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Nanayakkara, G. (2012) Mimesis, cover versions and the commercial vocalists' dilemma; Sri Lankan perspective. International Conference on Asian Studies.

Link to official URL (if available):

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## **Mimesis, Cover Versions and the Commercial Vocalists' Dilemma; Sri Lankan Perspective**

### **Introduction**

The vocalists in the Sri Lankan contemporary commercial music industry significantly contest others making cover versions of songs they once performed. Although the very commercial industry was inaugurated on similar mimetic practices of Indian songs, the vocalists in the contemporary industry detest the practice of cover versions. Vocalists in this small music industry context who are, more often than not, solely singers and therefore perform/depend on authors' compositions and lyrics do not possess a legal right under the copyright regime to prevent such a practice. It is the authors who are legally given such rights to control cover versions of their work. Nevertheless, strong oppositions maintained by the vocalists seems to have, to a certain extent, managed to be forceful in preventing such practices of covering to be evolved into a wider music practice with a significant commercial market. This paper will examine the issue of cover versions in Sri Lanka while discussing varying views in different geographical and musical context in the world. The paper also attempts to shed light on the effects of covering on the Sri Lankan commercial vocalists in order to understand the validity of some of these claims in the context of Sri Lankan singers.

It was much anticipated that the introduction of the Performers' Rights Regime (PRR) under the Sri Lankan Intellectual Property Act would resolve the issue of cover versions. Vocalists are one category of performers that are granted with new performers' rights under the aegis of copyright law. Nevertheless, this paper argues that the essential subordinate nature of the performers' rights to the overarching authors' rights under copyright law, makes resolving the issue of cover versions, difficult to resolve under the PRR. Empirical data gathered during field research in Sri Lanka is used to demonstrate the impact of cover versions in the national context and the incapacity of the PRR to satisfactorily resolve the cover versions issue.

### **Mimesis**

Borrowing or mimicking is common in music, widely in contemporary music but also visible in classical music.<sup>1</sup> Borrowings in the contemporary music industries could take many different forms and styles, such as cutting,<sup>2</sup> scratching,<sup>3</sup> sampling,<sup>4</sup> looping,<sup>5</sup> mashing<sup>6</sup> and covering.<sup>7</sup>

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<sup>1</sup> O.B. Arewa, 'From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context' (2006) 84 North Carolina Law Review 547, 550.

<sup>2</sup> "Using a cross fader on the turntable mixer to switch back and forth from each two turntables." – T.M. Evans, 'Sampling, Looping, and Mashing.....Oh My!: How Hip Hop Music is Scratching More Than the Surface of Copyright Law' (2010) 10(26) Widener Law School Legal Studies Paper Series 843, 845

<sup>3</sup> "Moving the vinyl back and forth against the stylus in different patterns and rhythms" - T.M. Evans, 'Sampling, Looping, and Mashing.....Oh My!: How Hip Hop Music is Scratching More Than the Surface of Copyright Law' (2010) 10(26) Widener Law School Legal Studies Paper Series 843, 846

Musical borrowings are seen as fruitful exercises in assisting musical creators to build upon existing creations for the purpose of making new creations. The borrowing practice of music is influenced by various objectives of the new creators, such as for the purpose of saving time and effort<sup>8</sup> for the new creator or as a form of honouring the initial work.<sup>9</sup> Some argue that it is free advertisement for the initial work,<sup>10</sup> while some say it is a type of parody.<sup>11</sup> For some, it is theft<sup>12</sup> while for some it improves and provides new insights to the initial work.<sup>13</sup>

However, the beginnings of some of these borrowings suggest that such practices emerged as a “powerful movement against the propertied and the social order maintaining their wealth.. by those struggling for economic or social justice”<sup>14</sup> or as a cultural resistance to forms of power.<sup>15</sup> Predominantly based on hip-hop culture, which was a local phenomenon in South Bronx, New York, it has been argued that some of these borrowing practices commenced as a medium of artistic expression of the poor urban youth.<sup>16</sup> Such borrowing practices are not limited to music. Borrowing in another cultural form, such as literary work, in the context of fanzines, is seen as “irony, mockery, parody, pastiche, and even alternative modes of appreciation, activities of creative appropriation [which] enables fans to comment indirectly not only on gender ideology, but on law, culture, authorship, authority and the commodity form”.<sup>17</sup> Accordingly the discussion on mimesis invites a broad range of interesting concepts from alternative practices in music to gender. This paper however will predominantly examine the effects of such practices in the music field.

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<sup>4</sup> “Digital manipulation of parts of pre-existing sound recordings as components for new recordings” – B. Sherman, and L. Bentley, ‘Cultures of copying: digital sampling and copyright law’ [1992] Entertainment Law Review 158, 158.

<sup>5</sup> “A loop is a piece of sound that can be played again and again in a coherent sequence” - Evans, T.M. Evans, ‘Sampling, Looping, and Mashing.....Oh My!: How Hip Hop Music is Scratching More Than the Surface of Copyright Law’ (2010) 10(26) Widener Law School Legal Studies Paper Series 843, 846.

<sup>6</sup> “Combines the music of one song with the lyrics of another” - T.M. Evans, ‘Sampling, Looping, and Mashing.....Oh My!: How Hip Hop Music is Scratching More Than the Surface of Copyright Law’ (2010) 10(26) Widener Law School Legal Studies Paper Series 843, 846.

<sup>7</sup> “An extant song is re-recorded, generally by a different label, with different vocalists” - P. Manuel, ‘The Cassette Industry and Popular Music in North India’ Popular Music, (1991) 10(2) 189, 196.

