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**The emerging Ethiopian copyright and related rights
collecting society: assessment of challenges and prospects**

BY: Kahsay Gebremedhn ID.No. GSR/0865/03

Advisor: Dr. Mandefro Eshete (Assistant professor)

Addis Ababa

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**Submitted in Partial Fulfillment of the Requirements for the Master
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Declaration

I, the undersigned, declare that this thesis is my original work, and this thesis has not been presented for a degree in any other University, and that all sources of materials used for the thesis have been fully acknowledged.

Kahsay Gebremedhn

Signature_____

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Abstract

Copyright collecting societies were developed so as to rectify the difficulty faced by individual copyright holders to negotiate and give license to multiple and dispersed users and vice versa. They serve as intermediary between users and copyright holders and create less costly supply of copyrighted works and less costly access to users of copyrighted works. With the same reason, i.e. to enforce their rights, following the promulgation of copyright proclamation in 2004, Ethiopian copyright holders and their professional associations have established a copyright collecting society known by the name Ethiopian copyright and neighboring rights collective management society (ECNRCMS) in November 2009 to collectively enforce their rights. Though it is a three years old association, ECNRCMS is not yet functional.

Thus, the aim of this paper is to examine the main challenges which make ECNRCMS ineffective and the opportunities or promising developments that helps the same to successfully involve in to its functions. The research paper examines the issue whether the appropriate laws, i.e. Ethiopian copyright legal regime and charities and societies' proclamation and other relevant laws, are in a position to facilitate the successful operation of the emerging Ethiopian copyright collecting society. Besides, it also carefully scrutinizes the role of appropriate institutions and the government in general in the establishment and operation of the emerging Ethiopian copyright collecting society. Moreover, the paper explores the problems other than legal and institutional challenges as well as the opportunities/ prospects for the successful operation of the emerging Ethiopian copyright collecting society (ECNRCMS). After examination of these issues, it is found that the existing Ethiopian copyright legal regime has loopholes that challenge the function of Ethiopian Copyright and Neighboring rights Collective management society. The legal regime fails to incorporate private levying system, specific provisions that deal with copyright protection on the online-environment; and incorporate special provisions that deal with copyright collecting society. The Charities and societies proclamation is also found irrelevant and inappropriate to regulate the function of the collecting society for the later is designed to regulate associations, which have distinct objective, and contains provisions that are totally in contrary to the very nature and operation of copyright collecting societies- such as it prohibits distribution of remunerations or benefits among its members.

In addition, absence of special institutional back up or government support, lack of awareness, existences of high level of copyright piracy in the nation, absence of competent staffs are the other challenges for the emerging Ethiopian copyright collecting society. The paper further finds positive developments (i.e. national and international) which can and would positively contribute for the successful operation and development of the copyright collecting society.

Introduction

With the growth of industrialization and the subsequent technological development and emergence of multiple chains of distribution of copyrighted works made individual enforcement of copyright and related rights very difficult. Put differently, the number of users of such works increased and became difficult for the right holders to individually negotiate with users and manage legal exploitation of their works. At the same time users also faced difficulties to negotiate with individual right holders due to time and distance constraints. Such difficulties proved the inadequacy of enactment of copyright laws, individual negotiation and enforcement of copyright and related rights, and ordinary judicial system for effective enforcement of copyrights and related rights and as a result paved a way for evolvement of collective management system of copyrighted works. put simply, Technological development and multiple chain of distributions of copyrighted works , indicated that, in addition to an appropriate legal framework, a strong state administration and functional judicial system; a developed collective management system of copyright and related rights is essential to ensure an efficient enforcement of copy right and related rights law. Thus, lack or weakness of copyright collecting society could lead to the failure of the copyright enforcement system. Collecting society plays an important role especially where copy righted works are so widely used and that becomes difficult or practically impossible for the owner to individually negotiate and issue licenses to all users and the vice versa. The primary role of a collective management organization is, therefore, to act as an intermediary between right owners and users.

Its historical development and other theoretical reasons show that copyright collecting societies were developed to ensure effective enforcement of rights of copyright and related right holders. However, a copyright collecting society to be effectively operational and enable to achieve the intended goals, there are preconditions that should be existed in the nation which includes, among other things: existence of well developed copyright legal regime; active government involvement especially in developing countries where the copyright holders are not, economical and technically, in a position to establish and carry out the function of collecting society; and competent staffs. In other terms, existence of relevant and well developed legal regime and

appropriate institutional setup are essential to make sure the establishment and function of copyright collecting societies is effective and successful.

For the same reason, i.e. to ensure effective enforcement of rights of copyright and related right holders, Ethiopian copyright holders and their professional associations have established a collective administration mechanism for their rights know by the name Ethiopian copyright and neighboring rights collective management society(ECNRCMS) in November 2009. ECNRCMS is however not yet functional. It has not been involving in collection and distribution of royalties and other activities that contribute to combat the prevalent copyright violation. Thus, the main focus of the paper is to uncover the legal and institutional challenges for the emerging Ethiopian copyright collecting society. It also discusses problems other than legal and institutional challenges. Discussion would further be made as to the opportunities /prospects for the successful operation of the emerging Ethiopian copyright collecting societies (ECNRCMS).

Chapter one of the thesis will discuss the proposal of the paper in general. Thus the background of the paper, statement of the problem, particularly issues to be worked on the legal and institutional framework would be indicated. Besides, the scope of the study, objectives, significance, research methodology and limitations of the study would be highlighted.

The second chapter of the thesis is mainly designed to help the reader better understand the notion of copyright collecting societies and its functions in general. Thus, under this chapter, a general over view would be made as to historical evolvement and theoretical justifications of copyright collecting society, function and sorts of copyright collecting societies, and rights that usually administered by copyright collecting societies. This chapter therefore aims at clarifying the concept of collective management system of copyright and related rights.

Chapter three discusses experiences of other jurisdictions. The discussion under this chapter mainly focuses on the legal and institutional frameworks of the nations devoted to facilitate the establishment and function of copyright collecting societies. Specifically, legal status of the copyright collecting societies; the legislative support given to copyright collecting societies in acquisition of rights (legislative support for copyright collecting societies' rights acquisition

processes); state support and control in formation and operation of copyright collecting societies, and legislative support extended in setting tariffs and distribution of royalties will be dealt.

Chapter four deals with the emerging Ethiopian copyright collecting society and the problems related with the existing copyright legal regime, copyright and neighboring rights proclamation, and charities and societies proclamation based on which the collecting society is registered and got legal personality. After discussing the challenges associated with the existing relevant legal regimes, emphasis would be made on discussing the problems related to the absence of appropriate institutional back up to the emerging Ethiopian copyright collecting society. Moreover, the impact of lack of public awareness about the importance of copyright collecting societies, high copyright violation, development of internet or online-environment, and absence of competent staffs on the successful operation of the emerging Ethiopian copyright collecting society. Finally, the promising developments (opportunities) which have positive impact for the successful operation of the emerging copyright collecting society would be subject of discussion. In this regard, the role of world intellectual property organization and world trade organization in the development of the emerging Ethiopian copyright collecting society would be explored. The relevant national measures that have been undertaken by Ethiopian intellectual property organization (EIPO); i.e. revising the existing copyright legal regime to strengthen border measures, preparation of legal regime that would regulate collection and distribution of royalties, establishment of national academy of intellectual property, establishment of national intellectual property council and other activities of EIPO , and their positive role in the successful operation of the emerging Ethiopian copyright collecting society would also be subject of discussion under this chapter. Finally, chapter five concludes and recommends.

CHAPTER-ONE

Proposal of the paper

1.1, Background of the study

The public in general or state could benefit a lot by extending due copyright protection to intellectual works of individuals for such protection would create economic as well as moral incentive / motivation for other potential authors. However, giving due legal protection to authors and other copyright holders solely might not enable any state to achieve the intended goals. There is a need to make such theoretical or legal principles practical (operational) in a way which could balance both the interests of the society and the authors. In this regard, Collective societies play a major role since they facilitate rapid and lawful access to information in a relatively inexpensive way. They are also guardians of copyright holders and create a favorable environment for creativity, i.e. providing fair remuneration to rights holders and incentives for future creation. In other terms, existence of well functioning copyright and related rights collecting society in a certain nation would ensure that the creators of copyrighted works gain recognition and fair economic reward for their works because collecting societies are effective than individual copyright and related right holders especially where it is impossible for right owners to individually negotiate with users and issue license and collect royalties.¹

While users of copyrighted works² are expected to use legally without affecting the right holders interest, especially in Ethiopia, they often - intentionally or due to the difficulties related with the dispersion of copyright holders which actually makes individual negotiation with all copyright holders difficult and sometimes impossible- prefer to use such intellectual works in an illegal way. Violation of copyrights not only affects the right holders' interest but also has a negative

¹ Shane Simpson, the role of copyright collecting societies in Australia,(<http://www.simpsons.com.au/wp-content/uploads/role-of-collecting-societies.pdf>) last visited on July 5, 2012.The role of copy right collecting societies is not limited to collect and distribute remunerations to its members, they are also fulfilling social and cultural obligation – sometimes imposed to them by the law, sometimes voluntarily. Schierholz, Preserving the social and cultural Roles of Collecting societies: Particularities in the Case of multi-territorial licensing, (<http://www.alai-croatia.org/prezentacije/7-10-schierholz-final.doc>) last visited on July 4, 2012.

