

A roadmap for TRIPS: copyright and film in Colonial and Independent India

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Copyright law shapes the film industry in many countries. As one of the largest producers of popular movies, India provides a case study for exploring the relationship between copyright law and the film industry. This article fills a gap in the intellectual property scholarship literature by analysing the developments of copyright law in Colonial and post-Independence India, and tracing the development of the law to the development of the industry. This historical background serves as a foundation for analysing contemporary debates in Indian copyright law, especially as applied to the film industry. The primary findings are on the recurrent theme of trade and copyright law, the extraterritorial application of copyright law outside India's borders, and the changing interpretation of the copyright law to reflect changes in the film industry and technology.

Keywords: *copyright, Colonial India, film industry, intellectual property, exhaustion, first sale doctrine*

INTRODUCTION: THE EMERGENCE OF GLOBAL INTELLECTUAL PROPERTY

Much scholarly and popular writing on the Uruguay Rounds of 1994 and the subsequent debates over the implementation of the TRIPS Agreement herald these events as the start of a global intellectual property system. Certainly the terms of TRIPS are the ones that contemporary policy makers and practitioners have to contend with in managing intellectual property rights globally. But much also can be learned from the past history of global intellectual property in order to address contemporary controversies.¹ Placing the present in context can often illuminate possibilities for reform and negotiation. The case can be made that the national and regional contours of intellectual property have always been shaped by the global environment of trade and movement of people. That implicit assumption informs this exploration of copyright law in Colonial India and its implications for the domestic film industry. Institutional understanding of copyright demonstrates how malleable and fluid law can be as it evolves in response to historical, economic, political, and social context. This study,

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1. See, eg, L Bently, 'Copyright, Translations, and Relations Between Britain and India in the Nineteenth and Early Twentieth Centuries' (2007), 82 Chi-Kent L Rev 1181, 1240 (drawing a parallel between controversies over right of translation in the late nineteenth and early twentieth centuries and current efforts by publishers to expand copyright protection through TRIPS).

at the end, should be respected as a challenge to the one-size-fits-all view of intellectual property propagated by the current treaty regime.

The Indian film industry is described as the biggest in the contemporary world.² It is also considered the oldest, with roots that predate the start of Hollywood by about a decade. The Indian film industry is also an example of indigenous industry, meaning that it developed within India.³ Although the technology of film was brought to India by the French Lumiere Brothers in the late nineteenth century, entrepreneurs on the subcontinent adopted the technology and fitted it to the tastes of the developing Indian market. The result represents an important interaction between the foreign and the local that illustrate the positive interactions which arose from the Colonial system. Law played some role in this industrial development, but one should not make too much of the causal connections between copyright law and the entertainment industry. Although much contemporary rhetoric suggests that copyright is a *sine qua non* for the commercialization of entertainment products and services, with any threat to legal rights portrayed as aimed at the heart of the industry, the reality is the law and industry developed in tandem. This article documents this progression and attempts to depict an alternative global system of intellectual property that arguably was more flexible, organic, and supportive of progress than that which we have witnessed with the TRIPS regime. While the article is a descriptive one, the analysis presented is meant to be provocative and promote future research on alternative global intellectual property systems.

The progression of the argument is as follows. The next section presents the development of the film industry and its regulation. The third section focuses on copyright. The fourth and final section presents lessons for global intellectual property gleaned from the study of copyright and film in Colonial and Independent India.

CINEMATOGRAPH REGULATION AND COPYRIGHT

Based on the number of films produced, the Indian Film Industry is often touted as the largest in the world currently although, in terms of annual worldwide revenues, the industry lags behind that of the United States. Culturally, the Indian film industry has had great influence on non-Indian filmmakers and on establishing communication and cultural channels for the diasporic community. Within India, the film industry is a diverse one. Often associated with Mumbai, a port city on the Southwestern coast, the film industry includes the industries of several regions, varying in religious and linguistic traditions. The term Bollywood is a reference to Bombay, the British name for Mumbai, but really represents a style of film that is a mixture of melodrama, music, romance, comedy, and tragic themes. For the purposes of this article, I will not examine these regional differences that constitute Bollywood, except for some casual references where appropriate. Since the focus is on national and international law, such as copyright, this broad-brushed focus may be appropriate. I leave an analysis of regional differences to future work.

2. For an important discussion of the film industry and examples of appropriation by US filmmakers of works from India, see M Sunder, 'Bollywood/Hollywood', (2011) 12 *Theoretical Inquiries in Law* 179, 181–2.

3. For a discussion of technological development within India and how it was shaped by Empire, see R Sudan, 'Mud, Mortar, and Other Technologies of Empire', (2004) 45(2) *The Eighteenth Century* 147, 156 (explaining how rationality and scientific exploration arose from an interaction between the British Empire and the colonized dominion).

As context, the following abbreviated history of Bollywood establishes some reference points for understanding the legal developments.⁴ I divide the discussion into developments before India gained independence from Britain in 1947 and afterwards.

