



The Status of Local Songwriters in Myanmar in the Enjoyment of Material Interests from a Human Rights Framework¹

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Abstract

Since 1914, the moral and material interests of songwriters in Myanmar have been protected by the Copyright Act. Though, their rights have been exploited in different ways ranging from uploading, downloading, and copying by non-commercial users to unauthorized selling, re-using as sound tracks, broadcasting and performing by commercial users such as music producers, event organizers and some other artists. Research which has effectively protected copyright owners and/or the public has been limited and done mainly by local academics. The government has been trying to fulfill local copyright owners' needs by implementing temporary measures which seem to be getting better. Nonetheless, the tension between the government and local songwriters is still ongoing. This paper argues that the Government of Myanmar ought to review the situation of songwriters from a human rights perspective to improve their livelihoods through full recognition and remuneration. To reach this end, the study used the qualitative research methods of documentary analysis and in-depth interviews. Data collection was done from May-June 2016 in Yangon, Myanmar. The study revealed that the new copyright (15th draft) law is still weak to meet the needs of local songwriters' problem, particularly to meet contractual arrangement which is the basic element to enjoy material interests in transferring the rights.

Keywords

Copyright protection in Myanmar, Songwriter rights, Author rights, Human rights framework to author rights

¹This article is extracted from a PhD thesis, titled "The right of authors enshrined in Article 27 (2) of UDHR and its implementation in Myanmar" in the PhD in Human Rights and Peace Studies (International Program), Institute of Human Rights and Peace Studies, Mahidol University.

Introduction

Protection of moral and material interests of songwriters is important in the music industry which is a core component of cultural industries and which can create job opportunities. Without them there will be neither songs nor a music industry. Generally, copyright laws protect an author's economic and moral rights by providing exclusive rights under the term "author" or "copyright owner". Despite protection by the Copyright Act of 1914,² their rights have been commercially exploited in different ways ranging from copying to selling, re-using as sound tracks, broadcasting and performing by others like music producers, event organizers and some other artists. Nonetheless, legal actions on copyright infringement are rare. Only four cases³ were brought to the court until now. Myaing (2007) argued that it is partly due to the lack of severe penalties in the Copyright Act of 1914 and partially due to the time, and the cost consuming complicated procedures of the Court.⁴ Based on her findings, two other scholars⁵ studied the system which could be beneficial for copyright owners through criminal provisions and recommended to the government that they update the existing Copyright Act 1914. None of those papers focused on an authors' real condition. Instead of amending the criminal provisions of the said Act; the government has been drafting new copyright laws since 1996. Meanwhile, seizure of pirated music albums in the number of 3,027 in 2011 (Nge, Pirated copies were confiscated in Tamwe, July 2, 2011), 168,953 in 2012, 3,000 in 2013 and 5,370 in 2014 from Yangon and Mandalay Region is the evidence of ongoing copyright infringements (Hein, 2013). Regarding the new copyright law, all stakeholders are complaining that it should have an effective enforcement system which is in line with the Agreement on Trade Related Aspects of Intellectual Property Rights 1994 (TRIPs Agreement) to which Myanmar is a member state.

²It was enacted by the British Government in 1914. It has never been updated, and is still an existing law in Myanmar.

³The four cases are "Mg NyiPu v. East End Films (1939)", "U Hla Win v. Daw Kyi Kyi alias Daw Yin Wai Lwin (1999)", "Daw Wa Dan Khaung Nan v. Daw Kham Yin & two others (2009)" and "Myanmar Music Association v. Tun Naing (2013)".

⁴Myaing (2007) argues that criminal penalties which only provide maximum up to one month imprisonment and 1000 Kyat in S. 7 and S. 9 under Myanmar Copyright Act 1914 are not enough to deter the future infringement. Thus, she recommended having strong penalties for copyright owners.

⁵Khin and May studied protection for copyright owners in Myanmar. Khin (2011) also argued to have enough penalties for piracy that civil litigation has no deterrence effect in the case of piracy. On the other hand, May argued that though criminal punishment is important to deter rampant piracy, civil litigation for monetary relief is better to be improved to compensate copyright owner's loss as it is the only way to restore the owner's financial loss. Hence, she proposed statutory damages which can be compensated to copyright owners as supplementary provision under criminal litigation system (May, 2012).

