

# Bollywood/Hollywood

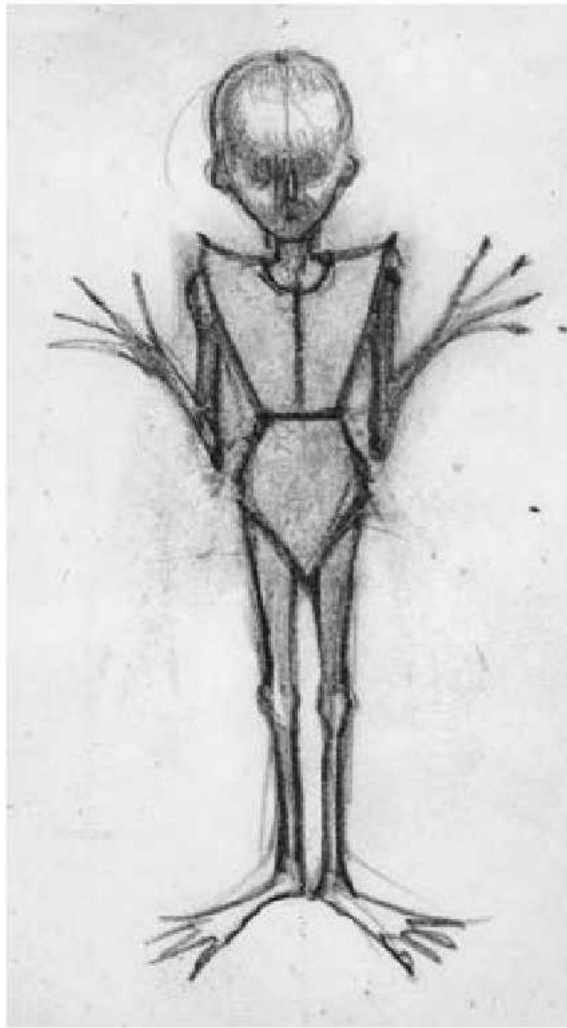
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*Free flow of culture is not always fair flow of culture. A recent spate of copyright suits by Hollywood against Bollywood accuses the latter of ruthlessly copying movie themes and scenes from America. But claims of cultural appropriation go far back, and travel in multiple directions. The revered American director, Steven Spielberg, has been accused of copying the idea for E.T. the Extra-Terrestrial from legendary Indian filmmaker Satyajit Ray's 1962 script, The Alien. Disney's The Lion King bears striking similarities to Osamu Tezuka's Japanese anime series, Kimba the White Lion. Neither Ray nor Tezuka's studio sued the American filmmakers and this Article is by no means an attempt to revive any particular legal case. Rather, this Article considers copyright's role in promoting free cultural exchange, albeit on fair terms in a global marketplace of ideas marked by sharp differentials in power, wealth, and knowledge.*

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"The East is still as far away from the West as it has ever been, at least in the cinema."  
— Satyajit Ray<sup>1</sup>



Ray's preliminary sketch of the alien, which represented a child victim of the 1943 Bengali famine.

In May 1967 the acclaimed Indian director of *The Apu Trilogy*, Satyajit Ray, received a "joyous carillon of a cable" from Hollywood: Columbia pictures would back *The Alien*. Ray would have a free hand. Both Marlon Brando and Steve McQueen were keen to play a leading role. Saul Bass would mastermind the special effects. And what luck — Peter Sellers was in Hollywood at that very moment, playing an Indian in a comedy, and anxious to meet Ray for the second time to discuss playing the Indian philanthropist in the film. As Ray later wrote of his own, as it would turn out, *ill-fated* Bollywood / Hollywood travails, "With the hum of the machinery in my ears, I arrived in Hollywood on June 1."<sup>2</sup>

1 ANDREW ROBINSON, SATYAJIT RAY: THE INNER EYE 287 (1989).

2 Satyajit Ray, *Ordeals of The Alien*, CALCUTTA STATESMAN, Oct. 4, 1980, available at <http://www.satyajitrayworld.com/raysfilmography/unmaderay2.aspx>.

By 1967 Satyajit Ray was already widely considered a genius filmmaker and the "father of Indian cinema." His films, rooted in the lives of Bengalis in post-Independence India and filmed in the Bengali language, depict ordinary lives: children fated to die of poverty, women trapped in subservient familial roles, a new generation of middle-class Indians now seeking liberation from their elders and the traditions of the past. In his first feature film, *Pather Panchali*,<sup>3</sup> Ray brilliantly directed impoverished Bengali villagers living in the rural countryside in the 1920s. In the film a wrinkled old woman brushes her teeth with her fingers and spits outside the house door; the main character, a young girl named Durga, succumbs to illness on account of the family's poverty. The acuity with which Ray captures their humanity is lyrical. Countless filmmakers around the world fondly recall their first viewing of the film.

Needless to say, Ray's films (some 37 in all) bore little resemblance to the grandeur of Hollywood cinema — or, for that matter, to the glitzy, upper-middle-class escapades glorified by escapist Bollywood films. But a chance correspondence between Ray and his friend Arthur C. Clarke, the British science-fiction writer and author of *2001: A Space Odyssey*, put Ray on a fateful journey across the Atlantic to seek to partner with Hollywood to create his first science-fiction film. The film, *The Alien*, was based on a short science fiction story titled "Bankubabur Bandhu" (translated as "Banku's friend") that Ray had written in Bengali for his family magazine, *Sandesh*, a few years earlier.<sup>4</sup> For most of his films Ray would not even have considered American backing — but a science-fiction film like *The Alien* would require special effects that Indians could not afford. Indeed, to this day Bollywood largely avoids the genre because of prohibitive costs. Ray's story revolved around a spaceship that lands in a pond on the outskirts of a Bengali village. Locals begin worshipping it as a temple, which they think has risen from the Earth. The alien (see sketch above) befriends a young village boy named Haba. The story is largely of their friendship, and the humorous pranks the alien plays on the local villagers, from reviving a farmer's dying crops to pestering a mean farmer by ripening his mango tree out of season.

Fascinated with Ray's idea, Clarke put him in touch with an American friend living in Sri Lanka, Mike Wilson. (Clarke was living in Sri Lanka at the time, as he did for most of his life.) Wilson had just written, directed, and

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3 PATHER PANCHALI (Government of West Bengal 1955).

4 SATYAJIT RAY, THE ALIEN (1967). See generally Michael Sragow, *An Art Wedded to Truth*, ATLANTIC MONTHLY 1994, available at <http://satyajitray.ucsc.edu/articles/sragow.html>.

produced a film about a Sri Lankan secret agent — unabashedly named James Banda (this should have been a warning sign to Ray!). Wilson took a keen interest in Ray's idea and swiftly flew out to Calcutta, where he propped himself in the renowned director's apartment for two weeks until Ray finished a script. Wilson flew the script to Hollywood and pressed Columbia Pictures to take up the project. By then Ray had become uncomfortable with Wilson's aggressive partnering in the project. Ray traveled to Hollywood to discuss the project with Columbia Pictures, but his high hopes were quickly deflated. For starters, mimeographed copies of *The Alien* script were floating around the Columbia Pictures offices emblazoned with the legend "Copyright Mike Wilson and Satyajit Ray." When Ray confronted Wilson, Wilson insisted that he had put himself on the copyright to protect Ray's interests. Later, Columbia Pictures asked Ray whether he had received any of the \$10,000 advance they had given to Wilson for them to share — Ray had not. The relationship between Ray and Wilson further deteriorated, and Columbia Pictures never made the film.

Still, Ray had not completely ruled out *The Alien* project when, in 1982, Steven Spielberg's *E.T. the Extra-Terrestrial*<sup>5</sup> premiered. The film, which began as a Columbia Pictures project, bore a striking resemblance to *The Alien*. Most telling, in Ray's words, was the fact that the alien is "small and acceptable to children and possessed of certain superhuman powers — not physical strength but other kinds of powers, particular types of vision, and that it takes an interest in earthly things."<sup>6</sup> Both Ray's and Spielberg's respective aliens "had a sense of humor, a sense of fun, a mischievous quality," said Ray. Ray's friend, Arthur C. Clarke, also immediately saw the resemblance between the two films, and he urged Ray to write to Spielberg and point out the similarities. "Don't take it lying down," Clarke advised. But while Ray did later say that "*E.T.* would not have been possible without my script of *The Alien* being available throughout America in mimeographed copies," he did not pursue the matter further. *E.T.*'s release resurfaced Ray's dismay towards Hollywood once again. Spielberg himself later denied any suggestion of plagiarism, saying he was in high school when the script had first been circulated in Hollywood. But that is not quite accurate — Spielberg graduated from high school in 1965, and by 1967 (when Ray visited Hollywood) Spielberg was already working in Hollywood, releasing a short film in 1968 through Universal Studios. By 1969 he was the youngest director at a major Hollywood studio.<sup>7</sup>

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5 E.T.: THE EXTRA-TERRESTRIAL (Universal Pictures 1982).

6 ROBINSON, *supra* note 1, at 294.

7 Obaidur Rahman, *Satyajit Ray and The Alien!*, DAILY STAR: WEEKEND MAG.,

## I. INTRODUCTION: THE BLACK ATLANTIC

Paul Gilroy's *Black Atlantic* thesis, observing how musical influences flowed across the African Diaspora, can be productively applied to film, from Bollywood to Hollywood. Just as Gilroy celebrated "the inescapable hybridity and intermixture of ideas"<sup>8</sup> with respect to literary and musical works, so too should we embrace — descriptively and prescriptively — the transcultural flow of ideas regarding the stories we tell in the movies. This Article flatly rejects notions of cultural purity and essentialism that would forbid ideas from flowing from East to West, and vice versa. In so doing I adopt an explicitly transcultural and intracultural perspective. Culture will and must be shared widely and freely both across borders and within them.

But in this Article I consider another view of the Black Atlantic, focusing on claims of copyright piracy and exploitation that lurk in the shadows of global cultural exchanges. Simply put, free flows of culture are not always fair flows of culture. Global cultural exchanges take place against a backdrop of sharp differentials in power and knowledge, which affect the way authors are recognized and rewarded. In this Article I seek to highlight how global inequalities combined with longstanding cultural biases may impede the free and fair exchange of culture.

