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Infringicus Maximus! An Exploration of Motion Picture Title Protection in an International Film Industry Through the Legal Battles of Harry Potter

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INFRINGICUS MAXIMUS! AN EXPLORATION OF MOTION PICTURE TITLE PROTECTION IN AN INTERNATIONAL FILM INDUSTRY THROUGH THE LEGAL BATTLES OF HARRY POTTER

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I. INTRODUCTION

Dark and difficult times lie ahead. Soon we must all face the choice between what is right and what is easy.

*Albus Dumbledore*¹

From his first day aboard the Hogwarts Express, Harry Potter has captivated millions. Through seven installments of Harry's adventures authored by J.K. Rowling and five (and counting) blockbuster films, the *Harry Potter* empire has grown into an international phenomenon. The *Harry Potter* novels have sold more than 400 million copies worldwide, and they have been translated into sixty-seven languages.² The films have grossed more than \$4.5 billion since 2001.³ Additionally, Warner Bros. Entertainment announced that the *Harry Potter* film series is the top-grossing motion picture franchise in history, topping both the James Bond films and the *Star Wars* series.⁴ Currently, the Harry Potter brand is worth an estimated \$15.09 billion.⁵

But Harry's fame comes with a price. As with any enormously successful entertainment franchise, Harry has been the subject of numerous legal disputes involving the intellectual property rights to this young wizard and his magical world.⁶ Warner Bros., as owners of the copyright and trademark rights to the *Potter* books and films,⁷ must be constantly vigilant of potential infringers. Guarding against infringement becomes increasingly difficult given the international success of the *Harry Potter* brand.

Harry's most recent legal battle has sent Warner Bros. to India. The Mumbai-based Mirchi Movies has produced a film entitled *Hari Puttar: A Comedy of Terrors*, which Warner Bros. claims infringes its intellectual property rights to the boy

¹ HARRY POTTER AND THE GOBLET OF FIRE (Warner Bros. Pictures 2005).

² Rhys Blakely, *Harry Potter and the Indian Lawsuit*, AUSTRALIAN, Aug. 27, 2008, available at <http://www.theaustralian.news.com.au/story/0,25197,24247105-2703,00.html>.

³ Randeep Ramesh, *Hollywood Studio Sues over Bollywood Film*, HINDU, Sept. 17, 2008, available at <http://www.hindu.com/2008/09/17/stories/2008091757662000.htm>.

⁴ Press Release, Time Warner, Warner Bros. Pictures' *Harry Potter* Films Combine to Become the Biggest Film Franchise in History (Sept. 10, 2007), <http://www.timewarner.com/corp/newsroom/pr/0,20812,1662017,00.html>.

⁵ Blakely, *supra* note 2.

⁶ See Cathryn A. Mitchell, *Letter to the Editor*, TIMES (Trenton, N.J.), Aug. 31, 2008, at D03 (discussing a copyright infringement case involving the fan published reference book, *The Harry Potter Lexicon*, and a threat of a lawsuit by Rowling regarding the Chinese film, *Harry Potter and Leopard-Walk-Up-To-Dragon*).

⁷ Christine Kearney, *Rowling, Warner Bros. Sue over Potter Book*, REUTERS, Oct. 31, 2007, available at <http://www.reuters.com/article/peopleNews/idUSN3133972420071101>.

wizard's name.⁸ Warner Bros. asserts that the film's title is confusing and could potentially infringe their copyright and trademark rights.⁹ In addition to the similarities between the *Hari Puttar* title and the *Harry Potter* title, Warner Bros. also claims that Hari's father, Professor Dhoonda, sounds too much like Harry's headmaster, Professor Dumbledore.¹⁰ Despite such claims, Mirchi Movies denies any similarity between their film and the tales of Harry Potter.¹¹ *Hari Puttar: A Comedy of Terrors* involves a ten-year-old Indian boy who moves to England with his family, where he is forced to protect a secret computer chip, developed by his father, from burglars.¹² In addition to their denial of any substantive similarity between the Indian film and the *Harry Potter* franchise, the producers of the *Hari Puttar* film deny any phonetic similarity in the film's title and Harry Potter.¹³ Producers note that "Hari" is a popular Indian name, and "Puttar" means son in both Hindi and Punjabi.¹⁴ Counsel for Mirchi Movies argued that just because someone might mispronounce "Hari Puttar" as "Harry Potter" does not give Warner Bros. a cause of action.¹⁵ Warner Bros. asserted that they sent legal notice to Mirchi Movies in 2005 when they first learned that the *Hari Puttar* film was being produced, and that Mirchi disregarded the notice.¹⁶ Although they sent legal notice to Mirchi Movies in 2005, Warner Bros. chose not to file the present lawsuit until August 28, 2008.¹⁷

Despite delaying the Indian film's September 19, 2008 release, Delhi High Court Judge Reva Khetrapal eventually rejected Warner Bros.'s claim of similarity between the movie titles, holding that audiences would be able to distinguish between the two films.¹⁸ The court noted that the *Harry Potter* movies are

⁸ Fiona Gray, *Hari Puttar and the Case of the Film That Sounded Too Familiar*, SCOTLAND ON SUNDAY, Sept. 14, 2008, <http://scotlandonsunday.scotsman.com/topstories/Hari-Puttar-and-the-case.4489918.jp>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Nyay Bhushan, *Delhi Court Hears 'Hari Puttar' Defense*, HOLLYWOOD REP., Sept. 5, 2008.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Dave Itzkoff, *Court Rules for Hari over Harry Potter*, N.Y. TIMES, Sept. 23, 2008, at E2.

“targeted to meet the entertainment needs of an elite and exclusive audience.”¹⁹ Consequently, all of Warner Bros.’s claims were dismissed.²⁰

The Hari Puttar case is not the first in which the holders of the rights to Harry Potter have been forced to engage the Indian courts in an attempt to protect their intellectual property interest in the boy wizard. In October 2007, an Indian court also rejected J.K. Rowling’s claim of copyright infringement against a community group in West Bengal that created a replica of the Hogwarts School of Witchcraft and Wizardry for a Hindu festival.²¹

Many difficulties arise when a company is forced to defend their intellectual property rights abroad: inconsistent applications of intellectual property laws across international borders, difficult and expensive travel, and cultural barriers.²² Beyond guarding against traditional infringement, protection of motion picture titles is an even greater challenge due to the lack of protection afforded to titles in general.²³

This Note will consider the difficulties that arise when asserting intellectual property rights to motion picture titles on both a domestic and an international scale and address how adequate protection can best be accomplished. Part II will examine the uncertain state of motion picture title protection in the United States in order to compare the protection that motion picture titles receive in the United States with the degree of protection afforded abroad. This Part will also provide background on the rise of India’s Bollywood film industry, and illustrate the difficulties that ensue from the birth of a new international player in the motion picture scene. Additionally, this Part will consider the international agreements and treaties, to which both the United States and India subscribe, that are currently in place to regulate the enforcement of international intellectual property rights. Finally, Part III will examine the consequences of the current regulatory structure’s failure to protect motion picture titles on an international scale. More specifically, this Part will provide public policy justifications for more stringent and effective protection of motion picture titles. This Part will argue that given the expansion of the international film industry into countries such as India,

¹⁹ See *HC Dismisses Warner Bros’ Plea on Hari Puttar*, FIN. EXPRESS, Sept. 23, 2008, <http://www.financialexpress.com/news/hc-dismisses-warner-bros-plea-on-hari-puttar/364656/> (explaining that Harry Potter fans are more likely to distinguish the two films because they are an “exclusive audience”).

²⁰ *Id.*

²¹ *Delhi Court Saves Bollywood Film ‘Hari Puttar’ from ‘Harry Potter Spell,’* HINDUSTAN TIMES, Sept. 22, 2008, available at <http://in.movies.yahoo.com/news-detail/34409/Delhi-court-saves-Bollywood-film-Hari-Puttar-Harry-Potter-spell.html>.

²² See *infra* Part II.C.1–3.

²³ See *infra* Part II.A.1–4.

protection of intellectual property rights in motion picture titles can be best affected by unified regulation.

II. BACKGROUND

A. PROTECTION OF MOTION PICTURE TITLES IN THE UNITED STATES

Generally, motion picture titles are afforded little protection under traditional intellectual property theories; therefore, courts tend to deny protection for the title of a single film or literary work.²⁴ However, the producer of a motion picture can attempt to assert rights under the theories of copyright infringement, trademark infringement, trademark dilution, or unfair competition.²⁵ While not all of these theories have proven successful for protecting motion picture titles, they are avenues by which rights holders can seek protection for those titles that are sufficiently famous and well recognized.²⁶

1. *Copyright Infringement.* As a long-standing rule, literary titles are not afforded copyright protection.²⁷ Copyright protection is extended only to the literary composition of a book.²⁸ Titles have been referred to as “a mere appendage, which only identifies, and frequently does not in any way describe, the literary composition itself, or represent its character.”²⁹ As a result, American courts consistently hold that a title alone, excluding plot, characterizations, or dialogue, will not be afforded protection under copyright law.³⁰ Therefore, a holder of a motion picture title could only utilize copyright infringement as a form of protection if the allegedly infringing film borrows not only the title from the original work, but other substantive parts, such as the plot or characters.³¹ As a result, copyright infringement is generally ineffective as a means of protecting the specific title of a film or literary work.

²⁴ Edward Robert McCarthy, *How Important Is a Title? An Examination of the Private Law Created by the Motion Picture Association of America*, 56 U. MIAMI L. REV. 1071, 1082–83 (2002).

²⁵ See *infra* Part II.A.1–4.

²⁶ See *infra* Part II.A.1–4.

²⁷ Terence P. Ross, *Legal Protection for Literary Titles*, 9 GREEN BAG 2d 161, 162 (2006).

