

ADDIS ABABA UNIVERSITY
COLLEGE OF LAW AND GOVERNANCE
STUDIES
SCHOOL OF LAW

**Protection And Enforcement Of Public Performance Right Under
Ethiopian Law**

By: Teklu Hunde

Advisor: Dr. Mandefro Eshete (Assistant Professor)

Addis Ababa

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**Addis Ababa
July 2013**

Approval Sheet by the Board of Examiners

**Protection And Enforcement Of Public Performance Right Under
Ethiopian Law**

**I hereby certify that this is my original work. Works of others included in this
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July 2013**

TABLE OF CONTENTS

Acknowledgment	i
Abstract	ii
Introduction	iii
CHAPTER ONE	1
1. Proposal Of The Paper.....	1
1.1. Background Of The Study	1
1.2. Statement Of The Problem.....	5
1.3. Objective Of The Study	6
1.4. Significance of the study.....	6
1.5. Research Methodology	7
1.6. Scope of the study.....	7
1.7. Limitations of the study	7
CHAPTER TWO	7
2. Economic Rights Of Authors And Other Copyright Owners.....	8
2.1. Under Civil Law And Common Law Legal Systems.....	8
2.1.1. Introduction	8
2.1.2. Right Of Reproduction.....	8
2.1.3. Right To Prepare Derivative Works	9
2.1.4. Right Of Distribution Of The Works.....	10
2.1.5. Right Of Performance Of The Work In Public	11
2.1.6. Right Of Public Display Of The Copyrighted Work.....	12
2.1.7. Resale Right	12
2.1.8. Right Of Importation Of Copyrighted Works	12
2.1.9. Right Of Broadcasting	12

2.1.10. Assignment Or Transfer Of Economic Rights	13
2.1.11. Duration Of Economic Rights	13
2.1.12. Limitations and Exceptions Of Economic Rights	14
2.2. Under International Conventions	15
2.2.1. Introduction	15
2.2.2. Economic Rights Under The Berne Convention For The Protection Of Literary And Artistic Works	16
2.2.3. Duration Of Economic Rights	17
2.2.4. Limitations And Exceptions To Economic Rights	17
2.3. Economic Rights Under Other International Conventions	18
2.3.1. WIPO Copyright Treaty.....	18
2.3.2. Universal Copyright Convention.....	18
2.3.3. TRIPs Agreement	18
2.4. Economic Rights Under Ethiopian Copyright And Neighboring Rights Law	19
2.4.1. Transfer Or Assignment Of Rights.....	21
2.4.2.Limitations And Exceptions To Rights.....	21
2.4.3. Terms Of Protection Of Economic Rights	22
CHAPTER THREE.....	23
3. General Overview Of Public Performance Right And Its Protection And Enforcement	23
3.1. Introduction.....	23
3.2. Meaning, Nature And Scope Of Public Performance.....	24
3.2.1. Meaning And Nature Of Public Performance	24
3.2.2. Scope Of Public Performance Right	27
3.3. Exceptions And Limitations To Public Performance Right	30
3.4. Protection And Enforcement.....	32

3.4.1. Protection	32
3.4.2. Enforcement	35
3.4.2.1. Performing Rights Organizations(PRO) or Collecting Societies	37
CHAPTER FOUR.....	42
4. Protection And Enforcement Of Public Performance Rights Under Ethiopian Law	42
4.1. Introduction.....	42
4.2. Legal And Institutional Frameworks.....	42
4.2.1. Legal Frameworks	42
4.2.1.1. The FDRE Constitution.....	43
4.2.1.2. Copyright and Neighboring Rights Protection Proclamation.....	45
4.2.1.3. Criminal Law	54
4.2.1.4. A Regulation?	55
4.2.1.5. Other Laws	56
4.2.1.6. Conclusion.....	56
4.2.2. Institutional Framework.....	57
4.2.2.1. Introduction	57
4.2.2.2. Government Institutions	58
4.2.2.2.1. Ethiopian Intellectual Property Office	58
4.2.2.2.2. The Police and Prosecutor offices.....	60
4.2.2.2.3. The Judiciary.....	61
4.2.2.3. Private Institutions	62
4.2.2.3.1. Associations	62
4.2.2.3.2. Collecting Society/Performing Rights Organization.....	66
4.2.2.4. Conclusion.....	68
4.3. What Does The Reality On The Ground Look Like?.....	68

4.3.1. Broadcasting Organizations	69
4.3.2. Nightclubs	71
4.3.3. Other Business Undertakings	74
CHAPTER FIVE	77
5. Conclusion And Recommendations	77
5.1. Conclusion	77
5.2. Recommendations	82
BIBLIOGRAPHY	84

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Abstract

.....Public performance right is one of the major constituent elements of economic rights. It may sometimes become the single most important source of revenue. But, despite its importance, emphasis had been on reproduction rights for years. It is through time that public performance right came to attract attentions of both law makers and right holders. General economic growth and expansion of entertainment centres and mediums in particular said to have caused this change. These days, public performance right is well protected in most countries and under international instruments. Its protection requires firm legal framework and its enforcement necessitates the existence of strong institutions, both public and private.

When we come to the case of Ethiopia, intellectual property rights in general and public performance rights in particular seem to have strong constitutional background. In addition to recognizing citizens right to own private property, which includes intellectual property rights, the constitution also outlines obligations of the government to protect and enforce these rights and works that should be done to promote development of literary, artistic and other creative works. Then, it is expected from other laws to implement constitutional provisions. Accordingly, Copyright and Neighboring Rights Protection Proclamation No. 410/2004 has been promulgated by the House of Peoples Representatives. This proclamation vests exclusive economic rights, including public performance right on the author and copyright owner.....

Introduction

Since time immemorial, people used to have properties, whether communal or private and property rights. While some of these properties had just been used for the sustainability of life, others had been used to greatly transform life of human beings and the world. Intellectual properties are among the latter categories. Intellectual property rights, as any property rights, had first their basis on natural law. They, latter on, began to be recognized by laws of the nations. Since then, intellectual property rights are at the centre of extraordinary attention of governments, right owners and right users both domestically and at international level for various reasons. In the first place, as intellectual properties are intangible things, owners can not physically possess them and defend thier rights. Secondly, as it has been said herein above, intellectual properties are among properties that had transformed and transforms the world, and requires extraordinary attention. Thirdly, as creations of the mind of their owners, they are not mere properties, but also manifestations of the personality of the creator and have something to do with his human rights in one way or another. Due to these reasons, intellectual property rights require special attention and protection. Accordingly, they have been enshrined under constitutions of countries and international instrunments.

Copyright is one of the intellectual property rights which deals with literary, artistic, musical, dramatic and other related works. Under copyright, authors are entitled to two main rights. These are moral rights and economic rights. Moral right is something thing related to the personality of the author and it is about his reputation and integrity. It has its basis on the special relationship between the work of the mind and its author. Economic right, on the other hand represents the economic or pecuniary interest of the author. It is about the economic benefits that the copyright owner should derive from his creation.

Public performance right constitutes one of the major elements of copyright. It is the right to publicly perform copyrighted works. It includes or related to the right to communicate copyrighted works to the public using various mediums. Intermis of its economic importance to the author or copyright owner of a work, this right usually comes after reproduction right. But, sometimes, revenues derived from this right may outweigh that of reproduction right. Despite its importance, public performance right had not recieved

enough attention from both governments and rightowners initially. This fact had rapidly been changed and changing domestically and at international level.

In the same manner, public performance right and other copyright and intellectual property rights have been recognized by the FDRE Constitution. Proclamation No. 410/2004, Copyright and Neighboring Rights Protection Proclamation also vests exclusive public performance rights on the author and other copyright owners.

The main focus of this paper is, therefore, to discuss the protection and enforcement of public performance rights under Ethiopian law. After brief discussions of general background of economic rights and protection and enforcement of public performance rights in the general jurisprudence, some countries' laws and under international instruments, it examines legal and institutional frameworks for the protection and enforcement of the right under Ethiopian law. To this end, the paper has been divided into five chapters.

Chapter one discusses the proposal of the paper in general. It deals with the background of the study and statement of the problem. In defining statements of the problem, it tries to identify issues that should be worked on and addressed by the research finding. In addition, objective of the study, research methodology, scope of the study and limitations of the study are issues that would be indicated in this chapter.

Chapter two of the paper is designed in a way that gives the reader better understanding of economic rights and the protection accorded to them. It discusses about economic rights under civil law and common law legal systems, international instruments and the Ethiopian law. It also looks at exceptions and limitations to economic rights, their terms of protections, etc.

Chapter three provides the reader with deep understanding of public performance right and its protection and enforcement. It deals with the meaning, nature and scope of public performance right at reasonable depth. It also discusses limitations and exceptions to public performance right, and presents clear picture of its protection and enforcement in general. It also looks at one of the most important institutions in the enforcement of the

right, performing rights organizations or collecting societies and their functions and importance along with their status and structure.

Chapter four, being the main part of the paper, deals with protection and enforcement of public performance right under Ethiopian law. It examines the existing legal and institutional frameworks for the protection and enforcement of the right and tries to pinpoint gaps and deficiencies within both frameworks. To this end, an enquiry will be made into all the relevant legislations including the constitution and both public and private institutions that are expected to participate in the enforcement of the right.

Finally, chapter five concludes the main theme of the paper along with its findings, and forwards possible recommendations on the basis of those findings.

CHAPTER ONE

1. Proposal Of The Paper

1.1. Background Of The Study

Copyright is the body of law that deals with the ownership and use of works of literature, music and art.¹ It grants authors (writers, musicians, artists and other creators) protection over their works.² Such protection consists in providing authors with ownership or property rights (or exploitation rights), which take into account their material interests. In addition to material interests of authors or copyright owners, copyright also protects moral rights of authors. That is, under copyright, authors are entitled to protection against unauthorized use of their works as well as to a possible share in any earnings from its use by the public,³ and protection against derogatory treatment to their mental creations. International instruments such as the Universal Declaration of Human Rights (1948) and the International Covenant on Economic, Social and Cultural Rights (1966) have also recognized protection of moral and material interests of author resulting from any scientific, literary or artistic production which he is the author as human right.⁴

Generally there are two main justifications for the protection of copyright (economic and moral rights of an author or copyright owner). These justifications stem from economic perspective and natural law perspective.

- Economic Justifications: From an economic point of view, granting an exclusive right ensures that the author will receive an economic reward for the exploitation of the work for a certain period and hence constitutes an incentive for creativity.⁵ That means protection of rights of authors/copyright owners that enables them to receive economic rewards from their works stimulates them to engage into further creative works. Increased creativity, on the other hand, means that many works will be at the disposal of

¹. Robert A. Gorman, 2006, *Copyright Law*, Second Edition, Federal Judicial Center

². Petya Totcharova and Emile Glele, 2010, *The ABC Of Copyright*, United Nations Educational, Scientific And Cultural Organization (UNESCO).

³. Ibid

⁴. Universal Declarations Of Human Rights, United Nations, 1948, and International Covenant on Economic, Social and Cultural Rights, 1966, articles 27(2) and 15(1&2) respectively.

⁵. Supra at note 2

the public, as copyright protection encourages authors to disclose their works to the public. This in turn results in the wide spread of knowledge and cultural and social progress which ultimately leads to overall development. Therefore, as per this perspective protection of moral and economic rights of authors benefits the public at large and it is for public good.

- Natural Law Justifications: for the proponents of natural law human being has property in his person and his labor. This right of a person also extends to the product of his labor. Product of a labor also includes creations of the mind of a person and, therefore, he owns the products of his intellect. Then it follows that as any property right copyright of an author also deserves legal protection. In addition it is held that products of one's mind are more than mere property. They are manifestations of the personality of the author and their protection enhances self assertiveness, freedom and equality of the person.

The economic argument has been particularly prevalent in countries which are part of the Anglo-American world, while the doctrine of natural law has had greater influence on the European continent and in countries of Roman law tradition.⁶ Accordingly, we may distinguish two major traditions in copyright law: the Anglo-American, or common law copyright system, and the continental European, or civil law authors' rights system. As this terminology might suggest, the former tends to emphasize the protection of the work, while the latter is rather centered on the personality of the work's creator.⁷ The difference between the two systems is more explicit when it comes to the protection of moral rights of authors.

When we come to the Ethiopian case we can find both justifications for the protection of economic and moral rights of an author/copyright owner. It is provided in the constitution that every Ethiopian citizen is entitled to ownership of private property and private property includes, inter alia, intangible things which are the products of ones labor and creativity.⁸ The copyright proclamation also emphasizes the role works of the mind play in the development of the country. It is provided in the preamble that, "literary, artistic and similar creative works have a major role to enhance the cultural, social, economic, scientific and technological development of a

⁶. Ibid

⁷. Ibid

⁸. Article 40(1) FDRE Constitution, Proclamation No. 1/1995, A Proclamation To Pronounce The Coming Into Effect Of The Constitution Of The Federal Democratic Republic Of Ethiopia

Country.”⁹ From these and other provisions of the proclamation it can be observed that justifications from economic perspective and natural law perspective underly protection of moral and economic rights of authors/copyright owners under Ethiopian law.

Copyright has two components. These are economic rights and moral rights. As the name indicates, economic rights protect the economic or pecuniary interest of the author. It is a right or an interest that has monetary value or that can be expressed in terms of money. Moral rights on the other hand protect the reputation or integrity of the author. It is something related to the personality of the creator and its basis is the special relationship between the work of the mind and its creator in the sense that works of the mind are manifestations of the personality of the creator. While moral rights always stay with the creator of the work, economic rights may belong to a person or an entity other than the creator of the work.

Economic rights are generally exclusive rights of the author which involve his pecuniary interest. They are about the right to exploit or put his work to economic purposes. As mentioned herein above the basis of economic rights is the belief that the author should be compensated and rewarded for his creativity, and is entitled to receive remuneration from the use of his work by others. That means one of the main purposes of copyright law is to ensure that authors receive some share of money resulting from the exploitation or use of their works. This objective is achieved by granting the author a number of rights which can be exercised, as any proprietary right, against the exclusion of all other persons. These exclusive rights enable the author to exercise them by himself or to authorize other individuals to conduct activities exclusively left for the author or not to grant any permission at all to the would be users of the work such as publishers, producers, etc. Use of such works without prior permission from the author, except in some circumstances provided by law, amounts to infringement of the right of the author and entails both criminal and civil liability.

In compliance with several international conventions, most countries recognize today certain standard catalogue of economic rights, which has constantly expanded with the evolution of evermore efficient means of reproduction and communication.¹⁰ As a result difference between common law and civil law legal systems concerning economic rights is insignificant. On the other hand one may also notice small differences even between countries that belong to the same

⁹. Proclamation No. 410/2004, A Proclamation To Protect Copyright And Neighboring Rights

¹⁰. Supra at note 2

legal system concerning economic rights either in the extent of economic rights or in the duration of time of economic rights. In addition, extent and duration of economic rights may also vary from one work to another even within a single country. But the following economic rights are generally recognized under both civil law and common law legal systems. These are reproduction right, derivative work right, distribution right, importation right, public display right, performance right, broadcasting right and other communication of the work to the public right.

As mentioned herein above, public performance right or the right to perform the copyrighted work publicly is one of the exclusive economic right granted to the author or copyright owner. This right entitles the author or copyright owner to perform the copyrighted work in public, or to authorize others to perform it or prohibit them from performing the work. The right of public performance refers to the presentation or performance of works outside the family circle and an author's closest social acquaintances.¹¹ In other words, to perform a work in public means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered, or to transmit or otherwise communicate a performance or display of the work to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.¹² This means the right of public performance is not limited to only live concerts, staging of theatre plays and projection of films in the cinema, but it also extends to the background music we hear in bars and shops whether they are live or recorded. In other words, public performance is performing or playing copyrighted works, for example, music in public places such as concerts, bars, hotels, cafeterias, nightclubs and any other places open to the public, and it also includes performances in means of transportations such as taxies, buses and rains, etc. Therefore these rights are exclusively granted to the author or copyright owner and any engagement into such activities without prior authorization from the author or copyright owner is infringement of copyright.

¹¹. Ibid

¹². Section 101, Copyright Act Of U.S. in Robert A. Gorman, 2006, Copyright Law, Second Edition, Federal Judicial Center

It is obvious that the authors or owners of copyright cannot personally monitor, license, and collect royalties from the potentially vast number of public performances of their works at various places mentioned in the preceding places by various meanses.¹³ As a result, it has become a usual practice to form organs called performing right societies or collective societies. These organs represent individual right holders and license their works to users and collect royalties and license fees from users which they allocate to right holders. ASCAP (American Society of Composers, Authors and Publishers, was formed in 1914 by eminent American composers including Victor Herbert and John Philip Sousa, BMI (Broadcast Music, Inc.), formed in 1939, and SESAC (formerly, Society of European Stage Authors and Composers)¹⁴ are some examples of these organs.

When we come to the Ethiopian case, the proclamation has recognized both moral and economic rights of authors/copyright owners. One of the economic rights recognized by the proclamation is the right of public performance of copyrighted works. Public performance is defined by the proclamation as performing the work to the public by recitation, playing, dancing, acting or otherwise, either directly or using any communication media, and in case of an audio-visual work, showing the images in sequence and, in case of sound recording making the sound recording audible to the public. The author or copyright owner of the work has an exclusive right either to perform or to authorize the public performance of the work.¹⁵ But the enforcement of economic rights of authors and copyright owners is not satisfactory due to various problems related with legal and institutional frameworks. The regulation which is meant to help in implementing the proclamation has not yet been promulgated. In addition, much emphasis of the law enforcers and right holders is on the prevention of illegal copying of works which violates the right of reproduction of authors/copyright owners, one of economic rights. But whether it is from a copy legally produced or illegally copied, copyrighted works are being played or performed publicly without authorization of the right holders. On the other hand, in countries where public performance right is duly enforced, significant amount of revenues is derived by the right holders.

1.2. Statement Of The Problem

¹³. Supra at note 1

¹⁴. Ibid

¹⁵. Supra at note 9, article Article 2(24) and 7(1, g)

As mentioned in the preceding paragraphs, though the right of public performance of copyrighted works is envisaged under the proclamation, it is not being enforced. Currently, the main task of government organs responsible for the enforcement of copyright, and stakeholders has become prevention of illegal copying of copyrighted works. As a result, public performance right seems to be neglected. Specifically, the following are some of the statements of the problem that the research intends to address:

- What are the main causes for the infringement of public performance right of authors/copyright owners on their copyrighted works?
- Are there legal gaps that caused the infringement?
- Do right holders have proper awareness as to either the existence or extent of the right of public performance?
- Are there adequate mechanisms for the enforcement of public performance right?
- What is the importance of establishing collective societies in enforcing the right?
- What would be the legal status of such societies?
- And other related issues will be dealt with in this research.