It is by now a commonplace observation in copyright scholarship that all creativity is derivative. Yet romantic notions of authorship and originality continue to have a strong hold on the imagination. The flip side is also true: the dramatic image of copyright pirates brashly ripping off the masterworks of original creators is equally alluring. One thesis of this Article is that *cultural stereotypes help feed the myth of the romantic author*, on the one hand, *and that of the inglorious pirate*, on the other. Cultural biases buttress the strong copyright claims of some creators — primarily those in the West who are seen as inherently "creative" and "original," and undermine claims for cultural dynamism and borrowing made by other creators — primarily those in Asian developing countries, which are thought to breed cultures of slavish imitation and obedience to tradition. These myths obscure the underlying dynamic nature of innovation as premised upon transcultural flows of knowledge. More insidiously, these stereotypes help to mask exploitation of the weak by the strong.

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May 22, 2009, available at <http://www.thedailystar.net/magazine/2009/05/04/perceptions.htm>.

8 PAUL GILROY, *THE BLACK ATLANTIC*, at xi (1993).

One goal of this Article is to flip some common perceptions about the world's innovators and pirates. A recent spate of copyright suits by Hollywood against Bollywood sounds a familiar theme, denouncing Asians as imitators and accusing them of ruthlessly copying film plots and lifting scenes from American hits such as *Mrs. Doubtfire* and *My Cousin Vinny*.<sup>9</sup> But claims of cultural appropriation go far back, and travel in multiple directions. As we have seen, even the revered American director, Steven Spielberg, has been accused of lifting *E.T.* from Satyajit Ray's 1962 script, *The Alien*. Later in this Article I will recount how Disney's *The Lion King* bears striking similarities to the Japanese *anime* series, *Kimba the White Lion*, directed by Japan's master animator, Osamu Tezuka.<sup>10</sup> Neither Ray nor Tezuka sued the American filmmakers — and this Article is by no means an effort to revive any legal case. This is not a brief. Rather, my task is to consider copyright's role in promoting free cultural exchange on fair terms in a global marketplace of ideas that is marked by sharp differentials in power, wealth, and knowledge. The problem in the cases I will recount is not that ideas and expression flow across state lines. To the contrary, copyright law ought to promote cultural exchange, not stymie it. Yet a free culture ought also to be a fair culture, in which people around the world can be fairly recognized and remunerated for their protectable work. In this Article I show how cultural stereotypes combined with actual inequalities across cultures often thwart mutual recognition of diverse authors and their contributions to our shared culture. In so doing, this Article considers some of copyright's blind spots to differences in global power, and law's assumptions about culture and authorship. In Part II, "Hollywood," I explore as a case in point the striking similarities between Disney's "The Lion King" and Tezuka's "Kimba the White Lion."

I turn to "Bollywood" in Part III. This Part considers claims that Bollywood filmmakers are brashly pirating the screenplays of their Hollywood counterparts. I suggest that while Hollywood films certainly influence the plot of a number of blockbuster Bollywood films, many Bollywood films are original, and those that do appropriate are far from simple mimesis in translation. Cultural appropriation helps to understand the life of another; putting oneself in another's shoes reveals both what makes us similar and how we stand apart.

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9 MRS. DOUBTFIRE (20th Century Fox 1993); MY COUSIN VINNY (Palo Vista Productions 1992).

10 See generally THE LION KING (Disney 1995); KIMBA THE WHITE LION (Tezuka Productions Ltd. 1966).

In an earlier article I have argued that poor people in the developing world have always been innovative, but their novelty is often overlooked because of the trope that the poor are the wardens of ancient "traditional knowledge," while the developed world is the home of modernity and innovation.<sup>11</sup> Where that earlier article focused on novelty and invention, this Article considers originality and authorship. In this Article, I explore yet another set of stereotypes about the developing world, namely Asia, as home to imitators and not innovators, pirates and not authors. Our perceptions of originality are not neutral. In contemporary rhetoric, Western creators are romanticized as "original"<sup>12</sup> and Asians, in particular, are cast as best suited to rote imitation. In both cases, originality and piracy are explained by certain underlying cultural philosophies, histories, and traits. The final Part of this Article examines what I call the "copyright and Asian values" debate that has emerged in parallel to the "human rights and Asian values" debate earlier recognized by Amartya Sen.<sup>13</sup>

Animating this Article is an understanding of copyright in broader terms than the traditional, narrow vision of law as merely a tool for incentivizing the innovation of cultural products. Copyright is far more than that. Copyright governs the creation, distribution, and participation in culture and art, which John Dewey memorably described as "the most effective mode of communication that exists."<sup>14</sup> Critics today are appropriately questioning the narrow economic incentive thesis, exploring the plural motivations that spur creativity.<sup>15</sup> In a forthcoming book, *iP: YouTube, MySpace, Our Culture*, I argue that a copyright law focused on producing more cultural goods is not enough. The very essence of culture is sharing meaning with others and promoting mutual understanding. In this Article and elsewhere I argue that copyright scholars need to take *participation* in cultural production more seriously, focusing not just on using law to incentivize the production

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11 See Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 LAW & CONTEMP. PROBS. 95 (2007).

12 On the Romantic origins of the concept of "authorship" and the related notions of "originality" and "individualism" in Britain and Germany during the eighteenth century, see Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455.

13 Amartya Sen, *Human Rights and Asian Values*, NEW REPUBLIC, July 14-21, 1997, at 36; see discussion *infra* notes 151-53 and accompanying text.

14 JOHN DEWEY, ART AS EXPERIENCE 286 (1934).

15 See, for example, Diane Zimmerman's contribution in this volume. Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29 (2011).

of more cultural goods, but also to promote global capacity to actively participate in making our cultural world, from music to film to stories.

*Cultural pluralism* — a global culture in which all peoples have an opportunity to be creative authors of their own lives and of our world — is both an end in itself, and a means to economic development in the Knowledge Age. Cultural pluralism is an end of freedom in the sense that making and sharing meaning with others — from singing together to recounting stories — is fundamentally what human freedom is *for*. The cultural sphere of life encompasses those joys and relationships that make a human life truly worth living.<sup>16</sup> At the same time, participation in cultural production today has significant social and economic effects. Promoting recognition of diverse authors and creators of cultural works fosters dignity and respect for others: as creative intellectuals and as fellow human beings with stories worth telling. What's more, in today's Knowledge Age, substantial revenues flow from the production and control of cultural goods exchanged through global markets.

Finally, cultural pluralism promotes mutual understanding through cultural exchanges. As Dewey eloquently put it, "[t]he art characteristic of a civilization is the means for entering sympathetically into the deepest elements in the experience of remote and foreign civilizations."<sup>17</sup> Today, the arts remain central in the project of fostering mutual understanding and sympathy for others. The 2008 Academy Award winning film, *Slumdog Millionaire*,<sup>18</sup> put millions of people around the world into the shoes of three impoverished and orphaned children born in the slums of Bombay. Literature and films help convey tragedy through comedy, humanize those born on far sides of the Earth, and reveal what is common in our sentiments and aspirations. As Martha Nussbaum writes,

We do not automatically see another human being as spacious and deep, having thoughts, spiritual longings, and emotions. It is all too easy to see another person as just a body — which we might then think we can use for our ends, bad or good. It is an achievement to see a soul in that body, and this achievement is supported by poetry and

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<sup>16</sup> My vision of culture as a critically important sphere for fulfilling individual self-realization and mutual recognition echoes Hegel's more elaborate social theory set out in *Philosophy of Right*. Arguing against Kant, Hegel emphasized that individual freedom could only be realized through mutual recognition by and of others in social relations or projects. See generally AXEL HONNETH, *THE PATHOLOGIES OF INDIVIDUAL FREEDOM: HEGEL'S SOCIAL THEORY* (2001).

<sup>17</sup> DEWEY, *supra* note 14, at 332.

<sup>18</sup> *SLUMDOG MILLIONAIRE* (Warner Independent Pictures 2008).



the arts, which ask us to wonder about the inner world of that shape we see — and, too, to wonder about ourselves and our own depths.<sup>19</sup>

Martin Scorsese recounts seeing Satyajit Ray's film, *Pather Panchali*, in New York City in the early 1960s: "I was 18 or 19 years old and had grown up in a very parochial society of Italian-Americans, and yet I was deeply moved by what Ray showed of people so far from my own experience." Scorsese "was very taken by the style of these films — at first so much like the Italian neo-realist films, yet surprising the viewer with bursts of sheer poetry."<sup>20</sup> Scorsese later helped convince the Academy of Motion Picture Arts and Sciences to award Ray an honorary Oscar. The Academy finally did give Ray the honor, in 1992, just three weeks before his death at the age of 70.<sup>21</sup> Ray called the Oscar "the best achievement of my movie making career," equating it with a Nobel Prize for filmmakers. What most touched Ray, perhaps, is that audiences and critics a world apart could appreciate his films. "The most distinctive feature [of my films]," said Ray, "is that they are deeply rooted in Bengal, in Bengali culture, mannerisms, and mores. What makes them universal in appeal is that they are about human beings."<sup>22</sup>

And yet, much art today is not so transcendent. Hollywood is criticized as being all too parochial in its choice of subjects. Worse still, at the dawn of the twenty-first century, there is still too much art that demonizes rather than humanizes the other. Heroes are white and villains are black, Asian or Middle Eastern. Women are objects, not subjects, still largely seen as the ultimate trophy in a contest among male protagonists. Bollywood fares no better. Often these films depict women pure as the Goddess Sita, long-suffering and sexually objectified (wet-sari scenes are abundant).<sup>23</sup> Such problems are not limited to popular culture. Even great literature is rife with gross imbalance

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19 MARTHA C. NUSSBAUM, *NOT FOR PROFIT: WHY DEMOCRACY NEEDS THE HUMANITIES* 102 (2010).

20 ROBINSON, *supra* note 1, at 360 (quoting Scorsese).

21 See theOscarSite.com, Satyajit Ray (1921-1992), [http://theoscarsite.com/whoswho7/ray\\_s.htm](http://theoscarsite.com/whoswho7/ray_s.htm) (last visited June 14, 2010).

22 ROBINSON, *supra* note 1, at 360 (quoting Ray).

23 As the Indian actress Shabana Azmi describes, women in Bollywood films in the 1960s were often portrayed stereotypically as "the forgiving mother, the all-suffering wife, the large-hearted sister, the sacrificing wife, etc." Recently women have been cast as what Azmi calls the "two-in-one heroine," a "sultry sexy siren before marriage and then . . . the chaste wife after." Women are objectified, subjecting themselves to "the male gaze." As filmmakers emphasize "a heaving bosom, a bare midriff, a shaking hip," says Azmi, "the woman is really losing all autonomy over her whole body." TEJASWINI GANTI, *BOLLYWOOD: A GUIDEBOOK TO POPULAR HINDI CINEMA 189-90* (2004) (citing Azmi).

and, indeed, racist mischaracterizations. Margaret Mitchell's most popular romantic literary dramatization of the social ravages of the American Civil War, *Gone With the Wind*<sup>24</sup> remains one of the bestselling books of all time (by some accounts second only to the Bible). And yet that work, too, offers some of the most racist and insulting depictions of African Americans in print. In short, art can degrade, mischaracterize, colonize, and provoke misunderstanding.

