



**ADDIS ABABA UNIVERSITY**  
**COLLAGE OF LAW AND GOVERNANCE STUDIES**  
**SCHOOL OF LAW**

**THE LEGAL AND PRACTICAL CHALLENGES OF LICENSING AND ASSIGNMENT  
OF MUSICAL WORKS IN ETHIOPIA**

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**The Legal and Practical Challenges of Licensing and Assignment of Musical Works in  
Ethiopia**

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## **Declaration**

**I hereby declare that this thesis is my original work and that all sources used are properly cited and acknowledged.**

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### **Abstract**

*Music is the most utilized intellectual product in the world. The musical market as with other commercial activities has earned high revenue. Right holders may transfer their work through the contract and in return, they will accrue pays back.*

*The respective obligation of the parties is governed by the general contract rules and the copyright proclamation. Under the Ethiopian copyright law, some rules and regulations aid him to exploit his right these are envisaged under Article 23-35 of the copyright proclamation. However, these provisions have lacunas in terms of benefiting right holders.*

*Practically the musical industry is out-dated, not suitable, and doesn't have rules and regulations that stand for the right holders of the music industry. Accordingly, right holders have not profited from their work.*

*To make right holders advantageous from their work the collective management society should have back up in terms of budget, skilled manpower, and so on. Moreover, proportional payment has to be spelled out clearly. Like that of the ring tone, the collective management society should have provisions that implement another manner of exploitation of musical works. Especially regarding broadcasting rights, public performance rights, synchronization rights, and mechanical reproduction rights there are unequal negotiating powers. Therefore, there have to be provisions that stipulate proportional payment and that the users of musical works should be intermingled within the rules and regulations.*

*Furthermore, the proclamation needs to be amended in a way that accommodates new use, territorial clause, and the right to transfer acquired right. Subsequently, the copyright market is directed through appropriate rules and regulations. In effect, this guarantees the benefit that right holders should get from their work.*

**Keywords-** *Copyright contract, Assignment, licensing, the scope of the Grant, Remuneration and Written Formality*

## Chapter one

### Introduction

#### 1.1 Background of the study

The main goal of copyright law is to strike a balance between right holders' interest and the public interest.<sup>1</sup> Society needs development in terms of social, technological, economic, and cultural products. This being so, it offers the right holder's copyrights and consequently, they will get revenue. In return, right holders are expected to access the work they have made to the public.<sup>2</sup>

The advantage of copyright law is measured from the viewpoint of achievement of the objective it has attained and the benefit it has accrued.<sup>3</sup> Accordingly, the copyright market rules and regulations are important to improve the returns from the copyright.<sup>4</sup> Hence, in one way the market is supposed to be favourable and modern to the right holders, and on the other, the public envisioned to get entertainment and information from the works disseminated to the public.

In relation to developing countries in the absence of copyright law or the copyrights law that does not sufficiently address the points that are supposed to raise the right holders and the public wouldn't able to get the paybacks that would have been accrued out of the benefits of copyright.<sup>5</sup> Therefore, adequate and feasible law has to be devised for the cultural industry particularly, for the music industry. Furthermore, to look after paybacks that can be assured by the right holder's strong collective management society needs to be created. Over and above punishing transgressors and those who trespass moral and economic right of the right holders should be given at most importance.<sup>6</sup>

The copyright law is looking forward to not only benefit the right holder and public. But it is way more than that. Nevertheless, it paved a way for intermediaries, broadcasters, publishers,

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<sup>1</sup> Christophe Geiger, Copyright as an access right: Securing cultural participation through the protection of creators' interests, ANU Press, p. 79, <https://www.jstor.org/stable/j.ctt1q1crjg.6>

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Andrew Surmani and Carl Anderson, The Music Products Industry as Part of a Collegiate Music Industry Program's Curriculum, College Music Society, College Music Symposium, Vol. 58, No. 1 (2018), p. 1-10, <https://www.jstor.org/stable/10.2307/26564932>

<sup>5</sup> Delia Lipszyc, *Copyright and Neighbouring Rights*, UNESCO Publishings, p. 66

<sup>6</sup> Ibid.

event organizers, and so on.<sup>7</sup> Even though the work is benefiting doesn't mean that the public and intermediaries can access it for free.<sup>8</sup> Therefore, the right holders should gain pays back from the exploitation of their musical works. Their advantage can be guaranteed through robust contract law.<sup>9</sup> In this regard, European countries have compulsory contract provisions to empower right holders.<sup>10</sup>

In Ethiopia, copyright law 410/2004 and the amendment proclamation 872/ 2014 gives protection to right holders.<sup>11</sup> Among other musical workers are going to have protection through this proclamation. In order to have protection for their original work, the work has to be written or recorded.<sup>12</sup> The work that is protected may be used either by himself that is self-exploitation or it may be transferred to another person.<sup>13</sup> In order to transfer and exploit the work, the proclamation has contractual provisions that are listed out from Article 23-25. However, these provisions have to be examined in terms of benefiting right holders. Furthermore, practically the very goal copyright law stands for is accomplished and the right holder's advantage has to be assessed in relationship with the market.

## 1.2 Statement of the problem

The supply of copyright works is always significantly greater than the demand for the work, whereas the number of companies using the work (publishers, theatres, producers, phonograms, broadcasting companies, etc.) increases very slowly, and sometimes declines. This is particularly true in developing countries like Ethiopia. Because of this, unequal bargaining power is created as the supply of musical work increases and the demand for musical works decreases.<sup>14</sup> This in turn puts the authors in a position of psychological submission, and as a result, they could not

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<sup>7</sup> Id. P. 275

<sup>8</sup> Christophe Geiger, supra note 1, p. 107

<sup>9</sup> Ibid.

<sup>10</sup> Ibid. and see also Guibault, L., & Hugenholtz, P. B.(2002). Study on the conditions applicable to contracts relating to intellectual property in the European Union, European Commission.

<sup>11</sup> Copyright and neighboring right protection proclamation, 2004, proclamation no. 410, Neg. Gaz., year 10<sup>th</sup>, no. 55. And Copyright and neighboring right protection (Amendment) proclamation, 2014, proclamation no. 872, Neg. Gaz., year 21<sup>st</sup>, no.20.

<sup>12</sup> Ibid. article 6 and see also Danielle Fosler-Lussier, Music on the Move- Copyright, Surveillance, and the Ownership of Music, University of Michigan Press. (2020), p. 184, <https://www.jstor.org/stable/10.3998/mpub.9853855.16>

<sup>13</sup> Kate Darling, "Contracting About the Future: Copyright and New Media," northwestern journal of technology and intellectual property., vol. 10 (2012), p. 486

<sup>14</sup> Delia Lipszyc, see supra note 5

negotiate contracts freely.<sup>15</sup> It also makes the authors more vulnerable to shoulder the effects of bad contractual agreements.<sup>16</sup>

Especially in the licensing and assignment of musical works, the unequal bargaining power between the right holder and the right seeker poses different challenges and is also a source of legal arguments. In this regard, the proclamation puts compulsory and gap-filling provisions aimed at protecting the interest of the authors taking into account the unequal bargaining power between authors and users. Accordingly, the law provides the requirement of form, restrictions on the transfer of rights, interpretation rule, and the right to termination of a contract.<sup>17</sup> However, practically speaking, there is a query on whether the provisions of the proclamation in this regard are properly implemented by the contracting parties. As already noted above, this puts the authors of musical works in a more disadvantaged position during the negotiation of contracts. For instance, the law obliges the contract of licensing and assignment to be in written form. Nevertheless, the failure of the contracting parties to observe this provision may affect the interest of the authors and owners of musical works considerably. This is to say; in the case of an oral contract, it may be problematic to ascertain the specific right, method/means of use, ownership, duration, and territorial applicability of the licensing or assignment contract.

On the other hand, as much as the law tries to address the unequal bargaining power and protect the interest of the author, there are concerns on whether it sufficiently incorporates the very basic provisions that increase the real negotiating power of the authors. For instance, the law has left the issue of remuneration to be settled by the agreement of the parties. However, considering the unequal bargaining power of the parties, one may claim that the approach taken by the proclamation in this regard is not well-informed. It may result in the authors of musical works not being sufficiently remunerated for their work.

Moreover, the proclamation leaves issues such as the right to transfer acquired rights, territorial applicability, and the method of use and means of dissemination that did not exist or unknown at the time of the contract to contracting parties. One must make a thorough investigation in order

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> See the copyright proclamation, *supra* note 4, art 23-25

to understand the reason why the law has taken this approach and its potential implications on the right of the author as well as the free transfer of intellectual works.

### **1.3 Research questions**

- What is the position of Ethiopian copyright law regarding the emergence of new method of use and means of dissemination that did not exist at the time of the conclusion of the contract?
- Are the issues of the right to transfer acquired right and territorial applicability properly regulated under the copyright and neighbouring right proclamation?
- Does the Ethiopian copyright law provide proper guidelines that ensure the adequate remuneration of authors of musical works?
- Is there a formality requirement for licensing and assignment contracts in Ethiopia? If so, is it practically observed by the contracting parties?

### **1.4 Objective of the study**

The research has the following general and specific objectives.

#### **1.4.1 General objective**

The general objective of the research is to explore legal and practical challenges of copyright contracts in the field of music.

#### **1.4.1 Specific objectives**

- To examine whether the Ethiopian copyright law provides proper guidelines that ensure the adequate remuneration of authors of musical works;
- To identify the position taken by the Ethiopian copyright law regarding emergence of new method of use and means of dissemination that did not exist at the time of the conclusion of the contract;
- To explore the law and the practice in Ethiopia concerning the formality requirement for licensing and assignment contracts;
- To explicate whether the right to transfer acquired right and territorial applicability are properly regulated under the copyright and neighbouring right proclamation;
- To suggest possible solutions and recommendations based on the problems identified;

## **1.5 Significance of the study**

The study fills research gaps as well as knowledge gaps, while there are no researches conducted in this area. The research can be used by policymakers, licensing and assignment experts, students, teachers, and practitioners of law as reference material.

In addition to this, the study can be a foundation for other related researches on the same subject or topic. Besides, it empowers actors in musical works to have awareness of the exploitation of rights through licensing and assignment.

Furthermore, it is significant for the partial fulfillment of the LL.M program at the University of Addis Ababa.

## **1.6 Methodology**

The research employs the qualitative doctrinal type of legal research. The doctrinal legal research techniques are used to explore the legal principles, concepts, doctrines, and stipulations surrounding the licensing and assignment of literary and artistic works in general and musical works in particular, whereas qualitative legal research techniques are used to explore the practical challenges of licensing and assignment of musical works in Ethiopia including the gap between the law and the practice.

The study used both primary and secondary sources of data. For the doctrinal part, primary sources of data such as proclamations, regulations, directives, and cassations decisions (case laws) are employed in the study. On top of that, textbooks, journals, court decisions, articles, commentaries, websites, parliamentary debate, and reports in the field are used as secondary sources of data. For the qualitative part, on the other hand, primary and secondary sources of data like an interview, questionnaire, laws, court decisions, journal articles, books, contracts, and etc. are used.

As far as interviews are concerned, the study employs unstructured interviews as it allows for spontaneity and for questions to develop during the course of the interview, which is based on the interviewees' responses.

The study employs purposive sampling. Sources of information will be selected purposively depending on the nature and type of information needed. For the interview, scholars, lawyers,

Judges, and officials from the EIPO and Musicians Association are selected purposively based on their expertise, experience, and position. Likewise, for the questioner, authors (lyricists and melodists) are purposively selected based on their expertise and experience in the industry.

