal for all countries. Indeed, some academics have suggested looking at the local context to determine the ideal

164. GLOB. INTELL. PROP. CTR., U.S. CHAMBER OF COM., *THE ROOTS OF INNOVATION: U.S. CHAMBER INTERNATIONAL IP INDEX 19* (2017), [http://www.theglobalipcenter.com/wp-content/uploads/2017/02/GIPC\\_IP\\_Index\\_2017\\_Report.pdf](http://www.theglobalipcenter.com/wp-content/uploads/2017/02/GIPC_IP_Index_2017_Report.pdf) [<https://perma.cc/Z6HW-7MX2>].

165. See NAT'L PRODUCTIVITY COUNCIL, *STUDY ON COPYRIGHT PIRACY IN INDIA* 52–54, <http://copyright.gov.in/documents/study%20on%20copyright%20piracy%20in%20india.pdf> (last visited Mar. 10, 2020) (discussing the ambivalent attitudes of the police towards copyright protection); Nate Anderson, *Best Copyright Policies in the World? Try India*, ARSTECHNICA (Apr. 25, 2010, 10:00 PM), <https://arstechnica.com/tech-policy/2010/04/best-copyright-policies-in-the-world-try-india> [<https://perma.cc/ZBN7-3EEY>] (arguing that India is the best for consumer- and culture-friendly copyright, even if its protections are weak and criticized by the United States).

166. See, e.g., Vikramaditya Khanna, *Corporate Governance in India: Past, Present & Future?*, 1 JINDAL GLOB. L. REV. 171, 181, 183 (2009) (noting that Clause 49 for securities listing requirements became effective in 2000 but was only first enforced by the Securities and Exchange Board of India (SEBI) in 2007).

167. See *infra* Section V.E.

168. See *infra* Section V.E.

economy-maximizing property structure for each country.<sup>169</sup> While constitutionally protected, highly specified property rights may have been the best path for early modern England and the Netherlands,<sup>170</sup> the same is not necessarily true for contemporary India. This Article argues that a looser standard for copyright that allows Indian cultural adaptation, at least to a degree, would be the better choice for Indian economic development.

## V. INDIAN CULTURAL ADAPTATION AS A DEVELOPMENT TOOL

While the exact confines of Indian copyright law in relation to Indian cultural adaptation are still being determined in the courts, a clear policy choice on Indian cultural adaptation would greatly benefit economic development in the Indian entertainment industry. While copyright protections are undoubtedly important, the elasticity of the idea-expression distinction, fair use, and *scène à faire* can be used to carve a flexible standard for copyright infringement that allows at least modest forms of Indian cultural adaptation in Indian movies. Unlike the historic norm of tightening property laws to encourage economic development, loosening copyright standards and allowing a degree of Indian cultural adaptation would be more beneficial for the Indian economy.

The following Sections detail first how Indian cultural adaptation benefits India. This Article then looks at the success of the Bollywood industry as a whole and the failure of Hollywood to break into the Indian film market. Finally, it addresses the potential for collaboration between Bollywood and Hollywood, with legalized Indian cultural adaptation, to produce future blockbusters.

### A. The Power of Indian Cultural Adaptation

Indian cultural adaptation's strength in film is turning a likely flop in India into a lucrative success. The Indian cultural elements contribute significant commercial value to the Bollywood films; star actors, popular songs, and colorful dances add to the market power of a Bollywood film.<sup>171</sup> Bollywood's creations of Hollywood expression with Indian cultural elements are far more profitable than their original Hollywood counterparts in India.<sup>172</sup> Regardless of their stories' origins,

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169. See Burlamaqui & Cimoli, *supra* note 159, at 494; Trebilcock & Veel, *supra* note 146, at 479.

170. North, *supra* note 146, at 105–08.

171. Basi, *supra* note 4, at 70–73.

172. *Id.* at 74.

Bollywood remakes of Hollywood films have been huge commercial successes.<sup>173</sup> As Bollywood remains far more popular than Hollywood in India, the commercial opportunities of providing an Indian equivalent of Hollywood movies are lucrative.<sup>174</sup> In addition, Indian films have much higher rates of return customers to see them in theaters, largely because the Indian elements create a spectacle rather than just a storyline.<sup>175</sup> Bollywood copies of American movies address different Indian cultural and societal concerns than their American predecessors.<sup>176</sup> Thus, Indian cultural adaptation is a powerful tool for the financial success of movies in India.

While the use of Hollywood expression may shock the sensibilities (and financial interests) of Hollywood movie directors, the Indian film community sees copyright differently; as Bollywood director Mahesh Bahtt succinctly put it, “[w]hen you take an idea and route it through the Indian heart, it changes entirely.”<sup>177</sup> As one scholar found, “the prevalent cultural attitude [in India] is that borrowing cinema plotlines, musical tunes, or even patented technologies is not so egregious a violation as to warrant legal sanction.”<sup>178</sup> Indian filmmakers argue that when a film is culturally adapted it becomes distinct from the original work.<sup>179</sup> While the plot and expressive elements may be the same, the film has been embedded in Indian societal and cultural norms and issues, changing the overall feel to provide the Indian populace with entertainment that the originals could not.<sup>180</sup> These changes are critical to how Indian moviegoers see the film. It is not unusual that Bollywood producers have embedded this successful formula in their own social mores.

Other directors around the world seem to think the same. Indian-US copyright infringement problems are not limited to Bollywood infringing Hollywood. The use of cultural copies is not uncommon and it is global; US films have copied expressive elements from Indian movies, and other countries have been implicated as

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173. *Id.* at 44–45.

174. *See id.* at 49.

175. *Id.* at 50.

176. *See* RAJINDER DUDRAH, BOLLYWOOD TRAVELS: CULTURE, DIASPORA AND BORDER CROSSINGS IN POPULAR HINDI CINEMA 13 (2012).

177. Badam, *supra* note 128.

178. *See* Guha, *supra* note 13, at 248.

179. Basi, *supra* note 4, at 47.

180. *Id.*; Desai, *supra* note 13, at 269.

well.<sup>181</sup> Bollywood has also supposedly infringed on films from other regional Indian studios, such as from the Telugu film *Magadheera* to produce the film *Raabta*.<sup>182</sup> Joint ventures in India with US companies have also started to lean on “inspiration” to create new movies. For example, 20<sup>th</sup> Century Fox and STAR Television’s *My Name Is Khan* was accused of copying the titular character from the story of *Forrest Gump*.<sup>183</sup>

The idea of drawing from expression in foreign works is hardly limited to the film industry, nor is it limited to the twenty-first century. For over one hundred years, the United States did not provide any copyright protection to foreign works.<sup>184</sup> The Copyright Act of 1790 explicitly stated that copyrights would only be granted to US citizens or residents.<sup>185</sup> Indeed, this was the norm worldwide.<sup>186</sup> This changed with the adoption of the Berne Convention in 1886, but the United States did not join the Berne Convention for another century.<sup>187</sup> The primary reasons for this delay were that works produced in the United States had little appeal overseas, and US consumers and artists wanted a cheap supply of works for their enjoyment and inspiration (or adaptation).<sup>188</sup> While the United States started to recognize foreign-produced works when it adopted the Chace Act in 1891,<sup>189</sup> there is still a century-long precedent of the United States allowing its artists to freely work off of foreign works. Indian cultural adaptation in Bollywood fits within this same economic vein.

While the controversy over copying looms largest, additional concerns that Indian cultural adaptation is instead diminishing Indian talent and creativity are exaggerated.<sup>190</sup> It is possible that reliance on cultural copies could undermine the encouragement of novel Indian

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181. See Bugwandeem-Doorasamy & Hassan, *supra* note 97; Insider, *How Bollywood Gave Britney Spears Her Greatest Hit*, YOUTUBE (Jan. 26, 2020), <https://www.youtube.com/watch?v=cj6CDicY3NM>.

182. Sreyoshi Guha, *Bollywood’s ‘Raabta’ with Copyright Infringement*, SPICY IP (June 3, 2017), <https://spicyip.com/2017/06/bollywoods-raabta-with-copyright-infringement.html> [<https://perma.cc/GP8X-UT2Z>].

183. See Iyer & Arora, *supra* note 2, at 1.

184. Tyler T. Ochoa, *Copyright Protection for Works of Foreign Origin*, in *THE INTERNATIONALIZATION OF LAW AND LEGAL EDUCATION* 167, 167 (Jan Klabbers & Mortimer Sellers eds., 2008).

185. Copyright Act of 1790, Pub. L. No. 1–15, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831).

186. Ochoa, *supra* note 184, at 168.

187. *Id.* at 169.

