

Bollywood is Coming!

Copyright and Film Industry Issues Regarding International Film Co- Productions Involving India

TIMM NEU*

TABLE OF CONTENTS

I.	INTRODUCTION	125
II.	COOPERATION CONSTELLATIONS	127
	A. <i>Art and Government-Funded Film</i>	127
	B. <i>Commercial Motion Pictures and Television</i>	128
III.	NATIONAL FILM INDUSTRIES PEERING ABROAD	129
	A. <i>India</i>	129
	B. <i>United States</i>	130
	C. <i>Germany</i>	131
IV.	INTERNATIONAL LEGAL ENVIRONMENT	132
	A. <i>The Berne Convention</i>	133
	B. <i>The Universal Copyright Convention</i>	135
	C. <i>The Rome Convention</i>	135
	D. <i>The TRIPS Agreement</i>	136
	E. <i>The World Intellectual Property Organization</i>	137
	F. <i>Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties</i>	137
	G. <i>Co-Production Treaties and Government Initiatives</i>	138

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V.	KEY FACTORS FOR INTERNATIONAL	
	CO-PRODUCTIONS.....	139
A.	<i>Parallel Imports</i>	139
B.	<i>Term of Copyright</i>	140
1.	<i>India</i>	140
2.	<i>United States</i>	141
3.	<i>Germany</i>	141
4.	<i>International Treaties</i>	141
a.	<i>Indian Film</i>	142
b.	<i>United States Film</i>	142
c.	<i>German Film</i>	142
d.	<i>Conclusion</i>	143
C.	<i>Moral Rights</i>	143
1.	<i>India</i>	143
2.	<i>United States</i>	144
3.	<i>Germany</i>	146
4.	<i>International Treaties</i>	147
D.	<i>Neighboring Rights</i>	147
E.	<i>Exploitation and Versioning</i>	148
F.	<i>Censorship</i>	148
1.	<i>India</i>	149
2.	<i>United States</i>	152
3.	<i>Germany</i>	154
VI.	CO-PRODUCTION CONTRACTS.....	155
A.	<i>Prior Documents</i>	156
B.	<i>Parties to the Contract</i>	156
C.	<i>Background</i>	156
D.	<i>Object of the Contract</i>	157
E.	<i>Definition of the Work</i>	157
F.	<i>Intellectual Property Right</i>	157
1.	<i>Acquisition of Rights and Permissions</i>	157
2.	<i>Rights of the Authors and Performers</i>	158
G.	<i>Assignment of Responsibilities</i>	158
H.	<i>Contributions</i>	158
1.	<i>Co-ownership of Copyright and Essential Elements of the Film</i>	158
J.	<i>Method for Reaching Agreements</i>	159
K.	<i>Accounting and Documentation</i>	159
L.	<i>Division of Revenue</i>	159
M.	<i>Attribution of Specific Rights</i>	160
N.	<i>Communication</i>	160
O.	<i>Deposit and Access</i>	160
P.	<i>Credits</i>	160
Q.	<i>Aid, Subsidies and Taxes</i>	160
R.	<i>Publicity and Promotion at Markets and Festivals</i>	161
S.	<i>Insurance and Completion Guarantees</i>	161
T.	<i>Sharing with or Transferring Rights to Third Parties</i>	161
U.	<i>Duration of Copyright Term</i>	162
V.	<i>Other Agreements</i>	162
W.	<i>Product Placement</i>	162
X.	<i>Competent Jurisdiction, Mediation and Arbitration</i>	162

	Y. <i>Applicable Law</i>	163
VII.	NATIONAL COPYRIGHT REGIMES.....	163
	A. <i>Choice of Law</i>	163
	1. <i>India</i>	164
	2. <i>United States</i>	164
	3. <i>Germany</i>	165
	4. <i>International Scholarship</i>	165
	B. <i>Indian Copyright Law</i>	166
	1. <i>Ownership and Transfer of Copyright</i>	166
	2. <i>Compulsory Licensing</i>	166
	3. <i>Scope of Copyright</i>	167
	4. <i>Fair Dealing</i>	167
	5. <i>Legal Action</i>	168
	C. <i>United States Copyright Law</i>	168
	1. <i>Ownership and Transfer</i>	168
	2. <i>Implied Licenses</i>	169
	3. <i>Fair Use</i>	169
	4. <i>Compulsory Licenses</i>	170
	5. <i>Scope of Copyright</i>	170
	6. <i>Future Legal Action</i>	171
	D. <i>Germany Copyright Law</i>	171
	1. <i>Ownership and Transfer</i>	171
	2. <i>Implied Licenses</i>	172
	3. <i>Scopy of Copyright</i>	172
	4. <i>Fair Use</i>	173
	5. <i>Remuneration</i>	173
	6. <i>Legal Action</i>	174
VIII.	CURRENT FILM INDUSTRY ISSUES IN INDIA.....	174
	A. <i>Enforcement</i>	174
	B. <i>Entertainment Tax</i>	176
IX.	CONCLUSION	176

I. INTRODUCTION

India's film industry produces more movies than any other country. It is on the threshold of emerging on the international market, with an expected growth rate of close to 20% per year.¹ Its regulatory and legal mechanisms are developing rapidly to keep pace. In 2001, the film industry in India was granted "industry" status which has helped make it more professional and more organized with regards to financing, production, and other allied activities.²

1. GORDON JOHNSON, A CULTURAL ATLAS OF INDIA 180 (1996).

2. TRENDS IN AUDIO VISUAL MARKETS: PERSPECTIVES FROM ASIA 4-5 (Dr.

Indian “Bollywood” cinema, with its romantic plots, energizing music, state of the art apparel and colorful costumes and panoply, has made its way into western markets.³ In countries with a large Indian population, such as the U.K., the U.S. and Canada, Bollywood cinema has naturally had its niche position for a long time. Consequently, there have been a number of international co-productions examining the situation of the Indian diasporas such as “My Beautiful Laundrette” (1984), “Sammy and Rosie Get Laid” (1987), “Mississippi Masala” (1991), “Salaam Bombay” (1988) and “Bhaji on the Beach” (1993).⁴ Lately, more mainstream foreign co-productions with Indian themes such as “Monsoon Wedding” (2001) or “The Guru” (2002) have excelled internationally and triggered an even broader audience interest for India and Bollywood films.

This is now also true for countries of continental Europe. Generally, there is a growing interest among broadcasters and distributors to look at Indian content (films and television shows). In Germany, a country with a comparably marginal Indian emigrant population, Bollywood films had practically been unknown to television audiences until mid 2005. It was only in film festivals where interested movie buffs and a few Indian spectators got to see Indian movies. Then, a private television broadcaster (RTL II) successfully had the 2001 Bollywood family drama “Kabhi Khushi Kabhie Gham” (“Sometimes Happiness, Sometimes Sorrow”/“Happiness and Tears”/“Sometimes Happy, Sometimes Sad”) dubbed and broadcasted. Shortly after, other Bollywood movies followed. By the end of 2005, many German video stores had profitable “Bollywood sections” exclusively featuring movies already broadcast on free television. Currently, German dubbing studios work on the synchronization of even more Indian mainstream movies and the trend has gained momentum.

But it is not only purely Indian cinematographic products that interest western movie industries and their affiliates. With over 15% of the world’s population and one of the fastest economic growth rates in the world, India is an emerging market for the international entertainment industry.⁵ Also, although Indian cinema was born to form an opposition to Hollywood mainstream, not only are Indian audiences interested in

Madanmohan Rao ed., 2005), http://www.unescobkk.org/fileadmin/user_upload/culture/Cultural_Industries/Singapore_Feb_05/Trends_in_AV_Markets.pdf.

3. “Bollywood” is the informal name given to the popular Mumbai-based Hindi language film industry in India.

4. K. MOTI GODULSING & WIMAL DISSANAYAKE, INDIAN POPULAR CINEMA—NARRATIVE OF CULTURAL CHANGE 115-16 (1998); VIJAY MISHRA, BOLLYWOOD CINEMAL TEMPLES OF DESIRE 241 (2002).

5. See Central Intelligence Agency, The World Factbook, *available at* <https://cia.gov/cia/publications/factbook/geos/in.html> (last visited Oct. 30, 2006).

U.S. films, but the Indian film industry is looking to attract foreign funds and runaway productions.⁶

These developments and mutual correlating interests underscore the rising trend in the number of international co-productions and cinematographic co-operations with India. Still, the practice of movie making in India differs in many ways from industry structures in the United States or Germany, which shall be analyzed as potential co-production partners. Contractual relations, industry regulations, involved parties, and the legal rules are so distinct, that a comparative view from a producer's perspective shall bring into light the frameworks and copyright issues of international film co-productions involving India.

II. COOPERATION CONSTELLATIONS

The film industry and the content it provides are generally framed by the influences of three major factors: the arts, laws or governments, and private investment.

A. *Art and Government-Funded Film*

Indian art cinema is known as "New Indian Cinema" or "the Indian New Wave". From the 1960s through the 1980s, art film was usually government-supported cinema. Today, independent films might be the future of art cinema in India, which has to a great extent lost its government patronage. Here, foreign co-production partners, especially with their financial potential, could come into play. The German independent cinema production "Schatten der Zeit" ("Shadows of Time") by Florian Gallenberger, for example, was a Bollywood-style film shot in Calcutta in 2003.⁷ It featured an all-Indian cast and could easily have had an Indian co-producer. Adoor Gopalakrishnan's film "Nizhalkkuthu" (2002) ("Shadow Kill") had a long list of European co-producers, including the French Artcam International who is supported by several French government institutions, the Dutch Hubert Bals Fund, and several Swiss contributors.⁸

6. Bollywood Film Studio at 21.

7. Bodo Fruendt, *Producer's Portrait: Fanes Film—Experience and Dreams*, KINO, Apr. 2002, <http://www.german-cinema.de/magazine/2002/04/germprod/fanes.html>.

8. Osian's Cine Fan 6th Festival of Asian Cinema, India—Europe Round Table, <http://www.cinemaya.net/europe.asp> (last visited Aug. 11, 2006).

With the growing importance of India as a global economic player, western interest in social realities and developments in India will correspondingly increase. Foreign themes commonly represent the classical content of documentaries and art films consequently predestining it to be the subject of co-productions not only with government funded agencies and maverick independent producers, but, due to a broadening market for Indian cultural content, with large and mid-size commercial production companies as well. A major hurdle for these potentially “free-minded” independent productions in India is that their scripts must be cleared by the Ministry of External Affairs in advance.⁹

B. Commercial Motion Pictures and Television

India’s extensive and well-equipped movie industry, low prices, cheap labor and specialists’ technological as well as multimedia know-how make it a viable alternative to high-priced Californian, Canadian or European government-sponsored studios to which many U.S. production companies have lately outsourced shootings movies such as “Chicago” (Toronto), “Gangs of New York” (Rome) or “Resident Evil” (Berlin).¹⁰ Animation work is frequently done by companies such as Crest Animation Studios or UTV Toonz in India. The financial advantages are obvious. A typical half-hour 3-D animation TV episode costs between \$70,000 and \$100,000 to produce in India, compared to \$170,000-\$250,000 in the United States.¹¹ The runaway productions phenomenon has already been the case for the post-production of films like “Spiderman” (2002), “Gladiator” (2000), “Titanic” (1997), “Independence Day” (1996) and “Men in Black” (1997).¹² Indian production partners have become increasingly aware of their crucial role and want not only to function as “FX adjuncts”, but to have an increased role. Emmy-winning Crest Animation Studios, for example, which has facilities in both Bollywood and Hollywood, has recently entered into a deal with Lions Gate Family Entertainment to co-produce three major features. Bollywood in general has adopted Hollywood’s long lasting love affair with special effects as well as state of the art

9. Ramoji Film City Guide—Essentials for Foreign Shoot, http://www.ramojifilmcity.com/html/film/filmmakers_guide/essentials.html?h=5 (last visited Aug. 11, 2006).

10. Greg Elmer & Mark Gasher, *Introduction: Catching Up to Runaway Productions*, in *CONTRACTING OUT HOLLYWOOD 3* (Greg Elmer & Mark Gasher eds., 2005).

11. Steven Schwankert & Bryan Pearson, *India Draws ‘em in for Toons*, *VARIETY*, at 28 (Dec. 19-25, 2005), available at <http://www.variety.com/article/VR1117934815?categoryid=1279&cs=1>.

12. *CONTRACTING OUT HOLLYWOOD*, *supra* note 10, at 2. See also *Hollywood May Be Local Software Cos’ Next Stop*, *THE ECONOMIC TIMES* (India), Mar. 14, 2003, available at <http://economictimes.indiatimes.com/articleshow/40201059.cms>.

equipment to please its cable-pampered domestic and increasingly western audiences. The recent Bollywood boom, without a doubt, is largely due to the films' modern western look, which increasingly makes Indian producers attractive partners for commercial co-productions.¹³

III. NATIONAL FILM INDUSTRIES PEERING ABROAD

The customs and commercial structure of the national film industries in India, United States and Germany vary immensely. When co-productions are agreed upon and contracts are entered into the different cultures will inevitably clash. A look at the different motion pictures production cultures shall provide the basis for a solution-finding process.

