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ONLINE COPYRIGHT INFRINGEMENT AND THE LIABILITY OF INTERNET SERVICE
PROVIDER IN ETHIOPIA

BY

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Abstract

Everything changes in time. The only thing that remains constant, as they say, is change itself. Time once had made protection of people's physical property very necessary and people have crafted laws in that regard. Now time is telling us to protect people's digital property in the virtual world. So we need to react for the same old reasons i.e. the notion of private property and ownership in general and encouraging creativity in the copyright system in particular. Yes of course digital properties unlike the physical ones does not give rise to rivalry and are non excludable as they can be exploited at the same time by many people without the risk of depreciation. However their free and unprotected use by many people does significantly harm the economic interest of copyright owners. Still again we may agree that the creation of literary and artistic works may not drain totally because digital contents are freely quenched. However if it is not protected after a fair period/extent of silence the severe and expansive damage will impair the interest of every copyright owner as they could not otherwise recoup their cost of production. On top of that as the momentum of digitizing intangible properties is accelerating to wipe out the use of tangible fixation materials like paper and surpass physical (analogue) distribution means's like publishing or printing of books the virtual world has be adjusted for safe and legal digital content transactions. In another word as digital technologies are making creativity and distribution of creative works very cheap and much easier, in the near future, it is very probable that physical and hard labour methods of inking down and disseminating intangible properties will be out of date. Therefore while authors chance to get reward for their creation from traditional methods of distribution like publishing drains slowly the digital world should be designed to provide a conducive environment that appreciates the good old Lockean notion of property and the incentive/reward theory of intellectual property i.e. one should be able to benefit from the fruit of his labour and when it comes to intangible property authors should be rewarded to keep the system safe from under production. It is only in that way the intellectual property concerns of under production and under utilization are balanced i.e. by providing rewards to encourage further creativity and by maintaining fair use exceptions to facilitate public utilization of creative works in the virtual world as it was and still is the case in the real (analogue) world.

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LIST OF ABBREVIATIONS

Art	Article
Beijing Treaty	The Beijing Treaty on Audiovisual Performances
Berne Convention	Berne Convention for the Protection of Literary and Artistic works
DMCA	Digital Millennium Copyright Act
DRM	Digital Rights Management
EC treaty	Treaty establishing the European community
ETC	Ethiopian Tele Communication
EU	European Union
GNI	Gross national income
InfoSoc Directive	Directive 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society
IP	Intellectual Property
IPO	Intellectual Property Organization
IPR	Intellectual Property Rights
IPS	Internet Service Providers
ITU	International Telecommunications Union
LDC	Least Developed Countries
PC	Per Capita
The Marrakesh Treaty	Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled
MPAA	Motion Pictures Association of America

Proc	Proclamation
RIAA	Recording Industry Association of America
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNDP	United Nations Development programme
US	United States of America
U.S.C	United States Code
WCT	WIPO Copyright Treaty of 1996
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

If the general public copy, save, transmit, and distribute content without paying attention to the written copyright rules, those rules are in danger of becoming irrelevant.

Jessica Litman.

CHAPTER ONE

INTRODUCTION

1. BACKGROUND

The development of science and technology in the world has made copyright protection vital¹ and unlike many other laws copyright law happens to be under constant influence of revolutionary technological developments. This is because the technologies that are used to record and distribute copyright works are under frequent technological mutations. As the means to record and distribute copyright works gets easier and simpler then the opportunity that those copyright works be illegally copied and distributed becomes ample and alluring.² Thus the laws have to keep track of the science and technology so that it would be possible to minimize the effect of illegal reproductions, distributions and other copyright infringing activities powered by technological advancement. With the introduction of digital technologies in the last decades of the 20th c and with the advent of making copyright works digitally available on the internet³ the need to adapt copyright laws to the changing situations

¹ Association OF Research Libraries, Copyright Timeline; A History of Copyright in the United States, retrieved from www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.VyQBNT0EZqs, accessed on April 30, 2016, 2:30 a.m.

² NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, Copyright in the Digital Era: Building Evidences for Policy, 22, 2013, retrieved from www.nap.edu/read/14686/chapter/4, accessed on April 30, 2016, 2:30 a.m.

³ Internet is a world-wide computer network that can be accessed via a computer, mobile telephone, PDA, games machine, digital TV, etc. There are different types of internet services which can be provided through a fixed (wired) or mobile network; analogue dial-up modem via standard telephone line, ISDN (Integrated Services Digital Network), DSL (Digital Subscriber Line) or ADSL, Cable modem, High speed leased lines, Fiber optics, Powerline, Satellite broadband network, WiMAX, Fixed CDMA, Mobile broadband network (3G, e.g. UMTS) via a headset or card, integrated SIM card in a computer, or USB modem. International Telecommunication Union (ITU) and United Nations Population Division (UNDP), Internet Users; internet live stats, retrieved from www.internetlivestats.com/internet-users/, accessed on April 2, 2015, 4:45am. For more explanations on each of the internet service types readers are advised to look at; Guy McDowell, types of internet access

was closely felt both nationally and internationally. These days many governments and concerned international organizations have showed their effort to regulate copyright under the digital age. Internationally under the auspice of the World Intellectual Property Organization (herein after WIPO) the WIPO Copyright Treaty (herein after WCT) and the WIPO Performances and Phonograms Treaty (herein after WPPT) are introduced (both adopted in Geneva on December 20, 1996 and entered in to force in 2002). These treaties are introduced to supplement the Berne Convention for the Protection of Literary and Artistic Works (herein after the Berne Convention) and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (herein after the Rome Convention).

In addition to those treaties WIPO also introduced in to the body of copyright law the Beijing treaty on audiovisual performances (herein after the Beijing Treaty) (24 June, 2012) and the Marrakesh Treaty⁴ (27 June, 2013), to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled (herein after the Marrakesh treaty). However, these treaties are not yet in force.⁵ The world trade organization (herein after WTO) had actually introduced the treaty on trade related aspects of the intellectual property (herein

technologies explained, and what you should expect, makeuseof, available at www.makeuseof.com/tag/types-of-internet-access-technologies-explained-and-what-you-should-expect/, accessed on April 2, 2015, 4:45a.m.

⁴ Unlike the Berne, the two 1996 WIPO treaties on copyright and performances and phonograms, the Beijing treaty on Audiovisual Performances, and TRIPS, Ethiopia is signatory of the Marrakesh treaty though it did not yet ratified it. WIPO, contracting parties>Ethiopia; WIPO-Administered Treaties, available at www.wipo.int/treaties/en/ShowResults.jsp?country_id=56C, accessed on March 5, 2015, 4: 24 p.m.

⁵ Since the Beijing and the Marrakesh treaty are not yet in force the online copyright infringement discussion will primarily pay attention to the 1996 copyright and performances and phonograms treaties and only in limited instances will the Beijing and the Marrakesh treaties be referred in this paper. WIPO, summary table of membership of the world intellectual property organization and the treaties administered by WIPO, plus UPOV, WTO and UN, available at www.wipo.int/treaties/en/summary.jsp, accessed on April 7, 2015, 7:15 p.m.

after TRIPS) in 1994 but since it didn't clearly regulate online copyright infringement unlike the WIPO internet treaties it will not be this paper's darling. Following these international conventions, nationally some countries, for instance United States amended its copyright act of 1976 to introduce the Digital Millennium Copyright Act⁶ of 1998 (herein after DMCA) of USA and regionally the European Union (EU) enacted the Information Society Directive⁷ (herein after InfoSoc Directive 2001/29/EC).

The multilateral intellectual property system as we know it today can be traced back to the Paris Convention of 1883 and the Berne Convention of 1886.⁸ Through the years that followed however those conventions went through several amendments and are accompanied by other international conventions so that the international intellectual property system be consistent to the revolutionary development of technology that went the entire road from paper to the digital age. Basically WIPO which administers both the Paris and Berne conventions had to share its hitherto exclusive competence on world intellectual property when the United States and its allies pushed for the TRIPS to be born in 1994 and that had once drowned WIPO under a strategic dilemma. However since both the Berne and TRIPS Conventions do not satisfactorily address online copyright issues WIPO, which started to provide technical assistance on IP matters in the WTO forum and signed cooperation agreements with WTO⁹ after the introduction of the TRIPS, came up with the 1996 Copyright and Performances and Phonograms treaties that are dubbed as WIPO internet treaties. And this helped it that it can prove to those after the TRIPS like United States that it can deliver

⁶ Digital Millennium Copyright Act (DMCA), 17 U.S.C, Chapter 12, section 1201 (1998), available at <http://www.google.com/m?q=the+digital+millini&client=ms-opera-miniandroid&channel=new>, accessed on March 6, 2015, 3: 05 p.m.

⁷ Harmonization of certain aspects of copyright and related rights in the information society, Directive 2001/29/EC, (22 May 2001), available at <http://eurlexeuropa.eu/search.html?qid=1435394720786&text=EU%20copyright%20Laws&scope=EURLEX&type=quick&lang=en>, accessed on March 3, 2015, 5; 20 p.m.

⁸ Sisule F. Musungu and Graham Dutfield, Multilateral agreements and a TRIPS-plus world: The World Intellectual Property Organisation (WIPO), 4, available at http://www.iprs.org/ictsd/docs/WIPO_Musungu_Dutfield.pdf, accessed on April 4, 2015, 11:50 a.m.

⁹ *Id.* 11.

new standards faster and more efficiently. That being one of the reasons why the two earlier mentioned Geneva treaties brought into picture in 1996, the need to secure copyright owners interest in cyberspace technologies is their prime manifestation. Saving the historical analysis on the treaties for a chapter to follow, the salient features of the two treaties is discussed below.

1.1. COPYRIGHT PROTECTION UNDER THE WIPO INTERNET TREATIES

The WCT is a special agreement under the Berne convention¹⁰ dealing with the protection of works and the rights of their authors in the digital environment. Just like the case in the TRIPS agreement it requires contracting parties to comply with the substantive provisions of the 1971 Paris act of the Berne Convention even though they are not bound by it.¹¹ In addition, other than the subject matters of protection under the Berne Convention this treaty extends its protection to computer programs, whatever the mode or form of their expression, and to compilations of data (data bases) in any form, which, by reason of their selection or arrangement of their contents constitute intellectual creations.¹² As to the rights granted to authors; in addition to those rights recognized by the Berne Convention, the Diplomatic Conference behind the adoption of the treaty reiterated the extended application of the right of reproduction¹³ to the digital environment under its agreed statement (1). And it also added the

¹⁰ Pursuant to art.20 of the Berne convention member countries of the Berne convention are free to enter in to a special agreement that procure more extensive rights to authors than those provided under the Berne convention and the 1996 WCT is one of those special agreements. World Intellectual Property Office, WCT, art.1, Dec 20, 1996, available at http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295166, accessed on March 20, 2015, 3:28 p.m.

¹¹ *Id.* art.1 (4). See also IP-related Multilateral Treaties: WTO: TRIPS, art.9 (1), 15 April 1994, available at www.wipo.int/treaties/en/text.jsp?file_id=305907, accessed on March 9, 2015, 4: 20 p.m.

¹² *Id.* art.4 & 5

¹³ Note that the WCT unlike the WPPT does not include the right of reproduction. However since the right of reproduction under art.9 (1) of the Berne convention is broad enough to make sure that copyright owners' exclusive right of reproduction is secured both in the analogue and digital environment what the Diplomatic conference responsible for the

right of distribution, the right of rental and the right of communication to public.¹⁴ Pursuant to the agreed statement No. five of the treaty the right of distributing and the right of renting copies or originals and copies are limited exclusively to fixed copies that can be put to circulation as tangible objects. With regard to the doctrine of first sale art.6 of the treaty has clearly provided that contracting parties to the treaty are free to determine the conditions under which the exhaustion of the right of distribution applies after the author makes the first sale or other transfer of ownership of the original or a copy of the work. On the other hand concerning the right of communication to the public, maintaining the broadcasting, rebroadcasting and communication to the public of literary and artistic rights under the Berne convention, the treaty has indicated that the right of communication to the public is attached to the circulation of intangible copies or original and copies of protected works.

This seems to limit and classify the right of distribution and the right of rental to the circulation of tangible copies or originals and copies of protected works and the right of communication to the public to the digital transmission of intangible copies or original and copies of protected works. However when art.8 of the treaty was discussed in the main committee of the Diplomatic Conference, it was stated-and no delegation opposed the statement-that contracting parties are free to use other rights like the right of distribution and the right of making available than the right of communication to the public to confer up on authors the exclusive right of authorizing digital transmissions of their works.¹⁵ So this means

adoption of the copyright treaty did was referencing the Berne convention and confirming that the right of reproduction does actually extend to the digital environment. Actually it was in June 1982, a WIPO/UNESCO Committee of Governmental Experts clarified that storage of copyright and neighboring works in an electronic medium is reproduction, and since then no doubt has ever emerged concerning that principle. WIPO-Administered treaties, Berne Convention, art.9 (1), 1886, available at http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283698, accessed on March 9, 2015, 4:18 p.m.

¹⁴ WCT, Supra, art.6, 7 & 8.

¹⁵ The International Bureau of WIPO, THE WIPO COPYRIGHT TREATY (WCT) AND THE WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT), 5 & 6, available at [http://www.google.com.et/search?q=the+WIPO+copyright+treaty+\(wct\)+and+the+WIPO+performances+and+phonograms+treaty+\(wppt\)&client=ms-opera-miniandroid&channel=new](http://www.google.com.et/search?q=the+WIPO+copyright+treaty+(wct)+and+the+WIPO+performances+and+phonograms+treaty+(wppt)&client=ms-opera-miniandroid&channel=new)

the Agreed Statement No. five of the treaty determines only the minimum scope of application of the right of distribution and as such it does not create any obstacle for Contracting States to exceed that minimum. In another word contracting states are free to extend the scope of the right of distribution to include digital transmissions or to limit the right of distribution to the circulation of tangible copies and legally characterize digital transmissions as the right of communication to public or the right of making available. This solution which is referred as the “umbrella solution” was proposed and accepted because there was difference in the legal characterization of digital transmissions and mainly because the scope of the right of distribution and the right of communication to the public differs to a great extent in national laws.

On top of this the treaty under its agreed statement No. seven has expressly stated that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. This is particularly meant to limit the liability of service and access providers in digital networks like the internet. Therefore we can say that the treaty has guarded service providers like internet service providers from strict liability for copyright infringements carried out by their service customers or end users.

As a matter of fact these three rights, the right of distribution, the right of rental and the right of communication to the public, are Berne plus because; first the right of rental is not recognized while the right of distribution is limited to cinematographic works under art.14 & 14bis of the Berne convention. Secondly the right of communication to the public is provided clearly in a manner that includes *making available to the public of one's work in such a way that members of the public may access the work from a place and at a time individually chosen by them*, which is missing in the Berne convention. This is the key sentence that clearly put internet under regulation internationally as a means of public communication. Similarly in comparison to the TRIPS treaty the WCT can still be regarded as TRIPS plus because the right of distribution is limited in scope in the TRIPS as it is the case in the Berne convention¹⁶ and the right of communication to the public under art.14 of the TRIPS is not

&gws_rd=cr&ei=aQ7EVo3UI8bDPfLSuJgB, accessed on Oct. 21, 2105, 2:23 p.m.

¹⁶ Note that the TRIPS oblige its contracting parties to comply with the substantive provisions of the Berne convention. And because of this the limitation of the right of distribution to cinematographic works under art.14 and 14bis of the Berne convention will also be the scope

clearly provided to include the *making available of a work to the public in such a way that members of the public may access it from a place and at a time individually chosen by them*.

Moreover, with regard to limitation and exceptions just like the Berne convention the WCT incorporates the so-called “three-step”¹⁷ test to determine limitations and exceptions extending its application to all rights.¹⁸ The extension of existing or the creation of new limitations and exceptions is allowed under the Berne convention if the conditions of the “three-step” test are met. This is a very important provision in the entire copyright system. When it reappeared in the 1996 WCT it also became a standard based on which countries could extend copyright exceptions to the virtual world.

Finally and most pertinently to the digital copyright discourse and of course both in Berne and TRIPS plus standard, the treaty obliges contracting parties to provide legal remedies against

of the right of distribution under the TRIPS too. IP-related Multilateral Treaties: WTO, TRIPS, art.9 (1), 1994, available at www.wipo.int/treaties/en/text.jsp?file_id=305907, accessed on March 9 2015, 4: 20 p.m.

¹⁷ As we know both the Berne Convention and the TRIPS agreement provide the three-step test in requiring their members to confine their limitations and exceptions to the exclusive rights to 1, certain special cases, 2, which do not conflict with a normal exploitation of the work, and 3, do not unreasonably prejudice the legitimate interests of the right holder. *Id.* art.13. See also The Berne convention, Supra, art.9 (2).

¹⁸ According to the agreed statement accompanying the treaty the limitations and exceptions established in national laws in compliance with the Berne convention can be extended to the digital environment. Therefore pursuant to this treaty the contracting parties are permitted to devise new exceptions and limitations that are appropriate in the digital network environment. WCT, Supra, art.10 and its agreed statement no. 8. The relevance of this agreed statement is so profound that both the WPPT and the Beijing treaty refer it for its application *mutatis mutandis*. See also World Intellectual Property Office, WPPT, art. 16 cum. its accompanying agreed statement (9), 1996, available at http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295578, accessed on March 9 2015, 3: 50 p.m. And World Intellectual Property Office, Beijing Treaty on Audiovisual Performances, art. 13 cum. its accompanying agreed statement no. 8, 24 June, 2012, available at http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295837, accessed on March 9, 2015, 4: 05 p.m.

the circumvention of technological measures like encryption that are employed by authors to protect their copyright content and against the removal or altering of any electronic rights management information without authority.¹⁹ Perhaps these are the rules that are totally not recognized in the Berne and TRIPS treaties while they are necessary to the protection of copyright in the digital environment. If countries include anti circumvention provisions in their copyright laws then it means that digital contents including those shared on the internet are going to be protected technologically from unauthorized access or copy. And this means the circulation of the copyright materials digitally and all kinds of non commercial and non transformative personal uses i.e. reading, watching, listening, quoting, and copying for private study, which are not prohibited in the real or analogue world, are going to be reprehensible unless the conventional fair use exceptions are also extended to the digital world. For this not to happen the treaty as mentioned above permitted signatory countries to extend the conventional copyright exceptions to the virtual world with all due regard to the three step test recognized in the treaty.

The WPPT on the other hand deals with the neighbouring rights of performers and producers of phonograms, particularly in the digital environment. As the WCT is special to the Berne this treaty is also a special agreement under art.22 of the 1961 Rome convention.²⁰ Article 1(3) of the Treaty, in respect of the relation to the other treaties, includes a provision similar to Article 1(2) of the WCT: “The Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties.” Paragraph (2) of the same article also determine the relation between copyright and neighboring rights by reproducing

¹⁹ WCT, Supra, art.11 & 12. Note that these obligations are also found under the WPPT and the Beijing treaty. See WPPT, Supra, art.18 & 19. And Beijing Treaty, Supra, art.15 & 16. Rights management information refers to indications on copyright materials or on the tangible material embodying them as to who the author of the work, owner of any right in the work, performer or producer of the phonogram is and that hold information as to the license, collection and distribution of royalties of the copyright protected performance or phonogram.

²⁰ However unlike the WCT which makes the substantive provisions of the Berne convention obligatory on its contracting parties, the WPPT does not oblige the substantive provisions of the Rome convention on its contracting parties. Rather what the treaty does is referencing to only few provisions of the Rome convention (those relating to the criteria of eligibility for protection). WPPT, Supra, art.1 & 3.

the text of art.1 of the Rome convention which reads as “Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.”²¹

The impact of digital technology on the treaty starts with the definitions provided under art.2. Unlike the definitions provided under art.3 of the Rome convention the WPPT defines “phonogram”, “fixation”, “producer of phonogram”, “broadcasting”, and “communication to the public” in a manner that includes “representation of sounds”. This however should not be regarded as an expansion of the relevant definitions provided under existing treaties rather it should be taken as a reflection of the desire to offer a clarification in the face of present technology.²²

The treaty confers the economic rights of reproduction, distribution, rental and the right of making available both to performers and producers of phonograms.²³ The fact that the treaty defined the right of reproduction under art.7 & 11 as an exclusive right to authorize the direct and indirect reproduction of phonograms or performances fixed in phonograms in any manner or form was enough to say that it subjects both analogue and digital reproduction to authors’ authorization. However, just like what it did in the case of the WCT, the Diplomatic

²¹ There have always been experts who tried to interpret art.1 of the Rome convention and art.1 (2) of the WPPT by suggesting that not only the protection but also the exercise of copyright should be left completely intact by the protection and exercise of neighboring rights; that is, if, for example, an author wishes to authorize the use of the sound recording of a performance of his work, neither the performer nor the producer of the recording should be able to prohibit that use on the basis of his neighboring rights. However, the Diplomatic conference behind the adoption of the WPPT rejected this interpretation under the agreed statement (1) of the treaty stating that in cases where authorization is needed from both the author of a work embodied in the phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the author does not cease to exist because the authorization of the performer or producer is also required, and vice versa.” *id.* agreed statement (1).

²² The International Bureau of WIPO, *Supra*, 14.

²³ WPPT, *Supra*, art.7-14.

conference behind the adoption of the WPPT has restated or emphasized under the treaty's agreed statement (6) that the right of reproduction under art.7 & 11 and the exceptions permitted there under art.16 also extend to the digital environment.

Concerning digital transmission of fixed performances or phonograms the treaty just like the case in the WCT has left the freedom to legally characterize such digital transmission as right of distribution, right of making available or the right of communication to the public to the contracting parties.²⁴ However for the purpose of the treaty the right of making available is used to refer to the digital transmission of fixed performances and phonograms under art.10 and 14. With regard to this right called making available of phonograms or fixed performances the liability of internet service providers is not dealt specifically. As we have seen above the WCT under its agreed statement (7) limits the liability of internet service providers by stating that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of the treaty or the Berne Convention. However the WPPT doesn't say anything about such a thing both under its substantive provisions and the agreed statement.²⁵

²⁴ Despite the consensus among contracting parties on subjecting digital transmission of copyright and neighboring works to the exclusive authorization of owners of copyright and neighboring rights there was difference in the legal characterization of the acts of digital transmission as distribution, making available or communication to the public. The problem arose because of the fact that transmissions are of a complex nature and that the various experts considered one aspect more relevant than another. However the fundamental reason was the fact that the two decisive rights, i.e. the right of distribution and the right of communication to the public, have a profound scope difference in national laws. Because of this a unique solution of what usually is referred as the Umbrella solution was proposed, i.e. to describe the act of transmission in a neutral way, free from specific legal characterization and in a technology specific way. This finally resulted in giving sufficient freedom to national legislations as the legal characterization of the exclusive right that encompasses the act of digital transmission. The International Bureau of WIPO, *Supra*, 15 & 16.

²⁵ Nevertheless according to a document prepared by the International bureau of WIPO the agreed statement (7) of the WCT should also be applicable to the WPPT *mutatis mutandis*. Therefore the mere provision of physical facilities for enabling or making a communication by internet service providers doesn't seem to bring strict liability on them both in the WCT

In addition to those rights pursuant to art.6 the treaty also granted to performers and producers of phonograms the right of broadcasting, the right of fixation and the right of communication to the public with regard to their unfixed or live performances. The treaty also recognizes moral rights of performers under art.5 so that they can claim the right to be identified as a performer and the right to object to any distortion, mutilation or other modification which would be prejudicial to the performers' reputation. In this regard this treaty introduced TRIPS plus standard because the later avoids moral rights in article 9(1) which rather are recognized under the Berne convention article 6 *bis*.

On top of this, though it can be reserved by contracting parties, the treaty under art.15 provides for performers and producers of phonograms to have the right to a single equitable remuneration both in the direct or indirect use of phonograms that are published for commercial purposes either in the form of broadcasting or communication to the public. On the other hand concerning limitations and exceptions, pursuant to article 16 of the treaty, as it is the case in the Berne convention article 9(2), the extension of existing or the creation of new limitation and exceptions is allowed so long as the three-step test are met. In this regard, by referring to the WCT, the accompanying agreed statement (8) of the treaty states that limitations and exceptions, as established in national law in compliance with the Berne convention, may be extended to the digital environment. So contracting parties can devise new exceptions and limitations that fit to the digital environment as long as it does not go against the conditions of the three-step test.²⁶

The term of protection provided both for performers and producers of phonograms is 50 years.²⁷ Once again most pertinently to the digital issue this treaty also obliges its parties to establish a system where legal remedies against the circumvention of technological measures, like encryption, watermarking, and the removal or altering of rights management information

and WPPT. However since this document is neither an agreed statement nor a resolution, whether there is strict liability on internet service providers for their mere provision of physical communication facilities remains in question under the WPPT though it has always been evident that a person who engages in an act other than an act covered by a right in the law/convention should bear no direct liability. The International Bureau of WIPO, Supra, 16.

²⁶ *Id.* art.16 cum. the agreed statement No. 8.

²⁷ *Id.* art.17.

be claimed and rendered.²⁸ So decrypting technologies used to unlock technologically protected copyright materials shall be hampered when used against the interest of copyright owners. However as we have seen above such a system by seeking perfect excludability of information would endanger the interest of the public to use existing stock of knowledge and create new ones unless enough fair use and other exemption grounds against prohibition of circumvention of access to digital contents are provided.

