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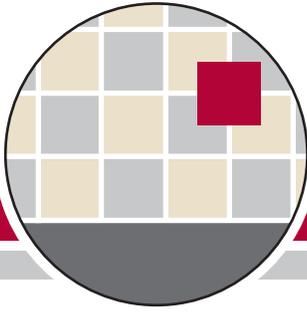
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Copyright and Cross-Cultural Borrowing: Indo-Western Musical Encounters

Arpan Banerjee*

INTRODUCTION

In a denunciatory book on India, the British historian James Mill (father of John Stuart Mill) labeled the country's people "mendacious," its art and sculpture "disgusting," its literature "monstrous," its cuisine "simple and common," and its music "unpleasing."¹ Mill — who had never actually visited India — attacked the admiring descriptions of Indian civilization by Western indologists, notably Sir William Jones.² While Mill's book might have shaped the views of many in the West towards India (for example, the book was compulsory reading for British officials posted in India³), scholars like Jones equally influenced an alternative discourse, epitomized by Mark Twain's gushing description of India in his travelogues.⁴ Postcolonial scholars, while criticizing Mill and similar colonial ideologues, have also been skeptical of romanticized depictions of Indian culture. For instance, Edward Said — who used the term "Orientalism" to refer to patronizing depictions of the East — accused the German indologist Friedrich Schlegel of "racism" for praising "the 'good' Orient;" comprising "a classical period

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1. JAMES MILL, *THE HISTORY OF BRITISH INDIA* 332, 354-57, 364-73, 472 (1817).

2. *Id.* at 431 (stating: "It was unfortunate that a man so pure and warm in the pursuit of truth, and so devoted to oriental learning, as Sir William Jones took up... the theory of a high state of civilization in the principal countries of Asia.").

3. See FRIEDRICH MAX MÜLLER, *TRUTHFUL CHARACTER OF THE HINDUS, INDIA: WHAT CAN IT TEACH US?: A COURSE OF LECTURES DELIVERED BEFORE THE UNIVERSITY OF CAMBRIDGE* 42 (1883) (Müller remarked: "Mill's 'History,' no doubt, you all know, particularly the candidates for the Indian Civil Service, who, I am sorry to say, are recommended to read it, and are examined in it.").

4. MARK TWAIN, *FOLLOWING THE EQUATOR: A JOURNEY AROUND THE WORLD* 347-48 (1897) (describing India as "the land of dreams and romance... cradle of the human race, birthplace of human speech, mother of history, grandmother of legend, great-grandmother of tradition").

somewhere in a long-gone India;” and denigrating “the ‘bad’ Orient;” comprising “present-day Asia, parts of North Africa and Islam everywhere.”⁵ Amartya Sen, who dates “exoticist” approaches to India to the writings of the ancient Greek diplomat Megasthenes, has observed that “[t]he outbursts of fascinated wonder in the exoticist approaches bring India into Western awareness in big tides of bewildering attention. But then they ebb, leaving only a trickle of hardened exoticists holding forth.”⁶

As a modern example of the “boom and bust” Western interest in India, Sen cites the Beatles’ short-lived fascination with Maharishi Mahesh Yogi,⁷ a globetrotting, Rolls Royce-loving Indian guru whose other disciples included Mike Love of the Beach Boys.⁸ The Maharishi and his celebrity followers certainly made for an odd sight. Mad Magazine lost no time in lampooning the Fab Four and their newfound quest for enlightenment in a cheeky cover picture.⁹ Yet, simply deriding such fads as superficial loses sight of the fact that interest in Indian culture by Western writers and artists, even if it be faddish, has inspired a rich corpus of works — from J.D. Salinger’s *Franny and Zooey*¹⁰ (which referred extensively to Indian philosophy) to a number of songs by the Beatles.¹¹ Moreover, artists in India have themselves, throughout history, used foreign themes and motifs in their works — from the ancient sculptors of Gandhara (who used Greek styles to depict the Buddha)¹² to the painter Abanindranath Tagore (who used Japanese styles and tried to create a pan-Asian style of

5. EDWARD W. SAID, *ORIENTALISM* 99 (Vintage Books 1979).

6. AMARTYA SEN, *THE ARGUMENTATIVE INDIAN: WRITINGS ON INDIAN HISTORY, CULTURE AND IDENTITY* 154 (2006).

7. *Id.* at 152. See also HUNTER DAVIES, *THE BEATLES: THE AUTHORIZED BIOGRAPHY* 328-45 (2009). It should be noted, however, that George Harrison’s interest in Indian music and culture was certainly enduring. After Harrison’s cremation, his family even flew down to India and scattered his ashes in the Ganges River, according to Hindu tradition. See generally ELLIOT J. HUNTLEY, *MYSTICAL ONE: GEORGE HARRISON: AFTER THE BREAK-UP OF THE BEATLES* (2004); JOSHUA M. GREENE, *HERE COMES THE SUN: THE SPIRITUAL AND MUSICAL JOURNEY OF GEORGE HARRISON* (2006). In a way, Harrison’s example perhaps vindicates Sen’s view about “only a trickle of hardened exoticists holding forth.”

8. By way of trivia, the Beach Boys song “He Come Down” includes the lyric “Maharishi teaches us to meditate/ To dive deep within come out and radiate.” (see Beach Boys, “He Come Down” Carl and the Passions — “So Tough” (Brother, 1972)). The Beach Boys’ album *The M.I.U. Album* (Brother, 1978) was named after Maharishi International University in Fairfield, Iowa, where the album was recorded. See STEVEN GAINES, *HEROES AND VILLAINS: THE TRUE STORY OF THE BEACH BOYS* 193-96, 305 (Da Capo Press 1995) (1986).

9. A picture of the cover can be viewed at http://38.media.tumblr.com/480e4c3881950ce67dc9dc87ffd79da6/tumblr_n1bj4ovmkc1sglrteo1_1280.jpg.

10. See EBERHARD ALSEN, *ROMANTIC POSTMODERNISM IN AMERICAN FICTION* 58-72 (1996).

11. See generally Jonathan Bellman, *Indian Resonances in the British Invasion, 1965-1968*, 15 *J. OF MUSICOLOGY* 116 (1997); David R. Reck, *Beatles Orientalis: Influences from Asia in a Popular Song Tradition*, 16 *ASIAN MUSIC* 83 (1985).

12. See Chaibai Mustamandy, *The Impact of Hellenised Bactria on Gandharan Art*, in *GANDHARAN ART IN CONTEXT: EAST-WEST EXCHANGES AT THE CROSSROADS OF ASIA* 17 (Raymond Allchin et al. eds., 1997).

art to counter the dominance of Western art)¹³ and to a host of popular films and songs.¹⁴ Thus, while cross-cultural borrowing might be objected to on the socio-political ground that it erodes distinctive cultural identities and perpetuates stereotypes in a world of inequitable power structures, on the economic ground that certain communities might be deprived of a material advantage if their works are appropriated, and on the aesthetic ground that artistic works “are best understood in their original setting,”¹⁵ it is also true that the world of art and culture would be duller without cross-cultural borrowing. Furthermore, scholars have pointed out that it is simply impossible to “fence off” a culture from outsiders, that “cultural internationalism” can promote mutual understanding and tolerance, and that all cultures have a degree of internal pluralism, which makes the concept of an “authentic” culture illusory.¹⁶

For intellectual property rights (“IPR”) lawyers, cross-cultural borrowing raises a number of issues. At a philosophical level, the validity of copyright has traditionally been justified by transposing the “labor theory” of John Locke (to argue that individuals should have rights over the fruits of their intellectual labor) and the “personality theory” of Georg Wilhelm Friedrich Hegel (to argue that a creative work is an extension of the personality of its author).¹⁷ However, these theories revolve around individualistic notions of ownership, which conceive of a “Romantic Author” rather than “a tradition or a collective of collaborators.”¹⁸ In many instances, works of art borrowed from another culture might be part of a communal tradition or folklore, and be ill-suited to such theories. Another significant issue is whether the agreeable notion of a “free culture,”¹⁹ in which individuals can creatively “remix” texts, films, and songs

13. See PARTHA MITTER, *ART AND NATIONALISM IN COLONIAL INDIA, 1850-1922: OCCIDENTAL ORIENTATIONS* 289-94 (1994).

14. The website *Inspiration in Indian Film Songs (ITWOFS)* contains an extensive archive of popular Indian songs which have borrowed melodies from Western songs (<http://www.itwofs.com>).

15. See Bruce Ziff & Pratima V. Rao, *Introduction to Cultural Appropriation: A Framework for Analysis*, in *BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION* 1, 9-15 (Bruce Ziff & Pratima V. Rao eds., 1997).

16. See David Howse, *Cultural Appropriation and Resistance in the American Southwest: Decommodifying ‘Indianness’*, in *CROSS-CULTURAL CONSUMPTION: GLOBAL MARKETS, LOCAL REALITIES* 138, 155-57 (David Howse ed., 1996). See also Deborah J. Halbert, *The State of Copyright: The Complex Relationships of Cultural Creation in A GLOBALIZED WORLD* 104-38.

17. See generally Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287 (1988).

18. Andreas Rahmatian, *Universalist Norms for a Globalised Diversity: On the Protection of Traditional Cultural Expressions*, in 6 *NEW DIRECTIONS IN COPYRIGHT LAW* 199, 214-21 (Fiona Macmillan ed., 2007). See also Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 *N. CAROLINA L. REV.* 547, 571-2, 585 (2006) (arguing that “music borrowing is a pervasive feature of musical composition across various traditions and times,” and that “Recognition of the importance of borrowing has been obscured by Romantic author conceptions of musical composition embedded in copyright doctrine.”).

19. Lawrence Lessig has defined a “free culture” as follows: “[F]ree’ as in ‘free speech,’ ‘free markets,’ ‘free trade,’ ‘free enterprise,’ ‘free will,’ and ‘free elections.’ A free culture supports and protects creators and innovators. It does this directly by granting intellectual property rights. But it does so indirectly by limiting the reach of those rights, to guarantee that follow-on creators and innovators remain *as free as possible* from the control of the past. A free culture is not a culture without property, just as a free market is not a market in

without impediments in obtaining permissions,²⁰ should be balanced by an equitable “fair culture” that gives due recognition to authors and communities from other cultures.²¹ Or, if doing so would result in a free culture being “queered by extremism in the property rights that define it.”²²

From a more practical, enforcement-related perspective, three questions are particularly important. First, copyright law only protects expressions of ideas and not ideas themselves.²³ While it has been observed that “[n]obody has ever been able to fix that boundary, and nobody ever can,”²⁴ it has also been pointed out that even if a person creates a work with the work of another “at his elbow,” the differences between the two works “may be so extensive as to bar a finding of infringement.”²⁵ As cross-cultural borrowing often involves modifying foreign works to suit native tastes, does it inherently shift the boundaries of the idea-expression divide towards the ideas domain, thus placing borrowers at an advantage on the issue of potential copyright infringement? For instance, the acclaimed Indian director Satyajit Ray was peeved when Steven Spielberg’s film *E.T. the Extra-Terrestrial* was released. Ray accused Spielberg of copying the plot of his screenplay *The Alien*, which was supposed to have been made into a film starring Peter Sellers, but never materialized — an accusation Spielberg denied.²⁶ Had Ray accepted the advice of his friend Arthur C. Clarke to pursue legal action,²⁷ Spielberg,

which everything is free. The opposite of a free culture is a ‘permission culture’ — a culture in which creators get to create only with the permission of the powerful, or of creators from the past.” (LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* xiv (2005 ed. 2004)).