This paper partly agrees with having an effective enforcement system. But it does not agree on “to be in line with TRIPs agreement” because protection systems under TRIPs has a lot of potential to undermine the benefits of an author. Thus, it argues that the Government of Myanmar ought to review the situations of songwriters from a human rights perspective to improve their livelihoods through full recognition and remuneration. In other words, this research aims to analyze the new Copyright (draft) law to determine whether it is centering on the author to be in line with Article 27 (2) of Universal Declaration of Human Rights 1948 (UDHR).⁶

This research uses the qualitative research design of documentary analysis and in-depth interviews due to the limited available research on the topic of copyright situation in Myanmar. Seven face to face in-depth interviews taking 40-60 minutes with each person took place in Yangon, Myanmar in May 2016. These respondents included both well-known and amateur songwriters. Purposive sampling was used to identify well known, experienced songwriters who were willing to expose copyright issues in Myanmar. They are labeled as GC which means they are a group of composers. Out of seven, three respondents, GC3, GC4 and GC5, were well-known modern music songwriters. Each of them has written more than 100 famous songs. GC-1 and GC-2 were experienced songwriters who also have a legal background and who are working for the benefit of the music industry. GC-6 and GC-7 were amateur songwriters/singers, and have launched their first music album. They were mainly asked about the impacts of copyright infringement on their livelihood and money, types of infringements which they have been facing, ways of transferring the copyright and the current used methods in solving infringement issues.

A document/legal analysis was done to describe and evaluate a legal framework for authors under international law particularly focusing on the material interests of authors. TRIPs Agreement 1994, Article 27 (2) of UDHR, general comment No. 17 of the Committee on Economic, Social and Cultural Rights (CESCR) on intellectual property rights are the main focus of this study. However, this paper only discusses that which Myanmar is obligatory to follow due to being a member in the case of TRIPs agreement and recognizing as domestic

⁶Not being a State party of the binding International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, Myanmar is not obliged to implement the provisions of ICESCR. However, Myanmar is required to protect the rights mentioned in the UDHR due to two reasons. The first ground is that Myanmar is obligated to promote and protect human rights and fundamental freedoms as a member state of the United Nations (UN) by Articles 55 and 56 of the United Nations (UN) Charter. The second reason is that Myanmar has already recognized the rights mentioned in UDHR as “human rights” of Myanmar.

human rights in the case of UDHR.⁷ Myanmar has published documents and some reported documents by various artists at national workshops, along with other related materials such as country reports and newspaper clippings. These are the main materials for data analysis.

The second section of this paper directly highlights the differences between two frameworks: copyright and human rights on the protection of authors as a foundation of the paper and to understand how authors could be placed in the center under a copyright regime. After that, whether a major breadwinner of the household or not, essential of royalties for songwriters for their livelihood together with their rights which are commercially exploited are discussed to identify the issues which could be solved in a new copyright (draft) law. It argues that identifying practical difficulties of authors are necessary to become fully functional law when it is implemented. Taking identified issues as a foundation, the next part of the paper is a general overview on whether the new copyright (draft) law meets the requirement of songwriters.⁸

Protection of authors under a human rights framework

The main international agreements that mention authors' rights are the UDHR and the ICESCR by acknowledging the link between their creativity and dignity. Article 27 (2) UDHR, states that "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author". By examining the elements set out in article 27 (2) and by referring to general comments No. 17 made by CESCR, this study draws the main components of the provision to clearly see who the protectable subject is and what main elements are to focus a human right framework for copyright protection as well as to cut off areas which are not included in the framework.

Firstly, the term "everyone" in Article 27 (2) refers to human being creator whether man or woman, individuals and/or a group of individuals (UN, 2005). By using "scientific, literary or artistic production which he is authors" and by guaranteeing "moral interests", it

⁷Thus, the provision of author rights included in ICESCR will set aside from this paper. However, as general comments made by the Committee of Economic, Social and Cultural Rights are authoritative interpretation for human rights framework of copyright protection to use as measurement, general comments No. 17 on creator rights is discussed.

⁸Since the focus of this paper is only on material interests of songwriters in Myanmar being exploited by commercial users under the existing copyright legal framework and new copyright (draft) law, the paper will not provide complete picture of other problems in human rights and copyright such as unqualified nature to protect indigenous people and non-nationals under some copyright laws, access to reading materials which causes tensions between public-private dichotomy.

only intends to assure the right of authors and expressly excludes the protection of subsequent rights holders which are protected persons under the term “copyright owner” in the copyright regime. Because of this personal linkage, it does not cover legal entity expressly protected under copyright regime by Article 1 (3) of TRIPs agreement. Thus, the obvious intention of Article 27 (2) of UDHR is to protect human being authors from the exploitation of unprincipled commercial users and other legal entities/people.

Secondly, the purpose is to encourage the active contribution of creators to the arts and sciences by providing remuneration which is necessary for living, to recognize, and to protect both the rights of authors by balancing with the rights of users.⁹ Under the copyright framework, it is trying to protect authors, owners and public users. When there is no proper management, rights of authors can be undermined by the other two groups.

