



Limitations of the Myanmar Government in Reforming Copyright Law to Meet Local Author's Concerns and the Standard of Article 15 (c) of ICESCR

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Abstract

The government of Myanmar has been re-drafting its copyright law since 2004. It has been doing so for three reasons: to fulfill the required obligations of the TRIPs Agreement of 1994 and the ASEAN Framework Agreement on Intellectual Property Cooperation of 1996, to prevent persistent copyright infringement issues in Myanmar, and to attract foreign direct investment in the creative industry. At the time of this writing a new Copyright Bill is ready to be discussed in Parliament. However, according to a study on the bill and its drafts (Aung, 2017), it will not meet the essential needs of local authors in Myanmar. Thus, this paper will outline the problems of the government in protecting the local authors' moral and material interests. This study uses a qualitative research design. Documentary research and key informant interviews with twenty-four participants were the methods of data gathering. The paper argues that the government's inability to address local authors' concerns in the revision of the Copyright Bill is due to faulty policy formulation due to the lack of awareness of the subject area among the officials themselves, lack of clear understanding of the issues to be solved, lack of democratic values restricting the participation of affected groups, and insufficient cooperation between related government institutions.

Keywords

Copyright law reform, Author's rights, Myanmar Copyright Law

Introduction

The government of Myanmar has been trying to reform the national copyright system since 2004 for three reasons:

1. The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) 1994, and the ASEAN Framework Agreement on Intellectual Property Cooperation 1996¹
2. to prevent persistent copyright infringement issues, and
3. to attract foreign direct investment in the Myanmar creative industry.

Regardless of such declared purposes, safeguarding the interests of the original creators or authors is part and parcel of the copyright law. Thus, one of the objectives of the new Copyright Bill² enumerated in Section 3(b) is to give protection to both the author of the literary/artistic work and the copyright owner. Obviously, authors' moral and economic rights can be threatened by commercial and non-commercial users. Aung (2017, p. 80) has confirmed the exploitation of authors by commercial users and other authors. This is partly due to the law and partly due to authors' lack of knowledge on the subject. Although the first issue is expected to be solved by adding relevant provisions in the Copyright Bill, Aung (2017) points out that the bill cannot solve the main issues of local authors such as contractual arrangements³ and Collective Management Organization. This situation also does not meet the obligations of Article 15 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966.⁴

To meet the issues of local authors, the proper use of knowledgeable resource persons and their contributions to the drafting of the law are important, particularly in a country where the democratic system is immature. Thus, the paper argues that these problems are due to faulty policy formulation due to the lack of awareness of the subject area among the officials themselves, lack of clear understanding of the issues to be solved, lack of

¹ The key issue of those two agreements is to provide more favorable conditions for either corporate or individual copyright owners rather than authors. This situation is directly contradictory to Article 15(c) of ICESCR which mainly protects the rights of the "human author".

² The Copyright Bill was passed by the Amyothar Hluttaw (Upper House of Myanmar Parliament) on 15 February 2018. At the time of this writing, the Bill is ready to submit to the Pyithu Hluttaw (Lower House) and Pyidaungsu Hluttaw (Assembly of the Union).

³ Although the contractual finding of Aung (2017) was based on the Copyright draft of 2015, it is still applicable, because Aung (2017: 88) cited obligatory contractual arrangements with penalties for both parties for failure to fulfill these arrangements. The proposed Copyright Bill of 2018 only includes the requirement of written contract.

⁴ Myanmar ratified ICESCR in October 2017. The Covenant came into force in Myanmar in early of 2018.

democratic values restricting the participation of affected groups, and insufficient cooperation between related government institutions. Thus, the object of this paper is to analyze the challenges of the Myanmar Government in this reform process.

The study is generally qualitative and uses document review and key informant interviews to explore the issue. An intensive study was undertaken of three groups of participants:

- relevant high-level officials from the Ministry of Education/ Science and Technology (MoE/ST)
- key practicing Intellectual Property (IP) lawyers, and
- representative authors from the music and book industries.

It is important to explore the role and experiences of practicing lawyers as well as representatives of the copyright industry in the law reforming process, in order to specifically understand the gap between theory and practice. Using a semi-structured format, twenty-four participants were individually interviewed in Yangon and Naypyitaw in May 2017. By using code numbers for each group, such as the group of professionals (GP),⁵ the group of composers from the music industry (GC),⁶ and the group of writers from the publishing industry (GW),⁷ their names were kept anonymous. Being well-known experienced authors and practicing IP lawyers were the criteria for selection of the interviewees on the assumption that they were active in the reform of the copyright law.

Since this study only focused on the two most problematic areas of copyright in Myanmar, the music and publishing industries, the findings of this study cannot be assumed to be representative of all authors in Myanmar. However, focusing on some selected well-known authors from these two sectors is credible because they are the most vulnerable to copyright infringement in Myanmar. This focus actually strengthens this study by providing deeper understanding of the situation.