1.3. Objective Of The Study

Though the proclamation provides for the right of public performance of authors/copyright owners on their copyrighted works, the right is not being enforced. Both users and right holders seem not to have the adequate awareness as to the existence or extent of this right. In addition, the regulation has not yet been promulgated, which would have helped in the enforcement of the right. The objective of the study is therefore to investigate the protection accorded to public performance right and its enforcement under Ethiopian copyright and neighboring right proclamation. Specifically the following are the objectives of the study:

- Identifying the general causes for the infringement of this right
- Identifying legal gaps that might have caused the infringement
- Forwarding possible recommendations on the basis of the finding of the study

1.4. Significance of the study

In light of the prevalent infringement of the public performance right, this study will have some important significances. In the first place, it helps in creating awareness on the part of users, right holders and law enforcers as to the existence and extent of the right. As the study incorporates protection and enforcement of the right in other jurisdictions, it helps law enforcers and right

holders by pointing out better means of enforcement. It can also be basis for further reasearch and servers academic purpose.

1.5. Research Methodology

In this study, a combination of various research tools will be employed. It makes use of both primary and secondary sources. Relevant literatures will be consulted to present clear picture of the right both domestically and internationally. All relevant domestic legislations including the constitution will be analyzed to see how much they are enough for the protection of the right. In addition, relevant international instrunments will be examined and domestic cases(if any) will be consulted. Being doctrinal research, it also employs interviews as a qualitative data gathering method to learn whether or not all the concerned government and private institutions have played and are playing their roles to ensure protection and enforcement of public performance right. Interview will also be employed to assess the reality on the ground concerning enforcement of the right. To this end, few questions will be presented to Broadcasting Organizations, Night Clubs and other business undertakings such as hotels, bars and restaurants and cafterias to understand their experience.

1.6. Scope of the study

Mainly, the study deals with public performance right on musical works, sound recordings and works of broadcasting organizations. It also touches upon public performance right on literary, dramatic and audiovisual works.

1.7. Limitations of the study

Absence of relevant cases on the protection and enforcement of public performance right in Ethiopia is one of the possible limitations of the study. In addition, as much is not written on Ethiopian copyright law, lack of adequate relevant literatures on the Ethiopian context is another limitation of the study.

CHAPTER TWO

2. Economic Rights Of Authors And Other Copyright Owners

2.1. Under Civil Law And Common Law Legal Systems

2.1.1. Introduction

Economic rights are generally exclusive rights of the author which involve his pecuniary interest. They are about the right to exploit or put his work to economic purposes. As mentioned herein above the basis of economic rights is the belief that the author should be compensated and rewarded for his creativity, and is entitled to receive remuneration from the use of his work by others. That means one of the main purposes of copyright law is to ensure that authors receive some share of money resulting from the exploitation or use of their works. This objective is achieved by granting the author a number of rights which can be exercised, as any proprietary right, against the exclusion of all other persons. These exclusive rights enable the author to exercise them by himself or to authorize other individuals to conduct activities exclusively left for the author or not to grant any permission at all to the would be users of the work such as publishers, producers, etc. Use of such works without prior permission from the author, except in some circumstances provided by law, amounts to infringement of the right of the author and entails both criminal and civil liability.

In compliance with several international conventions, most countries recognize today certain standard catalogue of economic rights, which has constantly expanded with the evolution of evermore efficient means of reproduction and communication.¹⁶ As a result difference between common law and civil law legal systems concerning economic rights is insignificant. On the other hand one may also notice small differences even between countries that belong to the same legal system concerning economic rights either in the extent of economic rights or in the duration of time of economic rights. In addition, extent and duration of economic rights may also vary from one work to another even within a single country. But the following economic rights are generally recognized under both civil law and common law legal systems. These are reproduction right, derivative work right, distribution right, importation right, public display right, performance right, broadcasting right and other communication of the work to the public right.

2.1.2. Right Of Reproduction

¹⁶. Supra at note 2

Right of reproduction is the authors prerogative to authorize or to prohibit the making of copying of his work and it is the most fundamental economic right. This is mainly because in order to exploit his work or obtain the desired return from the work, the author is expected to control the copying of the work. Reproduction is material fixation of the work of the author to facilitate its communication to the public. In conformity with international law, reproduction is to be interpreted widely, covering all possible ways of copying a work, either known or yet to be discovered.¹⁷ Conventional examples include the printing or photocopying of books or articles as well as the recording of music and films.¹⁸ In other words, Copies and phonorecords are the tangible forms in which reproductions of a work can be made; copies communicate to the eye while phonorecords communicate to the ear.¹⁹ “Phonorecords are material objects in which sounds are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device; whereas copies are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”²⁰ Reproduction also includes storage of a work in digital form using an electronic medium even though the result is not visible or the medium is not tangible. Reproduction right is a right exclusively granted to the author or copyright owner and engaging in such activity without authorization or permission amounts to infringement of copyright. But copyright laws in both common law and civil law countries provide exceptional circumstances in which copying of a work can be made without the permission of its author or copyright owner.

2.1.3. Right To Prepare Derivative Works

Right to prepare derivative work, also known as right of adaptation, is the right to modify an existing work to make a new work which is called derivative work. A derivative work is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or

¹⁷. *ibid*

¹⁸. *ibid*

¹⁹. *Supra* at note 1

²⁰. *Supra* at note 12

adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.”²¹ Right of adaptation entitles the author or copyright owner either to make a derivative work from his existing work or to authorize others to make such works, or not to grant permission to any body at all. That is the author or copyright owner thus has the exclusive right to convert her novel into a motion picture, to translate her play into a foreign language, to make an orchestral arrangement of her piano piece, or to make reproductions of her painting or sculpture—or to license third persons to do so.²² Adaptation or production of derivative work without prior permission from the author is infringement of copyright. “The simple building, to one degree or another, on the ideas of others does not, however, automatically constitute an infringement of copyright. Everyone is free to draw their inspiration from existing works, and so most detective stories, romantic comedies or Westerns, for instance, are based on more or less the same patterns. In order to speak of an adaptation, the derivative work must incorporate a certain portion of the protected work in a certain form, which is not always easy to determine.”²³ But when it is done with authorization from the author or copyright owner, the owner of adaptation or a person who produced the derivative work is entitled to copyright protection independently of the owner of the the original work provided that the adaptation meets requirements for copyright protection.

2.1.4. Right Of Distribution Of The Works

Exclusive right of reproduction meant that the author or copyright owner shall be economically benefited from the work either by sell or rent, etc. The means of achieving this objective is by granting the author an exclusive right of distribution, and exclusive right of reproduction is nothing unless accompanied by corresponding right of distribution. Distribution is putting into circulation copies of protected work and it can be done by putting into circulation tangible copies of protected work or simply by placing copyrighted material on an Internet bulletin board or website and makes it available for all interested persons to download into their computer hard-drive (or even simply to view on their computer monitors).²⁴Therefore distributing, without

²¹. Ibid

²². Supra at note 1

²³. Supra at note 2

²⁴. Supra at note 1

authorization, protected works in tangible copies like books and CDs, or placing them on the internet to enable others to access the work amounts to infringement of copyright.

“The distribution right is subject to an important limitation in favor of the free circulation of goods which is usually referred to as the principle of exhaustion: when a particular copy of the work has been distributed for the first time with the copyright owner’s consent, the purchaser of that copy may dispose of it, for example by giving it away or even by reselling it, without seeking further permission from the author.”²⁵ It is also called first sale doctrine, and as per this doctrine a book dealer who sold used books or an individual who lent a book to a friend can not be held liable for infringement of copyright(right of distribution). Another exception is public lending of computer programs. Public lending of computer programs does not amount to infringement of copyright(right of distribution) when it is conducted on a non-profit making basis.

2.1.5. Right Of Performance Of The Work In Public

The right to perform the copyrighted work publicly is another exclusive economic right granted to the author or copyright owner. This right entitles the author or copyright owner to perform the copyrighted work in public, or to authorize others to perform it or prohibit them from performing the work. The right of public performance refers to the presentation or performance of works outside the family circle and an author’s closest social acquaintances.²⁶ In other words, to perform a work in public means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered, or to transmit or otherwise communicate a performance or display of the work to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.²⁷ This means the right of public performance is not limited to only live concerts, staging of theatre plays and projection of films in the cinema, but it also extends to the background music we hear in bars and shops

²⁵. Supra at note 2

²⁶. Ibid

²⁷. Supra at note 12

whether they are live or recorded. Therefore, these rights are exclusively granted to the author or copyright owner and any engagement into such activities without prior authorization from the author or copyright owner is infringement of copyright.

2.1.6. Right Of Public Display Of The Copyrighted Work

This is public display of the work by use of various means such as film slide, television image, internet, etc.

2.1.7. Resale Right

“The resale right, which is commonly referred to as *droit de suite*, as in French, has been adopted by an increasing number of countries in order to secure for the authors of graphic or plastic works (e.g. paintings and sculptures) a share in the resale of their works at public auctions and in galleries. The artist receives a certain percentage of the resale price from the auctioneer or art dealer, but has generally no possibility to prohibit the transaction as a whole.”²⁸ The main justification behind this right is that visual artists can not be benefited by reproduction and communication rights as that of other artist due to the fact that these artists forfeit possession of such works by first sale and this first sale is usually for small amount of money that only enables the artist to earn his living and continue his career. The *droit de suite* therefore plays a compensatory role as it allows the artist to participate in a later increase of the sold works’ value. Since the artist can not prohibit resale of the work this right is not as such exclusive economic right, rather it only entitles the artist to remuneration.

2.1.8. Right Of Importation Of Copyrighted Works

This right is also an exclusive economic right and it entitles the author to import the original or copies of the work or authorize others to import it.

2.1.9. Right Of Broadcasting

²⁸. Supra at note 2

It is another exclusive economic right of the author or copyright owner and broadcasting any substantial part of a copyrighted work without prior authorization of the author is copyright infringement.

2.1.10. Assignment Or Transfer Of Economic Rights

As far as assignment or transferability of economic rights is concerned, one can not find any significant difference between countries that follow common law and civil law legal systems. In almost all countries, economic rights can be transferred or assigned either by law, contract, inheritance or will as any property right. In addition, valid transfer or assignment requires the act of transfer or assignment to be made in writing and accompanied by the signature of the copyright owner in almost all countries. There are, however, exceptions to this case the example of which is the case of Czech Republic and Germany. In Czech Republic economic rights can not be transferred nor waived.²⁹ In Germany, economic rights can only be transferred by inheritance or testamentary disposition,³⁰ with the exclusion of any other means of transfer or assignment. But in both Czech Republic and Germany, economic rights can be licensed. Another exception is related to formality requirement for transfer or assignment in Switzerland. While most countries that allow transfer or assignment of economic rights require written form and signature of the copyright owner for valid transfer or assignment, copyright law of some countries like Switzerland does not envisage any formality requirement such as written form,³¹ which means economic rights can be transferred orally.

2.1.11. Duration Of Economic Rights

There is also no significant difference between countries that follow common law and civil law legal systems regarding duration of economic rights. The duration of economic right lasts from fifty to seventy years from the death of the author in most countries. In case of joint author the end of economic rights is at fifty or seventy years from the death of the last joint author. But difference exists within a country on the basis of type of work or the date on which the work is

²⁹. Kenneth D. Crews and Jacque Ramos, 2004, Comparative Analysis of International Copyright Law Applicable to University Scholarship, Copyright Management Center, Indiana University Purdue University Indianapolis, Indianapolis, Indiana

³⁰. Ibid

³¹. Ibid

created. While duration of economic rights for most works is from fifty to seventy years from the death of the author, duration of economic rights of some works may last for 125 years from the date of creation.³²

2.1.12. Limitations and Exceptions Of Economic Rights

Copyright laws are there, *inter alia*, to strike a balance between two conflicting interests. On the one hand there is the interest of consumers to get access to the works of the mind of authors without any limitation. On the other hand interest of authors to exploit their works properly, which serves as incentive for further creativity, warrants protection of their rights against infringement. In a way of achieving this objective, two main limitations are put in place by copyright laws. Firstly, the duration of copyright protection is limited to a certain period of time. In this regard, as discussed in the preceding section, there is no as such significant difference between followers of common law and civil law legal systems. Secondly, there is what is called limitations and exceptions that legitimize unauthorized use of the copyrighted work which otherwise would amount to infringement of copyright. As per these exceptions and limitations, the exclusive right of authors or copyright owners to control the economic use or exploitation of their work is restricted by copyright laws. Though all countries' copyright laws envisage such limitations and exceptions, the difference between countries of common law and civil law legal system becomes explicit. While countries that follow civil law legal system have adopted a very restrictive set of limitations on copyright protection, common law countries include in their legislation comparatively extensive provisions allowing acts to take place without the prior authorization of the right owner. The open-ended 'fair use' concept in the United States and the more restrictive 'fair dealing' one in the United Kingdom, Canada or Australia, are examples of the latter approach.³³ That is, in addition to specific exceptions provided both in laws of common law and civil law countries, copyright laws of common law countries envisage some general residuary provisions entitled 'fair use or fair dealing' that exempt some unauthorized uses that does not fall under specific exceptions from being considered as infringement of copyright of the author or copyright owner. Therefore it seems that economic rights of authors or copyright owners are more restricted in common law countries than in civil law countries.

³². See U.K. and U.S. laws in *ibid*

³³. *Supra* at note 2

2.2. Under International Conventions

2.2.1. Introduction

Copyright laws are territorial in nature. The protection they accord to works of the mind of authors does not extend beyond the country's jurisdiction which promulgated them. Copyrighted works made in State A may not be protected in State B. There is no international copyright law that can automatically protect works of the mind of authors without any precondition as domestic copyright laws do with regard to works made domestically. One of the solutions countries had to solve this problem, that is to ensure copyright protection abroad to works made within their territory, is reciprocity. That is entering into reciprocal agreement that enables them to ensure copyright protections to works within each others territory. This is not always possible and sufficient as a country is expected to enter into reciprocal agreement with all other states in order to make sure that works made within its territory is protected in each and every country. The other alternative left to countries to have their works protected in other countries is to come up with international instrument that binds all member states to protect works made within the territory of member states. As a result, the Berne Convention for the protection of Literary and Artistic Works, the oldest and the most important treaty as far as copyright is concerned came into picture in 1886. In the sections that follow, economic rights as envisaged in this and other conventions will be discussed in brief.

In addition to conventions the subject matter of which is copyright, the issue of economic rights has also been addressed in other international instruments that generally deal with human rights and related issues. One of these is the Universal Declaration of Human Rights. In this declaration it is provided that "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."³⁴ The other instrument is the International Covenant on Economic, Social and Cultural Rights. It is also provided in the covenant that in addition to recognizing the right of every one to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author, member states to the covenant shall take steps necessary for the full realization of these rights and shall respect the freedom indispensable for scientific

³⁴. Article 27(2), Universal Declarations Of Human Rights, United Nations, 1948

research and creative activity.³⁵ Incorporation of these provisions in these instruments shows the emphasis given to the protection of moral and economic rights at international level.

2.2.2. Economic Rights Under The Berne Convention For The Protection Of Literary And Artistic Works

The convention vests up on the author and other copyright owners some exclusive economic rights in relation with the works of the mind they created. These are:

- Right Of Reproduction And Distribution: Authors of literary and artistic works have been granted the exclusive right of authorizing the reproduction of their works, in any manner or form.³⁶
- Right of translation, adaptation, arrangement and other alteration of the work: Authors of literary and artistic works shall enjoy the exclusive right of making and of authorizing the translation, adaptation, arrangement and other alterations of their works throughout the term of protection of their rights in the original works. In addition, authors of literary or artistic works shall have the exclusive right of authorizing the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced, and the public performance and communication to the public by wire of the works thus adapted or reproduced.³⁷
- Right of public performance and communication to the public of performance: Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing the public performance of their original and translated works, including such public performance by any means or process, and any communication to the public of the performance of their works.³⁸ In the same manner, authors of literary works shall enjoy the exclusive right of authorizing the public recitation of their original and translated works, including such public recitation by any means or process, and any communication to the public of the recitation of their works.³⁹

³⁵. Article 15(1) and(2), International Covenant on Economic, Social and Cultural Rights, 1966

³⁶. Article 9, Berne Convention for the Protection of Literary and Artistic Works, 1886, herein after referred to as Berne

³⁷. Articles 8, 12 and 14, Berne

³⁸. Article 11, Berne

³⁹. Article 11^{ter}, Berne

- Broadcasting and other related rights: Authors of literary and artistic works shall enjoy the exclusive right of authorizing the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images, and any communication to the public by wire or by rebroadcast of the broadcast of the work, when this communication is made by an organization other than the original one, and the public communication by loudspeaker or any other analogous instrument.⁴⁰
- Resale right: The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.⁴¹

2.2.3. Duration Of Economic Rights

The term of protection granted by the convention for most works is the life of the author plus fifty years. If the work is work of joint authorship, the fifty years period is calculated from the death of the last surviving author. But for anonymous or pseudonymous works, the term of protection is fifty years from the time the work is legally disclosed to the public, unless the identity of the author can be known with out doubt or he discloses his identity in which case the term of protection will be the life of the author plus fifty years. An exception is provided for member states with regard to some works such as cinematographic works to limit the term of protection to fifty years from the date on which the work is made or made public as the case may be.⁴² However, what is set by the convention as term of protection is the minimum standard and member countries are free to come up with longer term of protection than the one provided in the convention. It is in line with this that most countries extended the term of protection beyond fifty years.

2.2.4. Limitations And Exceptions To Economic Rights

⁴⁰. Article 11^{bis}, Berne

⁴¹. Article 14^{ter}(1), Berne

⁴². Article 7, Berne

As domestic copyright laws do, the convention subjects economic rights to some limitations and exceptions. These limitations and exceptions are by excluding some works from the protection of copyright laws, by limiting the term of protection of copyrighted works and by legitimizing some acts which would otherwise amount to infringement of copyright. In general, the convention allows domestic copyright laws to come up with limitations and exceptions and exempts some acts such as personal use, use for educational purpose and also provides for compulsory licensing.

2.3. Economic Rights Under Other International Conventions

2.3.1. WIPO Copyright Treaty

The WIPO Copyright Treaty was adopted in Geneva in 1996, and it is a kind of complementary to the Berne Convention for the protection of Literary and Artistic Works. It does not exclusively deal with economic rights. Rather it contains some specific economic rights such as the right of distribution and rental rights which are not explicitly dealt with in the Berne convention. As provided in the preamble the WIPO treaty has been introduced to strengthen the implementation of the Berne convention by introducing new international rules and clarifying the interpretation of the existing rules under the convention.

