

Private Use on Musical Works, Rights of Public Performance, and Collecting Society Systems.¹

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Introduction

A current hot issue in developing countries is the problem of conflict of interests in royalty collecting for music in department stores, restaurants and Karaoke shops nationwide. Some groups want to collect fees directly by themselves, others want to collect on behalf of the collecting societies, while the entrepreneurs do not want to pay fees.

Even though the dispute of copyright interests mentioned above may not be called “crisis” right now, but it has shown a significant sign that it might become a big problem in the near future, which some aspects have already occurred. For example; in Thailand, an event was the protest of the society of Karaoke owners against the government’s policy on this issue in few months ago.

However, finally, fees must inevitably be collected. The important question is that how is the best?

If fees for music mentioned above will be collected without the system, what will be going on? In theory, the problems would be as below;

- 1 Many enterprises of entertainment will face the cost of allowances that occur both high fees for music and many other rights of the copyright’s owners.
- 2 The higher the music copyright fees will be paid, the infringement of copyrights will be higher.
- 3 Music businesses may be obstructive.

When there are the said problems, the questions on intellectual property rights will then be raised to discuss, inevitably, both the concept of the exclusive rights of the copyright owners and the concept of rights of users who have legitimate copyrighted works, moreover, the concept of private uses.

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A classic question always raised is that why the owner of legitimate copyrighted works cannot freely use or play the legitimate copies without paying fees for the copyright owners, because they have already paid when they bought the copies? Why they cannot play music to entertain their customers without any direct charge to the customers.

How do we balance between the rights of owners and the rights of consumers? What will we choose between the money for the owner's rights and the entertainment for public? When do we focus on the economic rights, or do we concentrate on the public interests? These questions will respectively be answered later, otherwise the problems would be solved in their own process.

With the philosophy aspect, the copyright law is designed to achieve this objective by granting property right to authors that provide them with financial incentives to produce and distribute creative works. The user's right philosophy assumes that authors will only invest sufficient resources in creating and publishing new works if they will have ownership rights that will enable them to control and profit from their works' distribution to the public. So, actually, the concept of the copyright owner is the economic right. If we talk about the economic rights, unavoidably, we have to talk about the economic system. At present, the free market economic system disfavors monopoly unless there is a limited justification for them.² The question is whether the exclusive right of the copyright owner is a monopoly. Let see other philosophies. The United States' economy and the economies of most Western nations are based on the free market system and the belief that profits are the just reward for labor expended in creative endeavors. However, some other countries are based on different economic foundations and have different viewpoints on the concept of authorship. Many eastern economies are related to the religions of Confucianism, Buddhism, and Islam, which are more communally oriented. According to these countries' economic systems, profits should be shared within society. Under the authorship philosophies of some Asian countries such as Korea, creative works have historically been viewed not as private property belonging to their authors but as goods for everybody to share freely. In these countries, cultural esteem rather than financial gain was the main incentive for creativity. In feudal China, Confucian literary and artistic culture was based upon interaction with the past and discouraged bold innovation. Much of this background has survived in the people's Republic of China, which has been hostile to the concept of private ownership rights in intellectual property. However, China has been forced, due to foreign economic pressure, to adopt a copyright system highly similar to those of most Western nations. The forced nature of copyright is a probable reason for the enforcement problems that have been prevalent in China as well as other Asian countries. In many cultures, copying of copyrighted works is tolerated to a much greater extent than in the United States. In Islamic countries, where piracy is rampant, the rationale is that copying of original material should not be prevented since the most widespread dissemination of knowledge benefits the public good. Similarly, in countries such as China, Taiwan, South Korea and Singapore, imitation and reproduction of ideas, art and scholarship are sometimes considered a token of honor and respect. In the concept of economic rights philosophy, American copyright law, although historically based upon the user's rights philosophy, also incorporates some

² David J. Moser, *Music Copyright for the New Millennium*, ProMusic Press, 2002 at 5.