By far these being the most important features of the international law in the digital age with regard to copyright the national and regional laws that went good on meeting these standards include primarily the digital millennium copyright act of USA and InfoSoc directive of the EU.

1.2. STATEMENT OF THE PROBLEM

Now that copyright works are being availed digitally copyright owners have to protect their works by technological devices and software's in order to keep their digital works from unauthorized access and copy. The Computer Crime proc²⁹ of Ethiopia has also clearly prohibited under art.3 that it will be a criminal act to make unauthorized access of computer data's. Pursuant to art.2 (3) computer data is defined as any content data, traffic data, computer program, or any other subscriber information in a form suitable for processing by means of a computer system. On the other hand content data is defined under art.2 (6) as any computer data found in the form of audio, video, picture, arithmetic formula or any other form that conveys the essence, substance, meaning or purpose of a stored or transmitted computer data or computer communication. So from these definitions we can infer that copyright works in the form of soft copy are content data's. And if the unauthorized access of content data's is declared illegal then to make legal use of the copyright works that are technologically protected, especially according to the copyright limitations, the copyright law has to permit circumvention of the technological protections for selected fair use grounds.

The present copyright law of Ethiopia, i.e. Proc No 410/2004 as amended by Proc No 872/2014, does not provide any means by which the existing copyright exceptions be enjoyed digitally. This is because there is no provision that deals with unlocking technological

²⁸ *Id.* art.18 & 19.

²⁹ The Ethiopian Computer Crime Proclamation, 2016, proc No. 958, Fed. Neg. Gaz., year 22, no. 83.

protection devices or software's for the purpose of making reproduction of quotation, reproduction of teaching, reproduction by libraries and like institutions and reproduction for informatory purposes. So the existing laws need to undergo some revisitation so that beneficiaries of the copyright limitations can make legal use of copyright works and contribute in the development of literary and artistic works.

The Computer Crime proc other than declaring that it is unlawful to make unauthorized access it does not provide any provision that authorize circumvention to make fair use access of content data, especially with regard to copyright protected works. Rather to make the anti circumvention rule very tight it has declared under Art.7 (2-5) that anyone who intentionally imports, produces, offers for sale, distributes, makes available, possesses, transfers or discloses devices, products or secret code/key/password that are exclusively made for gaining unauthorized access of computer data is criminally liable. So in addition to prohibiting unauthorized access it is also criminalizing the use and circulation of circumvention devices that have the exclusive purpose of circumvention. Thus this law also does not provide any way out for making legitimate or fair use of copyright protected works. The only ground for making unauthorized access is provided under part three and part four based on Art.24, 25, 30 and 31 but it is only for the purpose of prevention and investigation of computer crimes. Therefore the copyright law has to come up with provisions that will give life to the copyright limitations whose application otherwise will remain restricted to analogue use of copyright works.

On the other hand the fact that the doctrine of exhaustion under Art.19 of the copyright proclamation is not restricted to analogue distribution or distribution of copyright works in tangible form has also its own repercussion. The experience of countries like U.S.A and E.U law indicate that the doctrine of exhaustion has to only be applied with regard to copyright works that are distributed in tangible form. The main reason is because allowing digital redistribution by third parties after the first sale may result in the infringement of the exclusive right of reproduction of copyright owners. This is because computers to carry out any function whatsoever will first reproduce the input and as a result if redistribution after the first sale is going to be allowed redistributors will sell the copyright work without losing what is in their possession. Making a certain file downloadable on a certain website does not result in the automatic loss of possession of the file. So to do away with such like intricate problems the doctrine of exhaustion is preferred to have a limited application on distribution by analogue modalities. As we know in the later situation the one who redistributes will lose the

file when s/he sell the copyright work and in that case unauthorized reproduction will not take place and the market scope of the copyright owner during the first sell will not shrink. Therefore the scope of art.19 has to be revised or else the copyright owners will be victims of copyright infringement.

The other problem of the present copyright proclamation is that it does not provide answer for the question; - who shall be held liable in case of online copyright infringement and to what extent? In every online copyright infringement virtually three different persons will come in to picture. These are the end user/ subscriber, the content/website developer and the service provider. So the Ethiopian copyright proclamation has to provide a response for this question. In addition the extent of the liability should also be determined. In this regard as we have seen above the WIPO internet Treaties consider internet service providers as mere conduits of communication as long as they merely provided physical facilities for enabling or making a communication.³⁰ This means unless their direct or contributory involvement is asserted they are free from liability.

The Draft Ethiopian computer crime law while regulating the liability of internet service providers under art.16 has limited their liability to arise only with regard to the types of computer crimes it prohibited under section three of part II. Accordingly if service providers involve in the dissemination of

- ✓ illegal child pornography videos, images, pictures, posters, or
- ✓ writings, videos, audios or images that threatens or intimidates another person/his family, or
- ✓ any written, video, audio or any other picture that incites fear, violence, chaos or conflict among people or
- ✓ Spam messages they will be held criminally liable.

In addition if they fail to remove after they came to know the existence of such illegal computer content data's or after they are notified by the competent administrative organ they will face criminal liability. However this doesn't apply to the dissemination of exclusively copyright protected works. So the liability of internet service providers remains unregulated with respect to the illegal dissemination of digital copyright works.

³⁰ WCT, Supra, Agreed Statement No. 7

Last but not in any way least the Ethiopian Copyright Proclamation fails to avail contemporary remedies that can be applied against online copyright infringers. There are various kinds of remedies that are contemplated under modern copyright laws of developed countries and awarded against internet service providers, content providers and/ individual subscribers. Mention can be made of graduated response and taking down infringing contents, blocking sites, ‘Throttling back’, termination of subscriber’s internet service, ‘follow the money’ approach which targets intermediaries like advertisers and financial intermediaries like banks that are sources of revenue for illegal copy content providers and so on.³¹ All this kinds of remedies are unknown in Ethiopia. As we know the types of remedies that exist in the Ethiopia are those of injunction, fine and imprisonment, which can be regarded as the oldest forms of remedies and that has never been used against online copyright infringers in Ethiopia.

1.3. RESEARCH QUESTIONS

This thesis will examine important issues with regard to online copyright infringement based on the following questions;

- A. When do we say that there is online copyright infringement?
- B. What are the types of exclusive copyrights of owners that are vulnerable to online copyright infringement?
- C. How do we read the fair use or dealing exceptions of the copyright law into digital copyright system? Do the exceptions extend to the digital environment?
- D. Does the existing copyright law of Ethiopia adequately regulate online copyright infringement?
- E. What is the best practice to adopt in regulating online copyright infringement in Ethiopia?
- F. What is/should be the extent of liability of Internet service providers, content providers and/ subscribers in Ethiopia?

³¹ Intellectual Property Office (IPO), International Comparison of Approaches to Online Copyright Infringement: Final Report, Intellectual Property office, 2 & 3, (2015), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/404429/International_Comparison_of_Approaches_to_Online_Copyright_Infringement.pdf, accessed on April 4 2015, 2:35 p.m.

G. What are the effective judicial and extra judicial remedies for online copyright infringement?

H. What are the possible pros and cons of acceding to the WIPO internet treaties to developing countries like Ethiopia?

1.4. OBJECTIVE

➤ General objective

In nutshell the gist of this paper is showing whether the Ethiopian copyright law is finely tuned with the technological use and distribution or protection of copyright works on the internet. Where Ethiopia is on the map of countries that regulate copyright over the internet and what remains to be done to line her up among the first in order will in broad be exhibited. In tandem with these objectives the research will also, in a broader perspective, be input to further findings on the same subject and it may also illuminate on the development of policy frameworks to the online copyright infringement in Ethiopia.

➤ Specific objective

The specific objective of this research is explicating the range of economic and moral loss online copyright infringement pose with respect to the exclusive rights of copyright owners. In doing so an effort will be made to seriously bring in to attention the need to regulate online copyright infringement in Ethiopia as the repercussions of online copyright infringement is becoming a significant cause to the reduction of economic enrichments of literary and artistic copyright owners both nationally and internationally. Since there is no any legal research conducted on the topic of this research the contribution of this research would be ample and decisive.

Actually an article was written on Internet and Ethiopia's IP law by Kinfe Micheal and Halefom Hailu but the article treated or tried to address the issue of online copyright infringement in less than 10 pages which by itself indicate that the article gave it a little attention while the issue has made countries like U.S.A to enact a 30 thousand or more word complex Act. Perhaps the fact that they discussed the issue of online copyright infringement and the liability of internet service providers together with other IP subject matters like patent, trade mark and the general framework of internet governance in Ethiopia might be the reason that made them dare to finish the story or try to summarize these rather complex topic in few paragraphs. But whatever the case may be this writer has not taken the article as a research

that addresses the issue of online copyright infringement in proper for the following visible reasons.

First the article falls short of discussing whether the existing copyright law can be applicable on the online use of copyright materials or not. Secondly it does not also answer whether the copyright exceptions extend to the digital environment or not. Thirdly the article dealt mainly about the protection of computer programs and databases on the online environment while copyright is not only about them. Fourthly the article also does not address issues like the liability of service providers and Digital rights management in a satisfactory way that consults the experience of the most developed jurisprudences on the area in this world. For this and other significant reasons this writer does not think that the article by those intellectuals is enough. Thus this paper taking the article as a raw material will devote itself to address all the issues not addressed by it. In tandem with this, the thesis will also see to it that appropriate recommendations based on the well developed jurisprudence of selected countries and international conventions is made if the government of Ethiopia so wishes to regulate online copyright infringement.

1.5. SCOPE

The scope of this thesis is limited to elucidating the far reaching consequences of online copyright infringement with due regard to the range of violations it pose on the exclusive rights of copyright owners. For this purpose the paper will try to concisely reflect on how and why countries like Ethiopia need to harmonize the existing copyright law to be consistent and accommodative of new technologies of the digital age. Therefore pinpointing the best way of regulating online copyright infringement and the effective approach to be adopted to prevent and redress the infringements especially with regard to the responsibility of internet service providers, subscribers and producers, importers and users of technological counterfeiting devices of copyright protections is the suburb of this research.

1.6. METHODOLOGY

The goal of this research is to study the serious effect of online copyright infringement and to analyze it's repercussion on copyright owners together with the extent of urgency to adopt a system that curbs the problems in Ethiopia in this regard. Accurately gauging the level of online copyright infringement in a given country is methodologically challenging and highly resource intensive. However, an effort to show the rampant adverse effect of online copyright infringement in Ethiopia will be made using qualitative research method accompanied by

purposive sampling. This sampling method is chosen so that the data's to the research are gathered from individuals and organizations that work on copyright matters. To this end the thesis will rely both on primary and secondary sources of information. Primary data will be collected from;-

- The Ethiopian intellectual property office; - an interview with the copyright and community knowledge protection and development directorate director and an expert therein.
- The Ethiopian writers association; - an interview with the president of the association.
- The Ethiopian musicians association; - an interview with the president of the association.
- The Ethiopian film producers association; - an interview with the president of the Ethiopian film producers association.
- The Ethiopian telecommunication office; - an interview with the media relation and publication head of corporate communication department.
- The Ethiopian federal high court; - an interview with three federal high court judges. With regard to this the Lideta branch Federal High Court is chosen because copyright bench is found only there.

Secondary data will be gathered from 3 websites per view status report; - sodere.com, diretube.com, and YouTube, with regard to 10 randomly selected music videos or movies uploaded on their site. These websites are chosen for their popularity. The reason the writer selected only three websites is because the extent of infringement in those websites can sufficiently tell a lot about how much economic loss is encountered by copyright owners in Ethiopia. Other secondary data's would be study reports of different organizations like ITU and WIPO/IPO, academic researches, and so on. Data from these sources will be gathered through interviews, personal observations and document analysis. The number and type of questions and persons to whom the interviews are administered are attached as annex 1.

1.7. TERMINOLOGY

In this paper the use of the terms piracy, online or internet or cyberspace copyright infringement is interchangeable. Actually the term piracy is usually related to illegitimate file sharing practices on the internet but since it is one form of online copyright infringement it is used interchangeably with online copyright infringement. So under this paper the use of the

term piracy does not only refer to file sharing but to all forms of copyright infringement on the cyberspace. On the other hand the term “exceptions” is used interchangeably with expressions such as “restrictions” and “limitations”. This term is intended to refer to certain categories of acts which are exempted by law from the copyright scope, with a view to achieving a number of public policy objectives (*e.g.*, allowing criticism, research, teaching, news reporting, parody, and so on)

1.8. ORGANIZATION OF THE PAPER

This paper is organized in such a way that chapter two explicates the extant literatures on online copyright infringement in tandem with its present nature in Ethiopia. The notion of file sharing, pirates and piracy, the evolution and development of regulating online copyright infringement, the exceptions to digital copyright system will be elucidated. The fact that Ethiopia at this time is a land of rampant online copyright infringement and the mystery behind the unreserved stupor of the copyright owners and their associations to react despite the provision of a benchmark to fight piracy in the extant copyright law of Ethiopia will be deliberated on. In addition the loopholes of the extant copyright law and the hesitation of the Ethiopian government to join important international treaties on intellectual property especially with regard to copyright will also be dealt. Subsequently on chapter three the paper will continue to dwell on the liability of the actors in the online copyright infringement. The breadth and depth of the liability of internet service providers, infringing content enablers and end users will be dealt. On top of that the enforcement instruments in the present copyright law of Ethiopia and the improvements that need to be made or the types of modern remedies available in the western countries against piracy will also be addressed. Finally the conclusion and recommendation of the paper will be delivered in chapter four.

CHAPTER TWO

2. ONLINE COPYRIGHT INFRINGEMENT /PIRACY

Providing definition for online copyright infringement or piracy in copyright laws is not even the practice in modern countries, like USA and the EU. Both the DMCA of America and the EU InfoSoc directive 2001/29/EC do not provide a crystal definition even for copyright infringement. What they rather do is providing principles and exceptions that cover the regulation of copyright, including copyright infringement over the internet. For the purpose of this study, however, online copyright infringement, often referred to as “online piracy” or “electronic piracy” can be defined as a form of intellectual property theft that occurs when a person or entity uses or circulates copyright protected creation/s over the Internet without authorization from the law or the person who has the exclusive legal right to reproduce, distribute, translate, adapt, transform, publicly display or communicate it to the public *in any way*.³² The last phrase ‘in any way’ presupposes technologies now known or later developed.

The Ethiopian copyright proclamation³³ neither provides a definition for copyright infringement nor for piracy or online copyright infringement. However what amounts copyright infringement in general and what may be understood as piracy in particular can be gleaned from the general spirit of the proclamation and by connecting the dots, i.e. the cross reading of some of the provisions. As long as they are original and fixed; literary, artistic and similar creative works including neighbouring rights are protected since they have a major role to enhance the cultural, social, economic, scientific and technological development of the Country. This being the preamble and general spirit of the proclamation unless it is for some specified exceptional fair uses permitted by the law it is a copyright infringement to make unauthorized reproduction, translation, transformation, distribution, importation, public display, performance, broadcasting and other communication of someone’s work.

Since the general copyright principles, in most cases, extend also to copyright infringement over the Internet the actions that suffice infringement are same old. Nevertheless, the

³² WiseGEEK, What is Internet Copyright Infringement?, available at <http://www.wisegeek.com/what-is-internet-copyright-infringement.htm>, accessed on May 10 2015, 3:40 p.m.

³³ Copyright and Neighboring Rights Protection Proclamation, proc. No. 410/2004.

technological words that are equivalent to reproduction³⁴, distribution, public display and the like for contents shared over the internet gets a little murky, especially when there is no clear copyright law regarding copyright infringement carried over the internet. To make things worse when we try to synchronize the fair use exceptions into the cyberspace system the identification of acts that suffice infringement and that do not really becomes perplex. Viewing, saving, mirroring, downloading, uploading, posting, file sharing and so on need elaboration as to when they tantamount infringement and when they don't.

Nevertheless under the Computer Crime Proc of Ethiopia unauthorized access of computer data's, which includes also content data's, is now prohibited. Word for word the proclamation defines the word access under art.2 (9) as communicating with, entering in, storing in, retrieving, obtaining data from, to view, to receive, move or copy data from a computer system, or otherwise make use of any data processing service. Thus to view, receive, move or copy data of exclusively copyright protected works is making unauthorized access and it will bring about criminal liability as per art.3 of the proclamation. In another word circumventing technological protection of copyright works to make unauthorized access is an infringement of law. Now let's discuss the strong and weak side of the present copyright law of Ethiopia.

2.1. SHORTFALLS OF THE ETHIOPIAN COPYRIGHT LAW

The present copyright law of Ethiopia exhibits a number of shortfalls when it comes to protecting intellectual property having a digital existence and once uploaded on the internet reproduced, distributed and openly communicated to the public online. And because of this cyberspace piracies are becoming rampant source of significant economic loss to copyright owners. On top of the legal loopholes there are also no institutional set ups structured to deal

³⁴ Unlike distribution and public display the term reproduction is defined in the Ethiopian copyright proclamation as 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. Could this definition be used to crystallize that downloading, uploading, posting, file sharing, saving including viewing; which in the case of computers presuppose temporary reproduction of a file in the computers Random Access Memory, are copyright infringing activities if prior authorization isn't secured or the unauthorized act doesn't falls under the fair use defense? *id.* Art.2 (25).

with controlling online copyright violations like file sharing³⁵ and providing suitable means to collect royalty of protected copyright works over the internet. Perhaps as computer technology is spreading worldwide and internet access is knocking every door especially in cities and towns the need to react with regulatory mechanisms is closely felt by many governments.³⁶ In addition, the fact that copyright protected materials are easily availed and that they can be reproduced and distributed limitlessly through the internet from one corner of the world to anywhere the internet service is provided makes the issue of internet piracy a very hot issue that requires immediate governmental response.

Before jumping into the shortfalls it is better to first discuss the strong side of the Ethiopian copyright proclamation in its commitment to reclude copyright infringement even on the internet. Because in that way the writer believes it would be easy to explain what remains to be included. Beginning from the definition part the proclamation has clearly indicated that the use of the terms like communication, public performance and reproduction includes both analogue and digital devices. Pursuant to art.2 (6) of the proclamation the term communication is defined to include wireless communication. Similarly the terms public performance and reproduction, under art.2 (24 & 25), are defined to include public performances that are made using any communication media and reproductions in electronic form. So when art.7 of the proclamation grant copyright owners the exclusive right on reproduction, public performance including the communication of copyright works by any other means it is declaring that it would be unlawful to use copyrighted works, both in analogue and digital form, without the authorization of the owners.

³⁵ It is a user-to-user transfer of copyrighted works without the right holders authorization enabled by peer-to-peer software and networks. Peer-to-peer software enables computers to communicate directly with each other and once a computer is connected to another networked computer it can locate a content file on the other networked computer and copy the encoded data onto its own hardware. Mazziotti, *Supra*, 137.

³⁶ In a world where more than seven billion people are reported to live today the number of internet users is rough and ready way above three billion. From a 0.3% estimated use in 1993 it elevated to above 40% in 2014 showing that the number of internet users is increasing tenfold. ITU and UNDP, *Supra*.

In line with this the proclamation has provided some copyright limitations.³⁷ However the limitations are not clear in terms of the scope and how they can be enjoyed in the virtual world. When copyright materials are made available digitally it means that the exclusive copyright owners have to shield their works from unauthorized access and copy by unique technological armour. Otherwise it will be difficult to protect those digitally availed copyright materials from unauthorized access and copy. If this is the case then, when we bring in the issue of copyright limitation for fair uses then the question how are copyright limitation beneficiaries going to make fair use of the technologically protected digital materials will come in to picture. Can they use circumvention devices to break through the technological protection software's or devices to make fair use access and reproduction? Should the exclusive copyright owner provide some online arrangement to help the copyright limitation beneficiaries enjoy their fair use right? It is not clear what will happen.

Actually the Computer Crime proc of Ethiopia under Art.3 explicitly criminalizes the making of unauthorized access of computer data³⁸ with a simple imprisonment not exceeding 3 years or fine from birr 30,000-50,000. In addition the same law under Art.7 (2-5) criminalizes persons who intentionally import, produce, offers for sale, distributes, makes available, possesses, discloses or transfers any computer device or computer program that are designed or adapted exclusively for purpose of circumvention of access protection technologies. This means the new law outlaws both circumvention and the use of circumvention devices/products that are designed exclusively for purpose of circumvention. Therefore a law that permit the use of protection technologies in a manner that leave some space for fair use and that prohibit the import, export, use and circulation of devices that do not have a *substantially non infringing use*³⁹ is indispensable.

³⁷ Copyright and Neighboring Rights Protection Proclamation, Supra, art.9-19.

³⁸ Computer data under this proclamation is defined to include content data's which is also defined as any computer data found in the form of audio, video, picture, arithmetic formula or any other form that conveys the essence, substance, meaning or purpose of a stored or transmitted computer data or computer communication. So it is clear that copyright works that are in a computer data form are protected from unauthorized access.

³⁹ *Sony v. Universal City Studios*, 464 U.S. 417 (1984). In this case the United States Supreme Court had refused to hold the manufacturer of a VCR liable merely because the machine could be used to make illegal copies, given that it was also "widely used for legitimate,

Perhaps with regard to the copyright limitation of reproduction for personal purpose since the beneficiary of article 9 of the Copyright Proc No. 410/2004 has to be owner of an original copy pursuant to Art.4 of the Copyright Amendment Proc No. 872/2014 there may be no problem. This is because while purchasing a digital copyright work the person who wish to reproduce it for personal purpose will legally unlock the technological protection. But the problem remains unsolved for the rest of the copyright limitation beneficiaries. For instance the technological protection will pose difficulties in making use of the copyright limitations that permit reproduction of quotation, reproduction for teaching, reproduction by libraries, archives and similar institutions, reproduction for informatory purpose etc. So the law has to provide some mechanism to those kinds of copyright limitations if they are going to make sense and be put to use by beneficiaries with regard to the digital enjoyment of copyright materials that are technologically protected.

In addition if the doctrine of exhaustion recognized under Art.19 of the copyright proc is applicable to both analogue and digital copyright works that will cause unfair market competition against the interest of the owner in exercising the exclusive right of distribution. Given the fact that digital works will not lose their quality through use unlike copyright works which are distributed in hard copy or by paper, if redistribution by means of sale is recognized even with regard to copyright works distributed digitally that will create unnecessary burden on the exclusive copyright owner's right of distribution. This is because the copies to be redistributed will have equal quality to the ones that were firstly put to the market and thereby create unfair competition. Because of this, countries like United States have limited the application of the doctrine of exhaustion to copyright works that are availed in analogue form.

On top of this redistribution using the internet will automatically involve reproduction of the copyright works. This means if after the first sale of the copyright work others are allowed to redistribute it through the internet they will be inviting others to download the file from a certain website and in the case of downloading the reproduction of the copyright work will be inevitable. Thus redistribution through resale will also infringe the exclusive right of reproduction of copyright owners because the re-distributor can pass over the copyright work without ever having to lose the original copy s/he first purchased. So permitting the doctrine of exhaustion to extend to the digital use or redistribution of copyright works will create

unobjectionable purposes.” The manufacturer should be liable, the Court explained, only where a device was incapable of substantial non infringing uses.

intricate problems. And since that would be defeating the very reason of recognizing the exclusive right of reproduction art.19 has to undergo some revisitation.

Moreover the proclamation rather than enunciating infringement grounds simply provides list of recognized copyrights. Basically it can be said that the absence of definition for copyright infringement has opened up loopholes that are visible under the existing copyright law because had the law included definition to copyright infringement it could have predetermined in the first place how and when copyright infringement would be said to have occurred assuming various grounds and situations of violations including online infringements. In fact it is not the practice to provide a full-fledged definition for what suffices copyright infringement even in the developed countries like the US and EU and one of the reasons for failure to do so could be the difficulty to come up with a well-versed definition for copyright infringement whose scope likely expands as the human life gets more civilized and technology becomes sophisticated. But still the definition is a key factor which could fill up many loopholes that may be source of many tangling questions arising from technologies now known or later developed. Nevertheless it is obvious that all the problems cannot be summed up and replied by only providing a definition for copyright infringement because there are also other questions that need to be encountered from different angles.

For instance it is not clear who shall be held liable? and in what degree of responsibility? as to the copyright infringing activities on the internet. Shall we hold liable the internet service providers⁴⁰, content enablers/providers (sanctioning the supply side), the end users (sanctioning the demand side) or both? Shall it be internet service providers' responsibility to

⁴⁰ With regard to internet service providers the Computer Crime proc of Ethiopia has declared under section three Art.16 that internet service providers shall face criminal liability if they are directly involved in the dissemination or edition of child pornography content data, content data's that intimidate, threaten or defames another person, content data's that incites fear, violence, chaos, or conflict among people, or in the dissemination of spam messages. In addition they are also made criminally liable if they fail to remove or disable access to such content data's after they came to know the same or after they are notified by a competent administrative organ. As we can see the scope criminal liability is limited to the stated types of illegal videos only and this means internet service providers are not going to be criminally

check, control and take down every illicit activities against copyright owners on the internet or shall it be copyright owners responsibility to check for infringement and unauthorized copyright infringing activities and request for take down by service providers?. Finally, courts also need legal direction as to the types of remedies that can be enforced with regard to unauthorized reproduction and other copyright infringing activities on the internet. It is very obvious that the existing remedies of injunction, fine and imprisonment are not enough.

