Tradition and Technology: The Two Faces of Indian Copyright Law

Date : 21th February, 2008

Prof. Ryu Takabayashi, Waseda University: We now start the RLIP Indian Special Seminar.

We have constructed the Indian IP case database project by using the fund of the Ministry of Education during this fiscal year. We are very pleased to announce you that 43 copyright cases have just been uploaded in our database today. Therefore if you access our website after the seminar, you can see them in your pc. In addition, we plan to add 30 patent cases, together with 30 trademark cases, which make up more than 100, would be available by March 2007. We hope it would draw your interest.

Recently, the interest toward India is rising in Japan. There are various projects introducing Indian copyright law or IP, however, I have not seen a presentation from academic aspect often. Today we invited Professor Mira Rajan, from India, teaching at Law School of University of British Columbia, who will present us about the Indian Copyright Law. With the introduction of Professor Toshiko Takenaka, University of Washington, that she is recognized as an expert of India in US, and I look forward to having her presentation today.

Professor Mira Sundara Rajan, University of British Columbia: Thank you for your very kind introduction, and thank you for coming to the seminar on Indian Copyright Law today on somewhat short notice.

India has always been known as “a land of striking contrasts.” India’s cultural distinctiveness is apparent in the sense that Indians probably do not see this as a disadvantage. Rather, in the Indian context, contradictions are seen as a natural reflection of reality; a reality that is often too complex for the human mind to grasp. The idea of contradiction also defines the copyright landscape in India. The contradiction underlying Indian Copyright Law is the coexistence of a traditional culture with high technology.

This is an outline of my presentation this evening. I will begin with some introductory remarks and then proceed to an overview of some policy concerns surrounding Indian Copyright issues. I will then attempt to place Indian Copyright Law in its historical and international context and then talk about two copyright cases that demonstrate some of challenges present in India. And finally, conclude with some hopefully optimistic remarks about the future of Copyright Law in that country.

India’s situation is highly unique among developing countries. It is indeed a developing country with some pockets of severe underdevelopment. At the same time, it has also become an international leader in technology, perhaps even rivaling the United States and Japan.

India’s prominence in technology is notable in two areas: software and film. In the area of information technology, we are dealing with a unique form of new technology that is directly protected by copy-
right law as a new technological work.

Accordingly, information technology gives India an important stake in international copyright developments and has lead to a preoccupation with this particular aspect of intellectual property regulation.

As for film, it is symbolic of India's significant involvement in more traditional copyright industries. When I talk about film, I am referring in particular to the Indian popular or commercial movie industry known as Bollywood in North India or Kollywood in South India. This is an economically important industry both in India and on the world scale.

In fact, you may be interested to know that India, and not the United States, is the largest producer of commercial films in the world. And I hope you will not interpret my comments as signifying any approval of the Bollywood film industry.

On the other hand, we see a different face of India; India as a developing country that shares many traditional concerns of the developing world. There are two areas that are particularly important from a copyright perspective. First, the issue of improving levels of education among its population at large. This is a key issue for development particularly when we consider the fact that 300 million Indians are said to be middle class by world standards but we have 700 million who fall below that level, sometimes significantly below.

A second area to be aware of is the protection of traditional knowledge and culture and, in fact, the recognition of traditional culture through copyright law has long been an issue of concern in India. Indian cultural tradition might be called a warehouse in the renaissance sense of the term filled with folk stories, music, religious and cultural symbols, knowledge of the environment and so on which represent the Indian way of life and also the accumulated resources of the past. Protecting traditional culture from misappropriation or abuse is, therefore, an important issue and one in which copyright law can play a role. Copyright law can help to bring value to traditions in the context of the modern world and it can also help to situate them in relation to other forms of knowledge such as scientific inventions or works of individual authorship which enjoy intellectual property protection.

So, what can we identify as India's domestic or indigenous goals in relation to copyright law? And I have indicated here what I would consider three primary goals or objectives. The first would be the promotion of innovation and in particular, putting in place the right kind of framework for the information technology industry to grow. Now, what exactly does this mean? It is actually quite difficult to make claims about the right kind of IT protection in India and we only need to look at the United States to have an example of what I am talking about here.

In the United States, we must always remind ourselves that the growth of the software industry initially occurred in the absence of regulation. Now, the software companies that were able to thrive in that environment are aggressive in pressing forever higher levels of copyright protection, both at home, in the United States and abroad and Microsoft is only the most prominent example of the attitude of the software industry. So, India is highly sensitive to the issue of how copyright legislation is likely to affect the IT industry but there is a great deal of uncertainty about how to implement that understanding in practice.