20. See generally Lawrence Lessig, *The Second Annual Distinguished Lecture in Intellectual Property and Communications Law: Creative Economies*, 2006 MICH. ST. L. REV. 33.

21. See generally, Madhavi Sunder, *From Free Culture to Fair Culture*, 4 WORLD INTELL. PROP. ORG. J. 20 (2012); Madhavi Sunder, *Bollywood/Hollywood*, 12 THEORETICAL INQUIRIES IN LAW 275 (2011).

22. Lessig, *supra* note 19, at xvi.

23. Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement] (“Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.”). See also *Baker v. Selden*, 101 U.S. 99, 100-01 (1879) (“Where the truths of a science or the methods of an art are the common property of the whole world, and author has the right to express the one, or explain and use the other, in his own way.”); *R.G. Anand v. M/s. Delux Films*, A.I.R. 1978 S.C. 1613, ¶ 48 (“[A]n idea, principle, theme, or subject matter or historical or legendary facts being common property cannot be the subject matter of copyright of a particular person. It is always open to any person to choose an idea as a subject matter and develop it in his own manner and give expression to the idea by treating it differently from others.”).

24. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

25. *Designers Guild Ltd. v. Russell Williams (Textiles) Ltd.*, [2000] UKHL 58, 1 W.L.R. 2416 (H.L.) at 2432 (Eng.).

26. Responding to Ray’s allegation, Spielberg had supposedly remarked, “Tell Satyajit I was a kid in high school when his script was being circulated in Hollywood.” Ray’s biographer notes that Spielberg’s denial “hardly resolves the doubts, especially as Spielberg was already an adult and getting started in movies” during that period. See ANDREW ROBINSON, *SATYAJIT RAY: THE INNER EYE* 287-95 (I.B. Tauris 2004) (1989).

27. *Id.* at 295 (Robinson writes that, according to Ray, Clarke had told him, “Don’t take it lying down.”).

even if he had admitted to borrowing from Ray's screenplay, could have easily resorted to a defense that, ironically, an Indian High Court would mention several years later in the context of a film by Ray. In a case filed by a British novelist against the producers of a Hindi television mini-series, the Court had hypothetically cited the example of Ray's film *Ganashatru* (*Enemy of the People*), where he had borrowed the plot of Henrik Ibsen's play *An Enemy of the People* (whose copyright had lapsed) and adapted it to an Indian setting. Although Ray's film was publicized as an adaptation of Ibsen's play, the Court suggested that Ray would have anyway evaded liability in a hypothetical copyright infringement suit, as "[a]lthough the central theme is the same, it is but an idea."²⁸

Second, cross-cultural borrowing has historically not lead to much cross-border litigation, especially instances of artists from developing countries suing artists from developed countries.²⁹ There is evidence that this is gradually changing following the TRIPS Agreement. A prominent example is a suit filed in the United States (eventually settled) by the heirs of the South African musician Solomon Linda, over the unlicensed copying of Linda's song "Mbube" in the song "The Lion Sleeps Tonight."³⁰ There have also been suits filed by Indian artists and companies over the unlicensed sampling of recordings in hip-hop songs.³¹ Conversely, Hollywood studios have sued Indian filmmakers copying plots of Hollywood films.³² But while the TRIPS Agreement has attempted to harmonize IPR laws in World Trade Organization (WTO) member-states, it has left considerable "wobble room" to governments and also witnessed uneven levels of compliance.³³ In India, the level of copyright enforcement

28. *Bradford v. Sahara Media Entm't Ltd.*, (2004) 28 P.T.C. 474, ¶ 154 (Cal. H.C.).

29. There have, of course, been exceptions. For example, in the late 1970s, the well-known Brazilian musician Jorge Ben Jor sued Rod Stewart over the obvious similarities between his song "Taj Mahal" and Stewart's "Do Ya Think I'm Sexy." Ben Jor agreed to a settlement under which Stewart would donate royalties to UNICEF. Commenting on the case in his autobiography, Stewart said, "I had been to the Carnival in Rio earlier in 1978 [. . .] I had heard Jorge Ben Jor's 'Taj Mahal' being given heavy rotation all over the place. It had been rereleased that year, and clearly the melody had lodged itself in my memory [. . .]. Unconscious plagiarism, plain and simple." (ROD STEWART, *ROD: THE AUTOBIOGRAPHY* 225-26 (2012)). See also TIMOTHY ENGLISH, *SOUNDS LIKE TEEN SPIRIT* 105-06 (2007).

30. See Matome Melford Ratiba, "The Sleeping Lion Needed Protection" — *Lessons from the Mbube (Lion King) Debacle*, 7 J. INT'L COM. L. & TECH. 1 (2012).

31. See, e.g., *Saregama India Ltd. v. Andre Young*, 2003 U.S. Dist. LEXIS 28046 (C.D. Cal. March 11, 2003); *Lahiri v. Universal Music & Video Distrib. Corp.*, 2006 U.S. Dist. LEXIS 97904 (C.D. Cal. Mar. 24, 2006); *Saregama India Ltd. v. Mosley* 635 F.3d 1284 (11th Cir. 2011).

32. One example is a suit filed by Twentieth Century Fox against an Indian producer over a Hindi film with similarities to the plot of the film *My Cousin Vinny*, where Twentieth Century Fox received a \$200,000 USD settlement (See *Bollywood Copy Case 'Is Settled'*, BBC NEWS, AUG. 7, 2009, news.bbc.co.uk/2/hi/entertainment/8189667.stm). The following year, Twentieth Century Fox obtained an injunction against another Indian producer in a case where it alleged similarities between the plot of a Hindi film and the film *Phone Booth* (*Twentieth Century for Film Corp. v. Sohail Maklai Entm't Pvt. Ltd.*, (2010) 44 P.T.C. (Bom. H.C.) 647). See also Arpan Banerjee, *How Hollywood Can Sue Bollywood for Copyright Infringement and Save Indian Cinema*, 32 EUR. INTELL. PROP. REV. 498 (2010).

33. J.H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 CASE W. RES. J. INT'L L. 441, 459 (2000); see also Amy Kapczynski, *Harmonization and Its*

is perceived to be particularly weak. Thus, in cases where cross-cultural borrowing does lead to litigation, what litigation strategies should copyright holders exercise? And do plaintiffs in India really stand at a disadvantage compared to plaintiffs in the United States?

Third, legal scholars have advocated the global protection of expressions of folklore and Traditional Cultural Expressions (TCEs)³⁴ using arguments that are economic (for example, that protecting TCEs can aid industries like tourism and earn revenue for communities) and moral (for example, that desecrating traditions is disrespectful to communities).³⁵ The forms of IPRs recognized in the TRIPS Agreement — be it copyrights, trademarks, or geographical indications — do not encompass expressions of folklore and intangible TCEs. At best, piecemeal protection may be availed of in certain countries via passing off laws against misrepresentation (in cases of wrongful attribution and false labeling).³⁶ While the WIPO Performances and Phonograms Treaty recognizes that “performers” may perform “expressions of folklore,” it only protects the performance of an expression of folklore, rather than the expression of folklore itself.³⁷ Thus, faced with such obstacles, what roles can communities play when their cultural expressions are commercialized?

As the frequency of cross-cultural borrowing between India and the United States is likely to increase, due to a growing market in both countries and the proliferation of music on the internet, the three questions above assume significance. In this paper, I will accordingly respond to these questions, with reference to case law in India and the United States. I will limit my focus to cross-cultural borrowing in the context of popular music, which is usually of greater commercial value than other forms of music, and has already been the subject of cross-

Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector, 97 CAL. L. REV. 1571 (2009).

34. TCEs have been defined as “any form of artistic and literary, creative and other spiritual expression, tangible or intangible, or a combination thereof, such as actions [such as dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfix], materials [such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places], music and sound [such as songs, rhythms, and instrumental music, the songs which are the expression of rituals], verbal [such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols] and written and their adaptations, regardless of the form in which it is embodied, expressed or illustrated which may subsist in written/codified, oral or other forms”. (World Intellectual Property Organization [WIPO], *The Protection of Traditional Cultural Expressions: Draft Articles - Rev. 2*, at Annex 5, WIPO Doc. WIPO/GRTKF/IC/28/6, (Apr. 4, 2014), available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_28/wipo_grtkf_ic_28_6.pdf).

35. See DAPHNE ZOGRAFOS, INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS 5-7 (2010). See also Margaret Chon, *Sticky Knowledge and Copyright*, 2011 WIS. L. REV. 177, 209 (2011).

36. Chon, *supra* note 35, at 223-24.

37. WIPO Performances and Phonograms Treaty Arts. 2(a), 5-10, Dec. 20, 1996, 36 I.L.M. 76, available at <http://www.wipo.int/treaties/en/ip/wppt>. See also Brigitte Vézina, *Are They In or Are They Out? Traditional Cultural Expressions and the Public Domain: Implications for Trade*, in INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE: LEGAL AND POLICY ISSUES 196, 201-03 (Christoph Graber et al. eds., 2012).

border litigation. I will also focus greatly on litigation in India, the volume of which is likely to increase in comparison to the past. In part I, I will briefly trace the evolution of three genres that typify Indo-Western cross-cultural borrowing in popular music — the now-defunct “raga rock”³⁸ genre, the “Bollywood”³⁹ genre of popular Indian film music, and American hip-hop music. In part II, I will examine the legal issues identified above. I will refer to case law and examine strategies used by litigants in instances where copyright infringement was alleged. I will identify the challenges that such cross-border litigation entails. I will also ponder how communities can safeguard their interests in folklore and TCEs in an environment where IPR laws cannot achieve such objectives.