of the author's rights philosophy. Actually, it may be more accurate to describe the current American copyright policy as an economic rights (or trade-based) philosophy. The United States is the world's largest producer and exporter of intellectual property. Copyrighted works account for over \$457 billion (or 5.5%) of the annual gross domestic product in the United States. Copyright-related industries are also the fastest growing segment of the U.S. economy and employment in copyright related industries has grown at about three times the rate of employment growth in the economy as a whole in recent years, accounting for about 4.3 million jobs. Copyrights bring more revenue into the United States than any other major industry, including aircraft, automobiles and agriculture. As copyrighted works have become a larger part of international trade, they have also become one of the few positive components in the otherwise unfavorable United States trade balance (i.e., the U.S. imports more of just about everything than it exports). One major exception is copyrighted works, where the U.S. has a surplus trade balance with every country in the world. Although foreigners are not buying huge quantities of American physical products such as cars, stereos or computers, foreign sales of American intellectual property products such as music, movies, television programs and computer programs are substantial. Consequently, the United States has taken a much more active role in expanding copyright's reach and enforcing copyright on an international basis, often without much consideration of either author's or user's rights. For example, the United States recently decided to extend the duration of copyright by twenty years. It seems unlikely that this additional twenty years of copyright protection will make authors more likely to create artistic works. In reality, the two primary motivating factors for the twenty year extension were: (1) to preserve many valuable copyrights (including the copyrights to several Disney characters such as Mickey Mouse and songs written by George Gershwin) that were about to expire; and (2) to bring the term of American copyright protection in line with many European countries. Although these reasons may be important, they have little to do with encouraging authors to create new works. There was no evidence presented to suggest that authors would be less likely to create new works without the additional twenty years of protection and, in fact, this issue was not even considered by Congress. The passage of the term extension amendment was due primarily to the lobbying efforts of the copyright owners of some very valuable copyrighted works such as Disney and the Gershwin estate, with only token consideration given to providing incentives to authors or public access. This goes against the ideological basis for copyright, but reflects the reality of our political system.³

Facts mentioned above have obviously shown that the reasons for protection on intellectual property works in each country are different. Those reasons are based on political, religious, economic, and cultural philosophical basis.

Copyright owners may claim the property right is an original right of human being but it would be noted that even though the property right exist everywhere, what is necessary about them is just that some exist. It appears that many specific systems of ownership are compatible with any set of environmental conditions and social

³ *Id.* at 6-7.

structures.⁴ This paper will show some aspects of difference, some interesting concepts, and some important systems concerning the said topic of the paper.

Conclusion

From all materials above mentioned, a conclusion may be difficult to do so, if necessary, it would summarize in the way of factors in the present age. At present, the society is global not rural. Domestic economic system is no more existing. The global economic system is overwhelmed all. The economic rights come first. The notion of rewarding the discoverer or creator for giving society a useful thing is ancient.⁵ The school of thought of public right may be obsolete.⁶ Nothing is absolutely free.

Private uses on musical works are in trends to be strictly construed. Public performance on musical works in restaurants, cafes or shops, even small of spaces, may have to pay fee to the copyright owners or collecting societies. The exception will clearly be provided by laws. No pay, No rights. As M. Bourget said “you consume my music, I consume your wares”.⁷ However, In some regards, there is a critical question, that is, the all owners’ rights in the scope of the copyright laws are the exclusive right or the remuneration rights.⁸

Limitations of exclusive rights, fair use, fair dealing, exhaustion of right, homeuses and others, may finally be interpreted by courts in the narrow meanings, or any exemption will ostentatiously be provided by laws, otherwise no limitations can be raised.

Music seems to be freely available but it is not free. Music is created and owned by somebody and that somebody, be it a composer, songwriter, lyricist or music publisher, has a right to ask for payment.⁹ Therefore, normally, the users inevitably have to pay royalties to the rightowners.

At present, the collecting societies, the new, or rather no longer so new, information technology of digitalization and network communication has radically changed the landscape of copyright collecting societies. They do not need any longer to be collective, not in their tariffs and other conditions, nor in their offer of global repertoires and nor in the allocation of royalties. User contracts can be completely individualized and so must repertoire and the distribution of royalties.¹⁰ Especially, in the light of the requirements arising out of the digital environment, it is necessary to ensure that collecting societies achieve a higher level of rationalization and

⁴ Martin Kretschmer, The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments, *European Intellectual Property Review*, Sweet & Maxwell, 2002 at 5 (Westlaw).

⁵ Anthony D’ Amato, Doris Estelle Long , *International Intellectual Property Law*, Kluwer Law International, 1997 at 27.

⁶ *Id.* at 28-39.

⁷ Ernest Bourget, a French composer of popular musical chansons and chansonettes comiques. He said in 1847, and he won before the Tribunal de Commerce de la Seine. Martin Kretschmer, The failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments, *European Intellectual Property Review*, 2002 at 2.(Westlaw)

⁸ See Schonning, *supra* note 133, at 971.

⁹ The leaflet released by The Performing Right Society (PRS) March 1993 at 3.

¹⁰ See Jehoram, *supra* note 186, at 7.

transparency with regard to compliance with competition rules.¹¹ They will have to develop into completely neutral intermediaries between two parties in the market, rightowners and users.¹²

On the basis of the exclusive exploitation right the collecting society can place a supplementary copyright on the market.¹³ However, the royalty rate must be reasonable compensation for the copyright owner and also reasonable for the user to pay.¹⁴

It is important to realize that the collecting societies in each country have been established within a particular legal, cultural and economic context. Therefore how is the best system of the societies would consider all factors of context of each country.

¹¹ *Id.*

¹² *See Id.*, at 6.

¹³ *G. Basset v. Societe des Auteurs, compositeurs et Editeurs de Musiue* (SACEM),[1987] 3 C.M.L.R.173.

¹⁴ *See Id.*, *supra* note 283.