

Performers' Rights Regime in Sri Lankan music: Did we get it right?

**By
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1.0 Introduction

Prior to the invention of the gramophone, the cinema, the radio and, later on, the television, performers only had access to the payment they received at the end of their renditions. They performed in the presence of their audience, and such a performance was only recorded in the minds of the audience. However, with the advance of technology, performers' renditions could be enjoyed by an audience who were not physically present when the performance took place, but who were thousands of miles away and at a time and place chosen by them. The essentially temporal nature of the performers' renditions was substantially changed as a result of technological advances, making it feasible to record, play back and reproduce, paving the way for unprecedented increases in diffusion and accessibility of performers' renditions.

Although this substantially increased the amount of income generated through such performances, it also had adverse consequences for performers whose employment opportunities were reduced as a result. Since a recorded rendition could be used instead of a live performance, the performers' opportunities to give live renditions became limited.¹ Hence the initial positive assessment regarding the enhancement of remuneration due to technological developments was later looked at with scepticism. The need for a mechanism to address the loss of income due to technological

¹Edward Thompson, 'International Protection of Performers' Rights: Some Current Problems' (1973) 107 International Labour Review 303, 304 - The recording as the enemy of the performer and it would result in depriving the performer of employment possibilities in broadcasting due to the multiple utilisation of a recording.

advancement and for an opportunity to control the uses made of their performances were strongly felt by performers.² This need provided the initial support for the creation of a system for the protection of performers.

Initial attempts made to recognise rights for performers were met with barriers.³ It was anticipated that these new rights, which would essentially apply to works that were created by authors, would disturb the authorial supremacy over such work, which was intended to be maintained under copyright law.⁴ The strong opposition by the authors was thus based on concerns relating to the loss of prominence they enjoyed in the entertainment industry, and in particular to the need for sharing their revenue with the performers.⁵ While technological unemployment acted as a strong basis for the introduction and development of the Performers' Rights Regime (PRR), authorial supremacy acted as an equally strong opposition to the introduction and development of the PRR. This paper will attempt to shed light on the trajectory of the national PRR in Sri Lankan music and further examine the expectations of this regime and whether such expectations were fulfilled.

2.0 Copyright and its subsidiary: the Performers' Neighbouring Right

Copyright is that branch of intellectual property law that 'regulates the creation and use that is made of a range of cultural goods such as books, songs, films and computer programmes'.⁶ Copyright law grants exclusive rights, generally to the authors of such

² ILO, 'The ILO and the Protection of Performers, Record Manufacturers and Broadcasting Agencies' (1956) 73 *International Labour Review* 252, 255.

³ *ibid.*

⁴ *ibid.*

⁵ *ibid.*

⁶ L Bentley and Brad Sherman, *Intellectual Property Law* (OUP 2001); P Goldstein, 'Copyright' (1990-1) 38 *Journal of the Copyright Society of the USA* 109.

works, to determine the limitations of the ways in which their works ought to be used by others. These rights can be mainly divided into two categories: economic rights and moral rights. While economic rights are expected to enable the author to gain revenue from the economic utilisation of their work, moral rights are expected to ensure that the author and their work are acknowledged, respected and protected from any distortion.

The right recognised for the protection of performers is called a neighbouring right, which is a right deriving from and secondary to the authors' copyright. 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 own⁷ the lyrics and the music composition of that song under copyright law. Hence it has been argued, on behalf of the authors, that whatever rights the performer gets ought to be subject to and secondary to such authorial rights, by maintaining the supremacy of the authorial right. Thus a subcategory within copyright was created by the term 'neighbouring right', which is deemed to safeguard the protection of the performers among other types of beneficiaries, such as broadcasting organisations and phonogram producers. 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's⁸ who, *inter alia*, has the authority to make changes to the song and allow another singer to perform the same song.

⁷ If he has not transferred his rights to a recording company.

⁸ Or the copyright owner's, if the copyright ownership has been transferred to another.