The medium of film reached India in 1896 with the screening by Maurice Sestier of a film by the Lumiere Brothers in Watson's Hotel in Mumbai. The Lumiere Brothers are famous for making the first public screening of a film in Paris, France in 1895. The most famous screening was that of a train coming into a station, and viewers were awed and shocked by the moving image. Screenings of shorts and newsreel footage in Kolkata and Madras followed in the year after the Mumbai screening. The medium spread with the establishment of tent screenings in major cities, showing newsreel footage and depictions of local events such as wrestling matches and local theatre. Elphinstone Bioscope was the first motion picture theatre in India, established by JF Madan in Kolkata in 1907. The first feature film produced and screened in India was the film *Raja Harishchandra* directed by Dadasaheb Phalke in 1913, three years after DW Griffith made the first feature film in Hollywood. As the number of Indian feature films expanded during World War One, the Indian government enacted the Indian Cinematograph Act of 1918, modelled on and pursuant to the British Act. This Act recognized the industry and set rules for censorship by local bodies and rules for licensing the distribution of films by the state. The Cinematograph Committee initiated a study of the emerging film industry in 1927, which resulted in a report published in 1928. The Report recommended several subsidies for Indian films and the establishment of a government film library. However, the Committee split on the grant of preferences to British-made films and quota for Indian films. Many of the Committee's recommendations on state financing would not be implemented until 1960, thirteen years after Independence. As the Indian government moved to regulate the film industry, United States films entered the Indian market with Universal Pictures Corporation establishing an agency for the distribution of US films in India in 1916. Attempts to establish major Hollywood production facilities in India were thwarted by the stock market crash in 1929. With Hollywood as less of a player in the film industry, several Indian film studios developed in the 1920s and 1930s. Also leading to the expansion of the Indian film market was the advent of sound which allowed audiences to enjoy films in regional and national languages, other than English. The first sound features were produced in India in 1931.

After India's Independence in 1947 and the establishment of the Republic of India, the film industry continued to be a focus for economic expansion as well as for regulation. The Cinematograph Act of 1918 was amended to allow for further censorship and for taxation of the industry. In 1949, the national government created the SK Patil Film Enquiry Committee, which issued its report in 1951. The Report criticized the star system and corruption in the industry as film production companies were often a means to launder money. The Report also noted the decline of the studio system and the rise of independent entrepreneurs post-Independence. Some of the recommendations echoed those of the 1928 Cinematograph Report: state financing and the creation of a film library and institute. These recommendations were finally implemented in 1960 with the establishment of the Film Finance Corporation, designed to extend low interest loans to independent projects. Further government support for the film industry came from the establishment of the Indian Motion Picture Export Corporation in 1963, which promoted the export of films overseas. This pattern of government

4. This history is distilled from the chronology published in A Rajadhyaksha and P Willems, *Encyclopedia of Indian Cinema* (Routledge, London 1994) 17–31.

subsidy and censorship defined the regulation of the film industry to the present day.⁵ Copyright developed as a parallel regulation, which I described in greater detail below. What is striking about the Indian film industry is that it has developed with little government regulation as compared with the industry of other countries, such as South Korea or France,⁶ or arguably Great Britain, where the government played a greater role in setting quotas or national content requirements for the industry. However, it should be pointed out that the Indian censorship boards, operating at the national and local levels, acted to limit the import of non-Indian films. Copyright issues did arise in the 1951 Report and echoed issues discussed by the Cinematograph Commission in 1928.

Although copyright, and intellectual property more generally, were of less concern in the early years of the Indian film industry as compared with censorship and financing issues, the copyright issues that did arise foreshadow current global intellectual property institutions. The 1927 Cinematographic Commission, empowered by the Governor-General of India and consisting of six members, three Indian and three British, had the mission to visit important film centres for distribution and production, to interview filmmakers, exhibitors, and distributors, and to ‘consider whether it is desirable that any steps should be taken to encourage the exhibition of films produced within the British Empire generally and the production and exhibition of Indian films in particular’.⁷ The Commission’s objectives were both imperial and national. India’s status was that of a dominion, but the home office in Britain had understood the Crown’s relationship with India as an economic one. Promotion of the Indian film industry could benefit the Crown. At the same time, India could provide a market for British products, especially cultural products. As we will see in our discussion of British and Indian copyright law in the early twentieth century, copyright reform in Britain was designed to promote colonial markets for British copyrighted works. While copyright reform was driven by markets for books and music, the Cinematographic Commission’s work was to identify a potential market for the growing and popular medium of film.

In its summary of the main findings from its year-long investigation, the Commission reported two complaints of what is called ‘piracy of films’.⁸ The first complaint came from Mr Alex Hague of Pathé, India, a subsidiary of the French studio in India. His complaint was of unauthorized copies of films copyrighted outside India being imported into the United States.

His letter published in the Report states:

A certain number of Black-legs in this country have adopted the shady trick of importing ‘pirated’ copies of certain famous films,.... To give you a specific example, just recently a

5. See A Bannerjee, ‘Political Censorship and Indian Cinematographic Laws: A Functionalist-Liberal Analysis’, (2010) 2 Drexel LRev 557, 623–4. S Bhowmik, *Cinema and Censorship: The Politics of Control in India* (Orient Black Swan, Hyderabad 2009) 70–1 (describing review of film of censorship after Independence).

6. See, eg, SA Pager, *Catching a Korean Wave from Bollywood to Nollywood: Promoting Diversity in Filmmaking through a Decentralized, Market-Based, Trade-Friendly Cultural Protectionism*, 31 Nw J Int’l L & Bus (forthcoming 2010). For a discussion of the Nigerian film industry, see A Prabhala, ‘Nollywood: How It Works – A Conversation with Charles Igwe’, in G Krikorian and A Kapczynski (eds), *Access to Knowledge in an Age of Intellectual Property* (Zone Books, New York 2010) 595.

7. Report of the Indian Cinematograph Committee 1927–8 xi–xii (1928).

8. Ibid at 85.

picture entitled 'Sky High' has been imported in Bombay. Now, the 'Sky High' is nothing but a copy of a film called 'Safety Last,' featuring the famous comedian Harold Lloyd, of which the rights belong to me.⁹

Mr Hague pointed out that the Censorship Board readily licensed many of these pirated films and should more carefully scrutinize films for piracy.¹⁰ More to the point, he advocated for a registration system that would allow copyright owners to combat piracy.¹¹

The complaint came from exhibitors who expressed concern that screenings of pirated copies of movies interfered with their exclusive contractual right, obtained from the producers or owners of the films, to exhibit the works.¹² It is not surprising given the state of film production and the resulting high cost of copying film that there were not more complaints of copyright piracy. The exhibitor's complaint was aimed at the parallel imports of grey market for film. The unauthorized copies of movies entering India were coming from authorized distributors in the United States who would send the films to India after their American run.