### **1.7 Organization of the study**

The research is organized into three chapters. Accordingly, the first chapter deals with the introduction and the proposal of the study. In this regard, among others, it illustrates the problem, objective, and methodology of the study.

The second chapter focuses on the details of related literature reviews on the exploitation of musical works. Chapter three, deals with data presentation, data analysis, and data interpretation as well as problems/challenges concerning licensing and assignment of musical works. Besides, based on the analysis of data puts the conclusion and recommendation.

### **1.8 Scope of the study**

As a subject matter, the study focuses on economic rights and the general compulsory provisions of copyright contract laws. Furthermore, the investigation revolves around songwriters and lyricists. Moreover, it is limited to Addis Ababa because of finance and resource limitations.

## Chapter Two

### 2. Overview of exploitation of musical works

#### 2.1 The Copyright Contract of Music

Music is one of the most important intellectual property products at this time.<sup>18</sup> It<sup>19</sup> is an art of combining the sounds of human voices or instruments or of one and the other at the same time, strings the emotions.<sup>20</sup> Among others, Melodies and lyrics are an essential part of the music that is done by human beings. In this regard, melodies<sup>21</sup> and lyrics that are fixed and original entitles the author protection by the law.<sup>22</sup> Even though the protection of exploitation rights varies from country to country according to their legal systems; authors can convert their monopoly<sup>23</sup> into money. Except for self-exploitation, such economic rights are exercised through a copyright contract.

Copyright contract legislative policies are differed from legal systems to legal systems according to the emphasis they have given to musical works. Common law or copyright system countries emphasize the free dissemination of music through protecting the transaction of economic rights. While civil law or author rights countries stand for the protection of the author's personality right through restricting freedom of contract. In both legal systems, copyright exploitation rules are designed according to the concern they have given. While civil law countries adopt rules for the protection of the author's rights, common law countries acquired rules for the free dissemination of copyright.

*Muriel Josselin*<sup>24</sup> provides a possible definition of copyright contract in both systems. In copyright system countries, copyright contract is "A legal act whereby the copyright owners

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<sup>18</sup> N. Bortoloff, Wipo Guide on The Licensing of copyright and related right- music (2004), p. 125

<sup>19</sup> Music is different from noises; because it is a rational collection of sounds. Music is made up of melody, harmony, and rhythm. The combination of these three parts with words results in musical composition with words. Delia Lipszyc, Copyright and neighboring rights, UNESCO publishing's, 1999, p. 81 and see also T. Getahun, copyright protection for musical works in Ethiopia law and practice, LLM thesis, Addis Ababa university faculty of law, May 2003, p. 12

<sup>20</sup> Delia Lipszyc, supra note 2, p. 81

<sup>21</sup> Ibid.

<sup>22</sup> The civil code of the empire of Ethiopia, 1960, art 1648(b) and 1649, proclamation no. 165, Neg Gaze, year 19<sup>th</sup>, no. 2, and copyright and neighboring right proclamation, supra note 4, art 2(13) (30), and art 4(2).

<sup>23</sup> Elliot Groffman, "Comment, Divisibility of Copyright: Its Application and Effect", 19 Santa Clara L. Rev., 171 (1979), p. 174 Available at <http://digitalcommons.law.scu.edu/lawreview/vol19/iss1/7>

<sup>24</sup> Muriel Josselin, the concept of the contract for exploitation of authors rights: a comparative-law approach, UNESCO Publishing, Vol XXVI, No. 4, 1992 p. 12

*undertakes either to transfer copyright or authorize acts of exploitation in respect of copyright works; the author may, by the same act, definitely relinquish his or her non-prerogatives pertaining to the work, or authorizes the contracting party to undertake any act infringing those prerogatives.*''<sup>25</sup>

On the other hand, in authors rights countries, a copyright contract is ' *the contract for the exploitation of authors right in a legal act having as its object the economic rights of the author in respect of his work, whereby the author transfers his rights within a necessarily specified limit.*'<sup>26</sup>

As the definition implies, in the copyright system there is freedom of contract. Parties can agree on both moral rights and economic rights. In the copyright system assignments and licenses are instruments for the transfer of economic rights. Using an assignment contract one can be an absolute owner of musical works.<sup>27</sup> This right would not revert to the author if the assignee went out of the business or in material breach of the contractual agreement.<sup>28</sup> In addition, by having exclusive or non-exclusive permission one may exploit musical works to a certain period. The former presupposes exercising of right with the exclusion of the author and other third parties according to the conditions of the contract. While the latter permitted in competition with other licensees. Thereby, economic rights can be fully assigned or can be licensed. Furthermore, moral rights can be waived, or may party agreed for infringement thereof.

While in the author's right legal systems only economic rights are transferable. But moral rights are not subject to transfer and waiver.<sup>29</sup> There is no full transfer of ownership since moral rights

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> It is a dualist's approach that reflects copyright has two autonomies' or independent rights; which are economic rights and moral rights. Since economic rights are an alienable assignment of rights as well as licensing of rights is permissible. Thus, the author can transfer his economic rights either totally or partially. In addition, because of assignment of rights is allowed users could be the owner of a copyright product. See Ozge Akin Mengenli, Does it make a difference to follow monism or dualism, p. 87 and 88, <https://dergipark.org.tr/tr/download/article-file/787347> accessed Wednesday, Feb. 22

<sup>28</sup> David stopps, how to make a living from music, second edition, no. 4, world intellectual property office (Wipo), p. 32-33

<sup>29</sup> In French, for instance, moral rights are non-transferable and imprescriptible that perpetually attached to the author. This is because the French give a higher degree of recognition of moral rights than economic rights. Due to this reason authors, reimbursing the assignee or licensee can withdraw the sale or circulation of his work after the contract. This right which is called the right to reconsider and withdraw has no recognition by Ethiopian law. See art. L-121-1

remain with the author. The only modality of transfer is licensing since the legal system is considered copyright as one single right that comprises both moral and economic rights.<sup>30</sup> In addition, there is a limitation on the scope of transfer, among others, by interpretation and principle of specialty in favor of the author.

## **2.2 The Ethiopian Copyright Contract and The legal system**

The Ethiopian legal system has the manifestation of both systems-that are copyright system and the author's right system- in the exploitation of musical works.

In the Ethiopian legal system, authors can waive moral rights according to article 8(3) of the proclamation.<sup>31</sup> The only thing that is expected from the parties is to specify the condition and extent of the waiver in the agreement. From this, it is clear that the legislator intends to prevent the exploitation of economic rights from obstacles of moral rights. Besides, the law stresses public interest than the author's right by giving the center of attention to the work. In this regard, parties have freedom of contract on both the economic and the moral right of the author.

Since the center of attention is the work, the law allows the full transfer of musical rights.<sup>32</sup> As a result article 2(16) of the proclamation entitles the person whom the right transferred a title of ownership. Furthermore, they have the right to register their ownership<sup>33</sup> and the right to transfer acquired rights to third persons in written form.<sup>34</sup> Accordingly, the proclamation is said to be designed to protect investors who play a vital role in the functioning of creative works. Thus, from the subject matter of transfer and the extent of transfer of ownership, Ethiopian law is taking a stand of the common law copyright system in the exploitation of musical works.

One that distinguishes Ethiopian law as an author's right system is that it sets limits to contractual freedom. In this regard, in the copyright proclamation, we may find the type of limits used by some countries in the civil law legal system. For instance, in Spain, there are gap-filling rules in cases where parties fail to specify certain conditions. Accordingly, if the parties fail to

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<sup>30</sup> In the monist approach, copyright is a unitary/single right that contains economic and moral rights. Hence, both economic and moral rights are not transferable and alienable to third parties. Due to this reason assignment of rights is proscribed. Ozen, supra note 7, p. 87 and 88

<sup>31</sup> See copyright proclamation art. 8 ff

<sup>32</sup> Id. Art 23 of copyright proclamation of Ethiopia

<sup>33</sup> Registration of Works Entitling Copyright and Neighboring Rights Council of Ministers Regulation, Art 3(1), and art 14, regulation no. 305/2014, Neg. Gaz., year 31, No. 31

<sup>34</sup> Article 7 and Article 23(2) of the Ethiopian copyright proclamation

set a time limit the contract remains effective for five years and where they fail to indicate the territory of the contract it remains to the place where the contract was signed. Another mandatory limit is that the contract is in writing.<sup>35</sup>

The other limitation we find in the civil law legal system is that the demarcation of the scope of the right transferred in the contract. To do so, countries require the explicit statement of transferred rights in the agreement. In French copyright law, in this regard, the non-specification of the scope of the contract makes the agreement null and void.<sup>36</sup> Besides, according to rules of specialty, rights not explicitly transferred to the user remain with the author.

But the experience in Germany and Spain is different. Though they are not made the contract void, stipulates the requirement to the scope of the contract. In Germany, there is a *purpose of grant* interpretation rule. This rule of interpretation allows the contract to be narrowly interpreted when the contract has an indeterminate scope.<sup>37</sup> So that it can be used for the parties as far as possible. The same is true in Spain. This is all to protect the financial and non-financial interests of the author.

The Ethiopian proclamation also contains provisions that favor the author as like civil law countries. It specifies that the contract must be in written form and that the contract remains for five years when it fails to set a time limit.<sup>38</sup> Except for the territorial extent, it is similar to the protection Spain has. As far as the scope of transfer is concerned articles 23(1) (3) and 24(1) (4)<sup>39</sup> are very important provisions. Accordingly, article 23(3) and 24(1) requires rights to be explicitly defined in the agreement. But, rights that are not explicitly provided are amount, not transfer. In this connection, we can say that Ethiopian law holds the rule of specialty as in the case of France.

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<sup>35</sup> See Muriel Josselin, *supra* note 7, p.13

<sup>36</sup> French intellectual property code, Art L-112-2

<sup>37</sup> See Muriel Josselin, *supra* note 7, p. 12-13, and see art 31(5) of German copyright law

<sup>38</sup> See art 23(1) and 24(3) of the copyright proclamation

<sup>39</sup> Both the Amharic and English versions of article 24(4) of the proclamation, as well as the minute of the proclamation, cross-refer sub-article 2 of the provision. However, article 24(2) is all about independence between copyright and material object that dictates ownership of material object does not give rise to ownership of copyright. Since article 24(4) talks about specific economic rights under the agreement, it has to be read in line with article 24(1) of the law. Therefore, it will give us a meaning of how transferred economic rights could be utilized in cases where the agreement fails to provide ways and means of exploitation of musical works. See art. 24(1) (4) and also see the legislative minute of copyright.

On the other hand, contracts will not be void due to reason that the agreement does not specify the manner of use. However, the assignee or the licensees are entitled to choose the manner of use to achieve the intended purpose taking into account the purpose for which the right was transferred.<sup>40</sup> According to this law, the right to decide what method should be used is given to the licensee or Assignee.

Unlike Ethiopian law, the German and the Spanish<sup>41</sup> laws did not set out who would decide the manner of use. The German law under art 31(5) reads as follows: *'If the **types of use have not been specifically designated**... the types of use...shall be determined in accordance with the purpose envisaged by both parties to the contract. A corresponding rule shall apply to the questions of whether a **right of use has been granted**, whether it shall be a nonexclusive or an exclusive right of use, how far the right of use and the right to forbid extend, and to what limitations the right of use shall be subject.'*<sup>42</sup>

This implies that the Ethiopian proclamation gives protection to the economic transaction of musical works that ultimately reaches public interest than the author's right. The law seems more sensitive to the free flow of musical works. Having the purpose of making it accessible to the public, the law is said to be favored exploiters of musical works than the authors.