2.3.2. Universal Copyright Convention

The Universal Copyright Convention (UCC) was adopted at the 1952 Diplomatic Conference convened by UNESCO in Geneva, and later on revised in 1971 in Paris. The objective of this Convention was to provide less rigorous author protection, so as to attract those countries that had rejected the Berne agreement.⁴³ The convention does not explicitly recognize moral rights and this is made deliberately to accommodate countries that did not sign the Berne Convention on the basis of such grounds.⁴⁴ It also contains minimum term of protection which is 25 years from the date of publication and not less than 25 years after the death of the author, depending on the type of work.

2.3.3. TRIPs Agreement

⁴³. J. Carlos Ferná Ndez-Molina And Eduardo Peis, 2001, The Moral Rights Of Authors In The Age Of Digital Information, Journal Of The American Society For Information Science And Technology, 52(2)

⁴⁴. Ibid

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) was signed in Marrakech, Morocco, on 15 April 1994. As a result of the Uruguay Round of Multilateral Trade Negotiations, it forms part of the legal obligations of the World Trade Organization (WTO), which is the successor of the General Agreement on Tariffs and Trade (GATT) of 1947.⁴⁵ The TRIPs links works of the mind with trade, and it requires member states to comply with substantive provisions of the Berne Convention with the exception of moral rights. This was also done to accommodate countries like the United States that was reluctant to join the Berne Convention due to its provisions on moral rights of authors.

2.4. Economic Rights Under Ethiopian Copyright And Neighboring Rights Law

The Ethiopian Copyright and Neighboring Rights proclamation envisages various exclusive economic rights that can be exercised by the author or copyright owner. In this section, brief discussion of these rights, as provided in the proclamation and their relation with corresponding rights in the civil law and common law legal systems, will be made.

- **Right of reproduction of the work:** As else where, the proclamation recognizes one of the most important economic rights, the exclusive right to reproduce the work. Reproduction is defined in the proclamation to mean the making of one or more copies of a work or sound recording in any manner or form, including any permanent or temporary storage of work or sound recording in electronic form. The author or the copyright owner has the exclusive right to reproduce the work by himself or to authorize others to do so.⁴⁶
- **Right to make derivative works:** as a natural consequence of the exclusive right of reproduction of the work and in line with the copyright laws of most countries in both common law and civil law legal system, the author is entitled to make some derivative works from his copyrighted work or to authorize others to do the same. These derivative works on which the author or copyright owner has got exclusive rights are: translation, adaptation, arrangement or any other transformation or modification of the work.⁴⁷ But if the author has authorized others to make derivative works from his copyrighted work,

⁴⁵. Supra at note 2

⁴⁶. Supra at note 9, Article 2(25) and 7(1, a)

⁴⁷. Ibid, Article 7(1, b&c)

the author of the derivative work is also entitled to exclusive economic rights which is different from the right of the author of original work.

- **Right of distribution of the works:** granting the author the right to reproduce the work or make derivative works alone is nothing without the right to distribute the work and derive economic benefits thereof. As a result, the proclamation has vested the right to distribute or authorize distribution of the original or copy of the work to the public by sale or rental on the author or copyright owner. But this exclusive right does not extend to the rental or public lending of computer program where the program is not an essential object of the rental or lending.⁴⁸ In a similar manner, the author has the exclusive right, where the work is made abroad, to import the original or copies of the work or to authorize others to import it.⁴⁹
- **Right of public display of the work:** to display the work to the public is to show the original or copy of the work to the public by various means such as film slide, television image, screen, or any other device and this right has also been recognized by Article 7(1,f) of the proclamation.
- **Right of public performance of the work:** public performance is defined by the proclamation as performing the work to the public by recitation, playing, dancing, acting or otherwise, either directly or using any communication media, and in case of an audio-visual work, showing the images in sequence and, in case of sound recording making the sound recording audible to the public. The author or copyright owner of the work has an exclusive right either to perform or to authorize the public performance of the work.⁵⁰
- **Right of communication of the work to the public:** an other exclusive economic right granted to the author or copyright owner is the right to communicate the work to the public. Communication to the public means the transmission by wire or without wire images or sounds or both of a work, a performance, a sound recording or a broadcast in such a way that the images or sounds can be perceived by a person outside the normal circle of a family and its closest social acquaintance at a place or places so distant from the place where the transmission originates, that without the transmission the images or

⁴⁸. Ibid, Article 7(1, d) and (2)

⁴⁹. Ibid, Article 7(1, e)

⁵⁰. Ibid, Article 2(24) and 7(1, g)

sounds would not be perceivable and, further, irrespective of whether the persons can receive the images or sounds at the same place and time, or at different places and/or times individually chosen by them. This exclusive right is left to the author or copyright owner and he can communicate the work to the public himself or authorize others to do the same.⁵¹

- Right of broadcasting the work: to broadcast a work is to transmit it by wireless means for public reception of sounds or of images and sounds. The author or the copyright owner is exclusively entitled to broadcast the work by himself or authorize others to broadcast it.⁵²
- Resale right: like copyright laws of the civil law countries and some common law countries, the principle of ‘droit de suite’ has also been enshrined in the proclamation. As per this principle, the author(or his heirs) of the original work of art or original manuscript shall have the inalienable right to have a share of the resell price of the work subsequent to the first transfer of the work by the author.⁵³

2.4.1. Transfer Or Assignment Of Rights

As is true in both common law and civil law legal systems, economic rights can easily be assigned, transferred or licensed in whole or in part by the author or copyright owner. But the act of licensing, assigning or transferring it has to be made in writing.

2.4.2. Limitations And Exceptions To Rights

Like other copyright laws, the proclamation also puts some limitations and exceptions to most exclusive economic rights. These exceptions and limitations are provided by limiting the term of protection of rights and by exempting some unauthorized uses from being considered as infringement of copyright of the author. As a result some acts such as reproduction for personal purposes, quotations, reproduction for teaching, by libraries, archives and similar institutions are allowed to be conducted without the authorization of the author or copyright owner. However,

⁵¹. Ibid, Article 2(6) and 7(1, i)

⁵². Ibid, Article 2(3) and 7(1, h)

⁵³. Ibid, Article 7(3)

the proclamation, unlike laws of common law countries, does not provide for broad exemptions like fair use or fair dealing.

2.4.3. Terms Of Protection Of Economic Rights

The term of protection of most economic rights under the proclamation is the life of the author plus fifty years. For works of joint authorship, the fifty years period commence from the death of the last surviving author. If the work is published after the death of the author, its term of protection is fifty years which runs from the date of its publication. The term of protection for other works such as collected works and audio-visual works is also fifty years starting from the date on which the work is made or communicated to the public whichever is later. The shortest term of protection which is 25 years is provided for photographic works. Therefore the term of protection under the proclamation is shorter than most other countries' laws provide which is 70 years after the death of the author.

CHAPTER THREE

3. General Overview Of Public Performance Right And Its Protection And Enforcement

3.1. Introduction

In almost all countries of the world, whether they had their copyright laws earlier or later, much emphasis had been on some economic rights such as reproduction and distribution rights. But, these are not the only rights copyright holders are entitled to, nor they are much more outstanding in terms of the benefits to the rights holders than other rights such as public performance rights. On the other hand, copyrighted musical, dramatic and literary works are usually performed publicly whether or not such performance is from the copies legally reproduced and distributed. In addition, revenues from public performance rights may some times outweigh those that can be derived from other rights.

Through time, public performance rights began to acquire various attentions and concerns both from the right holders and government organs, though it is not to the extent it deserves, partly due to resistances on the part of right users. Despite continued acceptance and protection of public performance rights all over the world, to varying degree, no major contributory factor may be singled out for such developments.⁵⁴ These days, countries recognised public performance rights in their copyright laws. Provisions in various international copyright instruments as well call for the protection and enforcement of public performance right. But the level of protection and enforcement may vary from country to country. In addition, types of performances that are protected by copyright laws and materials from which such performances are made may also vary from one country to another. In the following few sections, a brief discussion of public performance right and its protection and enforcement will be made.

⁵⁴. It is an undeniable fact that changes in copyright law have generally been caused by technological shifts. Specifically, invention of the Printing Press in the mid-fifteenth Century could be taken as a turning point for the development of copyright law, specially concerning reproduction right. When it comes to public performance right, it is very difficult, if not impossible to come up with a single contributory cause for its development. But, it can be said that general economic growth of the world has caused it. In other words, technological changes that brought about production of instruments that are used to perform music, changes in the modes of transport that facilitates movement of bands from place to place, and accumulation of wealth that fueled formation of recreation centers and stages for live concerts, coming into pictures of various medias generally caused changes in copyright laws as far as public performance right is concerned.

3.2. Meaning, Nature And Scope Of Public Performance

3.2.1. Meaning And Nature Of Public Performance

In its simplest meaning, to perform is to present a work, a form of entertainment, to an audience.⁵⁵ Performance, then, could be defined as the act of performing or presenting a work of entertainment to the audience. It is in this sense that performance is defined in various countries' copyright laws.⁵⁶ It means the presentation of a work to the audience in any mode, direct and indirect. This covers most of, if not all, the circumstances in which musical, dramatic and literary works are performed, including:

- playing recorded music on a CD or cassette player
- playing music, film, video or dramatic works on a radio or television
- playing a film or a video which contains any musical content (background music, opening song or theme)
- playing a film, video or dramatic works
- performing music live
- performing dramatic works live
- playing recitation of literary works
- recitation of literary works, etc

As mentioned herein above, performance could be made in any form and using any modalities or all means which are available. It could be live performance, or playing of recorded performance. Still, it does not make any difference whether or not performance is made from the original copy, legal or illegal copy, whether or not it is replaying of an already made performance. What matters is the fact that the work is presented to the audience.

⁵⁵. Concise Oxford English Dictionary, Tenth Edition, Oxford University Press.

⁵⁶. Under Copyright Law of the United States of America, to “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.”(see section 101)

On the other hand, it is not all performances that could be regarded as infringement of copyright. For a performance to be taken as infringing copyright law and need license before its delivery, it has to be public performance. But this does not mean that all sorts of public performances violate copyrights of the right holder. As we will see in the forthcoming sections, there are times when performances can be delivered publicly without granting license, under exceptional circumstances provided by law. In general, it is only when performances are to be given publicly that one needs to acquire license from the right holder or his/her representative. But, we do not find clear or direct definition or meaning of the word ‘public’ in various countries’ copyright laws.⁵⁷ Finding its appropriate meaning is an issue that has to be addressed by the judiciary. So far, courts elsewhere have interpreted it and case laws are available. As it can be inferred from these court decisions, it may be the case that it is likely that it will constitute a public performance if a work is performed in the presence of more than one person other than in private or domestic circumstances.⁵⁸ If the performance is made in a business environment, it does not make any difference whether the performance is made for the benefit of staff or customers. In one case, wherein a training video which included background music was viewed by employees, it was held that a public performance had occurred.⁵⁹ In that case, it was held that:

The occasion of the performance was the imparting of information

by the employer to its employees and the musical work was used to facilitate that process. The audience was brought together by the commercial purposes of the respondent [the Bank] and their public lives as employees.⁶⁰

Three broad principles have also been begun to be used by courts to determine whether or not a performance is delivered in public or not:⁶¹

⁵⁷. Nevertheless, it seems that, phrases used in defining public performance, such as “substantial number of persons outside of a normal circle of a family and its social acquaintances”, “person outside the normal circle of a family and its closest social acquaintance” may be used in determining the appropriate meaning of the word ‘public’ by the judiciary or any other concerned organ. (see section 101 of the U.S. copyright law, Article 2(6) of performance right.Proclamation 410/2004 of FDRE)

⁵⁸. http://www.aph.gov.au/.../House_of_Representatives_Com (The public performance right)

⁵⁹. APRA v Commonwealth Bank in *ibid*.

⁶⁰. *Ibid*.

1. Whether the performance took place in a ‘domestic and private setting:

If the performance was not given in a domestic and private setting, then it is presumed that it is a public performance. The determining factor is the reason that brought the audience together, whether they are brought together by reason of domestic or private tie or by reason of their public life.⁶²

2. Whether the performance occurred as ‘an adjunct to a commercial activity’⁶³:

If the performance was made in connection with a commercial activity, it is presumed that it is a public performance.⁶⁴

3. Whether the audience forms part of ‘the copyright owners’ public’⁶⁵:²²

“If the nature of the audience is a group which the copyright owner would contemplate as being part of ‘his’ or ‘her’ public for the purpose of earning royalties, then it is likely that the performance is ‘in public’. The emphasis is on the relationship between the audience and the copyright owner, and whether the copyright owner would be entitled to expect payment for the performance of the work.”⁶⁶

What has to be noted at this point is that, these ways of interpretations and principles may not uniformly be applied by courts of all countries. But it can be said, if assisted by phrases such as “substantial number of persons outside of a normal circle of a family and its social acquaintances”, “person outside the normal circle of a family and its closest social acquaintance” which are used in various countries copyright laws, courts may reach at similar decisions in coining the meaning of ‘public’ in the context of copyright law.

When we come to the types performance rights, they are usually classified into two. These are small (or concert) rights and grand (or dramatic) rights. Small rights, also called *Petits Droits* in French, are the rights to give concert performance of music – musicians giving a performance of

⁶¹. *Telstra v APRA* 146 ALR 649 at 690 in *Ibid*.

⁶². *Telstra v APRA* 146 ALR 649 at 690 in *Ibid*.

⁶³. *Ibid*.

⁶⁴. *Telstra v APRA* 146 ALR 649 at 690–691 in *Ibid*.

⁶⁵. *Ibid*

⁶⁶. *Ibid*

musical sounds only.⁶⁷ In small rights, performance is not accompanied by related actions such as dancing, pantomime, acting or other interpretive device. It is only the music that tells the story.⁶⁸ These days, small rights represent a considerable source of revenues in the music industry, and they are usually managed by collecting societies, which collect payments and pass them on to copyright owners.⁶⁹

Grand rights, also called Grand Droits, on the other hand are also performance rights which refer to performances which contain literary or visual elements that go beyond the performance of musical sounds alone.⁷⁰ “These can include non-musical plays with incidental music added after the play was written, plays where music is an integral part of the play as written, revues comprising stage presentations of separate musical numbers and dramatico-musical works.”⁷¹ Unlike small rights the license of which can be granted from performing rights societies, license for the performance of grand rights can only be granted by negotiation with the copyright owner or their assigned agent. In other words, collecting societies do not license grand rights.

3.2.2. Scope Of Public Performance Right

Public performance right extends to all copyrighted subject matters which are capable of being performed in public. In other words, public performance right covers all the works protected by copyright law, and performance of such works in public without prior authorization or permission from the copyright owner amounts to infringement of copyright. But, the scope of protection of public performance right may vary from work to work and the degree of protection for some works is much broader than others. For example, copyright laws recognize copyright protection for two separate categories of works within the music realm: musical works and

⁶⁷. Lawrence Tarlow & Robert Sutherland, 2004, The Music We Perform: An Overview of Royalties, Rentals and Rights, Major Orchestra Librarians’ Association. See also United Nations Educational, Scientific And Cultural Organization(UNESCO), 2010, The ABC Of Copyright, Staffan Albinsson, 2012, The Advent of Performing Rights in Europe.

⁶⁸. Ibid.

⁶⁹. Supra at note 2.

⁷⁰. Supra at note 14.

⁷¹. Ibid. Dramatico-musical works are works in which the music is used to carry the action of the story forward. Opera, operetta, musicals, and ballet fall under this heading.

sound recordings.⁷² But in most copyright laws, sound recordings are less protected than the musical works, especially when it comes to public performance right.⁷³

In general, the scope of public performance covers, but not limited to, the following works:

- Music: public performance right extends to all the elements of music, irrespective of the degree of protection accorded to each work, such as: literary works – song lyrics, musical works – musical compositions, melodies or tunes; and sound recordings – the aggregate of the sounds contained on a CD, record or cassette (or any other device on which the sounds can be recorded). It is also applicable regardless of the manner in which performance is made, i.e. whether or not the music is performed live, played from CDs, cassettes and other devices, played on radio or television, etc.
- Literary works: literary works in this case are not those which made the constituent elements of music. Rather, they are works such as books and other writings in any form which can be performed on their own by recitation, or reading it out. Again, as far as protection of public performance right is concerned, it does not make any difference whether the act of recitation or reading it out is made directly before an audience or the performance is made from a recording made earlier.
- Dramatic, dramatico-musical works, pantomimes, choreographic works, and other works created for stage production: protection of public performance right also extends to these works, not only when they are directly performed before an audience, but also when the recording of an earlier performance is performed publicly.
- Audio-visual works: audio-visual works are works that consist of a series of related images, which impart the impression of motion, with or without accompanying sounds, susceptible of being made visible; by any appropriate device, and include a cinematographic or other film.⁷⁴ These works are also within the ambit of public

⁷². A musical work refers to the notes and the lyrics of a song, while a sound recording is a recorded version of a musician singing or playing a musical work, as that rendition is captured in a tangible medium of expression such as a compact disc, cassette tape, vinyl album, or MP3 file.

⁷³. For example, in U.S. the holder of copyright in the sound recording is not entitled to claim royalty from terrestrial AM/FM broadcast radio station that perform the sound recording in public, while the holder of copyright in the underlying musical work in the sound recording is entitled to royalty.

⁷⁴. Proc. Art.2(1)

performance right of the copyright owner, and their performance to the public requires permission from the right owner.

In addition to the works to which it applies, the scope of exclusive public performance right can also be treated from other point of views. One of these is from the point of view of who is entitled to exclusive public performance right. It is provided both in domestic legislations and under relevant international instruments that authors are entitled to exclusive public performance rights. On the other hand, the term ‘author’ is defined as a person who has intellectually created the work. Accordingly, exclusive public performance right is vested upon persons who have created the works. For example, in relation with dramatic, musical and literary works, authors are those individuals who have written these works and they are entitled to exclusive public performance right. In additions to authors, other individuals or organs may also be entitled to some exclusive public performance right. An example of this is performers and producers who are treated as neighboring right holders under Ethiopian law. Performers have exclusive public performance right on their live and unfixed performances. Producers also have the exclusive right of making available to the public of their sound recordings.

In addition, the scope of exclusive public performance right can be treated from the point of view of the boundaries it shares with other similar rights. Public performance right has some similarities with communication to the public right and broadcasting. For example, under Ethiopian law, public performance is defined as performing a work to the public by recitation, playing, dancing, acting or otherwise directly or using other communication medium. To publicly perform an audio-visual work and a sound recording is to show the images in sequence and make the sound recording audible to the public, respectively. This is also an accepted definition both in domestic legislations and under international instruments. As it can be understood from the definition, one of the means by which works are publicly performed is by using some communications medias. Ways of publicly performing a work and communicating the work to the public may happen to be the same or at least very similar. In addition, what is communicated to the public is either the work it self or its performance. This may show the similarity between public performance right and communication to the public, or the fact that the boundary that delimits the two is some what grey. In the same manner, broadcasting could be taken as one of the means of publicly performing works, and public performance could be

broadcasting a work. Therefore, it is not always easy to clearly demarcate the scope of public performance right from other similar rights.

