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# **Promise and Perils of Sri Lankan Performers' Rights: The Royalty Collection in Music**

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## **Abstract**

Royalty collection in music is considered as the 'holy grail' in resolving the remuneration issue of musical artists through copyright and performers' rights. Predominantly grounded on economic incentive theory, these intellectual property regimes promote extensive implementation and enforcement of royalty collection schemes coining the survival and sustainability of the relevant aesthetic industry and their participants. This article will examine the feasibility of musical performers' royalty collection under performers' rights in Sri Lanka while making reference to established schemes in other music industries such as USA, UK and India. In doing so, this paper attempts to highlight the perils of introducing a royalty collection scheme in a relatively smaller music industry in Sri Lanka that is heavily dependent on foreign music. Probing the capabilities of such a scheme to address the remuneration concerns of the country's aging artists, a commercially vulnerable group within the music industry, this paper attempts to demonstrate how a music royalty scheme would fall short of its promise if not implemented with appropriate sensitivities to the relevant domestic conditions and with realistic expectations.

## **1.0 Introduction**

Performers' Rights, a novel concept in the Sri Lankan law that was introduced by its recent Intellectual Property Act, made several promises to its singers. One of the main improvements anticipated by the performers' rights regime (PRR) was the implementation of a proper and consistent royalty scheme in the country. Royalty collection was deemed as the 'holy grail' to the remuneration issues faced by singers in the music industry as well as the authors. Nevertheless, much to the dismay of the artists in the music industry, all attempts to implement a consistent royalty scheme in the

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music industry has so far not been fruitful. This article explores and questions whether the proper implementation of a royalty collection scheme would improve the economic position of the vocalists in the country and resolve the remuneration issues in the Sri Lankan music industry.

Performers' rights, as a subcategory under copyright, are a secondary right (or commonly known as a neighbouring right) to Copyright. Under copyright, the authors of books, songs, drawings, etc. are entitled to an exclusive right to determine the way in which their copyright work (book, song or drawing) is commercially utilised. Performers, on the other hand, as a group of artists who more often have to depend on authors' work for their performances (for example, singers performing songs written by authors), are entitled to determine how their performances (live/recorded renditions) are commercially utilised.

The reason commonly made for providing secondary position for performers is, as required under the PRR, because the performer performs a literary or artistic work already created by an author, who possesses the authorial rights over such work or owned by an entrepreneur, to whom the author has transferred the copyright. For example, if we take Adele's recording of 'Make you Feel my Love', Bob Dylan, as its songwriter, may own<sup>1</sup> the lyrics and the music composition of that song under copyright law. Accordingly, as the performer, under PRR, Adele is entitled to be remunerated (along with her recording company) by the various commercial uses of that song recording, but this is a lesser right than Bob Dylan's<sup>2</sup> who, *inter alia*, has the authority to make changes to the song and allow another singer to perform the same song. Under copyright and PRR, authors and performers are entitled for a royalty pay when their song recordings are commercially utilised. Thus it is expected that a royalty collection scheme would ensure a mode of revenue for both these groups of artists along with other creative contributors.

The remuneration issue is an interesting one in the context of Sri Lankan vocalists. This is due to the fact that they are significantly better remunerated than authors, who are significantly under-remunerated in the industry, even in the absence of a PRR. The customary industrial practice in the country, where the singers are remunerated for each

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<sup>1</sup> If he has not transferred his rights to a recording company.

<sup>2</sup> Or the copyright owner's, if the copyright ownership has been transferred to another.

performance they made, did not have a system of remunerating the authors of the songs for the use of their lyrics and musical compositions, and more often not even for the initial creation of such work. This paved way for a creative hierarchy in the music industry that was different to the one proposed by the PRR and copyright law where authors ought to enjoy better remuneration. Therefore, whether one can argue remuneration to be an issue for singers in Sri Lanka would be an appropriate question to probe into. However, as the interviewed vocalists in Sri Lanka have pointed out, when one considers the economic value generated by musical performances through various means, such as broadcasting and mobile ring tones, being cut out from that value chain would seem to create a financially disadvantaged position for them. If we leave aside the paradox between the creative hierarchy that the copyright and PRR endorses and the existing hierarchy in the industry for a moment, the PRR would seem to have the potential to address the remuneration issue, at least to some extent, through a proper royalty payment scheme. As advocated under these regimes, a proper royalty payment mechanism would ensure *inter alia* that revenue generated from all uses of recorded performances would be shared among all contributors to those recordings, and this includes vocalists. Since the performers already have a good financial reward in terms of the revenue generated through their live performances, it is indeed the recorded performances that they wish to obtain a better revenue from. Although the royalty scheme provides a shared revenue, it could be argued that such a scheme could, in fact, tap into a revenue chain that the simple payment method for vocalists after each live performance cannot so far reach.

Accordingly, this paper examines royalty collection as a remuneration scheme, and how it functions in popular music industries such as the UK, USA and India, as well as in Sri Lanka. The findings of this paper are informed by qualitative data drawn from interviews conducted between 2012 and 2013 in Sri Lanka.<sup>3</sup> The interviews were carried out through semi-structured questionnaires, allowing the interviewees the space to provide detailed views about the questions raised. Overall, 17 participants, were interviewed, including singers, lyricists, music composers, entertainment lawyers, members of artists' organisations, politicians and representatives of media companies.

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<sup>3</sup> The situation in Sri Lankan music industry has not been subjected to any significant change yet.

As the scholarly literature relating to the Sri Lankan music industry and Sinhala singers is limited, I believe that the qualitative data gathered through the interviewees' experiences enables me to illustrate the claims that this case study is able to make. The paper also makes comparisons between the Sri Lankan music industry and other music industries, in order to understand whether the Sri Lankan situation is distinctive and therefore require a different system to royalty collection that is proposed under intellectual property law. This examination is expected to be helpful in ascertaining whether the PRR's royalty collection scheme has the capacity to respond to the Sri Lankan vocalists' expectation of remuneration.

## **2.0 The Contemporary Sri Lankan Commercial Music Industry**

Sri Lanka, an Asian country in the Indian Ocean, and an important sojourn for ancient travellers on the silk route, was affected by foreign socio-cultural, legal and economic impacts. Its multi-ethnic society, partially the result of its geographical positioning, consists of Sinhalese, Tamils, Muslims and Burghers. The majority, Sinhalese, constitute about 74% of the population, while the Tamils and other minorities constitute about 26%.<sup>4</sup> While Buddhism is the country's main religion, with around 69% following, Hinduism, the second main religion, is followed by 15% of the population.<sup>5</sup> Sinhala is the language spoken by the majority Sinhalese. However, English and Tamil are also constitutionally recognised as the state languages of Sri Lanka.

Consequently, the music industry today consists of a variety of music genres such as classical music, pop music and even Baila music, a Portuguese musical influence. Mimicking Indian and English/Western songs is a prevalent practice, although making Sinhalese cover versions of such songs is also common. Although the contemporary music industry is mostly populated by Sinhala singers, there is a considerable amount of Sinhalese, Tamil and English music currently being performed by artists from other ethnicities. Thus, the focus of the paper is on singers who perform Sinhala songs in the entertainment industry, regardless of the ethnicity they belong to.

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<sup>4</sup> 7% of Moors and 1% of others. 'Sri Lanka in Brief' <<http://www.priu.gov.lk/TourCountry/Indextc.html>> accessed 15 September 2016.

<sup>5</sup> 8% of Christians and 7% of Muslims. 'Sri Lanka in Brief' <<http://www.priu.gov.lk/TourCountry/Indextc.html>> accessed 15 September 2016 .

The contemporary music industry consists of various income potentials for the Sinhala vocalists. While some such methods have been significantly promising for some, such as live shows<sup>6</sup> and advertising<sup>7</sup>, certain other methods have been more fruitful for others, play back singing for movies<sup>8</sup> and music recording<sup>9</sup>. Interestingly, there are still potential revenue-generating routes that the artists have been unable to tap into (such as digital downloads), and receiving royalty payment from the commercial use of their recorded renditions is certainly seen as one of them.