This paper first provides a general sketch of the leading role of the Intellectual Property Department in the MoE/ST to understand the wider situation. The second part of the paper identifies the limitations of the IP Department and of the government in formulating the new Copyright Bill.

Role of the Intellectual Property (IP) Department

⁵ There were altogether nine participants, ranging from academics to practicing lawyers and senior officials from the Ministry of Education/Science & Technology

⁶ There were altogether eight authors from the music industry.

⁷ Eight authors from the publishing industry in Myanmar also participated in the research project.

Becoming a member of the TRIPs Agreement in 1994 obliged Myanmar to update the existing obsolete Copyright Act of 1914, making it consistent with the provisions of the TRIPs Agreement and covering modern issues. Instead of merely upgrading the old act, they prepared an entirely distinct Copyright Law in 1996.

In drafting the current new law, Myanmar should be aware of the responsibilities in the ICESCR, which encourage a balance of protection between authors and users.⁸

Assignment of focal department for Law Drafting

The Office of the Attorney General (OAG)⁹ was assigned to draft all IP laws in 1996 by the State Law and Order Restoration Council (SLORC) (Aye 2015, p. 87). Nevertheless, the Prime Minister at that time felt that invention was important for the all-round development of the nation, so the drafting of the IP law was shifted from the OAG to the Ministry of Science and Technology which is now combined with the Ministry of Education¹⁰ as the (MOE/ST). Thus, an IP Department was established in 2002 under the MOE/ST to be the focal department of the World Intellectual Property Office (WIPO) and to draft the new law with the assistance of the OAG. Since then, it has taken massive responsibilities to set up an effective IP system by drafting all the bills on intellectual property (Thwe 2014, p.16), and promoting IP awareness through frequent coordination and cooperation with experts and experienced persons from international and local organizations. On 18 August 2004, the IP Department began drafting IP laws in collaboration with the OAG (JICA 2014). Here “collaboration” means the OAG only provides legal opinions when drafts are submitted to it.

Drafting IP laws

Drafting the four main IP laws (Patent, Industrial Design, Copyright and Trademark) was to be done with the support of various local foreign experts as well as other responsible persons from related Ministries through consultation meetings. In reality, instead of regular meetings, most were done in a rush, especially when World Trade Organization (WTO) deadlines were approaching. For example, there were thirty-five discussion meetings on four intellectual property draft laws before the initial deadline for transition to full compliance for LDCs in January 2006. This was just before the expiration of the first deadline of TRIPs implementation. After getting an extension of the TRIPs deadline to 2013, there were no

⁸ There was also detailed discussion of the Human Rights Framework for Intellectual Property, titled “The status of local songwriters in Myanmar in the enjoyment of material interests from a Human Rights Framework perspective,” (Aung, 2017).

⁹ After 2010, it became the Union Attorney General’s Office.

¹⁰ It combined the two ministries in April 2016 by Notification No. 1/2016, dated 30 March 2016.

further discussion meetings until May 2013. Meanwhile, Myanmar received further extensions to comply with the TRIPs obligations by 2021 (WTO 2013).¹¹

Before finalizing the draft law to circulate for wider public consultation, several internal discussions were organized by the IP Department during 2013-2015 (Thwe, 2015, p. 11). After repeated amendments over twenty years,¹² the 15th draft of a Copyright Law, which included 97 sections, was circulated in July 2015 to the public for the first time. However, due to changes in the government, in November 2015, the discussion on IP Laws was put on hold. Even after the new NLD government took power, and though promulgation of IP laws should have been at the forefront of policy, it has not been discussed in Parliament at all. Meanwhile, the IP Department is drafting the rules and regulations for the implementation of these laws. For the time being, all that can be done is hope they will be submitted to Parliament.

Aung (2017) has already proven that Myanmar authors are not fully protected. Anyone who participates in the legal drafting is duty bound to bring the draft in line not only with the obligations of the TRIPs Agreement, but also with local conditions as well as obligations to protect cultural rights and the right to fair compensation. This is the general situation which places inevitable limitations upon the IP Department and the Government of Myanmar in trying to realize the rights of authors, as discussed in the next section.

Limitations of the IP Department in Myanmar

Limitation of human capacity in the area of copyright

Although Myanmar has had a copyright law since 1914 as a British legacy, it does not have many resource persons in academia or in practice. Only after 1995 did the IP laws, particularly copyright and trade-mark laws, become popular subjects to learn among local legal professionals and scholars, due to the need for new IP laws to cover issues caused by advanced technology and the gradual influence of WIPO and WTO to implement the TRIPs obligations. “Popular” in this case’ means people starting to learn what intellectual property actually is. A personal interview with respondent GP-2, who is now the founder of a famous IP law firm in Myanmar, reflects the situation as follows:

I set up my own law IP law firm in 1995 when IP became a popular subject. But accessibility of IP-related reading materials was limited, even in the libraries of foreign embassies. No training, distance learning or internet was available to learn IP. Meanwhile, a few senior law officers were sent abroad to learn IP in short-term

¹¹ WTO members agreed on 11 June 2013 to extend until 1 July 2021, the deadline for least-developed countries to protect intellectual property under the TRIPs Agreement, with a further extension possible at that time.

