

**FAIR PRACTICE UNDER COPYRIGHT LAW OF
ETHIOPIA:
THE CASE OF EDUCATION**

**BY
DANIEL MITIKU**

**ADVISOR
Dr.MANDEFRO ESHETE (Assistant professor)**

**FOR THE PARTIAL FULFILMENT OF THE REQUIREMENT OF
MASTERS DEGREE IN LAW (LLM)**

**ADDIS ABABA UNIVERSITY
GRADUATE STUDIES
FACULTY OF LAW**

**JANUARY 2010
ADDIS ABABA**

Acknowledgement

First and for most I would like to thank the Almighty God. Second, my appreciation extends to my advisor Doctor Mandefro Eshete. And thanks to Muradu Abdo(Assistant professor, Faculty of Law, Addis Ababa University) for his valuable comment and support. I also like to thank Hiruy Wube and Yidnekachew Mitiku for their constructive advice. I would also like to thank the Federal Prosecutor Hailemariam Temesgen for his good cooperation. At last my thanks goes to all those helped me to accomplish this thesis.

List of Tables

	Pages
Table- I-Rate of questionnaire distribution.....	7
Table –II-The awareness of respondents.....	80.
Table –III-Practice of respondents.....	83.
Table –IV-Solutions proposed by respondents.....	86.

Abbreviations

TRIPS Agreement-Trade Related Intellectual Property Rights Agreement

UCC-Universal Copyright Convention

UNESCO-United Nations Educational, Scientific and Cultural Organization

WIPO-World Intellectual Property Organization

WTO-World Trade Organization

Abstract

Table of contents

Acknowledgement	i
List of Tables	ii
Abbreviations	iii
Abstract	iv
Introduction.....	vi
Chapter one: General background to the research	1
1.1. Background of the study	1
1.2. Statement of the problem.....	3
1.3. Objective of the study	5
1.4. Significance of the study.....	6
1.5. Research methodology.....	6
1.6. Scope and Limitations of the Study.....	7
Chapter two: Background concepts on copyright.....	9
2.1. Origin and Historical development of copyright	9
2.2. General concepts of copyright	13
Chapter Three: Fair Practice	23
3.1. Concept of fair practice.....	23
3.2 Rationales of fair practice	31
3.3. Special areas justifying fair practice exception	32
3.4. Fair practice in common law and civil law legal traditions	35
3.4.1. Copyright in common law and civil law in general.....	35
3.4.2. Fair practice in common law tradition.....	38
3.4.3. Fair practice in civil law tradition.....	41
3.5. New technologies and challenges relating to fair practice.....	43
3.5.1. Fair practice and new technology (digital Era).....	43
3.5.2. New challenges to the fair practice.....	46
Chapter Four: Fair Practice under International Copyright Conventions.....	48
4.1. International copyright conventions in general.....	48
4.2. Fair practice under international copyright conventions	51
4.3. Fair practice under TRIPS Agreement.....	55
4.4. The three step test limits	60
Chapter five: Fair practice under copyright law of Ethiopia: special emphasis on education.....	63
5.1. Brief history of copyright in Ethiopia.....	63
5.2. General rules and exceptions under the new proclamation	67
5.3. Fair practice exception.....	74
5.4. Fair practice in education.....	76
5.4.1. About education in general	76
5.4.2. What is education in copyright?	78
5.4.3. What is fair practice in education?.....	80

5.4.4. Standards of fair practice in education.....	92
5.5. Comparison with international copyright conventions	108
Chapter Six: Conclusion and Recommendation	111
Bibliography	114
Annexes.....	120

Introduction

Copyright law was developed to encourage creativity, one, by protecting the interest of the author or owner of the copyrightable work. The protection given by copyright law is expressed through entrusting the author or the owner of copyrightable work the exclusive right of reproduction, sale, rent, transfer, and other communication of the work to the public.

However, protecting the interest of the owner of the copyrightable work is not the only purpose of the copyright law .Copyright law has to also take in to account the interest of the society at large. That means the copyright law has to allow some access to and use of information of the copyrighted works. Thus, to balance between the interest of owner of the copyrighted work and the public, the copyright law provides exceptions. Education is the important exception that sides with the interest of the public.

But, in the name of exceptions, the users of the copyrighted works should not be made to free ride and affect the interest of the copyright owner. So, something has to be done to limit free riders. That means an exception to an exception is necessary. In this regard, the concept that is used to balance the interest of the society and the copyright owner is known as fair practice.

This paper only focuses on the standard fair practice as it is applied to education exception provided under copyright proclamation No.410/2004 of Ethiopia. International copyright conventions are also looked from such perspective. In this regard, the paper gives emphasis on the standards that help to identify whether a certain practice is fair or not.

Therefore, to realize the above objectives, this paper is divided in to six chapters. The first chapter is on the general background to the research. The second chapter is on the general background concepts on copyright. Here the historical background of copyright at international level and the general concepts of copyright are addressed.

The third chapter is on the concept of fair practice. This chapter explains fair practice. Its rationale is also treated. It also compares between legal traditions of the world in relation to fair practice. New technologies and challenges in light of fair practice are also given part in this chapter.

Chapter four is wholly devoted to fair practice under international copyright conventions. And chapter five, the main chapter, is on fair practice under copyright law of Ethiopia with a specific focus on education. Finally, conclusion and important recommendations are given.

Chapter one: General background to the research

1.1. Background of the study

Copyright means a property right that subsists in a certain specified type of works.¹ These specified type of works in which copyright subsists are original literary works, films and sound recordings.

The owner of copyright subsisting in a work has the exclusive right to do certain acts in relation to the copyrighted work .These acts are making a copy, broadcasting or selling copies to the public.²

The owner of a copyright has a control over the work³. That means it is only the owner of the copyrighted work who is entitled to exploit the work, either by making copies or by authorizing others to do these things in return for payment. This implies that other persons, unless authorized by the owner, are restricted by the copyright law from doing acts like making copy, broadcasting or selling copies to the public .If any person performs such acts without the permission or license of the copyright owner, the latter has remedies like injunction and claim for damage by suing for infringement of his/her copyright.⁴

Even if the one of the purposes of copyright law is to protect the interest of the copyright owner, but it should not ensure the owner of copyright the maximum economic benefit. Rather, the copyright law balances between the interest of copyright owner to obtain a

¹ David Bainbridge, *Intellectual Property* (1999), p. 29.

² Arthur R. Miller and Michael H. Davis, *Intellectual property: Patents, Trademarks and Copyright in Nutshell* (2000), p. 295.

³ David Bainbridge, note 1.

⁴ W.R. Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (1981), p. 344.

fair return and society's interest in access to and use of information. As a result, the copyright law does not only provide exclusive right to the copyright owner, but also exceptions to the exclusive right and allow the use of copyrighted work by third parties in certain circumstances. One of the main area in which copyright exception would be permissible is education.⁵

Such exceptions by themselves do have their own limits. These exceptions and limits to the exceptions are generally guided by a doctrine known as "fair use"⁶, and "fair dealing"⁷, and fair practice⁸ in USA, UK, and Ethiopian legal systems, respectively.

The title of the research paper is "**Fair Practice under Copyright Law of Ethiopia: the Case of Education**". The research paper dwells much on the standard fair practice with a specific focus on education. It tries to give not the exact definition but some explanations for fair practice standard, how it is introduced in the copyright law of Ethiopia and how it works with the cases of education, compares with the known legal systems, and shows the gap under our legal system.

International copyright instruments, mainly the TRIPS provisions, are also be examined particularly those provisions of the TRIPS relevant to fair practice .It states also what it means for Ethiopia as an acceding country to the WTO (World Trade Organization).The fair practice provisions of international copyright instruments are also compared with Ethiopian .In addition, the concept of fair practice and new technologies and new challenges to the concept are also included in the paper.

In this paper the researcher uses fair practice as a standard to balance the interest of the copyright owner and the public interest in access to information and creative works. So, fair practice can be used as a standard in the process of protecting the two interests.

⁵ Copyright and Neighboring Rights Protection Proclamation, No.410/2004, Article 11.

⁶ Arthur R. Miller, note 2, p. 354.

⁷ David Bainbridge, note 1, p. 170.

⁸ Supra note 5, Articles 10 and 11.

Thus, the main theme of the paper is on standards which help to understand and apply fair practice in cases of education. So the paper recommends standards to avoid confusions in the area and to make easy for the interpreting organ or judges in applying fair practice in cases of education.

1.2. Statement of the problem

The standard of fair practice is provided to limit the exclusive right of the copyright owner and also other third parties in using exceptions to the exclusive right of the copyright owner. Education is the known exception to the exclusive right of the owner. However, there are problems with regard to the definition and application of the standard fair practice. Primarily, it is difficult to differentiate what practice is fair and what are not. In most legal systems, including our (Ethiopia), fair practice is left to be defined by judges. But it is not an easy task as such to be defined by them. It should not totally be left to them. It might end up in inconsistent application of it.

And to apply the standard for each exception to the exclusive right of the copyright owner, certain substantive standards (elements that constitute part of the standard) are needed. These standards are important to apply and interpret the fair practice to each exception and practical cases. Since the focus of this paper is the application of fair practice specific to educational exception, general as well as specific standards are absent in Ethiopian copyright system.

In addition, the copyright law has to strike a balance between the interest of the copyright owner and the interest of the society through the standard of fair practice. How can the standard of fair practice strike a balance between the two interests is the big question that needs to be addressed particularly in education.

The Ethiopian Copyright Proclamation No.410/2004 provides the standard of fair practice even if not for all exceptions to the exclusive right of the copyright owner .The fair practice standard is provided by the Proclamation under article 11 for educational exception(for the purpose of teaching). And this proclamation neither defined the standard fair practice nor provided the contents of the standard in condensed form in order to apply for cases brought before court.

Some people may think that reproducing the copyrighted work of another, if it is for the purpose of education, is permitted without limit. If it is so, what is the importance of including the phrase “fair practice” in article 11 of the Proclamation?

So, the paper mainly addresses the problem relating to our legal system by comparing or adopting the solutions from other countries legal system that developed the standards for the fair practice in applying for cases before court. The paper does not really define but explain the standard of fair practice, the rationale for it, and recommends some standards (guidelines) to ease the application of it for each case brought before court.

The difficulties encountered by the Ethiopian judges in applying the concept of fair practice for cases brought before them are also covered by the paper .In US legal system general standards in applying the “fair use” doctrine are provided by law to make easy the task of judges. But, we do not have such standards. Therefore, the paper recommends solutions on such gaps.

Furthermore, internationally, what is fair practice in one country may not be the same in another country? Especially, concerning new technologies like internet which makes the access to information easy to the peoples of the glob required some conventions. The copyright law of Ethiopia also is looked from the perspective of such international copyright conventions. Whether the copyright law of Ethiopia gives much protection than the minimum standards of international copyright conventions is addressed.

Finally, new challenges are coming with new technologies that affect the application of the concept of fair practice .The copyright law of Ethiopia does not provide for any thing concerning such new challenges .The paper also says something on such gaps.

1.3. Objective of the study

Primarily, the paper tries to explain the standard of fair practice .The standard of fair practice by itself is vague and needs certain clarification. In line with it the reasons for having the standard of fair practice in the copyright law are also treated.

But, the main objective of the study is to show the importance of standards in applying fair practice, particularly for the case of education and find out some standards that help to decide each case brought before Ethiopian courts. Countries which have developed their legal system relating to the concept are referred to recommend appropriate solutions for Ethiopia.

The writer of this paper chooses the specific exception, education, because of the following reasons:

- since education is the basic policy of our country;
- since it is very difficult to differentiate what uses are infringing and what are not in case of education: and
- since enough research on this area is not done.

So, the paper shows the gaps relating to the standard of fair practice under Ethiopian copyright law by comparing with other legal systems, international conventions, new technologies and new challenges and then recommends solutions.

1.4. Significance of the study

The paper recommends important standards that help to apply the fair practice for each case brought before court. The judges of Ethiopian courts can refer to such standards and easily handle the copyright cases brought before them.

The paper is also important for the law making organ to amend the copyright proclamation in force by showing the gaps concerning the standard fair practice in cases of education .The fair practice standard is not provided for all exceptions to the exclusive right of owner under the copyright proclamation in force .Even the definition and standards in using fair practice for each case by the court are not provided in any law .The proclamation also does not consider new technologies like internet and new challenges relating to it .Therefore, the paper shows such gaps and recommend appropriate solutions to the appropriate organ.

In addition, the paper also contributes to endeavor the committee under the Ministry of Trade and Industry which facilitate the accession process of Ethiopia towards WTO concerning the standard fair practice by looking at the copyright proclamation of Ethiopia from the perspective of TRIPS Agreement.

1.5. Research methodology

Both primary and secondary data are referred to do the research paper. The Ethiopian copyright and neighboring rights proclamation No.410/2004 is the main legislation since it is the governing copyright law. International copyright conventions relating to the topic of research are also considered. Books, journals and internet are important sources.

Interviews are conducted with judge of Federal court and with selected individuals .And decided cases are not considered to supplement the arguments since related cases are not appearing before court.

Some 210 questionnaires to higher institution teachers and students in Addis Ababa are administered. These methodologies show clearly the research problem and so that the researcher is enabled to recommend appropriate solutions.

Table I. Table to show the rate of questionnaire distribution (sample size)

No	Institution	Number of respondents		Total
		Teachers	Students	
1	Addis Ababa University	10	20	30
2	Civil Service College	10	20	30
3	St. Mary University College	10	20	30
4	Alpha University College	10	20	30
5	Unity University College	10	20	30
6	Admass University College	10	20	30
7	Queen's University College	10	20	30
Total				210

The data collected show how fair practice is implemented in higher educational institutions situated in Addis Ababa: both private and public. To assess the application of fair practice in these institutions, as it is stated in the above, 210 questionnaires are distributed to 7 selected higher institutions. Out of these questionnaires 184 are collected, which amounts to almost 88%.

1.6. Scope and Limitations of the Study

The scope of the paper is only limited to the standard of fair practice, not the whole copyright. And it does not deal with fair practice for all issues of copyright, only to the cases of education. From this it focuses on higher education in Addis Ababa. The questionnaires are distributed to selected higher education institutions situated in Addis Ababa.

And the thesis will not compare the legal systems of all countries of the world .It is limited to some exemplary countries.

There are limitations to the research paper. To state some of them, it has been said that defining the standard of fair practice is not an easy task. Because of the nature of the phrase by itself, its definition will not be given word by word in single line .And, very specific and exhaustive standards for the application of the standard of fair practice in cases of education may not also be given. Rather general and illustrative standard will be given.

Chapter two: Background concepts on copyright

2.1. Origin and Historical development of copyright

Historically, copyright law is a recent development internationally compared to other developments.⁹ In ancient times, at the beginning of civilization, the economic right of the author was not protected and there had been persons who profited from the work of others. The emphasis was on moral rights of the author. In such times, two factors limited the protection of literary works. First, before fifteenth century, majority of books were religious, written by monks and plagiarism of them were impossible since they require massive human labor and skill to produce such works. Second, the illiteracy of a large population did not create a market for books.¹⁰

Two inventions in the late fifteenth century: the invention of type writer in 1455 and the development of printing press in 1478 changed history and contributed for the development of copyright.¹¹ The invention of the art of printing (in time of the first copying industry) was the first situation that gave rise to the need for copyright legislation.¹² But, the concept in which the author should have an exclusive copyright got its firm shape at the beginning of the eighteenth century when the statute of Anne was enacted in England in 1710.¹³

England pioneered the true copyright law in the copyright history of the world.¹⁴ With the development of art of printing, multiplying copies became easy and its profitability increased. Henry VIII of England banned importation of books into England in order to restrict and control the printing of religious and political books. But, a system of

⁹ Corpus Juris Secundum, Copyright and Literary Rights (1939), Vol. 18, P. 161.

¹⁰ David Bainbridge, Intellectual Property (1999), P. 31.

¹¹ Ibid.

¹² Corpus Juris Secundum, note 1.

¹³ W.R. Cornish, Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights (1981), p. 393.

¹⁴ Corpus Juris Secundum note 1.

privileges was created by the Act of 1529 and stationers' company was empowered to control printing.¹⁵

This was the earliest form of copyright protection in which the modern copyright laws grow from. The Act of 1529 prohibits printing unless the book was first licensed and registered by the stationers' company (the forefather of the modern publisher). The purpose of the Act was censorship, not for the protection of authors or publishers. This Act was expired by the year 1694 and such form of protection was replaced by the new legislation which was called the statute of Anne. This statute was considered to be the first true copyright law in copyright history of the world.¹⁶

The statute of Anne grants the sole right and liberty of printing books to the authors and their assignees. Even though, the author ought to have some protection over his work before it was published, the Act did not cover it.¹⁷ In 1790, United States of America congress copied the statute of Anne and so there existed the similarity between copyright law of the UK and the U.S.A.¹⁸

Since 1710 attempt was made to limit as well as to create copyright protection.¹⁹ And then the scope of copyright was gradually increased to include other works.²⁰

The legal protection to publishers and the challenges by authors showed the important commercial distinction between authors and publishers in 18thc. The author had some legal rights prior to publication even though they were not clearly defined. The publisher

¹⁵ David Bainbridge, note 2.

¹⁶ Ibid

¹⁷ W.R. Cornish, note 5, p. 295.

¹⁸ David Bainbridge, note 2, p. 34.

¹⁹ Arthur R. Miller and Michael H. Davis, *Intellectual Property: Patents, Trade Marks and Copyright in Nutshell* (2000), P. 286.

²⁰ David Bainbridge, note 2, p. 34.

gained publication right after publication. Such distinction existed until recently with some changes.²¹

The American copyright law came to distinguish between the right of an author to his unpublished creations and the statutory copyright that might be secured upon publication. The right of an author to his unpublished creations was recognized as “common law” right of an author and accordingly the author had a perpetual right to his creation until recently. And the author had the right to decide when and how to publish the work. If it is published, the common law rights of the author terminate upon publication and then the statutory right of the author takes the place.²²

Although the common-law copyright existed independently from statutes of copyrights, it has been recognized for a long time in the express provision of the copyright acts in United States of America.²³ But, the copyright act of 1976 altered the distinction between common-law right of an author to his unpublished works and the statutory copyright upon publication in order to avoid confusion and dual protection to issues of copyright; and the line of demarcation was shifted from the moment of publication to the moment of fixation of the work.²⁴

The 1976 Act protects the author as soon as his work is recorded in some concrete way and it protects all expressions upon fixation in a tangible medium.²⁵

In England, the common law copyright is abrogated in 1911 and all rights are included under the statute and are claimed from it and there is no intention to deprive the owner of property of an intellectual production from the fruits of his intellectual productions.²⁶

²¹ Arthur R. Miller, note 11, P. 286.

²² Ibid

²³ Corpus Juris Secundum, note 1, p. 138.

²⁴ Arthur R. Miller, note 11, p. 287.

²⁵ Ibid

²⁶ Corpus Juris Secundum, note 1, p. 139.

Limiting the right of author was expressed in the first true copyright law –statute of Anne in 1709.The perpetual copyright that exist at common law for unpublished works was replaced with time limitation for published works by the statute of Anne .Since then, in practice, judges further limited the right of authors by permitting some copying by the reason of “fair dealing”. Then the “fair dealing” concept was codified by the parliament in 1911.As a result an attempt was made to reconcile the dual purpose of statute of Anne as recognized by courts :rewarding author ,and stimulating other authors to produce for the benefit of society.²⁷

Then the American judges learn from English precedent and developed the concept of “fair use”, which is the counter part of England’s “fair dealing”.²⁸

Like in common law countries of England and U.S.A, as it is stated in the above, the development of printing press demanded also copyright law in civil law countries, such as France.²⁹And the historical development of copyright in these countries was not as such different, substantively, from those countries discussed in the above. However, historically and now also, the French copyright law is known with the approach that is associated with author’s right.³⁰

Even though the French copyright approach is associated with author’s rights, some observers testify that copyright in France was the least protected of all property rights since they were enforced by balancing with the public domain and social welfare.³¹

The jurisprudence of copyright in French in the middle of nineteenth century was considered in terms of rights of personality. But, until the beginning of twentieth century,

²⁷ *Copyright Fair Use: Case Law and Legislation*, Duke Law Journal, Vol. 1969, Feb. 1969, p. 75.

²⁸ Ibid

²⁹ [An Economic History of Copyright in Europe and the Untied States, http://eh.net/encyclopedia/article/khan.compyright.accessed](http://eh.net/encyclopedia/article/khan.compyright.accessed) on June 18, 2009

³⁰ Ibid

³¹ Ibid

the moral right of author was not incorporated in the law. Since then, the subsequent copyright laws recognize moral rights of the author.³²

2.2. General concepts of copyright

“Copy” means, in ordinary sense of the word, “[a] reproduction of a part or whole of a thing; it implies or requires identity (i.e. must be substantially identical, cannot be said that a copy must be an absolute duplicate in every detail; some discrepancies may exist. It is a completed reproduction; a document which is taken or written from another as opposed to an original; a reproduction or duplication of a thing; a reproduction or imitation, as of a writing, printing, drawing, painting, or other work of arts, so as to have another or others similar to the original; something other than the original; a transcript from an original; a writing like another writing; that which comes so near to the original as to give to every person seeing it the idea created by the original; any single book or sets of books containing a composition resembling the original work; one of a set or number of reproductions or imitations containing the same matter, having the same form and appearance, or executed in the same style”.³³

Copyright means the right to make copy of a work exclusively belongs to the owner.³⁴ Others, unless otherwise authorized by the owner, are excluded from reproduction of a work partly or in whole; they cannot take substantially from the original so that it gives identical idea to the people seeing it. It is the right of preventing all others from printing or otherwise multiplying copies, of publishing, and vending of intellectual production.³⁵

The exclusive right, such as the reproduction right, the derivative work right, the distribution right, the performance right, the display right and the digital transmission performance right, is exercised by the owner.³⁶ The exclusive right to make copy is enjoyed by the owner as it is provided in the statutory provisions. A copyright law given

³² Ibid

³³ Corpus Juris Secundem, note 1.

³⁴ Definition of copyright, <http://www.nolo.com/definition.cfm/term/4B5A08FF-555D-4EBF-89468COAFF8401F6> accessed on June 20, 2009.

³⁵ Corpus Juris Secundem, note 1.

³⁶ Arthur R. Miller, note 11, p. 323.

by the government grants to the owner of an intellectual production the exclusive use and enjoyment of it to the extent specified in the law.³⁷

In line with the above, Black's Law Dictionary defines copyright as:

“[t]he right of literary property as recognized and sanctioned by positive law. An intangible, incorporeal right granted by statute to the author or originator of certain literary or artistic productions, where by he is invested, for a specified period, with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them.”³⁸

Thus, copyright means an intangible, incorporeal property right granted by the law to the owner of the specified types of works like literary or artistic works.³⁹ One nature of copyright is that it is intangible, incorporeal right in which the right totally disconnected and independent from any material substance, such as the manuscript or the plate used for printing, sale or other transfer.⁴⁰

In addition, a copyright is a statutory grant or a grant by law to the owner to have a complete monopoly over the copyrighted work.⁴¹ The copyright law grants protection to the owner of his right in relation to the work.

A copyright may be obtained only for a work falling within the copyright law enumeration or description. According to the common law understanding, copyright is a new or independent right granted by the law; it is not a pre-existing right. The rights are as only the law confers and such rights can be enjoyed and obtained only with respect to the subject, by the persons on the terms and conditions specified in the copyright law.⁴²

³⁷ Corpus Juris Secundum, note 1.

³⁸ Black's Law Dictionary, 6th Ed.

³⁹ David Bainbridge, note 2, p. 29.

⁴⁰ Corpus Juris Secundum, note 1.

⁴¹ Harriet F. Pilpel and Morton David Gold Berg, A Copyright Guide (1966), p. 1.

⁴² Corpus Juris Secundum, note 1, p. 165.