<sup>8</sup> With regard to sampling, B. Sherman, and L. Bentley, ‘Cultures of copying: digital sampling and copyright law’ [1992] Entertainment Law Review 158, 159

<sup>9</sup> A.L. Smith, ‘Other People’s Property: Hip-Hop’s Inherent Clashes with Property Laws and Its Ascendance as Global Counter Culture’ (2007) 7 Virginia Sports and Entertainment Law Journal 59,79

<sup>10</sup> A.L. Smith, ‘Other People’s Property: Hip-Hop’s Inherent Clashes with Property Laws and Its Ascendance as Global Counter Culture’ (2007) 7 Virginia Sports and Entertainment Law Journal 59,79.

<sup>11</sup> P. Manuel, ‘The Cassette Industry and Popular Music in North India’ Popular Music, (1991) 10(2) 189, 196.

<sup>12</sup> Grant Upright Music Ltd v Warner Brothers and Others, (US District Court 16 December 1991)

<sup>13</sup> G. Plsketes, ‘Look What They’ve Done to My Song: Covers and Tributes, An Annotated Discography 1980-1995’ (1995) 19(1) Popular Music and Society 79, 79.

<sup>14</sup> A.L. Smith, ‘Other People’s Property: Hip-Hop’s Inherent Clashes with Property Laws and Its Ascendance as Global Counter Culture’ (2007) 7 Virginia Sports and Entertainment Law Journal 59. See further Rosemary J. Coombe, *The Cultural Life of Intellectual Properties – Authorship, Appropriation and the Law* (Duke University Press 1998)

<sup>15</sup> Rosemary J. Coombe, *The Cultural Life of Intellectual Properties – Authorship, Appropriation and the Law* (Duke University Press 1998)

<sup>16</sup> A.L. Smith, ‘Other People’s Property: Hip-Hop’s Inherent Clashes with Property Laws and Its Ascendance as Global Counter Culture’ (2007) 7 Virginia Sports and Entertainment Law Journal 59, 61

<sup>17</sup> Rosemary J. Coombe, *The Cultural Life of Intellectual Properties – Authorship, Appropriation and the Law* (Duke University Press 1998) 125

## Mimesis and Copyright Law

In the name of protecting creativity of the author, the copyright regime still struggles to consider such practices of borrowing as a creative process. Therefore it labels them as infringing acts, to the extent they do not comply with the copyright regulations.<sup>18</sup> The foundations of such rejections and regularisation are, to a certain extent, based on romantic authorship ideology, which regards the author as an autonomous creator of intellectual work.<sup>19</sup> This underpins the creation of copyrights, which prohibits another from gaining from/using the authors' work for such borrowing. Some argue that such objection may be based on failure of the copyright law to adapt to new technological standards that have facilitated these borrowings.<sup>20</sup> Thus the copyright law is hesitant in terms of allowing new work based on and borrowed from previous work to accept as collaborative work, on the empirically unsubstantiated assumption that it would stifle creativity of the initial authors.

After the first judicial pronouncements<sup>21</sup> relating to such borrowing practices in music<sup>22</sup> in the west nearly two decades ago, still the parameters of legal borrowing in music is quite blurred and therefore difficult for one to ascertain whether their work would constitute a fair use, a *de minimis* use, a derivative work<sup>23</sup> or an infringement. Thus it has been argued that "treatment of musical borrowings under current copyright standards is far too often inequitable".<sup>24</sup> The process of obtaining licenses, for some who wish to be safe in their borrowings, is seen as restrictively costly, cumbersome<sup>25</sup> and therefore curtailing.

## Cover Versions and Varying Perspectives

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<sup>18</sup> O.B. Arewa, 'From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context' (2006) 84 N.C. Law Review 547

<sup>19</sup> P. Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of "Authorship"' [1991] Duke Law Journal 455.

<sup>20</sup> O.B. Arewa, 'From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context' (2006) 84 N.C. Law Review 547, 552

<sup>21</sup> UK case of *BBC v Precord Ltd* [1991] SRIS C/89/91 (Ch) and US case of *Grant Upright Music Ltd v Warner Brothers and Others*, (US District Court 16 December 1991) – as referred to in B. Sherman, and L. Bentley, 'Cultures of copying: digital sampling and copyright law' [1992] Entertainment Law Review 158, 158.

<sup>22</sup> Relating to digital sampling in these cases.

<sup>23</sup> This is due to the fact that the court decisions are made on different infringement standards, (fair use, *de minimis* use and derivative work are legally acceptable borrowings under copyright law) as stated in T.M. Evans, 'Sampling, Looping, and Mashing.....Oh My!: How Hip Hop Music is Scratching More Than the Surface of Copyright Law' (2010) 10(26) Widener Law School Legal Studies Paper Series 843

<sup>24</sup> O.B. Arewa, 'Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use' (2006) 37 Rutgers Law Journal 277, 281.

<sup>25</sup> A.L. Smith, 'Other People's Property: Hip-Hop's Inherent Clashes with Property Laws and Its Ascendance as Global Counter Culture' (2007) 7 Virginia Sports and Entertainment Law Journal 59, 80.

Although various types of musical borrowings are visible to a greater or lesser degree in various parts of the musical world, as far as the case study of this paper is considered, i.e., Sri Lankan music industry, cover versions have attracted much attention and controversy than any other type of borrowing. Cover versions, while bear most of the attributes of other musical borrowings, can be considered different to the other types, as it generally involves a whole song, composition and lyrics of a single song, rather than part/parts of a song or songs<sup>26</sup> and it does not use the recording of the song *per se* but rather uses the song and reproduces the composition, lyrics and vocals through new artists. This can be considered as one of the oldest form of borrowing while most of the other borrowings ascended much later with the improvements in technology.