3.3. Exceptions And Limitations To Public Performance Right

As it has been stated herein above, copyright is subjected to some limitations and exceptions. It has also been said that these exceptions and limitations are put in place to safeguard the interest of the public to get free access to works of the mind of authors. These limitations are provided in two different ways. The first one is by limiting the period of copyright protection of a work. After such period has expired, the work will be in the public domain and every body is free to exploit it. The second form of limitation is by legalizing some unauthorized use of the copyrighted work. In this case, during the period of copyright protection, the exclusive economic right of authors/copyright owners is restricted by exceptions and limitations and some free uses are allowed without financial compensation. Being one of the exclusive economic rights of copyright owners, public performance right is not an exception to these limitations and exceptions. It is subjected to various limitations and exceptions both under domestic laws and international copyright instruments. With some differences in countries' copyright laws, the following are common limitations and exceptions to exclusive public performance right:

- **Performance For Educational Purposes:** as some other economic rights such as reproduction right, public performance right is also subjected to exceptions for educational purpose. When a work is performed by instructors or students in a face to face classroom session which is offered free of charge, it does not amount to infringement of public performance right of the copyright owner.⁷⁵
- **Performance For Services At Religious Institutions:** if the work is of religious nature, its performance in the course of services at religious institutions does not amount to infringement of public performance right of the copyright owner.⁷⁶

⁷⁵. See for example section 110 of the U.S. Copyright Act. This exception is subjected to an other exception. That is, copies made illegally and those made primarily for mediated class room instruction may not be performed with out paying royalty even at face to face teaching activities.

⁷⁶. Ibid.

- **Performance For Charitable Purposes:** public performances made with out any financial advantages for individuals participated in the performance and the income of which is exclusively devoted to educational, charitable and religious purposes are also one of the exceptions put by the copyright laws to exclusive public performance right.⁷⁷
- **Performance At Family Gatherings And in School:** performances given free of charge at family gatherings and in schools are also exceptions to the exclusive public performance right of the copyright owner.⁷⁸
- **Other Exceptions:** various other exceptions which restrict the exclusive rights of the copyright owners are also provided to users of the copyrighted work. Some of these are performances delivered with out charging entrance fee on the attendants, either directly or indirectly, performances made to promote the sale of the material being performed at a place where the sale takes place, performance at undertakings which offer to consumers food and drinking services wherein exception is made on the basis of the size of the undertaking and the number of devices used to perform the work, etc.

International copyright instrunments also provide for limitations and exceptions to exclusive public performance right of the copyright owner. Despite the failure of the Berne Convention to provide for exemptions to compliance to its provisions, there is an understanding among scholars that some limited exceptions to exclusive public performance right are acceptable. These limited exceptions seem to apply to ‘charitable, religious and patriotic celebrations’.⁷⁹ Under the TRIPS agreement, member states are allowed to put exceptions and limitations to exclusive economic rights, including public performance right. At the same time, member states are obliged to confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.⁸⁰ These are three cummulative requirements that must be met at the same time for exceptions to be acceptable under the TRIPS agreement: the exception must be limited to a special case, it must not conflict with a normal exploitation of the work and it should not

⁷⁷. See *ibid*.

⁷⁸. See for example art. 16 of Proclamation 410/2004.

⁷⁹. Para. 11.6, WIPO Guide to the Berne Convention for the Protection of Literary and Artistic Works, Geneva 1978; Attorney General's Department, Submissions, p. S774; Dr Warwick Rothnie and Professor James Lahore, Submissions, pp. S143–S144, in *supra* at note 5.

⁸⁰. Article 13 of TRIPS agreement.

unreasonably prejudice the legitimate interest of the copyright owner. It has been argued that “blanket exemptions covering a broad sector of the economy would probably be too broad to satisfy the 'special case' requirement. Any use of the music in a commercial context would probably conflict with the normal exploitation of the author's work. It is likely that any exemption which deprived copyright owners of royalties to which they would otherwise be entitled would be prejudicial to the interests of the right holder.”⁸¹

3.4. Protection And Enforcement

3.4.1. Protection

Recognition and protection of intellectual property rights in general and copyrights in particular is so essential to the development of a nation and the well-being of its society. As any property do, intellectual property deserves protection. As work of the mind of its owner, it deserves more protection. It deserves more protection because it is not only a property, as creation of one's mind it has some thing to do with human rights of individuals. It is one of the means in which individuls express themselves. Again, as a creative work it fosters social, cultural, economic and scientific development of a country. These are some of the reasons that make intellectual property right secure their places in the constitutions of countries. That is, protection of intellectual property rights begins with a provision in the constitution. For example, it is provided under the U.S. Constitution that the Congress has the power to legislate laws in order to “promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”⁸² But, provisions of the constitutions are too general to deal with specific issues of intellectual properties. That is why legislators are empowerd to come up with specific laws that regulate details of intellectual property rights issues. One of these laws is the copyright law. Copyright law governs all the matters related to all varieties of literary, artistic and musical works. But still, copyright law has various components dealing with different issues within a copyright, and having differents status.

⁸¹. Dr Warwick Rothnie and Professor James Lahore, Submissions, p. S145, in supra at note 5.

⁸². Article I, Section 8, Clause 8 of the Constitutions of the United States of America. See also Article 40(1) of the FDRE Constitution. It is provided under this provision that the right of Ethiopian citizens to private property is protected and private property includes, inter alia, intangible things which are the products of ones labor and creativity.

Usually there is a proclamation, which comes next to the constitution, and it deals with general issues of copyright. It is also a usual practice to have a regulation, which is more detail than the proclamation, and used to implement the latter. It is also necessary to have another law, next to the regulation, which is used in further implementing the other two laws. Nothing new has been said so far. All these are normal whether it is for copyright or other subject matter. But, as copyright has various constituent elements such as reproduction right, distribution right, public performance right, etc, it is some times necessary to come up with specific law for better protection and enforcement of some of these rights. Among the constituent elements of copyright, public performance right is one that necessarily, even mandatorily, requires the promulgation of additional law for its effective protection and enforcement. Two or three provisions within a proclamation and some others in a regulation do not suffice to protect and enforce public performance right. Compared to other constituent elements of economic right, public performance right is some what complex and different interms of its protection and enforcement. In the first place, different parties are entitled to public performance right on a single piece of work such as musical work. Again, public performance right is subjected to various exceptions and exemptions than other constituent elements of economic rights. Its enforcement also requires the involvement of atleast two institutions, government and private. Therefore, adequate and detail legislations are required to regulate the relationship between the institutions, the extent of the rights of each party and limitations to the right. In addition, the approach to copyright in general and public performace right in particular should change rapidly with emerging technologies. It is true that development in technology brings with it new means of infringing copyright, and public performance right is very much susceptible to this problem. To take just one example, musical works are uploaded on internet and it can be performed by every body who has internet access. Therefore, countries are expected to come up with laws that address these issues and anticipate new ones.

Inline with this thinking, many countries have come up with various extensive laws on copyright in general and public performance right in particular. United States of America is at the forefront in this regard. It has extensive copyright law in Title 17 of the United States Code. This law is so

broad that it covers most of the issues that should be dealt with modern copyright law. In addition, U.S. has come up with other laws which are specific to public performance right.⁸³

Various international copyright instruments also provide for the protection of public performance right. To begin with, the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) establishes international standards for the protection of public performance right of authors in relation to musical and literary works. The convention grants authors/copyright owners of literary and musical works the exclusive right of authorising:⁸⁴

- (i) the public performance of their works, including such public performance by any means of process;
- (ii) any communication to the public of the performance of their works.

The Berne Convention also applies to public performances of musical works which occur by means of radio or television broadcasts. It is provided that authors/copyright owners of literary and artistic works have the exclusive rights of authorising:⁸⁵

- (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;
- (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;
- (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

The convention also deals with the right of public recitation and of communication to the public of a recitation. Accordingly, it is stated that authors/copyright owners of literary works shall enjoy the exclusive right of authorising:⁸⁶

⁸³. In addition to its extensive main copyright law, U. S. has also promulgated various other laws which are essential for the proper protection and enforcement of copyright. See for example the The Digital Millennium Copyright Act of 1998, The Copyright Royalty and Distribution Reform Act of 2004, etc.

⁸⁴. Article 11 Berne Convention for the Protection of Literary and Artistic Works, 1971, Paris.

⁸⁵. Article 11^{bis}, Ibid.

- (i) the public recitation of their works, including such public recitation by any means or process;
- (ii) any communication to the public of the recitation of their works.

Another international instrument in relation to public performance right is the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, the Rome Convention. As its name indicates, it protects performers, producers of sound recordings and broadcasters. This convention provides that performers and producers of sound recordings shall be paid equitable remuneration for the broadcasting or communication to the public of sound recordings.⁸⁷ WIPO Performances and Phonograms Treaty also entitles performers and producers of sound recordings to similar protections.⁸⁸

Another international instrument with much relevance to the public performance right is the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) which provides a link between intellectual property rights and trade. This agreement obliges all member states of the World Trade Organization(WTO) to comply with articles 1 through 21 of the Berne Convention with the exception of article 6^{bis} which deals with moral rights of authors.⁸⁹ That is, all member states of WTO are expected to enforce these provisions whether or not they are parties to the Berne Convention.

3.4.2. Enforcement

Mere existence of legislations, whatever their status(whether a constitution, a proclamation or a regulation) and however detail and extensive they are does not by itself guarantee the realization of the intended result. It could only be one step forward, infact big step! In other words, the fact that a right is enshrined in a constitution, or a proclamation does not mean that it is put into practice. Something must be absent, and that is enforcement. That right or a law that protects the

⁸⁶. Article 11^{ter}, Ibid.

⁸⁷. Article 12, International Convention For The Protection Of Performers, Producers Of Phonograms And Broadcasting Organisations (Rome Convention), 1961, Rome.

⁸⁸. Article 15(1) of the WIPO Performances and Phonograms Treaty provides that ‘performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.’

⁸⁹. Article 9(1), Agreement On Trade-Related Aspects Of Intellectual Property Rights ("TRIPS Agreement")

right must be enforced. But still, it is undeniable that protection of the right is important. Protection precedes enforcement. It is true that a right that is not protected by the law can not be enforced. That is why we said recognition provided by law to a certain right is not only a step forward, but it is also a big step forward to its enforcement. So enforcement is also as important as protection.

When we come to the issue at hand, protection of copyright in general and public performance right in particular both domestically and internationally does not alone enable creators and copyright owners to collect the fruit of their labour. For this to happen, enforcement of their right is not only necessary, but it is also mandatory. On the other hand, for effective enforcement of copyright, or any other right for that matter, one needs to have all the necessary enforcement mechanisms at hand. Among the things that are required to enforce a right, law enforcing institutions come at the forefront.

Copyright is not an exception to this, and law enforcing institutions play a vital role here too. Therefore to have public performance right effectively protected and enforced, there must be duly organized judiciary, prosecutor and the police force. These organs must be enabled and made to play active role in the enforcement of public performance right. But the problem is that, unlike other rights which are enforced purely by public authority, public performance right requires the involvement of additional organ, without the participation of which one cannot imagine effective enforcement of the right. That is, right holders must engage in the activity of enforcing their rights. They do this not individually, but through an organ that represents them. This organ is called performing rights organization or copyright collecting society. In the following few paragraphs, a brief overview of this organization will be made.

3.4.2.1. Performing Rights Organizations(PRO) or Collecting Societies⁹⁰

Performing rights organizations or collecting societies are organizations which collect and distribute royalties to their members who are copyright owners. In other words, collecting society means a society, an association or corporation that carries on the business of collective administration of copyright or of the remuneration right conferred on copyright owners who authorize it to act on their behalf.⁹¹ That is, it is formed by the copyright owners who agree that such society or organization will administer their rights on their behalf.

The benefit of establishing collecting society or performing rights organization can be seen from two point of views. From the point of view of the right holders, ‘collective administration is the only means of ensuring that the legitimate interests of copyright owners are respected when they are dealing with a multiplicity of users.’⁹² Practically, it is impossible for a copyright owner to control and monitor the use of his work at different places by various users. For example, it is very difficult, if not impossible, for a composer to know what use is being made of his music in the countless of bars, cafes, restaurants, shops, radio and televisions stations, or generally in all public places in a country or across the globe, and enforce his rights in the courts each time they are infringed.⁹³ Therefore, ‘collective management of copyright allows copyright owners to monitor and, in some cases, control certain uses of their works that would be otherwise unmanageable individually due to the large number of users.’⁹⁴ In addition to easing the administration of their rights, collective society also helps copyright owners to exploit the power of unity. It allows copyright owners to use the power of collective bargaining to obtain more for

⁹⁰. Copyright collecting societies are known by different names. While ‘collecting or collective societies’ is the name commonly used, they are also known by other names such as rights management organizations, collective management organizations, etc. Performing rights organizations, on the other hand, are narrower than collecting societies. Collecting society administer all the constituent economic rights of its members, where are performing rights organizations denotes a society which is responsible for the administration of public performance rights and right of communication to the public of its members. In this work, different names such as: collecting society, collective society, collective management, collective administration and performing rights organization may used interchangeably according to the circumstances.

⁹¹. Daniel J. Gervas, Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective, Report Prepared for the Department of Canadian Heritage, 2001.

⁹². Paula Schepens, Guide To The Collective Administration Of Authors’ Rights: The Administration Society At The Service Of The Authors And Users, 2000, UNESCO.

⁹³. Ibid. See Also, Collecting Society And Cultural Diversity In The Music Sector, by Hellenic Foundation For European and Foreign Policy(Scientific Coordinator), European Parliament, 2009.

⁹⁴. Supra at note 38.

the use of their work and negotiate on a less unbalanced basis with large users such as broadcasters.⁹⁵

Equally important is the benefit of the existence of collecting society for the users of copyrighted works. At first glance, collecting society does not seem to have much benefit for the users, as they represent rightholders. But, this is far from the truth. Collective management ensures that users will have easy access to the rights needed to use the copyrighted work.⁹⁶ It is the most effective means of facilitating the public dissemination of works when the user draws upon a multiplicity of works.⁹⁷ It is tiresome and costly for a radio or TV broadcaster, cafes, bars and shops owners to apply to hundreds and thousands of copyright owners for the exploitation of their rights. High transaction cost may sometimes deter users from acquiring license and make them resort to illegal uses. By offering one-stop shopping or single point for rights clearance, collecting societies prevent commercial users from having to negotiate with multiple right holders.⁹⁸ In this, it substantially reduces the transaction costs of right users to get license and that of rightholders to administer their rights. This much being said on the necessity of performing rights organizations, it is also important to have a brief look at the businesses of these organizations.

The obvious job that a collective society has at hand is that of representing its members. It licenses its members' rights on their behalf and makes sure that exploitations of these rights are made as per the authorisation granted. It also collects royalties from users of the copyrighted works as stipulated in the license. Accordingly, it safeguards the financial interests of its members. In doing this it is said to have played an **economic role**, in the sense that it ensures that economic interest of its members is protected. In the mean time, it also makes sure that users are getting access to the copyrighted work within the framework of license agreement it provides, thereby preventing illegal exploitation of rights.

⁹⁵. Ibid.

⁹⁶. Ibid.

⁹⁷. Supra at note 39.

⁹⁸. Hellenic Foundation For European and Foreign Policy(Scientific Coordinator), Collecting Society And Cultural Diversity In The Music Sector, European Parliament, 2009.

Collective societies have also many other roles to play which inherently flow from their function of representing their members in dealing with users. One of these roles is **political role**.⁹⁹ A collective society plays a political role in the sense that it preserves the balance between the right to information of the general public and the right to effective protection of creators of copyrighted works. Users have the right to get access to works of the mind of authors. Authors also have the right get reasonable remuneration for the exploitation of their works by users. Collective society makes sure that this balance is maintained to the satisfaction of both parties, creators and users. A collective society has also a **legal role** to play.¹⁰⁰ In advising its members, drawing up standard contracts for licensing rights, negotiating contracts, enforcing rights in the court whenever they are infringed etc, the performing rights organization is said to have played its legal role. In addition to economic, political and legal roles, a collective society is also expected to play a **social role**. Creators' life as well as their income is irregular.. Success is sometimes intoxicating and deceptive, and may bring with it failure. Creativity decreases as old age comes. A creator may die, or fall sick. It is here that the benefit of collecting society becomes outstanding. 'It obliges its members to put a little away for the rainy days'.¹⁰¹ It withholds a small percentage while distributing royalties, so that creators or their families can resort to in case any of the above unwanted, but some of which are inevitable facts happen. Last, but not least is another obvious role of the performing rights organization, which is called **cultural role**. It is true that copyright protection encourages creativity. Performing rights organization ensures that this protection is maintained. It makes sure that economic interests of its members are safeguarded. In doing this, it leaves creators with ample time that should be invested on creativity. Thus, it fosters creativity and enhances cultural identity and diversity. Besides, it organizes various cultural festivals, stages and concerts and encourages new creators to come to the scene, thereby ensuring cultural continuity.

Another important point that should be raised with regard to collecting societies is the status they should have during their formation. It is argued that collecting society is not trading company and it should not have a business concern like business organizations. It does not live for itself; rather it exists for the sole benefits of its members who formed it and own it. So it does not make

⁹⁹. Supra at note 39.

¹⁰⁰. Ibid.

¹⁰¹. Ibid.

profit.¹⁰² From the point of view of the rationale behind its formation, the above assertion is quite correct. Collecting society is formed for the primary purpose of taking care of the interests of its members. It is destined to serving copyright owners and users. It is not to carry on business. But this does not rule out the possibility of coming across a collecting society having the status of profit making entity. Though majority of the collecting societies are not-for-profit entities, there are also others that have the form of for-profit entities.¹⁰³ One may also find a collecting society having the form of public authority.¹⁰⁴ Therefore, collecting societies may have various forms(for-profit, not-for-profit, or public authority), and most countries law do not clearly determine the form such societies should have. It seems that, it is left for them to decide. Likewise, the success or the failure of a performing rights organization does not seem to have any relation with its legal status.¹⁰⁵ Both successful and less successful collecting societies may operate under one or the other legal form.

An equally important point concerning the structure of the collecting societies is determination of its status as a de jure or de facto monopoly. While some countries put express or implied restrictions as to the number of collecting societies that should operate in a given field, multiple performing rights organizations may operate in a single field in other countries.¹⁰⁶ Obviously, creating legal monopoly in favour of some collecting societies is not advisable from the point of view of both rightholders and users. Rightholders should be free to join a collective society of their choice or create new ones. In the same manner, users need to have few collecting societies to choose from. But, having too many collecting societies per field may have its own negative impact. Among other things, inefficiency may be resulted. More importantly, having many societies in a given field may negate the purpose of their establishment. One of the benefits of having a collecting society is the fact that it eases the difficult task of users to deal with multiple rightholders. Existence of collecting societies enables users to acquire license for the exploitation of many works from one place. Allowing many collecting societies to operate in a single field

¹⁰². Ibid.