Artists in the industry believe that the implementation of a proper royalty collection and distribution system, if implemented, would facilitate receiving their share of the revenue generated from their recorded renditions, to a certain extent. As live performances are considered the most lucrative source of income for vocalists in Sri Lanka,<sup>10</sup> a royalty scheme would be expected to provide an extra income for them. Accordingly, for those artists who are unable to make live performances or be practicing any form of revenue generation, due to their age or inability, a royalty scheme is expected to be the sole mode of income. Thus, the absence of a royalty collection scheme is seen as a significant concern, where vocalists are denied their share of the revenue generated from their recorded renditions.

Therefore, this paper will examine the functioning of royalty collection in music by exploring the way in which it is implemented in other commercially successful music industries in the world, to understand whether such a scheme would deliver the expected outcomes for Sinhala singers.

### **3.0 Royalty collection in music**

Royalty collection schemes emerged as a facilitator for intellectual property rights holders to administer the various uses of their work by the wider society and translate that into revenue, as it was not technologically possible for them to do so on their own. While copyright protection was extended to music in 1777,<sup>11</sup> royalty collection

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<sup>6</sup> Interview with P2 and P7.

<sup>7</sup> Interview with P13.

<sup>8</sup> For example, Lata Walpola. Deepthi Fonseka, *Lata, Hela Gee Rejina, Charithapadanaya* [Biography of Lata Walpola] (Sarasavi 2008).

<sup>9</sup> Interview with P13

<sup>10</sup> Interviews with P2, P3, P7 and P14.

<sup>11</sup> In a Court case in UK initiated by, Johann Christian Bach (the youngest son of J S Bach, and London's leading composer at the time) against unauthorised publication of one of his pieces. Wallis, C Baden-Fuller, M Kretschmer and G M Klimis, 'Contested Collective Administration of Intellectual Property

schemes did not surface for nearly another century, when in 1851, with the help of a publisher, Ernest Bourget, a French composer, created the first modern royalty collecting society, SACEM.<sup>12</sup>

The essentially pay-for-play method that royalty collection adopts is used to monitor musical activity in a particular territory, and thereafter collect and distribute royalty fees accordingly.<sup>13</sup> The revenue collected is then distributed to the relevant stakeholders by the royalty collection societies, after deducting their running costs.<sup>14</sup> As the discussion about royalty collection in different jurisdictions will examine, the parties entitled to these royalties can vary depending on the applicable laws, judicial pronouncements and customary practices in a particular music industry. Nevertheless, the proponents of royalty collecting societies would argue that this scheme provides an efficient mechanism for royalty management and the licensing of music, which otherwise would be a complex and costly process for the owners of such copyright work, while also providing credible legal threats in the event of copyright infringement.

Further to this introduction relating to royalty collection societies and their operation, this section will explore the functioning of this scheme in various music industries in the world, such as the UK, USA, India and Sri Lanka.

### **3.1 Music royalty collection in the UK**

Although music copyright was first<sup>15</sup> formally recognised in England, following a court case in 1777 by Johann Christian Bach, the youngest son of J.S. Bach, not until 1924 did the UK have a well-established royalty collecting society – the Mechanical Copyright Society (MCPS).<sup>16</sup> Currently, the collective management in the UK is conducted by four collecting societies, managing different music rights exclusively for

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Rights in Music: The Challenge to the Principles of Reciprocity and Solidarity' (1999) 14(1) European Journal of Communication 5.

<sup>12</sup> G M Klimis, M Kretschmer, R Wallis, 'The Changing Location of Intellectual Property Rights in Music: A study of Music Publishers, Collecting Societies and Media Conglomerates' (1999) 17 (2) Prometheus 163,169.

<sup>13</sup> Wallis, Baden-Fuller, Kretschmer and Klimis, 'Contested Collective Administration' (n 11) 5.

<sup>14</sup> B Andersen, R Kozul-Wright and Z Kozul-Wright, 'Rents, Rights N'Rhythm: Cooperation, Conflict and Capabilities in the Music Industry' (2007) 14 (5) Industry and Innovation 513, 535.

<sup>15</sup> Thereafter, music was accepted as subject matter of copyright under 1709 Act, which previously protected 'books and other writings'.

<sup>16</sup> Andersen, Kozul-Wright and Kozul-Wright (n 14) 513.

different right holders: the Performing Rights Society (PRS), the Mechanical Copyright Protection Society Limited (MCPS), Phonographic Performance Limited (PPL) and Video Performance Limited (VPL).<sup>17</sup> The PRS represents<sup>18</sup> authors, publishers who own or control the rights in the UK of public performances (live or recorded), and broadcasting, including cable diffusion of musical works.<sup>19</sup> The MCPS<sup>20</sup> collects and distributes mechanical royalties<sup>21</sup> generated from the recording of music in varying different formats, such as audio CDs, VHS videos, mobile phone ring tones, audio-visual and broadcast material.<sup>22</sup> PPL<sup>23</sup> represents record companies, from the large multinationals to small independents, and, on their behalf, collects licence fees from broadcast and public performance users.<sup>24</sup> VPL<sup>25</sup> is the collecting society set up by the recording industry to grant licences to users of music videos, such as broadcasters, programme-makers and video juke box system suppliers. As a consequence, these varying royalty collecting societies, for various different aspects of the music industry, have created a complex system of tariffs and licensing agreements in the UK.

As far as this paper is concerned, PPL is the most important society as it predominantly collects royalties for performers, while other societies may also play a role depending on the extent of creative and other contributions by a singer. The royalties that the vocalists receive would come predominantly through PPL if the artists are solely singers. As is more often the case, if the artist is a singer-songwriter, the vocalist will have the option of receiving royalties from the PRS and PPL. If the artist has expanded their involvement in the industry and operates their own recording firm, then there are additional royalties via the MCPS. Likewise, VPL will also bring in some royalties if the music video was also produced by the artist him/herself.

Although, on the face of it, the system seems to suggest a promising mechanism to channel the revenue back to vocalists, the actual realisation of this financial entitlement can be far removed. The inefficiencies of these societies have been alleged to vary from

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<sup>17</sup> *ibid* 534-535.

<sup>18</sup> In 2002 had a membership of more than 37,500.

<sup>19</sup> Andersen, Kozul-Wright and Kozul-Wright (n 14) 534.

<sup>20</sup> In 2004 had around 17,000 members made up of approximately 12,500 writers and 4,500 publishers.

<sup>21</sup> Royalties that a publisher or songwriter is entitled to, when their songs are reproduced on a tape, CD or MP3 etc.

<sup>22</sup> Andersen, Kozul-Wright and Kozul-Wright (n 14) 534.

<sup>23</sup> In 2004 they have had 3000 record companies registered with them.

<sup>24</sup> Andersen, Kozul-Wright and Kozul-Wright (n 14) 535.

<sup>25</sup> In 2004 had approximately 900 members from and 50,000 music videos registered.

corruption and mismanagement to confiscation of funds and a lack of transparency. These, it has been argued, have deprived artists of their revenues earned.<sup>26</sup> Some of these issues relating to UK royalty collection will be discussed below.