Thirdly, the protection of the “moral interests” of authors in Article 27 (2) of UDHR is optional for the State as TRIPs agreement expressly excluded from the list of protection by Article 9 (1).¹⁰

Lastly, according to the drafting history of Article 27 (2), the entitlement of material interests is only for just remuneration¹¹ for intellectual labor but must be remuneration which could effectively support an adequate standard of living (Yu, 2007). However, it can be assumed that to enjoy an adequate standard of living, authors’ material interests should be guaranteed and remunerated on all commercial exploitation and even through the use of government (Yu, 2007).¹²

To sum up, the major intention of the protection of authors’ rights by international human rights is to safeguard the moral and material interests of the natural authors from being exploited by certain individuals or large, successful companies as well as to ensure that authors benefit materially. Thus, from a human rights perspective, copyright law must be judged by how well it serves the interests of human authors as well as the interests of

⁹Article 27 (1) of UDHR provides that “everyone has the right to freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”

¹⁰“Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6 *bis* of that Convention or the rights derived there from.” Article 6 *bis* of Berne Convention is the protection of moral rights of author.

¹¹The original Article 43 of Cassin’s draft of the UDHR included the phrase “just remuneration for (the author’s) labor in parallel with a moral right.”

¹² To guarantee the remuneration of authors and inventors is the main intention of human rights framework because of the bitter experiences of the wide use of conscripted scientists and engineers in Nazi Germany and Stalinist Russia in the World War.

general users. Taking into account the basic idea of the aforementioned human rights framework, the following sections analyze the current situation of songwriters under the current copyright framework.

Unsecured livelihood of songwriters in Myanmar under Copyright Act 1914

The livelihood of songwriters depends on the remuneration or royalty received from the assignment or licensing of their creations within the limited period provided by copyright law. Under S. 5 (1) of the Copyright Act of Myanmar, authors/songwriters are the first copyright owners of all moral and economic rights. This economic right lasts until 50 years after the death of an author. Within this period, by S. (3) copyright owners can enjoy copying or reproducing the work; performing the work in public; making a sound recording of the work; using it in a motion picture ; broadcasting; translating and adapting the work (S.1 (2)). Any commercial exploitation without assignment or license from authors is called copyright infringement. Hence, for the commercial exploiter, for instance singer, music producer, event organizers, TV, FM radio stations are required to obtain either a license or assignment not to be sued by the author. By the same token, to earn material interests systematically, authors must allow those commercial users to use the works.

Earning is important to support a family and to enjoy basic human needs or basic human rights such as the right to just and favourable remuneration (Article 23 (3) of UDHR) and the right to an adequate standard of living (Article 25 (1) of UDHR) which includes adequate food, clothing and housing, and to the continuous improvement of living conditions. In the past, giving license or assigning the use of a song to record (recording right) and the use of song as a playback (synchronizing right) were major earnings for Myanmar songwriters. In the case of recording right, the singer directly buys from the songwriters. Thus, the royalty earned from the right to record is a more clear process than synchronizing right. The transaction is only between songwriter and singer. The songwriters could enjoy 100% of royalty from recording right.

When a song is used in playback, it is called a synchronizing right, and the situation gets complicated. There can be at least two conditions: the use of only lyrics or melody of the song which directly has to deal with the songwriter and that of the recorded song which has to deal with the songwriter, the singer and the producer of the song. This means that when the synchronizing right is used, a royalty must be paid to the songwriter alone or the respective stakeholders based on how it is used. Nonetheless, until 2008, there was no sharing practice among stakeholders. Rather, any person, either songwriter or singer, who

had received a contact from a movie director will receive the whole share of the royalty¹³ (GC-2, personal communication, May 16, 2016 & GC-3, personal communication, May 22, 2016).

In the case of performance rights under S. 35 (1) of the existing Copyright Act, "performance" means any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representations made by any mechanical instrument. Under this term, the use of songs to perform on the stage by singers, music at restaurants, TV broadcasts, etc., have become increasingly important earning for songwriters particularly when the government allowed private companies to play radio in 2002 and televisions in 2005 and when those rights are commercially being exploited (Thwin, 2016).

According to international practice, songwriters can exercise their rights by an agent and by the author's administration organization (Distabanjong, Keys success factors for composer's copyright collective management regime in Asia countries, May 26-27, 2004). It has been shown that practicing the musical rights through collective society is more fruitful particularly under the age of advanced technologies and when there are many commercial users to detect (Liu, 2007). When there is not a proper organized one in Myanmar, they have to practice those rights individually, by analogous organization¹⁴ and with alike-minded group.¹⁵ Since 2009, songwriters in Myanmar have been struggling to enjoy the right of public performance not only from singers and event organizers but also from the hotels and restaurants by advertising through the state-owned newspaper (PN, Music Copyright and its voice, March 25, 2010). Very recently, the vice president of Myanmar Pro, which is the first authorized author's organization formed officially in March 2016, did a press conference on why his organization has issued a warning to take legal action on organizations and persons who have failed to take the license of performance rights which they have been asking from them. The warnings said that ninety percent of live performances have been performing

¹³In the interview with GC-2, he explained that "First, the composers did not know to pay the royalty to the other stakeholders. When the singer realized that his/her voice was re-used and did not receive any royalty, he/she got angry. So, to revenge on the composer, the singer sells the song without permission of other stakeholders. So, in the previous days, selling the song to use in movie was done by anyone who had the chance to sell, and it became the practice of music industry." Similarly, GC-3 said that "In one example, the music producer (Y) sold one famous song of him to use in the movies and videos. Besides, the title of the song was used as the title of video. But, the composer did not receive any royalty for them."