A. India

Until the end of the 1990s, the Indian film industry received a lot of its finances from shady sources and criminal circles.¹⁴ Still in 2002, it was described as bearing "a striking resemblance to the Hollywood of the 1930's, when big-shot producers, financed by shady Las Vegas businessmen, made star-driven tearjerker extravaganzas for an audience seeking temporary diversion from a life of grinding poverty."¹⁵ The recent granting of industry status has made financing much more accessible to producers and the ambivalent financiers have nearly disappeared. This "commercialization" which has lead to increasing financial transparency in India's film industry is a fundamental requirement for international cooperation.¹⁶

Bollywood is a star-centric industry in which actors like Amitabh Bachchan are worshiped like half-gods by their numerous fans. This is why, although producers are the largest stakeholders in film production, they do not dictate the terms. Most contractual agreements are verbal, and those which are on paper are rarely enforceable. Even when stars sign up for films, it does not imply anything beyond a loose commitment,

13. See *supra* Introduction.

14. Bollywood World—What is Bollywood?, <http://www.bollywoodworld.com/whatisbollywood/index.htm> (last visited Oct. 31, 2006).

15. George Darley-Doran, *The Investor's Guide to Bollywood & Hollywood*, Oct. 4, 2002, <http://www.capitalideasonline.com/articles/index.php?id=707&PHPSESSID=d8b680b6e4cff7355872748c8a41eb32> (last visited Aug. 11, 2006).

16. UK Film Council, <http://www.ukfilmcouncil.org.uk/filmindustry/india/> (last visited Oct. 15, 2006).

which they often do not stick to.¹⁷ Also, the cost structure of Indian movies is hard to estimate since the majority of the commercial dealings are cash transactions. Stars often work on several sets during the same period of time which can cause delays. Disciplinary efforts by the producers come to naught. In addition, due to the absence of insurance models, completion guarantors, and gap financing systems producers have to bear all of the financial risks.¹⁸

B. United States

The United States' film industry, as a multi-billion dollar business, is the most influential film industry in the world. Internationally, U.S. producers are often in a strong negotiating position. The monetary supply from the private sector (studios, film funds, etc.) and market reach are unparalleled.¹⁹ The U.S. film industry is also the most "commercialized" industry of its sort in the world. A film simply has to make money and is considered a flop if it does not earn quite as much as expected. This is a high standard for international co-productions, which often only address limited audiences.²⁰ However, the growing number of potential English-speaking consumers represents an immense potential market that could easily be targeted in the future with market-specific and comparatively low-cost productions.

Hollywood studios act upon the commercial rationale of outsourcing labor and employing less expensive personal, but numerous interest groups try to prevent "runaway productions" which are U.S. productions executed abroad to lower expenses. These actions indirectly impair any potential for international co-productions. Ironically, the U.S. Writers Guild of America (WGA), Directors Guild of America (DGA), and Screen Actors Guild (SAG), who try to protect local talent from exploitation through large production majors are the ones discouraging majors from international co-productions through their exclusivity requirements. The exclusivity requirements provide that members of the guilds may only work for companies aligned with the guilds signatories and guild signatories may only employ guild members. The requirements are broadly construed to include independent contractors.²¹ However, many guild signatories escape guild jurisdiction by entering into production, finance, and

17. Ashni Parekh, *India*, in ENTERTAINMENT LAW: THE COMPERATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS 157, 169-70 (Dennis Campbell & Susan Meek eds., 2000).

18. *Id.* at 170.

19. CONTRACTING OUT HOLLYWOOD, *supra* note 10, at 15.

20. Darley-Doran, *supra* note 15.

21. ENTERTAINMENT LAW 253 (Howard Siegel ed., New York State Bar Association, New York, 2004).

distribution agreements (“PFD agreements”) with “unrelated” production companies which are typically owned by individual producers but who are not themselves signators and therefore not subject to the guild agreement.²² The Film and Television Action Committee (FTAC), at the forefront of the runaway productions opposition, has been the most forceful in the struggle to keep Hollywood in Hollywood. Supported by the AGSGA, the FTAC has filed a 301(a) petition with the International Trade Commission and the United States Trade Administration in November 2003, claiming workers in the American film and television production industry have been “substantially harmed” by the Canadian government’s film policies “which have unfairly removed good paying jobs from our shores”.²³ They also called for a boycott of the TV series “Rudy: The Rudy Giuliani Story”, the story of the former New York, because it was shot in Toronto.²⁴ They argued “... this is about patriotism. This is about one of America’s darkest hours[:] 9/11. This [is] about the American Spirit.”²⁵ The FTAC also engages in other forms of protest in this respect. It was supported at the time by now California Governor Arnold Schwarzenegger as well as the SAG’s Global One Rule, which insists that its members work under a SAG contract rather than a local guild contract when working in a non-English-speaking country such as India. This creates the likelihood of jurisdictional conflicts between U.S. and Indian unions thereby decreasing the cost advantages of offshore productions. States also make offshore productions look less enticing by enacting programs such as California’s Film First Program of 2000 to disperse millions of dollars for film’s made within the state.²⁶

Despite these attempts to preserve U.S. jobs, the tendency has been towards decentralization of the three major production phases: (1) development and pre-production, (2) production and actual shooting of the film, and (3) post-production. However, in an entertainment culture where the mighty dollar is the measure of all things, the lower costs offered in India will be triumphant and more work will be shipped abroad. Some even suggest that this process could reinforce Hollywood’s global

22. *Id.* at 254.

23. CONTRACTING OUT HOLLYWOOD, *supra* note 10, at 3.

24. *Id.*

25. *Id.*

26. *Id.* at 6.

dominance, because Indians will increasingly profit from its success and will thus be less likely to politically oppose its box office dominance.²⁷

C. Germany

The German film industry has a typical European structure. On the one hand, there are several big commercial film production companies. On the other hand, there are state and tax-funded public television stations, which at times also fund cinema productions. Like most European countries, Germany has for a long time had a television and radio sector reserved for public stations. This and the mission of the public television stations to educate the public are the main reasons for the extensive culture of public film funding. All German states have their own film boards which subsidize the costs in addition to the national and European funds, such as the MEDIA Plus Programme²⁸ or Euroimages.²⁹ Overall, there are more than two dozen sources of funding.³⁰

While recent German cinema is successful in festivals, it underperforms in Germany as well as foreign box offices as compared to non-German features.³¹ Germany's minister of culture announced in 2001 that one of the primary goals during his term would be to encourage international co-productions with German participation thereby increasing the popularity of German films.³² Nevertheless, despite the rhetoric, tax advantages for investment in international productions were severely reduced by regulation under the Medienerlass of February 23, 2001, and entirely disabled in 2005.³³ However, starting in July of 2006, the new government has sought to increase the German film and co-production investment reinstating some of the incentives.³⁴

27. *Id.* at 15.

28. The European Commission Media Plus Programme, http://europa.eu.int/comm/avpolicy/media/index_en.html (last visited Aug. 11, 2006).

29. Council of Europe Eurimages, http://www.coe.int/T/E/Cultural_Co-operation/Eurimages/ (last visited Aug. 11, 2006).

30. Von Dr. Matthias Kurp, *Filmsförderung erreicht rekord-Niveau*, Feb. 2, 2004, http://www.medienmaerkte.de/artikel/kino/040502_film_foerderung.html (last visited Aug. 11, 2006).

31. Wikipedia- Deutsche Filmgeschichte, http://de.wikipedia.org/wiki/Deutsche_Filmgeschichte#Die_90er_Jahre_E2.80.93_Aufbruch_und_Stagnation_zugleich (last visited Aug. 11, 2006).

32. Prof. Dr. Julian Nida-Rümelin, *A Message from the new Federal government commissioner for Cultrual Affairs and the Media*—"Medium of Entertainment and Cultural Messenge," KINO, Feb. 2001, <http://www.german-cinema.de/magazine/2001/02/focus/nidaruemelin.html>.

33. *Nida-Rümelin möchte dem deutschen Film helfen*, Feb. 5, 2002, <http://www.dreharbeiten.de/archiv/print.cfm?id=1186> (last visited Aug. 11, 2006); Wikipedia—Medienfonds, <http://de.wikipedia.org/wiki/Medienfonds> (last visited Aug. 11, 2006).

34. Wikipedia—Medienfonds, <http://de.wikipedia.org/wiki/Medienfonds> (last visited Aug. 11, 2006).

In sum, enticing factors such as the support of German politicians, availability of public funds to producers who cooperate with German partners and the attractiveness of certain regions of Germany as shooting locations leave the door wide open for Indo-German film productions.

IV. INTERNATIONAL LEGAL ENVIRONMENT

International copyright treaties and institutions lay the groundwork for the entire realm of film production-related transactions such as licensing, assignment, and ownership of rights.

A. The Berne Convention

India, Germany and the United States are direct signatories to the Berne Convention.³⁵ The World Trade Organization's (WTO) TRIPS agreement,³⁶ which now binds 145 countries, provides that WTO Member States shall comply with the substantive provisions, except those covering moral rights, of the Berne Convention as well as the Appendix of the Paris Act of the Convention.³⁷ Literary and artistic works of authors who are nationals of Berne Union countries or who have published their work first or simultaneously in a Berne Union country are protected by the Convention.³⁸ Briefly stated, the core principles for films are:

1. *Art. 5(1) Berne Convention:* In Berne Union countries, foreign authors shall enjoy the rights which the laws of the country granted to nationals now or in the future ("national treatment").³⁹
2. *Art. 5(1) Berne Convention:* In Berne Union countries other than the country of origin of the work, authors shall in

35. Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised in Paris on July 24, 1971 (Paris Act, 1971) [hereinafter "Berne Convention"].

36. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakech Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round vol. 31, 33 I.L.M. 81 (1994) [hereinafter "TRIPS Agreement"].

37. J.A.L. STERLING, *WORLD COPYRIGHT LAW* 602 (London, Sweet, & Maxwell, 2003).

38. *Id.* at 603-05.

39. *Id.* at 605.

addition enjoy the rights specifically granted by the Berne Convention.⁴⁰

3. *Art. 6bis(1) Berne Convention*: In Berne Union countries, the author has the right to claim authorship for his work (“paternity right or “attribution right”).⁴¹
4. *Art. 6bis(1) Berne Convention*: In the Berne Union countries, the author has the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the work, which would be prejudicial to his honor or reputation (“integrity right”).⁴²
5. The right referred to under (3) and (4) remain with the author after he has licensed or assigned the economic rights.⁴³
6. *Art. 9(1) Berne Convention*: The author has the right to authorize the reproduction of his work.
7. *Art. 12 Berne Convention*: The author has the right to authorize adaptation, arrangements and other alterations of his work.
8. *Art. 14(1)(i) Berne Convention*: The author has the right to authorize the cinematographic adaptation, reproduction of his work, and the distribution of the work thus adapted or reproduced.⁴⁴
9. *Art. 11, 11bis and 14 Berne Convention*: These articles grant authors the right to authorize the communication of a work to the public by means such as broadcasting, wireless, wired or cable retransmission of the work.

Matters of public order and censorship are left to the governments by provision of Art. 17.⁴⁵ This is why, India availed itself twice of the faculties provided for in Articles II and III of the Appendix to the Berne Convention, which make it possible for developing countries to grant the right to translations and reproductions, under certain additional circumstances. The term of this exception however elapsed in 1994.⁴⁶

40. *Id.* at 605-06.

41. *Id.* at 615.

42. *Id.*

43. *Id.* at 616.

44. *Id.* at 620.

45. *Id.* at 629.

46. World Intellectual Property Organization [WIPO], Berne Notification No. 110, *Berne Convention for the Protection of Literary and Artistic Works, Notification by the Republic of India concerning Articles II and III of the Appendix to the Paris Act (1971)*, (June 20, 1984), available at http://www.wipo.int/edocs/notdocs/en/berne/treaty_berne_110.html.

B. The Universal Copyright Convention

The Universal Copyright Convention (UCC) was drafted as an alternative to the Berne Convention and today has nearly 100 members. However, it will probably not be developed further since India, Germany and the United States are obligated to comply with the Berne Convention which has a higher standard of protection than the UCC.⁴⁷

C. The Rome Convention

India, the United States, and Germany are all parties to Article 24 of the Rome Convention. Whereas earlier copyright law, including international agreements like the *1886 Berne Convention*, had originally been written to regulate the circulation of printed materials, the Rome Convention of 1961 responded to the new circumstance of ideas variously represented in easily reproduced units, by covering performers under copyright, referring especially to the economic rights dimensions.⁴⁸ Performers (such as actors, singers, musicians, dancers and other persons who perform literary or artistic works) are protected against certain acts they have not consented to. Such acts include: broadcasting and other communication to the public of their live performance; fixation of their live performance; reproduction of such a fixation if the original fixation was made without their consent or if the reproduction is made for purposes different from those for which they gave their consent.⁴⁹ The Rome Convention allows the following exceptions in national laws to the above-mentioned rights: private use, use of short excerpts in connection with the reporting of current events, ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts, use solely for the purpose of teaching or scientific research and in any other cases, except for compulsory licenses that would be incompatible with the Berne Convention, where the national law provides exceptions to copyright in literary and artistic works.⁵⁰

Article 14 of the Rome Convention provides that the term of protection lasts 20 years from the date of the performance or broadcast.⁵¹

47. *Id.* at 644.

48. *Id.* at 660; Rome Convention, Wikipedia, http://en.wikipedia.org/wiki/Rome_Convention (last visited Apr. 17, 2006).

49. STERLING, *supra* note 37, at 661.

50. *Id.* at 666.

51. *Id.* at 651.

Member states are obligated to provide the above mentioned rights to the protected groups and, as under the Berne Convention, apply “national treatment” to them.⁵² Furthermore, once a performer has consented to the incorporation of his performance in a visual or audiovisual fixation, the provisions on performers’ rights have no further application.⁵³ This is almost exclusively the case regarding actors in motion pictures.