188. See *id.* at 169–70.

189. Act of Mar. 3, 1891, ch. 565, § 13, 26 Stat. 1106, 1110 (repealed 1909).

190. See, e.g., Desai, *supra* note 13, at 270–71.

films,<sup>191</sup> but it is unlikely that this would do away with creativity altogether, let alone undermine the viability of the entire Indian entertainment industry. The art of adapting plot elements into an Indian mode of expression is creative in and of itself, and the creation of the film and its associated music and dance numbers provide rich opportunities for creative expression. Furthermore, the critique that by drawing inspiration from Hollywood, Bollywood is admitting its own inferiority,<sup>192</sup> is inaccurate. In fact, Indian cultural adaptation is improving the US film in the eyes of the producers and consumers. Thus, while some elements of expression may be made in Hollywood, there is still substantial creativity involved in culturally adapting a film to make it a success with the Indian public.

Adapting films in culturally specific ways can have enormous benefits, not only producing lucrative end products but also employing and nurturing local talent such as musicians and dancers for the iconic song-and-dance portions of Bollywood films.<sup>193</sup> 741,000 people are directly employed in the film and television sector in India.<sup>194</sup> The film industry also stimulates other related sectors of the economy, such as catering, set and equipment development, and tourism, resulting in the overall employment of 2.36 million Indians.<sup>195</sup> Even if a film only employs a few hundred people directly, it indirectly contributes to employment many times that number.<sup>196</sup> With a boost in the number and budgets of films, this number would only increase.

Another rationale for the popularity of practicing Indian cultural adaptation is that many Bollywood producers assume that an Indian cultural adaptation of a Hollywood success will also be a hit.<sup>197</sup> This is largely driven by financial worries: despite its success, Bollywood remains hungry for financing, and studios are thus hesitant to invest in risky movie ventures.<sup>198</sup> Indeed, some producers, wanting to back only likely blockbusters, say they will finance only Hollywood

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191. *Id.*

192. Shah, *supra* note 11, at 461.

193. See *Innovative Business and Film-Financing Models Next Big Thing of Bollywood*, ECON. TIMES [hereinafter *Innovative Business and Film-Financing Models*], <https://economictimes.indiatimes.com/business-of-bollywood/innovative-business-and-film-financing-models-next-big-thing-of-bollywood/articleshow/8721643.cms> [<https://perma.cc/5J66-33PM>] (Aug. 1, 2012, 12:07 PM).

194. DELOITTE, ECONOMIC CONTRIBUTION OF THE FILM AND TELEVISION INDUSTRY IN INDIA, 2017, at 5 (2018).

195. *Id.*; Garde, *supra* note 76, at 28 (discussing related growth in the music industry).

196. See, e.g., DELOITTE, *supra* note 194, at 5.

197. Shah, *supra* note 11, at 455.

198. See *id.* at 455.

remakes.<sup>199</sup> Furthermore, Bollywood strives to produce a large quantity of movies to feed the immense domestic demand; this is why India is the top producer of films in the world.<sup>200</sup> Drawing inspiration from existing movies helps producers create a larger number of movies, which in turn is critical to Bollywood's enormous profits.<sup>201</sup> This financial situation also suggests the need for greater capital, to which this Article will later return.<sup>202</sup>

### *B. Why Legalize Indian Cultural Adaptation?*

Despite the negative impression of online headlines about Bollywood's copying of Hollywood films,<sup>203</sup> Bollywood's Indian cultural adaptation practices clearly have benefits, as detailed in Section V.A.<sup>204</sup> On the other hand, intellectual property rights are important for promoting the creation and distribution of creative works.<sup>205</sup> But while enforcing intellectual property law is critical, Indian cultural adaptation, at least under certain confines, seems to fit within the historical justification for copyright exceptions such as fair use and *scène à faire*, as well as historic norms for why countries did not provide any protection for foreign-produced works. It also provides significant cultural and economic benefits to India, justifying an Indian cultural adaptation carve-out for the goal of economic development, which conflicts with the commonly accepted logic of increasing property rights for economic development<sup>206</sup> and suggesting how these intellectual property rights could be partially weakened and still benefit economic development in India.

First, although copyright is often justified on the basis of encouraging innovation,<sup>207</sup> it is not clear that it is actually necessary.

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199. Badam, *supra* note 128.

200. Shah, *supra* note 11, at 455.

201. *See id.*

202. *See infra* Section V.E.

203. For just a few, see Jared Canfield, *15 Biggest Bollywood Copies of Classic Hollywood Movies*, SCREEN RANT (Sept. 29, 2016), <https://screenrant.com/biggest-most-blatant-bollywood-copies-of-hollywood-movies-classics> [<https://perma.cc/8AB4-A572>]; Divya Chauhan, *Here's a List of 50 Bollywood Movies That Took Some Serious Inspiration from Hollywood Movies*, SCOOP WHOOP, <https://www.scoopwhoop.com/50-Bollywood-Movies-That-Are-Copied-From-Hollywood-Movies> [<https://perma.cc/CG5H-URY3>] (last visited Feb. 6, 2021).

204. *See supra* Section V.A.

205. *See, e.g.*, *Stewart v. Abend*, 495 U.S. 207, 228 (1990).

206. *See supra* Part IV.

207. Shyamkrishna Balganes, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1572 (2009); *see also* *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 477 (1984) (Blackmun, J., dissenting) ("Copyright is based on the belief that by granting authors the exclusive rights to reproduce their works, they are given an incentive to create.").

Incumbents, copyright owners in this case, often have a desire to stop disruptive innovation.<sup>208</sup> Copyright law allows incumbents to lock out new innovation for decades, even if it is against the best interests of the population.<sup>209</sup> Indeed, this is one reason why copyright has historically lagged behind in adapting to technological innovation.<sup>210</sup> For example, copyright trolls have zealously guarded their copyrights to an extent unsupported by actual law, chilling new creations and innovation.<sup>211</sup> In other cases, the refusal of copyright owners to negotiate in good faith and not create substantial roadblocks to new innovation has forced governments to step in and establish usage rights through compulsory licensing structures.<sup>212</sup> Copyright law must strike a balance between protecting copyright owners' rights and encouraging innovation<sup>213</sup>—a balance that Indian cultural adaptation could achieve.

Next, this Article considers why copyright law has exceptions. The US, Indian, and international copyright regimes are not monolithic protections for all types of creative works. There is less protection for certain types of creation, such as facts or methods.<sup>214</sup> *Scène à faire* also excludes common themes and ideas from copyright protection. There are also explicit carve-outs in US and Indian copyright law for types of uses that are permitted under copyright. The most well-known is fair use, but there are over ten statutory exceptions in US law, and many of these are incorporated into the more specific fair dealing standard

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208. Amanda Reid, *Copyright Policy as Catalyst and Barrier to Innovation and Free Expression*, 68 CATH. U. L. REV. 33, 49–50 (2019).

209. *Id.* at 51–52.

210. *Id.* at 52.

211. Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 U. COLO. L. REV. 53, 109–10 (2014); see Luke S. Curran, Comment, *Copyright Trolls, Defining the Line Between Legal Ransom Letters and Defending Digital Rights: Turning Piracy into a Business Model or Protecting Creative from Internet Lawlessness?*, 13 J. MARSHALL REV. INTELL. PROP. L. 170, 202 (2013) (concluding that copyright trolling is “unravel[ing] the fabric of intellectual property enforcement”). A copyright troll is a copyright owner that is more interested in gaining income through litigation, or rather the threat of litigation, than selling or licensing his work. Matthew Sag, *Copyright Trolling, an Empirical Study*, 100 IOWA L. REV. 1105, 1108 (2015); see also Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 732 (2013). An attorney can also be defined as a copyright troll if he is driving copyright lawsuits for similar purposes. See generally Michael P. Goodyear, *A Shield or a Solution: Confronting the New Copyright Troll Problem*, 21 TEX. REV. ENT. & SPORTS L. 77 (2020).

212. See, e.g., Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 STAN. L. REV. 915, 927–30 (2020) (discussing how compulsory licenses are used to overcome inefficient market failures).

213. Pamela Samuelson & Members of The CPP, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1194 (2010).

214. See, e.g., *Baker v. Seldan*, 101 U.S. 99, 107 (1879) (concluding that copyright only protects the booklets, not the underlying bookkeeping system).



under Indian law.<sup>215</sup> Fair use, for example, advances the purpose of copyright by allowing “others to build freely upon the ideas and information conveyed by a work.”<sup>216</sup> The goals of most of these exceptions are to improve access to certain groups and to increase opportunities for creating new works. Additionally, copyright law has often been shaped by business needs.<sup>217</sup> This has made copyright, in general, relatively narrow compared to patents, and using copyrighted works as inspiration often does not require express copyright permissions.<sup>218</sup> Indeed, all authors and artists draw on prior works to a certain extent, necessitating these carve-outs for copyright.<sup>219</sup>

To a certain extent, Indian cultural adaptation fits in this same vein. Indian cultural adaptation is built off of common plot elements, which is closely related to *scène à faire*. It also creates potentially transformative new types of works that meet a different market’s demand, similar to fair use. All of the exceptions to copyright allow great flexibility for the purpose of allowing access or development of new works that are substantially removed from the creativity of the original.<sup>220</sup> Indian cultural adaptation should not be made a broad carve-out that excludes any use that is given Indian elements; rather, Indian law should make it explicit that merely copying a certain level of expression from a movie, but not every scene, is a copyright exception under the heading of Indian cultural adaptation.