¹² Counted from the year the Copyright Law (first draft) was written up by the IP Department (2004).

courses because at that time the Office of the Attorney General was supposed to be the IP law-drafting unit (GP-2, 2017).

This highlights the scarcity of resource persons and learning materials on IP rights. When the current IP Department under MOE/ST was assigned to be the focal department in 2002, instead of recruiting all the then-trained resource persons from the OAG, it recruited many other scientists who today still have limited knowledge of IP and related law. Having just taken over the supervisory role from the OAG may have been the motive of the IP department for not recruiting the only available qualified people to participate in the law drafting process. In fact, before starting systematic programs to raise awareness in the public, capacity-building for internal staff was the most urgent necessity for the IP Department, in order to complete the law drafting, and to operate the whole IP system properly and effectively in the future. By choosing unqualified people, the government failed to enable this process.

The above quote also reflects the unfavorable conditions at that time for local scholars and lawyers to improve their specializations. No IP courses were available at universities in Myanmar until 2005. Only after three academics, including respondent GP-3, got their doctoral degrees in areas of trademark, copyright and related legal knowledge, has IP been included in the curriculum of third-year Law courses. IP is now taught in all Law departments in the 18 universities in Myanmar. Nowadays, there are people doing research on local or ASEAN copyright issues for their doctoral degrees in Yangon and Mandalay universities. However, the total is not more than fifteen. Apart from the formal courses noted above, no particular awareness-raising programs or workshops have been offered to the public by the universities alone or in cooperation with the IP Department.

To date, capacity of the IP Department internal staff has been developed by training locally and abroad, as well as by the assistance of foreign experts, who were the main actors for providing seminars, workshops and a series of training sessions since 1997 (personal communications from IP Department officials, as well as GP-7, GP-8 and GP-9, 2017). Aye (1997b) listed the WIPO, Japan Copyright Office (JCO), Japan Patent Office (JPO), European Patent Office (EPO), and the United States Patent and Trademark Office (USPTO) as major supporters. From 1996-2010, Japan received 29 trainees from Myanmar under the JPO Funds-In-Trust program, in co-operation with WIPO (Nakayama, 2013, p. 23). It is difficult to receive complete lists of workshops and trainings done by those international organizations, as well as lists of trainees (particularly on copyright) from the Myanmar IP Department and other related Ministries, due to a lack of documentation coupled with limited access to government information. Nonetheless, persons working in the Copyright section had only limited chances to attend short-term training sessions which lasted a maximum of three months. Most of the staff learned via WIPO Distance Learning courses (GP-9, 2017).

These circumstances continue to limit the capacity of the IP Department to conduct activities to raise stakeholder awareness about copyright without external support.

Another factor revealed by this research is that although some training was provided by WIPO to invite wider participation of stakeholders other than government officials, most of respondents were not invited to attend any seminar, workshop or training session. Limited budget to hold the seminars/workshops or to pay the trainers and organizers resulted in limited numbers of participants. Many respondents did not even receive news of those workshops or training sessions. IP personnel efforts to re-share newly-learned knowledge with the public were rarely successful or effective. Furthermore, most of the training given by WIPO in recent years is mainly for industrial design, patent and trademark protection. According to respondent GP-9 (2017), there were only three copyright-related workshops from 2005 to 2015:

- (1.) A National Workshop for Copyright Awareness and Production and Utilization of the Myanmar Version of *Asian Copyright Handbook* (directly related to copyright protection), was held in Yangon in September 2005.¹³ The aim was solely to raise the awareness and the production and utilization of the Myanmar version of “Asian Copyright Handbook. The 100 attendees of that workshop were representatives from MOI, MOE/ST, OAG, Union of Myanmar Federation of Chambers of Commerce and Industry (UMFCCI), Myanmar Writers and Journalists Association (MWJA), and writers, editors, illustrators, cartoonists, artists, and publishers from various journals, magazines and newspapers (Naing, 2008).
- (2.) A second national seminar on copyright and related rights in the creative industries was held in Yangon in May 2006.¹⁴ 60 of the representatives who attended the first national workshop were invited to attend this one.
- (3.) The last national workshop was on the role of copyright and related rights in economic and cultural development. It was held in Yangon in July 2015. The total number of participants was around 100 (GP-8, 2017).

