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Do Bollywood films infringe Hollywood copyright?

Hollywood v Bollywood: is there a case to answer? Enforcement mechanisms

Bollywood (originally a condescending reference to the Indian Hindi film industry, historically perceived as a poor relative to world cinema) is now being given its due importance by global media giants, investors and audiences alike. Its boldly uncompromising grandeur and exaggeration, in comparison to its foreign cousin Hollywood, makes its individuality all too apparent, with distinctive melodies, humour and ideas of romance. However, the glamour is overshadowed by frequent allegations that the Indian film industry infringes copyright by producing Bollywood versions of popular Hollywood movies. This feature explores Bollywood's respect for copyright law in some cases, its alleged infringement in others and the enforceability of copyright protection against Bollywood productions.



Hollywood v Bollywood: is there a case to answer?

It is a well-accepted principle in law that only original works, that is the original expression of thoughts or information in some precise form (and not merely the thoughts or information), can be protected by copyright. In order for a work to be eligible for protection, it is not necessary that it express original or inventive thoughts; copyright laws are not concerned with the originality of ideas, but merely with the expression of such ideas. To constitute infringement, a showing of appropriation in the exact form or substantial appropriation of the copyrighted material is therefore required.⁽¹⁾

The Indian courts have observed that with regard to films it is necessary to determine whether an allegedly infringing work has reproduced a substantial part of the film.⁽²⁾ In such cases substantiality is not a question of quantity but of quality.⁽³⁾ Although no exhaustive criteria have been specified to decide what a substantial part of a picture is, one useful test, which has been followed in several decisions of courts,⁽⁴⁾ is that laid down by Lord Herschel LC in *Hanjstaengl v Bains & Co*⁽⁵⁾:

"...it depends really on the effect produced upon the mind by a study of the picture and of that which is alleged to be a copy of it, or at least of its design."

Thus, one test used to determine whether a violation of copyright has taken place is to examine whether a spectator, after having seen both works, is clearly of the opinion that the subsequent work appears to be a copy of the original.⁽⁶⁾

Where the same idea is being developed in a different manner, it is very likely that similarities will occur. In such cases the courts have to determine whether the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the alleged infringer's work is nothing but a literal imitation of the copyrighted work with occasional variations, it would amount to violation of the copyright. In other words, in order to be actionable the copy must be a substantial and material one, which at once leads to the conclusion that the infringer in question is guilty of an act of copyright violation.⁽⁷⁾

The same is true in US jurisprudence: the law does not recognize property rights in abstract ideas, nor is a mere idea protected by copyright. It becomes a copyright work only when the idea is given embodiment in a tangible form.

So an idea, principle, theme or subject matter being common property cannot be the subject matter of copyright.⁽⁸⁾ A person may choose any idea as a subject matter and then develop it in his or her own manner, giving expression to the idea by treating it differently from others. Thus, where a charge of infringement of copyright has been made, the fundamental fact which has to be determined is whether the infringer not only adopted the idea of the copyrighted work but also adopted the manner, arrangement, situations, scenes with minor changes or additions or embellishments.⁽⁹⁾ Infringement thus involves the copying or use of an identified work, not just evidence that two works are similar, or even that the second work has used the same idea as its basis.

In light of this and given the individuality and uniqueness of Bollywood films, it may be difficult to claim that a Bollywood rendition of a Hollywood film amounts to copyright infringement. Courts in most jurisdictions have taken the view that persons may choose a copyrighted idea and develop it in their own manner. Thus, even if the contention that a Bollywood film has borrowed some Hollywood film plots was accepted, it would likely be noted that Bollywood films have developed these plots in an individual manner, infusing dance and (melo)drama interspersed with a generous sprinkling of songs, thereby moving away from the idea as originally conceived by the Hollywood film maker.