D. The TRIPS Agreement

WTO member states are, through a provision in the TRIPS Agreement, obligated to comply with the Berne Convention. The moral rights exceptions of the TRIPS Agreement are not applicable to India, Germany, or the United States, since all are signatories to the Berne Convention. In addition to requiring compliance with the basic standards of the Berne Convention and imposing an obligation of “most-favored-nation treatment,” under which advantages accorded by a WTO member to the nationals of any other country must also be accorded to the nationals of all WTO members,⁵⁴ the TRIPS Agreement clarifies and adds certain specific points.⁵⁵ Performers can be in the position to prevent the unauthorized reproduction of fixations of their performance which is not an issue in regards to motion pictures.⁵⁶ The TRIPS agreement also provides that any member may, in relation to the protection of performers, producers of phonograms and broadcasting organizations provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention.⁵⁷ However, copyright must be granted automatically, and may not be based upon any “formality”, such as registrations or systems of renewal.⁵⁸ Article 11 provides that authors shall, in certain circumstances, have the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works.⁵⁹ With respect to cinematographic works, the exclusive rental right is subject to the so-called impairment test: A member is exempt from the

52. *Id.*

53. WIPO, *Summary of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961)*, available at http://www.wipo.int/treaties/en/ip/rome/summary_rome.html (last visited Apr. 17, 2006).

54. WIPO, *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, n.1, available at http://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited Apr. 17, 2006).

55. Overview: the TRIPS Agreement, WTO, available at http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm#copyright (last visited Apr. 17, 2006).

56. TRIPS art. 14(1).

57. TRIPS art. 14(6).

58. Overview: the TRIPS Agreement, WTO, available at http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Apr. 17, 2006).

59. TRIPS art 11.

obligation unless such rental has led to widespread copying of such works which materially impairs the exclusive right of reproduction conferred on authors and their successors in title.⁶⁰ While widespread copyright infringements in India might lead to violation of an author's right, this would not make a difference, since the author of the film in India is the producer, who generally is interested in having his film rented out and distributed by video stores. Generally, the TRIPS Agreement provides a broad basis for the international exploitation of cinematographic works, which in regard to intellectual property rights (including trademarks), by its means, are protected in all WTO member countries. Co-productions that address an international audience through their potentially universal appeal or popular content thus profit from the TRIPS Agreement.

E. The World Intellectual Property Organization

Apart from providing additional protections deemed necessary due to advances in information technology since the formation of previous copyright treaties, the WIPO Copyright Treaty provides authors of works with control over their rental and distribution rights which they may not have under the *Berne Convention* alone.⁶¹ Also, the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite of 1974 provides additional protections.⁶² However, India is not a party to these treaties, thus they shall not be discussed in further detail here.⁶³

F. Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties

Germany and the United States did not sign this convention, which obligates its members to legislatively avoid double taxation.⁶⁴ Since

60. *Id.*

61. See WIPO, *WIPO Copyright Treaty*, art.6-8 (adopted Dec. 20, 1996), available at <http://www.wipo.int/documents/en/diplconf/distrib/94dc.htm>.

62. See (1974) 1144 UNTS 3.

63. For more information see Contracting Parties, WIPO, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16 (last visited Apr. 17, 2006).

64. See United Nations Educational, Scientific and Cultural Organization [UNESCO], *The Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties*, State of Ratifications, Acceptances and Accessions up to 1 January 2000, Dec. 13, 1979, available at http://www.unesco.org/culture/laws/doubletax/html_eng/page1.shtml.

producers are generally the beneficiaries of copyright royalties international co-producers would significantly benefit if Germany and the United States joined the convention.

G. Co-Production Treaties and Government Initiatives

Western productions are not the only ones interested in foreign locations and production venues. Bollywood has a long tradition of setting scenes, musical clips and substantial parts of movie plots in foreign locations such as the Austrian Alps, which especially appeals to Indian audiences because of their exoticness and exclusivity. Due to these reciprocal entrepreneurial and artistic interests, much “bilateral” interest in the co-production market has been displayed. Consequently, India has entered into film co-production agreements with Britain (2005), Italy (2005) and France (1985). While some treaties still have to be ratified before they take force, India continues to engage in negotiations with other countries over co-production treaties.

Generally, international co-production treaties between two countries bring several major financial, human-resources-related and organizational benefits to the co-production partners, such as:

1. The film can be treated as a national film in each country for the purposes of any benefits and subsidies afforded in that country to national films;
2. participants and workers involved in the production of the film are allowed to work and remain in the country where the film is produced for the time the production lasts; and
3. the equipment used in an approved co-production may be temporarily imported and exported tax-free.

In 2006, as part of efforts to refresh the relationship with India in the field of cinema, the French government sponsored a tour for ten producers to theme locations in France and committed itself to creating a French Film Office in Mumbai by September 2006.⁶⁵ Across the border in Germany, a €50-million-fund has been set up to support Indian co-productions with German production companies or for films shot in the state of Hessen, Germany.⁶⁶

65. Y. Mallikarjun, *French Trying to Attract Bollywood Producers*, THE HINDU, Feb. 26, 2006, <http://www.thehindu.com/2006/02/26/stories/2006022600221300.htm>.

66. Sudipto Dey, *Now, Germans Woo Bollywood*, THE ECONOMIC TIMES, Oct. 10, 2003, <http://economictimes.indiatimes.com/cms.dll/articleshow?msid=226887>.

V. KEY FACTORS FOR INTERNATIONAL CO-PRODUCTIONS

A. Parallel Imports

Realistically, the primary danger from parallel imports is that legally produced copies of popular co-productions which are distributed in India at lower prices than in the United States or Germany, could be imported as “grey imports” back into the United States or Germany. This could discourage producers from producing films attractive to both Indian and foreign audiences. The Berne Convention declares the law of the country of import applicable to decide whether the imported copy infringes a copyright.⁶⁷

Germany’s highest appeals court (*Bundesgerichtshof*) has held that the doctrine of international exhaustion of copyrights, which mirrors the United States first sale doctrine, governs parallel importation.⁶⁸ The European Union allows the doctrine of international exhaustion to exist only between member states, but not outside the EU.⁶⁹ To import copyrighted material in the above mentioned way into Germany is thus against European law and German copyright Law.

The legal situation in the United States has not yet been entirely clarified. Generally, parallel importation is prohibited, and the United States Trade Representative lobbies other governments to prevent parallel importation in their respective jurisdictions.⁷⁰

In *Quality King Distributors Inc. v. L’anza Research International Inc.*, a case involving distribution of hair care products bearing a copyrighted label, the Supreme Court unanimously found that the first sale doctrine, which allows the purchaser to transfer a particular legally acquired copy of a protected work without permission once it has been obtained, applies to importation of copyrighted works (the labels) which were originally made in the United States and then exported.⁷¹ The importation of goods first manufactured outside the United States under the copyright laws of other countries was specifically excluded from that

67. Berne Convention, Art. 5(2).

68. Parallel Import-Wikipedia, http://en.wikipedia.org/wiki/Parallel_importation#Germany (last visited Apr. 17, 2006).

69. See First Council Directive 89/104/EEC of 21 December 1988 to Approximate the Laws of the Member States Relating to Trade Marks, art.7, 1989 O.J., 1-7.

70. Parallel Import—Wikipedia, http://en.wikipedia.org/wiki/Parallel_importation#United_States_2 (last visited Apr. 17, 2006).

71. 523 U.S. 135, 144-45 (1998).

decision, leaving unclear whether goods “lawfully made” under the Copyright Act outside the United States also benefit from the first sale doctrine. Until this issue is decided, copyright holders are free to take action against foreign distributors who sell products made in their country into the U.S. market.⁷²

Consistent with this, in *Columbia Broadcasting Sys., Inc. v. Scorpio Music Distributors*, the court reasoned that the first sale doctrine applies only to copies made and sold within the United States because the language of Section 109(a) refers to a copy “lawfully made under this title.”⁷³ Also, in *U2 Home Entertainment v. Lai Ying Music and Video Trading*, the court found the importers admitted that their imported copies of films had not been lawfully obtained for resale in the United States.⁷⁴ The court also found the importers’ argument that the Copyright Act did not apply because the imported copies were manufactured by a foreign copyright holder was manifestly contrary to 17 U.S.C. Section 602(a).⁷⁵ The import was thus deemed illegal. Thus, as long as the lawful copies of the motion picture (such as DVDs) sold in India are produced outside of their respective territories, the import into the United States and the European Union can legally be prohibited. Naturally, this is reassuring for non-Indian co-producers, who own all the exploitation rights for their respective markets.

B. Term of Copyright

The terms intellectual property protection granted by national governments and international treaties still vary significantly throughout the world. It is thus essential to determine what term is applicable in a specific case before a given court.

1. India

Section 26 of the Indian Copyright Act provides that the copyright in a cinematograph film subsists until 60 years from the beginning of the calendar year following the year in which the film was published.⁷⁶

72. Wikipedia, First-sale Doctrine, http://en.wikipedia.org/wiki/First_sale_doctrine (last visited Aug. 11, 2006); STERLING, *supra* note 37, at 134.

73. 569 F. Supp. 47 (E.D. Pa. 1983), *aff’d mem.*, 738 F.2d 424 (3d Cir. 1984); BMG Music v. Perez, 952 F.2d 318, 319 (9th Cir. 1991), *cert. denied*, 505 U.S. 1206 (1992); Parfums Givenchy, Inc. v. Drug Emporium, Inc., 38 F.3d 477, 481-82 (9th Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995).

74. U2 Home Entertainment, Inc. v. Lai Ying Music & Video Trading, Inc., No. 04 Civ. 1233 (DLC), 2005 U.S. Dist. LEXIS 20018 (S.D.N.Y. Sept. 13, 2005).

75. *Id.*

76. B.L. WADEHRA, LAW RELATING TO PATENTS, TRADE MARKS, COPYRIGHT DESIGNS & GEOGRAPHICAL INDICATIONS 333 (2d ed., Universal Law Publ’g Co. 2000).

2. United States

According to 17 U.S.C. Section 302, for works “made for hire” created after January 1, 1978 the duration of copyright is 95 years from publication or 120 years from its creation, whichever is shorter.⁷⁷ 17 U.S.C. Section 101 defines works “made for hire” as including a “work specially ordered or commissioned for use as a part of a motion picture”, which makes the motion picture itself a work “made for hire”.⁷⁸

3. Germany

According to Section 65, clause 2 of the German Copyright Law (*Urheberrechtsgesetz*), the copyright in a cinematographic work ceases 70 years after the death of the longest-living of the following persons: The main director, the screenplay author, the dialogue author or the composer of the music composed for the film.⁷⁹ The term, according to Section 69 of the *Urheberrechtsgesetz*, begins to run with the end of the calendar year in which the copyright film was completed.⁸⁰

4. International Treaties

The Berne Convention and the TRIPS Agreement, in different terms and with differing specifications both provide cinematographic works to be protected for a minimum of the life of the author plus 50 years—or for 50 years after authorized publication or the year of completion of the work.⁸¹ India, the United States and Germany thus all comply with their treaty obligations. Art. 7, clause 8 of the Berne Convention provides “. . .the term shall be governed by the legislation applicable in the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.”⁸² The laws of the United States, Germany, and India do not contain “otherwise providing” provisions. In the classical situation, the origin of a film is the country of either of the co-producers. Thus, if a co-producer is sued in his country, the court

77. 17 U.S.C. § 302 (2005).

78. *Id.* § 101.

79. *Urheberrechtsgesetz* [German Copyright Law], Sept. 9, 1965 as amended Sept. 10, 2003, § 65, available at <http://bundesrecht.juris.de/urhg/BJNR012730965.html>

80. See *id.* at § 69.

81. STERLING, *supra* note 37, at 626.

82. Berne Convention, Art. 7(8).

there will apply its law to determine from which country the film originates. If the court rules that its country's rules does not govern, then the term specified in the laws of the country of the other co-producer (plaintiff) will govern. The following definitions are applied regarding the national origin of a film.

a. Indian Film

In Chapter I, section 2(1) of the Indian Copyright Act, an Indian work is considered as such if: (1) its author is Indian; (2) it was first published in India; or (3) in case it is unpublished, if the author, when she made the work, was Indian.⁸³

b. United States Film

The U.S. Copyright Act provides that the "country of origin" of a Berne Convention work, is the United States if the work (1) is first published in the United States or simultaneously in the United States and another nation or nations adhering to the Berne Convention; (2) whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States; or (3) simultaneously in the United States and a foreign nation that does not adhere to the Berne Convention; or (4) in a foreign nation that does not adhere to the Berne Convention, and all of the authors of the work are nationals, domiciliaries, or legal entities with headquarters in the United States.⁸⁴

c. German Film

In Germany, essential steps have been taken towards the goal of European integration. Thus, the term "German film" has been replaced by "film deserving subsidies." If a film was not produced within the framework of a bilateral treaty, which would be the case for a Indo-German co-production, for the film to be considered "German" or as "deserving subsidies" would require that (1) the financial contribution of the German producer must be substantial; (2) at least 30% of the artistic as well as the technical contributors must be from an EU Member state, Norway, Liechtenstein, or Iceland. Of these, at least one has to be a protagonist and another has to be a supporting actor or, if this is not possible, two must have important parts. In case of a majority contribution, the film must be in German or must have been presented as a German contribution at a Category-A-film-festival (Cannes, Berlin, etc.).

83. Indian Copyright Act, 1957, ch. I § 2(1).

84. 17 U.S.C. § 101 (2005).