Learning through private training¹⁵ or through a course opened for those preparing to sit the online exam of WIPO Distance Learning Education were the only ways for the respondents from the music and publishing industries to build their copyright knowledge and

¹³ This workshop was jointly organized by the Asia Pacific Cultural Centre for UNESCO (ACCU) and the Myanmar Writers and Journalists Association (MWJA). It was attended by 100 people. Retrieved from http://www.accu.or.jp/appreb/02/02-02/02-02country/previous/prev_mm.html

¹⁴ The National Seminar was jointly organized by the World Intellectual Property Organization (WIPO), the Japan Copyright Office (JCO), and the Myanmar Writers and Journalists Association (MWJA). It focused on disseminating an awareness of copyright and related rights in Myanmar. Retrieved from http://www.accu.or.jp/appreb/02/02-02/02-02country/previous/prev_mm.html

¹⁵ The training was opened by U Aung Soe Oo, who is both a practicing IP lawyer and a script writer.

capacities. Many persons who are now established as practicing IP lawyers and leading IP law drafters learnt IP through these two methods. This shows that the main source for IP study is WIPO Distance Learning. Even then, the number of candidates was relatively limited until 2010, due to government control of the internet. These facts in turn illustrate why the authors and other stakeholders in the copyright industry of Myanmar have limited understanding of the basic concept of copyright. In the meantime, this situation restricted the ability of resource persons in the IP Department to do research on local issues.

All of this context explains why, within two decades (1995 until now) Myanmar is still facing a lack of resource persons who clearly understand the gap between the theory and the real situation. Moreover, lack of competent local human resources is also a problem for the legal drafting process. Although there were approximately 15 IP resource persons at different universities in Myanmar in the period (2005-2015) when the consultation meetings were conducted with local experts, not one has been invited to participate either in the drafting process or the consultation meetings for copyright law. Thus, new copyright law has been drafted without using all of the available domestic resource persons.

Another reason why the draft law does not address authors' issues is officials' lack of knowledge of the human rights framework for intellectual property rights, which was expanded after the TRIPs agreement entered into force, as discussed below.

Limited knowledge of human and cultural rights

It appears that only a few scholars have looked at cultural rights, which are the direct concern of writers, creators, inventors, and the public. Most of them have only noticed the issues of freedom of expression and public right to freely enjoy the created works and scientific achievements. Two issues are the public right to participation in cultural life, including the arts and sciences on the one hand, and protection of private rights, particularly the moral and material interests of creators, writers, inventors, on the other hand. Focusing on private rights is less favored than focusing on public rights, for four reasons.

The first reason is that the term "human rights" was taboo terminology for past military governments. Human rights were used as a weapon to claim or protect public rights of access to medicines in other developing and least-developed countries such as Brazil and South Africa during the 2000s (Cullet, 2003). Also, the availability of adequate learning materials such as university textbooks, was a mobilizing issue in South Africa and other developing countries. But this has not been the case in Myanmar. Indeed, there is a visible lack of access to adequate learning materials in Myanmar, clearly demonstrated by the lack of language proficiency books and other scientific, economic, or medical reference books throughout the decades. No one has discussed human rights issues because this was a topic that could be openly discussed only after 2010, when the democratization process began. Even then, authors' rights were assumed least important compared to other human rights

issues such as freedom of expression, right to assembly and right to nationality, which have been ongoing issues for authors and other human rights advocates since 1962. Thus, the latter issues have been prioritized by human rights activists, including the Special Rapporteur to make the government address those issues after 2010 (Quintana, 2011, 2012, 2013 & 2014). Locally, neither scholars nor reformers of copyright law are fully aware of the relationship between human rights and copyright.

The second reason is freedom from censorship which has been a longstanding issue since 1962. The rejection of 30-40 percent of submitted stories, the ban on many books and songs under the Printing and Publishing Law of 1962, the arrest of many journalists¹⁶ who criticized the government, even after 2010: all these incidents are well-known in Myanmar. In all these cases, authors were victims of the system. Thus, all respondents focused on Article 19 of the Universal Declaration on Human Rights (UDHR) and on the International Covenant on Civil and Political Rights (ICCPR) regarding rights to hold opinions without interference and to seek, receive and impart information through any media. For correspondents GP-2 and GP-4 (2017), freedom of expression highlights the linkage between human rights and copyright.

The third reason is influential government policies. For instance, even repressive governments have allowed translation for the needs of literature development and human development,¹⁷ as well as the development of the computer software industry.¹⁸ This has influenced people in Myanmar, including legal drafters, to think about the importance of public rights to national development. Nevertheless, technology transfer through imitation and copying, though it clearly deviates from international copyright standards, is still quite common. So, respect is often paid verbally to the principle of copyright protection, but widespread and public actions often ignore it. For example, respondents mentioned that they had been lectured by senior officials not to forget the right of the public while they were in the midst of trying to do just that: protect the rights of particular authors and owners (GP-5, 2017).

¹⁶ Daily Eleven reporter Ma Khaing who was pursuing a story on corruption was sentenced to three months in prison by a court in Kayah State in 2013. In 2014 four journalists and the Chief Executive Officer of the Unity newspaper were arrested in connection with a report dated 25 January, alleging the existence of a government chemical weapons factory in Magway Region.

