

Moral Rights in Developing Countries: The Example of India – Part I

Mira T Sundara Rajan

*Queen Mary Intellectual Property Research Institute, University of London
John Vane Science Building, Charterhouse Square
London EC1M 6BQ, United Kingdom*

(Received 5 June 2003)

The “moral right” is an aspect of a copyright law that seeks to protect the non-commercial, personal, or spiritual interests of an author in his work. This paper argues that moral rights can make an important contribution to culture in developing countries. In particular, moral rights provide a counterweight to the increasingly commercial orientation of the international copyright system under the TRIPS Agreement, which may ultimately prove to be damaging to development and culture. The paper considers the innovative treatment of moral rights by Indian legislators and judges as an example of how the cultural potential of these rights may be realized, and attempts a critical assessment of the current Indian trend towards a more restrictive treatment of these rights. It is in two parts. Part I covers copyright policy in India, traditional approaches to moral rights in India and moral rights in Indian Copyright Act. The Part II, to be published in the next issue, will deal with judicial development and interpretation of moral rights, moral rights and development and future of moral rights in India.

Developing countries have traditionally understood copyright as an area of both commercial and cultural regulation, and indeed, many of them have emphasized the cultural benefits that may be gained from effective copyright policies. In contrast to this approach, the TRIPS Agreement has brought a new commercial emphasis to intellectual property at the international level. In the area of copyright, the focus of the Agreement is on the development of “copyright industries,” including “cultural

industries.” At the same time, aspects of copyright law, which are perceived to be primarily cultural in nature are treated with disfavour, and even suspicion, under the TRIPS scheme. Notably, the moral rights of authors, which protect the non-commercial interests of authors and artists in their work, have been effectively excluded from the reach of the TRIPS Agreement¹.

Historically, moral rights have been greatly favoured in the developing world. Developing countries have almost

E-mail: mira.sundararajan@st-peters.oxford.ac.uk

uniformly included strong protection for moral rights in their copyright legislation, citing reasons of cultural policy and artistic “prestige”². With the advent of the TRIPS copyright system, however, developing countries have not been encouraged to maintain high levels of protection for these rights in revised copyright legislation. The trend towards lower levels of protection for moral rights, a characteristic feature of copyright reform around the world, is an entirely negative one. Moral rights have much to contribute to culture and creativity in developing countries; moreover, their exclusion from the TRIPS system potentially allows them an unusual degree of flexibility and independence, bringing to them a new significance in the context of the current international regime. The Indian experience in this area shows how innovative legislative and judicial approaches to moral rights can contribute to cultural vitality, a powerful, though vastly underrated, force for development.

Copyright Policy in India

Like most developing countries, India faces two fundamental challenges in the area of copyright law. First, Indian copyright law must promote the widest possible access to information and knowledge. The Indian public requires access to copyright works, both foreign and domestic, for scientific, educational, cultural, and intellectual development. The broad availability of information and knowledge is essential, not only for industrial growth, but also, for the

promotion of literacy, in the broadest sense of the word.

Secondly, Indian copyright law must provide a favourable regulatory environment for the ongoing development of creative endeavours within India. Copyright law can help to promote artistic and intellectual activities within India. It can also contribute to the protection and publicizing of India’s existing cultural heritage. In order to accomplish this objective, Indian copyright law must successfully accommodate a range of interests associated with the great diversity of Indian cultural expression, whether in ancient or modern times³.

In their pioneering study of different copyright systems around the world, Ploman and Hamilton draw attention to these features of the Indian cultural scene – cultural traits that are characteristic of many developing countries, but especially prominent in the Indian context. They observe: “There is...a great variety of expression from the most traditional to the most modern. This mixture and juxtaposition of the traditional and the modern would by itself pose a number of specific copyright problems. At the same time, the development needs of the country require access to and wide dissemination of intellectual works, particularly scientific and technical. As a result, India’s attitude towards intellectual property rights has to take into account the need to promote and encourage indigenous creation of expression in both the traditional and the modern sector, and also to provide for an active public role in the widespread dissemination of

intellectual property. Indian copyright policy might therefore be seen as founded on two basic principles: encouragement of authorship through protective copyright, and provision of safeguards against undue barriers to the exploitation of works.”⁴

In a more general sense, the dissemination of knowledge and the provision of adequate “incentives to create” are universally recognized as two fundamental objectives of copyright policy. However, these two policy goals are often considered to be in conflict, while effective copyright laws are in search of an equitable balance between them. Copyright law in developing countries requires a somewhat different conceptual orientation: it becomes necessary to consider the ways in which the two basic objectives of copyright policy, rather than being in competition, can also be understood as two aspects of a single goal. It is apparent that authors have an interest in the broad dissemination of their ideas, and in securing their own access, for creative purposes, to the intellectual and artistic work of others. At the same time, the public has an important interest in maintaining the best possible quality of information and knowledge in society, by promoting the accuracy and reliability of reproductions and adaptations, and encouraging an attitude of respect towards intellectual endeavour. In practice, how can these policy objectives be made to work together effectively? This is the pragmatic problem, which Indian copyright law attempts to address.

Moral rights are a meeting-point for these two policy considerations. They are a valuable instrument for the protection of authors’ interests in their work, and perhaps, for cultivating the cultural phenomenon of authorship in developing countries. However, moral rights also impose an additional burden on the use of copyright works, beyond the restrictions generated by economic rights of authorship, and bring a new element of risk to their exploitation.