A “work” can be said in case of copyright, as the ordered expression of thought.⁴³

Furthermore, copyright protection subsists in original works of authorship fixed in any tangible medium of expression. In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, and system, method of operation, concept, principle, or discovery.⁴⁴ One important feature of copyright law is that it does not protect ideas, rather protects the expression of an idea.

The copyright law may require the work to have some tangible form. This means the copyright law requires the work to be fixed. The works of authorship or the specified types of works in which copyright protection subsists include original literary works, musical works (including any accompanying words), dramatic works (including any accompanying music), pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works, and sound recordings.⁴⁵

A work, in order to be protected by copyright law, it has to be original. The word “original” in ordinary dictionary meaning has no place in cases of copyright.⁴⁶ And by contrast to a patent, a work of originality need not be novel.⁴⁷ Originality in case of copyright is to imply that the copyright owner originated the work.⁴⁸

A work must be original to be copyrighted is in the sense that the author has created it by his own skill, labor, and judgment without directly copying or evasively imitating the work of another.⁴⁹ The author can claim copyright as long as he created the work; even if

⁴³ David Bainbridge, note 2, p. 36.

⁴⁴ Black’s Law Dictionary, note 30.

⁴⁵ Ibid.

⁴⁶ David Bainbridge note 2, p. 39.

⁴⁷ Arthur R. Miller note 11, p. 295.

⁴⁸ Ibid.

⁴⁹ Corpus Juris Secundum, note 1, p. 166.

many people created it before. Originality only implies that the person who claimed copyright did not copy from someone else.⁵⁰

One way of testing the originality of a work is searching for a reasonable amount of effort expended in the creation of a work. A copyright protection to subsist in a literary, dramatic, musical or artistic work, such things must qualify as a 'work'. To determine whether a thing qualifies as a work, considering the amount of skill, labor or judgment applied in its creation is important.⁵¹

A work to get protection by copyright law need not consist of a new or original matter. A copyright protection may extend to plan of a work as connected with the selection, arrangement, and combination of the matter, even though all the materials used and its subject are common to all authors. An author may come up with his own new work by selection and modification, arrangement, and combination even if it shows evidence that it was derived from a former publication.⁵²

In such a case, if the selection, plan, arrangement, and combination of material are new and original, the author will be entitled to copyright to that work. The copyright protection extend to what is new and original not to the old material used in the new work. So, compilations, abridgements, and indexes may get copyrights protection to the extent that it is new and original in respect of selection modification, arrangement and combination.⁵³

In the past, many jurisdictions required either notice or registration as a prerequisite for copyright protection. But, the international copyright conventions reversed this trend and avoid such requirements. Primarily, the Berne convention avoids the requirements .And the Berne convention is incorporated in to the TRIPS Agreement.⁵⁴ So neither notice nor

⁵⁰ Arthur R. Miller, note 11, p. 295.

⁵¹ David Bainbridge, note 2, p. 41.

⁵² Corpus Juris Secundum, note 1, p. 168.

⁵³ Ibid.

⁵⁴ TRIPS Agreement, Article 9.

registration is required to obtain copyright protection. Now United States and many WTO Members administer a voluntary copyright registration.

In these countries, as a practical matter, however, copyright notice and registration are still important in establishing and proving copyright.⁵⁵

As it is stated in the above, the copyright law empowers the owner to have a control over the work. The author himself may be the owner of the copyrighted work. Author means a person who produces or created an original work by his own intellectual skill and labor.⁵⁶ Here, a corporate body may also be the author of a work. For example, the arrangements in sound recordings made by officers of a music company in which case the company are deemed to be the author. And sometimes the identity of the author may not be known. The author may not wish his identity to be disclosed in case of anonymous and pseudonymous works.⁵⁷

Sometimes, the author of a work may be more than one, i.e. the case of joint authors, if two or more persons jointly result in the production of a work.⁵⁸

In case of copyright there are two distinct concepts: authorship and ownership, in which each attracting its own peculiar right. In the former case (i.e. authorship) the author has moral rights.⁵⁹ This is because authorship implies the exercise of mental power and the production in concrete form of an original intellectual conception.⁶⁰ The three most common forms of moral right are:

- i) The right to decide up on making the work public;
- ii) The right to claim the authorship of a published work; and

⁵⁵ Mitsuo, Matsushita, Thomas J, Schoenbaum, and Petros C, Mavroids, *The World Trade Organization: Law, Practice, and Policy* (2006), p. 701.

⁵⁶ *Corpus Juris Secundum*, note 1, p. 182.

⁵⁷ David Bainbridge, note 2, p. 76.

⁵⁸ *Ibid.*

⁵⁹ David Bainbridge, note 2, p. 74.

⁶⁰ *Corpus Juris Secundum*, note 1, p. 166.

iii) The right to prevent alterations and other actions that may damage the author's honor or reputation.⁶¹

In the later case (i.e. ownership), the owner of copyright possesses economic rights. The owner means a person who possesses economic rights.⁶² There are instances in which the author of a work will also be the owner of the copyrighted work. The person who created the work is normally considered to be the first owner of the work, except he created the work in the course of employment in which the employer becomes the first owner of the copyrighted work. Ownership flows from authorship.⁶³

The other instance in which the author could not be the owner of the copyrighted work is in the case of assignment. The ownership of a copyright, the title, can be transferred to another person. In such a case the assignee will be the owner of the copyrighted work since the title to the copyright has been transferred to him.⁶⁴

Through different methods of contract the copyright owner may exploit the work. The owner of a copyright may assign the ownership of copyright or license it to another. In the former case, the owner of copyright loses his ownership right, while in the later he may reserve his ownership but he can allow another person to carry out certain acts, like making copies, in relation to the work.⁶⁵

If the person created the work independently for his own pleasure and not employed under contract of employment, and even the person is employed, but the work has not been created in the course of employment, the author will be the first owner of copyright.⁶⁶

⁶¹ W.R. Cornish, note 5, p. 393.

⁶² David Bainbridge, note 2, p. 74.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

The problem arises in case of ownership of the copyright subsisting in anonymous works since there is no author available or willing to give evidence. In such a case, mostly, it is presumed that publisher of an anonymous work is the owner of the copyright, unless contrary is proved.⁶⁷

The joint authors will automatically be joint owners of a copyrighted work unless the authors are employees and created the work in the course of employment.⁶⁸

In addition, the owner of a copyright either licenses it to another by reserving ownership to him or assigns it which relinquishes the economic right of the owner himself. The copyrighted work consists of several rights associated with the work; a number of rights subsist in a work. For example, musical copyright, literary copyright, copyright in the sound recording, performance rights, rental and lending rights, the composer's and the lyricist's moral rights can be derived from a song recorded as a sound recording. All these complex rights exist in a song.⁶⁹

And these bundles of rights in a copyrighted work can be exploited in a number of ways. It is possible to deal with each right in a copyright separately.⁷⁰ The copyright law provides a very useful and effective way of exploiting the work economically. The owner of a copyright has to be careful on how to exploit the work economically so that he can maximize his income derived from the work protected by the copyright law.

So, the various rights bundled in a copyright work can be licensed or assigned separately. Assignment result in the transfer of ownership while license is a permission to do what otherwise would be infringement. The licensee's freedom is more restricted than assignee. The licensee may not be entitled to assign or sub-license and the licensor may grant a license to others unless contracted exclusivity to the first licensee.⁷¹

⁶⁷ Id, p. 79.

⁶⁸ Ibid.

⁶⁹ Id, p. 85.

⁷⁰ W.R. Cornish, note 5, p. 381.

⁷¹ W.R. Cornish, note 5, p. 381.

In such a case, even if the owner of copyright has the right to deal with the work, like transferring the right to another or granting licenses to another, the author's moral right must be respected by the copyright owner, assignees, licensees, and the public in general.⁷²

As it is stated in the above, the owner of the copyright work is entrusted with exclusive rights in relation to the acts provided by the copyright law. Whosoever does or authorizes another to do any of the acts restricted by copyright without getting the consent (whether it is contractual or otherwise) of the copyright owner is said to be infringing the copyright subsisting in a work.⁷³

Black's Law Dictionary defines "infringement" as "a breaking in to; a trespass or encroachment up on; a violation of a law, regulation, contract, or right" and also define "infringement of copyright" as "unauthorized use of copyrighted material; i.e. use without permission of copyright holder".⁷⁴

Infringement of copyright can also be defined as a trespass on a private domain owned and occupied by the owner of the copyright as it is protected by the law.⁷⁵ Infringement is synonymously used with piracy. Doing an act by any person out of the restricted acts and in any manner out of the copyright law, is not an infringement of copyright. There must be a copyright protection subsisting in an original work and infringement by copying to support infringement suit. The copyright law must enumerate those rights secured to copyright owner and those acts constitute infringement.⁷⁶

Among other things, the copyright owner has the exclusive right to: copy the work, issue copies of the work to the public, rent or lend the work to the public, perform, show or play the work in public, broadcast the work or include it in a cable program, and make an adaptation of the work. If any one performs or authorizes another to perform these acts

⁷² David Bainbridge, note 2, p. 120.

⁷³ Id, p. 121.

⁷⁴ Black's Law Dictionary, note 30.

⁷⁵ Corpus Juris Secundum, note 1, p. 205.

⁷⁶ Ibid.

restricted by copyright law without the consent of the owner, he infringes the copyright subsisting in a work.⁷⁷ So, infringement occurs whenever some body exercises any of the rights reserved exclusively for the copyright owner by the copyright law without the consent of owner.⁷⁸

Establishing copyright ownership and impermissible copying of the copyrighted work are necessary to prove infringement before court.⁷⁹ The plaintiff has to prove, directly or indirectly, that the defendant copied from the work in which he claims copyright.⁸⁰ The existence of copying is necessary to support the infringement suit. If there is no copying, there is no infringement.

Here, the fact that two works are similar or identical, does not amount to infringement. Both works may be protected by copyright even though they are identical if each works produced independently and fulfills the requirement of originality.

However, if the similarity or identity of the works is due to copying from the copyrighted work that the later work may be deemed an infringement.⁸¹ In such a case, first it has to be shown that copying occurred. Then, such copying should amount to impermissible appropriation i.e. the copied work has to be protected by copyright law since there is permissible copying.⁸²

Once the court determined that a person is guilt of copyright infringements, the penalties like injunction, confiscation of the items, paying the owner of the copyright any profits received will be imposed on the infringer.⁸³ These penalties and civil remedies should be specified in the copyright law.

⁷⁷ David Bainbridge, note 2, p. 121.

⁷⁸ Arthur R. Miller, note 11, p. 340.

⁷⁹ Id, p. 344.

⁸⁰ W.R. Cornish, note 5, p. 295.

⁸¹ Corpus Juris Secundum, note 1, p. 216.

⁸² Arthur R. Miller, note 11, p. 345.

⁸³ Infringement of Copyright, <http://www.lostquilt.com/soverces.html>, accessed on June 20, 2009

Not all use without permission of copyright owner is considered to be infringement of copyright. There are exceptions and limitations to copyright. Any copyright law provides or has to provide some express exceptions to copyright which can be used as defenses to the accusation of copyright infringement. The pertinent limitations of the exclusive rights of copyright owners are fair practice, the first sale doctrine, and specific exemption for teaching, libraries, and non profit organizations.⁸⁴

The rationale for the limits or exceptions to the exclusive right of owners of copyrights is to provide a fair balance between the rights of copyright owners and the rights of the society at large. One of the more important exception and limits to the exceptions that balances between the rights of copyright owners and the rights of the society is known as “fair dealing” in British legal system and “fair use” in U.S.A. legal system.⁸⁵

In other jurisdictions, such as continental Europe, they are known as exceptions and limitations to the exceptions of copyright and their copyright law lists those exceptions and limitations to that effect.⁸⁶

The governing copyright proclamation of Ethiopia provides exceptions and limits to the exceptions of copyright. With in such exceptions and limits to the exceptions, it also introduces the concept “fair practice” which is similar to “fair dealing” and “fair use” in British and U.S.A. legal systems, respectively. The following chapters focus on this latter important concept particular to education in copyright.

⁸⁴ Dan Thu Thi Phan, *Will Fair Use Function on the Internet?* Columbia Law Review, Vol. 98, No.1, January 1998, p. 178.

⁸⁵ Copyright Exceptions and Limitations, <http://www.copyright.gov>, accessed on September 9, 2009

⁸⁶ Carlos M Correa ,*Fair Use In The Digital Era*, International Review of Intellectual property and competition law(IIC), Vol. 33, No. 5/2002, P. 574.

Chapter Three: Fair Practice

3.1. Concept of fair practice

As it is discussed in the previous chapter, copyright is the exclusive right given to the owner of a copyright work. When unauthorized non-owner transgresses the rights of the owner, infringement of copyright takes place and the owner gets remedy to that effect.

The scope of copyright monopoly has to be kept reasonable .Several principles have evolved to limit copyright protection .Extended scope of protection would undermine the public benefit policy of copyright .The most significant exemption is the standard fair practice.⁸⁷

Intellectual property policy, especially copyright policy, serves as policy tool that structures the use and flow of information .It play a major role in an information age.⁸⁸

The copyright regime seeks to balance the public's desire for broad access to copyrighted works with the need to provide a pecuniary incentive for the copyright holder to disseminate the work .An important tool in maintaining the copyright system's equilibrium has been the standard fair practice, which authorizes certain uses of copyrighted materials without the need to obtain the copyright holder's permission.⁸⁹But there is no perfect consensus on how to maintain a perfect equilibrium between the two competing interests.⁹⁰

The copyright system should provide the appropriate level of economic incentives to copyright holders to motivate creativity without hindering society's interest in the wide spread dissemination of works and the free flow of ideas and information .The precise contours of such balancing are of great importance because they (the precise contour)

⁸⁷ Dan Thu Thi Phan, *Will Fair Use Function on the Internet*, Columbia Law Review, Vol. 98, no. 1 (Jan.1998), and p.181.

⁸⁸ Id, p. 170.

⁸⁹ Ibid.

⁹⁰ Id, p. 216.

will determine whether the copyright system will fulfill or frustrate its goal by either hindering or encouraging the full potential for learning and creation.⁹¹

The notion of fair practice would encourage original research and the creation of new works. The standard fair practice should be adapted to further principles of education and dissemination, thus advancing the stated goals of copyright.⁹²

The twin aims of copyright system is to provide public benefits flowing from the creative activities of individual authors and to protect the pecuniary interests of the copyright holder through a temporary copyright monopoly .The temporary monopoly to copyright holder does not signify solely as a protection of the copyright holder’s pecuniary interest, but it also realizes the public interest by limiting the monopoly right ,which is temporary .The function of fair practice standard has to coincide with the dual objectives.⁹³

On the other hand, it can be said that it must strike a balance between the dual risks created by the copyright system: one, that depriving authors of their monopoly will reduce their incentive to create ,and on the other hand ,that granting authors a complete monopoly will reduce the creative ability of others.⁹⁴

A limited copyright monopoly is a necessary condition to the full realization of the productive activities of authors .And public access is a policy behind copyright. Access is still required during the limited period. The public still needs the opportunity to gain knowledge from the incopyrightable ideas included in the work. The creation of new work is dependent on use of existing material even during its copyright period. Other wise, copyrighted material would not be accessible to subsequent authors or to the public,

⁹¹ Ibid, p. 170

⁹² Ibid, p. 173

⁹³ Ibid, p. 174

⁹⁴ Tyler G. Newby, *What’s Fair Here Is Not Fair Every Where: Does the American Fair Use Doctrine Violate International Copyright Law*, Stanford Law Review, Vol.51, No.6 (Jul.1999), p. 1637

and the primary aim of copyright i.e. the promotion of knowledge and learning would be frustrated .Over protecting the author will restrict public access to copyrighted works.⁹⁵

The positive law copyright (statutory copyright) is regulatory in nature. The legislative body when enacts copyright law is concerned with the public welfare. So it grants rights to the copyright owner but also limits those rights. The copyright law allows also a limited use of another's copyrighted work.⁹⁶

However, not all uses without the consent of the owner of copyright are infringement. We do not have to consider, in case of copyright, that the exclusive rights to the owner are absolute. Usually, the copyright law provides some exceptions to the exclusive right of the owner to copyrighted work and some uses (practices) without the consent of the owner may be permissible.

Copyright is not an inevitable, divine, or natural right that confers the absolute ownership of their creations. Copyright law is designed to encourage activity and progress in the art for intellectual enrichment of the public. It has a utilitarian goal as well. Authors should get reward for their creative efforts. Authors should get fair return for their labor. But they shouldn't impede the harvest of knowledge. Copyright has to increase the harvest of knowledge.⁹⁷

Copyright law is a result of a response to the recognition that creative intellectual activity is vital to the well being of society. The society confers monopoly exploitation benefits for a limited duration on authors in order to obtain for itself the intellectual and practical enrichment that result from creative endeavors.⁹⁸

Copyright law recognizes monopoly protection of intellectual creators to stimulate creativity and authorship. But if the protection is excessively broad, it would stifle the

⁹⁵ Dan Thu Thi Phan, note 1, p. 175.

⁹⁶ L. Ray Patterson, *Understanding Fair Use: Law and Contemporary Problem*, Duke University School Of Law, Vol. 55, No. 2, (spring 1992), p. 250.

⁹⁷ Pierre N. Leval, *Towards a Fair Use Standard*, Harvard Law Review, Vol.103, No.5, (March, 1990), p. 1107

⁹⁸ Id, p. 1108.

objective of copyright. All intellectual creative works are in part derivative. Every one advances by standing on prior works or thinking. And, prior works or thinking has to be referred to advance or create better work or to think better. Reexamination of prior works is necessary. So, monopoly protection of intellectual property would affect negatively these objectives. Fair practice is the one and most important concern in copyright to enforce these objectives.⁹⁹

One of the more important and known exception to the exclusive right of copyright to the owner is called fair practice.¹⁰⁰ Fair practice is not only uses as exception to exclusive right of the owner of copyright, but also use as limitation to the exception. That means it can be used as a defense for the accusation of copyright infringement by the alleged infringer. But, the accused person cannot use fair practice only for his own benefit without limit. Fair practice by itself puts also a limitation on the alleged infringer in using the fair practice exception to the exclusive right of the owner of copyright.¹⁰¹

Fair practice is a limitation on copyright monopoly to further on the utilitarian objective of copyright law. In the enjoyment of copyright, one should not create obstacle on the advancement of science. For instance, fair practice for the purpose of criticism, comment, news reporting, teaching, scholarship, or research may be made. In applying a fair practice to each particular case, it has to serve the copyright objective of stimulating productivity and learning without excessively damaging the incentive for creativity. The governing purpose of copyright law has to be considered in using fair practice.¹⁰²

As there are fair practices, there are also unfair practices. A fair practice (use) of a copyright work is not an infringement. And at the same time unfair practice (use) of a copyright work is an infringement.¹⁰³

⁹⁹ Id, p. 1109.

¹⁰⁰ Copyright Exceptions and Limitations, <http://www.copyright.gov>, accessed on September 9, 2009

¹⁰¹ Corpus Juris Secundum, (1939), Vol. 18, P. 219.

¹⁰² Pierre N. Leval, note 11, p. 1110.

¹⁰³ Corpus Juris Secundum, note 15.

Fair practice has the same meaning to “fair dealing” of U.K and “fair use” of U.S.A. The phrase “fair practice” is taken from the Ethiopian proclamation to protect copyright and neighboring rights, No 410/2004. “Fair dealing” and “fair use” are synonymous phrases and they are the known copyright exceptions and limitations to the exceptions of exclusive right of copyright owner.

Fair practice is part of a defense available to the accusation of copyright infringement. It is a limitation of the exclusive rights of a copyright owner.

The purpose of copyright is not to ensure the owner a maximum economic return. Rather, to balance the author’s right to obtain a fair return and society’s interest in access to and use of information.¹⁰⁴ The exclusive nature of copyright favors the owner of a copyright to initiate infringement suit. But, the standard fair practice puts a limitation that may be against the interest of the owner of copyright.

By the fair practice defense, it can be established that certain uses of copyrighted material are by their nature more conducive to meet the objective of copyright than others. In such a case a greater reduction of demand of the original work has to be shown to justify a finding of infringement. If there is a constitutional policy favoring dissemination of information, a broader application of fair practice may be justified.¹⁰⁵

Limits on the exclusive right of a copyrighted work are set by taking into account the public interest. In order to balance, copyright laws provide varieties of limitations on the author’s exclusive right, particularly on the reproduction right of the owner.¹⁰⁶ It balances the social benefits of a transformative secondary use against injury to the incentives of authorship.¹⁰⁷

¹⁰⁴ Carlos M Correa, *Fair Use in the Digital Era*, International Review of Intellectual Property And Competition Law (IIC), Vol. 33, No. 5/2002, P. 573.

¹⁰⁵ *Copyright Fair Use: Case Law and Legislation*, Duke Law Journal, vol.1969, (Feb.1969), p. 97.

¹⁰⁶ Carlos M Correa, note 18.

¹⁰⁷ Pierre N. Leval, note 11, p. 1127.

Fair practice, since it limits on the exclusive rights of copyright owners, strike a balance between the interests of users of copyrighted works and that of the author. In such a case fair practice allows for individuals (non-owners) certain latitude of use so that they can make reasonable use of copyrighted works without the consent of the owner.¹⁰⁸The copyright owner should not make an unfair use of copyright itself by expanding his or her claim beyond statutory limits.¹⁰⁹

The court evaluates and balances the social benefit that the public derives from the unauthorized use in light of the interest in protecting the copyright owner's exclusive control of the work .And fair practice exists to encourage creativity and promote productive use of existing copyrighted material.¹¹⁰In balancing the equities, public interest should prevail over the possible damage to the copyright owner .The copyright holder's interest in a maximum financial return is subordinate to the greater public interest in the development of art, science and industry.¹¹¹

The copyright owner may sue to protect what he owns .His right extend only to the limits of copyright .A fair practice is not an infringement ,the owner has no power over it.¹¹²

The standard of fair practice allow the copying or other use of the copyrighted work which would otherwise be an infringement, of course, the amount taken from the original work has to be taken in to account.¹¹³ If there is no copying, there is no infringement and so that there is no question of "fair" and "unfair" practice. It is when there is some copying that the question arises and it is necessary to determine whether the copying is fair or not.¹¹⁴

¹⁰⁸ Yoseph Mulugeta, the Doctrine of Fair Use and Its Application under the Ethiopian Copyright Law, 1997, P. 34.

¹⁰⁹ L. Ray Patterson, note 10, p. 255.

¹¹⁰ Dan Thu Thi Phan, note 1, p. 181.

¹¹¹ Id, p. 183.

¹¹² Pierre N. Leval, note 11, p. 1126.

¹¹³ David Bainbridge, Intellectual Property (1999), P. 170.

¹¹⁴ Corpus Juris Secundum, note 15.

It can be said that the concept of fair practice permits copying of copyrighted materials and be used without getting the consent or authority of the author. It is a line between the rights of author and the legitimate interests of users.¹¹⁵ It is difficult to ascertain the boundaries of it.¹¹⁶

Fair practice, as the name indicates, uses equitable rule of reason which lack rigid and ready made definition and standards.¹¹⁷ An attempt to define fair practice is unhelpful. But it can simply be said that ,even though not the only ,fair practice is a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without the consent of the owner .Here the debate also arises whether fair practice is a privilege in which the defense to be assessed after a finding of infringement or it is an element the absence of which must be established to prove infringement .The definition does not help judges to determine the fair practice question in particular case. But establishing the standards is necessary.¹¹⁸

But some scholars argue that fair practice is an affirmative defense that comes into play only after the plaintiff has proven a prima facie case of infringement .To prove prima facie infringement ,the author must have a valid copyright ,be in compliance with statutory requirements if any exists ,show copying ,which can be established by showing that the infringer had access to the work ,and show that the two works were substantially similar. For example, in the context of a book, a user could obtain a copy of that book and quote certain passages from that book without seeking prior authorization by the copyright holder .If the copyright holder objects, then the holder can sue for copyright infringement and the user can use the affirmative defense of fair practice.¹¹⁹

It can be justified and determined by broad notions of policy, not by strict statutory rules. Weighing of competing policies relating to the specific case before court is necessary to

¹¹⁵ Yoseph Mulugeta, note 22.