² In this paper, unless the contrary follows from the given context, “copyright” means also related rights, and “work” also means objects of related rights.

effect on the economic, social and cultural development of nations because it paralyzes the motivation of creators of copyrighted works to come up with other creative works.³ These days, taking these effects in to account, almost all jurisdictions extended legal protections and introduce collective means for copyright and related rights management which is termed as copy right collecting society.⁴

Earlier, when intellectual works such as works of authors (when art had begun to flourish); extended protection to such works by enacting laws and enforcing such laws through the ordinary judicial system was believed adequate.⁵ Copyright protection as a concept emerged during medieval period and during that time it was not impossible to enforce copyright and related rights by enacting laws and through courts for two reasons: first, copyrighted works were not as such diversified and hence not difficult to manage individually; second, due to the absence of technological development and copyrights had not been commercialized.⁶

However, later on, with the rise of industrialization and the subsequent technological development, emergence of multiple chains of distribution of copyrighted works made individual

³ Daniel Gervais (ed), Collective Management of Copyright and Related rights, (2010) p 6. The positive role of copyright collecting societies in the cultural and economic development of a certain nation is being proved also by the world intellectual property office (WIPO). According to the publications of the organization, the experience gained during the years proves that enrichment of the national cultural heritage is directly subjected to the level of protection given to literature and artistic works; i.e.the higher the level of protection, the more the authors are encouraged to create. On the other hand, “an increase in the number of literature and art creations stimulate the auxiliary use of these creations in creative industries, including book publishing, music recording, etc. Indeed, encouragement of intellectual creation represents one of the main conditions for social, economic and cultural development”. See also Dorian Chicora, The role of the administrative authorities and collective management societies in promoting creativity and copyright based industries (http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipa_ge_08/wipo_ipa_ge_08_theme08_3.pdf),lasted visited on june 29, 2012.

⁴ Id

⁵ Martin Kretschmer, Access and Reward in the Information Society: Regulating the Collective Management of Copyright, (www.cippm.org.uk.) last visited on June 25, 2012.

⁶ World intellectual property organization (WIPO) and international federation of reproduction rights organizations (IFRRO), collective management in reprography, (opentraining.unescoci.org/cgi-bin/page.cgi?g...html;d=1pdf ,) last visited on June 25, 2012.

enforcement of copyright and related rights very difficult. Put differently, the number of users of such works increased and became difficult for the right holders to individually negotiate with users and manage legal exploitation of their works.⁷ Users also faced difficulties to negotiate with the right holders due to time and distance constraints. Sometimes it was also hard to know the right holder which, according to some scholars, led users to illegal use of copyrighted works.⁸ Such difficulties proved the inadequacy of enactment of copyright laws, individual negotiation and enforcement of copyright and related rights, and ordinary judicial system for effective enforcement of copyrights and related rights and as a result paved a way for evolvement of collective management system of copyrighted works which allows copy right holders to alleviate pervasive violation of their rights and realize their economic interests.⁹ It is the incapability of the copyright holders to manage and individually deal with the users, as its historical evolvement of collecting societies indicates, that led to the establishment of copyright and related rights collecting societies. The concept of collecting society, these days, has got wide acceptance across the globe and became a key instrument to enforce economic and sometimes moral rights of copyright holders.¹⁰

Among many problems and challenges that copyright is facing, especially, in the third world countries copyright violation is the main danger. Likewise, in Ethiopia copyright violation is a critical issue which requires serious attention and collective responsibility. The problem is now busted out and forces the artists, the government and the society to realize its impacts and crave for its solutions. Ethiopia government, following the right holders' voice as to the inadequacy of

⁷ United Nations Educational, Scientific and Cultural Organization (UNESCO), Guide to the collective administration of authors' rights (www.ilo.org/public/english/dialogue/actemp/.../srscbarg) last visited on june 28, 2012.

⁸ Id

⁹ Id

¹⁰ the importance of copy right collecting societies is not limited to national copy right enforcements, scholars and some states such as member states of European union have also started to use them in order to prevent the cross border copy right and related rights violations. European Union has taken legislative measures so as to uniformly regulate the establishment and operation of copy right collecting societies. For more on this cf. KEA European affairs, The collective management of rights in Europe: the quest for efficiency, (www.keanet.eu/report/collectivemanpdffinal.pdf) last visited on June 28, 2012.

the 1960 Ethiopian civil code to protect their rights, has enacted copyright proclamation in 2004-copyright and neighbor rights proclamation proc. No. 410/2004. Despite the fact that the proclamation has provided better legal protection to copy right holders than 1960 Ethiopian civil code, pervasive violation of copyrights has been continuing.¹¹ Such legislative measure and other temporary measures taken by the right holders and police are found to be ineffective for they are not well organized, regular, implemented for complex and technical violation of copyrights. Still the level of piracy and counterfeiting remain high, this meaning that even an appropriate legal regime that represents a key issue for ensuring an efficient copyright and related rights protection is not enough.

To ensure enforcement of the copyright and neighboring rights proclamation, before three years, in 2009, copyright holders have started movement to establish collective management system or copyright collecting society. However, the collecting society is not yet functional due to a number of problems. Establishment and operation of collecting societies, especially in developing countries like Ethiopia where the financial and technical capacity of the copyright holders is at a very rudimentary stage, is not effective in the absence of appropriate legal and institutional framework and other technical assistance of the government.¹² There are also a number of obstacles that an emerging collecting society, like ours, usually faces. Thus, the main theme of the paper is to uncover the opportunities and challenges that the emerging Ethiopian copy right collecting society has been facing in the process of its establishment and would face in its operation. In doing so, particular emphasis would be given to the existing relevant institutional and legal framework of the nation. Based on the findings, the paper would recommend measures to be taken so as to make the emerging Ethiopian collecting society effective in enforcement of copyright and related rights.

¹¹ However, it has to be noted that the action that has been taken by the courts and police forces against illegal users, though it is limited to few areas, is not undermined.

¹² Ulrich Uchtenhagen, Establishment of Collective Management Organizations, (http://www.wipo.int/about-ip/en/copyright_societies.html) lat visited on July 3, 2012.

1.2 Statement of the problem

Though devising comprehensive legal regime for protection of copyrighted works of individuals is crucial and first step, it is meaningless if such law is not implemented. In addition to an appropriate legal framework, a strong state administration and functional judicial system; a developed collective management system of copyright is essential to ensure an efficient enforcement of copyright and related rights law.¹³ This means that lack or weakness of collecting societies would make the copyright enforcement system ineffective or incomplete. Thus, existence of well organized and developed collective system of management for copyrights is one determinant factor to ensure efficient enforcement of copy rights.

Copyright collecting society plays an important role especially where copyrighted works are so widely used and that becomes difficult, if not impossible, for the owner to individually negotiate and issue licenses to all users.¹⁴ To state it in slightly different terms, on one hand, the author may not be able to monitor all uses at all times and in an indefinite number of places around the state. On the other hand, users do not have the possibility to enter into nationwide negotiations with countless authors and other right owners on a one by one basis. The primary role of a copyright collecting society is, therefore, to act as an intermediary between right owners and users of copyrighted works. It is basically based on the theory that copyright collecting society constitutes an efficient way of organizing the lawful exploitation of works in those fields where individual licensing would prove difficult or impossible.¹⁵ And, it is certainly cheaper to share the financial expenses of negotiation, supervision and collection of royalties among the greatest possible number of parties.¹⁶ As a result collecting society significantly increases the choice of copyrighted works available to the public and guarantees the lawful exploitation of creative works of individuals. Nowadays, copyright collecting societies have got wide acceptance and have been playing crucial role in ensuring economic rights of copyright holders by collecting and

¹³ Dorian Chiroca, cited above at note 3,p1

¹⁴ Daniel Gervais, cited above at note 3, p 5

¹⁵ UNESCO, cited above at note 7,p 5

¹⁶ Ariel Katz, Copyright collectives, (www.rotman.utoronto.ca/timothy.simcoe/KatzCopyright.pdf), last visited on July 8, 2012.

distributing royalties of their works.¹⁷ Though collecting society has got wide recognition worldwide including in developing countries as best mechanism for efficient administration of copyright and related rights, they have been facing a number of challenges. Such challenges are wide specially in developing countries for the copyright societies have been introduced recently compared with the developed nation. So as to ensure effective enforcement of copyright and related rights in Ethiopia, individual right holders and their professional associations have recently begun to establish copyright and related rights collecting society. Such entity is not yet functional due to a number challenges. A major focus of this study is thus to explore the challenges which may hinder the effective establishment and operation of the emerging Ethiopian copy right collecting society and the opportunities for the emerging Ethiopian copy right and related rights collecting societies.

In particular the study will assess the emerging Ethiopian collecting societies in light of the existing realities such as the capacity of the individual right holders to successfully establish and follow up the operation/ function of the collecting society and the awareness of users as well as individual right holders.

Second, the study will analyze the legal, institutional and operational constraints that have negative impact to the function of emerging Ethiopian collecting society. The areas to be reviewed here is the existing Ethiopian copyright legal regime and institutions established to enforce the same and other privately established associations.

Third, Ethiopia became a party to the convention establishing the world intellectual Property Organization (WIPO) in February 1998. It has applied to become a member of the World Trade Organization (WTO). Thus, the study will try to address the positive effect of such international and regional agreements in the operation of the emerging Ethiopian copy right collecting society.

¹⁷ Copy right collecting societies of developed countries, they have collected a significant amount of capital from users of copy right- protected works. For instance, research made by daneil g, jervies indicates, within one year, 2008, that collecting societies of the US performing rights Collective Management Organizations collected US\$698 million, or approximately US\$2.50 per capita, while France collected US\$216 million, or US\$3.66 per capita; Germany collected US\$344 million, or US\$4.20 per capita; and the United Kingdom US\$248 million, or US\$4.20 per capita. Daniel J.Gervais, collective management of copyright and neighboring rights in Canada: an international perspective, (http://cilt.dal.ca/vol1_no2/pdfarticles/gervais.pdf) last visited on July 5, 2012.