On a more practical basis, more concrete standards are easier to enforce than vague ones, especially for courts in developing countries that might have less expertise in these technical areas. Indeed, developing countries, compared to developed countries, face substantial internal obstacles towards effective enforcement, including a lack of specialized expertise, vague rules, and cultural concerns.<sup>221</sup> As an example from a developed country, the US state of Delaware is renowned for its pro-business corporate laws that employ vague and complex rules, but these vague and complex standards are only possible because of the vaunted expertise of the Delaware courts in applying

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215. 17 U.S.C. §§ 107–122 (2018); Copyright Act, 1957 (Act No. 14/1957) § 52(a)–(y) (India).

216. *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 262 (4th Cir. 2019) (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991)).

217. See CTR. ON L. & INFO. POL’Y, *FORDHAM UNIV. SCH. OF L., REPORT ON AN ANALYSIS OF THE ECONOMIC/LEGAL LITERATURE ON INTELLECTUAL PROPERTY (IP) RIGHTS: A BARRIER TO ENTRY?* 60 (2012).

218. Menell & Scotchmer, *supra* note 41, at 1483.

219. See *id.* at 1499.

220. See *supra* Part III.

221. See Jens Schovsbo, *Fire and Water Make Steam – Redefining the Role of Competition Law in TRIPS*, in *INTELLECTUAL PROPERTY RIGHTS IN A FAIR WORLD TRADE SYSTEM: PROPOSALS FOR REFORM OF TRIPS* 308, 329–30 (Annette Kur & Marianne Levin eds., 2011).

them.<sup>222</sup> Indian courts are not the copyright equivalents of the Delaware courts. Overwhelmingly inundated by all manner of cases, Indian judges just do not have the time to fully delve into the vague copyright standards of ideas versus expression and fair use.<sup>223</sup> And with such a large and diverse docket of cases (India's Supreme Court hears hundreds of cases a day while the US Supreme Court only hears seventy to eighty cases a year),<sup>224</sup> Indian judges also do not have the time to develop expertise in areas such as copyright, which are far from the top of their priorities.<sup>225</sup> A concrete standard for determining whether Indian cultural adaptation is permitted or not under copyright law would allow for Indian courts to more quickly and effectively decide such matters.

Legalizing Indian cultural adaptation would provide cultural benefits to India in the guise of promoting Indian creative works. Culturally adapting a film requires substantial knowledge of Indian cinematic and cultural norms, as well as artistic, musical, and choreographic talent. Thus, culturally adapted films provide employment opportunities for thousands of Indians in the cultural and artistic sectors. The Indian film industry also produces works that resonate with Indian, rather than American, experiences, which helps further and encourage interest in Indian culture.

Related to the cultural benefits of Indian cultural adaptation are the economic benefits. As will be discussed in the following Sections, Bollywood movies have enjoyed enormous success with a movie-mad population while Hollywood films have mostly fallen short of expectations.<sup>226</sup> Indian cultural adaptation sells, and it sells very well in India. Culturally adapted films, in India at least, are extremely profitable because of the massive Indian entertainment and film market and the expectations of Indian consumers. Specifically designating the confines of legal Indian cultural adaptation in Indian copyright law would further encourage the creation of more films and grow the Indian entertainment sector. In addition, as will be argued in Section V.E of this Article,<sup>227</sup> legalized Indian cultural adaptation would

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222. See Lynn M. LoPucki, *Delaware's Fall: The Arbitration Bylaws Scenario*, HARV. L. SCH. F. ON CORP. GOV. (May 19, 2017), <https://corpgov.law.harvard.edu/2017/05/19/delawares-fall-the-arbitration-bylaws-scenario> [https://perma.cc/PN63-KL2V].

223. See Iyer & Arora, *supra* note 2, at 5.

224. Jeffrey Gettleman, Hari Kumar & Kai Schultz, *Hundreds of Cases a Day and a Flair for Drama: India's Crusading Supreme Court*, N.Y. TIMES (Sept. 27, 2018), <https://www.ny-times.com/2018/09/27/world/asia/india-supreme-court-modi.html> [https://perma.cc/G5S9-D24P].

225. See Iyer & Arora, *supra* note 2, at 5.

226. See *infra* Sections V.C, V.D.

227. See *infra* Section V.E.

increase the bargaining position of Bollywood studios in negotiating much needed foreign investment deals.

### C. Success of Bollywood

Culturally adapted films have directly and substantially contributed to the success of Bollywood and the Indian entertainment industry. By the numbers, India is unparalleled in movies. India is the largest producer of films in the world, a position it has held since the early 1970s, producing 1,724 movies in 2013.<sup>228</sup> While attendance at Indian cinemas has been in decline for the last decade, it still far outpaces other countries.<sup>229</sup> Furthermore, in recent years, the percentage of movies in India that are considered blockbusters has increased, especially among domestic-foreign coproductions.<sup>230</sup> Bollywood's market power has further increased in the past two decades through the corporatization of Indian studios, growing digital demand, and increased overseas popularity.

Beyond just output, the media and entertainment sector in India is also an economic powerhouse, encompassing a market size of INR 1,631 billion in fiscal year 2019.<sup>231</sup> This sector is only growing and is estimated to reach INR 3,070 billion by fiscal year 2024.<sup>232</sup> In 2019, Indian films produced INR 183.2 billion in revenue, a 15.3 percent increase from 2018.<sup>233</sup> There was growth in every area of film revenue, including overseas cinemas, digital rights, and advertising.<sup>234</sup> Rising access and consumption is especially driven by growing digital demand, led by "over-the-top" (OTT) access to film and television via the internet.<sup>235</sup> India has the second largest number of internet users in the world, and this number is quickly rising.<sup>236</sup> Growth in the entertainment sector is being driven by rising incomes and an

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228. Sayantan Ghosh Dastidar & Caroline Elliott, *The Indian Film Industry in a Changing International Market*, 44 J. CULTURAL ECON. 97, 97–98 (2020); Doshi, *supra* note 71, at 295; Sashi Kumar, *Contemplating a Century*, FRONTLINE (Oct. 18, 2013), <http://www.frontline.in/arts-and-culture/cinema/contemplating-a-century/article5184953.ece> [<https://perma.cc/U4WP-VFZQ>].

229. Dastidar & Elliott, *supra* note 228, at 98.

230. See Agarwal et al., *supra* note 34, at 20.

231. KPMG, INDIA'S DIGITAL FUTURE: MASS OF NICHES – KPMG IN INDIA'S MEDIA AND ENTERTAINMENT REPORT 2019, at 14 (2019), <https://assets.kpmg/content/dam/kpmg/in/pdf/2019/08/india-media-entertainment-report-2019.pdf> [<https://perma.cc/6V3U-B3Y4>].

232. *Id.* Another estimate is USD 34.8 billion by 2021. Atul Bist, *Media*, INV. INDIA, <https://www.investindia.gov.in/sector/media> [<https://perma.cc/JMR4-TPYM>] (Jan. 27, 2021).

233. KPMG, *supra* note 231, at 78.

234. *Id.*

235. *Id.* at 13.

236. Bist, *supra* note 232.

increasingly younger population that uses 4G and portable devices.<sup>237</sup> Indeed, India has an extremely large young population; the average age of the more than one billion people in India is just 28.7 years old.<sup>238</sup>

Corporatization of Indian film studios in the early 2000s has also contributed to the industry's strength. Indian films are an important economic vehicle and have been a critical cog in advertising in India, producing lucrative marketing deals, cross-promotions, and celebrity endorsements.<sup>239</sup> These trends took off after the greater corporatization of the Indian film industry in the first decade of the twentieth century.<sup>240</sup> The corporatization of Indian studios also led studios to understand the importance of backend profits from broadcasting rights, the so-called "long tail."<sup>241</sup>

More recently, digitization is increasing the profitability of Indian movies. India is undergoing the fastest digital transition anywhere.<sup>242</sup> The potential profits for the film industry away from the silver screen have risen sharply due to the increase in digitization.<sup>243</sup> As the second largest country in the world in terms of population, India has a ready supply of entertainment consumers and a burgeoning amount of content, but limited infrastructure; the growth of digitization is ameliorating this problem.<sup>244</sup> Digital downloads of Hindi movies increased by 30 percent between 2013 and 2017.<sup>245</sup> In fiscal year 2019, the number of broadband internet subscribers in India grew by 37 percent, with rural areas' use growing by three times that of urban areas.<sup>246</sup> These trends help explain the rapid growth of digital rights, which grew in revenue by 30 percent from 2018 to 2019.<sup>247</sup>

237. *Id.*

238. *India*, THE WORLD FACTBOOK, <https://www.cia.gov/the-world-factbook/countries/india/#people-and-society> [<https://perma.cc/QA63-2Q5T>] (Jan. 29, 2021).