A second objective that I have identified here is the encouragement of national copyright industries in all their forms and the first such example that I mentioned is, of course, film. So, in the case of
film, the Indian government is increasingly aware of a need for adequate protection from piracy, both domestic and international.

There is an interesting irony in all of these because Bollywood has an entrenched tradition of copying from Hollywood. And you may be interested to know that we have already seen a couple of cases in India involving alleged copying by Bollywood producers of Hollywood films. The attitude of Indian courts is to view the American companies with little sympathy while, on the other hand, recognizing the clout of Bollywood.

Another example that I wanted to mention had to do with literature and other types of creative or artistic work because writers and artists in India are traditionally in quite a disadvantaged position. This group of people is not supposed to be interested in money and at the same time they are often not believed to be worldly enough to retaliate against abusive treatment. In ancient times, the system worked perhaps because of the power of Dharma, the idea of rightful conduct. Now, whoever deals with literary or artistic works in India does so without fear of the consequences of their actions whether they may be misconduct, outright copyright infringement or violations of moral rights.

I wanted to add a few words about the problem of translation which has a special element of complexity in the Indian context. So, we have a multiplicity of languages in India quite in contrast to Japan I think, something like 18 official languages at the latest count and hundreds, possibly thousands of dialects. Translation in India moreover is something beyond translating from one language to another. Historically, translation has been treated as an exercise in new creative forms, so it is part of the development of new knowledge.

So, I wanted to give you one example concretely of what I am talking about and I chose the ancient Indian epic in the Sanskrit language called Ramayana or Life of Rama. This story is a very powerful story in the Indian tradition because it is widely known – probably every individual in the Indian subcontinent regardless of social class, gender, age; possibly even religion is familiar with the story in one form or another.

Authorship of the work is usually ascribed to the sage Valmiki but in fact the epic incorporates traditional knowledge and folklore that was known from even more ancient times. This Sanskrit text has been adopted into most of India’s national languages by classical poets and these are not straightforward translations of Valmiki’s text into the other national languages but they are actually efforts to recreate the Ramayana story in the cultural and historical context of that region.

So, examples of those national adaptations of the story are the Kamban Ramayana of Kamban, an original tunnel work, which actually elevated this poet to a classic status in South Eastern India. Similarly, Tulsidas did the same thing thousands of miles away in the region of Delhi. So, you can see that what the story accomplished was to promote the cause of cultural unity in India. So, there is a special role that translation has in the Indian culture.

In modern times, we see that traditional, colonial and modern perspectives on translation often come into conflict. So, in the modern context, India wants freedom to translate English and foreign works into local languages and also to make translation common among the different Indian languages. So the widely accepted practice and one that is sanctioned in the Indian Copyright Act is compulsory licensing of translations both between the Indian languages and from English or foreign languages into Indian languages. And as you may imagine in these circumstances, translation entails potentially intense conflict.
among the different interests involved. And I will give you just one example, the example of an original work written in English by a Tamil speaking writer, translated back into Tamil by an unknown person and threatening to damage that writer’s reputation in her mother tongue. And the third and final point I Wanted to make about Indian copyright objectives is the recognition and preservation of traditional knowledge through Copyright Law.

And we can consider this from two perspectives; first, the practical issues of protection from misappropriation, or misuse, or exploitation without any return to the country. Secondly, I think also the moral issue, the need to give social status to this knowledge which had always been considered inferior during the period of western colonial rule.

So in summary, India’s position on domestic copyright policy may be said to be a need for selective, sophisticated and nuance to design of copyright provisions.

And clearly, we are talking about two potentially conflicting objectives; the promotion of innovation on the one hand and the protection of cultural industries both modern and ancient on the other.

Now, this complex task must be additionally balanced against the requirements of the international community and, in particular, the copyright regime at the World Trade Organization.

I would like to move on now to talk about Indian Copyright Law in context. I think that the boom in technology has certainly led to heightened international interest in India, but India was and is a different world. This is particularly the case for western intellectual property lawyers who can feel a true sense of culture shock when confronted with India. So this is why I think it is quite important for international scholars and lawyers as a first step to acquire an understanding of Indian Copyright Law in context to situate India in the world tradition of copyright. Usually when we classify the world’s legal systems, we begin with two major divisions; civil law and common law.

These are distinguished by the emphasis on the codification of law in the civil law system versus the status given to the interpretation of law by judges in the other. This is why we usually talk about judge-made law in common law systems.