There are various kinds of remedies that are contemplated under modern copyright laws of developed countries and awarded against internet service providers, content providers and/ individual subscribers. Demand side sanctions like graduated response letters, throttling back, termination of access and supply side sanctions like take down and blocking of sites, ‘Follow the money’ approaches which are all extra judicial sanctions are also legally availed in addition to the obsolete judicial remedies of injunction, fine and imprisonment.⁴¹

Graduated response letter is one type of extra judicial remedy which is available in United States, France, Korea and United Kingdom.⁴² It is a sanction by which warning letters of increasing severity are sent to subscribers whose accounts are linked to alleged online copyright infringement, with the ultimate sanction of prosecution if infringement from the account being monitored does not cease. Throttling back is also another extra judicial remedy which is being applied in US.⁴³ It means slowing down the speed of the internet connection to accounts that have been linked to infringement if the behavior persists. Termination of access on the other hand is a sanction by which the internet access of subscribers whose accounts have been linked to persistent infringement is terminated for a given period. It is in use in the US and Korea. From the supply side US, UK, Brazil, Netherland, Spain, Korea and Italy use the sanction of take down and blocking of sites to shut websites or block them.⁴⁴ And countries like Netherland, Spain and UK employ ‘Follow the money’ approach to target

liable, at least by the new Computer Crime Proclamation, if they are found involved in the dissemination of copyright protected works through the internet.

⁴¹ Intellectual Property Office (IPO), Supra, 2 & 3.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

intermediaries like banks and advertising agencies who either knowingly or not knowingly are involved in monetizing online content that infringes copyright.⁴⁵ All this kinds of remedies are unknown in Ethiopia. As we know the types of remedies that exist in the Ethiopia are those of injunction, fine and imprisonment, which can be regarded as the oldest forms of remedies and that has never been used against online copyright infringers in Ethiopia.

That being the problem of the present copyright law of Ethiopia what kept the copyright owners and their association's stupor and insensitive in looking for legal remedies before court of law is the important question. As we have seen there is something at least that can serve as benchmark for lodging a suit in the law. There are adequate signs that substantiate that piracy is also not favoured in the Ethiopia copyright system. So what is holding the copyright owners and their associations to not react against online copyright infringement is the mystery. Is it unawareness of the fact that the law actually condemns internet copyright infringement? Is it because most of the content enablers or website runners are out of jurisdiction of Ethiopia? Why didn't they at least react against the one and only internet service provider i.e. the Ethiopian telecommunication? Why are they not reacting against infringing content enablers in Ethiopia? The internet is and has been the monster from which infringing CDs and DVDs gets hatched there and here in the country. So while the police and the copyright owners are pursuing those infringing CDs and DVDs why are they not going after the root source of the problem?

According to an interview made to the president of the Ethiopian Copyright Association Mr. Dawit Yefru said the copyright society in general has been in a deep sleep and indifference about online copyright infringement.⁴⁶ Since the enactment of the 1996 copyright proclamation all the effort the association has been exerting was up on the fight against the illegal reproduction and distribution of CDs and DVDs. Actually Mr. Dawit said that it is not the association's job to legally represent musicians and bring claims before court of law. And as such its role has been limited to creating awareness amongst musicians as to the nature and type of extant copyright infringements and threats. That being the case the association started to take the issue of online copyright infringement seriously only after it became a rampant

⁴⁵ *Id.*

⁴⁶ Interview with Mr. Dawit Yefru, President of the Ethiopian Copyright Association, in Addis Ababa, (Dec. 25, 2015)

source of infringement and since 2013/14 a number of conferences had been held with many copyright stakeholders like the Ethiopian intellectual property office (EIPO). And the amendment copyright proclamation that calls for the establishment of a collective management society⁴⁷, as he claims it, is one of the great deal results of those conferences.

However as we have seen earlier this amendment proclamation also does not provide an adequate response for the various questions raised under chapter one like the manner of applicability of the various exception and exemption grounds listed from art.10-14 & 19 of the copyright proclamation to the virtual world and the responsibility and extent of liability of internet providers, content providers and subscribers with regard to online copyright infringement. so even if the amendment proclamation has solved the issue of reproduction for personal purpose in the virtual world and declared that any person who uses any work protected under the proclamation for commercial purpose have the obligation to pay royalty to the relevant collective management society, there are still visible loopholes awaiting the reaction of the legislative organ. Mr. Dawit also blames the whole copyright stakeholders for their insensitivity and the legislator for its failure to put in place a strong and full-fledged legal protection.⁴⁸

Similarly the president of the Ethiopian writers association Dr. Muse Yaekob also said that there hasn't been any effort coming from their side and their fight against copyright infringement is limited to the analogue reproduction and distribution of Ethiopian writers copyright protected works.⁴⁹ However Dr. Muse emphasized the need to cooperate with the other associations in the literary and artistic world like the Ethiopian Copyright Association and the Ethiopian Film Producers Association and reach on common grounds on how to fight the online copyright issue. In addition he stressed the fact that the government has to come up with a comprehensive law that regulates every affair in the digital copyright issue and assign certain governmental agencies like the EIPO and ETC with the task of monitoring and taking intervening measures against the online copyright infringement in Ethiopia. With regard to the

⁴⁷ Copyright and Neighboring Rights Protection (Amendment) Proclamation, proclamation no. 872/2004, art.32.

⁴⁸ Interview with Mr. Dawit Yefru, Supra.

⁴⁹ Interview with Dr. Muse Yaekob, President of the Ethiopian Writers Association, in Addis Ababa, (Dec. 27, 2015)

copyright the Society, i.e. the writers, musicians, performers and film producers in general, he said that he is always stunned by their silence and ignorance and believe that it would have been a different story if they had shouted and made their voice heard by the government.

Mr. Bineyam Alemayehu, the president of the Ethiopian film producers association, on the other hand said that the association has been undergoing a major structural adjustment this year because of a new government law that orders film producers to be organized as commercial associations and as a result there hasn't been any serious activity made by the association concerning copyright infringement.⁵⁰ However, he mentioned that the association is planning to facilitate the provision of content service on the internet legally and in this regard it is also planned to communicate with website developers.

Furthermore Mr. Bineyam added that producers are working very hard to protect the unauthorized reproduction and distribution of their movies while it is on cinema. Because it is mostly after movies are relegated from cinema that the illegal reproduction and distribution of movies begin, be it in the form of CDs, DVDs and on the internet. On top of this he also emphasized that it is the cinema business that usually help the film producers to regain their cost of production and fight for survival in the industry. However, he said, since the copyright sky is foggy all the copyright society misses the bright and sunny day and for this the government should as much as possible have to make the playing ground inconvenient to the pirates by providing furious copyright law and reorganizing some concerned government agencies with the financial capacity and working system to monitor piracy.

In an effort to capture the existing effort from the side of the Ethiopian government the writer also went to the Ethiopian Intellectual Property Office (herein after EIPO), the Ethiopian Ministry of Information and Communication Technology (herein after MICT) and the Federal High Court, at Lideta, where there is a copyright bench. Accordingly Mr. Tedla Mamo, copyright and community knowledge protection and development directorate director at EIPO, stated that the existing copyright law, though it makes available some general provision, lacks clarity and particularity on the outlawing of online copyright infringement.⁵¹

⁵⁰ Interview with Mr. Bineyam Alemayehu, President of the Ethiopian Film Producers Association, in Addis Ababa, (Dec. 28, 2015)

⁵¹ Interview with Mr. Tedla Mamo, copyright and community knowledge protection and development directorate director, in Addis Ababa, (Dec. 25, 2015)

He said that since the present law grant copyright owners exclusive rights on reproduction, distribution, translation, public performance and communication in general unauthorized dissemination and use of copyright works over the internet is also prohibited. However he said that the copyright limitations are not provided in a way they can be enjoyed with regard to technologically protected digital copyright materials. It is not clear if people who want to make fair use of digital works are allowed to circumvent technological protection devices or software's. As a result he said the law has to be amended to make the copyright limitations effective in the virtual world.

Furthermore he mentioned that unless the law is amended it will be difficult to lodge a suit against infringing subscribers, content providers and internet service providers. Thus the prime agenda in the discourse of piracy in Ethiopia is the creation of adequate and effective legal protection. Otherwise the law interpreting organ and the law enforcing organs will not be in a position to effectively react against pirates. For instance it is the law that has to determine the extent of liability of intermediaries or internet service providers, whether they have to be held directly or contributorily liable, so that courts will not be in confusion in the face of copyright owners difficulty to bring a suit against every individual subscribers who are infringing copyright on the internet. Finally Mr. Tedla talked about the urgency to install an appropriate legal protection to the digital copyright system and stressed that despite the technological and financial challenges that fighting piracy brings it is not a matter of choice to remain stupor and careless.

Last but never least, when the writer asked Mr Tedla about his personal opinion on whether Ethiopia should accede to the 1996 WIPO internet treaties he replied that adopting international treaties has its own merits and demerits and as such it needs the government's policy decision based analysis of different factors. Nevertheless, he said, it would always be advisable to adopt such treaties because the fight against crimes committed by technological devises usually exhibit international traits.

On the other hand 3 Federal high court copyright bench judges the writer interviewed at Lideta branch also indicated that no copyright case has so far involved an issue of online copyright infringement and added that they are observing a sense of indifference from the side of the overall copyright society. The first judge said that given the general provisions of the present copyright law it could have been possible to take at least deterrence measures against national infringing websites if a suit was lodged with regard to online copyright infringement. However, he said that, the present law definitely falls short of regulating the digital copyright

infringement aspect in detail. The other two judges also shared the first Judges idea and suggested that a legal reform has to be introduced right away.

2.2. EXCLUSIVE COPYRIGHTS AFFECTED BY PIRACY

Using old copyright rules in the face of new and modern technology has the obvious disadvantage that the rules will not necessarily fit the current situation very well.⁵² Where the new sorts of works behave differently from the old sorts of works, we need to figure out some sort of fix. However the new rules that are going to be enacted for the new technologies has to uphold some basic features of copyright like providing copyright limitations. Because history and conventional wisdom tells us that if copyright does not provide some shelter or incentives for ensuring the continuous development of art then for absence of raw materials people will refuse to invest in the art sector.⁵³ As we know people come up with new literature using existing piece of arts as their foundation. Thus the new copyright rules with regard to the new technologies should provide some copyright limitations as the old copyright law so that the continued development of art is secured.

In Ethiopia the time to replace or amend the old rules of copyright with new one is right now. This is because the old rules are showing some shortages in regulating new technologies. To day if we scan and upload a copyright material on the internet then it will be possible to do everything that can be done using an analogue device even in a much better, faster and least costly manner. Be it reproduction, distribution, adaptation, public display etc anything is possible thanks to the inventors of these technologies and what we may be required, to do staffs like translation, broadcasting and the like is to have software's that do translations and the internet that broadcast it using a computer. So except the difference in the magnitude of exclusive copyright types that are infringed over the internet, virtually with help of software's and modern technological devices all types of exclusive copyrights can be infringed digitally over the internet, even much rampantly, obscurely and cheaply. However the present copyright law of Ethiopia falls short of properly regulating this new technology as it does not provide how the copyright limitations be enjoyed in the face of technological protection of copyright works, fails to limit the scope the doctrine of first sale to redistribution of tangible

⁵² Jessica Litman, Digital Copyright, 171, (2006), available at <http://bookfi.org/md5/61f6a3b9ee7bbdb12dd8dbcac1fd671a>, accessed on March 8 2015, 3:25 p.m.

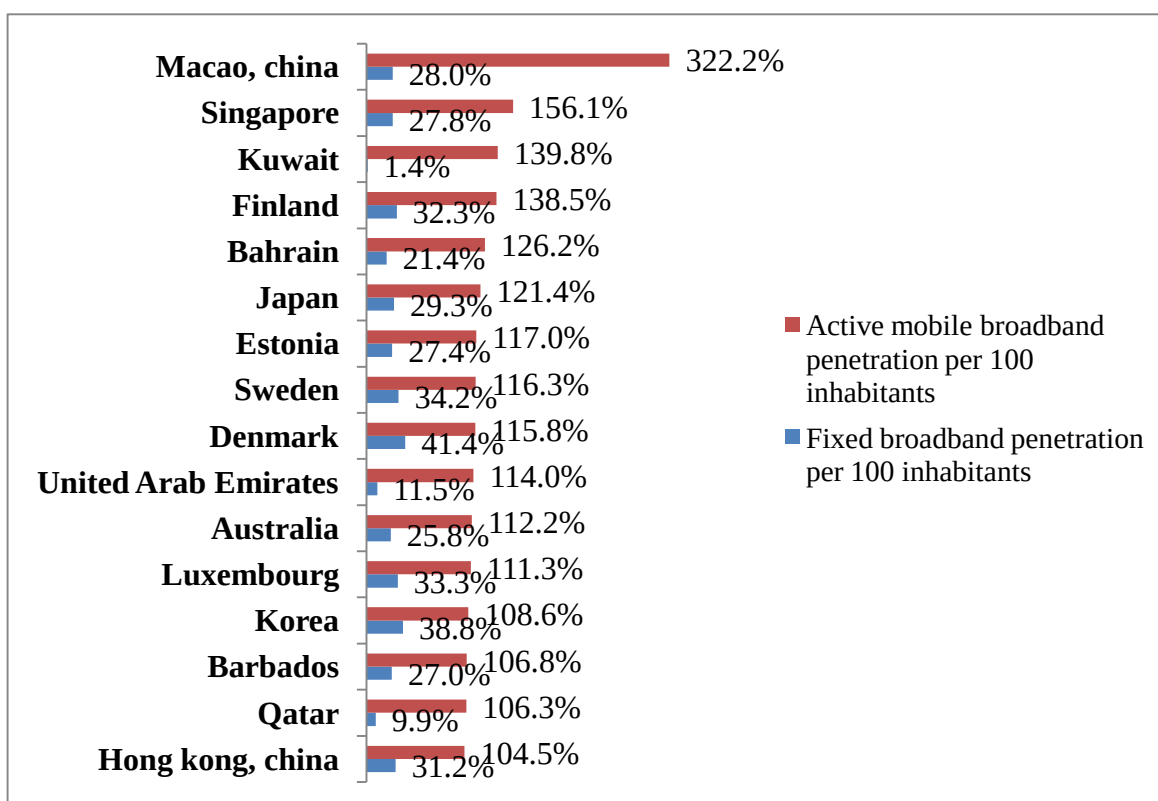
⁵³ *Id.* 173

copyright works only, fails to determine the liability of internet service providers, content providers and end users and fails to provide appropriate remedies in consideration of the behaviour of the new technologies. Therefore the existing law has to be revised to solve such issues.

2.3. PIRATES AND PIRACY

The actors that participate in piracy include individual subscribers, content enablers/providers and internet service providers. Whatever its form piracy is basically reliant on different contributing factors; wireless or fixed broadband internet penetration level, internet connection speed, the absence or presence and affordability of legal online music, movie, TV programs, and other files or data services of a given country are some of them. The penetration level per population, the internet connection speed and the presence of legal online service provision is significantly low to the extent that can be said there is no internet service provision in most of the developing countries, especially in Africa. On the other hand in many developed and some developing countries of the world the penetration of active mobile broadband internet use is surprisingly way above 100%. If we take a look at the 2015 report of the international telecommunications union (herein after ITU), mobile broadband internet penetration per 100 inhabitants in the world is above 100% in more than 10 countries as shown below⁵⁴;

⁵⁴ International Telecommunication Union (ITU), Measuring the information society report (MIS) 2015, 222-225, retrieved from <http://www.itu.int/en/ITU-D/statistics/pages/publication/mis2015.aspx>, accessed on Oct 20, 2015 10:43 p.m.



Similarly the overall internet penetration has gone way above 85% in more than 20 countries and higher than 90% in more than 10 countries of the world. Countries like Iceland, Norway, Denmark, Andorra, the Netherlands, Sweden and United Kingdom have a record of more than 90% of their population surfing the internet.⁵⁵

The internet connection speed is also high in the European countries with an affordable mobile/fixed broadband price compared to other regions, more particularly Africa. By the year 2014, Europe was the region with the most affordable fixed and mobile broadband price in terms of gross national income per capita.⁵⁶ In the same year the basic fixed-broadband connection in Europe represented 1.3 per cent of GNI p.c. High-speed Internet access is most affordable for people in the United Kingdom, Switzerland and Austria. In countries with the least affordable service (Serbia, the Former Yugoslav Republic of Macedonia, Montenegro and Hungary), the average price of the plan represented was between 2.2 and 3.5 per cent of GNI p.c. In all other European countries, it represented 2 per cent or less of average GNI p.c. This makes Europe the only region in which all countries have reached the Broadband

⁵⁵ *Id.*

⁵⁶ *Id.* 113

Commission target of offering basic fixed-broadband services for a price below 5 per cent of GNI p.c.

When it comes to internet connection speed none of the European countries offer fixed-broadband services at the minimum threshold of 256 Kbit/s.⁵⁷ Only Poland offers a 512 Kbit/s plan, and 1 M bit/s plans are on offer in Turkey, Spain, Slovenia, Montenegro and Albania. All other countries offer plans of at least 2 M bit/s and half of the European countries included in the data collection offer speeds of 7 M bit/s or higher. Very high speeds of 100 M bit/s are advertised in Romania, Lithuania and Ireland. The most common entry-level fixed-broadband speed in the region is 5 M bit/s. The region is also the leading in the world in terms of mobile broadband price and internet connection speed.⁵⁸ Specific countries that stand out in Europe for having the lowest mobile-broadband prices are Austria, Lithuania and Romania. The results confirm that Europe is the region with the most affordable mobile-broadband prices, and differences across countries in Europe are small in terms of GNI p.c. This is largely explained by the high GNI p.c. levels in the region.

On the other hand the penetration of mobile and fixed broadband internet is very low in Africa and at its inception in Ethiopia. On 2014 Africa was estimated to have had a 19% active mobile broadband penetration and 0.4% fixed broadband penetration which is actually the lowest compared to all other regions in the world.⁵⁹ Similarly Ethiopia, by the year 2014, had an estimated 7.5% mobile broadband penetration and 0.5% fixed broadband penetration.⁶⁰

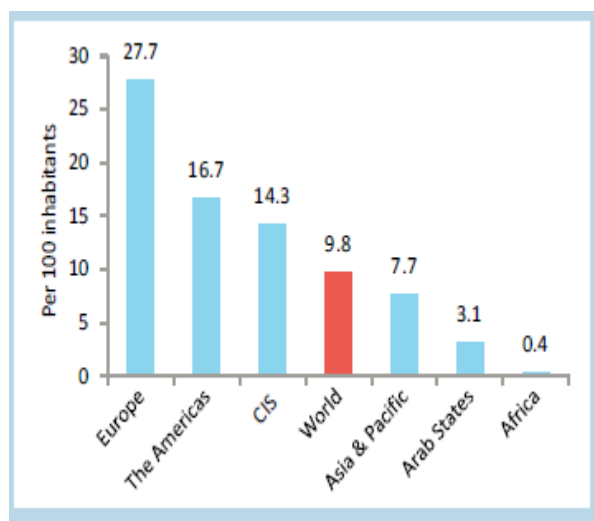
⁵⁷ *Id.* 111

⁵⁸ *Id.* 126

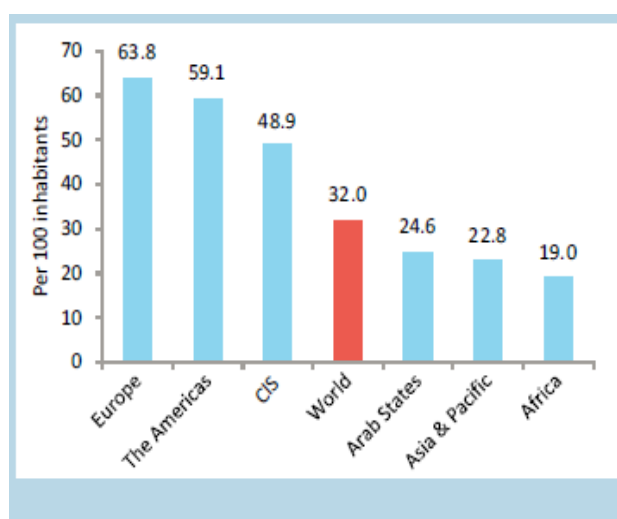
⁵⁹ International Telecommunication Union (ITU), Measuring the information society report (MIS) 2014, 5, 6 & 15 retrieved from <http://www.itu/en/ITU-D/statistics/Pages/stat/default.aspx>, accessed on Oct 20 2015, 10:35 p.m.

⁶⁰ International Telecommunication Union (ITU) (MIS) 2015, *Supra*.

Fixed (wired)-broadband subscriptions by level of development, 2005-2014 and by region, 2014



Active mobile-broadband subscriptions by level of development, 2007-2014 and by region, 2014



The overall internet penetration in Africa and Ethiopia is also rudimentary. On 2015 While Africa has had an estimated 20% of internet penetration Ethiopia was among the least with an estimated 2.9% penetration.⁶¹ Actually unlike many countries there are few countries in Africa that managed to attain an outstanding 50% and above internet penetration. For instance if we see the internet penetration in morocco and Seychelles they have 56.8% and 54.3%

⁶¹ *Id.*

record.⁶² However, since the majority of African countries have a very low penetration rate the region has remained to be one with the lowest internet penetration rate in the world.

Similarly lower internet connection speed and higher fixed/mobile broadband price rates is on the other hand the attribute of many developing countries and most African countries.⁶³ Only Six African countries – Seychelles, South Africa, Mauritius, Gabon, Cape Verde and Botswana -offer basic fixed-broadband plans at prices corresponding to 5 per cent or less of average GNI p.c. In most countries, the price of the service represents more than ten per cent of GNI p.c. In almost half of the African LDCs, including Uganda, Rwanda and the Central African Republic, the price actually exceeds average GNI p.c. levels.

Despite such a very low internet penetration, internet users in Ethiopia has been procuring enormous benefits from the unstoppable flow of creative works made available at no cost through a borderless networked environment. Had it not been for such very low penetration rate an immense loss could have been inflicted on the economic interest of copyright owners in Ethiopia as the people with wide free online copyright works wouldn't have spent a dime on the purchase of CDs and DVDs. Copyrighted materials over the internet remain non-excludable and non-rival to a great extent and this has been a source of utmost freedom to net surfers in Ethiopia.

The cost of copying and disseminating information approach zero and the increasing ease in bypassing the hurdle of copyright protection and the absence of right holder intermediation has given internet users in Ethiopia the firm conviction that the Internet is a land free of copyright law. It looks like that the poor internet penetration in the country has created a sense of insensitivity as to much of the online copyright infringement and there hasn't been any noticeable movement by copyright stakeholders in Ethiopia towards securing copyright over the global net. Nevertheless piracy in the economic northern countries, almost for about two decades, has been a media darling and center of attention between producers, copyright owners, other interest groups, the public and the law maker. There are plenty of cases filed and settled with regard to piracy over the cyberspace.

However the Ethiopian government and the copyright owners have rather chosen not to lend their ears to this copyright revolution vibrating internationally. The government has showed

⁶² *Id.*

⁶³ *Id.* 117

the insensitivity or naiveness in not even signing the Berne convention, which is administered by fairly developing countries friendly WIPO, let alone the 1996 WIPO copyright and performances and phonograms treaties whose primary agenda is securing copyright over the internet. Perhaps the government may have different and various policy reasons for not adopting many international conventions including the WIPO conventions but it should be noted that in fear of dreams people won't stop sleeping. And we need to come clean very soon to join the world that is becoming a village. The Ethiopian intellectual property office (EIPO), the Ethiopian telecommunication office (ETC), the Ethiopian musicians association, the Ethiopian writers association, the Ethiopian film producers association and generally copyright owners all seems comfortably sleeping while the store of copyright goods is being looted by pirates. However, it all seems pretty clear that with every new development of technology the pitch of the copyright playing field should also be changed.

According to Mr. BIRHANU LEGESE, media relation and publication head of corporate communication department in the Ethiopian telecommunication authority, in 2015gc the internet users in Ethiopia had reached 9.4 million.⁶⁴ And according to the authorities report he said the number of internet users has increased by a rate of 53% compared to the last year report promising that it will not be long for the internet penetration per adult population in Ethiopia increase by more than 50%. Being the only internet service provider in Ethiopia the Ethiopian telecommunication provides Narrow band, GPRS (mobile) and broadband internet service types.

⁶⁴ With regard to the statistical data released by the Ethio-telecommunication and the regional or international telecommunication unions there are efforts to standardize statistical methodologies and the uniform use of parameters in the development of ICT development index. Accordingly the international telecommunication union regional workshop was held in Addis Ababa, Ethiopia from 27-30 Oct 2015. The workshop was organized by the ITU in collaboration with the government of the Federal Democratic Republic of Ethiopia. The participants mainly dealt on issues of strengthening the capacity of countries in the region to produce national statistics and indicators on telecommunication and information communication technologies based on the internationally agreed standards and methodologies. Ethiopian Telecommunication, Ethio telecom: The international telecommunication union (ITU) regional workshop will be held here in Ethiopia, retrieved from www.ethio telecom.et., accessed on Dec. 3, 2015, 3:50 p.m.