The area of translations and adaptations provides an apt illustration of the complex role of moral rights. Translation and adaptation into new languages and media often have a greater importance in developing countries than in the West, not only because of the need to improve public access to foreign works, but also, for the purposes of cultural exchange within the country. This is particularly true in the case of India, which is undoubtedly one of the most culturally diverse nations in the world⁵. In contrast to the relative homogeneity of Western Europe culture, translation and adaptation in India serve an essential function; far from being at the periphery, they are the essence of creative development⁶. Indeed, a consideration of social and literary phenomena such as the *Ramayana* demonstrates that translation has been intrinsic to Indian cultural development for thousands of years⁷.

Copyright law in India, as in many developing countries, faces the additional problem of enforcement. The costs associated with litigation, and the time

involved in obtaining an authoritative judicial decision, are major obstacles to the effectiveness of the courts in resulting copyright disputes. At the same time, the governments of developing countries represent a great concentration of power and resources, and they often become the ultimate authority, *de facto*, on cultural issues. While the government may have special powers and abilities in relation to cultural matters, official corruption and the capacity for violence may also have a damaging impact on the cultural sphere⁸. Indian copyright law attempts to take into consideration the special powers and abilities of the government in relation to cultural matters, as well as its special duty of care. A consideration of Indian jurisprudence in this area reveals a strong and growing awareness among Indian judges of the special role of government in relation to intellectual property⁹. As Ploman and Hamilton observe: "Distinguishing Indian law from European and Anglo-American legislation are several provisions that, under certain circumstances, allow the government to play an active role in encouraging the exploitation of needed intellectual property."¹⁰

Finally, it is worth noting that the relative power of cultural industries may stand in stark contrast to the relatively weak position of the individual author in developing societies. For example, the Indian film industry is a wealthy and powerful force for any author to confront¹¹ – a deciding factor in the seminal Indian moral rights case of *Mannu Bhandari v Kala Vikas Pictures*¹².

Traditional Approaches to Moral Rights in India

The problem of "literary theft" has long been recognized in Indian culture. Its widespread occurrence is documented in writing as early as the seventh century. It has been the subject of both complaint and investigation by Indian poets and aesthetic philosophers. For example, Anandavardhana, a ninth-century poet, undertakes a detailed analysis of the phenomenon: he identifies three distinct categories of theft, with only the last of the three, the "similarity between two individuals" being "permissible" conduct for authors¹³. Moreover, in Indian tradition, the author was believed to have rights and interests in his ideas which were equivalent to his interests in the final work, the position that is drastically different from Western copyright tradition. As Krishnamurti points out, plagiarism in tenth-century India was defined as "an appropriation by a writer of words *and ideas* – I emphasize, and ideas – from the work of another and passing them off as his own."¹⁴

Legal Approach to "Literary Theft"

In spite of the relatively common occurrence of literary theft, the problem was never dealt with by legal authors as a matter of law. Rather, in ancient India, literary appropriation was a theme explored by philosophers and poets. Nevertheless, the Indian cultural tradition includes a particularly rich and highly developed legal tradition, based on Sanskrit texts and treatises on law. Why, then, were the problems of appropriation and exploitation faced by literary and

artistic authors not considered by ancient legal scholars?

This puzzling situation could have been due to a number of factors. The absence of authors' rights, interests, and obligations from the ambit of the law in traditional Indian society suggests that it was somehow not considered to be appropriate to deal with these issues as matters of law, at all. Indeed, it is commonly believed by Western scholars that the traditions of the developing world do not recognize the issues, which flow from the appropriation of literary and artistic works to be legal problems.

This analysis often leads to the conclusion that the misappropriation of literary and artistic work has historically been tolerated in developing societies. However, this perspective is basically flawed. On the contrary, developing societies are keenly aware of the value of knowledge in all its forms, often, like India, in highly sophisticated terms. However, the way in which these interests are recognized and protected depends on the cultural environment. As Gana observes: "[T]he mistaken premise of [United States] negotiations with China and...with most other developing countries is that these countries lack intellectual property laws. A cursory study of indigenous approaches to the protection of intellectual goods reveals that most cultures recognized the material value engendered by the results of intellectual labour. The way that value is protected, however, differs significantly from what modern categories of intellectual property laws provide."¹⁵

With respect to India, Krishnamurti points out that the absence of discussion among legal authors of issues arising from the misappropriation of knowledge is clearly a matter of culture¹⁶. In keeping with Indian tradition, Krishnamurti identifies the value of "*dharma*," which may be very loosely translated into English as "duty," as the basic ethos of Indian civilization. Society at large, and the creators of artistic and intellectual works in particular, have mutual obligations towards each other. The structure of Indian society reflects this basic understanding of the role of art and artists, in such a way that it has not been necessary for Indian thinkers to attempt to concretize this relationship according to the conventions of written law¹⁷. As Krishnamurti points out: "It was the duty of the State and the people to look after the authors. That one side might stray from its duty or its obligations was not considered sufficient justification for the other to give up its duty. So far as I understand, it was more or less the same in Europe till about three centuries ago."¹⁸

The Relationship between Artists and Society

Krishnamurti limits his discussion of the impact of culture on concepts of "copyright" to *dharma*. However, the Indian social ethos surrounding art played a key role in defining the status of authors' rights in ancient Indian society. Hindu thought, in particular, attributes a value to art beyond the purely "aesthetic," in the sense of the enjoyment of beauty. Rather, artistic expression is an expression of metaphysical values. The

Hindu view of art implies a certain understanding of the relationship between artists and the society in which they live. The functions of the artist are recognized as serving a concrete social purpose, and stand in some contrast to the potential elitism and emptiness of purpose in the modern affirmation that art's ultimate value lies in its "uselessness."¹⁹ As Pandit observes: "[T]he true nature and purpose of art... is [as] a means of relating human life to the creative cosmic life, to the essential vitality and movement which underlies the universal system. The artist discovers this universal creative process by an actual participation and essential identity of experience."²⁰