¹⁴Myanmar Music Association (MMA) is engaged in collection from TVs and FM radio stations and distribution of money to copyright owners. It will be explained more under the sub-heading of "systematic authorized agent of collecting money".

¹⁵To collect performance rights, 30 local composers set up Myanmar Composers and Lyrics Club (MCLC) in 2009 which was predecessor of Myanmar Performance Organization (Myanmar Pro).

without paying any royalties to songwriters although they were informed by the Myanmar Performance Organization (Myanmar Pro) to do copyright clearance (Aung, 2016). Another singer songwriter who is planning to take legal action against FM stations alleged that his music had been used by stations upwards of 45,000 times without compensation or authorisation since 2012 (Mon, 2016).

By looking at the above situations, some reflections are that (i) the exploiters are business organizations (often event organizers) and other copyright owners (singers may be copyright owners if their recorded song is played), (ii) the rights of authors are necessary to differentiate from copyright owners as well as to look at them from a human rights framework because the purpose of the human rights framework is to protect the weak from the strong, the poor from the rich and the disadvantaged from the advantaged (Castle, 2010), and it did not favour authors under the existing copyright Act of 1914.

Under this circumstance, how we can save their lives from being exploited? What will their situation be under a new legal framework is the question to be considered.

Root causes of the problems

There are two main causes: not following the legal requirements in business transactions and not having a systematic royalty collecting society discussed in the following paragraphs. Indeed, the above mentioned exploitations by commercial users can be taken based on a breach of license or assignment provided in Section 5 (2) of the existing 1914 Copyright Act since it is a direct infringement by a licensee or assignee. If there is no written contract between them, the songwriter will have many potential chances of winning the case as the law expressly provides "no assignment and license will be valid unless it is writing signed by the author or his legal representative."

(a) Lack of systematic ways of business transaction

There are two ways that a copyright owner can transfer some or all of his or her copyright: through a license or an assignment. In an assignment of copyright rights, the owner sells his or her ownership rights to another party and has no control over how the third party uses those rights. This is sometimes referred to as a sales agreement for copyright. The buyer (assignee) can then use the copyrighted work or do whatever he or she likes with all of the assigned rights that the original owner had. A valid assignment of copyright must be in writing and signed by, or on behalf of, the copyright owner/assignor. The subject of the assignment must be clear as to what copyright is being assigned. In the case of licensing, the owner maintains his or her copyright ownership, but allows another party (the licensee) to exercise some of those rights with clear terms and conditions.

The essence of S. 5 (2) of the existing Copyright Act is to have a written contract for commercial users. Concerned with this, there was a leading decision in 1999 which favoured

the author based on no contractual license signed by the writer with the movie director for adaptation of a novel to a movie (*U Hla Win and other vs. Daw Kyi Kyi alias Daw Yin Wae Lwin*; 1999, *Myanmar Law Reports (Civil)* p.208-221). In this case, the writer Daw Kyi Kyi wrote the novel "*Hmine Wae Chit TeKhetThissa*" which was published and became famous in 1981. Then, she sold the manuscript to Daw KhinThan for reproduction of it into video. Daw Khin Than resold the manuscript to U Hla Win (Pho Wa video production) in 1999. As the movie director changed the name of the novel without permission from the author, the author sent the objection letter to him. Nonetheless, the video was launched and distributed to the whole country. There was no contract either between the author and first buyer, Daw KyiKy and Daw Khin Than or, between the first buyer and the second-buyer, Daw Khin Than and Pho Wa video production. Thus, the Supreme Court clearly decided that while there was no written or documentary evidence of assigning the rights, the assignee or licensee had never received any adaptation or re-assigning rights.

Although this case should become the turning point for the protection of authors for all the sectors in the copyright industry, no other similar cases have been brought to the court till now. It is a good example for the producers, publishers or any other commercial users to have a written contract with the author. Whenever there is no contract, it becomes possible to lose a case for a commercial user. In other words, this example showed that the author has more rights than a publisher and producers under the existing 1914 Copyright Act.