Cover version is a term used for a performance of a piece of music that someone else has also performed,<sup>27</sup> a base song.<sup>28</sup> Western musical theorists view covering songs in various ways. Some see this as lack of musical creativity while some see it as an easier way of making money,<sup>29</sup> by not having to spend on a new lyric and a composition. Contrary to the above views, some see the practice of cover versions as an important method of learning various musical skills from the base song<sup>30</sup> or “an opportunity to engage in a dialogue with music other on their ‘own’ and with other performers who have been involved in ‘covering’ that or similar music”.<sup>31</sup> Regardless of how cover versions are musicologically viewed, it has been argued that cover songs have “always been an integral, multifaceted, attribute of popular music”.<sup>32</sup>

Proponents of cover versions argue that “the cover phenomenon in popular culture may be viewed as a postmodern manifestation of rampant recontextualisation in music as artists revisit, re-interpret and re-examine a significant cross section of musical styles, periods,

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<sup>26</sup> Mashup is considered as a cover subgenre in D. Tough, ‘The Mashup Mindset: Will Pop Eat Itself?’ in G. Plasketes (ed), *Play it Again: Cover Songs in Popular Music* (Ashgate Publishing 2010) 212. However, in mashup, mixing a tune and lyrics of two different songs take place whereas in cover versions, it is the composition and lyrics of the same song.

<sup>27</sup> D. Horn, ‘Some Thoughts on the Work in Popular music’ in M.Talbot (ed), *TheMusical Work: Reality or Invention*, (Liverpool University Press 2000) 15 as referred to in J. Butler, ‘Musical Works, Cover Versions and Strange Little Girls’ (2010) 7(1) *Volume ! La revue des musiques populaires* 6

<sup>28</sup> To mimic Mosser’s phrase to mean ‘a song that, due to its status, popularity, or possibly other reasons, is taken to be paradigmatic, and thus the version to which all other recordings or performances are compared’. Kurt Mosser, “Cover Songs”: Ambiguity, Multivalence, polysemy’ <<http://www.popular-musicology-online.com/issues/02/mosser.html>> accessed 25 October 2011

<sup>29</sup> D. Horn, ‘Some Thoughts on the Work in Popular music’ in M.Talbot (ed), *TheMusical Work: Reality or Invention*, (Liverpool University Press 2000) 30 as referred to in J. Butler, ‘Musical Works, Cover Versions and Strange Little Girls’ (2010) 7(1) *Volume ! La revue des musiques populaires* 6

<sup>30</sup> H.S. Bennett, ‘The Realities of Practice’ S. Frith and A. Goodwin (eds), *On Record: Rock, Pop and The Written Word*, (Routledge 1990) and Bayton, M., ‘How Women Become Musicians’ S. Frith and A. Goodwin (eds), *On Record: Rock, Pop and The Written Word*, (Routledge 1990), also in D. Horn, ‘Some Thoughts on the Work in Popular music’ in M.Talbot (ed), *TheMusical Work: Reality or Invention*, (Liverpool University Press 2000) 30 as referred to in J. Butler, ‘Musical Works, Cover Versions and Strange Little Girls’ (June, 2010) 7(1) *Volume ! La revue des musiques populaires* 7

<sup>31</sup> D. Horn, ‘Some Thoughts on the Work in Popular music’ in M.Talbot (ed), *TheMusical Work: Reality or Invention*, (Liverpool University Press 2000) 30.

<sup>32</sup> G. Plasketes, ‘Re-flections on the Cover Age: A Collage of Continuous Coverage in Popular Music’ (2005) 28(2) *Popular Music and Society* 137, 144.

genres, individual records, and other artists and their catalog of works”.<sup>33</sup> Re-interpretation of one artist’s version is regarded as the most widely discussed conception of cover songs where a sufficiently well known base song is used in this regard. When certain such cover versions become more popular than the previous version, the new interpretation tends to be a base song for further re-interpretations.<sup>34</sup> In the case of inter-language parodies in India and Indonesia, it has been argued that cover songs “could be seen as revitalizing and empowering regional cultures”<sup>35</sup> as the most popular songs are made available in various other languages apart from the dominant one.

Opponents raise concerns of “contextualization, authenticity, repetition, ownership, originality, cultural exhaustion, homage and conflicts between commodity and concept”.<sup>36</sup> These concerns are related to the desires of enforcing notions of intellectual property law, which promotes and regulates the maintenance of ownership, originality and authenticity of authors’ or creator’s work. Mimicking practices such as cover versions challenge these ambiguous and legally forged concepts of the Western states i.e., originality and ownership. Imposition of these concepts ignores the “existence of practices of copying in the premodern West, in the margins of Western culture, and in non-Western cultures... and the fact that different societies have had attitudes to copying that differ radically from [one’s] own”.<sup>37</sup> This complements Gordon’s views of culture being interdependent and “requiring each act of dependency to render an accounting would destroy the synergy on which cultural life rests.”<sup>38</sup> It has been affluently argued by Coombe that these postmodern dialogic practices which involves borrowing, “come into tension with the monologism of a modern legal discourses that bestowes monopolies over meaning under the authority vested” in the form of property”.<sup>39</sup>

Accordingly, various culturally, anthropologically, musically and sociologically strong arguments welcome the practice of cover versions, although arguments challenging such views are not entirely absent. While proposing views focus on the freedom of creativity of the

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<sup>33</sup> G. Plasketes, ‘Like a Version’ in G. Plasketes (ed), *Play it Again: Cover Songs in Popular Music* (Ashgate Publishing 2010), 2.

<sup>34</sup> Kurt Mosser, ‘Cover Songs’: Ambiguity, Multivalence, Polysemy’ < <http://www.popular-musicology-online.com/issues/02/mosser.html> > accessed 25 October 2011

<sup>35</sup> Peter Manuel, ‘The Cassette Industry and Popular Music in North India’ (1991) 10(2) *Popular Music* 189, 198 referring from P. Yampolsky, ‘Hati Yang Luka, an Indonesian Hit’, (1989) 47 *Indonesia* 1.