As alluded to above, the subject matter protected and the extent of the protection afforded varies in copyright and neighbouring right. While copyright protects literary and artistic work, the neighbouring right protects performances, phonograms and broadcasts. Copyright is granted to authors whose productions are in literary, scientific and artistic domains.⁹ Performers who are protected under the neighbouring right are actors, singers, musicians, dancers and so on.¹⁰ While copyright equips the author or the owner¹¹ with exclusive rights to authorise a range of activities in terms of his/her work,¹² the neighbouring right grants certain exclusive rights to ‘qualified performers’, either based on the fact that they perform an author’s work or that such work is an aural recording.¹³

For the purpose of protecting the renditions, it was necessary to identify the beneficiaries of the PRR. The basis of recognising beneficiaries commenced with a very restrictive notion of those who performed copyright work¹⁴ and has today been expanded to include expressions of folklore.¹⁵ Thus, although there can be a spectrum of different kinds of performers, such as singers, actors, musicians, acrobats, ventriloquists and jugglers, the PRR only protects those who perform works created by authors and those who perform expressions of folklore, and not variety artists. The

⁹ Article 2 of the Berne Convention for the Protection of Literary and Artistic Works (1886).

¹⁰ Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, (1961) Art 3(a).

¹¹ Who is generally an intermediary such as a recording or media company who get the ownership of the songs transferred to them.

¹² Translation (the original work to another language), reproduction (reproduce copies of the original), public performance (eg. Show a film or drama in public), broadcasting, adaptation (create a drama out of the story in a book).

¹³ Broadcasting, fixation (recording), remuneration and reproduction (reproducing copies) of their performances.

¹⁴ Rome Convention, Art 3(a).

¹⁵ WIPO Performers and Phonograms Treaty, Art 2(A).

protection of performers is further restricted by several limitations introduced in international legal instruments.¹⁶

Since it is maintained that PRR, as a neighbouring right, is a subsidiary right to the authors' right, the PRR is made more restrictive in its availability compared to copyright. As argued elsewhere,¹⁷ this position was deliberately arranged for the purpose of maintaining the supremacy of copyright ownership and to avoid any hindrance to it. As 'qualified performers' would be creating renditions of works that are already protected under copyright, it was argued that granting them with stronger or similar rights to those of the owners of copyright would create conflicts between these two right holders and could even hamper the exercise of authors' rights. Thus, as PRR stands at present, a performer of a copyright work obtains the opportunity only to control their live renditions and audio recordings of such renditions, thus leaving the opportunity for the owner of the copyright to control the copyright work such a rendition was based on.

3.0 The historical emergence of the PRR in Sri Lanka

The Portuguese, the Dutch and the British colonized Sri Lanka, formerly known as Ceylon. The Dutch were the first colonisers who were interested in introducing their legal system to those areas they ruled in Ceylon. 'Dutch law was regarded as a residuary law which was resorted to where the local customary laws were silent or the Dutch considered them unsuitable.'¹⁸ Thus, Ceylon was exposed to the Roman-Dutch law,

¹⁶ Such as based on the type of recording of the rendition.

¹⁷ G. Nanayakkara 'Performers' Rights Regime in Sri Lanka: Singers' Melancholia' (PhD thesis, University of Kent 2016)

¹⁸ L J M Cooray, *An Introduction to the Legal System of Ceylon* (Lake House 1972) 5.

which still remains as the common law of the island.¹⁹ However it was the British who managed to have a lasting impact on the country's legal system. Copyright law, being part of this legal system, can accordingly be considered as a colonial hangover from the British rule.

As Ceylon was initially a conquered²⁰ and, subsequently, a ceded²¹ colony of Britain, 'the law that was already in force, prior to the cession or conquest, continue[d] in force until changed'.²² However, by an Ordinance passed in 1852, the English law was made applicable to Ceylon, pertaining to certain commercial and maritime matters.²³ Several other legislative instruments²⁴ were implemented thereafter for the purpose of introducing English Law to Ceylon. Thus, by the time Ceylon obtained freedom from the British rule, it was left with a very complex legal system – a combination of customary laws, Roman-Dutch law and English law.²⁵

¹⁹T Nadaraja, *The Legal System of Ceylon in its Historical Setting* (E J Brill 1972) 17.