As the topic of the thesis is ***“the emerging Ethiopian collecting societies: assessment of challenges and prospects”***, generally, it will address the possible challenges against the effective operation of the collecting society as well as the existing opportunities. Specifically, in addition to these general issues, the thesis will address the following questions:

- Is the existing legal and institutional framework for copyright and related rights protection in a position to support and facilitate the successful establishment and operation of the emerging Ethiopian collecting society?
- Does the government play its role to ensure successful establishment and operation of the emerging Ethiopian copyright collecting society?
- What are the possible opportunities for the effective operation of collecting society?
- Do the international agreements, particularly WIPO and WTO, have anything to do with the successful operation of the emerging Ethiopian collecting society?

Generally the paper will try to uncover the existing and potential challenges for effective operation of the emerging Ethiopian copy right collecting society. It will, mainly, focus on the legal and institutional frame works designed to enforce copyright and related rights and their implication to the effective operation of the emerging Ethiopian collecting society or otherwise. Besides, the paper will try to address other problems which may affect the function of the collecting societies. In addition to challenges, the potential opportunities will be accessed.

1.3 Scope and delimitation of the study

The paper would examine the challenges that the emerging Ethiopian collecting society has been facing in its operation. Such examination may incidentally discuss or address technical challenges and problems which are not related to the existing relevant legal and institutional framework of the nation. However, it will mainly address the challenges related to the relevant legal and institutional frame works of the nation. It will also try to review the opportunities of the collecting society especially in relation to the relevant international and regional treaties signed and supposed to be signed in near future by the nation.

For the purpose of clarity, foreign experiences on the establishment and operation of collective management system of copy right and related rights; legal and institutional frameworks of the jurisdictions and the role of the same in facilitating the establishment and operation of collecting societies will be reviewed. Accordingly, the experience of Canada, France, Kenya and South Africa would be presented.

As far as the geographical limit of the study is concerned, the relevant information would be collected from private and public institutions in Addis Ababa.

1.4 Objective and Significance of the study

As the concept of collective management system of copyright and related rights is new concept ,in Ethiopia, there is no research so far on the area in general and specifically in relation to the challenges and prospects of the emerging copyright collecting society. Hence, the study's objective is to exhaustively examine the existing and possible challenges and opportunities. Based on the whole research findings possible recommendations would be made.

The research aims to achieve two equally important objectives. First, it aims at contributing to the knowledge about copyright and related rights collecting society and the challenges that affect effective operation of the same. Second, it, in light of the research background, problems and questions indicated above, aims at indicating the measures that should be taken by the government and individual members to ensure effective operation of the emerging Ethiopian copyright collective society. The research, therefore, is helpful for pursuit of knowledge and identification of the measures to be taken so as to alleviate the challenges. Further, it will enable the government to take necessary measures –which may include policy, law, and institutional rearrangements- so as to make the function of the collecting society effective which in turn ensures the enforcement of copyright and neighboring rights. In addition, it would open a further research in the area.

1.5, Research method

This research will make use of both primary and secondary sources. Primary sources to be studied include the copyright and neighboring Proclamation No.410/2004 and some other

relevant laws. Secondary sources include interviews, books, journals, unpublished materials, reports, news papers and bulletins and cyber sources.

1.6, limitation of the study

Since the collecting society is not yet functional, there are no real cases which will clarify the challenges of the society for its effective operation. Thus, it will have no case analysis to exemplify challenges.

CHAPTER-TWO

General overview of copyright collecting societies

2.1 Introduction

Throughout the world, the rights of creators such as writers and music composers are known to be their personal rights or, if those rights have been legally transferred, the rights of the new owners. They form part of the individual rights provided for in Article 27 of the Universal Declaration of Human Rights of December 10, 1948. Besides, other international conventions, such as Berne Convention and Rome Convention, and national laws recognize the exclusive rights of copyright and related right holders over their works. In other terms, copyright and related right holders have the right to allow or to prohibit the use of their works. Such exclusive right can be exercised by the right holders individually.

However, cases show that individual management of copyrights and related rights is virtually impossible with regard to certain types of use for practical reasons. An author is not materially capable of monitoring all uses of his works; he cannot for instance contact every single radio or television station to negotiate licenses and remuneration for the use of his works. On the other hand, it is not possible for users such as broadcasting organization to seek specific permission from every author for the use of every copyrighted work. The very impracticability of managing these activities individually, both for the owners of rights and for the users, creates a need for collective management organizations/copy right collecting societies, whose role is to bridge the gap between them. Thus, collecting societies are an important links between users and copyright and related right holders.

The concept of collecting society generally refers to an organization/s which is established by copyright and related right holders with an aim to administer their rights. In order to underlay the discussions to follow, under this chapter the writer will try to clarify the denotation of copyright collecting society or collective management system of copyright and related rights, historical development of such organizations and the very rationales or reasons behind its development.

Besides, classification of copyright collecting societies and general function of the same will be dealt.

2.2 Definition of copyright collecting society

When we talk about challenges and prospects of the emerging Ethiopian copyright collecting society, it is essential to define what copyright collecting society is. The term copyright collecting society¹⁸, according to Sinacore Guinn, is a “legally cognizable entity whose objectives are to represent owners of copyright and related rights and whose function is to administer , using transactional techniques of a greater or lesser degree of collectivization, the economic and moral rights of a significant nations’ creative rights owners in their works”.¹⁹ Likewise, in his important work *Collective Administration of Copyright and Neighboring Rights*, Dr. Mihaly Ficsor, former Assistant Director General of the World Intellectual Property Organization (WIPO), defines copyright collecting society as an organization established by copyright owners to administer their rights, that is, to monitor the use of copyrighted works, negotiate with prospective users, give them licenses against appropriate fees and, under appropriate conditions, collect such fees and distribute them among the owners of rights.²⁰ Thus, as per the above mentioned definitions, the term copyright collecting society denotes or refers to associations established by copyright and related right holders to administer their rights.

¹⁸ The term copy right collecting societies also know as management societies, collective management societies, societies of authors or authors’ rights’ societies, collection and distribution societies, collective management and protection organizations or copyright offices. United Nations Educational, Scientific and Cultural Organization (UNESCO), Collective Management Bodies in Cameroon, (http://portal.unesco.org/culture/en/files/23814/11515030291Seuna_e.pdf/Seuna_e.pdf) last visited on august 12, 2012.

¹⁹ David Sinacore Guinn, collective administration of copy rights and neighboring rights (1993), (www.amazon.com/Collective-Administration-Copyrights-Neighboring-Rights) last visited on august 14, 2012.

²⁰ Mihaly Ficsor, Collective Administration of Copyright and Neighboring Rights (http://www.wipo.int/export/sites/www/dcea/en/pdf/tool_2.pdf), lasted visited on august 16, 2012.

The definition of the term, copyright collecting society, may be different when one looks at the legal provisions of different jurisdictions due to the government's policy in relation to its establishment, legal status or nature, and regulation of the same. In some jurisdictions copyright collecting society is considered as public or semi – public organization while in other jurisdictions it is private entity established by copyright and related right holders and treated as business organizations or non-profit associations. For instance, the Canadian copyright act defines copyright collecting society as an association or corporation that carries on the business of collective administration of copyright or of the remuneration right for the benefit of those who, by assignment, grant of license, appointment of it as their agent or otherwise, authorize it to act on their behalf in relation to that collective administration, and operates a licensing scheme, applicable in relation to a repertoire of works, performer's performances, sound recordings or communication signals of more than one author, performer, sound recording maker or broadcaster, pursuant to which the society, association or corporation sets out classes of uses that it agrees to authorize under this Act, and the royalties and terms and conditions on which it agrees to authorize those classes of uses, or carries on the business of collecting and distributing royalties or levies payable pursuant to the copy right holders.²¹ Unlike the Canada copy right act which doesn't impose a particular legal form for copyright collecting rights²², in some jurisdictions like Italy, copyright collecting societies are public authorities.²³

At the nutshell, though there is some sort of difference which is substantially related to government policy and legal regime of the jurisdictions, when one looks at the main functions of the copyright collecting society, it is clear that the expression of copyright collecting society refers to an entity or organization established by government or individual copyright right holders to provide license, collect royalties, distribute collected royalties to members, enter in

²¹ Daniel J. Gervais, cited above at note 17, p 12

²² In Canada, some copy right collecting societies are for-profit corporations, but often controlled by a not-for-profit Foundation, while several others are themselves not-for-profit entities. Id, p26

²³ In Italy, SIAE, the Italian Society of Authors and Publishers and the principal Collective Management Organization in the country is in fact a public authority. Ibid.

to reciprocal arrangements with other collecting societies , and to enforce moral rights of copyright holders.

2.3 Historical developments of copyright collecting societies

The evolution of copyright collecting societies dates back to 18th century.²⁴ Copyright has been managed collectively since the late 1700s and frequently claimed that it was started in France in 1777, in the field of theatre, with dramatic and literary works.²⁵ The first of such organization was *Society des Auteurs et Compositeurs Dramatiques* (SACD), created in 1777 in France by playwrights, to collect fees from theatres that had refused to pay them for the use of their plays, and *Society des Auteurs, Compositeurs et Editeurs des Musique* (SACEM), formed in 1851 by composers and music publishers, to collect money for the live performance of music in cafes, for the same reason.²⁶

The story which is considered as a beginning point for establishment of copyright collecting societies in France is described by Collsoc:²⁷

An evocative story recounts the visit of Ernest Bourget, a French composer of popular chansons and chansonettes comiques, to the Paris café Ambassadeurs where, among other pieces, his music was being played without permission. He then refused to settle the bill for his drink of sugared water, at the time a fashionable beverage. In the resulting brawl, M. Bourget argued ‘you consume my music, I consume your wares’ – an argument he won before the *Tribunal de Commerce de la Seine* which upheld a revolutionary law of 1793, recognizing a right to public performance for the first time and caused for the establishment of collective administrative management system.