This view of art implies a focus on the work rather than the artist. In a subtler way, rather than the physical object *per se* that is produced by the artist, the experience inspired by the work represents the essence of artistic achievement. Seen from this aesthetic perspective, it is clear why the Indian concept of appropriation may have extended to ideas. At the same time, it is worth noting that the protection of expressions and ideas occurred through artistic and social conventions, arguably a distinctive form of "law" in themselves. As Coomaraswamy observes: "Themes are repeated from generation to generation and pass from one country to another; neither is originality a virtue nor 'plagiarism' a crime, where all that counts is the necessity inherent in the theme. The artist as maker, is a personality much greater than that of any conceivable individual; the names of even the greatest artists are unknown."²¹

Indeed, a closer examination of the Indian view of law reveals that authors' rights and obligations did, in fact, amount to a matter of "law" within the meaning of this term in traditional Indian society. The traditional concept of law, like the Indian conception of "intellectual property," was more wide-ranging and comprehensive than the modern, Western understanding of the bounds of the legal arena²². Modern and traditional societies diverge widely in their understanding of the place of culture in society, both in relation to cultural heritage, and the intellectuals, artists, and craftsmen who create it. Law, in the form of legislation, adjudication, and social custom, is an embodiment of these relationships.

The relationship between artists and society has traditionally been one of mutual dependence and, potentially, mutual suspicion. Artists play a fundamental role in developing social values, since their works are essentially reflections of the societies in which they were produced. Both the laudatory and the critical aspects of artists' work are of value to society. At the same time, artists are dependent on society to value their work and to participate in it as audience, spectator, and critic.

In one form or another, law inevitably has an important role to play in mediating the relationship between artists and society. It accomplishes this function in a number of ways, from allowing censorship to protect society from the excesses of the arts, to recognizing the right of artists to express their ideas beyond the normal reach of social mores and public acceptability. In Western

society, legislation and case law in an adversarial context reflect the traditional tensions in the relationship between artists and society. In contrast, the role of artists in traditional cultures is somewhat different, due to a degree of common awareness of the social needs fulfilled by the arts, and recognition of the social value of the artistic function. As Pandit points out: "The traditional Indian theory of art assumes an integral relation between art and society.... The point of difference between this approach... and other art theories lies basically in its refusal to isolate art from human purposes and to make a distinction between the utilitarian and the beautiful.... To seek for art a function away from society and to try and create beauty without meaning and utility is to reduce art to a mere superficiality. By introducing art to serious living, the quality of disciplined spontaneity and organized pleasure is brought to everyday life and work is transformed from drudgery into a creative fulfilment. The primary function of art in society is to effect this transformation and thereby to help integrate the social order."²³

Perhaps as a result of this difference in the perception of the relationship between artists and society, traditional cultures, including those with a long tradition of written law such as India, often maintain a degree of flexibility and informality in their systems of law, particularly in relation to the arts. Notably, social custom and traditional rules are an important source of "law" relating to the arts in these societies. Pandit observes: "As a tangible phenomenon,

art is subject to the laws and rules of society, and its making is not merely an occasion for aesthetic contemplation, but does something for human needs.... [T]he outward restrictions imposed upon the artist are not designed to stultify and choke him, but rather to provide the guidelines within the framework of which he can achieve a more profound expression. The goal of art is not a vagrant spontaneity but a disciplined expression. Freedom in art as in any other human activity is achieved, when the universal principles are understood by the subject so completely that their manifestation in a specific form becomes effortless and spontaneous."²⁴

Indigenous Theories of Copyright

A brief consideration of pre-colonial theories of the arts, creative endeavour, and the nature of creators' rights in their creation reveals a number of divergences from modern copyright concepts. Copyright law reflects the historic rise of individualistic theories of creativity, characteristic of romantic ideals of authorship and original genius. The close link between the romantic concept of authorship and the ever-increasing possibilities for public access to knowledge during the eighteenth century lies at the heart of the historical development of the arts as professional fields²⁵. Copyright law reflects the individual author's attempt to secure both economic returns and social status from his work, by controlling the conditions of its dissemination²⁶.

In a culture, which did not conceive of the author in primarily economic and

professional terms, however, the problem of misappropriation of knowledge was dealt with as a matter of ethics, custom, and convention. The focus of thinking on “intellectual property” was the work, rather than the identity of the author, allowing flexibility and diversity in the development of artistic and literary forms. This conceptual orientation may well have provided an environment favourable to the development of diverse forms of authorship, such as group and community authorship²⁷.

Interestingly, these considerations also demonstrate some interesting similarities between modern ideas of copyright and Indian cultural traditions. Notably, moral rights, which emphasize the integrity of artistic and literary works and the preservation of an accurate historical context for these works share, perhaps paradoxically, the fundamental cultural concerns of Indian tradition. This may also be the case in other developing countries which share the Indian cultural mix of individualistic and community values²⁸. This juxtaposition of values may also be at the heart of the extensive acceptance of moral rights in the Indian context, especially by the judiciary.

