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MORAL RIGHTS IN THE PUBLIC DOMAIN:

Copyright Matters in the Works of Indian National Poet C Subramania Bharati

This paper deals with copyright and moral rights issues in the works of Indian national poet, C Subramania Bharati. Its focus is on policy questions, touching on the protection of the artistic integrity of creative works, the democratization of access to literature, the possibility of perpetual moral rights protection in artistic works of exceptional national importance, and the appropriate role of moral rights in developing countries. The analysis will concentrate on Indian copyright law. It will also consider the impact of international copyright developments on the law in India, concluding with a brief critique of international principles in their application to developing countries.

> "Vande Mataram"
>
> People of the Tamil country!
>
> ... I will undertake the responsibility of publishing all of Bharati's works in my lifetime, and afterwards, I have decided to bequeath them to the people of Tamil Nadu.*

I. INTRODUCTION

C SUBRAMANIA BHARATI died in 1921 at the early age of thirty-nine. He left behind a remarkable legacy of poetry and prose writings whose importance for the Tamils today can only be compared to the status of Shakespeare in the English-speaking world. Bharati's writings sparked a renaissance in Tamil literature. While Bharati drew his inspiration from ancient sources of Indian culture, his works were truly innovative in both form and expression. In the words of his granddaughter, an eminent Tamil scholar:

> Though Bharati belongs to the age-long tradition of Tamil literature, and limits himself in some places to [its] conventional banks, his poetry

* Chellamma Bharati, Preface to the First Volume of Bharati's Complete Works, entitled, "National Songs" (1922), translated by Dr S Vijaya Bharati.

> flows with [the] racing vigour of contemporaneity, gushing with new ideas and emotions. The course of its flow, its speed and manner, its transgressions and its light are totally new, and original in the finest sense of the word. Its impact on modern Tamil literature has been tremendous ... [I]t has given life and form to present-day writing in Tamil.[1]

Bharati was not only the greatest of modern Tamil poets: he was also an ardent Indian nationalist and an impassioned advocate of social reform. Through the power of his ideals, he was able to envision freedom and independence for the three hundred million Indians dominated by British Imperial force. In Bharati's imagination, the imminent liberation of Indians would free them both from imperial rule by the British – at a time when Britain was the most powerful nation on earth – and from oppressive social customs which had been practised in India for thousands of years.[2]

Unfortunately, Bharati was persecuted for his convictions by both the British and the orthodox elements of his own, Brahmin society, who treated him as an outcast.[3] He was exiled from British India in 1908 and went to live in Pondicherry, a French colony in South India. He spent ten years in exile there and eventually returned to Madras, where he died.[4]

As is often the case with epoch-shaping genius, the true extent of Bharati's greatness came to be realized only after his death. Growing interest in his life and thought eventually led the government of Tamil Nadu state to adopt radical measures for publicizing the writings of this important national figure. This paper examines the steps taken by the government to promote the publication, reading, and study of Bharati's works, specifically by means of copyright law.

In dealing with Bharati's works, the government faced a classic copyright dilemma. On the one hand, it wanted to promote accessibility and widespread dissemination of these important works. On the other hand, it was faced with the challenge of protecting their integrity and the stature of the personality behind them. Indeed, many of the problems which have arisen in relation to Bharati's works are typical of the situation of artists, artworks, and culture

1 S Vijaya Bharati, C *Subramania Bharati* (New Delhi: Publications Division, Ministry of Information and Broadcasting, Government of India, 1972) at 62.

2 Bharati envisioned India as Mother India, an embodiment of the Hindu principle of energy, Parashakti. He wrote numerous poems and essays on social issues, particularly on improving the position of women.

3 S Vijaya Bharati, *supra,* note 1, at 53.

4 A biographical summary is available in S Vijaya Bharati, *ibid.*

in general in developing countries. Nevertheless, this paper argues that the most effective approach to copyright in relation to culturally-important works may actually result from the joint pursuit of dissemination and integrity objectives. Bharati's circumstances suggest that the two basic objectives of copyright policy are best pursued as interdependent and complementary means of furthering cultural interests, rather than competing goals.

The situation of Bharati's works also raises the larger question of the suitability of international copyright standards for India and other developing countries. International copyright law was codified in one primary instrument for more than a century, the Berne Convention for the Protection of Literary and Artistic Works.[5] The Berne Convention has now been absorbed into the broader regime for international trade established by the World Trade Organization (WTO) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).[6] It is generally acknowledged that the TRIPs Agreement is largely a product of Western approaches to culture, reflecting the cultural outlook and priorities of industrialized countries. At the same time, the integration of intellectual property standards into the international trade regime has made membership in the TRIPs system virtually a pre-requisite for economic growth.[7] In these circumstances, developing countries have generally accepted the copyright standards in TRIPs, but the cultural implications of the Agreement remain unclear. This study will conclude with a brief consideration of some of the ways in which the international copyright regime should be made more responsive to the distinctive cultural requirements of the developing world.

II. Bharati's Life and Work

A. *His Reputation*

After Indian independence, Bharati's contribution to Indian culture was widely recognized. There is no major city in India that does not have a street named after him, or a statue erected in his honour. Bharati's works

5 *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, 828 UNTS 221, online: World Intellectual Property Organization (WIPO)<http://www.wipo.org/eng/iplex/wo_ber0_.htm> (date accessed: 15 May 1999)[hereinafter Berne Convention].

6 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex 1C to the WTO Agreement, 15 April 1994, 33 ILM 1197 (entered into force 1 January 1995) [hereinafter TRIPs Agreement].

7 RC Dreyfuss & AF Lowenfeld, "Two Achievements of the Uruguay Round: Putting TRIPs and Dispute Settlement Together" (1997) Va J Int'l L 275 at 279-81.

have been translated into every major Indian language, as well as a number of European languages, including English, French, German, Russian, and Czech.[8] The government of India has also issued a postage stamp in his honour.[9]

In recognition of Bharati's exceptional contribution to Indian culture, as a poet, nationalist, and social reformer, the government of India ultimately conferred upon him the title of Indian "National Poet."[10]

B. *Publication History of His Works*

Bharati's attempts to publish his works were frustrated by several factors whose negative influence persisted throughout his life. One of these was, of course, the political situation in India. Bharati's unyielding anti-British stance resulted in a government ban on the publication of his works because of the political views which they expressed.[11]

Bharati was also constrained in his publishing efforts by poverty. British persecution made it impossible for him to maintain his position as a journalist in Madras.[12] He attempted to continue his professional activities in Pondicherry, but his magazine *India*, a Tamil-language publication, was not allowed to circulate outside the French territory. As a result, *India* was cut off from the greater part of the readership for which it was intended, the Tamil-speaking population of Madras Province. The magazine was forced to cease publication in 1910. Bharati spent the following years in great poverty.

In spite of his financial difficulties, Bharati came to be keenly interested in publishing a definitive edition of his works. He made several attempts to publicize his intentions in the hope that he would be able to raise the necessary funds from friends and publishers. He also sought help from the Maharajah of Ettayapuram, his native village.[13]

Bharati's circular of 28th June 1920 provides a clear statement of his intentions in this regard.[14] In this letter, Bharati argues that the publication of his works would respond to "the historic necessity ... for the uplift of the Tamil land which ... is a sheer necessity of the inevitable, imminent

8 See S Vijaya Bharati, *supra,* note 1, at 61.

9 The commemorative stamp was issued in 1960.

10 It should be noted that the name, "Bharati" is itself a title, meaning "Wise One." It was conferred on Bharati by the poets of the Ettayapuram court when he was seven years old. See S Vijaya Bharati, *supra,* note 1, at 2.

11 Dr S Vijaya Bharati in conversation.

12 S Vijaya Bharati, *supra,* note 1, at 48.

13 *Ibid,* at 52-53.

14 *Ibid,* at 53-54.

and Heaven-ordained Revival of the East."[15] He also expresses his intention to employ "novel and American-like improvement[s]" in the printing and binding of his works, and to set a low price for his books.[16] He expected his "high reputation and unrivalled popularity in the Tamil-reading world" to generate a large volume of sales.[17] Bharati concludes his letter by noting that government restrictions on his writings have been lifted – and even suggests that government officials may be asked to provide loans for this worthwhile endeavour![18]

Unfortunately, Bharati's efforts to publish a definitive edition of his works did not bear fruit during his lifetime. After his death, the project was taken up by his widow, Chellamma. Chellamma published notices to the public in several Tamil magazines. In these notices, she stated that she was going to establish a printing press to publish Bharati's works, and she sought the help of the public in her undertaking.

Chellamma, with the help of her brother, established a publishing company called Bharati Ashramam in Madras. She advised the public that she intended to publish twelve books. The first volume appeared in January of 1922, and included ninety "National Poems," patriotic songs in the cause of Indian independence and cultural revival. Chellamma wrote a preface to this volume. She expressed her ultimate intention to publish all of Bharati's works, and to bequeath these publications to the people of Tamil Nadu as public property upon her death.[19]

Bharati Ashramam brought out five volumes. However, Chellamma's personal commitments prevented her from fully realizing her goal of bringing out a complete edition of her husband's works. In 1924, another publishing company, Bharati Prachuralayam, was formed by Bharati's brother, C Viswanathan, his son-in-law, and one of his friends. While Chellamma retained the copyright in Bharati's works, Bharati Prachuralayam went on to publish almost all of his writings. In 1931, the company purchased Bharati's copyright from Chellamma for what can only be called the "astoundingly small sum" of four thousand rupees.[20]

15 S Vijaya Bharati, *supra,* note 1, at 54.

16 *Ibid*.