(3) Finally, the German producer must have produced, within five years before the application, a motion picture in an EU Member state or EFTA states such as Norway, Liechtenstein or Iceland and must contribute at least 30% of the production costs.

d. Conclusion

In India and the United States, the producers are the authors of the film.⁸⁵ In Germany, the bar to consider a film co-produced by a German producer is also not very high since all the national laws would easily assume that a co-production is of “national” origin, they will mostly apply their national copyright terms without looking to another country’s law. In the cases of India and the United States, a simultaneous worldwide release of the film for example, would automatically lead to the exclusive application of national law. If the German co-producer does not fulfill the requirement set forth by German law, the term of copyright protection will be ten years shorter than the one provided for by German law. Thus, it is important that the mentioned requirements be met.

C. Moral Rights

Moral rights are a crucial issue for producers when it comes to securing exploitation without the danger of interference by creative contributors.

1. India

India protects the right of paternity, the right of integrity and the right to publish a work. Moral rights in India are inalienable and perpetual.⁸⁶ Instead of treating moral rights as a hard-to-enforce and primarily contractual matter, as is the case in the United States,⁸⁷ the courts in India have been very cautious and sensitive in cases regarding moral rights violation cases. The Indian courts repeatedly protected the moral rights of authors. The facts of *Mannu Bhandari v. Kala Vikas Pictures*

85. ALAN S. GUTTERMAN & BENTLEY J. ANDERSON, *INTELLECTUAL PROPERTY IN GLOBAL MARKETS* 384 (Kluwer Law Int’l Ltd. 1997).

86. *Id.*

87. Ranjan Narula & Taj Kunwar Paul, *A Stronger Footing? Economic Versus Moral Rights*, COPYRIGHT WORLD, June 2005, at 13-14.

Ltd. revolve around the motion picture “Samay Ki Dhara” (1986), which the defendant produced under an assignment of rights in the plaintiff’s novel “Aap Ka Bunty”.⁸⁸ The plaintiff had an objection to the screening of the motion picture on the grounds that the picture was a distorted version of her novel that would undermine her reputation before students, research scholars, and the literary world if it was allowed to be presented in its present form. The author objected to the change in name, modifications in character and dialogues, and the climax of the movie, which according to the plaintiff had been changed. Providing due respect to the moral rights of the author, even after the economic rights were duly assigned, the court held that the dialogues which had been deleted from the film could not be described as necessary variations for the change in the medium *i.e.*, from literary to audio-visual. The court also held that the name “Aap Ka Bunty” should find a place in the title of the film.⁸⁹ However, it is important to note that moral rights are not granted to actors in movies.⁹⁰

2. United States

During the passage of the Berne Convention Implementation Act, the U.S. Congress, while focusing on paternity and integrity rights, specifically stated that rights equivalent to moral rights of authors were recognized under the common law of misrepresentation and unfair competition.⁹¹ Section 43(a) of the Lanham Act, prohibits “false designation of origin, false or misleading description of fact” that is “likely to cause confusion, . . . mistake,” or deception about “the affiliation, connection, or association” of a person with any product or service as well as defamation (libel) law.⁹² Additionally, legal authors have attempted to locate moral rights in the “derivative work” provision of the Copyright Act and the rights of privacy and publicity. Therefore, Congress asserted that the law in the United States complied with Art. 6*bis* of the Berne Convention without any additions or changes to copyright law in the United States. Interestingly however, in 1990, U.S. Congress passed the Visual Artists Rights Act that specifically gave authors of visual art rights of attribution and integrity but excludes works “made for hire”, such as motion pictures.⁹³

88. *Smt Mannu Bhandari v. Kala Vikas Pictures Pvt Ltd* (1986), 1987 AIR (Delhi 13).

89. *Id.*

90. Krishna K. Tummala, *Regime Corruption in India*, ASIAN J. POL. SCI. (forthcoming June 2006).

91. S. REP. NO. 100-352 (1988).

92. Lanham Act § 43(a), 15 U.S.C. § 1125(a)(1)(A).

93. Colleen Creamer Fielkow, *Clashing Rights Under United States Copyright*

While not as prominent as in many European jurisdictions, moral rights in the field of motion pictures have actually been affirmed by courts in the United States.⁹⁴ In *Gilliam v. American Broadcasting Cos.*, the court ruled in favor of Monty Python as the screenplay owners, finding a violation of Section 43(a) of the Lanham Act because ABC edited approximately 27% of the content of the original works to insert commercials and deleted allegedly obscene or offensive matter.⁹⁵ However, even in cases of a grant of right, a claim for false attribution might still arise. Other claims to prevent motion picture editing for television have only been successful to the extent that the editing would “adversely affect or emasculate the artistic or pictorial quality of the film, or destroy or distort materially or substantially the mood, the effect or the continuity of the film”.⁹⁶ In *Smith v. Montoro*, the court held that the removal of an actor’s name and the substitution of another actor’s name in the credits constituted a violation of Section 43(a) of the Lanham Act.⁹⁷ Also, when only licensed and not otherwise connected to or approved by the author, a film may not be advertised as the author’s film, but at the most as “based upon” his licensed work.⁹⁸ Generally however, motion pictures are considered works “made for hire” under U.S. copyright, which makes the producer or commissioner the author and initial copyright owner;⁹⁹ and usually the only rights that the DGA and the WGA secure for their members concern credits and the mentioning of their names or pseudonyms. Contractual provisions granting moral rights to creative contributors are basically the sole, highly unusual way to come to a more “European” power of the creative mind with regard to the end product. Due to the inequality of bargaining power, only the most prominent directors, like Woody Allen or Steven Spielberg, are in the position to preserve their moral rights.¹⁰⁰ WGA members working for guild signatories, if they are “professional writers” and their work

Law: Harmonizing an Employer’s Economic Right with the Artist-Employee’s Moral Rights in a Work Made for Hire, 7 DEPAUL-LCA J. ART & ENT. L. & POL’Y 218, 260 (1997).

94. Press Release, Library of Cong., Copyright Office Issues Report on Waiver of Moral Rights in Visual Artworks (Mar. 21, 1996), <http://www.loc.gov/today/pr/1996/96-045.html>.

95. 538 F.2d 14, 19-21 (2d Cir. 1976).

96. INT’L ASS’N OF ENTMT’Y LAWYERS ET AL., MORAL RIGHTS 169-70 (Cees van Rij & Hubert Best eds., MAKLU Publishers 1995).

97. 648 F.2d 602 (9th Cir. 1981).

98. *King v. Innovation Books*, 976 F.2d 824, 831 (2d Cir. 1992).

99. INT’L ASS’N OF ENTMT’Y LAWYERS ET AL., *supra* note 96, at 176.

100. *Id.* at 179-82.

was entirely original material, are under the “separation of rights” provisions of the WGA agreement and only entitled to preview the films on which they worked. This however does not guarantee that their work will be used without changes. Some productions are also simply produced outside of union jurisdiction (“PFD agreements”). Thus, the financing owner of the film usually retains all essential moral rights.¹⁰¹

3. Germany

While not as broad as the “droit moral” in France, the protection of moral rights in Germany clearly displays the different facets of moral rights, of which only the most relevant shall be outlined here. An assignment of copyrights is impossible in Germany. This is also the case for moral rights, which in contrast to copyrights, cannot even be licensed. They only pass on to another person (or the heir) in case of the author’s death.¹⁰² However, the terms of the post mortem moral right varies and depends on the case at hand.¹⁰³ In Germany, the permission of the author is not only required to publish but also to produce a motion picture that represents an adaptation of a work by the author.¹⁰⁴ Also, authors in Germany are granted the right to publish the work and the right of attribution.¹⁰⁵ If a work is adapted for a motion picture, the protection of the integrity of the work only comes into effect in case of gross derogation of the work once the author has agreed to the adaptation for a motion picture.¹⁰⁶ Gross derogation only occurs if the sense or essential parts of the work or the film are significantly defaced against the author’s intentions.¹⁰⁷ This is not the case, if the author knew and approved the screenplay or if the derogations agreed upon has been defined in sufficient detail beforehand.¹⁰⁸ Despite these legal barriers, in practice, the above mentioned approval requirements have been “commercialized” to a great extent in the fields of advertisement and film exploitation of music as well as other areas.¹⁰⁹ Thus, in most cases, a financial agreement with the author can be reached.

101. *Id.* at 179-81.

102. Urheberrechtsgesetz, *supra* note 79, §§ 28-29.

103. Bundesgerichtshof [BGH] [Federal Court of Justice] June 8, 1989, 107 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 384 (F.R.G).

104. Urheberrechtsgesetz, *supra* note 79, § 23.

105. *Id.* §§ 12-13.

106. GRUR 96, 254, 257; See Urheberrechtsgesetz, *supra* note 79, § 93.

107. Oberlandesgericht Munich in Gewerblicher Rechtsschutz und Urheberrecht of 1986, at 460, 461 (OLG München GRUR 1986, 460, 461).

108. *Id.*

109. HELMUT HABERSTUMPF, HANDBUCH DES URHEBERRECHTS 90 (Hermann Luchterhand 2000).

4. *International Treaties*

The text of the Berne Convention indicates a broad scope of works that are covered by moral rights. It also contains language giving member countries the discretion to narrow the works covered by moral rights. Art. 6*bis*, for example, does not address whether moral rights are alienable and/or waivable.¹¹⁰ Although specific language addressing these issues is absent, commentators have interpreted Art. 6*bis* moral rights as inalienable and nonwaivable. Others have suggested that the silence in Art. 6*bis* indicates an intention that issues of alienability should be left to the discretion of each member country.¹¹¹ This however is inconsistent with moral rights theory as interpreted in the United States. It is the protection of the creator's personal expression and spiritual embodiment within her work that constitute her moral rights. They cannot simply be assigned to a financier. Moral rights exist independently from economic rights. An artist's status as an independent contractor, as opposed to an employee, under a work "made for hire" determination can therefore not be crucial to recognizing and protecting her moral rights.¹¹² However, the above mentioned broad interpretation of Art. 6*bis* of the Berne Convention allows the de facto neglect of moral rights in the United States' motion picture industry under international law.

D. *Neighboring Rights*

India, the United States and Germany, in essence, all recognize the existence of neighboring rights, such as broadcasting and public performance rights. The major difference is that in India and the United States the works' "made for hire" doctrine attributes these rights to the employer by law. In contrast, in Germany, the artists or potential copyright holders have to license their respective rights to the producer of the film. However, Section 89, clause 1 of the Urheberrechtsgesetz provides that in case of doubt, the producer shall have the exclusive right to modify, translate, and exploit the film, including the performances in it.¹¹³ Section 94, clause 1 of the Urheberrechtsgesetz also provides the producer with the exclusive right to reproduce and disseminate the

110. Berne Convention art. 6*bis*.

111. Fielkow, *supra* note 93, at 223-24.

112. *Id.* at 233-34.

113. Urheberrechtsgesetz, *supra* note 79, § 89(1).

original copy of the film as well as to publish it.¹¹⁴ Here the copyright and the authors' right system are quite different structurally, but in practice the differences are routinely equalized, because performers in Germany routinely grant all their rights to the producers in their work contract.

E. Exploitation and Versioning

In the area of international co-productions, exploitation of the film in different markets goes hand in hand with editing the motion picture to fit the target audiences' media desires and needs. The above mentioned German Bollywood-style production "Schatten der Zeit", for example, satisfied all but one requirement of the Indian film market. It excluded song-and-dance scenes. Had those been inserted, the movie could have been a success in India. Without them, films do not become box office successes in India.¹¹⁵ As shown above, moral rights of creative contributors, if exercised, can limit the editing possibilities available to broadcasting companies, even after the industry player interested in editing the work has acquired the necessary license from the copyright owner. Thus, due to different moral rights standards and censorship provisions in India, the United States and Germany, it is not only essential to foresee and contractually provide the possibility for substantial alterations in the co-production's final product, but it might also make sense to produce alternative footage to fill in gaps left after editing. Another way to make a film suitable for a more restrictive market, such as India, would be defused dubbing or subtitling, as it, has been implemented in the case of the German dubbing version of the U.S. movie "Starship Troopers" (1997) because the dialogues partially cites Nazi rhetoric.¹¹⁶

F. Censorship

Censorship represents a threat to the commercial exploitation of motion pictures in the censoring jurisdiction. Censoring stipulated by the laws of one country can limit the display of certain cinematographic elements, such as violence, sex or religious acts, which may be a crucial factor to the success of the film in another country. While versioning could be a solution in such cases, there is the danger of substantially defacing the artistic work and stripping it of its essential artistic value and character,

114. *Id.* § 94(1).

115. NANDKISHOR MULEY ET AL., FILMLAND INDIEN: EINE DOKUMENTATION 40 (Freunde der Deutschen Kinemathek e.v. ed., 1991).

116. Wikipedia, Starship Troopers (Film), [http://de.wikipedia.org/wiki/Starship Troopers_%28Film%29](http://de.wikipedia.org/wiki/Starship_Troopers_%28Film%29) (last visited Aug. 13, 2006).

not to mention the moral rights and copyright issues involved. Thus censorship of any kind, from an exploiter's commercial perspective, is negative.