Although a written contract is the requirement to be valid for any assignment or licensing of copyright, the author who follows this requirement is hardly found. Previously, all the respondents did not use a contract. This is not because they do not understand the nature of the contract because even the songwriters¹⁶ who have a legal background rarely do a business transaction with a written contract (GC1, personal communication, May 13, 2016, GC2, May 16, 2016 & GC3, May 17, 2016). Not asking for the contract is just a matter of habit which is common in Myanmar and there can also be a fear of losing the investor or the existence of long lasting friendship with all stakeholders in the music industry due to the small size of the industry in Myanmar, and the belief that keeping a good reputation is important to long lasting survival in the music industry. The method which has been mostly used is mutual understanding based business transactions. Instead of clarifying over the use of a song, "let's share the benefit mutually in the future" was a common conversation for the copyright transaction (GC-5, May 27, 2016 & GC-6, May 15, 2016). The songwriter assumed that a singer or a user completely understood that the composer is the sole copyright owner of the song in the future. Meanwhile, the singer thinks that the song is under his/her control after it is bought from the songwriter.

¹⁶Respondents (GC-1) and (GC-2) are LL.B degree holders.

Then, by reference to the leading case decision of “*U Hla Win and other vs. Daw Kyi Kyi alias Daw Yin Wae Lwin 1999*”, it should be deemed that songwriters or authors are in the favourable position to win a case. But, the case of not having a written contract in the music industry can be slightly different and complicated. Although there is no written contract directly between songwriters and singers, there is one document which can be assumed implied consent between them. It is the document which the songwriter has to submit lyrics before going to be recorded to the Press Scrutiny Board (PSB)¹⁷ under the Ministry of Information by mentioning the name of the singer and the purpose of the song to be used with the signature of the songwriter and the music producer. The purpose of this document in the past was for cassette tape only. Anyhow, it becomes the evidence letter at least for recording to the singer and the music producer. This could be assumed partial licensing. However, many flaws such as not mentioning about copyright owner, royalty sharing, not to use the song other than the said purpose, etc., are the reasons for being exploited by the commercial users. Particularly, when the song is re-used by the same producer and the same singer with the same player in the CD or music video other than tape, disputes with composers were bigger.¹⁸ When there are no express provisions on assignments or licensing, singers and producers assume that they have the right to manage the use of the song other than recording. For instance, they use the song in live performances which could reap many profits neither taking consent from nor paying royalties to the songwriters. In 2009

¹⁷The PSB was inaugurated by Ne Win Government in the 1970s. It was composed with a group of Myanmar intellectuals and prominent writers (AungZaw. (April 2004). Chapter (6): Burma: music under siege. *Shoot the singer*. Retrieved [11 February 2017] from, <http://freemuse.org/archives/1027>. It functioned as an agency for censoring all media content. It was abolished and transformed into Copyright Registration Department in 2013. (MOI, “*History of Information and Public Relation Department (IPRD)*”, Ministry of Information official website, Retrieved [11 February 2017] from, http://www.moi.gov.mm/iprd/sites/default/files/IPRD%20History%20Latest_0.pdf

¹⁸GC-2 who is a famous songwriter and musician said in an interview done in Yangon that “When we talked about music album, the types produced have been different based on technology such as tape series, CD, VCD and DVD, etc. So, when we submitted for the scrutinizing committee, it was agreed to use in tape. There was nothing mentioned to use in the movie. We mentioned that ‘we are going to use for tape’. And we did not say anything on rights such as assignment or license. Since there was nothing clear arrangement between us, we could not say that the rights which appeared due to the technology are only related to the composer. The respondent (GC-5) said that ‘People do not know how to do and also do not understand this. Moreover, there is no contract at all. But, there is one thing like a contract. That one is when the song is submitted to the Scrutiny Board, registration becomes the evidence for us. In this evident letter, the composer allowed the producer to use tape, CDs, VCDs, and DVDs for one time use’.

when composers started collecting for performance rights, neither singers nor event organizer of Iron Cross, one of the famous bands in Myanmar, paid the royalties to the composers by expressly saying no. Indeed, this issue was brought to the MMA which is the only organization in charge for the music industry. Nonetheless, MMA failed to settle the issue (GC-2, May 16, 2016, GC-3, May 22, 2016, &GC-5, May 27, 2016).

In the same way, there is no contractual license between TV channels and FM radio stations for the use of songs with individual songwriters. The first launched partial private owned FM radio station was City FM on 1 November 2001 (Agga, 2002). Since it started running for a commercial purpose and using most of the popular songs, songwriters had complained to pay reasonable royalties for the use of songs (GC-5, personal communication, May 27, 2016). Hence, if songwriters take action for the use of their song without consent, it is less predictable that they are going to win the case based on the above mentioned document. The position to win is on the margin and the complexity of the case is going to take their time and cost of litigating.

To change the above mentioned situation, some songwriters, including respondents GC-3 and GC-5, started to use contractual assignments over the use of songs in 2016. Though it is not difficult for respondent GC-3 who does not need to depend much on the money to ask for a contractual assignment, it is somehow difficult for respondent GC-5 who is the major breadwinner of his family due to the fear of rejection even he is a well-known person. Even then, respondent GC-3 could only ask acquaintance or amateur to sign the contract. Neither respondents GC-6 nor GC-7 or their bands asked for the contract due to the fear of destroying their friendships and in this case their songs are used by close friends for the fear of them being rejected by producers. They only allow close friends to use their songs based on trust.