The telecommunication is also working through the years and days to improve the internet penetration rate and broadband and mobile internet speed. When it introduced 3G fast mobile internet access it was only limited to the countries capital city Addis Ababa but now it has expanded its 3G coverage to many regional states and from January 1 to June 30 2015 it was serving customers who are residing in areas where Ethio telecom completed its 3G network expansion project by upgrading their SIM from 2G to 3G service according to their free SMS request. Ethio telecom has also introduced 4G fast mobile internet access services on March 21st 2015 and by doing so it has made a step forward in its vision of availing a better telecommunications service and meeting the growing demand of various sectors of the country. The 4th generation wireless internet access technology which is capable of providing 100Mega bits per second up to 1Giga bits per second is expected to transform the extant internet speed in the country to a superfast and uninterrupted one.⁶⁵

CDMA and EVDO internet services are also being availed to the people though they are costly and not affordable to the majority of the population who struggle to secure their daily meal. Anyways had there been high internet penetration and very fast internet speed with widest possible coverage the tendency of the people to share files using file sharing software's would have reached an alarming rate by now and as the extant copyright law stands loose in regulating online copyright infringement the country would have been the land of rampant piracy. So along the effort to improve the internet penetration and speed the government has to also make sure that the legal system is not open to piracy.

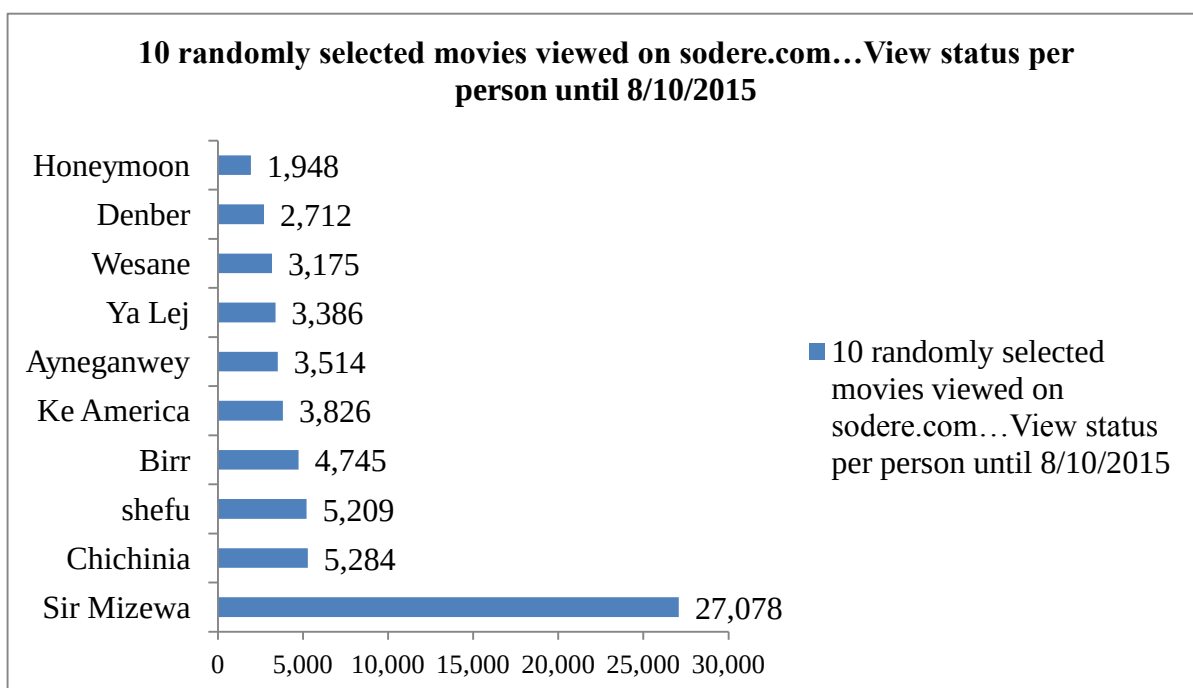
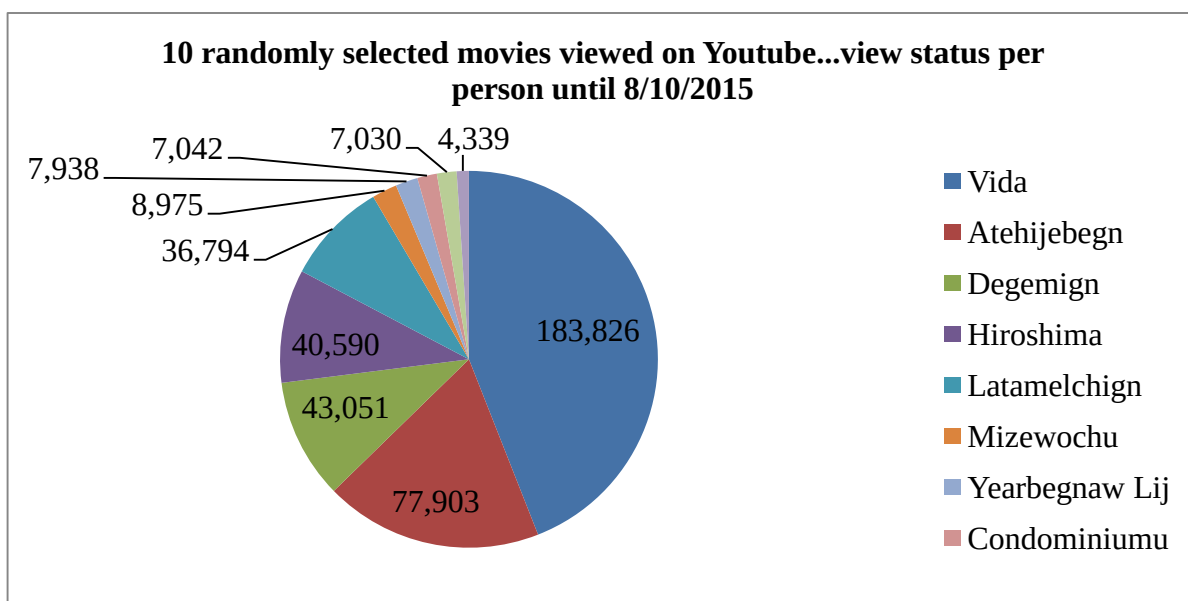
With all these types of internet services, Mr. Birhanu admitted that rampant copyright infringements are being carried out. He also couldn't deny that no measures have so far been taken to fight piracy by the Ethiopian telecommunication and believes that much is expected from copyright owners and other stakeholders in pushing the government or the legislative organ to come up with a comprehensive law on copyright protection over the internet.

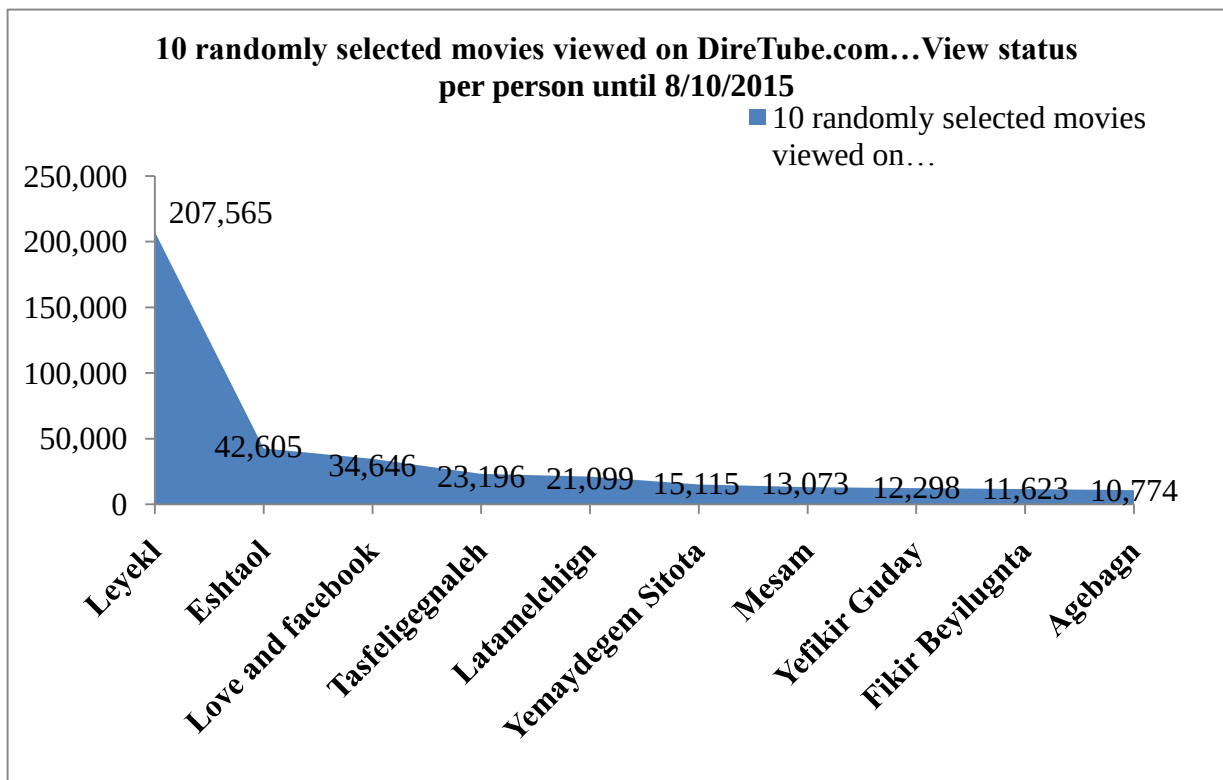
In an attempt to give a glimpse of the extent of piracy the writer has also tried to assess the view status of randomly selected 10 movies and music clips on 3 selected foreign and national websites which are chosen for their popularity. In the subsequent tables the number of views

⁶⁵ Ethio telecom, corporate communications Department, Ethio telecom launches the Fourth Generation Long Term Evolution (LTE) service in Ethiopia, Ethio telecom, retrieved from www.ethio telecom.et/?q=node/968899, accessed on Oct 15, 2015, 3:12 p.m.

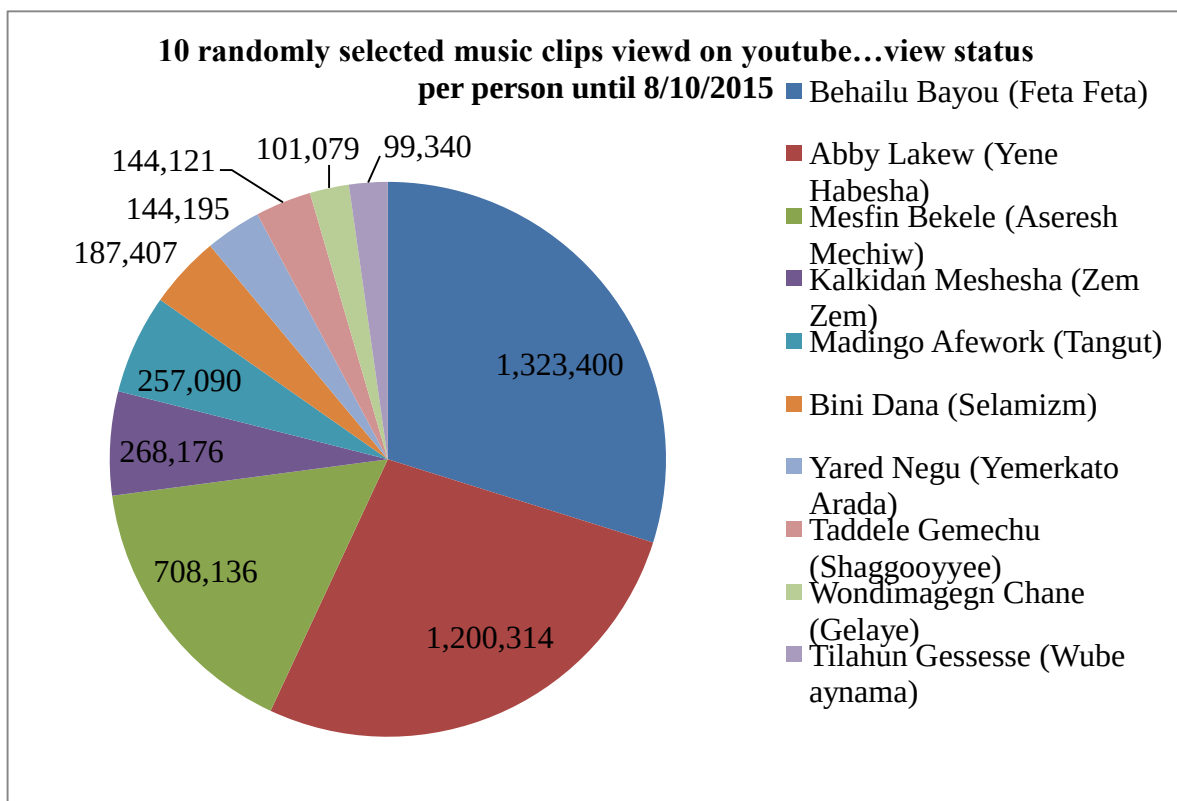
of 10 movies on 3 (one international and two national) popular websites (youtube.com, sodere.com and Dire Tube) and the number of views of 10 music clips on 3 (one international and two national) popular websites is depicted. The writer chosen these websites because of their popularity which can be told from the frequency of visit people tend to make to these websites.

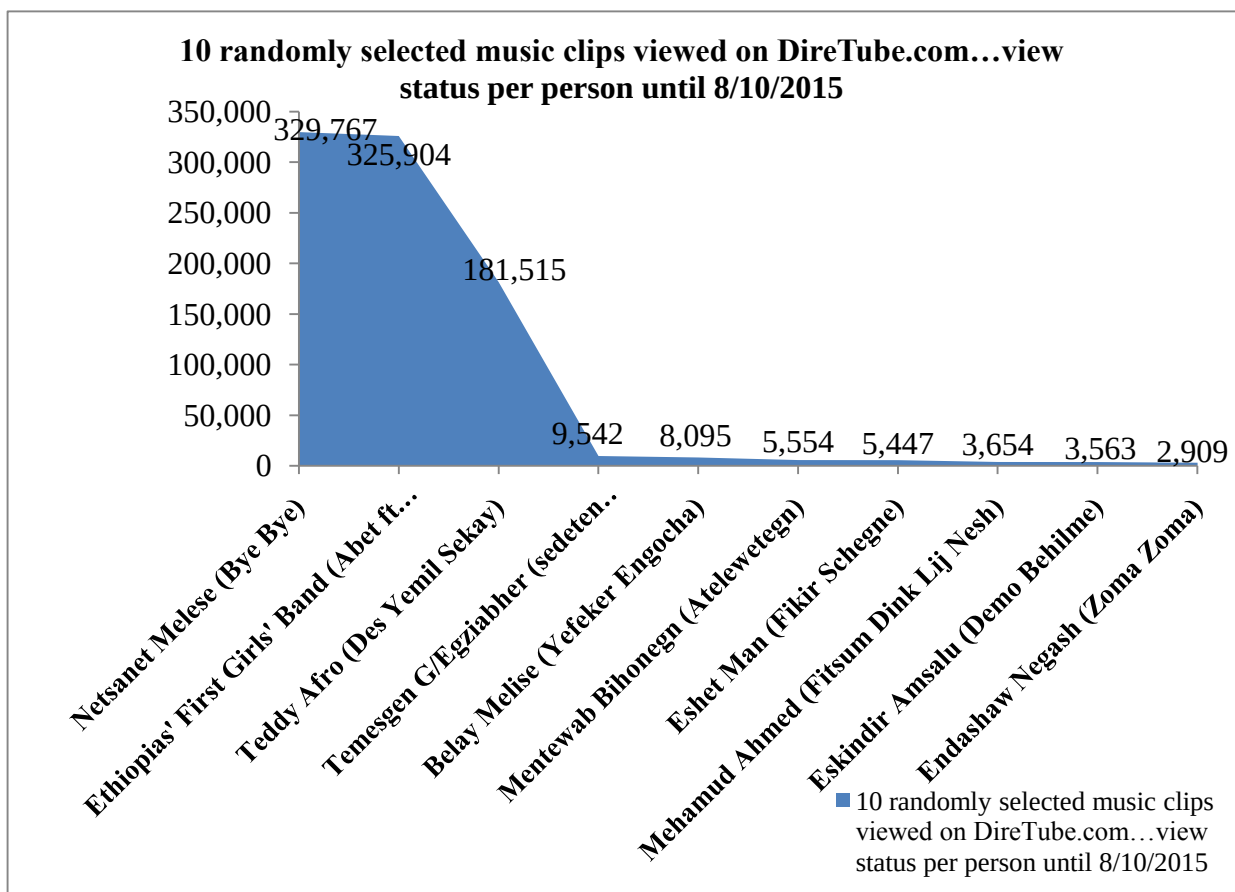
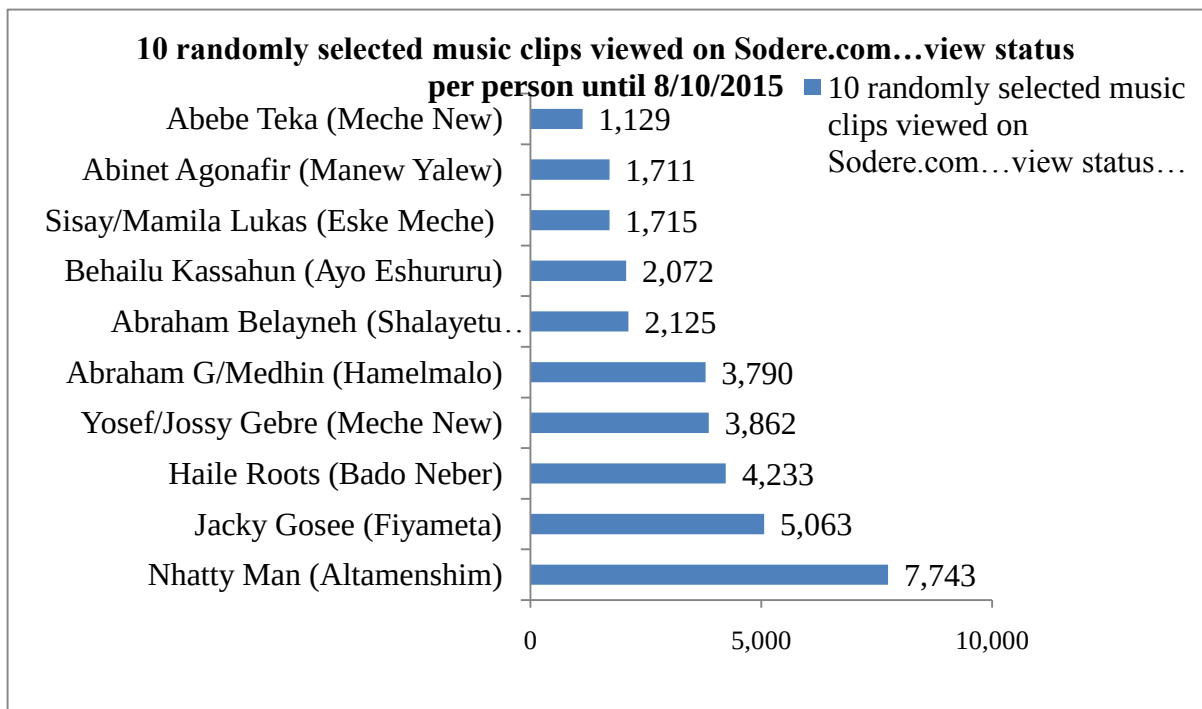
The following charts show the number of times the identified movies and musics are viewed on the different websites.





The following charts on the other hand presents the number of times the selected music clips are viewed on 3 different websites. Let's begin with the international one...





As we can see these copyright protected music's and movies have been viewed between the range of thousands and million. Even if the websites do not show the download status of those

files it could be the case that those files have been downloaded in 100th of thousands unlawfully as there is no legal mechanism that make individuals pay penny to the copyright owners every time they download. Whatever the case may be, since modern digital copyrights consider every temporary RAM copy made by computers as an actionable reproduction it means that those files have actually been reproduced illegally as many times they have been viewed. So we can say that the loss of copyright owners with regard to those files is incalculable. Actually perfect exclusion of every illegal and copyright infringing site's on the internet is impossible but had there been efforts to take down and block infringing websites since the enactment of the Ethiopian copyright proclamation it would have been possible to minimize the huge economic loss of copyright owners.

These facts and figures are not simple and easy to live with in a sense of indifference. We cannot also say that it is not the time for Ethiopia and the copyright owners to react against this. This is stealing people's property on a broad day light even if it is in the virtual world. Had it been theft of people's tangible property everyone would have reacted automatically. So we cannot say that it is not the time. It is very obvious that had there been high rate of internet penetration and internet connection speed the damage would have been devastating. So as the government is working on the improvement of these service provisions the laws to fill up these piracy issues should also be underway. Yes of course it is not too late but it is not also very early to react against. We should not forget that the above figures only show the view status of copyright music and movies in only 3 websites. There could be more than 10 or 20 such like familiarized websites from which not only music and movies but also books, researches, pictures etc are viewed, downloaded or reproduced.

Basically, searching and blocking every infringing websites is not enough rather legal online content services should also be introduced on the internet. If we take a look at the experience of western countries with a relatively up to date digital copyright system, along the unreserved effort to block copyright infringing sites the government and private stakeholders are working hard on introducing and familiarizing legal online content services. There are many western countries that managed to have more than 20 legal online content service sites. UK, Germany, US, Austria, France, Netherland, Japan, Poland, Canada etc are some of the countries.⁶⁶

⁶⁶ Intellectual Property Office (IPO), Supra, 12

2.4. THE EVOLUTION AND DEVELOPMENT OF REGULATING ONLINE COPYRIGHT INFRINGEMENT

Being the birth place to the invention of internet United States is also the country where both national and international efforts to regulate it began.⁶⁷ According to Jessica Litman it was in the wake of the 1990s, when the internet began to be characterized by many as a giant copying machine that facilitates widespread and undetectable copyright infringement, the entertainment and information industries of America got cracking on reforming the copyright law to make the internet safe for the then-leading copyright owners.⁶⁸ The U.S. industries during that period started the walk towards a massive revision of the then copyright law by warning the congress that they will stay out of the online market until Congress strengthen copyright protection.⁶⁹ The warning was based on the proposition that during the last decades of the 20thc United States was the world leader in entertainment or artistic industry. And if the internet isn't going to be made safe for copyright owners, either all the people in all other countries would get together and steal all their stuff, or U.S. copyright owners would decline to put their stuff on the Internet (because it isn't safe) and the United States might lose the advantage of world leadership on the internet.⁷⁰

According to Jessica however this argument proved to be wrong practically because during that period copyright materials were being availed on the internet and they were accessed freely by the public without frustrating copyright owners from continuing their creation and without obstructing United States film and music industries from continuing their treadmill. Thus the real reason behind the 1990s wave arousing revision of the United States copyright act was the greed of copyright owners and various interest groups to secure the broadest possible rights with the narrowest possible exceptions in every possible way of using copyright materials on the virtual world.⁷¹

⁶⁷ Computer Hope, Free Computer Help and Information, Who invented the internet?, available at www.computerhope.com/issues/ch001016.htm, accessed on Sep 5, 2015, 4:34 p.m.

⁶⁸ Jessica Litman, *Supra*, 26.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* 55

If we take a look at copyright history until the 1970s and 80s the copyright system was a system of bargain because Copyright was a bargain between the public and the author, whereby the public bribed the author to create new works in return for limited commercial control over the new expression the author brought to her works.⁷² The public's payoff was that, beyond the borders of the authors' defined exclusive rights, it was entitled to enjoy, consume, learn from, and reuse the works. Even the bounded copyright rights would expire after a limited term. It was not like today, life of the author plus 70 years as it is particularly indicated in section 302 (a) of title 17 of the U.S. code. So there was a limited protection model which gave only limited exclusive rights to the copyright owners. It never gave owners any control over reading, or private performance, or resale of a copy legitimately owned, or learning from, talking about and writing about a work, because those were all part of what the public gained from its bargain.⁷³ This means the copyright system some 30 or 40 years back do not take the raw materials the public might need to use to create new works of authorship. However beginning from the late 1970s and early 1980s the copyright system became a system of incentive with an eye to enable copyright owner's capture a greater share of the value embodied in copyright-protected works.⁷⁴

This economic analysis model focuses on the effect greater or lesser copyrights might have on incentives to create and exploit new works.⁷⁵ It doesn't bother about stuff like balance or bargains except as they might affect the incentive structure for creating and exploiting new works. To justify copyright limitations, like fair use, under this model, you need to argue that authors and publishers need them in order to create new works of authorship, rather than, say, because that's part of the public's share of the copyright bargain. The model is not rooted in compensation and so it doesn't ask how broad a copyright should be to say it is appropriate or fair; instead it inquires whether broader, longer, or stronger copyright protection would be likely to lead to the production of more works of authorship.⁷⁶ We talk now of copyright as property that the owner is entitled to control—to sell to the public (or refuse to sell) on

⁷² *Id.* 79

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* 80

⁷⁶ *Id.*

whatever terms the owner chooses. In general this Copyright economic model transforms copyright into a right of property that owners should protect to keep what is rightfully theirs out of the unauthorized reach of others.⁷⁷

To espouse this economic model the copyright owners and other interest groups argued that, in a digital age, anyone with access to their works could commit massive violations of their copyrights with a single keystroke by transmitting unauthorized copies all over the Internet.⁷⁸ And in order for their rights to mean anything they should be entitled to have control over access to their works—not merely initial access, but continuing control over every subsequent act of gaining access to the content of a work. Thus, to protect their property rights, they called for the congress to amend the then copyright law and prohibit individuals from gaining unauthorized access to copyrighted works in the virtual world.⁷⁹

Accordingly it was during the reign of President Clinton that the very first movement to calibrate the copyright system began.⁸⁰ With the view to create a new National Information Infrastructure multiple task forces with different committees and working groups were appointed.⁸¹ In 1994 leading the working group on intellectual property the then patent commissioner Bruce Lehman managed to introduce a draft “Green Paper” report on copyright issues after holding public hearing that enabled them to assess the then market leaders’ demand in the information and entertainment industries.⁸² The report recommended a revision. However, those suggested as minor revisions on the report appeared to crack the entire copyright balance.⁸³

⁷⁷ *Id.* 81

⁷⁸ *Id.* 82

⁷⁹ *Id.*

⁸⁰ *Id.* 90

⁸¹ Information Infrastructure Task Force, Intellectual property and the national information infrastructure; The report of the working group on intellectual property rights, 1, available at <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf>, accessed on Sep. 5, 2015, 2: 48 p.m. This is what is dubbed as the green paper.

