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## **The Lessons of the Past: C Subramania Bharati and the Nationalisation of Copyright**

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It would be hard to accuse writers of an easy life. The constant stress of work, solitary, often unrewarded and unrecognized until late, or too late – and in the old days, you could add to these inherent facts of the writing career, persecution by rivals, political authorities, and even empires.<sup>1</sup> A challenging life, perhaps even a difficult one. Yet good writers and great writers somehow manage to persist, achieving personal and spiritual satisfaction in spite of the obstacles.

These are the realities represented by the copyright principle. It is a way for society to recognise the hardships of writers and their contributions to the world. At a more fundamental level, it is also a legal mechanism reflecting the relationship between an author and his own work. Call it what you will – property or moral right; individual talent or social genius; incremental step or transformative vision – nothing can take away the relationship between a creator and his own work. Fundamentally, for a writer, his work is all that he has.

Throughout the modern era, the author's copyright has played an invaluable role in helping him to secure the respect and reward due to him from his work. Of course, copyright is not the only means of recognising authors and, indeed, its recent incarnations are often less than attractive. The themes of corporate ownership, resistance to technology, and intimidation of the public have led many thinkers on copyright to argue that the law has exceeded its beneficial scope and become harmful to the public interest.<sup>2</sup> The recent move in Europe to extend the duration of copyright for musical performances from 50 to 95 years seems extravagant, and it is unclear how this change will benefit the twin causes of authorship and culture.<sup>3</sup> Nevertheless, the copyright concept remains a powerful mechanism for the protection of authors, and as such, demands care and attention in our dealings with it.

The Government of India's Tamil Nadu State would be well-advised to take this caution to heart. Located in Southeastern India – a region famous for its classical language and literature – the State first began its experiments in nationalisation with the grandest design of all: the acquisition of copyright in the works of Indian National

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<sup>1</sup> Examples can be found in the history of many countries. In India, Subramania Bharati is a case in point and the problem is also a thread that flows through Russian culture at every stage - Soviet, Imperial and, possibly, contemporary. See MT Sundara Rajan "Moral Rights in the Public Domain: Copyright Matters in the Works of Indian National Poet C Subramania Bharati" (2001) Singapore J Leg Stud 161 [hereinafter SJLS]; and, for a discussion of some Russian examples, MT Sundara Rajan *Copyright and Creative Freedom: A Study of Post-Socialist Law Reform* (Routledge UK 2006), Chapters IV and V, and the discussion of the notorious show trial of writers Andrei Siniavsky and Yuli Daniel in Chapter VI.

<sup>2</sup> The anti-copyright, or "Copyleft," movement, as it has come to be known, has many prominent advocates; including the founder of the Creative Commons movement, Professor Lawrence Lessig of Stanford Law School. For an interesting and recent look at the collisions between copyright and freedom of speech, in particular, see NW Netanel *Copyright's Paradox* (Oxford University Press USA 2008).

<sup>3</sup> For example, see the European Union press release, available online website of the European Union, at: <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/240>>, and the confirmation of 12 February 2009: "Music copyright to be extended to 95 years," available on the website of the European Parliament: [http://www.europarl.europa.eu/news/expert/infopress\\_page/058-48812-040-02-07-909-20090209IPR48791-09-02-2009-2009-false/default\\_en.htm](http://www.europarl.europa.eu/news/expert/infopress_page/058-48812-040-02-07-909-20090209IPR48791-09-02-2009-2009-false/default_en.htm)

Poet and Tamil Mahakavi (Supreme Poet), C Subramania Bharati (1882-1921).<sup>4</sup> Nationalisations have been undertaken from time to time since then.<sup>5</sup> Yet it seems that an important new wave has now been initiated with the announcement, in February 2009, of a decision to nationalise copyright in the works of twenty-eight more authors, and place them in the public domain.<sup>6</sup> In doing so, the Government cited the apparent “success” of its experience in 2006, when it nationalised the works of forty-six authors and paid out a sum of 4.86 crores of rupees to the heirs.<sup>7</sup>

A look into the past reveals the complexities of this choice. In 1949, during the exciting epoch of modern India’s birth, the Madras government – as it then was – decided to nationalise copyright in the works of Subramania Bharati. It was an unprecedented step. The reasoning may have been noble – to encourage publication of the poet’s works and their accessibility to all Indians – but the method chosen to accomplish this goal was fraught with problems. Exactly sixty years later the nationalisation of Bharati’s works is a cautionary tale. What should we have learned?