²⁰ As the Dutch possession in the maritime provinces of Ceylon were conquered by the British in 1796, and the Kingdom of Kandy in 1815. L J M Cooray, *An Introduction to the Legal System of Ceylon* (Lake House 1972).

²¹ The Dutch ceded the colony of Sri Lanka to Britain in 1802, L J M Cooray, *An Introduction to the Legal System of Ceylon* (Lake House 1972).

²² As per the decision by Lord Mansfield in *Campbell v Hall* (1774) 1 Cowper 204, as cited in L J M Cooray, *An Introduction to the Legal System of Ceylon* (Lake House 1972) 6.

²³ In respect of questions relating to bills of exchange, promissory notes and cheques, to ships and to all maritime matters – Sec. 1,2 of Ordinance No.5 of 1852 as cited in T Nadaraja, *The Legal System of Ceylon in its Historical Setting* (E J Brill 1972) 185.

²⁴ Ordinance no. 22 of 1866, The Sale of Goods Ordinance no.11 of 1896, The Bills of Exchange Ordinance No.25 of 1927, Penal Code, Criminal Procedure etc..As stated in T Nadaraja, *The Legal System of Ceylon in its Historical Setting* (E J Brill 1972) 239.

²⁵ The complexity of the legal system of Ceylon is aptly demonstrated in the following example:

"A Tamil living in the Jaffna district of Ceylon would inherit property of his father's death according to the law of the *Thesawalamai*; he might be called upon to be a trustee of a Hindu temple in which case principles which originated in the English courts of equity and Hindu religious law would be relevant to determine his powers, rights and duties; he would mortgage his property according to principles derived from the Roman-Dutch law; he has a choice whether to contract a marriage according to the statute law of the land or custom, but his capacity to marry would be determined by statute law; if he brought an action for divorce, he would to some extent be subject to principles of law originally developed in England; but his claim to the custody of his children would depend on the Roman-Dutch law; and his wife's right to retain the property she had brought into the marriage community and any property she may have acquired subsequently would be governed by the *Thesawalamai*." - L J M Cooray, *An Introduction to the Legal System of Ceylon* (Lake House 1972) 1-2.

When narrowing down the discussion to the application of copyright law in Ceylon, it is difficult practically to find any information about such or similar laws, neither during the pre-colonial era nor during the Portuguese and Dutch periods. However, as the British parliament enacted imperial Acts to extend to all its colonies, the Copyright Act of 1911 being one of them,²⁶ this Act can be seen as the first Ceylonese copyright law.

When dominion status was granted to Ceylon in February 1948, the Ceylon Independence Act stipulated that certain British Acts that were applicable to Ceylon would not extend to Ceylon after 4th of February 1948, and thus were repealed by the Parliament of Ceylon. Interestingly, the Copyright Act was one of the Acts that was not repealed and hence continued to apply to Sri Lanka until 1979, when the first Sri Lankan Intellectual Property Act was implemented.²⁷

Although the British copyright law was given prominence in the local legal system, similar importance did not seem to have been given to those British rules relating to performers. The UK was one of the few countries that had legislation in place to safeguard the performers' interests, to a certain extent, prior to the emergence of the international PRR (under the Rome Convention 1961), through the Dramatic and Musical Performers' Protection Act 1925. The following section examines this Act in order to understand the national PRR prior to the emergence of the international PRR. This discussion aims to shed light on how the national PRR in Sri Lanka was influenced and shaped by these precursors.

²⁶Acts of the Imperial Parliament Applicable to Ceylon (The Government Printer 1914), as cited in L J M Cooray, *An Introduction to the Legal System of Ceylon* (Lake House 1972) 150-151.

²⁷ *ibid* 151.

3.1 Historical protection of performers in Britain and its impact on Ceylon

The UK Dramatic and Musical Performers' Protection Act 1925 was enacted to rectify an emerging problematic situation in the gramophone and broadcasting industries, 'owing to the rapid progress of science and mechanical invention; illicit mechanical reproduction of a performance transmitted by the [British] Broadcasting Company'.²⁸ Such illegal reproduction of performances had undesirable implications for several aspects of the recording and broadcasting industry. Performers were becoming apprehensive about making renditions for the British Broadcasting Company (BBC), due to the fear of endangering their earning capacity in performing for gramophone manufacturing.²⁹ When such an illicit record was reproduced and became a saleable record, it was seen that the artist's opportunity to obtain further employment from a recording company might be substantially hindered or altogether cease. If such an illegal reproduction of the record was of inferior quality, it was seen as disrespectful to the relevant artist. Thus, while the artists were anxious with regards to giving renditions to the broadcasting company, the gramophone industry also suffered losses from sales of illicit records that were priced at a considerably lower rate than their own.