This Article takes up the ways that *copyright relations*, too, can upend cultural production and further the divide between East and West, North and South, rich and poor. That is, copyright can help to promote either recognition or misrecognition of global others. Satyajit Ray, one of the greatest filmmakers of all time, reached out to Hollywood to help realize his dream of making a science fiction film. The special effects he sought in the film, though modest by American standards, put it out of reach of Indian production budgets; he needed a Hollywood partner. Yet his encounter ultimately led to disappointment. Indeed, the exploitation of Ray's copyright from the beginning of the project dissuaded him from becoming involved in the project altogether. Poor copyright relations meant Ray's film never got made. One can only speculate about what we may have lost in the process: revenues flowing East, a genre of Bollywood science fiction films, greater East/West collaboration, and perhaps even the more elusive improved East/West understanding and social relations.

There is a connection between the depiction of Indians in Hollywood films at the time, and Hollywood's treatment of Ray himself. Ironically, on Ray's visit to Hollywood in 1967, Peter Sellers invited Ray to watch him on the set, where he was playing "an Indian in a Hollywood setting" in the film, *The Party*.<sup>25</sup> Indeed, Ray had initially tapped Sellers for *The Alien*<sup>26</sup> because he had seen Sellers play an Indian before, in *The Millionairess*.<sup>27</sup> A Hollywood-financed movie would need a big name actor like Sellers to seal the deal. Sellers was keen to play a role in *The Alien*, telling Ray that a fortuneteller had told him to take the part; it was "fate." Yet Sellers evinced a great naiveté about his own role in perpetuating negative stereotypes of Indians abroad. Watching Sellers filming *The Party*, Ray began to question Sellers' judgment. As Ray recounts, he witnessed "quite the most tasteless, heavy-handed caricature of an Indian ever put on the screen."<sup>28</sup> "I was

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24 MARGARET MITCHELL, *GONE WITH THE WIND* (Pocket Books 2008) (1936).

25 *THE PARTY* (Mirisch Corporation 1968).

26 RAY, *supra* note 4.

27 *THE MILLIONAIRESS* (Dimitri De Grunwald Production 1960).

28 ROBINSON, *supra* note 1, at 291 (quoting Ray).

so disgusted that I would in any case have found it most difficult to work with him,"<sup>29</sup> Ray later said of Sellers. A year later Ray watched a screening of *The Party* while on tour in Sydney. Ray took Sellers' depiction as a personal insult. In *The Party*, Sellers plays a two-bit Bollywood actor who is mistakenly invited to an A-list Hollywood party. At the party, the Indian ogles a big-breasted blond; she takes a fancy to him and invites him home. But standing at the door of her apartment, he declines to enter.<sup>30</sup> Ray recounts the film's end: "I'm sorry," says Bakshi to the girl who has taken a fancy to him and has asked him into her flat. "I'm sorry, but I must go back to my monkey." "Monkey!" "Yes. My pet monkey, Apu."<sup>31</sup> Ray believed the name of the monkey, Apu, was not mere coincidence (Ray's celebrated *troika* of films chronicling the life of one boy, beginning with *Pather Panchali*,<sup>32</sup> is called *The Apu Trilogy*). His Hollywood experience, Ray later wrote in a letter, was "the beginning of a period of profound uneasiness . . . I was too *deeply* disturbed, and for another — I was in a strange sort of way *fascinated* by the sinister turn of events and waited to see which way and how far it would go."<sup>33</sup>

In the Parts that follow, I begin to consider the dynamics of global cultural borrowing and appropriation that take place against a backdrop of sharp inequalities in power, knowledge, and social status. In particular, I consider the role that cultural stereotypes — of romantic authors in the West, and slavish imitators in Asia — play in masking both exploitation and originality.

## II. HOLLYWOOD

Let us first consider the classic case of the romantic author: Disney. Disney's mega-hit animated film, *The Lion King*,<sup>34</sup> has earned over a billion dollars thus far and is one of the most beloved animated films in the Disney canon. *The Lion King* musical won several Tony awards and is one of the longest running shows on Broadway. What is far less known, however, is that the film has been beset by allegations of piracy from global creators. Recently Disney paid a hefty settlement to the heirs of Solomon Linda, the late South African musician who composed the film's main musical hit, "The Lion

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29 *Id.*

30 THE PARTY, *supra* note 25

31 Ray, *supra* note 2.

32 PATHER PANCHALI, *supra* note 3.

33 ROBINSON, *supra* note 1, at 294 (quoting Ray).

34 THE LION KING, *supra* note 10.

Sleeps Tonight" (originally titled "Mbube") in 1939. Linda and his family received virtually nothing for the song until a *Rolling Stone* journalist revealed the song's origins in 2000, together with the sordid history of exploitation of Linda's copyright across the "Black Atlantic," from Africa to the United Kingdom, to the United States.<sup>35</sup>

But charges of plagiarism had been leveled at Disney well before the Linda family's suit emanating from a different part of the world. On the heels of the film's release in 1994, well-known Japanese *manga* (comic) artists and fans organized public protests against *The Lion King* because it bore a striking resemblance to the popular television series *Kimba the White Lion*<sup>36</sup> by the master Japanese animator Osamu Tezuka.<sup>37</sup> Tezuka has long been hailed as the father of Japanese anime and the "Walt Disney of Japan." His well-known anime series, *Kimba the White Lion*, based on his *manga* serial *Jungle Emperor*<sup>38</sup> of the early 1950s, aired as the first color animated television series in Japan in the early 1960s and circulated widely among animation buffs internationally. English and Spanish versions of the series were created in 1966, and *Kimba the White Lion* aired as a syndicated program by NBC in the United States for more than a decade.<sup>39</sup> (Other Japanese anime programs on American television at that time include *Speed Racer* and Tezuka's own *Astro Boy*, which aired prime-time on NBC.<sup>40</sup>) Tezuka reportedly spent a year researching Africa before penning *The Jungle Emperor*, which he considered his crowning achievement.<sup>41</sup> As one scholar writes, "There is not a single Japanese who does not know Tezuka and *Jungle Emperor*."<sup>42</sup> Tezuka's own admiration for Disney had been great, so much so

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35 See Sharon LaFraniere, *In the Jungle, the Unjust Jungle, a Small Victory*, N.Y. TIMES, Mar. 22, 2006, at A6. See generally RIAN MALAN, *IN THE JUNGLE* 3 (2003).

36 KIMBA THE WHITE LION, *supra* note 10.

37 The San Francisco Chronicle broke the story. See Charles Burrell, *Uproar Over "The Lion King," Disney Film Similar to Work From Japan*, S.F. CHRONICLE, July 11, 1994, at A1; see also Robert W. Welkos, *A "Kimba" Surprise for Disney*, L.A. TIMES, July 13, 1994, at F1.

38 JUNGLE EMPEROR (Tezuka Productions Ltd. 1997).

39 See Fred Patten, *Simba Versus Kimba: The Pride of Lions*, in THE ILLUSION OF LIFE 2: MORE ESSAYS ON ANIMATION 275, 285-89 (Alan Cholodenko ed., 2007); Shinobu Price, *Cartoons from Another Planet: Japanese Animation as Cross-Cultural Communication*, 24 J. AM. & COMP. CULTURES 153, 162 (2001).

40 Sean Leonard, *Progress Against the Law: Anime and Fandom, With the Key to the Globalization of Culture*, 8 INT'L J. CULTURAL STUD. 281, 284-85 (2005).

41 Yasue Kuwahara, *Japanese Culture and Popular Consciousness: Disney's The Lion King vs. Tezuka's Jungle Emperor*, 31 J. POPULAR CULTURE 37, 41 (2010).

42 *Id.*

that upon hearing of the allegations that *The Lion King* copied from Tezuka, the President of Tezuka Productions said the revered Japanese artist would have been flattered if that were the case.<sup>43</sup> (Tezuka died in 1989, before *The Lion King* was made.)

Devotees of Tezuka are less sanguine about the similarities, which are abundant:<sup>44</sup>

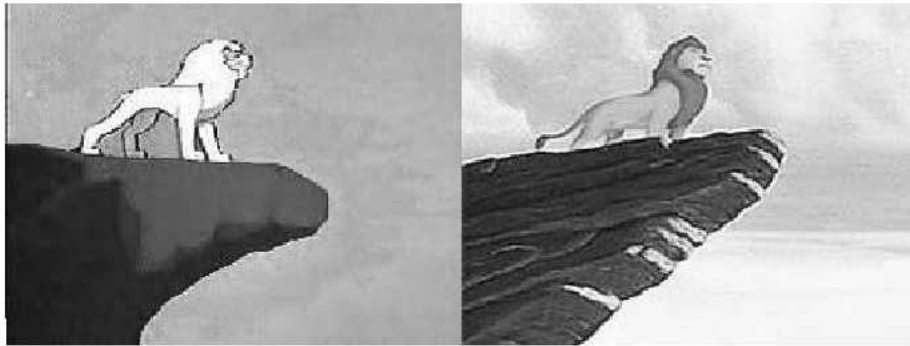
- The basic story plot and setting are the same: an African emperor lion dies early, leaving a young cub. The son struggles with himself over his responsibilities to lead the animal kingdom. The son eventually returns from exile and overthrows the evil lion who has usurped power in the son's absence;
- Nearly every animal character in *Kimba the White Lion* has an analogue in *The Lion King*. For example, in both versions a baboon serves as an old sage, the henchmen for the evil lion are hyenas, and the hero lion's advisor is a parrot;
- The evil lion in *Jungle Emperor*, "Claw," is blind in one eye; the evil lion in *The Lion King*, "Scar," has a scarred eye;
- In both stories the lion cub doubts his ability to lead his people and his father comes to him in a vision in the moon to embolden him;
- The names of the leading lion cubs are similar — Kimba and Simba;
- Both lion cubs eventually grow up and mate with their childhood playmate, a lioness cub;
- The setting of the film and the television series is similar, a rocky terrain, not the more common desert habitat that lions roam;
- Both Kimba and Simba become vegetarian and eat insects to help save the other animals;
- A stampede scene during the lion cubs' early years is a pivotal moment in the cubs' lives;
- In both the TV series and the later film, a lightning bolt starts a forest fire and rain puts it out;

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<sup>43</sup> See Burrell, *supra* note 37, at A1 (quoting the president of Tezuka Productions: "If Disney took hints from 'The Jungle Emperor,' our founder, the late Osamu Tezuka, would be very pleased by it. Rather than filing a claim, we would be very happy to know that Disney people saw Tezuka's work. On the whole, we think 'Lion King' is absolutely different from 'Jungle Emperor' and is Disney's original work.").