The first fully-fledged collective management organization which was established after the first Copyright collecting society of France was the Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) – the Society of Authors, Composers and Music Publishers, in 1851.²⁸ It was

²⁴ WIPO AND IFRRO, Cited above at note 6, p9

²⁵ Ibid

²⁶ Ibid

²⁷ Martin Kretschmer, cited above at note 5, p8

set up shortly after the famous incident whereby the composers Parizot and Henrion together with the poet Bourget obtained an order against a Parisian café-concert for infringement of their rights by performing their works without permission and without payment of remuneration.²⁹ The French example was soon followed, first in other parts of Europe, then elsewhere- Today there is an international network of copyright collecting societies in more than 100 countries.³⁰

The development of related rights' collecting societies- societies established to collectively administer neighboring rights has recent history compared with copyright collecting societies , and the main reason for that is absences of any statutory support for neighboring right claims in most jurisdictions.³¹ At international level, neighboring rights has been legally recognized since the enactment of the Rome convention, 1961, which has also provided the base from which most national neighboring rights legislations have developed.³² The earliest, Phonographic Performance Limited (PPL), was formed in 1935 after British courts in a landmark decision *Gramophone Co. Ltd. v. Carwardine* recognized record producers rights for the first time.³³

The importance of copyright collecting societies was not limited to the administration of copyright and related rights within a certain nation because problems of copyright infringements were not limited to the domestic scene. Put differently, following technological development and the global economic integration copyright violations had been extending to the international scene which is difficult to avert by the national collecting societies. As a result, as collective management societies flourished in their own national states, the need for cooperation and harmonization on the international level became apparent.

²⁸ United Nations Education, Scientific and Cultural Organization (UNESCO), the ABC of copyright, (2010)(<http://www.unesco.org/culture/copyright>) last visited august 15,2012, p74.

²⁹ *ibid*

³⁰ WIPO and IFRRO ,cited above at note 5, p10

³¹ Paul Berry, Introduction to Collective Management of Copyright and Related Rights: a regional approach, (http://www.wipo.int/meetings/en/details.jsp?meeting_id=3662), last visited on July 24,2012

³² *Ibid*

³³ *Ibid*

Historically, the development of international cooperation of copyright collecting societies was initiated by French collecting societies.³⁴ The first international association of copyright collecting society, international confederation of societies of authors (CISAC), which encourages reciprocity agreement between copyright collecting societies of different nations, was established in 1926 following the two initiatives³⁵ organized by French collecting societies.³⁶ The founding members identified the need to establish both uniform principles and methods in each country for the collection of royalties and the protection of works, and ensure that literary and artistic property were recognized and protected throughout the world.³⁷ the International Federation of Reproduction Rights Organizations ([IFRRO](http://www.caslon.com.au/colsocietiesprofile.htm))³⁸, the Bureau International des Sociétés Gérant les Droits D'Enregistrement et les Reproduction Mecanique ([BIEM](#))³⁹ also other international association that represents copyright societies of different nations and encourage the cooperation of copyright collecting societies.⁴⁰

2.4 Theoretical justifications of copyright collecting society

³⁴ <http://www.caslon.com.au/colsocietiesprofile.htm>, last visited on July 24, 2012.

³⁵ The first initiative to establish international collecting society was organized in 1925 by Romain Coolus and it was founded to tackle some insurmountable problems involving international issues. It is around the same time that Firmin G' emier succeed to establish the universal theatrical society which is considered as second initiative for the development of international confederation of societies of authors (CISAC).Ibid.

³⁶ Ibid

³⁷ Ibid

³⁸ IFRRO began in 1980 as a working group of the Copyright Committee of the International Publishers Association (IPA) and the International Group of Scientific, Technical & Medical Publishers (STM). It is primarily concerned with photocopying and digital dissemination of text publications. Ibid

³⁹ BIEM is the international organization representing mechanical rights societies. It is based in Neuilly-sur-Seine (France) and represents 52 societies, from 56 countries. Members of BIEM enter into agreements to allow each of them to represent the others' repertoire. In this way, a BIEM society is able to license users for the vast majority of protected works in the world. Ibid

⁴⁰ Ibid

Before we proceed to theoretical justifications for development or evolution of copyright collecting societies, let's briefly review the general functions of such entity because that may give us some clue of the rationales on which the collective societies are based. The main tasks performed by copy right collecting societies of various nations are monitoring where, when and by whom works are being used; negotiating with users or their representatives; granting licenses against appropriate remuneration and under sound conditions; collecting remuneration; and distributing it to rights holders.⁴¹ Thus, Copy right collecting societies were generally intended to facilitate the effective execution of the rights of the owners of the creative works (authors) and to favor the lawful exploitation of works and cultural productions. This is the general goal for which the copy right societies are established. But, what are the specific rationales raised by scholars to justify the existence of collecting societies in the area of literary, artistic, and other creative works would be the next logical question which is examined in this topic.

The rationales claimed to justify evolution of copyright collecting society is basically based on the theory that they constitute an efficient way of organizing the lawful exploitation of works in those fields where individual licensing would prove impossible or impractical. And, it is certainly cheaper to share the financial expenses of negotiation, supervision and collection of royalties among the greatest possible number of parties. Specifically, *incapacity of owners of copy right and related rights to effectively administer their rights and transaction cost of the public as well as the owners* are the frequently forwarded rationales for emergence of copy right collecting societies.

2.4.1 Incapacity/ failure of owners of copy right and related rights to effectively administer their rights:

The general justification raised under this theory is that collecting societies came in to existence in cases where individual management of copyright is either impracticable or impossible, and copyright holders established professional organizations to look after their rights.⁴²

⁴¹ WIPO and IFRRO, cited above at note 6, p12

⁴² Christopher Heath and Kung-Chung Liu (ed), Copyright Law and the Information Society in Asia (2007), p99.

Individual copyright and related right holders practically face difficult to administer the economic right they have over their literary or music or artistic or other creative works. This is because the works or activities that should be done to exploit economic rights are next to impossible for individual copyright holders due to time and resource constraints. Thus, the possible way out to this problem is collective management of different authors' right (establishment of copy right collecting societies); the proponents of collecting society argue.⁴³ They claim further that "While an individual person is typically in a weaker position facing powerful corporate users, such as record companies, publishing houses or broadcasting organizations, uniting authors through a joint organization allows them to stand on an equal footing with their counterparts, thus providing them with a greater say as to royalty or tariffs and other licensing conditions."⁴⁴

According to those who subscribe to this view, Collective administration system of copyright and related rights is the only means of ensuring that the legitimate interests of right holders are respected when the latter is dealing with a multiplicity of users.⁴⁵ To show that establishment of collective society is the only way in order to rectify the limitations of individual copyright holders in administering their rights, they point out questions which lead to accept their assertion: "How could a composer know what use was being made of his music in the countless bars, cafés and shops, in short in all the public places around the state? And how could he enforce his rights in the courts each time they were infringed? A dramatist might be able to keep track of the performances of his plays by professional actors, at a pinch! But he is totally incapable of monitoring performances by amateurs."⁴⁶ they further argue that an artist will know who has purchased his painting when it is sold for the first time, but if the lucky owner is obliged for reasons beyond his control to part with his acquisition or if he decides to do so knowingly, the successive sales will escape the artist's attention.⁴⁷

⁴³ UNESCO, Cited above at note 7,p10

⁴⁴ *ibid*

⁴⁵ *Ibid*

⁴⁶ *Ibid*

⁴⁷ *Ibid*

Paula Schepens interestingly presents the view that copyright collecting societies are the only way to administer copyrights by raising instances where it is practically impossible for individual user to negotiate with copyright holders individually and the vice versa:⁴⁸

Collective administration is the most effective means of facilitating the public dissemination of works when the user draws upon a multiplicity of works. Consider a local radio broadcasting music almost non-stop 24 hours a day from records or pre-recorded tapes somewhere out in the bush in the tropics or in the jungle of a big city, who could it apply to other than an administration society to obtain the license that the law requires it to have? Television transmits a considerable number of musical works. Where would it get permission to use them if there were no authors' societies? Not to mention the operator of a cable network who does not even know the content of radio and television programs before retransmitting them and would thus be totally incapable of ensuring that he had the consent of the authors of all the different categories of works that he uses, be it music, films, drama, works of visual art or photographs. The publisher of an encyclopedia or electronic database, to make it more attractive to consult, must use a large number of illustrations. By applying to the authors' society he may draw from the world repertoire that it represents. Otherwise he would have to make do with just the drawings that could be produced by his in-house illustrator. What riches would then be out of his reach! Unless he were to behave like a pirate, a user who is faced with a multiplicity of right holders will find that collective administration is the only solution, even if he uses only a single work.

This theoretical view thus underlies the practical impossibility/ failure of copyright holders to administer their rights is the very reason behind the evolution of copyright collecting societies and hence the main task of copyright collecting societies is to protect and realize the interests of its members. Establishment of collecting societies, thus, is justifiable only if it is proved that the individual right holders could not individually administer their rights.

2.4.2 Transaction cost theory

without denying the historical reason or rationale for the development of collecting societies, i.e right holders inability to administer their economic rights, scholars have also come up with economic rationale for the development of collecting societies, transaction cost theory. The emergence of collecting societies as organization is to reduce the costs that copyright and related right holders may incur while they negotiate and conclude an agreement individually with users

⁴⁸UNESCO, Cited above at note 28, p74

of their works.⁴⁹ Besides, creating easy and less costly access of copyright-protected works for users is another element of the theory.⁵⁰ In the absence of collecting society from which the user could legally acquire copyright-protected works, a prospective user would face unnecessary transaction costs. That means potential users of a copyrighted-work may find it costly to identify and locate the rights owner; search costs – the time required to obtain the information needed to negotiate a price for a given use; and transaction time costs – the time taken to negotiate with individual rights owners for reproduction rights.⁵¹

Therefore, according to this theory, the existence of copyright collecting societies enables copyright owners to provide their works to users with less cost and helps users to access the creative works with lower transaction costs.⁵² Collective management system of copyright and related rights also increases the range of rights that are traded. Facilitating trade is the key function of collective management bodies as transaction costs will often be a deterrent to unilateral action (in particular for individuals and small businesses) with the result that no trade occurs.⁵³ The more right owners join a copyright collecting society the further potential of reducing costs exists given the scope for gains from economies of scale.⁵⁴

⁴⁹An economic analysis of copyright, secondary copyright and collective licensing (<http://www.pwc.co.uk/economic-services/publications/an-economic-analysis-of-copyright-lice>) last visited on august 10, 2012. See also Christopher Heath and Kung-Chung Liu (ed), Copyright Law and the Information Society in Asia (2007), p99.