I. CROSS-CULTURAL BORROWING IN INDIAN AND WESTERN MUSIC

Following the Second World War, the British government enacted legislation that opened its borders to immigrants from British dominions and colonies.⁴⁰ This resulted in a wave of immigration from India to the extent that, by the 1960s, exposure to Indian culture in London “may have been virtually unavoidable.”⁴¹ During this period, two of the earliest songs of the raga rock genre — an unreleased version of the Yardbirds’ “Heart Full of Soul”⁴² and the Beatles’ “Norwegian Wood”⁴³ — were created, both through chance encounters with Indian musicians in London’s ubiquitous Indian restaurants. The Yardbirds recorded an outtake version of “Heart Full of Soul” using an Indian sitar player to play the instrumental riff. According to a member of the Yardbirds, it was their manager who came up with the idea, apparently having encountered the sitar player at an Indian restaurant where he had lunch.⁴⁴ The quality of the recording was unsatisfactory. The idea of using the sitar was thus abandoned in favor of Jeff Beck producing a “sitar-like effect on the guitar.”⁴⁵

In contrast, “Norwegian Wood” was officially released as part of the Beatles’ album *Rubber*

38. The term “raga rock” was used “to describe any Rock song that evoked an Indian or generally Oriental mood, whether by use of sitar or another instrument imitating it,” and was originally used in the media to describe the song “Eight Miles High” by the Byrds (See Bellman, *supra* note 11, at 117; see also BERNARD GENDRON, BETWEEN MONTMARTRE AND THE MUDD CLUB: POPULAR MUSIC AND THE AVANT-GARDE 345, 365 (2002) (crediting the journalist Sally Kempton with coining the term in an article for *Village Voice*). However, the Byrds actually used a guitar in the song, rather than a sitar.

39. The term “Bollywood” is a portmanteau word combining “Bombay” and “Hollywood”, referring to the popular Hindi-language film industry based in Bombay. The term was coined by the British detective novelist H.R.F. Keating. See TEJASWINI GANTI, PRODUCING BOLLYWOOD: INSIDE THE CONTEMPORARY HINDI FILM INDUSTRY, n. 20, at 369 (2012).

40. See RANDALL HANSEN, CITIZENSHIP AND IMMIGRATION IN POSTWAR BRITAIN 35-61 (2000) (discussing the background of the British Nationality Act of 1948).

41. Bellman, *supra* note 11, at 117.

42. YARDBIRDS, *Heart Full of Soul*, on FOR YOUR LOVE (Epic 1965).

43. BEATLES, *Norwegian Wood*, on RUBBER SOUL (Parlophone 1967).

44. Bellman, *supra* note 11, at 123-4 (quoting Jim McCarty).

45. *Id.*

Soul. The song, though written by John Lennon and Paul McCartney, had George Harrison playing the sitar — by his own admission “very badly”.⁴⁶ Harrison, whose sitar playing at the time was self-taught, had first encountered the instrument while filming a scene in the movie *Help!* at an Indian restaurant. Looking back at the incident, Harrison remarked, “[T]here were a few Indian musicians playing in the background. I remember picking up the sitar and trying to hold it, and thinking, ‘This is a funny sound.’”⁴⁷ Harrison was subsequently introduced to the music of the Indian sitar player Ravi Shankar by David Crosby of the Byrds at a party.⁴⁸ Harrison eventually met Shankar, who would go on to become a lifelong friend, and took lessons from him for six weeks. According to Shankar, he made Harrison “practice all the correct positions of sitting and some of the basic exercises,” which was “the most one could do in six weeks, considering that a disciple usually spends years learning these basics.”⁴⁹ Harrison went on to compose a handful of the Beatles’ raga rock songs and invited Indian sessions musicians to play on them, notably “Love You To,”⁵⁰ “Within You Without You,”⁵¹ and “The Inner Light.”⁵² Harrison’s own experimental album, *Wonderwall Music*,⁵³ went a step further and contained compositions with much stronger Indian influences, although Harrison did not sing or play any instruments himself.⁵⁴ Harrison also composed some solo material with minimal use of Indian instruments but with lyrics using Hindu religious chants, such as “My Sweet Lord”⁵⁵ and “Gopala Krishna.”⁵⁶

It would, of course, be wrong to suggest that musicians other than Harrison did not

46. Interview by John Fuglesang with George Harrison and Ravi Shankar on the VH1 program “George Harrison & Ravi Shankar: Yin & Yang” (Jul. 24, 1997), available at <http://georgeharrison.w.interia.pl/wywiad/vh1inter.htm> [hereinafter *Ravi Shankar VH1 Interview*].

47. Bellman, *supra* note 11, at 118 (quoting George Harrison).

48. See David Fricke, *George Harrison’s Greatest Musical Moments*, ROLLING STONE, DEC. 5, 2001, <http://www.rollingstone.com/music/news/george-harrisons-greatest-musical-moments-20011205> [hereinafter *Fricke*]. See also Phil Gallo, *Ravi Shankar’s Impact on Pop Music: An Appreciation*, Billboard, Dec. 12, 2012, <http://www.billboard.com/articles/news/1481439/ravi-shankars-impact-on-pop-music-an-appreciation> (discusses the influence of Shankar on Crosby and other Western musicians); Dean Nelson, *Beatles Introduced to Ravi Shankar’s Music at LSD party, Byrds Singer Reveals*, Telegraph, Apr. 19, 2010, <http://www.telegraph.co.uk/culture/music/the-beatles/7603772/Beatles-introduced-to-Ravi-Shankars-music-at-LSD-party-Byrds-singer-reveals.html>.

49. *Fricke, supra* note 48.

50. BEATLES, *Love You To*, on REVOLVER (Parlophone 1966). See also Reck, *supra* note 11, at 101-02.

51. BEATLES, *Within You Without You*, on SGT. PEPPERS’ LONELY HEARTS CLUB BAND (Parlophone 1967). See also Reck, *supra* note 11, at 108-09.

52. BEATLES, *THE INNER LIGHT* (Parlophone 1968). See also Reck, *supra* note 11, at 113-15.

53. GEORGE HARRISON, *WONDERWALL MUSIC* (Apple 1968).

54. See SIMON LENG, *WHILE MY GUITAR GENTLY WEEPS: THE MUSIC OF GEORGE HARRISON 47-51* (2002).

55. GEORGE HARRISON, *My Sweet Lord*, on ALL THINGS MUST PASS (Apple 1970).

56. GEORGE HARRISON, *GOPALA KRISHNA*, (unreleased bootleg), available at https://www.youtube.com/watch?v=gzLZEJrZ_TQ. The song was an outtake that “missed the cut” on *All Things Must Pass*. See Leng, *supra* note 54, at 78.

contribute to the raga rock genre. For example, “Across the Universe,”⁵⁷ which used the sitar and contained a Hindu religious chant, was a Lennon-McCartney composition. Other fine examples of raga rock included “Om” by the Moody Blues,⁵⁸ “Moog Raga” by the Byrds,⁵⁹ and “We Will Fall” by the Stooges.⁶⁰ Nevertheless, as many critics have noted, it was arguably Harrison who was the genre’s greatest proponent.⁶¹

Raga rock genre found little commercial success after the 1960s and gradually faded away. In later years, a few artists used a modified guitar designed in the 1960s called the “electric sitar” (or “Coral sitar”)⁶² to mimic a sitar sound, such as Steely Dan (in “Do It Again”),⁶³ and Tom Petty & the Heartbreakers (in “Don’t Come Around Here No More”).⁶⁴ But these songs had no Indian influences as such, and were far removed from the works of Harrison and similar artists. A few commercially successful songs did loosely revive the raga rock tradition, a prime example being the hard rock paean “Govinda” by the British band Kula Shaker⁶⁵ (criticized by one scholar as “souvenired knick-knack mysticism”⁶⁶). However, these were mere sporadic examples. Raga rock was clearly a “short lived”⁶⁷ fad that is today firmly dead and buried, and is an apt illustration of Sen’s boom-and-bust hypothesis. Indeed, when once asked if sitar-influenced Western music was “just one big gimmick,” Ravi Shankar had correctly prophesized that it would probably be a usual fad that “comes and goes,” saying, “[M]aybe it will be the Japanese koto tomorrow.”⁶⁸

57. BEATLES, *Across the Universe*, on LET IT BE (Apple 1970).

58. THE MOODY BLUES, *Om*, on IN SEARCH OF THE LOST CHORD (Deram Records 1968). See also Bellman, *supra* note 11, at 129-31.

59. THE BYRDS, *Moog Raga*, on THE NOTORIOUS BYRD BROTHERS (Columbia 1968).

60. THE STOOGES, *We Will Fall*, on THE STOOGES (Elektra 1969).

61. See, e.g., PETER LAVEZZOLI, THE DAWN OF INDIAN MUSIC IN THE WEST: BHAIRAVI 172-73 (2006) (stating: “Harrison’s Indian-styled compositions for the Beatles remain the most graceful representations of Indian musical values in the context of Western popular music...George Harrison opened the door to a world of music that many Westerners may otherwise may never have discovered.”); KEN HUNT, *India — East/West Fusion: Meetings by the River*, in 2 WORLD MUSIC: A ROUGH GUIDE 109 (Mark Ellingham et al. eds., 2000) (stating “George Harrison...brought Indian music real global attention. When he played the instrument on ‘Norwegian Wood’ (1965) it was the first time most Western listeners had heard sitar.”).

62. See *Danelectro Introduces Electric Indian Sitar*, BILLBOARD, MAY 13, 1967, at 62 (news report on the launch of the instrument).

63. STEELY DAN, *Do It Again*, on CAN’T BUY A THRILL (ABC 1972).

64. TOM PETTY AND THE HEARTBREAKERS, *Don’t Come Around Here No More*, on SOUTHERN ACCENTS (MCA 1985). See also PAUL ZOLLO, CONVERSATIONS WITH TOM PETTY 91 (2005) (quoting Petty, on being asked whether “Don’t Come Around Here No More” used a real sitar, as saying: “No, it’s a Coral Sitar. They were made in the Sixties. They’re pretty cool instruments. It’s like a guitar, but there’s an autoharp thing built onto it, under plexiglass on the top. So you tune this, with lots and lots of strings, like an autoharp, so it will ring on the note that you want. And then it actually sounds like a sitar.”).

65. KULA SHAKER, *Govinda*, on K (Columbia 1996).

66. JOHN HUTNYK, CRITIQUE OF EXOTICA: MUSIC, POLITICS AND THE CULTURE INDUSTRY 105 (2000).

67. MARK PAYTRESS, THE HISTORY OF ROCK: A DEFINITIVE GUIDE TO ROCK, PUNK, METAL AND BEYOND 81 (2011).

68. Interview by Keith Relf and Jeff Beck with Ravi Shankar, *A Whole Scene Going*, BBC Television (Lon-

It is worth noting that Shankar was fiercely opposed to raga rock, despite his influence on the genre. Shankar described the sound of the sitar on “Norwegian Wood” as “terrible.”⁶⁹ He was also deeply annoyed at Indian classical music having been appropriated by “the hippies, and the long-haired ones,”⁷⁰ remarking, “[t]he association with India was so wrong...[with t]he superficiality of everyone becoming ‘spiritual,’ the clichés of yoga ... the Kama Sutra, LSD, and hash.”⁷¹ Yet, as Shankar himself acknowledged, raga rock was loved by the youth in both the West and India. To quote Shankar, “I saw the effect on the young people, I couldn’t believe it, even in India...not only in the West... they were just lapping it up.”⁷² Shankar claimed that it was his “niece and nephews” who first played “Norwegian Wood” to him, and were fans of the song.⁷³ In fact, one of those inspired by the raga rock sound was Shankar’s nephew Ananda Shankar, an accomplished sitar player himself. In 1970, Ananda Shankar released a self-titled album that included sitar versions of the Doors’ “Light My Fire” and the Rolling Stones’ “Jumpin’ Jack Flash,” along with original compositions blending rock and funk sounds with the sitar.⁷⁴ Even more significantly, the raga rock sound found its way in Bollywood.