239. Iyer & Arora, *supra* note 2, at 2.

240. Agarwal et al., *supra* note 34, at 10–11.

241. *Id.* at 10; *see also* Chris Anderson, *The Long Tail*, WIRED (Oct. 1, 2004, 12:00 PM), <https://www.wired.com/2004/10/tail> [<https://perma.cc/J3NR-XZHR>].

242. *See Numbers Mask Changes in India's Media and Entertainment Industries*, KNOWLEDGE@WHARTON (Apr. 4, 2013) [hereinafter *Numbers Mask Changes*], <https://knowledge.wharton.upenn.edu/article/numbers-mask-changes-in-indias-media-and-entertainment-industries> [<https://perma.cc/U7VS-KQYG>].

243. *Id.*

244. *See id.*

245. *Bollywood Movies Have Become More Popular in Countries All Around the Globe*, TECXIPIO MAG. [hereinafter *Bollywood Movies Have Become More Popular*], <https://www.tecxipto.com/single-post/market-research-tool-overseas-markets-for-bollywood-movies> [<https://perma.cc/LYH7-JEUV>] (last visited Feb. 6, 2021).

246. KPMG, *supra* note 231, at 38.

247. *Id.* at 78.

Perhaps most surprisingly, Indian films, especially Bollywood films, are no longer limited in appeal to the Indian subcontinent. Naturally, Bollywood has remained popular with Indians as they have immigrated abroad, spreading the viewership of Hindi films across the world through the diaspora;<sup>248</sup> but there is also increasing global demand for Indian movies.<sup>249</sup> The Indian film industry's overseas market revenues have steadily grown since 2012, with INR 10.9 billion coming from the sector in 2016.<sup>250</sup> Bollywood films have done particularly well in the Arab world, doing even better than Hollywood.<sup>251</sup> Interest in downloading Hindi movies outside of India has had a large increase in the past few years, especially in East Africa and Ireland.<sup>252</sup> Bollywood has also been expanding its films to new markets, including across Latin America, Africa, Central Asia, and, importantly, the yet untapped consumer base of China.<sup>253</sup>

#### *D. Hollywood's Limited Success in India*

Hollywood is a recent arrival on the Indian movie scene, and its first steps were a shocking defeat. Hollywood's interest in the Indian movie market only really began at the start of the twenty-first century.<sup>254</sup> Its first attempts were shocking failures for studios that had known only worldwide success; local language dubs of Hollywood blockbusters fell flat in India and an investment of USD 100 million between 2007 and 2009 on production of Indian films made a minimal impact at the box office.<sup>255</sup> Epitomizing the early struggles of Hollywood was the fight between Hollywood-produced film *Saawariya* and Bollywood classic *Om Shanti Om*. The first major Hollywood-produced Bollywood film, *Saawariya*, was an authorized Indian reworking of the

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248. Basi, *supra* note 4, at 43–44.

249. *Bollywood Movies Have Become More Popular*, *supra* note 245.

250. *Id.*; see also Jeanette Settembre, *Bollywood Is a Major Moneymaker in the US with Mega Hits like 'Baahubali 2' – and Other Top Must-See Indian Films*, MARKETWATCH (July 14, 2017, 2:28 PM), <https://www.marketwatch.com/story/bollywood-is-a-major-moneymaker-in-the-us-with-mega-hits-like-baahubali-2-and-other-top-must-see-indian-films-2017-07-14-1488289> (in the US context); Parth Vohra, *Indian Movies Attract Millions Around the World – and That Number Looks Set to Grow*, CNBC, <https://www.cnbc.com/2018/08/03/indian-films-attract-millions-globally-and-it-appears-to-be-growing.html> [<https://perma.cc/YB98-GL8S>] (Aug. 2, 2018, 11:53 PM) (in the international context).

251. Basi, *supra* note 4, at 58.

252. *Bollywood Movies Have Become More Popular*, *supra* note 245.

253. Naman Ramachandran, *Bollywood Breaks Borders as Indian Studios Expand Distribution Footprint*, VARIETY (Dec. 14, 2016, 10:45 AM), <https://variety.com/2016/film/global/bollywood-international-distribution-indian-studios-1201941518>.

254. See Iyer & Arora, *supra* note 2, at 3.

255. *Id.*

1985 American film *White Nights* and was predicted to do well with Indian audiences.<sup>256</sup> However, *Saawariya* was released the same day as Bollywood icon Shah Rukh Khan's *Om Shanti Om*.<sup>257</sup> The fight between these Hollywood- and Bollywood-produced movies turned out to be hardly a fight at all; *Om Shanti Om* raked in USD 27 million while *Saawariya* brought in only USD 9 million, after spending USD 7 million on production.<sup>258</sup> Disney and Warner Bros.'s first forays into India—the films *Roadside Romeo*, *Saas Bahu aur Sensex*, and *Chandni Chowk to China*—were all similarly underwhelming, and all three barely broke even.<sup>259</sup> Why did Hollywood, home of the largest studios on earth, fail so badly?

A cultural disconnect between what Hollywood is offering and what Indian consumers want to see appears to be at the core of the problem. As Karan Johar, one of Bollywood's leading players, surmised, "[t]hey understand the business, but how well do they understand the pulse of this audience?"<sup>260</sup> Top US film executives Jim Gianopoulos—the former co-chair of Fox Filmed Entertainment—and Richard Fox—former executive vice president of Warner Bros.—both admitted that cultural humility and understanding is critical to success in the Indian media and entertainment market.<sup>261</sup> Johar received Hollywood's foray into India in stride, noting that with their "bags of cash, We [*sic*], the Indian film industry, welcome you to India."<sup>262</sup> But the money was potentially part of the problem. One Bollywood insider surmised that "Hollywood chased the big names [studios and directors] without paying any attention to detail."<sup>263</sup> Vikramjit Roy of Mumbai Mantra argued that Hollywood focused "too much on marketing and too little on content . . . at the script level, there is a lot left to be desired."<sup>264</sup> Trade analyst Komal Nahata concluded that "the script has taken a backseat . . . Hollywood production houses need to know that money is not everything."<sup>265</sup>

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256. Anupama Chopra, *Stumbling Toward Bollywood*, N.Y. TIMES (Mar. 20, 2009), <https://www.nytimes.com/2009/03/22/movies/22chop.html> [<https://perma.cc/3Q7N-JV4F>].

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *See id.*

262. GANTI, *supra* note 5, at 56.

263. Meena Iyer & Bharati Dubey, *Hollywood Takes a Short Cut in India, Loses Its Way*, TIMES OF INDIA (Feb. 8, 2009, 5:15 AM), <https://timesofindia.indiatimes.com/india/Hollywood-takes-a-short-cut-in-india-loses-its-way/articleshow/4092810.cms> [<https://perma.cc/SYD6-3CPH>].

264. *Id.*

265. *Id.*

Additionally, Johar warned US executives that the Indian film industry itself is a strikingly different world from Hollywood; Indian film production is still largely driven by kinship and personal long-term relationships.<sup>266</sup> Indian film production remains fragmented—neither vertically nor horizontally integrated—which increases the importance of personal relationships.<sup>267</sup> For most of its history, the Indian film industry did not have the panoply of agents, executives, lawyers, managers, and talent scouts that are characteristic of Hollywood.<sup>268</sup> Even today, while their numbers are growing, the star actors are a primary driver of films and one of the main predictors of success.<sup>269</sup>

Beyond the politics and customs behind the screen, Indian films also address an entirely different, extremely diverse culture. At a demographic level, the Indian film industry is not as one dimensional as Hollywood; Indian films must have the potential to appeal to an incredibly diverse population, and different studios across the country appeal to different demographics.<sup>270</sup> While the Indian Constitution only recognizes Hindi and English as official languages,<sup>271</sup> the Eighth Schedule of the Constitution lists twenty-two recognized languages,<sup>272</sup> and India has more than 1,652 local languages.<sup>273</sup> While the Mumbai-based, Hindi language Bollywood is perhaps the most well-known internationally, other regional studios produce films in a variety of other Indian languages, such as Tamil, Marathi, and Malayalam.<sup>274</sup> India also has millions of Hindus, Muslims, Christians, Sikhs, Buddhists, and Jains.<sup>275</sup> The caste system serves as an important source of identity across India as well.<sup>276</sup>

Connected to this diversity in India is the likely possibility that US films suffer from “cultural discount,” even when using an Indian cast and crew.<sup>277</sup> “Cultural discount” is the idea that:

266. GANTI, *supra* note 5, at 56–57.

267. *Id.* at 59.