Thus, in reversion of the trust-based or mutual based business transaction to contract based business, many experienced songwriters have tried many times with little success. Willingness to change the situation is blocked by the feeling of hesitation for asking the persons who they have known for a long time and by the underdog position of the songwriters in the music industry. Nonetheless, some songwriters such as A Yoe in 2007 (Weekly Eleven Media Group, 2008), respondent GC-2 in 2010, and respondent GC-3 in 2016 started using a contract for a music copyright license for recording tapes, CDs, VCD, broadcasting and performing songs live.¹⁹

Overall, the failure to follow the proper licensing and assignment system is the whole root cause of today's royalty collection issue. At the same time, this paper is aware

¹⁹GC-3 said that I ask them whether you want me to continue composing songs for you or not. If they say "yes", I told them "you have to pay any tax collected from your performance and to pay royalty for composer".

that since the collection of royalties are concerned with the mass users such as TVs, FM radio stations, restaurants, etc., it is difficult to guarantee that a songwriter could manage their licensing and collecting process alone. Thus, there should be a proper association which can collect and distribute the royalties.

(b) Lack of a systematic authorized agent to collect royalties

The use of individual producers, singers and event organizers for recording, performing and reproduction can be managed by individual songwriters by directly contacting each of them before a transaction is done. But, in the case of TV channels, FM radio stations, restaurants, KTV, etc., the frequency and number of the songs used even in one day are massive. The songwriters to be contacted by those commercial users in the transaction could be numerous. Hence, this situation is difficult for the commercial users to contact each and every author every time a song is played on air. In the same way, it is unrealistic for the author to monitor the number and frequency of songs used by commercial users and to contact each of them to create a license.

Authors or copyright owners can collect their royalties through a legally authorized collective management organization²⁰ in other countries. Neither a legal framework nor a fully functional authorized collective management organization is available in Myanmar yet. However, the gradual emergence of partial privatized FM radios²¹ and Television channels²² could cause the declination of album sales stimulated MMA's members to claim royalties from users since 2003-4 fiscal years from the City FM station. The interview with respondents GC-1 (May 13, 2016), GC-3 (May 22, 2016), GC-4 (May 26, 2016) and GC-5 (May 27, 2016) demand for royalty was rejected by City FM radio station by saying that they would only use songs allowed to air freely. Tireless efforts of songwriters and singers for royalty could accomplish the first official collection from Mandalay FM in 2007 and City FM in 2008. MMA, the representative of musicians, has signed the contract of license to use by Mandalay FM radio station by mentioning Mandalay FM is required to send the list and the frequency of songs that are aired (Weekly Eleven Media Group, 2008).

²⁰ It is an administration system in which owners of rights authorize collective administration organizations to administer their rights, that is, to monitor the use of the works concerned, negotiate with prospective users, give them licenses against appropriate fees and, under appropriate conditions, collect such fees and distribute them to the owners of rights. (John, W. R. "*The importance and functioning of collective management organizations*", WIPO/CR/DAM/05/2, p.4).

²¹ The City FM was the first station which played for commercial purpose in 2001. Currently, there are ten FM stations in Myanmar.

²² Interview with GC-5, MRTV4, a pay-TV channel jointly set up by the Myanmar Radio and Television Department (MRTV) and the private company Forever Group, was launched in December 2006. Before that, state-owned TV played only government approved programs which were excluded western music.

MMA set up a Copyright Management Committee (CMC) and systematic country's popular music library in 2010 with the aim of helping musicians to secure royalty payments from the use of their works (Mon, 2016). The decision on royalty rate was collectively made by MMA's members by the meeting resolution. The collected money has been shared among five layers such as producers, composers, musicians, singers and sound engineers. Since there are no laws, rules, and regulations on collecting, sharing and managing, some songwriters do not agree on the royalty rate decided by and system run by MMA. In that case, apart from sending an objection letter to the commercial users to stop using and MMA to manage the issue, no litigation has been done yet.²³ Nonetheless, it cannot be said that the collection of royalties done by MMA has been successful because since 2009, in some cases, the MMA could not collect royalties from FM radio stations, TV and other event organizers for performance rights on behalf of songwriters. A good example is a rejection to pay a royalty for performance by Iron Cross (IC), a famous music band of Myanmar, in their use of songs in any live show for two grounds. The first ground is that it is bothersome for them to do copyright clearance every time they do a live performance. The second ground is not a simple answer because they denied to pay royalties as they know the composers could not do anything rather than sending objection letter²⁴ because in its reply to the notice of Myanmar Composer Lyrics Club and Company Ltd. (MCLC) for copyright clearance, manager of IC band expressly stated that they are going to follow the decision of MMA.