It is evident in the parliamentary debates that this Act was not predominantly implemented for the benefit of the performers. It was stated that this Act was implemented 'to improve the programmes of broadcasting companies, though that is not very visible on the surface'.³⁰ This position was justified on the basis that the sale of illicit records 'has the effect of breaking contracts between the artists and various gramophone companies, and in order to save their contracts it [was] impossible for most

²⁸ Submissions made by the Earl of Shaftesbury, HL Deb 13 July 1925, vol 62, cols 18-23.

²⁹ *ibid.*

³⁰ Sir M. Conway, HC Deb 26 June 1925, col 1970.

of them to have their performances broadcast.³¹ Thus, this Act was enacted to facilitate the operation of the broadcasting and gramophone industries, rather than to protect performers' interests.

It is noteworthy that the illicit reproduction of records was, in any event, an unlawful act under the UK Copyright Act at the time. The Dramatic and Musical Performers' Act further criminalised the same act but based on a different premise: '[A] man who takes the voice of a performer, and uses it for his own profit without paying for it, ought to stand in the dock'.³² Thus a criminal offence was created. Objections were raised against the Dramatic and Musical Performers' Bill in the House of Commons on two grounds: firstly, it was argued that this Act could have been brought in as an amendment to the Copyright Act or under civil law; secondly, it was stated that '[t]he tendency in modern legislation to try and cure every possible defect in the law by sending more and more people to prison, and increasing the jurisdiction of the police, is not the right way of dealing with this matter'.³³ Nevertheless, the majority of the members of the House of Commons agreed to the passing of the bill. Hence the Dramatic and Musical Performers' Protection Act was enacted in 1925, which was later replaced by the Dramatic and Musical Performers' Protection Act 1958.³⁴

This Act penalised the recording, reproducing, distributing, selling, using for public performance or broadcasting of a dramatic or musical performance without the consent of the relevant performer. Accordingly, a performer in any dramatic and musical performance that has been subject to mechanical reproduction is covered by this Act.

³¹ *ibid.*

³² Sir M Shaw, HC Deb 26 June 1925, col 1975.

³³ Sir H Slessor, HC Deb 26 June 1925, col 1971.

³⁴ Which consolidated the Dramatic and Musical Performers' Act 1925, and the provisions of the Copyright Act 1956, amending it.

There were several ways of applying UK legislation in Ceylon during the British colonial rule.³⁵ Historically, it is not very clear as to whether the UK Dramatic and Musical Performers' Protection Act was applied in Ceylon and, if so, to what extent. Nevertheless, it is evident that agents of the British Performing Rights Society were deployed in Ceylon in as early as 1931.³⁶ As the PR Gazette of the British Performing Rights Society records, Messrs. Sandersons and Morgans, Calcutta was the chief appointed agent overseeing India, Burma, Ceylon, Malaya and Aden, collecting royalties on behalf of the British PRS.³⁷ It is clear from the records of the PR Gazette that such collecting of royalties initially was exclusively from British recordings.³⁸ Since the major UK gramophone companies, such as His Master's Voice and Odeon, pioneered the gramophone industry in Ceylon by that time, such involvement of the British Performing Rights society in the country may have been an extension and acceptance of the UK legislation relating to royalty collection. Thus it can be reasonably argued that, if the necessity arose, the UK Act would have been applied through one of the several legislative routes referred to earlier. Nevertheless, after Ceylon obtained dominion status in 1948, none of the UK statutes were applicable in Ceylon unless specific statutory provisions were made by the Ceylonese parliament to that effect.