⁸² *Id.*

⁸³ *Id.* 211-236

Among the key recommendations which the report suggested the first was the one that confers on copyright owners the right to control each and every reproduction on a random access memory of computers whenever people read or view digital text, music or video files on computers.⁸⁴ According to this recommendation since an actionable reproduction takes place every time something is loaded in to a random access memory of computers the copyright owners of digitally availed text, musical or video files should be allowed to claim unauthorized reproduction. This smart legal analysis was derived from the 1990s brilliant USA court holdings which concluded that loading software in to a random access memory of computers create an actionable copy.⁸⁵ One of these basic holdings was reflected in the 1992 USA district court case of *MAI Systems v. Peak Computer*.⁸⁶

The other recommendation was the one that insisted the revision of the copyright act which used to consider transmissions only as public performance or display. The report elucidated that transmissions should also be treated as a form of distribution.⁸⁷ The reason behind this proposal is because of the assumption that transmissions can substitute the purchase of copies. With regard to this in addition to the claim to treat transmissions as distributions the report also recommended the first sale doctrine be not applied to transmissions. This is because if transmissions might substitute the purchase of copies as a form of distribution and a copy once purchased is going to be transmitted for free the very purpose of considering

⁸⁴ Jessica Litman, *Supra*, 91

⁸⁵ *Id.*

⁸⁶ *MAI Systems Corp. v. Peak*, 991 F.2d 511 (9th Cir. 1993), cert. dismissed, 114 S. Ct. 671 (1994). In a recent report to Congress, the Copyright Office wrote, "Every court that has addressed the issue of reproductions in volatile RAM has expressly or impliedly found such reproductions to be copies within the scope of the reproduction right." U.S. Copyright Office, *DMCA section 104 Report* 118 (August 2001). U.S. Copyright office, [DMCA section 104 Report](http://lcweb.loc.gov/copyright/), available at <http://lcweb.loc.gov/copyright/>, accessed on Oct 20 2015, 4:50 p.m. Actually in this regard we can also have a look at art.4 (a) of the 1991 EC software directive and art.7 (2) (a) of the 1996 EC database directive which reserve any and all permanent/temporary fixation of a computer program and data, by any means/ in any form and in part or in whole, to the copyright owner.

⁸⁷ Information Infrastructure Task Force, *Supra*, 213

transmissions as distribution will be defeated. So the report in arms length required the consideration of transmissions as distributions and authors be allowed to put their hand on transmissions of purchased copies. This recommendation is intended to impose strict liability⁸⁸ on internet service providers for every unauthorized reproduction and distribution that individual internet users commit using their internet service.

On top of these the report also recommended that since enforcing copyright on every single individual customer is difficult copyright owners should be permitted to use copy-protection technology to prevent individuals from committing infringement.⁸⁹ In tandem with this the Working Group also concluded that the law should also be amended to prohibit any circumvention of anti-copying technological systems and forbid the creation or sale of any device or service intended to defeat such systems.⁹⁰

These recommendations were loved and cherished by the motion picture, the recording, and computer software industries, but they were at the same time a source of dismay to libraries, composers, writers, online service providers and the makers of consumer electronic devices and computer hardware's.⁹¹ After the report was made public hearings were held among the public and public comments were also solicited via email. However while a large number of the comments were negative the commissioner Bruce Lehman insisted the final report to uphold the substantive recommendations unchanged.⁹² Subsequently the working group moved on to preparing the white paper but the later also simply endorsed the green paper recommendations in a more stylistic language. They said that the recommendations are desirable amendments and well settled and uncontroversial interpretations of the existing law. To prove this the working group, in what can be regarded as a skewed preparation of the

⁸⁸ Jennifer L. Kostyu, Copyright Infringement on Internet: Determining the Liability of Internet Service Providers, Catholic University Law Review, 1256, available at <http://scholarship.law.edu/cgi/viewcontent.cgi?article=1431&context=lawreview>, accessed on Sept. 2, 2015, 11:28 p.m.

⁸⁹ Jessica Litman, Supra, 93

⁹⁰ Information infrastructure Task Force, Supra, 230

⁹¹ Jessica Litman, Supra, 93

⁹² *Id.* 94

white paper, claimed that the 1976 copyright act was actually meant to prohibit reading, listening and viewing in digital technologies like computers when it prohibited reproduction, performance and display of protected works.⁹³ Arguing that Congress already considered a question, and resolved it in one's favor previously is a common tactic in the history of copyright lobbying, because it bypasses the problem of persuading Congress to consider the question and resolve it in one's favor today.⁹⁴

After the white paper was released in 1995 an implementing legislation was introduced in both houses of congress with bipartisan support, and Commissioner Lehman confidently predicted easy enactment. However it didn't turn out that way. It encountered ardent objection from Library groups, online service providers, consumer organizations, writers' organizations, computer hardware manufacturers, Internet civil liberty groups, telephone companies, educators, electronics manufacturers, and law professors.⁹⁵ Other than the deceptive description that the white paper made in claiming that the then copyright law already gave copyright owners all the additional rights it was seeking, the fact that it did not also provide privileges, limitations, and exceptions to the new proposed rights was something violent for the opposing groups.⁹⁶

When it became clear that the White Paper implementing bills would not merely sail through Congress unopposed, supporters of the legislation began negotiating with opponents in a series of different stages.⁹⁷ The "serious" negotiations—the ones perceived to be necessary to ensure the enactment of legislation—involved the motion picture industry, the music recording industry, the book publishers and the software publishing industry on behalf of the "content owners," and the online and Internet service provider industry, the telephone companies, the television and radio broadcasters, computer and electronics manufacturers, and libraries representing the "user interests." Actually according to Jessica even in these series negotiations the interest of the general public or individual internet consumers was not

⁹³ *Id.* 95

⁹⁴ *Id.*

⁹⁵ *Id.* 123

⁹⁶ *Id.* 125

⁹⁷ *Id.* 126

properly represented. Thus intensive negotiations among supporters and detractors of the bill led to a proliferation of narrow, stingy, conditional privileges and exceptions that apply to those folks who insisted on them, but not to the general public or individual consumer.⁹⁸

Despite all the efforts, troubled by stiff oppositions, the process to enact the National information infrastructure was stalled in the 104th Congress session during the summer of 1996. Emotionally distressed Commissioner Lehman chosen to take the matter to Geneva on an international diplomatic conference hosted by the WIPO.⁹⁹ He made every effort that a draft treaty on internet regulation presented to the conference for adoption would embody the reforms proposed by the White Paper.¹⁰⁰ It was his hope that if his agenda get adopted by the WIPO members finally the US congress would be obliged to come up with an implementing legislation that will literally be according to the white papers recommendation. During the conferences developing nations showed their resentment about the more expansive proposals and the majority of WIPO members proved unwilling to sign on to the U.S. delegation's vision of fortified copyright in cyberspace.¹⁰¹ Finally only few of Lehman's ambitious proposals were adopted as a treaty because his sleepless opponents at home also went on to the international fora to tackle him to the end.¹⁰²

The proposal that required actionable reproductions to include all temporary RAM copies was not accepted.¹⁰³ With regard to the proposed broad right of transmission or public communication the treaty also reduced the liability of internet service providers from strict to one that depend on the knowledge of the service providers about the unauthorized reproduction or communication taking place through their online service.¹⁰⁴ This is because the treaty under its agreed statement (agreed statement no 7) to article 8 exempted persons from being held liable for infringement of public communication right of copyright owners

⁹⁸ *Id.* 126 & 127

⁹⁹ Litman, *Supra*, 129

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* 130

¹⁰⁴ *Id.*

when they acted as a mere conduit by providing transmission facilities. In addition to this the extensive technological protection right proposed was also softened. While the proposal supported by the United States had prohibited the manufacture, sale, or distribution of devices or services to circumvent technical protections, the ultimate treaty language required only that signatory nations offer effective legal remedies for circumvention.¹⁰⁵ Moreover, the proposal limiting fair use and other exceptions was also reversed into one authorizing the extension of exceptions and limitations (art. 10 of the WCT and art.16 of the WPPT) like fair use in order to ensure their effective exercise in the digital environment.¹⁰⁶ All in all the treaty which finally got adopted by United States as a WIPO copyright law didn't go as planned for Lehman.¹⁰⁷

2.4.1. THE DIGITAL MILLENNIUM COPYRIGHT ACT (DMCA)

Copyright owners, disappointed by the circumscribed provisions included in the final treaty, nonetheless hoped to use the treaty as a platform to achieve more expansive objectives when the nation start to introduce an implementing legislation to the treaty.¹⁰⁸ Then they went on the earlier subtle rhetoric's that the US copyright law has already provided expansive rights to control all transmissions and temporary reproductions.¹⁰⁹ They also wanted to use the treaties obligation to provide adequate and effective legal remedies against circumvention of technological protection as a benchmark to have a law that prevent circumvention of technological measures from occurring at all.¹¹⁰ Prohibiting any circumvention of technological protection, without regard to the reason for it like fair use or because the work has fallen in to public domain after expiry. And making any devices or services that facilitate circumvention illegal regardless of whether the devices or services were used for legitimate purposes was what they dreamed to see in the upcoming new digital copyright law.¹¹¹

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* 131

¹¹⁰ *Id.*

¹¹¹ *Id.*

The public interest groups shocked by what the copyright owners are trying to do after all the treaty concessions reiterated the important treaty terms in every meeting during the preparation of the draft treaty implementing bill by the department of commerce.¹¹² They said that there should be a fair use exception to circumvention prohibitions and that only when a person circumvents a protected work without authorization and in a manner not falling under legal exemption that it shall be illegal.¹¹³ Nevertheless Bruce Lehman chairing the information infrastructure task force insisted for a tough antipiracy law reasoning that other countries would never enact a law that protect US copyright works unless the congress take the lead.¹¹⁴ Finally when the implementing bill was enacted it appeared to be very perplexing and very broad being composed of around 30 thousand words and covered more than 50 pages.¹¹⁵

As signed by the president on October 28, 1998, the DMCA was enacted to implement the WCT and WPPT. The DMCA with five titles added new chapters, chapter 12 & 13, and a new section to chapter 5, section 512, under title 17 of the U.S. code. Among other things title I (which is about WCT and WPPT implementation) and II (online copyright infringement liability limitation) dealt particularly with the prohibition of circumvention of technological protection measures under chapter 12 and the liability of internet service providers under section 512 of chapter 5. Actually these are the two most important titles of the Act and the first title under its section 1201 adopts the provisions of art.11 & 18 of the WCT and WPPT while section 1202 adopts the provisions of art.12 & 19 of the WCT and WPPT. As we have seen in chapter one art.11 of the WCT & art.18 of the WPPT require contracting parties to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures used by copyright owners to protect their works. In addition art.12 of the WCT and art.19 of the WPPT oblige contracting parties to provide adequate and effective legal remedies in protection of the integrity of copyright management information.

On the other hand title II of the DMCA, which regulates the liability of access or service providers like internet service providers, is included under section 512 of chapter five of title

¹¹² *Id.* 132

¹¹³ *Id.*

¹¹⁴ *Id.* 134

¹¹⁵ *Id.* 143

17. As we have seen the WCT under art.8 and its accompanying agreed statement (7) liberates internet service providers from strict liability for the infringing activities of their customers or end users by declaring that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of the treaty or the Berne Convention.¹¹⁶ Espousing this stand of the WCT the DMCA under section 512 has provided four new grounds that limit the liability of online service providers and nonprofit educational institutions. Subsequently we will discuss the first title in a bit detail and leave the discussion of title II to chapter four.

2.4.1.1. CIRCUMVENTION OF TECHNOLOGICAL PROTECTION MEASURES AND MAINTAINING THE INTEGRITY OF COPYRIGHT MANAGEMENT INFORMATION

Section 1201 (a) (1) prohibits the circumvention of technological protection measures that prevent unauthorized access to a copyrighted work and this provision of the Act has been effective since Oct. 29, 2000.¹¹⁷ This is a very key provision and we can say that it is a bar against anybody that tries to make both transformative (caricatures, parodies, and pastiches, as well as uses such as quotations for teaching, criticism and scientific research) and non transformative (reading, watching, listening to, and copying for purposes of entertainment,

¹¹⁶ Note that the WPPT unlike the WCT does not say a word about the liability of service providers for the infringing activities of their customers or end users when the former have only provided a mere physical facility that enables communication. However according to one document prepared by the International bureau of WIPO the agreed statement (7) of the WCT should also be applicable to the WPPT *mutatis mutandis* because that is a simple omission and the same Diplomatic conference have shown its belief under the WCT that mere provision of physical facilities that enable communication shall not be considered as communication within the meaning of the treaty or the Berne convention. Nevertheless this document is neither an agreed statement nor a resolution and as such it will be difficult to adhere to. The International Bureau of WIPO, Supra, 16.

¹¹⁷ Pursuant to the act to “circumvent a technological protection measure” means to descramble a scrambled work, to decrypt an encrypted work, or otherwise avoid, bypass, remove, deactivate, or impair a technological measure without the authority of the copyright owner. Digital Millennium Copyright Act, Supra, Section 1201(a) (3).

private study, information and communication) uses of copyright protected materials over the internet.¹¹⁸ Now we may be tempted to question if the DMCA is really avoiding all the exceptions and limitations/fair use grounds in the analogue world from being applied in the virtual world. In an attempt to answer this we may be forced to look at different provisions of the Act. First it is important to take note of the fact that the Act under the same section, section 1201 (c) explicitly provides that the anti circumvention provision of section 1201 (a) does not affect the limitations or defenses to copyright infringement including fair use. If this is the case then the next question that should be raised is whether the beneficiaries of copyright limitations including fair use can legitimately circumvent technological protections and if so from where or how they shall acquire the circumvention devices.

In this regard it is necessary to make a closer look at the provisions of section 1201 (a) (2) and (b). These provisions prohibit the manufacturing, import, offer to the public or otherwise traffic in any technology, product, service or device that can be used to circumvent access and copy protection technologies. They explicitly prohibit the making, provision and circulation of access and copy circumvention technologies that are **primarily designed or produced** for the purpose of circumvention, **have only limited commercially significant purpose or use** other than circumvention and **marketed for use** in circumvention. The otherwise meaning of these provisions is that the law does not prohibit the making, provision and circulation of circumvention technologies that are not primarily designed or produced for purpose of circumvention, have commercially significant purposes or use other than circumvention and marketed for other uses than circumvention. If this is the case then copyright limitation beneficiaries can use circumvention devices or services that are not clearly prohibited by the law. It is also in line to such interpretation that the U.S. Supreme Court in the *Sony v. Universal City Studios* case¹¹⁹ decided not to hold the manufacturer of a VCR liable merely because the machine could be used to make illegal copies, given that it was also “widely used for legitimate, unobjectionable purposes.”¹²⁰ The manufacturer should be liable, the Court explained, only where a device was incapable of substantial non infringing uses.¹²¹

¹¹⁸ Mazziotti, Supra, 7

¹¹⁹ *Sony v. Universal City Studios*, Supra.

¹²⁰ IFLA, Limitations and Exceptions to Copyright and Neighboring Rights in the Digital Environment: An International Library Perspective (2004), available at www.ifla.org/publications

Nevertheless it is worthy to mention that in another case between *universal v. Reimerdes* the U.S. Supreme Court has banned software called DeCSS that enable DVDs to be decrypted despite claims that it could be used for fair use purposes.¹²² Thus what we can infer from the current U.S. digital copyright Act is that it is open to interpretation by courts with regard to the enjoyment of the copyright limitations including the fair use grounds. Actually the issue with regard to copyright limitations in the digital copyright Act does not stop here. Because it has also provided an administrative mechanism for the provision of temporary exceptions on the one hand and permanent and new exemption grounds against the anti circumvention rule of section 1201 on the other hand.

The permanent exceptions are listed and described under the Act from section 1201 (d)-(j) which includes exception for:-

A. Nonprofit library, Archive and Educational institution- Section 1201 (d)

The prohibition on the act of circumvention of access control measures is subject to an exception that permits nonprofit libraries, archives and educational institutions to circumvent solely for the purpose of making a good faith determination as to whether they wish to obtain a copy of a given copyright work. After the good faith determination if the nonprofit libraries, archives and educational institutions wish to have a copy of the work they can reproduce the work. Pursuant to section 404 of the DMCA these organs are allowed to reproduce up to three copies of both published and unpublished works digitally.

B. Law enforcement, Intelligence, and other Governmental activities- Section 1201 (e)

This section permits a lawfully authorized investigative, protective, information security, or intelligence activity of an officer, agent, or employee of the United States, a State, or a political subdivision of a State, or a person acting pursuant to a contract with the United States, a State, or a political subdivision of a State to make unauthorized circumvention.

ons/limitations-and-exceptions-to-copyright-and-neighbouring-rights-in-the-digital-envirom,
accessed on March 19, 2016, 9: 50 a.m.

¹²¹ *Id.*

¹²² *Id.*

C. Reverse Engineering- Section 1201 (f)

Pursuant to this provision circumvention, and the development of technological means for such circumvention is permitted to a person who has lawfully obtained a right to use a copy of a computer program for the sole purpose of identifying and analyzing elements of the program necessary to achieve interoperability with other programs, to the extent that such acts are permitted under copyright law.

D. Encryption Research- Section 1201 (g)

This exception on the other hand permits circumvention of access control measures, and the development of the technological means to do so, in order to identify flaws and vulnerabilities of encryption technologies. This is also called a research in cryptography which is concerned with communication security like confidentiality of messages, integrity of messages, sender authentication and many other related issues in relation to technological devices and software's.¹²³

E. Protection of Minors- Section 1201 (h)

Courts are empowered to decide on the circumvention of access protection measures provided to components or parts of certain copyright materials with regard to which minors are prevented to access them on the internet.

F. Personal Privacy- Section 1201 (i)

This provision allows circumvention when the technological measure, or the work it protects, is capable of collecting or disseminating personally identifying information about the online activities of a natural person.

G. Security Testing- Section 1201 (j)

This exception also grants permission to circumvent access control measures, and the development of technological means for such circumvention, for the purpose of testing the security of a computer, computer system or computer network, with the authorization of its owner or operator.

¹²³ Copyright.gov, United States copyright office, Joint Study of Section 1201 (g) of the Digital Millennium Copyright Act, retrieved from www.copyright.gov/reports/studies/dmca_report.html, accessed on Dec. 16 2015 2:50 p.m.

All these exceptions have their own set of conditions with regard to their applicability but since it would be broadening the scope of this research discussion of the detailed conditions is left to the interest of readers.

On the other hand according to section 1201 (a) (1) (B)-(E) of the Act the temporary or ongoing exceptions are those rule makings that the Librarian of congress introduces periodically and every three year up on the recommendation of the registrar of copyrights. It authorizes the Librarian of congress to evaluate the impact of section 1201 (a) (1) (A), i.e. the prohibition on circumvention of access protection measures, on users of particular class of works that are or are likely to be adversely affected by the prohibition from making non infringing uses. After making the evaluations and taking all the recommendations the Librarian of the congress will introduce the list of class of copyrighted works with regard to which the non infringing use by persons are or are likely to be adversely affected. Then it will declare that with regard to the identified class of works the anti circumvention rule under section 1201 (a) (1) (A) will not apply for the ensuing 3 years period, to be counted beginning from time the rule making is issued.¹²⁴ Accordingly, the Librarian of congress introduced its first rule making on 2000g.c and since then it has issued 6 rule makings and the 6th one was introduced on 27 Oct 2015.¹²⁵

Exemption proposals are first submitted by the public to the registrar of copyrights and after a process of hearing and public comment the final rule will be recommended by the registrar and issued by the Librarian.¹²⁶ The exemptions once issued will expire after three years and

¹²⁴ The Librarian in evaluating and issuing the rule makings shall examine the recommendations based on 1) the availability for use of copyrighted works, 2) the availability for use of works for nonprofit archival, preservation, and educational Purposes, 3) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research, 4) the effect of circumvention of technological measures on the market for or value of copyrighted works; and 5) such other factors as the Librarian considers appropriate. *id.* Section 1201(a) (C) & (D)

¹²⁵ Copyright.gov, United States copyright office, Sixth Triennial Section 1201 Proceeding, 2015, retrieved from www.copyright.gov/1201/, accessed on Dec. 16 2015 2:50 p.m.

¹²⁶ *Id.*

must be resubmitted for the next rulemaking cycle if they have to continue as an exemption ground.¹²⁷ As a result virtually all the earlier exemptions based on the prior rulemakings, i.e. the 2000, 2003, 2006, 2010 and the 2012, have expired. There were two exemptions in 2000; 4 in 2003; 6 in 2006 and 2010 and 8 in 2012.¹²⁸

The Librarian of Congress has issued its 6th Triennial rulemaking on 27 Oct 2015.¹²⁹ Some writers criticizing this tedious system of dealing with the problem, posed by the anti circumvention rule, suggest the system to be changed because the failure of the DMCA to make a simple reference to the fair use and/exception/limitation rules of chapter I of title 17 is costing a lot of effort than it was first imagined.¹³⁰ Nevertheless the writer of this paper believes that the Act has made all the necessary cautions in extending the copyright limitations in the analogue world to the digital world and that is the right thing to do. Especially this is true given the fact that it is very difficult to control unauthorized access and reproduction while at the same time it is necessary to provide fair use grounds of copyright limitations that permit unauthorized access and reproduction.

The other important provision of title I of the DMCA is the one dealing with the integrity of copyright management information. As we have mentioned earlier section 1202 of the DMCA implements art.12 of the WCT and art.19 of the WPPT. These provisions oblige contracting parties to the treaty to provide adequate and effective legal remedies to the protection of the integrity of copyright management information. The treaties under the same provisions also define copyright management information as information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Note that the DMCA has actually provided that nothing in the anti circumvention section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use provisions of title 17. However, this does not mean that all the defenses including the fair use rules in section 107 and ff are extended to the digital world. Rather it means that the provisions of the DMCA do not affect or avoid the provisions of defense in the analogue world despite the fact that only the limited grounds of defense will be applicable to the digital environment. *id.* Section 1201(c)

conditions of use of the work, and any numbers or codes that represent such information. In addition both conventions declare, under art.12 of the WCT and art.19 of the WPPT, that it is illegal to distribute false copyright management information that have the intent to induce, enable, facilitate, or conceal copyright infringement and the intentional removal, alteration and dissemination of copyright management information or copies of works knowing that the copyright management information has been removed or altered.

The DMCA has recognized these treaty terms without that much modification. The definition of copyright management information is similar to the definition provided by the two treaties except the fact that the DMCA has provided a definition that is a bit more detailed.¹³¹ Moreover, under section 1202 (a) it has clearly prohibited the provision, distribution and importation for distribution of false copyright management information's, just like those treaties. On the other hand section 1202 (b) has declared that no person shall without the authorization of the copyright owner or the law intentionally remove or alter any copyright management information, distribute, import for distribution or publicly perform works/ copies of works or phonorecords, knowing that the copyright management information has been removed or altered. Here the law has emphasized that the person who removes or alters copyright management of information or distribute, import for distribution or publicly perform works, copies of works or phonorecords should also have the intention or with respect to civil remedies the reasonable ground to know that his act will induce, enable, facilitate or conceal an infringement of any right under the copyright law to be liable.

Along these prohibitions the DMCA, in addition to what is provided in the treaties, has provided some limitation grounds for the obligation to maintain the integrity of copyright management information of copyright protected works. For instance according to section 1202 (d) the obligation to maintain the integrity of copyright management information cannot be enforced against law enforcement, intelligence and other government activities lawfully authorized by the united states government or the states.¹³² Last but not least the DMCA has also provided civil and criminal remedies, liability limitations and procedures for bringing different claims of violations with regard to the infringement of these rules. The discussion of

¹³¹ *Id.* Section 1202 (c)

¹³² *Id.* Section 1202 (d)

the liabilities, remedies and the procedures to copyright infringement claims will be discussed in chapter four.

Generally this is what the DMCA looks like in the regulation of copyright infringement in the virtual world. Though it is complex it does have extended the application of copyrights in the analogue world to the virtual world and provided its own unique grounds of exception/limitation to the copyrights it recognized in the virtual world. In addition even if it couldn't eradicate piracy all in all it has provided copyright owners and their association a very good weapon to fight against it in a way that helps to achieve minimization of the copyright infringement in the digital environment. And this is a very good lesson to learn for countries like Ethiopia where digital copyright infringement is rampant and has come very far to discourage copyright owners in their contribution to the creation of literary and artistic works.