²⁸ *Osgood v. Allen*, 18 F. Cas. 871, 875 (D. Me. 1872).

²⁹ *Id.*

³⁰ J. THOMAS MCCARTHY, 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 10:34 (4th ed. 2008). See also *Warner Bros. Pictures, Inc. v. Majestic Pictures Corp.*, 70 F.2d 310, 311 (2d Cir. 1934) (“A copyright of a play does not carry with it the exclusive right to the use of the title.”); *Arnstein v. Porter*, 154 F.2d 464, 474 (2d Cir. 1946) (“A title cannot be copyrighted.”).

³¹ See *Silberstein v. Fox Entm’t Group, Inc.*, 424 F. Supp. 2d 616, 624 (S.D.N.Y. 2004) (noting that to prove copyright infringement, a copyright owner must show: (1) defendant copied the work; and (2) the copy is substantially similar to the original work).

2. *Trademark Infringement.* Trademark infringement is one of the more viable options for protecting the rights to a motion picture title. The value of a trademark is the “good will that the mark represents to consumers.”³² And because motion pictures are sold in the commercial market where consumers are more susceptible to deception, further government protection is warranted.³³

However, there are several limitations on registering a motion picture title as a trademark. The United States Patent and Trademark Office (USPTO) will not register a title of a single literary work as a trademark.³⁴ Precedent has treated all single works as “inherently descriptive” or “inherently generic.”³⁵ The Federal Circuit has held that a single book title does not identify the source of the book and is therefore generic.³⁶ Registering a single title as a trademark is problematic, because a trademark endures as long as the mark is being used, while a copyright has a set expiration date.³⁷ As a result, registering a single title as a trademark could hinder unrestricted use after a copyright on the text expires, because a book with a trademarked title would have to be published under a different name.³⁸

However, titles of single works may be protected under section 43(a) of the Lanham Act if there is a showing of secondary meaning.³⁹ Section 43(a) of the Lanham Act creates liability for “[a]ny person who . . . uses in commerce any word, term, name, symbol or device . . . or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which is likely to cause confusion . . . or . . . misrepresent[ation].”⁴⁰ It is established that the title of a motion picture or book has acquired a secondary meaning when “the title is sufficiently well known that consumers associate it with a particular author’s work.”⁴¹ Additionally, secondary meaning can be demonstrated by showing that

³² *Heirs of Estate of Jenkins v. Paramount Pictures, Corp.*, 90 F. Supp. 2d 706, 709 (E.D. Va. 2000).

³³ *See Rogers v. Grimaldi*, 875 F.2d 994, 997 (2d Cir. 1989) (explaining that the government is permitted to regulate communication that has potential to deceive the public).

³⁴ MCCARTHY, *supra* note 30, § 10:4.

³⁵ *See, e.g., Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164 (Fed. Cir. 2002) (citing *In re Cooper*, 254 F.2d 611, 614–15 (C.C.P.A. 1958)); *In re Posthuma*, 45 U.S.P.Q.2d 2011, 2013 (T.T.A.B. 1998) (noting that the Trademark Trial and Appeal Board has consistently held that “single titles of works are not registerable as trademarks”).

³⁶ MCCARTHY, *supra* note 30, § 10.4.

³⁷ *Herbko Int’l, Inc.*, 308 F.3d at 1164.

³⁸ *Id.* (explaining that after a copyright expires, a publisher may try to publish copies of text and this practice would be limited if trademark protection was extended to single titles).

³⁹ *Id.* at 1162 n.2.

⁴⁰ 15 U.S.C. § 1125(a) (2006).

⁴¹ *Rogers v. Grimaldi*, 875 F.2d 994, 998 (2d Cir. 1989); *see also Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 887 (1996) (“When a movie is not in the public domain, a showing of secondary meaning only requires proof that the public associates the movie

the title is one of a series.⁴² This “series exception” exists because courts have found that titles of a series of books, or a series of movies, function more as traditional trademarks because they indicate that each book comes from the same source as previous books.⁴³ Trademark rights in the title of a series date back to the first volume of the series “only if the second volume is published within a reasonable time with a requisite association in the public mind.”⁴⁴

To prevail on a claim for trademark infringement, a mark holder must demonstrate that their alleged mark survives a two-part analysis.⁴⁵ First, the mark holder must demonstrate that the mark is a valid trademark under the Lanham Act, meaning that it has acquired a secondary meaning, is part of a series, or both.⁴⁶ Second, they must demonstrate that the actions of the alleged infringer are likely to cause confusion.⁴⁷ In determining whether a mark has acquired a secondary meaning, courts consider the following factors: “(1) advertising expenditures; (2) consumer studies linking the mark to a source; (3) unsolicited media coverage of the product; (4) sales success; (5) attempts to plagiarize the mark and (6) length and exclusivity of the mark’s use.”⁴⁸ After establishing a secondary meaning, courts utilize another multi-factor test to evaluate the likelihood of confusion.⁴⁹ Factors include:

- (1) the strength of Plaintiffs’ marks; (2) the similarity of Plaintiffs’ and Defendants’ marks; (3) the competitive proximity of the products; (4) the likelihood that Plaintiffs will ‘bridge the gap’ and offer a product like Defendants; (5) actual confusion between the products; (6) good faith on Defendants part; (7) the quality of Defendants’ product; and (8) the sophistication of buyers.⁵⁰

title with a single source, even if that source is anonymous.”)

⁴² *Herbko Int’l, Inc.*, 308 F.3d at 1163 (indicating that the name of a series serves a trademark function by showing that each book comes from the same source (citing *In re Cooper*, 254 F.2d 611, 615 (C.C.P.A. 1958)).

⁴³ MCCARTHY, *supra* note 30, § 10:6.

⁴⁴ *Herbko Int’l, Inc.*, 308 F.3d at 1163.

⁴⁵ *See Tri-Star Pictures, Inc. v. Unger*, 14 F. Supp. 2d 339, 348 (S.D.N.Y. 1998) (detailing a two part analysis under which a trademark holder must prove: (1) their trademark is valid; and (2) the defendant’s mark is likely to cause confusion).

⁴⁶ *Id.*

⁴⁷ *Id.* at 354.

⁴⁸ *Id.* at 348.

⁴⁹ *Id.* at 354.

⁵⁰ *Id.* Each Circuit Court employs some variation of a multi-factor test for determining likelihood of confusion, ranging from five to thirteen factors. LYDIA PALLAS LOREN & JOSEPH SCOTT MILLER, *INTELLECTUAL PROPERTY LAW: CASES & MATERIALS* ch. 5, pt. 3, at 18 (Semaphore Press 2008), available at http://www.semaphorepress.com/IntellectualPropertyLaw_

Neither set of factors is dispositive nor exhaustive, so courts have quite a bit of discretion in determining the validity of a claim of trademark infringement for a motion picture title.⁵¹

3. *Unfair Competition.* The same basic framework and analysis used to evaluate trademark infringement is also used to evaluate claims of unfair competition. Both theories employ a two part analysis that requires a rights holder to demonstrate: (1) entitlement to protection and (2) likelihood of confusion.⁵² However, unfair competition is a realistic prospect for protection of motion picture titles given the broad nature of the doctrine.⁵³ Unfair competition is applicable when acts of the infringer mislead customers to believe that the infringer's goods are the goods of the complaining party.⁵⁴ The doctrine also applies when the "impression is created that the complaining party has sponsored, or approved or is in any way connected with the activities of the infringer, or that the latter is affiliated with, or a part or a branch and subsidiary of the former."⁵⁵ The Senate Committee on Patents has said that there is essentially no difference between trademark infringement and the broad doctrine of unfair competition.⁵⁶ Additionally, the Committee noted that unfair competition is the "genus" of which trademark infringement is a "species"; therefore, all trademark cases are also cases of unfair competition because they involve the "same legal wrong."⁵⁷

However, slight differences do exist between the two theories of protection. Unfair competition is a much broader tort than trademark infringement because anything that has an impact on the purchaser might be relevant in determining whether the actions of the accused are unfair or are potentially confusing to the purchasers.⁵⁸ Therefore, cases could arise where a party might be guilty of unfair competition but not guilty of trademark infringement.⁵⁹ Given the broad nature of the doctrine, unfair competition could also serve as a viable source of protection for potentially confusing titles. For example, in *Application of Cooper*, the court noted that "[i]t is well known that the rights in book titles are afforded

overview.html (quoting Professor Barton Beebe, who suggests that in theory these multi-factor tests are balancing tests and judges actually rely on only a few factors or combinations of factors to make decisions, rendering many of factors irrelevant or redundant).

⁵¹ *Tri-Star Pictures, Inc.*, 14 F. Supp. 2d at 348–54.

⁵² McCarthy, *supra* note 24, at 1083.

⁵³ *Id.* (noting that unfair competition is a realistic doctrine for protecting motion picture titles).

⁵⁴ *Capital Films Corp. v. Charles Fries Prods., Inc.*, 628 F.2d 387, 394 (Tex. App., 1980) (citing *Burge v. Dallas Retail Merchants Ass'n*, 257 S.W.2d 733, 736 (Tex. Civ. App. 1953)).

⁵⁵ *Id.*

⁵⁶ S. REP. NO. 79-1333, at 4 (1946), *reprinted in* 1946 U.S.C.C.A.N. 1274, 1275.

⁵⁷ *Id.*

⁵⁸ *See id.* (noting that unfair competition is a "more broadly conceived tort" than trademark infringement).