17 *Ibid*.

18 *Ibid,* at 55.

19 See *cover page*; reprinted in C Subramania Bharati, *Bharati Paadalkal: Aayvu Pathippu* [Bharati's Songs: Research Edition] (Tanjavur: Tamil University, 1987).

20 S Vijaya Bharati, *supra,* note 1, at 62. Vijaya Bharati also provides a description of the uses to which this money was eventually put. These included the payment of family debts connected with the marriage of one of Bharati's daughters.

When two of the partners in the Bharati Prachuralayam eventually withdrew from the company, the copyright in Bharati's works became the property of his brother. In 1949, the copyright was purchased from Viswanathan by the government of Madras. Interestingly, the government also paid Chellamma and Bharati's two daughters five thousand rupees each at this time.[21]

The government began to publish Bharati's works in 1950. It established a publishing committee to oversee publication. The committee was composed of the members of Bharati Prachuralayam, as well as two leading post-Bharati poets. This committee attempted to establish definitive texts based on Bharati's manuscripts and earlier published versions of his works. Any doubts as to content were primarily resolved by incorporating suitable additions at the discretion of the most literary members of the committee.[22]

The copyright in Bharati's works was made public by the government of Tamil Nadu state in 1954. From this time onwards, anyone in India was free to undertake publication of Bharati's works. Members of the public were to enjoy complete freedom to publish. Subsequent publishers of Bharati would not be required to pay a copyright fee, or to submit their editions to the government or any other agency for approval.

C. The Current Situation

Over the past seventy-five years, numerous editions of Bharati's poetry have appeared. His works have been translated extensively, and both his works and his own personality have featured in a number of films. However, the expansion of public access to Bharati's works has been matched by a decline in the quality of publication, from both technical and critical points of view. As S Vijaya Bharati observes:

> Bharati has been raised to the status of a national poet; his writings have come to be honoured as national literature. This is both an advantage and a disadvantage. When a poet gains recognition as the poet of the people it is often found that his poetry loses part of its appeal and on account of wide interpretations is apt to be misjudged. ... This perhaps accounts for there being neither a scholarly edition nor a proper criticism of Bharati's works till this very day.[23]

[21] S Vijaya Bharati, *ibid*. The government also put aside ten thousand rupees in trust for Chellamma. The interest from this sum was paid to Chellamma as a pension for the remainder of her life. Upon her death, however, the money disappeared. Dr S Vijaya Bharati in conversation.

[22] Dr S Vijaya Bharati in conversation.

[23] S Vijaya Bharati, *supra,* note 1, at vii.

The problems that have accumulated over the years in the publication of Bharati's works include careless printing that incorporates both typographical and interpretative errors into the final texts; false attribution of the works of other poets to Bharati; inaccurate and inappropriate translations; misleading representations of the poet's personality; and erroneous statements about his life and works. A simple example is the routine misspelling of Bharati's name – strange when we consider that Bharati was quite particular about the way his name was written in Latin letters.[24] In the area of translations, there is one instance in which a phrase meaning, "to walk with the majesty of a bull" is rendered into English by a hapless translator with imperfect knowledge of Tamil as, "to walk like a plough."[25] The same translator may be criticized for the style of her translations.[26] Surprisingly, the author of the introduction to her book of translations has also availed himself of an unheard-of opportunity to denigrate the work of the poet whose work is being translated. No doubt, this is a sad reflection of the persistence of a colonial-era mentality towards native genius which could be found even among the Indian intelligentsia of the post-Independence era.[27]

On another occasion, the writer of an English-language biography of Bharati appears to have plagiarized a portion of his introduction from another work on the poet.[28] The same writer has printed what to some eyes might appear as a vulgar, tasteless, and inaccurate description of the poet's death.[29]

The remainder of this paper will examine legal approaches to resolving these types of problems. Copyright law should provide a framework for regulating both the dissemination of literature and the integrity of literary works. The pursuit of one goal at the expense of the other – in this case, widespread dissemination and minimal concern about integrity – can only result in the impoverishment of cultural heritage as a whole.

[24] For example, it is misspelled by K Kuldip Roy, *Subramanya Bharati*, Twayne's World Authors Series: A Survey of the World's Literature, ed Sylvia Bowman, *India*, ed ML Sharma (New York: Twayne Publishers, 1974). Another common variant is "Bharathi."

[25] See S Prema, *Bharati in English Verse* (Madras: Porunai Publishers, 1958). This error occurred because the sound, "ra" is represented by two different letters in Tamil. Two words containing different "ra" spellings will have different meanings.

[26] *Ibid*.

[27] *Ibid*. Foreword.

[28] Foreword to the first edition of a collection of Bharati's original writings in English: CS Bharati, *Agni and Other Poems and Translations, and Essays and Other Prose Fragments* (Madras: A Natarajan, 1980). See Roy, *supra,* note 24, preface.

[29] *Roy*, *ibid,* at 48-49.

III. Indian and International Copyright Law

Copyright in India is governed by the *Indian Copyright Act* of 1957.[30] Like copyright legislation in other parts of the British Commonwealth, the Copyright Act has its origins in British copyright law.

The first British statute on copyright which was supposed to take effect in India was the *Literary Copyright Act, 1842*, which applied to all the British Dominions.[31] Because of doubts concerning the applicability of British statutes to territories administered by the East India Company, another Act was passed by the Governor-General of India in Council in 1847. This Act specifically provided rules of copyright for India.[32] In the words of one commentator, the purpose of the Act of 1847 was to "encourag[e] ... learning in the Territories subject to the Government of [the] East India Company by defining and providing for the enforcement of copyright therein."[33] Under the Act of 1847, the duration of copyright protection in India was for the life of the author and seven years after his death, or forty-two years, whichever term was longer.[34]

The Act of 1847 was replaced in 1914 by the *Indian Copyright Act*.[35] The Copyright Act essentially adopted the provisions of the landmark *British Copyright Act, 1911*. However, it included some modifications to the British provisions which were thought to be appropriate in the Indian context. Notably, Section 4 of the Copyright Act of 1914 provided that the exclusive right to translate a work would subsist for only ten years following first publication.[36] This provision would cease to be applicable only if the author, or a person authorized by him, published a translation of the work into any language within a ten-year period.[37]

30 *Indian Copyright Act 1957*, Act 14 of 1957, online: The Institute of Intellectual Property Research and Practice, Haryana, India <www.naukri.com/lls/copyright/section12.htm> [hereinafter Copyright Act] (last modified 14 Aug 2000).

31 5 & 6 Vict, 45.

32 Act XX of 1847.

33 Rustom R Dadachanji, *Law of Literary and Dramatic Copyright in a Nut-Shell* (Bombay: Rustom R Dadachanji, 1960) at 7.

34 See S Ramaiah, "India," in *International Copyright Law and Practice*, gen ed PE Geller (original eds MB Nimmer & PE Geller) (New York: Matthew Bender, 1999) at para 1[2].

35 Act III of 1914; passed by the Governor-General of India in Council.

36 See Ramaiah, *supra,* note 34, at para 1[2].

37 *Ibid*. Interestingly, Vaver comments: "Translation in th[e] [colonial] context was less a humanising exercise than an act of dominion, since it was thought that only British, not native translators, could be trusted to act appropriately. Natives could not interpose any right between their texts – written or oral – and the translator, who inevitably reconstructed them according to his own biases. The translation became the authentic version of native culture both for coloniser and colonised, often as a prelude to its being demonised and

The statute of 1914 continued to be law in India until the passage of the Copyright Act of 1957. Several factors made it important for independent India to have a new copyright statute. These included India's desire to continue its membership in the Berne Copyright Union and the Universal Copyright Convention as an independent country,[38] which required levels of copyright protection not provided for in the 1914 Act.[39] Technological and social developments which were bringing about increased access to intellectual creations, as well as a "growing public consciousness of the rights and obligations of authors" in the Subcontinent, also called for a new approach to copyright protection.[40] Finally, the practical difficulties of applying the 1914 Act were additionally among the factors mandating change.[41]

The Copyright Act of 1957 introduced major innovations in several areas. It extended the term of copyright protection to the life of the author and fifty years after his death. It also dispensed with the limitation on authors' translation rights imposed by the Act of 1914. In addition, the Copyright Act established a number of administrative organs concerned with enforcing copyright standards, including a Copyright Office, a Registrar of Copyrights, and a Copyright Board. The Copyright Board was empowered to adjudicate disputes relating to public performances, and also, to grant compulsory licences, including those involving translation rights.[42] At the same time, the Act provided that the registration of copyright was not a prerequisite to infringement proceedings, maintaining the fundamental principle that copyright subsists automatically in a creative work.[43]

The Copyright Act of 1957 continues to govern copyright in India. However, various amendments to the Act have been made. These include a series of amendments in 1983 aimed at making Indian copyright law

displaced in favour of the "superior" British culture and religion." D Vaver, "Translation and Copyright: A Canadian Focus" (1994) 16:4 EIPR 159 at 165.