Indian judges are well aware of the difficulties of situating a modern framework for copyright protection in Indian tradition, and at the same time, of the necessity of doing so for the establishment of viable legal and social practice. India’s ambivalence towards copyright concepts is pointed out by Ramaiah, who offers contrasting quotations from two Indian courts on the

judicial approach to copyright. While the High Court of Madras stated, in 1959 that “India was and continues to be a member of the Copyright Union and in that sense the conception of copyright is not repugnant to her ideas,” a Bombay court later determined that, “if historically some roots of this legislation are to be found in English statutes, they may be cited [only] as an aid to thinking.”²⁹

Moral Rights in Indian Copyright Legislation

Copyright in India is currently governed by the Copyright Act of 1957³⁰. Section 57 of the Copyright Act protects the moral right of the author, under the heading, “Author’s special right.” In recent years, the protection of moral rights in Section 57 has undergone a number of modifications. While current Indian law is specifically tailored to the requirements of Article 6*bis* of the Berne Convention for the Protection of Literary and Artistic Works³¹, the old Section 57 provided considerably more extensive protection for moral rights than what is required by Article 6*bis*. In particular, amendments to Section 57 restricted protection in two key areas: the scope of the author’s moral right of integrity, and the duration of moral rights. It is, therefore, interesting and important to consider the development of moral rights from the old to the new Section 57, examining the reasons why moral rights protection has been scaled back, and attempting to evaluate the consequences of these changes for cultural activities in the Subcontinent.

Current Indian Law and Article 6bis of the Berne Convention

Section 57 of the Indian Copyright Act states:

- (1) Independently of the author's copyright and even after the assignment wholly or partially of the said copyright, the author of the work shall have the right to:
 - (a) claim authorship of the work; and
 - (b) restrain the claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work which is done before the expiration of the term of copyright if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation:
Provided that the author shall not have the right to restrain the claim damages in respect of any indication of a computer program to which clause (aa) of sub-section (1) of Section 52 applies.
- (2) The right conferred upon an author of the work by sub-section (1), other than the right to claim authorship of the work, may be exercised by the legal representatives of the author.

The current Section 57 closely reflects the provisions of Article 6bis of the Berne Convention. Article 6bis provides for the protection of two moral rights in international copyright law: the author's right of attribution, and his right to the integrity of his work. Article 6bis, which has remained virtually unchanged since

its incorporation into the Berne Convention at the 1928 Rome revision conference, states that "the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation."³² This provision also specifies that authors' moral rights shall be "independent" of their economic rights, and will therefore continue to rest with the author "even after the transfer" of his economic rights.

According to the Berne provisions, moral rights are to be protected, at a minimum, "at least until the expiry of the economic rights." It is clear that the Berne Convention envisions the possibility of a longer term of protection for moral rights; indeed, this particular formulation reflects the need to accommodate extended terms of moral rights protection in certain civil law jurisdictions. However, Article 6bis (2) also makes one concession allowing a shorter duration for moral rights: those countries whose legislation does not provide for the protection of all of the specified moral rights after the death of the author may cease to protect some moral rights upon his death. This provision was adopted in order to accommodate common-law actions in tort, which have long been presented by a number of common-law countries as legal alternatives to the statutory protection of moral rights *per se*. Actions such as defamation cannot normally be pursued after the death of the injured party.

Attribution and Integrity

Like Article 6bis, Section 57 provides for the protection of two ‘special rights’: the right of attribution and the right of integrity. As in the Berne formulation, a finding that the author’s right of integrity has been violated depends on finding damage to the author’s ‘honour or reputation’ mistreatment of the work is not considered to be, *prima facie*, an infringement of the integrity right. It is not yet clear whether this clause, in Indian law, means that the integrity of an artistic work should be determined by ‘objective’ criteria – essentially, the determination of the judge concerning the effects of alteration on the reputation of the author – or ‘subjectively’, according to the author’s own perception of the alteration and its impact on his reputation. Interestingly, moral rights jurisprudence to date suggests that Indian judges are predisposed to interpret the provision as a subjective test, while legislators prefer an objective one³³.

Section 57 also reflects the standard set by the Berne Convention in terms of what is excluded from the ambit of moral rights. Notably, it does not provide explicit protection for moral rights other than the rights of attribution and integrity, a contrast to the law in many countries of Continental Europe, including France³⁴. France provides for a right of first publication (*droit de divulgation*), which protects the author’s right to release his work to the public; and for a right of withdrawal (*droit de retrait ou de repentir*), which allows an author to withdraw his work from circulation on the grounds that it has ceased to represent

his views. While a right of publication appears to be implicit in the Indian Copyright Act, an author does not have the right to withdraw a published work from public availability, perhaps in recognition of an overriding public interest in access to knowledge³⁵.

Scope of the Right of Integrity

In contrast to the current provision, the old Section 57(1)(a) of the Copyright Act allowed an author to assert a violation of his right of integrity in relation to “any distortion, mutilation or other modification of the...work,” without requiring a consideration of the impact on his reputation. The language of Section 57(1)(a) indicated clearly that an integrity violation on the basis of these acts would not depend on prejudice to the author’s honour or reputation. Rather, Section 57(1)(b) protects the author against “any other action in relation to the...work which would be prejudicial to his honour or reputation.”³⁶

The scope of protection for the right of integrity under Section 57 significantly exceeded the extent of the right of integrity in Article 6bis. Section 57 appears to support the theory that any distortion, mutilation or modification of a literary or artistic work is, in itself, *prima facie* evidence of prejudice to the author’s honour or reputation. In this sense, Section 57 follows the strongest approach to the right of integrity, typically associated with France, which “treat[s] it as an absolute right against alteration.”³⁷ The Indian legislation implicitly allows the author to be the ultimate judge of quality in relation to his own work.

Section 57 does not appear to support a defence to claims of integrity violations based on the argument that the changes to the author's work are an improvement to the original.