The effective execution of the royalty collection mechanism itself has provoked many issues and controversies. For example, the Monopolies and Mergers Commission (MMC) inquired into PPL in 1988, due to its alleged malpractices.<sup>27</sup> The MMC reported that ‘there is no assurance that even the most prominent and well-established performers (mostly instrumentalists, but some vocalists as well) will receive what is due to them, whilst for less distinguished there will be little or no benefit, even if the recordings in which they have taken part have been major commercial successes’.<sup>28</sup>

As revealed by a study relating to royalty collection in the music industry, carried out by the UK Monopolies and Mergers Commission and relating to the PRS, 80% of those who owned performance rights earned less than £1,000 from performance royalties for 1993, while 10% of owners received 90% of the total distribution.<sup>29</sup> Thus there seems to be a significantly skewed royalty distribution among the right holders, which does not seem to ensure equitable advantages to all artists. As has been observed, one reason for this situation may be a fundamental data problem with the PRS, as their statistical methods designed to determine how much money members deserve inevitably favour more popular artists.<sup>30</sup>

On another level, it has been argued that the forceful nature of management by royalty collection societies has negatively affected the artists as well as the music users. For example, a Welsh collecting society, Eos, which was formed when Welsh musicians

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<sup>26</sup> J Band and B Butler, ‘Some Cautionary Tales about Collective Licensing’ (2013) 21 Michigan State International Law Review 687.

<sup>27</sup> R Arnold, *Performers’ Rights* (4<sup>th</sup> edn, Sweet and Maxwell 2008); A Robinson, ‘UK Copyright and the Communication of Sound Recordings to The Public: The Slings and Arrows of Outrageous Fortunes’ (1995) Entertainment Law Review 312, 317.

<sup>28</sup> ‘Collective Licensing – A report on certain practices in the Collective Licensing of public performance and broadcasting rights in sound recordings’, Cm 530 paragraph 7.35 as referred to in Robinson, ‘UK Copyright and the Communication of Sound Recordings to The Public: The Slings and Arrows of Outrageous Fortunes’ (1995) Entertainment Law Review 312, 317.

<sup>29</sup> MMC, *Performing Rights: A Report on the Supply in the UK of the Services of Administering Performance Rights and Film Synchronisation Rights* (HMSO 1996).

<sup>30</sup> ‘Because the fact is, if your music gets played on the radio five times, but only one of those times are counted, the collection society will assume, based on statistical probability, that it was not your song but, let’s say, Elton John’s that got played those other four times.’ Andrew Dubber, ‘How to Solve Royalty Collection Societies, Music Think Tank’ (13 June 2010), <<http://www.musicthinktank.com/blog/how-to-solve-royalty-collection-societies.html>> accessed 15 September 2016.

complained that the PRS was shortchanging artists, took control of over 30,000 Welsh songs in early 2013. They demanded that Welsh language radio station Radio Cymru pay ten times the licence fee to broadcast the songs in Eos' catalogue.<sup>31</sup> Since it was difficult to come to an agreement with regards to the licence fee, Radio Cymru shortened its broadcast day by two hours and replaced its normal Welsh pop and rock fare with classical music and hymns.<sup>32</sup> The royalty collection society that was created to rectify the issues created by another similar society made the matter worse, for the artists as well as the listeners of music.

It is not only the collecting societies that have come under scrutiny but the recording companies too. Some popular and financially-able artists have sued their recording companies for inaccurate calculation of royalties. It is reported that, in 2006, EMI<sup>33</sup> was sued by Paul McCartney, Ringo Starr and the families of John Lennon and George Harrison for £30 million as unpaid royalties.<sup>34</sup> Thus the creation of royalty collection societies alone would not necessarily ensure a distribution of fair royalties to the relevant artists. Since the recording companies are required to send the relevant share of the royalties from the original sum they receive from royalty collecting societies, such loose arrangements of royalty distribution allow room for mismanagement. While wealthy artists may have the financial prowess to confront such mismanagement, this may not be a possibility for the majority of artists.

While royalty collection is believed to be functioning well within the UK music industry, as discussed above, it is not without its own issues. While both the legal system and the artists in the UK play significant roles in keeping this mechanism as reasonable and corruption-free as possible, these issues point out the importance of using this scheme with great care and caution. The following section will now focus on the US music industry, to understand whether there are any significant differences in their royalty collection system.

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<sup>31</sup> 'Welsh Music Dispute: BBC Radio Cymru Cuts Airtime and Amends Playlist', BBC News (01 January 2013) <<http://www.bbc.co.uk/news/uk-wales-20878895>> accessed 15 September 2016.

<sup>32</sup> *ibid.*

<sup>33</sup> Multinational record company based in the UK.

<sup>34</sup> R Salmon, 'The Digital Music Business: Income and Royalty Payments' (2009) 20(8) Entertainment Law Review 278, 282.

### 3.2 Music royalty collection in the USA

There are four music royalty collecting societies in the USA: the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music Inc. (BMI), SESAC (previously referred to as the Society of European Stage Authors and Composers) and the latest addition to the list, SoundExchange. ASCAP, the first royalty collecting society in the US, formed in 1914, represents authors and music publishers. As of 2010, it has a membership of 390,000. BMI was established in 1939 by radio broadcasters<sup>35</sup> against the virtual monopoly enjoyed by ASCAP. BMI represents approximately 475,000 authors and music publishers in all genres of music. SESAC, the smallest of the four organisations, founded in 1930, is the second oldest royalty collecting society in the US. SESAC's membership initially consisted only of music publishers but later expanded to include authors too, with a membership of 10,000 as of 2010. SoundExchange, which was formed in 1995, represents the record labels and performers, with a current membership of over 100,000 accounts.<sup>36</sup>

The royalty collection structure in the US is slightly different to the UK structure. Although SoundExchange has a specific group of contributors in music – singers and record labels – the other three institutions, ASCAP, BMI and SESAC, do not have such a specific separation, as they each represent a mixture of writers, composers and publishers. In the UK, as discussed in the previous section, the four royalty collecting societies oversee different aspects of the music industry, whereas in the US, such demarcations only came into being with the introduction of the digital performance right under the Digital Performance in Sound Recordings Act 1995.<sup>37</sup> The 1995 Act created an opportunity for performers and copyright holders to be compensated for the digital music uses facilitated by the internet, and satellite and cable streaming services. SoundExchange was formulated to recognise this new right and enforce it by collecting and distributing royalties to the respective parties.<sup>38</sup> For US vocalists, the digital royalties scheme is, and has been, the only route through which they receive royalties from their recordings, as they do not enjoy similar rights relating to analogue (AM/FM)

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<sup>35</sup> A group of major radio networks and 500 independent radio stations.

<sup>36</sup> <<http://www.soundexchange.com/about/our-work/>> accessed 15 September 2016.

<sup>37</sup> Further supported by the Digital Millennium Copyright Act 1998 (US).

<sup>38</sup> M Huppe, 'You Don't Know Me, But I Owe You Money: How SoundExchange Is Changing the Game on Digital Royalties' (2010-2011) 28 Entertainment and Sports Law 3, 8.

radio transmissions.<sup>39</sup> Since there is no such qualification for performers' royalties in the UK, this is a distinctive position in the US when comparing the Anglo-American royalty collection schemes. Accordingly, US vocalists only started to receive royalties after 1995, as opposed to their UK counterparts who have been enjoying such rights for years.

Although there are some notable differences in royalty collection structures in the US compared to the UK system, the US system does not necessarily guarantee a smooth operation of royalty collection and distribution. It has its own set of issues that affect the artists as well as the users of music. Similarly to the UK system, the issues surrounding the US royalty collection also vary, from issues of complexities in royalty collection and rates to mismanagement, unfair distribution, a lack of transparency and affecting the singers and authors negatively.

The complexities involving collective management could be quite detrimental to the users of music. For example, if one operates business premises that involve some level of music, even in the background, in order to safely avoid potential suits from collecting societies, they may have to obtain licences from all institutions, as it would be difficult to know which artist is registered with which organisation (except from SoundExchange, unless any digital music is used). Such an issue is reported to have taken place in 1997, when a restaurant owner only had a licence with BMI and their bar pianist responded to a guest request for the song 'Zip-a-Dee-Doo-Dah', composed by an ASCAP member. An ASCAP controller who was in the audience at the time registered the incident and raised an initial bill of \$75,000, which ended with an out-of-court settlement of \$4,000.<sup>40</sup> This case not only demonstrates the extent and the forceful and complex administration of royalty collection, but also the hindering effect that could have on various users of music.