<sup>44</sup> For a fuller comparison, see Patten, *supra* note 39, at 291-96.

- Most importantly, there are several scenes of nearly identical cinematic and artistic expression in the films (see below).<sup>45</sup>

Drawing from *Kimba the White Lion*Drawing from *The Lion King*

The similarities even inspired a *Simpsons* parody of *The Lion King*'s Mufasa, which appears in a cloud and says to Lisa "You must avenge my Death Kimba . . . I mean Simba!"<sup>46</sup>

To be sure, there are differences between the *Kimba* series and *The Lion King*, as well. Most notably, humans played a significant role in the *Kimba* story, which considered the benefits of human civilization over the law of the jungle. Indeed, just as Ray's original *The Alien* was inspired by the Bengal famine of 1943, *Jungle Emperor*, too, had a particularly local focus on the costs and benefits to Japan of modernization and Westernization. *The Lion King*, in contrast, has no humans or similar themes. Nonetheless, observers call the similarities "striking."<sup>47</sup> The *San Francisco Chronicle* reported that Tezuka Productions had "received calls of congratulations from several people who assumed the firm had licensed the project to Disney."<sup>48</sup> In 1994, Machiko Satonaka, a well-known Japanese comic artist, published an open letter signed by 200 Japanese animation artists in a major Japanese daily publicizing the allegations, writing that "[s]imilarities between *The Lion King* and *Jungle Emperor* cannot be dismissed as mere coincidence," and that as Japanese who respect Walt Disney, they were "saddened by such

<sup>45</sup> A general search on YouTube reveals dozens of comparisons of *The Lion King* and *Kimba the White Lion*.

<sup>46</sup> *The Simpsons: Round Springfield* (Fox Apr. 30, 1995).

<sup>47</sup> See Burrell, *supra* note 37, at A1.

<sup>48</sup> *Id.*

similarities.<sup>49</sup> To the outrage of Tezuka fans, Disney not only denied lifting any of the plot or characters from *The Jungle Emperor* or *Kimba*, but went even further, claiming not to have even heard of Tezuka or *Kimba the White Lion*. "Frankly, I'm not familiar with (the TV series)" stated Rob Minkoff, co-director of *The Lion King* with Roger Allers, in response to the allegations.<sup>50</sup> Fans in Japan and the U.S. were angry, not at Disney's being inspired by Tezuka's work, but by Disney's failure to acknowledge Tezuka and his influence. To make matters worse, *The Lion King* was billed as the first Disney animated feature to be an *original* story.<sup>51</sup> Former Disney studio chair (now CEO of Dreamworks Animation), Jeffrey Katzenberg, called the film Disney's "first cartoon feature not based on a fable or a literary work."<sup>52</sup> The film's creators say the story was inspired by Joseph and Moses in the Bible and Shakespeare's *Hamlet*.<sup>53</sup>

Animation experts and historians have argued that Disney's claim of ignorance of Tezuka is likely disingenuous, given the prevalence of the master animator's work in the U.S. from the late 1960s on and the frequency of Disney's own executives' travel to Japan, including to Tokyo Disneyland.<sup>54</sup> *The Lion King*'s co-director Roger Allers himself lived in and worked in animation in Tokyo in the 1980s, during which time Tezuka was alive and already well known as "Japan's Walt Disney." A remake of *Jungle Emperor* aired prime-time on Japanese television contemporaneously.<sup>55</sup> In the alternative, some argue that Disney's purported ignorance of Tezuka at the very least undermines its claims of superior knowledge of all things animation.<sup>56</sup> Anime fan and historian Fred Patten concludes that at least some people working on *The Lion King* knew about *Kimba the White Lion*.<sup>57</sup> Patten surmises that these animators either subconsciously copied, or paid silent homage to Tezuka's work with in-group references to it in *The Lion King*.<sup>58</sup>

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49 See Kuwahara, *supra* note 41, at 45 ("[A] majority of published opinions supported the protest.").

50 Welkos, *supra* note 37, at F1.

51 See Burrell, *supra* note 37, at A1 ("Disney has promoted the film as its first cartoon feature since 1970 not taken from an existing story.").

52 Richard Corliss & Jeffrey Rensner, *The Mouse Roars*, TIME, June 20, 1994, at 58, 59 (quoting Katzenberg).

53 DVD: *The Lion King: Platinum Edition* (Disc 2) (Walt Disney Productions 2003).

54 See, e.g., Patten, *supra* note 39, at 298-99.

55 *Id.* at 299.

56 *Id.* at 303.

57 *Id.* at 310.

58 *Id.* at 306.

Few stories of artistic inspiration and cultural appropriation are simple or unidirectional. Tezuka, who died in 1989 at the age of 60, met Walt Disney and describes his own artistic debt to Disney in his autobiography. Tezuka describes the arrival of *Bambi*<sup>59</sup> to Japan after World War II, and admits traveling from Osaka to Tokyo and staying in a hotel near the theater so he could see *Bambi* "over one hundred times."<sup>60</sup> Subsequently Tezuka licensed the rights to Disney's *Bambi* to make his own adaptation. At a comics festival in Los Angeles in 1978, Tezuka described *Jungle Emperor* as both homage and a critique of *Bambi*, which Tezuka believed did not sufficiently consider the possibility of mutual recognition between animals and humans.<sup>61</sup> Perhaps, then, similarities between *Kimba the White Lion* and *The Lion King* derive from their both being based on Disney's own *Bambi*<sup>62</sup> (hence the similarities to Tezuka's work may reflect the "circle of creativity"). Two or more original works may have much in common because each borrows from the same works in the public domain. In this case, both *Kimba the White Lion* and *The Lion King* have their source in *Bambi*, common folktales and the story of *Hamlet*. In short: as elsewhere, the search for authorship may resemble a vain "search for the source of the Nile and all its tributaries."<sup>63</sup>

Notably, in all three cases — *The Alien*, *Kimba the White Lion*, and *The Lion Sleeps Tonight* — new works in the U.S. appear to have been derived not from the work of unknown foreign artists, but of great masters: Ray, Tezuka, and Linda, respectively. Ray was already an internationally recognized and award-winning film director by the time he made the acquaintance of Hollywood. Tezuka, the creator of yet another well-known anime classic,

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59 BAMB I (Walt Disney Productions 1942).

60 Kuwahara, *supra* note 41, at 42.

61 See Patten, *supra* note 39, at 281.

62 Matthew Roth, *Man Is in the Forest: Humans and Nature in Bambi and The Lion King*, 9 INVISIBLE CULTURE (2005), [http://www.rochester.edu/in\\_visible\\_culture/Issue\\_9/issue9\\_roth.pdf](http://www.rochester.edu/in_visible_culture/Issue_9/issue9_roth.pdf). Roth recounts:

[T]he similarities [between *Bambi* and *The Lion King*] are numerous. Both films are inhabited entirely by animals: humans, though consequential, are on the periphery of *Bambi*; there is no indication of humans in *The Lion King*. Pride Rock, the *Lion King*'s "throne" overlooking the Pridelands, is a rocky ledge that resembles the outcropping that *Bambi*'s father stands on. A parent dies in both movies, though it is a father in *The Lion King*. Simba, the hero of *The Lion King*, has an adult romance with a childhood friend. Finally, both stories climax with a threatening pack of predators (dogs or hyenas), a fire, and the ultimate triumph over physical danger.

63 *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 540 U.S. 806, 812 (2003).



*Astro Boy* (recently remade by Hollywood in 2009), created Japan's first television animation studio in 1961<sup>64</sup> and is often referred to as the "Godfather of Anime" and "Japan's Walt Disney." Having created more than 70 titles and drawn more than 150,000 pages during his lifetime, Tezuka was the subject of a retrospective at the San Francisco Asian Art Museum in 2007 (the first ever such exhibit outside of Japan), titled "Tezuka: The Marvel of Manga."<sup>65</sup> Linda's original composition, "Mbube," was recorded and became Africa's first pop hit.<sup>66</sup>

These stories resemble Italian director Sergio Leone's taking in broad daylight of the copyrighted work of Japanese filmmaker Akira Kurosawa, another great auteur of the Twentieth Century (Kurosawa, too, received an Oscar for lifetime achievement).<sup>67</sup> Kurosawa's films document well the mutual influence of global artists. Kurosawa himself was highly influenced by the American Westerns of John Ford, as well as the literature of Shakespeare and Dostoevsky. In offering his own perspective on the Western in films like *Seven Samurai* and *Yojimbo*, Kurosawa transformed the genre. Indeed, Yul Brynner, who stars in the Hollywood adaptation of *Seven Samurai*,<sup>68</sup> *The Magnificent Seven*,<sup>69</sup> has called *Seven Samurai* "one of the great Westerns of all time, only it was made by the Japanese, in the Japanese medium."<sup>70</sup> Many sought permission to remake Kurosawa's works, but when Leone copied *Yojimbo*<sup>71</sup> and remade it as *A Fistful of Dollars*<sup>72</sup> without permission, Kurosawa protested. In a letter to Leone, Kurosawa wrote of *A Fistful of Dollars*, "It is a very fine film, but it is my film. Since Japan is a signatory of the Berne Convention on international copyright, you must pay me." An out-of-court settlement determined Kurosawa would receive 15 percent of *Fistful's* worldwide receipts, with a guarantee of around \$100,000.<sup>73</sup>

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64 Patten, *supra* note 39, at 277.

65 Michael J. Ybarra, *Anime Instinct; Osamu Tezuka Has Been Called Japan's Walt Disney. But His Drawings Aren't Happy Fantasies*, L.A. TIMES, June 6, 2007, at A2.