¹⁰³. Supra at note 38, see also Pierre Trudel and Sylvie Latour, *Les mécanismes de la gestion collective des droits d'auteur au Canada*. Actes du colloque, Montréal, March 18, 1994, at p. 44, quoted in *ibid*.

¹⁰⁴. For example, in Italy, SIAE, the Italian Society of Authors and Publishers and the principal Collective Management Organization in the country is in fact a public authority. (*ibid*)

¹⁰⁵. Ibid.

¹⁰⁶. In countries such as Italy where collecting societies have the legal status of public authority, there is clear de jure monopoly. Competition is expressly discouraged among collecting societies in the Netherlands and Spain. One may also notice de facto monopoly in countries such as Austria, Japan, Denmark and Finland in some fields. (*Ibid.*)

may get users into confusion to go to one or the other society for the work they need to exploit. Therefore, having unlimited number of collecting society is also not advisable.

Exploitation of copyrighted works also occurs beyond boundaries. This limits the ability of domestic collecting societies to fully safeguard the right of their members. It is to solve this problem that international collecting societies like CISAC¹⁰⁷ and others were established. As a result, domestic societies are expected to be members of these international organizations to ensure protection of their members' rights across borders.

When it comes to licensing their members' rights, setting tariffs, collection and distribution of royalties, it is a matter left for the collecting societies alone. This is mainly because of the fact that, collecting societies are private organizations the primary purpose of which is administration of their members' property rights.¹⁰⁸ Limitations that are normally expected to be set in this circumstance are those that ensure the methods collecting societies apply in setting tariffs, collecting and distributing royalties comply with the requirements of the law.

¹⁰⁷. CISAC: Confédération Internationale des Sociétés d'Auteurs et Compositeurs/International Confederation of Societies of Authors and Composers was established in 1926.

¹⁰⁸. An exception to this is the case of collecting societies that have the form public authority. In such cases, it is legitimate to expect some sort of government intervention concerning the operation of the societies. The same is true if the right administered by the society is subject to compulsory licensing in which case tariffs are usually set by the government.

CHAPTER FOUR

4. Protection And Enforcement Of Public Performance Rights Under Ethiopian Law

4.1. Introduction

In this part of the paper, the writer deals with the legal and institutional frameworks for the protection and enforcement of public performance rights in Ethiopia. An examination of the constitutional provisions and existing relevant legislations will be made to assess their adequacy for the protection of the public performance rights. Likewise, a look at the institutional framework will be made to see whether or not the existing institutions are paying adequate attention for the enforcement of the right, and all the necessary institutions are in place. In the mean time, an attempt would be made to pinpoint deficiencies both in the legislations and institutions in protecting and enforcing the right.

Last, but not least, an enquiry will be made to have a clear picture of the reality on the ground concerning enforcement of public performance right in Ethiopia, whether or not deficiencies in legislations and institutions have any relation with the enforcement or infringement of the right.

4.2. Legal And Institutional Frameworks

4.2.1. Legal Frameworks

It is crystal clear that the existence of laws or legal provisions is the primary factor for protection as well as enforcement of any right. As it has been said herein above, it is impossible to enforce a right that is not protected by a law. In the same manner, one needs to have legal provisions at hand to deal with protection of public performance right in particular and copyrights or any proprietary rights in general. Protection of property rights including copyright usually begins with a constitutional provision and supplemented by other laws such as proclamations and regulations. In the sections that follow, protection of public performance right under relevant laws including the constitution will be discussed.

4.2.1.1. The FDRE Constitution

A constitution is the supreme law of a country. It is said to be both legal and political document. In its legal aspect, it regulates major and general legal issues. It is too general to deal with all legal issues. It only regulates some important legal matters and leaves details for other laws. Property right is so an important right that it is one of the matters dealt with by constitutions. Constitutions provide that individuals/citizens are entitled to acquire and own private properties. Among private properties are rights in intangible things which are the products of human creativity or human intellect. These are called intellectual properties. In addition to right to private property, which includes intellectual property, some constitutions expressly provide for the protection of intellectual property right. As mentioned somewhere in this paper, this is mainly for two reasons. Firstly, as product of human intellect, intellectual property is some thing more than a mere property and it has some thing to do with human right, therefore deserves better protection. Secondly, protection of intellectual property enhances country's economic, technological, cultural and social developments. A typical example of constitutions which expressly provide for the protection of intellectual property right is the 1879 U.S. Constitution which empowers the Congress to legislate laws in order to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."¹⁰⁹

When we come to the FDRE Constitution, it also recognizes the proprietary right of Ethiopian citizens. It provides that:

*"Every Ethiopian citizen has the right to the ownership of private property. Unless prescribed otherwise by law on account of public interest, this right shall include the right to acquire, to use and, in a manner compatible with the rights of other citizens, to dispose of such property by sale or bequest or to transfer it otherwise."*¹¹⁰

This constitutional provision not only gaurantees citizens right to private property, but it also defines the latter and provides for the means of its acquisition. Accordingly, private property shall mean:

¹⁰⁹. Supra at note 29.

¹¹⁰. Article 40(1), FDRE Constitution.

“any tangible or intangible product which has value and which is produced by the labour, creativity, enterprise or capital of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common.”¹¹¹(emphasis added.)

It is true that the definition provided by the constitution for private property includes intellectual property. Apart from this, some implied and express mentions are made here and there by the constitution, and these, to some extent, show the emphasis given to the protection of intellectual property. For example, though its main concern is freedom of expression, it can be argued that article 29 of the constitution has some thing that encourages creativity.¹¹² In addition, it is provided that the state is responsible to contribute to the promotion of arts,¹¹³ and one of the means by which the state discharges its responsibility is by according due protection to the copyrights of authors and owners of arts. Most importantly, one of the things that have been adopted as cultural objectives in the constitution is the support that the government should extend towards the development of creativity. It is put as the duty of the government that it shall, to the extent its resource allows it, support the development of arts, science and technology.¹¹⁴ The first thing the government is expected to do to have this objective accomplished is to enable creators collect the fruits of their labour. This can only be done by duly protecting the economic rights of creators and right holders.

When we come to the issue at hand, protection of public performance right under the constitution which is a sub-set of the wider intellectual property right and copyright, it can be said that enough attention has been paid to it by the constitution. Taking into account the nature of a constitution, in the sense that it is general and does not address some detail issues, the things we have mentioned herein above suffice to help us understand the emphasis the constitution has given for the protection of intellectual property, which also includes copyrights and its constituent element, public performance rights. Therefore, it can be concluded that appropriate protection has been granted to public performance rights at the constitution level.

¹¹¹. Article 40(2), FDRE Constitution.

¹¹². See sub-articles 2&3 of art. 29 of the FDRE Constitution.

¹¹³. Article 41(9) of the FDRE Constitution.

¹¹⁴. Article 91(3) of the FDRE Constitution.

4.2.1.2. Copyright and Neighboring Rights Protection Proclamation

In accordance with the power granted to it by article 55(1) of the constitution, the House of Peoples Representatives promulgated the Copyright and Neighboring Rights Proclamation in 2004. This long-awaited proclamation was made ten years after the FDRE Constitution had been proclaimed. It is a much-awaited proclamation due to the wide spread violations and infringements of copyrights and neighboring rights at the time. Continued struggle from right holders who had been much suffered from violations of their economic rights and eager to see their constitutional rights realised, and pressures from civic societies had contributed a lot to the coming into effect of this proclamation.

As its name indicates, the sole concern of the proclamation is the protection and enforcement of copyrights and neighboring rights. It begins with emphasizing the role literary, artistic and other creative works play in the cultural, social, economic, scientific and technological development of a country, and the necessity of protecting neighboring rights to make the former productive.¹¹⁵ It then follows on with definition of important terms and determination of the scope of application of the proclamation, and list of works not protected by copyrights law. It goes on by putting requirements that should be fulfilled by a work in order to get copyright protection, and providing exclusive economic and moral rights along with exceptions and limitations to them. It also contains provisions on ownership of copyright, presumption of ownership and assignment and licensing of economic rights and the procedures thereof. The proclamation devotes a part to the protection of rights of performers, producers of sound recordings and broadcasting organizations, and limitations and exceptions to their rights. It finally deals with enforcement of the rights. It outlines the roles the judiciary should play in the enforcement of the rights which ranges from taking provisional measures to passing final decisions, the measures that should be taken by the Customs authority at border when the goods are imported in violation of copyright law, civil remedies that are awarded to the victims of infringements of the rights and criminal sanctions that will be imposed on persons that infringe rights protected under the proclamation. This much being said on its general content, an attempt will be made to examine the provisions of the proclamation that deal with protection and enforcement of public performance right, which

¹¹⁵. See the Preamble of the Proclamation.

is the main concern of the research, at a reasonable depth in the paragraphs that follow, at the expense of some repetitions.

The proclamation defines public performance as performing a work to the public by recitation, playing, dancing, acting or otherwise, either directly or using any communication media. Audio-visual works are performed by showing the images in sequence, where as a sound recording is performed by making it audible to the public.¹¹⁶ If a copyrighted work is presented to the public in any of the above means, depending on the type of the work, it is said to be publicly performed. Though treated separately in the proclamation, communication to the public of a work seems to have similar, or atleast close meaning with public performance right, in the sense that both are about presentation of the work to the public.¹¹⁷ As per its definition provided in the proclamation, communicating a work to the public is:

“transmission by wire or without wire images or sounds or both of a work, a performance, a sound recording or a broadcast in such a way that the images or sounds can be perceived by a person outside the normal circle of a family and its closest social acquaintance at a place or places so distant from the place where the transmission originates, that without the transmission the images or sounds would not be perceivable and, further, irrespective of whether the persons can receive the images or sounds at the same place and time, or at different places and lor times individually chosen by them.”¹¹⁸

Meaning of the word ‘public’ is provided nowhere in the proclamation. In its ordinary dictionary meaning, it is to mean something open to the people. Public performance, then, is a performance delivered at the presence of people. Making use of the phrase provided in article 2(6) of the proclamation, (... a person outside the normal circle of a family and its closest social acquaintance....) (emphasis added), public can be taken as gathering of people having no family

¹¹⁶. Article 2(24) of the Proclamation.

¹¹⁷. While public performance includes presentation of a work to the public where the audience is directly attending the performance or presentation, the so called live performance, communication of the work to the public is limited to circumstances wherein the work is presented to the public from a distance through wire or wireless means. Therefore, public performance seems to include communication to the public, and a variety of cases, they are treated to have close meaning both in literatures and legal documents. In addition, what is communicated to the public is either the work itself or its performance. Therefore, for the purpose of this research also, public performance of a work and communication of a work to the public are taken as having similar meaning.

¹¹⁸. Ibid, Article 2(6)

relationship or close social acquaintance. Accordingly, if a work is performed before, or communicated to two or more persons not having the above mentioned relationship, it is said to be public performance of the work, or communication of the work to the public.

The proclamation also defines the word ‘work’, and it has the meaning of a production in the literary, scientific and artistic fields. It includes: books, booklets, speeches, other oral works, dramatic, dramatico-musical works, pantomimes, choreographic works, and other works created for stage production, musical compositions, audiovisual works, etc.¹¹⁹ If these and other works capable of being performed or communicated are presented to two or more persons, who are not family members or have no close social relation, using any of the above mentioned means, it is said to be public performance of the work, or communication of the work to the public.

It is only the author or copyright owner that has the right to present the work or authorize its presentation to the public. That is, the author or copyright owner of the work shall have the exclusive right to carry out performance of the work or communication of the work to the public, or authorize others to do these activities.¹²⁰ Engagement in these activities without due authorization from the author or copyright owner of the work amounts to infringement of the right and violation of the copyright law, and entails civil and criminal liabilities.

This exclusive public performance right is not without limitations and exceptions. There are exceptional circumstances wherein a copyrighted work can be publicly performed by a person/s other than the author or copyright owner and without authorization by the latter. The first of these exceptions is communication of the work to the public for the purpose of providing information to the society. Communications made for inforamatory purposes such as providing current informantion, reporting current events, communication to the public of works published in newspapers, periodicals, etc are put as exceptions to the exclusive right of right holders.¹²¹ Another exception to exclusive public performance right of the author or copyright owner is private performance free of charge. Accordingly, the right holder cannot forbid private performance of his work given free of charge at a family gathering or in a school.¹²² For such performance to be an exception, it is expected to fulfill two cummulative requirements. The first

¹¹⁹. Ibid, Article 2(30 a-e).

¹²⁰. Ibid, Article 7(1g& i).

¹²¹. Ibid, Article 13.

¹²². Ibid, Article 16.

requirement is that the performance has to be delivered at a family gathering or in a school. Secondly, it has to be a performance given free of charge. These conditions must be met at the same time. A performance of the work made at places other than a school or a family gathering, even if made without charging any fee does not meet the condition set under this article. Similarly, a performance delivered by charge in a school or at family gathering fails to meet the requirement. Compulsory licensing or issuance of non-voluntary license by a relevant government organ also can be taken as an exception to exclusive right of the author or copyright owner. Irrespective of oppositions from a right holder, a work can be licensed by a government organ in charge of copyright issues, subject to the conditions and payment of compensation to be determined by the latter.¹²³

With regard to neighboring rights holders such as performers and producers of sound recordings, they also are entitled to some exclusive public performance rights or the right of communication of their works to the public. To begin with, performers have an exclusive right to either carry out by themselves or authorize the broadcasting or other communications to the public of their works except where the broadcasting or communication is made from a fixation of the performance made with the permission of the performer or it is a rebroadcast authorized by the first broadcaster.¹²⁴ (emphasis added.) When a broadcasting or other communication to the public is made from the fixation of the performance made with the authorization of the performer, it does not mean that the latter will totally be excluded from making use of his public performance right. It is to mean that the right is exercised by a person whom the performer authorized to make the fixation, and the performer claims his right through this person. In the same manner, when it is a rebroadcasting authorized by the first broadcaster, the performer can claim his right through this broadcaster. Apart from this, a performer has an exclusive right to make by himself or authorize others to make his fixed performance available to the public by wire or wireless means, in such a way that members of the public may have access to them from a place or at a time individually chosen by them.¹²⁵ An exception to these rights of the performer is when he has authorized the incorporation of his performance in a visual or audiovisual fixation,¹²⁶ in which case he claims his right through the producer of visual or audiovisual fixation. In addition, the performer can not

¹²³. Ibid, Article 17.

¹²⁴. Ibid, Article 26(1a).

¹²⁵. Ibid, Article 26(1f).

¹²⁶. Ibid, Article 26(2),

forbid the communication to public of his performance when it is accessory to an event constituting the principal subject of a scene, or of a work, or of an audiovisual document.¹²⁷

Producers of sound recordings too have an exclusive right of making or authorizing others to make available to the public of a sound recording, by wire or wireless means, in such a way that members of the public may have access to it from a place or at a time individually chosen by them.¹²⁸ While no exceptions are provided to this right, some obligations are imposed on producers of sound recordings.¹²⁹ But, interestingly enough, the proclamation has also gone to the extent of dealing with the issue of payment of royalty, which it has never mentioned with regard to right of others. It provides that:

“Where a sound recording published for a commercial purpose or a reproduction of such sound recording, is used directly for broadcasting or other communication to the public or is publicly performed, a single equitable remuneration for the performer and the producer of the sound recording shall be paid by the user to the producer.”¹³⁰

Subject to the existence of contrary agreement between them, the royalty received from the user is to be shared equally between the performer and producer.¹³¹

Apart from the exceptional circumstances, public performance or communication to the public of a copyrighted work without authorization is infringement of copyright and violation of the copyright law. As mentioned herein above, such violation of copyright law has the consequences of facing civil and criminal responsibilities. Civil remedies range from temporary injunctions to compensation for moral and material damages, while criminal sanction is an imprisonment from one to ten years, based on the state of mind of the criminal, and could be accompanied by

¹²⁷. Ibid Article 26(3).

¹²⁸. Ibid, Article 27(1e).

¹²⁹. See ibid, articles 28 & 29. A producer of sound recording or of an audiovisual work is duty bound to state on the label of the recording or on its container: the title of the work, the name of the author and of the main performers, the name of the distinguishing mark of the producer and that the rights accruing to the producer under this proclamation are reserved, the symbol (P) and the year in which the recording was first published. Though the effect of failure of the producer to discharge these obligations is not stated clearly, it seems to cost him the rights themselves.

¹³⁰. Ibid Article 30(1).

¹³¹. Ibid, Article 30(1).

seizure, forfeiture and destruction of the infringing material and any other materials used in the commission of the offence.¹³²

At this juncture, the scope of public performance right or extent of public performance right of various right owners is worth consideration. As it has been repeatedly said, what makes public performance right a little bit different and complex among other economic rights is the fact that it involves different right owners. That is, two or more parties can enjoy exclusive public performance right on a work such as musical work or audiovisual work. But, the degree of protection and the extent of exclusive right that right owners are entitled to varies on the basis of who the right owner is. To begin with, it is an author or owner of a work that has the most exclusive public performance right under the proclamation. It is provided that they shall have an exclusive right to publicly perform or communicate the work to the public or authorize others to do so. This means that authors or owners of a work are not going to share the right with any body, nor they claim it through others, they exercise it by themselves. Simply put, they have the right to exclude all others. So, their exclusive public performance right is the broadest of all right owners.

When it comes to public performance right of performers, it is not as exclusive as that of authors' or owners of a work. Their exclusive public performance right is limited to their live performances, unfixed performances and making of fixed performances available to the public by wire or wireless means. Exclusive public performance right of performers does not extend to broadcasting or other communication of the work to the public when it is made from a fixation they authorized to be made, and its rebroadcast. In this case, performers have no right to exclude other, rather, their right is limited to that of claiming remuneration. In case of rebroadcasting authorized by the first broadcaster, the performer whose work is broadcast may not directly claim remuneration from the second broadcaster. He is expected to exercise his right through the first broadcaster.