Mismanagement is seen as another controversial issue surrounding collective management. Hanging onto accumulated undistributed licence fees is one such management problem that royalty collection organisations are often accused of. For example, it has been reported that, by 2007, SoundExchange had accumulated over \$100 million in undistributed licence fees and, by December 2011, they were carrying

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<sup>39</sup> *ibid.*

<sup>40</sup> Wallis, Baden-Fuller, Kretschmer and Klimis, 'Contested Collective Administration' (n 11) 5.

\$363 million that had not yet passed through to artists and rights holders.<sup>41</sup> According to federal regulations, if within three years SoundExchange cannot locate a party who is owed royalty payments, then after a relevant payment is made into the fund that is distributed to its registered members, the balance becomes the property of SoundExchange.<sup>42</sup> In 2011, SoundExchange admitted that more than 20% of the recordings played by its statutory licencees consists of recordings made prior to 1972, which are not covered by federal copyright and therefore are not covered by federal statutory licences.<sup>43</sup> These issues lead to SoundExchange's undistributed pot becoming bigger, while music users continue to unnecessarily contribute towards it. Therefore, it can be argued that these management problems create significant doubts relating to the efficiency of royalty distribution to artists and, at the same time, put significant financial burdens on music users.

The unfair distribution of royalties, it can be argued, does a disservice to the audiences as well as the artists in the music industry. In the early days of ASCAP, they used a skewed distribution method to ensure that career composers, rather than those composers whose songs were performed most, were granted the 'lion's share of the societies' intake'.<sup>44</sup> For example, it has been pointed out that 'in 1933 a member of the ASCAP directorate received \$3,417 for 1,020 performances, where Cole Porter was only paid \$1,174 for 24,476 performances'.<sup>45</sup> ASCAP has also been accused of discriminating against rural<sup>46</sup> and African-American songwriters<sup>47</sup> in the 1930s.<sup>48</sup> It has been argued that such genres have only come to dominate popular culture after they were allowed widespread airplay, consequent to being freed from such discrimination by ASCAP.<sup>49</sup> Royalty collecting societies, accordingly, have indirectly functioned as gate-keepers of music, to the detriment of artists as well as music users.

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<sup>41</sup> J Band and B Butler, 'Some Cautionary Tales about Collective Licensing' (2013) 21 Michigan State International Law Review 687, 693.

<sup>42</sup> M Shaw, 'The Supremacy of SoundExchange: Federal Preemption of State Escheat Laws' (2004-2005) 22 Cardozo Arts & Ent L J 845.

<sup>43</sup> Band and Butler, 'Some Cautionary Tales' (n 41) 693.

<sup>44</sup> S Sen, 'The Denial of a General Performance Right in Sound Recordings: A Policy That Facilitates Our Democratic Civil Society?' (2007) 21 Harvard Journal of Law and Technology 233, 244-45.

<sup>45</sup> *ibid.*

<sup>46</sup> D Pecknold *The Selling Sound: The Rise of the Country Music Industry (Refiguring American Music)* (Duke University Press 2007) 54-55.

<sup>47</sup> C Squires, *African Americans and The Media* (Polity 2009) 147.

<sup>48</sup> This, it has been reported, ultimately led to the formation of the BMI.

<sup>49</sup> Band and Butler, 'Some Cautionary Tales' (n 41) 687.

Having looked at the functioning of royalty collection in two large music industries in the West, the next section will explore the situation in the largest Asian music industry, India, and how its royalty collection scheme works in comparison to its Western counterparts.

### **3.3 Music royalty collection in India**

Music royalty collection in India is also carried out through a group of societies representing different players within its entertainment industry. It has been argued that the enormous success of Bollywood movies is due to the substantial role that Indian songs and music play in them, as the films are predominantly musicals. Therefore, the commercial success of a Bollywood movie can sometimes be significantly dependent on the music and songs used in that movie. When examining music as a separate industry to movies, a very high percentage of the songs are from movies rather than independent creations. This position, along with the way in which copyright law intervenes in these industries, has created complex legal relationships involving the ownership of these songs. Thus, royalty collection in the Indian music industry can be quite complex, due to the variety of stakeholders.

Currently, there are three music royalty collection societies in India: Phonographic Performance Ltd (PPL), the Indian Performing Right Society Limited (IPRS) and the Indian Singers' Rights Association (ISRA). First established as the Phonogram Producers Association in 1936, PPL, the oldest of the three organisations, today represents more than 300 music labels in India.<sup>50</sup> According to PPL, their repertoire currently consists of over 500,000 songs across India and including other foreign songs.<sup>51</sup> The IPRS, on the other hand, was established in 1969 and represents the interests of songwriters, composers and publishers in the Indian music industry.<sup>52</sup> As of 2009, the IPRS represented over 2,000 members and collected over £3.5 million per year.<sup>53</sup> The youngest of the three organisations, ISRA, represents the singers in the

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<sup>50</sup> PPL website <<http://pplindia.org/aboutus.aspx>> accessed 15 September 2016.

<sup>51</sup> PPL website <<http://pplindia.org/aboutus.aspx>> accessed 15 September 2016.

<sup>52</sup> E Kemp, C Natesan and L Borders, 'Copyright Liability and Performing Rights Organisations in the United States and India: A Comparative Analysis' (2011) 3 *Journal of Emerging Knowledge on Emerging Markets* 343.

<sup>53</sup> *Ibid.*

music industry. Formed by singers themselves in 2013, ISRA previously functioned as the Singers Association of India (SAI) for several decades.<sup>54</sup> However, until 2013, it did not function as a royalty collection society but merely as a welfare society for singers.<sup>55</sup> ISRA now has the authorisation to collect royalties from FM stations, broadcasters, hotels and others places where recorded music is commercially played.<sup>56</sup> This authorisation is only valid for songs recorded post 1963, since the protection for song recordings is available for 50 years, as per the Indian Copyright Act. Although, legally speaking, the requirements are now in place for singers to derive royalties from their recordings for the first time within Indian music, the effective execution of this still remains to be seen.

The complexities involved in collective management in India have created mayhem in the music industry. As initially discussed, under the UK royalty collection, a radio performance of a song would attract royalties for both singers and recording companies (through PPL UK), as well as for music composers and lyricists (through PRS). The US situation is slightly different to this, as the singers and record labels do not receive royalties from analogue radio broadcasts (AM/FM) but only from digital broadcasts, while the composers and lyricists will receive royalties from both analogue and digital broadcasts. The Indian situation is further distinctive from both these situations, as it has been ruled by several Indian High Courts that only record labels (through PPL India) are entitled to claim royalties from radio broadcasts, and not the composers or lyricists (or, now, singers).<sup>57</sup> Although these decisions have received criticism, they still stand as authoritative decisions, and the IPRS is now hindered from collecting royalties from radio broadcasts on behalf of composers and lyricists. While the authors, singers and record labels will continue to receive royalties from public performances of recorded songs in hotels and commercial buildings, only record labels will continue

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<sup>54</sup> Anita Iyer, 'Singers Assure a Transparent Royalty Collection Body' (19 July 2013) <<http://www.soundbox.co.in/singers-assure-a-transparent-royalty-collection-body/>> accessed 15 September 2016.

<sup>55</sup> *ibid.*

<sup>56</sup> K Subramaniam, 'Singers from South to Claim Their Due' The Hindu (Chennai, 20 August 2013) <<http://www.thehindu.com/todays-paper/tp-national/singers-from-south-to-claim-their-due/article5040406.ece>> accessed 15 September 2016.