First, the conduct of the nationalisation itself was questionable. In 1949, India was still governed by the Indian Copyright Act of 1914 – a slightly modified version of British Imperial legislation.<sup>8</sup> But the Act of that day clearly accords with the modern Indian Copyright Act of 1957 on at least one key point: there is no provision for the obligatory or “compulsory” purchase, in copyright language, of an author’s copyright by the state.<sup>9</sup>

History was not devoid of such cases. A notable example is Soviet Russia, where the Bolsheviks made compulsory acquisition of the copyright of important authors a first order of business in 1917.<sup>10</sup> The action was perhaps well-intentioned – to make great literature available to a public desperately in need of education – but the arbitrariness of the policy was utterly characteristic of an authoritarian government. In other words, no-one has the right to take over an author’s copyright against his will, or, after his time, against the will of his heirs. The granting of monetary compensation – like the Tamil Nadu Government’s offer in the current round of purchases – cannot be a substitute for securing the freely-given consent of the author’s heirs.

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<sup>4</sup> The title of National Poet has been conferred on Bharati by the Indian government. *Mahakavi* is how he is commonly known among Tamil-speakers. The reason is simple, Bharati’s poetry laid the foundation for the modern Tamil language and created a Renaissance in Tamil literature, leading scholars to compare his impact in the Tamil world to Shakespeare’s in English. See SJLS (n 1), Introduction; a thorough assessment may be found in the biography sponsored by the government of India, S Vijaya Bharati *C Subramania Bharati* (Publications Division, Ministry of Information and Broadcasting, Government of India, New Delhi, 1972) 62; and in the Preface to the Standard Edition of Bharati’s Works, Volume 1 (S Vijaya Bharati Publications, Chennai & Vancouver, 2008).

<sup>5</sup> In particular, coverage in *The Hindu* mentions a round of nationalisations in 2006; see “Works of 28 more Tamil scholars to be nationalised,” *The Hindu*, February 18, 2009; available online: <<http://www.hinduonnet.com/2009/02/18/stories/2009021859690900.htm>>.

<sup>6</sup> N 5.

<sup>7</sup> N 5.

<sup>8</sup> *Indian Copyright Act, 1914*, Act III of 1914; passed by the Governor-General of India in Council.

<sup>9</sup> *Indian Copyright Act 1957*, Act 14 of 1957, online, website of the Government of India, Ministry of Human Resource Development: <<http://www.education.nic.in/CprAct.pdf>>

<sup>10</sup> *Copyright and Creative Freedom* (n 1), Chapter V, notes 3-12 and accompanying text.

Indeed, the question of how to calculate what the Tamil Nadu Government calls a “solatium”<sup>11</sup> for the author’s descendants is bound to enmesh us in a thicket of thorns. Even with the best of intentions, how can anyone make an effective assessment of factors such as the “social impact” of a work?<sup>12</sup> For example, during Subramania Bharati’s short lifetime, the social impact of his work was probably not great. How could it be when the British Government of the day managed to prevent almost all of it from circulating through normal channels? How things change! A century later, it seems that there is no sphere of Indian society, in the South as in the North, where Bharati’s influence is not felt! The image of Bharati – in North Indian-style turban; “manly” jacket (as he felt); and brave moustache – has become iconic throughout India.<sup>13</sup> Bharati’s visionary words on women and caste are constantly quoted.<sup>14</sup>

Similarly, the idea of a government assessing “literary value” should make any thinking person shudder. For example, what would have been the imperial British Government’s opinion on the literary worth of Bharati’s writings? Or the Nigerian Government’s perspective on Ken Saro-Wiwa; Stalin’s view of Boris Pasternak...<sup>15</sup> Have we learned nothing from the experience of dictatorships of the past?