As the Commission noted, this unauthorized importation would not constitute copyright infringement since no copy of the film was made. The Commission recommended that Indian exhibitors of US films follow the practice of their British counterparts and place clauses in their contracts with the producers and owners of the film to indemnify against harms resulting from unauthorized exhibitions.¹³ In addition, the Commission recommended that India adopt a registration system similar to that existing in Britain. While the British system was one of copyright registration, the Commission's proposal was to have exhibitors in India register their imported films with the Central Bureau, regulating customs, in order to prevent unauthorized copies at the border.¹⁴ The Commission's report also provided a detailed discussion of the state of Indian and British copyright law at the time, and there is no mention in the summaries of existing statutes of importation rights and first sale doctrine, which inform the parallel importation debate now. The Cinematograph Commission portrayed the parallel importation problem as one of contract law and customs control.

Twenty-three years after the Cinematograph Commission Report and four years after Independence, the Film Enquiry Committee issued its report on the Indian film industry. Established by the Parliament, the Committee's goals were to explore the need for reform in the film industry, which was viewed as a vibrant industry but one rife with corruption and in need of reform. A critical theme in the 1951 Report was assessing arguments for nationalizing the film industry, not surprising given the extent of central planning that was the heart of the newly independent state's methods for development and growth.¹⁵ While the Committee did not recommend nationalization, especially given the decline of the studio system and the rise of independent filmmaking, the Report provides a model for state subsidies and centralization of regulation to oversee the organization and financing of film production. As the Report states:

9. Indian Cinematograph Committee, *1927–1928 Evidence*, Vol IV, *Written Statements of Witnesses not Orally Examined* (The Government of India Central Publication Branch, Kolkata 1928) 404.

10. *Ibid.*

11. *Ibid.*

12. Report, *supra* (n 7) at 218.

13. *Ibid.*

14. *Ibid* at 85.

15. Report of the Film Inquiry Committee (1951) 185.

We feel, therefore, that while the State and the community should provide the necessary stimulus and corrective, the industry should be allowed to bring out its own latent power to reform itself and while State and public vigilance and interest should be ever active to prevent the industry from straying into the path of error and failure....¹⁶

One example of this mix of public vigilance and self-regulation is demonstrated by the Report's views on copyright reform in the film industry.

The Report talks extensively of the weakness of the then existing Indian copyright law to address the concerns of the film industry. The authors point to several types of piracy: filmmakers stealing material from other filmmakers, filmmakers stealing material from published literary works, and filmmakers stealing material from writers submitting unpublished stories and screenplays as bases for films.¹⁷ Indian copyright law in 1951 followed the British model and did not provide separate copyright protection for films. Instead, the film was protected under copyright law as a mixture of a photographic, a dramatic work, and a derivative work of pre-existing literary works.¹⁸ The Report identifies the problems that arose from this hybrid treatment. Copyright protection was limited to the arrangement of the photographic images as opposed to the underlying story being told through the images. This treatment limited the rights of the creator of the film, who found it difficult to raise a claim against an infringer who told a similar story through different images.¹⁹ Authors of literary works were also at a disadvantage if the filmmaker did not use words from the literary source and used the photographic image to tell a similar story.²⁰

All of these problems are familiar from ongoing debates over derivative works. However, the authors of the 1951 Report did not offer extensive recommendations for reform of copyright law itself. Instead, two institutional changes were the basis for reform. The first was the adoption of a registration system for film as evidence of the film content that could be used to screen infringing works in court and by the office created for registration.²¹ The committee recognized that the registration proposal was first made by the Cinematograph Commission in 1928.²² The second institutional reform was equally familiar to modern readers and reflected the mixture of government regulation and self-policing that was the spirit of the Report. In order to address the problem of writers having their published and unpublished works misappropriated by filmmakers, the authors of the Report recommended the creation of a centralized agency which would serve as a clearinghouse for authors' works and serve as a mediator for disputes between authors and filmmakers.²³ Modelled on the association of Authors and Playwrights which existed at the time in the United Kingdom, the proposed 'story Bureau'²⁴ sounds like a governmental version of the Writers' Guild of America, which was designed in the United States to protect writers against exploitation by the motion picture studios. These two reforms show the depth of the Film Enquiry Committee's recommendations for institutional change and recognition of the copyright issues affecting the industry. As with the recommendations of the

16. Ibid.

17. Ibid at 37–8.

18. Ibid at 37.

19. Ibid at 37–8.

20. Ibid at 38.

21. Ibid at 38.

22. Ibid.

23. Ibid at 38.

24. Ibid.

Cinematograph Commission, these proposals were ignored although the 1957 Copyright Act did recognize film as a separate category of copyrighted work.

This section provides a brief history of the film industry in India and the regulatory environment within which this history has played out. Copyright has been one aspect of this regulatory environment which reflects the changing political and legal circumstance of India as it has moved from a colonial dominion to an independent republic engaged in development through centralized planning. Contemporary India reflects a movement from a centrally planned economy to a liberalized one. With this background, I turn to an analysis of how copyright law has developed over the course of Indian history as a reflection of the changing legal and political environment.