Recently, we also have the recognition of two more categories; socialist or pro-socialist legal systems and developing legal systems. So, India is a blend of these. It is a system with a common law heritage from Great Britain. It also has a modest amount of civil law influence through France and, possibly, Portugal.

Of course, India is also a developing country and this particular category is very difficult to assess. In the period of decolonization following World War II from 1945, this term was quite pejorative. It meant that the developing countries had no meaningful tradition of indigenous law but, instead, we are attempting to modernize their law based on legal models from the west.

In reality, every human civilization that we have ever known has had law or in other words rules of social conduct. Although these rules may not have been written down, is it really true to say that there was no law? So, what status should we assign to oral traditions, to custom, and so on and so forth?

India is a truly perplexing case from a western point of view because it is a developing country dominated by British government for more than two centuries but it also had a system of indigenous law. In fact, it has an incredibly complex legal tradition including oral tradition and custom but also written codes of law usually in the Sanskrit language. India also has and has always had diverse social practices governing every sphere of life and I have quoted a comment on that from the Laws of Manu which per-
fectly expresses the idea, “the usages of good men are valid and perhaps the ultimate source of law.”

So, in sum, in India we have a highly decentralized and defused legal tradition and a special relationship among written codes, oral traditional and, of course, social custom. So, what was the indigenous legal position surrounding knowledge and culture in India?

Artistic creation does not appear to have been dealt with in the legal codes but the idea of legal or appropriate conduct in relation to knowledge can be traced back at least as far as the ninth century.

And I have identified here a writer, a poet called Ananda Bharthana, who actually wrote about the problem of literary theft as he calls it. He undertakes a detailed analysis of this phenomenon and actually identifies three distinct categories of theft. Thankfully, only one of the three is considered to be permissible, the idea that similarity between two works maybe accepted.

We also have scholarship that traces the idea of plagiarism back to the 10th century in India. And in the India tradition, plagiarism not only meant copying of words but also copying of ideas.

So, this leads to two noteworthy points about the Indian model of copyright; first, copying was generally not tolerated, and secondly, the protection of ideas was at least as important as the protection of actual works.

I also wanted to make a third point about reputation and this has to do with understanding the law in its broader cultural context. So, in the Indian tradition, artists and intellectuals were not expected to make money out of their work rather the focus was on fame or reputation. For their livelihood, artists and intellectuals have traditionally dependent on patronage or in other words, gifts from others, which could be on a large or a small scale.

Interestingly, this lead to a situation, where the spread of knowledge was severely restricted by the communities who controlled it. But at the same time, they had limited economic or financial power and resources at their disposal. And in fact today, it is still very much the case in India that people do not want to pay artists for their work and I will describe this in some more detail when I reach the case studies towards the end of the presentation.

So, the Indian model of copyright, if I can call it such, has some interesting modern implications and I have just listed them on this slide. First, we see that the recognition of copyright in India seems to have predated Western copyright concepts significantly. Usually, we consider the Statute of Anne 1709 to 1710 to be the first copyright law in the common law world. Secondly, the concept of copyright in India was actually larger than the western model because it extended to both ideas and expression.

In western law, we cannot really talk about copyright without fixation. So, unless the work is recorded in a tangible medium, we cannot have copyright protection. And just to put that in context, we can consider United States law as an extreme example of the insistence upon fixation. Canada a very lenient model, we do not have fixation anywhere in our copyright act.

Thirdly, the indigenous concepts could actually be useful when we look at current problems. So, for example, in a digital environment is fixation really appropriate? And again, we live in a time where the importance of something intangible, like reputation, seems to be growing even greater than that of money.

And fourth and final point, relating to the enforcement of rights, again to repeat what I said earlier, it is still the case that people do not want to pay artists and creators for their work. Onto this surface, the veneer of British law was not imposed. Please do not be frightened by this picture. It is actually not that
complicated.

Please begin looking at this with me on the top. I have identified the British copyright act of 1842, which was the first modern copyright law to apply in India. In fact this was an act that applied to all British dominions, and in order to ensure that it was procedurally correct to apply that act to India in 1847, a new set of legislation was passed. It is interesting to consider as a key feature at that point in time, the duration of copyright protection in India, which was life of the author and seven years after his death, or 42 years which ever was longest.