268. *Id.* at 60.

269. *Id.* at 61.

270. *Id.* at 63.

271. India Const. art. 343.

272. *Id.* at Eighth Schedule.

273. *Language Education*, MINISTRY OF EDUC., GOV'T OF INDIA, <https://www.education.gov.in/en/language-education> [<https://perma.cc/THJ5-7DRD>] (Apr. 19, 2016, 12:29 PM).

274. Iyer & Arora, *supra* note 2, at 2.

275. *Religion*, OFF. OF THE REGISTRAR GEN. & CENSUS COMM'R, INDIA, [http://censusindia.gov.in/Census\\_And\\_You/religion.aspx](http://censusindia.gov.in/Census_And_You/religion.aspx) (last visited Feb. 2, 2020).

276. See Clark D. Cunningham & N.R. Madhava Menon, *Race, Class, Caste . . . ? Rethinking Affirmative Action*, 97 MICH. L. REV. 1296, 1303–04 (1999).

277. Dastidar & Elliott, *supra* note 228, at 110.

part of the appeal of the products will be lost because the audience in the other market is not likely to have the same background knowledge, linguistic competence, and other forms of cultural capital to fully appreciate them. Differences in cultural values and social norms may also lower the appeal of foreign media products to a local audience.<sup>278</sup>

Hollywood films, as they are, would be a poor fit for audiences in India.<sup>279</sup> Indian cinema is based on very different conventions from Hollywood film; the visual emphasis of Indian films does not employ the Hollywood staples of continuity editing, naturalistic lighting, or even realism in many cases, instead focusing on drama, brightness, and rich colors.<sup>280</sup> Perhaps the best known aspect of Bollywood films, the spontaneous songs and accompanying dances in exotic locales, are critical for Indian film success; very few Hindi films without songs become box office hits.<sup>281</sup> Even 2019's biggest Bollywood hit, *War*, which was a spy action film, still included two extended Bollywood song-and-dance numbers.<sup>282</sup>

Despite its slow start, Hollywood's share of Indian entertainment has grown slightly. In 2009, foreign films only accounted for 5 percent of the Indian film industry.<sup>283</sup> In 2016, Hollywood's revenue in India grew 10 percent from 2015, but this was largely driven by dubs of its own American movies.<sup>284</sup> Today, Hollywood movies take in approximately 10–15 percent of box office revenues in India, still boosted considerably by dubbing its Hollywood films.<sup>285</sup> Practically the only way Hollywood studios can break into the Indian movie industry at all is to produce local language films.<sup>286</sup> Despite the growth in English-content viewership in India, regional languages still

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278. Francis L.F. Lee, *Hollywood Movies in East Asia: Examining Cultural Discount and Performance Predictability at the Box Office*, 18 *ASIAN J. COMMUN.* 117, 119 (2008).

279. GANTI, *supra* note 5, at 89–90.

280. *Id.* at 84–86.

281. *Id.* at 96–98.

282. See Tiger Shroff Dances to Hrithik Roshan's *Ghungroo* Song. Disha Patani Says Wow, *INDIA TODAY*, <https://www.indiatoday.in/movies/bollywood/story/tiger-shroff-dances-to-hrithik-roshan-s-ghungroo-song-disha-patani-says-wow-1616265-2019-11-06> [https://perma.cc/F23W-3ARE] (Nov. 6, 2019, 6:11 PM).

283. Chopra, *supra* note 256.

284. Nyay Bhushan, *Hollywood Film Revenue in India Rises 10 Percent, Boosted by Dubbed Versions*, *HOLLYWOOD REP.* (Mar. 21, 2017, 3:48 AM), <https://www.hollywoodreporter.com/news/hollywood-film-revenue-india-rises-10-percent-boosted-by-dubbed-versions-987585> [https://perma.cc/HK9M-H9E6].

285. See Varun Aggarwal, *Hollywood vs Bollywood: How the Titans Clash for Screen Space*, *HINDU BUS. LINE* (Sept. 20, 2019), <https://www.thehindubusinessline.com/news/variety/hollywood-vs-bollywood-how-the-titans-clash-for-screen-space/article29465862.ece> [https://perma.cc/96RN-XWWP].

286. Chopra, *supra* note 256.



dominate;<sup>287</sup> in 2019, 95 percent of Indian YouTube consumers watched videos in a regional language.<sup>288</sup> Local language films have also been growing in market strength, accompanied by the growth of regional film studios.<sup>289</sup> And the dominance of regional languages over English is expected to grow.<sup>290</sup> Sony Pictures Entertainment, Warner Bros., and Walt Disney, taking heed, all set up operations to create local-language productions.<sup>291</sup>

Hollywood-produced Indian movies have finally started enjoying success in the last few years as well, with multimillion-dollar successes such as *Padmaavat*, *PadMan*, and *102 Not Out*.<sup>292</sup> But these more recent successes are focused on personalized and unique stories, picking up niche markets rather than producing the standard Bollywood marathon showstopper, in which Hollywood still cannot compete.<sup>293</sup> One notable standout was when Disney and Aamir Khan coproduced the 2016 hit *Dangal*, which became the fifth-highest grossing non-English movie and the biggest Bollywood movie in overseas box office revenue in history.<sup>294</sup> Yet, that same year Disney announced that it would exit the Hindi film industry.<sup>295</sup> Disney instead decided to focus entirely on its own Hollywood movies rather than try to create content specifically for Indian audiences, leaving behind the difficult Hindi film market.<sup>296</sup> This move has achieved some success, as Disney's blockbuster *Avengers: Infinity War* was a standout success in India.<sup>297</sup>

But, critically, Hollywood's limited successes in India are not due to copyright infringement. Bollywood's copying primarily hurts Hollywood financially by not paying a license for an authorized

287. See 'Bigg' Prospects: Media Companies Tune In to India's Growing Entertainment Sector, KNOWLEDGE@WHARTON (Dec. 17, 2009), <https://knowledge.wharton.upenn.edu/article/bigg-prospects-media-companies-tune-in-to-indias-growing-entertainment-sector> [<https://perma.cc/3C52-FAE6>].

288. KPMG, *supra* note 231, at 41.

289. *Id.* at 81.

290. See *id.* at 43, 48.

291. Chopra, *supra* note 256.

292. Nyay Bhushan, *How Hollywood Is Finally Finding Success at the Indian Box Office*, HOLLYWOOD REP. (May 12, 2018, 11:15 PM), <https://www.hollywoodreporter.com/news/how-hollywood-is-finally-finding-success-at-indian-box-office-1111390> [<https://perma.cc/CY4E-3PQG>].

293. *Id.*

294. Agarwal et al., *supra* note 34, at 14; *Leading Indian Movies of All Time as of August 2020*, by International Box Office Revenue, STATISTA, <https://www.statista.com/statistics/311921/highest-grossing-bollywood-movies-non-india> (last visited Feb. 6, 2021).

295. Agarwal et al., *supra* note 34, at 2.

296. See Nyay Bhushan, *Disney India Getting Out of Bollywood Production*, HOLLYWOOD REP. (Aug. 26, 2016, 2:42 AM), <https://www.hollywoodreporter.com/news/disney-india-getting-bollywood-report-923099> [<https://perma.cc/9GYE-QAXT>].

297. KPMG, *supra* note 231, at 78.

adaptation.<sup>298</sup> It is a valid criticism that, by releasing unauthorized adaptations, Bollywood takes the opportunity to exploit the Indian market from Hollywood.<sup>299</sup> However, from an economic perspective, one must consider what market would have existed for the Hollywood producers if Hollywood-inspired Indian films did not exist. The Indian film market is indeed lucrative, but Hollywood, although it could deliver the same inspiration, would not provide the same content that has made the Indian entertainment and media industry so profitable. The Bollywood producers are simply better equipped and more culturally attuned to capitalize on the Indian film market.

Despite early failures and continued struggles, Bollywood has remained tantalizing for global giants; Netflix and Amazon are just two of the most recent players to enter the fray.<sup>300</sup> Beginning in the late 2000s, Hollywood made the most headway in India not through independent competition with Bollywood but by working with creative, local talent and forming joint ventures with Indian studios.<sup>301</sup> Karan Johar and other Bollywood elite welcomed US “bags of cash,”<sup>302</sup> but so far Hollywood has spent a plethora of war chests for minimal returns. The reason for Hollywood’s limited success in India is not copyright infringement but an unwillingness to understand the Hindi film market and the Indian film industry more broadly.