⁵⁰ Ibid

⁵¹ Ibid

⁵² KEA European affairs, cited above at note 10, p8

⁵³ Ariel Katz, cited above at note 16, p4. For more on that See also World Intellectual Property Organization, *Collective Administration of Copyright and Neighboring Rights*, (1990) 63-65 (noting that not only in the case of performing rights, but also in the case of reprographic reproduction rights and the rights concerned by simultaneous and unchanged retransmission of broadcast programs “the number and circumstances of uses and the number and variety of works used make it, practically, impossible for the users to identify the right owners in due time, ask for their authorization, negotiate their remuneration and other conditions of the use and to pay the fees, on an individual basis. It is also, from a practical point of view, impossible for right owners to monitor all such uses.”)

⁵⁴ Ibid

In this regard, Ariel Katz argues the importance of copyright collecting societies is not only to protect the interest of economic rights of its members but also helps to reduce the transaction cost that both copy right holders and users may incur in the absence of copyright collecting societies.⁵⁵

By reducing the number of persons with whom users have to negotiate licensing contracts, collective rights management is, more particularly, beneficial in those fields where easy access to protected works is generally seen as desirable, such as transmission of broadcasting programmes via satellite and cable retransmission. With regard to these uses, collective management may be considered a viable alternative to a system of non-voluntary licenses as allowed for under certain international conventions. Finally, collective management increases the bargaining power of authors. While an individual person is typically in a weaker position facing powerful corporate users, such as record companies, publishing houses or broadcasting organizations, uniting authors through a joint organization allows them to stand on an equal footing with their counterparts, thus providing them with a greater say as to royalty tariffs and other licensing conditions.

In *BMI v. CBS*, the US Supreme Court articulated the classic transaction costs theory of copyright collectives:⁵⁶

[Collective licensing mechanism] is developed together out of the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid, and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. ... [T]he costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants, and it was in that milieu that the blanket license arose. A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided.

Form the above presentation it is clear that copyright collecting societies are of great importance not only to protect copyright holders' interest but also helps the users of copyright-protected works to get less costly access. The problem, not only in terms of cost but also identification of

⁵⁵ Ibid

⁵⁶ ibid

copyright owners, that users may face in the absence of collecting societies is not easy which might not be resolved through private negotiations with individual right holders.

At the nutshell, what one can sum up from the above discussion is that establishment of copyright collecting society, in addition to the benefit that owners could achieve, has also a positive implication to the users of the creative works. The theme of the theory is that collecting societies are of importance for administration of copyright and related rights for the reason that they help to reduce the cost of both the copyright and related right owners and users. Collecting societies reduce the transaction costs by establishing a network between potential users and copyright owners thereby consolidating otherwise duplicated efforts by individual rights owners on monitoring infringement and reducing the number of negotiations required between users and rights owners. Such a solution offers economic benefits because users benefit from lower costs of access to a wider range of copyrighted works; while copyright holders also benefit from lower costs as well as market access.

2.5 Functions of copyright and related right collecting societies

All sorts of copyright collecting societies have four main functions; viz: acquisition of rights from right-owners; licensing of rights to buyers; collection of fees from users for the uses made; and distribution of fees collected to the right-owners.⁵⁷ In addition to these principal functions, collecting societies undertake other related activities such as ‘improving and defending the base of rights the organization manages through action for legislative change and court action to establish precedents in law; enforcement by court action of the rights managed where

⁵⁷ Paul Berry, Cited above at note 31, p4

infringement or piracy occurs; information and education related to intellectual property and the rights managed; social or cultural action in the industry concerned'.⁵⁸

2.5.1 Acquisition of rights

As its historical evolution shows, copyright collecting society was developed to manage rights on behalf of copyright and related rights holders because it was difficult for the right holders to manage their rights individually; and hence the first step for a certain collecting society to be functional is acquiring rights from the right holders (mandates to administer copy right and related rights on behalf its members). By acquisition of rights it is to mean the process whereby the right holders transfer their rights to copyright collecting society and the latter gets legitimacy to manage such rights on behalf of the former. This process is necessary since the copyright and related rights legislations give to copyright and related right holders exclusive right over their works which includes the right to authorize, the right to prohibit and the right to receive equitable remuneration.

The process of acquisition of rights is often to be accomplished at the time of formation, though it also proceeds after its formation for new works.⁵⁹ Accordingly, at the time of formation of the collective administration organization, right-owners must make a number of decisions as to what rights and what works they will turn over to the collective administration organization for management. So raising a question that what would be the effect of individuals' decision to transfer their right to the collecting society over individual right holders' right to manage or deal with users of their work seems to be important at this juncture. Rights that are specifically

⁵⁸ Though the main function of copy right collecting societies is protecting and realizing its member's interests, a number of copy right collecting societies also engaged in other related activities such as cultural, social and educational activities. In recognition of such important role, most copyright collecting societies of different jurisdictions normally make provisions for a cultural fund within their budget to promote their national arts and culture through such events as concerts, workshops and seminars, and the provision of music scholarships to develop local cultural talent and promote national creativity. Ang Kwee Tiang, collective management organizations, their role, functions and structure, (www.wipo.com) last visited on August 10, 2012.

⁵⁹ Ibid

transferred remain with the right-owner and subject to the collecting society's management and control. Thus, individual right holders, after they specifically transfer their rights to the collecting society, would not be entitled to deal with users and give licenses over their works. However, it is worth mentioning that Moral rights, which are not assignable, cannot be managed collectively. It is only economic rights that copyright and related rights holders can transfer to the collecting society.

According to the guideline of collecting societies prepared by WIPO, There are six fundamental questions to be answered by the right holders while they decide to transfer their rights to the collecting society:⁶⁰

- ✓ whether the rights will be transferred by way of assignment and, therefore, whether the organization will have exclusive or non exclusive management of the rights and works
- ✓ whether the grant will be for one or more specific types of works
- ✓ whether one right only or more than one right will be managed
- ✓ what the geographical range of the organization's mandate will be: for the world or for a specifically defined territory
- ✓ whether the rights are assigned for the full term of protection granted by legislation for the rights assigned or a lesser defined period
- ✓ Whether the organization will represent all the holders of a particular right or only a particular group holding such rights (for example, producers and performing artists or producers only, where neighboring rights are concerned).

What one can infer from the above stated questions is that the process of acquisition of rights is not an easy task since it all depends on the right holders' decision especially when the copyright legislation leaves such process to be determined by the free will of copyright and related holders. Copyright collecting society may acquire an exclusive right to manage and can exclude the right holders from licensing of their economic rights. However, the reverse could also be true if the copyright and related right owners transfer their rights by reserving their right to manage and deal with the users. During the process of acquisition of rights, it is also possible to limit the

⁶⁰ Id, p5

period of time that the collecting society would have an authority to manage and to give license to users over economic rights. Right holders may further put limitations with respect to territory, the number of right holders to be represented by the collecting society and the number of rights to be managed by the collecting society.

The process of acquisition of rights/ transfer of mandates to the collecting society may be voluntary or involuntary (compulsory).⁶¹ In some legal systems, to be functional as representative of copyright and related right holders, collecting societies are expected to acquire mandate from individually right holders or representative organizations of individual right holders through an agreement. While in case of compulsory collective management system of copyright and related rights, collecting societies derive their mandate by legislation and hence they need not to conclude agreements with individual right holders or their professional associations.

It is because of its effect on the effective functioning of collecting society that different jurisdictions have tried to put some sort of regulation on the process of acquisition of rights. In some jurisdictions copyright and related rights holders are legally obliged to transfer exclusive rights to collecting societies. Thus, collecting societies derive their mandates not from individual right holders but by the law. The sort of collecting societies adopted in those jurisdictions are termed as compulsory collecting society and extended collecting society.⁶² In contrast, in a number of legal systems the process of acquisition of rights is to be determined freely by the right holders and the collecting society's agreement- voluntary system of collective management. Under the unregulated process of acquisition of rights (voluntary collecting societies), collecting societies are granted mandates by individual right holders. This is the case in the United States,

⁶¹WIPO and IFRRO, Cited above at note 6, pp15-22

⁶² Though management of copy right and related rights as an exclusive right is a voluntary act, but in cases of compulsory collective management rights holders cannot make claims on an individual basis. Compulsory license is introduced in 1995 by French according to which individual right holders are legally obliged to make claims only through collective management organizations. In case of extended collective management, collective societies are extended to cover rights owners who have not specifically mandated the collective society to act on their behalf (e.g. Australia, Netherlands, Singapore, and Switzerland). *Id*

United Kingdom, Japan, Colombia, Jamaica etc.⁶³ This sort of collecting society allows potential users to obtain licenses either directly from right-owners or from the collecting society.