While it is clear that a secondary user should not escape liability for infringement based on that user's making immaterial variations in the work, drawing the line between a permitted use of the ideas and impermissible use of expression is largely a question of fact.⁽¹⁰⁾

Enforcement mechanisms

In recent years, the rising appeal of Bollywood films in international markets (and the revenues generated by Bollywood film productions both within and outside India) has caused its audience as well as makers of original works to draw comparisons with films from Hollywood as well as other overseas film productions. As a result, foreign production companies and copyright holders have sought remedies to enforce their rights against Bollywood film reproductions to the extent that such reproductions constitute an infringement of copyright. The Copyright Act 1957, supported by the Copyright Rules 1958, is the governing law for copyright protection in India. Under Indian law, registration is not a prerequisite for acquiring copyright in a work and copyright in a work is acquired when the work is created and given a material form, provided it is original. Thus, unlike the United States, under Indian law registration does not confer any special rights or privileges with respect to a registered copyrighted work. The Copyright Act provides rights holders with a dual legal machinery for enforcing their rights. Enforcement is possible through (i) the Copyright Board, to the extent the copyright is registered, and (ii) the courts.

Civil remedies for enforcing copyright include injunctions, damages and account of profits and can be invoked by the copyright owner. In India, most court cases run for several years before being concluded at a final hearing. Therefore, obtaining an interim injunction is crucial for plaintiffs in IP lawsuits, especially as damages are awarded only after the final hearing of any action. Indian courts have realized the importance of protecting IP rights and have started to grant innovative interim orders to enable effective action to be taken. An example of the Indian courts' proactive and innovative approach in protecting IP rights is a recent case where only 3,500 of India's 40,000 cable operators had obtained licences to broadcast the 2006 football World Cup in India. In this case the Delhi High Court granted an order against the anonymous defendants that allowed the rights holder, accompanied by a court-appointed commissioner, to locate the unlicensed cable operators and shut down their unauthorized World Cup transmissions. Such orders are called Ashok Kumar orders in India, equivalent to John Doe orders.

The importance of IP rights is now being realized by legislators, courts and the industry in India. India is a signatory to various IP rights treaties and conventions and has already taken steps to comply with its obligations under the [Agreement on Trade-Related Aspects of Intellectual Property Rights](#). Accordingly the Indian IP law regime is almost at a par with that of regimes in most developed nations. Historically, the enforcement of IP rights has not been effectively administered in India. However, recent judicial rulings and steps taken by various enforcement agencies demonstrate that India is gearing up for effective protection and enforcement of IP rights, which will in turn encourage foreign investment. The Indian police have even established special IP cells where specially trained police officers have been appointed to monitor IP rights infringement and cybercrimes. Indian companies too

have become more proactive in protecting their IP rights and are starting to appreciate the importance of such protection as a way of adding value to their business. India's growth, with participation by foreign investment, depends on the effective protection of IP rights and progress has begun with support from the legislature, the courts and the industry.

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Endnotes

- (1) *Dorsey v Old Surety Life Ins Co*, 98 F 2d 872.
- (2) *The Daily Calendar Supplying Bureau Sivakasi v The United Concern*, 1967.
- (3) *Star India Private Limited v Leo Burnett (India) Private Limited*, 2003 (27) PTC 81 (Bom).
- (4) *Francis Day and Hunter Limited v Twentieth Century Fox Corporation Limited*, 1940 AC 112 (PC); *Ladbroke (Football) Limited v William Hill (Football) Limited*, 1964 (1) WLR 273; *Merchandizing Corporation of America Inc v Harpbond Limited*, 1983 FSR 32; *RG Anand v Delux films* (supra), AIR 1978 SC 1613; and *Fritco Lay Limited v Uncle Chips Private Limited*, 2000 PTC 341.
- (5) *Bobbs-Merrill Company v Isidor Straus and Nathan Straus*, 210 US 339; *Shipman v RKO Radio Pictures*, 100 F 2d 533.
- (6) *RG Anand*.
- (7) *Ibid*.
- (8) *Barbara Taylor Bradford v Sahara Media Entertainment Ltd*, 2004 (28) PTC 474 (Cal).
- (9) *RG Anand*.
- (10) Chapter 3.16 of the *Collective Administration of Copyrights and Neighbouring Rights, International Practices, Procedures, and Organizations*, published by Little, Brown and Company.