38 Universal Copyright Convention (as rev'd 24 July 1971, Paris), 943 UNTS 178 [hereinafter UCC].

39 Most developing countries joined the international copyright system as colonies and later had to decide on the conditions of their participation as independent countries: see S Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London: Centre for Commercial Law Studies, Queen Mary College, 1987) at 590-93 for a discussion of the initial participation of developing countries in the Berne Convention.

40 Ramaiah, *supra,* note 34, at para 1[2]: he quotes from the Statement of Objects and Reasons appended to the bill leading to the enactment of the new *Copyright Act*.

41 *Ibid*.

42 See Dadachanji, *supra,* note 33, at 9.

43 See Ramaiah, *supra,* note 34, at para 5[3]. Registration of copyright can, however, serve an evidentiary function in infringement proceedings: *ibid*.

compatible with the 1971 Paris revisions of the Berne Convention; amendments in 1984 to make the Act applicable to video films and computer programs; and amendments in 1992 which extended the duration of copyright protection to the life of the author and sixty years after his death.[44]

In 1994, leading up to the international implementation of the TRIPs Agreement, a new series of major amendments to the Copyright Act was undertaken.[45] Among the most important of these changes are the introduction of performers' rights and the creation of a *droit de suite*, which allows authors to share in the proceeds from resales of original objects and manuscripts.[46] The 1994 amendments also provide copyright protection for composers of Indian classical music. Copyright for composers of Indian music was not available under previous legislation, which required music to be written down before it could be protected. However, it was inappropriate to apply this "fixation" requirement to Indian music, since, as a matter of tradition, composers in India do not usually write their works down in a form analogous to Western musical notation.[47] On a more restrictive note, the 1994 amendments also reduce the scope of protection previously enjoyed by "moral rights."[48]

The Indian Copyright Act has had to confront some special challenges flowing from India's membership in the World Trade Organization and its adherence to the TRIPs Agreement. At the international level, TRIPs has meant the movement of copyright standards out of WIPO and the United Nations system into the more demanding framework of international trade. Somewhat in contrast to the Indian provisions on patents, however, the Indian law of copyright has now been largely accepted by the international community and the United States – the driving force behind the TRIPs Agreement – as meeting India's new international requirements.[49]

[44] S 22 of the Copyright Act. See also Ramaiah, *ibid*, at para 1[1], 3[1]; the term of sixty years, effective from December 28, 1991, runs from the date of the author's death or from the date of first publication, depending on the circumstances of the work.

[45] See the *Copyright (Amendment) Act, 1994*, Act No 38 of 1994, reproduced in P Narayanan, *Law of Copyright and Industrial Designs*, 2d ed (Calcutta: Eastern Law House, 1995) at 612-13.

[46] See Ramaiah*, supra,* note 34 at paras 1[1], 3[2][b], and 4[3][c] for a description of the new provisions.

[47] An exception might be Dikshitar, known for composing in Western notation.

[48] Details of the amendments are provided by P Anand, "The Concept of Moral Rights under Indian Copyright Law" (1993) 27 Copyright World 35.

[49] It is no mere coincidence that the first dispute over TRIPs occurred between the United States and India over India's pharmaceutical patent regime: see *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (Complaint by the United States)* (1997), WTO Doc. WT/DS50/R (Panel Report), online: WTO <http://www.wto.org/wto/dispute/distab.htm> (last modified: 31 May 1999).

In the area of moral rights, it is the international system which remains fluid: the TRIPs Agreement requires members to adhere to Article 6*bis* of the Berne Convention, but the provisions on moral rights, partly at the insistence of American negotiators, remain outside the reach of TRIPs dispute-settlement and enforcement mechanisms.[50] Indian moral rights legislation has therefore continued to be based on nationally-generated policies. However, as the recent amendments suggest, moral rights in India may eventually come to reflect the loss of prestige suffered by these rights at the international level.

IV. Copyright Issues Raised by Bharati's Case

The copyright issues relevant to Bharati's works fall into four general areas. These are authors' moral rights; protection of works in the public domain; the particular problems posed by translations and adaptations; and problems associated with musical compositions in the Indian context.

A. *Moral Rights*

Common-law legal systems have traditionally focussed on an author's economic interest in his creative work. The philosophy underlying the common-law approach to copyright has been fundamentally commercial in nature, seeking above all to protect the ability of authors to earn a livelihood from their work. In contrast, protection of the non-economic interests of authors is restricted at common law to narrow and limited contract remedies, such as the introduction of implied terms into contracts, and tort actions, including the torts of passing off, injurious falsehood, and defamation.[51]

Continental jurists have adopted a fundamentally different approach to copyright – no doubt, reflected in the terminology of "authors' rights" which European countries employ in this area.[52] Continental laws emphasize the protection of the non-economic interests of authors in their work. This conceptual orientation is based on the view that an intellectual or artistic work is an embodiment of the author's personality. As Ricketson observes:

> In Continental law, ... [the] recognition [of moral rights] sprang from the assumption that an artist's work was an extension of his personality

[50] See Art 9.1 of the TRIPs Agreement (*supra,* note 6).

[51] See G Dworkin, "The Moral Right of the Author: Moral Rights and the Common Law Countries" (1995) 19 Colum-VLA JL & Arts 229 at 231-37.

[52] For example, *droit d'auteur* in France, *Urheberrecht* in Germany.

> and, therefore, that any interference with that work which offended the honour or reputation of its author was to be restrained, quite apart from any adverse economic effect that this action might have.[53]

The expression, "moral rights," is itself a somewhat awkward translation into English of the original term in French law, "*droit moral*." The connotations of this French expression are quite different from its English equivalent, evoking, as Ricketson suggests, rights of a "personal or spiritual" nature, above all.[54]

The two main types of moral rights are the rights of attribution and integrity.[55] The right of attribution allows an author to assert authorship of his work, and to prevent another person from claiming authorship of his work. In addition, an author may prevent the attribution of works to him which he did not create.[56]

The right of integrity allows the author to protest any distortion, mutilation, modification, or other treatment of his work which is, in the language of the Berne Convention, "prejudicial to his honour or reputation."[57] In contrast to the highly specific right of attribution, the right of integrity is a broad right which allows authors to object to a wide range of practices – including editing, publishing, performance, and possibly exhibition – which may not be compatible with the intentions of the author.[58]

In addition to these two types of moral rights, three other moral rights are recognized in some Continental jurisdictions, notably France. The right of disclosure or publication allows the author to decide whether his work is to be published or otherwise brought before the public, and how this should be done.[59] The right of withdrawal allows an author to recall a published work from circulation on the grounds that it has ceased to represent

[53] S Ricketson, *The Law of Intellectual Property* (Melbourne: The Law Book Company, 1984) para 15.56 [hereinafter *Intellectual Property*].

[54] Ricketson, *ibid*, para 8.93.

[55] These terms come from the somewhat anachronistic French *droit de paternité sur l'oeuvre* and the useful *droit au respect de l'oeuvre*, with its explicit emphasis on the work. See J-M Pontier, J-C Ricci, & J Bourdon *Droit de la culture*, 2ième édn (Paris: Dalloz, 1996) para 345; see also Ricketson, *Intellectual Property*, para 15.57.

[56] Pontier *et al, ibid*, and Ricketson, *ibid,* para 15.57.

[57] Ricketson, *ibid*, para 14.30; see also S Ahuja, "Latest Amendments to the Indian Copyright Act" (1994) 44 *Copyright World* 38 at 43-44.

[58] Ricketson, *ibid*, para 15.57.

[59] *Ibid: droit de divulgation*.

his views.[60] Lastly, the right to prevent excessive or vexatious criticism is also a recognized moral right.[61]

1. *Moral Rights in the Berne Convention*

The Berne Convention achieves a compromise between common law and Continental views of authors' rights, by providing limited recognition of the two principal moral rights.[62] Article 6*bis* of the Berne Convention recognizes the author's rights of attribution and integrity. The attribution right in Article 6*bis* provides that "the author shall have the right to claim authorship of the work." Implicit in this article is also the author's ability to exercise his attribution right in a "negative" way, preventing another person from claiming authorship of his work, and to prevent the attribution of another person's work to him.[63] Article 6*bis* also provides for a right of integrity which exists independently of the author's economic rights in his work, but this right is restricted to cases where the reputation of the author is affected – an evidentiary burden which the author will have to discharge satisfactorily.[64] The Berne Convention does not provide protections for any other moral rights. A proposal at the Rome conference of 1928 to introduce a right of publication into the Berne provisions was rejected, and the idea of international recognition for other moral rights has not so far been proposed at subsequent revision conferences.[65]

60 *Ibid*: *droit de retrait ou de repentir*. Ricketson points out that the work may also be withdrawn by the author on the grounds that it is harmful to his reputation for some other reason. See also Pontier *et al, supra,* note 55, para 345.