In addition to the above stated mode of acquisition of rights, there is a third way by which collecting societies may acquire their mandate, i.e. from copyright and related rights holders' organizations or associations (e.g. authors and publishers associations), which in turn hold mandates from their members.⁶⁴

2.5.2 Licensing of rights

The second main function of collecting societies is providing licenses to users of copyrighted works. Licensing is an agreement between collecting society and users which sets the terms and the price to be paid for a particular use of copyright-protected works.⁶⁵ Such agreement may also conclude between individual copyright holders and users if the collecting society is not granted exclusive right to licenses certain copyright-protected works. There are two principal licensing techniques applied by collecting societies, i.e. title by title licensing and blanket licensing.⁶⁶

A, Title by title licensing

In this sort of licensing the collecting society authorizes users to use only a particular copyright-protected work by determining the fees in advance. It is to mean that the authorization granted to

⁶³ Argentina, Brazil, Canada, Chile, Colombia, Ireland, Hong Kong, Italy, Jamaica, Japan, Kenya, Mexico, New Zealand, South Africa, South Korea, Trinidad and Tobago, Uruguay are also instance of nations with legal regimes which permit voluntary collective licensing. In some countries, especially when the individual right holders are well organized, voluntary licensing is supported by legislation so as to guarantee fully covering licensing to the users (e.g. Denmark, Finland, Iceland, Malawi, Norway, Russia, and Sweden). Id, pp 15-22.

⁶⁴ The Jamaican Copyright Licensing Agency (JAMCOPY), Bonus Presskopia in Sweden, Japan Reprographic Rights Center (JRRC), and The Reproduction Rights Society of Nigeria (REPRONIG) are instance in this regard. Id pp 28-29

⁶⁵ Paul Berry, cited above at note 31, p9

⁶⁶ Ibid

the users could be on a work by work basis and hence users might not be entitled to exploit or reproduce other copyrighted works which are administered by the collective society. Thus, “where licenses are issued on a title-by-title basis to a licensee, there is a direct link between the work, the fee, the use, and the earnings generated for the work by the use licensed”⁶⁷. It is said that title by title licensing is the most accurate and precise method of licensing and in line with the objectives of copyright legislation which is to compensate authors individually in direct proportion to the actual use of their works.⁶⁸ This technique is often used for licensing reproduction rights in musical works for sound recordings (mechanical licensing), film and television programs and advertising (synchronization rights licensing) and literary works for performance in theatres, among others.⁶⁹

Though it simplifies the collecting society’s task of distribution, title by title technique of licensing makes the licensing process costly.⁷⁰ Besides, it is not feasible where the works to be used by the licensee are too large.⁷¹

Though the principle is that title by title licensing is freely negotiated between the copyright collecting society and users, there are also exceptional circumstances where title by title licensing becomes involuntary. Mr. Paul Berry has indentified that there are three techniques developed by legislators to enact involuntary or compulsory licensing scheme: first, the actual license is contained in the copyright or neighboring right statutes and is termed a "statutory license"; second, the license terms or rates are subject to review and approval by a Court or Tribunal before they are effective; third, a right to "equitable remuneration" may be substituted for the rights to authorize and to determine the conditions of use as in neighboring rights legislation.⁷²

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ Ibid

⁷⁰ Id, p 10

⁷¹ Ibid

⁷² Ibid

B, Blanket licensing

Blanket licensing is another way that collecting societies use to license copyrighted works and refers to a licensing technique where the entire list of works managed by a copyright collecting society is made available for a particular use or uses to a licensee for a single fee. Unlike title by title technique of licensing, blanket licensing allows the license holder to use all the Works in a collecting society's catalogue in return for paying a set of fee. The fee to be paid by licensee to the collecting societies⁷³ can be tied to the actual use made of the repertoire or to other factors (such as gross revenues of the licensee) which have only an indirect link to use, or none at all.⁷⁴ This indicates that the users who acquire blanket license from the collective society are not obliged to pay fees in advance. The question which should be raised here is that how does the society determine such Tariffs or fees, and what are the points which the society should consider to determine the amount of the tariffs.

WIPO, in its publication states the general principles as to the determination of tariffs and the factors to be considered in determining the same which have got international acceptance one of which is that the tariff is calculated in the form of a percentage of the receipts (also known as percentage rule).⁷⁵ As per this principle, if all the works used belong to the copyright repertoire,

⁷³ Though generally the process of determining fees is left to be determined by the negotiation of copy right collecting societies and representative of users, some jurisdictions have introduced some sort of regulations. In this regard, some jurisdictions require the government while others specify the factors to be taken in to account in setting of rates. For instance, Swiss law states the following factors to be considered in setting tariffs or fees: nature and quantity of works; proceeds obtained from use of works, ratio of protected to unprotected works. The government intervention in the setting of tariffs is justified that the government should also make sure the interest of users is not affected by the collecting societies because collecting societies have defacto or de jure monopoly in most jurisdictions. International Confederation of Societies of Authors and Composers (ICSAC) (<http://www.ecap-project.org/archive/fileadmin/ecapII/pdf/en/activities/national/malaysia/s>), last visited on august 12,2012.

⁷⁴ Paul Berry, cited above at note 31, p 10

⁷⁵ UNESCO, Cited above at note 28, p 24

the user generally pays about 10% of his receipts.⁷⁶ However, if the works are not the main source of interest for the public, it is not always necessary to apply the percentage rule. The society can convert the percentage into a flat charge or lump sum using criteria and parameters which enable an indirect connection to be established with the receipts that it is estimated were obtained partly; and the flat charge must follow the cost of living by being linked to the price index.⁷⁷

With respect to the factors that should be taken in to account in determining tariffs, WIPO puts the general standard; i.e. the society should determine the tariffs by reconciling both the interest of copyright holders and users.⁷⁸ However, some jurisdictions such Swiss law put specific factors to be taken in to account in setting tariffs. The factors stated by Swiss law are nature and quantity of works; proceeds obtained from use of works, ratio of protected to unprotected works.⁷⁹

Generally The ways which could be used to determine tariffs are three: first, it could be determined by individual negotiation of the collective society and users; second, if there is association of users, it could be determined by collective negotiation of the collective society and association of users which could be made at national or regional or international level; the third , in special cases, the tariff is given in the law- This will be the case when the legislator provides for a compulsory license with a right to remuneration which leaves the interested parties little or no freedom to negotiate rates.⁸⁰

Blanket license is of importance, as stated above, especially when the users' interest is to acquire license for use of different copyright-protected works. In other terms, it is the only possible licensing option where the volume of works used by a licensee or a group of licensees is too large to permit title-by-title licensing. This type of license is universally used for licensing

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ Ibid

⁷⁹ ICSAC, cited above at note 73, p 30

⁸⁰ Ibid

performing rights to the broadcast industry.⁸¹ However, it is worth to mention that blanket licensing has also its own pitfalls. It makes the distribution process very complex and expensive because it is difficult to assess the uses of particular work out of the works listed in the blanket license and distribute among the members of the collecting society.⁸²

Though the principle is, like in case of title by title licensing, that blanket licensing is freely negotiated between the copyright and related rights collecting society and users, there are also exceptional circumstances where blanket licensing becomes involuntary.

2.5.3 Collection of royalties

Collecting the royalties from the users is also the third basic and main function of any collecting society. For a collecting society to achieve its objectives for which it is established, it must collect fees and devise appropriate means or way to effectively accomplish such task. Such role of collecting societies may extend to foreign users in addition to the domestic users if it could conclude reciprocal agreement with other nations' collecting societies. In other term, the source of fees to be collected by collecting societies can be domestic and foreign.

Domestic royalties are collected from the users licensed by the collecting societies. The amount to be collected from domestic users may also include the fees of foreign works where the collecting societies have made reciprocal agreement with foreign collecting societies. Thus, the royalties that the collecting society is expected to collect are both the fees for the national copy right- protected works and other foreign copy right- protected works which of course have got legal protection by the national legal regime.⁸³

There is a problem as to the amount of royalties to be paid by the licensee because collecting societies most often give license to users without determining the amount of fees in advance.

⁸¹ Paul Berry, cited above at note 31, p 10

⁸² ICSAC, cited above at note 73, p 30

⁸³ Such distinction- royalties of domestic and foreign works - is necessary for the reason that collecting society will pay proportionally to foreign and national copy right owners. Paul Berry, cited above at note 31, p11

Such act of collecting societies is of course justifiable because sometimes it may be difficult to know and set the amount of royalties for the works to be utilized. In determining the royalties' for future usage of copyright-protected works, Mr. Paul Berry points out that the collecting society "must rely on the licensee to report accurately on the number of copies sold, on the concert receipts collected, or gross advertising revenues earned, as the case may be, so that the base upon which the licensee has calculated the amount of the royalty payment due is known".⁸⁴ This sort of calculating the rate of royalties' to be paid is also termed as principle of proportional remuneration which requires that license rates⁸⁵ be keyed to factors that make the total royalties payable a function of the income the licensee earns from use of works and rights licensed. This technique tells about the precautions that the collecting society in setting rates and hence helps the collecting society to collect proportional royalties from licensees.

As mentioned above, in addition to domestic royalties, the mandate of collecting society may also extend to foreign royalties, i.e. those generated by the licensees of foreign collective administration organizations, are collected from foreign organizations pursuant to the reciprocal representation agreements. There are two fundamental principles that apply to foreign royalty income: first, a foreign society will only pay for works and right holders for which it have received acceptable documentation; second, foreign society's statutes, distribution rules and procedures will apply to determine whether a payment will be made and the amount.⁸⁶ These principles indicate that it is important for the national society to put what might be called a documentation "export" function for its domestic repertoire into place where its members are performing in, or their works are being used in, foreign territories. It is also essential that the national society become familiar with the statutes and distribution rules of each society with which it has a reciprocal agreement.

Finally, in relation to agreement of collecting societies of different nations, it has to be noted that their relationship depends on their bilateral agreement and there is no any sort of international

⁸⁴ Ibid

⁸⁵ It refers to the rates determined by the collecting society while it provides the license to users. Id, p 13

⁸⁶ Id , p14

standard or legal instrument to regulate such cooperation of collecting societies. It all depends on principle of cooperation and reciprocal representation agreement of collecting societies.