COPYRIGHT IN THE COLONIAL AND POST-COLONIAL MODES

Two narratives structure this section. The first is the development of international intellectual property systems. The second is the development of lawmaking and copyright law in India, particularly as applied to film. These two narratives are not independent. During the colonial period, developments in Indian copyright law tracked debates over international trade and the importation of copyrighted works into the British colonies. After the colonial period, Indian copyright law tracked debates over centrally planned economies and trade between developed and developing countries. The development of copyright law in India reflects the relationship between these two narratives. Indian copyright law went through three phases: (1) the colonial period extending from 1757 with the East India Company taking over governance of the regions of India with which the company had been trading; (2) the period from Independence in 1947 to 1990 when the Republic of India began a process of economic liberalization which included a reform of intellectual property law; and (3) the period from 1990 to the present when the Republic of India engaged in intellectual property law reform as a signatory to TRIPS.

The Colonial period

India's relationship with Great Britain started as an economic one with the East India Company entering into a trading agreement in 1615 with the Mughal emperor governing territorial India at the time.²⁵ This economic relationship turned into one of governance and control as the East India Company, chartered by the Crown in 1600, expanded its dominion over the territory, and the Mughal rulers ceded their sovereignty to the Company, which eventually obtained sovereignty over India in 1757 after the defeat of the French on Indian soil in the Battle of Plassey.²⁶ Governance by the East India Company was pursuant to the common law of England which was introduced into India. Concern over corruption by the East India Company led the British Parliament to enact the Government of India Act of 1833, which established the Governor-General of India.²⁷ The Governor-General was empowered to enact laws for India which did not interfere with or contradict British law. Under the Government of

25. See R Guha, *India After Gandhi: The History of the World's Largest Democracy* (Harper Perennial, New York 2007) 53.

26. *Ibid* at 287.

27. R Sagar, 'Introduction of Exclusive Privileges/Patents in Colonial India: Why and for Whose Benefit?', (2007) 2 *Intellectual Property Quarterly* 164, 165–6.

India Act of 1858, England directly governed India, maintaining the Governor-General to enact local Indian legislation pursuant to British law. Through the Government of India Act of 1858, India obtained dominion status in the British Empire, meaning it was not fully self-governing and was subject to control by the Home Office in London.²⁸

Copyright legislation entered India through the Copyright Act of 1847, enacted pursuant to the copyright law reform in England passed in 1842. Three issues motivated the enacted of Indian copyright law.²⁹ First was the enforcement of copyrights under English common law as introduced into India under the East India Company.³⁰ Second was the enforcement of copyright under principle of equity in Indian courts.³¹ Third was the jurisdiction of English copyright law in India.³² Legislation in India was necessary to clarify these three issues and allow for protection of UK copyrights in India. Under the terms of the Copyright Acts of 1842 and 1847, Works published anywhere in the colonies would be subject to protection under English copyright law. Indian copyright law governed infringement within India of works first published in the United Kingdom.³³ The Indian Copyright Act of 1847 followed the details of English copyright law as far as duration of rights, but copyright extended only to literary and artistic works, and not to musical or dramatic works.³⁴ Furthermore, registration of copyright was with the Secretary of State's Office in India, rather than the Copyright Office in the United Kingdom.³⁵ Most importantly, the Indian copyright act did not treat unauthorized importation of works copyrighted under UK law as infringement, which created a ready market for what was deemed to be pirated literary works from the UK.³⁶

Copyright reform did not stop with the 1842 and 1847 statutes, which created controversy as well as addressing some issues. The Imperial Copyright Act of 1911 and the subsequent Indian Copyright Act of 1914 were the next set of copyright legislation during the colonial period. The reforms were in response to many challenges in the international environment.

First was the need for uniformity of copyright laws across the colonies in order to deal with the unauthorized importation of copyrighted works into the local colonial marketplace.³⁷ Under the International Copyright Act of 1886, any work produced in the colonies was given the same copyright protection as a work created in the United Kingdom.³⁸

The second challenge came from unauthorized translations of UK copyrighted works in the colonies. A letter from John R MacGrath, Vice-Chancellor of the University of Oxford, to the Secretary of State for India, dated 24, January 1896, reported on a decision by the High Court of Mumbai against Macmillan Press which

28. J Darwin, *The Empire Project: The Rise and Fall of the British World System 1830–1970* (Cambridge University Press, Cambridge 2009) 81.

29. WACopinger, *The Law of Copyright* (Sweet & Maxwell, London 1893) 812–13.

30. Ibid.

31. Ibid.

32. Ibid.

33. Ibid.

34. Ibid at 814.

35. Ibid.

36. Ibid at 815.

37. JM Easton, *Copinger's The Law of Copyright* 5th edn (Stevens and Haynes, London 1915) 332.

38. Ibid.

had brought a copyright challenge against the publisher of an unauthorized translation of books.³⁹ The High Court had ruled that a translation was not copyright infringement.⁴⁰ Mr MacGrath, representing the interests of Oxford University and Clarendon presses, urged that a British copyright holder had less protection in the colonies than a non-British copyright holder, and recommended reforms of Indian copyright law.⁴¹ In a separate letter, dated 30 November 1885, the Under Secretary of State rejected an appeal from the Governor-General of India, urging for copyright reform in India.⁴² The Under Secretary, citing commentary from Sir Henry Maine on copyright reform, stated that copyright reform in India should coordinate with reform efforts in Britain.⁴³ The translation issue was addressed by the Indian Copyright Act of 1914, which created a compulsory licence system for translations.⁴⁴

The third challenge came from the Berne Convention of 1896 and the Berlin Convention of 1908, each of which required revisions of copyright law to conform to international standards. These treaties required amendments to address issues of duration and moral rights.⁴⁵ The Berlin Convention specifically required copyright protection for cinematographic works as either a literary or artistic work. The Imperial Copyright Act of 1911 and the Indian Copyright Act of 1914 responded to these challenges by attempting to harmonize the copyright law of the colonies. At the same time, the Imperial Copyright Act of 1911 allowed dominions to diverge from the Imperial Copyright Act in local application of its copyright laws.