In 1914, we had a new act, the Indian Copyright Act, which was actually an extension of the landmark British Imperial Copyright Act of 1911 to India. And this is quite interesting, because the 1914 act actually included some modifications to the British provisions which were thought to be appropriate in the Indian context, and I will mention translation in particular. It is common in modern copyright law for us to recognize that the author has a right to control translations of his work. In this act however, that right was limited to a very short period, only 10 years.

It is also worth mentioning that the act was on landmark statute in the sense that it brought India as a British dominion into the international copyright regime in particular the Berne Convention for the protection of copyright. So, India had a very early membership in and exposure to the international copyrights system and just to put that in perspective. Let us compare the United States, which did not join the Berne Convention until 1989.

So, the next movement forward in Indian copyright law occurred after independence, with the Indian Copyright Act of 1957. There were two major influences on this act: the first one, being somewhat ironically, the new United Kingdom Copyright Act of 1956, but secondly, this act also attempted to respond to Indian indigenous cultural needs. And I think perhaps it was more effective in doing so than any subsequent attempt at amendment. So, some of the defining features of the 1957 Act included a term of copyright protection for life of the authors’ plus 50 years after his death and also a manipulation of the provisions on translation rights. It ended the limitations on authors’ translation rights in the old act, but, it introduced the scheme of compulsory licenses involving translation rights.

The act has been amended a number of times and I have tried to identify some of the major amendment processes here. We had some revisions in 1983, which involved updating the act to match the 1971 version of the Berne Convention. In 1984, interestingly, the act was amended to become applicable to video films and computer programs. It seems like very early recognition of IT, actually, in the Indian law.

In 1992, we had an extension of duration to life of the author and 60 years after his death and I will return to this point again in my case studies.

1994 was a landmark year, the year in which the World Trade Organization was established and we had a new agreement on Trade-Related Aspects of Intellectual Property Rights known as TRIPS. So, Indian membership in the WTO was an issue of concern and extensive amendments to the copyright act were undertaken as a result. There were very interesting changes that occurred at that period, and I will just mention a number of those for you.

First is the introduction of performer’s rights, secondly, the creation of droit de suite, also known as the Author’s Resale Right, which allows authors to share in the proceeds from resale of original objects and manuscripts, thirdly, copyright protection for composers of Indian classical music. This is peculiar to the Indian situation because in the old legislation music had to be written down in order to be protected
by copyright. But traditionally in India composers of classical music do not write down their music in graphical notation.

Fourth area of amendment is related to software. Changes involving software, first of all, have to do with fair uses. You may be interested to know that in India fair use of software includes a right to decompile and analyze software as long as you have obtained it legally. This provision is intensely disliked by the United States government. But from an Indian perspective, it responds to the special characteristics of the software industry. So it is believed that excessive protection would dampen development in this industry. That is often known as “The Chilling Effect.” You might be familiar with that expression.

Second area of amendment involving software had to do with moral rights. And here there is a very interesting question about whether moral or non-economic rights actually exist in relation to software.

So I think this chart provides a useful way of thinking about copyright and moral rights. So you can see that our common lawyers think about copyright as a bundle of rights involving two large groups, economic rights and the moral or non-economic rights on the other hand. And the two major non-economic or moral rights that are very widely recognized are the right of attribution, which is simply the right to have your own work attributed to you as its author. Secondly, the right of integrity or reputation, which is the right to protect your work from damage or mistreatment, particularly, where it may result in damage to your reputation. These two moral rights are actually codified in international copyright law, in the Berne Convention, article 6bis, for your reference.

Now, software is usually protected as a literary work. It is not supposed to be treated any differently than any other kind of literary work. So presumably, moral rights extend to software protection as well. Yet the issue has so far been widely ignored at the international level. In fact, as far as I am aware, India is the only jurisdiction in the world that makes mention of the issue of moral rights in software. But it does so in a very limited or careful way. The Indian Copyright Act tells us that moral rights cannot be invoked where someone makes a fair use of a program, as defined by the act. But does that leave us with the implication that nevertheless moral rights do subsist in computer programs? I would say that whether or not we like it, the answer to this question is probably yes, because that is the default position of copyright law.

To go on to a fifth point of amendment, on a more restrictive note, the 1994 amendments generally reduced the scope of protection previously enjoyed by moral rights under section 57 of the Act. So I have reproduced that section here.

Section 57 tells us that, independently of the author's copyright and even after the assignment either wholly or partially into said copyright, “the author's work shall have the right to restrain or 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 act would be prejudicial to his honor or reputation.”