61 *Ibid*. This right is discussed in the French context by Georges Michaélidès-Nouaros, who argues that criticism must be done "avec sincérité [with sincerity]" and in "termes corrects [appropriate terms]." See Michaélidès-Nouaros, *Le droit moral de l'auteur: Étude de droit français, de droit comparé et de droit international* (Paris: Librairie Arthur Rousseaeu, 1935) para 168.

62 However, it should be noted that the inclusion of moral rights in the Berne system is itself an indication of a more favorable attitude towards Continental systems of authors' rights than their common-law counterparts.

63 Pontier *et al, supra,* note 55, para 345.

64 Berne Convention, *supra,* note 5, Art 6*bis*.

65 *Ibid*. The right of publication was of great importance in socialist societies. This is hardly surprising, as, once the work had been submitted for publication, the author had no control over its treatment by the state – which controlled virtually all means of distribution. For example, see MA Newcity *Copyright Law in the Soviet Union* (Praeger New York (1978) 72.

a. *Term of Protection*

Paragraph 2 of Article 6*bis* provides that the author's moral rights shall be maintained after his death "at least until the expiry of...[his] economic rights." This provision was first formulated in the Stockholm discussions of 1967, and represents a radical change from previous Convention provisions which did not allow for the protection of moral rights after the author's death. The language of this provision provides for a minimum period of protection for moral rights which will be equal to the term of protection for economic rights. Moreover, countries may choose to extend the term of moral rights protection beyond the expiry of economic rights, even to the extent of allowing perpetual protection for moral rights.[66]

Paragraph 2 also provides that moral rights shall be exercised after the death of the author by "the persons or institutions authorized by the legislation of the country where protection is claimed." In practice, the moral rights of a deceased author are usually exercised by his descendants.[67]

b. *Limitations on Moral Rights Protection*

The provisions for protecting moral rights after the author's death are weakened by an exception. Countries whose legislation does not provide for the protection of all the moral rights described in Article 6*bis*(1) at the time of their accession to the Paris Act may cease to protect *some* of these rights after the author's death. This exception was introduced to accommodate common-law legal systems, where moral rights protection has often been accomplished through the tort of defamation. An action for defamation cannot generally be brought after the death of the person defamed. It should be noted, however, that moral rights cannot be extinguished in their *entirety* after the death of the author.[68]

2. *Indian Copyright Law*

The Indian Copyright Act currently provides protection for authors' moral rights in conformity with the Berne Convention.[69] Section 57(1)(a) of the Act provides that an author shall have a right of attribution which includes

[66] Berne Convention, Art 6*bis*(8).
[67] Ricketson, *supra,* note 53, para 14.31.
[68] Berne Convention, Art 6*bis* 11; also see Ricketson, *ibid*, para 14.31.
[69] Section 57, *supra,* note 30: it is also reproduced in Ramaiah, *supra,* note 34, at para 7[1].

both the right to assert authorship and the right to object to the false attribution of others' works to him, or of his works to others. Section 57(1)(b) grants the author the right to restrain, or to claim damages in respect of, "any distortion, mutilation, modification or other act" affecting the work, and which would be prejudicial to his honour or reputation. In keeping with the minimum requirements of Berne, section 57(1)(b) provides that modifications must occur "before the expiration of the time of copyright" in order to be actionable violations of the author's right of integrity.[70] It should also be noted that moral rights continue to rest with the author even if he has assigned the copyright either in part or in its entirety.[71] However, under Indian law, moral rights may be waived in certain circumstances by the author.[72]

a. *1994 Amendments*

The latest amendments to the Copyright Act have considerably modified the original language of section 57. The new provisions dramatically alter the character of moral rights in Indian law. The amendments have affected two important aspects of moral rights protection, the relationship between modifications to a work and the author's reputation, and the term of protection for moral rights.

i. *Reputation of the Author*

The original section 57 did not connect changes to the work with the reputation of the author. As a result, it was possible for section 57 to have effects which considerably exceeded the level of protection in the Berne Convention.[73] For example, the Indian provisions could protect a work of art from outright destruction, something that is generally believed to be beyond the scope of the Berne provisions on moral rights.[74] The international rationale for limiting the integrity right in this way is that an author's reputation cannot be damaged by the condition of a work that is no longer in existence. However, it is apparent that the destruction of a work could

[70] *Ibid*. Interestingly, s 57(1)(b) restricts the applicability of moral rights to adaptations of computer programmes.
[71] See s 57(1), *ibid*.
[72] See Dworkin, *supra,* note 51.
[73] Ahuja, *supra,* note 57, at 43-44.
[74] This was the finding of the Delhi High Court in the case of *Amar Nath Sehgal* v *Union of India* (1992), Suit No 2074 (Delhi HC), (1994) 19 Industrial Property Law Reports 160.

have negative consequences for an author's reputation, at the very least, because it would reduce the overall size, and possibly quality, of his artistic corpus.[75]

The amended section 57 limits moral rights claims based on the distortion, mutilation, or modification of works to cases where the author's honour or reputation are indeed deemed to be prejudiced. This amendment has had the effect of making section 57(1) identical in substance to Article 6*bis*(1) of the Berne Convention.[76] In practical terms, the requirement that the offending treatment of the work must be linked directly to the author's reputation seems to impose an additional evidentiary burden upon Indian authors. The change is probably a reflection of fears about the commercial consequences of a broad integrity right, or even a concern that authors might abuse the moral right of integrity for their economic advantage. For example, an author who claims that a film adaptation of his novel distorts his work might be entitled to a damages award which greatly exceeds the copyright fee paid to him by the producer. Moreover, whatever the quality of the adaptation and the nature of its relationship to an original work, the film might still generate interest in the author's work and encourage the public to read his novel. In the Indian context, however, where the mass-market film industry is an economic and political force to be reckoned with, it seems far more likely that authors may become victims of misrepresentation, particularly through film adaptations of their work. In the seminal moral rights case of *Mannu Bhandari* v *Kala Vikas Pictures*,[77] the Delhi court openly voiced its determination to protect the interests of creative authors against the film industry.

ii. *Term of Protection*

Indian law did not initially specify a fixed term of protection for moral rights. In view of Article 6*bis* of the Berne Convention, the duration of moral rights protection had to match the term of protection of copyright, at a minimum. The Copyright Act was amended in 1992 to extend the duration of copyright protection from fifty to sixty years, either from the year of the author's death or from the year of first publication.[78] However, protection

[75] See Anand, *supra,* note 48, at 36, on the rationale behind the international position.

[76] *Ibid*. The amendment to section 57 also provides that failure to display a work, or failure to display it in a manner that is satisfactory to the author, is not an infringement of the author's moral rights.

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

[78] See Ramaiah, *supra,* note 34, para 3[1]; the provision is contained in s 22 and the details are set out in ss 23-29.

of moral rights was not necessarily limited to sixty years, but could in theory continue indefinitely. Section 57(2) of the Act supported this view, since it provided for the exercise of moral rights after the author's death by his legal representative.[79]

With the 1994 amendments, however, section 57(1)(b) clearly implies that the duration of protection for the right of integrity is limited to the term of copyright protection – at most, extending sixty years beyond the lifetime of the author. The section effectively excludes perpetual protection for the right of integrity. However, the duration of the attribution right continues to be undefined.[80]

3. *Bharati's Moral Rights*

Many of the problems involving Bharati's works may effectively amount to violations of the author's moral rights. The false attribution of the works of other authors to Bharati contravenes his right of attribution. Faulty printing is a modification of his work which could prejudice his reputation, depending on the nature and extent of the errors, and violates his right to the integrity of his work. However, the Copyright Act does not protect all of the interests which should be protected in his case. For example, the author's name should be protected from an undesirable association with the introduction to a book of translations of his poems which openly attacks his standing. This is a clear case of malicious criticism. The writer of the introduction is expressing views which are totally unsubstantiated in critical scholarship. His comments occur in a most inappropriate context, and might do considerable damage to the author's reputation among non-Indian or non-Tamil readers who may not be fully aware of Bharati's stature.[81]

In addition, the issue of appropriation of Bharati's personality is one that arises frequently in practice, and must be considered. Arguably, it is logical for moral rights standards to include some kind of protection for an author's personality, since moral rights doctrine is itself based on the

[79] *Ibid*, at para 7[1]. This section is qualified by the strange and apparently inexplicable condition that the legal representative may not himself claim authorship of the work. This provision is somewhat obscure; the need for it is not clear. Strömholm discusses this provision in some detail: see S Strömholm, *Le droit moral de l'auteur en droit allemand, français et scandinave avec un aperçu de l'évolution internationale – Etude de droit comparé,* t 1 (Norstedt & Söners Förlag, 1967) at 420. Notwithstanding Strömholm's discussion, however, the most interesting question on this provision may be whether descendants can vindicate the moral rights of a newly-discovered or newly-attributed work.

[80] *Ibid*, at para 7[3].