In addition, in German law, rights not explicitly transferred are also governed by the purpose of the grant rule. But, the Ethiopian proclamation takes the French stand that rights are not explicitly transferred could not be exploited without the consent of the author.

In the following section, we will consider restrictions that are imposed on copyright contracts to protect authors.

## **2.3 Restrictions of Copyright Contract**

### **2.3.1 Written formality**

Generally, there is freedom from/of form.<sup>43</sup> But it may be restricted by law or by agreement of the parties.<sup>44</sup> From among laws, copyright law restricts freedom of form. As it provides " any

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<sup>40</sup> See art 24(4) of the Ethiopian copyright proclamation

<sup>41</sup> See also article 43(2) of the Spain copyright law

<sup>42</sup> See note 18

<sup>43</sup> George Krzeczunowicz, Formation and Effects of Contracts in Ethiopia, Faculty of Law, Addis Ababa University, (1983), p. 71-78 and see also art. 1719 of the civil code

assignment of an economic right and any license to do an act ... **shall be made in writing**,<sup>45</sup> so that written formality is the only mode to transfer musical works other than other ways of transfer. As inferred from the law, written formality is both essential (*ad validitum*) and evidential (*ad probatum*) requirement of copyright contract.<sup>46</sup> In both cases, it is a pre-condition for the making and proving of the content of the copyright contract.

On the one hand, article 23(2) requires any licensing and assignment of musical works to be in writing. So, that the existence of the contract is not proved in any other way. Accordingly, formless copyright contracts would make the transaction invalid and unenforceable as well as un-provable by the witness.<sup>47</sup> However, when written copyright contract destroyed stolen or lost; there is a probability to prove by witnesses according to article 2003 of the civil code.

Furthermore, the cumulative reading of article 23(2-3) and 24(1)<sup>48</sup> provides the effects of non-fulfillment of written formality. Consequently, it denotes that there is no copyright contract unless otherwise musical work rights are explicitly specified and transferred in writing form.

The use of rights that are not made and specified in writing form entails civil and criminal liability.<sup>49</sup> As a result, users are forced to be conscious for the manner of the transfer of musical works. This in turn helps the author to identify, control, manage, and exploit rights that are transferred and not transferred in the agreement. Due to this reason, authors' rights are protected.

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<sup>44</sup> See supra note 23, article 1723, 1724, 1725, 2472 of the civil code and the commercial code of the empire of Ethiopia, 1960, art 264, 219, 220, proclamation no. 166, Neg Gaze, year 19<sup>th</sup>, no 3 and see article 2674 of the civil code provides that publication contracts must be also explicit.

<sup>45</sup> See Copyright proclamation art 23(2)

<sup>46</sup> Rene David, Commentary on Contracts in Ethiopia, Published by the Faculty of law Haile Selasi I University, Addis Ababa, 1973, p.33-36

<sup>47</sup> Forms give existence to the transaction. Accordingly, Article 1720(1) of the CC. says that “*where a special law is prescribed by law and not observed there shall be **no contract** but a mere draft of a contract*” See George Krzczunowicz, supra note 25 and see the CC. of Ethiopia art 1720(1)

<sup>48</sup> In the Cassation decision of Ethiopia, as Judge Ali Mohamed dissenting opinion, directory provisions that have not been taking do not defeat the validity of the contract. They only reflect the aspiration of the legislator. But, mandatory provisions are provisions that defeat the validity of the contract if they are not taken seriously. To identify whether the provision is mandatory or directory, as he said, we have to see the effect of the non-observance of the formality requirement or the law. *The case between Memihir Mekuanint Werede vs. Meskerem Dagneu and et al., Federal Supreme court of Ethiopia Cassation bench decision file no. 34803, vol. 08, p. 282-292*

<sup>49</sup> Parties who failed to specify the manner of use should utilize the work according to the purpose of the grant. Besides, the deviation from the purpose of the grant makes them liable. See art. 24(1) (4) and art. 33-36 of Ethiopian Copyright Proclamation.

Given that, formality requirement is a compulsory requirement that incorporated in many countries like France.<sup>50</sup>

On the other hand, according to article 23(2-3) and 24(1) the scope of exploitation of musical work is limited to the content of the agreement explicitly mentioned therein. As the law indicates, the right and duties of the parties that incorporated in the document is helps for evidentiary purpose. Thus, the written formality requirement is also designed for proof of right.

### **2.3.1.1 Rationales of written formality**

Copyright contracts are contracts for a long time that the legislator presupposes that they are made at least for 5 or 10 years.<sup>51</sup> As a result, written formality is intended to protect parties from collapses of memories of their own and witnesses.<sup>52</sup> Besides, the legislator wants to create an opportunity for authors to consider the terms and conditions of the contract.<sup>53</sup> In this regard, the authors may consider the transfer of the right, the manner of use, remuneration, and other issues alone or with lawyers before and at the time of the conclusion of the contract.

Furthermore, written formality is aimed at protecting composers and lyrists from surprise.<sup>54</sup> For example, oral contracts are susceptible to surprising contracting parties as far as the scope of the grant is concerned and other related contractual conditions. Nonetheless, if the right and manner of use are specified in the contract authors may not be exposed to surprise in the execution of the contract.

Additionally, written formality is envisioned to separate the preliminary negotiations and the final terms of the agreements specified in the contract.<sup>55</sup> In this regard, on paper copyright contracts are binding and final. However, preliminary negotiation/contracts are a mere draft of the final agreement and not obligatory.<sup>56</sup> Accordingly, the conclusion of the contract is established by the issuance of a written document.

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<sup>50</sup> Law on the intellectual property code of France, (no. 92-597 of July 1, 1992, as last amended by laws Nos. 94-361 of May 10, 1994, and 95-4 of January 3, 1995), Art. L-132-2

<sup>51</sup> Art. 1725 (c) of the CC cum Art 24 (3) of copyright proclamation. Also, we can see and understand the legislative intent from article 25 of the proclamation as it denies the right to revocation before three years.

<sup>52</sup> See George Krzeczunowicz, *supra* note 25, p. 75

<sup>53</sup> See K. Zewigert, *supra* note 32, p. 375-377

<sup>54</sup> *ibid*

<sup>55</sup> *ibid*

<sup>56</sup> See article 1721 of the CC.

The requirements of the form may offer encouragement to negotiate.<sup>57</sup> So parties are in a position to consider the terms and conditions of the contract deeply before articulating documents. In this regard, it can be said that the lawmaker wants to get the seriousness of the intention of the parties<sup>58</sup> and wants to assure equal bargaining power of the parties.

As copyright contractual regulation provides a minimum standard<sup>59</sup> one may say that the details of formality requirement are governed by the civil code.<sup>60</sup> In line with the civil code, any party bound by the contract should put a signature or thumb mark on every sheet of the contract to validate terms and conditions agreed.<sup>61</sup> Furthermore, the copyright contract shall be attested and signed by two capable witnesses to enhance its evidential value.<sup>62</sup>

Notarial registration is not a requirement for the validity of the copyright contract. But after the conclusion of the contract assignees may voluntarily register their rights specified in the agreement by themselves or by their agent<sup>63</sup> at the intellectual property office of Ethiopia.<sup>64</sup> Such registration is targeted to get a prima facie evidence of ownership but not more.

### **2.3.2 Divisibility / independence of economic right**

Theoretically, copyright was a single indivisible package of exclusive right in the 1909 copyright law of America. But it was unworkable practically for the reason that the theory has not complied with the commercial reality. Unless otherwise the right has been transferred entirely, the theory was deprived of the right to transfer separate exclusive right of ownership. Besides, it was produced injustices to owners/authors of copyright, since various subsidiary rights have

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<sup>57</sup> Martin Kretschmer, supra note 3, p. 154

<sup>58</sup> See K. Zewigert, supra note 32, p. 375-377

<sup>59</sup> Delia Lipszyc, supra note 2, p. 278

<sup>60</sup> Since copyright law is silent on formality, the general contract law is applied by article 1676. Therefore, issues of formality requirement are governed by article 1719-1730. See, civil code supra note 23, and see Tilahun Teshome, Basic principles of Ethiopian Contract law, 3<sup>rd</sup> edition, Published by Addis Ababa University book center, Addis Ababa, 2007, p. 64-67

<sup>61</sup> See George Krzeczunowicz, supra note 25, p. 76-77

<sup>62</sup> Id art 77-78

<sup>63</sup> See supra note 15, Art 6(2), 7(4), and art 9(2)(3) of the regulation of registration of works entitling copyright and neighboring right.

<sup>64</sup> In the Ethiopian legal system, the regulation only allows the registration of assignees. Thereby, it excludes licensees. However, it is better to register documents about the exclusive and non-exclusive right of copyright. That is because the purpose of registration is a notification to the outside of the world and *prima facie* evidence. It has nothing more. Allowing registration of licensees assists the justice system in resolving disputes arising from copyright. Therefore the law should be amended to be inclusive of licensees. Id. See art. 3(1) and art 14

been created and marketed separately. As a result, the theory of divisibility of copyright was developed by owners with the approval of courts.<sup>65</sup>

The 1976 amendment copyright law of USA under section 201 (d) (1) (2) is explicitly addresses the theory of divisibility. In this regard, section 201 (d) (1) is discoursed that the copyright ownership can be transferred wholly or in part by the law, by succession or by conveyance. Also, in Section 201 (d) (2) any of exclusive rights that are enumerated under section 106 and any subcategory of them are permitted to separately transferred and separately owned. Furthermore, section 101 sanctions that copyright owners could be an owner of single exclusive rights that comprises copyright.<sup>66</sup>

In the French intellectual property code, provisions are found concerning divisibility and independence of economic rights. According to article L-131-4 authors has a right to assign their works separately or totally. In this regard, it can be side that the law is recognizing divisibility of economic rights.<sup>67</sup> Also, article L- 122-7 clarifies that the transfer of the right of reproduction does not in any means entails the transfer of performance right and vice versa. In such a case, economic rights have independent existences as the law provides as follows ‘...*Transfer of the right of performance shall not imply transfer of the right of reproduction. Transfer of the right of reproduction shall not imply transfer of the right of performance. Where a contract contains the complete transfer of either of the rights referred to in this Article, its effect shall be limited to the exploitation modes specified in the contract.*’

It is important to know whether the theory of divisibility and independence of economic rights recognized or not in the Ethiopian law. In the Ethiopian copyright proclamation there is explicit recognition of principle of divisibility of economic rights under article 23(1). In connection with this, the law provides that economic rights could be assigned or licenced in whole or in part.<sup>68</sup> Accordingly, economic right/s can be transferred totally in all forms of exploitation rights or partly in a specific modality of uses.

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<sup>65</sup> General Guide to The copyright Act of 1976, United States Copyright Office, The Library of Congress, September 1977, p. 5:1-5:8

<sup>66</sup> Ibid. see Section 101 “Copyright owner”, with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

<sup>68</sup> See supra note, article 23(1) of the Ethiopian copyright law.

Furthermore, such principle can be inferred from art 2(8) cumulative with art.7, art.23 (3), and, 24(1) (4) of the proclamation.

Article 2(8) of the proclamation defines copyright as ‘*economic right*’ that is subsisting to musical or other creative works.<sup>69</sup> In such definition a single economic right that is listed under article 7 of the proclamation go make up copyright. In compliance with the definition, article 7 of the proclamation under the title “economic rights/ ኢኮኖሚዊ መብቶች” is lists out nine exclusive and independent rights.<sup>70</sup> Accordingly, the cumulative reading of these two provisions is telling us that economic rights have divisible and independent existence.