<sup>57</sup> *IPRS v Aditya Pande and Others* FAO (OS) No.423-424/2011 High Court, Delhi available at <<http://lobis.nic.in/dhc/PNJ/judgement/08-05-2012/PNJ08052012FAOOS4232011.pdf>> accessed 15 September 2016; *Music Broadcast Pvt Ltd v Indian Performing Right Society* (25 July 2011) Mumbai High Court and *Mathrubhumi Printing and Publishing v The IPRS* FAO. No. 82 of 2009 (08 February 2011) High Court, Kerala <<http://www.indiankanoon.org/doc/976185/>> accessed 15 September 2016.

to receive royalties from the broadcasts of recorded songs. For vocalists, who have only very recently managed to create an organisation to collect royalties on their behalf, this limitation to their royalty entitlement may indeed be an unwelcome change to the royalty collection scheme.

As with other music industries, Indian royalty collection is also plagued with issues surrounding a lack of transparency in their functioning. Although the true nature of this issue in relation to ISRA is yet to be seen, this is not a new allegation with regards to the IPRS and PPL. PPL does not seem to publicly specify its licence rates and, while they imply that over 95% of international recorded music is represented in their catalogue, the extent of their authority to collect fees for foreign sound recordings seems unclear.<sup>58</sup> While the IPRS demands that entertainment venues pay their licence fees, when asked to provide a list of their repertoire of songs/members, in order to ascertain the actual use of songs from their members, they have not, as has been noted by some, been very forthcoming with such information.<sup>59</sup> It has been expressed by the Federation of Hotel and Restaurant Association India (FHRA) that ‘IPRS people are behaving as if their members have a copyright over every music track... There is no mechanism to know which tracks belong to IPRS members.’<sup>60</sup> Accordingly, this lack of transparency has made the users of music lose trust in the system.

Another common allegation directed at royalty collection societies in India, similar to the US and UK, is their anti-competitive behaviour. PPL has been subject to severe criticism in this respect. Since PPL consists of the seven biggest music labels in India<sup>61</sup> and the board of directors consists of representatives from these major labels, any complaint against PPL, it has been argued, can be presumed to be a complaint against these seven music companies that control PPL.<sup>62</sup> It has been alleged that PPL seems to be insisting that their members license them with the right to collect royalties for all

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<sup>58</sup> Nikhil Krishnamurthy, ‘Indian Copyright Collecting Societies and Foreign Royalties: Whither Transparency?’ (Spicy IP, 18 November 2008) <<http://spicyipindia.blogspot/ch/2008/11/indian-copyright-collecting-societies.html>> accessed 15 September 2016.

<sup>59</sup> Priyanka Deshpande, ‘Music Rights Body Pauses Party Organisers’ Playlists’ Midday Metro (Delhi, 30 December 2013) <<http://www.mid-day.com/articles/music-rights-body-pauses-party-organisers-playlists/246485>> accessed 15 September 2016.

<sup>60</sup> Pradeep Shetty, Secretary FHRA, included in Deshpande (n 59).

<sup>61</sup> (i) Virgin-EMI (ii) Universal (iii) Tips (iv) Sony (v) Saregama (vi) Aditya (vii) Venus.

<sup>62</sup> P Reddy, ‘Music labels across India complain against PPL’s anti-competitive behaviour’ (Spicy IP, 29 December 2011) <<http://spicyipindia.blogspot/ch/2011/12/music-labels-across-india.html>> accessed 15 September 2016.

royalty streams, despite the fact that some labels may not want to license over to PPL the right to collect royalties for mobile ringtones and digital streams.<sup>63</sup> Since PPL is enjoying a dominant position with regards to licensing recordings, the members of PPL are forced into licensing away their bundles of rights to PPL, without any option of choosing the most profitable method of licensing them separately.<sup>64</sup>

With the advent of the ISRA and the introduction of a mechanism to collect royalties for singers, the music labels in India have been proactive, one could argue, in attempting to achieve benefits from this. It has been reported that the music labels have started to force singers to enter into feudal and exploitative contracts, which would result in singers signing away their right to perform and their right to receive royalties from their performances, once they record songs with a particular music label.<sup>65</sup> Due to the unique and close interwoven nature of music and Bollywood movies, these contracts play a significant role for all parties concerned. Music labels argue that the singers have the opportunities to generate high revenue through their live performances and, therefore, such a contract would not affect the singers much.<sup>66</sup> The singers, on the other hand, argue that they are not demanding money from the labels, but the labels do not wish to share the revenue and this is why they are being forced to enter into such contracts.<sup>67</sup> As a result, the realities of collecting and distributing royalties for singers in the music industry still seem to be unclear, even though a proper royalty collection scheme has been put in place in the Indian music industry.

Further to the above discussion relating to royalty collection in three of the most popular music industries in the world, the next section will discuss the emergence and contemporary status of royalty collection in the Sri Lankan music industry.

### **3.4 Royalty payment collection in Sri Lanka**

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<sup>63</sup> Technically, under the Indian law, a member of PPL can choose to selectively licence only certain rights to PPL i.e. while a label can licence to PPL the right to collect royalties for public performance in hotels and restaurants, the same label can choose not to licence the ringtone royalty rights for the very same sound-recording. Reddy (n 62).

<sup>64</sup> Reddy (n 62).

<sup>65</sup> V Lalwani, 'Discordant Notes' Mumbai Mirror (Mumbai, 25 December 2013) <<http://www.mumbaimirror.com/entertainment/bollywood/Discordant-Notes/articleshow/27872087.cms>> accessed 15 September 2016.

<sup>66</sup> *ibid.*

<sup>67</sup> *ibid.*

Royalty payment, which, until the 1970s, had been an alien term for Sri Lankan music, was first used when the Performing Rights Society was created in Sri Lanka in 1981, under the auspices of the British Performing Rights society.<sup>68</sup> Although the UK copyright law, which provides for royalty collection and distribution, was directly applicable in Sri Lanka for over a century before that, the reasons for the lack of such a system in the local music industry are not very clear. The Sri Lankan Performing Rights Society (hereinafter referred to as SLPRS) was initially formed with the financial support of the Government of Sri Lanka and the British Performing Rights Society.<sup>69</sup> According to its founding chairman, its initial task was mostly to collect royalties for foreign works rather than for local works.<sup>70</sup> As he further stated, some of the revenue collected as royalties by the SLPRS were sent back to the relevant international PRS, while some of them were permitted to be retained by the SLPRS to cover the administration costs.<sup>71</sup>

It was stated by one interviewee that the SLPRS has been most successful in collecting royalties on behalf of foreign PRSs from large hotels in Colombo, the commercial capital of Sri Lanka, where the high demand for international music is visible.<sup>72</sup> The least successful, according to another participant, was when the PRS representatives attempted to collect royalties from live shows held in remote areas outside of Colombo. As one author puts it:

The body [SLPRS] didn't, I think, have enough money to go around Sri Lanka and collect all this money. And then people who organised these shows outside Colombo had their people looking out for them. They are not to be messed around with. You go and say 'you have to pay us money', you would end up in hospital. This is how it was. So they [SLPRS] didn't actually have the funding and the necessary weight behind them to collect any kind of money. No powers, because although the [Intellectual Property] Act [was] there, it was not mobilised.<sup>73</sup>

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<sup>68</sup> WIPO Report Based on Consultation with Stakeholders and Detailed Examination of Current Copyright and Related Rights Protection System in Sri Lanka' (World Intellectual Property Organisation February 2009).

<sup>69</sup> Interview with P6.