[81] See S Prema, *supra,* note 25.

idea that the author's personality is reflected in his works. The protections offered by moral rights clearly implicate a number of legal concepts outside copyright's traditional reach – for example, the laws of privacy and misappropriation of personality come to mind. Misrepresentation of an author's personality may have an impact, not only on how his work is received, but also, on how it is interpreted and understood.

The question of who should exercise the moral right of the author after his death also poses serious problems. The Copyright Act provides for a legal representative to exercise moral rights *post mortem auctoris*. However, the effectiveness of a legal representative in vindicating an author's moral rights is doubtful. Both legal and personal representatives may suffer from certain blind spots in dealing with an author's work. On the one hand, legal representatives who are not personally involved in the author's work and reputation may not be as sensitive to infringements of his moral rights as a family member would be. On the other hand, family members may be at risk of being over-protective of the author, perhaps with the inadvertent consequence of concealing truths about his life and work.

An author's descendants may also lack the qualifications to assess the scholarly aspects of moral rights issues, including, for example, inaccurate printing and false attribution. In Bharati's case, however, it so happens that the people most qualified to protect his moral rights were his wife and descendants. Bharati's works were taught directly by him to his wife and two daughters, and they, in turn, passed these works on to his grandchildren. In effect, there was an oral tradition in the family of preserving and communicating Bharati's poetry.

Although Bharati's family members were well-versed in his poetry, other factors restricted their ability to protect his moral rights. These included not only the proliferation of publications and performances of his works in independent India, making it difficult to monitor these activities, but also, their own poverty and lack of education. These problems were remedied in the generation of Bharati's grandchildren, two of whom became university professors, but the uncertainties surrounding moral rights in Bharati's works and the rapidly expanding volume of relevant materials have both been factors preventing them from pursuing these issues.

Notwithstanding these pragmatic concerns, a strong case can be made for extending perpetual protection to Bharati's moral rights, as would have been possible prior to the 1994 amendments to the Copyright Act. Because Bharati's works entered the public domain only three decades after his death, protection of his copyright was actually curtailed long before the time when it would have expired "naturally" – that is, in accordance with statutory provisions. In effect, these immortal and incomparable works were denied even the level of copyright protection granted to ordinary works. Moreover, given that interest in the works of important authors often develops long

after their death, it seems unnecessarily restrictive to limit the protection of their moral rights to the duration of their economic rights. In the case of cultural works of outstanding importance, the perpetual protection of moral rights would provide a valuable means of supervising the treatment of these works to ensure that their integrity is maintained on an ongoing basis. In Bharati's case, his works are not only outstanding examples of literature, but they are also historical and social documents of great value. Any distortion of his writings would inevitably entail damage to Indians' perceptions of their own history and society.

The idea of extending this level of protection to the moral rights of at least some authors may also be worthy of general consideration as a policy matter. Particularly in the case of authors whose work is of outstanding cultural value, a strong argument can be made for perpetual protection of the author's moral rights. Bharati's works are immortal, since they will continue to be read as long as one Tamil person is alive, and the Tamil language is spoken. It seems logical to suggest that measures for the protection of their integrity, which are mainly made possible through moral rights provisions, should last as long as these works continue to live.

The problem of alienating moral rights must also be dealt with in these situations. Is it necessarily the case that, when Bharati's copyright was sold to the government and later made public, his moral rights were sold, as well? While some jurisdictions allow moral rights to be sold along with copyright or waived when copyright is transferred from the author to a new owner, others restrict the transfer of moral rights.[82] Limitations on the transferability of moral rights reflect a concern with maintaining the conceptual connection between the author and his rights of personality, and practical concerns about the implications of waivers in a commercial context where the author has limited bargaining power – for example, as a feature of "standard form" artists' contracts.[83]

The Copyright Act also supports the idea of the inalienability of moral rights to the extent that they are not transferable under section 57, although they may be waived by specific agreement.[84] In a landmark decision, however, a Delhi court held that an author's rights under section 57 may even override

[82] This issue is discussed in great detail by Dworkin, *supra,* note 51, at 18-19.

[83] See S Fraser, "Berne, CFTA, NAFTA & GATT: The Implications of Copyright *Droit Moral* and Cultural Exemptions in International Trade Law" (1996) 18 Hastings Comm/Ent LJ 287 at 292-93: even in France, traditionally the jurisdiction which is most sensitive to moral rights issues, waivers of moral rights appear to be allowed in practice.

[84] See Anand, *supra,* note 48, at 36, see also Dworkin, *supra,* note 51.

the terms of a contract for the assignment of copyright.[85] In effect, any contract for the assignment of copyright cannot offend the provisions of section 57, and its terms must be read subject to this section.[86] As a result, the possibility of waiving moral rights appears to have been practically eliminated from Indian law as a matter of public policy. Under the Copyright Act, moral rights are effectively inalienable.

In view of this understanding of moral rights, it can be argued that Indian law favours the "inheritability" of moral rights. Until the expiry of the term of copyright protection, Bharati's descendants have the right to protect his moral rights. If the term of protection for moral rights had not been limited by the latest amendments to the Copyright Act, his descendants would still have the right to vindicate his moral rights at the present time. This could be the case in spite of the fact that Bharati's copyright is publicly owned, since recent court decisions appear to interpret the Act as creating moral rights which are inalienable.

Indeed, it is readily apparent that the latest developments in Indian moral rights law reflect the Indian government's concerns about the pro-active role courts have assumed in protecting and promoting authors' rights, lending them the benefit of the widest possible interpretations of legislative provisions. If this is in fact the case, moral rights in India will continue to be in flux for some time to come, making it all the more important to be aware of the policy considerations that should drive the development of Indian provisions in the long term.

B. *Protection of Works in the Public Domain*

The protection of works in the public domain presents a number of special difficulties. At the same time, it is important to remember that all intellectual creations eventually find their way into the public domain. Policy approaches to works whose copyright has expired will therefore have a definite influence on the long-term status of national culture, heritage, and history.

In Bharati's case, his works were expressly – and perhaps, prematurely – brought into the public domain as a matter of public policy. By acquiring ownership of Bharati's copyright and, subsequently, making it public, the government wished to promote two objectives. First, it wanted to encourage the widest possible dissemination of Bharati's works. This was believed to be an important policy objective, not only because of the literary value

[85] Anand, *ibid*, at 36-37; also see Ramaiah, *supra,* note 34, at para 7[4]. The case is *Mannu Bhandari*, *supra,* note 77.

[86] Ramaiah, *ibid.*

of Bharati's writings, but also because of his erudite nationalism and social ideals, which could not fail to make an important contribution to nation-building and development after Independence. His work was of such great value to Indian society that no person should be denied contact with it.

Secondly, the government wanted to publicize Bharati's works in recognition of the obstacles that he, himself, had faced in attempting to publish his own writings. In a sense, the government was attempting to fulfil a belated debt of gratitude to Bharati for his truly self-sacrificing part in the nationalist struggle. The government's motives seem to have been remarkably pure in this undertaking. When Bharati's copyright was eventually transferred to the public, there was no requirement for the payment of fees of any kind to the government for the use of Bharati's works.

The government's policy of non-intervention in Bharati's copyright did, however, generate some ambivalent consequences. When the government initially purchased Bharati's copyright, it had created a special committee to oversee the publication of his works. The *raison d'être* of this committee had been to ensure the integrity of the publications as they were issued. However, when the government made the copyright public, no supervisory mechanism was put in place to monitor the use of Bharati's works. This situation resulted in a number of problems which the government had apparently not foreseen.

1. *Duties of the Government*

Bharati's situation raises the question of whether governments have a duty to protect the integrity of works in the public domain. This problem has particular urgency in relation to the unusual category of works which have been brought into the public domain deliberately, before the statutory expiry of copyright, though it remains an important issue for all public-domain works. The state has an interest in protecting national culture for its own prestige, and for the benefit of the public. Ideally, the government should perceive its interest in protecting the integrity of cultural works to be as strong as the author's drive to protect his own reputation.[87] While it is true that the benefits to the public from the protection of cultural works are not easily quantifiable, the public nevertheless stands to benefit directly – and the state, indirectly – from the maintenance of cultural heritage. Culture makes an important contribution to development, through industry and wealth creation, and through its subtler effects on national consciousness, self-

[87] For a discussion of related points, see CA Berryman, "Toward more Universal Protection of Intangible Cultural Property" (1994) 1 J Intell Prop L 293 at 300.

esteem, and literacy. Indeed, these "unquantifiable" benefits of culture may be better understood as "invaluable" ones.[88]

In the landmark case of *Amar Nath Sehgal* v *Union of India*,[89] the Delhi High Court upheld the duty of the Indian government to maintain the integrity of artworks which it owns. The case involved an Indian sculptor, Amar Nath Sehgal, who created a mural cast in bronze which was considered to be a national treasure. In 1979, the government took down the mural and placed it in a storehouse. Due to carelessness in moving and neglect in storage, the mural was seriously damaged. Sehgal filed for an injunction to prevent the government from causing further harm to the mural. The court granted the injunction.[90]

One of the issues addressed by the court was whether the Indian government owes a duty of care towards artworks in its possession. The case established that the public has a right to be assured of the appropriate maintenance of artworks belonging to the government. As Anand observes:

> [T]his case raised ... [an] important issue, namely, the right of every citizen to see that works of art which belong to the government, being national wealth, are treated with respect and not destroyed by the government.[91]

Although the *Sehgal* case dealt specifically with a work of art owned by the government, the principle of governmental responsibility which it establishes may be extended to publicly-owned cultural property. Particularly in Bharati's case, the government purchased his copyright and made it public before the statutory time of expiry, as an express policy decision. The status of Bharati's copyright works may therefore be considered the responsibility of the government. In a sense, the government continued to have an interest in the copyright after it was made public, because use of Bharati's works

88 Frazier points out the power of governments and their ability, not only to promote cultural developments, but even to define what is and is not art. Following Frazier's line of argument, it is equally true that governments may influence social attitudes towards art. See JA Frazier, "On Moral Rights, Artist-Centered Legislation, and the Role of the State in Art Worlds: Notes on Building a Sociology of Copyright Law" (1995) 70 Tulane L Rev 313 at 330-54.