³⁵ (i) a statute passed by the Parliament of the United Kingdom was copied and enacted as law by the legislature in Ceylon; (ii) the principles underlying the decisions of the English courts were codified and adopted by the local legislature; (iii) the English law on a particular subject was extended by the local legislature to Ceylon, without further elaboration of the substance of the law in the enabling enactment, or in other words, English law was incorporated by reference; (iv) provision was made for the application of English law where a statute in (i) or (ii) above was silent; (v) the extension before 1948 of Acts of the United Kingdom Parliament to Ceylon as a consequence of Ceylon's colonial status; (vi) English law became applicable as a consequence of the assumption of British sovereignty – L J M Cooray, *An Introduction to the Legal System of Ceylon* (Lake House 1972) 28.

³⁶ The PR Gazette, July 1939, 201.

³⁷ Ibid.

³⁸ The PR Gazette, July 1939, 209-210. Mr Brasher, a member of Messrs. Sandersons and Morgans, reported the impact of the withdrawal of the British military troops from India on the revenue of the PRS, alluding to the reduction of the potential audience. He suggested the expansion of the PRS' remit to include Indian artists such as Rabindranath Tagore, as a form of extending PRS' revenue as well as addressing the inadequate remuneration received by the Indian authors and composers. This evidence that the PRS' remit was limited to British recordings initially.

Although the UK Copyright Act was permitted to continue in the context of Ceylon, no such provisions were made in terms of the applicability of the UK Dramatic and Musical Performers' Protection Act. Thus it is questionable as to whether any form of PRR was in existence in Ceylon until 2003, when the national PRR emerged.

3.2 The national Intellectual Property Acts of Sri Lanka

After 1978, when Ceylon became the Democratic Socialist Republic of Sri Lanka, its economy – which was more State-regulated – thereafter gradually turned into a liberal, free-enterprise economy.³⁹ In order to promote international trade and international financial investment in such open-economic conditions, it was felt necessary to update the country's Intellectual Property law. Thus the first Intellectual Property Act (IP Act) that was implemented by the Sri Lankan parliament came into effect in 1979.⁴⁰ As argued in the parliament, the implementation of the IP Act was 'part of [the] programme to update all commercial law in [the] country [as] there is no point in ...talking about improving [the] economy, having more exports and imports, if our legal structure is as ancient as the hill and does not keep up with modern development'.⁴¹ It was anticipated by the legislation that the introduction of IP laws would be indispensable for the commercial development of Sri Lanka.

Key reference was given by the legislature to patents⁴² and trademarks⁴³ and not so much emphasis was put on copyright. Nevertheless, copyright too was protected under

³⁹I N Abeysekera, *Sri Lankan Copyright Law and the TRIPS Agreement* (Mahapola Higher Education Scholarship Trust Fund 1999) 1.

⁴⁰Act No. 52 of 1979.

⁴¹Lalith Athulathmudali, Hansard Official Report, Parliament Debates, 5th group, 4th zone, 25 May 1979, 500.

⁴² That branch of intellectual property, which protects inventions.

⁴³ That branch of intellectual property, which protects trade names, marks, etc.

Part II of the 1979 Code. Sri Lanka is a member of the Berne Convention for the Protection of Literary and Artistic Works (1886)⁴⁴ and the Universal Copyright Convention (1952).⁴⁵ Sri Lanka is not a member of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961), the first international Convention on Performers' Rights, which can be seen as a reason for the absence of the PRR in the first national IP Act.

However, when Sri Lanka became a member of the World Trade Organisation in 1994, which required it to amend its Intellectual Property regime for the purpose of bringing it in line with the provisions in the TRIPS Agreement, inclusion of the PRR under the national copyright law became a legal obligation. Sri Lanka, being a developing country, was entitled to a grace period of up to five years to bring its IP system into compliance with the TRIPS Agreement. Although this grace period ended on 1 January 2000, Sri Lanka finally managed to implement its second national IP legislation in 2003.⁴⁶ This was the first national legislation that provided for performers' protection. Thus the national PRR was implemented by the Sri Lankan parliament for the very first time.