So, prior to these amendments, the Indian provision on moral rights was very open ended. There was no fixed duration and there was no requirement that the author must show damage to his honor or reputation. This language was added in order to limit the power of the moral rights of the author. And, in particular, to respond to the issue of government liability for potentially mistreating works of art and culture. And I will return to that point in my case studies.

I also wanted to mention the areas that are currently being discussed as possible points of further
amendment. So, these are proposed changes and they are available at this web address, official site of the
government of India in a 41 page long document. And I find this very interesting, because the Indian
government often says that Indian copyright law is very up-to-date and does not need much amendment.
So given the brevity of the time available this evening, and also out of some compassion for our translator,
I will leave this area for questions, but briefly list some points to think about. So you can see the film
industry is identified. Actors who appear as extras in the films will not be granted performance rights. We
have provisions on royalties, on performers, on fair use, and on parallel imports.

So this is a whirlwind overview of Indian Copyright Law from the beginning to the present and pos-
sibly into the future. I would like to talk about two case studies involving the practices surrounding In-
dian Copyright Law. The first case involves Sri Subramanya Bharathi, India’s national poet. It began in
about 1948 and continues to the present time. The second case, Amarnath Sehgal began in about 1978
and continued until 2005, and it involved a work of sculpture.

Let us speak first about poet Subramanya Bharathi. This takes us back to the post-independence
period in India which was a ton of great uncertainty for copyright law. And in fact the idea of modern
copyright protection that could be applied to Indian authors was itself relatively new. Colonial copyright
law was really focused on assuring a degree of protection to colonial authors whose works were dissemi-
nated in India, particularly where translation into local languages was involved.

So in its early days, the independent Indian government was greatly preoccupied with the dis-
semination of native knowledge and culture. One of the reasons for this, not surprisingly, was the desire
to forge a sense of national identity through a common literature. One of the policies that were used to
serve this purpose was the idea of purchasing or buying out copyrights. What this essentially means is
that a copyright would be purchased by the Indian government before its natural or usual expiry within
the terms of copyright legislation.

Bharathi’s copyright as far as I am aware, is the first illustration of such an event occurring in India.
Bharathi was actually a pioneer of the freedom movement in the southern part of India. His writing was
outlawed by the British government and he therefore had to flee British territory. He went Pondicherry
which was controlled by the French. And fortunately, the French, of course, welcomed him with open
arms. Bharathi could not publish anything within British-India because his writings were prescribed. So,
he essentially had no way of making a living as a writer. As a result, he lived in fairly serious financial
straits throughout his entire life, which was actually quite short due to stress. He died at the age of 39.
After his death, his reputation grew tremendously and copyright of all of his works was eventually pur-
chased by the Government of Madras State that occurred in 1949.

And the government did something really unprecedented. It gave the copyright to the public as a
gift. So, actually, the idea was that any Indian citizen would acquire the right to publish the works of
Subramanya Bharathi, I suppose you could think of it as a kind of compulsory purchase but it should be
noted that this was not authorized by Indian Copyright Law.

And from a practical point of view, the purchase was accomplished for astoundingly small sums of
money that were paid to his surviving wife and two children. What happened as a result is quite fascinat-
ing and instructive. Indians are great entrepreneurs. So the Indian publishing community saw an oppor-
tunity here and began printing his works. This was done without any editorial or supervision process by
qualified people for the simple reason that no one was available at that time. So the works became best
sellers and, in fact, the publishers earned huge amounts of money, none of which was ever seen by the
descendants of the poet.

But, perhaps there is even more important than this commercial aspect. The integrity of the works
was seriously compromised over time. So, for example, works of dubious authorship were credited to
him. Printing occurred with erroneous words and phrases and critical information that was incorrect was
published.

And this occurred in spite of the fact that the Indian Copyright Act, recognized in Section 57, ex-
tensive protection for the moral rights of the author, protection which extended beyond his death and
even when he ceased to be the owner of the copyright of his own work. But unfortunately, the attitude of
publishers is one of hostility towards anyone who tries to point out this problem. They feel that they have
both a legal and a moral entitlement to publish.

Now, since the case of Bharati it has actually become a very common practice in Tamil Nadu State,
which was formally Madras State, to buy out the copyright of deceased authors. But they do so for en-
tirely different reasons. In order to combat corruption in the publishing industry and also to prevent the
author’s descendants from becoming impoverished, while the publishers make earnings. It is a practical
issue. There is no way of enforcing the collection and payment of royalties and practice, and the situation
is only likely to become worse in the digital environment.