89 *Supra,* note 74; see Anand, *supra,* note 48, at 36.

90 For a detailed discussion of the case, see M Sundara Rajan, "Moral Rights and the Protection of Cultural Heritage: *Amar Nath Sehgal* v *Union of India*" (2001) 10(1) Int'l J Cult Prop 79. See also Anand, who is Mr Sehgal's representative in the litigation, *ibid*.

91 Anand, *ibid*. In effect, it appears that the government was holding the property in trust for the public – although the court's argument was not framed in these terms.

implicitly occurred on the basis of government permission. Given its responsibility for publicizing Bharati's copyright, the government had an implicit obligation to ensure that the public would make proper use of the works.

2. *Domaine public payant*

Bharati, himself, said that he wanted his works to be as readily available to the public "as a matchbox."[92] To this end, the government's decision to publicize his copyright remains laudable. However, the admirable ambition of mass dissemination should not become an excuse for poor quality of publication. Indeed, the sole justification for seeking to control public use of Bharati's works is to safeguard their integrity and, through them, to protect the personality of their creator. To this effect, the governments of Tamil Nadu state and India could easily establish a committee of qualified persons to supervise publications, performances, broadcasts, translations, and adaptations of Bharati's works, ensuring that they are of good and honest quality.[93] If the skills required for this project cannot be accommodated within a single committee, or if the volume of work is too large for one committee to handle, a group of committees could as well be established.

Alternatively, different projects could be submitted to the supervision of different persons who are appropriately qualified. For example, a new edition of Bharati's poetry might require the supervision of Tamil scholars; a film adaptation of one of his stories, on the other hand, might benefit from the comments of a leading film producer on the conventions of this form, in addition to the input of expertise on Bharati's life. The current biographical film on Bharati is a prime example of the problems that can arise from unaccountable public use of the poet's works and portrayal of his personality. The use of Bharati's songs and the depiction of his family life in the film both appear to be somewhat inaccurate. In the first case, the film's producers have re-cast Bharati's original melodies to suit current tastes in Indian popular music, and in the second, they have interpreted his relationship with his wife in a controversial and potentially unjustified way.

The financing of this type of supervisory system could be accomplished through the creation of a legislative scheme which would levy a small fee for the use of Bharati's works. This fee would be calculated as a proportion

[92] S Vijaya Bharati in conversation.

[93] Arguably, the quality of publications and, to some extent, of derivative works, must be measured according to their reliability.

of the returns expected from the project, and it would contribute to the realization of the endeavour. This scheme would be a particular variety of the legislative schemes traditionally known in international copyright parlance as *domaine public payant*.[94]

The *Tunis Model Law on Copyright for Developing Countries*[95] encourages the use of *domaine public payant* arrangements to support culture in developing countries. In effect, this type of scheme would allow some countries to surmount the financial obstacles to the protection of culture. Since the publishers of cultural works generally expect some financial return from their undertakings, it does not seem inappropriate to ask them to contribute a small portion of their gains to the government, which, in this case, initially created the opportunity for them to use the works. The limitations on use as a result of the fee would probably be so minor as not to affect dissemination overall.[96] Users of the works should not begrudge what is, in essence, taxation of their efforts in order to ensure the integrity and authenticity of their own products.

It should be emphasized that the system of the *domaine public payant* aims to collect fees from the *business* undertakings of publishers, filmmakers, and producers of translations and other, related works. The objective is not to penalize the general public, or other artists who draw their inspiration from existing works. On the contrary, an excessively narrow focus on the rights of individual artists will result in a dangerous tendency to undervalue the communal and cumulative aspects of artistic and intellectual achievements.[97] As William Krasilovsky argues:

> There is nothing to criticize in ... [the] use of public domain sources [by creators]. That is the primary purpose of an unrestricted public domain. We thereby can make cultural giants for the benefit of the public at large by allowing even a dwarf to stand on the shoulders of his artistic predecessors. In effect, we make the artists of today the cultural heirs of the creators of the past.[98]

94 See Berryman, *supra,* note 87, at 307-308 for a discussion of the *domaine public payant*.

95 World Intellectual Property Organization, *Tunis Model Law on Copyright for Developing Countries* (Geneva: WIPO, 1976).

96 Of course, the intervention of the legislature might be required to prevent increased costs of production from being passed on to consumers.

97 This aspect of creativity is brilliantly described by TS Eliot, "Tradition and the Individual Talent" in *Selected Essays*, new ed. (New York: Harcourt, Brace & World, 1964) 3.

98 W Krasilovsky, "Observations on Public Domain" (1996) 14:2 Bull Copyright Soc'y 205 at 207.

Indeed, at least one type of *domaine public payant* scheme is based on the idea of redistributing the funds collected through the program to living artists. The recent proposal of the German Writers' Union is to create a "community right of authors and performers" which will allow funds to be collected from public domain works and performances, and given to living artists in support of their work. The proposal and its long pedigree – dating from German government proposals of 1962 – are described in detail by Adolf Dietz. He also summarizes its policy bases:

> Its economic justification lies in the simple idea that more money from the "copyright cake" should directly favour the living generation of authors (and performers),... in the form of grants for young authors and performers, in the form of financing complementary old age and pensions systems, and partly in financing less profitable, but highly cultural editions, communications to the public and other events....[A]uthors are indeed members of an (in legal terms: fictive) artistic community (past and present). That could mean that authors whose works are successful only long after their death, by way of a general (once more: fictive) testament, contribute to financing and developing the creativity of living authors who are, to a certain degree, paid in advance and will on their own pay back such credits by later income from their works long after their own death. This is what Hubmann, a fierce defender of paying public domain, called the revolving system of authors' remuneration.[99]

In Bharati's case, it is the deceased author, himself, who must somehow be allowed "to benefit from" the *domaine public payant* idea. Given the relative neglect of his works during his lifetime, current publishing initiatives confront the difficult task of retroactively correcting this situation. Nevertheless, proposals such as those of the German Writers' Union may eventually become appropriate for promoting post-Independence culture in India.

C. *Translations and Adaptations*

Bharati's works have been translated into a number of languages. Some of these translations are his own, while others have been done by his personal

[99] A Dietz, "Term of Protection in Copyright Law and Paying Public Domain: A New German Initiative" [2000] EIPR 506 at 507.

acquaintances.[100] The vast majority of translations of his works, however, were completed after his death. Many of these appear to be of disappointingly poor quality, particularly those in English and French.

The problems which arise in relation to these translations can often be characterized as moral rights issues. It is generally accepted that an original author has a moral right in translations of his work undertaken by other authors.[101] As far as possible, translations should accurately reflect the meaning, ideas, and style of the original.[102] However, the situation of translations and adaptations in developing countries is quite distinctive, and deserves separate treatment beyond the sphere of moral rights.[103]

In a vast and culturally diverse country like India, the quality of translations may be virtually as important to an author as the quality of his original works. Translations will determine whether the author's works are read in other linguistic areas of India, as well as outside the country. The quality of translations is almost certain to affect his international reputation and standing. The availability of good translations not only determines whether an author's works are read for pleasure in another country, but they will also have an impact on international scholarship on his works, and in the growth of international interest in his language, culture, and country.[104]

Given Bharati's historical importance, translation within his own country is vitally important. Few Indians are literate in more than one or two national languages, a situation that KR Srinivasa Iyengar appropriately calls a "mental *purdah*."[105] As a result, for Indians to be aware of literary happenings in different parts of the country, reliable and suitable translations into regional languages are crucial. This applies equally to readers and to other writers,

[100] For example, see *Agni and Other Poems and Translations, supra,* note 28. Many of the works in this collection are also original works in English.

[101] For example, see Article 11*ter*(2) of the Berne Convention.

[102] See D Vaver, "Translation and Copyright: A Canadian Focus" (1994) 16:4 EIPR 159 at 163. Vaver quotes from the case of *Seroff* v *Simon & Schuster Inc*, (1957) 162 NYS 2d 770, 773, affd. (1960) 10 NYS 2d 479.