The 2003 IP Act was introduced with the hope that it would assist Sri Lanka 'to move forward in this knowledge-based economy...as [it was argued that] there is absolutely a growing need for a knowledge-based economy in the globalised world'.⁴⁷ At that moment in Sri Lanka, '53% of the Gross Domestic Product was in the service industry; 26% in agriculture and 21% in the industrial area'.⁴⁸ A strong shift towards a

⁴⁴ From 20 July 1959.

⁴⁵ From 25 January 1984.

⁴⁶ Intellectual Property Act No. 36 of 2003 (Sri Lanka).

⁴⁷ Ravi Karunanayake, Hansard Official Report, 23 July 2003, 1047.

⁴⁸ *ibid.*

knowledge-based economy was felt necessary. With the implementation of the IP Act, the overarching aim of economic development was expected to be achieved through two main routes: protecting the creativity of the Sri Lankan people and drawing foreign investment to Sri Lanka.⁴⁹

In terms of the former, it is argued that:

...on a knowledge based economy...one of the biggest aspects and one of the biggest intrinsic advantages is the knowledge of our people. There are hidden talents in people. Creativity is there. That is what we want to protect. We feel that this type of thing will certainly help our industrious, very creative minded people to get a foothold into the globalised world. Through this process we will be able to promote trade.⁵⁰

In terms of drawing foreign investment, it has been argued that:

...[w]hen there is a proper legal system in this country...foreign direct investment will come into this country. Otherwise, investors are worried because they would not like to put their money in this country. They will feel uncertain as to whether their investments are safe or not in the country. That is the reason why we want to be in step with the rest of the developed world because we want to capture some of those very important investments to our country.⁵¹

Accordingly, it can be stated that the predominant aim of implementing the 2003 IP Act was to promote trade and, through that, to develop the country's economy.

⁴⁹Ravi Karunanayake, Hansard Official Report, 23 July 2003, 1049.

⁵⁰ibid 1048.

⁵¹ibid 1049.

Although the 1979 Act was also implemented with a similar goal, it is argued that, ‘due to the technological advancement and internationalised nature of intellectual properties, it is apparent that new legislation is required to provide protection in these new contexts’.⁵²

When examining the reasons behind the introduction of the PRR in the local IP Act, in addition to complying with the obligation under the WTO Agreement, it can be argued that the PRR was a by-product in the attempt to promote the economic development of the country through law. As mentioned earlier, it has been widely argued that this IP Act would facilitate economic development. This development was expected to achieve through internal and external effects/factors. Internally, it has been argued that protecting the local creativity and facilitating remuneration for such creativity, through providing protection under law, would also improve the country’s economic development. Externally, when the IP laws are inviting for international investors, it is expected that more investments would flow into the country, which would improve the country’s economic development. These two main themes, to varying degrees, can also be extended in the discussion relating to specific provisions of the PRR under the IP Act. The inclusion of PRR under the IP Act is predominantly argued around three main themes: The prevention of piracy, remuneration for artists and prevention of cover songs.

3.3(a) Combating piracy and the PRR

⁵²Sunil Handunnetti, Hansard Official Report, 23 July 2003, 1064

Among several provisions that have been introduced to safeguard artists in the country, the attempt to reduce piracy is seen as an important motivation.⁵³ It has been stated that ‘[t]hese creations that cost millions of rupees for production are being pirated by people who have had no involvement or any other interest in the production of them and they exploit it for economic advantage’.⁵⁴ Another member of parliament brought the experience of a popular deceased vocalist, Jothipala, to the attention of the House. Jothipala had once gone to Singapore to record a cassette. Before he even came back to Colombo, the same cassette, with his picture on the case, was available in Malwatte Road (the road considered to be a haven for cassette and CD pirates).⁵⁵ This problem is not only limited to the music industry but also applies to the cinema and teledramas.⁵⁶ ‘Sinhala movie CDs are available at a very nominal rate in Malwatte.’⁵⁷ With regards to teledramas, it has been stated that:

...when teledramas are telecast today, the very next day they are sold in shops. They even have a network where the very next day they export it to foreign countries and sell them there without having to spend a single cent on the production of these teledramas. A teledrama usually costs about Rs.150,000/- per half hour episode to be produced today, but they are sold for a very meagre profit of say Rs.25,000 or so. By this producers do not get any benefit, but outside people make use of it.⁵⁸

Although the provisions that have been introduced to hamper piracy were introduced for the effective operation of the relevant intellectual property industries, it has been

⁵³Ravindra Randeniya, Hansard Official Report, 23 July 2003, 1075.