Professor Lionel Bently and other academics have provided details of the Imperial Copyright Act and its Indian companion.⁴⁶ Here I will focus on how the two copyright acts addressed film in order to comply with the Berlin Convention. Indian law on this point tracked the Imperial Copyright Act without variation. The Imperial Copyright Act defined a cinematographic work as ‘a series of instantaneous photographs projected on the screen in rapid succession so as to give effect of motion’.⁴⁷ The Act recognized the work so defined as an artistic work and ‘entitled to copyright as such’.⁴⁸ The statute also treated a cinematographic work as a dramatic work since the photographs ‘may also be arranged in a particular way or they may represent original acting form or combination of incidents’.⁴⁹ The Act, however, excluded from protection the filming of single or different incidents in real life or of a non-copyrighted play unless the creator of the film gave the material an original form.⁵⁰ Finally, the Imperial

39. Letter from John R Magrath, Vice-Chancellor of the University of Oxford to Secretary of State for India (dated 24 January 1896) (available in the British Library).

40. Ibid.

41. Ibid.

42. Letter from Board of Trade, rejecting copyright reform in India until bill introduced in England (30 November 1885) (available in the British Library).

43. Ibid.

44. Bently, *supra* (n 1) at 1187–8.

45. See P Kamina, *Film Copyright in the European Union* (Cambridge University Press, Cambridge 2002) 18–21.

46. See Bently, *supra* (n 1) and citations therein; I Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (Hart Publishing, London 2010) 142–3.

47. HC Mital and BDJain, *The Law of Copyright in India* (Eastern Law House, Kolkata 1939) 85.

48. Ibid.

49. Ibid.

50. Ibid.

Copyright Act recognized that ‘the author of a literary dramatic or musical work has the sole right to make a Cinematograph of his work’.⁵¹

Like the 1909 Copyright Act in the United States, neither the Imperial Copyright nor the Indian Copyright Act recognized film as a separate copyrighted work. However, the treatment of film under copyright law was confusingly complex under Imperial Copyright and therefore under Indian Copyright. In the United States, a motion picture was categorized as a dramatic work. The Imperial Copyright Act, by contrast, treated film as both a dramatic work and an artistic work. This dual treatment created confusion in the resulting case law.⁵² The case law was confounded by film’s dual status as both an original work and as a derivative work. For example, courts split on whether selling a movie constituted a public performance and hence an infringement of copyright.⁵³ However, promotion of a movie was viewed as contributory infringement of copyright.⁵⁴ Film’s dual status as dramatic and artistic works also created confusion as to copyright ownership, with one British court splitting copyright ownership in film between the producer (who was deemed to own copyright in the photographic elements) and the screenwriter (who was deemed to own copyright in the dramatic elements).⁵⁵ The confusion in British law is reflected in the discussion of copyright reform by the Film Enquiry Committee, described above and in further detail in the next subsection.

Indian copyright during the colonial period shows an intimate connection between copyright reform in Britain with the emerging understanding of copyright in the colonies. This connection was a flexible one with the dominion colonies, like India, given latitude in the development of copyright. However, with respect to the emerging area of film copyright, India adopted British law without variation. The confusion in British film copyright law became a source of debate within India after Independence and shaped post-Independence Copyright reform.

The Republic of India from 1947 to 1990

The 1951 Film Enquiry Committee identified several problems facing the film industry from inadequate copyright legislation. Many of these inadequacies stemmed from the confusing treatment of film copyright under the Imperial Copyright. These inadequacies were in turn adopted in the Indian copyright legislation. As discussed above, some of the problems raised by copyright infringement of film and of literary works adopted into film stemmed directly from the hybrid treatment of film as dramatic, artistic and derivative works.

However, there were other issues that the Film Enquiry Committee identified. Following Imperial Copyright, Indian copyright granted protection to both works published in India and unpublished works if the author at the time of making the work was either a British subject or a resident of British dominions.⁵⁶ This rule posed a

51. Ibid.

52. FE Skone James, *Copinger on the Law of Copyright* (Sweet & Maxwell, London 1927) 218.

53. See *Glenville v Selig Polyscope*, (1911) 27 TLR 554 (no infringement); (1909) 100 LT 260(no infringement); but cf. *Kilmer v Harper Brothers*, 222 USR 55 (1911)(infringement).

54. See *Fenning Film Source v Wolverhampton Co Cinemas*, 3 KB 1171 (1914); *Falcon v Famous Players Film Co*, (1926) 2 KB. 474.

55. See *Milligan v Broadway Cinema Palace Co*, (1923) Scots Law Times 35 (producer owner of copyright in cinematographic production while writer is copyright owner in scenario).

56. Report of the Film Inquiry Committee, supra (n 15) at 37.

problem for film because the screening of a film was deemed a public performance and not a publication.⁵⁷ Consequently, cinematographic works obtained copyright protection as unpublished works.⁵⁸ The result was that Indian copyright protection did not extend to films made by non-British subjects or residents outside the British dominion. The Committee noted that these non-British filmmakers could obtain copyright protection within India by publishing a short description of the film in India.⁵⁹ But, as the Committee also pointed out, this would accord protection only to the dramatic aspects of the film that are recorded in the description and to only some of the photographic elements if photographs were also published.⁶⁰