[103] Ploman and Hamilton draw an interesting distinction between the domestic and international objectives of copyright policy in developing countries. For example, access to foreign scientific knowledge is a key issue for the developing world. See EW Ploman & LC Hamilton, *Copyright: Intellectual Property in the Information Age* (London: Routledge & Kegan Paul, 1980).

[104] Rabindranath Tagore is a case in point. His own English-language translations of his Bengali poems captured the attention of WB Yeats and resulted in the award of the Nobel Prize for Literature to him.

[105] See KR Srinivasa Iyengar, *Literature and Authorship in India*, with an introduction by EM Forster, PEN Books, ed Hermon Ould (London: George Allen & Unwin, 1943) at 10-11.

whose creative development stands to benefit from contact with writers in the other national languages.[106]

1. *Translation Rights in Indian Law*

Under the Indian Copyright Act, the right to translate a work, like the right of reproduction, is vested in the author. The author may authorize a translation of his work either by providing a licence to the translator, or by assigning his translation rights to the translator.[107]

The translator has copyright in his translation. He may protect his translation against infringement as an original work in its own right. However, under Indian law, only authorized translations are assured of protection as original works. Unauthorized translations are considered to be infringing works which do not merit copyright protection.[108]

The Indian stand against unauthorized translations seems very harsh. Although the translator's work has not been authorized by the author of the original work, it remains an original work in its own right, reflecting the skill and effort of its creator. Rather than denying protection to these works, which is equivalent to sanctioning further illegal or immoral activity by allowing anyone to exploit them freely, the legal focus should be on protecting the integrity of the original author's works. Instead, the original author should be able to restrain the sale and distribution of unauthorized translations on the basis that the translation infringes his rights, both economic and, if appropriate, moral.

The situation of translation in Indian law may grow out of an awareness of the difficulties of pursuing legal remedies in the Indian context. Authors may not have the financial means to vindicate their legal rights through the court system. Further, the time period which is likely to pass before the granting of an injunction or a damages award may be so long that the damage to the author's reputation or, indeed finances, is irreparable. However, it should be noted that translators may also have great difficulty in obtaining authorization for their work because of the vast distances and difficulties of long-distance communication which appear to remain typical of India. It remains to be seen whether Information Age technologies will succeed in improving these conditions.

[106] India has a long tradition of "translating" works into different Indian languages – the process is one of complete cultural adaptation. A famous Tamil example is the Ramayanam of Tamil classical poet, Kamban.

[107] See Ramaiah, *supra,* note 34, at para 2[3]; s 14 on "derivative works" is the relevant provision of the Indian Copyright Act.

[108] *Ibid.*

In Bharati's case, almost all translations of his work are unauthorized. After his death, neither his family members nor a legal representative of his estate authorized any translation work. When the government took over the copyright, the publishing committee was not concerned with translations of his work. Finally, when the copyright became public, there was no system for monitoring or supervising translations.

The importance of translations should not be underestimated. They require as much approval and supervision by qualified people as original editions and scholarly work. If Bharati's work were to be incorporated into a system resembling the *domaine public payant*, translations should also be subject to this regime.[109]

2. *Adaptation Rights*

Like translation rights, the right to make adaptations of intellectual works is vested in the author. Adaptations present many of the same advantages and problems as translations. They offer an author possibilities for public exposure that may well exceed the potential of the original work. For example, film adaptations of literary works have the power to reach mass audiences, both nationally and internationally, and appeal to a wide variety of social and educational classes. However, adaptations also pose the problem of personal and artistic misrepresentation on a massive scale. For this reason, it is especially important to protect the author's moral rights in adaptations of his work. The possibility of protecting portrayals of the author's personality in adaptations through moral rights should also be considered. Using moral rights to protect authors from the misappropriation of their personalities is quite different from protecting privacy. The issue here is the protection of a public figure on cultural and artistic grounds. Misrepresentations of an author's life or personality in a film, for example, may cause significant damage to his reputation. In the Indian context, the economic and political force of the film industry further skews the universal imbalance of power between industry and artists, and calls for legal protection of the moral rights of authors in relation to both their works and their personalities.

It should be emphasized, however, that it is far more difficult to determine the quality of adaptations than it is to supervise translation work. By its very nature, the process of adaptation may require significant changes to the original. While the author of the work may feel that its integrity has not been respected, the producer of the film version may feel that the adaptation would not succeed without the changes. The producer's measure

[109] See *Amar Nath Sehgal, supra,* note 74 and Anand, *supra,* note 48, at 36.

of success may be commercial – in the sense of recovering the costs of producing the film and making a decent profit out of it – artistic – in view of the requirements of this particular art form – or, what is most likely, a combination of both types of standards.

It is also worth noting that the author is, at least theoretically, in a position to exploit his moral rights with respect to an adaptation of his work. While this danger is generally present in the area of moral rights, it is worthy of mention in the area of adaptations simply because of the scale of resources at stake in film-making. An author's potential gain from a damages award for violation of his moral rights could act as an incentive to object to the treatment of his works on film. This argument is somewhat specious, however: given the general weakness of individual artists compared to the organized market power of the film industry, this pattern seems unlikely to develop. On the contrary, Indian courts have placed great emphasis on the need to protect authors from the demands of the film industry, as in the *Mannu Bhandari* case.[110]

3. *Translation Rights in the International Context*

The problems of translation from one Indian language to another may be compared to the international problem of translating works from Western languages into the languages of the Third World. Since most scientific literature appears in English, developing countries have traditionally been eager to promote translation of foreign works. Translations from English provide an important means of improving public access to education and information. For this reason, the Berne Convention makes special provision for the granting of compulsory licences for translation from Western languages in developing countries.

The Stockholm Protocol to the Berne Convention outlines the details of this scheme.[111] If a translation has not been made in the three years following first publication of a work, any national of the country may obtain a licence to translate the work into the local language and publish his translation. If the local language is a language which is not in use in a developed country, the period may be reduced to one year. The author must be paid royalties. The right to produce translations under the licence ceases as soon as an authorized translation becomes available. The purpose of the licence is to allow translation for educational purposes.

[110] *Supra,* note 77.
[111] Art II of the Appendix: for a detailed discussion, see Ricketson, *supra,* note 39.

In spite of the fact that developing countries argued keenly for special provisions with respect to translations, they have generally not taken advantage of this Appendix.[112] This may be due in some measure to economic limitations. The payment of royalties to the author must be made in an "internationally convertible currency."[113] For net importers of translations, existing controls on the right to translate may represent a flow of payments out of the country.[114]

In order to be effective, a scheme to encourage translation of works from the industrialized world for educational purposes in developing countries would have to exempt these countries from the payment of fees. Such a policy could be implemented in a number of ways. For example, translations for educational purposes could be exempted from royalty payments for a fixed number of years. Alternatively, developed countries could assume the burden of royalty payments for translations of the works of their authors for educational purposes. If authors wish to publicize their works in the developing world, they should be willing to bear the costs of this endeavour, or as a matter of public policy, the government of the country of origin should be prepared to underwrite them. If the dissemination of certain works in developing countries is pursued as a matter of international public policy, it is only natural that industrialized countries should be prepared to subsidize the cost. If a policy of maximum dissemination of certain types of literature is to be pursued, the economic rights of the author should be restricted for this purpose. However, authors should retain moral rights to object to poor translations.

Under the TRIPs Agreement it seems unlikely that developing countries will be able to exercise special translation rights to any significant extent. Article 13 of TRIPs sets out a three-step test for exceptions to the standard copyright protections. Exceptions are limited to "special cases" which "do not conflict with a normal exploitation of the work" and "do not unreasonably prejudice the legitimate interests of the right holder."[115] Under Article 13, the only way to allow differential treatment for translations for educational purposes may be to recognize in them a standard exception. This task may eventually fall to the Dispute Settlement Body of the WTO to decide.

[112] See D De Freitas, *The Copyright System: Practice and Problems in Developing Countries* (London: Commonwealth Secretariat, 1983) at 59.

[113] *Ibid*, at 61-62.

[114] It is advantageous for countries to encourage local translation, but this will still entail payments out of the country to the author of the original work.

[115] Art 13 is examined in detail by R Okediji, "Toward an International Fair Use Doctrine" (2000) Colum J Transnat'l L 75 at 114-36. She compares its scope with the limitations allowed under the Berne Convention, and also traces its relationship with the American concept of "fair use."

D. *Musical Compositions*

The protection of musical compositions in India presents special difficulties because Indian composers do not usually use graphical notation to preserve their compositions. Rather, music is taught by the composer to his disciples.

Copyright law generally does not accommodate oral culture. Indeed, the notion of oral traditions is largely foreign to Western perspectives on copyright, which usually emphasize that a work must be "fixed" before it can be protected. Their position – balancing creation against dissemination – reflects the philosophy that "ideas" cannot be protected by copyright, but only their "expression" falls within the ambit of the law.[116]

At the international level, the formal requirements of Western copyright law have created obstacles to the legal recognition of "traditional knowledge" and culture. There is a growing sense among international scholars that the failure to protect these forms of knowledge presents a serious threat to their survival.[117] A reexamination of the conceptual bases of copyright is arguably key to remedying this situation. Indian copyright law has attempted to offer one such modification at the conceptual level to benefit Indian classical music. The 1994 amendments to the Indian Copyright Act attempt to correct this deficiency by introducing a new definition of "composer." This definition provides that a composer is not required to record his composition in graphical notation to qualify for copyright protection.[118] This change is complemented by the introduction of a performer's right which provides copyright protection for performances for twenty-five years from the time of the performance. The performer's right provides some protection for composers of Indian music who compose in performance. However, it is interesting to note that the scope of protection remains inferior to that provided for "fixed" works.