Songs in Bollywood films — an integral part of the genre — have traditionally used “hybridised styles ranging from Indian classical, light classical and folk to Western pop or symphonic.”⁷⁵ In particular, the “sound of massed strings playing melodic lines”⁷⁶ is one of the most striking examples of Western influence in Bollywood music. As early as the 1930s, a “typical” Bollywood film orchestra comprised “approximately six violins, cello, bass, clarinet, saxophone, flute and tabla”.⁷⁷ The early years of Bollywood music were strongly influenced by Indian folk and classical music. It was only after the 1950s that the influence of Western popular music became more pronounced.⁷⁸ In the 1950s, the composers O.P. Nayyar

don), Season 1, Episode 23, Jun. 8, 1966, http://www.youtube.com/watch?v=8J__-K6EAfE (contains the relevant excerpt) [hereinafter *A Whole Scene Going*].

69. Interview by Terry Gross with Ravi Shankar, *Ravi Shankar: Remembering A Master of the Sitar*, WFAE, Dec. 15, 2012, <http://wfae.org/post/ravi-shankar-remembering-master-sitar>.

70. Sue C. Clark, *Ravi Shankar: The Rolling Stone Interview*, ROLLING STONE, Mar. 9, 1968, <http://www.rollingstone.com/music/news/ravi-shankar-the-rolling-stone-interview-19680309>.

71. See Robin Denselow, *Ravi Shankar: The Beatles’ Muse Who Turned his Back on Rock*, GUARDIAN, Dec. 12, 2012, <http://www.theguardian.com/music/2012/dec/12/ravi-shankar-beatles-rock>.

72. *Ravi Shankar VHI Interview*, *supra* note 46.

73. *Id.*

74. *Ananda Shankar*, in 1001 ALBUMS YOU MUST HEAR BEFORE YOU DIE (Robert Dimery ed., 2011 rev. 2005).

75. Anna Morcom, *An Understanding between Bollywood and Hollywood? The Meaning of Hollywood-Style Music in Hindi Films*, 10 BRIT. J. ETHNOMUSICOLOGY 63, 69 (2001).

76. *Id.*

77. See generally, Greg Booth, *That Bollywood Sound*, in GLOBAL SOUNDTRACKS: WORLDS OF FILM MUSIC 85 (Mark Slobin ed., 2008) (discusses the history of Bollywood orchestras fusing Indian and Western musical elements).

78. See GANESH ANANTHARAMAN, BOLLYWOOD MELODIES: A HISTORY OF THE HINDI FILM SONG 1-18 (2008) (discusses the evolution of Bollywood music).

and C. Ramchandra enjoyed commercial success with rock 'n' roll songs. Nayar triggered a "rock 'n' roll invasion" in Bollywood⁷⁹ after the success of his song "Mera Naam Chin Chin Chu," one of the decade's biggest hits. In later years, Bollywood composers employed sounds ranging from "twangy surf guitar" pop⁸⁰ to disco.⁸¹ Many Bollywood composers directly lifted melodies and riffs from Western songs, without any attribution. According to one estimate, the total number of plagiarized tunes from merely six composers exceeds 200.⁸² Over the years, the myriad artists whose tunes have been plagiarized have ranged from The Beach Boys to Deep Purple.⁸³

Two examples of cross-cultural borrowing by Bollywood composers during the early 1970s — the songs "Ae Naujawan" by the duo Kalyanji-Anandji, and "Chura Liya Hai Tumne Jo Dil Ko" by R.D. Burman — would prove to be particularly influential. Kalyanji-Anandji blended the sitar and the tabla with a "wild mix of jazz, funk and wailing guitars,"⁸⁴ to create a sound that was not unlike the raga rock sound in the West. Burman's song, a similar Indo-Western blend, borrowed the melody of a film title song composed by the British folk-rock musician Donovan.⁸⁵ Burman's song went on to become one of the most popular hits in the history of Bollywood. In the mid-1990s, the song regained popularity among younger audiences, courtesy of a remix by the British-Indian DJ Bally Sagoo.⁸⁶ Sagoo burst into the British musical scene at a time British-Indian underground musicians were finding mainstream success in the United Kingdom by fusing Western and Indian sounds, often hip-hop with Punjabi *bhangra* music.⁸⁷ This coincided with the greater availability of Indian music in the West, partly as a result of economic globalization. Sagoo's exploration of "South Asian roots through black musical forms" influenced a new wave of hip-hop songs, in both India and

79. *Id.* at 9.

80. See David Novak, *Cosmopolitanism, Remediation, and the Ghost World of Bollywood*, 25 *CULTURAL ANTHROPOLOGY*. 40, 42 (2010) (discussing the song "Jaan Pehechaan Ho").

81. See Biswarup Sen, *The Sounds of Modernity: The Evolution of Bollywood Film Song*, in *GLOBAL BOLLYWOOD: TRAVELS OF HINDI SONG AND DANCE* 85, 98-99 (Sangita Gopal & Sujata Moorti eds., 2008) (discussing the work of the composer Biddu Appaiyah).

82. See Karan Thapar, *Can you "Steal" a Song?*, *HINDUSTAN TIMES*, Mar. 24, 2007, <http://www.hindustan-times.com/news-feed/columnskaranthapar/can-you-steal-a-song/article1-211741.aspx> (referring to the ITWOFS database).

83. See R.D. Burman, ITWOFS, <http://www.itwofs.com/hindi-rdb.html> (compares excerpts of, *inter alia*, the song "Bombay to Goa," composed by R.D. Burman, and The Beach Boys' song "Help Me Rhonda"); Anu Malik, ITWOFS, <http://www.itwofs.com/hindi-am.html> (compares excerpts of, *inter alia*, the song "Aisa Zakhm Diya Hai," composed by Anu Malik, and Deep Purple's song "Child in Time").

84. Robin Denselow, *Kalyanji Anandji, The Bollywood Brothers*, *GUARDIAN*, May 1, 2008, <http://www.theguardian.com/music/2008/may/02/worldmusic1>.

85. J.P. RAGS, *If It's Tuesday, This Must Be Belgium*, in *IF IT'S TUESDAY, THIS MUST BE BELGIUM* (World Pacific 1969).

86. See NABEEL ZUBERI, *SOUNDS ENGLISH: TRANSNATIONAL POPULAR MUSIC* 205 (2001).

87. See Dominic Pride et al., *Asian/British Connection Thrives: Acts Find Increasing Commercial Niche*, *BILLBOARD*, Mar. 29, 1997, at 1.

Britain, that remixed or sampled Bollywood tunes from earlier decades.⁸⁸ Soon, a host of leading Western hip-hop artists would sample Bollywood songs.⁸⁹ One of the high points of this trend was the song “Don’t Phunk With My Heart,” by the Black Eyed Peas. The song, which won a Grammy Award for Best Rap Performance by a Duo or Group, heavily sampled “Ae Naujawan,” along with another song by Kalyanji-Anandji. According to a member of the Black Eyed Peas, this *mélange* was “inspired by the *bhangra* clubs in London.”⁹⁰ Since then, there have been instances of Western pop and hip-hop artists directly collaborating with Indian artists. For example, Snoop Dogg contributed a track blending Indian and hip-hop music to a major Bollywood film.⁹¹ More recently, Pitbull collaborated on a track with the Bollywood actress-turned-singer Priyanka Chopra,⁹² while will.i.am collaborated with the well-known Bollywood composer A.R. Rahman.⁹³

Like raga rock, the Bollywood hip-hop genre has been the subject of criticism, with scholars terming some aspects of it “Orientalist schlock”⁹⁴ and “racial masquerade.”⁹⁵ Yet, as the above discussion shows, Indian musicians too have used Western sounds and collaborated with Western musicians, including hip-hop musicians. Bollywood has also perpetuated racial stereotypes of the West, and has conversely been accused of “Occidentalism.”⁹⁶ Indeed, a question that Ravi Shankar was once asked during a television interview nearly 50 years ago — “[W]hy do you object to [George Harrison] using [the sitar] to play strictly Western music, just as Indians use the violin and harmonium and even saxophone to play their own

88. See NABEEL ZUBERI, *SOUNDS ENGLISH: TRANSNATIONAL POPULAR MUSIC* 205-10 (2001).

89. See Sarah Hankins, *So Contagious: Hybridity and Subcultural Exchange in Hip-Hop’s Use of Indian Samples*, 31 *BLACK MUSIC RES. J.* 193 (2011); Amit Gurbaxani, *Come Together*, *Time Out Bengaluru*, Jan. 24, 2012, <http://www.timeoutbengaluru.net/art/features/come-together>; *From Britney Spears To Black Eyed Peas: Top 10 Classic Bollywood Songs Sampled by International Artistes*, *Pinkvilla*, Apr. 13, 2014.

90. TABOO, *FALLIN’ UP: MY STORY* 239 (2011).

91. See Vishwas Gautam, *You Sang With Me*, *TIMES OF INDIA*, Dec. 12, 2008, <http://timesofindia.indiatimes.com/entertainment/hindi/bollywood/news/You-sang-with-me/articleshow/3823679.cms>.

92. See Ikam Acosta, *Pitbull Teams Up With Bollywood Star Priyanka Chopra For New Single “Exotic,”* *HUFFINGTON POST*, July 9, 2013, http://www.huffingtonpost.com/2013/07/09/pitbull-priyanka-chopra_n_3565987.html.

93. See A R Rahman’s “Urvashi Urvashi” Inspires Will.i.am’s “Birthday,” *TIMES OF INDIA*, May 22, 2014, <http://timesofindia.indiatimes.com/entertainment/hindi/music/news/A-R-Rahmans-Urvashi-Urvashi-inspires-Will-i-ams-Birthday/articleshow/35477339.cms>.

94. Wayne Marshall & Jayson Beaster-Jones, *It Takes a Little Lawsuit: The Flowering Garden of Bollywood Exoticism in the Age of its Technological Reproducibility*, 10 *S. ASIAN POPULAR CULTURE* 249, 253 (2012).