### *E. Improving Foreign Investment in Culturally Adapted Films*

The best strategy, then, is to have Hollywood provide the capital and international distribution networks while Bollywood producers do what they have always done—produce Indian blockbusters that are frequently culturally adapted versions of Hollywood movies. Allowing Indian cultural adaptation under copyright would provide greater financial and leverage opportunities for Bollywood studios. Instead of destroying cooperation between Hollywood and Bollywood, as some have suggested,<sup>303</sup> the issue of copying could instead be used to build new, necessary connections between the two. The regulation and growth of the Indian film industry has made it an attractive target for foreign investment, which is necessary to achieve Bollywood’s full

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298. Shah, *supra* note 11, at 459.

299. *Id.* at 460.

300. Agarwal et al., *supra* note 34, at 16.

301. Richard F. Celeste & David J. Karl, *The Hollywood Connection in U.S.-India Relations*, HUFFPOST, [https://www.huffpost.com/entry/the-hollywood-connection\\_b\\_364523?ncid=engmodushpmg00000006](https://www.huffpost.com/entry/the-hollywood-connection_b_364523?ncid=engmodushpmg00000006) [<https://perma.cc/2RK2-SW64>].

302. GANTI, *supra* note 5, at 56.

303. See, e.g., Shah, *supra* note 11, at 461–62.

economic potential, and Indian cultural adaptation, rather than adaptation licenses, provides the key to unlocking that potential.

The ability of Indian studios to obtain legitimate financing is less than twenty years old. Until 2000, filmmaking did not have an industry status in India and was therefore forced to rely on unofficial methods of financing, namely the “black” economy of unreported income and the mafia.<sup>304</sup> The mercurial nature of funding from Indian crime bosses led to yearslong production timelines, if the films were ever finished at all.<sup>305</sup> Blocked access to institutional and international funding sources, as well as general government apathy about the entertainment industry, severely impeded the Indian film industry’s growth.<sup>306</sup> Due to this situation, Indian cinema was characterized by opaque accounting practices, verbal contracts sealed with a handshake, and payments in cash.<sup>307</sup>

In 2000, the Indian government granted industry status to the entertainment sector, allowing it to take advantage of tax concessions, access to financial institutions, and more legitimate forms of credit.<sup>308</sup> The introduction of industry status and corporatization has led to greater respect and prestige for the film industry, as well as an enormous increase in available funding.<sup>309</sup> The Reserve Bank of India issued guidelines to banks on film financing and Indian studios have benefitted enormously from Indian institutional finance, private equity, and venture capital funds.<sup>310</sup> This increased funding has led not only to greater expenditures but also greater successes; a number of films have reached the “100 crore club” of INR, attaining one billion INR in box office returns annually since 2008.<sup>311</sup> Large production houses have had initial public offerings and some of the largest Indian companies, such as Reliance, have entered the entertainment industry.<sup>312</sup>

The opening of the Indian entertainment industry also professionalized it; since 2001, the panoply of “suits” that make Hollywood run—the lawyers, accountants, agents, business executives, and talent scouts—has become a fixture of the Indian film industry

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304. GANTI, *supra* note 5, at 64; Iyer & Arora, *supra* note 2, at 2.

305. GANTI, *supra* note 5, at 64–65.

306. Agarwal et al., *supra* note 34, at 4.

307. *Id.* at 6.

308. *Id.* at 4–5; Iyer & Arora, *supra* note 2, at 2.

309. GANTI, *supra* note 5, at 65–66; Garde, *supra* note 76, at 27.

310. Agarwal et al., *supra* note 34, at 4, 7.

311. GANTI, *supra* note 5, at 66. A crore is ten million, so the 100 crore club includes those films that have earned INR one billion.

312. Iyer & Arora, *supra* note 2, at 2; *see also* Agarwal et al., *supra* note 34, at 8.

too.<sup>313</sup> The corporatization of the Indian film industry only accelerated with the entry of leading Indian non-film businesses, such as Reliance, into the movie market.<sup>314</sup> Today, fewer than 2 percent of India's movies are produced by an unorganized producer (compared to 52 percent before 1994), demonstrating the organization of India's film sector.<sup>315</sup> Furthermore, India continues to improve its securitization scheme to better protect against risk, such as in the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.<sup>316</sup>

In addition to the Indian film industry's legal recognition as an industry and its increased professionalization, foreign investment has, critically, emerged. India's economic liberalization at the end of the twentieth century attracted greater foreign investment in general.<sup>317</sup> Prime opportunities for investment in the Indian entertainment sector arose in 2000, after which FDI of up to 100 percent has been allowed in the film industry.<sup>318</sup> Approval for FDI in the film industry, "defined as film financing, production, distribution, exhibition, marketing, and associated activities relating to film industry," was automatic after 2000, but subject to requirements: the companies had to have (1) an "established track record in films, TV, music, finance and insurance;" (2) a minimum paid-up capital of at least USD 5 million, or USD 10 million if they were the single largest equity shareholder; (3) a minimum investment of USD 1 million or USD 2.5 million if they were the single largest equity shareholder; and (4) domestic borrowings that

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313. Agarwal et al., *supra* note 34, at 6.

314. *Id.* at 8; GANTI, *supra* note 5, at 59–60.

315. See Agarwal et al., *supra* note 34, at 18.

316. Stephen W. Workman, *Bank Financing of "Bollywood" Films: Opportunity or Risk?*, WORLD MEDIA LAW.COM, <http://www.worldmedialaw.com/resources-a-links/30-film-financing-in-india.html> [https://perma.cc/3XNK-FHU4] (last visited Feb. 5, 2020).

317. Dastidar & Elliott, *supra* note 228, at 100.

318. *Press Note No. 2 (2000 Series)*, MINISTRY OF COM. & INDUS., GOV'T OF INDIA (2000), [https://dipp.gov.in/sites/default/files/pn23\\_0.pdf](https://dipp.gov.in/sites/default/files/pn23_0.pdf); see also Brinda Shroff, *India: Foreign Investment and the Indian Media and Entertainment Industry*, MONDAQ (July 4, 2016), <http://www.mondaq.com/india/x/505800/Inward+Investment+Foreign+Investment+And+The+Indian+Media+And+Entertainment+Industry> [https://perma.cc/7QKK-85GU]; *Foreign Direct Investment in Indian Media & Entertainment Industries*, BISWAJIT SARKAR, [https://www.biswajitsarkar.com/fdi\\_in\\_entertainment\\_media.php](https://www.biswajitsarkar.com/fdi_in_entertainment_media.php) [https://perma.cc/V3LH-N48P] (last visited Feb. 5, 2020). Note that India only really opened up to FDI in general in 1991, once its long-held restrictive foreign investment policy was redacted. M.K. Dutta & G.K. Sarma, *Foreign Direct Investment in India Since 1991: Trends, Challenges and Prospects* 2–3 (Jan. 1, 2008) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1443577](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443577); *FDI Policy*, INV. INDIA, <https://www.investindia.gov.in/foreign-direct-investment> [https://perma.cc/VA7G-BZHS] (Feb. 4, 2021).

do not exceed equity.<sup>319</sup> But in 2002, these restrictions were lifted,<sup>320</sup> further liberalizing FDI in the Indian film industry.

This 100 percent FDI has been used to facilitate the entry of major Hollywood studios directly into India.<sup>321</sup> Domestic-foreign coproduction is still uncommon with Indian movies, but it has been steadily growing since 2007.<sup>322</sup> Coproduced movies between Hollywood and local Indian studios have had mixed results, and the early films in particular were often flops.<sup>323</sup> One proposed reason for these failed Hollywood-Bollywood collaborations is a lack of serious investment on the part of Hollywood.<sup>324</sup> But there has been greater success more recently. For example, Netflix grew by 700 percent in India during 2018–19 due to local Indian content and marketing.<sup>325</sup>

Beyond the allure of the lucrative Indian entertainment market, for which Hollywood studios have already invested in Bollywood,<sup>326</sup> Indian studios are not without potential collateral to entice investment, including property and their valuable intellectual property in the form of copyrights in the films themselves.<sup>327</sup> Online distribution should be especially attractive to the Indian film industry as it achieves the benefits of reaching the Indian diaspora and Indian film fans abroad without the same distribution and marketing costs of traditional cinema releases.<sup>328</sup> Online marketing is substantially cheaper and it provides what Hollywood studios are seeking—increased reward with little risk.<sup>329</sup> Furthermore, India has a substantial benefit over China because China's communist form of government greatly restricts the amount of content that can be produced and shown there.<sup>330</sup> This all

319. *Press Note No. 2 (2000 Series)*, *supra* note 318; *see also FDI Policy*, *supra* note 318 (comparing the automatic route to the alternative government route, under which proposals must be submitted to the Indian government and approved before FDI can commence, which could take more than ten weeks from initial submission to final approval).