Moreover, article 23 (3) of the copyright proclamation is for its part deals with the independence of economic rights in the transfer of ownership.<sup>71</sup> Art. 23(3) provides that “ [a]ny assignment or licensing of economic rights shall not be deemed to include assignment or license of any other right not explicitly refereed therein”. In this regards, the law is indicate that the transfer of one economic right does not carry with another economic right listed under article 7 of the proclamation. For instance, the transmission of the right of reproduction does not take along with the right of performance (See in this regard the article 2681 and 2682 of the civil code of Ethiopia). Therefore, economic rights have independent existence in the exploitation of copyright.

Also, the cumulative reading of article 23 (1) and 24(1) (4) dispels the transfer of ownership or the right of usage is limited to the right and the manner of uses specified in the contract.<sup>72</sup> So, the proclamation is being acquainted with the principle of divisibility and independence of economic rights. Therefore, the exclusive rights that are listed under article 7 and any subdivision of them can be transmitted and unconnectedly owned.

### **2.3.3 The total and the partial transfer of right**

As we can see above economic right/s can be transferred in whole or in part. But it is imperative to spectacle what does the whole transfer and the in part transfer mean in the Ethiopian law. It is important because the Amharic and the English version of article 23(1) have taken different stands.

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<sup>69</sup> Ibid. see art. 2(8)

<sup>70</sup> Id. Art 7 of copyright proclamation of ethiopia

<sup>71</sup> Id art 23(3)

<sup>72</sup> Id. Art 23(1), 24(1) and (4)

On the one hand, the English version of article 23 (1) provides that *economic rights* can be assigned or licenced to others completely as far as whole transfer concerned.<sup>73</sup> In this regards, the word economic rights refers to all exclusive rights that are listed under article seven. Besides, it gives a meaning that all rights enumerated under article seven are subjects to total transfer with all possible manner of uses.

Also, insofar as partial transfer concerned, the law gives a meaning that one or more of the entire exclusive rights are subjects to transfer. For instance according to the saying of the law, from among rights listed, the right of reproduction or the right of performance are matters of transfer. But the law does not suggest that partial transfers of rights are also subject to full or part transfer. It does not reflect whether manners of uses of a part right are also separately transferred or not.

The Amharic version, on the other hand, provides that *economic right* can be assigned or licenced to others entirely.<sup>74</sup> In this regard the word economic right discusses to a single exclusive right that is listed under article seven. Thus, it provides a connotation that only exclusive rights are focuses of whole transfer.

In this respects, the whole transfer can be the transfer of performance right with all forms of uses. Nevertheless the transfer of performance right for specific purpose is considered as partial transfer of economic right. In this regards, for instance, a contract for a stage performance of musical works at a certain hall is considered as in-part transfer of rights.

The Amharic version of the provision seems to take in to account the commercial reality of the sector and it is in the pecuniary interest of the authors. Besides, it is allow the author to exploit each economic rights and subsidiary right of it separately. For the most part, the provision is reflects the theory of independence and divisibility of economic rights noticeably.

Furthermore, the Amharic version of the law is appreciates the difference of each right in the exploitation of copyright. In this regard, the law is considering the dissimilarity of each right in terms of the concepts the characteristic and the legal nature.

The Amharic provision seems to recognize, for instances, that the publication, the performance and the broadcasting contracts are an autonomous contract in the field. Indeed, the publication

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<sup>73</sup> Id art 23(1)

<sup>74</sup> Id. See the Amharic version of article 23(1)

contract (contract for mechanical reproduction of right in case of music) is a contract made between the author and the publisher for reproduction of a given number of copies.<sup>75</sup> As it is unique in nature imposes obligation over the publisher to advertise distribute and sell copies of the work to the public at his account and risks.<sup>76</sup> Also the publisher is assumes obligation to pay remuneration proportional to the receipts derived from the sale of the copies or a lump sum. In addition, for a contract of mechanical reproduction of musical works the producer is assumes obligation to pay proportional remuneration.<sup>77</sup>

Likewise, broadcasting contract is also contract made between the author and the broadcasting organization to communicate the work through television or radio magnetic waves. The organization has the obligation to transmit the work and pay the author remuneration proportional or a lump sum to the profits of the sales of advertisings or other incomes. The transmission may be made by live performance by performers, a sound recording or an audio visual fixation.<sup>78</sup>

In addition, public performance contract is also contract made between the author and the impresario (event organizer). The latter agree to perform all or part of the work to the public by means of live performance or indirect performances (by using fixation, broadcast or transmission by cable network). The event organizer is assumes obligation to pay remuneration proportionate to the box office or similar receipts or lump sums.<sup>79</sup>

For all of those reasons, the Amharic version of the proclamation is takes in to account the commercial reality of the sector and it is advantageous to the author. But, it must to think through that whole transfer of economic rights is allowed in the spirit of the Amharic version of the law. Because, authors has autonomy of contract to transfer the entire rights they have.

The Amharic and the English version of article 23(2) is emphasize that the assignment and licencing of each economic rights to be made in written form. Subsequently, the law is presupposing the existence of multiplicity of written contracts for each right mentioned under

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<sup>75</sup> See supranote , delia lipzic p.290ff

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

article seven. This may be, because, each rights has independent nature and characteristics as mentioned above.

As far as written formality of publishing contract concerned, the civil code provide that the contract to be explicit.<sup>80</sup> In such a case it can be said that article 2674 of the civil code conforms to article 23(2) of the copyright proclamation. As a result, the publishing contract is must be concluded by a separate written agreement.

Pursuant to Article 24(1) & (4) the above mentioned rights that are supposed to transfer has to be either wholly or partially apart from that the specific transfer should be made in written form.<sup>81</sup> Moreover in principle the right and the manner of use have to be specifically mentioned in accordance with Article 24(1) cum with 24(4). However, if the contract fails to stipulate manner of the use the contract is exploited in a way that it would be possible for the parties' purpose.

The main goal of Article 24(1) & 24(4) is to interpret the contract restrictively. This has two fold implications. On the one hand it is clearly shows that the specific economic right has independent existence and characteristics.<sup>82</sup> On the other hand if there is a total transfer of the specific right it would serve as to demarcate the manner of use specified in the contract.<sup>83</sup> Instead, if the contract fails to envisage manner of use the contract is going to be interpreted restrictively according to the purpose of the grant. This is all to benefit the author from manner of uses that are not incorporated in the contract.

### **2.3.4 The New Method of Use and Others**

One of the conditions that copyright contracts can be interpreted as a result of rapid technological advancement is a new use of musical works. This process of interpretation varies according to the country's copyright policies. The common law legal system focuses solely on trade relations and believes that the legal consequences obtained through external expressions

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<sup>80</sup> See supra note , article 2674 of the Civil Code.

<sup>81</sup> Article 24(1) and (2) of the copyright proclamation of Ethiopia

<sup>82</sup> Claudy Colombet, *Major Principles of Copyright and Neighbouring rights in the world*, A comparative Law Approach, World Congress on copyright Teaching and Information, Paris, September 1987, p.67

<sup>83</sup> Ibid.

and actions of the parties.<sup>84</sup> As a result, contractual interpretations mainly focus on the words and actions of the parties but not the internal intention of them.<sup>85</sup>

On the contrary, the legitimate interpretation of civil law countries will be based on the intention of the parties. As a result, when the terms are interpreted, the judge considers the common and the hypothetical intention of the parties.<sup>86</sup>

Civil law countries prohibited unknown and unforeseeable method of exploitation of musical works by law. This is because it is beyond the intention of the author and that the exploiter neither negotiated nor paid to the author. Also, the exploiter should not be benefited from the windfall rights of new media. It is also because it is considered opposite to moral and the author could not evaluate the new media in terms of money. However, they can be transferred exceptionally when they are clearly stated and proportional payments are paid. This is clearly stated in French law article 131-6<sup>87</sup> and it is a good demo though.

In such countries, unless otherwise agreed, unknown and unforeseen methods are interpreted in favour of the author. It is to encourage creativity and to benefit authors taking in to account the unequal bargaining power of the parties.

In common law countries, parties can agree in any method either present or future since they have individual autonomy and freedom of contract. Accordingly, the right of individuals determined solely by the terms of the contract between the parties. In the USA the case between *Cohen v. Paramount pictures* and *Boosey and Hawkes music publishers v. Walt Disney* clearly shows the position of unforeseen and unknown methods of copyright contract.<sup>88</sup>

Both cases concluded that if the condition set out in the contract includes new uses, it must be interpreted for the benefit of the person to whom the right has been transferred. The author had to set a special provision for the general expression set out in the contract to benefit from the

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<sup>84</sup> see supra note , Stefan Vogenauer, p. 3-9

<sup>85</sup> ibid

<sup>86</sup> ibid

<sup>87</sup> See art 131-6 of the French intellectual property code

<sup>88</sup> See Herbert L. Cohen, dba Bizarre Music, Co., v. Paramount Pictures Corp., United States Court of Appeals Ninth Circuit. 845 F.2d 851 and see also the case between Boosey & Hawkes Music Publishers, LTD., v. The Walt Disney Company and Buena Vista Home Video, United States District Court, S.D. New York, 934 F. Supp. 119 (1996)

contract. In the absence of this if the author argues that the right has not been transferred, the burden of proof will be the author's own. Since the new use is beyond the intention of both parties, it is the right choice to interpret the contract according to the words expressed without trying to find their intention. Furthermore, it is not appropriate to interpret the contract in favor of the author that makes him benefited from a windfall right.

When we look at Ethiopian law, we find article 2679 of the publishing contract and article 1735 of the general contract law. In the case of publishing contracts, the publisher should use the method in a way that the parties intended or had intended. At the same time, the general contract law articulated that general terms should be considered with the intention of the parties. When we look at these laws, new uses that are beyond the intention of the author are not included and the author should not be deprived of his right through the interpretation of terms. As a result, the contract will be interpreted in favour of the author.

Concerning with method of use the copyright and neighbouring right proclamation under Article 24(4) prescribes that if contracting parties are failed to articulate manner of use it should be construed in a way to achieve common purpose. The implication of this law is to show that the transferee shouldn't exploit the work way more than the objective that has been intended in the contract. On the top of that the law has targeted to demarcate one manner of use from another manner of use. That is to say, that apart from common purpose of the parties it has intended to precludes other manner of uses. Common purpose could be inferred from usage, custom, expression of the parties, intention of the parties, previous existing business relationship and so on.

There are issues related to third parties in the transfer of musical works including sub-licensing and standing to sue. Besides, either the law or the nature of the transfer answers the issue of the right to transfer acquired rights or the right to institute the proceeding.<sup>89</sup> In this regard, countries may require the consent of the author for the transfer of musical works and the institution of proceedings as well.

Right holders are required their consent to exercise control over their rights and to ensure that their moral rights are respected. In Austria and German, exclusive licensees have a right to

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<sup>89</sup> Lucie Guilbault and et al, supra note 45, p.

transfer musical works to third parties with the consent of the author.<sup>90</sup> The author should not refuse his consent without good reason and contrary to good faith. Furthermore, if the author did not respond within three months, it will be considered as acceptance.<sup>91</sup> Since non-exclusive licenses are not transferable by their nature *Intuit persona* nature of the contract does not apply to it.<sup>92</sup> After the transfer, the subsequent licensee is bound by all obligations following from the contract. The person whose rights have been transferred will be held jointly and severally liable for the transfer of right without the consent of the author.<sup>93</sup>

In the United Kingdom, the assignee can transfer the right to third parties without the consent of the author. However, the exclusive licensee must require the consent of the author.<sup>94</sup> The Ethiopian law is problem fraught area as far as the right to transfer acquired right. In relation to these the Ethiopian copy right proclamation is failed to address a provision which states that licensees who are gotten right from right holders would pass to third parties. But this being so, assignees could pass the right to third parties. This can be understood from cumulative reading of Article 23(2) and the Article that prescribes who is the owner of the work that is 2(16). This is owing to the fact that assignment contract would have final effect of ownership. Whenever, a certain work is either licensed or assigned to third parties the law doesn't say anything about demanding consent from the author. This has an implication; the intention of the law maker seems that musical works could be disseminated freely to the public without restrictions. This has in effect has facilitated smooth economic transaction and could make musical works be exploited at liberty.