<sup>36</sup> G. Plasketes, ‘Like a Version’ in G. Plasketes (ed), *Play it Again: Cover Songs in Popular Music* (Ashgate Publishing 2010) 2.

<sup>37</sup> M. Boon, *In Praise of copying* (Harvard University Press 2010) 6-7.

<sup>38</sup> W Gordon, ‘On owning Information: Intellectual Property and the Restitutionary Impulse’ (1992) 78 *Virginia Law Review* 149, 168 as referred to in Rosemary J. Coombe, *The Cultural Life of Intellectual Properties – Authorship, Appropriation and the Law* (Duke University Press 1998) 68.

<sup>39</sup> Rosemary J. Coombe, *The Cultural Life of Intellectual Properties – Authorship, Appropriation and the Law* (Duke University Press 1998) 68.

public, the opposing views focus on the protection of creativity of authors more strongly and protection of public from inferior copies to a lesser extent.

### **Practice of Cover Versions in Sri Lanka**

Cover versions is not a practice that is completely alien to Sri Lanka. The very commercial music industry in Sri Lanka was founded on mimicked Indian melodies, which were reproduced by Sri Lankan vocalists. Thus it is correct to say that foundation of the local commercial music industry was exclusively based on cover versions of Indian songs. Although the nationalistic music genre emerged in the 1950s, condemning the existing practices of dependence on Indian and Western songs, making cover versions of foreign songs are not entirely absent in the contemporary music industry. Majority of these cover versions, however, were based on Indian and English western songs.

Considering majority of cover versions of Sinhala songs that have been made in Sri Lanka, it is correct to say that it has been primarily used for the purpose of embarking one's journey into the music industry while some of them may have been made with intentions to introduce versatile versions or re-interpretation of the same song. Thus budding artists, who, to a certain extent, mimic the initial vocalist, to attract popularity and lay the foundations of becoming an established vocalist, mainly do cover versions. One would rarely hear an established vocalist making cover versions of another artist in Sri Lanka.<sup>40</sup> Accordingly, many artists<sup>41</sup> who were once budding performers making cover versions, would seldom continue on such practice. Once they build up their repertoire, they would limit to performing their own base songs. Therefore, it can be argued that there is a certain level of stigma attached to performing cover versions in Sri Lanka as that would indicate that a particular artist is either an amateur in the industry or not having any of their own songs to sing.<sup>42</sup>

Although foreign songs are widely covered, an interesting characteristic of the cover version practice in Sri Lanka is that one does not see many Sinhalese songs covered by other Sri Lankan vocalists. Even on such limited occasions, the 'initial vocalists'<sup>43</sup> have not hesitated to express their displeasure towards it.<sup>44</sup> Unlike in the west and in the neighbouring country India, Sinhalese cover songs were not widely done for it to become a substantial part of the

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<sup>40</sup> Exception to this is Bhatiya & Santhush, a modern established duo who perform cover songs along with their own creations.

<sup>41</sup> Nirosha Virajini, Nanda Malini, Champa Kalhari

<sup>42</sup> Author-Singer Participant 1

<sup>43</sup> To avoid ambiguous term of 'original singer', the term 'initial singer' is used. The use of 'original singer' could suggest that subsequent singers who make versions of base songs may be inferior in their aesthetic abilities and skills.

<sup>44</sup> Author-Singer Participant 1, Singer Participant 1

local music market. Although it is not very clear as to why a cover version market for Sinhalese songs did not become prominent, it can be argued that the strong resistance made by the vocalists and the nationalistic approach to music making which predominantly involved reproving mimicking Indian and English songs may have had an impact on it, at least to some extent.

Accordingly, out of respect for the initial singer or unwillingness to be subject to criticism by other artists and the wider society, it seems that there is a silent agreement among majority of artists in Sri Lanka in terms of not performing and recording cover versions. Nevertheless, with the introduction of many singing competitions in Sri Lanka, which are done in a similar fashion to programmes such as UK/US 'X factor' and 'American Idol', not only conversations about cover versions of Sinhalese songs, but also a market for such cover versions seems to be emerging during the last few years.

### **Cover Versions as a Contested Phenomenon in Sri Lanka**

Recording and performing cover versions of Indian and English western songs by Sinhalese vocalists take place without much hindrance in Sri Lanka. However, making cover versions of Sinhalese songs is a highly contested issue in the national context. Talking to the interviewees, it was revealed that, for the vocalists, an important and pressing issue was the practice of cover versions.

A clear division of views was visible among the interview participants, regarding the practice of cover versions. While majority of singers were not in favour of cover versions, all of the authors and the majority of the singers who are also authors were in favour of the practice of cover versions. Some of the authors, however, were not approving the manner in which the practice is carrying on in Sri Lanka but were not against the concept of cover versions. It must be noted that although authors and authors who are also singers were not against making cover versions, most of them currently do not receive any financial benefit out of this practice.<sup>45</sup>

When considering the various opposing views of the vocalists with regard to cover versions, it seems that their discontent is based on two main reasons; remuneration and ownership. It is a concern for the initial vocalists' remuneration, as, according to the interviewees, they would not be invited for as many performances as they would otherwise have received due to the competition between cover singer and the initial singer. It was also an ownership issue for the

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<sup>45</sup> The only exception was Author-Singer Participant 2 who said that he has mechanism in place where he signs agreements with new artists and let them perform his songs for a small fee.



vocalists, as, according to the interviewed vocalists, they have a sense of belonging towards the songs they once performed.

Accordingly, they see covering songs as a thieving act. In a small musical industry where one would find artists who are predominantly vocalists, majority of them with limited musical repertoire,<sup>46</sup> rather than singer-songwriters, such a competition could result in significant loss of opportunity to perform at live shows, where the vocalists gain the substantial proportion of their revenue. These opposing views to cover versions, in the national context, based on remuneration and ownership are examined below.