In the same manner, producers of sound recordings have exclusive right of making available to the public of sound recordings through wire or wireless means. Similarly, broadcasting organization's exclusive right in relation with public performance right is limited to authorizing rebroadcasting of its broadcast. No mention is made whether or not it has other public performance rights over its productions/broadcasts

At the beginning of this section, it has been said that the proclamation was a much-awaited one due to the wide spread infringement of copyrights at the time. As a result, it is reasonably expected from the proclamation to address those problems. If one asks whether or not the

¹³². Ibid, Articles 34 & 36.

proclamation is upto the expectation of the interested parties and the general public, he may not get uniform responses. It may not be fair to generally categorize the proclamation as defective as there are areas in which achievements are due to it. A typical example of these areas is reproduction right. A lot of works have been done to prevent illegal coping of copyrighted works since the coming into effect of the proclamation. But, when it comes to protection and enforcement of public performance rights, it has not gone even half a way. In other words, though the proclamation has included provisions on protection and enforcement of public performance rights, its contribution to the enforcement of the rights is nothing or very minimal. This is mainly due to the incomplete nature of the proclamation in the sense that it fails to incorporate essential issues that could have helped in the enforcement of public performance rights. Some of these apparent deficiencies of the proclamation will be discussed in the following paragraphs.

- **Absence of provisions on collecting societies or performing rights organizations:** it has been said time and again that the role collecting societies or performing rights organization play in the enforcement of copyrights in general and public performance rights in particular is too essential to neglect. Enforcement of public performance rights is very difficult, if not impossible, with out the involvement of these organizations. Though they are private associations, and established by right holders, the government organ in charge of copyright issues inevitably involves in the task of their regulation and oversees their operations. For this to happen, the importance of a law that regulates the activities of the organizations and outlines the powers and duties of the government organ in its relations with the organizations is unquestionable. Again, there is no better a place for such laws or legal provisions to be incorporated in than the proclamation on the protection of copyright and neighboring rights. Therefore, it can be argued that provisions on collecting societies or performing rights organizations are unreasonably and unnecessarily excluded from the proclamation. Had the proclamation incorporated such provisions, it could have long ago inspired the establishment of the organizations. As the absence of performing rights organizations have great contribution for the non-performance of the public performance right, absence of provisions of such kind in the proclamation said to have contributed a lot towards non-performance of the

rights. As a result, part of the blame for infringements of public performance rights goes to the law maker who failed to include provisions on performing rights organizations in the proclamation. At the same time, this fact can be taken as one of the major defects of the proclamation.

➤ **Absence of express provisions on payment of royalties:** it is provided in the proclamation that the author or copyright owner shall have exclusive power to carry out or authorize public performance and communication to the public of his works. The author or copyright owner may authorize others to publicly perform the work or communicate it to the public for consideration or gratuitously. When the authorization is made for consideration, users of the copyrighted work (persons to whom authorization is given) are expected to pay royalties to the author or copyright owner. On the other hand, royalty is not going to be paid arbitrarily. The manner of payment and its rate must be determined in accordance with the law. But, when it comes to Copyright and Neighboring Rights Protection Proclamation, let alone determination of manner of payment of royalty and its rate, it does not even make express mention of the fact that royalty is payable to the author or copyright owner. An exception to this is Article 30 of the Proclamation wherein it is provided that single equitable remuneration be paid to the performer and producer of sound recordings when these works are used for broadcasting or communicated to the public, provided that they are made for commercial purposes. Apart from this, payment of royalty and its rate is not mentioned in the articles of the proclamation. Once again, this is one of the major defects of proclamation as far as public performance right is concerned.

➤ **Incomplete or Very Few Exceptions:** we all well know that copyright is a kind of monopoly and it is anti-competition by its nature. Authors and copyright owners are granted with this monopoly right due to the importance of their creations in the cultural, social, economic, scientific and technological development of a country. The main rationale behind protection of copyright is to encourage creativity which benefits the society at large, it is not just to reward right holders. That is why intellectual property laws in general and copyright laws in particular are exceptions to anti-competition laws. That is, the former vest monopoly right on copyright owners and other right holders,

while the latter tries to prevent monopolization as it is one of anti-competition practices. It is also true that exceptions should not go to the extent that they become the rule. This in turn subjects copyright itself to further exceptions. In other words, exclusive rights of authors and copyright owners are subjected to various exceptions. This is particularly true for public performance rights which is the subject of wider exceptions and exemptions. But, when we come to the Ethiopian copyright and neighboring rights protection proclamation, we find very few and incomplete exceptions. The only exceptions to exclusive public performance rights provided in the proclamation are public performances for informatory purposes and private performances delivered free of charge at family gatherings and in schools. These are not the only exceptions a public performance right should be subjected to both under other countries copyright laws and in literatures. There are various other exceptions, some of which are the following:

- **Exceptions for Educational Purposes:** copyrighted works could legitimately be performed in face-to-face classroom instructions, and such performance does not amount to infringement of the right. But this exception does not apply to works which are themselves produced for educational purposes.
- **Performances for Services at Religious Institutions:** performances of works of religious nature for religious services at such institutions does not amount to infringement of public performance right.
- **Performances for Charitable Purposes:** public performances made without any financial benefits to the participants of the performance and the income of which is exclusively devoted to charitable purposes are exceptions to exclusive public performance rights of authors and copyright owners.
- **Promotional Performances:** a public performance made to promote the sale of the material which is being performed does not amount to infringement of the right.
- **Small Business Exceptions:** there are also circumstances in which small businesses are exempted from paying royalties to right holders even if they perform copyrighted works publicly. This is by taking into account the capacity of the businesses and it is a kind of support to make them viable in the market. The smallness or otherwise of

such businesses is determined by an area they occupy and devices they use to perform a work.

The Ethiopian Copyright and Neighboring Rights Protection Proclamation fails to incorporate these and other important exceptions to exclusive public performance rights. This is not fair and imposes extra burden, which is non-existent in other countries law, on users of copyrighted works. It also creates confusions among both right holders and users as to the exact limits of their rights. This becomes an obstacle to the enforcement of public performance rights. Accordingly, this fact can also be taken as one of the deficiencies of the proclamation, atleast as far as protection and enforcement of public performance rights is concerned.

In generally, protection accorded to public performance rights by the proclamation is not satisfactory. To the dismay of authors and other copyright owners who had waited for the coming to effect of the proclamation with much hope, the legislature failed to incorporate some important issues which are so essential for the enforcement of the rights.

4.2.1.3. Criminal Law

It has been stated in the preceding section that infringement of public performance rights and other economic rights of authors and other copyright owners entails civil and criminal liabilities. Though the proclamation contains provisions on both civil and criminal responsibilities, the criminal code also deals with criminal liability of violation of copyright. Accordingly, it is provided in the code that:¹³³

1) Whoever, apart from cases punishable more severely by another provision of the this Code, intentionally violates laws, regulations or rules issued in relation to rights on literary, artistic or creative works, is punishable with rigorous imprisonment not exceeding ten years.(emphasis added)

(2) Where, the act is committed negligently, the punishment shall be simple imprisonment not exceeding five years.

Since public performance right is one of the rights an author or copyright owner has on literary, artistic and other similar creative works, violation of any legal provisions on this right is

¹³³Article 721 of the Criminal Code

punishable with simple or rigorous imprisonments, based on the mental state in which the offence is committed. While the same punishment is provided in the proclamation and in the code, it is also implied in both that there are circumstances in which a violation may entail heavier punishment if such is provided under other provisions of the criminal code.

4.2.1.4. A Regulation?

It is needless to say that the existence of a regulation is essential for the full protection and enforcement of copyrights in general and public performance rights in particular. It is even too obvious to talk about its necessity. For one thing, relatively speaking, a proclamation is too general to deal with every detail aspects of a certain right, for example public performance right. It is natural that some detail issues of implementation and enforcement of a right enshrined in a proclamation are left for the next law in hierarchy, a regulation. Without the existence of this law, the rights incorporated in the proclamation, and the proclamation itself will not be complete and sometimes meaningless, in the sense that its implementation is difficult, or may even be impossible. Practically, there may not be much difference between a right that is not protected and a right that is protected but not implemented.

When we come to the issue at hand, the Ethiopian Copyright and Neighboring Rights Proclamation authorizes the Council of Ministers to issue regulations for the implementation of the Proclamation.¹³⁴ In addition, the proclamation also refers some issues to be determined by the regulation that is to be issued by the Council of Ministers.¹³⁵ We have also said that a regulation has its own purpose to serve without which the proclamation itself and rights incorporated in it will not be complete. Very close to celebrate its 10th anniversary, the proclamation has not yet been followed by any regulation. Various issues that have been intended to be addressed by the regulation are still left as they were almost ten years ago. This greatly affects not only enforcement, but also the protection of public performance right. Among

¹³⁴. Article 39(1) of the Proclamation. Sub-article two of this article also empowers the Office to issue directives for the implementation.(emphasis added). As per the definition provided under article 2(15) of the proclamation, the name 'office' refers to the the Ethiopian Intellectual Property Office established by Proclamation No. 320/2003.

¹³⁵. See for example Article 17(2) of the proclamation. This article provides that the Office has the right to authorize exploitation of copyrighted works by granting license to users not withstanding opposition from right owners. The conditions and forms of such authorization along with the compensation to be paid to the owner of the right is left to be determined by the regulation.(Art.17(2). Article 7(3) of the proclamation, which entitles authors of original works of arts and original manuscripts to a share of resell price, leaves out the amount of share and the condition of entitlement to be determined by the regulation.

other things, had the regulation been issued, some of the defects of the proclamation could have been rectified.

4.2.1.5. Other Laws

Though a right is sometimes dealt with some specific laws, other laws may inevitably involve in its enforcement. A typical example of this is the case of criminal and civil procedure laws. Being procedural laws, they are usually used in the implementation or enforcement of other substantive laws. This is not an exception in copyright cases. Both criminal and civil procedure laws are applied in the enforcement of the criminal code provisions on copyright and the proclamation. It is specifically provided in the proclamation that, ‘the provisions of the civil procedure and the criminal procedure codes on search and seizure shall be applicable where an act that infringes the rights protected under this law is committed.’¹³⁶ Thus, these laws are also used in the enforcement of public performance rights.

4.2.1.6. Conclusion

It is quite obvious that effective protection and enforcement of a right requires solid legal framework. A good legal framework is composed of various laws of differing hierarchy which ranges from a constitution to a directive. Copyright or public performance right is not an exception to this. The effectiveness or otherwise of its protection and enforcement greatly depends on the underlying legal framework. When it comes to protection and enforcement of public performance right under Ethiopian law, the legal framework underlying it is not as solid as it should be. Though intellectual property, which includes copyrights and public performance rights, has firm constitutional background, deficiencies in other laws seems to have created a huge gap in the protection and enforcement of public performance right in particular. This writer has observed some apparent defects in the proclamation. In addition to its failure to include provisions on one of the most important role players in the enforcement of public performance right, collecting societies, it only incorporated very few and incomplete exceptions and exemptions to the right. Moreover, the absence of the regulation, which is supposed to supplement the proclamation, made the gap wider. In addition to its contribution to enhance

¹³⁶. Ibid, Article 33(4)

protection and enforcement of public performance right, the regulation could have remedied some of the defects of the proclamation had it been issued. To conclude, public performance right is not supported by adequate legal basis, or the legal regime for the protection and enforcement of the right is not satisfactory in Ethiopia.

4.2.2. Institutional Framework

4.2.2.1. Introduction

It has been said herein above that enforcement of a right is equally important as its protection. It is true that for a right to be enforced, it has to be first protected. That is why we said protection of a right is a big step forward. In the same manner, for protection of the right to be meaningful, it has to be enforced. A right that has not been enforced is not better than a right that has not been protected. For effective enforcement of rights, we need to have duly organized institutional framework, in addition to effective legal framework. Therefore, we can not imagine of effective enforcement of any right without having in place all the necessary institutions which are well equipped.

While some rights are enforced mainly by public authorities or government institutions, enforcement of others necessitate the involvement of private individuals or private institutions who are right holders or their representatives. In some cases, the participation of these private institutions is so essential that one can not think of effective enforcement or any enforcement at all in their absence. Public performance rights and other copyrights are among the rights which mandatorily require right holders to participate in the enforcement process. While government involves through its usual law enforcing institutions and others having relevance to the right in question or established for its protection and enforcement, right owners may involve either personally or by the representation of institutions set up for this purpose. In the sections that follow, a berief discussion of government and private institutions and their roles in the enforcement of public performance rights will be made.

4.2.2.2. Government Institutions

Enforcement of laws and rights enshrined therein is one of the most important constitutional duties of any government. Governments discharge this constitutional duty through the institutions they establish for this purpose. The judiciary, police and prosecutor office are the major role players in the enforcement of laws as it is their usual business. Other government organs may also involve in the enforcement of laws based on the type of rights at stake. Participation of the judiciary, police and the prosecutor is also necessary and mandatory in the enforcement of public performance rights. In addition to these institutions, Ethiopian Intellectual Property Office is also expected to involve in the enforcement of public performance right, one of its objectives being following up the implementation of laws on intellectual property rights.

4.2.2.2.1. Ethiopian Intellectual Property Office

It is a usual practice, both domestically and at international level, to have a separate organ that exclusively deals with issues of intellectual property. In addition to its contribution to the protection and enforcement of intellectual property rights, this organ also regulates exploitation of the rights to make sure that users or the general public are deriving appropriate benefits from protected works.¹³⁷ Accordingly, Ethiopia has also established a separate government organ, Ethiopian Intellectual Property Office, the sole business of which is taking care of intellectual property issues by Proclamation No. 320/2003. The main rationale behind the establishment of the Office is the need to have a government organ which will assume the responsibility to implement or follow up the implementation of laws on intellectual property.¹³⁸ Hence, the office has the following major objectives provided in the proclamation:¹³⁹

- to facilitate the provision of adequate legal protection for and exploitation of intellectual property in the country
- to collect, organize and disseminate technological information contained in patent documents and encourage its utilization

¹³⁷. It is for the interest of users or the general public that compulsory licensing are allowed by intellectual property laws.

¹³⁸. See the Preamble of Proclamation No. 320/2003, Ethiopian Intellectual Property Office Establishment Proclamation.

¹³⁹. Ibid, Article 5.

- to study, analyze and recommend policies and legislations on intellectual property to the Government
- to promote knowledge and understanding of intellectual property among the general public

In order to achieve these objectives, the office has been given powers and assumed duties, some of which are:¹⁴⁰

- implementing laws and regulations on intellectual property rights issued by the government
- to facilitate the establishment of, support and strengthen inventors, authors and musicians associations as well as similar societies
- to implement and/or follow up the implementation of intellectual property, policies as well as International agreements to which Ethiopian is a party
- to facilitate conditions that will help to create linkages between intellectual property owners and entrepreneurs who wish to exploit their creative works.

When it comes to protection and enforcement of public performance rights in particular, the office has a lot of roles to play than any other government organs, based on the rationale behind its establishment, objectives it is meant to achieve and its powers and duties. From the point of view of its objectives to facilitate adequate legal protection for intellectual property rights, and to study, analyze and recommend legislations on intellectual property to the government, it is expected to propose enactment of laws on public performance rights in particular and copyrights in general, by identifying gaps and deficiencies in the existing proclamation and enactment of other laws which are used to implement the proclamation, such as regulation. In addition to initiating the making of new laws, the office has to implement and follow up the implementations of provisions of laws on public performance rights, in coordination with the police and prosecutor office and performing rights organizations. It has also the power/duty to facilitate the establishment of performing rights organizations, and support and strengthen these

¹⁴⁰. Ibid, Article, 6(7, 14 & 15)

organizations. Moreover, as lack of awareness on public performance rights is one of the main causes for its infringement, the office is also expected to promote knowledge and understanding of the rights among the general public and users.

As per the mandate given to it by the establishing proclamation, the Office is currently performing a lot of activities which are intended to enhance protection and enforcement of public performance right in particular and copyright in general. Among the works that are being done by the Office currently, Draft Proclamation and Regulation are the major ones. It has finalised the drafting of regulation on registration of copyrighted works and submitted it to the Council of Ministers.¹⁴¹ It is also working on the draft proclamation on copyright and neighboring rights, which is hoped to address the defects of the proclamation currently in force¹⁴². But, it can be said that what the Office has done so far, especially concerning protection and enforcement of public performance right is not satisfactory.

4.2.2.2. The Police and Prosecutor offices

The police and prosecutors are at the forefront in the task of enforcement of laws. It has been said that one of the main constitutional responsibilities of any government is enforcement of laws and rights enshrined therein. Governments discharge this responsibility mainly through the institution of police and prosecutor. That means, police and prosecutors are the major and most important role players in the enforcement of laws. It can be said that their role is too obvious to discuss.

This is also true in the case of copyrights law. As violation of copyright laws entails criminal responsibility, in addition to civil liability, the involvement of these institutions is not only necessary, but also mandatory. But, unlike other laws which the police and prosecutor enforce on their own and by their own initiatives, rights protected by copyright law mandatorily requires the participation of private institutions. So, however organized and ready they are to play their roles, police and prosecutor may not successfully discharge their duties if the involvement of the private institutions is absent or not satisfactory. In the same manner, enforcement of public performance right necessitates the smooth coordination of these institutions, police and

¹⁴¹. Interview with Ato Yasin Omer and Ato Henok Tegegnework, Copyright and Traditional Knowledge Research, Registration and Information Team Leader and Legal Enforcement Expert, respectively.

¹⁴². Ibid.

prosecutor on the one hand and private institutions on the other hand. Very much organized and competent in tackling crimes and enforcing laws across the country, I do not think the police and prosecutor will have any problem to enforce public performance rights and other copyrights. In my opinion, as far as non-enforcement of public rights is concerned, any blame should not go to these government institutions. All the widespread infringement of public performance rights we see must be, partly, due to the non-existence or failure of private institutions to do their part of the job. It has to be born in mind that, compared to that of private institutions, the involvement of these government institutions in the enforcement of public performance right is limited, in the sense that there intervention is required when the law is violated. In most cases, public performance rights are implemented through a contract between right owners and users. Where there are strong and functional performing rights organizations, infringement of public performance rights is expected to be rare, and so is the intervention of police and prosecutor.

4.2.2.2.3. The Judiciary

Courts also play decisive roles in the enforcement of public performance rights, as they do in the enforcement of any laws and rights enshrined therein. But, like that of police and prosecutor, its involvement is not as decisive as that of private institutions. In the first place, the role of the judiciary comes into picture only when infringements of the rights occurred. As we have said, public performance rights are implemented through agreements made between performing rights organizations and users of the works, and infringement of rights is normally expected to be rare. Even compared to that of police and prosecutor, the involvement of the judiciary is still limited. It is limited to adjudication of cases brought before it, and not all infringements are to be brought before court. It is also possible that some cases of infringements are settled through out of court mechanisms. In the Ethiopian case, where there is no performing rights organization that licenses rights, collects royalties and take the cases of infringements before courts of law, the participation of the judiciary is even much limited. Therefore, the judiciary is not going to be blamed for the widespread infringements of public performance rights in Ethiopia. Whether or not it discharges its responsibilities effectively has to be evaluated on the basis of cases it adjudicates. So far, the researcher could not find any case on public performance rights that has been brought before court.