Of course, a government can purchase copyright on much the same legal basis as any private party. But if and when it does so, the transaction between government and copyright owner must be treated as a transaction between equals. Does the government in such a case acquire the right to “place the works in the public domain”?

In Bharati’s case, the works were not exactly opened to the public domain. Rather, they were given as a “gift” to the people of India, meaning that any Indian citizen would acquire the right to publish his works.<sup>16</sup> Once again, the principle may have been noble but the ultimate result of the undertaking could not have been more commercial in nature, nor more disappointing. By making this gift of what was literally the patrimony of the poet’s family, the government created an extraordinary

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<sup>11</sup> The term is used by The Hindu, n 5 above.

<sup>12</sup> N 5 above: the article cites this as part of the Government’s rationale for the project.

<sup>13</sup> The image accompanies this article.

<sup>14</sup> For example, see the recent editorial by Indian Supreme Court Justice, Markandey Katju, entitled, “The ideal of women’s emancipation” The Hindu, 18 February 2009, available online: <http://www.hindu.com/2009/02/18/stories/2009021852761100.htm>. Justice Katju quotes extensively from Bharati’s poems in his article. The poet thought of woman as man’s natural superior – a physical embodiment on Earth of the female principle Shakti, governing the universe!

<sup>15</sup> Ken Saro-Wiwa, a well-known Nigerian writer, was executed by the Nigerian Government, with eight other activists, for his outspoken opposition to the activities of Shell Oil, carried on with the collusion of anti-democratic leaders. The attempts by Saro-Wiwa’s family to restore his reputation are described in Sam Olukoya “Saro-Wiwa’s remains go home” BBC News Online, 1 December 2004: <http://news.bbc.co.uk/2/hi/africa/4056935.stm>. For an overview of Boris Pasternak’s case, see *Copyright and Creative Freedom* (n 1), Chapter V, notes 90-93 and accompanying text. Ivan Tolstoy’s forthcoming book promises to reawaken difficult memories surrounding this remarkable Russian writer: see Peter Finn “The Plot Thickens: A New Book Promises an Intriguing Twist to the Epic Tale of ‘Doctor Zhivago’” The Washington Post, 27 January 2007, page C01, available online: [http://www.washingtonpost.com/wp-dyn/content/article/2007/01/26/AR2007012601758\\_2.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/01/26/AR2007012601758_2.html).

<sup>16</sup> N 4.

incentive to commercialise Bharati's works for profit. Additionally, over the past eighty-eight years since the poet's death, this is exactly what has happened. The publication of Bharati's works has become an industry non pareil in South India. One reads with disbelief the Government's statement quoted in an article in India's National Newspaper, *The Hindu*, on March 11, 1954, that "[T]here is no profit likely to be made by [the] Government on the publication [of Bharati's works]."<sup>17</sup> By today's reckoning, it seems unlikely that profits from Bharati's works, made by the Government and every other publisher of his works, would total less than multi-millions of rupees.<sup>18</sup>

The economic consequences of this transaction for Bharati's heirs are almost too disheartening to describe. Let us not speak of the poet's wife, Chellamma Bharati – truly Tamil Nadu's first feminist, and, in her own way, just as outstanding an individual as he was – who lived out a life of heroic optimism in desperate circumstances after his death. Let us not speak of the exploitation of Bharati's female heirs by male members of the family who should have known better.<sup>19</sup> Above all, let us not look too closely at the Government's nonchalance when confronted with these facts as it approached the family about the "purchase" of Bharati's copyright – accomplished for an "astoundingly small sum" in the 1940s.<sup>20</sup>

If the economic consequences of nationalising Bharati's copyright were sad for his family, the moral consequences were tragic. They not only affected Bharati's family, they will also be felt by Tamil Nadu, India, and the world in perpetuity. The rush to publish his works allowed errors to creep into printing; the misattribution of works to the poet which he never wrote; and the development of a culture of criticism and pseudo-scholarship, which failed to grasp the simple democratic fact that a National Poet, though he belongs to the people, may still be a great and sublime intellect whose works should be approached with humility and care.<sup>21</sup> For Bharati's works are the

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<sup>17</sup> See "Bharati's Poems," *The Hindu*, 11 March 1954. In a discussion surrounding the release of a collection of Bharati's poems published by the Madras Government, Mr C Rajagopalachari, Chief Minister, announced in the Madras Legislative Council on March 10: "We provided for certain benefits to the family when we took up this business. There is no profit likely to be made by [the] Government on the publication."