Independence from Economic Rights

In keeping with the Berne Convention, Section 57 affirms the 'independence' of economic and moral rights and, in subsection (2), it implies protection for the author's moral rights after his death, which can be vindicated on his behalf by his legal representatives. An author continues to be able to assert his moral rights even after the assignment of his economic rights, either wholly or partially, in his work³⁸. However, Indian copyright legislation does not explicitly address the question of whether moral rights may be transferred or waived. It is generally accepted that Section 57 allows an author to waive his moral rights³⁹.

Term of Moral Rights Protection

Section 57 of the Indian Copyright Act does not specify the duration of moral rights protection. However, Section 57(1)(b) provides that any act infringing in the moral right of integrity must be 'done before the expiration of the term of copyright'. It therefore appears that the term of protection for the integrity right is effectively equivalent to the term of copyright – the lifetime of the author and sixty years after his death. Nevertheless, subject to any relevant limitation period, an infringement claim could prefer after the expiry of copyright for actions undertaken while copyright was protected.

Section 57(2) provides for the exercise of moral rights claims by the legal representatives of the author. Since this provision deals with the assertion of moral rights after the author's death, all of the moral rights in Section 57, by implication, must continue to be protected after the author's death⁴⁰. However, there is some confusion surrounding this issue with respect to the right 'to claim authorship of the work', protected in Section 57(1)(a).

Section 57 on author's special rights includes an unusual provision in paragraph (2), which states that the author's legal representatives may assert his moral rights on his behalf, but that they may not 'claim authorship of the work.' The meaning of this section is obscure. The provision appears to draw a distinction between the assertion of the author's moral rights by his descendants or legal representatives on his behalf, and the capacity of these agents to claim authorship of his work.

It does not seem logical that this provision would restrict the ability of the author's descendants or representatives to assert attribution rights on his behalf, after his death⁴¹. Strömholm identifies this problem as the question of whether the author's descendants act in their own name, or as agents of the author. However, a determination of the legal or policy reasons for making this distinction, in relation to moral rights, would require extensive analysis, not only of Indian copyright law, but also, of Indian law and traditions related to inheritance. As Strömholm observes: "Quant à la règle suivant laquelle le droit de revendiquer la

paternité de l'oeuvre ne passe pas aux héritiers, son sens exact paraît dépendre de la réponse qu'il convient de donner à la question de savoir si les héritiers sont censés agir en leur propre nom en intervenant contre les atteintes portées au droit moral ou s'ils sont considérés en quelque sorte comme des mandataires. Pour trancher cette question, il faudrait posséder des informations précises sur la conception indienne du droit des successeurs *mortis causa*. Si la première alternative est la correcte, la disposition est parfaitement logique: les héritiers ne peuvent pas réclamer *pour eux* la paternité de l'oeuvre. Dans cette hypothèse, il paraît possible de leur accorder, en revanche, le droit de s'opposer au moins à certaines atteintes portées au droit à la paternité et notamment d'intervenir contre la suppression du nom de l'auteur sur les exemplaires d'une oeuvre publiée pendant la vie de son créateur sous sa signature."⁴²

It is possible to interpret the Indian Copyright Act as granting perpetual protection to the right of "authorship," or attribution. In fact, the old Section 57 left open the general possibility of perpetual protection for moral rights. Perpetual protection was not explicitly rejected by Indian law. Moreover, this question may deliberately have been left unresolved by the drafters of the Act, in order to allow the Indian courts to decide the issues associated with perpetual protection on a case-by-case basis, and to develop a coherent jurisprudence around the term of moral rights protection. In the case of copyright in works of outstanding cultural

importance, the perpetual protection of moral rights would provide a valuable means of supervising the treatment of these works. Perpetual protection could help to ensure the maintenance of their integrity, and of the integrity of the historical, cultural, and social record, which they represent. However, the question of who should exercise perpetual moral rights is an important one. Should these interests and obligations be entrusted to the author's personal descendants, his legal representatives, cultural organizations, or the government?

Remedies

Section 57 makes specific remedies available to the author in case of a violation of his moral rights. Paragraph (1) provides that the author has "the right to restrain, or claim damages in respect of" any violations of his integrity interests in his work. Indian courts have the authority to fashion both corrective and compensatory remedies, an important freedom in view of the nature of the damage which a moral rights violation may inflict on the author or his work.

Amendments to the Copyright Act

While India's current provisions on moral rights meet the minimum standards set out in the Berne Convention, they represent a scale-down version of the original Indian provisions on moral rights set out in the Act of 1957. The old Section 57 provided protection for moral rights that was both more comprehensive and more nuanced than the current provisions. A consideration of the old

legislation alongside the new reveals that the earlier provisions, like legislation in many developing countries, may have been influenced favourably by the principles of Continental European law. In its breadth and expansiveness, it also reflected a typically Indian approach to culture.

The Indian Copyright Act has gone through two major series of amendments during the last decade, enacted by the Copyright Cess Act 1992 and the Copyright (Amendment) Act 1994⁴³. The amendment process had two objectives: first, to modernize Indian copyright law, and secondly, to bring Indian standards of protection into line with the international requirements of the TRIPS Agreement. Interestingly, the interaction between these two aspects of reform is quite complex, and has implied potentially conflicting directions for law reform. Modernization was mainly a concern surrounding India's growing information technology industry, and may have led to more extensive, complex, or alternatively, reduced copyright provisions related to new technologies. In relation to moral rights, a right against modification has major implications for the software industry, which is heavily dependent on re-using existing programs, and indeed, India is among the first countries in the world to attempt a coherent, policy-driven approach to moral rights in computer program⁴⁴. The WTO requirements reflected international needs, particularly in the industrialized countries; they include a need for higher standards in many areas – in particular, standards that may exert pressure on the economic

needs of developing countries, while largely ignoring their cultural perspectives. Interestingly, in the area of moral rights, TRIPS encourages reduced protection, a reflection of the economic orientation that the WTO has brought to copyright, to the detriment of cultural policy⁴⁵.