Copyright during Independence followed the 1914 Act until substantive amendments and reforms were implemented in the 1957 Copyright Act. The 1957 Act constitutes contemporary Indian copyright law with substantive revisions in 1994 and in 1999 to address issues of computer software and of digital copyright. The 1994 and 1999 revisions were adopted in order to comply with obligations under TRIPS, to which India became a signatory in 1995. As far as the treatment of film is concerned, the 1957 Copyright Act has remained unchanged. The main change that the 1957 Act offered with respect to film was the treatment of cinematographic work as an independently protected work, in contrast with the hybrid treatment under the 1914 Act.⁶¹ The 1957 Act maintained the right to make a cinematographic work for copyright holders of literary, musical, dramatic, and artistic works.⁶² Strangely, the 1957 did not include the right to make a cinematographic work as a right of the cinematographic work copyright holder.⁶³ Presumably, if someone wanted to make a sequel or prequel of an existing cinematographic work, the sequel or prequel creator would have to clear rights with any literary, musical, dramatic, or artistic work copyright holder, but not the copyright holder in the first-generation cinematographic work. The 1957 Act, however, did clarify the narrow confounding definition of publication, which under the 1914 Act excluded public performance. The 1957 Act included 'communication to the public' as an alternative definition for publication.⁶⁴

Two other changes introduced by the 1957 Act further shored up copyright protection for film. First, the act clarified ownership rules by vesting copyright ownership in the party commissioning or financing a cinematographic work rather than the author of the work.⁶⁵ This provision, much like the United States work for hire doctrine, clarified the ownership of film copyright. Second, the 1957 Act enacted a broad provision for compulsory licences, with the Copyright Board given the authority to hear complaints and impose licences. The compulsory licence provision allows for a licence when an Indian work has been withheld from the public. An Indian work includes any work by an Indian citizen or a cinematographic work or sound recording made or manufactured in India.⁶⁶ Although the compulsory licence for film has not been invoked, the policy of public access reflected in the compulsory licence provision seems to inform some of the case law on film copyright.

57. *Ibid.*

58. *Ibid.*

59. *Ibid.*

60. *Ibid.*

61. Indian Copyright Act, 1957 § 13.

62. Indian Copyright Act, 1957, §§ 14(a)(iv), 14(c)(iv).

63. Indian Copyright Act, 1957, § 14(d).

64. Indian Copyright Act, 1957, § 1.

65. Indian Copyright Act, 1957, § 17(b).

66. Indian Copyright Act, 1957, §§ 31–31A.

The 1957 Copyright Act addressed many of the criticisms of the 1914 Act. To assess the effect of copyright law on the film industry I analyse some of the published judicial opinions ruling on film copyright disputes. I address this case law in the next section, which focuses on the period of liberalization in India.

The Republic of India during the period of liberalization

With the liberalization of the economy and the accession to TRIPS, India has engaged more with copyright reform and addressing film piracy. Although much of the focus in India has been on patent reform, particularly with the creation of a viable administrative system for patent prosecution and an effective court system to adjudicate patent infringement matters, copyright issues percolate in the courts and have been the object of reform efforts. In 2010, there was discussion in Parliament of an overhaul of the 1957 Indian Copyright Act to modernize the duration of copyright and infringement actions.⁶⁷ A long-standing criticism of India is the delays and inefficiencies of the court system.⁶⁸ Nonetheless, some important copyright decisions have come down in the post-Independence era. In this section, I will discuss four of them as examples of the development of copyright law in contemporary India.

The 1970 Supreme Court of India decision in *Abbas v Union of India*⁶⁹ is a seminal case on freedom of speech under the Indian Constitution and film censorship. Although the opinion does not address copyright issues, the decision is important for understanding the development of film regulation. Abbas was a filmmaker who challenged the ruling by the Cinematograph Commission that his documentary film depicting poverty and squalor in four metropolitan areas of India was obscene because of depiction of prostitution and pimping. The challenge was to a system of film review and licensing that dated back to the Cinematograph Act of 1918 and continued after Independence with the Cinematograph Act of 1952. The constitutional challenge to the 1952 statute was grounded in the Indian Constitution's protection for 'freedom of speech and expression'. The Indian Supreme Court relied on United States First Amendment jurisprudence to rule in favour of *Abbas*. The Court adopted a position that appreciated the need for limits on speech restrictions:

Parliament has left [the task of what may not be shown] to the Central Government and, in our opinion, this could be done. But Parliament has not legislated enough, nor has the Central Government filled in the gap. Neither has separated the artistic and the socially valuable from that which is deliberately indecent, obscene, horrifying, or corrupting. They have not indicated the need of society and the freedom of the individual. They have thought more of the depraved and less of the ordinary moral man. In their desire to keep films from the abnormal they have excluded the moral. They have attempted to bring down the public motion picture to the level of home movies.⁷⁰

67. See, eg, L Mulchandani, 'Indian Movies Without Songs, Possible?', *The Economic Times Online Edition* (11 January 2011), available at <http://articles.economictimes.indiatimes.com/2011-01-22/news/28433106_1_music-rights-film-industry-songs>.

68. PB Mehta, 'India's Judiciary', in D Kapur and PB Mehta (eds), *The Promise of Uncertainty in Public Institutions in India: Performance and Design* (Oxford University Press, Oxford 2005) 159–60.

69. 1970 INDLAW SC 165.

70. *Ibid.*

A seminal freedom of expression decision, the *Abbas* opinion also had implications for film regulation in India. As described above, the Cinematograph Act was a critical regulation of the film industry that served as a way to limit the amount of competition in the industry. It arguably shaped the film industry as much as copyright did, perhaps even more given the deficiencies of copyright law in India. The victory for free speech marked a waning of industry regulation through censorship and created space for copyright law to enter and shape the industry.

An example of the judiciary's engagement with copyright law is the Delhi High Court's 1986 decision in *Bhandari v Kala Vikas Pictures*.⁷¹ Bhandari was a prominent Hindi novelist who had licensed the right to film his novel *Aap Ka Bunty* to the defendant film producer. He was not pleased with the result, finding the film distorted his work. The High Court rejected the novelist's claim, finding nothing in the Copyright Act to support the claim for distortion of the work. The High Court found that the absence of this moral rights provision was consistent with the goals of copyright law.