1. India

Under the British colonial regime, in 1918, the Indian Cinematographic Act introduced mandatory licensing of cinema houses to insure the audiences' safety and colonial government's grip on power.¹¹⁷ The Act was preserved by the national Indian government established in 1947. The previously localized censorship was centralized and now executed by the Central Board of Film Censors (CBFC),¹¹⁸ whereby the word "censors" has later simply been replaced by the less controversial term "certification". In India, films can only be publicly exhibited after certification by the CBFC.¹¹⁹ The CBFC either censors certain scenes, which then have to be cut, or prohibits the exhibition of the motion picture in its entirety. The roots of independent national censorship were drastically nationalistic and idealized the state. For example films which depicted a policeman taking bribes or a character that remotely resembled a Congressman drinking alcohol on screen, as was the case in "Parash Pathar"¹²⁰ ("The Philosopher's Stone") was not allowed. This like the complete ban of on-screen kissing has been changed in modern days.¹²¹ Even homosexuality, a taboo in India, is being addressed openly in art films from major cities such as New Delhi. However, the audience for such films is limited to a tiny highly educated, artistically interested, tolerant and often exclusively homosexual fraction of the Indian population. Major movie theatre chains are not showing such features. Also, censoring is mounted against unrestricted public exhibition through wall posters, advertisements in newspapers, video clippings in television channels and hoarding of to-be-released films before they are censored.

117. JOHAN MANSCHOT & MARIJKE DE VOS, *BEHIND THE SCENES OF HINDI CINEMA: A VISUAL JOURNEY THROUGH THE HEART OF BOLLYWOOD* 37 (KIT Publishers, Amsterdam 2005) [hereinafter MANSCHOT].

118. See Central Board of Film Certification Homepage, <http://www.cbfcindia.tn.nic.in/default.htm> (last visited Apr. 17, 2006).

119. DENNIS CAMPBELL & SUSAN MEEK, *ENTERTAINMENT LAW—THE COMPARATIVE YEARBOOK OF INTERNATIONAL BUSINESS* 172 (Kluwer Law International, The Hague 2001).

120. PARASH PATHAR (Aurora 1958).

121. MANSCHOT, *supra* note 117, at 38.

An essential facet of the CBFC's motivations to censor a film is government influence. Restrictions can be imposed on public exhibition of a film if it or any part of it is against the interests of the sovereignty and integrity of India. These intents include the security of the state, friendly relations with foreign states, public order, decency or morality, and the prevention of defamation, contempt of court or the commission of any offence. Often, this broad power is exploited to settle scores between political and ideological opponents, as the board functions as an appendage of the ruling party. This frequently causes the judiciary to supersede the board and pass the film. A recent controversial example of such government interference involved the BJP government led by Prime Minister Vajpayee. It banned several films and videos involving the violent incidents between Muslims and Hindus in Gujarat between 2000-2003 and also required every Indian submission to the Mumbai International Documentary Film Festival to have a censor certificate, which caused widespread protest.¹²²

Apart from these general observations, Section 5B(2) of the Indian Cinematograph Act of 1952 severely regulates the display and cinematographic use of smoking, drinking, drug usage, certain dual meanings that obviously cater to "baser instincts", religion, race, the modus operandi of criminals, intimacy, violence as well as other topics. The Cinematograph Act actually explicitly calls for clean and healthy entertainment by requiring the film to be of aesthetic value and cinematically of a good standard. When watching modern Indian cinema, it is often hard to tell where exactly the censors draw the line regarding the cinematographic use and references to many of the mentioned issues. Interestingly, a recent popular Indian dictum says: "For a film to be successful, it needs to display either sex or Shahrukh Khan."¹²³ A lot of extremes of intimacy, sexuality and violence that are frequently present in American and European movies certainly do not pass Indian muster. However, in the "Bandit Queen" (1994) case, the Indian Supreme Court, with a sense for artistic value, upheld the certification for public exhibition on the grounds that the frontal nudity of woman and depiction of rape were necessary parts of the theme of the film justifying the criminalization of a young girl who was brutally hurt by the cruelty of society.¹²⁴

122. *Id.*

123. Shahrukh Khan is a popular Indian film star appealing especially to younger audiences.

124. Bobby Art Int'l vs. Om Pal Singh Hoon & Ors (1996) ICHRL 29 (May 1, 1996).

The CBFC classifies the films to which it grants a censor certificate by categories. However, the compliance with these following ratings is essentially never enforced by the Indian police.

U: Universal—suitable for all ages.

U/A: Universal with adult/parent guidance—unsuitable for those under 12.

A: Adult—can be viewed only by those above 18.

Sexuality and intimacy are frequent issues. Kissing, for example, is a subjective theme. In the past, films displaying kisses used to get an “A” rating, nowadays they get a “U” certification as long as the kiss is not prolonged and erotic. A dance sequence with a close up on a woman will get an “A” rating, but if the same scene is shot from afar, it gets a “U” rating.¹²⁵

These restrictions severely affect the attractiveness of co-producing a commercial film with an Indian partner with the goal of exploiting the work in India as well as western countries. An extreme character, a mixed message or a liberal sexual morale will make the film subject to censorship on the Indian market and often decrease box office revenues. However, a “too soft” or superficial approach to social, religious or political tensions will bore western audiences. In addition, the requirement to get the script approved by the Ministry of Information and Broadcasting beforehand and again having to seek approval if it is felt that any material changes or deviations from the approved script are necessary, imposes a significant burden on producers, who, in the case of large Hollywood productions treat their scripts and project-related information like trade secrets.¹²⁶

Thus, apart from the cultural restraints, obligatory elements (song-and-dance-scenes, marriage, happy end, etc.) as well as structure of Bollywood films, censorship on the Indian market is possibly one major reason for the considerably small number of commercial cinematographic co-productions with foreign and especially western partners. Although there has been broad protest against the strong influence of the CBFC,¹²⁷ there is no indication that the Indian legislature plans to loosen its grip on the content of motion pictures that are shown, despite the fact that

125. Indian Film Censor Ratings, http://en.wikipedia.org/wiki/Indian_film_censor_ratings (last visited Apr. 17, 2006).

126. See Essentials for Foreign Shoot, *supra* note 9.

127. MANSCHOT, *supra* note 117, at 38.

local cable television channels broadcast without any de facto restrictions in India.¹²⁸ As a considerable part of the voting population in India still has no television, this might actually be more politically effective than some in the film industry suspect. However, with the technology boom and the rising living standard in India, there is hope that at a point not too far in the future, enough people will have access to uncensored media to make motion picture censorship so ineffective, obsolete and potentially economically harmful that it will be substantially reduced.

2. United States

The first amendment to the U.S. Constitution explicitly forbids the government to censor advocacy of religious ideas or practices and guarantees the rights of citizens to speak and publish freely.¹²⁹ The freedom of speech is very broadly construed in the United States. Courts have even ruled that the First Amendment protects “indecent” pornography from regulation, however not “*obscene*” pornography.¹³⁰ Due to the restrictive legal and cultural environment in India, it is highly unlikely that pornography will be subject to a co-production, which is why it shall not be further addressed here. The broad conception of free speech also protects acts which in many countries constitute a crime, sedition or subversion, such as (symbolically) burning the U.S. flag.¹³¹

The major barrier to complete passive free speech in films is the Motion Picture Association of America (MPAA) film rating system. It is instituted by the MPAA to rate a movie in the United States based on its content and to help patrons decide which films may be appropriate for children and/or adolescents. In the United States, it is the most recognized system for classifying potentially offensive content, but it is usually not used outside of the film industry because the MPAA has trademarks on each individual rating.¹³²

If a film has not been submitted for a rating, the label “NR” (Not Rated) is often used; however, NR is not an official MPAA classification. While the MPAA does not publish an official list of all the exact words, actions, and exposed body parts used to determine a film’s rating, some guidelines can be derived based on the MPAA’s actual rating decisions.¹³³

128. *Id.*

129. *See* U.S. CONST. amend. I.

130. *Brandenburg vs. Ohio*, 395 US 444 (1969); *United States vs. Eichmann*, 496 U.S. 310 (1990).

131. *Texas vs. Johnson*, 491 US 397 (1989).

132. MPAA film rating system, http://en.wikipedia.org/wiki/MPAA_film_rating_system (last visited Apr. 17, 2006).

133. *Id.*

If a film uses “one of the harsher sexually-derived words” (such as “*fuck*”) once, it is routine today for the film to receive a PG-13 rating, provided that the word is used as an *expletive* and not with a sexual meaning. Mostly, PG-13 movies are allowed two or three uses (Examples are: “*As Good As It Gets*”, “*Rent*” and “*Elizabethtown*”). Exceptions may be allowed “by a special vote of the ratings board” where the board feels such an exception would better reflect the sensibilities of American parents. A reference to drugs, such as marijuana, usually gets a movie a PG-13 rating at a minimum. A well-known example of an otherwise “PG movie” getting a PG-13 for a drug reference is “*Whale Rider*”.¹³⁴ The film contained only mild profanity, but received a PG-13 because of a scene where drug paraphernalia was briefly visible. A “graphic” or “explicit” scene of illegal drug use typically earns a film an R rating at the minimum. If a film contains strong sexual content, it usually receives an R rating. The film “*Lost in Translation*” had a scene in a strip club that had brief topless nudity and a song in the background that repeated the phrase “sucking on my titties”.¹³⁵ The scene was brief and the rest of the film had PG-13-level content, but the film still received an R rating. Legally, the rating system is entirely voluntary, so some movie theatres enforce it and some do not. In contrast to Germany where minors are generally allowed to see any film as long as they are accompanied by their parents. Still, signatory members of the MPAA (major Hollywood studios) have agreed to submit all of their theatrical releases for rating, and few mainstream producers (outside the *pornography* niche) are willing to bypass the rating system due to potential effects on revenues. Therefore, it can be argued that the system has a *de facto* compulsory status in the industry.¹³⁶

Generally, it can be said that the United States’ legally voluntary rating system and its broad interpretation of the notion of free speech leave film producers with the most freedom. Thus, as the analysis of German law will show, U.S. law is least likely to limit content and creative expression in a film co-production.

134. WHALE RIDER (Apollo Media 2002).

135. LOST IN TRANSLATION (Elemental Films 2003).

136. MPAA film rating system, http://en.wikipedia.org/wiki/MPAA_film_rating_system (last visited Apr. 17, 2006).

3. Germany

Censorship is prohibited by Art. 5, clause 1, sentence 3 of the German Constitution (Deutsches Grundgesetz), but Art. 1 declares the dignity of men to be untouchable. Thus, there are certain limitations to the Art. 5 principles. Primarily, this is the case if a criminal law or any other law that aims at protecting minors (Jugendschutzgesetz) is violated. Before a film is released, the “Voluntary Self-Control of the Film Business” (FSK), which was installed after WWII and based on the outdated U.S. Hays Code (1934-1967), classifies films into one of the following categories, which are scrupulously enforced at the box office:

No age limit: For all ages.

6: No one under 6 years admitted.

12: People 12 or older admitted, children between 6 and 11 only, when accompanied by parent or legal guardian.

16: People 16 or older admitted.

18: Only adults (18 or older) admitted.

All films not submitted to the FSK are automatically treated as only admitted for adults and may additionally be put on the German “list of youth-endangering media” if considered endangering to minors by the Federal Department for Media Harmful to Young Persons (*Bundesprüfstelle für jugendgefährdende Medien*, BPjM).¹³⁷ This is a ban on all advertising, import, export, or mailing of such material. Section 131 of the Penal Code (*Strafgesetzbuch*, StGB) forbids the glorifying display of inhumane or cruel violence or the belittlement thereof. Approximately three hundred extremely violent films, such as the first and the second part of Tobe Hooper’s “*Texas Chainsaw Massacre*”¹³⁸ or Sam Raimi’s “*The Evil Dead*,”¹³⁹ have been confiscated from dealers and distributors. However, all copies of such confiscated versions owned for personal use are legal to possess for adults. Movies may be re-edited to achieve lower ratings, if a lower rating is preferred by the distributor. At times, due to excessive violence, even movies that are only available to adults may be edited down. However, FSK rated movies are exempt from all blacklisting measures of the government.¹⁴⁰ If a motion picture is in violation of German criminal laws (StGB), no measures by the Federal Department for Media Harmful to Young Persons are necessary, but the district

137. Tasks and Competencies of the BPjM, <http://www.bundespruefstelle.de/bpjm/Die-Bundespruefstelle/aufgaben.html>, (last visited Apr. 17, 2006).

138. THE TEXAS CHAINSAW MASSACRE (Vortex 1974).

139. THE EVIL DEAD (Renaissance Pictures 1981).

140. Motion Picture Rating System—Germany, http://en.wikipedia.org/wiki/Motion_picture_rating_system#Germany (last visited Apr. 17, 2006).

attorney will take appropriate legal measures. There are a number of criminal laws which can become relevant in the context of motion pictures. Sections 86 and 86a of the StGB declare it illegal to show and divulge propaganda of unconstitutional and thus forbidden organizations (such as the Nazi Party) in a positive context. These materials can only be displayed in movies if they are a piece of art as defined in Section 2, section 1, number 5 of the *Urheberrechtsgesetz* (UrhG). If the movie propagates unconstitutional organizations, it is in itself propaganda material. Section 130 of the StGB forbids sedition. In clause 3 it especially declares the public support, denial or belittlement of acts committed under the Nazi regime that are able to disturb public peace is illegal. Further, Section 166 of the StGB protects religious commitments of believers and Section 184 forbids certain kinds of porn and regulates porn divulgation. German law is insofar "European," in that it proactively protects minors and, "self-cautiously" forbids certain unconstitutional organizations' propaganda material.¹⁴¹

VI. CO-PRODUCTION CONTRACTS

The contract between co-producers is the central document binding the production process. In its core, it determines the contributions of the parties and the sharing of rights and eventually profits or losses.¹⁴² In the international context, most importantly, it provides for the laws which are to apply to the contract. The legal nature of a co-production may vary considerably and take on different forms at successive stages of the production process.¹⁴³ Additionally, depending on the legal culture, provisions in co-production contracts are sometimes characteristically framed. However, as international co-productions need a contractual framework which, ideally, builds upon common artistic and business conceptions, a number of central issues are routinely addressed. Often, the producers' primary economic perspective does not leave much room for cultural specificities in contract drafting.