Due to the failure to get royalties by the MMA during the IC case, there are some songwriters who have started managing their rights by setting up MCLC in 2009. It was succeeded by Myanmar Performance Rights Organization (Myanmar Pro) in 2016. Since 2009, it started struggling with performance rights by issuing a notice to various users through the state-owned newspaper to the managers of IC music band in December 2009 and in February 2010 as well as Myanmar Water festive stages to take the performance license. Nonetheless, the respondents GC-1 (May 13, 2016) and GC-5 (May 27, 2016) revealed that the composers have received only ten percent of performance rights. Very recently, the vice president of Myanmar Pro did a press conference on why his organization has issued a warning to take legal action on organizations and persons who have failed to take the license of performance rights (Aung, 2016). From January 2013, MMA allowed

²³Jet MyaThaung who has been famous singer-songwriter sent an objection letter to five leading FMs in Myanmar and claim for compensation since 2012. He is preparing to sue the said FMs by complaining that his music has been used by the stations upwards of 45,000 times without compensation (Mon, 2016). Myint Moe Aung is also planning to sue all the users who failed to take license for performance rights (Aung, 2016).

²⁴This case was brought to the MMA. First the MMA issued a notification by stating that every commercial user was required to take a performance license in advance through the state-owned newspaper. But, MMA revoked this notification within two weeks.

individual management over the songs to the songwriters or copyright owners who want to collect the royalties individually. Hence, the payment of royalty by commercial users also mainly depends on the attitude of the business owners particularly when there is a lack of legal framework and enforcement on failure to compensate.²⁵

The above-mentioned two situations (i) the lack of practicing contractual arrangements and (ii) the lack of a systematic authorized agent for collecting royalties under the existing Copyright Act should be settled by a legal framework. Bearing this condition in mind, the following section is going to identify whether the new legal framework could protect the material interests of songwriters.

Reflection on authors' rights in the new copyright (draft) law 2015

The new copyright (draft) law which had been drafted since 2004 was issued for public consultation in 2015. The following is an analysis on the law concerned with the issue of authors.

(a) Licensing and Assignments

When it becomes a source of earning for daily living, each stage from negotiation to its execution and termination of licensing and assignment is critical for authors. In this sense, making a contract between authors and the other subsequent right holders means the authors want to secure remuneration and oversee the use of works making sure it is within the allowance by the authors. The provision of licensing and assignments should be for the purpose of protection of authors or mutual benefits of both parties. Alternatively, provisions should have a fair determination of the remuneration and its effective payment to authors.

The provisions of the new copyright (draft) law mentions that a copyright owner also has the right to transfer, assign or license the aforesaid rights to others (S.28) and if the work is a registered work, then the assignee or licensee must register on such transfer at the Intellectual Property Office by section (S.29 (a)). Moreover, if they have something to add or delete in any of transferred documents, any of the parties must apply for the correction on the registration paper with document-based evidences (S.29 (b)).

Apart from saying that authors are able to transfer, assign and license, the draft law is silent on the ways of copyright transfer. Even it does not include the similar stipulation such as "unless the assignment or license is written and signed by the author or legal representative, nothing is valid" provided in the existing Copyright Act 1914. However, it could say that the phrase "document-based evidences" used in section 29 (b) impliedly refers to have a written contract. Nonetheless, without clear expression for the requirement of

²⁵Interview with GC-5 mentioned that Myanmar Pro has been fighting for compensation of royalties of performance right from the use of famous bands and some signers since 2009.

written contract makes the situation which the author can control insecure. Do the law drafters intend to apply the principle of contract law which can be enforced for an oral contract? It is very doubtful that disputant parties are willing to spend their valuable time for an oral or implied contract which can in many cases produce less reliable evidence. They should notice the unwillingness of songwriters to take action and go to the court even when there is an implied document and even when they have the affirmative condition to prevail in the suit under the existing law.

Hence, the new draft law at least should include a similar contractual requirement condition stated in the existing Copyright Act 1914 in which the law said any kind of copyright transfer must be valid by only written contract with two witnesses. This study asserts so based on the court decision on "*U Hla Win and other vs. DawKyikyi alias Daw Yin WaeLwin*" case which favored authors when there was no written contract of copyright license or assignment. This case showed that when there is no contract which is mandatory under the law, copyright is never transferred to any party and still remains with the author. This situation favors the author. Meanwhile, it can also be seen as a fore warning to potential subsequent right holders about importance of the contract which can make them lose their benefits on copyrighted materials when there is no contract. It could be used as a weapon to alert all stakeholders to follow on the written contract. Thus, exclusion of the similar requirement from the new copyright (draft) law can create no better condition than before.