2.5.4 Distribution of remunerations/royalties

Distribution of royalties refers to the process of organizing payment of sums collected during a certain period of time. Collecting society's task to distribute royalties collected from users⁸⁷ among members is the fourth one and claimed to be more complex which needs well developed mechanisms or standards of distribution.

In order to make the distribution accurate and fair, collecting society must distribute the money it has collected to copyrighted-works, right holders, and actual uses made.⁸⁸ However, expertise on the area argue that it is not possible to accurately describe how distribution systems of collecting societies work in detail to arrive at payments that meet or approximate the above four criteria.⁸⁹ Each collecting society has developed its own set of rules and mechanisms and hence one can't also find international standards. Thus, the writer will try outlining some basic concepts and common practices of collecting societies in.

The first and essential activity which collecting societies should do is documentation. Generally, to distribute royalties to copyright holders: firstly, society usually possess documentation on all copyrighted-works in its repertoire, either from its members' notifications or through international documentation exchange; secondly, users send it program returns of the works used

⁸⁷ Though Collecting societies are, in the vast majority, not-for-profit organizations with no share capital; and that operate on the principle that 100 % of their revenues is distributed to right-owners after the deduction of their costs of operation; in some jurisdiction, in addition to operation cost, they are legally obliged to deduct some percent from their annual total revenue for social and cultural purpose (known as socio-cultural deduction) which includes These include aid and pension programs for members and the funding of prizes, scholarships, festivals, etc to promote the national repertoire. Paul Berry, cited above at note 31, p 18

⁸⁸ Id, p14

⁸⁹ Id ,p15

classed by distribution section.⁹⁰ The royalties for all the works that have been identified will be sent to the right owners concerned.⁹¹

The areas where documentation should be made by collecting societies are three: ⁹²documentation on works⁹³, for both the national and international; documentation on right holders⁹⁴; documentation on uses made of works by licensees (statements/broadcast logs)⁹⁵. The quality of documentation in these areas determines quality of its distribution processing - i.e. whether the correct amounts of money are paid to the right people in a reasonable period of time.

Having said these much as to sorts of documentation and their basic role in accuracy of distribution of royalties, it is imperative to review ways of distribution that most collecting societies apply. The Mechanisms used to distribute royalties by different collective societies of various jurisdictions, according to WIPO, could be categorized in to two; i.e. title specific and nontitle specific.⁹⁶

⁹⁰ WIPO and IFRRO, cited above at note 6, p45

⁹¹ Ibid

⁹² Paul Berry, cited above at note 31, p15

⁹³ Ibid

⁹⁴ This documentation links the right holders to the collective administration organization of which they are members. Ibid

⁹⁵ This information is obtained normally from the licensees themselves; and On the assumption that every licensee was able, and would agree, to provide full data relating to use made of protected works, a collective administration organization would have the option to obtain full documentation from all users or partial documentation from all users or full documentation from selected users or partial documentation from selected users. Ibid

⁹⁶ See, for example, “The Copyright Clearance Center (CCC) in the United States of America uses a variety of methods to collect and distribute remuneration. In so-called “full transactional reporting” a licensee maintains a record of each instance of copying. CCC then invoices according to each use, and the revenue is distributed to rights holders accordingly.” In addition to this, under England though the mechanism is the same with that of USA there some difference as to the power to determine the copy right fee. The process of distribution in England is that: “The

Title-specific distribution can be based on different underlying data, with the following main methods: Full reporting, Partial reporting, Surveys, Objective availability, possibility to be copied.⁹⁷ Full reporting is an ideal basis for distribution and refers to that users record details of every copyright work copied.⁹⁸ While its advantage is obvious, this method may be burdensome to the user and entail high costs for collective society. Under partial reporting, users report the copying that they carry out over a certain period of time. The collection of relevant data can also be based on surveys using sampling methods.⁹⁹ Distribution in these cases is based on a sample of actual copying instances.¹⁰⁰

The samples which collective society may take to distribute royalties could be distinct from one jurisdiction to other jurisdiction. For instance, In Denmark, 5% of all schools covered by the school license must report to Copy-Dan all copying of copyrighted material that takes place over a period of 12 months.¹⁰¹ While , In the United Kingdom, the sampling period used by the Copyright Licensing Agency (CLA) is shorter than that used in Danish schools; CLA samples 2.5% of schools annually for a period of ten weeks within ten Local Education Authorities per term, over a three-year cycle in geographic rotation.¹⁰² During the survey sampling period users

agreement between the Copyright Licensing Agency Limited (CLA) and the British Library covers the activities of the world's leading document supply organization, the British Library Document Supply Center. When documents are delivered to organizations that undertake research for commercial purposes, the copyright fee is set by the rights holder, and the records of the licensing transaction are used to enable exact payment to the rights holder'. WIPO and IFRRO, cite above at note 6, p 43

⁹⁷ Ibid

⁹⁸ Ibid

⁹⁹ Ibid

¹⁰⁰ Ibid

¹⁰¹ Id , P44

¹⁰² Ibid

are asked to make an extra one-page identifying copy of each copyright copying event, recording the number of pages copied and the number of copies taken.

Where it is impossible or not feasible to collect information from the users, distribution can be based on the principle of objective availability or possibility to be copied.¹⁰³ The rationale underlying this distribution method is that all material that is available in the market can be photocopied, and at some point probably will be copied. Remuneration is therefore allocated to material on the market. Rights holders themselves report their works and publications to the collective societies. This distribution method is often used by collective societies that manage legal licenses, especially levy systems.¹⁰⁴ As it is almost impossible to collect user data from private persons, this distribution method is a cost effective way of obtaining distribution data.

In some countries rights holders have opted for non-title specific distribution of remuneration.¹⁰⁵ Statistical surveys are designed to collect generic information regarding the volume of copying of different types of material, rather than identifying specific publication. Data is collected from a limited number of users covered by the agreement, for a limited period of time; and Surveys are conducted at intervals, normally every 4–5 years.¹⁰⁶ Under this distribution method, remuneration is channeled to authors and publishers in an indirect way. The collective societies distribute remuneration to its member organizations representing authors and publishers; and it is generally left to the rights holders' associations to decide on the criteria for distribution.¹⁰⁷

¹⁰³ Ibid

¹⁰⁴ Ibid

¹⁰⁵ For instance, In Norway, collective societies normally carry out surveys in each sectors every five Years. Surveys are carried out by independent statistical bureau, engaged jointly by the collective societies and the user. The survey identifies 15 different categories of publications (such as textbook, scientific journal, sheet music and newspaper) and 15 different types of material (such as poetry, scientific text, photo, illustration and musical notes). For each area, data is processed into a matrix, which is used as a basis for calculating the remuneration. Id, p45

¹⁰⁶ Ibid

¹⁰⁷ Ibid

Authors usually have grant schemes and may fund common activities. Publishers combine data on market share and pay the remuneration individually to publishers.¹⁰⁸

2.6 Rights collectively administered by copyright collecting societies

2.6.1 Introduction

This section would focus on the types of rights under collective management and the mode of operation of collective management organizations and then proceeds to typical forms or kinds of copyright and related rights collecting societies. It seems important to make clear at the outset that collecting societies are nowadays functional to administer different rights which are known in general as copyright and related rights and that the aim of this topic is to review the special sort of collecting societies established in different jurisdiction to specially administer distinct kinds of copyrights and neighboring rights. In addition, it would try to clarify the rights that are administering by such collecting societies.

In principle, it is economic rights that can be administered collectively by collecting societies.¹⁰⁹ There are economic rights of creators which should not be transferred to collecting societies; and moral rights are not subject to collective administration system of copyright and related rights. Such principles are applicable to all types of copyright- protected works which include reproduction rights, public performance rights, cable transmission rights, publication rights, adaptation right, broadcasting rights, and online transmission rights.¹¹⁰ This is the underlying principles for all copyright collecting societies and the subsections to follow will make detail discussion as to the existing sorts of collecting societies and copyrighted works that could be administered by the same.

2.6.2 Copyrights and related rights under collecting society

Collecting societies administer several important rights on behalf their members. Firstly, collecting society administers performing rights which is termed as collecting society of

¹⁰⁸ Ibid

¹⁰⁹ Ibid

¹¹⁰ Ibid

performing rights or small rights of musical works.¹¹¹ The performing right has been defined as the right to perform works in public, to broadcast or communicate works to the public.¹¹² The International Confederation of Societies of Authors and Composers' (CISAC) Model Contract of Reciprocal Representation between Public Performance Rights Societies ("CISAC Model Contract") defines public performances as including any sound and performance that is rendered audibly to the public in any place and by any means.¹¹³ A public performance includes "in particular, performances provided by live means, instrumental or vocal; by mechanical means such as phonographic records, wires, tapes and sound tracks (magnetic or otherwise); by processes of projection (sound film), of diffusion and transmission (such as radio and television broadcasts, whether made directly or relayed, retransmitted, etc.), as well as by any means of wireless reception (radio and television receiving apparatus, telephonic reception, etc., and similar means and devices, etc.)."¹¹⁴ This definition includes nearly all forms of communication to the public, including transmission via Internet.

Secondly, copyright collecting societies administer mechanical rights on behalf of their members and this sort of collecting society is known as collecting society of mechanical rights.¹¹⁵ Mechanical rights refer to an author's right to authorize the reproduction of his work in the form

¹¹¹ The criteria for distinguishing between 'grand' and 'small' rights are the type of works involved. Broadly speaking, grand rights concern the performance of all dramatic-musical creations, such as operas or ballets, while small rights refer to the non dramatic forms of music. Only small rights are administered on a fully collective basis. Grand rights are a rule, licensed more or less individually, since the works in question are used far less frequently and their performance can be more easily monitored. UNESCO, cited above at note 28, p74

¹¹² World Intellectual Property Organization (WIPO), A Guide to Copyright Organization of Trinidad and Tobago (COTT), (<http://www.wipo.int/>), last visited on august 20, 2012.