¹¹⁶ Arthur R. Miller and Michael H. Davis, *Intellectual Property: Patents, Trademarks and Copyright in Nutshell* (2000), P. 354.

¹¹⁷ Yoseph Mulugeta, note 22, p. 35.

¹¹⁸ Copyright fair use, note 19, p.86, and see also Blacks' Law Dictionary, 6th Ed.

¹¹⁹ Dan Thu Thi Phan, note 1, p. 181.

reach at conclusion.¹²⁰ Since it lacks ready made standards, it is going to be decided on the case-by-case on the basis of its own facts.¹²¹ Fair practice is a question of fact. Every case has its own facts .This created a difficulty in having fixed rules .But this doesn't inhibit courts from setting specific standards for future decisions.¹²²

But, there have to be general standards that help to determine which uses are fair and which are not. For instance, in determining “fair” or “unfair” copying of a copyrighted work, considerations, such as the quantity and quality or value of the matter copied, the proportions of matters taken, and the competitive character of the two works have to be taken in to account.¹²³

In addition, concerning the scope of application of fair practice, it applies to all copyrighted work in so far as the exploitation is reasonable. There are no qualifications as to the type of copyrighted works in respect of which reasonable use is to be made.¹²⁴

Copyright exceptions in general and fair practice in particular are provided in order to resolve important conflict of interests such as the concern of education.¹²⁵ Therefore, usually, fair practice for the purposes of research or private study, for reporting current events, and for criticism or review would be provided in the copyright law.¹²⁶ There are different types of original works .The copyright protection may vary in accordance with the categories.¹²⁷

The broad policies justifying copyright monopoly favor for a finding of infringement. The opposite may be concluded because of the concept of fair practice. But, here, one

¹²⁰ Arthur R. Miller, note 30.

¹²¹ Corpus Juris Secundum, note 15.

¹²² Copyright fair use, note 19, p. 85

¹²³ Corpus Juris Secundum, note 15.

¹²⁴ Yoseph Mulugeta, note 22, p. 36.

¹²⁵ W.R. Cornish, Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights (1981), P. 363.

¹²⁶ Ibid, P. 364

¹²⁷ L. Ray Patterson, note 10, p. 255.

cannot generally conclude that educational activities or parody or some other activities are per se a fair practice, since certain inquiry is applied in to particular fact of a case.¹²⁸

3.2 Rationales of fair practice

The early explanation of fair practice, by English and American decisions, was that “either custom of the literary community or the implied consent of the author sanctioned some non consensual use of a copyrighted work”.¹²⁹

The first rationale for fair practice is to meet the constitutional purpose behind copyright law. If the copyright protection purpose is not affected by the use and rather if public welfare is advanced that will be a fair practice. For example, the America constitutional purpose to protect copyright is to “promote the progress of science and useful arts”. This can be met by securing to authors the exclusive right to their writings. So, if the use doesn’t reduce the economic benefit of the author, fair practice would be justified.¹³⁰

The second reason for having a fair practice exception is to develop and create a better work that contributes much to the society. This rationale basis on the saying, “the world goes ahead because each of us builds upon the work of our predecessor: A dwarf standing on the shoulders of a giant can see farther than the giant himself.”¹³¹

To develop a better work and to make a progress a reality, persons have to base on the creative of others. To advance knowledge, encourage further research and to promote art and culture, some use of a copyrighted work may be made. Otherwise progress of science and useful arts would be hindered and so that the copyright law may fail to promote such important areas of the society.¹³²

Thirdly, it is to assure social utility or satisfy the interest of the public at large. The purpose of copyright law is not only to reward creative individuals to engage in creative

¹²⁸ Arthur R. Miller, note 30, p. 355.

¹²⁹ Copyright Fair Use, note 19, p. 88.

¹³⁰ Id, p.89

¹³¹ Yoseph Mulugeta, note 22, p. 38.

¹³² Corpus Juris Secundum, note 15.

intellectual efforts, but also to make the works of creative individuals available and be accessible to many peoples as quick and cheap as possible. So that the fair practice concept makes persons to use a copyrighted work without authorization of the author which result in wider dissemination of those works without seriously eroding the incentives for creators.¹³³

At last, the copyright law through the concept of fair practice, attempts to promote general happiness. Fair practice recognizes incentives for creating original works as well as the dissemination of it to the people so that it satisfies the interest of the general public and the individual creator.¹³⁴

3.3. Special areas justifying fair practice exception

The fair practice concept does not work for all purposes. There have to be special purposes justifying fair practice exception .The known special areas which justify fair practice exception to the exclusive right of the owner of copyright are the following.

a. Fair practice for the purpose of research or private study

Fair practice exception for the purpose of research or private study may be used as a defense of accusation of copyright infringement .The purpose of copying of the work of another has to be to do private research. It does not have to be for the purpose of producing a competing work. If it is for commercial or industrial research, it has to be looked carefully. Here, the mere purpose of copying the work of another for research or private study does not totally justify defense of fair practice .Even if it is difficult to draw the limit of fair practice for the purpose of research or private study but certain considerations are important. The financial motive behind copying has to be checked

¹³³ Yoseph Mulugeta, note 22, p. 38.

¹³⁴ Ibid

.Other justifications have to be also seen. Copying simply to save expense does not justify fair practice.¹³⁵

This justification mainly works in the field of education.¹³⁶For instance, you cannot reasonably expect a research student will purchase a whole of a work who practically wants an article of a journal or a single chapter of a book .It may be fair if one article of journal or a single chapter of a book is copied for the purpose of research or private study, for example by a student of postgraduate. But more than this may not be fair .Here copying does not only signify by photocopying; a copyright may be also infringed by hand written copy. But it is less likely that a substantial part will be taken by hand written copy since it requires high effort and time.¹³⁷

b. Fair practice for the purpose of criticism or review

The practice of Copying may be fair if it is for the purpose of criticism or review provided that a sufficient acknowledgement is given. That means copying to criticize or review once own or another's work is fair if the source is sufficiently acknowledged .Here, the motive behind copying of a plaintiff's work is an important factor in determining fair practice. If the use is for rival purpose i.e. to compete with the plaintiff's work, the mere claim of criticism or review purpose would not justify fair practice defense.¹³⁸

c. Fair practice for the purpose of reporting current events

Copying the work of another for the purpose of reporting current events to the public is fair practice. For instance, a certain current writings may be taken from a newspaper or

¹³⁵ David Bainbridge, note 27, p. 173.

¹³⁶ W.R. Cornish, note 39, p. 364.

¹³⁷ David Bainbridge, note 27, p. 174.

¹³⁸ Id, p. 175.

other work by any other broadcasting organization to inform the people .In such a case, sufficient acknowledgement is necessary.¹³⁹

d. Education

Copying the work of another for the purpose of education is a known exception to exclusive right of the copyright owner.¹⁴⁰The standard fair practice also works here. This will be dealt in detail in the next chapter.

e. Libraries and archives

Copying by libraries and archives is a permitted act .But they are not left without limit .The purpose of libraries and archives should be to support researchers and persons who under goes study .Copying to replace the lost ,destroyed or damaged is possible. And making copy to preserve the original is also permitted .These all may not work if it is reasonable and practicable to purchase a copy of the work .Taking in to account such limits, libraries and archives should have a photocopy policy to make persons follow and not to infringe right of copyright holder.¹⁴¹Libraries and archives are allowed to make a single copy of a work as long as they are not done for their commercial advantage.¹⁴²

There are also other special circumstances, common to certain jurisdictions, in which the defense of fair practice would be raised. One would be the incidental inclusion of copyright material. A copyrighted material may accidentally be included by another work. By the use of cameras or video cameras, or live broadcast, a copyrighted work may incidentally be included .And such incidental inclusion may not amount to infringement, rather it will support fair practice defense. Other wise arranging films and others will be

¹³⁹ Id, p. 176.

¹⁴⁰ Arthur R. Miller, note 30, p. 372.

¹⁴¹ David Bainbridge, note 27, p. 179.

¹⁴² Arthur R. Miller, note 30, p. 372.

difficult. But, here, the inclusion would not be deliberate. Fair practice defense does not extend to deliberate inclusion of copyrighted work.¹⁴³

In addition, using the work of another in the course of public administration like in court and parliamentary proceedings does not result in copyright infringement. And using a computer program for backup purpose is permissible. Other additional exceptions may be provided and may be different from country to country.¹⁴⁴

3.4. Fair practice in common law and civil law legal traditions

3.4.1. Copyright in common law and civil law in general

Historically, in continental Europe (civil law legal tradition) for example in French legal system, copyright is viewed as a “natural right” that means it is considered as the rights for the author to enjoy the fruit of his labor. It is so called the *droit d’auteur*¹⁴⁵ view of copyright.

However, in the Anglo-Saxon legal tradition (i.e. U.K and U.S.A.), Copyright is viewed from the perspective of socio-economic rationale. This is well expressed in the U.S constitution and so that article 1, section 8, clause 8 of it states that the U.S congress may “promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”. One can understand from this clause that the primary objective is the socio-economic purpose. The end is the social and economic benefits.¹⁴⁶

Thus, there are two traditions in relation to intellectual property right protection for literary, musical and artistic works. These are “copyright” tradition and “author’s” right

¹⁴³ David Bainbridge, note 27, p. 176.

¹⁴⁴ Id, p. 180.

¹⁴⁵ It is a French word meaning author’s right.

¹⁴⁶ Kamiel J. Koelman, *Copyright Law and Economics in the EU Copyright Directive: Is the Droit D’Auteur Passé?* International Review of Intellectual Property and Competition Law (IIC), Vol. 35, No 6/2004, P. 603.

tradition.¹⁴⁷In the common law system, in the countries of United States, United Kingdom, and other countries associated with the system, the “copyright” tradition prevails. In this tradition a utilitarian approach which tries to balance between the incentives to investment and consumers interests in access is given an emphasis.¹⁴⁸

However, in European, Latin American, and other countries that adhere to civil law system gives emphasis to author’s right. And they claim that authors deserve protection for their works as an inherent natural right.¹⁴⁹

In the civil-law legal tradition reward to the owner of copyright is a primary consideration of the copyright law. However, the reward to the author by the copyright law is a secondary concern in Anglo-Saxon Legal tradition.¹⁵⁰

At present, such difference on the rationales of copyright law between Anglo-Saxon and continental legal tradition is not as such observed. The economic argument behind copyright is getting preference also in continental Europe. That is the utilitarian approach of U.S which is on the comparison of costs and benefits to advance public welfare become more influential in continental Europe at present.¹⁵¹ Here, the doctrine of “fair use” introduced to answer for the difficult question to balance between private and public good in copyright¹⁵²and America uses the broadest interpretation of the doctrine.

In addition, both legal traditions in general agree that a human being can be an author. Exceptions, in which physical person (like company) or employer may be an author are also provided whether it is expressly or impliedly.¹⁵³

¹⁴⁷ Paul Goldstein, *Copyright, Patent, Trademark, and Related State Doctrines: Cases and Materials on the Law of Intellectual Property* (1993), p. 943.

¹⁴⁸ Ibid

¹⁴⁹ Ibid

¹⁵⁰ Paul Goldstein, note 61.

¹⁵¹ Ibid

¹⁵² An Economic history of copyright in Europe and the Untied States, <http://eh.net/encyclopedia/article/khan.copyright.visted> , accessed on June 18, 2009

¹⁵³ J.A.L., Sterling, *Philosophical and Legal Challenges in the Context of Copyright and*

The difference between the copyright and author's right traditions, mentioned in the above, result also in difference in treating questions relating to the protection of new media such as motion pictures, sound recordings, and broadcasting which typically involve corporate creators and minimal creative contributions.¹⁵⁴

The question of these new media mainly challenged the civil law system that propagates author's right tradition which presupposes an individual author and a high level of creativity. As a result civil law countries created an alternate system of protection to meet the new media question i.e. "neighboring rights".¹⁵⁵

The most important categories of neighboring rights include: "the right of performers to prevent fixation and direct broadcasting or communication to the public of their performances without their consent; the right of producers of phonograms to authorize or to prohibit reproduction of their phonograms and the import and distribution of unauthorized duplicates thereof; the right of broadcasting organizations to authorize or prohibit rebroadcast, fixation and reproduction of their broadcasts".¹⁵⁶

However, countries that follow "copyright" tradition and which accept the principle of corporate authorship and traditionally provided a low standard of protection, easily absorbed these new media in to their fabric of protection.¹⁵⁷ But the civil law tradition influenced the international treaty on trade - related aspect of intellectual property rights (TRIPS) and it included in its provision distinctively the concept neighboring rights.¹⁵⁸

The new Ethiopian copyright proclamation No.410/2004 seems to follow the approach of international copyright conventions: Berne and TRIPS. It is difficult to conclude totally that it follows civil tradition or common law.

Digital Technology, International_Review of Intellectual Property and Competition Law (IIC), Vol. 31, No 5/2000, P. 511.

¹⁵⁴ Paul Goldstein, note 61, p. 949.

¹⁵⁵ Id, p. 950.

¹⁵⁶ Ibid

¹⁵⁷ Ibid

¹⁵⁸ TRIPS Agreement, Art.14.

At last, these background rationales behind copyright in each legal tradition have an impact on application and interpretation of the standard fair practice.

3.4.2. Fair practice in common law tradition

England was sighted as the origin of the standard fair practice (exactly termed as fair dealing). The base line of fair practice was first propounded by English jurist. The influential England jurists wrote about the need to balance public and private interests in the copyright arena. Then the American courts followed the direction established by English judges.¹⁵⁹ Of course, the standard fair practice was emerged as a judicial concept when the judges of America and English use in interpreting modern copyright statutes.¹⁶⁰ So, it can be said that the origin of the standard fair practice were in common law countries, specifically UK and America.

Fair abridgment was known before “fair use” right shortly after the creation of the copyright by the statute of Anne of 1709. Courts recognized that certain instances of unauthorized reproduction of a copyrighted material would not infringe the author’s right. This is first described as fair abridgement, and then fair use. Then the fair use doctrine incorporated in the U.S. Copyright Act of 1976 and it provides that the fair use of a copyrighted work is not an infringement.¹⁶¹

In the early 19thc the rights in copyrighted works are very narrow. The abridgement of book to produce new book is not infringement. That means one can use another’s copyrighted work to prepare a derivative work without permission. But later on judges perceived that it was unfair to take a free ride on the original author’s work. And then the fair use doctrine came in to play.¹⁶²

In the late 19thc fair use became a recognized principle that every author, compiler, or publisher may make certain use of a copyrighted work. This is believed to increase the

¹⁵⁹ Leon R. Yankwich, *What Is Fair Use?*, The University of Chicago Law Review, Vol.22, No.1 autumn, 1954, p. 212.

¹⁶⁰ Yoseph Mulugeta, notes 22, p. 36, and see also supra note 74, p. 214.

¹⁶¹ Pierre N. Leval, note 11, p. 1107.

¹⁶² L. Ray Patterson, note 10, p. 255.

growth of knowledge, otherwise if every works were sealed to all subsequent authors, learning be hindered. Not individual consumers needed the fair use defense; rather potential infringers (authors, compilers, publishers) need it well.¹⁶³

In England, the notion of permitting some use of a copyrighted work which is considered to be fair is known as “fair dealing”. The same concept is known in America as “fair use”. The “Fair dealing” in case of UK has nothing to do with “dealing” in a trade sense. It can be equated with the meaning of “use”.¹⁶⁴

Under the Anglo-American copyright law, exceptions are formulated on the ground and application of general principles and on case-by-case basis. In such a case fair dealing or fair use help to justify acts like copying for purposes of research, teaching, journalism, criticism, parody and library activities.¹⁶⁵

The copyright exceptions, in the Anglo-American copyright law, are guided by “fair dealing” or “fair use” doctrine. Specifically, in U.S.A. the doctrine of fair use is provided as general legislative guidelines, but largely leaved to as tasks of courts to elaborate it in particular instances.¹⁶⁶

U.S.A. applies the broadest interpretation of fair use doctrine.¹⁶⁷ Fair practice jurisprudence has developed into a broad and highly fact specific exception to copyright’s exclusive right i.e. an exception that is far more expansive than the limitations on copyright that exist in other countries.¹⁶⁸ This is because the country gives emphasis primarily to the advancement of public welfare than to encourage the author.¹⁶⁹ Section 107 of the 1976 copyright act of U.S.A provides the fair use exception and it states that:

¹⁶³ Ibid

¹⁶⁴ David Bainbridge, note 27, p. 170.

¹⁶⁵ Carlos M Correa, note 18, p. 574.

¹⁶⁶ Id, P.574

¹⁶⁷ J.A.L. Sterling, note 67.

¹⁶⁸ Tyler G. Newby, note 8, p. 1636.

¹⁶⁹ J.A.L. Sterling, note 67.

“... the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright.”

The act also provides some general standards by which fair use may be ascertained.¹⁷⁰ Before the incorporation of fair use and its standards in the copyright Act of 1976, it was developed through case law. What is incorporated in the Act is the result of what is developed in the case law. The Act incorporated ,even if not the only ,the articulation of Justice Story in 1841 in *Folsom v Marsh* case in approaching question of fair use ,i.e. “...we must often ...look to the nature and objects of the selection made, the quantity and value of the materials used ,and the degree in which the use may prejudice the sale ,or diminish the profits ,or supersede the objects ,of the original work.”¹⁷¹

Even the Act of 1976 did not provide the detail standards and their importance .These will create confusion to judges .The confusion is not only to judges ,but also to writers ,historians ,publishers and their legal advisers .They only guess and pray as to how courts will resolve copyright disputes. So, doctrine of fair use should not be mysterious or dependent on the intuitive judgments. Fair use should not be perceived as a disordered exception or departure from the principle governing copyright law. It has to be perceived as a rational, integral part of copyright and necessary to achieve its objective.¹⁷²

And, in England, the fair dealing exception for the purpose of research or private study, for reporting current event, or for criticism or review are permitted.¹⁷³

So, it can definitely be said that the standard fair practice was originated and also developed well in common law countries.

¹⁷⁰ Arthur R. Miller, note 30, p. 356.

¹⁷¹ Pierre N. Leval, note 11, p. 1107.

¹⁷² Ibid

¹⁷³ W.R. Cornish, note 39, p. 364.

3.4.3. Fair practice in civil law tradition

In continental Europe, the phrases “fair dealing” or “fair use” are not known. Civil law countries do not have a broad, judicially created doctrine that is analogous to the United States fair use exception.¹⁷⁴ But, the exceptions and limits to the exceptions are simply provided in their statute. The exceptions and limits to the exceptions in some circumstances constitute part of “fair use” or “fair dealing” or “fair practice” stated in the above. In continental Europe, not only exceptions are provided but also limits to the exception (can be said exceptions for exceptions). The exceptions for exceptions include:

- Copies should be made of mere parts of the work. Whole copying of works may be allowed when the originals are not available on the market;
- Copies may be produced by reprographic process only because the existing copies are of lesser quality;
- Only single copies are allowed for private purposes and cannot be used other than private purposes and cannot be given to third parties;
- The private use has to be intended by the copier himself. That means the intention to copy has to be in a non-commercial way;
- The libraries and archives (who benefit from the exemptions) must be accessible to the public and act in a non-commercial way; and
- The legitimate interests of the right holder must be taken in to account.¹⁷⁵

These exceptions in the Anglo-American copyright law are guided by fair dealing or fair use doctrine.¹⁷⁶ The policies and purposes behind copyright law of a given country also have an impact on the interpretation and application of copyright exceptions. The public policy behind the U.S.A. copyright Act makes the country to interpret the fair use exception broadly.

¹⁷⁴ Tyler G. Newby, note 8, p. 1643.

¹⁷⁵ Carlos M Correa, n 18, p. 574.

¹⁷⁶ Ibid.

But in civil law countries like France, more than common law countries, gives high value to the right of authors.¹⁷⁷ So this policy behind copyright law has an impact on the extent of copyright exceptions, their interpretations, and applications.

Generally, not only in Anglo-American, but the notion of permitting some use of a copyright work which is considered to be fair is also common in many jurisdictions, of course there are some basic differences.¹⁷⁸ But more countries have a significant degree of variations in their fair practice provisions. Some countries provide extremely limited and rigid exceptions, while others allow for a much broader exception. Some countries do have laws permitting some of the uses that are often characterized as fair use in America .Section 107 of the U.S. copyright Act of 1976 is unique from other countries of the world.¹⁷⁹

Even with in the same legal tradition there is a significant degree of variation in their copyright exception provisions. India has a broader fair dealing exception i.e. may be as a result of colonial ancestor–United Kingdom. But her copyright code does not include standards for courts to consider when determining whether the use was “fair dealing”. Consider German also, it lacks an all inclusive fair practice exception. However, numerous exceptions to copyright owners’ rights that are similar to exceptions recognized as fair practice.¹⁸⁰

Japanese copyright act also lacks a broad fair practice doctrine. And limitations on copyright owners’ are restricted to the specific exceptions listed. But some of the exceptions are similar to those recognized under section 107 of America .For instance, Article 32 allows quotation from published works, “provided that their making is

¹⁷⁷ J. A. L. Sterling, note 67.

¹⁷⁸ David Bainbridge, note 27, p. 170.

¹⁷⁹ Tyler G. Newby, note 8, p. 1643.

¹⁸⁰ Ibid

compatible with fair practice and their extent does not exceed that justified by purpose such as news reporting, criticism or research”.¹⁸¹

The Ethiopian copyright law also lacks an all inclusive and a broad fair practice doctrine. The limitations to the exclusive right of owner are restricted to specific exceptions(from Article 9-19 of the proclamation No.410/2004).The fair practice exception is only provided to the case of quotation and teaching.(Articles 10 and 11 of the proclamation).And it does not include standards for courts to consider in determining fair practice. This will be discussed later in detail.

These variations among countries of the world have an impact on the harmonization through international copyright treaties.¹⁸²

Almost every copyright law contains exceptions for copying for personal use (i.e. scientific, educational or other private use), archival copying, library use, education, and freedom of news reporting and reporting of current events. Most national laws provide exception for private or personal use even if preventing unauthorized reproduction of a protected work is the main objective of copyright protection. However, these exceptions are not generally allowed for reproduction and affect seriously the author’s primary market. Therefore, these exceptions have to be limited by different ways.¹⁸³ That means, it requires the exceptions for exceptions.

3.5. New technologies and challenges relating to fair practice

3.5.1. Fair practice and new technology (digital Era)

New challenges to copyright are now posed by the digitalization of information and the development of computer networks such as the internet. The ways they are resolved by copyright have important implications for the access to and the use of information world wide. The technological developments result in improvements in data storage, manipulation and transmission of data. Digitalization makes all kinds of data and

¹⁸¹ Id, p. 1644

¹⁸² Id, p. 1645.

¹⁸³ Carlos M. Correa, note 18, p. 573.

copyrighted work to be recorded and compressed in the same format. This will allow the reproduction of copies without any problem and developments in software permits easy manipulation of data images and sounds.¹⁸⁴

This digital technology has changed the way creators work and how authors and publishers deliver copyright works. These developments of new technologies have the capacity to create unauthorized, perfect free copies. In addition, the growth of internet makes any work to be distributed world wide with insignificant cost.¹⁸⁵

So, data transmission is not limited to one-to-one bases, but one-to-all. Thus, an internet becomes a “broadcasting” system. Therefore, these developments affected the market position of several industries and services.¹⁸⁶

These developments notified the copyright law to react and protect the producers and suppliers of works while preserving the interests of the public, particularly in relation to research and education. Some argue that a minor change only is required in order to adapt copyright to the new technologies. Other argues strong protection has to be given to copyright owner and major changes are necessary in the introduction of *suigeneris* right to supplement copyright protection for data bases. Accordingly, they view that the “right to prevent copying” has to be replaced by a “right to prevent access”.¹⁸⁷

The application of general guidelines in case of fair practice concept has provided a flexible framework to adopt solutions as new technologies have emerged. The development and diffusion of digital technology has created a controversy on the status and scope of the fair practice exception. It has been already said that the creation of digital technology has substantially modified the way creators work and how authors and publishers deliver copyrighted works. In such a way it increased the power of copyright owners to control copying, the sale of copies and public transmission of works and also

¹⁸⁴ Id, P. 570.