95. Sunaina Maira, *Belly Dancing: Arab-Face, Orientalist Feminism, and U.S. Empire*, 60 *AM. Q.* 317, 334 (2008).

96. See Asma Sayed, *Bollywood in Diaspora: Cherishing Occidental Nostalgia*, in *DIASPORIC CHOICES* 11 (Renata Seredyńska-Abou Eid ed., 2013). See also Priya Ramani, *An Open Letter to Amitabh Bachchan*, *LIVE MINT*, Jan. 23, 2009, <http://www.livemint.com/Leisure/GGN3gM5bpoTVKi1MH5hpnM/An-open-letter-to-Amitabh-Bachchan.html>; Imran Azam, *Bollywood and its Love Affair with White Dancers*, *ASIAN IMAGE*, Nov. 13, 2013, http://www.asianimage.co.uk/columnists/10803485.Bollywood_and_its_love_affair_with_white_dancers/?ref=rss (criticizing the portrayal of white women in Bollywood films).

music?⁹⁷ — is all the more valid today. Here, it must also be mentioned that Shankar himself collaborated on Indo-Western fusion albums with renowned classical musicians, such as the violinist Yehudi Menuhin⁹⁸ and the composer Philip Glass.⁹⁹

Shankar's response to the question posed to him was that the use of Western instruments by Bollywood musicians and Indian classical musicians must be distinguished.¹⁰⁰ This view would probably be shared by many connoisseurs, who would consider genres like Bollywood and hip-hop as “low-brow”¹⁰¹ and regard their fusion as aesthetically inferior to fusion of the Menuhin-Shankar variety. Beyond aesthetics, critics have also extended a stock argument against popular culture — that it is a product of “commercial greed”¹⁰² — and contended that the intermingling of Bollywood culture with Western popular culture furthers the “neo-liberal free market economic agenda” underlying relations between India and the United States.¹⁰³ But as the sociologist Herbert Gans argued in an influential work, popular culture can be defended because it “reflects and expresses the aesthetic and other wants of many people,” and that “all people have a right to the culture they prefer, regardless of whether it is high or popular.”¹⁰⁴ The same defense can be applied to the fusion of Indo-Western popular music, including Bollywood hip-hop. This is not to suggest that unlicensed commercial exploitation and cultural denigration should be tolerated. On the contrary, legal strategies should be devised, wherever possible, to counter these.

In the next section, I will discuss the three practical questions I identified earlier regarding the legal implications of cross-cultural borrowing, i.e. the question of whether cross-cultural borrowing inherently shifts the boundaries of the idea-expression divide towards the ideas domain, the question of how litigants should strategize in India and the United States in infringement cases, and the question of how communities can safeguard their interests in folklore and TCEs, in the absence of adequate legal protection.

97. *A Whole Scene Going*, *supra* note 68.

98. YEHUDI MENUHIN & RAVI SHANKAR, *WEST MEETS EAST* (HMV 1966). See also Sue Fox, *How We Met: Yehudi Menuhin & Ravi Shankar*, *INDEPENDENT*, Oct. 1, 1995, <http://www.independent.co.uk/arts-entertainment/how-we-met-yehudi-menuhin-and-ravi-shankar-1575503.html>.

99. RAVI SHANKAR & PHILIP GLASS, *PASSAGES* (Atlantic 1990).

100. Interview by Keith Relf and Jeff Beck with Ravi Shankar, *A Whole Scene Going*, BBC Television (London), Season 1, Episode 23, Jun. 8, 1966, http://www.youtube.com/watch?v=8J_-K6EAfE (contains the relevant excerpt)

101. See, e.g. Ashis Nandy, *Introduction: Indian Popular Cinema as a Slum's Eye View of Politics*, in *THE SECRET POLITICS OF OUR DESIRES: INNOCENCE, CULPABILITY AND INDIAN POPULAR CINEMA* 1, 7 (Ashis Nandy ed., 1998) (describing Bollywood as “low-brow, modernizing India in all its complexity, sophistry, naiveté and vulgarity”); Lisa A. Keister & Darby E. Southgate, *Inequality: A Contemporary Approach to Race, Class and Gender* 459, 464 (2012) (describing hip-hop as “a prime example of low-brow culture”).

102. See HERBERT J. GANS, *POPULAR CULTURE AND HIGH CULTURE: AN ANALYSIS AND EVALUATION OF TASTE* XIV (1999).

103. Daya Kishan Thussu, *Cultural Practices and Media Production: The Case of Bollywood*, in *MEDIATING CULTURAL DIVERSITY IN A GLOBALISED PUBLIC SPACE* 119, 128 (Isabelle Rigoni & Eugénie Saitta eds., 2012).

104. Gans, *supra* note 102, at xi.

II. LEGAL IMPLICATIONS

A. *The Idea-Expression Divide*

In copyright infringement suits involving films, literary and dramatic works, Indian courts have determined similarities between works by applying the lay observer test, i.e. assessing whether “the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.”¹⁰⁵ However, “stock characters and stock plots” do not enjoy copyright protection.¹⁰⁶ In the context of infringement suits involving musical works, courts have applied the lay listener test, i.e. assessing whether a person with an “untrained ear” and “no expert knowledge of music” would identify a “‘catch part’ or hook part, howsoever small” in comparing the works in question.¹⁰⁷ But the mere use of certain instrumental styles, and some similarities in rhythm, do not amount to infringement.¹⁰⁸ In at least two music infringement cases, the plaintiffs annexed expert opinions by musicologists to buttress their submissions.¹⁰⁹ However, in both cases, the extent of copying was quite blatant, and the court did not go beyond applying the lay listener test.

Plagiarism by Bollywood has occasionally led to overseas artists expressing anger¹¹⁰ and amusement,¹¹¹ but has seldom led to litigation. Based on the limited case law available, there is little to suggest that borrowing a work and adapting it to a different cultural context inherently works to the advantage of the borrower in an infringement suit. In a rare suit arising from cross-cultural borrowing, where Twentieth Century Fox alleged similarities between its film *Phone Booth* and the Hindi film *Knock Out*, the defendants pointed to various dissimilarities in the second film, particularly a sub-plot dealing with corruption in the Indian political and police establishment.¹¹² The court ruled in favor of the plaintiff, observing that even though the defendants had “indeed shown several dissimilarities,” there was “little doubt that a person

105. R.G. Anand v. M/S. Delux Films, *supra* note 23, at ¶ 48.

106. Bradford v. Sahara Media Entm’t Ltd., *supra* note 29, at ¶¶ 76, 216.2.

107. Ram Sampath v. Rajesh Roshan, (2009) 40 P.T.C. 78, ¶¶ 13, 16 (Bom. H.C.).

108. Gaurav Dayal v. Rabbi Shergil, (2009) 39 P.T.C. 205, ¶¶ 9-10 (Del. H.C.).

109. Sampath, (2009) 40 P.T.C. at ¶ 11; Saregama India Ltd. v. Balaji Telefilms Ltd., (2012) 3 C.H.N. 436, ¶ 9 (Cal. H.C.).

110. For example, the Indonesian band Peterpan, who discovered that one of their songs had been copied by a Bollywood composer, told the media that they deserved a public apology and compensation, but neither the band nor its record company ended up filing a lawsuit, and there were no reports of any compensation being paid to the band. See Priyanka Dasgupta, “*They Should Tender a Formal Public Apology*,” *TIMES OF INDIA*, Aug. 29, 2006, <http://www.timesofindia.indiatimes.com/calcutta-times/They-should-tender-a-formal-public-apology/articleshow/1933692.cms>.

111. For example, Quentin Tarantino saw a Bollywood film that copied the plot of his film *Reservoir Dogs*. Tarantino thought that the film was “cool,” and felt “truly honoured.” See Subhash K Jha, *Tarantino Likes the Cop-Y & Robber Tale*, *TIMES OF INDIA*, May 11, 2007, <http://www.timesofindia.indiatimes.com/lucknow-times/Tarantino-likes-the-cop-y-robber-tale/articleshow/2029668.cms>.

112. Twentieth Century for Film Corp. v. Sohail Maklai Entm’t Pvt. Ltd., *supra* note 33, at ¶ 30.

seeing both the films at different times would come to the unmistakable conclusion that the [d] efendants' film is a copy of the [p]laintiff's film."¹¹³

In the context of music infringement, a suit filed by the Bangladeshi rock band Miles against the producers of the Bollywood film *Murder* was one of the first documented instances of a lawsuit being filed by a non-Indian musician in India over alleged copying. The Calcutta High Court ruled in favor of the plaintiff and directed the infringing song be removed from the film.¹¹⁴ In another case, the Canadian new age musician Loreena McKennitt sued the music composer of the Malayalam-language film *Urumi*, Deepak Dev, along with the film's producers. McKennitt alleged that Dev's song "Aaro Nee Aaro" had copied her songs "Caravanserai" and "The Mummies' Dance." The Delhi High Court held that McKennitt had "been able to make out a strong prima facie case for passing of an ex parte ad-interim injunction."¹¹⁵ According to media reports, the parties had tried to arrive at a settlement, involving the payment of "hefty compensation" to McKennitt.¹¹⁶ However, at the time of writing, negotiations had failed and the suit had been revived.¹¹⁷

In the cases of both Miles and McKennitt, the plaintiffs' suits were filed on the basis of substantial similarity in melody. While the case involving Miles involved similar musical genres, McKennitt's case is striking because of the general differences in style and instrumentation between the new age genre — in McKennitt's case, a marked use of Celtic and middle-eastern sounds — and the peppier Bollywood-style genre. The case thus illustrates that the lay listener test transcends cultural contexts, and that aural similarities between songs can be apparent even if a copyist changes the tempo, inserts lyrics in another language, and used different instruments. Indeed, several ordinary fans in India, who compared the songs after reading about the case, detected copying and criticized Dev on social media.¹¹⁸ A few months after McKennitt's lawsuit, Barobax Corp, a popular Iranian band, similarly sued the producers of a major Bollywood film, *Agent Vinod*, before the Bombay High Court, in what

113. *Id.* at ¶¶ 29, 31.

114. See Abul Kalam Azad, *Rock 'n Roll in Bangladesh: Protecting Intellectual Property Rights in Music*, in *MANAGING THE CHALLENGES OF WTO PARTICIPATION: 45 CASE STUDIES* 53 (Peter Gallagher et al. eds., 2005); *Band Cries Murder Over Tune Lift*, Telegraph, May 20, 2004, http://www.telegraphindia.com/1040520/asp/calcutta/story_3268390.asp.

115. Loreena McKennitt v. Deepak Dev, Civil Suit No. 2349/2011 (Del. H.C. Sep. 21 2011), http://delhi-highcourt.nic.in/dhcqrydisp_o.asp?pn=195364&yr=2011.