And once again, we return to the problem of enforcement. Publishers have no fear of the Court
System because of long delays in achieving victory. And when I say long, I am talking about periods of
decades. For example, the Amarnath Sehgal, which I will describe next, took almost three decades to be
resolved finally. So, very few litigants clearly will have the financial or personal stamina to await a verdict
from the courts, and the state government essentially has intervened to help the families of authors.

Now, I would like to compare the situations surrounding the treatment of Bharathi’s copyright with
another great Indian writer, Rabindranath Tagore, who, of course, is India’s Nobel Laureate in Literature.
Here, I have reproduced a paragraph from the statement of the Indian Government in 1993 amendments
to the Copyright Act, which extended the duration to life of the author plus 60 years. So, when Tagore
died, he bequeathed his writings to Visva-Bharati, which was a university that he founded. So, reading
now, Gurudev Rabindranath Tagore died in the year 1941 and copyright in his published works, which
stood vested in Visva-Bharati was to expire on 31st December, 1991. There have been numerous demands
for according extended protection to his works in view of their national importance. While it was not
considered feasible and appropriate to extend the term of copyright in respect of one author alone, the
government reviewed the whole question of what should be the appropriate term of copyright and de-
cided to extend the term of copyright generally in all works protected by the Copyright Act 1957 from 50
to 60 years. This was, however, not to apply to works which had already entered the public domain before

Before I discovered this provision, I thought that Russia was the only country which had extended
copyright term for the sake of one author. In the Russian case, the author was Pushkin. And Pushkin’s
widow actually petitioned the Russian Government to obtain an extension of copyright term in the late
19th century. So this is a stark and shocking contrast with the situation of Bharati, in terms of copyright
protection for works of national literature.

I would like to look secondly, at the case of Amarnath Sehgal which, as I said, went one for about
three decades, from 1978 to 2005. And this allows us to take a closer look at the role of judges in giving effect to the copyright law.

Now, clearly, as I mentioned, the problem of delay is a serious one. But on the other hand India has a tradition of a highly activist judiciary. And in fact it is quite interesting to note that the activities of the judiciary often counteract the actions of the government. So, the Indian judiciary could be set to have its own ideas and priorities in relation to copyright law. And its goals are often incompatible or possibly in conflict with those of the government.

So, Mr. Amarnath Sehgal, who was pictured here with one of his creations, is an Indian sculptor of great national and international renown. So, back in the 1970s, when he was an up and coming artist, he actually signed a contract to design a sculpture for a public building in Delhi. In fact, the building was the first international conference center for visitors to India in the entire country, and Nehru, who was then the Prime Minister, actually favored the idea of decorating important buildings like this to showcase the works of Indian artists. So, the work eventually came to be considered a national treasure of India. I have not pictured it here for reasons that I am about to explain. Because after the work had been on display for sometime in 1979, it was actually taken down by the government in order to store it. But in the process of doing so, the work was actually damaged in transit and improperly stored.

So, Mr. Amarnath Sehgal applied for an injunction to prevent further damage, which he was granted by a court in 1992. And he actually won damages in this case in February of 2005.

But between 1992 and 2005, something interesting happened to the provisions on the right of integrity in the Indian Copyright Act. In fact, as I showed you before, the addition of an onus of proof to show damage to honor our reputation was added to the Act. And in fact, this amendment to the act was a direct result of concern on the part of the Indian Government about its liability to Amarnath Sehgal.

When the case eventually came to a final conclusion, the Court had an interesting approach. It said that regardless of the language of the Indian Copyright Act, there could never be an obligation on Mr. Sehgal to show damage to his reputation. And from a legal point of view, the approach of the Court was ingenious.

The Court said the circumstances of the case were such that it was sufficient to infer the required damage to reputation. So, the Court made two points. First, it looked at the facts of the case and it said that that the destruction of parts of the sculpture, actually led to a destruction of the artist's concept, which was to see the work as a whole. Secondly, the Court said that the provisions on world rights had to be understood in a much broader context of Indian legislation, not only copyright legislation but also cultural property legislation. So, given the breadth of the India's commitment to cultural heritage, in other words, it was important to read Indian moral rights in very broad terms.

And this case is simply an illustration of what we can observe generally when we look at cases involving the copyright and moral rights of individual authors and artists in India. The Indian judiciary maintains a strongly activist pro-culture and pro-author stands in these matters. The courts do not hesitate to impose a duty of care on the government to deal properly with works in its possession. And it reads the modified requirements regarding proof for moral rights with great leniency and sympathy towards individual artists.