66 Michelle Faul, 'Lion Sleeps Tonight' Deal Likely to Boost Poor Musicians, CHI. TRIB., Mar. 23, 2006, at 14.

67 Rick Lyman, *Akira Kurosawa, Film Director, Is Dead at 88*, N.Y. TIMES, Sept. 7, 1998, at A1.

68 SEVEN SAMURAI (Toho Company 1954).

69 THE MAGNIFICENT SEVEN (Mirisch Corporation 1960).

70 See video interview with Yul Brynner in *Akira Kurosawa: Influences and Influence Part I*, YOUTUBE (May 26, 2007), [http://www.youtube.com/watch?v=G1STFM39vJ4&feature=PlayList&p=A8AF545CE1F135&playnext\\_from=PL&playnext=1&index=31](http://www.youtube.com/watch?v=G1STFM39vJ4&feature=PlayList&p=A8AF545CE1F135&playnext_from=PL&playnext=1&index=31).

71 YOJIMBO (Kurosawa Production Co. 1961).

72 A FISTFUL OF DOLLARS (Constantin Film Produktion 1964).

73 See John Tottenham, *Yojimbo, A Fistful of Dollars: A Spaghetti-Western Classic*

Ironically, the reworking of the American Western by a Japanese director not only recast the Western itself, but also inspired the creation of another genre, the "Spaghetti Western," for which Leone is most well-known. Furthermore, it was through remakes such as *The Magnificent Seven* and *A Fistful of Dollars*, which became iconic films themselves, that stars were made, from Steve McQueen to Clint Eastwood, both of whom became icons of American manliness.

In the next Part I will recount charges that Bollywood has appropriated Hollywood hits in broad daylight — what one observer wryly describes as "(re)making hay while the sun shines!"<sup>74</sup> But examples of allegations against Hollywood for similar activity are less familiar. I began with these to pose a question: what about our conceptions of originality and romantic authorship leads us to more easily view some cultures as creative and original, and others as appropriators and copiers? Disney has long been the epitome of the romantic author: a wholly "original" genius. But in fact, the world's most famous copyright owner has often made its fortune by mining the works of past creators that have passed into the public domain. "There would hardly be a Disney at all if not for the works by Rudyard Kipling, H.C. Andersen, Victor Hugo, and Robert Louis Stevenson, all of whom make it possible for Disney to make animated features of wolf-boys, mermaids, hunchbacks, and Long John Silver," Eva Hemmungs Wirtén reminds us. Wirtén criticizes Disney's hypocrisy for benefiting from iconic works that quickly fell into the public domain under old copyright laws with short copyright terms, while holding its own works tightly and nearly into perpetuity. If current law had governed when Disney made *The Jungle Book*,<sup>75</sup> the corporation would have had to either wait another forty years before releasing the film or negotiate permission from Kipling's heirs.<sup>76</sup>

My point is not that Disney erred in producing new works based on the old. To the contrary, this is a natural part of the creative process and should be encouraged. There are vast benefits for all cultures to be gained by enabling individuals in the present to be able to interact with culture of the past. These benefits range from fostering historical communities with shared

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*and Its Samurai Inspiration Return to the Big Screen*, L.A. WKLY. Mar. 6, 2008, available at <http://www.laweekly.com/2008-03-06/film-tv/men-with-no-names/>.

74 Vikramdeep Johal, *Bollywood Bhelpuri: Plagiarism as an Art-Form*, TRIBUNE, Nov. 8, 1998, available at <http://www.tribuneindia.com/1998/98nov08/sunday/bollywood.htm>.

75 THE JUNGLE BOOK (Walt Disney Productions 1967).

76 EVA HEMMUNGS WIRTÉN, TERMS OF USE: NEGOTIATING THE JUNGLE OF THE INTELLECTUAL COMMONS 120-22 (2008).

values, to allowing current generations to critically rethink the normative values of the past. At the same time, we ought to reconsider biases in our understanding that lead us to more readily recognize some creators as original thinkers and others as slavish imitators. Walt Disney and the Disney Corporation have been romantically embraced as epitomizing creativity and originality. Yet some have accused Disney of plagiarism, not of works in the public domain, but of foreign copyrighted work. Furthermore, we ought to pause and consider how cultural stereotypes may lead copyright law to misrecognize altogether some "foreign" authors (here Tezuka, Ray, and Linda) whose contributions to world culture are more readily ignored — or at least not granted attribution, not to mention royalties.

How do differences in power and knowledge affect people's willingness to share culture? Global inequalities render some more vulnerable to exploitation of their rights. Fear of exploitation may discourage people from sharing and distributing their knowledge, be it music and literature or local knowledge of the medicinal properties of plants. The University of California, Berkeley historian of science Abena Dove Osseo-Asare documents how holders of traditional medicine in Ghana, for example, have kept that knowledge close for fear of being exploited.<sup>77</sup> Though these studies focus on patents, modern global copyright law, too, must confront this reality of difference in the world and explore creative legal tools that would incentivize people to share across cultures, class divides, and colonial histories. Promoting fairness among global creators makes for good innovation policy, fosters free speech, and promotes better cultural and social relations. Modern intellectual property law ought to be attentive to crafting rules that promote the ethical extraction of knowledge. This is of utmost importance in our global Knowledge Economy: today both economic and human development increasingly are linked to fair cultural exchanges in global markets.

Considerations of global justice and fairness may shed light on our traditional understanding of incentives themselves within copyright law. We have come to believe that property rights in intellectual creations are there simply because they incentivize creative activity. But there is an older understanding that flows out of notions of unfair competition and more visceral feelings of justice. It is now commonplace that in fact

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<sup>77</sup> Abena Dove Osseo-Asare, "Bioprospecting and Resistance: A View from West Africa," Remarks at A2K2 Conference, Yale Law School (Apr. 28, 2007). See generally Abena Dove Osseo-Asare, *Bioprospecting and Resistance: Transforming Poisoned Arrows into Strophanthin Pills in Colonial Gold Coast, 1885-1922*, 21 SOC. HIST. MED. 269 (2008).

people create without exclusive property rights — as evidenced by open source software, fan fiction, and user-created mash-ups. But behavioral economists have identified a natural sense of justice that may lead people to "irrational" decisions if they feel that they are being treated unfairly.<sup>78</sup> Even the premise of the "intellectual property as incentives" thesis can be understood as responding to the "vulnerability" of the creator in the absence of intellectual property rights, given the often high costs of production and the typically low costs of copying.<sup>79</sup> Today studies show it is not necessarily true that individuals will not create without incentives; but it may well be the case that creators will not innovate or share if continually treated unjustly in an unregulated marketplace.

The next Part examines some of the dynamics of cultural borrowing in the other direction, from Hollywood to Bollywood. Stereotypes of Asian "pirates" permeate; Bollywood is plagued with a reputation for mimicry, not creativity. But in the next Part I consider whether the claims of piracy are not sometimes overblown. Furthermore, I suggest that global borrowing by Bollywood from Hollywood must be understood in the context of cultural hegemony and resistance.

### III. BOLLYWOOD

Bollywood is the world's largest film industry<sup>80</sup> and Bollywood films are "the most-seen movies in the world."<sup>81</sup> Some 1,000 films are produced annually in Bombay and other major film centers in India; Bollywood films enthrall moviegoers not only all over India and among the Indian Diaspora, but also "in such unlikely places as Russia, China, the Middle East, the Far East, Egypt,

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78 Daniel Kahneman et al., *Fairness and the Assumptions of Economics*, 59 J. BUS., at S285, S299 (1986) ("A realistic description of transactors should include the following traits. (1) They care about being treated fairly and treating others fairly. (2) They are willing to resist unfair firms even at a positive cost. (3) They have systematic implicit rules that specify which actions of firms are considered unfair.").

79 See, e.g., Seana Valentine Shiffrin, *Intellectual Property*, in A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 653, 661 (Robert Goodin et al. eds., 2007) ("[O]nce a work is created . . . it is often relatively easy and inexpensive for others to copy and use the work. This makes it easy for competitors (and consumers) to 'steal' a work and undercut the creator's price. This *vulnerability* may deter creators from generating intellectual works.") (emphasis added).

80 Priti H. Doshi, *Copyright Problems in India Affecting Hollywood and "Bollywood,"* 26 SUFFOLK TRANSNAT'L L. REV. 295, 314 (2003).

81 NASREEN MUNNI KABIR, *BOLLYWOOD: THE INDIAN CINEMA STORY* 1 (2001).

Turkey, and Africa."<sup>82</sup> The industry earns more than \$2 billion annually.<sup>83</sup> Handsome dancing heroes like Amitabh Bachchan and Shahrukh Kahn and Ms. Universe-worthy starlets from Aishwarya Rai Bachchan ("the world's most beautiful woman"<sup>84</sup>) to Madhuri Dixit shake their hips and entertain literally billions. In 2001 when U.S. troops drove the Taliban out of Kabul after the September 11 attacks, the first film to play in that city was a Bollywood epic.<sup>85</sup>

Cinema was born in India in what was then Bombay roughly contemporaneously with its birth in other parts of the world. In 1896 the first "cinematographe" show premiered on the Indian subcontinent at the Watson's Hotel in Bombay, just three months after a premier in Paris. "The marvel of the century" proclaimed the *Times of India*.<sup>86</sup> But only British elites attended the premiere, as the hotel barred Indians. Shows were screened to Indians a week later at the Novelty Theatre in Bombay. Later, Bombay also became the site of one of the first films made in India. Bombay's position as a gateway for commerce and trade created by the British East India Company made it a natural portal for the reception of film technology. The city's own access to capital and a vibrant creative culture of theater groups and writers made it fertile ground for the eventual development of a full-fledged indigenous film industry,<sup>87</sup> now oft-referred to as "Bollywood," a moniker that the city has retained though the city has now shed its British name in favor of the indigenous "Mumbai".

The visionary idea of an indigenous, Indian film industry came from the early and influential film pioneer, Dhundiraj Govind Phalke. In 1910 he watched the film, *Life of Christ*, in a Bombay theater and had a transformative experience. "While the life of Christ was rolling before my physical eyes, I was mentally visualizing the Gods, Shri Krishna, Shri Ramachandra, their Gokul and Ayodhya," Phalke recounts, continuing: "I was gripped by a strange spell. I bought another ticket and saw the film again. This time I

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82 *Id.*

83 In contrast, Hollywood rakes in more than \$50 billion annually. Susan P. Crawford, *The Biology of the Broadcast Flag*, 25 HASTINGS COMM. & ENT. L.J. 603, 652 n.4 (2003) ("By 2006, movie theater admissions and the movie aftermarket (DVD sales, rentals, TV) will be generating more than \$50 billion in North America, according to PricewaterhouseCoopers.").

84 *60 Minutes* (CBS News Dec. 29, 2004).