<sup>70</sup> *ibid.*

<sup>71</sup> *ibid.*

<sup>72</sup> *ibid.*

<sup>73</sup> Interview with P2

According to the interviewees, the PRS seemed to have been experienced primarily as a royalty collection scheme for the benefit of the international artists, rather than a royalty payment scheme, as far as the local artists are concerned. Although the SLPRS is still in existence, interviewees reported that it seems to be barely operative in terms of music royalty collection.<sup>74</sup> A few more groups have been created recently, according to some interview participants,<sup>75</sup> with the intention of forming collective organisations.<sup>76</sup> Nevertheless, none of these seem to have been able to implement the royalty payment mechanism so far.<sup>77</sup>

The PRR may have had some effect on the Sri Lankan media since the 2003 Act, as ad hoc royalty payments have become visible in the industry. Some participants said that certain radio stations have started making royalty payments to artists in such a way that each station deemed fit.<sup>78</sup> According to the participants, some artists have started getting cheques in the post from a certain radio company once in a while, and another radio company started holding public presentation gatherings in this respect.<sup>79</sup> Some of the cheques, as these participants pointed out, have arrived with a covering letter explaining briefly that it was for the services obtained from the relevant artist, while some artists only received a cheque without any explanation as to why the cheque was sent to them.<sup>80</sup>

One interviewee shared her experience as follows: ‘One radio station sends about Rs.350/- about every five years. They say this is based on the number of times the songs were played. But there is no mention of rates. They just send a cheque. Is Rs.350/- enough for that many years? But all the contestants in these singing competitions (similar to X Factor, UK) are singing our songs.’<sup>81</sup> When one of the interviewees – who is attached to a media company that makes ad hoc royalty payments – was questioned about this rate, she refused to answer on grounds of confidentiality.<sup>82</sup> Thus, it seems that there is a lack of transparency in the ad hoc royalty schemes operated by some media companies in Sri Lanka. However, one participant was pleased that they are

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<sup>74</sup> Interviews with P1, P2, P6, P7, P8 and P13.

<sup>75</sup> Interviews with P1 and P8.

<sup>76</sup> Outstanding Song Creators’ Organisation (OSCA) and Creative Value Protection Society of Sri Lanka.

<sup>77</sup> Interviews with P1 and P8.

<sup>78</sup> Interviews with P3, P5, P7, P11 and P14.

<sup>79</sup> Interviews with P1, P3, P5, P7 and P14.

<sup>80</sup> Interview with P5.

<sup>81</sup> Interview with P3.

<sup>82</sup> Interview with P15.

getting something from these radio companies: ‘They [a particular radio station] make a small payment... I appreciate it with respect. It is something that should be done... I do not think that the amount is adequate at all. But at least they are doing something. So I am thankful for that.’<sup>83</sup>

This kind of selective royalty pay is also visible in the emerging digital content market in Sri Lanka too. According to some participants, those few artists<sup>84</sup> who have managed to come to an agreement with the relevant media companies regarding their share, in terms of ring tone downloads, manage to get the payment sent straight to the artist.<sup>85</sup> According to them, digital content has engendered a very lucrative mode of income for them through royalties.<sup>86</sup>

However, the majority of artists do not seem to have managed to become party to that particular value chain. As one singer puts it, ‘Certain recording/distribution companies sell our songs to mobiles [mobile companies]. They take all the money. Not even five cents are given to the singer, lyric writer or the composer. That company takes your song as theirs. I give the song to them only to make records. Not for such things. But they distribute it to everybody. Nothing for the singer.’<sup>87</sup>

One singer-songwriter expressed an experience that he and a director of a drama encountered relating to digital downloads as follows:

The producer and director of the drama that I sang a song in, once called me and said, ‘There is a programme on TV now where a new singer sang that song [in the drama] and they are saying that it can be downloaded from a particular mobile company as a ring tone.’ I said, ‘Yes, I am watching that programme now.’ Then he said, ‘That is my product, no? I spent money on it. I asked the writer to do it, I gave him the idea, I asked him to do such a tune. It was in my drama. How can they sell it without asking me?’ Someone can sing the song, but how can they sell the product?<sup>88</sup>

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<sup>83</sup> Interview with P14.

<sup>84</sup> According to P9, they even send digital royalties to India for Hindi and Tamil song downloads. Interview with P9.

<sup>85</sup> Interviews with P13 and P17.

<sup>86</sup> Interviews with P13 and P17.

<sup>87</sup> Interview with P3.

<sup>88</sup> Interview with P4.

Accordingly, the digital market raises similar transparency issues, where the value generation and distribution take place unhindered while excluding the authors, singers and, sometimes, owners of the songs. The difference here compared to selective radio royalty pay is that, although the majority of the creators of songs seemed to be deprived of this royalty, those who have managed to tap into this chain seemed to be content with the remuneration they got. Thus, the lack of transparency here lies with the selection of parties as the entitled persons to receive a royalty share for a song, rather than the actual calculation of the entitled royalty fee. Interestingly, such a lack of transparency in the local ad hoc systems is somewhat reminiscent of the transparency issues under the royalty collection schemes in the major music industries in the world.

In addition to these ad hoc royalty schemes, there is no proper and consistent royalty collection or distribution with regards to music in Sri Lanka.

#### **4.0 PRR: a potential solution to Sri Lankan vocalists' remuneration concern?**

##### **4.1 Vocalists' expectations of a proper royalty scheme in Sri Lanka**

The only development that the PRR seems to be able to provide, within the Sri Lankan music industry context, is the establishment of a proper and consistent royalty payment scheme for the benefit of the musical artists, which includes vocalists. However, to date, the efforts made to implement a consistent royalty scheme have not been fruitful in the Sri Lankan music industry. All participants in this empirical study were unanimous in reporting inadequate remuneration for artists in the music industry. When detailing the concerns of remuneration, they eventually talked about the lack of a proper royalty scheme as a cause behind this situation. However, the majority of the artists interviewed – mainly singers – were quite content with the revenue they managed to generate through other sources in the absence of a proper royalty scheme.<sup>89</sup> It is noteworthy, however, that these singers are all currently actively involved in performing music in the industry. Although they may not perceive royalty collection as significantly financially beneficial to them while they are working, the importance of such a scheme for retired vocalists in the music industry was voiced by many of them.<sup>90</sup>

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<sup>89</sup> Live shows, making records, advertising etc.

<sup>90</sup> Interviews with P1, P2, P3, P4, P5, P7, P11, P13 and P14.

When participants were questioned about the royalty payments received, they had interestingly varied views about them. One singer said, ‘The way I see it, if you get paid royalties it is a bonus. We are not expecting it. I am not expecting it.’<sup>91</sup> One singer-songwriter said, ‘They [radio companies] pay a royalty<sup>92</sup> but it is a very small, negligible amount. So we don’t make a fuss on that.’<sup>93</sup> It must be noted that both these artists are well established and are still actively involved in performing in the industry.

Although the active vocalists claimed to be gaining satisfactory remuneration, they were all quite expressive in demonstrating their displeasure in terms of the media exploiting their work and gaining high revenue for their companies, while failing to redirect an adequate share of such revenue towards the artists. Thus, they were hopeful that a proper royalty payment scheme would ensure some form of remuneration for all artists, authors and vocalists, by seizing and redirecting some of the revenue generated by media companies through their recorded performances.

Many seemed to suggest that such a royalty scheme would, more importantly, be of assistance to ageing vocalists in the industry, who are not in a position to generate revenue by making renditions any more. Similar views were expressed regarding authors, who are considerably under-remunerated in the industry, as opposed to vocalists, who actively perform in the industry, having myriad opportunities to generate income.

A lawyer and a member of an artists’ organisation expressed his view on ageing artists. He stated that ‘Amaradeva’s<sup>94</sup> songs go on the radio every single day from dawn to dusk. Certain radio stations commence their morning broadcasts everyday with Amaradeva’s *Paramitha* song. But he doesn’t get paid a cent. Today, financially, he is in a difficult situation.’<sup>95</sup> This participant was referring to an artist who is not as actively involved in performing as he used to be, due to old age. Similar comments relating to other artists in the industry who are not able to perform anymore, due to various reasons such as old age and health conditions, were expressed during these interviews.<sup>96</sup>

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<sup>91</sup> Interview with P7. Similar sentiment was expressed by P2.

<sup>92</sup> Referring to ad hoc royalty payments, which will be discussed in detail later on in this section.

<sup>93</sup> Interview with P13.

<sup>94</sup> One of the most prominent vocalist and composer in Sri Lanka and recipient of Ramon Magsaysay award (the Asian version of the Nobel Prize) in 2001.