This fascinating approach raises questions about how film and software will be treated in the future. These are areas where we see the overlap of multiple copyrights and also different types of copy-
right, both of corporate copyright and the moral right of individual authors. It is going to be a very complex matter; first of all, to find the right legislative framework to deal with these situations, and secondly, to pacify Indian judges in these areas.

So, in conclusion, what is the future of Indian copyright law? Clearly, this is going to remain a very dynamic area in India for some time to come. The current amendments as you would have noticed in my quick overview respond in particular to technological issues. In fact, it is very interesting for those of you who are familiar with international copyright. You will note that the latest international agreements are the WIPO Internet Treaties of 2002. India is not yet a signatory to those treaties. However, the proposed areas of amendment all respond to the language and legal obligations described in those treaties. And in fact, one of the reasons behind this is a close and developing relationship between India and the United States on copyright issues.

My hope for India is that both government and judges will attempt to take a far-sighted perspective on copyright law. The complexity of the issues at stake in India is staggering and I believe that copyright law will have an important influence on shaping the country’s future development. A proper attempt at policy development should seek to accommodate all of India’s needs in relation to intellectual property rights. And I think that as international lawyers we should also call upon the international community to have a greater understanding of the peculiar context of developing countries including India. Even more than a “development agenda” as WIPO likes to express it; I think we need a development perspective, one that is going to aim towards promoting the creation and dissemination of knowledge in developing countries.

I thank you very much for your interest and your patience, and I look forward to hearing your questions.

Prof. Ryu Takabayashi: Thank you very much, Professor Rajan. Now we will move to the time of questions. The almost two hours’ presentation contains various interesting points. Originally Professor suggested the bilateral character of the Indian copyright law as the theme. In other words, it might be the diversification instead of dualism. We often categorize into 2: copyright approach versus author’s right approach, in copyright law. By today’s presentation, we can well understand that it is very difficult to analyze like the way of India.

In the presentation, she introduced the long history of the concept of copyright starting from the 9th century, which is totally new information for me.

Our organization is called <<Institute for Corporation Law and Society>>. As the fundamental policy is that we should create the independent and unique system based on the tradition, although we have imported the Western legal systems since Meiji Era. Therefore, we believe that we should not just import the western system as it is. As a country of rather long history, which might be much shorter than India, we have such an idea and found the similarity to India.

The situation of Indian copyright sounds quite vivid, while we have more confrontational one between the organizations of authorities and consumers in Japan. It means that there are various parties with power, including the court; it may be a resource of the interesting solutions. We just had very limited knowledge about India, being a developing country, with strong IT and a member of BRICs, which threatens Japan. So, today’s lecture was so interesting for me.
I myself wanted to ask some questions if time allows, however, our time is quite limited and we will receive a few questions in coming 20 minutes.

Prof. Rajan: And may I see also that I have put my contact details here knowing that we only had a very short time today, so, if anyone has questions or comments, please feel perfectly free to contact me after the session and I will be glad to respond.

Professor Ryu Takabayashi: It contained various topics. Please give your name and organization when you ask questions.

querist 1: My name is Uehara, Kokushikan University. Your presentation was so interesting. My impression is that the way of understanding the copyright law in India is quite similar to that of Japan except one fundamental point. I have worked for the broadcasting treaties for last 10 years, and I will be in the WIPO conference next month. As my position, I was opposing to India. Indian government said they do not have the intention to join WCT, and WPPT, clearly, however, according to your presentation, they seem to think about joining WCT at least and I would like to ask you about this point. As Indian scope of protection of copyright includes ideas, from the standpoint of protecting industries, they might possibly hesitate to join WCT for IT industries. Do they have such intention?

Prof. Rajan: This is an extremely interesting question. And I hope that my answer will not be interpreted as cynical. I think that this is a situation where the “right hand does not know what the left hand is doing,” as we say. As you know, India has always had a leadership position in the area of copyright internationally. It is a leader among developing countries. It was probably the first developing country to realize that international copyright rules might not be in accordance with the interest of the developing world and it was proud of taking a stance as an independent country from the great powers of world.

I think, this also reflects the perspective of the Indian public on copyright and intellectual property. They do not view intellectual property regulation as being in their interest.

At the same time, there is a growing constituency in India, and a powerful one, that is becoming interested in intellectual property rights in the western model, notably, some parts of the pharmaceutical industry, IT, some parts of the film industry and so on.

So I think, accession to the WIPO Treaties, is seen as a politically dangerous move. It is not going to be popular with the Indian public.