<sup>18</sup> The issue is thoroughly documented in a paper, as yet unpublished, by PK Sundara Rajan, entitled, "The Reputation of C Subramania Bharati": private papers of Dr S Vijaya Bharati.

<sup>19</sup> Bharati was survived by his wife and two daughters. After the poet's death, Chellamma raised funds from the public in order to publish the works. The monies were handled by Chellamma's elder brother and little of the money found its way back to Chellamma. The situation is described in a book by Shakuntala, Bharati's younger daughter, Ravichandra Bharati ed [with S Vijaya Bharati], *En Thanthai* [My Father] (Palaniappa Brothers Chennai 2007). Subsequently, Chellamma agreed to sell the copyright to Bharati's half-brother, Viswanthiyer, in order to repay expenses associated with the wedding of Shakuntala, Chellamma's granddaughter, S Vijaya Bharati affirms that the contract transferring ownership of the copyright from Chellamma to Viswanthiyer was agreed under financial duress. The contractual document has since been published in S Vijaya Bharati's Standard Edition, Volume 1 (n 4). Chellamma's signature shows the awkwardness of a woman who never learned to write. Nevertheless, as her grandchildren attest, she knew from memory virtually every line written by the poet. She died in a coma, quoting his poems in her unconscious state.

<sup>20</sup> N 4.

<sup>21</sup> Some of the problems which occurred – errors in printing, including the use of incorrect letters and words, the misattribution of works to Bharati which were not authored by him, and abusive criticism in the post-Colonial period – are documented in SJLS (n 1), notes 23-28 and accompanying text.

Tamils' gift to the world; they are India's cultural heritage; and part of the treasure of humanity's universal heritage. Bharati, who believed that it was possible to live forever – not only in spirit, but also in the physical body – at least deserves immortality through his work. And for this, he depends on the care and attention to duty of every person into whose hands his work may fall.

Copyright recognises these cultural needs as well in the powerful concept of moral rights. As provided in s 57 of the Indian Copyright Act, every author has the right to be associated with his own work by name; and every author has the right to protest against mistreatment of his work that may harm it or damage his reputation. The Delhi High Court emphatically affirmed this principle in the landmark case of *Amar Nath Sehgal v Union of India* (2005).<sup>22</sup> Not only did the Court champion Indian moral rights, but it also concluded that the Government had a special duty of care to protect artworks in its custody.<sup>23</sup>

At present, the current round of nationalisation in Tamil Nadu has raised protests from the descendants of at least 2 of the authors involved. Let us learn the lesson of Bharati's experience. Nationalisation must be undertaken with the utmost care. The legal basis for the undertaking must be made clear and credible, lest the government be charged with arbitrary dealing in treasured works of culture. The consent – and indeed support – of the author's heirs and representatives is essential. However difficult it may be to do so, that consent must be obtained on unquestionably fair grounds, and with due regard to the sometimes complex and competing claims of those who survive the author. In the case where an author's heirs refuse their support, their reasons must be weighty: why else, in this modern age, would anyone refuse money? Indeed, any question of "compensation" in the case of nationalisation must be approached with scrupulous honesty and a fair consideration of all of the circumstances involved. Finally, and perhaps most important of all, what is the purpose of nationalisation? If the goal is to promote the public interest, India needs to think again. Bharati's case shows that nationalisation, whilst a powerful tool, may be a blunt instrument where a fine chisel is needed – a policy that shatters the very form it hopes to shape. Nationalisation may be the right course of action, but it must be pursued with clarity of purpose. If wisely pursued, it may even help to protect our precious cultural heritage from the harsh effects of commerce. But the goals must be clearly articulated and unerringly pursued. Where nationalisation is concerned, let us try to attain that most difficult of achievements and learn from past experience.

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<sup>22</sup>2005 (30) PTC 253.

<sup>23</sup>N 22, paras 53-56.