The first ground of objection to cover versions, remuneration, is a concern raised by majority of the vocalists. It was revealed during the interviews that the new performer gets contracted to perform the cover version at media companies and more importantly at live shows, locally and internationally, and as a result the initial singer sits at home losing out on his/her potential income.<sup>47</sup> On certain occasions, it was stated, the first vocalist has to compete with cover performers.<sup>48</sup> As one vocalist mentioned, “a certain new performer had asked a very senior artist, while on the plane on their way to an overseas musical show, not to sing certain of her first [base] songs, as the new artist was intending on performing [covering] them.”<sup>49</sup> This incident shows that the first performer may get restricted and be required to compete with a new young performer, who sings versions of songs she/he performs.

On another level, it has been stated that new artist manages to earn significantly more by performing the same songs that have been performed by a senior artist for decades.<sup>50</sup> As one of the participants explained, “One of the new singers who became popular through a singing competition by performing a particular prominent artist’s songs, even after winning the competition continued to sing songs of that prominent artist”.<sup>51</sup> The new singer’s voice resembles the voice of the prominent artist. It was stated that while the prominent artist charged Rs.10,000/- for a performance, the new artist charged Rs.40,000/- to cover the same songs.<sup>52</sup> Still the new artist managed to get more offers to perform.<sup>53</sup> The prominent artist was not pleased.<sup>54</sup> Practice of cover versions has therefore affected the income generation of certain vocalists whose base songs are now covered. Accordingly, the issue of cover versions has created significant animosity among the vocalists in Sri Lanka.

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<sup>46</sup> WIPO Document on Sri Lankan music industry prepared in February 2010.

<sup>47</sup> Singer Participant 1, Singer Participant 2

<sup>48</sup> Singer Participant 3

<sup>49</sup> Singer Participant 3

<sup>50</sup> Artists’ Association representative 1, Singer Participant 1

<sup>51</sup> Singer Participant 1

<sup>52</sup> Singer Participant 1

<sup>53</sup> Singer Participant 1

<sup>54</sup> Singer Participant 1

Another reason for vocalists' contestation regarding cover versions can be seen as an ownership issue. This sense of belonging they feel towards the songs they perform ought to be discussed in light of the cultural practice of creating a song in the Sri Lankan context. Although many songs may be created as a result of the invitation of a recording company, it was stated that there is still a group of artists who take the song making process very personally and passionately.<sup>55</sup> They would, according to some interview participants, go in search of a particular lyric writer and spend time with them explaining the type of song they need written.<sup>56</sup> Then they would, according to these interviewees, approach a particular composer and explain them about the type of melody they would want and would not leave the composer, or visit the composer again and again, until they are content with what they have received.<sup>57</sup> Labelling this process as commissioning would undermine this personal aesthetic journey of an artist as discussions about money, according to these artists, rarely takes place in these dealings.<sup>58</sup> Thus, for such artists, their songs are more like a part of themselves, very carefully and selectively created and nurtured. They feel that they possess a certain level of belonging towards those songs and therefore not exclusively owned by authors as prescribed under copyright law nor are they available for another vocalist to perform. This is reflected in a sympathetic question one vocalist raised as follows; "why can't they do new songs and let our songs be?"<sup>59</sup>

Authors, on the other hand had a different view about covering songs. Although they were not against the practice of cover versions, they raised concerns of acknowledgement. Some authors think that cover versions are done in a thieving fashion<sup>60</sup> in Sri Lanka and that is why it is unacceptable.<sup>61</sup> One participant stated "what happens is that the new singers or the up and coming singers, they take songs that have been made popular by senior musicians or singers. And then they claim it as their own. Now that is where I disagree with. Take it [the song], give it your own flavour, make it something new. Don't kill the originality of the song and don't claim it. It is just another version."<sup>62</sup> Accordingly, much of the cover versions that take place in the contemporary music industry do not seem to be by obtaining approval from the relevant authors. As a result, there have been a few occasions where the authors initiated legal proceedings against artists who made cover versions without their consent.<sup>63</sup> Accordingly the issue of cover versions has created significant irritations among authors and vocalists.

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<sup>55</sup> Singer Participant 3, Author-Singer Participant 1

<sup>56</sup> Singer Participant 3, Singer Participant 2, Author-Singer Participant 1

<sup>57</sup> Singer Participant 3, Singer Participant 2, Author-Singer Participant 1

<sup>58</sup> Singer Participant 1, Singer Participant 3, Singer Participant 2

<sup>59</sup> Singer Participant 1

<sup>60</sup> Without obtaining approval from or acknowledging the relevant authors.

<sup>61</sup> Author Singer Participant 1, Author Participant 1

<sup>62</sup> Singer Participant 4

<sup>63</sup> Some such authors are, Hudson Samarasinghe, Sunil Ariyaratne, Rohana Beddage.

As majority of established artists expressed their displeasure and the adverse impact this practice of cover versions has on them, it is important to consider the impact this has on budding vocalists, since it is them, in the Sri Lankan context, who predominantly engage in covering songs. An example case from the industry would be enlightening in this regard. Several years ago, an up and coming vocalist then, started performing a very old theatre song with a modern musical take. A song that was long forgotten for many Sri Lankans and in the case of young generation, never heard of, swiftly attracted many admiring viewers to it. This attention was further extended to this new artist who managed to receive a huge popularity as a result. However, he failed to obtain approval from the authors of the song. Therefore the lyric writer of the song later filed action against him for breach of copyright. By that time he has made fame and good fortune out of the song. The singer agreed to make a significant payment to the lyric writer and also agreed never to perform the cover song again. Thus the matter was settled and the cover was vanished.