Under the above-mentioned circumstances, obligatory contractual arrangement with penalties for failure to do so for both parties should be included in the new copyright (draft) law. In addition, available remedies might be different between the availability of a written contract and none of it because of four conditions. The first reason is that authors from the music industry are reluctant to ask singers or producers for profit sharing because they don't want to damage their friendships. This is especially true for amateurs who rely heavily on producers. Second, when most authors or stakeholders in the copyright industry are not accustomed to the practice of making contracts and taking action on a breach of contract by contract law, when there is no express written contract, the condition will make them take time to prove the authorship and it will become again dormant practice for taking like to claim moral rights infringement through tort law in Myanmar. Third, it will become the sound evidence of which rights are transferred and how royalty is going to share. Fourth, if the contractual arrangement in the copyright law provides more detail on the licensed/assigned rights, mode of exploitation, then it is useful for authors who are a lack of knowledge on contract particularly when the local authors deal with the foreign users. Last but not least, the emerging trend of using contracts and the unsuccessful attempts to secure rights through contracts discussed is the excellent support to include contractual provisions in the new law.

These contractual regulations can be a method which ensures a balance relationship between publishers and authors, commercial users and songwriters so that copyright is effectively licensed while fair treatment and remuneration are accorded to authors.

(b) Collective Management Organization

The necessity of systematic association for royalties' collection is fully aware by the legal drafting members as it is developing for the first time to have the system in the law. By section 55 (a) of the draft copyright law, copyright owners may form a collective management organization. The members of CMO are creators, right holders, performers, phonogram producers, publishers and technician of the copyright industry (section 55 (b)). Mandates of CMO are provided in section 57, (a) to develop the improvement quality creations, performance, and phonograms, (b) to do mediation and settlement of infringement cases; (c) to collect appropriate remuneration or royalties from users on behalf of copyright owners and to distribute those collected royalties to the concerned owners; (d) to keep extra copyrighted works for the purpose of keeping records, (e) to communicate with other international collective management organizations but with the approval of in charge Ministry and (f) to follow the rules and regulations stipulated by the Ministry.

There is no express definition for a "collective management organization" in the draft law. But, by referencing the provisions, it can be defined as "an organization composed with authors, copyright owners and other stakeholders of each sector to promote the quality creations, performance and phonograms, to do mediation and settlement of infringement cases and to collect appropriate remuneration from users and to distribute to authors and copyright owners".

Moreover, according to S.57 (c), it can be assumed that it is CMO who is going to determine the royalty rate because the law provides that "CMO should collect the appropriate remuneration from the users and distribute to the right holders." If the author or copyright owner is the main determiner of the royalty rate, they could use the term "CMO should collect the remuneration determined by copyright owners..." Anyway, this phrase assumes that the royalty fees are established by voluntary agreements by private negotiations between the CMOs and the music user. It impliedly means that music users need to take prior consent from the CMOs.

Having a legal framework will be beneficial for both authors and commercial users. In addition, the current intended use of voluntary licensing can provide autonomy to authors. But, it is doubtful to produce a beneficial result. For example, since the users need to take prior consent, it could consume time to compromise the user's willing to pay a price and the owner's willing to license price. Plus, members of collective management organizations, it will be difficult for the music users to contact and identify the rights owners who are not members

of CMO. It can be a hindrance for users and many potential musicians to be sued with copyright infringement. In that sense, the legal drafters should use caution. They should think about an alternative system such as a statutory licensing system.

Overall, anew copyright (draft) law is still required to consider the different types of issues faced by authors in each sector of the copyright industry. This paper does not mean the copyright (draft) law guarantees that the author will reap the highest profits. Rather, it reminds to the legal drafters to assure that the songwriters are remunerated on every commercial use.

Conclusion

This paper has argued that the Government of Myanmar ought to review the situation of songwriters from a human rights perspective to improve their livelihoods through full recognition and remuneration. According to a human rights framework, the rights of natural authors are protected from being exploited by certain individuals, or large business organizations. The findings of the presented paper suggest that the current copyright situation in Myanmar needs to pay more attention to authors because their performance rights have been exploited by singers, event organizers, business organizations such as FM stations, broadcasting organizations, restaurants, KTV, etc. Moreover, failure to follow the compulsory contractual obligations and the lack of systematic collecting society makes the authors fail to enjoy ninety percent of their material interests from performance rights used by business organizations. Exclusion of contractual arrangement in the new Copyright (draft) Law cannot guarantee the material interests of authors in the future. Thus, the study offers that compulsory contractual arrangement under licensing and assignment of the works should be included in the new copyright law as it can balance the power between authors and business organizations. The paper also proposes to have a system which allows the commercial users such as broadcasting organizations and FM stations to use the copyrighted works with remuneration but without taking permission. Finally, the study suggests that policy makers and legal drafters in Myanmar reexamine the new copyright (draft) law before it is enacted, although it is not a conclusive answer to the question of what the exact match provision of compulsory contractual arrangements should be for Myanmar. This topic needs further research.

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