⁵⁴ibid.

⁵⁵S Kaviratne, Hansard Official Report 23 July 2003 1096.

⁵⁶Similar to soap operas in the UK.

⁵⁷Kumara Dissanayake, Hansard Official Report, 23 July 2003, 1094.

⁵⁸Ravindra Randeniya, Hansard Official Report, 23 July 2003, 1076-1077.

argued that vocalists, as a group of performers, indirectly benefit from such provisions. This is due to the fact that recording companies tend to limit their investment in making new records, as widespread piracy would negatively affect their income potential from such records. This has a significant impact on vocalists, who are in desperate need of financial support to contribute their voice to new songs. When it is ensured that ample recording opportunities are available, due to the availability of investment, this potentially assists the income generation for vocalists. Thus, the attempt to combat piracy under this legislation can be connected to the two main themes of improving international investment and protecting creativity. It can be argued that, when it appears to the international investors that the local law has provisions to address issues of piracy, it is expected that they would be assured to receive the expected financial returns on their investment. In terms of protecting creativity, as expressly stated in the debates, hampering records of poor quality and facilitating maximum return on entrepreneurs' costs are expected to foster creativity in the music industry, through remunerating creators.

3.3(b) Ensuring remuneration through the national PRR

Although the 2003 Act specifically provides for a right of equitable remuneration, this is shared between the performers and the producers of sound recordings.⁵⁹ Performers constantly complain that the media companies in Sri Lanka rarely remunerate them. Accordingly, this is a clear development for performers, providing them with the ability to claim for remuneration for the reproduction of their sound recording. However, there has been minimal discussion about this aspect in the House. It has been pointed out

⁵⁹Section 19.

that, historically, vocalists used to get some fees paid during the era of Radio Ceylon, but such a system is not in place at present.⁶⁰ As it has been further argued, with the wide growth of media companies in the country, what has been forgotten is that their existence, especially that of television companies, has been made possible due to the contribution made by musicians, lyric writers and singers.⁶¹ As has been argued, the media companies have managed to attract viewers and, as a result, were able to create a market for themselves, mainly by telecasting and broadcasting the musical works of these artists.⁶² Thus, failing to give these artists with adequate remuneration is seen as forgetting the important role they played in the development of media companies. These arguments relating to remuneration, it can be said, are made around the main theme of protecting creativity.

The same minister expressed that he believed that the new Act ensuring rights for artists would facilitate the remuneration concern.⁶³ Following on from the international PRR, Article 19 of the Act introduces equitable remuneration for performers of sound recordings – i.e. for aural fixations and not for audiovisual performances. This discussion about vocalists receiving their share of revenue raises an important question as to why such focus was not given to the fact that musical composers and lyric writers, as authors in the Sinhala music industry, were not adequately remunerated and/or recognized, even when the authors' rights regime had been available for more than a century. One would wonder whether this is due to a lack of attention being paid to extant laws at the expense of focusing on the newly introduced laws or, more

⁶⁰Karunasena Kodituwakku, Hansard Official Report, 23 July 2003, 1097.

⁶¹ibid.

⁶²ibid.

⁶³ibid.

importantly, whether this mirrors the existing supremacy of the vocalists in the music industry,⁶⁴ which locals have accepted as the norm.

3.3(c) Preventing cover songs through the national PRR

Combating cover song recording, interestingly, played a substantial role in the parliamentary debates relating to PRR. Significant attention in this discussion was given to the difficulties encountered by a couple of prominent and highly regarded classical vocalists, Pundit Amaradeva and Nanda Malini. In Amaradeva's situation, another vocalist made a recording of songs once performed and popularised by him.⁶⁵ 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. In Malini's case, a boy band covered some of her popular songs.⁶⁶ The issue in this situation was slightly different to Amaradeva's case as, here, the male vocalists mimicked the female artist's voice, rather than singing in their own voices. Another difference in this case was that the boy band did not obtain the 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 of the recording in court.⁶⁷

⁶⁴ G. Nanayakkara 'Performers' Rights Regime in Sri Lanka: Singers' Melancholia' (PhD thesis, University of Kent 2016)

⁶⁵ Ravindra Randeniya, Hansard Official Report, 23 July 2003, 1076.