141. See generally the French "Droit des Médias."

142. Cinema and Television-International Coproduction Contracts: Legal Problems and Information Needed, http://www.obs.coe.int/online_publication/reports/00001259.html, (last visited Apr. 17, 2006).

143. Enric Enrich, *Legal Aspects of International Film Co-Production* (Nov. 2004), in 19TH CONFERENCE ON INT'L AUDIOVISUAL LAW, May 12-13 2005 (European Audiovisual Observatory trans., 2005), http://www.obs.coe.int/online_publication/expert/coproduccion_aspectos-juridicos.pdf.

A. Prior Documents

In the course of negotiations, it is common for parties to come to an agreement in principle on the basic elements of the future co-production agreement. To give substance to the agreement, documents called deal memo, M.O.U. (memorandum of understanding), or letter of intent should be signed. These may have one of two very different consequences:

1. They may constitute mere proposals or rough drafts and not be binding, being subject to the negotiation and signature of a contract in which the definitive conditions are set out; or
2. they may be binding, although the details are to be set out in the subsequent contract.

Especially, considering the culture of oral contracts in the Indian film business, it is essential for the harmony between the Indian and the United States or German producers to determine whether such an agreement shall be binding or not. Also, to avoid the possibility of confusion, the contract should indicate that it constitutes the final agreement of the parties and replaces any earlier document.¹⁴⁴

B. Parties to the Contract

Not all the parties to the co-production contract need to be producers; they may be television channels, distributors, banks, private investors, etc. In any international contract, particularly in those in which one of the parties is a multinational company with subsidiaries established in a number of countries, it is important to specify and ensure which contracting party will assume the obligations of the contract. A very solvent parent company may have a subsidiary which does not have the same solvency and thus is not equally reliable.¹⁴⁵

C. Background

This clause explains the parties' activities and what they hope to achieve through the contract. Although this background information does not constitute rights and obligations, it can be of help in interpreting any obscurely worded sections of the contract.¹⁴⁶ It is the part of the contract which is routinely neglected by lawyers, although one can only gain by adding to it.

144. *Id.*

145. *Id.*

146. *Id.*

D. Object of the Contract

This clause should mention the object of the co-production contract, which are:

1. To define the audiovisual work exactly, including details that are normally set out in a detailed appendix;
2. to list the various tasks, responsibilities, contributions and investments on the part of the co-producers and third parties in the three phases of production of the film;
3. to apportion the quotas of ownership of all the elements of the audiovisual work, including the intellectual property rights in respect to the work;
4. to specify how exploitation of the audiovisual work is to be achieved; and
5. to lay down the rules for the sharing of profits or losses from the exploitation.

E. Definition of the Work

A detailed definition of the work's "key elements" (content, author(s) and technical points) specifying the nationality of each contributor is crucial. This information is used to check for the existence of the quotas necessary for obtaining the benefit of international co-production agreements that India might enter into. For obvious reasons, there should also be a clause indicating that no changes may be made without the unanimous agreement of the co-producers.¹⁴⁷

F. Intellectual Property Rights

1. Acquisition of Rights and Permissions

The use of any pre-existing work in the film may require the transfer of rights held by its rights-holders. If the image of a person is used (face, physical representation, name, voice, etc.), the person's consent, depending on the applicable law, may be required.

147. *Id.*

2. *Rights of the Authors and Performers*

The definition of who the authors of the film are will depend on the applicable law.¹⁴⁸ The co-producers may want to specify in the contract who they consider to be the author(s), and give details of the chain of title. If one of the co-producers signed a transfer of rights, this, with a guarantee that the rights have been duly acquired (“chain of title”) and that the co-production will profit from the acquisition, should be stated in the contract. Whether the performers license or assign their copyrights to the producers should also be mentioned.¹⁴⁹ Even if there are no provisions concerning versioning or editing in the artist agreements, there should be a provision which deals with the hypothetical case when a contributor exercises her moral rights against the interests of the producers. In such a case, the producers could, for example, agree to jointly oppose the claim or separately take responsibility for the claims arising in the territories in which each independently exploits the work.

G. Assignment of Responsibilities

Decisions need to be made on the identity and scope of responsibility of the executive producer. Typical responsibilities of executive producers include the power to sign contracts with third parties and insure the staff of artistic responsibilities, technical tasks, and commercialization.¹⁵⁰

H. Contributions

The contributions of co-producers may be non-monetary, goods, rights, production, or commercialization services. If one of the parties should fail to make its promised contribution, the contract should enable the co-producer(s) meeting their obligations to continue with the production and replace the defaulting party.¹⁵¹ Also, as in national co-productions, it is important to contract for the possibility that the production will exceed its budget.

I. Co-ownership of Copyright and Essential Elements of the Film

A key element to a co-production contract is that the co-producers become co-owners of the producer’s copyrights as well as all the integral elements of the motion picture in proportion to their respective contributions. This community of goods will be governed by the parties’

148. *Id.*

149. *Id.*

150. Filmrecht-Die Verträge, at 123-25.

151. Enrich, *supra* note 143.

agreements and, subsequently by the rules governing the community of goods is the law applicable to the contract.¹⁵² The contract should also contain clauses protecting the co-producers from action that could enable creditors to instigate proceedings against a single co-producer with the intention of taking over ownership of the motion picture (purchase option rights).¹⁵³

J. Method for Reaching Agreements

The contract should state the method for adopting mutual agreements. Most importantly, it should provide a means to decide upon the definitive version ("final cut") of the film.¹⁵⁴

K. Accounting and Documentation

If one of the co-producers keeps the accounts of the co-production, she should be required under the contract to keep them clear as well as separate from the rest of her accounts. In international co-productions it is important to verify whether accounting practices and rules in the country of the co-producer keeping the accounts are different or to agree on a common practice. How the types of exchange are to be calculated should also be stated. Co-producers preferably should use a separate bank account, designate an auditor for the co-production, inform the other co-producers and provide them with the necessary documentation, especially where one co-producer acted as an agent, and allow the accounts to be checked by the other co-producers.¹⁵⁵

L. Division of Revenue

Once the costs of the film have been recouped, the income is shared. It should be defined which expenses may be deducted from the gross revenue before any division is carried out.¹⁵⁶

152. *Id.*

153. Filmrecht, *supra* note 150, at 117.

154. Enrich, *supra* note 143.

155. Filmrecht, *supra* note 150, at 122-25.

156. Enrich, *supra* note 143.

M. Attribution of Specific Rights

Given that each co-producer knows her own market best, it is common for the exploitation rights within the respective market to be reserved exclusively by the respective co-producer. Apart from this, rights are usually divided up and grouped by the categories of “territory,” “country” and “mode of exploitation.”¹⁵⁷ Due to the historical role of Indian cinema in the countries of the former Soviet Union and Iran as well as India’s geographical proximity to China, the exploitation rights for these territories could go to the Indian co-producer.¹⁵⁸ It is also necessary to set up “hold-backs” (which may provide, for example, that the DVD sales in the United States does not begin until the motion picture has been in theatres in India for a year).¹⁵⁹

N. Communication

The form of transmitting information and the intervals in which the parties are to meet in the course of the co-production should be explicitly added.¹⁶⁰

O. Deposit and Access

The co-owners should designate by mutual agreement where the work is to be deposited and may be accessed, either jointly or separately, in the form provided for by the contract.¹⁶¹

P. Credits

The credits of the film are laid down in the contract, and may be different in each country involved. For example, the same movie could be called Indo-German in India and German-Indian in Germany.

Q. Aid, Subsidies and Taxes

If there are ever co-production treaties that bind the United States, Germany or India and the parties benefit from national subsidies under it, the contract should state if this type of revenue belongs to all the co-producers jointly or only to the producer of the state from which it is

157. *Id.*

158. MANSCHOT, *supra* note 117, at 137-41.

159. Enrich, *supra* note 143.

160. Filmrecht, *supra* note 150, at 125.

161. Fernseh- und Filmproduktionen Rechtshandbuch, at 265

obtained.¹⁶² It should also state whether the contract is conditional upon the granting of subsidies.¹⁶³ In Germany, foreign co-producers also have to be made aware of the 25% tax that applies under Section 50(a) of the German Tax Law (*Einkommenssteuergesetz*).¹⁶⁴

R. Publicity and Promotion at Markets and Festivals

The parties should agree on the forms of promotion, with the possibility of the co-producers each carrying out such actions, at their own expense in the markets assigned to them.¹⁶⁵

S. Insurance and Completion Guarantees

The co-producers should insure the production of the audiovisual work and negatives against the usual risks of loss and civil liability. Anglo-Saxon distributors and broadcasters often demand the subscription of an “errors and omissions” insurance or a “completion bond.”¹⁶⁶ The latter guarantees, that the film will be completed in a timely fashion and within the budget. While the concept of completion guarantors is relatively new in Bollywood and Germany, these contacts are commonly found in Hollywood. It is a “must” to get bank financing in India.¹⁶⁷ German producers are often reluctant to provide for completion guarantees, because they are fairly expensive and a film can be produced for the money it costs.¹⁶⁸ However, their introduction may have a positive, security-providing influence on the Indian market.

T. Sharing with or Transferring Rights to Third Parties

A co-producer may share or transfer her rights in the co-production. It is necessary to state in the contract if such activities require authorization from the other co-producers. The contract could provide that the said co-

162. Enrich, *supra* note 143.

163. *Id.*

164. Filmrecht, *supra* note 150, at 117.

165. *Id.* at 130.

166. Enrich, *supra* note 143.

167. NISHITH DESAI ASSOCIATES, MEDIA REPORT, <http://www.nishithdesai.com/hollywood-bollywood/media-chap-5-D.htm> (last visited Oct. 31, 2006).

168. Filmrecht, *supra* note 150, at 113.

producer remains responsible for her original contractual obligations vis-à-vis the other co-producers.¹⁶⁹

U. Duration of Copyright Term

As stated above, the duration of the term is a crucial factor in regard to the exploitation of the film. The longest applicable national term represents the minimum duration of the co-production contract. The contract may contain conditions allowing for early termination in cases of mutual agreement, failure to perform the obligations set out in the contract or if one of the parties suspends payments.¹⁷⁰

V. Other Agreements

Other points that should also be addressed in the contract due to its international character include: Declarations and guarantees by each of the parties, *force majeure*, notifications, protection of personal data, confidentiality, and the authoritative version in the event the contract(s) being translated are unclear.¹⁷¹

W. Product Placement

Companies usually enter into advertising agreements with producers for subtly advertising their products or services in the film. While such agreements are additional sources of revenue, it is important to lay down an understanding as to the extent of the advertising.¹⁷²

X. Competent Jurisdiction, Mediation and Arbitration

An *a priori* neutral formula is advisable. The matter should be submitted to the jurisdiction of the court in the defendant's domicile. This way, proceedings will not need to be brought in two countries, once for the main dispute and subsequently, in the defendant's country for enforcement. Also, mediation before a trusted "tiebreaker" and arbitration before the International Chamber of Commerce (ICC), the International Film and Television Alliance (IFTA) or the American Film Market Association (AFMA) should be considered.

169. Enrich, *supra* note 143.

170. *Id.*

171. *Id.*

172. NISHITH DESAI ASSOCIATES, *supra* note 167.

Y. Applicable Law

There can be no contract without law. Contracts are binding because there is a law under which they are born and which lays down the conditions for their formation, conclusion, nullity, grounds for termination, etc. Of course, the more detailed the contract, the less decisive it can be which laws are applicable. Normally, the law of the country of the principal producer is chosen as the applicable law.¹⁷³

VII. NATIONAL COPYRIGHT REGIMES

The law chosen to be applicable to the contract is independent of the law applicable to the motion picture. The most relevant and/or unique parts of their copyright regimes, as well as the question of which law applies to a given copyrights conflict shall be explored next.

A. Choice of Law

In the context of intellectual property rights, the central legal question for co-producers is which country's law applies to the intellectual property issues. The consequences of the answer to this question are drastic, as can be deduced from the above section "Key Copyright Factors for International Co-Productions."

The country of protection-principle, *Schutzlandprinzip*,¹⁷⁴ or *lex protectionis* has come to dominate the issue of applicable law in international copyright and related rights. Exclusivity of a right, its duration, the copyright holder and the scope of the rights, are determined by the law of the country for which protection is claimed.¹⁷⁵

173. Enrich, *supra* note 143.

174. Till Jäger and Carsten Schulz, AUSGEWÄHLTE RECHTLICHE ASPEKTE DER ERSTELLUNG VON BEITRÄGEN FÜR WIKIPEDIA. EINE KURZE DARSTELLUNG DER BESTEHENDEN PROBLME IN FRAGE-/ANTWORTFORM, March 2005, available at <http://www.keft.net/Wissen/Wikipedia/Recht/Urheberrecht/Anwendbares.Recht/index.asp>.

175. Thomas Hoeren, *Kollisionrechtliche Anknüpfungen in Internationalen Datennetzen*, available at <http://www.uni-muenster.de/Jura.itm/hoeren/INHALTE/publikationen/IPR234.pdf>.

