

Let the music play

Copyright laws that prevent the playing of songs in public are increasingly stifling

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Copyright and intellectual property recently became a high-profile controversy again, after a restaurant owner in Phrae reported a visit from a representative of veteran music and entertainment company GMM Grammy. The owner, who played music in his store through YouTube, said he had to pay 20,000 baht in copyright fees to the representative, who was also accompanied by a police officer.

The incident caused much discussion on Thai social media, with many conflicting opinions from both the public as well as artists and lawyers alike. Facebook page "Buddy Lawyer" (Tanai Koojai) cited a previous case in which the Supreme Court ruled that playing songs in a restaurant without charging extra specifically for the music does not constitute using those songs for profit, and as such is not illegal. Meanwhile, copyright lawyer Paiboon Amonpinyokeat presents a conflicting argument, saying in an interview published by Matchon TV that the court's ruling was brought about by outside circumstances unrelated to copyright law, and does not apply to the case in Phrae.

While the Ministry of Intellectual Property has come out to confirm Paiboon's stance, many are left unclear as to what exactly constitutes an infringement of copyright law in Thailand.

After the uproar, several Thai artists -- mostly independent -- announced that they were pleased to allow cafés and restaurants play their songs without paying, apparently in a spirit of defiance against what they perceive as cynical enforcement of the law by giant labels.

"Thailand's law regarding this matter is admittedly very convoluted and open to interpretation," said Nandana Indananda, partner at copyright firm Tilleke and Gibbins Bangkok, and former judge of the Central Intellectual Property and International Trade Court.

According to Nandana, Thailand's current copyright laws don't currently have any specific clauses that account for the broadcasting of copyrighted material on the internet, though it can be interpreted that way, as the wording of the laws covers any kind of distribution of a copyrighted work. As such, by playing a song in a public area like a restaurant, the owners of the restaurant can be considered as infringing on the label's right to public distribution of the songs.

"Overseas, the right to broadcast music to a public audience is considered to exclusively belong to the artists, or whoever holds the rights to the lyrics and musical arrangement in a song, while publishing labels hold the right to the recording and reproducing of those songs," he said.

"This is different from Thailand, where the rights to reproduction and broadcasting are considered to belong to the music label, while the rights to performing the song as well as its lyrics and music belong to the musician. This creates a problem, as it's often unclear who holds the rights to what. As such, even if someone wants to purchase the rights legitimately, they don't know how."

Nandana also explained that in Europe, there have been many rulings that suggest music publishers or artists who upload their songs onto a free, massively accessible platform like the internet are considered to have ceded their rights over distribution, as it's impossible to control access to a piece of work once it's online.

"Frankly, this subject is one that's relatively new to the world's courts, and there are still very few definitive cases to draw a conclusion from. But if we interpret the Thai copyright law as it is worded, then any act of public distribution, including uploading a copyrighted work online, is considered copyright infringement."

To further expand on what constitutes copyright infringement according to Thai law, Life asked Nandana to determine the legality in several different scenarios, such as covering or remixing musicians as well as scenarios involving the radio.

Scenario 1

A person is unknowingly recorded performing a song in a gathering, and that recording is uploaded to YouTube.

"In terms of the performer, she did not infringe on the right to distribute the work in public, as a gathering among friends is not considered to be a public space," said the lawyer. "Furthermore, as she did not know she was going to be recorded, it implies that her performance is not done for profit, which means she is legally safe, even if the recording were to bring her further fame or fortune in the future."

However, Nandana adds, the person who recorded the performance and uploaded it to YouTube could be considered infringing on the publisher's right to distribute the song, and is therefore liable, even if they didn't receive any profits.

"Many people are under the impression that if they don't try to profit from the distribution, they'll be legally safe. Even if the legal consequences may not be as severe, it is still technically illegal."

Scenario 2

Cover musicians, whether street performers, restaurant musicians or those performing in online videos.

"Speaking entirely in terms of the law, these people will be liable for public distribution of the song."

This also applies to television shows such as The Voice. According to an executive who worked on the hit singing contest programme, applicants/competitors are required to submit the song they wish to perform in advance, so the programme's producers have time to acquire the appropriate rights to broadcast and modify the song.

"It's not always straightforward, however, as we sometimes have problems finding the appropriate owners of various rights," says the programmer, who declines to be named. "Also, there are no standard pricing regulations, so the price to a song's rights can vary depending on the owners."

Scenario 3

Remixes or rearrangements

Nandana explains that while the unauthorised reproduction of copyrighted material is always considered wrong, remixes and rearrangements are often considered by foreign courts to be the creation of a new or derivative piece of work, which is not illegal, as the remixed/rearranged song is a separate entity from the original. This is to encourage the creativity and innovation of artists by giving them the ability to build upon existing works. In Thailand, however, the law is not quite as open.

"Music labels and studios will often be the ones to hold the rights to modifying or creating a derivative piece of work. Therefore, in this context, music labels technically do have the right to sue artists who remix or rearrange their songs without permission."

Scenario 4

Playing the radio in public

According to Nandana, playing a radio in public (or listening to it with loudspeakers) isn't necessarily illegal, though there is room for music labels to argue against that as well.

"If you're listening to the radio in a restaurant and someone happens to hear it, then it is not illegal. However, you must also be aware that in this case, radio stations technically have a right over their own broadcasts, not to mention the music labels' rights over the songs. If a restaurant owner were to play a radio station for his customers, even if the radio station has acquired the legal rights to broadcast those songs, then music labels can viably argue that the rights they sold to the radio station only extend to private use, and therefore find the restaurant guilty of infringement."

To ensure that incidents regarding copyright infringement like this one do not become a source of controversy in the future, Nandana suggests the establishment of a copyright database as well as a regulatory agency to oversee the pricing of copyright fees. This way, restaurant owners or cover and remixing artists can have legal access to copyrighted works at a reasonable fee, as opposed to the universal fee currently offered by many Thai music labels.

"Basically, we need a system that helps people with no intention to infringe on rights to defend themselves in cases of unintentional copyright infringement," he said.

"Overseas, there are agencies that artists and establishments can appeal to in cases where they feel they're being charged unreasonable fees for copyrights. For example, if I wanted to play a shortlist of songs in my little restaurant, but can't do so as the music label insists on charging me a universal fee for all their music, I can appeal to these agencies, who have the authority to force music labels to sell the appropriate rights to me at a more reasonable price.

"Respecting others' rights is always a good thing. But in the current situation, I think we should have a law that is productive and fair, one that is actually conducive to the creativity and progress of the people."

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