⁵⁹ *Id.*

appropriate protection under the law of unfair competition” when they denied an application for the trademark registration of the title of a book called *Teeny-Big*.⁶⁰

4. *Trademark Dilution*. Traditionally, trademark dilution is utilized as a theory of recovery when consumers begin to associate a famous mark or product with a “new and different” source.⁶¹ The Federal Trademark Dilution Act (FTDA) provides a federal cause of action for use of a famous mark that “whittles away the value of a trademark” when it’s used to identify different products.”⁶² Five elements are necessary to prevail on a claim of trademark dilution: “(1) the senior mark must be famous; (2) it must be distinctive; (3) the junior use must be a commercial use in commerce; (4) it must begin after the senior mark has become famous; and (5) it must cause the dilution of the distinctive quality of the senior mark.”⁶³ Enacted in 2006, the Trademark Dilution Revision Act (TDRA) keeps the same basic elements of the FDFTA, but eliminates the need of actual dilution for a trademark holder to prevail on a dilution claim.⁶⁴ As a result, the enactment of TDRA has made it somewhat easier for a trademark holder to prevail on a dilution claim.⁶⁵

A claim of trademark dilution can be pursued via one of two theories: blurring or tarnishing.⁶⁶ Blurring occurs when the unauthorized use of one party’s trademark weakens the trademark’s ability to identify and distinguish the source of the product.⁶⁷ Blurring is the most common type of trademark dilution.⁶⁸ Tarnishing occurs when a negative association is created by a secondary use of an owner’s trademark.⁶⁹ For either theory of dilution, the primary focus is on the trademark holder’s injury, unlike trademark infringement, which focuses on likelihood of consumer confusion.⁷⁰

One commentator speculates that the actual purpose of trademark dilution is to prevent “free-riding” on famous marks, rather than preventing actual “dilutive harm.”⁷¹ In contrast, critics note that because dilution applies to only purely

⁶⁰ 254 F.2d 611, 617 (C.C.P.A. 1958).

⁶¹ 74 AM. JUR. 2D *Trademarks and Tradenames* § 116.

⁶² Joshua Beser, *False Endorsement or First Amendment?: An Analysis of Celebrity Trademark Rights and Artistic Expression*, 41 SAN DIEGO L. REV. 1787, 1800 (2004) (quoting *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 903 (9th Cir. 2002)).

⁶³ 74 AM. JUR., *supra* note 61.

⁶⁴ LOREN & MILLER, *supra* note 50, ch. 5, pt. 4, at 3.

⁶⁵ *See id.* (noting that the TDRA eliminated the need to prove actual dilution).

⁶⁶ Beser, *supra* note 62, at 1801.

⁶⁷ *Id.*

⁶⁸ MCCARTHY, *supra* note 30, § 34:67.

⁶⁹ Beser, *supra* note 62, at 1801–02.

⁷⁰ *Id.*

⁷¹ *See* MCCARTHY, *supra* note 30, § 34:67 (noting that Professor D.J. Franklyn argues that the actual purpose of trademark dilution is to prevent free-riding and not dilutive harm).

commercial use, the theory should not be applied to prevent free-riding in situations where a famous product name is used in either film or music because such a scenario would constitute a non-commercial and artistic use.⁷²

5. *MPAA Private Regulation.* In addition to public regulation, a form of private law has developed in the United States to afford additional protection to motion picture titles. In 1925, the Motion Picture Association of America (MPAA) established a Title Registration Bureau to permit member companies and producers to reserve certain motion picture titles for their exclusive use.⁷³ The MPAA's establishment of this private registration system was a reaction to the "absence of copyright protection on the title itself and the expense and delays of litigation to establish usage rights."⁷⁴ Essentially, the MPAA chose to privatize public law in an effort to guard against the duplication of motion picture titles and prevent marketplace confusion, thus affording titles a degree of protection they would not otherwise have received.⁷⁵

Both members of the MPAA and independent producers are permitted to register titles with the MPAA Title Registration Bureau.⁷⁶ Each member is permitted to register up to 250 "permanent titles" for protection at any time, but can register an unlimited number of titles on a "non-permanent" basis.⁷⁷ Conflicts in titles are discovered via the Bureau's daily title-registration report that lists all newly registered titles.⁷⁸ If the member believes that a proposed title is "harmfully similar" to a previously registered title, then a complaint must be filed within ten business days.⁷⁹ When a dispute arises, the Bureau permits two options for the opponents: (1) settle by direct negotiation or (2) send the complaint to the MPAA for resolution.⁸⁰

The majority of motion picture title conflicts are resolved through direct negotiation, and most are resolved in a matter of weeks.⁸¹ The Bureau does not provide any operating rules or standards for negotiations, which generally take

⁷² See Beser, *supra* note 62, at 1802–03 (explaining that the "non-commercial use exception" for trademark dilution is applicable to all speech that is not "purely commercial," and if dilution actions were permitted against use of a mark in a motion picture, an explosion of litigation would occur).

⁷³ Ross, *supra* note 27, at 163.

⁷⁴ *Id.* at 163 (quoting THE 1946 FILM DAILY YEAR BOOK OF MOTION PICTURES (Jack Alicoate ed. 1946)).

⁷⁵ *Id.*

⁷⁶ McCarthy, *supra* note 24, at 1074–75.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1075.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Matthew Heller, *What's in a Name: Film Title Disputes Raise Legal, Business Questions*, THRESQ: ENTERTAINMENT AND MEDIA LAW BLOG, Feb. 14, 2007, <http://www.allbusiness.com/services/legal-services/4468289-1.html>.

place behind closed doors among production company executives.⁸² Although the proceedings are generally secretive, many production companies have reportedly purchased titles from opponents or even traded their own presently held titles for the title they are attempting to register.⁸³ For example, Disney reportedly paid \$600,000 to Columbia Pictures for the rights to the Mel Gibson blockbuster *Ransom*.⁸⁴ Disney also traded its rights in the titles to *Father's Day* and *Conspiracy Theory* to Warner Bros. in an effort to secure the rights for its animated film *A Bug's Life*.⁸⁵ If an agreement cannot be reached through direct negotiation, then either one party must change their film's title or the parties are contractually bound to utilize the MPAA arbitration process.⁸⁶

Should the parties opt to send the complaint to the MPAA for resolution, the president of the MPAA will send the complaint to an arbitration panel, composed of at least three disinterested Title Committee Members.⁸⁷ The function of this panel is to ensure that similar motion picture titles will not confuse the public as to a film's identity or origin.⁸⁸ The panel considers all equities involved, but they often focus on the film's budget, status of scripts, investments already expended, proximity to theatrical release, theme or plot, marketing, campaign and anticipated release pattern.⁸⁹ During the arbitration process, if the proposed title is identical to a previously registered title, then the panel often gives preference to the previously registered title.⁹⁰ In addition to deciding whether a party is granted the right to use the title in question, the panel also has the power to award damages for any public confusion that results from a party's behavior.⁹¹ Generally, courts will uphold decisions made by the MPAA's arbitration panels under the Federal Arbitration Act, which requires the enforcement of arbitration decisions "save upon grounds as exist in law or in equity for the revocation of any contract."⁹²

Although the MPAA's Title Registration Bureau offers a quick and efficient resolution, problems can arise because membership in the Bureau is not compulsory for all filmmakers. Use of the Bureau is a condition of MPAA membership, but other production companies only use the system on a voluntary

⁸² McCarthy, *supra* note 24, at 1076.

⁸³ *Id.*

⁸⁴ Heller, *supra* note 81.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ McCarthy, *supra* note 24, at 1075.

⁸⁸ *Id.* at 1078.

⁸⁹ *Id.* at 1079.

⁹⁰ *See id.* (stating the first party to register a title is guaranteed the right to use the title).

⁹¹ *Id.* at 1081 (describing the heavy fines demanded from Miramax after showing *Scream* for six weeks in theaters even after receiving a timely complaint from another studio).

⁹² *See id.* at 1075 (quoting 9 U.S.C. § 2 (1994)).

basis.⁹³ If a non-participating company attempts to use a registered title, the only means of protection for the titleholder is one of the above-noted public law avenues: copyright infringement, trademark infringement, unfair competition or trademark dilution.⁹⁴ Additionally, if a title is not properly registered with the Bureau, the owner could be forced to resort to public law options.⁹⁵ For example, in *Tri Star Pictures, Inc. v. Unger*,⁹⁶ Columbia Pictures, owner of the rights to *Bridge on the River Kwai*, resorted to the courts because they failed to file a timely protest to the attempted registration of *Return from the River Kwai*.⁹⁷ The case was eventually resolved in a lawsuit for trademark infringement rather than through the Bureau's arbitration or negotiation processes.⁹⁸ Still other critics of MPAA registration believe the arbitration system infringes on creativity and free speech because it places too high of a value on the Bureau member's intellectual property rights in the already registered titles.⁹⁹ Despite the fact that Bureau participants are still forced to resort to the theories of copyright infringement, trademark infringement, trademark dilution, and unfair competition to protect their rights to a film title, some commentators contend that the MPAA registration system is a superior form of protection of a filmmaker's intellectual property rights, as opposed to those protections afforded by law.¹⁰⁰

B. THE BIRTH OF BOLLYWOOD

India is currently the world's leading producer of motion pictures.¹⁰¹ The Indian film industry produces around 1,000 films a year and grosses over \$72 billion internationally.¹⁰² Additionally, a thirty percent growth rate makes the entertainment industry one of the most rapidly growing divisions of the Indian

⁹³ *Id.*

⁹⁴ See *supra* Part II.A.1–4.

⁹⁵ See Ross, *supra* note 27, at 163 (noting that trademark infringement is available for owners of titles that are not properly registered).

⁹⁶ 14 F. Supp. 2d 339 (S.D.N.Y. 1998).

⁹⁷ *Id.* at 345. The MPAA requires an objection to be filed within seven days of receiving notice of registration. *Id.*

⁹⁸ *Id.* at 364.

⁹⁹ McCarthy, *supra* note 24, at 1093.