Amendments to the Copyright Act include three important changes to the moral rights provisions of Section 57. First, the new moral rights provision provides that the copying or adaptation of computer programs for certain purposes will not lead to a violation of the author's moral rights⁴⁶. Secondly, the explanatory notes to the new Section 57 provide that failure to display a work, or to display it in accordance with the author's wishes, will not constitute a violation of the author's moral rights⁴⁷. As Anand points out: "The natural consequence [of this amendment is]... that the [artist]... would be unable to prevent his work from being displayed in an environment alien to the one for which it was created. This change has been criticized for being insensitive to the rights of artists by various artists' forums in India."⁴⁸

Finally, the amendments to Section 57 include a major change to the structure of the section, making the moral right of integrity applicable only to situations where the treatment of the author's work causes prejudice to his honour or reputation. This amendment makes the coverage of Section 57(1), in relation to the right of integrity, identical to Article 6bis(1) of the Berne Convention⁴⁹.

Through these amendments, the Indian government has attempted to restrict the

scope of legislative protection for the moral rights of authors⁵⁰. In this respect, Indian legislative authorities have moved in a somewhat different direction from the Indian courts. Since 1987, India has begun to develop a solid jurisprudence around moral rights issues, and the provisions of Section 57, in particular. Indian courts have generally favoured strong protection for the moral rights of authors, on a variety of grounds, ranging from the ideological to the economic.

Indeed, amendments to the treatment of moral rights in the Copyright Act are, to a significant degree, a reaction to the courts' expansive treatment of moral rights. This apparent tension between legislative and judicial approaches to moral rights is currently the main dynamic driving the development of moral rights in India. While Indian courts appear to see a primary social role for themselves as guardians of civil liberties and individual rights, the government's main concern may well lie with economic policy, and in particular, India's position in the international trading regime. The Indian government may see the expansion of moral rights protection as a potential threat to India's international competitiveness, on two grounds.

On the one hand, India's participation in the Berne Convention and the WTO will compel it to extend any moral rights protections, which it grants to its own authors and to foreign authors, as well. Not only would this restrict Indian access to foreign materials, by requiring Indian users to observe additional precautions when using foreign works, but it might also make India a less attractive

destination for foreign investment in creative enterprises, such as film, by increasing the risks associated with these activities in India. On the other hand, the extension of moral rights protection to Indian authors would bring new considerations to bear on a number of economically and culturally important activities within India, such as the making of adaptations of existing works in new media, and the translation of works among regional languages, and into English.

While the concerns which may be at the heart of the Indian government's reluctance to expand moral rights protection are legitimate, the approach of the courts is firmly grounded in the realities of Indian society, and may eventually prove to be the more far-sighted view. The process of industrialization in India has seen the development of an entertainment industry with great economic and political clout, especially in its incarnation as the commercial Hindi-language film industry. Indians, like people in most countries of the world, also have a fascination with the forms of American popular culture, which enjoy increasing prominence in India, perhaps at the expense of traditional cultural perspectives. At the same time, the development of less highly-commercialized activities, such as creative writing in regional languages, is haphazard, and does not appear to enjoy any particular benefit of governmental support. In upholding moral rights protections, Indian courts have, in a sense, become the champions of individual creative efforts and non-

commercial artistic endeavour – arduous and perhaps undervalued activities in present-day India. Through moral rights, their focus on the relationship between authors and their works has also allowed them to avoid the pitfalls of attempting to assess artistic quality, in an objective sense, in the courtroom.

References and Notes

- 1 Article 9.1 of the TRIPS Agreement deals with copyright by requiring member countries to adhere to Articles 1-21 of the Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, 828 UNTS 221, Paris Act of July 24, 1971, as amended on September 28, 1979, online: World Intellectual Property Organization <<http://www.wipo.int/treaties/ip/berne/index.html>> [hereinafter Berne Convention]; however, it provides: “[m]embers shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention [on moral rights] or of the rights derived therefrom”
- 2 See Ploman & Hamilton, who cite Claude Masouyé: Ploman EW& Hamilton L C, *Copyright: Intellectual Property in the Information Age* (Routledge & Kegan Paul, London) 1980, 22-25
- 3 It is interesting to note that India’s Hindi film industry is the largest film industry in the world. It is known as the Hollywood of Bombay, or “Bollywood.” This author would argue that the name is an effective indication of the kind of quality which the popular film industry in India aims for, and is successful in achieving
- 4 Ploman & Hamilton (n 2) 132
- 5 Ploman & Hamilton (n 4) point out “India not only is one of the world’s most populous countries but also possesses one of the longest and most varied cultural traditions in the world. The range of cultural expression is wider than in the more homogeneous industrialized countries.” Indeed, in the period leading up to independence, one eminent scholar of Indian literature referred to the scarcity of translations of Indian literary works into Indian languages as a situation of “mental *purdah*.” See Srinivasa Iyengar K R, *Literature and Authorship in India*, with an introduction by E M Forster (PEN Books, ed H Ould George Allen & Unwin, London) 1943, 10-11
- 6 See Srinivasa Iyengar (n 5) on the importance of translation for Indian cultural unity
- 7 The Ramayana is one of two celebrated ancient epics in Sanskrit, which is ascribed to the authorship of Valmiki, but incorporates traditional knowledge and folklore from ancient times. The Sanskrit text has been adapted into most of India’s regional languages by leading classical poets. These adaptations are not straightforward translations of Valmiki’s text into regional languages, but actually, efforts to recreate the Ramayana story creatively in the cultural and historical context of the region. Examples include the Kamba Ramayanam of Kamban in Tamil, and Tulsidas’ Ramayana, Rama-carita Manas in Hindi. The diffusion of the Ramayana throughout India was also associated with the development of a movement in Indian history known as *bhakti*, which represented a revolutionary new understanding of spirituality in terms of a direct relationship between the individual and the divine being, and which produced a number of remarkable minds in Indian philosophy, literature, and music. The growth and development of the *bhakti* movement is discussed by Thapar R, *A History of India*, vol 1 (Penguin Books, Baltimore) 1966, 185-93, 304-10.
- 8 For example, government power can affect artists and intellectuals through the practices of censorship and bribery. Fundamentally corrupt governments can act even more drastically against artists, as the killing of the Nigerian writer, Ken Saro-Wiwa, illustrates. It is a grim and enduring paradox that, while government policy often fails to recognize the value of culture and its creators, states are quick to perceive the dangerous power of literary and artistic work over public opinion, values and behaviour