⁶⁶ Along with few other female artists' songs.

⁶⁷ Interview with P1 (Colombo, Sri Lanka, 20 July 2012). P1 was professionally involved in this particular court case as an Attorney-at-Law.

The focus on the above two situations during the parliamentary debates suggests that there would seem to be more reasons for acting against cover songs by the members of the parliament. Taking into consideration the artists that were looked at to support such a campaign, it would seem 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 ill health. Thus, it seems that the legislature, along with vocalists, is lobbying for preserving these historic songs and their renditions by restricting access to them.⁶⁸

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 was that once a vocalist performs/records 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 with 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.

Protecting the national culture has also been suggested 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.⁶⁹ One government minister maintained this view as follows;

⁶⁸ Ravindra Randeniya, Hansard Official Report, 23 July 2003, 1076.

⁶⁹ Alhaj A.H.M. Azwer, Hansard Official Report, 23 July 2003, 1089.

Do not murder these songs...*Siri Nandana Siri Pada Vandimu Samanala Kande* (popular old Sinhala song) Can any one else sing this song? Should we let another sing this song [and] destroy a nation? Destroy local music? That song is a very meaningful song by A.J.Karim. We must not let other people sing this song. If they create their own ones that is fine. Why do they have to copy these? ⁷⁰

Thus, it has been argued that meaningful songs should not be subjected to being changed and sung by anyone else. Further criticism has been expressed against cover songs on the grounds that they have a significant negative impact on the honour and respect of the artists and the music industry.⁷¹

Although passionate resentment is expressed by the legislature (against the practice of cover songs), which argues that performers ought to get an opportunity to prevent the covering of songs once they're performed, the legislature has not been able to circumvent the authorial regime of copyright, which conceptually provides such strong rights for authors and not vocalists. While legislative debates suggested that lawmakers sought to provide a strong national PRR for the benefit of the vocalists; however, analysis of the Act indicates that they did not deliver. Under Article 9 of the Intellectual Property Act, the right to authorise cover songs is still vested in authors and not performers.

On an ancillary point, one could argue that some of the concerns relating to the adverse effects of cover songs could have been addressed by introducing moral rights to performers. Accordingly, if a situation such as Nanda Malini's was to occur again, she,

⁷⁰ *ibid.*

⁷¹ *ibid.*

as the performer, would be able to challenge such mimicking, regardless of the fact that the other vocalist had obtained authorisation 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 an opportunity for performers.

As briefly highlighted above, some of the problems at the forefront of the Sri Lankan music industry have not been satisfactorily addressed in the national legislation, although it seems that the legislature was intending to address some of these. 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 in providing 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.

4.0 Conclusion

This paper discussed the national PRR in Sri Lanka, in order to understand the impact of the international PRR in this national context and, more importantly, to provide a foundation to the discussion on whether the national regime addresses the concerns of the national vocalists. While similar connotations to the international negotiations of the PRR can be seen on the national level, such as addressing the technological adversities that affect performers' remunerations, there is, however, some contradiction within the negotiation of the PRR and its final implementation under the Intellectual Property Act of 2003. This is in relation to the ownership of the songs the singers

perform. The negotiations in the Sri Lankan parliament seemed to have paradoxically accepted the international approach to authorial supremacy. Within multilateral fora, authors are considered to have the ownership of the songs they create as opposed to the performers, who, merely carry the authors' work to the public. However, the local debate in Sri Lanka appeared to have privileged vocalists' supremacy, where the vocalist who performs a song will have rights over their performances as well as over the songs they perform. Although such a difference in focus is visible between international and national negotiations, the PRR implemented under the IP Act 2003 is in line with the international PRR, where authorial supremacy is maintained. While such conformity prevents any legal issues relating to Sri Lanka's membership with the WTO, one could wonder whether the national expectations of the PRR were overshadowed by the international PRR, making it difficult for the local performers to resolve their problems.