320. *Press Note No. 4 (2002 Series)*, MINISTRY OF COM. & INDUS., GOV'T OF INDIA (2000), <https://dipp.gov.in/sites/default/files/pn54.pdf>.

321. Agarwal et al., *supra* note 34, at 8.

322. *Id.* at 20.

323. *Id.* at 8–9.

324. *See* Phil Hoad, *Will Hollywood Ever Conquer Bollywood?*, GUARDIAN (Feb. 14, 2012, 12:32 PM), <https://www.theguardian.com/film/filmblog/2012/feb/14/hollywood-bollywood-us-india> [<https://perma.cc/4QT9-3A96>].

325. *Media and Entertainment Industry*, INDIA BRAND EQUITY FOUND., <https://www.ibef.org/industry/media-entertainment-india.aspx> [<https://perma.cc/B7N3-LQTL>] (Jan. 21, 2021).

326. Basi, *supra* note 4, at 58.

327. Workman, *supra* note 316.

328. *See Innovative Business and Film-Financing Models*, *supra* note 193.

329. *See id.*

330. *Numbers Mask Changes*, *supra* note 242.

makes the Indian film industry a tantalizing frontier for potential investors.

Greater foreign investment on equitable terms is key to developing the Indian film industry. As founder and CEO of Azure Entertainment Sunir Kheterpal surmises, “[t]he Hollywood studios bring the material, and we have the ability to develop it for the local market.”<sup>331</sup> While the Indian entertainment industry is a major economic driver in India, it still has trapped latent value due to limited financial resources and infrastructure.<sup>332</sup> The increase of Indian films’ export market around the globe will require greater large-scale investment.<sup>333</sup> Furthermore, with the growth of viewership over OTT platforms, going to the cinema today is more restricted to cinematic spectacles, which, naturally, require large investments to happen.<sup>334</sup> Traditionally, higher-budget films, on average, tend to do better in the Indian film market, but this also requires increased investments.<sup>335</sup> Recently, however, smaller-budget films have also been growing in appeal, with smaller productions even doing better on average in 2019 than big-budget pictures.<sup>336</sup> But these small-budget movies need funding as well, which is often hard to obtain due to their traditionally riskier nature, even if they have been performing better recently.<sup>337</sup>

So far, Hollywood has entered Bollywood as a competitor, using its funds to take charge of productions to directly compete with Indian studios. As demonstrated by the *Saawariya* and *Om Shanti Om* incident, this was misguided from the start. Instead, the best path for success for Hollywood and Bollywood is to have Hollywood and other non-Indian investors invest directly in Bollywood’s own success to

331. Bhushan, *supra* note 292.

332. See Rob Cain, *India’s Film Industry—A \$10 Billion Business Trapped in a \$2 Billion Body*, FORBES (Oct. 23, 2015, 2:22 AM), <https://www.forbes.com/sites/robcairn/2015/10/23/indias-film-industry-a-10-billion-business-trapped-in-a-2-billion-body/#16d8fb2870d2> [https://perma.cc/G86P-BZ24].

333. Dastidar & Elliott, *supra* note 228, at 110.

334. See Lata Jha, *What the Disney-Fox Deal Means for Bollywood’s Future*, MINT (Jan. 22, 2018, 3:56 PM), <https://www.livemint.com/Consumer/feih5DLJm2WEXtEVOZ7eJK/What-the-DisneyFox-deal-means-for-Bollywoods-future.html> [https://perma.cc/53GS-G7NH].

335. See *id.*; Dastidar & Elliott, *supra* note 228, at 107, 109–10.

336. See Gaurav Laghate, *As Small Films Deliver High Returns, Bollywood Has Found a New Kahaani for Success*, ECON. TIMES, <https://economictimes.indiatimes.com/industry/media/entertainment/as-small-films-deliver-high-returns-bollywood-has-found-a-new-kahaani-for-success/articleshow/70851179.cms> [https://perma.cc/XVQ4-3GSD] (Aug. 27, 2019, 10:21 PM).

337. See *id.* The same dynamics of poor movies being risky investments are true in the United States. For a success story, refer to US producer Jason Blum, most known for his hit 2017 horror movie *Get Out*. See Steve Henn & Stacey Vanek Smith, *Episode 650: The Business Genius Behind Get Out*, NPR: PLANET MONEY (Mar. 29, 2017, 5:37 PM), <https://www.npr.org/templates/transcript/transcript.php?storyId=521950337> [https://perma.cc/7KSV-EZ2D].

unleash Bollywood's latent economic talent. The best outcome is creating more content and using each party's capabilities to add more value to films.<sup>338</sup> To achieve this equitable investment strategy, it is critical that Bollywood studios have leverage at the negotiation table. Currently, Bollywood has the advantage of knowing the market, but that is just one factor in their favor. By permitting modest Indian cultural adaptation under copyright law, the Indian studios would gain more leverage in negotiations with Hollywood. Bollywood would be able to negotiate better terms with Hollywood studios, rather than having to give more to Hollywood in exchange for a license to adapt a movie. If Indian law explicitly carved out cultural adaptation as a copyright exception, Hollywood studios would be left with little recourse and would likely have to accept Indian studios' right to adapt American films. This leverage is especially important when considering persisting challenges to FDI in India, including ground-level hassles and infrastructure shortcomings.<sup>339</sup>

An alternative that Hollywood studios have started to explore is selling adaptation rights to their films to Indian producers.<sup>340</sup> Producers Nikhil Advani and Mukesh Talreja of Orion Pictures were the first to do this by obtaining the right to remake Warner Bros.'s *Wedding Crashers*.<sup>341</sup> In 2009, Indian director Karan Johar bought the adaptation rights to the Hollywood movie *Stepmom*.<sup>342</sup> Producer Mukesh Bhatt similarly acquired adaptation rights to the movies *The Hidden Face* and *Metro Manila* for 2013 and 2014, respectively, Indian remakes.<sup>343</sup>

On its face, these deals are beneficial to both sides: the Bollywood studio gets to remake the movie with no risk of copyright infringement suits and, in exchange, the Hollywood studio gets paid for creating the original story.<sup>344</sup> But different cultural and social perceptions of intellectual property in India shape how the populace views adapting Hollywood movies, undermining the value of Hollywood's copyrights in India.<sup>345</sup> While some producers, like Johar and Bhatt, are trying to gain legal rights first, many are still following

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338. See Jha, *supra* note 334 (quoting Gaurav Verma, chief revenue officer at India's Red Chillies Entertainment).

339. See Dutta & Sarma, *supra* note 318, at 14.

340. Iyer & Arora, *supra* note 2, at 6; see Bhushan, *supra* note 292.

341. Basi, *supra* note 4, at 64.

342. Iyer & Arora, *supra* note 2, at 6–7.

343. Agarwal et al., *supra* note 34, at 6.

344. See, e.g., Basi, *supra* note 4, at 64 (describing the deal between Orion and Warner Bros. over the adaptation rights to *Wedding Crashers*).

345. See Iyer & Arora, *supra* note 2, at 8–10.

the traditional practice of adapting Hollywood movies for Indian audiences.<sup>346</sup> Explicitly legalizing Indian cultural adaptations would clarify this gray area in Indian copyright law.

A further problem with turning to adaptation licenses is the cost. Acquiring adaptation rights might be too steep of a price for Indian producers. For example, Bollywood filmmaker Vishal Bhardwaj canceled a potential Indian cultural adaptation of the play *The Same Time Next Year* when the copyright owner's price was too high.<sup>347</sup> For a country where the minimum wage is INR 178 per day, the equivalent of USD 2.50,<sup>348</sup> the cost of a license for Indian studios may be too prohibitive to produce viable culturally adapted versions of Hollywood movies.

While adaptation licenses would prove constricting to the Indian film industry's growth, an allowance for Indian cultural adaptation of movies under copyright would instead allow the market to flourish. Copyright infringement has been a heated dispute between Bollywood and Hollywood for nearly two decades; but if the lines of copyright infringement are drawn more clearly by explicitly allowing for Indian cultural adaptation, this dispute is solved by demarcating a clear legal exception that has long been the case in practice. Perhaps most importantly, it allows Indian studios greater flexibility to develop movies that will succeed with the Indian public and increased leverage in achieving foreign investment to continue to grow one of the largest employment and economic sectors in India.

#### *F. A Model for Other Countries? The Case of Nigeria*

Legalizing Indian cultural adaptation is particularly suited for Indian economic development due to its extremely robust film industry and long-standing cultural practices relating to movie production. Given these unique circumstances, legalizing Indian cultural adaptation (or its cultural equivalent) in all developing countries may not be advisable or may not promise the same degree of benefits that it does in India. The country that might most benefit from such a change after India is Nigeria and its burgeoning film industry, "Nollywood."