What is important in this anecdote is what happened thereafter. Due to the huge popularity he received as a result of the song and later on because of the court case, he managed to find a recording company for a new album, with which he became even more popular and successful. Thus one could argue that doing cover versions can be considered as a platform for budding artists to commence their career as vocalists. Many contemporary vocalists are living examples to this position.<sup>64</sup> On an ancillary point, it must be stated how the audience lovingly embraced this new version of the song which livened up the old theatre song. Nevertheless, the copyright law and its formalities, restricted the opportunity for the viewers to continue to enjoy the cover version.

With the above extensive discussion on the position of making cover versions in the Sri Lankan context, the following section will examine three major music industries in the world, UK, USA and India, who are governed by similar copyright regimes, in order to ascertain whether the issue of cover versions is a unique quandary encountered by the commercial vocalists in the Sri Lankan music industry.

### **Covering in the UK Music Industry**

Cover versions is widely seen in the UK music industry, while being “rampant in early seventies”.<sup>65</sup> Cover versions of UK artists and UK artists covering songs by others is

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<sup>64</sup> Nirosha Virajini, Champa Kalhari, Nanda Malini, Mariazelle

<sup>65</sup> S. Lenig, 'David Bowie's *Pin-Ups*: Past and Prelude' in G. Plasketes (ed), *Play it Again: Cover Songs in Popular Music* (Ashgate Publishing 2010) 130.

abundant.<sup>66</sup> Accordingly, there seems to be a substantial market for cover songs in its music industry.

The scheme in place for practice of cover versions in the industry is to obtain permission from and make relevant payments to the copyright owners, which is facilitated by the Mechanical Copyright Protection Society Ltd, in UK.<sup>67</sup> According to the UK copyright Act, if one cannot obtain the permission, due to the copyright owners' refusal or difficulty in tracing the owners/high licensing cost, they cannot make a legal cover version.

If a cover version was allowed, the musical authors and publishers would continue to receive royalties from the cover versions along with the base version through the royalty collection scheme in place. The initial vocalists, however, would not receive any financial benefit from cover versions. Nevertheless, given the fact that many artists are, or claimed to be, singer-songwriters, it is questionable whether lack of or reduction of financial benefit from cover versions for vocalists affect much in the UK music industry. Covering their base songs by others has not been coined as a significant issue for vocalists in the UK. One could argue that this may be due to availability of wider performance options in a significantly large music industry, with potential for considerable revenue generation, and thus a cover version could not possibly affect such artists much. In any event, it ought to be noted that under UK copyright law and PRR, vocalists has no control or authority over other performers covering their base songs.

### **Covering in the US Music Industry**

Cover versions is a widely acceptable practice in the US. This practice, which was common during the first half of the twentieth century, continued in diverse manner and was seemed to have "promoted greater national exposure, acculturation, diversity, and legitimacy in American popular music".<sup>68</sup> As was the case in the UK, many artists covered songs while many were covered by others.<sup>69</sup> Cover bands, who recreate music of various popular groups from the Beatles to ABBA make a living through the practice of covering in major US cities.<sup>70</sup>

Wider practice of cover versions in the US may have resulted due to its Copyright Act, which takes a more prominent approach in dealing with cover versions than the UK Act. Under

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<sup>66</sup> Ex. The Beatles, Elton John, Robbie Williams, Engelbert Humperdinck, David Bowie etc.

<sup>67</sup> R. Salmon, 'Sampling and sound recording reproduction – fair use or infringement?' (2010) 21(5) Entertainment Law Review 174, 176

<sup>68</sup> B. Lee Cooper, 'Charting Cultural Change, 1953-57: Song Assimilation Through Cover Recording' in G. Plasketes (ed), *Play it Again: Cover Songs in Popular Music* (Ashgate Publishing 2010), 43.

<sup>69</sup> Ex. Bob Dylan, Leonard Cohen, Nat King Cole, Carole King etc.

<sup>70</sup> Kurt Mosser, "'Cover Songs': Ambiguity, Multivalence, polysemy' < <http://www.popular-musicology-online.com/issues/02/mosser.html> > accessed 25 October 2011

section 115 of the US copyright Act, it specifically provides for obtaining a compulsory license for making and distribution of a phonorecord, once a phonorecord has been released to the public in the USA.<sup>71</sup> Accordingly if one wants to make a cover version of a US song, they need to obtain a mechanical license by notifying the copyright owners of the song and making the relevant payments prescribed by the publishers of the song.<sup>72</sup> The difference in the US compared to UK is that once a particular song is released, the copyright owners cannot oppose to releasing cover versions when the required formalities are followed.<sup>73</sup> Similar to the UK situation the songwriters and the publishers will continue to receive royalties from the cover versions but not the initial vocalists.<sup>74</sup> Again, as in the UK, many artists are, or claimed to be singer-songwriters and therefore, there does not seem to be any contestations by vocalists regarding cover songs.

### **Covering in the Indian Music Industry**

Cover versions or version recording, as it is widely known in India, is visible in large scale in India. A reason for this is seen as the multilingual context in India, which invites cross-language parodies.<sup>75</sup> Additionally one would also find many songs covered within the same language.<sup>76</sup> It has been argued that version recording has been able to cater for the large demands of the market which the main recording company, GramCo was unable to address and at the same time provided a monetarily cheaper alternative, for more expensive initial recordings, to the Indian viewers.<sup>77</sup>

Although the Indian copyright act is predominantly based on UK copyright act, when it comes to cover versions, Indian copyright act closely resembles the US copyright Act. Accordingly, under section 52(1)(j) of the Indian copyright Act, provisions for compulsory license was provided for, similar to the US provision, regarding compulsory license for cover versions<sup>78</sup> subject to, however, certain restrictions.<sup>79</sup>

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<sup>71</sup> Circular 73 of the US Copyright Office

<sup>72</sup> D. Turner, 'The Cover Song Quagmire' (Music Dish, 11 June 2004) <<http://musicdish.com/mag/?id=9460>> accessed 27 October 2011.