¹⁰⁰ See generally *id.* at 1093–94 (concluding that the MPAA has effectively privatized public law and provides a superior system of protection for motion picture titles due to its speed, efficiency, and avoidance of expensive litigation).

¹⁰¹ Michael H. Hoffheimer, *Bollywood Law: Commercial Hindi Films with Legal Themes*, 98 LAW LIBR. J. 61, 61 (2006).

¹⁰² Rachana Desai, *Copyright Infringement in the Indian Film Industry*, 7 VAND. J. ENT. L. & PRAC. 259, 259 (2005).

economy.¹⁰³ Although the first motion picture was shown in Mumbai in 1896,¹⁰⁴ the Indian film industry has enjoyed the bulk of its growth in the past decade.¹⁰⁵ In 2001, the Indian Film Industry was granted “industry” status, which permitted the film industry to become more professional and more organized with respect to “financing, production, and other allied activities.”¹⁰⁶ Previously, associations with organized crime had marred the legitimacy of the film industry.¹⁰⁷ In the 1980s, mob financing became vital when television cut back on movie audiences and the film budgets began to increase.¹⁰⁸ Until 2001, mob financing constituted almost forty percent of Bollywood funds.¹⁰⁹ However, recent police crackdowns and the availability of new money have reduced the industry’s reliance on illegitimate money.¹¹⁰ It is currently estimated that only ten percent of the Bollywood industry relies on revenue from organized crime.¹¹¹ With a more professional and legitimate reputation, Bollywood has sought to expand their reach by spreading to the international market, including countries with large Indian populations, such as the United Kingdom, the United States, and Canada.¹¹²

The Indian film industry was born as an opposition to the Hollywood mainstream of the United States.¹¹³ In the 1970s, the term “Bollywood” was coined as a combination of Hollywood and Bombay.¹¹⁴ This unique film industry has sought to integrate both South Asian and Western influences through flashy song and dance.¹¹⁵ There are marked differences between mainstream Hollywood

¹⁰³ *Id.*

¹⁰⁴ India Heritage: A Living Portrait of India, India Scene, <http://www.indiaheritage.org/perform/cinema/history/inscene.htm> (last visited Mar. 23, 2009) (noting that the first motion picture shown in India was on July 7, 1896 in Mumbai (formerly Bombay), India).

¹⁰⁵ Timm Neu, *Bollywood is Coming! Copyright and Film Industry Issues Regarding International Film Co-Productions Involving India*, 8 SAN DIEGO INT’L L.J. 123, 125 (2006).

¹⁰⁶ *Id.*

¹⁰⁷ See Manjeet Kripalani & Ron Grover, *Bollywood, Can New Money Create a World-Class Film Industry in India?*, BUS. WK. ONLINE, Dec. 2, 2002, http://www.businessweek.com/magazine/content/02_48/b3810013.htm (noting that Bollywood first turned to mob financing in the 1980s and the “thugs” often required certain scripts and stars which decreased the appeal of many films).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See Neu, *supra* note 105, at 126 (noting that Bollywood has a “niche” position in countries with large Indian populations, such as the U.K., the U.S. and Canada). Recently, “foreign co-productions” such as *Monsoon Wedding* and *The Guru* have broadened the Indian market even further.

¹¹³ *Id.* at 126–27.

¹¹⁴ Hoffheimer, *supra* note 101, at 62.

¹¹⁵ *Id.*

cinema and the Bollywood phenomenon. Bollywood films are typically twice as long as their Western counterparts, include narrative interrupted by musical and dance routines, depict romantic melodrama, incorporate dense plots of both comedy and tragedy, and include fantastic imagery.¹¹⁶

The explosive growth of the Bollywood film industry has brought about a number of cross-cultural conflicts. Bollywood's Hollywood inspiration has given rise to the phenomenon known as "cultural copies."¹¹⁷ Basically, an Indian film producer takes a hit Hollywood film, adapts it to the Indian culture and then re-releases the "Indian version" of the film on the Bollywood stage.¹¹⁸ It has been estimated that almost eight out of ten Bollywood scripts was "inspired" by a Hollywood film.¹¹⁹ Many Indian screenwriters can have a cultural copy of a Hollywood film ready the same day as a film's American premiere because they are so skilled at plagiarism.¹²⁰ For example, Yash Raj Films' *Mere Yaar Ki Shaadi Hai* is a cultural copy of *My Best Friend's Wedding*, and 2002's *Kaante* is believed to be a copy of Quentin Tarantino's *Reservoir Dogs*.¹²¹ Although cultural copies initially flew under the radar of top Hollywood producers, the international success and expansion of the Bollywood industry brought the legal implications center stage.¹²² Naturally, the expansion of the Internet and other communication technologies allows holders of intellectual property rights in these Hollywood films to more readily discover infringing Bollywood films.¹²³ However, Indian courts have been reluctant to find plagiarism among the inspired Bollywood cinema.¹²⁴ One Indian judge has commented that a work inspired by a copyright protected work is not infringement as long as the producer "take[s] an idea and route[s] it through the Indian heart."¹²⁵ Aside from blatant cultural copies, many Bollywood productions borrow individual characters, plots or titles from American works in an effort to increase interest in their work.¹²⁶ As a result of this cultural copy phenomenon

¹¹⁶ *Id.* at 63.

¹¹⁷ *See* Desai, *supra* note 102, at 259, 267–68 (noting that lack of international recognition is likely the cause of Bollywood's practice of copying other films, rather than creating original scripts).

¹¹⁸ *See id.* ("A cultural copy is nearly a direct copy of a movie or other work from one culture to another.").

¹¹⁹ *Id.*

¹²⁰ *Id.* at 267.

¹²¹ *Id.*

¹²² *Id.* at 259, 267.

¹²³ *Id.*

¹²⁴ *See* Neu, *supra* note 105, at 174–76 (stating the "enforcement of India's copyright laws is simply not taking place").

¹²⁵ *Id.*

¹²⁶ *See* Desai, *supra* note 102, at 266 (detailing a claim by Barbara Taylor Bradford that the plot of one of her romance novels was made into a 260-part television series by an Indian entertainment group).

and Bollywood's increasing fame, legal clashes have ensued on an international scale.¹²⁷ Whether a Bollywood production amounts to an exact copy or if the plagiarism involves a more specialized portion of a protected work, American film producers are now more aware of Bollywood's infringement on Hollywood's intellectual property rights and will now be forced to travel abroad to defend their rights in the Indian Courts.¹²⁸

C. INTERNATIONAL INTELLECTUAL PROPERTY PROTECTION IN INDIA

Various international treaties on intellectual property rights lay the groundwork for interaction between countries, including the United States and India. However, it is often the case that enforcement issues arise regardless of the regulatory treaties currently in place.

1. *International Agreements on Intellectual Property Rights.* The first major international treaty for the protection of intellectual property rights was the Paris Convention of 1883 for the Protection of Industrial Property (Paris Convention).¹²⁹ The Paris Convention was created to help individuals obtain protection for their "intellectual creations" in foreign countries.¹³⁰ However, the Paris Convention only provided protection for patents, trademarks, and industrial designs.¹³¹ A short time after the creation of the Paris Convention, the 1886 Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) was established to extend protection to literary and creative works.¹³² Despite the optimistic aspirations of the Paris and Berne Conventions, both lack the strength to compel substantial compliance by their member countries.¹³³ As a result, the World Trade Organization (WTO)¹³⁴ finalized the Trade-Related Aspects of

¹²⁷ See *id.* at 260 (arguing that globalization and growth of the Bollywood film industry will inevitably "lead some American film studio to bring suit in India").

¹²⁸ *Id.* at 259–60.

¹²⁹ World Intellectual Property Organization, Understanding Copyright and Related Rights 6, http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.pdf.

¹³⁰ See Jishnu Guha, Note, *Time for India's Intellectual Property Regime to Grow Up*, 13 CARDOZO J. INT'L & COMP. L. 225, 251–52 (2005).

¹³¹ Paris Convention for the Protection of Industrial Property, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 303.

¹³² Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended on Sept. 29, 1979, 25 U.S.T. 1341, 828 U.N.T.S. 221.

¹³³ See Guha, *supra* note 130, at 253 (commenting that the Paris and Berne conventions were more of a "gentleman's agreement" than an enforceable treaty because they lack "sufficient teeth").

¹³⁴ The WTO was established by the 1986–1994 Uruguay Round negotiations. World Trade Organization, What Is the WTO?, http://www.wto.org/english/thewto_e/whatis_e/whatis_E.htm (last visited Mar. 23, 2009). The WTO consisted of 153 member nations as of July 23, 2008. World Trade Organization, Members and Observers, http://www.wto.org/english/thewto_e/whatis_e/

Intellectual Property Rights (TRIPS) agreement in 1995.¹³⁵ The TRIPS agreement requires that each member nation afford a minimum level of intellectual property right protection to fellow member nations.¹³⁶ Each nation is required to “accord to the nationals of other members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property,” a condition known as the “national treatment.”¹³⁷ The TRIPS agreement requires that the laws of each country detail a minimum level of protection; however, it does not provide for any specific enforcement for those laws.¹³⁸ TRIPS Article 41(5) does not place a requirement on member nations to “put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of the law in general.”¹³⁹ The agreement also notes that it is not intended to create an obligation with respect to distribution of judicial resources and requires only that procedures be “fair and equitable.”¹⁴⁰

Should disputes arise between member nations, the WTO’s Dispute Settlement Understanding (DSU) will control.¹⁴¹ Under the DSU, the countries will consult, and if they are unable to reach a solution, the dispute will be referred to a panel that has the authority to “hear the complaint, gather evidence, and issue a report.”¹⁴² Any losing state will have a set period of time to correct the problem in order to bring their laws into compliance with the TRIPS agreement.¹⁴³ If a country still fails to comply with the TRIPS agreement after a report is given, cross-sectorial retaliation is permitted under the external enforcement provisions.¹⁴⁴ Currently, both the United States and India are member nations of the WTO and must therefore comply with the TRIPS agreement.¹⁴⁵

tif_e/org6_e.htm (last visited Mar. 23, 2009).