However, the transferors who are transferring right acquired from right holders could require the consent of right holders. This is because the right holder right moral and economic has accorded protection from the view point of both international conventions that is UDHR&ICESCR and domestic laws that is the FDRE constitution. Nevertheless, the consent should not be forbidden contrary of good faith and unreasonably.

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<sup>90</sup> In this regard, users of musical works should take in to account the personality of the author. This principle is called *the intuit personae* nature of the contract. See article 27(2) of Austria's copyright act, see art 33 of the German copyright law, see art 132-16 French intellectual property code and see also Delia Lipszyc, *supra* note 1, p. 284-285

<sup>91</sup> See article 27(2) of Austria's copyright act

<sup>92</sup> I. Fred Koenigsberg, *supra* note 108, Id. P. 284-285

<sup>93</sup> See, Spanish copyright law art. 49(2)

<sup>94</sup> Lucie Guilbault and et al, *supra* note 45, p. 131

While one of the arguments has an economic claim, the other has an ethical claim. But it is worthwhile to look at which of the two arguments will better protect the public interest. The users want to get profit by disseminating the work without any problem. Whereas, it is in the interest of the authors that their moral and economic interests to be protected. In this sense, the public will be benefited when the right of authors is protected. There are two reasons in this regard. First, while the author's interests are best protected by law, the public gets new creativities that allow him to develop in culture and science. Second, authors shall not deny the transfer of right in bad faith. Therefore, the economic transaction will not be harmed. As a result, the second argument seems plausible

### **2.3.5 Remuneration**

Remuneration is the purpose and objective of copyright law.<sup>95</sup> It assures the economic benefit of music authors and promotes creativity.<sup>96</sup> Copyright/remuneration right by itself is not an incentive but it has to be enforced by contract.<sup>97</sup> To get revenue and the work to be accessible; the right holder of musical works has to conclude contracts with users.<sup>98</sup> However, weak copyright protection, contract, and enforcement could not assure the benefit of authors.<sup>99</sup>

Remuneration is the point that the interest of music authors and users conflicted.<sup>100</sup> While users want to exploit musical works by minimum or no payment, authors require proportional/fair payment.<sup>101</sup> Besides, unequal bargaining power makes a risk in that author deprived of a fair share of the profit.<sup>102</sup> As a result, it is important to regulate remuneration in a copyright contract arrangement.<sup>103</sup>

Remuneration is either regulated by the law or left to the parties. Those countries that regulate remuneration give more protection to authors by intervening in freedom of contract. Among others, Countries like France Germany Portugal and Spain have regulated remuneration in their

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<sup>95</sup> Lucie Guilbault and et al, supra note 45, p. 33

<sup>96</sup> Richard Watt, Copyright and Contract Law: Economic Theory of Copyright Contracts, 18 *J. Intell. Prop. L.* 173 (2010), p. 175-186 Available at: <https://digitalcommons.law.uga.edu/jipl/vol18/iss1/6>

<sup>97</sup> Estelle Derclaye & Marcella Favale, Copyright and Contract Law: Regulating User Contracts: The State of the Art and a Research Agenda, 18 *J. Intell. Prop. L.* 65 (2010), p. 67-74 Available at: <https://digitalcommons.law.uga.edu/jipl/vol18/iss1/4>

<sup>98</sup> Ibid.

<sup>99</sup> See supra note 81

<sup>100</sup> Lucie Guilbault and et al, supra note 45, p. 33 and See Delia lipszyc, supra note 2, p. 273-277

<sup>101</sup> ibid

<sup>102</sup> ibid

<sup>103</sup> ibid

laws.<sup>104</sup> On the contrary, Ethiopia is one of the countries that left remuneration to the parties' agreement.<sup>105</sup>

Remuneration can be gained in two ways that are individual negotiating income and collective management income. Collective management is devised for incomes that are impossible to regulate in an individual capacity. Besides, collective management society may collect remuneration from public performance rights, broadcasting rights, and mechanical reproduction rights. As far as public performance concerned, the society may collect royalty especially from indirect performances. Indirect performances include playing discs and magnetic tapes at bars, discos, hotels, motels, and etc. Also, it includes the performance of musical works by broadcastings or by cable network provided for the public. Moreover, the society has a mandate to collect remuneration from the proceeds of advertisements for broadcastings of musical work through television or radio satellites. Furthermore, the society collects royalty from the sales of musical works from phonographic companies.

#### **2.3.5.1 Proportional payment**

Proportional payment is a payment that depends on the successes of the work in the market.<sup>106</sup> Besides, it is calculated and paid from the revenue generated. Accordingly, payment is uncertain at the beginning of dealings between parties to the contract.<sup>107</sup> Thereby, the author is associated with the work, the industry, and the user due to the reason of continuous royalty.<sup>108</sup>

Proportional payment is assumed as reasonable arrangement for the author and the user of the work. It is presumed that the parties will be benefited or suffered together from the success or the fail of the work respectively. It is, in principle, fairest modality of payment. However, it has weakness. On the one hand, setting a percentile remuneration at a very low rate satisfies the requirement of the law. For these reasons, authors could not get relief more than the expressions of the contract. On the other hand, laws do not provide the amount of the remuneration since no hard and fast rule that can be laid down.

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<sup>104</sup> Examples of countries that regulate remuneration in their laws are Denmark, Danish, Spain, Portugal, France, German, Belgium, Greece, Italy, Venezuela, etc.

<sup>105</sup> Examples of countries that did not regulate remuneration in their laws are Ireland, Luxembourg, Sweden, Finland, etc.

<sup>106</sup> *ibid*

<sup>107</sup> *ibid*

<sup>108</sup> *Id. P. 32*

In France, proportional payment is a mandatory principle that calculated based on the revenue obtained after tax.<sup>109</sup> As a result, non-regulation or violation of remuneration entails relative nullity. Since proportionality discovered taking in to account the sell, the user should provide statements, receipts, and evidence necessary.<sup>110</sup>

In Greek authors of musical works should be paid in percent that agreed with users. In this regard, as a general rule, article 32 (1) of the Greek law says ‘‘ [t]he fee payable to the author... relating to the transfer of all or part of the economic right... **shall be obligatorily determined as a percentage, agreed freely between the parties.**’’<sup>111</sup> On the other face, Greek provides percentages to some of the copyright product uses. Accordingly, among others<sup>112</sup>, the composer and the lyricist should get a minimum of 1 percent of the revenue for each view of the film synchronized by music.<sup>113</sup> Therefore, conditions contrary to the law and payments lower than the law prescribed makes the contract null and void.<sup>114</sup>

### **2.3.5.2 Lump Sum Payments and the Best Seller Clause**

In Greek and France, lump-sum payments are exceptions to proportional payments. The lump-sum payment is designed to protect the interest of authors from the effect of proportional payment.<sup>115</sup> The lump-sum payment, as opposed to proportional payment, is certain at the beginning of dealings between authors and users.<sup>116</sup> Hence, there are grounds to employ lump sum payments that are lack of means of supervision of proportional participation, the impracticability of calculation basis for proportional payment, the nature or condition of exploitation makes impossible the application of proportional payment, disproportionate of the

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<sup>109</sup> Intellectual property code of France, supra note 67, art L-131-4, 132-5 and L 132-25

<sup>110</sup> Ibid. see art L-132-13, see art L-132-21 and L-132-21

<sup>111</sup> Art. 32(1) of the Greek copyright law

<sup>112</sup> For example, for Broadcastings 15% will be paid for first broadcastings and 20% for subsequent broadcastings. In addition, Play writers should get 22% from state theaters and 10% from private theaters of the gross revenue. Likewise, for the contemporary translation of international play authors should get a minimum of 5% of the revenue. Also, the author should get a minimum of 10% of the revenue for literary works published in book form. See art. 33-37 of the Greek copyright law

<sup>113</sup> Id. Art. 37

<sup>114</sup> Id. Art 39

<sup>115</sup> Delia Lipszyc, supra note 1, p. 287-288

<sup>116</sup> Katrina stechova, supra note 121, p. 32

income and cost of calculation as well as disproportionate of the income and cost of supervision of proportional payments.<sup>117</sup>

In France, intellectual property code under article L-131-5, *'if the exploitation right has been assigned and the author suffers a prejudice of more than seven twelfths as a result of a burdensome contract or of insufficient advance estimates of the proceeds from the work may demand a review of price condition under the contract. Such demand may only be formulated where the work has been assigned against lump-sum remuneration. The burdensome contract shall be assessed taking into account the **overall exploitation** by the assignee of the works of the author who claims to have suffered prejudice.'*<sup>118</sup> This right to revision is called the bestseller clause. This best seller clause or the right to revision is entitles the author to revise the inequality of payments made to the author and the user in case of lump sum payment.

The Bestseller clause is not found in Greek copyright law. Nonetheless, the person suffered damage may require payment on the ground of **public order and good moral** by general contract law. In the meantime, Finland also has no best-seller clause but she governs **unfair payments by the civil code**.

In the same way, countries like Venezuela Spain and Nordic countries put a general compulsory rule that makes proportional payment principle while lump sum payment an exception.<sup>119</sup>

On the other hand, in Germany, equitable or fair remuneration has to be paid to musical authors.<sup>120</sup> Even though it is rebuttable, contractually agreed payment is presumed fair.<sup>121</sup> But if the agreed payments are unfair or disproportionate the author can ask revision of the price condition. Nonetheless, if contracts fail to provide payments; it will be paid according to collective management.

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<sup>117</sup> Intellectual property code of France, supra note 67, art L. 131-4 and Greek copyright law, supra note, art. 32 (1) (a)(b)(c)

<sup>118</sup> Id., art L. 131-5

<sup>119</sup> Delia Lipszyc, supra note 1, p. 287

<sup>120</sup> Lucie Guilbault and et al, supra note 45, p. 122-124

<sup>121</sup> See The German copyright law, art. 32(2)

Moreover, prices set by collective management societies are presumed fair. So collectively agreed prices are irrefutable and not subject to revision.<sup>122</sup> On the other hand, if there are no collectively agreed on prices, the case will be brought to arbitration.<sup>123</sup>

In the meantime, the right to revision is considered as a guarantee to fair payment.<sup>124</sup> Even though fair or equitable remuneration is subject to interpretation<sup>125</sup>, fair payments are evaluated in terms of **the use, duration, frequency, and scope of the work granted** as well as **other circumstances** that are **fair and customary in the business relationship**.<sup>126</sup> Besides, the evaluation of fairness considers the day the contract is concluded.<sup>127</sup>

In Ethiopia proportional payment is provided by the bylaw of the copyright and neighbouring right collective management society of Ethiopia (CNRCMSE). The regulation entitles the CNRCMSE to collect royalty from registered content and telecom service providers. The CNRCMSE collects the remuneration from musical works that are exploited in the form of ring tone and caller ring back tones. In such a case the telecom and content providers are get a 40 % and 60 % profit from gross revenue correspondingly.

The CNRCMSE distributes remaining payment to right holders in an equitable manner. Accordingly, the society is distributing royalty share to author's composers and lyricists 20 percent each. While, the performers and arranger will get 15 percent each, the producers will have a 10 percent share from the total earning.