¹⁷ In 1947 Myanmar leaders set up the Myanmar Translation Society, which became Sar Pay Beik Man in 1963. It has been publishing numerous translated books (Win, 2006).

¹⁸ Although there is a Computer Science Development Law of 1996, there is no penalty in it for the illegal use of software. The Government established a number of computer universities and a big computer software industry without sound legal infrastructure (Min & Kudo, 2012, p. 54).

The last reason why public rights are in fact favored over private rights is that due to the peoples' lack of full understanding of human rights, the officials deem most issues to be purely technical copyright issues among the IP professionals. Even some respondents who have knowledge of human rights concepts do not utilize Article 27 of the UDHR or Article 15 of the ICESCR (GP1 and GP5, 2017). No one tries to link moral rights of authors with human dignity. It could be that when compared with the existing Copyright Act, so many new rights and stronger punishments are to be found in the new law that people are just sitting back and waiting.

However, insufficient understanding of authors' rights as human rights can lead to completely ignoring the voices or concerns of actual stakeholders such as authors. Thus, it is important to identify how the interested parties try to shape the new Copyright Bill and how the rights of authors are at least sometimes protected within the drafting period and consultation meetings. This will be discussed in the following section.

Lack of identification of local issues

Issues essential to the Copyright Bill should be investigated by the IP Department through research and consultation with private and concerned parties in order to meet the objectives of the law (Zander, 2004). However, research was not done systematically either before or during the drafting process by the IP Department, and public consultations seem very limited until 2014 (JICA, 2014).¹⁹ When there is no research, the law to be shaped will depend mainly upon how the interested parties influence the law-making process directly and indirectly, and upon how the legal drafters of the IP Department and other experts balance those influences against the interests of international and domestic investors, non-commercial users, and authors. In the following discussion, copyright owners are the main threat to the rights of authors. Copyright owners are investors, corporations which own copyrights, as well as other licensees and authors. As expected, the tension between the copyright owners and the non-commercial users was the most crucial dialogue in the consultation meetings.

Domestic copyright owners, IP lawyers, and writers are lobbying the government to try harder to finish the new law or be more effective in specific actions.²⁰ They act frequently and directly through different media for better and more effective protection by emphasizing

¹⁹ A detailed discussion can be read in "Myanmar: study of cooperation for the establishment of an Intellectual Property Office", by JICA in 2014. Most interviewees from Myanmar-based Japanese companies who participated in this research said that they wanted to know what will happen after the enactment of the Copyright Law as they wanted to prepare for the future and they expected a stronger penalty system. They did not have a chance to see the draft law until 2014.

²⁰ Very recently, MMA has launched an anti-piracy campaign video on Myanmar Television (MRTV), Myanmar International Television (MITV) and on radio channels (MMA official website, 23 May 2016).

the attraction of foreign direct investment, and by describing infringement stories²¹ such as the use of soundtracks without paying royalties, the use of novels to make films without permission from the writers, and pirated CDs. These efforts have strong impacts for stricter copyright protection. Thus, in the consultation meetings with local representatives which were started only in 2012 (Respondent GP-8), the debated topics between the representatives and leading members of the law-drafting committee were the establishment of an effective enforcement system and public domain.²²

“Effective enforcement system” here means maximum terms of imprisonment from ten to twenty years. IP experts and members of the IP Department revealed that contrary to their desire, many copyright owners, both international and domestic, requested higher penalties in order to protect their investments. These investors also wanted to have a system of raiding and seizing all pirated products, including at the border.

The needs of foreign interest groups are reflected indirectly through multilateral arrangements, for instance the TRIPs Agreement,²³ the ASEAN Cooperation work plan on copyright, and other regional and bilateral investment arrangements.²⁴ Whether Myanmar is strictly following the requirement or not is checked by the interested developed countries and by the WTO secretary of the Trade Policy Review (TPR) process. Questions regarding the existing IP enforcement procedures in the draft copyright law, protection from software piracy and the possibility of Myanmar acceding to the WIPO Copyright Treaty (1996) and the WIPO Performance and Phonogram Treaty (1996) are asked by all interested countries (WTO, 2014, pp.32-36, 64-65).

The ASEAN Framework Agreement also intends to have an effective copyright protection system in all ASEAN member states. It uses the term “efficient copyright systems”

²¹ Myay Mhone Lwin (Pwint, 2012) and Dr. Thant Thaw Kaung (Mudditt, 2015) are good examples of persons who called for effective protection by saying that copyright piracy has been rampant due to lack of severe punishment in the Copyright Law.

²² “Public domain” here refers to any creative works that are not protected by copyright laws.

²³ Detailed discussion on how US copyright interest groups lobby is found in Matthews (2002). Corporations were complaining to the U.S Government through the International Intellectual Property Alliance (IIPA), including the film, music, publishing and software sectors of the U.S. In 1985, IIPA (2006) submitted a report entitled “Piracy of US copyrighted works in ten selected countries.” Half of the countries are from South East Asia, and it contains detailed amounts for each sector. Similar interested groups from Japan and the EU also joined the Uruguay Round discussion (Matthews, 2002). See also JICA (2014), which called for change in the local IP system.