116. Parvathy S Nayar, *Urumi Song Issued Warrant for Plagiarism*, TIMES OF INDIA, Oct. 31, 2012, <http://timesofindia.indiatimes.com/entertainment/malayalam/movies/news/Urumi-song-issued-warrant-for-plagiarism/articleshow/17019082.cms>.

117. Loreena McKennitt v. Deepak Dev, Civil Suit No. 2349/2011 (Del. H.C. Jul. 31 2014), http://delhi-highcourt.nic.in/dhcqrydisp_o.asp?pn=156034&yr=2014 (observing that the case had been adjourned "mainly, on the reason that the parties were trying to resolve" the dispute, but that the suit has been revived as the parties could not arrive at a compromise).

118. Prashant Reddy, *Finally, an Indian Music Composer Gets Sued for Allegedly Copying a Foreign Melody!* SPICY IP, Nov. 24, 2011, <http://spicyip.com/2011/11/finally-indian-music-composer-gets-sued.html>.

was arguably a borderline case.¹¹⁹ Sadly, from an academic perspective, a valuable precedent was lost as the band was held not to have standing (a ruling stemming from the fact that Iran is not a WTO member),¹²⁰ and the band was forced to withdraw the suit and issue a humiliating apology to the defendants.¹²¹

In the United States, a case against Universal Music and Dr. Dre was possibly the first known instance of a musical copyright infringement lawsuit filed by an Indian plaintiff against a Western plaintiff.¹²² In 1976, the well-known Bollywood musician Bappi Lahiri had composed a song (“Thoda Resham Lagta Hai”) and assigned its copyright to the producers of film called *Jyoti*, released in 1981. A hip-hop musician, DJ Quik, fortuitously stumbled across the song some two decades later on an Indian cable channel in the United States. Quik recorded the footage, added some beats to the track through a drum machine, and handed it to Dr. Dre, who was an executive producer at Universal. Dr. Dre had the singer Shari Watson (known by the name “Truth Hurts”) rap a few lines over the remixed track, added some vocals by the hip-hop artist Rakim, and released the final product under the title “Addictive” in 2002.¹²³ Thus, “Addictive” essentially comprised the chorus of “Thoda Resham Lagta Hai” looped repeatedly in the background, but with a hip-hop makeover. Despite using the original recording of “Thoda Resham Lagta Hai”, neither Dr. Dre nor Universal bothered to seek a license from the existing copyright owner, the Indian music company Saregama. With “Addictive” proving to be a commercial success, a lawsuit was inevitable. Both Lahiri and Saregama sued Dr. Dre and Universal, the former’s lawyer accusing Dr. Dre of “cultural imperialism.”¹²⁴ While a court granted an injunction against the exploitation of the song,¹²⁵ Saregama was denied punitive damages.¹²⁶ A claim for damages by Lahiri (who had resolved a dispute with Saregama and become a co-owner of the musical and sound recording copyright, through an agreement signed in 2004) also failed. The court observed that Lahiri had registered

119. Barobax Corp had alleged similarities between “the first 10 seconds” of their song with a song in Agent Vinod. However, to quote a journalist interviewing the band, the part allegedly copied was “very common in terms of middle eastern melodies.” See Priyanka Dasgupta, “We don’t want to sing for Bollywood”, Times of India, Mar. 12, 2012, <http://timesofindia.indiatimes.com/entertainment/hindi/music/news/We-dont-want-to-sing-for-Bollywood/articleshow/12339777.cms>.

120. *Barobax v. Eros*, Civil Suit No. 766 of 2012 (Bom. H.C., 22 Mar, 2012, <http://www.bombayhighcourt.nic.in/data/original/2012/S76612220312.pdf>). See also Prashant Reddy, *Bombay High Court denies Barobax ex-parte relief*, SPICY IP, Mar. 31, 2012, <http://spicyip.com/2012/03/bombay-high-court-denies-barobax-ex.html>.

121. *Iranian band Barobax apologizes to Pritam*, TIMES OF INDIA, Apr. 3, 2012, <http://timesofindia.indiatimes.com/entertainment/hindi/music/news/Iranian-band-Barobax-apologizes-to-Pritam/article-show/12651768.cms>.

122. *Saregama v. Andre Young & Lahiri v. Universal*, *supra* note 31.

123. Marshall & Beaster-Jones, *supra* note 94, at 257.

124. *Id.* at 250. Lahiri’s claim was hugely ironic, as Lahiri has often plagiarized tunes from Western songs. See Bapli Lahiri, ITWOFS, www.itwofs.com/hindi-bl.html.

125. *Composer Wins Injunction Over Truth Hurts Hit*, BILLBOARD, Feb. 4, 2003, <http://www.billboard.com/articles/news/72442/composer-wins-injunction-over-truth-hurts-hit>.

126. *Saregama v. Andre Young*, *supra* note 31, at *2 -*4.

the work with the US Copyright Office “well after” the defendants had ceased manufacturing and selling the album containing the song, and that allowing Lahiri to retroactively recover damages would “encourage other similarly situated plaintiffs to follow suit, hence opening a floodgate.”¹²⁷ Lahiri also failed in a claim for false attribution, with the court holding that “the right of attribution is limited to producers of actual products, not ‘to the author of any idea, concept, or communication embodied in those goods.’”¹²⁸ Nevertheless, this does not take away from the fact that an infringement of copyright clearly occurred, and Dr. Dre conceded that Lahiri would have been credited had he sought a license.¹²⁹ There is nothing to suggest that placing Lahiri’s song in a different cultural context would have aided the defendants.

However, a trickier issue concerns the copying of a very small segment of a song, or using it in a manner in which a lay listener would not be able to detect it. The classic case that illustrates this is *Bridgeport Music, Inc. v. Dimension Films*.¹³⁰ Here, a mere two-second guitar sample from the song “Get Off Your Ass and Jam” by Parliament Funkadelic was used in the song “100 Miles and Runnin” by N.W.A. For a lay listener, the sample, which sounded like a police siren, was hard to detect and was drowned by other sounds.¹³¹ The court rejected a *de minimis* defense and held that, in the case of copyright infringement involving a sound recording, the criteria for determining infringement was not the same as a musical work. What is protected “is not the ‘song’ but the sounds that are fixed in the medium,” and involves “a physical taking rather than an intellectual one.”¹³² But had this case only involved a musical copyright claim, it is unlikely that the plaintiffs would have succeeded, as the question would then involve that of an intellectual taking, rather than a physical one. Furthermore, the finding of this case has also been called into question by eminent scholars, such as Nimmer,¹³³ and in a case involving cross-cultural borrowing, filed by Saregama against the hip-hop musician Timbaland.

Timbaland had sampled, without a license, an approximately one-second long clip from the song “Baghon Mein Bahar Hai” — from the hit Bollywood film *Aradhana*, released in 1969 — in his song “Put You On The Game.”¹³⁴ Like in *Bridgeport*, the use of the sample

127. Lahiri v. Universal, *supra* note 31, at *19 - *21.

128. *Id.* at *18-*19 (citing *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003)).

129. *Id.* at *18.

130. 410 F.3d 792 (6th Cir. 2005).

131. *Bridgeport Music, Inc. v. Dimension Films LLC*, 230 F.Supp.2d 830, 842 (M.D. Tenn. 2002) (stating “[T]he Court finds that the copied segment is not even recognizable to a lay observer as being appropriated from the plaintiffs’ work. The siren sounds in ‘100 Miles’ are in the background, appear at irregular intervals, and their similarity to the guitar introduction to ‘Get Off’ is only apparent if one is made aware of the attribution before hearing the sample. The Court finds that no reasonable jury, even one familiar with the works of George Clinton (the author of ‘Get Off’), would recognize the source of the sample without having been told of its source.”).

132. *Bridgeport Music, Inc.*, *supra* note 131, at 797.

133. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[2][B] (2007).

134. *Saregama India Ltd. v. Mosley* 687 F. Supp. 2d 1325, 1326-29 (S.D. Fla., 2009)

was enveloped by other sounds, and was not readily evident. Saregama sued for both musical copyright and sound recording copyright infringement. Saregama failed in its claim as it could not establish that it owned the copyright over the song.¹³⁵ Nevertheless, the court made important observations regarding Saregama's copyright claims. With respect to the musical copyright claim, the defendants contended that the sample in question constituted "an unoriginal and common vocal exercise."¹³⁶ The defendants' expert witness also felt that the sample at issue was "a basic musical element" that "was not original," and that even though Timbaland "may have copied" from Saregama's song, the two songs were "dissimilar compositions as a whole."¹³⁷ On the other hand, Saregama's expert witness opined that the snippet taken from Saregama's song was "a distinctive and memorable piece of the song as a whole."¹³⁸ The court held that, when compared as a whole, both songs were "completely different," with "different lyrical content, tempo, rhythms, and arrangements."¹³⁹ The court found it "highly unlikely that the average lay observer could discern the source of the one-second snippet without prior warning," and stated that "no reasonable jury, properly instructed, would...conclude that the two works were substantially similar."¹⁴⁰

With respect to the sound recording copyright claim, Saregama cited *Bridgeport* and argued that any sampling of a sound recording, irrespective of length, constituted infringement.¹⁴¹ However, the court interpreted the rule laid down in *Bridgeport* differently. The court held that for an act of sampling to amount to sound recording copyright infringement, the sampling must copy "any sound" and be a "similar-sounding work" that imitates or simulates the sound taken.¹⁴² Here, the court observed that there was nothing to suggest that Congress intended to follow "the distinction between sound recordings and all other forms of copyrightable work that the *Bridgeport* court imposes."¹⁴³ Agreeing with Nimmer, the court held that a "substantial similarity inquiry" should still be undertaken in sound recording infringement cases.¹⁴⁴ Thus, Timbaland's song could not be said to have infringed sound recording copyright "merely because it contain[ed] a one-second snippet of" Saregama's song.¹⁴⁵ The court, therefore, arguably extended the lay listener test to apply to cases involving mere sound recording

135. *Id.* at 1332-36 (holding that Saregama had "at most, a two-year exclusive license to exploit" the song); *Saregama India Ltd. v. Mosley* 635 F.3d 1284 (11th Cir. 2011) (affirming the ruling).

136. *Mosley*, 687 F.Supp.2d at 1336.

137. *Id.* at 1330-31.

138. *Id.* at 1330.

139. *Id.* at 1338.

140. *Id.*

141. *Id.* at 1338-9.

142. *Id.* at 1340-41 (interpreting 17 U.S.C. § 114 (b), which states: "The exclusive rights of the owner of copyright in a sound recording...do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.").

143. *Id.* at 1341.

144. *Id.*

145. *Id.* at 1340.

infringement, and implicitly endorsed a *de minimis* defense.