¹⁸⁵ Peter, Schonning, *Licensing Authors on the Internet*, International Review of Intellectual Property and Completion Law (IIC, Vol. 31, No. 7-8/2000, P. 967.

¹⁸⁶ Carlos M. Correa, note 18, p. 570.

¹⁸⁷ Id, P. 571.

extended such power to reading, re-using copies and viewing protected materials. On the contrary, digital technology also permits the creation of unauthorized, perfect and free copies and world wide distribution of protected works through computer networks.¹⁸⁸

These developments in digital technology have forced to review the availability and scope of fair practice and to internationalize the copyright system. If the transaction costs are too high and this prevented the copyright owners and users from entering in to a copyright license like in the cases of library photocopying, the fair practice concept can be justified here.¹⁸⁹

In addition, since digital technology permits a world wide distribution of protected works through computer network, it needs to internationalize the copyright system. Internationalizing the copyright system is necessary because of the existence of diverging legal solutions at the national level. Acts of reproduction that may be subject to the right holder's consent in one country may well be covered by a fair practice standard in other countries.¹⁹⁰

As a result, the status of fair practice in digital context has led to in some countries to the establishment of new national legislation and the negotiation and adoption of two international treaties. It is the need to adapt and strengthen copyright law in the digital environment was that the driving force behind the negotiation and adoption of two world intellectual property organization (WIPO) treaties in 1996.¹⁹¹

And the preamble of WIPO copyright treaty of 1996 states that:

“[t]he needs to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne convention”.

¹⁸⁸ Id, P. 57.

¹⁸⁹ Id, P. 577.

¹⁹⁰ Id, P. 579.

¹⁹¹ Ibid

In addition, in 1991 the European Union took an important step in reducing the scope of limitations to exclusive reproduction right in the area of soft ware.¹⁹²

3.5.2. New challenges to the fair practice

The fair practice concept has survived even if new technologies have eroded its status and scope. However, new challenges have emerged to the application of fair practice. These are:

a) Anti-circumvention measures

It is a technical means of protection. The owner of the copyright work, through the available technologies, is in a position to control access by third parties to works in digital form.¹⁹³ Even it is possible to control and regulate the use once third parties accessed. This kind of protection is more effective but it may deprive the fair practice standard. The use of such protective technologies makes the owners of copyrighted works to have absolute control over their works and unencumbered by the limitations provided in copyright law.¹⁹⁴

b) The extended use of contract law to control access to and the use of digital copyright works

This challenge is constructed on the basis of the first mentioned above. The protective technologies used the owner as electronic fences and make him to be in a position to prohibit use or to seek payments for any use of technologically protected works. So, that the owners of copyright can, practically, supersede any rules allowing fair practice.¹⁹⁵

These all makes the owner of copyright to interact directly with users and to determine the conditions for access to and use of copyright work. In such a case the copyright owner and suppliers contracts with uses on terms and conditions dictated by the formers

¹⁹² Id, P. 578.

¹⁹³ Peter, Schonning, note 99, p. 972.

¹⁹⁴ Carlos M Correa, note 18, p. 580.

¹⁹⁵ Id, P. 582.

which is a threat to fair practice and copyright at large. And it is real that the fees charged for electronic information licenses given to libraries or schools are generally higher than prices for the equivalent book or periodicals.¹⁹⁶

c) The development of a sui generis form of protection for data base

Data base are protected as compilations under copyright. A simple compilation of data is under public domain. Only those databases that meet the copyright originality test are protect able. The development of a sui generis regime for databases restricted the fair practice concept.¹⁹⁷

The European council provided a new directive and developed a sui generis form of protection for any database if it is shown that, qualitatively and/or quantitatively, a substantial investment has been made either in obtaining, verification or presentation of the contents. So that the directive provides the “right to prevent” the extraction or reutilization of the whole or substantial part evaluated quantitatively or qualitatively, of the database. This means an insubstantial part is not protected. The sui generis right is conferred in addition to other existing rights.¹⁹⁸

Here, the effect is that the adoption of new regulations on databases may limit the scope of fair practice, specifically for scientists, libraries and educational institutions. However, in U.S.A. extracting information for non-profit educational, scientific or research purposes constitute a fair practice only if those acts do not materially harm the primary market of the database maker.¹⁹⁹

¹⁹⁶ Ibid.

¹⁹⁷ Id, P. 583.

¹⁹⁸ Id, P. 584.

¹⁹⁹ Ibid

Chapter Four: Fair Practice under International Copyright Conventions

4.1. International copyright conventions in general

At the beginning copyright law was known to govern printing of books. Gradually the scope of copyright was extended to include works such as lithographs, sculptures, dramatic works and musical works. The term of copyright was also extended.²⁰⁰

In 19thc copyright was recognized as important internationally. As a result the Berne Copyright Convention was formulated by the year 1886. The purpose of this convention is to promote greater uniformity and harmonization of copyright law. In addition, giving full protection to copyright owner in all member states is also the object of it.²⁰¹

The Berne convention reconciled the different nature of UK copyright with the French tradition of droit d'auteur. The Berne convention was revised in 1908 and was called the Berlin Act. The Berlin Act influenced the UK copyright law and major changes were seen in the copyright Act of 1911. The 1952 Universal Copyright Convention (UCC) also played similar role. And the droit moral of the Rome Act of 1928 of the Berne convention²⁰² influenced the 1988 current act of copyright, designs and patents of UK and moral rights of author is included in it. The influence of such international copyright conventions on UK copyright law and the subsequent revisions pulled UK copyright law closer to most other European countries.²⁰³

International copyright conventions resulted in major changes of copyright law than internal national considerations.²⁰⁴ So, international copyright conventions played to a

²⁰⁰ David Bainbridge, *Intellectual Property* (1999), P. 34.

²⁰¹ Ibid

²⁰² Article 6bis of the Berne Convention included moral rights, but Article 9 of the TRIPS Agreement excluded it from its provision.

²⁰³ David Bainbridge, note 1.

²⁰⁴ Ibid.

certain degree for the harmonization of copyright law and will play in the future for greater harmonization.

France influenced for the subsequent evolution and developments of international copyright laws. The U.S.A. rather, led the movement for the harmonization of patent laws. U.S.A became reluctant for the harmonization of copyright law and for long time failed to recognize the right of foreign authors. The U.S congress repeatedly rejected the proposal to reform copyright law. U.S refused to sign the 1886 agreement of the Berne Convention. But, contextually accepted the weaker universal copyright convention in which its many members are developing countries that did not wish to comply with the provisions of Berne convention because they consider the Berne Convention favors developed countries. By the year 1956, UCC became complementary agreement to the Berne convention.²⁰⁵

The United States was among the last entrants in to the Berne Convention which was in 1988. However the harmonization of copyright law was driven and promoted by France and other civil law countries which urged stronger protection for authors.²⁰⁶

United States, uniquely to other developed countries, concerned on broader access to intellectual productions to enhance mass literacy and public education. But European countries concerned on stronger protection to copyright owners.²⁰⁷

The earlier copyright policy of United States was primarily emphasis on public welfare and follows the utilitarian approach. As a result the “fair use” exception with broader interpretation has been followed by the country.²⁰⁸

However, to harmonize international copyright laws, international copyright conventions hold the middle position of the two approaches (of the U.S.A. and civil law regime). At present the tendency is towards stronger copyright enforcement .International

²⁰⁵ An economic history of copyright in Europe and the United States <http://eh.net/encyclopedia/article/khan.copyright.accessed> on June 18, 2009

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

harmonization through the Berne convention made the fundamental principles and democratic provisions of America copyright to be changed and it introduced the protection of all creations on their fixation in tangible form.²⁰⁹

The 19thc and 20thc viewed that author's rights are having territorial application.²¹⁰ But with the development of technologies like satellite broadcasting, cable distribution and internet made the territorial limitation to be no longer the rule. They require international exhaustion. The private international law even did not protect effectively the author's right because of a lot of complications relating to jurisdiction, applicable law and enforcement of judgments.

So, for the effective regulation of the use of protected material on the internet, an international instrument must be concluded in order to make the world one country. In such a case the owners get speedy and effective relief for infringement. The TRIPS Agreement by incorporating the Berne convention (1971), the Rome convention (1961) and the WIPO Treaties of 1996 relating to digital technology obliges members to ensure specified enforcement procedures for effective action against any act of infringement of intellectual property rights.²¹¹

Berne copyright convention is administered by the world intellectual property organization (WIPO) and universal copyright convention by UNESCO: the United Nations Educational Scientific and cultural organization.²¹² By now these copyright conventions are less enforced compared to the TRIPS. As a result there is a resort to WTO (World Trade Organization). This is because to use the WTO dispute settlement and enforcement mechanism, which is claimed to be effective.

²⁰⁹ Ibid.

²¹⁰ J.A.L., *Sterling, Philosophical and Legal Challenges in the Context of Copyright and Digital Technology*, International Review of Intellectual Property and Competition Law (IIC), Vol. 31, No 5/2000, P. 522.

²¹¹ Ibid.

²¹² David Bainbridge, note 1, p. 263.

Therefore, international copyright conventions played and will play a great role for the harmonization of copyright laws; of course there are differences, like in terms (duration) of protection and copyright exceptions, from country to country.

4.2. Fair practice under international copyright conventions

Specifically, the purpose of this topic is to deal fair practice from the perspective of international copyright conventions. Fair practice, even if not directly and in detail, is provided under international copyright conventions considered in this paper. One possible explanation for the lack of uniformity among different countries' fair practice law is the absence of a well defined international standard for fair practice in the international copyright treaties mainly the two major multilateral treaties: the Berne Convention and the TRIPS Agreement.²¹³ The known international copyright conventions considered in this paper are Berne convention, universal copyright convention, the 1996 World Intellectual Property Organization (WIPO) Copyright Treaty and Trade Related-Intellectual Properties Agreement (TRIPS).The focus is on TRIPS.

Prior to the signing of the TRIPS Agreement the Berne Convention was the major multilateral treaty providing international protection for copyright .The Berne convention was originally created in 1886 and the most recent text of the treaty is the Paris act of 1971 .Protection under the Berne convention relies on two central principles :national treatment and international minimum standards of protection .The minimum substantive protection include the term of copyright ,the types of right that copyright owners and authors have ,and the subject matter that is protected under the national treatment provision ,member states must accord to nationals of other signatory countries the same level of protection that they give to their own nationals.(Article 5 of the convention).²¹⁴

The major weakness of the Berne convention is its anemic enforcement provision. While members have the theoretical option of bringing disputes over interpretation of the treaty

²¹³ Tyler G. Newby, *What's Fair Here Is Not Fair Every Where: Does the American Fair Use Doctrine Violate International Copyright Law*, Stanford Law Review, Vol.51, No.6 (Jul.1999), and p. 1645.

²¹⁴ Ibid.

or other members' enforcement of the convention before the International Court of Justice (ICJ), it is an option that has never been exercised.²¹⁵ And reciprocity is the main enforcement mechanism (Article 6(1) of the convention).²¹⁶

The Berne convention under Article 9, paragraph one, requires signatory states to protect the exclusive reproduction right of the author. It says the authors of literary and artistic works have the exclusive right to reproduce their works in any manner or form. However, Berne also provides for a number of exceptions to the right holder's reproduction right. Article 10 of the convention establishes certain fair practice exception to the reproduction right. For instance Article 10(1) of the convention mandates an exception for quotation from a work which has already been lawfully made available to the public.²¹⁷

Education is also taken by the Berne convention as condition for exception and the fair practice exception in education also provided by the convention. Article 10(2) of the convention permits an exception to the right of reproduction for the purpose of teaching. It reads:

“it shall be a matter for legislation in the countries of the union ,and for special agreements existing or to be concluded between them ,to permit the utilization ,to the extent justified by the purpose ,of literary or artistic works by way of illustration in publications ,broadcasts or sound or visual recordings for teaching ,provided such utilization is compatible with fair practice”.

These exception to the right holder's right to authorize reproduction of a copyrighted work and implicitly all other exceptions to this right that members might permit –are

²¹⁵ Article 33(1) of the Berne convention provides that “any dispute between two or more countries of the union concerning the interpretation or application of this convention, not settled by negotiation, may, by any one of the countries concerned, be brought before the international court of justice by application in conformity with the statute of the court, unless the countries concerned agree on some other method of settlement”.

²¹⁶ Tyler G. Newby, note 14.

²¹⁷ Article 10(1) of the Berne convention provides “it shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries”.

limited by another provision in Berne. Article 9(2) of the convention balanced the exclusive rights by stating that “it shall be a matter for legislation in the certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author”. This gives member states the right to adopt exceptions to the right of reproduction as long as the exceptions satisfy the three cumulative test limits stated in the Article.²¹⁸

The Berne convention provided minimum standards, not the details, of copyright protection. As a result, it provided also the room for the inclusion of exceptions by national laws. Exceptions can be incorporated by national legislation in special cases. But, the exceptions are not without limit. There have to be reasons to reproduce by third parties and such reproduction should not conflict with a normal exploitation of the work. So, fair practice can be one and important exception that satisfies the limits and the minimum standards given by the Berne convention.

The Universal Copyright Convention (UCC) of 1952 which was promoted by UNESCO provided less stringent conditions, compared to Berne convention, about the terms of protection, the types of work protected and the extent of protection to attract United States and developing countries into the network of international copyright relations.²¹⁹ UCC represents a low level copyright arrangement and it resembles in many ways the original 1886 Berne Convention. And it simplified the copyright relation of United States with other countries and vice versa.²²⁰

And by the subsequent revision of the UCC, developing countries are allowed to reduce the term of copyright in their national law, to authorize translation into their national language, to authorize reproduction for educational and cultural purposes, to authorize reproduction to teaching, study or research, and to limit the scope of the exclusive right to

²¹⁸ Tyler G. Newby, note 14, p.1647.

²¹⁹ W.R. Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (1981), P. 302.

²²⁰ Paul Goldstein, *Copyright, Patent, Trade Mark, and Materials on the Law of Intellectual Property* (1993), p. 943

broadcast.²²¹ So, there is a wider room to provide a fair practice exception by the national law of the member country as it is stated under UCC.

The 1996 WIPO copyright treaty also recognizes the inclusion of fair practice concept in to national laws for cases of digital technology. The driving force behind the 1996 WIPO copyright treaties is of course the need to adopt and strengthen copyright law in the digital environment.²²² Art. 10 of the WIPO copyright treaty provide the limitations and exceptions to the exclusive right and it states that:

1) contracting parties may in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

2) Contracting parties shall, when applying the Berne convention, confine any limitations of or exceptions to rights provided for there in to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

And the agreed statements of the Diplomatic conference that adopted the WIPO copyright Treaty as it is deposited by the director general of WIPO in the International Bureau of WIPO states that:

“it is understood that the provisions of Article 10 permit contracting parties to carry, forward and appropriately extend in to the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne convention. Similarly, these provisions should be understood to permit contracting parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne convention”.

²²¹ Ibid, p. 304

²²² Carlos M., Correa, *Fair Use In The Digital Era*, International Review of Intellectual property and competition law(IIC), Vol. 33, No 5/2002, p. 579.

But, Art 10 of the WIPO treaty is more restrictive than the Berne convention since the word “confine” is stated in the WIPO treaty.²²³ According to Art.10 of WIPO treaty, states should “confine” the exceptions to meet the three step tests which are also introduced under Art 9(2) of the Berne convention.

4.3. Fair practice under TRIPS Agreement

Copyright as part of intellectual property has a relation with trade. At first intellectual property rights in general were not even mentioned in the GATT-1947. Later on, in the Uruguay Round multilateral trade negotiation, the link between intellectual property and trade was established and as a result the Trade Related Aspects of Intellectual property Rights (TRIPS) came in to being even though developing countries accepted reluctantly. The TRIPS Agreement entered in to force on 1 January 1995.²²⁴

By the Uruguay Round Negotiation of the General Agreement on Tariffs and Trade, the enforcement of copyright and other intellectual property rights elevated with the inclusion of the Trade Related Aspects of Intellectual Property (TRIPS) Agreement. The enforcement mechanism of the WTO is added by the TRIPS Agreement to the minimum standards provided in the earlier Berne Convention for the protection of literary and artistic works.²²⁵

Why TRIPS is necessary having multitude of international intellectual property conventions? Two reasons can be forwarded for this. First, developed countries are unable to strength the protection of intellectual property through WIPO. Second, the existing intellectual property conventions leave the enforcement of it through judicial and administrative remedies to local decisions.²²⁶

²²³ Ibid.

²²⁴ Mitsuo Matsushita, Thomas J. Schoenbaum, and Petros C. Mavroidis, *The World Trade Organization: Law, Practice and Policy* (2006), p. 697.

²²⁵ Tyler G. Newby, note 14, p. 1635.

²²⁶ Mitsuo Matsushita, note 25, p. 704.

Thus, because of globalization, higher standard of intellectual property protection and international enforcement became increasingly important. So, TRIPS Agreement came in to being. The TRIPS Agreement establishes rights and obligations between WTO Members, not private individuals or firms.²²⁷

The TRIPS Agreement addresses many categories of intellectual property rights. These are:

- 1) Copyright and related rights
- 2) Patents
- 3) Trade marks and service marks
- 4) Geographical indications
- 5) Undisclosed information or trade secretes
-) Industrial deigns; and
- 7) Layout designs of integrated circuits.

Of course there are overlaps between these categories. For example, a computer program may be patentable and is protected by copyright.

The TRIPS Agreement provides relatively high minimum standards for each of the main categories of intellectual property rights, establishes standards of protection and enforcement, and provides for the application of the WTO dispute settlement mechanism to resolve disputes between WTO Members. In the field of copyright, the Berne Convention for the protection of literary and artistic works (as revised in 1971) also lacks effective enforcement provisions.²²⁸

Specifically, the TRIPS Agreement contains minimum substantive standards for protection of copyright and neighboring rights. The TRIPS Agreement incorporates the substantive standards of the Berne Convention. But it goes beyond to establish higher and more specific norm of protection for copyright and neighboring right.²²⁹The minimum substantive standards required from WTO Members include:

²²⁷ Ibid

²²⁸ Id, p.698

²²⁹ Id, p.705

- to give full recognition to the copyright regime of the Berne Convention²³⁰;
- to include computer program as copyrightable subject matter as the term used in the Berne Convention²³¹;
- to observe the minimum term of copyright protection which is 50 years from the end of the calendar year of making or publication²³²;
- to provide a limited exception to copyright protection for certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interest of the right holder.²³³

TRIPS Agreement also sets out standards of enforcement of intellectual property rights. Enforcement must be effective as well as fair and equitable.²³⁴ These enforcement measures must include civil and administrative remedies, criminal remedies, and border (custom) measures.²³⁵

The TRIPS Agreement contains general non-discrimination obligations of MFN (Most favored nation) and national treatment principles for WTO members.

The dispute settlement process, as provided for in the Dispute Settlement Understanding (DSU) of the WTO Agreement, applies to the settlement of disputes arising under the TRIPS Agreement.²³⁶

A council for Trade –Related Aspects of Intellectual Property Rights is established to monitor the operation of the TRIPS Agreement .The council is composed of representatives of each of the WTO Members.²³⁷

²³⁰ TRIPS Agreement, Article 9.

²³¹ Id, Article 10

²³² Id, Article12

²³³ Id, Article13

²³⁴ Id, p. 706

²³⁵ Mitsuo Matsushita, note 25, p. 732.

²³⁶ TRIPS Agreement, Article 64(1).

²³⁷ Ibid, Article 68

The TRIPS Agreement requires, WTO Members, compliance with certain multilateral conventions administered by WIPO. WIPO (World Intellectual Property Organization), a specialized agency of the United Nations whose mandate is to promote the protection of intellectual property, administers some 23 intellectual properties including the Berne Convention.²³⁸

The incorporation of WIPO conventions in to the TRIPS Agreement subjects them to the TRIPS Agreement dispute settlement regime and allows WTO panels to interpret WIPO conventions. This authority has the potential to create conflicts between WIPO and the WTO.²³⁹

As part of its incorporation of the Berne Convention's minimum standards, the TRIPS Agreement requires that members provide for exceptions to the copyright owner's exclusive right to authorize reproductions of his work.²⁴⁰

Coming to the specific topic, the TRIPS Agreement sets a minimum standard for member countries in providing copyright exceptions. In addition to adopting Berne Article 9(2)'s limitation on the scope of these exceptions,²⁴¹ Article 13 of the TRIPS Agreement expressly limits the scope of exceptions that members may create to any exclusive right of the copyright owner.²⁴²

Countries can provide exceptions to special cases unless they conflict with the normal exploitation of the work and unreasonably prejudice the interest of the author. Article 13 of the TRIPS Agreement reads as follows:

²³⁸ Mitsuo Matsushita, note 25, p. 698.

²³⁹ Ibid, p. 724

²⁴⁰ Tyler G. Newby, note 14, p. 1635.

²⁴¹ Article 9(2), of the Berne Convention states that "it shall be a matter for legislation, in the countries of the union, to permit the reproduction of such works, in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interest of the author".

²⁴² Tyler G. Newby, note 14, p. 1635.

“Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder”.

Thus member countries should comply with these minimum standards in providing exceptions to exclusive right of copyright owner by their national law or in implementing the TRIPS Agreement. The scope of exceptions to the exclusive rights of authors and copyright owners are restricted by Article 9(2) of the Berne Convention and Article 13 of the TRIPS Agreement. But the language of Article 13 of the TRIPS is more restrictive than Berne. The phrase “shall confine” justifies this. In addition, the Berne article is only provides the exception to reproduction right of the author, but TRIPS Article 13 applies to exceptions to any exclusive right of the author.²⁴³

Furthermore, the general provision of the TRIPS Agreement provides that WTO members can adopt measures to protect public health and the public interests that are consistent with TRIPS obligations .Article 8 of the TRIPS Agreement provide the following:

1) Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

2) Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

So the above all shows that the TRIPS Agreement permits fair practice to be one exception to the exclusive right of the owner of copyright .Finding of fair practice often

²⁴³ Id, p. 1648.

imply important public policy considerations ,so that it requires a very liberal reading of TRIPS Article 13 and Berne Article 9(2).²⁴⁴

Negotiators in the Uruguay round of GATT recognized the absence of a well defined international fair practice standard, and the creation of such a standard was an issue in the drafting of the TRIPS Agreement. However, the final draft of the TRIPS Agreement merely adopted the already existing Berne articles and expanded the limitation found in Berne article 9(2).²⁴⁵

4.4. The three step test limits

The above international copyright conventions provided minimum standards for Member countries in applying copyright exceptions. Member countries in providing copyright exceptions by their national legislation or in implementing international copyright conventions they have to observe the minimum standards. The minimum standards used as tests to see the compliance of member countries. International copyright conventions, specifically Berne, TRIPS, and WIPO copyright treaty considered in this paper, provide the following three tests. They are cumulative requirements for exceptions and limitations to exclusive rights.²⁴⁶ These tests are:

- i) exception should be given to certain special cases
- ii) copying should not conflict with the normal exploitation of the work; and
- iii) Copying should not unreasonably prejudice the legitimate interest of the author.

These three tests are used to search for the appropriate balance between rights of copyright owner and the public interest in access to copyrighted works.²⁴⁷ Too many limitations to the exclusive right affect the economic interest of the copyright owner. On

²⁴⁴ Id, p. 1636.