- 9 Writing in 1988, Ramaiah points out , “although the present Copyright Act was passed in 1957, Indian case law has yet to be developed on many of its provisions.” See Ramaiah S, “India,” in *International Copyright Law and Practice*, P Geller & M Nimmer, eds (Matthew Bender, New York) 1988, IND-10
- 10 (N 2) 133
- 11 One of the interesting features of the *Mannu Bhandari* case, which is discussed below, was the author’s success in taking on the Hindi film industry: see n 73 below and accompanying text
- 12 (1986), 1987 AIR (Delhi 13) [hereinafter *Mannu Bhandari*]
- 13 See Krishnamurti T S, “Copyright - Another view” *Bulletin of the Copyright Society of the USA*, 15(3) 1968, 217-34, 218 for a description of Anandavardhana’s approach. However, Krishnamurti does not explain what is meant by “permissible” – whether similarity was aesthetically acceptable, or whether it was allowed on grounds of social acceptance. A discussion of Anandavardhana’s role in the development of aesthetic philosophy in India can be found in Pandit S, *An Approach to the Indian Theory of Art and Aesthetics* (Sterling, New Delhi) 1977, 10-11. Pandit identifies his main contribution as lying in his recognition of the special and distinct quality of aesthetic experience
- 14 Krishnamurti (n 13); he cites Rajashekara, another poet
- 15 Gana R L, “Prospects for developing countries under the TRIPS Agreement,” *Vanderbilt Journal of Transnational Law*, 29, 1996, 735 [hereinafter “Prospects”], 765-66
- 16 See Krishnamurti (n 13), 219-24. Gana, citing Bickel, also makes the interesting point that the forms in which law manifests itself ultimately reflect social values: “Intellectual property law, like other law ‘is more than just another opinion; not because it embodies all right values, or because the values it does embody tend from time to time to reflect those of a majority or plurality, but because it is the value of values. Law is the principal institution through which a society can assert its values.” See Gana R L, “Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property,” *Denver Journal of International Law & Policy*, 24, 1995, 109, 112
- 17 See Krishnamurti (n 13) 220-21
- 18 See Krishnamurti (n 13) 220
- 19 This point is made by Pandit (n 13) 128-35, with reference to the view of “art for art’s sake”
- 20 Pandit (n 13) 111; he goes on to relate this Indian concept of the creative process and the artistic work to Chinese thought, and quotes Kuo Jo-hsu, a 12th-century Chinese painter, who affirms that, “The secret of art lies in the artist himself”
- 21 Quoted in Pandit (n 13) 134. See also Oliver R, *Communication and Culture in Ancient India and China* (Syracuse University Press, Syracuse) 1971, 21, who points out: “Strikingly and significantly, early Indian history is the history of societies rather than persons. Even the great literary and philosophical masterpieces are all anonymous. Not who said it, but what was said – this was what mattered”
- 22 For example, Manu, the author of a celebrated Sanskrit treatise on law, mentions that the “usages of good men” are a recognized form of law in their own right
- 23 Pandit (n 13) 122-23, 132-33
- 24 (N 13) 133-34
- 25 The historical development of the concept of the author as an independent, original genius is traced by Woodmansee M, “The genius and the copyright: economic and legal conditions of the emergence of the ‘author,’” *Eighteenth-Century Studies*, 17, 1984, 425, 427-41. In her study of the early stages of German Romanticism, Woodmansee emphasizes the new potential for the practice of the arts as a profession arising from the growth of literacy during the eighteenth century. It is interesting to note that the concept of the artist as original genius, preeminent in society and almost god-like in his abilities, depended on the democratization of culture for its existence
- 26 Woodmansee (n 25). See also Foucault M, “What Is an Author?” in P Rabinow, ed, *The Foucault Reader* (Pantheon Books, New York) 1984, 101 for a discussion of the