85 Manjeet Kripalani, *Bollywood: Can New Money Create a World-Class Film Industry in India?*, BUS. WK., Dec. 2, 2002, available at [http://www.businessweek.com/magazine/content/02\\_48/b3810013.htm](http://www.businessweek.com/magazine/content/02_48/b3810013.htm).

86 GANTI, *supra* note 23, at 6.

87 *Id.* at 7-8 (quoting Phalke).

felt my imagination taking shape on the screen. Could this really happen? Could we, the sons of India, ever be able to see Indian images on the screen?"<sup>88</sup> Phalke openly linked the creation and sustenance of an indigenous film industry with nationalism and self-determination. Home Rule depended on Indian support of this industry, Phalke said.<sup>89</sup> In 1913 his first film, *Raja Harishchandra*,<sup>90</sup> debuted in Bombay. The story was based on the Indian epic poem, the *Mahabharata*, and the film was advertized as "the first film of Indian manufacture."<sup>91</sup> The film was silent; sound and music did not arrive to the Indian cinema until 1931. But its focus on Indian stories by Indians had a profound and lasting influence.

The organization and structure of the Indian film industry in Bombay is distinct from the mega production studios in Hollywood. Unlike Hollywood, where big motion picture studios finance everything from production to film distribution, Bollywood is a fragmented industry. Independent entrepreneurs finance Bollywood films, while still others pay for the rights to distribute and exhibit the films. During World War II, illicit war profiteers looking to invest their black market fortunes began an unholy alliance between the underworld and Bollywood. Mobsters still serve as a significant source of the financing for Bollywood films (although this is decreasing now), creating instability and violence. Mob influence affects the artistic content of the films. Some consider Bollywood's inclination to remake Hollywood hits — rather than experiment with original stories — to be a direct result of mafia pressure for sure-fire hits.<sup>92</sup>

On paper, Indian copyright law is not much different from the law of Western countries. Indian copyright law traces its origins to the British Empire. The first copyright laws developed in India under British rule substantially paralleled Britain's copyright law of 1911. India's first copyright act after Independence, the Copyright Act of 1957, retained many of the prior provisions. India's most recent amendment to its Copyright Act in 1999<sup>93</sup> brought the law in line with the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs).<sup>94</sup> Despite the laws on the books, however, the lack of enforcement of copyright laws is a continuing complaint

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88 *Id.* at 9.

89 *Id.*

90 RAJA HARISHCHANDRA (Phalke Films 1913).

91 GANTI, *supra* note 23, at 10.

92 See 1 SUSHIL ARORA, CYCLOPAEDIA OF INDIAN CINEMA (2004).

93 Copyright (Amendment) Act, 1999, No. 49, Acts of Parliament 1999.

94 Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 1197, 1869 U.N.T.S. 299.

and source of strains on India's trade relationship with the U.S.; the U.S. has placed India on the Section 301 "watch list" for lax enforcement of copyright.

For its own part, Bollywood appears to be of two minds about copyright. On the one hand, Bollywood filmmakers call upon copyright law to protect against video piracy. Pirated DVDs of Bollywood films are freely available in India and abroad, including the U.S., with some estimating losses to the industry at upwards of \$80 million a year.<sup>95</sup> With the advent of cable television, pirated copies of films were shown on television, sometimes on the very day the films were released in the movie halls. Still, enforcement of copyright claims is lax because such claims remain a low priority for the police and the courts.<sup>96</sup>

In contrast to Bollywood's stance against video piracy, many charge that the industry has not been respectful of the copyright claims of artists within the industry and without. Actors, directors, and writers frequently work without any written contracts. Scripts are few and far between, and directors develop films on the fly. Musicians have been particularly vocal about the unjust appropriation of their work. One Bollywood director, when scolded for copying in the industry and asked, "Where is your artistic skill?" replies, "My skill is knowing what to steal."<sup>97</sup>

In recent years, since 2000 when the Indian government granted industry status to Bollywood, filmmakers have been able to seek more secure sources of funding, from banks, foreign investors, and India's own corporate titans such as the \$8 billion Tata Group and the \$13 billion Reliance Industries. Earlier this year Indian billionaire Anil Ambani of Reliance Industries invested some \$825 million in Steven Spielberg's DreamWorks SKG Studios.<sup>98</sup> This money flowed to the U.S., but it illustrates the availability of significant investment capital in India. Some are hopeful that the huge sums now available within India for investment in Bollywood could potentially transform the Indian film industry. Recall, for example, that Ray initially reached out to Hollywood because he lacked the technology and funds necessary to make a successful science-fiction film — indeed, Indians have

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<sup>95</sup> Kripalani, *supra* note 85, at 2. An Indian film industry official estimated that the industry loses about \$360 million annually from piracy, Doshi, *supra* note 83, at 297.

<sup>96</sup> Doshi, *supra* note 80, at 307-10.

<sup>97</sup> Emily Wax, *Paying the Price for Hollywood Remakes: Bollywood Facing Copyright Lawsuits*, WASH. POST, Apr. 26, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/25/AR2009082503104.html>.

<sup>98</sup> *Id.*

continued to avoid this genre of films and others, including animation, for the same reasons. New sources of funding offer new creative opportunities.

Major Hollywood studios, including Warner Bros., Sony Pictures, 20th Century Fox and Disney, are also now investing in Bollywood films. This comes as no surprise — Hollywood has long sought, albeit unsuccessfully, to tap into India's vast film market, where movies sit alongside cricket as a national pastime. Strikingly, Hollywood, which controls a whopping 80-90 percent of the European film market, has failed to penetrate the Indian market with its own films. Hollywood films make up only 10 percent of the Indian film market.<sup>99</sup> This surprisingly low level of penetration is the result of neither quotas nor nationalist censor boards. Hollywood films simply do not seem to appeal to Indian moviegoers. Hollywood films released in India with straight-up dubbing have flopped.<sup>100</sup> As one Bollywood director puts it, "Hollywood films are considered 'dry' here."<sup>101</sup>

Hollywood's new strategy? Invest in Bollywood films instead. This year Warner Bros. released *Chandni Chowk to China*,<sup>102</sup> only the third Bollywood/Hollywood collaboration in history. But this film too, starring Bollywood megastar Akshay Kumar, was a box office flop. A comedy about an Indian vegetable seller from New Delhi's Chandni Chowk neighborhood who ends up in China (Hollywood's ambition appeared to be to tap two of the world's largest movie-going markets with this one film!),<sup>103</sup> the film fell far short of investor expectations.<sup>104</sup>

Hollywood executives recognize that Indian movie audiences are growing quickly; indeed, before the recent global economic downturn, Indian domestic box office returns were growing at a rate of 15 percent, compared to a 2 percent growth rate in the U.S. during the same period.<sup>105</sup> One result of such new alliances, of course, is that more Bollywood profits will now flow back to the West rather than remain at home. Another result of American alliances is increased pressure on Bollywood to clean up its act with respect

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99 See Tyler Cowen, *Why Hollywood Rules the World, and Whether We Should Care*, in THE GLOBALIZATION READER 335, 336 (Frank J. Lechner & John Boli eds., 2008).

100 Hindi-language films produced by Warner Bros. and Disney have "bombed at the Indian box office." See Rama Lakshmi, *Bollywood, Hollywood Tightening Ties*, OVERSEAS INDIAN, Mar. 7, 2010, <http://www.overseasindian.in/2009/mar/news/20091003-045918.shtml>.

101 GANTI, *supra* note 23, at 182-83 (quoting Bollywood art director Sharmishta Roy).

102 CHANDNI CHOWK TO CHINA (Warner Bros. Pictures 2009).

103 Joe Leahy, *Bollywood Dreams On*, FIN. TIMES, May 28, 2009, at 38, 39.

104 See rediff.com, *Chandni Chowk to China Is a Disaster* (Jan. 19, 2009), <http://specials.rediff.com/movies/2009/jan/19box.htm>.

105 Leahy, *supra* note 103, at 40.



to copyright. Hollywood began paying close attention to Bollywood several years ago, with the success of Mira Nair's *Monsoon Wedding*<sup>106</sup> and Aamir Khan's *Lagaan*,<sup>107</sup> which was nominated for an Oscar for Best Foreign Film in 2002. The attention has not all been positive, as Hollywood directors soon realized that Bollywood has been appropriating ideas from Hollywood in their own films. Bollywood adaptations include *Daraar*<sup>108</sup> (similar to *Sleeping with the Enemy*<sup>109</sup>), *Akele Hum Akele Tum*<sup>110</sup> (resembling *Kramer vs. Kramer*<sup>111</sup>), *Chachi 420*<sup>112</sup> and *Aunty No. 1*<sup>113</sup> (both similar to *Mrs. Doubtfire*), and *Ghajini*<sup>114</sup> (homage to *Memento*<sup>115</sup>). But these resemblances do not always violate copyright. Indian copyright law, like copyright law everywhere, protects original expression but not ideas. Directors of Indian films based on Hollywood hits claim their films are "inspired" by the ideas in the Hollywood films, but that their own expression of the idea is unique. The film *Chachi 420*, for example, is similar to *Mrs. Doubtfire* only in plot (an estranged father dresses as a nanny to spend more time with his child), but no original expression is taken from the Hollywood film. Says Bollywood director Subhash Ghai: "There are only 36 plots in the world drama, and you can make 36,000 stories out of those. So stories don't change; science changes, times change and values change."<sup>116</sup>

The critical and box office success of *Slumdog Millionaire*, in particular, has piqued Hollywood's interest in Bollywood once more.<sup>117</sup> Though *Slumdog Millionaire* was not technically a Bollywood movie (the film's producers and director, Danny Boyle, are British), it succeeded internationally by employing typical Bollywood themes of urban poverty and corruption, with Indian actors, Bollywood-style melodrama, and stop-action dance numbers to the music of acclaimed Bollywood musical director A.R. Rahman. Again, however, the attention has meant a spate of copyright

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106 MONSOON WEDDING (IFC Productions 2001).