²⁴⁵ Ibid

²⁴⁶ Peter Van Den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 2nded, 2008, p. 767

²⁴⁷ Ibid

the other hand certain exceptions, like for education, are desired to advance the public good.²⁴⁸

Unfortunately, the conventions offer no guidance as to what constitute a “special case”, a “normal exploitation of the work”, or a “legitimate interest of the author”. The determination of these standards is left to member countries or in the event of conflict between countries, to an ICJ or WTO panel. The vagueness of the tests creates a problem on the purposes of the international copyright conventions: establishing minimum international standards.²⁴⁹

However, some explanation can be given by referring to the ruling of WTO Panel. With regard to the first test, i.e. the concept of ‘certain special cases’, it prohibits broad exceptions of general application. By Article 13 of TRIPS limitations should be clear and narrow in scope.²⁵⁰

The exceptions should only be made to certain specific cases, not in broad or for all cases. The term ‘special’ is in the sense that the exceptions, considered by national laws, should be justified by clear reason of public policy or other exceptional circumstances. Education or research could be one public policy reason that justifies exception. And the term ‘special’ also indicates the scope of exceptions should be narrow. Even the term ‘certain’ would tell us that it did not indicate to all cases in which exceptions might be permissible.²⁵¹

Coming to the second test: ‘conflict with the normal exploitation of the work’, the use of a work by other persons should not conflict with the normal exploitation by the owner.

²⁴⁸ Ibid

²⁴⁹ Tyler G. Newby, note 14, p. 1647.

²⁵⁰ Peter Van Den Bossche, note 47, p. 768.

²⁵¹ Roger Knights, Limitations and Exceptions under the ‘Three Step Test’ and in National Legislation –Differences Between the Analog and Digital Environments, presented on regional workshop on copyright and related rights in the information age organized by the World Intellectual Property Organization (WIPO) in cooperation with Copyright Council of the Ministry of Education and Culture of the Eastern Republic of Uruguay, Montevideo, September 13 and 14, 2000.

Such conflict exists when use of the work result in to economic competition with the ways the copyright owner normal exploitation of the economic value from his right. If the copyrighted work copied without the consent of the owner and made available to the market and this reduced the sale opportunities of the owner, it conflicts with the normal exploitation of the work. But if the copying is for the purpose of research, it may not conflict.²⁵² 'The normal exploitation of the work' refers to the rights given by copyright law to the owner to increase his income. The exceptions should not deprive such rights.²⁵³

At last, the third test: 'unreasonably prejudice the legitimate interest of the right holder', signifies that exceptions and limitations should not cause to unreasonable loss to the income of the copyright owner. Public policy reasons, like teaching or research, may cause to reasonable loss to copyright owner. But, a heavily commercial use of the work would not be consistent with this test.²⁵⁴ The term 'unreasonable prejudice' indicates us that any exception would cause prejudice to the interest of the owner. So the term 'prejudice' has to be qualified, otherwise no exception would be permissible. The TRIPS Panel reaches to the conclusion that 'prejudice to the legitimate interest of the right holder reaches an unreasonable level if an exception causes, or has a potential to cause, an unreasonable loss of income to the right holder'.²⁵⁵ The scale of loss to the right holder is the determining factor in judging whether the exception is unreasonable or not.²⁵⁶

These discussions of the three step test are not full and conclusive. Many questions may be raised and further discussion can be made. For this, full reading of the TRIPS Panel on EU/US case is quite vital. Any national legislator and country member to the TRIPS Agreement better to look at the ruling of the panel on three step requirements.

²⁵² Peter Van Den Bossche, note 47, p. 768.

²⁵³ Roger Knights, note 52.

²⁵⁴ Peter Van Den Bossche, note 47, p. 768.

²⁵⁵ Roger Knights, note 52.

²⁵⁶ Ibid

Chapter five: Fair practice under copyright law of Ethiopia: special emphasis on education

5.1. Brief history of copyright in Ethiopia

In Ethiopia, intellectual property in general and copyright in particular is a very recent development compared to other countries, pioneers of it. It was not introduced for a long period of time. The introduction of policy, legal and institutional frame work in the country relating to intellectual property is a recent phenomenon.²⁵⁷

This is because the importance of IP protection and the resulting economic benefits was not well aware and was not accorded the proper concern in Ethiopia and by the developing countries as a whole.²⁵⁸

The art of printing was introduced to Ethiopia in the reign of Emperor Menelik II. Emperor Menelik II was the first in introducing printing machine in 1898 E.c, with the aim of expanding education and for the reproduction of books. Printing of Magazine (“AEMIROGAZETA”), proclamation and notices of the government to a limited extent started in time of Emperor Menelik II. But, before that there are books, many of which are religious, written manually (called “kum tsihuf” in Amharic).²⁵⁹ Religious books written in foreign language were translated in to the language of the country. There are also many religious drawings and paintings. The books, drawings, and paintings were considered to be as public domain and serve the purpose of the religion (Ethiopian Orthodox Church).²⁶⁰ But, copying of such religious and philosophical books and

²⁵⁷ Getachew Mengistie (Director General of Ethiopian Intellectual Property Office), Intellectual Property Assessment in Ethiopia (2006), P. 10.

²⁵⁸ Ibid.

²⁵⁹ Blaten Geta Mahiteme SelassieW/Meskel, “Zekreneger” 1970 E.c, p. 683.

²⁶⁰ Mandefro Eshete and Mola Mengistu, Exceptions and Limitations under the Ethiopian Copyright Regime: An Assessment of the Impact on Expansion of Education, 2009.

distributing of them to the public were so difficult since there were no printing machines and the numbers of literate persons were too low.²⁶¹

In time of Emperor Haileselassie modified printing machines and additional printing enterprises were introduced. Even after the introduction of art of printing, copyright and protection of the author was not given recognition for long time. In 1927(E.C.) Emperor Haileselassie provided a rule for printing of magazines and books. The aim of this law is not for the protection of copyright to authors. Rather it is provided to censor printers and the writings of authors (part 8 of the 1927 law for printing of magazines and books).Even though this law does not have a provision to protect authors, it can be said that it is the first legislation in the art of printing.²⁶²At this time, let alone fair practice exception, the main body of the copyright law was not known.

The first organized rule on copyright was given in 1960. The 1960 Civil Code of Ethiopia, consisting of 28 provisions on the title literary and artistic ownership was provided.²⁶³ The civil code in addition provided certain provisions concerning publishing contracts dealing with the transfer or assignment of copyright.²⁶⁴Certain copyright notions are provided in the civil code. There are also some exceptions to the exclusive right of the author. But there is no mention of fair practice in any of the provisions. On the other hand, some of the provisions can be added to constitute substantively part of fair practice.²⁶⁵ The 1957 penal code also used to protect copyright. In case of copyright infringement, the penal code had a provision of penal remedies.

However, the laws were not sufficient to cover all issues relating to copyright and to effectively protect the right of authors and owners of copyright. When time passes and

²⁶¹ Blaten Geta Mahiteme Selassie W/Meskel, note 3.

²⁶² Id, p. 685.

²⁶³ From Article 1647-1674 of the 1960 Civil Code of Ethiopia

²⁶⁴ From Article 2672-2697 of the 1960 Civil Code of Ethiopia

²⁶⁵ The Civil Code allows reproduction for private use, analysis, and press review (Art.1660).

Short quotations are also permissible (Art.1661).and parody, pastiches or caricature are out of the exclusive right of the author (Art.1654 (3)).Other public interest considerations are also provided in the civil code.

technology develops, changing the existing laws is necessary to accommodate new situations and creative.

At present, the country has no consolidated national intellectual property policy.²⁶⁶ But, the 1997 cultural policy clearly states the need for protection of copyright in order to promote the creation of literary and artistic works.

Primarily, the Federal Democratic Republic of Ethiopia (FDRE) constitution recognizes the protection of intellectual property. According to the FDRE constitution, matters relating to intellectual property (patent and copyright) are given to the Federal Government.²⁶⁷ As a result, the House of Peoples' Representatives is empowered to enact law on copyright.²⁶⁸ The Council of Ministers is made to be responsible for the protection of copyright.²⁶⁹

In addition, the FDRE constitution under its cultural objectives provision (i.e. Art 91(3)) obliges the Federal Government to support the development of copyright. It states that "Government shall have the duty to the extent its resources permit to support the development of the arts, science and technology". The words "arts", "science", and "technology" constitute part of intellectual property. Specifically the words "arts" and "science" refers to works covered under copyright.

The administration of intellectual property at first had been in fragmented manner. The administration of matters related to patents, utility models and industrial design was by Ethiopian Science and Technology Commission. Copyright had been handled by the Ministry of youth, sport and culture and the ministry of trade and industry administered trademarks.²⁷⁰

²⁶⁶ Getachew Mengistie, note, p. 1 17.

²⁶⁷ The Constitution of the Federal Democratic Republic of Ethiopia, Article 51 (19)

²⁶⁸ Id, Art. 55 (29)

²⁶⁹ Id, Art. 77 (5)

²⁷⁰ Getachew Mengistie, note 1, p. 29.

On April 8, 2003, the administration of intellectual property becomes in one umbrella and as a result the Ethiopian Intellectual Property Office (EIPO) established as an autonomous government body by the proclamation No. 320/2003.²⁷¹

Then a better proclamation to protect copyright and related rights (herein after referred to as Proclamation No.410/2004 throughout the paper) was enacted in 2004.²⁷² This new proclamation introduced new concepts and rights, widened the scope of copyright and related rights, and provided a better mechanism of enforcement and protection of copyright. This copyright proclamation better than the civil code included comprehensively all matters related to copyrights and is consistent with the requirements of international conventions.²⁷³

The proclamation, without the requirement of prior registration, provides protection of literary works, musical works, artistic works, maps and technical drawings, photographic works, cinematographic works, and computer programs. The proclamation introduced the moment of “fixation”²⁷⁴ than “publication” to protect the copyright.²⁷⁵

The new Ethiopian Criminal Code Proclamation No.414/2004 also applies in addition to Proclamation No.410/2004 to protect infringement of rights relating to literary, artistic or creative works.²⁷⁶

²⁷¹ Id, P. 30

²⁷² Copyright and neighboring rights protection proclamation, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, proclamation No. 410/2004.

²⁷³ Getachew Mengistie, note 1, p. 23.

²⁷⁴ In copyright law, a work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both that are being transmitted is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission. (Black’s Law Dictionary, 6thed).

²⁷⁵ Proclamation No.410/2004, Article 6(1b).And Mandefro Eshete and Mola Mengistu, supra note 28, argue that this fixation requirement is not important for the country since it negatively affects the interest of people who create copyrightable works but does not have access to new technology. But it creates opportunity to others who have the access to technologies to benefit easily from which they did not create.

²⁷⁶ Art.721(1) of the Criminal code of Ethiopia provides that “whoever ,apart from cases punishable more severely by another provision of this code, intentionally violates laws ,regulations or rules

Of course, Ethiopia is not a member to almost all multilateral international conventions on intellectual property. The only exception is that in 1982 accepted the 1981 Nairobi Treaty on the protection of the Olympic symbol. And in 1998 the country only acceded the convention establishing the world intellectual property organization (WIPO).²⁷⁷ That means the country is simply a member to WIPO. By now the government of Ethiopia is interested to make the country be member to international convention on intellectual property. This can be derived from the country's application to join the WTO (World Trade Organization). Ethiopia applied to join the WTO and its application was accepted in February 2003.²⁷⁸ Being a member to WTO will make the country automatically a member to the TRIPS agreement since the TRIPS agreement become part of WTO. So, to be WTO consistent, the country's IP laws must recognize and meet the requirements provided under the TRIPS which are a multilateral treaty on IP including copyright.

5.2. General rules and exceptions under the new proclamation

As it is stated in previous chapters, the governing legislation for the protection of artistic and literary works in Ethiopia is proclamation No. 410/2004, which is a proclamation to protect copyright and neighboring rights.

Art. 3 (7) of the Proclamation No. 410/2004 of Ethiopia states that copyright is an intangible, incorporeal right so that the copyright protection does not extend to the ownership of the material object which constitute the work. Copyright in a work gives right that are distinct from ownership of the physical form of the original work: the manuscript, letter, painting or whatever.

issued in relation to rights on literary ,artistic or creative works ,is punishable with rigorous imprisonment not exceeding ten years". On the other hand sub Article (2) of this Article provides that "where, the act is committed negligently, the punishment shall be simple imprisonment not exceeding five years".

²⁷⁷ Getachew Mengistie, note 1, p. 28.

²⁷⁸ Ibid, P. 29

The Proclamation on Article 2 (8), defines copyrights as: “an economic right subsisting in a work and where appropriate includes moral right of an author.”

That means a copyright is an economic and moral rights granted to the author that subsists in a work. The same proclamation, on Article 2(30), defines the meaning of “work”. According to this provision a “work” means a production in the literacy, scientific and artistic fields. These productions are also listed in the proclamation.

However, the proclamation on Article 5(1) provides that the protection does not extend to:

“Any idea, procedures, system, method of operation, concept, formula, numerical tables and forms of general use, principle, discovery or mere data, even if expressed, described, explained, illustrated or embodied in a work”.

The proclamation requires the work to have some tangible form. This means the copyright law requires the work to be fixed in order to be protected.²⁷⁹ According to Article 2(11) of the proclamation “fixation” means the embodiment of works, images, sounds, or representations there of in order to be perceived, reproduced, or communicated through a device prepared for the purpose.

In addition the proclamation provides the requirement of originality to entitle a protection to a work.²⁸⁰

The proclamation also protects secondary works and they are called “derivative works”.²⁸¹

Neither notice nor registration is a requirement to get copyright protection in Ethiopia.

²⁷⁹ Proclamation No. 410/2004, Article 6 (1b).

²⁸⁰ Proclamation No.410/2004, Article 6 (1a)

²⁸¹ Proclamation No.410/2004., Article 4.By this article translations ,adaptations ,arrangements, Other transformations or modifications of works and collection of works such as encyclopedia or anthologies or data bases are protected.

The proclamation also gives definition of author and it says the author means the person who has intellectually created a work.²⁸² But, it doesn't directly define a "joint authorship". But, the same definition can be derived from the definition of "a work of joint ownership" provided under Article 2(29) of the proclamation.

The moral right of author is protected under Article 8 of the proclamation. The forms of moral right that are protected by this proclamation include:

- the right to claim authorship of his work
- the right to remain anonymous or to use pseudonym
- the right to object any distortion, mutilation or other alteration of his work; and
- the right to decide up on making the work public

The proclamation also provides that the original owner of the economic rights is the author who created the work, or the co-authors where the work is created by several author, or the person who directed the work in case of "collective work".²⁸³ Exceptions to this rule in case of employment and to the works of audiovisual are provided under the proclamation.²⁸⁴

The owner of the copyrighted work has the right to either assign or license it. The assignment and licensing of economic right of the owner of copyright is provided under part-four, beginning from Article 23 of copyright proclamation of Ethiopia.

The proclamation also gives the right to the author to remain anonymous or to use pseudonym. In such a case the publisher of the work is presumed to represent the author to exercise and enforce the moral and economic rights of him.²⁸⁵

²⁸² Proclamation No.410/2004, Article 2 (2)

²⁸³ Proclamation No.410/2004, Article 21 (1), (2), and (3)

²⁸⁴ Ibid, Art. 21(4) and (5)

²⁸⁵ Proclamation No.410/2004, Article 22(3)

The proclamation does not define clearly the term infringement. It simply provides the enforcement provisions for the infringement of copyright and neighboring rights protected by the proclamation.²⁸⁶ However, one can get the definition of infringement impliedly from Article 7 of the proclamation. Art 7 of the proclamation provides acts exclusively given to the author or owner of a work. So, since the acts are exclusively given to the owner of work, other persons are excluded from doing those acts in relation to the work of the owner. If they did those acts, it means, impliedly, infringing the rights of the owner of a work and so that the enforcement provisions will apply.

The proclamation provides for the exclusive right for the copyright owner as well as limits or exceptions to it. Article 7 of the proclamation states that the copyright owner has the exclusive right to carry out or authorize another third parties acts like:

- Reproduction and translation of the work;
- Adaptation, arrangement or other transformation of the work;
- Distribution of the work to the public;
- Importation of the work; and
- Public display, performance, broad casting, and other communication of the work to public

These are only given to the owner and third parties are restricted from doing such acts as it is stated under the copyright and neighboring rights proclamation.

However, the proclamation also provides exceptions to the above exclusive right of the copyright owner beginning from Art. 9. The exceptions include:

i) Reproduction for personal purposes

Art. 9(1) of the proclamation puts a limit on the owner of a copyright and provides that the owner of a work can not forbid private reproduction of a published work in a single copy by a physical person exclusively for his own personal purposes.

²⁸⁶ Proclamation No.410/2004, from Article 33-36.

Here, Art. 9(2) of the proclamation provide a limit for the above exception (i.e. exception for exception). According to this sub-article, the private reproduction exception should not apply in cases of a work of architecture in the form of a building or other construction, musical work in the form of notation, work of fine art of the original or a copy made and signed by the author, and reproduction of a computer program except as provided in Article 14 of the proclamation.

Further more, this sub-article also prohibit the private reproduction of the whole or a substantial part of a data base in digital form. But, insubstantial taking of a database in digital form for personal purpose is permitted.

In addition, Art. 9(2c) of the proclamation provides that the private reproduction for personal purposes should not conflict with or unreasonably harm the normal exploitation of the copyrighted work or the legitimate interest of the author.

ii) Quotation

Art. 10(1) of the proclamation provides that the copyright owner cannot forbid the reproduction of a quotation of a published work. But, sub-Article (2) provides a limit and it say that “the quotation shall be compatible with fair practice and does not exceed the extent justified by the purpose”. But, here, what practices constitute fair is not known.

iii) Reproduction for the purpose of teaching

Article 11(1) of the proclamation prescribes that the owner of copyright cannot forbid a reproduction of a published work or sound recording for the purpose of teaching. The user, in such a case, should not exceed a fair practice and the extent justified by the purpose and should indicate the source and the name of the author of the work. This will be discussed here under in detail.

iv) Reproduction by libraries, archives and similar institution

Art. 12(1) of the proclamation provides that the owner of copyright cannot forbid a reproduction of a work by a library, archive, memorial hall, museum or similar institutions. This article also provides a limits and general guiding principles in applying the exception. The limits and guidelines include:

- The activity of the institutions should not be, directly or indirectly for profit;
- The reproduction by library or archive has to be solely for the purpose of study, scholarship or private research;
- The reproduction has to be once and if repeated it has to be on separate and unrelated occasion;
- The act or reproduction has to be done only if there is no administrative organization which can afford a collective license of reproduction;
- The copy has to be made to preserve, to replace or copy or a copy which has been lost, destroyed or rendered unusable; and
- If it is impossible to obtain a copy under reasonable conditions.

The above guidelines would tell us that one cannot simply reproduce a copyrighted work with out limit. These guidelines are exhaustive. But they have to be illustrative by including the phrase fair practice. The institutions should be allowed to reproduce a work if it is done with fair practice.

V) Reproduction, broadcasting and other communication to the public for information purposes

Art. 13 of the proclamation provides an exception to the exclusive right of copyright owner and states that it is permitted to reproduce the work of another in a newspaper or periodical or broadcasting or other communication to the public. The works could be of an article published in a newspaper or periodical on current economic, political, social, religious or on similar topics.

And this exception also include the reproduction, broadcasting or other communications to the public of short excerpts of a work seen or heard for the purpose of reporting current events. In addition, it is possible to reproduce in a newspaper or periodical or

broadcasting or other communication to the public of a political speech, lecture, address, sermons or other similar work delivered in public or a speech delivered during legal proceedings for the purpose of providing current information.

Vi) Reproduction and Adaptation of Computer Program

According to Article 14(1) of the proclamation, the owner of copyright cannot forbid a single copy of reproduction or adaptation of computer program subject to limits provided in sub-article (2).

Furthermore, the proclamation also provided other exceptions to the exclusive right of the owner. Importation for personal purpose (Art. 15) and private performance (Art. 16) of a copyrighted work are allowed under the proclamation. The issues of exhaustion also settled by the proclamation and Article 19 states that a copy of a published work may be redistributed by means of sale if once it is sold to the public.

Exhaustion means once the published work is put in the market, the owner of this copyrighted work has no a power to control it concerning the sold work.²⁸⁷It is considered that the owner exhausted his right. Here according to the proclamation No.410/2004, now Ethiopia follows the principle of national (territorial) exhaustion. Importation of the original or copies of the work is exclusively given to owner of copyright .So parallel importation is not allowed. Parallel import means importing a work copyrighted from abroad available at low price.²⁸⁸This would be possible if the country's copyright system follows the principle of international exhaustion. It is better to adopt the later one for our country.²⁸⁹

And the case of compulsory license is also provided under Article 17 of the proclamation.

²⁸⁷ Biset Beyene, *The Impact of the Doctrine of Exhaustion of Intellectual Property Rights on International Trade: The Ethiopia Perspective* (2008), p. 25.

²⁸⁸ Ibid, and see also Mandefro Eshte and Mola Mengistu, *Exception and Limitations under the Ethiopian Copyright Regime: An Assessment of the Impact on Expansion of Education*.

²⁸⁹ Exceptionally, Article 15 of the proclamation allows importation for personal purpose.

Concerning the protection of performers, producers of sound recording and broadcasting organizations, Article 32 of the proclamation provide an exception on their exclusive right. So that using the work of another is allowed for the purpose of providing current information, for scientific research, solely for the purpose of face-to-face teaching activities and case under which the exceptions are stated under part II (the above exceptions, from Art. 9-19) of the proclamation. But, the using of short excerpts for reporting current events has to be done to the extent justified by the purpose of providing current information (Art. 32(a) of the proclamation).

The proclamation No.410/2004 does not also settle issues relating to new technologies and challenges such as internet. Only computer program and data bases are included.

The Ethiopian proclamation to protect copyright and neighboring rights, No. 410/2004 provide exceptions and limits to the exceptions of copyright as it is stated in the above. With in such exceptions and limits to the exceptions, it also introduces the standard “fair practice” which is similar to “fair dealing” and “fair use” in British and U.S.A. legal systems, respectively. The following topics focus on this later important concept particular to education in copyright.

5.3. Fair practice exception

Coming to the main topic, fair practice, the Proclamation introduced the standard. But, the phrase fair practice is mentioned in the proclamation only twice without defining and providing substantive standard to apply it. The proclamation provided the fair practice exception only for the cases of two exceptions: the cases of quotation and reproduction for teaching.

The problems here are two fold. First, the fair practice standard is not provided for other exceptions provided by the proclamation. Second, the meaning and the standards to interpret and apply the fair practice are not provided in the proclamation.

The standards which help to interpret and apply the fair practice are provided extensively in the U.S copyright Act, section 107. Even the standards are not exhaustive. The standards and the non-exhaustive nature of them help the judges to entertain each case in relation to various public policy reasons.

Providing standards to fair practice concept under the Ethiopian copyright proclamation helps the judges to consider various social, economical, and political policies of the country in entertaining each case. For instance, the country has several social policies in areas like education and health. Since the country is under developed, there are problems relating to education and health. The country has policies to expand education and betterment of health care. So, providing standards to fair practice have an impact on these policies. Allowing reproduction of books, for example, for the purpose of expanding education, research and experiment has a positive impact in fulfilling social objectives of the country. At the same time, the job of judges becomes easy in interpreting and applying the fair practice standard to individual cases.

The country, by the Proclamation No.410/2004, seems to follow a mixture of Anglo-Saxon and continental Europe trend relating to copyright exceptions and their limits. Like continental Europe the proclamation lists those copyright exceptions and their limits. At the same time, even if it is for two exceptions only, like Anglo-Saxon, introduces the standard fair practice.

A modern copyright law has to incorporate important concepts either from civil law or common law tradition .The international conventions even attempted to reconcile the differences and provide a mild position.²⁹⁰ And as a back fire, these international conventions influenced national laws who follow either of the two traditions.