2.5. COPYRIGHT LIMITATIONS ON THE INTERNET

As discussed earlier, article 10 and 16 of the 1996 WCT and WPPT respectively open the door wide open for possible extension of existing or creation of new limitations/ exceptions to the exclusive copyrights recognized, so long as the conditions of the “three-step” test are met. The agreed statement No. 8 of the WCT, which is cross referenced by both the WPPT and the Beijing treaty, also provides that the limitations and exceptions which are permitted to be established in national laws in compliance with the Berne convention can be extended to the digital environment. As we have seen in the evolution of regulation of online copyright infringement these treaty terms were nationally adopted for the first time by the Digital Millennium Copyright Act (DMCA) of USA.

Regionally, on the other hand, the InfoSoc directive of the EU can also be mentioned as a good example as it took the primary role in facilitating the adoption of the WIPO 1996 internet treaties in the European community. Since a brief over view of such copyright laws is important to have a glimpse of the know how to regulate piracy in countries like Ethiopia a discussion of the exclusive copyrights and exceptions in light of the protection of copyright materials on the internet under the U.S. and EU copyright laws is in order. The writer has chosen the U.S. and EU copyright laws for the fact that the U.S. is the birth place for both the internet and its regulation and its law is the prominent one to leave its fingerprint on the digital copyright regulation of other countries while the EU InfoSoc directive is the first law to take the online copyright issue at a regional level and aims to foster substantial investment

in the new technological forms of exploiting creativity and innovation¹³³ in the EU community.

According to Joan Van Tassel the exceptions to the exclusive copyrights under title 17 of the U.S. code of 1976 are designed in some way to uphold the constitutional recognition of copyright protection.¹³⁴ The US constitution upholds the notion that copyrights' manifest function is stimulating progress of science and useful arts by giving rewards to creators in the form of recognition of their exclusive rights towards the use of their creations for a limited time.¹³⁵

Accordingly title 17 of the U.S. code under chapter I section 106 has recognized five fundamental rights which are the exclusive right of reproduction, adaptation, publication, public performance, and public display.¹³⁶ However since providing leeway to the highway of exclusive copyrights of authors is also another crux of the stimulation of science and art (because would be creators can only rely on existing science and art to contribute in the continues advancement of the same providing fair use access is necessary) the same title of the code under chapter I has also recognized a range of but narrow exceptions from section 107-122. Nevertheless the breadth and depth of these exclusive copyrights and exceptions, which were originally provided for the analogue world, were calibrated when the DMCA was enacted in 1998. So the exclusive copyrights & exceptions which were availed in assumption of the analogue world are extended to the digital world *mutatis mutandis*.

Similarly the EU also enacted a directive called the InfoSoc directive¹³⁷ to regulate the internet market within and among the member countries of the union. Actually pursuant to art.295 the EC treaty, a treaty establishing the European Community, the community has no

¹³³ Harmonization of certain aspects of copyright and related rights in the information society, Supra, Recital (4).

¹³⁴ Joan Van Tassel, *Digital Rights Management protecting and monetizing content*, 29, Elsevier Inc (2006).

¹³⁵ U.S. CONST. art I, Section 8, cl. 8.

¹³⁶ The U.S. Digital Millennium Copyright Act (DMCA), Supra, Section106

¹³⁷ Harmonization of certain aspects of copyright and related rights in the information society, Supra, Recital 15.

power to prejudice the rules in member states governing the system of property ownership. However, using art.95 cum 14 as a launch pad, it has enacted a horizontally¹³⁸ applicable copyright law¹³⁹, to adopt measures that have as their object the establishment and functioning of internal market in the member states. This is supposed to either help remove disparities between national provisions that hinder the free movement of goods or help to remove disparities that cause distorted conditions of competition in the union countries.

Actually according to Giuseppe Mazziotti copyright harmonization was not the prime objective of the directive which rather is taken as a precondition for the pursuit of the primary objective of fostering substantial investment in creativity and innovation.¹⁴⁰ He cites Recital 2 of the directive to support his argument which indeed states that the existence of an internal market for new products and services is a precondition for the development of the information society. Other than the approximation of laws among member countries and the objective of creating a single digital market in EU the directive was also initiated by the need to implement the 1996 WIPO internet treaties. However just like U.S., EU also didn't simply copy and paste the WIPO treaties rather it also enhanced the level of protection to some extent.

Be that as it may the directive has provided some exclusive copyrights and unlike the DMCA it has also availed an exhaustive list of limitations and exceptions which will only be applicable with regard to the use of copyright materials in digital environment. Article 1(2) of the directive makes it clear that the directive leaves intact and in no way affects the existing

¹³⁸ Before the enactment of the InfoSoc Directive in May 2001, EU law had addressed the issue of copyright exceptions in a purely “vertical” manner, *i.e.*, with regard to new and highly specific subject matters such as computer programs and databases. In 1992, another intervention in this field came with the harmonization of particular types of rights: the rights of rental and lending and the so called “neighboring” rights. A horizontal (*i.e.* general) regulation came into play only with the InfoSoc Directive, which was expected to define the “exceptions and limitations” set out by Member States “more harmoniously”. Mazziotti, *Supra*, 77.

¹³⁹ *Id.* 49

¹⁴⁰ *Id.* 50

community provisions relating to computer programs and databases.¹⁴¹ In addition to this the directive has skipped to regulate or take harmonization measure with respect to the basic requirements of copyright protection (the requirements of originality and fixation), the exclusive rights to authorize derivative works (i.e. acts of translation, adaptation or modification and the like of a copyrighted work) and with regard to the term of protection of copyright materials.¹⁴²

The exclusive rights protected in the directive are set out from art.2- 4. Article 2 provides the most fundamental “copy” right or the exclusive right of reproduction over direct/indirect or temporary/permanent copies of works to performers, phonogram producers, film producers, broadcasting organizations and authors. Art.3 & 4 on the other hand give the “communication to the public” right to all the above mentioned group of peoples. Pursuant to Recital 30 of the directive all of these rights, i.e. the right of reproduction, communication to the public and the right of distribution can be assigned, transferred or licensed.

The limitations and the exceptions to these exclusive rights, on the other hand, are provided exhaustively under art.5.¹⁴³ Since the exceptions and the limitations are exhaustive, it means that member countries are not allowed to add any other exception or limitation other than those exceptions or limitations provided in the directive for lawful use in the digital environment. This is justified in Recital 31 which states that in order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. So it is for the uniform application of the exceptions in the community that the directive, unlike the DMCA of U.S., provided an exhaustive list of copyright exceptions. However since the exceptions and limitations provided are all non mandatory except the one under art.5 (1) member states are not obliged to adopt all the exception types in their internal copyright law. In any case the following paragraphs will deal on some of the extended rights

¹⁴¹ See Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122, 14.06.1991, 42 (hereinafter “Software Directive”); and Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 077, 27.03.1996, 20 (hereinafter “Database Directive”).

¹⁴² Mazziotti, Supra, 50.

¹⁴³ Harmonization of certain aspects of copyright and related rights in the information society, Supra, Recital 32.

and exceptions in the U.S. and in the EU after the enactment of the DMCA and InfoSoc directive.

2.5.1 THE EXCEPTION OF FAIR USE

Under title 17 of the U.S. code it is section 107 that provides fair use exceptions. As it can be inferred from this section fair use can be used as an affirmative defence against a suit of unauthorized use of copyright protected work when the original material is used for purposes of criticism, comment, news reporting, teaching or education, and scholarship or research. Fair use, called “fair dealing” in Canada and the U.K., is the most important, and oft-cited exception to author’s or rights holder’s exclusive copyright. The criteria’s used to determine whether a given use is fair are:

a) *The purpose and character of the use*

- i. Is the new work merely a copy of the original? If it is simply a copy, it is not as likely to be considered fair use.¹⁴⁴
- ii. Does the new work offer something above and beyond the original? Does it transform the original work in some way? If the work is altered significantly, used for another purpose, appeals to a different audience, it is more likely to be considered fair use. Note that recent case law has increasingly focused on transformative use to make fair use determinations. As we know the most common example of fair use is when a user incorporates some portion of a pre-existing work into a new work of authorship but in a popular case called the *Campbell* case¹⁴⁵, the US Supreme Court expressly accepted the proposition that "transformative" uses are more favored in fair use analyses than uses that amount to little more than verbatim copying.

¹⁴⁴ NOLO, The fair use Rule: When Use of Copyrighted Material is Acceptable, retrieved from www.nolo.com/legal-encyclopedia/fair-use-rule-copyright-material-30100.html, accessed on Nov. 8 2015, 1:50 p.m.

¹⁴⁵ *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1177 (1994).

- iii. Is the use of the copyrighted work for nonprofit or educational purposes? The use of copyrighted works for nonprofit or educational purposes is more likely to be considered fair use.¹⁴⁶

b) *The nature of the work*

- i. Is the copyrighted work a published or unpublished work? Unpublished works are less likely to be considered fair use.¹⁴⁷
- ii. Is the copyrighted work out of print? If it is, it is more likely to be considered fair use.¹⁴⁸
- iii. Is the work factual or artistic? The more a work tends toward artistic expression, the less likely it will be considered fair use.¹⁴⁹

c) *The amount and substantiality of the portion used*

- i. The more you use, the less likely it will be considered fair use.¹⁵⁰
- ii. Does the amount you use exceed a reasonable expectation? If it approaches 50 percent of the entire work, it is not likely to be considered a fair use of the copyrighted work. Of course given the other important factors the use of only 10% or above of somebody's original work may be held unfair.¹⁵¹
- iii. Is the particular portion used likely to adversely affect the author's economic gain? If you use the "heart" or "essence" of a work, it is less likely your use will be considered fair.¹⁵²

¹⁴⁶ NOLO, Supra

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

d) *The effect of use on the potential market for the copyrighted work*

- i. The more the new work differs from the original, the less likely it will be considered an infringement.¹⁵³
- ii. Does the work appeal to the same audience as the original? If the answer is yes, it will likely be considered an infringement.¹⁵⁴
- iii. Does the new work contain anything original? If it does, it is more likely the use of the copyrighted material will be seen as fair use.¹⁵⁵

While many regard this fair use exception as rights of users it is, as a technical matter, an outright exemption from liability or affirmative defense to what would otherwise be act of infringement.¹⁵⁶ It is potentially available with respect to all manners of unauthorized use of all types of works in all media.¹⁵⁷ When it exists, the user is not required to seek permission from the copyright owner or to pay a license fee for the use.¹⁵⁸ But it is the burden of the user or the defendant, who raises a fair use defense, to persuade and bring evidences before court.¹⁵⁹

This concept or doctrine is rooted in some 200 years of judicial decisions.¹⁶⁰ It is the most significant limitation on the copyright holder's exclusive rights.¹⁶¹ As we can see deciding whether the use of a work is fair or not is not a science. There are no set of guidelines that are universally accepted. Instead, the individuals who want to use a copyrighted work must weigh

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Information Infrastructure Task Force, *Supra*, 73

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* 74.

¹⁶¹ *Id.*

the above four factors.¹⁶² Actually, though they do not have a force of law, there are many guidelines which started to be developed since the 1970's by many concerned U.S. authorities with regard to how to make fair use of copyright materials like books, music's, movies, off-air videotaping, and digital-images.¹⁶³ The classroom guideline of 1976 for instructors and students in educational centers is for instance very nice as it sets the minimum and maximum fair use practice for actors in the realm of education.¹⁶⁴ Such kind of guidelines are very important for countries like Ethiopia where there is no guideline for copyright fair use in both lower and higher education centers. However those guidelines no matter their benefit have no status of law and lacked enforcement in various cases before the U.S. court of law.¹⁶⁵ So while it would be appropriate to have such like supportive guidelines with regard to the use of some of the copyright exceptions, the same has to be done by an authorized governmental organ in a way that that gives them an advisory role before court of law.

If we say all these about the nature of fair use exception, which is virtually similar in most common law countries including U.S.A and UK, now the question is, do these fair use exceptions also apply on the digital use of copyright materials or not? Truly, as it exists to date, neither the DMCA of U.S nor the InfoSoc directive of EU have a general fair use type exception provision.¹⁶⁶ The U.S. copyright owners and the interest groups behind the implementation bill of the WCT and WPPT insisted from the very beginning that no fair use type exception be inserted in the DMCA.¹⁶⁷ Similarly on a debate between the European commission and the member countries of the European Union the proposition to include a general fair use type exception was also rejected.¹⁶⁸

The reason why governments are refraining from extending all the fair use and other copyright exception/limitation grounds in the analogue world to the digital world is

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* 83

¹⁶⁵ *Id.*

¹⁶⁶ Litman, *Supra*, 132

¹⁶⁷ *Id.*

¹⁶⁸ Mazziotti, *Supra*, 79 & 80.

attributable mainly to the fading away of the market failure justification behind the fair use rule.¹⁶⁹ Of course the copyright exceptions and limitations are justified predominantly by the public policy objectives of freedom of expression, public security, law enforcement, privacy, research and continuous advancement of literary and artistic creations.¹⁷⁰ But among others the exception of reproduction for personal use was mainly backed by the economic analysis of failure to form market for every home-taping and reproduction for private purpose.¹⁷¹

Historically when the video cassette recording and photocopy machine were first introduced and people started to make uncontrollable home-taping and private copying the copyright owners and the governments were out of option on how to subject those infringements to copyright law in the face of the issues of privacy and unformidable transaction cost of negotiating for every home-taping and reproduction for private purpose.¹⁷² And that has led to the recognition of every analogue reproduction for personal purpose as a fair use of copyrighted works.¹⁷³ But now given the fact that digital technologies are promising to control every reproduction or use of copyrighted works, justifying the fair use of reproduction for personal purpose is becoming unacceptable.¹⁷⁴ This is because the people who want to make reproduction for private use can request or secure permission before making unauthorized reproduction and the copyright owners can technologically detect and have their rights enforced against these offenders.¹⁷⁵ So since the digital environment can provide a better safety valve against unauthorized uses of copyrighted works the fair use defense is supposed to diminish.¹⁷⁶

As a result of this when the DMCA was finally enacted it only provided under section 1201 (C) that nothing in that section shall affect the rights, remedies, limitations, or defenses to

¹⁶⁹ *Id.* 28

¹⁷⁰ *Id.*

¹⁷¹ *Id.* 28 & 29.

¹⁷² *Id.* 27

¹⁷³ *Id.* 30

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* 28 & 29.

copyright infringement including fair use rule of title 17. However reading this provision cumulatively with the provisions of section 1201 (a) (2) and (b) we can say that copyright limitation beneficiaries are allowed to circumvent access protection technologies using circumvention devices or services that are not primarily designed or produced for purpose of circumvention, have commercially significant purposes or use other than circumvention and marketed for other uses than circumvention. Thus despite the absence of general fair use type copyright limitation in the DMCA we can say that the DMCA has provided provisions that can be read to say that it has not left copyright limitation beneficiaries out of option.

In addition, as we have seen above, the permanent grounds of exceptions provided in the DMCA to some extent and selectively have tried to avail limited number of exceptions. And those exception even though not titled as a fair use ground have similar behaviors to the general fair use type exceptions in section 107 of the U.S. code, which are provided to the analogue world. The main difference in the DMCA is the fact that the permanent grounds of exceptions are provided in a specific and limited manner unlike section 107 which provides an open ended and general fair use ground that invites courts to apply it to different cases through interpretation. On the other hand, the temporary exception grounds provided by the Library of congress on 2015 have provided some additional fair use type exceptions.

Since the permanent grounds of exception in the DMCA are very limited and fail to encompass many fair use exceptions it can be said that it is the administrative leeway of section 1201(a) (1) (b, c & d), which allows the introduction of temporary exceptions, that made the DMCA more workable with regard to fair use. According to these provisions the Library of congress is empowered to come up with a rulemaking, every three year since 2000gc, on exceptions that lift the anti access circumvention control for certain users of any particular class of works who are adversely affected or will likely be adversely affected in their ability to make non infringing uses. Consumer interest groups using this narrow leeway have managed to convince the Library of congress to introduce various fair use exceptions on 2000, 2003, 2006, 2010, 2012, and very recently on 2015. All the previous rulemakings had expired after being effective for 3 years and at the time of writing of this paper the rulemaking that was effective was the 2015 one.

The exemptions provided in the 2015 rulemaking of the Librarian are provided in a fashion that could make any reader witness that they are the extension of the general rule on fair use under section 107 to the digital world. For instance if you take a look at section 201.40 (b) (1)

(i-viii) of the 2015 rulemaking the following diverse and specific types of exemptions are provided with some detailed conditions¹⁷⁷;

- A. Motion pictures (including television shows and videos), as defined in 17 U.S.C. 101, where circumvention is undertaken solely in order to make use of short portions of the motion pictures **for the purpose of criticism or comment** in the following instances:
- (i) For use in documentary filmmaking
 - (ii) For use in noncommercial videos (including videos produced for a paid commission if the commissioning entity's use is noncommercial),
 - (iii) For use in nonfiction multimedia e-books offering film analysis,
 - (iv) By college and university faculty and students, for educational purposes,
 - (v) By faculty of massive open online courses (MOOCs) offered by accredited nonprofit educational institutions to officially enrolled students through online platforms, for educational purposes, where the MOOC provider through the online platform limits transmissions to the extent technologically feasible to such officially enrolled students, institutes copyright policies and provides copyright informational materials to faculty, students and relevant staff members, and applies technological measures that reasonably prevent unauthorized further dissemination of a work in accessible form to others or retention of the work for longer than the course session by recipients of a transmission through the platform, as contemplated by 17 U.S.C. 110(2),
 - (vi) By kindergarten through twelfth-grade educators, including of accredited general educational development (GED) programs, for educational purposes,
 - (vii) By kindergarten through twelfth-grade students, including those in accredited general educational development (GED) programs, for educational purposes, where the circumvention is undertaken using screen-capture technology¹⁷⁸ that appears to be

¹⁷⁷ Copyright.gov, United States copyright office, Open Rulemakings, retrieved from www.copyright.gov/1201/, accessed on Dec. 16 2015 2:50 p.m.

¹⁷⁸ A screen shot (sometimes called a screen capture) is an image of a computer desktop that can be saved as a graphics file. Various programs are available for creating screen shots, but it is easy to do without a special program. [whatIs.com, screen shot \(screen capture\)](http://whatIs.com/screen_shot_(screen_capture)), retrieved

offered to the public as enabling the reproduction of motion pictures after content has been lawfully acquired and decrypted; and

(viii) By educators and participants in nonprofit digital and media literacy programs offered by libraries, museums and other nonprofit entities with an educational mission, in the course of face-to-face instructional activities for educational purposes, where the circumvention is undertaken using screen-capture technology that appears to be offered to the public as enabling the reproduction of motion pictures after content has been lawfully acquired and decrypted.

In addition to motion picture the rulemaking has also exempted literary works, computer programs and video games for specific grounds and conditions provided there with. So we can say that though the DMCA prohibits circumvention the rulemakings are providing some holes to escape through the route of fair use at least for a period of three years. The question whether this structural design of providing temporary fair use exemptions to the digital world is proper or not is another matter. However for the time being along the need to secure copyright in the digital environment, the U.S. copyright system has provided such a mechanism to balance the interest of the copyright owners and the public.

The InfoSoc directive on the other hand extended the copyright exceptions in the analogue world to the digital environment by exhaustively listing under art.5 all the possible fair use exception grounds known in the analogue world. But it doesn't mention the term fair use and it doesn't also provide any open ended general exception ground that invite courts to assume any other fair use ground imaginable. This was a good move but the problem of the InfoSoc directive is the fact that it has conditioned, under art.6 (4), the public enjoyment of the lawful uses or exceptions on voluntary measures that right holders are expected to take to make the operation of the exceptions possible or on the existence of agreements between right holders and third parties. This means unless there is a voluntary measure from the side of the right holders to allow the public benefit from the legal exceptions or unless there is an agreement between right holders and third parties on the possible use of the exceptions the public can neither make access nor can it copy the technologically protected works for the lawful

from www.whatis.techtarget.com/definition/screen-shot-screen-capture, accessed on Dec. 14 2015, 3:20 p.m.

exceptional grounds.¹⁷⁹ This made the enjoyment of the exceptional grounds subject to the existence of contract between the right holders and third parties, which apparently is peculiar only to the InfoSoc directive.¹⁸⁰

Actually art.6 (4) has also provided that in the absence of voluntary measure taken by the right holders or a voluntary agreement between the right holder and third parties on the effective use of the exceptions the member states have to take appropriate steps. And that is directed towards ensuring that right holders provide the beneficiary of exceptions stated in art.5 (2) (a), (c), (d), (e) and 5(3) (a), (b), (e) the means by which they could benefit from

¹⁷⁹ Peculiarly and most surprisingly the InfoSoc directive of EU unlike the U.S. DMCA allows copyright owners to deploy both access protection and copy protection technologies that prevent the unauthorized access and copy of protected works. So it prohibits both the circumvention of anti access and copy protection technological and this will make it by far the most rigid digital copyright regulation. Harmonization of certain aspects of copyright and related rights in the information society, Supra, art.6 (3)

¹⁸⁰ According to Giuseppe Mazziotti this failure of art.6 (4) occurred because the EU legislators failed to follow the model of the interface for copyright exceptions and technical measures provided by art.7 of the 1991 software directive. Pursuant to art.7 of the software directive members of the EU are only obliged to provide effective remedies against circumvention to inhibit for instance, any act of putting in to circulation or the possession for commercial purposes of any means the sole intended purpose of which is to facilitate the unauthorized removal or circulation of any technical device which may have been applied to protect a computer program. In another way of speaking pursuant to this article users are not prohibited from circumventing technical measures that protect a computer program if their purpose is to engage in acts that are permitted by the exception provisions like to engage in acts of reverse engineering of the source code of the computer program where the reproduction of the code is necessary to achieve interoperability with an independently created computer program. So had the InfoSoc directive provided, in the same way as the software directive, that no circumvention prohibition should inhibit the exercise of certain uses permitted by the law, end-user acts of circumvention would have been lawful if carried out with the purpose of benefiting from one of the mandatory exceptions. Mazziotti, Supra, 100-102.

those exceptions to the extent necessary. However, on the one hand it is only for limited grounds of lawful use or exceptions¹⁸¹ that the member states are obliged to take appropriate steps to make sure that right holders avail the means by which the public could make use of the exceptions. And on the other hand, with respect to the exception of reproduction for personal use member states are given a rather optional or non mandatory power to take measures that would make the public benefit from the exception when the right holders fail to provide the means by which the public can make use of the exception of reproduction for personal use.¹⁸² On top of this, it has left most of the exceptions that enable transformative use of copyright materials like quotation for the purpose of criticism or review and use for the purpose of caricature, parody and pastiche without a safeguard because member states are not allowed to intervene in ensuring the ability of the public to benefit from those exceptions in case the right holders fail to provide adequate means that makes the public benefit from those exceptions in lawful manner.¹⁸³

¹⁸¹ It is only for reprographic copying, reproduction by public libraries, educational establishments, museums or archives for non direct/indirect commercial advantage, ephemeral recordings by broadcasting organizations, reproduction of broadcasts by non commercial social institutions, reproduction and public communication for the sole purpose of illustration for teaching or scientific research, reproduction or public communication for the purpose of benefiting disabled persons, reproduction or public communication for the purpose of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings that member states are obliged to make sure that the right holders provide the means by which the public could make use of the exceptions. Harmonization of certain aspects of copyright and related rights in the information society, Supra, art.6 (4).

¹⁸² *Id.* art.5 (2) (b) cum art.6 (4) Para 2. Note that here; though the member states are allowed to take measures that would enable beneficiaries of the exceptions to enjoy the same, they cannot prevent the right holders from adopting adequate measures regarding the number of reproductions.

¹⁸³ Article 6 (4)n has also failed to support the very objective of the directive reflected under Recital51 which insists that the technological protection measures should be applied without prejudice to the public policy reason behind the provision of exceptions in the directive. Mazziotti, Supra, 99.

To makes things worse, it is not clear what it meant by when the directive says that the member states can take appropriate steps when the right holders fail to take voluntary measures to enable the public benefit from the exception or limitation grounds provided. Therefore the InfoSoc directive in addition to its mistake of subjecting the public's privilege of benefiting from the lawful exceptions and limitations to the existence of voluntary agreement between right holders and third parties, it has also committed a fallible fault by not providing appropriate safety valves for the exercise of copyright exceptions against the use of technological protection measures by copyright owners.¹⁸⁴

All in all what we can deduce from these provisions of the DMCA and InfoSoc directive is that they have come up with their own peculiar approaches in regulating the digital world and that has got a lot to offer to countries like Ethiopia. They have tried to introduce new rights that are relatively balanced by appropriate copyright limitations. In addition to the U.S. and the E.U, countries like Australia and Canada have also adopted the WIPO internet treaties. Thus using the experience of all these countries and weighing their suitability Ethiopia can revise its copyright law satisfactorily in order to meet the exigencies of the digital world.

2.5.2 THE EXCEPTION FOR REPRODUCTION BY LIBRARIES AND ARCHIVES

Before the enactment of the DMCA section 108(a) of title 17 of the 1972 U.S. Code used to provide that libraries and archives are explicitly allowed to make analogue reproduction of no more than one copy or phonorecord of a work or to distribute such copy or phonorecord;-

- 1) if the reproduction/distribution is neither for direct nor indirect commercial advantage,
- 2) if the collections of the library or archives are open to the public or available not only to researchers affiliated with the library or archives, but also to other persons doing research in a specialized field, and

¹⁸⁴ In this regard Giuseppe Mazziotti believes that the directive has missed its very objective of creating harmonization as the different flaws it has committed with regard to art.5 and 6 have made member countries of the union to exhibit different position concerning the exceptions and the enforcement of the technological measures. He even accuses the InfoSoc directive for failure to comply with article 153 of the EC treaty which compels the community to take consumer protection law and policy in to account when defining and implementing other policies and legislative activities. *id.* 104-111.