The hallmark of any culture is excellence of arts and literature. Quality of creative genius of artists and authors determine the maturity and vitality of any culture. Art needs healthy environment and adequate protection. The protection which law offers is thus not the protection of the artist or author alone. Enrichment of culture is of vital interest to each society. Law protects this social interest.⁷²

The High Court cited section 57 of the Indian Copyright Act which provides special rights for authors.⁷³ These special rights, the Court noted, include the attribution rights of the author. However, the Court found no protection for loss of reputation or for distortion of the work. The Court further found that the film producer's alleged distortions would not harm the reputation of a prominent and well-respected author as the plaintiff.

The *Bhandari* case is one example of the Indian judiciary engagement with copyright. One post-TRIPS dispute raised some concerns about the adequacy of copyright protection in India. In 2003, Barbara Taylor Bradford, a romance novelist, brought a claim against Sahara Media Entertainment, the network that planned to broadcast a mini-series based on Bradford's novel, *A Woman of Substance*.⁷⁴ She brought her claim in the Kolkata High Court, which granted an *ad interim* (preliminary) injunction staying the broadcast of the programme.⁷⁵ After an appeal by Sahara, the High Court lifted the stay.⁷⁶ Bradford appealed this decision to the Indian Supreme Court that reinstated the *ad interim* injunction after one episode had been broadcast.⁷⁷ A few months after Bradford initiated suit, the Kolkata High Court ruled against her, finding no proof of copying since the similarity between the two works were only as to ideas.⁷⁸ The High Court awarded Sahara damages from the delay of the broadcast and costs.⁷⁹ Bradford appealed to the Indian Supreme Court, which upheld the finding of no infringement, but reversed as to damages.⁸⁰

71. 1986 INDLAW DEL 147.

72. *Ibid* at ¶ 9.

73. *Ibid* at ¶ 11.

74. R Desai, 'Copyright Infringement in the Indian Film Industry', in VP Sarathy (ed), *Indian Film Industry: Some Perspectives* (The ICFAI University Press, Hyderabad 2006) 163–4.

75. *Ibid*.

76. *Ibid*.

77. *Ibid*.

78. *Ibid*.

79. *Ibid*.

80. *Ibid*.

The Bradford case is noted as a prominent case involving copyright infringement and the Indian film industry.⁸¹ It also can be viewed as a troubling case, echoing some of the criticisms of Indian copyright law from the Cinematograph Committee Report and the Film Enquiry Report. However, the case shows the Indian courts responsive to copyright claims and the Indian Supreme Court attentive to non-Indian copyright interests. Copyright is not ignored in the Indian courts. A second example of the emergence of copyright law is the Madras High Court's 2009 decision in *Elango v Ganesan*,⁸² a controversy involving alleged unauthorized use of a copyrighted song in a Tamil-language film. The court found in favour of the songwriter, ruling that the plaintiff had in fact authored the song used in the film.

The pro-copyright orientation of contemporary Indian jurisprudence comes across in the 2009 Delhi High Court decision in *Warner Bros. Entertainment v Santosh*.⁸³ At issue was an online movie DVD rental business created by the defendant using DVDs purchased legally overseas. The online service was aimed at the Indian consumer interested in watching non-vernacular movies, meaning American films. Warner Brothers sued in the High Court of Delhi, raising claims under the Indian Copyright Act which grants film copyright owners the exclusive right to 'sell, or offer for sale any copy of the film, regardless of whether such copy has been sold or hired earlier'.⁸⁴ Although the Indian Copyright Act does not grant rental rights, Warner Brothers read this rights provision to include rental rights. The High Court ruled in favour of Warner Brothers and enjoined the defendant's business.

A critical issue in the case was the limitation on the copyright owner's rights from the first-sale doctrine. The Indian Copyright Act does not recognize a general first-sale doctrine as exists under United States Copyright law. Instead, the first-sale doctrine is applied on a case-by-case and work-by-work basis. Santosh raised an exhaustion, or first-sale defence, before the High Court of Delhi, arguing that the legitimate purchase of the DVDs overseas exhausted the copyright holders' rights in the work. The High Court, looking to both US⁸⁵ and Canadian⁸⁶ case law on copyright exhaustion as well as the language of the Indian Copyright Act, ruled against Santosh. Looking to the text of the Indian Copyright Act, the High Court reasoned that limitations on the copyright holders' rights for works in circulation applied to literary, artistic, dramatic, or musical works, and not to cinematographic works. The statute provides the owner of a cinematographic copyright the right to distribute 'whether such copy has been sold or hired earlier'. The qualifying clause meant that the first-sale doctrine did not apply to film.

Furthermore, the High Court distinguished the various applications of the first-sale doctrine. Contrasting the European approach with the US approach, the High Court describes the former as adopting regional exhaustion, applying only to sales within the European Union, and the latter as adopting international exhaustion, applying to sales made by the United States copyright owner anywhere in the world. The High Court remained silent on the scope of exhaustion under Indian law, but relied on the distinction between Europe and the United States to conclude that the scope of the first-sale

81. Ibid at 164.

82. 2009 INDLAW MAD 1091.

83. 2009 INDLAW DEL 970.

84. Indian Copyright Act, 1957, § 14(1)(d).

85. *Bobb Merill Co v Strauss*, 210 US 339 (1908); *Quality King Distributors v L'anza Research International, Inc*, 523 US 135 (1988).

86. *Euro Excellence Inc v Kraft Canada, Inc*, 2007 SCC 37.

doctrine depends on national law. Accordingly, the court looked to the treatment of film copyright under the Indian statute to find against the defendant's first-sale doctrine defence. Under Indian law, the sale of a film does not exhaust distribution rights, and the film copyright owner retains the right to rent and resell the work.