In India, the Delhi High Court deliberated on the scope of a *de minimis* defense in *India TV Independent News Service v. Yashraj Films*.¹⁴⁶ In this case, a film company had sued a television channel for musical and sound recording copyright infringement for, inter alia, airing a commercial featuring a three-second excerpt (comprising five words) of a popular Bollywood song. A judge, referring to *Bridgeport*, held that the channel had infringed the film company's sound recording copyright, because "a physical lifting from a sound recording," even if be "the minutest part," constituted copyright infringement.¹⁴⁷ The judge also found infringement of musical copyright. On appeal, the court considered the validity of a *de minimis* defense. The plaintiff, referring to *Nimmer*, argued that *de minimis* was "not a viable copyright infringement defense" due to inconsistency in judicial opinion.¹⁴⁸ The court disagreed with this argument, and added that "*Bridgeport* gives no good reason why...*de minimis* is to be excluded" as a possible defense.¹⁴⁹ The court held that a *de minimis* defense was apt in cases of "trivial violations," where a fair use defense would be "a bad theoretical fit."¹⁵⁰ Furthermore, recognizing a *de minimis* defense would also be in "the interest of the society," as it would encourage creativity through the use of new technology and would also be a less "time consuming" defense to speedily resolve trivial copyright disputes, especially as "[i]t is not in society's best interest to adjudicate" trivial copyright disputes and the "ultimate compensation paid would not justify public expenditure in the adjudicatory process."¹⁵¹ The court accordingly laid down five factors to consider while applying the *de minimis principle*: (i) the size and type of the harm, (ii) the cost of adjudication, (iii) the purpose of the violation, (iv) the effect on the legal rights of third parties, and (v) the intent of the wrongdoer.¹⁵² Applying these factors, the court concluded that even though the excerpt from the recording featured "conspicuously and prominently," the "infraction is trivial and attracts the defense of *de minimis*."¹⁵³

In *Saregama Ltd. v. Viacom 18 Motion Pictures*,¹⁵⁴ the Calcutta High Court followed the above decision and promptly dismissed a case where Saregama had sued Viacom for infringement of musical copyright and literary copyright (in lyrics). Viacom had produced a film where a character had sung four lines of a popular song whose copyright was owned by Saregama. The court applied the *de minimis principle* and observed: "Let us assume that the rendition of those four words was infringement.... It has no impact, no effect and causes no

146. (2013) 53 P.T.C. 586 (Del. H.C.).

147. *Id.* at ¶ 5.

148. *Id.* at ¶ 49.

149. *Id.* at ¶¶ 34-36, 50.

150. *Id.* at ¶ 56.

151. *Id.* at ¶¶ 54-56.

152. *Id.* at ¶ 57.

153. *Id.* at ¶¶ 58-59.

154. (2013) M.I.P.R. 230 (Cal. H.C.).

loss to anybody. It is trifling. It is minimal. I would ignore it applying this principle.”¹⁵⁵

Hence, to summarize, cross-cultural borrowing can result in copyright infringement if a lay listener can detect substantial similarity on comparing two songs. In the United States, if an artist samples a very small excerpt of a sound recording, the decision in *Bridgeport* would work against the artist, even if the sampling cannot be detected by a lay listener. However, the decision in Timbaland’s case contradicts *Bridgeport* and provides some authority for a *de minimis* defense, with respect to both musical and sound recording copyright. In India, although India TV and Viacom did not concern sampling, it is arguable that these decisions provide a basis for using the *de minimis* defense in a case involving sampling, even if the excerpt alleged to be copied can be detected by a lay listener. In *Bridgeport*, the court disregarded “considerations of judicial economy” and observed, “If any consideration of economy is involved it is that of the music industry.”¹⁵⁶ The court thus stated that “it would appear to be cheaper to license than to litigate,” and warned, “Get a license or do not sample.”¹⁵⁷ On the other hand, in *India TV*, the Delhi High Court gave great emphasis to the social costs of adjudication. At the end of the day, India is a developing country where small music labels cannot usually afford to withstand litigation by major labels. Moreover, Indian courts have a massive backlog of cases, and public interest demands that judges spend little or no time on trivial copyright disputes. Hence, the court’s approach in *India TV* ought to be commended.

Of course, the recognition of a *de minimis* rule in India this still does not preclude music labels from sending cease-and-desist letters, or going ahead with a lawsuit even in cases of minimal use that would be undetected by a lay listener. But in cases of cross-cultural borrowing, whether a foreign music label will take the trouble to do so, especially when many cases of blatant copying by Bollywood have been ignored, is questionable. In comparison, as the United States is a country where out-of-court solutions are especially favored due to high litigation costs, Indian copyright owners may have greater incentives to indulge in such rent-seeking behavior, especially as the judicial position regarding the *de minimis* rule appears to be unclear. Thus, in the present milieu of Bollywood hip-hop remixes, it may well be more advisable for US artists to err on the side of caution and seek a license.

B. Legal Strategies

US courts are usually perceived to be favorable forums to sue in. As Lord Denning once remarked, “As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune.”¹⁵⁸ In contrast, Indian courts are “desperately congested,” and litigants face delays of “*Bleak House* proportions.”¹⁵⁹ In

155. *Id.* at ¶ 12.

156. *Bridgeport Music, Inc.*, supra note 131, at 802.

157. *Id.* at 801-02.

158. *Smith Kline & French Lab v. Bloch*, (1983) 1 W.L.R. 730, 733 (C.A. May 13, 1982).

159. Marc Galanter, *World of Our Cousins*, 2 DREXEL L. REV. 365, 368 (2010).

the context of IPR enforcement, India is included in a watch list of countries drawn by the US Trade Representative (USTR), owing to a “weak IPR legal framework and enforcement system.”¹⁶⁰ The Supreme Court of India has itself observed, “[I]n the matters of trademarks, copyrights and patents, litigation is mainly fought between the parties about the temporary injunction and that goes on for years and years and the result is that the suit is hardly decided finally.”¹⁶¹ Although the Supreme Court has observed more than once that the final judgment in an IPR infringement case should normally be delivered within four months from the date of the filing the suit,¹⁶² this has rarely been the case. Most IPR infringement cases in India still rarely proceed beyond the interim stage. Thus, what most plaintiffs in IPR infringement actions really look for is an ad interim injunction. Such an injunction is still very useful as a “first-strike” strategy.¹⁶³ Here, India offers plaintiffs a number of advantages.

To begin with, copyright owners can take advantage of generous long-arm jurisdiction provisions. Indian civil procedure rules normally require a suit to be instituted in a court with jurisdiction over: a) the defendant’s residence or place of business in India, or b) the place where the cause of action wholly or partly arises.¹⁶⁴ However, in “an obvious and significant departure” from these rules,¹⁶⁵ the Indian copyright statute gives plaintiffs an additional choice of forum — a court which has jurisdiction over the plaintiff’s place of residence or business, even if the cause of action did not arise there.¹⁶⁶ Furthermore, even though a suit for copyright infringement cannot normally be filed before a High Court at first instance,¹⁶⁷ as a result of a complex set of procedural rules, the High Courts in Delhi, Bombay, Madras and Calcutta — India’s four largest cities — can exercise first-instance jurisdiction in civil disputes valued by plaintiffs above a certain amount.¹⁶⁸ It has thus become common for plaintiffs to fix a

160. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, SPECIAL 301 REPORT 37-39 (2013), <http://www.ustr.gov/sites/default/files/05012013%202013%20Special%20301%20Report.pdf> (USTR Report).

161. *Vardhman Rice v. Chawalwala* (2009) 10 S.C.C. 257.

162. *Id.* at ¶ 5; *see also* *Bajaj Auto Limited v. TVS Motor Company* (2009) 41 P.T.C. 398, ¶ 5 (S.C.).

163. In IPR litigation, a “first-strike” strategy refers to the strategy of a plaintiff “to obtain a good first result” which, if required, can be leveraged to settle disputes. *See*, Michael C. Elmer & Stacy D. Lewis, *Where to Win: Patent-Friendly Courts Revealed*, MANAGING INTELLECTUAL PROPERTY, Sept. 2010, available at http://www.finnegan.com/files/upload/Articles%20and%20other%20Resources%20-%20PDF%20Files/Managing_Intellectual_Property_Where_to_win_patent_friendly_courts_revealed_09_10.pdf.

164. INDIA CODE OF CIV. PROC § 20 (1908).

165. *SmithKline Beecham v. Singhi*, (2001) P.T.C. 321, ¶ 6.

166. Indian Copyright Act of 1957, No. 14, Acts of Parliament, § 62

167. *Id.* (stating that a suit for infringement and other civil proceedings must be filed before a “district court”); INDIA CODE OF CIV. PROC §§ 2(4), 3 (1908) (defines a “District Court” as “a principal Civil Court of original jurisdiction” that is inferior to a High Court but superior to a Small Causes Court and other civil courts of a lower grade).

168. *See*, LAW COMMISSION OF INDIA, DELAYS AND ARREARS IN HIGH COURTS AND OTHER APPELLATE COURTS (Law Com. No. 79, 1979), ¶¶ 2.1-2.5, 15.1-15.2, <http://lawcommissionofindia.nic.in/51-100/Report79.pdf>; REPORT OF THE SELECT COMMITTEE ON THE COMMERCIAL DIVISION OF HIGH COURTS BILL, 2009, ANNEX. 4 CH. 1 (2010), <http://www.prsindia.org/uploads/media/Division%20High%20Courts/Select%20Committee%20Report.pdf> (explaining the basis on which the High Courts in Delhi, Bombay, Madras and Calcutta can exercise first-

high value to their suits, bypass lower courts, and sue out-of-state defendants for copyright infringement directly before one of these four High Courts, particularly the Delhi High Court. For example, in one particularly egregious case, Microsoft sued a defendant situated in distant Bangalore (well over a thousand miles away from Delhi) before the Delhi High Court.¹⁶⁹ Even though Microsoft had a large commercial presence in Bangalore and could easily have sued in Bangalore, it preferred to argue that it had a place of business in Delhi (which it did) and not to sue in Bangalore.¹⁷⁰ Very likely, this was because the relevant High Court with jurisdiction over Bangalore (the Karnataka High Court) could not exercise first-instance jurisdiction. The Delhi High Court strongly criticized “wealthy plaintiffs” like Microsoft for forum shopping in this manner, but grudgingly acknowledged that Microsoft was entitled to do so, and that “judicial discipline” required the court to hear the suit and grant Microsoft relief.¹⁷¹

Thus, if a music company like Sony or Universal wishes to sue before the Delhi High Court, it can do so if it merely demonstrates that, within the jurisdiction of the Delhi High Court, it “carries on business” (even if it be through an agent or a subsidiary office) or “personally works for gain” (a “much wider” expression meaning “having an interest in a business... a voice in what is done, a share in the gain or loss and some control thereover”).¹⁷² Since most major multinational music companies have subsidiary companies and branches in India, establishing this is not too difficult. In the event a plaintiff with no domicile or commercial presence wishes to forum shop before the Delhi High Court, the plaintiff can still try and invoke jurisdiction on the basis of cause of action. In the case of an infringing musical work, it could be argued that the work was broadcast or made available in Delhi. For instance, in Loreena McKennitt’s case, the natural forum for the dispute would arguably have been the southern state of Kerala, as the defendants were based in Kerala, and the film was meant for audiences in Kerala (where Malayalam is the main local language). The fact that the Kerala High Court is not vested with the same jurisdiction probably motivated McKennitt to sue before the Delhi High Court. While the court’s order does indicate the basis on which it exercised jurisdiction in the case, it presumably did so on the basis of a part of the cause of action arising in Delhi. In contrast, in the United States, it is arguably more difficult for foreign plaintiffs to convince courts to exercise jurisdiction in this manner. For example, in Timbaland’s case, Saregama had initially filed the suit before the Southern District of New York. The court directed Saregama to file the suit before the Southern District of Florida instead, ruling that “the core operative events, parties, witnesses and documents relevant to” the case “were located to a substantially greater extent in the Southern District of Florida,” and that the case ought to be transferred “for the convenience of the parties and witnesses, and in the interest of justice and the efficient administration of justice.”¹⁷³

instance civil jurisdiction).