3) if the reproduction/distribution of the work includes a notice of copyright.

Similarly pursuant to subsection (b) & (c) the same section the code used to recognize that libraries and archives could reproduce a copy or phonorecord of both unpublished and published copyright works provided that some conditions attached therewith are fulfilled. However when the DMCA was introduced it raised the number of copy or phonorecord that libraries and archives could reproduce to three. But this was limited to the reproduction of unpublished and published works dealt under subsection (b) & (c) of section 108 of the code.¹⁸⁵

It is the cumulative reading of section 1201 (d) and section 404 of the DMCA that amends section 108 of the U.S. Code. Pursuant to section 1201 (d) nonprofit libraries, archives and educational institutions are allowed to circumvent technological protection to make access to a copyright work and decide whether to acquire a copy of it or not. Then after making the good faith determination to have a copy of a copyright work pursuant to section 404 they can reproduce the work.

Section 404 of the DMCA amends Section 108 (a), (b) & (c) but most importantly with regard to the reproduction/distribution of unpublished and published works it has amended subsection (b) & (c) stating that libraries and archives can make up to three copies/phonorecords of both unpublished and published copyright works if¹⁸⁶:-

a) with regard to unpublished works

i. the reproduction or distribution is solely for the purpose of preservation and security or for deposit for research use in another library or archives,

¹⁸⁵ The U.S. Digital Millennium Copyright Act (DMCA), Supra, Title IV, Section 404

¹⁸⁶ However, libraries may not engage in systematic reproduction and distribution of copies. They may enter into interlibrary arrangements, provided the copies they receive under the arrangement do not substitute for a purchase or subscription. They have also broad privileges to copy and use many types of published works during the last 20 years of their copyright term for preservation and scholarship purposes, if the works are no longer being commercially exploited and cannot be obtained at a reasonable price. The U.S. Copyright Act, Title 17, chapter one Section 108 (g) & (h).

- ii. the copy or phonorecord reproduced is currently in the collections of the libraries and archives and
 - iii. *if any such copy or phonorecord that is reproduced in **digital format** is not otherwise distributed or made available to the public in that format outside the premises of the library or archives.*
- b) With regard to published works
- i. The reproduction/duplication is solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete.
 - ii. The library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price and
 - iii. *Any such copy or phonorecord that is reproduced in **digital format** is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy.*

This being the case the DMCA has failed to mention from where or how those nonprofit organs can get the circumvention device or service. It simply provided that they can circumvent technological protections. However using section 1201 (c) and 1201 (a) (2) & (b) we could be satisfied by the argument that these nonprofit organs just like other copyright limitation beneficiaries are not at least prohibited to use circumvention devices or services that are not primarily designed to circumvent, has a commercially significant purpose other than circumvention and marketed for use other than circumvention.

Despite this perplex nature of the DMCA the fact that it has provided an administrative break through to the anti circumvention rule by granting the Library of congress to come up with periodical temporary list of exception grounds under Section 1201 (a) (1) (B) (C) & (D) is ingenious. Because, using this provision the Library of congress has been and still is introducing different temporary fair use grounds, which are not included in the permanent grounds of exceptions of the DMCA, with regard to which the public could circumvent anti access protection measures of digitally availed copyright materials. Accordingly when we see the 2015 rulemaking of the librarian, pursuant section 201.40 (b) (1) (8) (i) (B) & (ii), libraries, archives or museums are allowed to circumvent access protection measures with regard to video games in the form of computer programs and they can reproduce it for the purpose of preservation. But this is as long as those organs do not have any direct or indirect

commercial advantage in view and that the video game is not distributed or made available outside their physical premises.

Here we may say that this is nowhere near sufficient but given the fact that every rulemaking lasts for a maximum of 3 years it could be the case that the librarian, with all the shoves coming from librarians and other interest groups for wider copyright exceptions, may in the future issue more exception grounds.¹⁸⁷ So for the time being we can say that the DMCA and the U.S copyright system can be said to have moved many steps forward in the fight against online copyright infringement without losing sight of the need to balance copyright owners right with the public interest for fair use. But the writer also agree that the existing law is less clear and the exceptions and limitations provided to the exclusive rights of copyright owners are way below what is enough compared to the those provided in the analogue world.

The InfoSoc directive on the other hand has explicitly provided under art.5 (2) (c) & (3) (n) that member states could extend or avail exceptions and limitations with regard to the exclusive rights of reproduction and communication to the public. According to these provisions libraries, educational institutions, archives/museums can be empowered by member state internal laws to reproduce or communicate/ make available, for purpose of research or private study, copyright works as long as they do not have any direct or indirect economic/commercial advantage in view. With regard to the means of circumventing a digital copyright material that is protected by a technological protection mechanism the preamble of the directive under Recital 48 has provided that the prohibition on the manufacturing and trafficking of technological protection measures that control access and copy shall not prejudice the production and circulation of devices that have a commercially significant purpose or use other than circumvention.¹⁸⁸

¹⁸⁷ On top of this note that libraries and archives just like individuals are beneficiaries of the exemption of the fair use. So they can make reproductions of musical, pictorial, sculptural, motion picture or audiovisual works based on the parameters of the fair use rule. The U.S. Copyright Act, Supra, Section 108(f) (4).

¹⁸⁸ Note that member states are obliged to provide adequate legal protection both against the circumvention of any effective technological measure that controls both access and copy and the manufacture and trafficking for commercial purposes of devices that are (i) primarily designed for circumvention of technological protection measures, (ii) are advertised,

However the problem of this directive, as we have seen above, is the fact that on the one hand it has not made the exception/limitation provisions mandatory and on the other hand it has subjected the operation of the exceptions/limitations to the existence of voluntary agreement between right holders and third party beneficiaries under art.6 (4). Further more in assumption of circumstances where right holders do not voluntarily provide the necessary means by which the public could make use of the exception/fair use grounds, under the same article, it has failed to provide sufficient safety valve to the effective application of the exception of art.5 (3) (n) in the member countries.¹⁸⁹

Generally despite their shortfalls since both the DMCA and the InfoSoc directive have both some good sides in providing copyright limitation for nonprofit libraries, archives and educational institutions once again countries like Ethiopia can learn a lot in the way how to regulate digital world.

promoted or marketed for purpose of circumvention, and (iii) have only a limited commercially significant use other than circumvention. Does this means that member states cannot prohibit the manufacture and trafficking in circumvention devices that are (i) are not primarily designed for circumvention, (ii) are not advertised, promoted or marketed for purpose of circumvention, and (iii) have a commercially significant purpose than circumvention? The other wise reading of the law seems to show that the answer to such question is positive but it needs confirmation from the law interpreting organs of member countries for an undoubted use of the later kind of circumvention devices by beneficiaries of copyright exceptions. Harmonization of certain aspects of copyright and related rights in the information society, Supra, art.6 (1 & 2).

¹⁸⁹ With regard to the exception on art.5 (2) (c), i.e. reproduction by libraries, educational institutions, archives/museums, and some other exception grounds the directive has provided a safeguard in case right holders fail to voluntarily provide the means by which third parties could make use of the exception. It says member states shall take appropriate measures to ensure that right holders make available to the beneficiary of an exception/limitation provided in national law in accordance with art.5 (2) (c) and other exception grounds the means of benefiting from the exceptions/limitations. However this obligation of member states is limited to certain exception/limitation grounds and leaves unprotected important transformative exception grounds like reproduction of quotations for purposes such as criticisms or review and use for the purpose of caricature, parody or pastiche. *id.* art.6 (4).

2.5.3 THE EXCEPTION ON THE RIGHT TO TRANSFER

Section 109 of title 17 of the U.S. code adopts the first sale doctrine which allows an owner of a particular copy/phonorecord of a copyright work to dispose it by sale, rental, by any other means so long as s/he has acquired it lawfully. Here we have to take note of the fact that any resale of an illegally pirated copy/phonorecord would be an infringement and the person possessing the copy/phonorecord should not be a mere holder but an owner.¹⁹⁰ So the copy/phonorecord must have been acquired legally. This doctrine limits copyright holder's public "distribution right" by providing that once the owner authorizes the release of lawfully made copies of a work, those copies may in turn be passed along to others by resale, rental, loan, gift or other transfer.¹⁹¹ Historically it was in 1908 that the supreme court of the United States, in *Bobbs-Merrill co. v. Straus* case, limited the exclusive right of distribution of copyright owners by recognizing the first sale doctrine.¹⁹²

Accordingly a library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose. This does not mean that conditions on future disposition of copies/phonorecords, imposed by a contract between their buyer and seller, would be unenforceable between the parties as a breach of contract, but it does mean that they could not be enforced by an action for infringement of copyright. Similarly with regard to the right of public display subsection (b) of section 109 has provided in principle that the lawful owner¹⁹³ of a copy of a work should be allowed to put his copy on public display without the consent of the copyright owner. But this does not mean that contractual restrictions display between a

¹⁹⁰ The U.S. Copyright Act, Supra, Section 109 (d).

¹⁹¹ American Library Association (ALA), DMCA section 104 Report on "First Sale", retrieved from www.ala.org/advocacy/copyright/dmca/section104, accessed on Dec.7, 2015 4:56p.m.

¹⁹² KRISTIN COBB, The Implications of Licensing Agreements and the First Sale Doctrine on U.S. and EU Secondary Markets for Digital Goods, *Duke Journal of Comparative & International Law* Vol 24:529, 534 (2104), retrieved from www.google.com.et/url?q=http://scholarship.law.duke.edu/cgi/viewcontent.cgi, accessed on July 20, 2015, 3:47p.m.

¹⁹³ Similarly to the case of disposition, the exemption on public display of copyrighted images also is allowed only to those who are owners rather than mere holders of the copyright material. The U.S. Copyright Act, Supra, Section 109 (d).

buyer and seller would be unenforceable as a matter of contract. So the owner of a particular copy can show it directly to the public as in a gallery, display case, or indirectly through an opaque projector. Where the copy is intended from the very beginning for projection then the public projection of a single image would be permitted as long as the viewers are present at the place where the copy is located.

However, if the public display is not going to be in analogue form or for instance if it is going to be communicated by television, by a computer system, cable and optical transmission devices then the story will be different. Since this would restrict the copyright owners market for reproduction and distribution it is not allowed. This means unless both the transmitted copy and the viewers are in the same place and at the same time it will be an infringement of the exclusive right of reproduction and distribution of copyright owners. Thus it is an infringement of copyright to transmit a copy of an image, though lawful acquired, over the internet. But if the transmission is to people who are found at same place where the transmission originates then the transmission of a single copy would be permitted. Therefore even where the copy and the viewers are located at the same place, the simultaneous projection of multiple images of a work would be an infringement. In another way speaking if everyone in a lecture hall with a separate personal computer need to visualize an image of a copyright work simultaneously the copyright owners' permission is required.

When the DMCA was introduced in 1998 the U.S. lawmakers and those lobby groups of copyright owners behind the enactment of the DMCA couldn't dare to take the risk of extending the doctrine of first sale recognized under section 109 (a) in to the digital world. The main reason was that permitting the applicability of first sale doctrine on the virtual world does not only affect the copyright owners exclusive right of distribution (making available as some prefer to call it in the virtual world) but also the exclusive right of reproduction as computers always does not result loss of one's copy when a person sends a copy to another person. So under section 104 the U.S lawmakers mandated the Registrar of copyrights and the Assistant Secretary for communications and Information to study and report on the effects of the DMCA on the operation of section 109 and the relationship between existing and emergent technology on the operation of section 109 of title 17 of the U.S. code.

Accordingly in August 2001, the copyright office issued its DMCA section 104 report and it concluded that it does not recommend any change to the first sale doctrine for the time being. The report essentially concluded that the use of technological protection measures either had not yet become widespread enough to have any measurable impact on the first sale doctrine

or, where such measures were in widespread use, the possibility of reduction or elimination of a resale market for copies did not constitute interference with the operation of the first sale doctrine. However the copyright offices 'let's wait and see' stand noted also that future developments might have serious consequences on the operation of the first sale doctrine which might in turn necessitate legislative attention at some later date.¹⁹⁴ So we can deduce from all these that presently the doctrine of first sale does not apply to digital transmissions though it actually apply on digital contents embodied in CDs and DVDs in the U.S.

Similarly to the U.S DMCA the InfoSoc directive of EU has also indicated both in its preamble and the art.3 (3) & art.4 (2) that the digital communication or making available of copyright materials is not exhausted by the first sale doctrine. The InfoSoc directive unlike the U.S DMCA clearly limited the scope of the distribution right to copyright materials affixed in tangible properties and indicted that the right of distribution of copyright works in the EU community will be exhausted if the copyright owner himself or by his consent makes the first sale of his work.¹⁹⁵ However with regard to the communication or making available of copyright works or as Recital 29 called it with regard to services and online services the doctrine of exhaustion does not apply. Accordingly members are expected to design their respective digital copyright law in accordance with these basic rules limiting the doctrine of exhaustion rule to the right of distribution as it applies to copyright materials fixed in tangible properties.

Therefore concerning the doctrine of exhaustion since the position of both the DMCA of U.S and the InfoSoc directive of EU are similar it would not be confusing for developing countries like Ethiopia what to do concerning the extension of exception to the digital environment. As these rules are augmented by practical reasons in consideration of the complex system of the

¹⁹⁴ Anthony Reese, The First Sale Doctrine in the Era of Digital Networks, retrieved from www.bc.edu/content/dam/files/schools/law/lawreviews/journals/bclawr/44_2/09_TXT.htm, accessed on Dec.5, 2015, 3:18 p.m.

¹⁹⁵ Note that the distribution right is exhausted up on first sale within the community only. For the distribution of copyright works outside the EU community the copyright owners' exclusive right will not be exhausted. This means the region has adopted a regional exhaustion principle rather than universal exhaustion doctrine. Harmonization of certain aspects of copyright and related rights in the information society, Supra, Recital No. 28, 29 & art.4 (2).

virtual world, which inherently involves computers that automatically make copies to process every kind of action it is ordered, it would be advisable to limit the doctrine of exhaustion to the analogue world distribution right.

2.6. THE PROS AND CONS OF ACCEDING TO THE WIPO INTERNET TREATIES

So far we have seen the dictates of the WIPO internet treaties concerning the regulation of online copyright infringements. The relevance and level of acceptance of these treaties could be objectively judged by the countries and other entities of the world that have moved forward to be members of these treaties. Until the 21st of March, 2016 the WIPO website shows that while 94 countries have signed the WPPT, 93 countries have also signed the WCT. More than 10 African countries have also signed both of these treaties. Thus we can say that the level of acceptance is good and the relevancy of the treaties is undoubted by many countries.

They are relevant because they uphold the very objective of copyright, i.e. granting exclusive rights to creative expression owners as an incentive for further investment in the creation and distribution of literary and artistic works. Since suppression of competition from pirates is necessary to allow local creative industries to flourish by extending the scope of copyright and neighboring rights protection to the digital or online system countries should strengthen the development of the creative industry. In fact the relevance of these internet treaties may not be the only criteria to weigh for developing countries in their plan to be a signatory member to them. They have to meticulously consider the benefits and the drawbacks of signing these treaties.

For instance, since both the WCT and WPPT recognize the obligation of national treatment¹⁹⁶ and since most developed countries have powerful and lucrative entertainment, educational, and research industries that export copyrighted works developing countries that import these copyrighted works will be in trouble collecting and paying more royalties and fees to the developed nations if they sign these WIPO internet treaties. On top of this because of enhanced copyright protection developing countries would be restricted from addressing important social needs such as providing their citizens with good educations as critical information's would be locked up by the enhanced copyright laws. Furthermore aligning a huge amount of budget for the proper collection of the royalties and establishment of

¹⁹⁶ WCT, Supra, art.3 and WPPT, Supra, art.4.

enforcement organs for the effective protection of copyright works of all the signatory member countries of the treaties will be up on the shoulder of poor developing countries.

Despite the fact that this would be a very great risk and burden to shoulder for developing countries the writer of this paper thinks that it will not be that much cumbersome and a delicate way of handling it can be designed. For instance the cost of collecting the royalties could be deducted from the royalties collected. In addition the foreign currency that the developing countries will get from the collection of royalties in the protection of their national copyright works can be taxed to some extent and the income the government collects from such source could be used to cover the cost of establishing and running national copyright enforcement organs. With regard to the issue of lessened educational raw materials also, which may result because of enhanced copyright protection of foreign copyright works, an effort to minimize the problem could be directed from the angle of providing wider copyright exceptions and limitations which in fact is allowed by the WIPO internet treaties as long as the three step test requirement is fulfilled.

Be that as it may the writer believes that these drawbacks of signing the WIPO internet treaties are not that difficult to deal with especially in light of the huge economic loss the developing nations, more particularly the Ethiopian copyright owners are facing. This is also shared by the Ethiopian Intellectual property office ...copyright director Mr. Tadele Mamo. He reckons that despite the challenges and the cost of lining the effective infrastructure to the online copyright protection an effort has to be in pipeline to save the Ethiopian copyright system from the danger of becoming irrelevant. He said that the existing copyright is facing a danger of irrelevancy because the general public is getting used to the belief that uploading and downloading from the internet is ethical and lawful. And if that is going to continue, he said, in the face of the transformation from analogue to the digital way of life it will be inevitable that the copyright owners source of income will drain and the incentive factor of copyright become negligible. According to him that will be the eve of a headline news story mourning the death art in Ethiopia. As a result Mr. Tadele finally said that the Ethiopian government has to, even if it chooses to stay not be a member of the WIPO internet treaties, revise its existing copyright law and provide effective legal and institutional infrastructure to fight online copyright infringement.

2.7. ISSUES OF PRIVACY AND FREEDOM OF EXPRESSION

In the digital copyright protection discourse balancing two important interests, i.e. the interest of copyright owners in the provision of digital copyright protection measures and the interest of the public with regard to freedom of expression and the right of privacy on the use of technologically protected copyright materials has been tangling. Undoubtedly, controlling the access to or the usages of protected contents is a right of the rights' holders and, in an economic perspective, a factor of security and of competitiveness advantage.¹⁹⁷ However at the same time failure to provide adequate fair use or lawful use exceptions/limitations in the digital environment would be endangering the public's fundamental right of freedom of expression. Similarly since the use of technological protection measures (TPM) may have serious impact on users' privacy the application of the technological protection measures and the design of digital rights management system has to take due regard of the privacy right of the public. This is true because the existing digital copyright management systems and laws empower copyright owners to control access, restrict unauthorized reproduction, identify infringers, and surveil other usages of their work in the hands of the public. Therefore creating a subtle balance between these two confronting interests will be among the major tasks of a modern digital copyright law.

The 1996 WIPO internet treaties simply permit the member states to extend exceptions/limitations to the digital environment also and require them to provide adequate and effective legal protections and remedies to the technological protection measures that copyright owners use for their work. Nevertheless in compliance of these international treaty terms the U.S DMCA and the EU InfoSoc directive provide that the application of digital or technological protections measures should be in congruence to the public's right of privacy and other public policy grounds. The DMCA for instance provides under section 1201 (c) (4) that nothing in the anti circumvention rule shall prejudice or enlarge/diminish the right of free speech in relation to the use of consumer electronics, telecommunications and computing products. In addition it has provided a list of permanent grounds of exception/limitation to the digital protection of copyrights and it has also devised an interesting mechanism to introduce

¹⁹⁷ Pedro Pina, Electronic Surveillance, Privacy and Enforcement of Intellectual Property Rights: A Digital Panopticon?, 302, retrieved from https://www.academia.edu/Documents/in/Digital_Copyright?page=13, accessed on Feb. 10, 2016, 2:49 p.m.

temporary copyright exceptions to the anti circumvention rule. And even if these exceptions are claimed by many as insufficient they are proper indications of the U.S governments' intention to uphold the public's right of freedom of expression and other public interests.

With regard to privacy also the DMCA has provided under section 1201 (i) that the public could make unauthorized circumvention of access protection technological measures for the sole purpose of disabling a system of the technology that has the capability of collecting or disseminating personally identifying information. This shows that the law has given a sword to the public to fight back technologies that try to trespass their privacy. This makes the U.S law very nifty. On the other hand the EU InfoSoc directive has also provided that digital rights management system should incorporate privacy safeguards in accordance with directive 95/46/EC of the European parliament and of the council of 24 October of 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data.¹⁹⁸ Similarly accompanying the preamble art.9 of the directive also stated that the directive shall be without prejudice to laws on data processing and privacy. When we see the EU directive on data processing and privacy it states that EU member states are obliged to protect the fundamental rights and the freedom of natural persons and in particular their right to privacy with respect to the processing of personal data.¹⁹⁹ And personal data is defined as any information relating to an identified or identifiable natural person; identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.²⁰⁰

With regard to the fundamental right of freedom of expression and other public rights the directive has also emphasized under its preamble that member states should be given the option of providing for certain exceptions/limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for the

¹⁹⁸ Harmonization of certain aspects of copyright and related rights in the information society, Supra, Recital No. 57.

¹⁹⁹ The protection of individuals with regard to the processing of personal data and on the free movement of such data, DIRECTIVE 95/46/EC of the European parliament and the council of 24 October 1995, art.1 & 2.

²⁰⁰ *Id.*

purpose of news reporting, for quotations, for use by people with disabilities, for public security uses and for use in administrative and judicial proceedings.²⁰¹ In accordance of this and the like ideas that promote freedom of expression and other public interests the directive under its preamble has dully recognized the need to create a system with enough/adequate space for exceptions/limitations.²⁰² Similarly art.5 of the directive as we have tried to see in detail above has also made available various grounds that allow fair use of copyrighted materials though it finally committed a big mistake in subjecting the operation of the exception grounds to the existence voluntary agreement between right holders and third party beneficiaries of the exceptions.²⁰³

²⁰¹ Harmonization of certain aspects of copyright and related rights in the information society, Supra, Recital No. 34.

²⁰² Tom W. Bell, Fared Use v. Fair Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine, 76, (1998).

²⁰³ James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society*, 19, (Harvard University Press, 1996). See Laura Gassaway, Growing Pains: Adapting Copyright for Libraries, Education and Society, 48, (Fred B. Rothman, 1997).

CHAPTER THREE

3. LIABILITIES AND ENFORCEMENT INSTRUMENTS

As we have seen so far the easy access of information in the digital world came with its own drawbacks. As a result in addition to various forms of violations of intellectual property in the real world, now the intellectual property owners risk their intellectual property rights being violated in the virtual world as well. Starting from the late 1990s both international organizations and countries with leading technological and entertainment industries showed their own respective effort to regulate these so called piracy in the digital world. Though they do not deal with liability and remedies in detail, the 1996 WCT and WPPT have put the responsibility of providing appropriate grounds of liability and effective remedies on their signatory national legislators.²⁰⁴ In accordance with this obligation the U.S. DMCA and the EU InfoSoc directive have provided a detailed set of rules on liabilities and enforcement instruments with regard to the copyright infringement in the virtual world. Let see what these laws have provided in brief.

3.1. LIABILITY LIMITATION FOR INTERNET SERVICE PROVIDERS

Title II of the DMCA, which is included as section 512 of chapter 5 of title 17, is dedicated to the regulation of the liability of service providers like the internet service providers. As discussed earlier unlike the WPPT, the WCT under art.8 and its accompanying agreed statement (7) liberates internet service providers from direct/strict liability for the infringing activities of their customers or end users by declaring that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of the treaty or the Berne Convention. As a general and regional law to be particularized by member countries the InfoSoc directive has, word for word, included this sentence of the agreed statement of the WCT in Recital 27 of its Preamble.

In addition the Preamble under Recital 33 has also provided that the exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject matter to be made. The same Recital also pinpointed that the act of

²⁰⁴ WCT, Supra, art.11 and WPPT, Supra, art.18.

temporary reproduction shall have no separate economic value on its own and to the extent that these conditions are fulfilled the temporary reproduction exception shall include the acts which enable **browsing**. And acts of caching, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognized and used by industry, to obtain data on the use of the information.

In accordance with this idea of the Preamble the main provision of the directive under art.5 (1) has stated that temporary acts of reproduction protected under art.2 of the directive shall not include reproductions that are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable:

- ✓ A transmission in a network between third parties by an intermediary, or
- ✓ A lawful use of a work or other subject-matter to be made which have no independent economic significance.

The philosophy behind such law is that internet service providers should not be strictly or vicariously held liable as per what the enterprise liability²⁰⁵ of tort law dictates. And this is what came out in the development of significant case laws in the common law countries. Once in the case of *Playboy Enterprises, Inc. v. Frena*²⁰⁶ the U.S. court held that the defendant, George Frena; computer bulletin board service (BBS) provider, is liable strictly for the copyright infringing activity of its subscriber. In this case subscriber of the bulletin service uploaded different playboy images without copyright owners' authorization and the court held the service provider strictly liable despite BBS's allegation that it has not uploaded the images

²⁰⁵ The enterprise liability of tort is based on the policy that enterprises should internalize losses caused by their existence as a cost of doing business. And both strict and vicarious tort liabilities share the idea that one who introduces risk through commerce should bear the costs associated with that risk, thereby serving the policies of enterprise liability. This encourages enterprises to take precautions against relevant losses or raise compensation for victims by spreading those costs over a broad segment of society. ALFRED C. YEN, Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment, 10 &11, retrieved from <https://www2.bc.edu/~yen/ISPLiab.pdf>, accessed on July 20, 2016, 3: 50 p.m.