²⁴ All six existing bilateral investment treaties and four ASEAN FTA and investment treaties of which Myanmar is a member also include general or specific provisions to direct the host government not to interfere in investors’ IP rights or to protect the investors’ intellectual property in line with international standards (<http://www.dica.gov.mm/en/investment-agreements>).

to attract investors, and is trying to create a network to combat copyright piracy with the cooperation of other countries.

There has been no public campaigning for access to knowledge in Myanmar. However, the high demand for cheap pirated products shows how private economic interests can influence government copyright policy.

The Myanmar government has had a strong policy of encouraging translation and adaptation of foreign literatures. All governments have long believed that foreign literatures are important for the whole community. This has been used by law drafters as justification of public needs. In 1947 Myanmar leaders set up the Myanmar Translation Society which became Sarpay Beik Man Publishing House in 1963. This institution has published many translated books without the permission of the original authors (Win 2005). In 1962, the Revolutionary Council government set up the Myanmar National Literature Awards for Translation (MOI, 2017), thereby continuing to support translation and adaptation of books without permission, up until now.

In addition, the Government has encouraged software development since 1996 by appointing MOE/ST as a focal ministry for training human resources, by setting up the Myanmar Computer Science and Development Council (MCSDC) in 1996 as a key institution for the development of new Myanmar technologies (OECD 2014, p. 74), and by setting up Yadanarpon Cyber City with 2,500 acres of software industry (Min and Kudo 2012).

These are all examples of how government has misapplied the concept of public needs (Min and Kudo 2012). Because of all these official initiatives, local entrepreneurs have had great opportunities to use software developed by others with little or no cost and to develop their own new enterprises. These examples show that public needs can be in a high priority position unintentionally based on the government particular strategy for economic development. Thus, the legal drafters are balancing the rights of copyright owners and general non-commercial users for the development of the country.

Further confirmation can be had by analyzing other 'public domain' issues. By definition, when the terms of protection expire, the protected work will become the property of all people, which means everyone is allowed to use it without authorization. Longer terms of protection will provide the author or copyright owner a longer period of commercialization. The copyright owners and representatives of songwriters claim 70 years of protection after the death of the author. They argue that these 70 years could help the late songwriters' families who have limited benefits under the existing Copyright Act of 1914. Nonetheless, this longer-term protection was rejected by the drafting members because it would also have to be extended to foreign works which are needed in Myanmar for development.

Overall, all the respondents represented only two groups. One is copyright holders and authors, either domestic or foreign. This group supports severe penalties and seventy years of protection. They argue that an effective and severe enforcement system attracts foreign investors, and that inward flow of investments is essential to the country's economic development.

The other group advocates for the public by saying that having less severe penalties and fifty years' protection is suitable for the public as well as for the creators who are developing new ideas based on the existing foreign-owned works. The counter-argument of government is that it can be a barrier for least-developed countries like Myanmar to afford those expensive copyrighted works which are also necessary for individual development. Above all, the Copyright Bill is intended for national development purposes.

Nonetheless, discussion to balance all these viewpoints has not included the fact that the legal drafters have forgotten the development needs of the authors; in other words, the contractual issue and the requirement of CMO which really protect the benefit of authors. This demonstrates that authors have never truly been seen as stakeholders in the whole issue. Rather, the legal drafters only see the issues of the copyright industry. When there are some provisions for authors in a draft law, legal drafters assume that rights of authors will be protected to some extent in the future. Thus, instead of consistently differentiating the issues of authors from the issues of owners, sometimes they include authors under the terms of the owners.

Discussions are under continuous soft pressure from different international key players and from the economic development policies of the government. However, the voice of authors is not heard, and the problems of authors are even less visible today even though local authors reported their problems in 2000 in the printed media. For instance, there is a lack of contractual transaction which leads to exploitation by producers (Nyein, 2000). However, since there is limited space for authors in both music and publishing to participate in the consultation process, law drafters will have less chance to hear the different ideas and experiences from stakeholders as discussed in the following section.

Fewer chances for authors to participate in the legal drafting process

Responsible persons from the IP Department reported that there was no procedure to widely invite authors from the whole copyright industry. Rather, starting from 2012, the IP Department has sent letters to groups such as the Myanmar Music Association (MMA) and the Myanmar Writers Association (MWA) to send representatives to attend consultation meetings on the copyright law (GP-8, 2017). Only a few of the many affected authors and writers have had a chance to attend the consultation meetings. This was due to limited funds for participants. As a result, this has directly affected the law drafting process.