1. India

Indian courts must apply the *lex protectionis* as set forth in the Berne Convention.¹⁷⁶

2. United States

The United States Supreme Court for example, in *Feist Publications, Inc. v. Rural Telephone Service Co.*, made it clear that the originality of a work is a constitutional requirement, thus implying that U.S. courts will not be able to apply the more lenient originality standard of a foreign country in any copyright case.¹⁷⁷ The ownership issue was later addressed in *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*¹⁷⁸ In *Itar-Tass*, several Russian journalists sued a New York-based Russian newspaper for allegedly infringing upon the copyright in their newspaper and magazine articles which were originally published in Russia.¹⁷⁹ The U.S. Court of Appeals for the Second Circuit held that national treatment is not a choice-of-law provision.¹⁸⁰ According to the Second Circuit, the applicable law is the law of the state that has the most significant relationship to the copyrighted work and the parties involved, in this case Russian law.¹⁸¹ Generally, should the case law is ambivalent.¹⁸² It has been recommended that parties consider pleading both U.S. and foreign laws, sometimes in the alternative, in some cross-border cases forestall any motion to dismiss for forum non-conveniens.¹⁸³

A number of commentators have argued that new choice-of-law rules may be needed to provide more effective international copyright protection. Courts have to consider choice-of-law questions on a case-by-case basis. Among the factors considered are those stated in the Second Restatement of Conflict of Laws:

176. Indian Department of Industrial Policy and Promotion, *Intellectual Property Rights*, <http://dipp.nic.in/ipr.htm> (last visited Aug. 12, 2006).

177. 499 U.S. 340 (1991); *see also* *Bridgeman Art Library, Ltd. v. Corel Corp.*, 25 F. Supp.2d 421 (S.D.N.Y. 1998).

178. 153 F.3d 82, 84 (2d Cir. 1998).

179. *Id.*

180. *Id.* at 88.

181. *Id.* at 85-89.

182. Paul Edward Geller, *Mastering Conflicts of Laws in Intellectual Property Litigation*, IPL NEWSLETTER, Summer 2000, vol. 18, no. 4, at 7, 11, available at <http://www-rcf.usc.edu/~pgeller/xborder.htm>.

183. *Id.*

1. The needs of the interstate and international systems;
2. the relevant policies of the forum;
3. the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
4. the protection of justified expectations;
5. the basic policies underlying the particular field of law;
6. certainty, predictability and uniformity of result; and
7. ease in the determination and application of the law to be applied.

3. *Germany*

German courts apply the *lex protectionis* since Germany's international private law includes no further provisions addressing international IP conflicts.¹⁸⁴

4. *International Scholarship*

International legal scholarship, has analyzed allocation principles such as party autonomy, the favor principle, functional allocation and closest connection. In addition, different proposals have been made to find a solution to the dilemma of co-producers' rights in different countries. These proposals include using the law of

1. the residence of the primary initiator;
2. the residence of the majority of co-producers;
3. the country of origin of the work;¹⁸⁵
4. the principal place of creation; and
5. the country where the work was first published.

The global problem with the current "national treatment" is that a co-producer may be regarded as initial co-owner or as entitled to protection in one country, but not in the next. This is also true for the presumed transfer of economic rights.¹⁸⁶ This causes uncertainty and problems with

184. Hoeren, *supra* note 175.

185. William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383, 430 (2003).

186. *Id.* at 429. See also Indian Copyright Act § 38(4).

tracing back the chain-of-title to the applicable laws of many different countries.¹⁸⁷

B. Indian Copyright Law

The protection of cinematographic works under Indian copyright law is broad and favors the producer(s).

1. Ownership and Transfer of Copyrights

Ordinarily, the author is the first copyright owner in a work, which, in the case of a cinematograph film, is the producer (under the works “made for hire” doctrine.). This includes the soundtrack to the film, if the producer has acquired the copyrights of the verse and song from the writers.¹⁸⁸ Once a performer (actor, musician, dancer, etc.) has consented to the incorporation of her performance in a cinematograph film, she has no rights to that performance.¹⁸⁹

The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may license in accordance with Section 18 of the Indian Copyright Act and assign the copyright manner. An assignee, in contrast to a licensee, becomes the new owner of the copyright. This is a great advantage for producers, who may wish to attain certain rights in relation to the film forever. Section 19 of the Indian Copyright Act provides that any assignment must be 1) written; 2) signed; 3) identify the specific works; 4) specify the rights assigned and the duration as well as territorial extent of the assignment; 5) specify the amount of royalty payable, if any, to the author or his heirs during the currency of the assignment; and be 6) subject to revision, extension or termination on terms mutually agreed upon by the parties. If the rights are not exercised within a period of one year from the date of assignment, it is deemed to have lapsed, unless otherwise specified. If the period or territorial extent of the assignment is not stated, it shall be deemed as five years for the whole of India.

2. Compulsory Licensing

The Indian Copyright Board has the power to grant compulsory licenses in certain circumstances on suitable terms and conditions, mainly if the

187. MIRELLE M.M. VAN EECHOU, CHOICE OF LAW IN COPYRIGHT AND RELATED RIGHTS 188-89 (2003).

188. P. NARAYANAN, LAW OF COPYRIGHT AND INDUSTRIAL DESIGNS 74-5 (2002).

189. SHIV SAHAI SINGH, THE LAW OF INTELLECTUAL PROPERTY RIGHTS 287-88 (2003).

copyright holders does not communicate the Indian work to the public.¹⁹⁰ Since film producers have a primary interest in the commercial exploitation of their products, this will hardly be an area of conflict in the context addressed herein. Compulsory licenses can also be granted to make the translation, reproduction and publication of non-Indian works at a reasonable price. However, if an Indian co-producer, as the movie's producer, is the author of the film, the work will be considered Indian.¹⁹¹ The licenses are only granted under very narrow circumstances and under timely restrictions.¹⁹² If the revenues from the Indian market are shared among the co-producers, there should be contractual provisions regarding how dubbing versions are going to be produced and exploited in India, to prevent compulsory licenses and conflicts between the parties.

3. *Scope of Copyright*

In the case of a cinematograph film, the copyright includes the following rights under Section 14(d) of the Indian Copyright Act:

1. Copying of the film including copying a photograph of any image forming a part thereof;
2. selling and lending out the film;
3. making the film accessible to the public (communication). This includes the right to license the wireless and wire-bound re-broadcasting rights;¹⁹³
4. the copyright in cinematographic works covers translating the work (for example in form of a dubbing version); and
5. adapting the film in the sense that another film is made out of substantial parts of the original film.¹⁹⁴

4. *Fair Dealing*

Section 39 of the Indian Copyright Act declares certain acts to be "fair dealing," or "fair use" by U.S. terminology, and thus not copyright-infringing. These include:

190. NARAYANAN, *supra* note 188, at 131.

191. Gov't of India, *A Hand Book of Copyright Law*, MINISTRY OF HUMAN RESOURCE DEVELOPMENT, July 24, 1999, <http://www.education.nic.in/copyright.asp>.

192. NARAYANAN, *supra* note 188, at 133-35.

193. *Id.* at 104-05.

194. Gov't of India, *supra* note 191.

1. The making of any sound recording or visual recording for private use of the person making such recording, or solely for purposes of bona fide teaching or research;
2. if the use, consistent with fair dealing, of excerpts of a performance or of a broadcast in the reporting of current events or for bona fide review, teaching or research; or
3. such other acts, with any necessary adaptations and modifications, which do not constitute infringement of copyright under Section 52 (which enumerates the usual non-infringing uses of copyrighted materials).

5. Legal Action

A producer can take legal action against any person who infringes the copyright in the film. She is entitled to remedies by way of injunctions, damages and restitution.¹⁹⁵

C. United States Copyright Law

The copyright regime of the United States does not significantly differ from the system in India due to the shared common law tradition.

1. Ownership and Transfer

The United States rewards the producer for the risk-taking and thereby grants them a broad copyright. It is customary that the producer contractually agree with the creative contributors that the film shall be a work “made for hire.”¹⁹⁶ It is clear that a work created within the scope of a regular, salaried employee’s job is a work “made for hire.” Whether a contributor is an employee is determined by looking at the control exerted by the employer over the employee, the work process and schedule, the supplying of equipment for the employee’s use as well as the payment of benefits and the withholding of taxes. If a film is created by an independent contractor, the film may still be a work “made for hire.” In addition to the above mentioned requirements, the film has been especially ordered or commissioned.¹⁹⁷

Like in India, express licenses, assignments and outright assignments of all of the copyrights in the film are possible in the United States. A transfer of one of these rights may be made on an exclusive or nonexclusive

195. *Id.*

196. GUTTERMAN & ANDERSON, *supra* note 85, at 66.

197. Bitlaw.com, Works Made for Hire—The Standard, <http://www.bitlaw.com/copyright/scope.html> (last visited Aug. 8, 2006).

basis. The transfer of exclusive rights is not valid unless that transfer is in writing and signed by the owner of the rights conveyed. Works “made for hire” are not subject to the author’s termination of transfer right under the Copyright Act.¹⁹⁸

2. *Implied Licenses*

An implied license is a license created by law in the absence of an actual agreement between the parties. It arises when the conduct of the parties indicates that some license is to be extended between the copyright owner and the licensee, but no explicit license exists. The implied license allows the licensee some rights to use the copyrighted work, but only to the extent that the copyright owner would have allowed, had the parties negotiated an agreement. Generally, the custom and practice of the community are used to determine the scope of the implied license.

Implied licenses have been used to grant licenses in situations where a copyrighted work was created by one party at the request of another. In one case, a special effects company was hired to create a specific effect for a film. The contract neither assigned the copyright in the effect nor provided for a license for the effect to be used in the movie. The court ruled that the effect could be used in the film through an implied license since the effect was created with the intent that it be used in and distributed as a part of the film.¹⁹⁹ This then entitled the “special FX” company to fair consideration within the framework of the implied-in-fact contract.²⁰⁰ While relying upon implied licenses is theoretically possible, it is highly discouraged, mainly because the producer might find that she has insufficient rights to alter, update, or transform the work for which she paid. Additionally, the price might be higher than if it had been negotiated.

3. *Fair Use*

Without going into the depth of the issue, it is important to note that not all copying in the United States is banned, particularly in socially important endeavors such as criticism, news reporting, teaching, and

198. *Id.*

199. *Id.*

200. ENTERTAINMENT LAW, *supra* note 17, at 293.

research.²⁰¹ The doctrine of fair use is now set forth in the Copyright Act, according to which four non-exclusive factors are to be considered in order to determine whether a specific action is to be considered a “fair use”:

1. The purpose and character of the use, including whether the use is of commercial nature;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the whole work; and
4. the effect of the use upon the potential market or value of the copyrighted work.²⁰²

Fair use can be advantageous for the producers, for example if they produce a parody which incorporates some but not all of the elements of the work being parodied.²⁰³ However, it can also prove to be disadvantageous to the co-producers if their work is used by an outsider.

4. Compulsory Licenses

Compulsory licenses allow third parties to copy, perform, or distribute certain types of works without the copyright owner’s permission, in exchange for which the third parties must pay a predetermined royalty amount. These compulsory licenses are extremely limited and there is no case law or other quantifiable legal trend indicating a severe threat to the film producers’ exploitation revenues. Generally, due to the strong belief in the free market theory in the U.S., the implementation of a wide-spread compulsory licensing system, as it has recently been proposed in regard to file-sharing on the internet appears highly improbable.²⁰⁴

5. Scope of Copyright

Again, as the producers are considered to be the authors of the film, generally they will enjoy the full range of copyrights recognized as such by the U.S. judiciary. The Copyright Act grants five rights to a copyright owner, which include:

201. 17 U.S.C. § 107.

202. GUTTERMAN & ANDERSON, *supra* note 85, at 69.

203. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

204. Compulsory License, <http://www.solrich.com/compulsory-license.asp> (last visited Aug. 8, 2006).

1. The right to reproduce the copyrighted work;
2. the right to prepare derivative works based upon the work;
3. the right to distribute copies of the work to the public;
4. the right to perform the copyrighted work publicly; and
5. the right to display the copyrighted work publicly.²⁰⁵

Still, as in India, film producers are obligated to separately acquire copyrights to the musical score employed in their films from the respective copyright holders. This especially is relevant in the context of Bollywood-style films, which incorporate soundtracks that often make up for a large percentage of the film-related revenues. With the advent of new media platforms, such as CD-ROM, DVD and CD-I, and the immense speed of technological development, the major studios are requesting language for rights “in any and all media, whether now known or hereafter developed,” without paying additional fees to music publishers and suggesting that whoever does not grant these rights will not have their music used in future films.

6. Future Legal Action

If the co-producers pursue legal action for infringement of their copyrights they can attain damages, the profits gained by the infringement and/or relief through injunction.²⁰⁶

D. Germany Copyright Law

Section 2, clause 1, subsection 6 of the German Copyright Act includes motion pictures and similarly made works in the list of protected works.²⁰⁷ Differing from the Indian and U.S. models, the German Copyright Act is based on the “creator doctrine,” the so called *Schöpferprinzip*, which does not view the author’s right as a completely transferable asset. This influences a number of copyright issues.

1. Ownership and Transfer

The authorship of a motion picture in Germany depends on the specific case. Whoever contributes creatively to the specific atmosphere,

205. Bitlaw, *supra* note 197.

206. GUTTERMAN & ANDERSON, *supra* note 85, at 70.

207. Urheberrechtsgesetz, *supra* note 79, § 2.

dramaturgy, content and visual aesthetics of the film, will be considered as one of the authors. Usually, the author of the screenplay, the director, the cameraman, the illuminator, the set designer, the decorator, the costume designer, the sound engineer, the cutter and the composer of the music specifically composed for the film are all considered to be the authors. Some also consider the authors of the exposé and the treatment authors. The author's "copyrights," in contrast to Indian and United States law, are inalienable and non-assignable. However, for all imaginable uses, the authors can and usually do grant exploitation licenses. This is routinely done by contract ("buyout") before the film is produced. Here, it is essential to specifically mention the grant of every single use. Otherwise, some exploitation rights may be assumed to fall back to the author earlier than intended.²⁰⁸ Thus, when working with a German co-producer, requiring her by contract to acquire all rights needed for an extensive exploitation of the film is of utmost importance. Finally, the producer and the performers are granted rights for their "performances." Just like in the case of copyrights, the producer will routinely acquire the rights from the performers.