At the same time, the Indian government represents a constituency that wants to develop a presence for India internationally and particularly a close relationship between India and the United States. And the United States government is campaigning both formally and informally with India to try to make its regime palatable to American interest.

So, it is a complex dynamic and I think that the answer to your question in the long run is that India will accede to the WIPO Internet Treaties. This is why India is modifying its law. But, it will wait until it is not so politically difficult to do so.

These are likely remarks but it is probably one of the most important questions that could be asked about the future of copyright in India.
querist 1: Thank you very much. It was so helpful for understanding. I have another simple question about Indian copyright law, especially about the neighbours right. There are performers’ right, and the right of producers as the amendment. As the whole right of interpretation, how do India take it? India has not joined the Rome treaty. Does India have any idea not to join or they intend to protect partly?

Prof. Rajan: I think that the Indian government is definitely thinking in terms of neighboring rights and the influence of WPPT in particular in India is undeniable. For example, one of the changes that they are planning is to create a moral right for performers. Then another thing is you distinctly see in the act that there is a separation between performers and the treatment of other areas like broadcasting, sound recording and so on. So it is a neighboring rights framework but they seem to have a special status for performers.

Professor Ryu Takabayashi: Thank you. Is there any other question?

querist 2: I have 2 questions. My name is Kanno of Casio. I have 2 simple questions. Firstly, you said that there are some trials takes for 30 years and I would like to know whether there is a possibility of shortening the time, further. If it takes such a long time, there is no meaning for the enforcement, I think.

Secondly, we have an opportunity to exchange ideas with India for the amendment of law and strengthening the control of IP, together with the Japanese government. However, we think that India is not interested in Japanese requests. As you explained prior, probably they will focus on the relationship between US and India further, while the legal system, they are based on the European system. Japan will have more interest in India and ask various requests, and how do you think about it?

Prof. Rajan: Regarding the court system, actually there are two points to notice. You are absolutely right. The enforcement is a theoretical idea when you have such long delays. In fact, the case of Amarnath Sehgal is quite remarkable because he had the stamina because of his stature. He is probably the premier sculptor in all of India over the past 40 years. So he was able to see the case through to the conclusion and most litigants cannot.

So, the Indian court system actually has developed some adoptive mechanisms, for example, interim orders have the status of final decisions. This is exactly what happened in the Amarnath Sehgal case. There was in interim order in 1992 which actually frightened the Indian government into making these amendments to the covering act.

Another thing that is happening is that India is actually trying to set up an independent system of intellectual property right tribunals and as far as I am aware, they are actually doing this with at least the moral support of the United States government. I am a little bit uncertain about the stature of these tribunals because there is a real shortage of expertise to serve judgments in this context. So this is a very new initiative and we will have to see how this develops in the future and if it can help to improve the enforcement of intellectual property rights in India.

And this leads quite naturally to your second point which is – I think you are absolutely right. There is a fascination for all things American in India and India perhaps sees in itself a reflection of the
United States. This may seem like a very strange comment because on the surface, India and the United States look like very different societies but actually there are many similarities in terms of how they see themselves if I can put it actually in that way. So, there is a cultural drive towards very close relations with the United States.

Again, I think that with time, India is going to recognize that it needs diverse international partnerships to be successful and so a country like Japan should be very high on its priority list because Japan is a premier country in the world for technology, even the United States is only number two. And I should add, as a Canadian, it pains me greatly that India does not seem to acknowledge the existence of Canada and yet we think of ourselves as an important country with much to offer in an economic and social partnership with India. So, over time we should see some diversity of viewpoints emerging about international relations.

I had another quick comment to that which is that the influence of the Indian Diaspora should not be underestimated and it is something that you might not appreciate fully unless you are able to go to India. But in terms of the social elite and groups that are involved in technology and education, almost everyone has a personal connection to the United States through relations or friends or members of their community so there is a very powerful link because of the influence of the Indian Diaspora in the United States.

**Professor Takabayashi:** Thank you Professor. As it is 8:45 now and we are to close the session today. We had very interesting seminar about the copyright ambiguity, which has not been well known in Japan, including the Indian relationship with Japan or with U.S. We are very pleased to have such an opportunity, and please give her a big round of applause again.

At the end of the seminar, let me speak about our current project, as I said prior. Today we completed to upload the 43 Indian copyright cases in our database. I have not checked whether the 2 famous cases introduced today are included, though. We will continue creating the database with patent and trademark cases. We have constructing the English database of Asian precedence as one of the activities of the 21st century COE, and we hope you would access to our website.