Of sixteen respondents from the music and publishing industries, only two were invited to participate in the consultation meetings, one from each industry (GC-5 and GW-6). They were invited since they were executive members of MMA and MWA respectively. Apart from this, there were no other means used by the IP Department to hear the voices of authors. In fact, “no survey or research was done to learn the authors’ issues by the IP Department” (GP-7, 2017).

Indeed, there are many authors whose ideas on local copyright issues are different from those of the legal drafters. For example, writers from both the music and publishing industries recognized the important role of publishers and producers in a functional copyright industry in which all stakeholders are interdependent. Without all these stakeholders, creative products cannot be launched, and users would have no access (GC-3, GW-2, GW-6 and GW-7, 2017). Therefore, instead of giving favour to any single group, a balance’ of benefits for all concerned is the concept promoted by the authors. More specifically, they are concerned mainly with the balance of rights and benefits in two areas: one is between authors and licensees or subsequent right holders, and the other is between authors and non-commercial users. They concede that they may not have refined legal knowledge of copyright, but based on their experience they do know what the law should be.

At the same time, all writers from the publishing industry report that they have experienced false accounts of the true number of books or editions published. They also have no control over changing the cover picture of subsequent editions.

Thus, authors in the publishing industry are more concerned with control of their rights, whereas songwriters want only a balanced approach. However, none of the respondents could tolerate other commercial users like movie producers who adapt their scripts into movies, changing the title or plot without asking prior consent. Similarly, under the existing copyright system songwriters, even professional groups like the Myanmar Performance Rights Organization (Myanmar-Pro, are powerless to compete with big business organizations such as FM radio stations and other commercial users (Aung, 2017). Currently, songwriters are totally ignored by ninety percent of those business organizations or commercial users. Based on such experiences, they are hoping for a system in which they will have some control over commercial users. Nonetheless, respondents, including authors themselves, have not been discussing down to the level of kinds of licenses or how to conclude valid contracts which can be easily enforced in the future. Strictly speaking, no one has used or mentioned either the TRIPs Agreement or the Human Rights Framework approach mentioned in Art. 27 of UDHR and Art. 15 of ICESCR.

Meanwhile, they do recognize the right of non-commercial users to access the copyrighted property with affordable prices. In this regard, respondent GC-5 from the music industry mentioned that without improving the income of authors’ direct families, no

strict rules of anti-piracy on individual non-commercial use are suitable. Both the sellers and the users of pirated versions of CDs and DVDs are also poor. There should be a plan for both of them before taking action on sales or possession of pirated versions.

Overall, respondents from the group of professionals (GP), members of the IP Department and other IP professionals did not mention protection of authors or issues between authors and subsequent copyright holders. But authors, who are directly affected by the 1914 copyright system, prefer a copyright framework with an author-centric approach. Thus, consideration of authors' voices in drafting the Copyright Law is essential. Similarly, the participation of local experts on copyright and related stakeholders such as the writers and the composers, is necessary. Nevertheless, this study reveals that authors have not been given many chances to show their concerns in the legal drafting process. The following section provides an analysis of the role of all the representatives who participated in the consultation meetings, the efficacy of cooperation during the process, and other limitations.

Limited cooperation and consultation with local experts and key representatives of interested groups

Several discussions with related ministries started in 2004, while discussions with related associations began only in 2012. Comments were received from the representatives of ministries, states and regions, non-governmental organizations (NGOs) and other associations who took part in the discussions (Thwe, 2014, p. 17). However, it is unclear whether the local experts on copyright and the related key stakeholders were able to fully participate in the process. This is a necessary step to produce a law which meets the needs of all stakeholders.

This study finds that only a handful of practicing IP lawyers had a chance to participate in the law drafting process. This can be due to three factors. The first one is failure to identify the local resource persons at the responsible ministries. Since 2004 the IP Department had discussions with representatives from the Ministry of Home Affairs (Police Department), the Ministry of Revenue (Customs Department), the Ministry of Information (Copyright Registration Department), the Ministry of Education/ST (Department of Law), the Supreme Court, and the Office of the Attorney General. Instead of identifying specialists on the topic, anybody from the department was assigned by senior officials to attend all the consultation meetings as a representative. Together with the serious lack of local resource persons discussed in the previous section, this situation is unacceptable. All available local resource persons should be identified and invited to join the law drafting process. Another example is that professors of Copyright from the Ministry of Education/ST were never invited to attend any of the consultation meetings nor the drafting process itself (GP-3, 2017). This was because invitation to a resource person was completely controlled by the concerned Ministry. It meant, for example, that when the IP Department made a request to

the Ministry of Education/ ST for a resource person, the head of the ministry directly nominated the head of the Department of Law of Yangon University. Nomination was rarely done. If someone personally sent a request to the ministry officials, the IP Department could arrange it only if there is space available (GP-8, 2017).