²⁹⁰ An economic history of copyright in Europe and the Untied States,
<http://eh.net/encyclopedia/article/khan.compyright>, accessed on June 18, 2009

Ethiopia is also influenced by this process of copyright at international level. Attempts were made to comply with the Berne Convention by the proclamation No.410/2004. The Berne Convention requires members to meet the minimum standards set by it.²⁹¹

Concerning the specific topic, in providing the exceptions, the trend of both civil law and common law is incorporated in the proclamation. Listing the exceptions and limits to the exception is a civil law trend. And the standard fair practice, its origin and development, is common law. These two trends are incorporated in the proclamation. The exceptions and limits to the exception are listed and at the same time the fair practice concept is also introduced.

The proclamation does not provide the fair practice standard for important exceptions like cases of criticism, review, libraries, archives and similar institutions. But, fair practice exception is a known exception in other countries in cases of, library, research and experiment. Because fair practice covers a broad range of subject matter, this paper focuses on one area, i.e. education.

5.4. Fair practice in education

5.4.1. About education in general

Education has a broad meaning .It does not only indicate the instruction given or received .Black’s Law Dictionary puts in its broadest sense and it defines that it “comprehends not merely the instruction received at school or college ,but the whole course of training ;moral ,religious ,vocational ,intellectual and physical”²⁹². But for the purpose of this paper, the writer wants to focus on the instruction given and received at college, university, and other higher educational establishments.

²⁹¹ Fair practice introduced under Article 10(quotations) and Article 11(reproduction for teaching) is almost copied from Berne Convention.

²⁹² Black’s Law Dictionary, 6th Ed.

Education is a basic human right and recognized as such since the 1948 adoption of the Universal Declaration of Human Rights (UDHR).²⁹³ Since then, numerous human rights treaties have reaffirmed this right.²⁹⁴ The right of access to education and the right to quality education are mainly promoted by UNESCO.²⁹⁵

Education is basic to support one's self and family and it is linked with health and well-being. And quality education addresses socio-economic needs.²⁹⁶

Since education is basic human rights, it forms important policy of many countries of the world. The Federal Democratic Republic of Ethiopia (FDRE) constitution recognized this basic right and forms part of human and democratic rights provisions. Art.41 of this constitution under its economic, social, and cultural rights provision included this basic right, education.²⁹⁷ The social objectives provision of the constitution strengthens and forms the basic policy objective of the country, Ethiopia.²⁹⁸

In Ethiopia, education, even if it is a basic human rights and forms part of important policy of the country, is not expanded and still now there are many illiterate individuals. The government is trying to ensure education for all and quality education to meet the millennium development goals by the year 2015. So, it can definitely be said that education is the basic policy of the country. And it is important to imagine what a role a copyright system can play in education. Copyright law has an impact on the development and expansion of education.

²⁹³ The Right to Education, http://www.globalactionforchildren.org/issues/basic-education/?gclid=cjphlvc_z0cfv, visited on September 21, 2009

²⁹⁴ Ibid

²⁹⁵ Ibid

²⁹⁶ Ibid

²⁹⁷ Art.41(4) of the FDRE constitution states that "the state has the obligation to allocate ever increasing resources to provide o the public health ,education and other social services"

²⁹⁸ Art.90(1) of the FDRE constitution states that "to the country's resources permit ,policies shall aim to provide all Ethiopians access to public health and education ,clean water ,housing ,food and social security".

5.4.2. What is education in copyright?

The main objective of protecting copyright is not only, simply, rewarding the copyright author or owner. Promoting and expanding education for the benefit of the public is also the main objective of protecting copyright. The copyright system allow the way others to learn from the creative works of prior author so that to develop their own new works. The copyright system allows for the public to have access to new creative works and get information which is learning –education.

Intellectual property law, particularly copyright law, is meant to accelerate the growth of knowledge and science. This can be attained, one, by encouraging creative individuals by rewarding limited monopoly over their work. Second, is by limiting the monopolistic control of the author and allowing others to have fair access to their works to develop new work important to the society. This second objective of copyright law is best reflected by educators and educational institutions.²⁹⁹

Thus by copyright system it can definitely be said that education would be promoted. Promoting education is also the objective of copyright law. Copyright has a special relation with education.

The objective of American copyright law is to “promote the progress of science and useful arts”. This is stated in their constitution.³⁰⁰ The progress of science means the progress of knowledge –learning-education. So by copyright law science will be promoted and as a result progress or development in knowledge- learning –education will be attained. This is the main objective behind protecting copyright.

The FDRE constitution also provides the same. The constitutional purpose behind intellectual property laws, including copyright law, is to support the development of arts,

²⁹⁹ Fair Use and Education Copying Guidelines for Teaching and Learning, https://www.amherst.edu/academiclife/dean_faculty/fph/policies/fairuse, visited on September 9, 2009

³⁰⁰ Article I, section 8, and clause 8 of U.S.A constitution.

science, and technology.³⁰¹This responsibility is given to the Federal Government.³⁰² And the House of Peoples' Representative (HPR) has given the copyright law³⁰³ to discharge its responsibility.³⁰⁴

The preamble of the proclamation No.410/2004 reflects what is stated in the above .The reason behind protecting literary, artistic, and similar creative works is to enhance cultural, social, and economic development of the country, Ethiopia.³⁰⁵one of the important social objective of the country is education .So, one important objective of Ethiopian copyright law is to promote educational development in the country .The primary concern of the proclamation is not rewarding the copyright owner .The primary concern is enhancing cultural ,social ,and economic development .But, these can be achieved ,one, by rewarding the copyright owner. Therefore, copyright system can be taken as a core tool in ensuring the right to education .So, education should be given due attention in copyright situation.

In many jurisdictions, the issue of education is recognized in their copyright law. The same is also true under international copyright conventions .One of the important exception to the exclusive right of the copyright owner is education .One of the major issue raised by developing countries at Stockholm and Paris revision of Berne convention and universal copyright convention (UCC), respectively, is education.³⁰⁶And as a result exception to the exclusive right of the copyright owner for the purpose of education is allowed.

³⁰¹ Art.91 (3) of the FDRE constitution states that “government shall have the duty, to the extent Its resources permit, to support the development of the arts, science, and technology”.

³⁰² Article 51 (19) of the FDRE constitution

³⁰³ Proclamation No.410/2004, A Proclamation to Protect Copyright and Neighboring Rights of the FDRE.

³⁰⁴ Id,Art.55(2g)

³⁰⁵ Paragraph one of the preamble, of Proclamation No.410/2004, states that “literary, artistic and similar creative works have a major role to enhance the cultural, social, economic, scientific and technological development of a country”.

³⁰⁶ W.R. Cornish, Intellectual property: patents, copyright, trade marks and allied rights (1981), P.302.

The Ethiopian copyright law also provided education to be an exception to the exclusive right of the copyright owner.³⁰⁷ Accordingly, reproduction by persons other than the owner for the purpose of teaching is allowed. But this exception is not free, it has a limit. This limit is fair practice.³⁰⁸ Finding of fair practice imply important public policy considerations.³⁰⁹ Education is one of the important policies of the public of every country, even more to Ethiopia as a least developed country.

5.4.3. What is fair practice in education?

The fair practice standard does not work for all purposes. There have to be special purposes justifying fair practice exception. The known special areas, in other jurisdictions, which justify fair practice exception to the exclusive right of the owner of copyright are:

- fair practice for the purpose of research or private study
- Fair practice for the purpose of criticism or review
- Fair practice for the purpose of reporting current events
- Education; and
- Libraries and archives

The concern of this paper is education. Fair practice is essential to education, research, and scholarship. Everyone at the educational institutions, especially University, should be aware of the implications of copyright law and the critical role of fair practice of copyrighted material in the teaching, research, and scholarship.³¹⁰

³⁰⁷ Art.11 of the proclamation No.410/2004

³⁰⁸ Ibid

³⁰⁹ Tyler G. Newby, *What's Fair Here Is Not Fair Every Where: Does the American Fair Use Doctrine Violates International Copyright Law*, Stanford Law Review, Vol.6, (Jul., 1999), p. 1636.

³¹⁰ A Teachers Guide to Faire Use and Copyright, <http://www.brown.edu/Administration/Copyright/faq.html>, accessed on September 21, 2009

Fair practice is not limited to any particular group of users as many other limitations are. But some groups, such as educational institutions and non-profit libraries, enjoy greater latitude under fair practice than other users of copyrighted works.³¹¹

The Ethiopian copyright proclamation No.410/2004 recognizes the fair practice exception to education. Article 11(1) of the proclamation prescribes that the owner of copyright cannot forbid a reproduction of a published work or sound recording for the purpose of teaching. The user, in such a case, should not exceed a fair practice and the extent justified by the purpose and should indicate the source and the name of the author of the work. The full reading of the provision is the following:

Article 11: reproduction for teaching

(1) Notwithstanding the provision of Article 7(1) (a) of this proclamation the owner of copyright cannot forbid, without exceeding fair practice and the extent justified by the purpose, a reproduction of a published work or sound recording for the purpose of teaching.

(2) A copy made in accordance with the preceding sub-Article shall indicate, as far as practicable, the sources of the work or sound recording reproduced and the name of the author.

This exception is limited only to reproduction right. What about other rights in copyright, such as translation and other rights? These rights, other than reproduction right, have to be included in the provision. In addition the word “teaching” should not be interpreted narrowly –face to face teaching. It has to also include other modes of teaching which forms part of education. Narrow interpretation is not the intention of the legislation which is important to our country to develop and expand education. If otherwise be the intention of the legislature, it has to define the word narrowly as it is provided under Article 32(c) of proclamation No.410/2004.

³¹¹ Supra note 43.

Some individuals may think that they can use a copyrighted work without limit if it is for the purpose of education. But the law does not say so. Even if the proclamation provides exception to the exclusive right of the owner for the purpose of education, it also puts a fair practice limit. So why the fair practice limits is provided in the proclamation. Let us take copying for the purpose of education is permitted without limit, what will be the benefit of, fore example, the writer who wrote a book totally important in educational area. Do writers be encouraged to write books useful at educational areas without benefiting from it? If it is so, issue of copyright is nothing for them. Rather we have to give meaning to the phrase fair practice.

In Ethiopia there are shortage of both teaching as well as reference materials in higher educational public institutions .The budget allocated to higher education is not sufficient, even if it is more compared to the capacity of the country. The intake of the institutions is increasing from year to year. But the allocation of budget to each student is decreasing from year to year.³¹² The major ingredients of quality education such as learning resources (journals, reference materials, text books, and internet services) and facilities like library are in shortage in higher education institutions of Ethiopia.³¹³ These problems imply the public interest in education. So this interest of the public has to be balanced with the interest of the copyright owner.

5.4.3.1. The awareness to copyright rules and exceptions

Some individuals think that copying the work of another for educational purpose is free. On the other hand, some of them do not know what the law says so and even may not know the basic principle of law, that is, ignorance of law is not an excuse.

³¹² Quality of Higher Education in Ethiopian Public Institutions (Forum for Social Studies), የከፍተኛ ትምህርት ሥርዓት ትምህርት አግባብነትና የመማሪያ ግብዓቶች ይዘታ, by Amare Asgedom, p. 84.

³¹³ Ibid ,Assessment Of Science Education Quality Indicators In Addis Ababa ,Bahir Dar And Hawassa Universities, By Ayalew Shibeshi, Dawit Mekonnen ,Tesfaye Semela ,And Yalew Endawoke, p. 210.

Table-II below shows the awareness of my respondents to copyright rules and exceptions particularly fair practice in cases of education. Majority of the respondents simply suspect the existence of copyright limitations in using copyrighted materials, but they don't know the exact provisions and what it says. They don't know about their rights and limits in using copyrighted materials in cases of education. They don't know the fair practice limit .Even they were not aware as if it is stated in the proclamation to protect copyright .Since they did not know about fair practice, only 28% of respondents responded to the question whether the phrase fair practice stated in the proclamation is clear or not. Out of which the majority reply that it is not clear. The amazing thing here is that majority of the respondents do not know whether there is a policy or not in their institution to use a copyrighted material. It can be implied from the response that if they don't know the existence, there is no policy. If there is, they have been aware of it .So it can be said that in the majority of the institutions, there is no policy in using copyrighted materials.

Table-II Table that show the awareness of respondents on copyright exception and fair practice for the case of education

No	Questions	Responses				Total	
		Teachers		Students		No	%
		No	%	No	%		
1	Is there a policy in your institution to use or photocopy a copyrighted material?						
	Yes	14	21. 9	26	21. 6	40	21. 7
	No	16	25	38	31. 6	54	29. 3
	I don't know	34	53. 1	52	43. 3	86	46. 7
2	Do you know the legal limitations in using copyrighted						

5.4.3.2. The practice of users to copyrighted works

Copying the work of another for the purpose of education is a known exception to exclusive right of the copyright owner .Of course copying for education is not without limit. Some control is needed. Fair reproduction for the purpose of education is allowed. But it is not clear that whether reprographic copying³¹⁴ is allowed or not .The writer of this paper suggest that reprographic copying may be permitted in certain situations like in cases of new educational establishments to fill shortage of reference materials to their libraries. This suggestion is given because reproduction of a single copy of a work for private purpose is allowed by Article 9(1) of the proclamation. The purpose of Article 11 is not to repeat what is stated in Article 9.Article 11 is provided for additional purpose than Article 9. Here an organ that is empowered to permit the reproduction of copyrighted materials with the payment of royalty has to be established. In addition, reprography of a small part for the purpose of instruction may be allowed, which is a common trend in other jurisdictions.³¹⁵

Fair practice of copyrighted materials for education extends certain rights to published and copyrighted works that are not extended otherwise. As we saw in the above, few educators fully understand copyright laws and fair practice exceptions. Others do not worry and simply uses the works of another.

Table-III shows how the respondents use the copyrighted material for the purpose of education. From the table we can read that majority of the respondents photocopy copyrighted materials and use them with out limit since it is for the purpose of education. They may photocopy one paragraph or a chapter or a whole book as they want .This is because, if it is for education, they can use as they want unless they are limited by money. It is not because to respect the copyright of the owner of the work. So it is difficult to say

³¹⁴ Reprography means a reproduction such as by photocopying. It has a wider meaning than simple photocopies of a work. Article 2(26) of proclamation No.410/2004 states that “reprographic reproduction means the making of facsimile copies of the original or a copy of a work by means other than printing such as photocopying ,whether or not they are reduced or enlarged in scale.”

³¹⁵ Arthur R. Miller and Michael H. Davis, Intellectual property: patents, Trademarks and copyright in nutshell (2000), p. 372.

that copyright of the owner is respected by students and teachers in higher educational institutions in Addis Ababa. It seems that copyright protection doesn't work in the territory of higher educational institutions.

Table-III Table that show the practice of respondents with regard to copyrighted materials

No	Questions	Responses				Total	
		Teachers		Students		No	%
		No	%	No	%		
1	Do you get material (books and others) for education purpose easily and in abundant?						
	Yes	16	25	26	22	42	23
	No	48	75	92	77	140	76
	I don't want to specify	-	-	2	1.6	2	1.1
2	How do you get the materials?						
	By purchasing	24	38	26	22	50	27
	By photocopying	42	65.6	80	66.6	122	66.3
	By borrowing	42	65.6	44	36.6	86	46.7
3	How do you practice or photocopy a copyrighted material?						
	With limits, some parts	12	18.8	48	40	60	32.6
	Without limit since it is for education	40	62.5	54	45	94	51.5
	I don't have experience to	12	18.8	12	10	24	13
4	How much, the amount, you photocopy?						
	One paragraph	-	-	-	-	-	-

	One chapter	-	-	-	-	-	-
	All	-	-	4	3.3	4	2.2
	As necessary	60	93.8	116	96.6	176	95.7
5	If you photocopy as necessary why?						
	To respect copyright law	2	3.1	2	1.6	4	2.2
	Since it depend the money I have	8	12.5	24	20	32	17.4
	Since it depends as required by education	54	84.4	92	76.6	146	79.3
6	Do you differentiate between copyrighted works?						
	No, all the same	38	59.4	74	61.6	112	60.9
	Yes, between creative and non-creative works	18	28.1	40	33.3	58	31.5

Reproduction (mostly by photocopying), the work of another, by a teacher or student of a small part of a work for the purpose of in class discussion might be a fair practice. The reproduction has to be only for members of the class. Even if what amount of taking is small or more is left undefined. Here even if it is difficult to provide the exact rule, it is possible to set standards which help to determine whether the taking is fair or not. These standards by no means would be definitive or determinative, but they use to balance competing interests.

Educational institutions should have policies relating to reproduction of copyright materials. Disregard for established policies that reflect copyright law could mean that copyright violation would receive no legal support.

Educators, without regard to or knowledge of copyright restrictions, sometimes duplicate materials illegally. Such copying is, in fact, stealing-taking someone's property without permission, thus depriving the author of income or control to which he/she is entitled.

Before using the work of another, one has to question himself questions like does the work is protected by copyright law, is my taking fall under fair practice or exceeds the limit of fair practice, and like questions.

Some people mistakenly believe that it's permissible to use a work (or portion of it) if an acknowledgment is provided. Acknowledgment of the source material may be a consideration in a fair practice determination, but it will not protect against a claim of infringement. Acknowledgement is not the only requirement under Article 11 of the proclamation. It is an additional to the fair practice limit.

Mere citation does not relieve the user from liability in cases of copyright infringement. In addition, a mere ownership of a book, image, software program, or other work does not automatically confer copyright ownership. The right to copy, display, or otherwise use must be specifically granted. Simply because a teacher has a book of another on his hand, does not signify he can copy or reproduce it.

5.4.3.3. Suggested solutions

Here, even if fair practice is introduced in to the proclamation, particularly to the case of education, the nature and the standards for application of it is not known.

In the above we have seen that the phrase fair practice stated in the proclamation is not clear enough. Because of lack of awareness about fair practice, majority of the respondents do not give their response to the questions categorized under solutions (Table IV). Only 42.3% of them gave their response to. Out of which the majority agree that standards have to be given by the law by considering the appropriate policy of the

country. Some of the respondents also suggest that further guidelines have to be given by higher educational institutions by taking in to account the standards provided by the law.

Majority of the respondents agree that narrowing or broadening of the copyright exceptions, particularly education exception, have an impact on the expansion and development of education .That means interpreting the fair practice concept narrowly or broadly have an impact on expansion and development of education. But, some of the respondents argue that broadening or narrowing the exceptions only have an impact on education if it is known and respected by higher educational institutions' community.

And majority of the respondents agree that the exceptions have to be broad for the purpose of education. But some of them argue that it shouldn't be broad or narrow, rather some how the law has to favor use for the purpose of education.

Table-IV Table that show the solutions proposed by the respondents to problem of the fair practice limit

No	Questions	Responses				Total	
		Teachers		Students			
		No	%	No	%	No	%
1	What would be the solution?						
	To define fair practice	1	1.6	8	6.6	9	4.9
	To provide standards	2	3.1	38	31.6	40	21.7
	To provide further guidelines by higher educational institutions	-	-	30	25	30	16.3
2	Does broadening or narrowing the exceptions have an impact on expansion and development of education?						
	Yes	42	65.6	76	63.3	118	64.1

	No	6	9.4	28	23.3	34	18.5
	I don't know	14	21.9	12	10	26	14.1
3	Should the exception be broaden or narrow for the purpose of education?						
	Should be narrow	8	12.5	18	15	26	14.1
	Should be broad	22	34.4	60	50	82	44.6
	I don't know	8	12.5	10	8.3	18	9.9

Generally it can be said that the standard fair practice, particularly in cases of education, is not well known. If it is not known, how could be respected. The Federal High Court Judge, Wuhib Mamo, told me that the standard fair practice is not known here in Ethiopia.³¹⁶ Even, to his knowledge, cases related with education did not appear before the court. Most cases that appear before the Court are related to music and audio-visual works. This happens because the standard is not known, not because it is respected by the people.

According to the Judge if cases related to education come before the Court by raising the fair practice provision, it is very difficult to interpret and apply. With out having the standards for fair practice, it is hard to decide cases come before the Court. The detail standards have to be given by the regulation. He added that since our country follow codified system (civil law approach) in which the judges are expected to refer only to the words of law, detail rule on the issue is necessary to reach at uniform decision.

The same idea is reflected by a person who is an advisor in copyright office at Ethiopian Intellectual Property Office (EIPO).He said that the copyright system as a whole in the country is a new phenomenon. By now mainly musical and audiovisual works are serious issues in the country. Literary works are not as such serious issues in the country.

³¹⁶ Interview made with Wuhib Mamo, Federal High Court Judge at Lideta. Here the writer of this paper also failed to found dead files in the High Court of copyright issues related to education.

Education mainly goes with literary works. So we do not see cases related with education .And even fair practice concept is not an issue to our courts and also to our office. Even, let alone fair practice, general copyright rules and exceptions are not promoted well. So our focus is on the latter. In the future literary works, fair practice concept, and cases relating to education will be an issue. He also added that higher education institutions should have policy in using copyrighted works for the purpose of education.³¹⁷

I have also interviewed the appropriate officers of St. Mary and Alpha University Colleges. They told me that they know that their modules are being reproduced by other individuals and institutions without getting permission from them. But they do nothing to enforce their right. Of course, by now there is an interest and some activity to enforce their right.³¹⁸

Some of the authors may not be interested to use and enforce their right. They simply write book with out benefiting from it. They consider publishing of it as a success. Only the moral right remains. Others: students, teachers and libraries may photocopy without getting permission from the author.³¹⁹

The data collected show and the writer of this paper believe that general standards for fair practice in cases of education are necessary in order to ease the understanding and application of the concept.

The next topic deal with the substance of these standards taken from other countries experience mainly USA which are important also for our country. These standards can be also derived from the preamble, objective, the particular provision (i.e. Article 11), and total spirit of the

³¹⁷ Interview made with advisor in copyright office at Ethiopian Intellectual Property Office (EIPO).

³¹⁸ Interview, with St. Mary's Distance Education Academic Wing Officer and Administrative head of Alpha University College

³¹⁹ Interview made with instructor in Science Faculty, Addis Ababa University, who wrote a book used for education. He said that I'm not eager as such to benefit from the book. Primarily I wrote the book not for gain. Since the people are poor I do not expect that. Students, teachers and libraries of higher education reproduce with out getting permission from me. But in general he suggested that a fair practice that benefits both the authors and the educators has to be done.

Proclamation No.410/2004.In addition the writer refers to foreign experience and materials for better explanation.

5.4.4. Standards of fair practice in education

The standard fair practice is dynamic in nature. It involves weighing of various and competing interests. The interests have no fixed boundaries, they are ambiguous, cannot be measured with any precision and overlap one with another. And, as a result, fair practice is said, in other jurisdictions as “the most troublesome in the whole law of copyright.”³²⁰

Issues relating to fair practice may appear before courts. However, the uncertainty as to the functions, rationale, and elements to fair practice will contribute to confusion in copyright cases.³²¹

Mostly, in many jurisdictions, the fair practice standard is ill-defined in the copyright law. Fair practice, in common law countries, is mainly applied by the use of case law. Even, it is not defined under English copyright, designs and patents Act of 1988. However, the U.S copyright Act under section 107 provides, better than others, certain standards in which copyrighted materials to be used without the consent of the copyright owner.³²² Such standards stated under U.S copyright Act and England legal system are developed by the case law.

Without having clear definition and standards, it is difficult to apply the fair practice. How much does the fair practice standard allow one to take from the original copyrighted work is the prevailing question behind the application of fair practice.

Lord Denning, in the UK system, describes the scope of fair practice for the purpose of criticism or review in *Hubbard V Vosper* case and he said: “you must first consider the

³²⁰ W.R. Cornish, note 50, p. 357.

³²¹ *Copyright Fair Use: Case Law and Legislation*, Duke Law Journal, vol.1969, (Feb.1969), p. 84.