107 LAGAAN (Aamir Khan Productions 2001).

108 DARAAR (Shree Shiv Bhakti Films 1996).

109 SLEEPING WITH THE ENEMY (20th Century Fox Film Corporation 1991).

110 AKELE HUM AKELE TUM (United Seven Combines 1995).

111 KRAMER VS. KRAMER (Columbia Pictures 1979).

112 CHACHI 420 (Eros Entertainment 1997).

113 AUNTY NO. 1 (Lata Films 1998).

114 GHAJINI (Gita Arts 2008).

115 MOMENTO (Newmarket Capital Group 2000).

116 GANTI, *supra* note 23, at 182-83.

117 Nandini Lakshman, *Slumdog Oscars Boost India Film Industry*, BUS. WK., Feb. 23, 2009, available at [http://www.businessweek.com/globalbiz/content/feb2009/gb20090223\\_810139.htm](http://www.businessweek.com/globalbiz/content/feb2009/gb20090223_810139.htm).

claims by Hollywood against Bollywood. Recently Hollywood ran ads in the *Times of India* newspaper warning Bollywood not to go through with a rumored Indian version of *The Curious Case of Benjamin Button*.<sup>118</sup> The actual similarities between the recently released Bollywood film, *Paa*, and *Benjamin Button* are trivial.<sup>119</sup> The film *Benjamin Button* is adapted from a 1922 short story of the same name written by F. Scott Fitzgerald, which tells the story of a man who ages backward. *Paa*, in contrast, is a literal story of a boy with progeria, the disease many believed inspired Fitzgerald's *Benjamin Button* story, but which is never expressly mentioned in Fitzgerald's tale or the Hollywood version of it. *Paa* trades largely on the gimmick of having Bollywood's most famous actor, Amitabh Bachchan, play the child afflicted with progeria, while his real-life son, Abishek Bachchan, plays the child's father.

Recently, the Delhi High Court threw out another case, by Warner Bros. against the producers of the Bollywood film, *Hari Puttar: A Comedy of Terrors*,<sup>120</sup> finding the film bore little resemblance to the *Harry Potter* series.<sup>121</sup> This was not a copyright case but a trademark dispute. Warner Bros., which owns a trademark in Harry Potter, argued that the name Hari Puttar was confusingly similar to the Harry Potter mark and threatened to dilute the famous original mark. But the Delhi High Court ultimately agreed with the defendants that the name, which referred to a Punjabi boy whose full name was Hariprasad Dhoonda ("Hari" is a common short form for Hariprasad and "Puttar" means son in Punjabi), would not likely be confused with J.K. Rowling's famous boy Potter. Notably, the court found that the difference in the class, language, and exposure of the audiences for the Potter films and the Puttar film were relevant, supposing that "an illiterate or semi-literate movie viewer, in case he ventures to see a film by the name of Hari Puttar, would never be able to relate the same with a Harry Potter film or book. Conversely," the court continued, "an educated person who has pored over or even browsed through a book on Harry Potter or viewed a Harry Potter film, is not likely to be misled . . . for, in my view, the cognoscenti, the intellectuals and even

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118 Wax, *supra* note 97.

119 PAA (Amitabh Bachchan Corporation Ltd. 2009); THE CURIOUS CASE OF BENJAMIN BUTTON (Warner Bros. Pictures 2008).

120 HARI PUTTAR: A COMEDY OF TERRORS (Mirchi Movies 2009).

121 Warner Bros. Entm't v. Kohli, IA No.9600/2008 in CS(OS) 1607/2008, para. 33 (India Sept. 22, 2008), available at [http://courtnic.nic.in/dhcorder/dhc\\_case\\_status\\_aprox\\_oj\\_list.asp?ctype=CS\(OS\)&cno=1607&cyear=2008](http://courtnic.nic.in/dhcorder/dhc_case_status_aprox_oj_list.asp?ctype=CS(OS)&cno=1607&cyear=2008).

the pseudo-intellectuals presumably know the difference between chalk and cheese or at any rate must be presumed to know the same."<sup>122</sup>

But a settlement for \$200,000 in the summer of 2009 between 20th Century Fox and the Bollywood producer of *Banda Yeh Bindaas Hai*,<sup>123</sup> accused of stealing from *My Cousin Vinny*,<sup>124</sup> seems to have sent a strong signal to Bollywood. Now two Indian producers have bought the rights to the Hollywood films they want to copy (including a license from Orion Pictures to remake the Hollywood film *Wedding Crashers*<sup>125</sup>),<sup>126</sup> a move largely unheard of before. Many in Bollywood welcome the idea of paying royalties to Hollywood.<sup>127</sup> Indeed, Bollywood ought to play by the rules: remakes that take original, protectable expression and that are not fair use should be licensed.

Yet, we may also ask whether claims of piracy by Bollywood may not at times be overblown, if not also partially misconceived. Consider the following:

1. *The most influential films in post-Independence Indian cinema are not remakes.* Of the top ten-grossing Bollywood films in 2008, only one or two are derived from Hollywood hits. The top-grossing *Ghajini*, starring Aamir Khan, has a plot similar to the American film *Memento*; another, titled *Race*,<sup>128</sup> admits inspiration from the 1998 Hollywood film *Goodbye Lover*.<sup>129</sup> But most of that year's blockbuster films were not expressly or obviously derivative of earlier American works (for example, *Singh is King* and *Jodhaa-Akbar* — the latter, starring Hrithik Roshan and Aishwarya Rai Bachchan, is the sixteenth century love story between the great Mughal emperor, Akbar, and a Rajput princess, Jodha).<sup>130</sup> Indeed, the most influential Hindi films have had expressly Indian storylines: *Devdas* (1935, remade in 2002) (about star-crossed lovers torn asunder by class differences); *Mother India* (1957) (a poor peasant woman, Radha, raises two sons and overcomes

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122 *Id.* para. 33.

123 BANDA YEH BINDAAS HAI (BR Films 2010).

124 MY COUSIN VINNY, *supra* note 9.

125 WEDDING CRASHERS (New Line Cinema 2005).

126 ApunKaChoice.com, "Wedding Crashers" to Be Officially Remade in Bollywood (May 4, 2008), <http://www.apunkachoice.com/scoop/bollywood/20080504-3.html>.

127 Jyothi Prabhakar, *B'wood Waking Up to Copyright Infringement*, TIMES INDIA, May 16, 2009, available at <http://timesofindia.indiatimes.com/Bollywood/Bwood-waking-up-to-copyright-infringement/articleshow/4533917.cms>.

128 RACE (Tips Films Pvt. Ltd. 2008).

129 GOODBYE LOVER (Regency Enterprises 1998).

130 SINGH IS KING (Blockbuster Movie Entertainers 2008); JODHAA-AKBAR (Ashutosh Gowariker Productions Pvt. Ltd. 2008).

her difficulties against all odds); *Guide* (1965) (the story of a clever village tour guide mistaken for a holy man); *Sholay* (1975) (marking the advent in Hindi films of the "angry young man" who grows up in poverty and avenges the murders of family members killed by underworld bandits); and *Lagaan* (2001) (chronicling the rising up of Indian villagers in nineteenth-century India against crippling colonial taxation).<sup>131</sup>

2. *Remakes are common in Hollywood and Bollywood.* Bollywood is not alone in turning to remakes as a guarantor for financial success. Hollywood, too, equally driven by concerns for the bottom line, frequently turns to remaking classics, local and global. In 2009 Hollywood offered an official remake of Osamu Tezuka's *Astro Boy*. Recall, too, that remakes may themselves later become iconic "classics," from *The Magnificent Seven* to *A Fistful of Dollars*. These and even more recent examples also challenge the conception that it is only American culture that influences the rest. Asian film has had a strong influence on Hollywood, as well. Martin Scorsese's Academy Award-winning film, *The Departed* (starring Leonardo DiCaprio and Matt Damon), for example, was a remake of the Hong Kong crime film, *Mou Gaan Dou* (2002), known by the English translation *Infernal Affairs*.<sup>132</sup> *The Departed* won the Oscar for Best Picture in 2006. The 2002 Hollywood horror film *The Ring* is a remake of the 1998 Japanese horror film, *Ring*.<sup>133</sup>

3. *Learning through pastiche.* Writers, musicians, and filmmakers practice their craft, and eventually develop their own voice, through the process of adapting existing works. Today, new technologies from digital video recorders to the Internet make the art of filmmaking accessible even to the poor in the developing world, democratizing not only broader consumption of cultural goods, but cultural production, as well. Notably, indigenous film industries have grown through the fruitful combination of cheap technological infrastructure and a rich creative heritage — often Bollywood films — from which to adapt more local stories. Nigeria now boasts one of the world's largest film industries (which has earned the nickname "Nollywood"), largely through perfecting this *modus operandi*,<sup>134</sup>

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131 GANTI, *supra* note 23, at 144-72; *see also* DEVDAS (Mega Bollywood 2002); MOTHER INDIA (Mehboob Productions 1957); GUIDE (Navketan International Films 1965); SHOLAY (United Producers 1975); LAGAAN (Aamir Khan Productions 2001).

132 THE DEPARTED (Warner Bros. Pictures 2006); MOU GAAN DOU (Media Asia Films 2002).

133 THE RING (DreamWorks SKG 2002); RING (Omega Project 1998).

134 *See generally* Sean A. Pager, *Catching a Korean Wave from Bollywood to*

combining cheap video technologies and "a creative history of appropriation and localization of Bollywood films."<sup>135</sup>

The Indian scholar Lawrence Liang describes a similar phenomenon within India, where an alternative film industry has emerged in the unlikely small town of Malegaon, located some eight hours away from Mumbai. Several years ago a local entrepreneur in this town of predominantly migrant Muslim loom workers found himself with a case of empty videocassettes. Deciding the cassettes would be more valuable with content on them, he made a "local" version of a well-known Bollywood film.<sup>136</sup> The concept took off and now the town is famous for a fledgling film industry that thrives on making local adaptations of Bollywood hits. Where Oscar-nominated *Lagaan* dealt with oppressive taxes under the British Raj, for example, the Malegaon adaptation confronts issues of local access to city services.<sup>137</sup> Far from criticizing the Malegaon copy, Aamir Khan, the director of *Lagaan*, has praised the use of "video theaters as a film school."<sup>138</sup>

4. *Copying requires creativity.* Imitation itself is often a more creative act than we commonly recognize. Take, again, the example of the fledgling Malegaon film industry. Liang lauds the creativity of the poor, who remake Bollywood films but on shoestring budgets of a mere \$1,000 per film.<sup>139</sup> One film, for example, reshot a helicopter scene in a Bollywood movie using a plastic toy helicopter that cost less than \$1! Liang suggests that the "creativity that goes into the making of the remakes lies as much in the way that the film is made, as in the content of the film."<sup>140</sup>

5. *"Indianizing" Hollywood films has minimal commercial effect on the market for the originals because Indian audiences do not otherwise see the Hollywood films.* Bollywood filmmakers often seek to retell a Hollywood film story, but in a way that appeals to Indian audiences. Usually this is done by "adding emotions," family relationships, and an extra hour of song

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*Nollywood: Promoting Diversity in Filmmaking Through a Decentralized, Market-Based, Trade-Friendly Cultural Protectionism*, 31 NW. J. INT'L L. & BUS. (forthcoming 2010).