[116] According to Krishnamurthi, this view is diametrically opposed to the conception of copyright which he draws from Indian philosophy, where ideas are also entitled to protection. See TS Krishnamurthi, "Copyright – Another View" (1968) 15:3 Bull Copyright Soc'y 217.

[117] The issues surrounding intellectual property protection for traditional knowledge are broadly canvassed by M Blakeney, "The Protection of Traditional Knowledge under Intellectual Property Law" [2000] EIPR 251. Some of the extensive work undertaken by WIPO on traditional knowledge issues is available on the Internet: see <www.wipo.int/traditionalknowledge>. WIPO's efforts are also summarized in, "The protection of folklore: regional consultations" (1999) XXXIII: 4 Copyright Bulletin. For an interesting introduction to the Indian approach, see "India presses for protection of traditional knowledge," The Financial Express, Nov 6, 2000, online: <www.expressindia.com/fe/daily/20001106/fec06058.html>.

[118] See Ahuja, *supra,* note 57, at 38.

The situation of Indian composers under the Copyright Act grows out of their dual role as composers and performers. Even a composer who teaches his compositions to his disciples is, in effect, "performing" the work for them, although this performance may or may not qualify as a public performance within the meaning of copyright law. The distinction between composer and performer is simply inaccurate in the Indian context.

A similar situation arises in the case of poets whose poems are also musical compositions. There is a long tradition in Indian culture of poets who "sang" their poetry. These poets include classic masters such as Thyagaraja, Mirabai, and Muthusami Dikshitar. Bharati, too, belongs to this tradition.

In itself, the music which Bharati composed to "accompany" his poems could be eligible for copyright protection under the new provisions of the Copyright Act. However, the protection of the single work of art resulting from the combination of poetry and music, which is a more precise description of Bharati's art, is somewhat problematic. Should performers and composers be allowed to sing his songs in a way that is different from his compositions? Innovative performances and compositions may have positive effects by increasing public exposure to his songs and, in particular, bringing them to new audiences.[119] In the rare case, new compositions for his poems may also bring new insights and understanding of the poetry.[120] However, there is an overwhelming danger that Bharati's way of singing may fall into disuse. This result not only concerns the preservation of his musical compositions *per se*, but it also represents the disappearance of his revolutionary approach to musical composition from public view.

Copyright protection which distinguishes between poetry and music cannot accommodate Bharati's art in its entirety. While the new definition of composer in the Indian Copyright Act makes steps towards greater accommodation of Indian musical forms in copyright, it fails to address this particular issue adequately.

V. Appropriateness of the International Copyright Regime to the Developing World

An examination of the copyright situation of Bharati's works suggests that the international regime of copyright protection represented by the Berne Convention and the TRIPs Agreement has major shortcomings in the Indian

[119] Musical audiences may be in search of a display of technical virtuosity by the performer which is not accommodated in the original composition.

[120] For example, in the musical renditions of one of his granddaughters, a brilliant vocal musician.

context. These include its inability to protect oral culture, and its lack of recognition of specific artistic forms which do not meet its classification system of works of art.

More importantly, the policies governing the international copyright regime differ significantly from the kinds of policies regarding culture which seem to be required in developing countries. The Berne Convention seeks to protect individual creators. In contrast, developing countries are faced with the task of preserving and promoting their cultures against mounting economic and social pressures. The present understanding of culture in the West, based on nineteenth-century conceptions of original genius, is extremely individualistic.[121] Eastern cultures, however, have traditionally conceived of culture as having both individual and collective aspects.[122]

As far back as 1976, the Tunis Model Law on Copyright for Developing Countries provided some interesting insights into the perspectives of developing countries on copyright protection. It includes suggestions for the perpetual protection of works, the employment of *domaine public payant* systems, and the protection of oral culture. However, it is difficult to see how these recommendations can be reconciled with movements in copyright protection at the international level.[123]

These problems have become central issues in the international debate over protecting "traditional knowledge" in developing countries, and among aboriginal peoples. The term, "traditional knowledge," is a broad expression encompassing oral culture, "folklore," and scientific knowledge – for example, as it relates to medicinal plants and herbs. It is evident that the commercial and proprietary bases of Western intellectual property law are deeply incompatible with the cultural and spiritual qualities of "traditional knowledge." What is not clear, however, is the extent to which intellectual property concepts can be adapted to the needs of non-Western cultural forms. Some observers argue that intellectual property and traditional knowledge are inherently in conflict and cannot make any mutual contribution to one

[121] See P Jaszi, "On the Author Effect: Contemporary Copyright and Collective Creativity" (1992) 10 Cardozo Arts & Ent LJ 293, and M Woodmansee "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'" (1984) 17 Eighteenth-Century Studies 425: they discuss the impact of these developments on copyright and moral rights.

[122] For example, see Pandit's exemplary study: S Pandit, *An Approach to the Indian Theory of Art and Aesthetics* (New Delhi: Sterling, 1977) 122-23, 132-33.

[123] Krishnamurthi, writing in 1968, argues that copyright protection is "inextricably linked with the state of society, knowledge of science and technology and the financial capacity of the consumers." He advocates "the separation of the philosophical and economic aspects of copyright." See Krishnamurthi, *supra,* note 116, at 223.

another. Nevertheless, a great deal of research among academics and international organizations is ongoing in this area. WIPO, in particular, is actively seeking to offer some preliminary assessments in this field.

The movement from the Berne Union to the TRIPs copyright regime has intensified these problems. Whatever its shortcomings, the Berne Union represented possibilities for international flexibility and national policy-making in the area of copyright. However, the TRIPs Agreement has brought a new degree of rigidity to the international copyright arena, strictly limiting the ways in which member countries can interpret and implement its provisions. The TRIPs Agreement has also taken copyright out of the United Nations framework and imported it into the world of international trade regulation. Its focus is distinctly commercial, while the cultural concerns that animated copyright discussions around the Berne Convention have now assumed a definite secondary role. The impact of the TRIPs Agreement on cultural development in non-Western countries – as on industrial progress – remains unknown. However, the international controversy surrounding the adoption of the Agreement in the first place does not generally bode well for their interests.

VI. Conclusion

Legal protection of the non-economic interests of authors is based on the personal connection of the creator with his work. However, protection of the artist is not the only purpose accomplished by moral rights doctrine. Recognition of authors' moral rights also promotes the preservation and promotion of culture.

Moral rights offer a powerful means of bringing cultural interests into the legal arena. Through the person of the author, these rights can make a valuable contribution to the protection of cultural heritage in all its forms.

The protection of authors' rights is sometimes seen as placing restrictions on the fulfillment of other social aspirations. Copyright law is itself characterized by an inner tension between the idea of providing incentives for authorship and the need to broaden public access to knowledge. However, a consideration of Bharati's situation reveals that moral rights protection need not be limited by this orthodox paradigm. Rather, the objectives of promoting the dissemination of artistic works and the protection of their integrity should be viewed as complementary principles. Both aspects of copyright favour artistic creation by protecting the efforts of individual creators, and they also help to foster a social attitude of respect towards culture. In addition, the protection of artistic integrity improves the overall quality of the cultural environment in which current artists find sustenance. Failure to protect authors' moral interests will inevitably lower the overall standard of culture.

Another common concern about moral rights is that they are somehow protected at the expense of freedom of speech, especially as regards the creative efforts of parodists and others who attempt to re-use and reinvent creative works in ways their original creators may not have envisioned. Here, too, it is essential to realize that protection for authors is part of an overall legal framework, reflecting a general attempt to achieve an appropriate balance of social interests. Even in the most worthy cases, authors' rights should hardly be absolute. At the same time, measures for the protection of culture should not be sacrificed for the sake of an absolutist conception of free speech.

Bharati's case shows the importance of uniting the protection of artistic works with the promotion of their dissemination. Bharati and his heirs and followers passionately wanted to publicize and distribute his works as widely as possible. However, the callous attitude of the government and members of the publishing industry towards the integrity of his works has discouraged, rather than promoted, this endeavour. It has done so by gradually destroying the integrity and reliability of information on Bharati and his works, and by threatening the integrity of his writings as a part of Indian cultural heritage. This situation has generated an attitude of hopelessness among Tamil scholars and lovers of Tamil literature.

In the case of important contributors to culture, the protection of the integrity of their works cannot be overemphasized. To a great extent, the history of culture and its future development both depend upon the protection of such works. It is therefore essential to undertake publication of these works in conjunction with the protection of their integrity. Only by uniting these two policy objectives can copyright's potential contribution to culture be fully realized.

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