The administrative cost of CNRCMSE is deducted from the gross revenue of the exploitation of musical works according to article 1 and 4 of the regulation.

Though, it is for one form of exploitation of musical work- ring tone- the regulation recognizes the proportional payment to be made. But the remaining rights of uses such as performance rights, mechanical reproduction rights, broadcastings, synchronizations are not endorsed to be

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<sup>122</sup> Id. art. 32(2) and art 36

<sup>123</sup> See The German copyright law art 36. Besides, in Finland and Denmark price paid according to collective management societies. If there is no price setted by collective management societies; it will be solved by mediation in Finland and by the ministry of culture in Denmark.

<sup>124</sup> Id. German copyright law art 32(2)

<sup>125</sup> Since the concept is susceptible to interpretation, fair compensation may not always serve the author.

<sup>126</sup> Note 24, Id. art. 32(2)

<sup>127</sup> See German copyright law art 32(2)

paid proportionally in Ethiopian law. Accordingly, remuneration is left to the parties that are presumed unequal in negotiating contracts.

## Chapter Three

### The practical challenge of Licensing and assignment of musical works in Ethiopia

#### 3.1 Observance of Form

The law stipulates that Copyright contracts must be in writing. This is because, among others, they are supposed to protect the interest of the author. Since copyright contracts are for a long time, it protects the author from surprise and collapse of memory of their own and witness. At the same time, it encourages a reconsidered negotiation. That's why written formality is, by law, the precondition for the existence and the content of the contract.

According to the questioner collected, a total of one thousand one hundred and thirty-four lyrics and melodies were transferred from *Meskerem* 2007 to *Tir* 2012. Of these, six hundred seventeen's are melodies and five hundred seventeen's are lyrics. Besides, nine hundred and eleven of the total lyrics and melodies are transferred orally.<sup>128</sup> The remaining two hundred and twenty-three of the work transferred in written form. As is formulated in percent, oral transfer accounts for 80.33% and 19.66% written.

The majority of transfers of poems and melodies are not following the law. As a result, oral contracts are more likely to cause misunderstandings between authors and users. This is because the parties do not put their ideas and possible problems in advance. On the other hand, it is because the ownership of the work is uncertain and unreliable. As a result, there may be situations in which authors lose out on their economic rights. It also creates an opportunity for users to thrive in the works of others. Besides, eighty percent of the oral agreements do not have a document to prove the existence and the content of the contract.

The reasons why copyright contract terms are in the paper vary according to the author's right systems and the copyright systems. According to Ethiopian law, any author or user must provide

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<sup>128</sup> Most of the time, it is not done in writing forms because the buyer has many choices. Consequently, the buyers will not be willing to buy such works on paper even though the authors require them. Besides, the authors are forced to accept the buyer's conditions since they are needy. Moreover, in some other instances, the buyers are named as an author in the album. As a result, they become the owner of the work; and the real authors leave the market totally by transferring the whole right they had in that specific work. Interview with Ato Dawit Yefiru, President of musician association, Musician Association, Addis Ababa, 3:20-4:25, 05/05/2012 E.C and interview with Ato Elesh Fekadu, Music Teacher, Jimma university music school, At Yared music school, 11/04/2011 E.C

a written contract for the validity of the agreement. Consequently, any party requesting the right should make available written evidence. On the contrary, the one who alleges that the obligation is invalid for lack of written evidence has to prove it. Besides, article 1808 (2) and 2003 of the civil code and article 23 (2) of the copyright law provided in support of this. Hence, it relates to copyright countries' stand that any party may void the contract that is not in writing.

In copyright countries, written formality is not intended to benefit either the author or the user. Its focus is to ensure smooth economic transactions and benefiting the public by protecting trade. Therefore, for the sake of the trade, any party will have the power to invalidation when the written requirement is not met.

In the Roman-German system, the reason for rights transferred in written form is to protect the author. Therefore, the author has the right to prove the existence or the non-existence of the contract in any way. Thus the author would not be challenged by the non-fulfillment of the written requirement proving the existence of the contract. However, the person to whom the right has been granted is obliged to provide written evidence to show his rights. Consequently, the author may object to the non-fulfillment of the requirement. This is because a law to benefit the author is not to hurt back the creator.

Article 23 to 25 of the copyright law restricts the transfer of rights to the benefit of the author. In particular, Article 23(2) and 24 (1) seems to be intended to benefit the author by restricting freedom of form and object of the contract. On the one hand, it has established a written requirement for border transfer of copyright should not be granted. On the other hand, it is to allow the author to control and protect his economic and moral rights. As a result, the law could be said that it has a Roman-Germanic foundation.

Consistent with the Roman-Germanic foundation, the author may prove the existence or non-existence of the contract using writings<sup>129</sup>, witnesses, presumptions, and oath. Contrary to this, users should provide written documentation to show the validity of the agreement since the very

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<sup>129</sup> The author may provide a certificate of registration according to article 11 of the proclamation that regulates the registration of copyright. See supra note 33, art 11

purpose of licensing and assignment contracts is to make suit-free exploitation of musical works.<sup>130</sup>

According to article 2003 of the civil code, a contract that has to be in written form shall be proved by the said document.<sup>131</sup> In light of this law, it is understandable that both the author and the user to whom the work transferred can challenge the validity of the contract.<sup>132</sup> So, the written form seems to be intended to ensure smooth economic transactions for the benefit of the public rather than the author.

Contrariwise, article 23(2-3) cumulative with Art. 24 (1) is designed to protect authors from the global transfer of rights that prejudiced economic interests. Moreover, it is to allow the author to identify, control, manage, and exploit rights exhaustively and effectively. From this point of view, the written formality is said to be made for the interest of the author. Therefore, one may argue that nullity is invoked by the author only as in the case of Greece copyright law.<sup>133</sup>

## **3.2 The market and the Proceeds**

### **3.2.1 The market structure of musical works**

In Ethiopia, there is an informal market structure of musical work.<sup>134</sup> The data gathered from the broadcasting agency shows that remuneration hasn't been paid for right holders.<sup>135</sup> As per Abera Wondossen who is communication director of the broadcasts agency ‘‘ Ever since I have never seen a right holder got a royalty for their work from any Television or radio stations in Ethiopia’’ This being so there are two alternative courses of actions for right holders these are either enforcement of their right through collective management society or court action.

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<sup>130</sup> Alexander I. Poltorak and Paul J. Lerner, *supra* note 7, p. 1

<sup>131</sup> Article 2003 provides an exception to prove the completion of contracts by other means whenever the contract is destroyed, stolen, or lost. See article 2003 of the civil code.

<sup>132</sup> See *supra* note 23, Article 2001(1)(2)

<sup>133</sup> In Greece copyright law, copyright contracts will be null and void unless otherwise they are concluded in writing form. Besides, the nullity of such contract is invoked by the author. See, Greece copyright law article 14

<sup>134</sup> Interview with Tewdross Mosisa, who is the head of the copyright and neighbouring rights collective management society of Ethiopia (CNCMSE) on December 03, 2020, Addis Ababa at 2:00 pm

<sup>135</sup> Interview with Dawit Yefru, who is the president of Musician Association of Ethiopia, on December 05 Addis Abeba, at 2:30 pm

Moreover, the data gathered from Ebs, Fana, Ebc, and Sheger radio stations also showed that remuneration hasn't been paid for right holders. The practice in the above-mentioned stations showed that there is a form which is prepared by the stations. The form has conditions by which works of right holders will be disseminated so long as they are not remunerated. The right holders were submitted to this kind of onerous contract with the motive of being famous.<sup>136</sup> This implies that there is unequal bargaining power between the right holders and the broadcasting organizations. This unequal bargaining power is attributed to the fact that lesser number of broadcasting agencies and a vast amount of musical works. On top of that right holders are dependent on the broadcasting organization for the dissemination of their work since they are not capable enough to broadcast the works done so far.

With respect to phonogram producers currently, there is a hell of a lot of publishers left the market owing to the fact that copyright infringement.<sup>137</sup> This infringement is done through a flash disk, memory card and ease of transferring files from one mobile to another and etc. Hence, the right holders' work is going to be sold through an informal market structure.<sup>138</sup> The music industry was getting worse to the point that musical works were sold through the supermarket. This is due to the fact that both producers and publishers were out of the market and engaged in other business. This would in effect make musicians hopeless to the point that they would give their work freely to hotels, DJs, and mass media and after gaining popularity it would create them a suitable environment to work on upcoming concerts. Under the current system, the musicians by their own risk and account record the music and finally disseminate it to the public. Besides, the musicians bought the lyrics and the melody and arranged it in a way they like so that it could be produced in a number of copies. Not only that the musicians are advertising, distributing, and sailing the work under whatever kind of challenges brought to them.<sup>139</sup>

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<sup>136</sup> Interview with Samuel Debebe who is director and producer of Ebs Tv. On December 6, Addis Ababa, at 3:00 pm

Interview with Ashenafi Jimma who is managing director at Fana broadcasting corporation on December 6, Addis Ababa, at 4:00 pm

Interview with Wegene Alemayehu, who is a producer at EBC on December 07, Addis Abeba, at 1:00 pm

Interview with Eshete Assefa, who is editor in chief at Sheger Radio on December 08, Addis Ababa, at 11:00 am

<sup>137</sup> Wondossen Belete & Seyoum Tadesse, The Economic Contribution of Copyright industry in Ethiopia, Wipo publication, (2014) p, 62

<sup>138</sup> Interview with Hailemichael Getenet (Haile roots), who is head of producers association and co-owner of awetar application on December 9, Addis Ababa, at 2:00 pm

<sup>139</sup> Ibid

Unless otherwise, the musician created the lyrics and the melody he/she may buy from another author by paying a lump sum amount for the author.<sup>140</sup> To prove the above-mentioned assertions there are 10 counterexamples of contracts that show the modality of payment is a lump sum. Furthermore, pursuant to the interviews conducted by the researcher all of the interviewees confirmed the fact that the modality of payment is a lump sum.<sup>141</sup>

With regard to the Audio-visual industry as compared with the above-mentioned broadcasting and mechanical reproduction sectors, this industry is more organized and formal. Formal in the sense those audio-visual producers are rampant. This industry is also undertaking cinematographic, video graphic, and television broadcasting audio-visual works. Practically there are agreements between the producers and musicians so that their music serves as a soundtrack for a certain movie.<sup>142</sup> As per Ato Hailaye “ As far as payment of soundtracks which are used for a certain movie is concerned it is paid onetime fee. But the very problem that is raised here is that since the payment is lump sum musicians are not supposed to ask for payment whenever the movie is projected to the cinema halls to the public. The same goes for the movies that are disseminated either through youtube or any other channel the musicians are barred from asking for payment. And once a movie outcasted from cinema halls the producer transfer the movie to audio-visual publishers. These publishers transmit the movie via cd to the public. Alternatively, they would sell to EBS around 15,000(fifteen thousand) or they would upload to the YouTube channels of their own or others in return for payment. Apart from that these audio-visual publishers are making accessible the movies to rental houses (English movie rental houses). In effect, these rental houses distribute the copy of the movie through flash discs or memory sticks. In all these processes the authors are denied to get any remuneration.’’.