Unlike Bollywood, Nollywood is a relatively young film industry. Yet, in the past two decades, it has risen to become the second largest producer of films in the world, creating over one thousand films a

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346. Basi, *supra* note 4, at 66.

347. *Id.* at 65.

348. *India National Floor Level Minimum Wage*, TRADING ECON., <https://tradingeconomics.com/india/minimum-wages> [<https://perma.cc/YT4F-D4UG>] (last visited Feb. 13, 2020).



year.<sup>349</sup> This large film industry is wildly popular in Africa and with African diasporic communities.<sup>350</sup> The Nigerian film industry generates approximately USD 250 million annually, making it the second largest export in Nigeria after oil,<sup>351</sup> with the overall economy related to film creating USD 500 million in value.<sup>352</sup> One of the biggest differences from Bollywood is that the vast majority of Nollywood films are direct-to-video and the films are largely quick, low-budget productions.<sup>353</sup> While Nigerian films pull from a plethora of influences, including Hollywood, they are rooted in sociocultural values that speak to Nigerian and wider African audiences.<sup>354</sup> Especially important is the fact that Nollywood allows Africans to tell African stories, tapping into a latent market of millions of viewers across the continent and the global diaspora.<sup>355</sup>

Nigeria has a comprehensive copyright law.<sup>356</sup> Nigeria is also a member of the WTO Agreement, making it bound by TRIPS and the incorporated Paris and Berne Conventions, just like the United States and India.<sup>357</sup> Similarly to the United States and India, Nigeria's copyright law grants the exclusive adaptation right to the copyright owner,<sup>358</sup> protects only expression, not ideas,<sup>359</sup> and provides a fair use carve-out.<sup>360</sup> Yet, like India, copyright enforcement has been less than perfect.<sup>361</sup> Nigerian protection of copyrights has been rather weak and

349. Olufunmilayo Arewa, *The Rise of Nollywood: Creators, Entrepreneurs, and Pirates* 3 (Univ. of Cal., Irvine Sch. of L., Legal Stud. Rsch. Paper No. 2012-11, 2012), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2011980](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2011980).

350. *Id.* at 3, 15–18.

351. *Id.* at 9.

352. Andrew Rice, *A Scorsese in Lagos*, N.Y. TIMES (Feb. 23, 2012), <https://www.nytimes.com/2012/02/26/magazine/nollywood-movies.html> [<https://perma.cc/L5HJ-TX5A>].

353. See Arewa, *supra* note 349, at 3–4, 25–26; see also Sophie McBain, *Inside Hollywood, Bollywood, and Nollywood*, SPEAR'S (Aug. 28, 2012), <https://www.spearswms.com/inside-hollywood-bollywood-and-nollywood> [<https://perma.cc/46AE-BFNP>].

354. See Arewa, *supra* note 349, at 6.

355. See *id.* at 6–7.

356. See Copyright Act (2004) Cap. (C28), (Nigeria).

357. See *Members and Observers*, *supra* note 43.

358. Copyright Act (2004), § 6(1)(a)(viii) (Nigeria).

359. See *id.* § 1(2)(b); see also Kunle Ola, *Evolution and Future Trends of Copyright in Nigeria*, J. OPEN ACCESS L. 6 (Sept. 11, 2014), <https://ojs.law.cornell.edu/index.php/joal/article/view/26/38>.

360. See Copyright Act (2004), Second Schedule (Nigeria) (providing nineteen exceptions to copyright protection including fair use, similar to 17 U.S.C. §§ 107–122 and § 52 of India's Copyright Act, which includes all exceptions under the broad umbrella of fair dealing).

361. See GLOB. INTELL. PROP. CTR., *supra* note 164, at 19, 55, 73 (noting that Nigeria is thirty-fifth out of forty-five major economies for effective intellectual property protection, although it should be noted that this is several places better than India).

pro-copyright constituencies in Nigeria are few, which has contributed to low enthusiasm for enforcement.<sup>362</sup>

Nigerian producers and actors see outside influences such as Hollywood movies as guides or teachers,<sup>363</sup> similarly to Bollywood's views on using Hollywood for inspiration. Nollywood films have copied stories from Hollywood films,<sup>364</sup> but there has been far less attention drawn to this copying than its parallel in India. But like with Bollywood, Nollywood films have developed a culture all their own, incorporating African cultural elements and views and especially the themes of marital discord, greed, and conflict between Christianity and juju.<sup>365</sup> The lack of awareness of such copying in Nollywood could be due to lower Hollywood interest in Nollywood than in Bollywood or poorer avenues of enforcement, although films from all three do well in the Nigerian box office.<sup>366</sup> The success of American movies in Nollywood could be a significant departure from the Bollywood example for determining whether Nigeria should adopt Nigerian cultural adaptation as a copyright carve-out. More research would be necessary to determine whether an American and a Nigerian adaptation would appeal to the same consumer market and whether they would be consumed exclusively by Nigerian consumers. Nonetheless, as Nigeria grows in importance as a destination for Hollywood movies, which is likely given its explosive growth rate and large population of over 200 million people,<sup>367</sup> it is likely that like Bollywood, Nollywood's practices will come under greater scrutiny.

Nollywood is primarily self-financed, with some outside financing, although this has generally remained very small, no doubt due to the low costs of production in the Nollywood film model.<sup>368</sup> Widespread piracy has served as a cap on the market and has

362. See Arewa, *supra* note 349, at 14–15.

363. See Ogochukwu C. Ekwonchi & Allen N. Adum, *Binaries and Ambivalence: An Analysis of Two Nollywood Actors' Spatial Discourses*, in *NIGERIAN FILM CULTURE AND THE IDEA OF THE NATION: NOLLYWOOD AND NATIONAL NARRATION* 257, 261 (James Tar Tsaiior & Françoise Ugochukwu eds., 2017).

364. Christina Ngene, *Nollywood Movies That Copied Hollywood Plotlines*, *NOLLYMANIA* (Mar. 18, 2020), <https://nollymania.com/nollywood-movies-that-copied-hollywood-plotlines/> [<https://perma.cc/Z68K-UTXD>].

365. See Rice, *supra* note 352.

366. See Meher Tatna, *Hollywood in Nigeria*, *GOLDEN GLOBES* (Oct. 15, 2019), <https://www.goldenglobes.com/articles/hollywood-nigeria> [<https://perma.cc/F6V8-D5W2>].

367. See *Nigeria Population*, *WORLDMETER*, <https://www.worldometers.info/world-population/nigeria-population> [<https://perma.cc/E8E3-ENCD>] (last visited Mar. 11, 2020).

368. See Arewa, *supra* note 349, at 8–9; McBain, *supra* note 353.

discouraged larger lending practices in Nollywood.<sup>369</sup> However, improved funding could help professionalize the industry and raise the quality of Nigerian films, as it did in India following its recognition as an industry (allowing it access to domestic bank loans) and opening it to FDI.<sup>370</sup>

Nigeria's Nollywood does share many similarities with Bollywood, including use of cultural copies, which could make it another suitable candidate for legalized cultural adaptation to help promote economic growth. Yet, unlike Bollywood, Nollywood has still largely not undergone professionalization and suffers from rampant pirating, which keeps prices and investments down.<sup>371</sup> Increased funding could improve this, but it would be a substantial hurdle in the short term, which may substantially constrict the economic development impact of legalizing Nigerian cultural adaptation compared to legalizing cultural adaptation in India. Smaller countries with less developed film industries may be even more constrained, to the extent that cultural adaptation for them would result in diminishingly marginal economic returns.

## VI. CONCLUSION

Bollywood movies have been suspended in legal limbo for nearly two decades. Yet, Indian cultural adaptation is not necessarily a condemnable practice; instead, it fits inside the framework of existing exceptions to copyright protection. A clear standard authorizing at least limited Indian cultural adaptation would allow for a greater margin of flexibility in creating new Indian films to feed the appetite of one of the globe's largest media and entertainment markets. This, in turn, would provide cultural and economic benefits to India, providing economic development not through strengthening the country's property laws, but by loosening the copyright standard in line with international copyright principles. This route of loosened copyright is an ideal fit for India's prominent entertainment industry; but, noting the importance of the country-by-country approach to property rights in law and economic development, it is not necessarily advisable or even replicable in other countries. But for India, legalized Indian cultural adaptation is a path forward in pursuing greater economic development through the entertainment and media sector.

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369. See McBain, *supra* note 353. Note that piracy has also been a problem for Bollywood historically, but that India, driven by its entertainment industry, has adopted stricter measures against piracy, although problems still remain. See Garde, *supra* note 76, at 26, 28, 34.

370. See McBain, *supra* note 353.

371. See Arewa, *supra* note 349, at 22, 36.