¹³⁵ Guha, *supra* note 130, at 253.

¹³⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round, 33 I.L.M. 81 (1994).

¹³⁷ *Id.* Part I, art. 3(1).

¹³⁸ *Id.* Part III, § 1, art. 41(5).

¹³⁹ *Id.*

¹⁴⁰ *Id.* Part. III, § 1, art. 4(2).

¹⁴¹ *Id.* Part V, art. 64(1).

¹⁴² Desai, *supra* note 102, at 262.

¹⁴³ *Id.*

¹⁴⁴ *See id.* (explaining that the WTO’s dispute settlement body can authorize sanctions against member states that fail to correct a violation even if the sanction does not involve the same sector as the violation). Professor Nimmer has noted that “[if] Korea is adjudged a copyright violator [by a panel], then Korea must proceed to honor copyrights in the American movies. If it does not do so, the United States is permitted to slap a punitive tariff on the importation of Hyundai’s from Korea.” *Id.*

¹⁴⁵ World Trade Organization, *supra* note 134 (listing both the United States and India as members of the WTO since Jan. 1, 1995).

2. *Intellectual Property Rights in India.* The Indian Embassy of the United States claims that intellectual property rights continue to gain strength in India.¹⁴⁶ The Embassy notes that India has a “well-established statutory, administrative and judicial framework to safeguard rights, whether they relate to patents, trademarks, copyrights, or industrial designs.”¹⁴⁷ On their face, current intellectual property rights in India have many similarities to the laws in place in the United States.¹⁴⁸ Many of India’s laws underwent significant reform in the past ten years in order to comply with international standards, including the TRIPS agreement.¹⁴⁹ For example, in 1994, the Indian Copyright Act of 1957 was specifically amended in an effort to bring the act into full compliance with the TRIPS agreement.¹⁵⁰ The new amendment added copyright protection for “satellite broadcasting, computer software, and digital technology” to the traditionally protected areas of “original literary, dramatic, musical and artistic works, cinematography, films and sound recordings.”¹⁵¹ The Indian Copyright Statute was ranked as one of the “most modern statutes of any country” by the International Intellectual Property Alliance (IIPA).¹⁵² Additionally, the Indian Embassy noted the significant modernization of the Indian Trademark Registry and the Office of Patent Information System.¹⁵³

Although India made significant reforms to its intellectual property laws in the last decade, the level of intellectual property protection in India is still considered weak in comparison with protection in the United States.¹⁵⁴ The lack of public awareness, inefficient bureaucracy, and weak penalties for infringers contribute to ineffective intellectual property protection in India.¹⁵⁵ As a result, India was placed on the United States’ “Priority Foreign Countries” list in 1991 due to its

¹⁴⁶ Embassy of India, Intellectual Property Rights in India, <http://www.indianembassy.org/special/ipr/ipr.htm> (last visited Mar. 2, 2009).

¹⁴⁷ *Id.*

¹⁴⁸ See Guha, *supra* note 130, at 225 (noting that India has the necessary intellectual property laws to protect artists, but the laws are not fully enforced); see also Desai, *supra* note 102, at 264 (stating that “Indian copyright laws resemble American copyright laws”).

¹⁴⁹ Ashish S. Prasad & Violeta I. Balan, *Strategies for U.S. Companies to Mitigate Legal Risks from Doing Business in India*, PRACTISING LAW INSTITUTE: CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES, Feb.–Mar. 2007, at 23.

¹⁵⁰ Desai, *supra* note 102, at 263–64.

¹⁵¹ *Id.* at 263.

¹⁵² *Id.*

¹⁵³ Embassy of India, *supra* note 146; see also Prasad & Balan, *supra* note 149, at 24–27 (noting how historical inadequacy of patent protection system in India lead to rampant piracy, but three successive amendments to Patent Act of 1970 brought laws into compliance with TRIPS by extending the patent period and allowing for the patentability of both pharmaceuticals and agrochemicals).

¹⁵⁴ Prasad & Balan, *supra* note 149.

¹⁵⁵ *Id.*

“denial of adequate and effective intellectual property protection . . . especially in the area of patent protection.”¹⁵⁶ The “Priority Foreign Countries” list is reserved for those nations with the worst policies and practices, while “less harmful violators” are often placed on the “Priority Watch List.”¹⁵⁷ Because of India’s placement on the “Priority Foreign Countries” list, the United States suspended duty-free privileges for Indian trade goods, including pharmaceuticals and chemical products.¹⁵⁸ The aim of the “Priority” classification and trade sanctions was to “influence [India] to change its copyright laws to better protect U.S. intellectual property rights abroad.”¹⁵⁹ Given the enactment of the Indian Copyright Act of 1994, this pressure seems to have been effective in leading to some of the recent, major reforms in Indian intellectual property law.¹⁶⁰ Although India has shed its classification as a “Priority Foreign Country,” India remains on the “Priority Watch List” because of its high piracy rates and lack of enforcement measures.¹⁶¹

3. *Enforcement Issues in the Indian Judiciary.* Even with intellectual property laws that substantially comply with the TRIPS agreement, protection in India remains an issue due to lack of enforcement.¹⁶² This lack of enforcement originates with the failure of the Indian judiciary system.¹⁶³

The Indian judiciary is divided into three levels: the Supreme Court, the high courts, and the district courts.¹⁶⁴ The Supreme Court has appellate jurisdiction over all civil and criminal proceedings that concern the interpretation of the constitution, and it has broad discretionary power to hear special appeals on any

¹⁵⁶ Desai, *supra* note 102, at 263 (quoting U.S. TRADE REPRESENTATIVE, NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 178–79, available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2002_NTE_Report/asset_upload_file830_6410.pdf (2002)).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Priti H. Doshi, *Copyright Problems in India Affecting Hollywood and “Bollywood,”* 26 SUFFOLK TRANSNAT’L L. REV. 295, 303 (2003).

¹⁶⁰ *Id.* at 303–04 (suggesting that pressure from the U.S. Trade Representative which negotiates with “Priority Foreign Countries,” prompted the enactment of India’s Copyright Act of 1994).

¹⁶¹ Press Release, Office of the United States Trade Representative, USTR Issues 2008 Special 301 Report (Apr. 25, 2008) (listing nine countries on the Priority Watch List: China, Russia, Argentina, Chile, India, Israel, Pakistan, Thailand, and Venezuela).

¹⁶² See Guha, *supra* note 130, at 226 (stating the need for “comprehensive intellectual property rights enforcement in India”).

¹⁶³ See Desai, *supra* note 102, at 269–70 (suggesting that although India is compliant with TRIPS standards, it will not be able to protect intellectual property rights without judicial reform).

¹⁶⁴ FED. RESEARCH DIV., LIBRARY OF CONGRESS, INDIA: A COUNTRY STUDY ch. 8 (James Heitzman & Robert L. Worden eds., 5th ed. 1996), available at <http://lcweb2.loc.gov/frd/cs/intoc.html>.

subject other than the armed forces.¹⁶⁵ Below the Supreme Court are eighteen high courts that serve the states and territories of India.¹⁶⁶ Each high court has original and appellate jurisdiction in its state or territory.¹⁶⁷ Below the high courts are separate and subordinate district courts within each state or territory.¹⁶⁸ In each district court, a district judge presides over civil cases and a session judge presides over criminal cases.¹⁶⁹ Even below the district court level, civil cases are filed in subdistrict courts and criminal cases are routed to a subordinate magistrate under the control of a district magistrate.¹⁷⁰ Disputes are resolved by “people’s courts” at the village level.¹⁷¹

Despite its structured organization, the Indian judiciary is overburdened and underfunded.¹⁷² As of fiscal year 2003–2004, India’s annual judicial budget was approximately \$26.5 million, compared to the United States’ annual judicial budget of approximately \$2.13 trillion.¹⁷³ India only spends about 0.027% of its annual federal budget on its judiciary, while the United States spends around 1.7% of its federal budget on justice administration.¹⁷⁴ The lack of administrative resources causes serious congestion in the Indian courts, which are already notoriously slow due to the highly litigious nature of Indian society.¹⁷⁵ The United Nations Development Program estimates that nearly 20 million cases are pending in the Indian courts, and the Chief Justice of the Delhi High Court reports the criminal appeals cases alone could take up to 466 years to work through.¹⁷⁶

The Indian Embassy responded to accusations of judicial inefficiency by the International Intellectual Property Association (IIPA) by noting that although the Indian judiciary is “seized of the matter of delay in administering justice,” it is “handling cases as expeditiously as possible.”¹⁷⁷ The Embassy also noted that Article 41(5) of the TRIPS agreement does not create an obligation for member states to put a separate judicial system in place to deal with the enforcement of intellectual property issues.¹⁷⁸

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Guha, *supra* note 130, at 240.

¹⁷³ *Id.* at 240–41.

¹⁷⁴ *Id.* at 241.

¹⁷⁵ Desai, *supra* note 102, at 265.

¹⁷⁶ Associate Press, *Report: Indian Court is 466 Years Behind Schedule*, Law.com, Feb. 2, 2009, <http://www.law.com/jsp/law/international/LawArticleFriendlyIntl.jsp?id=1202428286985>.

¹⁷⁷ Embassy of India, *supra* note 146.

¹⁷⁸ *Id.*; see also *supra* Part II.C.1.