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<sup>140</sup> Interview with Fiker Addis Nekatebeb , Who is chairwomen of performers association, On Nov 13, Addis Abeba, at 11:00 pm

<sup>141</sup> The contract between Surafel Abebe and Dawit Tsige, contracts for the sales of melody, 09/11/ 2010, and the contract between Natnael Germachew and Dawit Tsegi, contracts for the sales of lyrics, 21/11/2009, The contract between Abebe Birhany and Seid Nuru Hussen, contracts for the sale of melody and lyrics, 05/12/2000 and The contract between Semahegn Belew and Seid Nuru Hussen, contracts for the sale of melody and lyrics, 18/12/2000, the contract between Kerim Ali and Mesay Tefera, contracts for the sale of melody, *Tir* 03/2009, see the contract between Eliyas Gezachew and Gossaye Kellemu, contracts for the sale of melody, 15/04/2011, see the contracts between Wendesen Yehub and BIsrat Surafel, contracts for the sale of lyrics, 03/08/2010, see the contracts between Sherif Mohamed and Hamelmal Abate, contracts for the sale of melody, Meskerem 10/2012, see the contracts between Alemayehu Demeke and Gossaye Tesfaye, contracts for the sale of lyrics, 03/04/2011

<sup>142</sup> Interview with Ato Nassir Nureshed, ye copyright ena yemahbersboch ewket tebka ena lemat directorate at Oct 2, Addis Abeba, at 9:30 pm

In relation to the public performance contract, in the normal course of things public performance contract is done between right holders and Impresario (event organizers) with a view to show live performance and indirect performance. Direct performance implies that live performance of musical works in a certain hall, lounge, or any place which is conducive to show such kind of event. The performance has to be out of the strict private or domestic circle. <sup>143</sup>

On the other hand, indirect performance presupposes the transmission of fixed work through DVD players, cable networks, broadcastings and etc. In all these the event organizer is supposed to pay proportional or lump sum payment for the right holders. The performance contract has got ephemeral nature, that is to say, the contract is done in a certain place for a short period of time. <sup>144</sup>

Practically in Ethiopia, public performances are held to the public directly or indirectly. <sup>145</sup> Concerning direct performance, the works of right holders are performed domestically or internationally. Internationally the performance is made mostly in Arabian Countries, Europe, America, and Asian countries. As regards, fees related to room reservations, plane tickets, food, and visa are covered by promoters. <sup>146</sup> Whereas, the payment related to the performance is covered per one stage performance to the musician. But the amount of performance is negotiated depending on the popularity of the singer or the band. After one payment is made to the musicians, all revenues which are collected from the event are possessed by the promoters. With all these processes the lyricist, the composers, and the arrangers even the producers are precluded from getting the proceeds of their work. <sup>147</sup> While, as far as domestic performances are concerned live performances are displayed to the public through event organizers and night clubs. Within night clubs it could be done in AV lounge, alona, fidel , mams kitchen , Yod Abyssinia, 2000 habesha, vardas, lux, chaka bunna , Ramada, revolution, Wube berha, monarch, palmy, Mimis Addis etc. Despite the fact that the payment on these night clubs are made either monthly or per stage those who are popular singers earn way more than others. <sup>148</sup>

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<sup>143</sup> Delia Lipszyc, Copyright and Neighbouring right, UNESCO publishing's, 1999, p. 317

<sup>144</sup> Ibid

<sup>145</sup> Cited above at Note 134

<sup>146</sup> Ibid

<sup>147</sup> Ibid

<sup>148</sup> Ibid

Regarding event organizers, they undertake the work irregularly with a motive to transport musicians worldwide in return for money and to take advantage of the sponsorship. This being so these event organizers would pay to the musician per stage and they exclude right holders like lyricist, melodist, arrangers, and producers.<sup>149</sup>

With respect to the indirect performance of fixed works could be performed in hotels, nightclubs, airlines, and media, etc. In spite of the fact these works could be advantageous for the above-mentioned organs; it doesn't have any benefit to the right holders. This suggests that there is pathetic enforcement of copyrights. Even though the proclamation 877/ 2005 is coming into existence to establish collective management society there is no regulation to enforce this enabling act but also there is no guideline to implement it. To elaborate the above-mentioned assertion Pursuant to Tewdross Mosisa " There needs to be expertise manpower so as to study the area since it is bulky in nature. In addition, the collective management society is not strong enough to impose royalty which is collected from public performance and it has also faced a budget problem. Therefore the primary goal nowadays is concentrated on collecting royalty from giant corporations like airlines, telecommunication, and broadcasting organizations. And in the near future, this collective management society has an ambition towards the collection of royalties from public performance.

### **3.2.2 How regulation of remuneration counterproductive to the weaker party**

Compulsory commensurable payment is must be provided by the law for the advantage of the right holders. To say so as far as broadcastings are concerned, right holders are financially incapable to broadcast their works. As a consequence, to disseminate their work they are supposed to deliver their works to giant broadcasting organizations. On the polar opposite the broadcasting agencies are not willing to pay to right holders so that they are disseminating the work to the public for commercial purposes. The right holders on their part are expected to fill the contract which is burdensomely brought by broadcasting agencies.

In other words, since there are a vast amount of musical works on one hand and a small number of broadcasting organizations, on the other hand, make right holders have unequal bargaining power with their counterparts. This unequal bargaining power has prejudicial and risky for right

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<sup>149</sup> Ibid

holders while it is advantageous and profitable for broadcasting organizations. This implies that so long as right holders give their work freely it gives broadcasting agencies ready to disseminate. Nevertheless, if the right holders are offer payment for would be disseminated work broadcasting agencies are not willing to disseminate the work. From here one can cognizant of the fact that broadcasting agencies have ample power to disseminate or not to disseminate the work though right holders are settled with broadcasting agencies to disseminate their work freely. This has a detrimental effect on society to get quality of musical works and it discourages creativity. Hence, as long as the broadcasting agencies exploit the work of right holders there needs to be a mechanism that dictates these unequal negotiating parties to balance and compromise their power. Therefore the law has to come up with a scheme that provides proportional payment for right holders.

In relation to the Audio-visual industry, they have in common with broadcasting organizations in that there is also unequal bargaining power as a result the beneficiaries here also are producers. The proceeds of sale which are attained from cinema spectators and youtube viewers are left out right holders. In association here to reveal the Greek experience in a case where there is a soundtrack for certain film onlookers are expected to pay a 1 % fee for a synchronization right. In Ethiopia, the audio-visual industry providing proportional payment is beneficial to right holders.

In connection with public performance right and mechanical reproduction right the law has to pay for arrangements by which proportional payment is accorded to the right holders. When one examines public performance right the organ which is in charge of enforcing public performance right is collective management society. Nonetheless, the problem here is that the institution by itself is an infant in the first place, it also lacked skilled manpower and has budgetary problem moreover, and it doesn't have a proper guideline as a result right holders right is at stake. With respect to mechanical reproduction right holders should be advantageous from the proceeds of the sale of a copy of musical works. To sum up, the law has to provide in an explicit manner that right holders of public performance right and mechanical reproduction right has to get proportional payment from their work.

### **3.2.3 The Notion of 'Awtar' Application**

Currently, there is an ‘*Awtar*’ application which is launched by Artist Elias Melka, Artist Haile Root, Artist Jonny Raga, and Artist Dawit Negussie, it is a sort of private limited company. It is a system whereby users can go through favorite music easily. This application is intended to halt the deep-rooted problems and out-dated market system that has been experienced in the earlier arrangement.<sup>150</sup>

Furthermore, this system has come up with a mechanism whereby music professionals are benefited from a single or album sale. The system is done in collaboration with Ethio-telecom. The payment is arranged through hello cash, amole Cbe, Ebirr, and Abyssinia Bank. In return, Ethio-telecom got 30% of the sale whereas, right holders got 54% and the rest 16% is bestowed to service providers. From 54% which is bequeathed for arrangers, melodists, lyricist, producers, and performers got 20 % each.<sup>151</sup> The payment which is employed by the ‘*Awtar*’ application is proportional. This proportional payment is beneficial for right holders. The fact of being advantageous in terms of payment is also promoting creativity. This in turn has an effect on professionals of musical works to boost them up to deliver the quality of work. In the final analysis, the public is getting quality work. This private limited company comes to awaken up the law in a way that it upholds a proportional payment mechanism for the interest of the right holders.

As Yohannes Bekele pointed out that practically there is the absence of music stores that accorded musical works to the public. In other words, anyone couldn’t have a problem while accessing musical works which are enrolled in ‘*Awtar*’ platform any place and any time. In this regard, ‘*Awtar*’ platform has endorsed a mechanism whereby the public can access musical works easily. Furthermore, whenever musicians enrolled works in ‘*Awtar*’ application the system would give credit to the lyricist, melodist, and arrangers, and so on. This would in effect give detailed figures as to the titleholder of the work and on the other, it offers right holders to safeguard their moral right. On top of that after the coming into the scene ‘*Awtar*’ application, there were 70 newly coming albums where brought to the music store in the ‘*Awtar*’ application. Moreover, in the history of the Ethiopian music industry never have seen a single piece of music sold to the public but after the coming into existence of ‘*Awtar*’ musicians were entitled to get

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<sup>150</sup> Jonny Raga, who is co-founder of *awtar* application, on December 02 Addis Ababa, at 3:00pm

<sup>151</sup> Cited Above at Note 6

the payment of sale of single music. ‘Awtar’ has paid for both Dan Admassu and Wendi mak 60,000 per single music. It has also paid 75,000 birr for Jahlud for 2 single music’s.

### 3.4 New use

One of the conditions for the interpretation of the contract is the creation of a new manner of use through rapid technological advancements.<sup>152</sup>

Except for two contracts<sup>153</sup>, the entire contract collected does not mention the manner of use (see annexed).<sup>154</sup> Even though the parties fail, the law puts a solution that the manner discerns by the necessary purpose of the grant parties had.<sup>155</sup> However, in the remaining contracts, the exploiter has entitled to use the work in whatever manner. Accordingly, Article two of the contract reads as follows " ‘... [የዜማ እና የግጥም] ስራውን በፈለገው መልኩ የማቀናበር፣ የማሳተፍ፣ ወደ ሌላ ዐይነት ይዘት የመቀየር፣ የመክወን፣ የመሸጥ...’<sup>156</sup> This contract contains ambiguous and general term that is ‘...በፈለገው መልኩ...’ Besides, the term implies the present and future manner of uses.

Such kinds of clauses may create disputes between contracting parties about future uses and bring them to the court. The word creates the dichotomy of intention and expression rule of interpretation. As in the case of the former only the author is bind by his free will. Whereas, the latter, a rule has given priority to the meaning of the contract. For instance, after the conclusion of the contract, if a technologically invented manner of use has hashed out the parties would use it at the expense of them. Where there is a clause under the contract that includes an unknown manner of use the assignee or the transferee according to the terms of the contract would make operational in his favor. On the contrary, the right holder on his part may argue that this clause wouldn’t be interpreted in a way to uphold newly mode of use and he may prohibit the assignee to not use it in such away. Therefore, there comes the conflict of interest and the matter referred to the court of law.

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<sup>152</sup> Such manner of uses will get interpretation according to the philosophy of the legal system. While common law is based on the words of the contract, the civil law countries steaks with the intention of the parties. Besides, common law countries give protection to the trade through the interpretation of the contract. However, civil law countries give due emphasis on the interest of the author. Hussein Ahmed Tura, Interpretation of contracts under the Ethiopian civil code: subjective or objective method?, Addis Ababa University students Law Review, Vol. 2, No. 1, July 2011, p. 72-77

<sup>153</sup> See supra note 154

<sup>154</sup> See supra note 176

<sup>155</sup> See the Ethiopian copyright law, supra note 4, art 24(4)

<sup>156</sup> See supra note 154

In such a case, the court is supposed to interpret the contract. Besides, since the copyright law is silent, the court should resort to the civil code from article 1732-1739 to interpret the contract. Accordingly, it has to look at the parties' intention<sup>157</sup> as to whether or not unknown use will be included. To do so, the court is required to look into the general conduct of the parties before and after the contract.<sup>158</sup> Moreover, the court must take into consideration the parties' intentions based on good faith and customary practices.<sup>159</sup> In the case at hand, the parties have no common intention since the manner of exploitation is unknown. In the absence of parties' intention and general conduct, the court finds it difficult to interpret. Besides, if the court interprets the contract in favor of the user, the author's right will be at stake. Furthermore, the user may object, if the court interprets the contract in favor of the author. In this case, it is difficult to see how the issue should be resolved. In this regard, neither the civil code nor the copyright law provides a solution for such kinds of issues.