<sup>73</sup> A. Kohn and B. Kohn, *Kohn on Music Licensing*, (2<sup>nd</sup> edn, Aspen Law and Business 1996) 657

<sup>74</sup> B. Lee Cooper, 'Charting Cultural Change, 1953-57: Song Assimilation Through Cover Recording' in G. Plasketes (ed), *Play it Again: Cover Songs in Popular Music* (Ashgate Publishing 2010) 44.

<sup>75</sup> P. Manuel, 'The Cassette Industry and Popular Music in North India' *Popular Music*, (1991) 10(2) 189,196.

<sup>76</sup> P. Manuel, 'The Cassette Industry and Popular Music in North India' *Popular Music*, (1991) 10(2) 189,196.

<sup>77</sup> P. Manuel, 'The Cassette Industry and Popular Music in North India' *Popular Music*, (1991) 10(2) 189,197.

<sup>78</sup> P. Chothani, 'Managing Copyright in the Digital Era' (2007) 171 *Managing Intellectual Property* 81, 81

<sup>79</sup> Not to release a version recordings until the expiration of two years of the release of the initial, version recording should not be issued with misleading packaging and the owner of the copyright is allowed to inspect the books and accounts of the makers of versions recordings- The 1994 amendment to section

Additionally, another provision that assists in the case of cover versions is section 30 of the Act that provided for a voluntary license. Accordingly if one could obtain a voluntary license from the copyright owners of a song, he/she could legally record a cover for that song. Interestingly none of the restrictions stipulated under section 52(1)(j) would not have any relevance if one were to obtain a voluntary license from the copyright owners under section 30. Nevertheless, Indian courts have been grappling with these two provisions in terms of deciding which provision has the higher authority and thus must be followed at all occasions.<sup>80</sup> As a result, contradicting decisions have been made making the formalities of doing cover versions blurred. This position is rectified under the Indian Copyright (Amendment) Bill 2012, which was passed by the Indian Parliament on 22<sup>nd</sup> of May 2012. Accordingly, although the new provisions make it more formidable to create cover versions, it has now clarified that a cover version can only be legally created after 5 years from the release of the base song.<sup>81</sup> Following any of the prescribed methods of covering is expected to generate royalties for the musical authors/copyright owners from the base songs as well as the versions according to Indian copyright law,<sup>82</sup> but not for the vocalists.

There seems to be some contestation in terms of version recordings in India, it has been argued, due to record companies wanting to generate maximum remuneration from the initial recordings.<sup>83</sup> As one would not find music publishers in India, releasing versions by another record company would affect the sales of the initial recording and this is seen as the predominant reason for recording companies' hesitance. Accordingly recording companies in India have contested the practice of cover versions only in cases where the more lenient section 30 formalities are followed in certain situations. Whether such attitudes would change with the new 5 year rule is yet to be seen.

Accordingly, even in the neighbouring country, India, the practice of cover versions seems to have been accepted as an attribute of commercial music industry. Although attempts are being made to clarify the legal provisions relating to cover versions, the practice itself does not seem to be contested by vocalists.

### **Cover Versions Issue and the National PRR Negotiations**

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52(1)(j) as referred to in N. Krishnamurthy, 'The Statutory Mechanical License in India- Whose Version [of the Law] is Correct?' (2007) (1) Manupatra Intellectual Property Rights 115, 124-125

<sup>80</sup> N. Krishnamurthy, 'The Statutory Mechanical License in India- Whose Version [of the Law] is Correct?' (2007) (1) Manupatra Intellectual Property Rights 115; C.M. Lall, 'India: Copyright-Version Recordings-Permission of Copyright Owner Required' (1999) 10(2) 16

<sup>81</sup> <http://www.livehindiradio.com/analysis-of-the-indian-copyright-amendment-bill-2012/> (accessed on 19/06/2012)

<sup>82</sup> Provided the songs are not part of a movie track, in which case the producer will be the author of such work. N. Krishnamurthy, 'The Statutory Mechanical License in India- Whose Version [of the Law] is Correct?' (2007) (1) Manupatra Intellectual Property Rights 115

<sup>83</sup> N. Krishnamurthy, 'The Statutory Mechanical License in India- Whose Version [of the Law] is Correct?' (2007) (1) Manupatra Intellectual Property Rights 115

Combating cover song recording, interestingly, drew a significant attention of the Sri Lankan legislature. One could see varying reasons for this situation. As mentioned earlier in this paper, one such reason could be the strong resentment towards this practice, which is generally considered as an amateur's attempt to embark on the entertainment field. Additional views against this practice were also brought to light during the parliamentary debates on this issue.

Accordingly, significant attention was given to difficulties encountered by a couple of prominent and highly regarded classical vocalists in Sri Lanka, Pandit Amaradeva and Nanda Malini, in the discussion on cover versions, during the Parliamentary debates. In Amaradeva's situation, another vocalist made a recording of songs once performed and popularized by him.<sup>84</sup> As the relevant singer had obtained the rights from the copyright owners, this situation did not come under copyright infringement, which is the only mode of challenging cover song recordings under copyright law. In Malini's case, a boy band covered some of her popular songs.<sup>85</sup> The issue in this situation was slightly different to Amaradeva's case as here the male vocalists mimicked the female artists' voice rather than singing in their own voices. Another difference in this case was that the boy band did not obtain relevant copyrights from the copyright owners. As a result, Malini, through the assistance of the copyright owners of the songs, managed to successfully challenge this version recording in court.<sup>86</sup>

The focus on the above two situations during the parliamentary debates suggests that the legislature considered that there were more reasons for lobbying against cover songs. Taking into consideration of the artists that were looked at to support such anti-campaign against covering seems that the legislature felt the need to protect and preserve the songs performed by the nation's most prominent artists. When looking at the history of the commercial music industry, the generation of artists that were emerging at the beginning of the Sinhala commercial music industry in the 1950s is now becoming incapacitated due to old age or health issues. Thus it seems that the legislature, along with vocalists, is lobbying for preserving these historic songs and their renditions by restricting access to them.