In addition to the overburdened judicial system, the legitimacy of the Indian courts has been questioned due to their corrupt practices and lack of judicial accountability.¹⁷⁹ Courts in India avoid responding to allegations of judicial misconduct and continue to perpetuate what critics call an “enormous arrogance and abuse of power.”¹⁸⁰ Former Chief Justice S.P. Bharucha estimated that about twenty percent of the higher judiciary was corrupt, while High Court Justice Michael Saldanha estimates that the number is closer to thirty-three percent.¹⁸¹ Judicial misconduct, lack of accountability, and corrupt practices, along with the judiciary’s inability to resolve legal disputes in a timely manner “threatens to erode the remaining legitimacy of the judicial system.”¹⁸²

III. ANALYSIS

Although India claims to provide adequate protection for American holders of intellectual property rights, significant problems exist within the current regime. Regardless of compliance with international standards, widespread enforcement problems and a corrupt and inefficient judiciary continue to undermine the legitimacy of protection.

More specifically, complications arise when asserting protection of motion picture titles in a country such as India. Motion picture title protection can be difficult to secure even in the United States, where protection is often afforded to only those titles that have garnered worldwide recognition or titles that constitute part of a series.¹⁸³ Regardless of the difficulty in securing rights to a motion picture title, there are substantial benefits for permitting heightened protection for those titles that are sufficiently famous and well known. Allowing heightened protection encourages creativity and investment in ideas. Most importantly, it prevents unjust enrichment of freeriders who exploit a title or idea to gain personal profit. Although producers can often procure the needed protection in their home country, the lack of protection abroad will continue to erode their incentives to create, given the increasingly globalized film industry.

The emergence of major film industries abroad, such as India’s Bollywood scene, demands that greater attention be given to securing legitimate intellectual property protection both home and afar. Legitimate and effective protection can

¹⁷⁹ Desai, *supra* note 102, at 265.

¹⁸⁰ Bijo Francis, *India’s Judiciary Is Not a Holy Cow*, UPI ASIA.COM, June 9, 2008, http://www.upiasia.com/Human_Rights/2008/06/09/indias_judiciary_is_not_a_holy_cow/8300/.

¹⁸¹ *Id.*

¹⁸² FED. RESEARCH DIV., *supra* note 164.

¹⁸³ *See supra* Part II.A.

best be accomplished by unified regulation that would serve to protect the interests of all international filmmakers.

A. WAS HARRY POTTER GIVEN ADEQUATE PROTECTION BY THE INDIAN COURTS?

The *Harry Potter* vs. *Hari Puttar* battle was seen to be a “key test of India’s intellectual property laws.”¹⁸⁴ The question is: Did India pass the test? The answer appears to be no. To evaluate whether India afforded adequate protection to the boy wizard, it is helpful to assess whether Warner Bros. would have succeeded on their home turf, the United States.

1. *Harry Potter’s Protection in the United States.* In the United States, Warner Bros. could have sought protection for the Harry Potter title through the American judicial system on four key theories: copyright infringement, trademark infringement, unfair competition, and trademark dilution.¹⁸⁵

First, it is unlikely that Warner Bros. could have utilized the theory of copyright infringement to protect the Harry Potter title alone. Copyright protection would only be available if Warner Bros. could show substantial similarities in the plot, characterizations, or dialogue, because generally, literary titles alone are not copyrightable.¹⁸⁶ Warner Bros. alleged that similarities beyond the films’ titles existed.¹⁸⁷ They claimed similarities between the title characters: Harry Potter and Hari Puttar.¹⁸⁸ Both boys have similar names and both reside in England at the time of the film.¹⁸⁹ Also, Warner Bros. alleged similarity in name between Hari’s father, Professor Dhoonda and Harry Potter’s mentor, Professor Dumbledore.¹⁹⁰ Regardless of these slight similarities, it is unlikely that an American court would find that the Indian film rose to the level of copyright infringement. The Hari Puttar film involves a young Indian boy trying to protect a secret computer chip from thieves,¹⁹¹ while the Harry Potter films chronicle the life of a famous boy wizard whose destiny it is to destroy the evil Lord Voldemort and save the wizarding world.¹⁹² It is likely that an American court would find that the substantial differences in plot negate any similarity in character name.

¹⁸⁴ Blakely, *supra* note 2.

¹⁸⁵ See *supra* Part II.A.1–4.

¹⁸⁶ See *supra* Part II.A.1.

¹⁸⁷ Gray, *supra* note 8.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See Harry Potter at Bloomsbury, <http://www.bloomsbury.com/harrypotter/default.aspx?sc=c=2> (last visited Mar. 2, 2009) (summarizing each installment of the Harry Potter series).

Second, Warner Bros. would likely utilize the theory of trademark infringement if the case were brought in the United States. Warner Bros. would have a much stronger claim under a trademark infringement theory than under copyright infringement. Although the PTO will not register a single Harry Potter title as a trademark,¹⁹³ Warner Bros. has an excellent chance of proving secondary meaning to gain protection under section 43(a) of the Lanham Act. To prevail on a claim of trademark infringement, Warner Bros. will need to prove that the Harry Potter title has (1) acquired a secondary meaning and (2) that the alleged infringer is likely to cause confusion.¹⁹⁴ Under *Rogers v. Grimaldi*,¹⁹⁵ a motion picture title is sufficiently well known if “consumers associate it with a particular author’s work.” Given the widespread success of the Harry Potter novels and movies, it seems almost certain that an American court would find the title sufficiently well known that consumers would associate the film with its sources, Warner Bros. and J.K. Rowling.

Additionally, a finding of secondary meaning can be achieved through the “series exception.”¹⁹⁶ Warner Bros. could use the series exception because at the time of the Indian film’s release, five Harry Potter movies had previously been released under the same title. Further, the court can look at various factors to help aid in a finding of secondary meaning.¹⁹⁷ The majority of the factors seem to weigh heavily in favor of Warner Bros. Heavy advertising expenditures, copious amounts of unsolicited media coverage, widespread sales success, multiple attempts by other parties to plagiarize the Harry Potter brand, and the long and exclusive use of the Harry Potter mark all favor Warner Bros. Also, the last factor, consumer studies linking the mark to a source, would likely favor Warner Bros. if such a study was conducted. The Harry Potter novels have been translated into more than sixty-seven languages, and the films have garnered international success.¹⁹⁸ It is unlikely that any defendant could claim to be ignorant of the strength and consumer presence of this mark.

After a finding of secondary meaning, Warner Bros. would also need to prove that the infringing use, the *Hari Puttar* film title, would cause a likelihood of confusion. Again, it seems as though the majority of the factors that the court would evaluate to determine whether there was a likelihood of confusion would weigh in favor of Warner Bros.¹⁹⁹ Factors weighing in favor of Warner Bros.

¹⁹³ See *supra* Part II.A.2.

¹⁹⁴ See *supra* notes 46–47 and accompanying text.

¹⁹⁵ 875 F.2d 994, 998 (2d Cir. 1989).

¹⁹⁶ See *supra* note 43 and accompanying text.

¹⁹⁷ See *supra* note 48 and accompanying text.

¹⁹⁸ See *supra* note 2 and accompanying text.

¹⁹⁹ See *supra* note 50 and accompanying text.

would include the substantial strength of the Harry Potter mark coupled with the relative weakness of the *Hari Puttar* film title, the competitive proximity of the marks as the Harry Potter films have been released worldwide and the *Hari Puttar* film will be released outside of India in markets such as the United States, and similarity and quality of the products as motion pictures. More debatable factors include the similarity in the marks, the actual confusion between the products, sophistication of buyers, and the good faith of the defendant. Mirchi Movies, producers of the Indian film, argue that the marks are not substantially similar because “Hari” is a common Indian name and “Puttar” means son in both Hindi and Punjabi.²⁰⁰ However, the similarity in spelling and phonetics seems undeniable. Furthermore, even if the phrase “Hari Puttar” has significance in the Hindi or Punjabi language, it does not negate the fact that Indian audiences have been exposed to the “Harry Potter” brand and have read the Harry Potter books that were translated and sold in the Hindi language.²⁰¹ Indian audiences will likely see the association between the two titles. Given the widespread success of Harry Potter, it is impossible to assume that the producers were completely unaware of the similarity between their title and the Harry Potter brand. Further, this might serve as evidence of bad faith on the part of Mirchi Movies, as it apparently attempted to free ride off the good will of the Harry Potter brand. The sophistication of the buyer factor is arguably low since the market in question is entertainment. It is unlikely that moviegoers exercise a heightened level of care in selecting their products given the low investment needed to view a motion picture. Although actual confusion between the two marks is unlikely, since most moviegoers would recognize the difference between the Hollywood-produced Harry Potter films and the Bollywood-crafted *Hari Puttar* film, the other factors seem to weigh so heavily for Warner Bros. that the importance of actual confusion may be negated. Furthermore, actual confusion is not a prerequisite for a finding of likelihood of confusion.²⁰² In conclusion, it seems Warner Bros. would have an excellent case for trademark infringement if it prosecuted its claim in the United States.

Third, Warner Bros. could claim unfair competition under the laws of the United States. A claim for unfair competition employs the same basic framework as a claim for trademark infringement.²⁰³ Therefore, if the United States courts are likely to find for Warner Bros. on a claim of trademark infringement, then they are also likely to find for Warner Bros. on the theory of unfair competition. In fact, unfair competition would likely be a stronger claim, given its broad nature of

²⁰⁰ See *supra* note 14 and accompanying text.

²⁰¹ Blakely, *supra* note 2.

²⁰² See *supra* Part II.A.2.

²⁰³ See *supra* Part II.A.3.

including any factor that might be relevant in deciding whether the actions of the accused are unfair or confusing.²⁰⁴ In this case, a court is likely to give significant weight to the fact that it is seemingly impossible that the producers of the Hari Puttar film were completely unaware of the connection and similarity between their film and the Harry Potter series. Harry Potter's worldwide success and presence in India would be difficult for a court to ignore. A claim for unfair competition is a valuable alternative for producers wishing to protect their sufficiently famous motion picture titles and would likely be the most viable theory for Warner Bros.