4.2.2.3. Private Institutions

Unlike some rights which are enforced mainly by government law enforcing institutions, public performance right mandatorily requires the involvement of right owners, in addition to government institutions, in its enforcement. Though there are circumstances wherein right owners personally enforce their public performance rights, the usual and most effective way of enforcing the latter is through institutions established for this purpose. Without the existence or participation of these institutions called collecting societies or performing rights organizations, one cannot think of meaningful enforcement of public performance rights. In the sections that follow, an enquiry will be made whether or not such institutions or an equivalent of them exist in Ethiopia and they are doing their business effectively.

4.2.2.3.1. Associations

A number of associations had been established and are currently in existence in relation with artistic, literary and other copyrighted/copyrightable works. These associations had contributed and are still contributing a lot towards the development of works in their respective fields. These contributions range from exchange of ideas and opinions among members to assistances in terms of finance for members in need. But, it is usually claimed that the primary purpose of the associations is protection of the interests or rights of their members. Whether or not copyrights are among the rights meant to be protected by these associations will be discussed in the following paragraphs. For the sake of convenience and relevance, discussions will be limited to few associations only.

- **Ethiopian Writers Association:** Ethiopian Writers Association is one of the oldest associations established in the field of literary, artistic and other related works . It was established in 1953 E. C. or around 1961 G. C. Being an association free from any political, religious, racial, language and other similar influences or impacts, it is determined to struggle for the protection of rights and benefits of its members, and development of literature of the country.¹⁴³ It performs every necessary endeavors to eliminate any constraints and adverse effects which challenge creativity and freedom

¹⁴³. Objective of the Association as provided in its Brochure.

of writers.¹⁴⁴ The association also endeavors to create conducive conditions for the promotion and development of literature. To this end, it undertakes studies and research, and offers educations and trainings to its members.¹⁴⁵ It also arranges various seminars and workshops, and other stages which bring together writers from all corners of the country along with their different ideas and opinions to enhance both the knowledge and skills of its members and development of the literature.¹⁴⁶

When it comes to works the Association has done to protect copyright of its members, there is only little to be mentioned. So far, it has only tried to ensure the protection of reproduction right of writers and settles disputes between writers on the allegation of copying of each others works. As far as protection and enforcement of public performance right is concerned, the Association has not done even a single mentionable work.¹⁴⁷ It is only recently that it has started to participate in the efforts to ensure effective protection and enforcement of this right with other similar associations, as a result of which the Copyright and Neighboring Rights Associations Collective Management is formed. On the other hand, works of the mind of members of the Associations are being performed daily through radios and televisions and other various means. Various FM Radio stations have programmes called “Yemetsihaf Tireka” in which copyrighted books and other literatures are read out to listeners. With out exaggeration, hundreds of thousands of money goes to the pocket of radio stations and producers of the programmes from sponsors. The Manager of the Association told this writer that authors and copyright owners of books performed in such programmes do not get a single penny from such revenues. He added that neither individual member nor the Association has made claims for payment of royalties due to such performances. In general, it can be concluded that the association has not done any thing mentionable for the protection and enforcement of public performance rights of its members.

¹⁴⁴. Ibid.

¹⁴⁵. Ibid. Interview with Ato Gebrekristos Hailesellassie, Manager of Ethiopian Writers Association. As part of the effort of the Association to enhance the capacity of its members, it is providing scholarship opportunities to the members in collaboration with domestic private and public universities.

¹⁴⁶. Ibid.

¹⁴⁷. Interview with Ato Gebrekristos Hailesellassie, Manager of Ethiopian Writers Association.

- **Ethiopian Musicians Association:** established in 1957 according to Ethiopian Calendar, the Ethiopian Musicians Association is also one of the oldest associations of its kind. When it was first established, the aim of the Association was to help performers/musicians get payments for their live performances at hotels and other recreational centres. Managers or owners of these hotels and recreational centres used to refuse paying musicians after performances were delivered. They claimed that the drinks and foods musicians had consumed during performances is enough and there is no need to pay additionally. Surprisingly, they also thought that musicians were also enjoying themselves by just delivering performances at those places and additional payment is unnecessary.¹⁴⁸ It is to solve these problems that the Ethiopian Musicians Associations had been established. From then onwards, its activities, goals and objectives had been expanded. The Association has set various goals and objectives, among which contribution to the development of the profession and protection of the rights and interests of its members are the major ones.¹⁴⁹ It is obvious that copyright issues are at the forefront of the rights and interests of musicians, and the Association is doing a lot of activities in collaboration with similar associations and government organs to ensure copyright protection of the works of its members.¹⁵⁰ When it comes to protection and enforcement public performance rights of its members, the Association has done almost nothing. The President of the Association has mentioned two major reasons, in addition to legal problems, for the failure of the latter to do any thing of value on public performance right. The first reason is lack of awareness on the part of its members as to the existence of the right itself. Secondly, authors of musical works transfer all their economic rights to producers. Accompanied by weak institutional framework and existing legal gaps, these problems hinder the Association not to act in its full capacity. Recently, it is working closely with the Collective Management of Copyrights and Neighboring Rights Associations and Intellectual Property Office to ensure effective protection and enforcement of public

¹⁴⁸. An interview with Ato Dawit Yifru, President of Ethiopian Musicians Association.

¹⁴⁹. Article 5 of the Articles of Association of the Ethiopian Musicians Association.

¹⁵⁰. Supra at Note 38. But the emphasis of the Association, so far, is on the reproduction right or prevention of illegal copying of music CDS, DVDs and cassettes,

performance rights and other copyrights of its members.¹⁵¹ In general, it is admitted that what the Association has done so far for the protection and enforcement of public performance right is not satisfactory.

- **Ethiopian Audio-Visual Producers Association:** The Ethiopian Audio-Visual Producers Association is a non-profit, non-governmental and a non-partisan civil association established in 1988 EC.¹⁵² Established by the initiative of few private owners of music and film producing enterprises, the Association has set a lot of goals to accomplish. Maintaining and enhancing the development of copyright industry in Ethiopia, promoting and ensuring protection of intellectual property rights and economic benefits of its members, and boosting up the qualities of Audio-Visual products are among its major goals.¹⁵³ In order to achieve these goals, the Association is expected to engage in a variety of activities such as:¹⁵⁴
 - Working on and watching out all activities undertaken within the marketing system of Audio-Visual products and taking necessary measures based on the mandate given to it by the law;
 - Conducting unremitting assessments and scholarly researches on issues of particularly paramount importance to the very objective of the association and disseminating the results to the government offices, policy makers, stakeholders, and to the general public;
 - Organizing international conferences, seminars, panel discussions, community forums, and advocacy works aiming at enlightening the public consciousness and then promoting the importance of copyright industry in Ethiopia;
 - Working vigilantly for the protection of the economic benefits and property rights of its members from any illegal activities of copyright abusers; etc.

¹⁵¹. Ibid.

¹⁵². Brochure of the Ethiopian Audio-Visual Producers Association.

¹⁵³. Ibid.

¹⁵⁴. Ibid.

Accordingly, the Association has been engaging in various activities since its establishment. In particular, being one of the primary victims of wide spread infringement of reproduction rights, the Association is at the forefront in the effort to enforce copyright law. In collaboration with other associations and government organs, it has made many cases of violations of copyrights to be brought before courts of law.¹⁵⁵ It is also leading the coordinated efforts of all the Copyright and Neighboring Rights Associations in Ethiopia. It is by the leadership and continued effort of the Association that the Collective Management of Copyright and Neighboring Rights Associations came into existence in 2001 EC.¹⁵⁶ But, concerning protection and enforcement of public performance rights, the Associations has not done much works to be mentioned. The Association partly blames existing legal gaps for its failure to discharge one of its responsibilities, protection and enforcement of public performance rights of its members.¹⁵⁷ Recently, it is working closely with the Collective Management and Intellectual Property Office to ensure effective protection and enforcement of public performance right and other copyrights. But, in general, works the Association has done for the protection and enforcement of public performance rights of its members are far from being satisfactory.

4.2.2.3.2. Collecting Society/Performing Rights Organization

It has been said herein above that the role private institutions play in the enforcement of public performance rights is so crucial that one cannot imagine effective enforcement of the rights without the existence or involvement of these institutions. There could be private institutions of various forms which have some thing to do with the protection and enforcement of public performance rights in one way or another like the associations we have seen above. But, the usual, appropriate and effective institution is the one which is formed in the form of collecting society or performing rights organization and totally committed to licensing rights on behalf of its members, collection of royalties and related activities. When we come to the case of Ethiopia, there was no such type of institution for a long time. It was in 2001 E.C that Copyright and

¹⁵⁵. Interview with Hewan Yacob, Legal Officer, and Ato Equbay Berihe, President of the Ethiopian Audio-Visual Association.

¹⁵⁶. Ibid.

¹⁵⁷. Ibid.

Neighboring Rights Associations Collective Management had been established in the form of collecting society. Legal reasons or absence of express provisions in the Copyright and Neighboring Rights Protection Proclamation on collective society is the main reason for the non-establishment of the society¹⁵⁸. Other relevant laws also do not enable the society to be formed and perform its tasks as intended from the perspective of public performing rights or copyright in general. Formed in 2001 E.C, the Collective Management has the status of non-profit making organization and it is composed of about twelve Copyright and Neighboring Rights Associations. As per its Memorandum and Article of Associations, it has various goals to accomplish and activities to perform, most of which could have contributed a lot to the protection and enforcement of public performance right.

But, in effect, the Collective Management does not seem to be functional. In the first place, Proclamation No. 621/2009, Charities and Societies Proclamation on the basis of which the Collective Management is established does not allow societies to collect payments from the public¹⁵⁹, except from its members. This is clearly against the purposes of the Collective Management. An organization of such kind could not have any task to perform other than licensing rights and collecting royalties from users. But, the proclamation clearly prohibits it not to engage in such activities. On the other hand, as mentioned herein above, there is no express provision in the Copyright and Neighboring rights Proclamation which enables the Collective Management to collect royalties. Therefore, under the current legal situation, the organization can not be functional.

In addition, the Collective Management is a conglomeration of different associations(all Copyright and Neighboring Rights Associations found in Ethiopia). Experiences of other countries show that such kind of organization could not be effective collecting society. As it is composed of members with different functions and interests, the occurrence of conflict of interests is more likely. It could not effectively collect royalties representing all its members and fairly distribute among them. What is possible and recommended for such organization is to have the form of Umbrella Organization under which different collecting societies could come together representing their own distinct interests. Therefore, it can be concluded that there is no

¹⁵⁸. Interview with Ato Equbay Berhe, President of Copyright and Neighboring Rights Associations Collective Management.

¹⁵⁹. See for example Article 98 of Proclamation No. 621/2009, Charities and Societies Proclamation.

collecting society or performing rights organization in Ethiopia in the sense that it should exist under copyright laws.

4.2.2.4. Conclusion

For protection and enforcement of rights, existence and effectiveness of institutions mainly depend on legal frameworks. Institutions owe their existence to the underlying legal framework. Accordingly, institutional framework for the protection and enforcement of public performance right is the exact copy of its legal counterpart. Though there are various private institutions in relation with copyright including the Collective Management, none of them are effective concerning protection and enforcement of public performance right. They are either established for purposes other than protection of the right or unable to play their roles due to legal problems. Therefore, it can be concluded that there is lack of adequate institutional framework for the protection and enforcement of public performance rights in Ethiopia.

4.3. What Does The Reality On The Ground Look Like?

It will not be difficult to imagine what the practice looks like in the light of existing legal and institutional frameworks. Given inadequate and weak legal protection accorded to public performance rights and absence of performing rights organizations meant to enforce the same, what is reasonably expected is wide infringement of the right. To present a clear picture of the reality on the ground about enforcement of public performance right beyond speculation, a visit has been made to major users of copyrighted works, mainly music and related works. The writer has categorized users into three for the sake of convenience and based on their dependence on the works. These are: Broadcasting Organizations, Nightclubs and other business undertakings such as Cafeterias, Bars, Restaurants, etc. In addition to various formal and informal observations the researcher has made, three simple questions were presented to owners, managers and other persons in charge of these organizations during interviews made with them. These are:

1. Whether or not they pay royalties to authors and other copyright owners when they perform copyrighted works publicly,
2. Whether or not they have ever been asked by right owners to pay royalties, and

3. Their reactions/responses if they are asked to pay royalties to right owners.

In the following sections, a brief discussion of the findings will be presented.

4.3.1. Broadcasting Organizations

Broadcasting Organizations or Radio and Television Stations are one of the major users of music, literary and other related works capable of being performed. These organizations mainly rely on revenues derived from advertisements.¹⁶⁰ In order to attract as much advertisements as possible, they are expected to present programmes with good qualities. A programme with good qualities in turn attracts many audiences. Therefore, a radio or television station which presents programmes with good qualities attracts many audiences. It is obvious that business persons and organizations choose broadcasters which have large audiences to advertise their products and services. Among programmes which are attractive and with good qualities and broadcasted by radio and television stations, entertainment programmes are the major ones. On the other hand, music, dramatic, audiovisual and other related works constitute the lion's share of entertainment programmes. Then, it goes with out saying that radio and television stations must broadcast music as an entertainment programme or part of it. This is also what we see in reality. There are various stations abroad that almost exclusively play music. Music also occupy most part of entertainment programmes broadcasted by domestic radio and television stations. Especially, it can be said that both government and private FM Radio Stations heavily depend on music.

Broadcasting music and other entertainment works by radio and television stations is one of the means of publicly performing these works. Public performance on the other hand is a right exclusively vested on the author or copyright owner. It is only the author or copyright owner that has the right either to perform by himself or authorize others to perform his works. As a result broadcasting organizations are expected to get license from authors or copyright owners to broadcast the works and pay royalties accordingly. It is to know the applicability or otherwise of this practice in Ethiopia that the following questions are presented to broadcasters by the writer.

¹⁶⁰. This does not mean that all broadcasting organizations exclusively depend on revenues they derive from advertisements for their existence. There are broadcasting organizations that are totally or partly funded by governments.

Table 1. Responses of Broadcasting Organizations to the following three questions:

- ✓ Question No. 1: Do you pay royalties to authors and other right owners whenever you broadcast copyrighted works?
- ✓ Question No. 2: Have you ever been asked by authors and other right owners to pay royalties?
- ✓ Question No. 3: What would be your response/reaction if you are asked to pay royalties? Or would you be willing to pay?

S.No.	Name of Broadcasting Organization	Place/City	Response to Question No. 1	Response to Question No. 2	Response to Question No. 3	Date of Interviews
1	Oromia Radio and Television Organization	Adama	No	No	Positive/yes	January 8, 2013
2	Ethiopian Radio and Television Agency	Addis Ababa	No	No	Positive/yes	February, 18, 2013
3	Fana Broadcasting Corporate	Addis Ababa	No	No	Positive/yes	February, 19, 2013
4	Zami FM 90.7	Addis Ababa	No	No	Positive/yes	February 20, 2013
5	FM 96.3	Addis Ababa	No	No	Positive/yes	February 21, 2013

➤ As it can be observed from the table, the responses of all broadcasting organizations to the first question the researcher has asked, that is ‘whether or not they pay royalties to authors and copyright owners whenever the former broadcast copyrighted works’ are similar. The response of all broadcasters¹⁶¹(Television and Radio Stations presented in the table) is very simple. They told the researcher that they do not pay any royalty for the musics and literatures they broadcast.

- The second question presented to broadcasters is ‘whether or not they have ever been asked by authors and other copyright owners to pay royalties’. As it can be seen in the table, their response to the second question is also as simple as the first one. They said that they have never been asked to pay royalties by any author or copyright owner. They added that there is rather requests and pressures from musicians and performers that their works be broadcasted by the broadcasting organizations. According to these broadcasters, the request of copyright owners is that the latter use Television and Radio Stations to promote or advertise themselves/their works to the public.
- “What would be your response/reaction if you are asked to pay royalties?” is the last question the researcher has presented to broadcasters. Here again, the responses of all broadcasting organizations to this question is similar, they all responded that they are not antagonistic to the right and they will pay royalties if there is clear law that obliges them to do so, provided that there is an organ that is ready to collect royalties. According to these radio and television stations, there could not be any special reason for their willingness to pay royalties other than their obligation to be abide by the laws of the country. They added that, they have responsibility to encourage development of musical and literary works. They also admitted that the existence of broadcasting organizations is heavily depended on musical, literary and dramatic works. All these reasons make them to accept the issue of royalty positively.

4.3.2. Nightclubs

Nightclubs are also one of the major users of musical works. They are places where people enjoy by music, dancing, drinking and entertainment at night. They mainly derive their incomes from drinking and other services they offer to customers. They may some times charge entrance fees. Unlike radio and television stations, the existence of nightclubs is totally depended on musical works. people do not go to nightclubs just for the drinks; rather they go there to enjoy the music and dances performed there. Therefore, it is impossible to imagine the existence of nightclubs without musical works and dances.

To understand the practice at nightclubs concerning protection and enforcement of public performance rights and payment of royalties, the researcher has visited majority of nightclubs

found in Adama and some in Addis Ababa and Hawassa. Questions similar to those presented to broadcasters were presented to owners and/or managers of nightclubs and their responses are presented in the following table.

Table 2. Responses of Night Clubs to the following three questions:

- ✓ Question No. 1: Do you pay royalties to authors and other right owners whenever you broadcast copyrighted works?
- ✓ Question No. 2: Have you ever been asked by authors and other right owners to pay royalties?
- ✓ Question No. 3: What would be your response/reaction if you are asked to pay royalties? Or would you be willing to pay?