135 Lawrence Liang, Piracy, Creativity, and Infrastructure: Rethinking Access to Culture 3 (July 20, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1436229>.

136 *Id.* at 1.

137 *Id.*

138 *Id.* at 3.

139 *Id.* at 2.

140 *Id.* at 15.

and dance numbers. Bollywood film writer, Anjum Rajabali, emphasizes the difference in genres this way:

Relationships! That seems to be the primary criteria when Indianising a subject. Lots of strong, close, intense relationships that will have interesting moving stories/graphs of their own. Adding family is one important thing. That is why I think subjects like James Bond, detective stories, westerns and the like don't work as they are here. Who were James Bond's parents? Does Clint Eastwood of *The Good, The Bad, & Ugly* love anyone? What about his brothers or sisters?<sup>141</sup>

Perhaps this overstates cultural differences between India and the U.S. More persuasively, Indian directors argue they are offering a remake because Indians are simply not going to see the original Hollywood film. The Indianized remake, then, allows these audiences "to see a great story in their own language."<sup>142</sup>

6. *Bollywood remakes stave off Hollywood cultural imperialism.* More controversially, copyright law may give some consideration to the ways in which local adaptations of dominant, global cultural works from Hollywood enable local communities to resist cultural hegemony and talk back to the dominant Hollywood culture. Elsewhere, Anupam Chander and I have written of how women, gays, and minorities actively remake dominant cultural stories from Harry Potter to Star Trek through writing and sharing practices such as fan fiction to bring their own subjectivity to bear on the traditional tales.<sup>143</sup> The process of "Indianizing" a Hollywood film is a similar practice.

Some argue that Bollywood should make its own original stories, and not engage with those of the West. But as Lawrence Liang argues, this assumes that poor countries can afford to "disavow the global," which he says they cannot. "[I]n many countries," writes Liang, "the very question of what it means to be modern has always been defined in relation to an idea of the global."<sup>144</sup> Thus, for countries to be modern, they have no choice but to engage with the West. At the same time, viewing Western films forces poor audiences "to confront their physical and cultural marginality every time they attend the cinema," writes Liang.<sup>145</sup> Preparing local adaptations of

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141 *Id.* (quoting Rajabali).

142 Wax, *supra* note 97 (quoting Ghai).

143 Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 CAL. L. REV. 597 (2007).

144 Liang, *supra* note 135, at 22.

145 *Id.* at 24.

Hollywood films, by contrast, allows Indians to experience a "global" story or phenomenon, but on more locally relevant and palatable terms. The nationalist vision that inspired Indian film pioneer Phalke also continues to play a role in Bollywood's continued success. Phalke's concern was for the psychology of a nation that sees itself represented onscreen, rather than to view only the dominant classes in film.<sup>146</sup> The message? A white English boy cannot always be the hero.

#### IV. COPYRIGHT AND ASIAN VALUES

The current legal claims against Bollywood echo a long-standing meme about Asians as copiers, and Asian culture as one more suited to imitation than innovation. This is not to deny that cultural norms are relevant here. As William Alford persuasively shows in his rightly influential scholarly account, *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (1995), Chinese law and society is undergirded by Confucian values championing imitation and broad access to a shared past.<sup>147</sup> Alford partly explains China's resistance to modern intellectual property laws this way, writing that "[t]he indispensability of the past for personal moral growth dictated that there be broad access to the common heritage of all Chinese."<sup>148</sup>

At the same time, we must be careful not to exaggerate the differences between cultures on these points. After all, is the past not just as important for self-understanding everywhere? Alford describes as Confucian Chinese scholars' "disdain for commerce" and their desire to write "for edification and moral renewal rather than profit."<sup>149</sup> But are Chinese scholars unique in their altruistic desire to create knowledge for others? One problem with "civilizational" views about copyright and culture is that they can be misleading when they elide the plural values in all cultures, which rightfully

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146 A similar idea motivates cultural protectionism in the European film industry. See generally Pager, *supra* note 134, at 1 (quoting Francois Mitterand, former President of France, saying, "A society that surrenders to others the means to depict itself would soon be an enslaved society.").

147 WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE* 19-20 (1995) ("Lying at the core of traditional Chinese society's treatment of intellectual property was the dominant Confucian vision of the nature of civilization and of the constitutive role played therein by a shared and still vital past.").

148 *Id.* at 20.

149 *Id.* at 29.

recognize not only the values of innovation and participation, but also of shared meaning and common heritage. As Alford himself acknowledges, Chinese engagement with the past did not necessarily mean lack of originality in new works — rather, imitation and deep engagement with the past were required to create something new.<sup>150</sup> Furthermore, essentialist arguments about culture may have the effect of buttressing arguments for strong copyright (Westerners are profit maximizers who will only create for monetary reward) and weakening arguments for limits (Westerners are relationally unconnected and have no need to access the past). In contrast, those who value community, shared meaning, and knowledge creation to benefit the public are cast as foreign and premodern.

The Nobel Laureate Amartya Sen has highlighted how cultural stereotypes about Asians have been wrongly used to justify a denial of human rights in Asian countries. As Sen points out, the mistaken idea that Asians do not value human rights is voiced by authoritarian Asian leaders and skeptical Westerners alike. In so doing, Westerners inadvertently buttress Asian authoritarians. But such civilizational rhetoric elides plural, critical traditions committed to freedom, rationality, equality, and tolerance that have long been present in Asian societies. In fact, as Sen demonstrates, Asian nations, religions and traditions are rife with conflicting and diverse views on these topics.<sup>151</sup> He points out, for example, that scholars often cite to Confucian values when considering China, but seldom invoke Buddhist philosophy. Sen recalls the great Indian leaders Ashoka and Akbar, who championed and practiced pluralism in governing their vast empires long before these values were adopted in the West. As Sen concludes, "so-called Asian values that are invoked to justify authoritarianism are not especially Asian in any significant sense."<sup>152</sup>

Something similar is true in the case of copyright and so-called "Asian values." As one scholar has recently argued, Chinese commitments to access to knowledge are influenced by Buddhist enlightenment philosophy, not just Confucian commitment to tradition and authority.<sup>153</sup> Read in

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150 *Id.* at 26.

151 *Id.* at 34, 36-39.

152 *Id.* at 40.

153 See Charles R. Stone, *What Plagiarism Was Not: Some Preliminary Observations on Classical Chinese Attitudes Toward What the West Calls Intellectual Property*, 92 MARQ. L. REV. 199, 202 (2008) ("[A]lthough the influence of Confucianism in its various incarnations is unmistakable, the influence that Buddhism exerted [on copyright], and continues to exert, is still relevant and therefore deserving of further study.").



this light, the focus on public access to knowledge may be understood as promoting enlightenment and freedom, not just obedience to authoritarian elders. Recognizing each culture's plural traditions and values is crucial because it offers a more critical lens with which to assess our own societies. If access to shared culture is understood only as being fed by authoritarian values, we will be led to reject a robust public domain in the name of freedom. But if we understand diverse motivations, including those stemming from universal concerns for enlightenment and access to knowledge, then such commitments cannot easily be cast aside. Furthermore, claims that intellectual property laws are more "foreign" on some soils than others understates the extent to which intellectual property is something we must all be taught — the idea of exclusive rights in ideas does not come naturally. Indeed, today in the U.S. copyright industries expend great effort and money to teach (or indoctrinate) young children about the wrongs of piracy. American university academics continue to resist encroaching norms that would privilege the pursuit of knowledge for commercial gain rather than for the benefit of the public against the stepped up efforts of university technology transfer offices to teach researchers to patent their inventions.

Some have suggested that China now has an "innovation deficit,"<sup>154</sup> and needs to develop its own creative industries. While rates of innovation may, indeed, vary across the world, this may reflect a variety of factors, including access to knowledge, capital, education, and markets. These varying rates may also reflect culture, but we should be careful not to paint culture with too broad a brush, identifying a group as natural innovators, and another as instinctive copiers. In fact, there is a great deal of creativity taking place in Asia, not just in film, but in every area from computer gaming to fashion. For example, *Farmville*, "the most popular game on Facebook" with over "65 million unique monthly players," admittedly "rips off *Happy Farm*, a hugely popular online game in China."<sup>155</sup> Each season fashion industry buyers from the U.S. and Europe travel to Tokyo, whose youth are "trailblazers of street fashion" and "the envy of Western designers, . . . to buy up bagfuls of the latest hits. The designs are then whisked overseas to be reworked, resized, stitched together and sold under Western labels."<sup>156</sup> If innovation and progress are

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154 Justin O'Connor & Gu Xin, *A New Modernity? The Arrival of "Creative Industries" in China*, 9 INT'L J. CULTURAL STUD. 271, 279 (2006).

155 Belinda Luscombe, *Zynga Harvests the Cyberfarmer: The Meteoric and Controversial Rise of the Company Whose Games You Play on Facebook*, TIME, Nov. 30, 2009, at 60.

156 Hiroko Tabuchi, *Paris, Milan, Tokyo. Tokyo?*, N.Y. TIMES, Jan. 2, 2010, at B1 (concluding that "[i]n that business model, there is little financial gain for Japan").

our ultimate goals, we must take greater care to recognize how differences in global power and knowledge, combined with cultural stereotypes, affect the production and distribution of culture today.

### CONCLUSION

The effects of global copyright law today go well beyond incentives to create. Copyright law implicates mutual recognition or misrecognition of others. Furthermore, this law determines who will benefit from the wealth deriving from knowledge production today. In short, copyright law has both dignitary and distributive effects.

Arguments to buttress the intellectual property rights of Western creators typically presume these creative professionals are more deserving of protection than others because their creations are "original," while those of developing (especially Asian) countries are derivative. But this distinction overlooks the extent to which much of human creativity is derivative (indeed, we may recall Paul Gilroy's description of culture as "routes," not "roots"<sup>157</sup>). More importantly, the distinction elides the extent to which all humans are creative and active producers of knowledge of the world. Cultural stereotypes about originality and piracy do a disservice to understanding the universal aspects of human creativity and the ways in which power may upend the ultimate goals of promoting cultural exchange and mutual understanding. We need to take into account the ways in which actual global inequalities combined with longstanding cultural biases may impede the free and fair exchange of culture.

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<sup>157</sup> GILROY, *supra* note 8, at 19.