Lastly, Warner Bros. could attempt to utilize the theory of trademark dilution to protect the Harry Potter name in the United States. Warner Bros. could prove trademark dilution either through blurring, which is a weakening of the trademark's ability to identify and distinguish source, or through tarnishment, which means creating a negative association by a secondary use.²⁰⁵ Although this would be a difficult argument to make, Warner Bros. could contend that by producing a film that utilizes a mark that is substantially similar to its Harry Potter mark, Mirchi Movies decreases the value of the title for subsequent use in the forthcoming *Harry Potter and the Half-Blood Prince* and *Harry Potter and the Deathly Hallows*, parts I and II.²⁰⁶ Warner Bros.'s argument would be that the subsequent use would be weakened either because Mirchi tarnished the image of Harry Potter or weakened the ability of the Harry Potter name to identify a legitimate Harry Potter movie. However, this argument seems rather weak given the widespread success of Harry Potter. Although it appears that Mirchi Movies is attempting to free ride off the Harry Potter brand to turn a profit, it is unlikely that Harry Potter fans will not recognize a subsequent movie bearing the Harry Potter name because the mark has been weakened or tarnished.

Additionally, in lieu of public law, Warner Bros. could have utilized the MPAA Title Registration Bureau to secure its exclusive rights to the Harry Potter title.²⁰⁷ If Warner Bros. had registered the Harry Potter titles with the MPAA Title Registration Bureau, then it would have had the opportunity to protest any subsequent proposed title that it felt was "harmfully similar" to its own.²⁰⁸ If Mirchi Movies had attempted to register its title, *Hari Puttar: A Comedy of Terrors*,

²⁰⁴ See *supra* Part II.A.3.

²⁰⁵ See *supra* Part II.A.4.

²⁰⁶ The Internet Movie Database, <http://www.imdb.com/find?s=all&q=harry+potter> (last visited Mar. 2, 2009) (estimating July 17, 2009 as the release date for *Harry Potter and the Half Blood Prince*, November 19, 2010 for *Harry Potter and the Deathly Hallows: Part I*, and July 15, 2011 for *Harry Potter and the Deathly Hallows: Part II*).

²⁰⁷ See *supra* Part II.A.5.

²⁰⁸ See *supra* Part II.A.5.

then Warner Bros. would have had ten days to file a complaint. At this point, the parties could have settled through direct negotiation or sent the complaint for resolution through a MPAA arbitration panel.²⁰⁹ Direct negotiation between these two parties would have likely been futile because Warner Bros. requested that Mirchi Movies rename its film in 2005, but the producers declined to do so.²¹⁰ If sent to a MPAA arbitration panel, the panel would consider “all the equities” involved, and its decision would be upheld under the Federal Arbitration Act.²¹¹ Had this case gone before an MPAA arbitration panel, it is likely that Warner Bros. would have prevailed given that panels tend to prefer previously registered titles, and at least five Harry Potter titles would have been previously registered with the Bureau.²¹² However, the one complication with this private law system is that membership in MPAA Title Registration Bureau is not compulsory for all American filmmakers, much less international filmmakers.²¹³ For this system to be effective, Mirchi Movies would have had to subscribe to the MPAA system.

In conclusion, it appears that Warner Bros. would have enjoyed heightened protection for the Harry Potter title under the theories of unfair competition and trademark infringement had it been able to bring its case against Mirchi Movies in the United States. Although the MPAA Title Registration Bureau seems like a viable source of protection given its preference for previously registered titles and its quick and efficient resolution process, it would not be effective unless Mirchi Movies had chosen or was compelled to participate in the system in the system.

2. *Harry Potter under the Indian Framework.* Although it appears that Warner Bros. would have a chance for success on some of its claims if it had the opportunity to litigate in the United States, the reality is that Warner Bros. must seek protection from the Indian court system because the alleged infringer is based in India.²¹⁴ Both India and the United States are governed by the TRIPS agreement; however, TRIPS is not self-executing.²¹⁵ Therefore, any American producer who wishes to enforce intellectual property rights to his film in India must bring his claim to the Indian courts, as he cannot make a claim under TRIPS directly. Additionally, the TRIPS agreement only requires a minimum level of

²⁰⁹ See *supra* Part II.A.5.

²¹⁰ Bhushan, *supra* note 15.

²¹¹ See *supra* Part II.A.5.

²¹² See *supra* Part II.A.5.

²¹³ See *supra* Part II.A.5.

²¹⁴ See *supra* Part II.B.

²¹⁵ See *supra* Part II.C.1; see also Desai, *supra* note 102, at 261 (“TRIPS is not self-executing and claims cannot be brought on the basis of TRIPS in domestic courts.”).

protection by each member state and does not require any special expedited enforcement of intellectual property laws.²¹⁶

The substance of Indian intellectual property laws satisfies the TRIPS standards,²¹⁷ and the laws are quite similar to their American counterparts.²¹⁸ One might assume that if Warner Bros. had a case strong enough to prevail in the American legal system, then it would follow that the studio should have the strength to prevail on its claim in the Indian courts. This is not the case. Severe enforcement problems significantly hinder protection in this case and have hindered the protection of the Harry Potter brand in the past.²¹⁹ Indian courts are notoriously inefficient, corrupt, and lack judicial accountability.²²⁰ One commentator has noted that “[f]or litigation in India, you need a terrific amount of time, money and energy and most people are not ready to spend that kind of time.”²²¹ Even if the studio elects to spend the time and money involved in Indian litigation, Warner Bros. is significantly disadvantaged from the start by the structure and reputation of the Indian judiciary. Given India’s track record of denying protection to Hollywood studios,²²² it is no surprise that Warner Bros.’s claims failed in this instance. In a system plagued by delay and inefficiency, it is ironic that one of the primary reasons given for the dismissal of Warner Bros.’s claim was the studio’s delay in filing their case.²²³

B. CONSEQUENCES OF CURRENT INTERNATIONAL PROTECTION OF MOTION PICTURE TITLES

As illustrated by the lack of protection afforded to Harry Potter, severe consequences result from the current, ineffective framework in place to protect international intellectual property rights in India. The most devastating consequence of this system is the apparent lack of protection afforded to

²¹⁶ See *supra* Part II.C.1.

²¹⁷ See *supra* note 149 and accompanying text.

²¹⁸ See *supra* note 148 and accompanying text.

²¹⁹ See *supra* note 21 and accompanying text.

²²⁰ See *supra* Part II.C.3.

²²¹ Desai, *supra* note 102, at 269 (quoting Aabad Ponda, a lawyer to Bollywood celebrities).

²²² See *id.* at 266–67 (noting that Hollywood has yet to successfully enforce a copyright against a Bollywood studio despite rampant plagiarism exemplified by the fact that almost eight out of every ten Bollywood scripts was “inspired” by a Hollywood film); see also *Delhi Court Saves Bollywood Film ‘Hari Puttar’ from ‘Harry Potter Spell,’ supra* note 21 (stating that an Indian court rejected an October 2007 copyright claim by J.K. Rowling for an unauthorized reproduction of Hogwarts School of Witchcraft and Wizardry).

²²³ See *HC Dismisses Warner Bros’ Plea on Hari Puttar, supra* note 19 (noting the High Court’s opinion that Warner Bros. should have brought its claim earlier because it had “full knowledge” the film was being produced in 2005).

Hollywood studios when they attempt to enforce their rights abroad. It can only be assumed that this trend holds true for protection of motion picture titles as well, since copyright protection as a whole is more extensive than motion picture title protection.

Practically, the current framework means that any Hollywood studio attempting to enforce its rights to a motion picture title must spend an exorbitant amount of money on lengthy, expensive court battles that require the studio to travel over 8,500 miles to defend its rights.²²⁴ As previously noted, the litigation process in India is notoriously slow and requires a great deal of money to pursue.²²⁵ The staggering amount of money needed to pursue litigation in India is a significant deterrent for many potential plaintiffs. As a result, it is likely that smaller studios and independent filmmakers will be unable to protect their own ideas because they cannot afford the time and money needed to defend their rights in the Indian courts. Even if a studio is able to come up with the funds to actively pursue enforcement of its rights in India, it appears that the studio will have little success. If a large, prominent film studio like Warner Bros. cannot obtain adequate protection for a blockbuster like Harry Potter, what hope for success does any studio have?

Given the extraordinary amount of time and money involved and the probability of failure in the Indian court system, very few producers will attempt to protect their films from even blatant infringement. If blatant infringement goes unchecked, what incentive does a producer have to invest in his film when he knows it will be exploited upon release? Herein lies the basic difficulty of intellectual property law: if individuals do not have the right to the exclusive use of their own ideas, then they will not have an incentive to create and engage in artistic endeavors.²²⁶ It would be a tragic result to allow unchecked plagiarism of motion pictures to hinder the growing international film industry.

The consequences of ineffective enforcement of intellectual property rights for motion picture titles will only escalate as the film industry becomes more globalized. As new countries emerge in the entertainment industry, the market for both plagiarism and protection will increase.

²²⁴ Map Crow: Travel Distance Calculator, <http://www.mapcrow.info> (last visited Mar. 2, 2009) (estimating the distance between Los Angeles, California, USA to Mumbai, India is 8,695.18 miles).

²²⁵ See *supra* note 221 and accompanying text.

²²⁶ See generally LOREN & MILLER, *supra* note 50, at ch. 1, pt. 1 (noting the basic purpose of intellectual property rights is to “facilitate market transactions in intangible assets by providing excludability to creators”).