<sup>95</sup> Interview with P1.

<sup>96</sup> Interview with P3, P11, and P14.

Therefore, it was pointed out that vocalists who are unable to generate revenue anymore through various modes and, more importantly – according to some –through the most lucrative mode of live performing, are in need of a remuneration scheme.<sup>97</sup> Concerns surrounding ageing vocalists seem important, especially in the Sinhalese commercial music industry, as these are the artists who pioneered the creation of a local music genre in the 1950s, separate from the over-reliance on local copies of Indian music. Participants seemed to be considering a royalty payment scheme as a solution to the situation of the ageing artists and as a mechanism to redirect a share of the revenue that media companies generate towards them. Additionally, since it transpired that authors too are significantly under-remunerated in the music industry as a result of the lack of a proper royalty scheme,<sup>98</sup> it is expected that a proper royalty scheme would address the remuneration concerns of all artists in the music industry.

#### **4.2 The inherent limitations of royalty schemes**

All interview participants considered that a proper and consistent royalty scheme would correct the market conditions in the music industry in order to ensure appropriate revenue distribution among the artists. This is similar to the popular argument put forward by the proponents of an intellectual property regime; a royalty payment scheme based on exclusive rights given to intellectual creators would correct market failures and ensure returns for labour spent. Thus, the position of the interview participants was that the failure to implement an effective royalty scheme in Sri Lanka has resulted in the lack of adequate remuneration for artists.<sup>99</sup>

Various references made by the interview participants towards internationally popular Western artists, linking their financial success to royalty pay schemes, suggest that the

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<sup>97</sup> Similar concerns are being raised in the neighbouring music industry, India. A group of singers led by senior artists such as Lata Mangeshkar (78 years old) and her sister Asha Bhonsle have created an organisation to promote the payment performers' royalty to singers and urged the government to take necessary action in this regard. M Iyer, 'Lata Asha Appeal to Govt for Performers' Royalty' *The Times of India* (Mumbai, 17 September 2009) <[http://articles.timesofindia.indiatimes.com/2009-09-17/mumbai/28106408\\_1\\_playback-singers-kumar-sanu](http://articles.timesofindia.indiatimes.com/2009-09-17/mumbai/28106408_1_playback-singers-kumar-sanu)> accessed 15 September 2016.

<sup>98</sup> Since most of the authors interviewed except for one, had managed to create revenue generation schemes for them or not financially dependent on the industry as they had other sources of income, could be a reason why most of the authors interviewed were not much bothered about the lack of proper royalty scheme.

<sup>99</sup> Interviews with P1-P8, P11-P14, P16 and P17.

interviewees desire and anticipate similar circumstances through royalty schemes in Sri Lanka. As one singer-songwriter stated:

Say, for instance, Beatles' Lennon and McCartney wrote all the songs. But Lennon–McCartney songs are sung by Tina Turner, Michael Bubl  and all these people. Paul McCartney gets a payment of the sale... Beatles' songs, you can listen to Michael Bubl  and listen to all these young artists, they all sing. They all do recordings and release the album. They go through...there is a certain structure, they operate on. So the royalties are given to the right people and the new artist, they thrive on that. They make money on that. At the same time royalties are paid to whoever the parties concerned, with regard to the music and lyrics...I want a royalty scheme to work like in the West...have a proper structure, proper system. Everything is monitored. There is no proper system [in Sri Lanka], no structure, nothing at all... The payment should be divided the way they divide it in the West. I don't know how they do it. What kind of percentage goes to the composer, what kind of percentage goes to the lyric writer. But do it.<sup>100</sup>

While the expectations of a proper royalty scheme and the desire to have one similar to that in the West are evident in the interviewees' comments, it would be useful to assess the viability of such a scheme in resolving the singers' remuneration concerns. As the general expectations of a royalty scheme in music and how it functions in other music industries –amidst certain barriers – were examined earlier in this paper, revisiting some of the limitations here would be helpful in ascertaining their relevance in addressing the remuneration concerns in Sri Lanka. Since it could be argued that the revenue generated by the Sri Lankan commercial industry could be different compared to the international music industries discussed in this thesis, it could also be argued that the effects of the limitations that those industries encounter may have varying levels of impact in Sri Lanka.

It is believed that musical artists – along with performers – in countries with major music industries that have a proper royalty scheme in place generate income *inter alia*

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<sup>100</sup> Interview with P13.

through physical record sales, live performances and via royalty payment schemes.<sup>101</sup> It may indeed be a relief for any artist, whether in the UK, USA or in Sri Lanka, to know that they would continue to receive a pay cheque based on their musical work, especially when they are unable to make performances or create further work. Nevertheless, the overly complicated calculations<sup>102</sup> used to decide the rate of pay and the varying consumer demands for music, as discussed earlier, do not seem to promise large sums of money to the artists. Although it is generally contracted that there would be a royalty split between the authors and publishers<sup>103</sup> on a 70:30 or 50:50 rate and, under the PRR, a 50:50 split between the recording company and the main performer, the practical implementation of these provisions does not seem to be that clear or straightforward.<sup>104</sup>

As a study on global music royalty collection revealed, the mechanical royalty rate is set somewhere between 6% and 9.3%,<sup>105</sup> which is around 70 pence for the sale of a whole album.<sup>106</sup> When such amounts are divided between various other artistic contributors and the recording company, the vocalist would not get much (most of the time, something even less than a penny) as royalty for their song in the recording.

This situation can be argued as similar to royalties paid for broadcasting and digital content. For example, the statutory royalty rate in the US for online music streaming, including satellite radio and other non-interactive streaming, is set at around \$.0014 to \$.02 per song.<sup>107</sup> The PRS<sup>108</sup> in the UK has set the music streaming rate at 0.00085 pence per track.<sup>109</sup> Therefore, unless a certain artist has got an enormous repertoire, with a huge demand and popularity, these micro-payments would not mean much remuneration to vocalists.

A similar effect can be expected in the Sri Lankan context. Although proper and consistent royalty payments for broadcasts are still inoperative, the government of Sri

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<sup>101</sup> In the US however, vocalists will only receive digital royalties. Salmon, 'The Digital Music Business' (n 34) 278.

<sup>102</sup> Klimis, Kretschmer and Wallis, 'The Changing Location' (n 12); R. Towse, 'Copyright and Economic Incentives: An Application to Performers' Rights in the Music Industry' (1999) 52 *Kyklos* 369.

<sup>103</sup> Due to lack of market for sheet music, one would not find publishers in the Sri Lankan music industry.

<sup>104</sup> Klimis, Kretschmer and Wallis, 'The Changing Location' (n 12).

<sup>105</sup> *ibid* 169.

<sup>106</sup> Salmon (n 34) 280.

<sup>107</sup> *ibid*.

<sup>108</sup> The UK collecting society for publishers and composers.

<sup>109</sup> From 1<sup>st</sup> July 2009. Salmon (n 34) 279.

Lanka has set the minimum royalty rate at Rs.20/- (approximately 11 pence) per song, to be distributed equally among the lyric writer, composer, vocalist and recording company.<sup>110</sup> If and when the media in Sri Lanka follows this, a vocalist would get around Rs.5/- per broadcast. Accordingly, unless a particular artist has a long list of popular songs that get played multiple times a day, these payments would not result in a significant remuneration for them.

Nevertheless, a popular artist with significant bargaining power could potentially negotiate for a better royalty rate.<sup>111</sup> Thus, as discussed earlier in this paper, a royalty payment mechanism is vastly beneficial for already popular artists. Although such a position may be beneficial to some contemporary vocalists in Sri Lanka, it is questionable whether such a mechanism would effectively address the concerns relating to remuneration for the ageing artists in Sri Lanka. To benefit from this mechanism, they would need to have significant influence even in their retirement state, as well as possessing a back catalogue of songs that would enable the receipt of considerable revenue for them as royalty.