The High Court also addressed the importation as well as the rental issue. Warner Brothers had argued that the importation of the copyrighted films into India after the purchase from the United States violated its importation rights. Once again, the court delved into the structure and language of the statute to determine the scope of an Indian copyright holder's importation right. Starting from the provisions of the statute on licensing and the power of the Copyright Board to control imports,⁸⁷ the court concluded that the importation right was a separate right of the copyright holder and was not exhausted by Santosh's purchases of the DVDs in the United States.

On the point of whether the first-sale doctrine limited the importation right, the court relied on United States case law which held that the first-sale doctrine applied only to the distribution right and not to other rights such as reproduction or adaptation. Since the importation right was a separate right, the High Court reasoned that the first-sale doctrine did not exhaust the distribution right. In its analysis of the importation right, the court's decision did not rest on language specific to cinematographic works as it did with respect to the scope of the first-sale doctrine. Consequently, the High Court's holding on importation arguably applies to all works while its analysis on resale and rental would apply only to film.

The 2009 Delhi High Court opinion in Warner Brothers represents a pro-copyright decision, grounded in a strict application of copyright legislation. However, there are clear policy goals that inform the court's decision. To understand these policy inclinations, consider the policy argument raised by Santosh in defence of his online service:

The defendant ... submits that this Court should also take into account the Constitutional imperative that providing entertainment is a part of the fundamental right of freedom of speech and expression. Therefore, when a business seeks to exercise its fundamental right to provide entertainment as part of its freedom of speech and expression limitations should be restricted to those based on societal needs and benefits.⁸⁸

The defendant characterized these societal needs and benefits as creating a video club which allowed Indian consumers to have access to non-vernacular films, access that was limited by the inadequate number of theatres screening English-language films in India. The defendant concluded that not finding an exception under copyright law that would allow the distribution of the films would make the Indian Copyright Act unconstitutional.

The High Court dismissed the defendant's constitutional argument. Relying on United States case law, the court noted that the US copyright jurisprudence also noted the tension between copyright and constitutional values like free speech. 'Yet', the High Court reasons, 'the express terms of the US Constitution enjoin Congress to enable copyrights, to promote creativity. It is therefore a long held view, in academic quarters, as well as by the courts, that copyright law promotes free speech, by promoting originality of expression.'⁸⁹ The Indian Constitution, it should be pointed out, does not have an express provision granting Parliament the power to enact copyright legislation. Although the High Court does not acknowledge this point, it does address the policies inherent in copyright law.

87. Indian Copyright Act, 1957, § 53.

88. *Warner Bros.*, supra (n 83) at ¶ 14.

89. *Ibid* at ¶ 85.

Copyright law, and the protections afforded to owners and those entitled to it ... is a balance struck between the need to protection expression of an idea, in a given form to promote creativity, on the one hand, and ensure that such protection does not stifle the objective, i.e. creativity itself. Copyrights are part of intellectual property, which are but a species of property law. ... Just as the owner of real property ... is entitled to legitimately assert his domain over it, and protect it from unfair appropriation by another, the intellectual property owner is, by these laws, enabled to protect unwarranted exploitation or unauthorized use of what are his property rights.⁹⁰

Copyright law affirms property rights for the purpose of promoting creativity. This policy objective supports protection of copyright owner's rights over other social and public policy goals, including freedom of expression. Although this policy analysis is writ large, the strong protection the court finds for film copyright under the Indian Copyright Act vindicates the nearly century-long criticism of Indian copyright law, starting with the Cinematograph Committee of 1928. These criticisms culminate and are assuaged by the 2009 decision

Summary

The cliché that what is past is prologue is an appropriate description of the history of Indian copyright and film presented in this section. More litigation and policy debate are forthcoming. Nonetheless, the developments presented here provide background for how we can shape the future. What is interesting is how Indian copyright law has been shaped by that of other jurisdiction. That statement is true for any country's law since national and local institutions are shaped in a global environment. But what should be noted is how Indian copyright law has developed independently of global influence. The best example is the variations permitted for dominions under the Imperial Copyright Act of 1911. Furthermore, even though the Delhi High Court relied on US precedents for analogies in resolving a dispute under the Indian Copyright Act, the court's decision rested on a close reading of the Indian statute. Local law triumphed, but as the history warns, one may wonder what forces and factors shape local law. The final section of the article addresses how the history presented here can influence our future application and understanding of the law.

PROGRESS IN GLOBAL INTELLECTUAL PROPERTY LAW?

My project has two components. The first is to document the development of the Indian film industry from the perspective of state regulation. The second is to document the development of copyright law in India. While there are several primary sources on both topics, the secondary literature is thin, and attempts to closely analyse the relationship between the Indian film industry and copyright law is nonexistent. This article fills that gap.

What is the normative pull of exploring the historical origins of copyright and the film industry? My primary motivation is to place the development of TRIPS in a broader context of global intellectual property and thereby broaden the understanding of the term 'international intellectual property law'. This move allows policy makers

90. Ibid at ¶ 86.

and scholars to see how economic and political interests have shaped the content of intellectual property law.

Professor Madhavi Sunder, in her study of copying, borrowing, and the relationship between Bollywood and Hollywood reminds us that the creative freedom afforded by copyright law masks unequal distribution of resources and influence between the developed and developing world. This article reinforces those themes by placing TRIPS in larger historical contexts. My argument is not to suggest the historical inevitability of TRIPS. On the contrary, my goal is to highlight the possibilities, to show what decision makers can do, and to identify options existing within the world of TRIPS despite its tendency towards uniformity masked as harmonization.

I end this article with the provocative thought that there may have been more freedom to operate and to create intellectual property tailored to local circumstances under the British Raj than under the World Trade Organization (WTO). But such a comparison should not overshadow the ways in which developing countries such as India have tried to adapt intellectual property to reflect national interests and the goals of development. Presenting the history, one hopes, will make that normative goal of using intellectual property law to promote national development needs more appealing.