C. REASONS FOR HEIGHTENED PROTECTION OF MOTION PICTURE TITLES

Heightened protection of intellectual property rights in an international marketplace is essential to sustaining the integrity of the motion picture industry and for encouraging the growth of the international film industry. Had this heightened protection been implemented in India, it is likely that Warner Bros. would have received the protection to which it was entitled. The basic benefits that stem from the recognition of intellectual property rights in motion picture titles are (1) more creative works²²⁷ and (2) less consumer confusion.²²⁸

Recognizing the right to exclusivity in a well-known motion picture title will encourage more investment in ideas. The incentive to create will be much like that which stems from any recognition of intellectual property right. Additionally, recognizing this right on an international scale will encourage sharing of creativity between cultures, without the fear of exploitation. Exclusive rights to well-known motion picture titles will also aid in avoiding consumer confusion. Preventing a subsequent infringing use of an original motion picture title will ensure that consumers will not be deceived as to the origin or the nature of the film. Again, this benefit is even more persuasive on a global scale because as the international film industry grows, consumers will be exposed to an increasing number of films, and duplicate, infringing titles could be even more damaging and misleading. Finally, recognizing a right to protect a famous motion picture title will help prevent the unjust enrichment of a malicious infringer who engages in plagiarism or exploitation of a motion picture title in an effort to realize personal profit.

There is the potential that over-protection of motion picture titles could be extremely burdensome on the international film industry and limit the availability of valid, non-infringing titles. However, the potential for over-reaching could be alleviated by affording protection only to those motion picture titles that have acquired a secondary meaning. As noted, the public law of the United States offers protection for those titles that have acquired a secondary meaning either through their fame or through the establishment of a series.²²⁹ Carrying this standard over to the international film industry would go a long way in protecting motion picture titles, while still guarding against over-protection. Currently, the system for the domestic protection for motion picture titles in the United States seems to exceed that of other countries, including India. Additionally, a mechanism such as the MPAA Title Registration Bureau could limit over-

²²⁷ *See id.* at ch. 1, pt. 1, at 1 (noting that aspects of intellectual property law encourage creative activity by giving creators “exclusive rights to the fruits of their productivity”).

²²⁸ *See id.* at ch. 1, pt. 1, at 5 (stating that “trademark law makes it unlawful for someone to use another’s mark in a way that is likely to create consumer confusion”).

²²⁹ *See supra* Part II.A.

protection. Under the Title Registration Bureau, conflicting titles are evaluated by an independent arbitration panel that has the ability to weigh the interest in protecting a title with the interest in avoiding overprotection.²³⁰

D. PROPOSAL FOR UNIFIED REGULATION

The most effective way to ensure international protection of motion picture titles is through unified regulation. As the motion picture industry becomes more globalized, affording protection to both American and foreign film titles becomes even more essential. Unified regulation will help protect creative ideas and avoid consumer confusion among motion pictures. Inconsistent application of intellectual property law leads to confusion and exploitation of a film producer's rights.

One obvious solution would be to compel countries to enforce the intellectual property laws that are already in place. Many countries, including India, already have intellectual property laws that are substantially similar to laws of the United States, in part because the TRIPS agreement requires a minimum level of intellectual property protection for all WTO member nations.²³¹ Although India has seemingly adequate protection in place, it has failed to effectively enforce those laws, resulting in the exploitation of foreign motion picture rights.²³² Although India and the United States are governed by the TRIPS agreement, which requires a certain level of intellectual property protection, it does not compel enforcement of those laws.²³³ To provide a more unified regulation of motion picture title protection, the WTO could amend the TRIPS agreement to require all member nations to provide timely, fair and effective enforcement of their laws. Holding member nations accountable for their actions would force countries such as India to reevaluate judicial efficiency and initiate good faith changes in order to avoid sanctions by the WTO. Compelling enforcement through the TRIPS agreement would be a minimal, yet effective, step towards unified regulation of motion picture title protection. Since TRIPS already requires that member nations have adequate laws in place, the enforcement requirement would simply ensure that nations follow through with those laws. Additionally, implementing change through the WTO would be an effective step towards a more globalized and harmonious international film industry, because the WTO

²³⁰ See *supra* Part II.A.5.

²³¹ See *supra* Part II.C.2.

²³² See *supra* Part II.C.3.

²³³ See *supra* Part II.C.1.

currently consists of 146 member nations,²³⁴ all of which would be affected by a new enforcement requirement.

While the compelled enforcement of public law would be an effective tool in boosting the protection of motion picture titles in the international film industry, this system still has drawbacks. Although the TRIPS agreement requires a minimum level of protection, it does not necessarily require laws that directly protect or directly regulate the use of motion picture titles. Current public law protection in compliance with the TRIPS agreement is adequate, but it is not perfect. Litigation under public law can be expensive, time-consuming and is often not feasible for smaller studios and independent filmmakers. Furthermore, litigation becomes even more burdensome when it occurs in a foreign country.

While amending the TRIPS agreement would boost the level of international protection of motion picture titles, the most efficient system of unified regulation would mirror the MPAA's Title Registration Bureau, which currently governs MPAA members in the United States. An international title registration system would have the same benefits as the MPAA's Bureau: efficiency, low cost and adequate protection.²³⁵ Although the public law affords a decent amount of protection to those film titles that have sufficiently acquired secondary meaning, and thus deserving of protection, the litigation process can be time consuming and expensive.²³⁶ Compound this expense with the exorbitant amount of money needed to defend intellectual property rights in a foreign country, and it becomes clear that an international registry modeled after the MPAA system would afford the most protection with the least cost.

The obvious drawback with the MPAA system within the United States is that membership is not compulsory.²³⁷ In order for an international title registration bureau to operate effectively, international filmmakers must be compelled to join and register their titles. Although this seems to be a formidable barrier, many incentives exist for those filmmakers that choose to register. These studios will enjoy peace of mind that disputes regarding their film titles, whether they are the accused infringer or the alleged titleholder, will be arbitrated in a cost-effective and efficient manner. However, simply hoping that peace of mind will compel all filmmakers to subscribe to an international title registration bureau is not enough. Even with the effective registration system in the United States, some filmmakers choose not to participate. Therefore, the registration bureau would only be fully effective if every filmmaker complied. Although it seems improbable to force every filmmaker, from small independent artists to large, multi-million dollar

²³⁴ See *supra* note 134 and accompanying text.

²³⁵ See *supra* Part II.A.5.

²³⁶ See *supra* Part II.A.1-4.

²³⁷ See *supra* Part II.A.5.

studios, to join, the governing body of the registration system could push membership with economic benefits. Tax incentives, subsidies, or even networking opportunities could be utilized to encourage membership, depending on the system's administration and state cooperation.

Although an international title registration bureau is the most idealistic solution for unified regulation of motion picture titles, it might not be the most realistic alternative. Creating an international governing body for the film industry would require a substantial investment and cooperation among many countries whose film industries operate in fundamentally different ways. Should the investment be made, the benefits would be substantial. Although amending the TRIPS agreement would also take substantial cooperation, it would simply build on an existing structure of regulation. Despite its flaws, amending the TRIPS agreement is likely to be the most feasible step towards unified regulation of motion picture title protection.

Had either an amended TRIPS agreement or an international title registration system been implemented at the time of the *Harry Potter vs. Hari Puttar* battle, it is likely that Harry Potter would have enjoyed more adequate protection. With an international title registration system, producers of the *Hari Puttar* film would have had adequate notice of the registration of the *Harry Potter* title, and Warner Bros. would have been given the opportunity to contest the use of the title in an efficient and cost-effective manner, much like it would under the MPAA Title Registration Bureau.²³⁸ With an amended TRIPS agreement, India would be compelled to enforce its intellectual property laws in a timely and just manner. If India's laws were properly enforced, Warner Bros. would have received substantially the same protection it would have received in the United States.²³⁹

IV. CONCLUSION

Few motion picture franchises have reached the fame and worldwide renown that the Harry Potter empire enjoys. Harry Potter is adored by millions and his status is undeniable. Shockingly, the international community has not given this magical icon the recognition to which he is entitled. India's denial of motion picture title protection to Warner Bros., as holder of the rights to the boy wizard, demonstrates a grave flaw in the protection of international intellectual property rights. Despite efforts to standardize international protection via the TRIPS agreement, the inconsistency in the application of intellectual property rights threatens to hinder the growth of the international film industry and stifle

²³⁸ See *supra* Part III.A.1.

²³⁹ See *supra* Part III.A.1.

creativity. With India's rising Bollywood scene, the legitimate enforcement of intellectual property rights in motion pictures should be at the forefront of India's agenda. Although significant reforms have occurred in India, the lack of enforcement of intellectual property rights by its inefficient judiciary remains a threat to international innovation and the integrity of motion picture titles.

Given the current inconsistent application of intellectual property laws in the international film industry, a solution is needed to provide adequate protection for motion picture titles. Additionally, the failure of enforcement despite the international trade agreements currently in place is clear evidence that the current system is inadequate and a new solution is needed. Unified regulation of motion picture titles is needed to ensure protection as the international film industry continues to grow. Although compelling enforcement of TRIPS-compliant public law would assist in providing additional protection for motion picture titles, the most efficient and cost-effective mode of protection would be an international title registration system modeled after the MPAA Title Registration Bureau. This scheme would provide invaluable protection for both large studios and independent filmmakers, saving precious time and money that could be better channeled towards the creative process. However, a substantial investment is needed on the part of the international film community in order to make an international registration system a reality. Although the benefits of an international title registration bureau would be great, the most realistic unified regulation would take the form of an amendment to the TRIPS agreement. Compelling enforcement of intellectual property laws in member nations would force countries, including India, to recognize the failures in their current system and strive for a more efficient and more just system of intellectual property protection.

Indeed, dark and dangerous times lie ahead should the international community continue to take the easy way out and deny legitimate protection to the creative ideas that form the heart of the motion picture industry.

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