As has been discussed with regards to royalty collection in other music industries, the mere creation of a royalty collection would not ensure a fair distribution of royalty to artists. Over the years, collecting societies and record companies across the world have come under legal scrutiny due to inefficient practices and breaching of the set rules. For example, Eminem has reportedly sued Universal Music with regards to a royalty rate issue<sup>112</sup> and India Phonographic Performance Ltd has been sued due to charging excessive tariffs.<sup>113</sup> These legal interventions, made into royalty collection and distribution involving recording companies and collecting organisations, demonstrate that the mere implementation or appointment of a royalty collecting body or a royalty scheme would not address concerns relating to remuneration for the Sri Lankan vocalists. Such a mechanism involves the participation of powerful entrepreneurs, media companies, recording companies and collecting organisations, complying with various and convoluted legal requirements. From what transpired during the interviews,

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<sup>110</sup> Interview with P8.

<sup>111</sup> Ed Baden-Powell and J Baker, 'Case Comment - Pink Floyd Music Ltd v EMI Records Ltd – Money, It's Gas – Sharing Digital Revenue' (2010) *Entertainment Law Review* 245, 248.

<sup>112</sup> Salmon (n 34) 282.

<sup>113</sup> N Krishnamurthy, 'Music Broadcast Pvt Ltd v Phonographic Performance Ltd (Ind) (unreported)' (2009) 12(8) *Entertainment Law Review* 88.

it is difficult to believe that artists in Sri Lanka would be inclined to seek legal remedies on such occasions, when so far, on the occasions where they have encountered blatant breaches by recording companies, they have not been inclined to do so.<sup>114</sup> Therefore, ensuring that such companies are in fact returning the legally required royalty back to the individual artist would certainly be an additional burden for the effective maintenance of a royalty scheme, which the local vocalists may not be willing to take on.

### **4.3 Country-specific limitations of music royalty schemes in Sri Lanka**

After examining certain limitations in royalty schemes generally, this section will discuss some country-specific limitations in a royalty scheme within the Sri Lankan music industry context, in order to discuss the viability of such a scheme in terms of catering for the remuneration concerns of the vocalists.

The most problematic situation, as far as all artists, authors and vocalists in Sri Lanka are concerned, is whether they would benefit from a royalty scheme at all in the contemporary music industry context. As a Sri Lankan recording company representative explained, the recording companies get all the rights of the songs transferred to themselves.<sup>115</sup> He further stated that '[a]ctually we even take performing rights as well, we don't really enforce it. We let the artist perform.'<sup>116</sup> Accordingly, if the recording company obtains the rights over the songs, which includes right to remuneration, when a proper royalty scheme is implemented, it will be the recording company who benefits out of it and not the artists themselves.

Although a transfer of rights may have taken place readily in the past, possibly partly due to a lack of awareness among artists about the repercussions of it, artists today are not as willing to transfer their rights.<sup>117</sup> However, it is questionable as to how long these artists would be able to be adamant about their position for when, at the same time, they are desperate to get their work recorded and distributed. One established artist explained the experience of his son: 'My son is going through a hard time because some

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<sup>114</sup> Interviews with P11 and P14.

<sup>115</sup> Interview with P9.

<sup>116</sup> *ibid.*

<sup>117</sup> Interview with P13.

of these [record] producers who are trying to negotiate with the album, they want all the IP [ownership of copyright of the songs] and everything. IP, no producer can take that. Producers tend to put all those clauses in the contract which is wrong.<sup>118</sup> Since it seems that even new artists are pressured into transferring all their rights to recording and media companies, the significance of having an established royalty payment scheme in the future does not seem very promising for the vocalists in the Sri Lankan music industry.

In addition to the above, a proper royalty scheme could have a counter-productive impact on the artists and on the wider music industry in Sri Lanka. For example, the current irregular ad hoc royalties that are received by selected artists are not a divided share between record companies and artists but a payment made exclusively to the artists. The insignificance in the value and the irregularity of such a payment scheme may have discouraged the recording companies in pursuing their share of royalties from the media. However, within a proper royalty scheme, it is unlikely that the recording companies would not be interested in claiming their statutory share of royalty under the PRR. This could mean that the already negligible pay given to artists could become even more insignificant in value when they are required to share it with the recording company.<sup>119</sup>

Furthermore, establishing a proper royalty scheme would require Sri Lanka to comply with the national treatment<sup>120</sup> principle under the TRIPS Agreement. This could mean that the local media would be obligated to pay royalties to foreign works<sup>121</sup> that are used on a large scale in Sri Lanka. This could certainly be an unprecedented financial burden on media companies who have, more often than not over the years, freely<sup>122</sup> broadcasted foreign songs through their various channels.<sup>123</sup> It is yet to be seen whether

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<sup>118</sup> *ibid.*

<sup>119</sup> It has been predicted in terms of Indian vocalists that if their demand for performers' royalties is implemented, their up-front fee may be halved while the rest would come as royalty. D Ajwani, 'Unequal Music: Singers demand royalty but may have to take a cut in upfront payment for each song' *Forbes India* (India, 04 November 2009) <<http://business.in.com/article/resolution/unequal-music/6242/1#ixzz1ZuGz1g2R>> accessed 15 September 2016.

<sup>120</sup> Article 3. National Treatment essentially requires WTO members to give others the same treatment as one's own nationals.

<sup>121</sup> Mostly Indian (Hindi and Tamil) and English.

<sup>122</sup> Although payments are generally made for full programmes, none of the media companies pay for the foreign songs that are broadcasted.

<sup>123</sup> In an industry where majority of the songs are made in Sinhalese, there are various channels that exclusively broadcasts English programmes and songs. These English channels are not provided with much English songs that are made locally but are predominantly dependent on foreign songs.

such a financial burden could be borne by the local media while also ensuring royalty payments to local artists. Therefore, considering a wider perspective of the situation in the Sri Lankan music industry and royalty payments, it is likely that the implementation of a royalty collection scheme could in fact threaten even the existing ad hoc royalty payments made to selected artists.<sup>124</sup> Thus, it is unlikely that establishing a proper and consistent royalty scheme itself would address the concerns relating to remuneration, as expected by the vocalists in Sri Lanka.

## **5.0 Conclusion**

This paper explored the functioning of the royalty collection scheme as a method of revenue generation in three of the world's largest music industries along with Sri Lanka. While the extant royalty collection schemes seemed to be functioning in other industries in comparison to the almost non-existent royalty collection scheme in the Sri Lankan context, as this paper uncovered, royalty collection is a complex scheme that has its inherent limitations, and also has context-specific limiting factors due to the contemporary industrial practices in the Sri Lankan music industry.

While mismanagement, corruption and inefficiencies can easily plague such a scheme on a general level, on a country-specific level, the success of such a scheme would not appear to be promising when the expectation of the royalty collection scheme is for it to be a pension scheme for aged or retired artists in Sri Lanka. Such beneficiaries may not necessarily have the financial or physical strength to confront the various issues of mismanagement and keep the system on track. The convoluted calculation mechanisms and the inevitable gate-keeper status that these societies receive cannot necessarily promise a viable pension for the local artists, unless they have authority and an extremely popular back catalogue of songs. Even then, the recording companies, who have so far been silent about their entitlement to secure complete royalties as a result of the strict contractual arrangements, may not necessarily remain silent if a royalty collection scheme started to generate substantial royalties –thus making the whole exercise futile for the artists in the Sri Lankan music industry. Accordingly, a royalty

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<sup>124</sup> I do not support such a selective payment scheme. Nevertheless, I am skeptical about a proper royalty collection scheme being able to deliver anything better.

collection scheme, if and when implemented in the Sri Lankan music industry, must be carried out with great caution and care. However, in its current state, it is very unlikely that a proper royalty collection scheme would deliver a reasonable mode of remuneration for the vocalists in the Sri Lankan music industry.