Another reason for this criticism in the parliament towards cover songs could be the mirroring of the accepted norm of vocalists' supremacy. What the legislature was essentially arguing for is that once a vocalist perform/record a song for the first time, no other vocalist should be allowed to generate revenue by performing/recording the same song. This is a clear contradiction of the copyright norms, which provide the author the opportunity to decide the modes of use of their work. Thus it can be maintained that the legislature is arguing for vocalists' supremacy in the commercial music industry. What is unclear however is, when they state "protection to artists who dedicate their lives to creative work which is being

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<sup>84</sup> Ravindra Randeniya, Hansard Official Report 23<sup>rd</sup> of July 2003 at page 1076

<sup>85</sup> Along with few other female artists' songs.

<sup>86</sup> Copyright Lawyer Participant 1

exploited by outside parties”,<sup>87</sup> whether the legislature is only attempting to provide the so-called protection only to the prominent artists and not for non-prominent artists.

Protecting the national culture has also been coined as a connected reason for acting against mimicking. The practice of cover songs is seen as murdering the national music and along with it the national culture and therefore it has been argued that meaningful songs should not be subjected to being changed and sung by anyone else.<sup>88</sup> Further criticism has been expressed against cover songs on the ground that it significantly hampers the honour and respect of the artists and the music industry.

Although such passionate resentment expressed by the legislature (against the practice of cover songs) who argued that performers ought to get an opportunity to prevent covering songs once they performed, the legislature has not been able to circumvent the authorial regime of copyright which conceptually provide for such strong rights for authors and not for vocalists. The beginnings of Intellectual Property Act 2003 although seem to have set out to provide strong national PRR for the benefit of the vocalists, a close perusal of the Act does not support such view. Under this Act, a right to authorize cover songs is still vested in authors and not in performers.

### **Resolving the Vocalists’ Cover Versions Dilemma**

When comparing the situations in other music industries in the world with the Sri Lankan industry, one could argue that some of the claims made by the vocalists in Sri Lanka against the practice of cover versions may not necessarily be invalid in other musical industries. There may be some vocalists who may feel financially threatened or limited when another artist is covering their songs.<sup>89</sup> Nevertheless, given the comparatively small music market where majority of vocalists have a limited music repertoire, these issues may affect the Sri Lankan vocalists more than their US, UK or Indian counterpart. This may be why contestation among artists due to cover versions is not greatly visible in those countries. Alternatively, regardless of any negative economic effects of cover versions, the vocalists may have accepted the norms of copyright law. This situation therefore can be seen as a certain level of compatibility between the law and the market condition in those countries and/or accepting copyright norms and allowing those rules to govern their respective industries.

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<sup>87</sup> Ravindra Randeniya, Hansard Official Report 23<sup>rd</sup> of July 2003 at page 1076

<sup>88</sup> Alhaj A.H.M.Azwer, Hansard Official Report 23<sup>rd</sup> of July 2003 at page 1089

<sup>89</sup> Historically, this is a fact in the US. B.Lee Cooper, ‘Charting Cultural Change, 1953-57: Song Assimilation Through Cover Recording’ in G. Plasketes (ed), *Play it Again: Cover Songs in Popular Music* (Ashgate Publishing 2010) 44.



The Sri Lankan vocalists have contested the practice of cover versions for decades. Nevertheless, the PRR that was introduced to address vocalists' issues has not been able to resolve the issue of cover versions. PRR, which attempts to further emphasise authorial right regime under copyright, supports the subordinate status provided for vocalists under that regime. Therefore the PRR has in some ways created and in some ways aggravated the irritations among artists in the Sri Lankan music industry. It has created irritation by emphasizing that the vocalists are a subordinate category under authorial regime who does not get a control over cover versions, when the cultural practice in the industry has provided a more prominent authoritative position to vocalists than the rights granted to authors. It has aggravated the irritation by failing to successfully resolve the cover versions issue by reflecting and addressing the vocalists' circumstances in a practice of cover versions.

On an ancillary point, one could argue that some of the concerns relating to adverse effects of cover songs could have been addressed by introducing moral rights to performers. Accordingly if a situation like Nanda Malini's occur again, she, as the performer would be able to challenge such mimicking regardless of the fact that the other vocalist has obtained authorization from the copyright owners, as long as she could demonstrate that such mimicking affected her honour and reputation as a renowned artist. Nevertheless, the national PRR does not provide for such opportunity for performers.

## **Conclusion**

As highlighted in this paper, the issue of cover versions in the Sri Lankan music industry has not been satisfactorily addressed in the national legislation although it seems that the legislature was intending to address it. Thus evidently, there is a disparity between the national PRR that was implemented and the expectations of the vocalists and the legislation. It is questionable as to whether this is due to the ignorance of the legislature to provide for such provisions or simply due to the inability of the PRR to address the concerns of the Sri Lankan vocalists. As the analysis of the Sri Lankan national PRR reveals above, it can be reasonably argued that it may be a combination of both.

Vocalists, who get significantly restricted on their revenue even when they are physically able to perform, as a result of the practice of cover versions is a concern that seems to have been overlooked by the copyright regime and PRR. On the same vein, issues on justifiability of removing the opportunity these once performed songs provide the budding performers and hindering the viewers opportunity to enjoy re-interpretations of base songs, make it even more difficult dilemma to resolve.