While one of the arguments more favors the author, the second favors the user. On the one hand, since the purpose of copyright law, is to protect the author; the contract should be interpreted in favor of the author. This because the author encouraged to create new musical works. Also, the author is not negotiated and has not received payments for the said manner of use. Besides, the user should not have access to the right he does not deserve. Moreover, the judge could not create the right to the user by interpreting the contract beyond the principles of interpretation. Hence, it is beyond the intention of the parties.

On the other hand, the contract has to be interpreted according to the meaning it has but not the parties. Though the contract term is broad, the user is entitled to future forms of exploitation. This is for the reason that the contract terms are binding to the relationships of the parties. Since the terms reasonably include the use, it has to be interpreted in favor of the user. But the author could prohibit such transfer by providing an exception to the contract over future forms of exploitation. If he fails to set exceptions, it will be considered a deliberate transfer of the future manner of use as he presumed knows the fast technological advancement. If this is the case the author should not benefit from windfall right by a narrow interpretation of the copyright contract.

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<sup>157</sup> As Ethiopia transplants, the civil code from the French law follows subjective rules of interpretation. see the Ethiopian civil code, supra note 23, art 1732-1739 and see Hussein Ahmed Tura, supra note 205, p. 78, 80

<sup>158</sup> Id. 1734

<sup>159</sup> Id. 1747

In Ethiopian copyright law, unknown and unforeseen uses of musical works have to be regulated<sup>160</sup> by law to prevent such kinds of possible disputes. Besides, the law should be useful to the author for two reasons. First, since the laws governing the exploitation of economic rights are to benefit authors, unknown and unforeseen uses must also be interpreted in his favor. Second, it is necessary to make the new law comply with the principles of interpretation under the civil code.

### 3.5 The ‘Territory’ clause in copyright contracts.

The contracts collected do not set out the place where the rights transferred are applied.<sup>161</sup> Besides, as Moges Teka said, the author most of the time does not negotiate about territory.<sup>162</sup> As a result, users exploited the work anywhere in the world.<sup>163</sup> Most of the time, for example, the author's musical works are performed in Europe, America, Asia, and Arabic countries.<sup>164</sup> More than just cassettes/CD sales, revenue is obtained by concerts.<sup>165</sup> But they will not be involved in the revenue of the concert.<sup>166</sup>

As Yelma Gebereab said, an Epherem Tamirus album that is called “ሰው ነው መሰረቱ” was published and sold in America without permission by the singer himself. And he was requiring 25000 birr’s for each lyric and closed the dispute by mediation (*Shimgelina*).<sup>167</sup> But what is the solution for those who cannot handle their disputes through mediation?

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<sup>160</sup> Countries put provisions to protect the interest of authors in two ways. One, they put total prohibition of the manner of uses not existed or unknown at the time of the contract made. Two, they allow users to exploit such works by a proportional payment. See Intellectual property code of France, supra note 37, art L. 131-6

<sup>161</sup> See supra note 155, 164, 180

<sup>162</sup> Interview with Moges Teka, supra note 177 and Interview with, Samuel Admasu, Music teacher, Addis Ababa university yared music school, Addis ababa, 8:30 9:30, 2/03/2011

<sup>163</sup> For example, some of the Ethiopian performers collect royalties from *Ethiopic Amharic Collection albums* that are prepared by Joseph Francis Falsetto. But the authors are set-asides from the sales of the collections. Interview with Ato Dawit Yefiru, supra note 150

<sup>164</sup> Interview with fikirdiss Nekatibeb, chairperson of performers Association, Addis Ababa, 10:00-11:20, 15/01/2011

<sup>165</sup> As Yelema Gebereab said, he is not benefited from concerts. Once he sold the lyric in lump sums, the concert earning is to the publisher or the performer. Interview with, Yelma Gbereab, supra note 173

<sup>166</sup> Interview with Moges Teka, supra note 177

<sup>167</sup> Interview with, Yelma Gbereab, supra note 173

In this regard, there is no legal provision to cover such an issue in Ethiopian copyright law.<sup>168</sup> The gap of this law opens the way for copyright infringements. As a result conflicts and disagreements may arise. The courts also have no way of resolving such disputes.

The non-provision of territorial scope in the law or the contract has many problems. The silence of the law gives the border right to the users. They may use the work widely at the expense of the creative author. Authors are likely to be a spectator of their economic rights abuses simply because there is no legal cover. If this is the case authors will suffer economic and moral damage. This is morally inappropriate (which violates social etiquette).

Creators have to get adequate protection by law to get more creative works. This protection, ultimately, promotes the growth of the copyright industry and facilitates the development of the country.

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<sup>168</sup> As Judge Abdisa Dushray said, territory shows the marketplace of musical works. So, the no provision of the clause in the law and the contract has a disadvantage to the authors. Interview with Ato Abdisa Dashure, supra note 180

### **3.6 Conclusion**

Creators of musical works have economic and moral interests as far as the creation they have put on a show is concerned. Accordingly, the exploitation of musical works has to be enforced through a strong system of copyright.

In Ethiopia as far as copyright law is concerned the governing law is Proclamation no 410/2004 and amendment proclamation no 872/2014. However, the proclamations have failed to comprehend, provisions that safeguard the author's interest. Concerning remuneration which is the very object of the contract is concerned the law doesn't say anything. Regarding regulation of unfair payment, there is no best-seller clause in Ethiopia copyright law. Although the payment is prejudicial for the author it is predictable to bind by the terms of the contract.

Moreover, contracts done with broadcasting organizations are shown unequal bargaining power. This unequal bargaining power is attributed to the fact that there are no rules that make unequal equal. The same holds for phonogram producers, impresario, and audio-visual producers.

Since the proclamation is failed to address the abovementioned issues authors nowadays were not significantly benefited from their work. Given fact that the proclamation has a provision on compulsory contract provision, it doesn't take into account unequal negotiating powers between authors and users of the work. This unequal bargaining power is attributed to the fact that imbalance of the supply of the work and the demand of the work. Therefore, authors are at risk to assume the effect of bad contractual terms.

The law prescribed that copyright contracts of licensing and assignment are supposed to be made through in written formality. However, practically this is not perceived by contracting parties. Subsequently, the manner of use, duration of use, and territory of use left wide-open in that it prejudices the author's interest. Hence, currently, lyrics and melodies are comprehensively transferred through oral agreements. On the top of that, the law is failed to articulate provisions on fate of unforeseen and unknown methods of exploitation of musical works.

### **Recommendation**

Here are a couple of recommendations suggested by the writer.

- In principle, the Ethiopian copyright law doesn't propose proportional payment. Furthermore, in circumstances where lump sum payment is rewarded and the payment is not fair, there is no a mechanism that rectify the payment. Accordingly the law should come up with provisions that accord proportional payment. Moreover, the copyright law should be improved in a way to accommodate best seller clause.
- The collective management society has provisions to effect payments in case where certain music is used as a ring tone. However, other rights of the authors like mechanical reproduction, public performance, broadcasting right, and synchronization do not have provisions that prescribe proportional payment. Hence, the copyright law should have provisions that articulate other rights of the right holder should get proportional payment.
- Concerning with broadcasting agencies, since there is unequal negotiating power between right holders and broadcasting agencies there has to be clear provisions that stipulate broadcasting agencies to pay back fees for right holders from payments that would be accrued out of advertisings and other related fees. Apart from that there needs to be detailed provisions that insists on proportional payment for right holders.
- Regarding synchronizations are concerned it is prudent to have provisions that demands proportional payment for right holders. In this regard also the collective management society should act in a way that creates a room for that compromises unequal negotiating powers.
- Concerning phonogram producers, it is worthwhile, to construct platform like that of Awtar application. There should be a room that encompasses EIPO, public prosecutors, courts and police to work together to investigate copy right infringement and this in effect promote investors to come in in the market. Moreover, there has to be legal frame work that effect proportional payment for mechanical reproduction of musical works.
- With regard to collective management society is concerned collective management should strengthen its performance through finance , appointing experts who have expertise on the subject matter and there needs to have strong laws that enforce proportional payment.

- It is pointed out the Ethiopian copyright law is a problem fraught area regarding the right to transfer acquired right by the exclusive licensee. Accordingly, it is advisable that the proclamation needs to have a provision that demands the full authorization of the right holder in case where there is the transfer of the work by the exclusive licensee. Furthermore, consent shouldn't be prohibited out of good cause. These have ramifications from the view point of the right holders' interest and the public as well.
- In relation with unforeseen and unknown methods of exploitation of the work are concerned since it presupposes future and unknown manner of use the right holder doesn't get any advantage out of it. Hence, there should be a provision that devised in a manner to uphold future and unforeseen manner of use.
- As far as territorial clause is concerned, the law has to come up with provisions in a way that benefits right holders. When the territorial clause is not negotiated in the contract the performance of the contract has to be done in Ethiopia only. Therefore, the law up coming here should serve as a gap filling role in case where the parties fail to provide territorial application in their contract.
- Concerning with transfer of the right, it needs to be in written form. But currently the practice shows that these kinds of contracts are done orally. Consequently, As far as protecting the interest of the right holders is concerned, right holders should make the contract in written form.
- The regulation, by amendment, should include licensees in the registration of copyright.
- The Amharic and English of article 24(4) of the proclamation as well as the minute, cross-refer sub-article 2 of the provision. Since it is about specific economic rights under the agreement, it must be with article 24(1) of the law. Therefore, it gives a meaning of how economic rights utilized where the agreement fails to ways and means of exploitation of musical works.

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### **Annexe I**

AAU

School of Law

LL.M Program

Questionnaire for LL.M Thesis

For authors of musical works only

Full Name (if any).....

Address: - city.....

Sub city.....

Wereda.....

Phone number.....

Email Address.....

Job description.....

As part of my LL.M research at the Addis Ababa university school of law, I am conducting a survey that investigates *legal and practical challenges of licensing and assignment of musical works by right owners in Ethiopia*. I will appreciate if you could complete the following questioners. Any information obtained in connection with this study that can be identified with you remains confidential. Thank you for your time and cooperation.

**Part one**

**Q. 1** In what form do you conclude the contract of license or assignment of musical works to users?

A, in writing form  B, orally  C, both

D, others.....

**Q.1.1** How many contracts you concluded from 2007 to *Tir* 2012

A. in Witten form .....

B. orally .....

**Q. 2** what are the problems concerning licensing and assignment of musical works?

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## **Annex II**

**AAU**

**School of Law**

**LL.M Program**

**Interview questions**

**Q. 1** the law concerning the assignment and licensing of economic rights are sufficiently regulated?

**Q. 2** in practice, what is the problem in transferring musical works in written formality?

**Q. 3** that the fulfillment and non-fulfillment of formality requirement have advantages and disadvantages to the authors?

**Q. 4** do you think that the interest of authors will be protected if the law provides provisions concerning to remuneration?

**Q.5** what is the problem with not transferring a musical work to a specific place?

**Q.6** what are the problems or factors that disadvantage authors/owners of musical works in general?