Similarly, respondent GP-2, who is an IP lawyer, was not asked to participate in the meetings. When he received the 9th draft of IP laws from his friend who was a member of parliament, he found that the provisions in the draft laws did not match the TRIPs standards. For instance, a compulsory registration process and requiring many documents to submit are not practices required under TRIPs. Therefore, he and some other IP lawyers sent a letter to Vice President Dr. Sai Mauk Kham, requesting to let them participate in the consultation process and they were allowed to participate in the consultation meeting.

The 9th Draft of the Copyright Law was finished during 2013, just when the political system of the country was transforming into a more democratic one. The change provided a space for more IP experts to participate in the policy-making process. But it was never the government's initiative to open spaces for the interested parties to join the consultation meetings. It was only by request of individual participants like GP-2, and it was still difficult for relevant government officials, even those very familiar with the top-down management system of the Government, to offer voluntary service. As a result, this loss of expertise in consultation-meetings has led to the weak resistance of local stakeholders to the pressures of international experts.

Even after the coordination process was established, the decision-making power of representatives was dominated by the Government. This has been typical practice so that until the 15th draft of the copyright law, the drafting process has followed the top-down approach. In reality, this means that the suggestions or experiences of representatives and local legal experts were recorded, but no serious action was taken to change the law as they suggested. Respondent GP-5 who is an IP advocate for entrepreneurs revealed the situation as follows:

We must not stop suggesting what we need and want. We have to keep on insisting, little by little, even though our suggestions have never been taken seriously. Moreover, we hope that the 15th draft law is going to be re-drafted again with wide public consultations, since it was written under the control-oriented system. Thus, we have to be patient to get what we want (GP-5, 2017).

This shows that there was little feedback to the consulted stakeholders regarding the reason for not fully accepting their suggestions. This situation directly reduced trust to the government by stakeholders. Even worse, it also reveals that participants have been getting tired of contributing their knowledge and experiences with no results. When the government does not fully accept suggestions of the key representatives, it is ignoring the most reliable

information from affected stakeholders. This is especially wrong when those representatives are active and interested in learning the subject and the issues. For example, respondent GC-5 has become a more effective voice for songwriters by learning Copyright through WIPO Distance Learning education, and since he has joined the MMA, by explaining the actual problems that they are facing.

There are differences between the two copyright sectors. For example, the issue of collecting royalty from business organizations by songwriters, and the issue of names and titles for authors dealing with the publishing industry. But, issues and proposed solutions are often applicable to neighbouring sectors.

On the other hand, if the IP Department thinks the suggestions provided by the key representatives are irrelevant to the discussion point, the Department should ensure the efficiency of the cooperation by such methods as giving short-term training to all key representatives on the concept of copyright, distributing in advance the discussion points with some reading materials, and giving a final explanation of the reason for not accepting any suggestion.

This study argues that even after 2010, when the country had transformed into a more democratic system, the process of collaboration with local experts has been less effective due to three factors. The first factor involves the failure of the IP Department to clearly identify whom to consult, for example, the exclusion of GP-3. The second factor involves insufficient funding for the IP Department to hold fuller participation in its meetings. For example, better accommodation for personal requests for participation by highly qualified persons, as revealed by respondent GP-8. The third factor is the political context which has always ensured a non-participatory law-making process. For example, of the sixteen authors interviewed for this study, only one songwriter has been invited to participate. It seems the previous practice of the military government is still persistent today even though officially there is supposed to be more time for public comments. The net result is that the Copyright Bill was drafted by the IP Department with no apparent strategy or coordination among the relevant stakeholders, and no established mechanisms for public participation in the process.

Conclusion

As argued, the inability to address related local authors' concerns in the Copyright Bill is due to inadequate policy formulation, due to a lack of awareness of the subject area among the professionals themselves, lack of proper identification of the issue to be solved, lack of democratic values leading to less participation of affected groups, and insufficient cooperation between government institutions. To address the problems, the government should consider the following factors:

Firstly, recruiting copyright scholars who have experience in copyright research, either in their Masters or Doctoral theses. This should be done as soon as possible to fill the shortage of human resources. Meanwhile, current collaboration with international and national experts in cultural rights should be continued, in order to promote the human rights of authors and users. By doing so, the Human Rights Framework of authors articulated in Art. 15(c) of ICESCR will become central in the legal drafting process, and will become familiar to all responsible persons.

Secondly, copyright outreach activities for authors and users should be organized frequently and intensively before the copyright law is enacted. In such meetings and discussions, the basic knowledge of copyright can be shared, as well as specific topics such as the importance of licensing contracts.

Thirdly, the responsible authorities should develop the practice of doing research on the impact of existing copyright-related laws upon authors and other stakeholders. They should also pay attention to copyright issues appearing in different local media, often reported by the affected persons themselves. Such practices will help them to update the laws for the benefit of all stakeholders and to ensure that the laws are applicable to contemporary life.

Lastly, when cooperating with other ministries or with local associations, the responsible department should send representatives who are interested in the subject and its local impacts. Instead of fixing the number of representatives, the consultation should be opened all interested parties in the industry. The guiding principle should be changed from top-down to bottom-up.

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