169. Microsoft Corp. v. Gopal, (2010) 42 P.T.C. 1 (Del. H.C.),

170. *Id.* at ¶ 4

171. *Id.* at ¶¶ 17-18.

172. Dhodha House v. S.K. Maingi, A.I.R. 2006 S.C. 730, ¶¶ 45-46.

173. Saregama India Ltd. v. Taylor, No. 07 Civ.7601(VM), 2008 WL 243784 (S.D.N.Y. Jan. 28, 2008)

Another major advantage that plaintiffs enjoy in India is that the Delhi High Court is often inclined to grant speedy, *ex parte* injunctions in favor of plaintiffs.¹⁷⁴ As one scholar, criticizing the “trigger happy” approach of the Delhi High Court, notes, “Delhi courts are to IP owners in India what the Texas courts are to IP owners in the US.”¹⁷⁵ In McKennitt’s case, for example, an *ex parte* injunction was granted. While the fairness of the Delhi High Court’s exercise of jurisdiction and grant of an *ex parte* injunction against defendants situated some 1,500 miles away ought to be seriously questioned, the fact is that such orders are now common in India.

Indian copyright law also offers rights owners some additional advantages. For instance, copyright registration is not mandatory in India¹⁷⁶ and, unlike in the United States, is not required in cases where plaintiffs seek statutory damages and costs. The Indian government has further extended national treatment to foreign works and foreign nationals of countries that are member of the WTO and the Berne Copyright Union.¹⁷⁷ In recent years, the Delhi High Court has also favored awarding punitive damages in copyright infringement cases.¹⁷⁸ In comparison, in the suit filed by Saregama against Dr. Dre, the court refused to award Saregama punitive damages. The court observed that US copyright legislation did not permit the award of punitive damages, and that, under the principle of national treatment under the Berne Convention, Saregama could not seek greater protection than that provided for by US copyright law.¹⁷⁹ Yet another advantage offered by Indian copyright legislation is that it contains a moral rights clause which states that, independently of an author’s copyright, and even after the assignment of such copyright, an author still has the right to claim authorship of the work and restrain or claim damages against any distortion, mutilation or modification of the work that would be prejudicial to the author’s honor and reputation.¹⁸⁰ In comparison, as seen earlier, Bappi Lahiri failed in a false attribution claim as it was held that, under US law, only producers could sue for false attribution.

Hence, to summarize, even though litigation in India can be cumbersome and does not result in large damages awards like in the United States, plaintiffs who strategize cleverly

174. See generally T. Prashant Reddy, *A Critical Analysis of the Delhi High Court’s Approach to ex parte Orders in Copyright and Trade Mark Cases*, 3 MANUPATRA INTELL. PROP. REP. 171 (2011).

175. See Shamnad Basheer, *Ravi Kamal Bali v. Kala Tech: India’s First Doctrine of Equivalents Case?*, SPICY IP, Oct. 26, 2008, <http://spicyip.com/2008/10/ravi-kamal-bali-v-kala-tech-indias.html>.

176. Indian copyright law allows copyright owners to register their works but does not state that copyright exists only in registered works (Copyright Act of 1957, *supra* note 166, at §§ 13, 44, 45). Thus, Indian law treats copyright as an inherent right which exists on the creation of a work and does not require compulsory registration (*Satsang v. Mukhopdhyay* 1972 A.I.R. (Cal. H.C.) 533, ¶ 17).

177. Copyright Act of 1957, *supra* note 166, at § 40; International Copyright Order 1999 (Apr. 6, 1999).

178. See, e.g., *Microsoft v. Raval*, 2007 M.I.P.R. 72, ¶ 8 (Del. H.C.) (stating “This Court has no hesitation in saying that the time has come when the Courts dealing actions for infringement of trademarks, copyrights, patents etc. should not only grant compensatory damages but award punitive damages...with a view to discourage and dishearten law breakers who indulge in violations with impunity.”)

179. *Saregama v. Andre Young*, *supra* note 31, at *3-*4.

180. Copyright Act of 1957, *supra* note 166, at § 57.

can still forum-shop before the Delhi High Court, and try and obtain a first-strike advantage through an *ex parte* injunction. As attorney's fees in India are usually much less expensive compared to the United States, litigating in India does not always result in pyrrhic victories, as is often perceived.

C. Strategies to Counter the Use of TCEs

Finally, the third question that I posed referred to the options that countries and communities had in the event of their non-protectable TCEs being used. For example, in the context of raga rock, songs like “Across the Universe” and “We Will Fall” employed Hindu religious chants.¹⁸¹ In the context of Bollywood-inspired hip-hop, some music videos, such as that of “Don't Phunk With My Heart,” have imitated Indian clothing and dance forms. In such situations, there appears little that a community can do except respond through the media. A common reaction for sundry Hindu community organizations has been to register protests in cases where they have found Indian culture to be denigrated. Such protests have been aired in cases ranging from the wearing of a Goddess Kali Halloween costume by the model Heidi Klum,¹⁸² to the wearing of a *bindi* by Selene Gomez during a performance at the MTV Movie Awards.¹⁸³ While such protests have received coverage from the Western media, whether they serve their intended purpose — presumably, to deter similar acts in future and promote genuine interest in Indian culture in the West — is highly questionable. Therefore, a better strategy, for both the Indian government, and community groups keen to promote awareness of Indian culture, might be to pursue a larger strategy of promoting the country's “soft power,” which results in more informed perceptions of India than existing stereotypes.¹⁸⁴ Just how this is to be achieved, however, remains a difficult question. On its part, the Indian government could invest more in cultural diplomacy and establish large numbers of cultural institutes across the Western world, much like countries like the United States, United Kingdom, Germany, France and Spain have done in India and other countries (through the United States Information Service, the British Council, the Goethe-Institut, Alliance Francaise and Instituto Cervantes respectively). The Indian government could also mobilize private donors to establish more departments dedicated to the study of Indian culture in universities abroad.

181. See David R. Reck, *Beatles Orientalis: Influences from Asia in a Popular Song Tradition*, 16 *ASIAN MUSIC* 83, 123-4 (1985); PAUL TRYNKA, *IGGY POP: OPEN UP AND BLEED* (2007).

182. *Heidi Klum's "Kali Act" Leaves Hindus Fuming*, *TIMES OF INDIA*, Nov. 5, 2008, <http://timesofindia.indiatimes.com/world/Heidi-Klums-Kali-act-leaves-Hindus-fuming/articleshow/3677674.cms>.

183. Sarah Bull & Heidi Smart, *Not Intended for "Seductive Effects": Selena Gomez Criticised by Hindu Groups for Wearing Bindi Whilst Performing Sexy Single Come And Get It at MTV Awards*, *DAILY MAIL*, Apr. 16, 2013, <http://www.dailymail.co.uk/tvshowbiz/article-2310247/Selena-Gomez-criticised-Hindu-groups-wearing-bindi-whilst-performing-sexy-single-Come-And-Get-It-MTV-Awards.html>.

184. Shashi Tharoor, *Indian Strategic Power: Soft*, *HUFFINGTON POST*, June 26, 2009, http://www.huffingtonpost.com/shashi-tharoor/indian-strategic-power-so_b_207785.html.

CONCLUSION

While cross-cultural borrowing by musicians raises important philosophical, social and political questions, the more practical legal questions would concern challenges related to cross-border copyright licensing and enforcement. While some Indian and US musicians have been conscious to seek a license while copying songs from each other's countries,¹⁸⁵ many have not bothered to do so. It would appear to a casual observer that instances of such unlicensed use have been far greater in India than in the United States. A major reason for this may be the reluctance of Western musicians and record companies to sue in India. It is possible that negative perceptions of India's copyright enforcement system may have had some part to play in this. Yet, as this article has tried to argue, filing a lawsuit in India can be a feasible option for copyright owners who strategize well. In this regard, Loreena McKennitt's case has been described as one that could "shake up the Bollywood music industry."¹⁸⁶ That a relatively lesser known musician from Canada chose to litigate against the producers of a Malayalam film is remarkable. According to a news report, McKennitt was informed of the unlicensed use of her song when a music publishing company, co-owned by her record company, Universal, discovered the infringing song by "scanning" the internet.¹⁸⁷ In Barobax Corp's case, the band claimed to have been made aware of the alleged infringement by fans who pointed the band to the Hindi song on YouTube.¹⁸⁸ If the frequency of such online trawling increases, the drought of litigation in instances of cross-cultural borrowing could well be a thing of the past, forcing creators in both India, as well as the United States to rethink any unlicensed use of a foreign work.

185. This article has already stated the example of the Black Eyed Peas' licensed use of Kalyanji-Anandji's songs in "Don't Phunk With My Heart." In India, one example of a licensed use of a US work was a song from the Bollywood film *Kal Ho Na Ho*, which borrowed the main chorus of Roy Orbison's song "Pretty Woman." (See Suresh Mathew, *Original Fakes: Rip-offs Come Cheap and Easy*, CNN IBN, Apr. 10, 2008, <http://ibnlive.in.com/news/original-fakes-ripoffs-come-cheap-and-easy/63007-8.html>.)

186. Reddy, *supra* note 118.

187. Priyanka Dasgupta, *Sue Blot on Santosh Sivan's "Urumi,"* TIMES OF INDIA, Nov. 26, 2011, <http://timesofindia.indiatimes.com/entertainment/bengali/movies/news/Sue-blot-on-Santosh-Sivans-Urumi/article-show/10879701.cms>.

188. Dasgupta, *supra* note 119.