³²² Carlos M., Correa , *Fair Use In The Digital Era*, International Review of Intellectual Property and Competition Law(IIC), Vol. 33, No. 5/2002, P. 574,and see also copyright fair use (note 33), p. 108.

number and extent of the quotations... Then you must consider the use made of them. If they are used as a basis of comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, they may be unfair. Next you must consider the proportions. To take long extracts and attach short comments may be unfair. But short extracts and long comments may be fair. Other considerations may come to mind also. But it must be a matter of impression.”³²³

We can infer from the above quote that not only the purpose of inclusion of copyright material is relevant, but also the over all proportion to the whole must be considered. Not only qualitative test has to be taken in to account, but quantitative test also be considered even if it is difficult to ascertain.³²⁴

Here, the fair practice standard may not prohibit the copying of the entire work. For example, it is fair practice for the purpose of teaching to copy a photograph of a painting. That means if the copying is for the purpose of class room teaching like the style, content or composition of the painting, copying a photograph of painting is fair practice.³²⁵

However, it may not be fair practice if it seriously prejudices the commercial value of the copyright work. This harm on the commercial values of the copyright work is not because of teaching, of course, but because of the widespread publication of the work.³²⁶

From the above assertions, we can understand that the fair practice requires a certain standard to apply it. That means there have to be certain tests/conditions/ factors in order to determine whether the taking of a copyrighted material does or does not exceed the limits of fair practice or whether or not the taking of copyrighted material imbalances between the right of the author and the right of the public in the dissemination of knowledge and the promotion of science and artistic progress.³²⁷ The governing standards

³²³ David Bainbridge, *Intellectual Property* (1999), P. 171.

³²⁴ Ibid

³²⁵ Id, P.172

³²⁶ Ibid

³²⁷ Yoseph Mulugeta, *the Doctrine of Fair Use and Its Application under the Ethiopian Copyright Law, 1997*, P. 42.

used for fair practice should not be out of the objectives of the copyright law. They exist in the objectives of copyright law.³²⁸

Fair practice involves a balancing process and considers a complex of variables to determine whether other interests should override the rights of authors.³²⁹ The variables are used as tests to determine whether the practices are fair or not.

Setting standards, in order to determine whether the use made of a work in any particular cases is a fair practice or not, is important. Each standard is used to test the cases brought before court whether to grant or reject defense of fair practice in line with the objectives of the copyright.³³⁰

Uncertainty about the scope and nature of fair practice will create confusion among the courts and users.³³¹ The absence of a clear standard for fair practice result in lack of a reliable guide to writers, publishers, and other would be fair practice users on how to govern their conduct. And clear standard backed by objectives of copyright result in greater consistency and predictability of court decisions .By the standards of fair practice; a fundamental policy of the copyright law will be reflected.³³²

The standards should balance between the right of the author to the product of his creative intellect and the right of the public in the dissemination of knowledge and the promotion and progress of science and useful arts.³³³

Rather than listing exact limits of fair practice, copyright law should provide standards for determination of the fair practice exemption.

³²⁸ Pierre N. Leval, *Towards a Fair Use Standard*, Harvard Law Review, vol.103, no.5, (March, 1990), p. 1105

³²⁹ Arthur R. Miller and Michael H. Davis, *Intellectual Property: Patents, Trademarks and Copyright in Nutshell*, P. 355.

³³⁰ Pierre N. Leval, note 72, p. 1110.

³³¹ Dan Thu Thi Phan, *Will Fair Use Function on the Internet*, Columbia Law Review, Vol.98, No.1 (Jan.1998), p. 216

³³² Pierre N. Leval, note 72, p. 1135.

³³³ Leon R. Yankwich, *What Is Fair Use?* The University Of Chicago Law Review, Vol.22, No.1 (autumn, 1954), p. 213

The standards that are used to determine whether a practice relating to copyright are fair or not are developed in UK and U.S.A. through case law. Fair practice defense can be used in a number of diverse situations. It can be utilized arguably in any circumstances.³³⁴ Fair practice can be determined differently to each cases and situation .There is no rigid rules that can be applied to all situations .But certain standards can be used to determine whether the taking of copyrighted material does or does not exceed the limits of fair practice.³³⁵ The U.S copyright Act provided the standards under section 107. The standards are not exhaustive.³³⁶ Here under the standards which help to determine a fair practice as they are developed in common law counties, but also important for our country are summarized in brief.

i) The purpose and character of the use

This standard raises the question of justification. The important question here is that does the use fulfill the objective of copyright law? Simple justification is not sufficient. The justification has to be powerful or persuasive. And the court should weigh the strength of the secondary user's justification against factors favoring the copyright owner .The justification will be outweighed if the taking are excessive and other factors favor the copyright owner.³³⁷

Here it is clear that the purpose behind copying has to be education. It has been said in the above that the Proclamation No.410/2004 encourages education. In addition Article 11 of Proclamation, No.410/2004 states that copying has to be for the purpose of teaching. But the phrase “the extent justified by the purpose” stated in Sub-Article of the same Article warn every body that no one can simply copy the work in the name of education or one cannot copy the work simply because he is a teacher or a student.

³³⁴ David Bainbridge, note 67, p. 183.

³³⁵ Leon R. Yankwich, note 77.

³³⁶ Arthur R. Miller, note 73, p. 357.

³³⁷ Pierre N. Leval, note 72, p. 1111.

The educational use must have a clearly defined purpose. Fair practice for education allows the copying of parts of a copyrighted work as long as there is a very specific educational purpose at work and the copies are used only temporarily. A very important element is that the teacher himself must want to use the copyrighted work because the school does not have access to it.³³⁸

This standard is based on dual concepts. These are concepts of commercial versus non-commercial and public versus private uses.³³⁹ This is because of the dynamic nature of fair practice which involves interrelated factors.

This test focuses on whether the practice is for commercial or for non-profit educational purposes, transformative and productive or duplicative purposes.³⁴⁰ It is fair practice to take the whole work for the purposes of research or private study. The use for educational and non-commercial are encouraged.³⁴¹ Non-commercial nature of the use and its private character are highly persuasive in favor of fair practice to use as a defense by the defendant before court.

Transformative use is important to support the justification. That means, the use must be productive and must be employed in a different manner or for a different purpose from the original. The researcher in educational establishments cannot copy substantially from others and provide as if his own work. This fair practice standard calls for careful evaluation whether the use is for transformative purpose to advance knowledge and the progress of the arts or whether it is merely free riding on another's creation.³⁴²

Even if the use is commercial, this standard may not favor copyright owner if the use is transformative use that added something new, with a further purpose or different

³³⁸ Fair use Copyright Laws for Education, http://www.ehow.com/about_4812899_fair-use-copyright-laws-education.html, accessed on September 21,2009

³³⁹ Arthur R. Miller, note 73, p. 358.

³⁴⁰ Carlos M. Correa, note 66, p. 574.

³⁴¹ David Bainbridge, note 67, p. 172.

³⁴² Pierre N. Leval, note 72, p. 1111.

character, altering the first work with new expression, meaning, or message. The transformative use falls within the goal of copyright i.e. to promote science and arts. Even if the use is commercial, it may be found to be fair practice, so long as it appears that the public will derive some otherwise inaccessible benefit from the defendant's use.³⁴³

However, there is no rule that obliges a mere non-commercial purpose or mere private use automatically is fair practice.³⁴⁴ It is not fair practice to take a large amount of another's work for the purpose of criticism or review. Even if the use is for non-commercial educational purpose, it may be unfair if the use is significant and competes with the original work.³⁴⁵

Private nature of the use favors fair practice but it is not a legitimate component of it. Article 9(1) of the proclamation No.410/2004 considers the private use of a single copy of a work. Thus it is fair to reproduce a single copy of a work for private use. But Sub-Article 2(e) of the same Article has to be taken care of. By this Sub-Article, if a reproduction of a single copy conflict with or unreasonably harm the normal exploitation of the work or the legitimate interest of the author, the practice would be unfair. And the commercial nature of the claimed use by itself is not conclusive, but considered as one factor.³⁴⁶

Usually, commercial purpose has been a basis for deciding against fair practice and at the same time educational purpose, for non-profit, has been a basis in favor of fair practice. Here, even though, educational and non-profit purposes coincide, may not result in a defense of fair practice. For example, a defense of fair practice may be rejected when a teacher copied substantial portions of a text for use by his students. In this case the nature of the work, a text whose market was only expected to be in educational area and the

³⁴³ Tyler G. Newby, *What's Fair Here Is Not Fair Every Where: Does the American Fair Use Doctrine Violate International Copyright Law*, Stanford Law Review, Vol.51, No.6 (Jul.1999),p. 1640.

³⁴⁴ Arthur R. Miller, note 73, p. 358.

³⁴⁵ David Bainbridge, note 67, p. 172.

³⁴⁶ Arthur R. Miller, note 73, p. 358.

substantiality of copying out weights the education and non-profit purpose of the defendant.³⁴⁷

For instance, consider a module prepared by educational institutions or a guide books for students, their market is expected to be educational areas. So, to allow copying of a module or a guide book to a teacher or a student without limit highly affects the market of the owner.

Furthermore, in addition to non profit educational purpose, public policy reasons may out weigh the interest of copyright owner and the defense of fair practice may be used. For example, massive copying and distributing of medical journals may be fair if it is done for non profit educational purpose and as a result advancement of medical science to meet public policy is the objective.³⁴⁸ Even the use is commercial in nature, some times, the public benefit of the creation of new works outweighs and fair practice defense may be given.³⁴⁹

Finally, it can be said that the purpose and character test notify us that the profit motive of the defendant may weighs against fair practice, but the use for educational, critical purposes or otherwise may be used as a legitimate defense in favor of fair practice.

Even though materials may be copied for educational purposes, the other standards must be met.

ii) **The amount and substantiality of the use**

This is in relation to the portion used from the copyrighted work. That means the amount used in relation to copyrighted work as a whole. In such a case the general principle is “the more the taking, the more the infringement.”³⁵⁰ But, first one must define what “more” means. It can simply be said that the greater the taking of the copyrighted

³⁴⁷ Ibid, P.359

³⁴⁸ Ibid, P. 360

³⁴⁹ Dan Thu Thi Phan, note 75, p. 185.

³⁵⁰ Arthur R. Miller, note 73, p. 363.

material, the weaker the claim of the fair practice would be successful.³⁵¹ “More” can be defined meaningfully by considering the proportional substance or quality of the taking.³⁵² In such a case, the amount taken, its significance to the copyrighted work and to the work in which it is incorporated have to be considered.

If the user takes a substantial amount of the copyrighted work, it can be said that it is not a fair practice. Here, as it is stated in the above, not only quantity but also the quality of the material taken has to be considered. That means, even if the taking is relatively small in quantity, it may amount to substantial taking, if it is a valuable or core portion of the copyrighted work.³⁵³

Both qualitative and quantitative measures are relevant to ascertain the proportionality test. The proportionality has to be measured with respect to the copyrighted work. Even though, what is taken constitute a small portion of the plaintiff’s work, may constitute a major infringement of the defendant. Unfair advantage or profit should not be taken by the defendant by stealing from the work done by the efforts of the plaintiff.³⁵⁴

It is acceptable to copy entire paragraphs from a book and selected passages from a shorter work, but copying an entire work or an entire chapter probably may not be exempted.³⁵⁵

Sometimes the straight forward quantitative measurement of proportional copying may not be accepted. The entire copying of the copyrighted work may be justified by other factors. A simple mathematical calculation may not establish or preclude the fair practice defense. Even if the taking is only a portion from the copyrighted work, such taking may constitute the core part of the work and its commercial success depends on it. As a result

³⁵¹ Carlos M. Correa, note 66, p. 574.

³⁵² Arthur R. Miller, note 73, p. 363.

³⁵³ Yoseph Mulugeta, note 71, p. 44.

³⁵⁴ Arthur R. Miller, note 73, p. 364.

³⁵⁵ Supra note 82.

such qualitative taking constitute as substantial taking (more proportion have been taken). So the defense of fair practice may be rejected by the court.³⁵⁶

Even if the person copied a one percent of the copyrighted work and the copy forms part of a key and prominent part of the work of a person who copied from the original, the court may also reject the defense of fair practice.³⁵⁷ The qualitative proportion measurement is very significant in determining a fair practice against or in favor of the defendant.

A whole work of a protected may be taken, first, if there is a powerful justification for quotation of the entirety .Education would be a powerful justification. Second, if the original work is done for private motive and not for publication, quotation will not diminish the author’s interest to create works for the public benefit .And thirdly, if there is no effect on the market of the author and most unlikely to be marketed as a work of author.³⁵⁸ However copying an entire work can never be fair practice for the same function of the work.³⁵⁹

Article 10 of the Ethiopian proclamation No.410/2004 allows the reproduction of a quotation from a published work. This has to be done with fair practice. It provides a qualitative test. But the former copyright law, civil code of 1960, provided a quantitative test.³⁶⁰ It is not appropriate to provide only a qualitative test. Taking forty lines from a poet may amount to a core part of the original work which would constitute substantial taking. So quoting from a work for the purpose of education is permissible if it is done with fair practice. This fair practice limit has to be guided by the contour substantial taking, which follows either qualitative or quantitative test as appropriate. This substantial taking is included under Article 9(2c) of the proclamation No.410/2004 in

³⁵⁶ Arthur R. Miller, note 73, p. 365.

³⁵⁷ Ibid

³⁵⁸ Pierre N. Leval, note 72, p. 1123.

³⁵⁹ Copyright Fair Use, note 65, p. 108.

³⁶⁰ Article 1661 of the 1960 civil code of Ethiopia states that “the author cannot forbid short quotation from his work provided they do not exceed ,in the work in which they are included, **forty lines** in the case of a poetical work or **ten thousand** letters in the case of any other work”.(emphasis mine).

case of reproducing a single copy for private use of data base. This has to also extend to determine the amount of quotation from other works.

Additionally, paraphrasing the original work will not make one free from a claim of infringement and may not be a guarantee to use the defense of fair practice.³⁶¹ The paraphrased portion will be added with the literally copied portions to calculate the proportionality test.³⁶²

There are no absolute rules as to how much of a copyrighted work may be copied, but there are some rules of thumb that may be considered by educational institutions in other jurisdictions like America.³⁶³

iii) Nature of the copyrighted work

This standard implies that certain types of copyrighted material are more amenable to fair practice than others. Copyright protection is available to different categories of, such as, writings. A novel and also private letters are protected by copyright. Even if the two works are protected by copyright, they may have difference in case of fair practice application. A document for private purpose not for publication (like love letters) and artistic creations do not weigh same and serve the purpose of copyright. The owners of a document for private purposes are incidental beneficiaries' .But artistic creative form the heart of copyright purpose (i.e. stimulation of creativity).So this standard favors to the original author in cases of works created for publication than in cases of documents written for private reasons which have nothing to do with the objectives of copyright law.³⁶⁴ Because of this that Article 11(1) and also Article 10(1) of the proclamation No.410/2004 prefer to use the phrase “published works”. By these Articles reproduction of quotation or for the purpose of teaching of a published works are allowed.

³⁶¹ Arthur R. Miller, note 73, p. 365.

³⁶² Ibid

³⁶³ Supra note 43.

³⁶⁴ Pierre N. Leval, note 72, p. 1116.

The scope of fair practice becomes broader in case of factual works than works of fantasy.³⁶⁵ And also the copyrighted works which require a diligence are more likely to be used with an extent broader than creative works. That means works which require a mere diligence of author like newspapers and compilations are more likely to incline in favor of fair practice than creative writings such as novels.³⁶⁶ The greater the creative element in the work, the less likely courts is to find fair practice.³⁶⁷

Because the dissemination of facts or information benefits the public, you have more leeway to copy from factual works such as biographies than you do from fictional works such as plays or novels.³⁶⁸

If the work is a commercial publication that is explicitly intended for use in education, fair practice copying is generally discouraged.³⁶⁹

In addition, works like reference works and public speeches are more open to invite a degree of fair practice, which other works like poems and songs seems to consist impliedly a warning and they are compact in nature that it has to be used with some caution.³⁷⁰

The creative and original nature of the work indicates how much the author has invested on it. Works that reveal creative and original characteristic less support the defense of fair practice. But if the work requires a simple labor or trivial creativity and originality, the room for the use of fair practice defense becomes broader. A work more of diligence than

³⁶⁵ Carlos M. Correa, note 66, p. 574.

³⁶⁶ Yoseph Mulugeta, note 71, p. 48.

³⁶⁷ Tyler G. Newby, note 87, p. 1641.

³⁶⁸ Educational Guidelines on Faire Use, <http://www.google.com.et/#hl=en&source=hp&q=copyright+and+fair+use+in+education&aq=3&oq=copyright+and+fair+use&fp=7ea6e1f422ecf2df>, accessed on September 29, 2009

³⁶⁹ Supra note 82.

³⁷⁰ Yoseph Mulugeta, note 71, p. 48.

creativity or originality gives a greater license to the defendant to use the fair practice concept.³⁷¹

If a work is simply a compilation or a book of quotations, it is easy for the defendant to support his claim of fair practice. But, using from a work of a poem or musical composition would not be easy to support the defense of fair practice.³⁷²

The value of the material used is important to determine the issue of fair practice. Some protected works are valued under copyright law than others. This does not base on the literary quality of the work. Rather to consider whether the protected work is of creative type that the copyright law gives value and seeks to foster.³⁷³

The copyright proclamation No.410/2004 of Ethiopia made a distinction on this respect. It distinctively protects original creative and derivative works. Article 4 of the proclamation protects derivative works such as translation, adaptation, arrangement and other transformation or modification of works, collection of works such as encyclopedia or anthologies or databases whether in machine readable or other form in which such collections are original by reason of the selection or arrangement of their contents. Even the duration of economic right between original creative works and derivative works are different.³⁷⁴ So the proclamation looks those original works stated under Article 2(30) and derivative works under Article 4 differently. And it provided a greater protection to the former than the later. As a result fair practice should be looked distinctively to these kinds of works. Derivative works open widely for the acceptance of fair practice defense than original creative works.

³⁷¹ Arthur R. Miller, note 73, p. 361.

³⁷² Ibid.

³⁷³ Pierre N. Leval, note 72, p. 1116.

³⁷⁴ Article 20(1) of the proclamation provides that “economic rights shall belong to the author during his lifetime and to the heirs or legates for fifty years from the date of death of the author”. On the other hand Sub Article (4) of this Article states that “where the work is a work of collective work, other than an audiovisual work, the economic rights shall be protected for fifty years from the date on which the work was either made or first made available to the public, or first published, which ever date is the latest”.

A work, whose nature is the same as that of the claimed work, may not strongly support the defense of fair practice. A work whose nature is educational will not support fair practice defense if the defendant's work is also educational. This is because the nature of the use by the defendant has an impact on the economy of the original work.³⁷⁵ This can be derived from the intention behind originality requirement to get protection. According to Article 6(1a) of the proclamation No.410/2004, originality is the first requirement to get copyright protection.

If the author consented that the work be utilized by copying, the defense of fair practice relating to such work may be accepted. But, the principle is that the theory of implied consent. That means an author would not consent to uncompensated use when he expects to exploit the work for his own benefit.³⁷⁶

iv) Status of the work

This test relies on whether the original work is published or unpublished. And it is unlikely to be fair practice if the taking is from the work which has not been published. Taking a material from unpublished work weighs against fair practice.³⁷⁷ This is a practice in UK legal system. But, the congress of U.S.A. amended section 107 of the copyright Act and declare that the work's unpublished nature need not necessarily bar fair practice defense and included it in the above third standard.³⁷⁸

The scope of fair practice is narrower with respect to unpublished works. But a fair practice of unpublished works may be accepted if it is supported with persuasive justification, education. The central concern of copyright law is for the protection of works with a view to publication, not to private, confidential communications (like love letters) in which the author do not intend to share with the public .So, the fair practice concerns mainly on the former to go with the very purpose of copyright law. In the later

³⁷⁵ Arthur R. Miller, note 73, p. 361.

³⁷⁶ Ibid.

³⁷⁷ David Bainbridge, note 67, p. 171.

³⁷⁸ Arthur R. Miller, note 73, p. 362.

case the defense of fair practice may not be favored. Publication is important in assessing this standard.³⁷⁹

Article 11 of the copy right proclamation No.410/2004 of Ethiopia require the work to be published in order to reproduce for teaching purpose with out the consent of the owner. But publication is not the requirement to get protection by the copyright proclamation. According to this Article fair practice of unpublished work for the purpose of teaching is not allowed. The writer believes that this provision is not consistent with the fixation requirement of the proclamation. It has to be amended and allow fair practice of unpublished works for the purpose of teaching. But it has to be treated differently with published works.

v) Effect of the use on the potential market or value of the copyrighted work

This test tries to consider more the interest of copyright owner. It powerfully opposes a finding of fair practice. The impact of the use of a copyrighted work on the economic interest of owner has to be analyzed. It has been said that the most important purpose of copyright law is to protect the interest, mainly the market interest, of the owner. And the fair practice concept balances such interest with the societies. This test stand more from the side of the owner of copyright and it tells us that fair practice is not a concept only allows the use of a copyrighted work without limit.³⁸⁰

The excessive interference with an author's incentive affects negatively the aims of copyright .There is an assumption that the author created the copyrighted matter with the hope of generating rewards.³⁸¹

This test is the most important standard that brings all the other standards to play simultaneously. The proportionality test whether it is qualitative or quantitative, has to

³⁷⁹ Pierre N. Leval, note 72, p. 112.

³⁸⁰ Yoseph Mulugeta, note 71, p. 48.

³⁸¹ Pierre N. Leval, note 72, p. 1125.

bee seen in line with the economic impact of the claimed fair practice. A small part of a large work may constitute the economic core and may defeat the claim of fair practice.³⁸²

And if the nature of the use is for profit, it has an impact on the potential economic market of the author so that the defense of fair practice may be rejected. The economic impact of the use up on the plaintiff has to be proved well and has to be balanced with other guidelines or factors of fair practice.³⁸³ But the healthy competition and creation of new works outweighs the minor economic loss that the original copyright owner might suffer.³⁸⁴

Here, not every types of market impairment oppose fair practice, only when the market is impaired because the quoted material serves the consumer as a substitute or supersede the use of the original.³⁸⁵

The objective of the Ethiopian copyright proclamation No.410/2004 is not only protecting the interest of the public. The interest of the copyright owner has to be balanced. Because of this that the limit fair practice is provided under Article 11(1) of the proclamation. Economic interest is the important interest of the copyright owner. This interest has to be taken in to account in allowing reproduction of his work for the purpose of education with out his consent. This intention of the legislature can be derived from Article 9(2e) of the proclamation. By this sub- article a reproduction of a single copy of a work for personal purpose is limited if it conflicts with or unreasonably harm the normal exploitation of the work or the legitimate interest of the author. This will apply to all individuals including educators. So it can definitely be said that reproduction of a single copy of a work by teachers or students be unfair if it affect the economic interest or harm the normal exploitation of the owner of copyrighted work.

Vi) De Minimis Principle

³⁸² Arthur R. Miller, note 73, p. 367.

³⁸³ Ibid

³⁸⁴ Dan Thu Thi Phan, note 75, p. 185.

³⁸⁵ Pierre N. Leval, note 72, p. 1125.

That means too small for fair practice. In some cases, the amount of material copied is so small (or "de minimis") that the court permits it without even conducting a fair practice analysis.³⁸⁶ Trivial takings do not have place in fair practice analysis.

Applying the above, one or more standards weigh against the author's exclusive right.³⁸⁷ They are general standards. They lack complete and precise list of exempted acts and as a result may make difficult the application of them in a particular case. But it provides a flexible frame work to reach at decision to new cases and to adopt solutions when new technologies are emerged. Here, even if fair practice can be used as a defense for the accusation of copyright infringement by taking in to account the above standards, it has to be noted that sufficient acknowledgement in case of fair practice is necessary.³⁸⁸

These are the general standards that help to determine whether copying for educational purpose is fair or not. Further detailed guidelines(including numerical limits),by taking in to account the general standards, can be also provided particular to uses by educators and educational institutions .To do this all interested individuals and institutions have to agree on that .And the agreed guidelines have to be adopted by educational institutions as their own copyright policy. But they would be very detail to provide in the copyright law. The focus of this paper is on the general standards. Without having the general standards, talking about the details would be non sense in the eyes of law.