S. No.	Name of Night Club	Place/City	Response to Question No. 1	Response to Question No. 2	Response to Question No. 3	Date of Interviews
1	National	Adama	No	No	Positive/Yes	November 5, 2012
2	Pentagon	Adama	No	No	Positive/Yes	November 5, 2012
3	Joy Center	Adama	No	No	Positive/Yes	November 6, 2012
4	Harar	Adama	No	No	Positive/Yes	November 6, 2012
5	Babile	Adama	No	No	Positive/Yes	November 7, 2012
6	Mexico	Adama	No	No	Positive/Yes	November 7, 2012
7	Merry Bar	Adama	No	No	Positive/Yes	November 8, 2012
8	Millenium	Adama	No	No	Positive/Yes	November 8, 2012
9	Sangeorge	Adama	No	No	Positive/Yes	November 9, 2012
10	Florida	Adama	No	No	Positive/Yes	November 9, 2012
11	Illusion	Addis Ababa	No	No	Positive/Yes	February 11, 2013
12	Segen	Addis Ababa	No	No	Positive/Yes	February 11, 2013
13	H2O	Addis Ababa	No	No	Positive/Yes	February 12, 2013

14	Platinum	Addis Ababa	No	No	Positive/Yes	February 12, 2013
15	Memo	Addis Ababa	No	No	Positive/Yes	February 13, 2013
16	Suba	Addis Ababa	No	No	Positive/Yes	February 13, 2013
17	Tamtam	Addis Ababa	No	No	Positive/Yes	February 14, 2013
18	Gaslight	Addis Ababa	No	No	Positive/Yes	February 14, 2013
19	Joly	Addis Ababa	No	No	Positive/Yes	February 15, 2013
20	Jubilee	Addis Ababa	No	No	Positive/Yes	February 15, 2013
21	Club 21	Hawassa	No	No	Positive/Yes	January 14, 2013
22	Nico	Hawassa	No	No	Positive/Yes	January 14, 2013
23	Yugovia	Hawassa	No	No	Positive/Yes	January 15, 2013
24	Dreamland	Hawassa	No	No	Positive/Yes	January 15, 2013
25	Kelay	Hawassa	No	No	Positive/Yes	January 16, 2013
26	Evening Star	Hawassa	No	No	Positive/Yes	January 17, 2013
27	Nomona Noto	Hawassa	No	No	Positive/Yes	January 17, 2013
28	Beherawi	Hawassa	No	No	Positive/Yes	January 18, 2013
29	Qulubi	Hawassa	No	No	Positive/Yes	January 18, 2013
30	Addis Hiwot	Hawassa	No	No	Positive/Yes	January 18, 2013

As it is shown in the table, they all responded that they do not pay royalties for the performance of musical works at their nightclubs, and they have never been asked to do so. They also frankly confessed that they even do not play musics from original CDs and DVDs, and they simply play from Laptop Computers, Flash Discs, Memory Cards, etc. It is also clearly provided in the table that their response to the third question is similar to the ones made by broadcasters. That is, they will be willing to pay royalties whenever they are asked. They said that, in addition to their obligation to be abide by laws of the country, paying royalties is only their possible option. As

nightclubs cannot exist without performing music, the alternative is only between paying royalties and not playing music, and they are bound to choose the first alternative. But, so far, most owners or managers of nightclubs do not know the existence of public performance right under Ethiopian Law.

4.3.3. Other Business Undertakings

Other business undertakings include Hotels, Bars, Restaurants, Cafeterias and similar business undertakings. These undertakings offer food and drinking services to their customers. That is, customers do not visit these undertakings to enjoy music, rather to consume foods and drinks. But, this does not mean that music has no place in these undertakings. Musical works are usually used at these places to attract customers and make their stay joyful. That is why musical works are constantly performed at these places. To learn the practice at these undertakings concerning protection and enforcement of public performance right, questions presented to broadcasters and night clubs in table one and two, respectively are also presented to the former. These questions along with responses of business undertakings are presented in the following table.

Table 3. Responses of other Business Undertakings to the following three questions:

- ✓ Question No. 1: Do you pay royalties to authors and other right owners whenever you broadcast copyrighted works?
- ✓ Question No. 2: Have you ever been asked by authors and other right owners to pay royalties?
- ✓ Question No. 3: What would be your response/reaction if you are asked to pay royalties? Or would you be willing to pay?

S. No.	Name of Business Undertaking	Place/City	Response to Question No. 1	Response to Question No. 2	Response to Question No. 3	Date of Interviews
1	Gada Resort	Adama	No	No	Negative/No	November 12, 2012
2	Yohana Hotel	Adama	No	No	Positive/Yes	November 12, 2012
3	Crown Hotel	Adama	No	No	Unclear	November 13, 2012
4	Harar Bar and Restaurant	Adama	No	No	Positive/Yes	November 13, 2012
5	GH Cafe	Adama	No	No	Negative/No	November 14, 2012
6	Gibe Bar and Restaurant	Adama	No	No	Positive/Yes	November 14, 2012
7	Hidaz Cafe	Adama	No	No	Positive/Yes	November 15, 2012
8	Dreamland Cafe	Adama	No	No	Positive/Yes	November 15, 2012
9	Fenet Hotel	Adama	No	No	Unclear	November 16, 2012
10	Garuma Bar and Restaurant	Adama	No	No	Positive/Yes	November 16, 2012
11	Denver Cafe	Addis Ababa	No	No	Negative/No	February 6, 2013
12	Trio Cafe	Addis Ababa	No	No	Positive/Yes	February 6, 2013
13	John Cafe	Addis Ababa	No	No	Positive/Yes	February 6, 2013
14	Soya Bar and Restaurant	Addis Ababa	No	No	Unclear	February 7, 2013
15	Tinsae Bar and Reataurant	Addis Ababa	No	No	Positive/Yes	February 7, 2013
16	C Ardi Bar and Restaurant	Addis Ababa	No	No	Negative/No	February 7, 2013
17	Daniel Hotel	Addis Ababa	No	No	Positive/Yes	February 7, 2013
18	Adot Tina	Addis Ababa	No	No	Positive/Yes	February 8, 2013
19	Omedla Hotel	Addis Ababa	No	No	Positive/Yes	February 8, 2013
20	Tsion Hotel	Addis Ababa	No	No	Positive/Yes	February 8, 2013
21	My Cafe	Hawassa	No	No	Negative/No	January 9, 2013

22	New York Cafe	Hawassa	No	No	Positive/Yes	January 9, 2013
23	Time Cafe	Hawassa	No	No	Unclear	January 9, 2013
24	Ayu Bar and Restaurant	Hawassa	No	No	Positive/Yes	January 10, 2013
25	Sombarero Bar and Restaurant	Hawassa	No	No	Positive/Yes	January 10, 2013
26	Luwa Bar and Restaurant	Hawassa	No	No	Unclear	January 10, 2013
27	Tadesse Enjory Bar and Restaurant	Hawassa	No	No	Positive/Yes	January 11, 2013
28	Blue Nile hotel	Hawassa	No	No	Positive/Yes	January 11, 2013
29	Beshu Hotel	Hawassa	No	No	Positive/Yes	January 11, 2013
30	Lewi Meneharia Hotel	Hawassa	No	No	Positive/Yes	January 11, 2013

As it is indicated in the table, when the researcher asked owners and managers of these undertakings whether or not they pay royalties for the musical works they perform to the public, i.e. for their customers, they all responded that they do not pay royalties. Like other respondents in table one and two, representatives of these business undertakings also said that they have never been asked to pay royalties. Moreover, most of them admitted that they even do not know the existence of such rights. In a response to the last question, i.e. their reaction if they are asked to pay royalties, they expressed a lot of opinions. As it is shown in the table, while majority of undertakings expressed their willingness to pay if there is a law to this effect, some others said that they will not pay royalty, and still others are not sure as to what their response would be. Respondents who are either not willing to pay royalty or failed to have clear stand think that they may not be financial capable to pay royalties, and the former hold that they may choose not to play music if they are obliged to pay royalties.

In general, as it can be understood from the data presented in tables one to three, the reality on the ground concerning enforcement of public performance right is the exact mirror image of weak legal and institutional framework, and it can be concluded that the right is not enforced at all.

CHAPTER FIVE

5. Conclusion And Recommendations

5.1. Conclusion

Copyright law bestows on authors and other copyright owners two important rights. These are moral rights and economic rights, and they together constitute what is usually called copyright. Economic rights represent the economic or pecuniary interest of copyright owners. It is a right or an interest that has monetary value or that can be expressed in terms of money. Moral right on the other hand is about the reputation or integrity of the copyright owner. It is something related to the personality of the creator of the work and its basis is the special relationship between the work of the mind and its creator in the sense that works of the mind are manifestations of the personality of their creator.

Economic right, on the other hand, is composed of various constituent elements. Among these, reproduction right and public performance rights are the major ones. Right of reproduction is the right to reproduce or copy a work in whatever form. It is the material fixation of the work in order to make it available to the public. It is one of the most fundamental economic rights in the sense that a copyright owner is expected to control reproduction right to get the desired benefit from his work. Public performance right is the right to present or perform the work to the public. It includes all communications of the work to the public in various means. Whether it is a live concert, staging of theatre play, projection of films in the cinema, background music we hear in bars, cafes, shops etc, they all are public performance of the works. It is also one of the most fundamental economic rights in terms of revenues that could be derived from it. It may sometimes go to the extent of becoming the single most important source of income, especially when reproduction right is not effective for various reasons.

Despite its significance and potential source of revenue, public performance right had not been given enough attention for years. Emphasis of both government organs and right owners had been on protection of reproduction right. But through time, public performance right began to attract attention of right owners and governments. General economic growth and the consequent expansion of means of transport for moving bands and instruments from place to place, production of materials which enable performance of works, expansion of entertainment centres

and establishment of various medias said to have fuelled the development of public performance right.

By definition, public performance is the act of performing or presenting a work of entertainment to an audience or it is communication of the work to the audience. It includes live performances of literary, artistic and dramatic works and playing of a recorded version of these works using any medium. For a certain performance to be said public performance, it need to be delivered before a public, i.e, before two or more persons who are out side normal family circles or its closest social acquaintance. That is, public performance occurs whenever a work is performed before audience out side domestic or private settings. In other words, performance of a work before persons who are brought to gether due to their public life, such as at business environment amounts to public performance. To perform copyrighted works publicly, one needs to obtain permission or license from the right owner.

With slight variations among jurisdictions, public performance these days extends to all copyrighted subject matters which are capable of being performed. It covers all works protected by copyright law, provided that they can be performed by whatever means, publicly performing these works without prior permission or authorization from the right holder constitutes infringement of copyright law. These include all sorts of musical works and sound recordings, literary works, dramatic and dramatico-musical works, choreographic works, audio-visual works, etc.

Though public performance extends to various copyrighted works, it does not mean that all types of public performance amounts to infringement of the right. There are times when copyrighted works legitimately be performed to the public without permission from the right holder. These are under exceptional cirumstances provided by law. The law puts exceptions and limitations to safeguard the interests of users to get free access to works of the mind of authors, and they are put in a way that does not unreasonably jeopardise the economic interest of copyright owners. Performances for educational and charitable purposes, performances at family gatherings and in schools, promotional performances and performances at religious institutions for worshipping services are some of the major exceptions to the exclusive public performance rights of authors and copyright owners.

These days, public performance right is said to have been well protected both under international copyright instruments and most countries copyright laws. Domestic protection begins with the recognition given to the right by constitutions. It is usual to have a constitutional provision dealing with intellectual property rights. Then comes copyright laws or proclamations and other laws which extensively deal with public performance right and other copyrights. But, the strength and extent of protection accorded to public performance rights also varies from one jurisdiction to the other. International instruments such as the Berne Convention, the Rome Convention, WIPO Copyright Treaty, and the TRIPS Agreement oblige member states to provide adequate protection to copyright in general and public performance right in particular. As mere protection of a right does not enable copyright owners to collect the fruits of their labour, strong enforcement mechanism must be in place. For the existence of strong enforcement mechanism, the coordinated work of government and private institutions is both necessary and mandatory. Government institutions like the copyright offices, the judiciary, police and prosecutor need to actively involve in the enforcement of public performance right. Among the various private institutions, the collecting society or performing rights organization is the one the existence and participation of which is mandatory for effective enforcement of public performance right.

Existence of collecting society has various advantages both for the right holders and users. From the point of view of right holders, it administers their rights by representation and this leaves them with adequate time to be invested in creativity. It also helps users to get license for the performance of works of various owners at one place and makes them save both time and money. Though a collecting society could have various forms such as not-for profit organization, for-profit organization and public authority, the usual one is that of non-profit organization.

When we come to the Ethiopian case, protection of public performance right also begins with the FDRE Constitution. As it can be understood from some of its provisions, enough attention has been given to protection of intellectual property rights in general and copyright and public performance rights in particular at constitutional level. Given the general nature of a constitution, it is not fair to expect much detail about copyright or public performance right from the FDRE Constitution and it can be argued that it has laid enough basis for the protection and enforcement of intellectual property rights in general and public performance rights in particular. It is from the

next law in hierarchy that much is expected both to explain and put into practice the constitutional provisions. Accordingly, the House of Peoples Representatives had come up with Copyright and Neighboring Rights Proclamation in 2004 in accordance with Article 55(1) of the Constitution. This proclamation had been much awaited for due to the wide spread infringement of copyright at that time. It begins, in its preamble, by emphasizing the importance of literary, artistic and other creative works for the development of the nation and the necessity of protecting them. Then, did it hit on the head?

It could reasonably be asked at this juncture whether the proclamation has addressed problems that were prevalent during its promulgation or not. As far as public performance right is concerned, the proclamation did not really address the problems. It really failed to hit on the head! In short, it can be said that it all ends as unsuccessful attempt. The Proclamation recognizes authors', performers', producers' and broadcasters' right to public performance. It provides that copyright owners have an exclusive right to perform or authorize public performance of their works. It also goes on to the extent of prescribing both civil and criminal punishment for negligent and deliberate infringement of copyright which includes public performance right. Then, where does the problem lie? The problem lies somewhere in the middle. It is really like that of giving with one hand and snatching the same with another hand. Though the Proclamation recognizes copyright owners exclusive public performance rights, it failed to incorporate other essential tools which are both necessary and mandatory for the full protection and effective enforcement of the right. Absence of these things made the right unfunctional.

Copyright owners have the right to perform or authorize performance of their copyrighted works. To authorize is to permit or license other to exploit the right. The owner of the right in turn collects payments or royalties from users for the exploitation of the right. Then what? Here lies the problem! Payments or royalties are not to be collected arbitrarily as per the will of the right owner. Manner of collection of royalties and means of setting its rate is expected to be determined by law. Atleast, an organ responsible of doing these tasks must be designated by law. When we come back to the Proclamation in question, let alone dealing with the issue of means of payment of royalties and determination of rates, it does not even clearly make mention of the fact that royalties are payable.

Public performance right can only be enforced by the coordinated effort of government and private institutions. Among the private institutions having relation with copyright in one way or another, collecting society or performing rights organization is expected to play the leading role. Establishment of this organ, mechanisms of collecting royalties and determination of rates, means of distribution of royalties to members, its obligations towards users, the general public and its members, etc are expected to be dealt with a copyright proclamation. But, the Ethiopian Copyright and Neighboring Rights Proclamation did not incorporate a single provision on collecting society or performing rights organization. Then, how could the right be enforced?

As any other economic rights, public performance right is usually subjected to various exceptions and limitations. But, the proclamation in question incorporates very few and incomplete exceptions. It left out important exceptions and exemptions such as exception for educational purposes, exception for performances for services at religious institutions, exception for performances for charitable purposes, exception for promotional sales, small business exemptions, etc. Absence of these exceptions and exemptions imposes extra burden on users. It also creates confusions among right holders and users as to the exact extent of their rights.

In general, the Proclamation is incomplete and it is almost non-functional as far as public performance right is concerned. Though the Council of Ministers has been given the mandate to issue a regulation, it has not so far done any thing. Had a regulation been issued in time, it could have remedied at least some of the defects of the proclamation.

The institutional framework for the protection and enforcement of public performance right in Ethiopia is also the mirror image of its legal counterpart. The Ethiopian Intellectual Property Office which is meant to enhance protection and enforcement of public performance right in particular and intellectual property rights in general has not done so far any mentionable and satisfactory works regarding public performance right. Though there are various associations some of which are half a century old, they did not do a single piece of work to protect and enforce their members' public performance right. In addition to the existing legal problems, some of the associations and their members lack adequate knowledge and awareness on public performance right. They initially were also established for a purpose different from protection and enforcement of copyright. The Collective Management of Copyright and Neighboring Rights Association was established in 2001 E.C by about twelve associations. This Collective

Management is not functional concerning protection and enforcement of public performance right, mainly due to legal problems. Under the current Charities and Societies Proclamation on the basis of which it was established, the organization is not allowed to collect royalties.

In general, it can be concluded that the protection accorded to public performance right under Ethiopian law is hardly adequate. Practically, the right is almost unprotected. And the right is not totally being enforced. Moreover, private institutions which could play a leading role in the enforcement of the right are almost non-existent.

5.2. Recommendations

Based on the findings of the paper, the researcher would like to make the following recommendations:

- As repeatedly mentioned herein above effective enforcement of public performance right could not be imagined without the existence of strong collecting society or performance rights organization. One of the major defects of the proclamation currently in force is its failure to incorporate provisions on collecting society. Therefore, the upcoming proclamation is expected to remedy this defect. It should address the issue of establishing collecting society.
- It is provided that copyright owners have the right to perform or authorize others to perform their works. Such authorization could be gratuitously or for consideration. When the license is given for consideration, the user makes payments in the form of royalty. One of the failures of the current proclamation is absence of any express provision concerning royalty. The upcoming proclamation should also duly address this issue. Along with provisions on collecting society, manner of collecting royalty, means of setting its rate and mechanisms of distributing royalties to members must be duly dealt with by the upcoming proclamation, atleast in the form of guidelines.
- As any other economic rights, public performance right is subjected to various exceptions and limitations. It is even subjected to wider exceptions than some other economic rights. But, under Ethiopian law, there are only very few and incomplete exceptions. Some important exceptions are left out in the proclamation. This raises the question of fairness,

especially in light of the fact that copyright laws and intellectual property laws themselves are exceptions to competition laws. It imposes unnecessary burden on users and creates confusions among both right holders and users. Therefore, this issue has also to be adequately addressed by the upcoming proclamation. It should incorporate all the necessary exceptions and exemption in a way that does not unfairly compromise legitimate economic interests of copyright owners.

- The Ethiopian Copyright and Neighboring Rights Associations' Collective Management was established in 2001 E.C by about twelve associations. It is a kind of collecting society or performing rights organization and could have played a leading role in the task on enforcing public performance right. But, the Charities and Societies Proclamation on the basis of which the Collective Management was established does not allow it to collect royalties from users. Therefore, as it now exists, the Collective Management is unfunctional as far as collection of royalty is concerned. It is then expected from the upcoming proclamation to re-establish the organization. It should be re-established with all the necessary powers which enable it administer its members' right and collect royalties.
- As it now exists, the Collective Management is a collection of all the Copyright and Neighboring Rights Associations found in Ethiopia. As experiences of other countries indicate, such collection could not function as effective collecting society. As it consists of members with differing interests, the likelihood of occurrence of conflict of interests is high. The appropriate form for such organ is to be an umbrella association under which various collecting societies could be organized. Therefore, in the upcoming proclamation, collecting societies should be allowed to be established within their respective fields.
- In the process of holding interviews with various users to assess the practice on the ground concerning enforcement of public performance right, the researcher came to understand that most users do not have adequate knowledge and awareness on public performance rights. It is clear that this fact will be one of the challenges that could be faced by rights enforcing institutions in the future. What will expect them is really hard and tough time. Therefore, both collecting societies that will be established by the upcoming proclamation and the Ethiopian Intellectual Property Office should do all the

necessary jobs to raise the awareness of users and the public in general on public performance rights. In light of the mandate given to it by the law, the Office in particular should play the leading role.

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