- “individualized” “author function” from a more abstract point of view
- 27 An interesting example of culture where community authorship appears to have been the basic model of creativity is Bali. Balinese culture shares some important features with Indian culture, including the emphasis on rules and traditions of craftsmanship, but, in contrast to Indian thinking, it does not recognize the individual or proprietary aspect of creative knowledge, at all. As Ploman & Hamilton (n 2) 5 observe, “In the community-oriented Balinese culture, artistic property cannot exist; the expression of any new idea is there to be used by all.” This perspective on Balinese traditions provides an interesting background to Indonesia’s decision to withdraw from the Berne Convention in 1959
- 28 For example, Mali’s copyright legislation includes moral rights in its basic definition of copyright: Article 29 of Mali’s *Copyright Statute*, under “Nature of the Rights,” provides that, “Copyright includes attributes of an intellectual, moral and economic nature.” Article 30 goes on to define “Attributes of an intellectual and moral nature” as being “imprescriptible and inalienable.” See *Copyright Statute: Ordinance Concerning Literary and Artistic Property* (No 77-46CMLN), July 12, 1977 in Copyright Laws of the World Supplement 1979-1980 [date of entry into force, July 15, 1977]. The official French text is published in the *Journal officiel de la République du Mali*, No 525, of August 1, 1977
- 29 *Blackwood & Sons v Parasuraman*, (1959) AIR (Mad 410) 417, and *JN Bagga v AIR Ltd*, (1969) AIR (Bom 302) 308, respectively, quoted in Ramaiah (n 11) IND-10
- 30 Act 14 of 1957 [hereinafter Copyright Act]
- 31 N 1
- 32 Article 6bis (1) of the Berne Convention, n 1
- 33 For example, this approach was favoured by the judge in the *Mannu Bhandari* case (n 12)
- 34 See the French *Code de la propriété intellectuelle du 1er juillet 1992*, JO, 3 juillet 1992, Titre 2, Chapitre 1, Articles L 121-1 - L121-4; available online: <<http://www.admynet.com/code>>
- 35 But see Anand P, “The concept of moral rights under Indian copyright law” *Copyright World*, 27, 1993, 35, 37: he says that “[t]he author may also exercise other rights, such as the right to withdraw from circulation copies of the work under a contractual provision.” While the right of withdrawal enjoys only a limited recognition even in Western countries, Indian copyright law includes compulsory licensing provisions to promote the broadest possible public availability of copyrighted works: see Ploman & Hamilton (n 4) 133-34. India is typical of developing countries in this respect: see Ricketson S, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (Kluwer Centre for Commercial Law Studies, Queen Mary College, London) 1987, para 11.71
- 36 It is interesting to note that the structure of Section 57 is consistent with the traditional importance accorded to the work, independently of its creator, in Indian thinking on the arts. On the relationship between the artist and his creation in Indian thought, see Pandit(n 13) 134.
- 37 See Ricketson S, *The Law of Intellectual Property* (The Law Book Company, Melbourne) 1984 para 15.57, n 53 [hereinafter *Intellectual Property*]; this view is particularly French. For example, German and Italian law both provide that the author must provide “proof of some identifiable injury” to his honour and reputation
- 38 Copyright Act (n 30) Section 57(1)
- 39 Anand (n 30) 36 argues that, “[m]oral rights under Indian law are not transferable, although under an agreement an author may waive his rights under Section 57”
- 40 See Ramaiah (n 9) IND-46, and Strömholm S, *Le droit moral de l’auteur en droit allemand, français et scandinave avec un aperçu de l’évolution internationale: Etude de droit comparé*, vol 1, *Première Partie: L’Evolution historique et le mouvement international* (PA Norstedt & Söners Förlag, Stockholm), 1967, 420
- 41 Strömholm (n 40) points out that, “il serait singulièrement arbitraire de refuser aux héritiers le droit de défendre la paternité du *de cujus* en leur laissant le droit de s’opposer aux

- modifications, car si celles-ci deviennent souvent désirables après la mort de l'auteur,...l'usurpation de la paternité ne paraît pas justifiée par le fait que le créateur de l'oeuvre est mort." ("It would be exceptionally arbitrary to deprive the descendants of the right to vindicate the paternity of the *de cujus* while allowing them to retain the right to oppose modifications [of the work]...While modifications often become desirable after the author's death,...taking over the right of paternity does not seem to be justifiable on the grounds that the creator of the work is dead.")
- 42 "As for the rule which provides that the right to assert paternity of the work may not be exercised by the [author's] descendants, its precise meaning appears to depend on the proper answer to the question of whether the descendants are perceived to be acting in their own capacity against offenses to the moral right, or if they are considered to be acting as representatives [of the author]. To resolve this question, it would be necessary to have exact information on the Indian concept of the right of successors *mortis causa*. If the first possibility is correct, the provision is perfectly logical: the descendants cannot claim *for themselves* paternity of the work. In this case, it would appear to be possible to allow them, on the other hand, the right to oppose at least some attacks on the right of paternity and, notably, to intervene where the author's name does not appear on copies of a work published during his lifetime under his name."
- 43 Strömholm (n 42) 420
- 43 *Supra note* 52 and Act No. 38 of 1994, respectively [hereinafter Copyright (Amendment) Act 1994]
- 44 Section 57(1)(b), to be read in conjunction with s 52(1)(aa)
- 45 See n 1
- 46 Ahuja S, "Latest Amendments to the Indian Copyright Act," *Copyright World*, 44, 1994, 38, 44 points out that this provision seeks to make "debugging" possible without potential infringements of copyright and moral rights: the provision acts in conjunction with an addition to s 52 of the *Copyright Act* allowing the copying and adaptation of computer programs as "fair dealing" with computer programs under the Act. For a more detailed description of how s 57 and s 52(1)(aa) affect each other, see Narayanan P, *Law of Copyright and Industrial Designs*, 2d ed (Eastern Law House, Calcutta) 1995, para 7.10
- 47 See Copyright (Amendment) Act 1994, *supra note* 50, Section 20, reproduced in Narayanan (n 46) 612-13
- 48 Narayanan (n 46) 36
- 49 See also Section 20 of the Copyright (Amendment) Act 1994, in Narayanan (n 46)
- 50 Ahuja (n 46) 43 aptly points out that the amendments seek to "scale down the remedies available to authors," particularly with respect to the moral right of integrity