2. Implied Licenses

In cases of insufficient or unspecified uses, the doctrine of intended purpose (*Zweckübertragungslehre*) determines the rights for known uses will be assumed to have been granted.²⁰⁹ Additionally, on March 22, 2006 the German government decided in favor of a further reform of the Copyright Act which now assumes that the rights for all yet unknown uses have been granted to the producers.²¹⁰

3. Scope of Copyright

The author of a film has the following rights under German law:

1. The right to reproduce the film;²¹¹
2. the right of distribution;²¹²
3. the right of display;²¹³
4. the right of modification;²¹⁴

208. Rutger von der Horst, *Urheberrecht im Film*, FREDRICKS & VON DER HORST, <http://www.virtuelle-kanzlei.com/200104.htm> (last visited Aug. 8, 2006).

209. Urheberrechtsgesetz, *supra* note 79, § 89(1).

210. Kabinett beschließt Novelle des Urheberrechts, <http://www.bmj.bund.de/enid/j6.html> (last visited Aug. 8, 2006).

211. Urheberrechtsgesetz, *supra* note 79, § 16.

212. *Id.* § 17.

213. *Id.* § 18.

214. *Id.* § 23.

5. the right of publication;²¹⁵ and
6. a number of exploitation and other rights related to or deduced from the above mentioned rights.²¹⁶

As mentioned beforehand, the rights to the possible uses, which are based on these rights, are to be acquired by the film producers. Also, the rights to music that has been used in the film and has existed before need to be acquired from the collection society GEMA or through another European collection society.

4. Fair Use

Comparable to India and the United States, a number of mostly non-commercial uses are considered fair use in Germany.²¹⁷ Those however, do not substantially diminish the financial incentives to engage in film production in Germany.

5. Remuneration

The remuneration of authors in Germany is regulated by law. This is due to the fact creative workers routinely find themselves in weak bargaining positions in contractual negotiations with (corporate) producers. The German Copyright Act thus provides that remunerations of authors and performers, even if their amount is contractually provided for, have to be appropriate.²¹⁸ The amount is appropriate if it is fair and represents what usually is paid in a comparable situation or is set forth in a collective labor agreement. Also, if the author has licensed his rights and the film becomes an immense success and suddenly the remuneration is in a striking imbalance with the financial success of the motion picture, the author has a right to change the contract and consequently to additional payments, unless the situation is provided for in a collective labor agreement.²¹⁹ Most importantly, Section 32(b) of the German Copyright Act, a one-sided collision norm, provides that these laws are also applicable if there has been no choice of law and German law would be applicable or as far as substantial uses within German jurisdiction are

215. *Id.* § 12.

216. *Id.* §§ 19-27.

217. *Id.* §§ 44(a)-63(a).

218. *Id.* §§ 32, 36, 79.

219. *Id.* § 32(a).

the subject matter of the contract in conflict. Thus, Section 32 could even apply if Indian law is applicable to the contract and the film is considered Indian.²²⁰ From a producer's view this is a potentially painful limitation of the liberty of contract, since a film co-produced by a German producer will certainly be exploited in Germany. Thus, section 32(b) of the German Copyright Act will apply. In this context, it has been argued that now foreign authors would also have a claim against German right exploiters.²²¹ Other commentators, against the wording of Section 79, clause 2 of the German Copyright Act, claim that Section 32(b) of the German Copyright Act is not applicable to performers and that the *lex protectionis* is not applicable in the performer context.²²² This question has yet to be resolved. If Indian performers and supporting actors could rely on these laws, cheap labor possibly would not be so cheap anymore and the "performer's rights of Bombay Dreams" would be exported from Germany. Even if low remunerations might be usual in, for example, India, the fairness requirement remains. In practice however, the protections provided by these laws are rarely invoked and will most probably not discourage co-productions with Germany.²²³

6. Legal Action

If the co-producers pursue civil action for infringement of their copyrights, they can seek damages, the profits from the infringement and/or relief through injunction. Also, they can demand the unlawful copies be destroyed or left to them against appropriate payments.²²⁴

VIII. CURRENT FILM INDUSTRY ISSUES IN INDIA

A. Enforcement

The enforcement of India's copyright laws is simply not taking place. The TRIPS Agreement and other international agreements have in this context been criticized for their insufficient requirements in regard to the distribution of resources. But even when the United States imposed "Special 301" trade sanctions and India amended its 1957 Copyright Act

220. See Hermann Waldhauser, *Neuregelung des Urhebervertragsrechts*, FACHJOURNALISMUS, Jan. 7, 2002, http://www.dfjv.de/dfjv/artikelpool/pdf/96—waldhauser_urheberrecht.pdf.

221. PRAXISKOMMENTAR ZUM URHEBERRECHT, 386-89 (Ulrich Bock et al. eds., 2002.).

222. Letzte Änderung, *Urhebervertragsrecht Stellungnahmen in der Literatur zur Neuregelung*, ORY, Jan. 13, 2004, <http://www.ory.de/uvr/UrhVertR050.html#top>.

223. G. Haker, *Nationales und Internationales Urheberrecht*, JERÈ MIAS, Nov. 15, 2000, <http://www.jere-mias.de/biwi/urhebl.html>.

224. Urheberrechtsgesetz, *supra* note 79, § 98.

in 1994, nothing really changed.²²⁵ The copyright infringements mainly occur through unauthorized reproduction of films (videos, DVDs) and the display of these films on local cable networks. Without a regulatory body, it proves impossible to control over 10,000 cable operators by the standards of the Television Networks (Regulation) Amendment Bill of 2000, which make it mandatory for cable operators to secure copyrights of the films they telecast.²²⁶ The primary reason for the high level of piracy is that the general public and enforcement agencies are not fully aware of copyright laws or other related issues.²²⁷ Convictions and punishments are thus rare.

But lacking enforcement of copyright laws in India also represents a chance to succeed for co-producers. Almost 80% of recent Bollywood were “inspired” by one or more Hollywood film scripts.²²⁸ Some screenplay writers are so adept at plagiarizing that they can have a cultural copy of a Hollywood movie ready by the day that film is first released.²²⁹ Examples are “Mere Yaar Ki Shaadi”,²³⁰ which is said to be a cultural copy of “My Best Friend’s Wedding”,²³¹ “Rafoo Chakkar”,²³² which copied “Some Like it Hot”,²³³ “Dil Hain Ke Manta Nahin”,²³⁴ which copied “It Happened One Night”,²³⁵ or “Kaante”,²³⁶ which according to the New York Times, the Sydney Morning Herald and the Los Angeles Times “indianized” “Reservoir Dogs”.²³⁷ Indian courts have held that a work “inspired” by another copyrighted work is not an infringement as long as the theme of the “inspired” work is treated differently from its inspiration, which according to some, is always the case if “you take an

225. Rachana Desai, *Copyright Infringement in the Indian Film Industry*, 7 VAND. J. ENT. L. & PRAC 259, 263 (2005).

226. See Indian Television., <http://www.indiantelevision.com/indianbroadcast/legalreso/legalresources.htm> (last visited Oct. 31, 2006).

227. Priti H. Doshi, *Copyright Problems in India Affecting Hollywood and Bollywood*, 26 SUFFOLK TRANSNAT'L L. REV. 295, 312-13 (2003).

228. Subhash K. Jha, *Whose Movie is it Anyway?*, REDIFF, May 19, 2003, <http://www.rediff.com/movies/2003/may/19copy.htm>.

229. Desai, *supra* note 225, at 267.

230. MERE YAAR KI SHAADI (Yash Raj Films 2002).

231. MY BEST FRIEND'S WEDDING (Tristar Pictures 1997).

232. RAFOO CHAKKAR (1975).

233. SOME LIKE IT HOT (Ashton Production 1959).

234. DIL HAIN KE MANTA NAHIN (Vishesh Fims 1992).

235. IT HAPPENED ONE NIGHT (Columbia Pictures 1934).

236. KAAANTE (White Feather Films 2002).

237. RESERVOIR DOGS (Dog Eat Dog Productions Inc., 1992).

idea and route it through the Indian heart.”²³⁸ Due to this vague legal standard as well as the obstacle of the time-consuming and corrupt judicial system,²³⁹ it has not been and will not soon be the case that Hollywood studios try to mount copyright infringement cases in India.²⁴⁰ Also, no cases of injunctions against the distribution of such films outside India have been reported. For a U.S. or German co-producer this de facto represents the ambivalent but unique opportunity to “borrow” from international motion picture scripts at will for a project. Although India is taking measures to remedy the situation, it is still far from achieving a western standard of copyright enforcement and having an effectively working court system.²⁴¹

B. Entertainment Tax

In India, state entertainment taxes are very high. Their nature and extent varies widely across the different Indian states, ranging from 14% to 167%.²⁴² This is still the case although the national government in 2001 decided to fix the upper limit at 60%. Additionally, municipal show taxes, new releases taxes and property taxes of between 1% and 2% are levied by most state governments, municipal authorities or local bodies.²⁴³ Finally, for foreign film publicity materials such as posters, sample T-shirts and electronic press kits there is an import penalty of 100% of the value of the materials.²⁴⁴

IX. CONCLUSION

The harmonization of the copyright-related characteristics of the civil and common law systems within the Berne Convention and the TRIPS Agreement goes quite far in theory. In practice however, it does not provide the co-producers with sufficient security regarding the legal extent of their copyrights, since every court will, in most cases, apply its national copyright law to the motion picture. In fact, only a unified global copyright law could provide security. Additional burdens are

238. CBSNews.com, *Is Bollywood A Hollywood Clone?*, <http://www.cbsnews.com/stories/2003/06/04/entertainment/main557012.shtml> (last visited Aug. 8, 2006).

239. P.P. Rao, *Combating Corruption in the Judiciary*, PUCL BULLETIN, Jul. 2003, <http://www.pucl.org/Topics/Law/2003/corruption.htm>.

240. CBSNews.com, *supra* note 238.

241. Embassy of India, *India-US Bilateral Trade Zooms in 2002*, INDIAN EMBASSY, Mar. 4, 2003, http://www.indianembassy.org/press_release/2003/mar/04.htm.

242. Arpita Mukherjee, *Audio-visual Policies and International Trade: The case of India*, HAMBURG INSTITUTE OF INTERNATIONAL ECONOMICS, Nov. 1, 2002, <http://www.hwwa.de/Forschung/Publikationen/Report/2003/Report227.pdf>.

243. *Id.*

244. *Id.*

created by exceptional legislation, such as Germany's Section 32(b) *Urheberrechtsgesetz* which previously obliging producers to fairly remunerate creative contributors wherever they may be from and working. For issues such as moral rights in the context of versioning, the remuneration of authors and licensing specific contractual provisions will need to be drafted. Due to the different industry cultures and geographical distances, international co-production contracts should be drafted with much attention to details but also an emphasis on and flexibility in mutual agreement.

The fact that the enforcement of rights is insufficient in India, should not keep foreign producers from setting up cooperation projects. The rights for the Indian market will probably go to the Indian co-producer, making it primarily her financial risk. Also, any foreign film co-produced or not, will be pirated in India anyway, if there is money to be made.

Generally, the Indian film industry needs to be understood that written contracts are the rule and clauses like the choice of law can make a fundamental difference, when it comes to a complete long-time exploitation of a film. Indian producers can also learn a lot regarding profitability and international marketing from their German and U.S. counterparts. Eventually, a sustainable development towards a corporate film culture might be in Bollywood's near future. Whether this would actually make Bollywood films any better is doubtful. But it would most likely increase the Indian producer's and their partner's profit margins.

Considering the importance of a profitable exploitation worldwide, Indian censorship restrictions are a big issue. While western societies tend to have a high tolerance for sexuality and violence, this is not true for large parts of the Indian society. While this may very well change in the future, such development will take a long time. The actual co-productions aimed at both western and eastern markets would thus have to be rather in offensive, meaning "G" or "PG" by U.S. standards. While a co-production treaty between the United States and India seems unlikely due to the above mentioned opposition, Germany should enter into such a treaty on a national level to boost its regions as shooting locations and satisfy consumer fascination by promoting co-productions set in India.

Soon, the numerous financial and creative incentives to co-produce in and with India will certainly motivate a further rise in co-productions. This will hopefully lead to reduced entertainment taxation in both India as well as increased availability of subsidies in India and Europe. Politically,

India used to isolate itself and if the national film industry would become too international a similar unproductive reaction is possible. Indian producers thus need to be alert of profits from the new co-production opportunities on the one hand and retaining the characteristics of Bollywood cinema on the other hand. For them high times are approaching and they should try to stick with Indira Gandhi's advice and "learn to be still in the midst of activity and to be vibrantly alive in repose,"²⁴⁵ because "what happens when Hollywood and Bombay meet, Shiva only knows."²⁴⁶

245. The Quotations Page, http://www.quotationspage.com/quotes/Indira_Gandhi (last visited Oct. 30, 2006).

246. CONTRACTING OUT HOLLYWOOD, *supra* note 10, at 92.