²⁰⁶ *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

and also has no reason to know the uploads are copyright infringing as it was only providing file storage and distribution service for subscribers.²⁰⁷ However subsequent cases did not support the Frena holding. In the leading case of Religious Technology Center v. Netcom On-Line Communication Services, Inc.²⁰⁸, the Northern District of California court specifically considered and rejected the Frena approach. In this case the court said that although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy for a third party.²⁰⁹ Other courts have followed Netcom's repudiation of Frena.²¹⁰

With regard to vicarious liability of internet service providers also the development in the U.S. courts holding show that holding ISPs vicariously liable for subscriber infringements requires adopting a version of enterprise liability that is more extreme than American courts and legislatures have been willing to accept in tort law.²¹¹ This is because, as an initial matter, the relationship between ISP and subscriber is not at all like the kind of relationship that gives rise to vicarious liability in tort.²¹² Vicarious tort liability arises only when the underlying tortfeasor is an "employee."²¹³ It is difficult to see how an ISP's subscriber could even be considered an independent contractor, let alone an employee.²¹⁴ In an employer/employee relationship of the kind that gives rise to vicarious tort liability, the employer pays the employee to carry out the employer's wishes.²¹⁵ That quid pro quo is at the heart of the

²⁰⁷ ALFRED C. YEN, *Supra*, 9 & 10.

²⁰⁸ Religious Technology Center v. Netcom On-Line Communication Services, Inc., 907 F. Supp. 1361 (N.D. Cal. 1995).

²⁰⁹ ALFRED C. YEN, *Supra*, 10.

²¹⁰ *Id.*

²¹¹ *Id.* 11.

²¹² *Id.* 29.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

control that justifies the imposition of vicarious liability.²¹⁶ By contrast, an ISP does not pay its subscribers to carry out the ISP's wishes. Rather, the subscriber pays the ISP to carry out the subscriber's specific instructions over what to post, read, or download.²¹⁷

On top of this although Internet service is capable of misuse, those risks exist only when a user takes deliberate steps to commit copyright infringement.²¹⁸ Moreover, Internet service that is unable to reproduce, download, upload, or distribute copyrighted material is practically useless because the Internet's primary method of operation requires the reproduction and distribution of information.²¹⁹ Furthermore the free and speedy flow of information and the privacy of subscribers will be endangered if internet service providers are forced to censor everything that is uploaded and shared on the internet.²²⁰ Accordingly the current situation tells that internet service providers should only be held responsible as a contributory infringer and that is a judge-made doctrine that supplements the apparent contours of the copyright statute.²²¹ According to the courts, "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer."²²² Thus it is in accordance of this holding that that both the WCT and the InfoSoc directive of EU proclaimed that internet service providers shall not be held liable for providing a mere conduit of communication. Of the EU Member States Germany was the first to introduce legislation that limits the liability of internet service providers with the 1997 Multimedia Act and France followed in 2000 with its Freedom of Communications Act.²²³ The UK also joined these EU members by enacting the copyright and related rights regulation in 2003.²²⁴

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* 37

²²¹ *Id.* 38

²²² *Id.*

²²³ Christina Angelopoulos, BEYOND THE SAFE HARBOURS: HARMONISING SUBSTANTIVE INTERMEDIARY LIABILITY FOR COPYRIGHT INFRINGEMENT IN

In adoption of the same idea reflected in the WCT and the EU InfoSoc directive, the DMCA has also identified four grounds of limitation with regard to which internet service providers will only be considered as providing facilities enabling communication. These are: transitory communications, system caching, hosting of subscribers' files, and technical infringements committed through the use of search engines and other information location tools. To be eligible for these limitations a service provider must first adopt and reasonably implement a policy of terminating in appropriate circumstances the accounts of subscribers who are repeat infringers and accommodate and not interfere with "standard technical measures".²²⁵ If a service provider is eligible to these limitations it will be relieved from monetary liabilities though different injunctive orders can be made against it.²²⁶ The failure of a service provider

EUROPE, 1, retrieved from <https://www2.bc.edu/~yen/ISPLiab.pdf>, accessed on July 21, 2016, 3; 58 p.m.

²²⁴ Copyright and Related Rights Regulations, 2003 No.2498, section 8.

²²⁵ DMCA, Supra, Section 512 (i). Under this section subsection 2 the term "standard technical measures" is defined as technical measure that is used by copyright owners to identify or protect copyrighted work and have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process being available to anyone on a reasonable and nondiscriminatory terms without imposing substantial costs on service providers or substantial burdens on their systems or networks.

²²⁶ For conducts other than transitory communications courts may grant injunctive relief that restrains the service provider from; - providing access to a subscriber or account holder of the service providers system or network who is engaging in an infringing activity by terminating its accounts, providing access to an infringing material or activity residing at a particular online site on the providers system or network, or such other injunctive relief as the court may deem necessary. On the other hand for conducts that qualify for the limitation of transitory communication courts are allowed to grant an injunctive relief that restrains a service provider from; - providing access to a subscriber or account holder of the service providers system or network who is engaging in an infringing activity by terminating its account, or providing access, by taking reasonable steps in the order to block access, to a specific, identified online location outside the united states. *id.* Section 512 (j)

to qualify for any of these limitations does not necessarily make it liable for copyright infringement. The copyright owner must still demonstrate that the provider has infringed, and the provider may still avail itself of any of the defenses, like fair use, that are available to copyright defendants in general.²²⁷ Let see the four grounds of limitation in a bit detail;-

3.1.1. LIMITATION FOR TRANSITORY COMMUNICATIONS

For the purpose of this limitation a “service provider” is defined as an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the users choosing, without modification to the content of the material as sent or received.²²⁸ In general terms, section 512(a) limits the liability of service providers in circumstances where the provider merely acts as a data conduit, transmitting digital information from one point on a network to another at someone else’s request. This limitation covers acts of transmission, routing, or providing connections for the information, as well as the intermediate and transient copies that are made automatically in the operation of a network. In order to qualify for this limitation, the service provider’s activities must meet the following conditions:

- 1) The transmission must be initiated by a person other than the provider.
- 2) The transmission, routing, provision of connections, or copying must be carried out by an automatic technical process without selection of material by the service provider.
- 3) The service provider must not determine the recipients of the material.
- 4) Any intermediate copies must not ordinarily be accessible to anyone other than anticipated recipients, and must not be retained for longer than reasonably necessary.
- 5) The material must be transmitted with no modification to its content.

3.1.2. LIMITATION FOR SYSTEM CACHING

For the purpose of this limitation and the other two subsequent limitations a service provider is defined more broadly defined as “a provider of online services or network access, or the operator of facilities therefor”.²²⁹ Section 512(b) limits the liability of service providers for

²²⁷ *Id.* Section 512(l)

²²⁸ *Id.* Section 512(k) (1) (A)

²²⁹ *Id.* Section 512(k) (1) (B)

the practice of retaining copies, for a limited time, of material that has been made available online by a person other than the provider, and then transmitted to a subscriber at his or her direction. The service provider retains the material so that subsequent requests for the same material can be fulfilled by transmitting the retained copy, rather than retrieving the material from the original source on the network.

The limitation applies to acts of intermediate and temporary storage, when carried out through an automatic technical process for the purpose of making the material available to subscribers who subsequently request it. It is subject to detailed conditions some of which are:

1. The content of the retained material must not be modified.
2. The provider must limit users' access to the material in accordance with conditions on access (e.g., password protection) imposed by the person who posted the material.
3. Any material that was posted without the copyright owner's authorization must be removed or blocked promptly once the service provider has been notified that it has been removed, blocked, or ordered to be removed or blocked, at the originating site.

3.1.3. LIMITATION FOR INFORMATION RESIDING ON SYSTEMS OR NETWORKS AT THE DIRECTION OF USERS

Section 512(c) limits the liability of service providers for infringing material on websites (or other information repositories) hosted on their systems. It applies to storage at the direction of a user. In order to be eligible for the limitation, the following conditions must be met:

- 1) The provider must not have the requisite level of knowledge of the infringing activity, as described below.
- 2) If the provider has the right and ability to control the infringing activity, it must not receive a financial benefit directly attributable to the infringing activity.
- 3) Upon receiving proper notification of claimed infringement, the provider must expeditiously take down or block access to the material.

In addition, a service provider must have filed with the Copyright Office a designation of an agent to receive notifications of claimed infringement. The Office provides a suggested form for the purpose of designating an agent (<http://www.loc.gov/copyright/onlineasp/>) and maintains a list of agents on the Copyright Office website (<http://www.loc.gov/copyright/Onli>

nesp/list/).

Under the knowledge standard, a service provider is eligible for the limitation on liability only if it does not have actual knowledge of the infringement, is not aware of facts or circumstances from which infringing activity is apparent, or upon gaining such knowledge or awareness responds expeditiously to take the material down or block access to it.

The statute also establishes procedures for proper notification, and rules as to its effect.²³⁰ Under the notice and takedown procedure, a copyright owner submits a notification under penalty of perjury, including a list of specified elements, to the service provider's designated agent. Failure to comply substantially with the statutory requirements means that the notification will not be considered in determining the requisite level of knowledge by the service provider. If, upon receiving a proper notification, the service provider promptly removes or blocks access to the material identified in the notification, the provider is exempt from monetary liability. In addition, the provider is protected from any liability to any person for claims based on its having taken down the material.²³¹

In order to protect against the possibility of erroneous or fraudulent notifications, certain safeguards are built into section 512. Subsection (g) (1) gives the subscriber the opportunity to respond to the notice and takedown by filing a counter notification. In order to qualify for the protection against liability for taking down material, the service provider must promptly notify the subscriber that it has removed or disabled access to the material. If the subscriber serves a counter notification complying with statutory requirements, including a statement under penalty of perjury that the material was removed or disabled through mistake or misidentification, then unless the copyright owner files an action seeking a court order against the subscriber, the service provider must put the material back up within 10-14 business days after receiving the counter notification.

Penalties are provided for knowing material misrepresentations in either a notice or a counter notice.²³² Any person who knowingly materially misrepresents that material is infringing, or that it was removed or blocked through mistake or misidentification, is liable for any resulting

²³⁰ *Id.* Section 512(c) (3)

²³¹ *Id.* Section 512(g) (1)

²³² Jane C. Ginsburg, Essay: From Having Copies to Experiencing Works: the Development of an Access Right in U.S. Copyright Law, 85, (Sweet & Maxwell, 2000).

damages (including costs and attorneys' fees) incurred by the alleged infringer, the copyright owner or its licensee, or the service provider.²³³

3.1.4. LIMITATION FOR INFORMATION LOCATION TOOLS

Section 512(d) relates to hyperlinks, online directories, search engines and the like. It limits liability for the acts of referring or linking users to a site that contains infringing material by using such information location tools, if the following conditions are met:

- a. The provider must not have the requisite level of knowledge that the material is infringing. The knowledge standard is the same as under the limitation for information residing on systems or networks.
- b. If the provider has the right and ability to control the infringing activity, the provider must not receive a financial benefit directly attributable to the activity.
- c. Upon receiving a notification of claimed infringement, the provider must expeditiously take down or block access to the material.

These are essentially the same conditions that apply under the previous limitation, with some differences in the notification requirements. The provisions establishing safeguards against the possibility of erroneous or fraudulent notifications, as discussed above, as well as those protecting the provider against claims based on having taken down the material apply to this limitation.²³⁴

3.2. LIABILITY LIMITATION FOR NONPROFIT EDUCATIONAL INSTITUTIONS

For nonprofit educational institutions engaging in service providing, section 512 of the DMCA has also provided special rules concerning the application of these limitations. Section 512(e) determines when the actions or knowledge of a faculty member or graduate student employee who is performing a teaching or research function may affect the eligibility of a nonprofit educational institution for one of the four limitations on liability. As to the limitations for transitory communications or system caching, the faculty member or student shall be considered a "person other than the provider," so as to avoid disqualifying the institution from eligibility. As to the other limitations, the knowledge or awareness of the

²³³ DMCA, Supra, Section 512(f)

²³⁴ *Id.* Section 512(f)-(g)

faculty member or student will not be attributed to the institution. However the following conditions must be met:

- I. The faculty member or graduate student's infringing activities do not involve providing online access to course materials that were required or recommended during the past three years;
- II. The institution has not received more than two notifications over the past three years that the faculty member or graduate student was infringing; and
- III. The institution provides all of its users with informational materials describing and promoting compliance with copyright law.

On top of these, Title II establishes a procedure by which a copyright owner can obtain a subpoena from a federal court ordering a service provider to disclose the identity of a subscriber who is allegedly engaging in infringing activities.²³⁵ Section 512 also contains a provision to ensure that service providers are not placed in the position of choosing between limitations on liability on the one hand and preserving the privacy of their subscribers, on the other. Subsection (m) explicitly states that nothing in section 512 requires a service provider to monitor its service or access material in violation of law (such as the Electronic Communications Privacy Act) in order to be eligible for any of the liability limitations. All in all this title of the Act gave the wary Internet service provider an opportunity to jump through a long, complicated series of stumbling blocks and thereby avoid liability.

3.3. ENFORCEMENT INSTRUMENTS OF ONLINE COPYRIGHT INFRINGEMENT

We have seen above that the WCT and WPPT under art.11 & 18 oblige their members to provide adequate legal protection and effective legal remedies for the protection of technological protection measures that copyright owners use to protect their work from unauthorized access and copy. Accordingly the InfoSoc directive and the DMCA have provided certain provisions in their respective jurisdictions. As the InfoSoc directive is a regional law it has provided, in a general way, under art.8 that member states of the union shall make available appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in the directive. The sanctions and remedies are also required to be effective, proportionate and dissuasive.

²³⁵ *Id.* Section 512(h)

With regard to the types of remedies that could be availed in case of online copyright infringement it has stated sub art. 2 of the same provision that member states shall make sure that right holders whose rights are infringed in their territory can bring an action of damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as circumvention devices, products and components used for the infringement. On top of this the directive also required member countries to ensure that the right holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or a related right.

Accordingly some of the member states like UK, France, the Netherlands and Spain have put in place some extra judicial legal remedies for the online copyright infringement.²³⁶ For instance while measures like graduated response are in force in France and United Kingdom, supply side measures like take down and blocking of sites and follow the money approach are in use in UK, Netherland, Spain.²³⁷ Graduated response measure is a sanction by which warning letters of increasing severity are sent to subscribers whose accounts are linked to alleged online copyright infringement, with the ultimate sanction of prosecution if infringement from the account being monitored does not cease. The sanction of take down and blocking of sites is on the other hand used to shut websites or block them. The unique ‘Follow the money’ approach targets intermediaries like banks and advertising agencies who either knowingly or not knowingly are involved in monetizing online content that infringes copyright.²³⁸

The DMCA on the other hand has provided both civil and criminal remedies specifically.²³⁹ Any person injured by a violation of section 1201 or 1202 may bring a civil action in Federal court. Section 1203 gives courts the power to grant a range of equitable and monetary remedies similar to those available under the Copyright Act, including statutory damages. The court has discretion to reduce or remit damages in cases of innocent violations, where the violator proves that it was not aware and had no reason to believe its acts

²³⁶ Intellectual Property Office (IPO), Supra, 2 & 3.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ DMCA, Supra, Section 1203 & 1204.

constituted a violation.²⁴⁰ Special protection is given to nonprofit libraries, archives and educational institutions, which are entitled to a complete remission of damages in these circumstances.²⁴¹

In addition, it is a criminal offense to violate section 1201 or 1202 willfully and for purposes of commercial advantage or private financial gain. Under section 1204 penalties range up to a \$500,000 fine or up to five years imprisonment for a first offense and up to a \$1,000,000 fine or up to 10 years imprisonment for subsequent offenses. Nonprofit libraries, archives and educational institutions are entirely exempted from criminal liability.²⁴²

In addition to those judicial remedies, the U.S digital copyright law also provide extra judicial measures like graduated response, throttling back, termination of access, take down and blocking of sites.²⁴³ Graduated response is a sanction by which warning letters of increasing severity are sent to subscribers whose accounts are linked to alleged online copyright infringement, with the ultimate sanction of prosecution if infringement from the account being monitored does not cease. Throttling back is also another extra judicial remedy which means slowing down the speed of the internet connection to accounts that have been linked to infringement if the behavior persists.²⁴⁴ Termination of access on the other hand is a sanction by which the internet access of subscribers whose accounts have been linked to persistent infringement is terminated for a given period. From the supply side US also use the sanction of take down and blocking of sites to shut websites or block them.²⁴⁵

²⁴⁰ *Id.* Section 1203 (c) (5) (A)

²⁴¹ *Id.* Section 1203 (c) (5) (B).

²⁴² *Id.* Section 1204 (b)

²⁴³ Intellectual Property Office (IPO), *Supra*, 2 & 3.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

CHAPTER FOUR

CONCLUSION AND RECCOMENDATIONS

CONCLUSION

Internet in Ethiopia has been a networked environment where everyone is free rider without any fear of surveillance while surfing for and limitlessly downloading and sharing both national and foreign copyright protected files. Undoubtedly because of the Ethiopian governments' indifference or belief that inhibiting and fighting piracy over the internet is not a timely concern almost every one with internet access in Ethiopia has been a pirate and remains to be so until the government pushed by copyright stakeholders in/outside the country regulate online copyright infringement. The extant law as we have seen can be interpreted to outlaw online copyright infringement at least in principle. However since it lacks clarity with respect to the possibility and scope of extending the copyright exceptions to the online environment and the scope of exercising some of the exclusive rights like the right of reproduction and distribution in the digital environment the immaturity of the law to handle online copyright issues is visible.

The fact that the government has recently introduced the Computer Crime proc no 958/2016 which outlaws unauthorized access and copy of computer data's including content data is appreciable. Similarly the move by this same proclamation in outlawing the manufacture and circulation of products, devices or services that are primarily designed to circumvent such technological protection measures is also outstanding. However still the copyright law lags behind the expectation of this modern day as it does not provide the way how the copyright limitations be legitimately enjoyed in the face of technological protections for copyright works. It has to provided that for selected copyright limitation grounds the anti circumvention rule does not apply as it is done by the DMCA. In addition since the Computer Crime proc does not regulate the liability of internet service providers with respect to the online copyright infringements the existing copyright law of Ethiopia remains out of date. In this regard it is good to remind that the current copyright law of Ethiopia prohibit every temporary reproductions of copyright material which makes the very essence of internet service providers illegitimate as their function of enabling communication among individuals involve millions and billions of temporary reproductions. So the we can say that the copyright law has to also provide liability limitation provision with regard to internet service providers there by determining when they shall be held liable. This indeed will require declaring, among other things, that the exclusive right of reproduction concerning temporary reproductions does not

include certain acts which are carried out for non economic purposes of only enabling browsing and transmission.

Furthermore as discussed in chapter two the first sale doctrine recognized in art.19 of the copyright law has to also be limited to the analogue world. This is because in the digital world recognizing the first sale doctrine and thereby allowing people to make redistributions after the first sale triggers unauthorized reproductions to occur as computers multiply files without the loss of the original copy in ones hand. As such the scope of art.19 has to also be limited. Finally the writer reckons that the extant copyright law is ill-equipped to deal with the scale and speed of the phenomenon of online copyright enforcement. And thus, given the fact that the online copyright infringement is getting rampant on daily basis as the internet service is becoming more accessible and affordable, the Ethiopian governments' time for reaction is right now and today. And for this, the government has to revise the extant copyright law in consideration of the above facts and put in a place an adequate, dissuasive and effective legal remedies and institutional setup.

RECOMMENDATIONS

Believing that, for all the facts and figures concerning piracy in Ethiopia, it is better to put in place a system of prevention and deterrence before it gets too late to untangle the problem or an irreversible damage occurs the writer recommends the following points:-

- Coming up with suitable policy approaches to treat online copyright infringement. In the fight against piracy national policy framework to create unfavorably itchy environment for electronic piracy is the first and choiceless thing to do. Other than condemning electronic piracy as a sovereign nation it is also advisable to install a policy that appreciates working on shared approaches with other countries. There are many countries that are virtually matured in regulating online copyright infringement and working with them is the only way to fight pirates or website enablers at the international level who flee from country to country to continue with their infringing sites.
- Amending the existing copyright law. Providing provisions that enable effective circumvention for permitted grounds or fair use purposes, limiting the scope of the exclusive right on temporary reproductions and the first sale doctrine, regulating the liability of internet service providers and introducing new, modern and appropriate remedies that suit online copyright infringement is necessary. This is the only way to

close down the legal loopholes and show monster face of the law to those electronic pirates. In this regard having a look at what the 1996 WIPO internet treaties had to say concerning the protection of online copyright infringement is advisable. In addition, for their particularity, the U.S Digital Millennium Copyright Act of 1998 and the InfoSoc directive of EU are also worthy of contemplation. The way they have tried to keep certain similarities, with respect to the exclusive copyrights and exception/limitations, and create certain differences, concerning the recognition and provision of adequate and effective legal remedies for the protection of access and copy control technological measures, in the analogue and digital copyright environment is ingenious and a lot to learn from.

- Creating institutional and organizational setups to fight piracy. Structuring governmental agencies or civil societies that are pro eradication of piracy is decisive. For instance internet service providers (the Ethiopian telecommunication) and the Ethiopian intellectual property office (EIPO) have to establish a special task force that primarily deals with the identification, warning and blocking of infringing websites and subscribers. In this regard such and other entities might have to develop a harmonized system to work together.
- Devising new and workable institutional enforcement arrangements, procedures and measures. Either through state agencies or private actors or both a nation with a firm policy decision and law to fight piracy should structure both judicial and extra judicial institutional arrangements to deal with it. For instance when courts order an injunction against an intermediary internet service provider the internet service provider must be in a position to act according to the dictates of the court order. Be it sending awareness creation letters to those website developers or individual subscribers, diverting individual infringers search terms or domain of infringing websites to educational websites, slowing the internet speed, blocking their website, terminating their internet service and identifying the name and address of the infringers should be ready as a measure against infringing content enablers and subscribers.
- Assigning appropriate budget and finance to online copyright enforcement. For the proper and effective development of the Ethiopian Literature and art the government should be committed in allocating the necessary budget for financing law interpreting and law enforcing organs that work in the fight for online copyright infringement.

- Introducing market and industry based solutions. For instance, both in Italy and the UK, there are companies and organizations that provide due diligence for advertisers, to ensure that they do not place online adverts with sites that host or facilitate access to infringing content. In this regard the countries E-Commerce law, E-database law and cyber law should be well versed in discouraging those who enrich others or themselves by engaging in copyright infringing websites. For instance the E-Commerce law should criminalize website developers or content enablers that engage in the selling copyrighted works without authorization.
- Creating legal online service sites for those who are looking for digital literary and artistic works. Providing a legal protection is not only enough in the fight against piracy rather as the experience of some developed countries indicate legal online content service should also be made available on the internet. For instance along the unreserved effort to block copyright infringing sites the government and private stakeholders are working hard on introducing and familiarizing legal online content services in countries like UK, Germany, US, Austria, France, Netherland, Japan, Poland, Canada etc

APPENDIX

- I. The interview questions forwarded to the Ethiopian Writers, Musicians, Film Producers Associations, the Ethiopian Intellectual Property Office and the Ministry of Communication and Information Technology of Ethiopia.

I. Part one

1. General information

1.1 Name _____

Position _____

II. Interview questions

1. Do you think online copyright infringement in Ethiopia is endangering the economic interest of copyright owners?
2. What efforts has your association/office made so far in the fight against online copyright infringement?
3. What do you think should the Ethiopian government do in the fight against online copyright infringement?
4. Do you think that now is the right time for the Ethiopian government to react by against online copyright infringement?
5. What do you think are the necessary amendments that should be made to the present copyright proclamation of Ethiopia?

- II. The interview questions forwarded to 3 copyright bench judges in the Lideta Federal High Court of Ethiopia.
1. Have you ever encountered a case on online copyright infringement in Ethiopia?
 2. Do you think online copyright infringement in Ethiopia is endangering the economic interest of copyright owners?
 3. What do you think should the Ethiopian government do in the fight against online copyright infringement?
 4. Do you think that now is the right time for the Ethiopian government to react by against online copyright infringement?
 5. What do you think are the necessary amendments that should be made to the present copyright proclamation of Ethiopia?

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- ❖ Interview with Mr. Biniyam Alemayehu, president of the Ethiopian film producers association.
- ❖ Interview with Mr. Minda Feleke, Standard and Regulatory Directorate IT Team Leader at Ministry of Information and Communication Technology (MICT).
- ❖ Interview with Mr. Tedla Mamo, copyright and community knowledge protection and development directorate director at the Ethiopian Intellectual property office (EIPO).
- ❖ Interview with Addis Seyume, copyright and community knowledge protection and development Expert at the Ethiopian Intellectual property office (EIPO).
- ❖ Interview with Mr. Dawit yefru, President, Ethiopian Musicians Association.
- ❖ Interview with Judge Nuredin Kedir, presiding judge at the Ethiopian Federal High Court, copyright civil bench.
- ❖ Interview with Judge Yohanes Nigus, presiding judge at the Ethiopian Federal High Court, copyright civil bench.

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DECLARATION

I the undersigned declare that this thesis is my original work which has never been presented for degree in any other university and that all sources of materials used in the thesis have been duly acknowledged.

Declare by

Name TIBEBE SOLOMON

Signature _____

Date _____