Since the current copyright law of America was adopted, various organizations and scholars have established guidelines for educational uses. These guidelines are not part of the Copyright Act. However, the guidelines establish the standards for uses and copying in education.³⁸⁹

³⁸⁶ Supra note 112.

³⁸⁷ Arthur R. Miller, note 73, p. 357.

³⁸⁸ Carlos M. Correa, note 66, p. 574.

³⁸⁹ Ibid

Courts must consider these standards, at a minimum, once if it is provided in the copyright law. Even with in these standards, courts have a great deal of discretions in determining whether a practice is fair or not.³⁹⁰

By now, education is expanding in the country, Ethiopia. Many schools and higher institutions are opened and also will be opened in the future. So, providing fair practice standards and the guidelines, by taking into account the countries policies is necessary. This intention has to be indicated to judges to attain public welfare purpose of copyright law.

5.5. Comparison with international copyright conventions

Even if Ethiopia is not a party to almost all international copyright convention, by now she is on the process of accession to the WTO and her application was accepted in February 2003. If Ethiopia becomes definitely a member of WTO, she automatically becomes obliged by the TRIPS Agreement since the TRIPS Agreement form part of the GATT/WTO document.³⁹¹

So, under WTO, we have TRIPS Agreement which is not substantially different as such from the Berne convention. Even, Article 9 of the TRIPS Agreement recognizes the 1971 Berne convention to be part of the agreement.

Concerning the topic, Article 13 of TRIPS agreement provides limitations and exceptions to the exclusive right of the author and it reads as follows:

“Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder”.

³⁹⁰ Tyler G. Newby, note 87, p. 1637.

³⁹¹ Art.3 (2) of the proclamation also provides that the proclamation shall apply to works that are eligible for protection under international conventions in which Ethiopia is a party.

By this provision the TRIPS Agreement provided the three-step-tests in which state members should confine the exception by their national legislation. The member states copyright law becomes WTO consistent if they confine the exceptions to meet the three-step-tests stated under Art .13 of the TRIPS agreement.

It is also expected from Ethiopia to see her copyright and neighboring rights proclamation No. 410/2004, the exception provisions from the perspective of Article 13 of the TRIPS, specifically, to the three-step- test requirements.

Now let check the exception provisions of Ethiopian copyright and neighboring rights proclamation No. 410/2004 from the three-test requirements stated under Article 13 of TRIPS. Concerning the first test, the proclamation provided exceptions to certain special cases like for private study, teaching, library and archival use, and for broadcasting and informatory purposes.³⁹² So, the exceptions are not for all cases, they are limited to special cases which are common to all other countries, even.

Education is a special case even known in many jurisdiction and international conventions. The fair practice included both in Article 10 and 11 of proclamation No.410/2004 of Ethiopia seems copied from the Berne convention of Article 10(1) and Sub Article (2) respectively. But Article 11 gives more protection than the Berne convention by preferring to use the word “reproduction” and the phrase “published work”.

The Berne convention on Article 10(2) uses the word “utilization” than “reproduction” which is much broader than the latter. By the Article 11 of proclamation No.410/2004 of Ethiopia only reproduction right of the owner is limited. Other rights of the owner such as translation and adaptation rights are not limited. Even though Article 9(2) of the Berne convention allows for member countries to provide exceptions only on the reproduction right of the owner ,the similar provision of TRIPS ,Article 13,corrected that and make the Article to include all rights of the owner.

³⁹² Stated beginning from Art.9-19 of the Proclamation No.410/2004.

Concerning the issue of “published work”, the Berne convention on Article 10(2) does not require member countries to provide fair practice only for published works for the purpose of teaching. So, why should Ethiopia give more protection than the minimum standards of international copyright conventions, especially in case of education?

Concerning the second test, i.e. the exceptions should not conflict with a normal exploitation of the work requirement; the proclamation included this test only for the cases of one exception: reproduction for personal purpose. Art. 9(2e) of the proclamation states that reproduction for personal purposes should not conflict with or unreasonably harm the normal exploitation of the work. However, this test is not provided under the proclamation for other exceptions. Art.11 (teaching exception) of the proclamation does not mention this test. But the standards of fair practice have to include or take in to account this test.

The same is true concerning the third test, i.e. the exceptions should not unreasonably prejudice the legitimate interests of the right holder. The proclamation, under Article 9(2e), uses this test only for the reproduction of a work for personal purposes like the second test. Therefore, the proclamation does not use the tests consistently throughout its exceptional provisions. Even if the use is for educational purpose, it has to be reasonable .It should not make persons related with education to free ride.

To be consistent with TRIPS agreement; the exceptional provisions of the proclamation have to be revised in line with the three-step-tests provided in the TRIPS agreement. The fair practice interpretation has to take in to account also such three tests. The standards that are to be introduced in the future into the Ethiopian copyright law have to consider also such three-step-test required by the TRIPS. The standards have to take in to account these three tests provided by the TRIPS. This is because the three test requirements are provided by the TRIPS in order to balance between the rights of copyright owner and the interest of the public in access to copyrighted works. And the function of the fair practice is the same: to balance between the interest of the copyright owner and the public at large. The TRIPS Panel ruling on the three step test requirements is also important for further understanding.

Chapter Six: Conclusion and Recommendation

The purpose of copyright law is not to ensure the owner of copyright a maximum economic benefit, rather to balance the right of the copyright owner to obtain a fair return and society's interest in access to and use of information. As a result, the copyright law does not only provide exclusive right to the copyright owner, but also exceptions to the exclusive right and allow the use of copyrighted work by third parties in certain circumstances. One of the important exception is education .An exception to the exclusive right of the owner can be given for the purpose of education. Article 11 of the Ethiopian copyright proclamation No.410/2004 allows the reproduction of a work by persons other than the owner for the purpose of teaching.

Such exception by itself does have its own limit .The exception, education, is generally guided by a limit known as fair practice .Fair practice is an equitable rule of reason that helps to balance the interests between the copyright owner and the public.

Even if the fair practice is provided in the proclamation, its meaning and standards to apply it are not known .Without these it is difficult to implement.

As a result many individuals do not know about fair practice. Even, they do not know as it is stated in the copyright proclamation. So, if they do not know, they do not observe and respect. And many teachers and students understand that they can copy the work of another without limit if it is for the purpose of education. Here the writer wants to notify to every body that even if the educational exception is provided by the proclamation, article 11 of it also provides a limit –fair practice. The owner of the work can raise such limit and accuse the user of his work. Then determining whether there is infringement or a fair practice is left to be determined by the courts. The problem is here. There is no

standard for judges to interpret and apply fair practice. Even the individuals have to be certain about the out come of the cases before court.

Therefore, the following recommendations have to be taken into account to avert the problems:

- 1) The appropriate standards which help to interpret and apply the fair practice have to be provided by a regulation. Standards by taking in to account the spirit of the proclamation No.410/2004 and the policy of the country have to be given specifically for the case of education. In doing so the experience of other countries, especially US, that I considered in the paper are important.
- 2) While providing standards to fair practice, the three step test requirements of the international copyright conventions, specifically TRIPS, have to be considered.
- 3) Higher education institutions, in line with the standards provided by the regulation, have to provide detail guidelines in using copyrighted materials to their teachers and students.
- 4) The standards that would be determined by the regulation should not be exhaustive .They have to be illustrative and should give discretion for judges to include similar standards to handle new cases.
- 5) The fair practice concept and its standards for the cases of education have to be interpreted broadly, which inclines to the interest of the public in education. This will resolve the negative impact of strict copyright rules on the expansion and quality of higher education, since our country is a developing country. However, this has to be done to the extent of the three-step-test limit of international conventions permits.
- 6) Article 11 of the proclamation No.410/2004 provides that a fair practice for the purpose of teaching is allowed for “published” works. This limit the use of works unpublished but protected by copyright for the purpose of education. And there is no such requirement under international copyright conventions. So this has to be amended and fair practice of unpublished works has to be also allowed for the case of education. The same is true with regard to the word “reproduction” and it has to be replaced with a broad word –“exploitation” as it is provided in the Berne Convention, Article 10(2).

- 7) Article 11 of the proclamation has to also provide on how to use fairly new technologies like internet sources for the purpose of education.
- 8) The Ethiopian Intellectual Property Office (EIPO) has to do something to increase the awareness of individuals in higher education institutions in relation to copyright in general, fair practice concept and its standards.

Bibliography

Reference Books

- Bainbridge, David, Intellectual Property, 4thed, Pitman Publishing, 1999.
- Black's Law Dictionary, 6th Ed.
- Blaten Geta Mahitemesellassie W/Meskel, "Zekre Neger"(In Amharic Language), 2nded, Artistic Printing Press, Addis Ababa, Ethiopia, 1962Ec.
- Bogsch, Arpad, the Law of Copyright under the Universal Conventions, 3rd Ed., New York, 1970.
- Campbell, Dennis and Cotter, Susan (Eds), Copyright Infringement, Kluwer Law International, London, Boston, 1998.
- Copyright and Related Topics :A Choice Of Articles ,Los Angles Copyright Society And The UCLA School Of Law ,University Of California Press,1964.
- Cornish, W.R, Intellectual Property: Patents, Copyright, Trade Marks And Allied Rights, London (Sweet And Maxwell), 1981.
- Corpus Juris Secundum, Copyright and Literary Property, A Complete Restatement Of American Law, Brooklyn, N.Y., The American Law Book Company, Vol.18, 1939.
- Den Bossche, Peter Van, the Law and Policy of the World Trade Organization: Text, Cases and Materials, 2nd Ed, Cambridge University Press, 2008.
- Field, South, Intellectual Property Primer, Brooks and Kushman, 1991
- Freitas ,Denis De, The Law Of Copyright And Rights In Performances, The British Copyright Council's Guide, British Copyright Council, London, 1990.
- Goldstein, Paul, Copyright, Patent, Trademark, and Related State Doctrines: Cases and Materials on the Law of Intellectual Property, 3rded, University Case Book Series, 1993.
- Kupferman, Theodore R. And Foner, Mathew (Eds), Universal Copyright Convention Analyzed, Federal Legal Publications, New York, 1995
- Leaffer, Marshal A. Understanding Copyright Law, New York, 1995
- Long, Doris Estelle and Amato, Anthony D', A Course Book in International Intellectual Property, American Case Book Series, West Group, 2000
- Marke, Julius J., Copyright and Intellectual Property, New York, 1967

- Matsushita, Mitsuo, Thomas J., Schoenbaum, And Petros, C. Marvoidis, *The World Trade Organization: Law, Practice, And Policy*, 2ndedn The Oxford International Law Library,.., 2006.
- Miler,Arthur R., and Michael H Davis, *Intellectual Property: Patents, Trade Marks, and Copyright In Nut Shell*, West Group, 2000.
- Patterson, L.Ray, ‘Understanding Fair Use: Law and Contemporary Problems’, *Duke University School Of Law*, Vol.55, No.2, 1992.
- Pilpel, Hrriet F., and Morton David Goldberg, *a Copyright Guide*, R.R. Bowker Company, New York, 1966
- Quality Of Higher Education In Ethiopian Public Institutions* ,Forum For Social Studies, Addis Ababa ,Ethiopia ,2009.
- Robert, P. Merges Peters, Menell, and Mark, A. Lemley, *Intellectual Property In The New Technological Age*, Aspen Publishers, New York, 2002.
- Senfleben ,Martin ,*Copyright ,Limitations, And The Three Step Test :An Analysis Of The Three Step Test In International EC Copyright Law*, Kluwer Law International ,New York,2004.
- White, T.A Blanco, *Industrial Property And Copyright*, London, 1962.
- World Intellectual Property Organization: Intellectual Property Reading Material*, 2nd Ed, Geneva, 1998.

Journals

- Adeny ,Elizabeth ,*The Mask Of The Author –Anonymity And Pseudonymity In Two Common Law Countries*, *International Review Of Intellectual Property And Competition Law(IIC)*,Vol.31,No.7-8,2000.
- Copyright Fair Use: Case Law and Legislation*, *Duke Law Journal*, Duke University School Of Law, Vol.1969, No.1, 1969
- Correa ,Carlos M., *Fair Use In The Digital Era* , *International Review Of Industrial Property And Copyright Law(IIC)* ,The Max Plank Institute For Intellectual Property, Competition And Tax Law, Munich Vol.33,No.5,2002.

- Dowell, Jonathan, *Bytes And Pieces: Fragmented Copies, Licensing, And Fair Use In A Digital World*, California Law Review, California Law Review, Inc., Vol.86, No.4, 1998.
- Hilty, Reto M, *Intellectual Property and the European Community's Internal Market Legislation: Copyright in the Internal Market*, International Review of Intellectual Property and Competition Law (IIC), Vol.35, No.7, 2004
- Koelman ,Kamiel J., *Copyright Law And Economics In The EU Copyright Directive :Is The Droit D' Auteur Passé?*, International Review Of Intellectual Property And Competition Law(IIC),Vol.35,No.6,2004.
- Leval, Pierre N., *Towards A Fair Use Standard*, Harvard Law Review, the Harvard Law Review Association, Vol.103, No.5, 1990.
- Longdin ,Louise, *Copyright Dowries In Academia: Contesting Authorship And Ownership Of Online Teaching Materials In Common Law Jurisdictions*, International Review Of Intellectual Property And Competition Law(IIC),Vol.35, No.1, 2004.
- Newby, Tyler G., *What's Fair Here Is Not Fair Every Where: Does the American Fair Use Doctrine Violate International Copyright Law?* Stanford Law Review, Vol.51, No.6, 1999.
- Peukert ,Alexander ,*Protection Of Authors And Performing Artists In International Law –Considering The Example Of Claims For Equitable Remuneration Under German And Italian Copyright Law*, International Review Of Intellectual Property And Competition Law(IIC),Vol.35,No.8,2004.
- Posner, Richard A, *When Is Parody Fair Use?* The Journal of Legal Studies, the University Of Chicago Press, Vol.21, No.1, 1992
- Schonning, Peter, *Licensing Authors on the Internet*, International Review of Intellectual Property and Competition Law (IIC), Vol. 31, No. 7-8, 2000.
- Sterling, J.A.L., *Philosophical And Legal Challenges In The Context Of Copyright And Digital Technology*, International Review Of Intellectual Property And Competition Law(IIC),Vol.31,No.5,2000.
- The Parody Defense to Copyright Infringement: Productive Fair Use after "Betamax"*, Harvard Law Review, the Harvard Law Review Association, Vol.97, No.6, 1984.

Thi Phan, Dan Thu, *Will Fair Use Function on the Internet?* Columbia Law Review, Vol.98, No.1.1998.

Yankwich, Leon R., *What Is Fair Use?* The University Of Chicago Law Review, Vol.22, No.1, 1954.

Unpublished Articles

Biset Beyene, *The Impact of the Doctrine of Exhaustion of Intellectual Property Rights on International Trade: The Ethiopia Perspective* (unpublished LL.M Thesis), Addis Ababa University, Addis Ababa, Ethiopia, 2008.

Getachew Mengistie (Director General of Ethiopian Intellectual Property Office), *Intellectual Property Assessment in Ethiopia* (unpublished), Addis Ababa, 2006

Knights, Roger, *Limitations and Exceptions under the ‘Three Step Test’ and in National Legislation –Differences Between the Analog and Digital Environments*, Presented on Regional Workshop on Copyright and Related Rights in the Information Age Organized by the World Intellectual Property Organization (WIPO) in cooperation with Copyright Council of the Ministry of Education and Culture of the Eastern Republic of Uruguay, Montevideo, September 13 and 14, 2000.

Mandefro Eshete And Mola Mengistu, *Exceptions And Limitations Under The Ethiopian Copyright Regime: An Assessment Of The Impact On Expansion Of Education* (Unpublished), 2009.

Yoseph Mulugeta, *the Doctrine of Faire Use and Its Application under the Ethiopian Copyright Law* (Unpublished LL.B Thesis), Addis Ababa University, 1997

National Legislations

Civil Code of the Empire of Ethiopia, Negarit Gazeta, 1960, Proclamation No.165/1960

Copyright and Neighboring Rights Protection Proclamation, Federal Negarit Gazeta of the Federal Democratic Republic Of Ethiopia,2004,Proclamation No.410/2004.

The Constitution of the Federal Democratic Republic of Ethiopia, proclamation No.1/1995

International Conventions

Agreement on Trade-Related Aspects of Intellectual Property Rights, (TRIPS) as it is signed in Marrakesh, morocco, on 15 april 1994.

Berne Copyright Convention as it is revised at Paris on July 24, 1971.

Universal copyright convention as it is revised at Paris on 24 July 1971.

World Intellectual Property Organization (WIPO) Copyright Treaty, As Adopted In Geneva, December 20, 1996.

Internet sources

An Economic History of Copyright in Europe and the United States,

<http://eh.net/encyclopedia/article/khan.compyright>, accessed on June 18, 2009

A Teachers Guide to Faire Use and Copyright,

<http://www.brown.edu/Administration/Copyright/faq.html>, accessed on September 21, 2009.

Circular 21, Reproduction of Copyrighted Works by Educators and Librarians,

<http://www.copyright.gov>, accessed on September 9, 2009

Copyright Exceptions and Limitations,

<http://www.copyright.gov/title17/92chap5.html-72k>, accessed on February 10, 2008

Definition of Copyright,

<http://www.nolo.com/definition.cfm/term/4B5A08FF-555D-4EBF->

[89468COAFF8401F6](http://www.nolo.com/definition.cfm/term/4B5A08FF-555D-4EBF-89468COAFF8401F6), accessed on June 20, 2009

Educational Guidelines on Fair Use,

<http://www.google.com.et/#hl=en&source=hp&q=copyright+and+fair+use+in+education>

[&aq=3&oq=copyright+and+fair+use&fp=7ea6e1f422ecf2df](http://www.google.com.et/#hl=en&source=hp&q=copyright+and+fair+use+in+education&aq=3&oq=copyright+and+fair+use&fp=7ea6e1f422ecf2df), accessed on

September 27, 2009

Fair Use and Education Copying Guidelines for Teaching and Learning,

https://www.amherst.edu/academiclife/dean_faculty/fph/policies/fairuse, accessed on September 9, 2009

Fair Use Copyright Laws for Education,

http://www.ehow.com/about_4812899_fair-use-copyright-laws-education.html, accessed

on September 21, 2009

Infringement of Copyright,

<http://www.lostquilt.com/soverces.html>, accessed on June 20, 2009

The Right to Education, http://www.globalactionforchildren.org/issues/basic-education/?gclid=cjppjhlvc_z0cfv, accessed on September 21, 2009

Interview

Interview with Wuhib Mamo, Federal High Court Judge, on November 17, 2009.

Interview with physics Instructor, Science Faculty, Addis Ababa University, on November 18, 2009

Interview with St. Marry University College, Distance Education Unit, Academic Wing Officer, on November 19, 2009.

Interview with Alpha University College Administration Head, on November 21, 2009.

Interview with Ethiopian Intellectual Property Office (EIPO), Copyright Office, Copyright Advisor, on December 22, 2009.

Annexes

Annex one Questionnaire Filled by students and teachers

This questionnaire is prepared to undertake a research thesis at post graduate level. The focus of the research is on “**fair practice under copyright law of Ethiopia: the case of education**” as it is stated under copyright proclamation No.410/2004. The purpose of this questionnaire is to assess the implementation of “fair practice” in higher educational institutions of Ethiopia situated in Addis Ababa.

Thank you in advance for filling this questionnaire.

N:B : use a mark (x) in the box provided or circle the answer as appropriate to each question.

1. Do you get materials (books and others) for education purpose easily and in abundant?

Yes

No

I don't want to specify

2. How do you get the materials?

a) By purchasing

b) By photocopying

c) By borrowing

If other please specify.....

3. How do you practice or photocopy a copyrighted material?

a) With limits, some parts

b) Without limit since it is for education

c) I don't have experience to

If other please specify.....

4. How much, the amount, you photocopy?

a) One paragraph

b) One chapter

c) All

d) As necessary

If other please specify.....

5. If your answer for number 5 is as necessary, why?

- a) To respect copyright law
- b) Since it depend the money I have
- c) Since it depends as required by education

If other please specify.....

6. Do you differentiate between copyrighted works?

- a) No, all the same
- b) Yes, between creative and non-creative works

If other please specify.....

7. Is there a policy in your institution to use or photocopy a copyrighted material?

Yes No I don't know

If other please specify.....

8. Do you know the legal limitations in using copyrighted materials?

Yes No

If other please specify.....

9. Do you know the limitations imposed on the copyright owner and the rights and obligations provided to users of a copyrighted material by copyright proclamation of Ethiopia?

Yes No Somehow

If other please specify.....

10. Do you know about fair practice limit?

Yes No Somehow

If other please specify.....

11. If your answer for number 10 is yes, does the fair practice stated in the copyright proclamation clear enough?

Yes No I don't want to specify

If other please specify.....

12. If your answer to number 11 is no, what would be the solution?

- a) To define fair practice b) To provide standards
- c) To provide further guidelines by higher educational institutions

If other please specify.....

13. Does broadening or narrowing the exceptions have an impact on expansion and development of education?

Yes No I don't know

If other please specify.....

14. Should the exception be broaden or narrow for the purpose of education?

- a) Should be narrow b) Should be broad c) I don't know

If other please specify.....

Further suggestion ,if any,-----

-----.

Annex two

Interview questions to high court judge

1. How do you see that the concept fair practice as it is stated under proclamation No.410/2004 to protect copyright and neighboring rights?
2. Do you believe that fair practice is stated clearly under the proclamation?
3. Did cases related to fair practice, particularly education, appear before court?
4. If they appear before court, how parties argue?
5. Wouldn't it be difficult to stick only to the provision stated in the proclamation?
6. Is it necessary to have, in the law, further standards for the understanding and application of fair practice?
7. Is there a difference in the understanding between copyright owner and users of it? Does this revealed in the trial before court?
8. Should the fair practice stated under the proclamation be interpreted broadly or narrowly?

Annex three

Interview questions to copyright advisor at EIPO

1. How do you see that the concept fair practice as it is stated under proclamation No.410/2004 to protect copyright and neighboring rights?
2. Did cases related to fair practice particular to education come before the office?
3. Are they implemented as it is stated in the proclamation?
4. Do you believe that fair practice is stated clearly under the proclamation?
5. Wouldn't it be difficult to stick only to the provision stated in the proclamation?
6. Is it necessary to have, in the law, further standards for the understanding and application of fair practice?
7. Should the fair practice stated under the proclamation be interpreted broadly or narrowly, particularly for education?
8. What things that the EIPO is doing to promote fair practice and increase the awareness of the people?

Annex four

Interview questions to owners of copyrighted works

1. Do you know the exceptions to the exclusive rights of copyright owner stated under proclamation No.410/2004 of Ethiopia?
2. Do you know also the limits to the exceptions?
3. How do you see the fair practice particular to education as it is stated under Article 11 of proclamation No.410/2004?
4. Is your right violated by students and teachers of higher educational institutions and also by the institution itself?
5. What do you do when your rights are violated?
6. Do you believe that fair practice is stated clearly under the proclamation?
7. Is it necessary to have, in the law, further standards for the understanding and application of fair practice?
8. Should the fair practice stated under the proclamation be interpreted broadly or narrowly, particularly for education?

Declaration

I, Daniel Mitiku, declare that this thesis is my original work and never presented in any higher institution and in undergraduate program and the materials I refer to are duly acknowledged.

Daniel Mitiku

Signature-----

Date -----

Approved By Board of Examiners

**Fair Practice under Copyright Law of Ethiopia:
The Case of Education**

**By
Daniel Mitiku**

**Advisor
Dr. Mandefro Eshete
Signature -----
Date -----**

**Examiner
Name -----
Signature -----
Date -----**

**Examiner
Name -----
Signature -----
Date -----**