¹¹³ World Intellectual Property Organization (WIPO), Introduction to Collective Management of Copyright and Related Rights (<http://www.wipo.int/>), last visited on august 22, 2012.

¹¹⁴ Ibid

¹¹⁵ In many countries, mechanical rights', which concern the reproduction of works in the form of sound recording - and performing rights, are administered by one collecting society. UNESCO, Cited above at note 28, p75

of mechanically produced recordings such as phonograms and audiovisual fixations.¹¹⁶ This is the reproduction of mostly musical works in CDs, tapes, vinyl records, cassettes, mini-discs, or other forms of recordings.¹¹⁷

Thirdly, collecting societies administer rights in dramatic works (referred to as collecting societies of dramatic works), which include scripts, screenplays, mime shows, ballets, theater plays, operas and musicals.¹¹⁸ These rights are usually administered using the agency type or partial collective management.¹¹⁹

Fourthly, collective management societies administer the right of reprographic reproduction of literary and musical works. This type of collective management arose as a result of the copyright problems that were caused by the development of reprography or photocopying after the 1971 Paris Revision of the Berne Convention.¹²⁰

Fifthly, collecting societies, though not widely recognized in most jurisdictions, are also established to administer rights of authors or composers after their death; i.e. known as collecting society of the *droit de suite*. Such collecting societies are established by the institutions or individuals who are entitled to acquire copyright of deceased authors or composers. The *droit de suite*, as a rule, covers original works of art; in some countries, however, it also covers original manuscripts.¹²¹ It is fairly rare that the *droit de suite* is extended to all sales (that is the case in

¹¹⁶ WIPO, cited above at note 113, p8

¹¹⁷ Ibid

¹¹⁸ Ibid

¹¹⁹ Ibid

¹²⁰ Ibid

¹²¹ Id, p15

Brazil, Portugal, Uruguay). ¹²²The great majority of countries only apply this right to public auction sales and some of them also to sales through dealers. ¹²³

Finally , there are three sorts of collecting societies developed to administer not only copyrights but also to collectively manage related rights; viz, collecting societies of performers and phonogram producers, collecting societies of rights concerned by cable transmission of broadcast programs, and collecting societies concerned by home taping. The mandate of collecting society of performers and phonogram producers is to administer the exclusive right of performers and producers of phonograms in respect of broadcasting and communication to the public of their performances recorded on phonograms or their phonograms, respectively. In the majority of countries where such a right is recognized, performers and producers of phonograms have established joint collective management organizations¹²⁴ while in certain other countries, the two categories of beneficiaries have separate organizations (e.g., SAMI in Sweden for performers, PPL in the United Kingdom and IFPI national groups in other countries).¹²⁵

2.6.3 Classification of copyright collecting societies

As it is described under the topic which dealt with rationales for development of collective society, collective societies of both common law and continental legal system perform a number of common roles: they provide a single point of access to content for those wishing to reproduce copyright materials and, in this way, help to keep administrative costs of secondary licensing to a minimum. They also ensure content creators are rewarded for any copying or reproduction of their work and they act as advocates for their members.

¹²² Ibid

¹²³ Ibid

¹²⁴ Austria, Brazil, Denmark, Finland and Germany are the states where performers and phonogram producers have established joint collecting society. Id, p 24

¹²⁵ Ibid

However, there are some significant differences in the forms/kinds of collective societies across countries. These are often the result of the legislative framework under which they operate and the economic, social and political realities of the countries.

I, voluntary collecting societies, Voluntary collective societies with back-up in legislation, and collecting societies which provide Licensing under a legal license

Taking the legislative frame in which copyright collecting societies operate, international federation of reproduction rights organization (IFRRO) classifies the operating models of copy right collecting societies in to three: viz; voluntary collecting societies, Voluntary collective societies with back-up in legislation , and collecting societies which provide Licensing under a legal license.¹²⁶

Under the first sort of copy right collecting society, voluntary collecting societies, the mandate of collecting societies to provide license and collect royalties from users is voluntarily entrusted by copy right and related right holders and hence individual copy right holders have the right either to transfer their right to the collecting society or individually licenses and collect royalties from users.¹²⁷ There is no law which governs the role of copy right collecting societies and their relation with the individual right holders. Put differently, the relationship between the copy right collecting societies and copy right holders is to be determined by agreement of the organizations and individual right holders.

Voluntary copyright collecting society with back-up in legislation has two forms; first extended collecting society and compulsory collecting society.¹²⁸ Extended collecting society is similar with that of voluntary collecting society except that the agreements reached between users and

¹²⁶ WIPO and IFRRO, cite above at note 6,p 15

¹²⁷ Argentina, Brazil, Canada, Chile, Colombia, Ireland, Hong Kong, Italy, Jamaica, Japan, Kenya, Mexico, new Zealand, South Africa, south Korea, Trinidad and Tobago, Uruguay are also instance of nations with legal regimes which permit voluntary collective licensing. UNESCO, cited above at note 28 ,pp 15-22

¹²⁸ Id , p 16

collective societies are extended to cover rights of owners who have not specifically mandated the collective society to act on their behalf.¹²⁹ In this sort of copy right collecting society Rights owners are able to opt out of the collective societies if they wish. Under compulsory copy right collecting society, right owners are obliged by law to negotiate secondary rights through a Collective societies with no opt out.¹³⁰

Finally, the third form of collecting society is collecting societies which provide licensing under a legal license in that users get licenses to exploit creative works without securing right holder's consent by paying the legally determined remuneration to owners of the work.¹³¹ Collecting societies which provide a legal license are mostly functional in relation to reproduction rights.¹³² This sort of collecting society also takes two forms. First; Non-voluntary system with a legal license in that a license is provided by law so that no agreement with the rights owner is needed; however, there is a right to remuneration and a license fee is set by law and collected by collective societies on behalf of all rights owners.¹³³ Second, Private copying remuneration with a levy system in that license fees are levied on copying equipment at the point of sale or for ongoing operation and the collective society collects and distributes the fees to the rights owner.¹³⁴

¹²⁹In some countries, especially when the individual right holders are well organized, voluntary licensing is supported by legislation so as to guarantee fully covering licensing to the users (e.g. Denmark, Finland Iceland, Malawi, Norway, Russia, and Sweden). Id, p 17

¹³⁰ Though management of copy right and related rights as an exclusive right is a voluntary act, but in cases of compulsory collective management rights holders cannot make claims on an individual basis. Compulsory license is introduced in 1995 by French according to which individual right holders are legally obliged to make claims only through collective management organizations. Ibid

¹³¹ Australia, Netherlands, Singapore, and Switzerland have copy right legal regime which recognizes collecting societies which provide Licensing under a legal license. Id,p18

¹³² Ibid

¹³³ Switzerland copyright legal regime is an instance in this regard. Ibid

¹³⁴ Example Belgium copy right legal regime. Ibid

II, Traditional collecting society, Agency type collecting society, and One- stop shop collecting societies

From the view point of the scope of rights they administer, copy right collecting societies may also be classified as traditional, agency type and one- stop shop collecting societies. Traditional collecting societies refers to copy right collecting societies in which individual right holders are not entitled to individually negotiate with users after they transferred their copy right to be collectively administered.¹³⁵ In other terms, it is the copy right collecting society that has the exclusive power to negotiate and provide license to users and hence there is no individual license. Thus, under traditional copy right collecting society, individual right owners authorize one or more collecting societies to administer their rights on their behalf, on an exclusive basis. This is to mean that the individual right owner, as a rule, may no longer individually negotiate terms and conditions with the users of the creative work -it is the collecting societies that then offer licenses to prospective users.

In agency type collective society, the individual right owner, to greater or lesser extent, has a role in the negotiation which could be made to determine the terms of use of the creative work. The typical example of such agency-type of collective management is in the field of dramatic and dramatic musical works where collecting societies negotiate a general agreement with organizations, representing theatres, for the exploitation of particular works.¹³⁶ Such agreements only specify minimum terms and the particular performance of each play still requires the permission of the author in question in the form of an individually negotiated contract.¹³⁷ This sort of collective society is, thus, different from traditional form of collective society in that the individual owner has exclusively transferred his right to negotiate and determine or issue secondary licenses to the collective society.

¹³⁵ Id ,p20

¹³⁶ Id ,p 76

¹³⁷ Ibid

Finally, the third kind of collective society, one-stop shop sort of collective society, is a coalition of independent collective society's issues licenses that include several authorizations concerning different sets of rights.¹³⁸

III, Non-profit-making private entities, profit- making Private entities, and public or semi-public entities

Legal status of copy right collecting societies is not the same in all jurisdictions. It is from this point of view that copy right collecting societies are classified in to three; Non-profit-making private entities, profit-making Private entities, and public or semi- public entities.

Copy right collecting societies which fall under the first category, non- profit – making entities, are legally treated as association established with an aim to protect their members' interest and not obliged to carry out their activities like other business organizations which are established to achieve economic profit or some sort of economic gain.¹³⁹

The second sort of copy right collecting societies, profit-making private entities, are established by organizations and legally treated as business organizations established to achieve economic profit. Such sort of copy right collecting society is developed and prevalent in United States of America.¹⁴⁰

¹³⁸ Historically, one – stop shop sort of collecting society has been evolved to address the problem in licensing a creative work over which a number of individuals have right ; and It is particularly helpful with regard to audiovisual works, multimedia productions and all other works in which multiple right owners may claim rights, such as directors or script writer. Ibid

¹³⁹ Such sort of copy right collecting societies are established by right owners and most of European and south American copy right collecting societies are typical examples in this regard. Ibid

¹⁴⁰ BMI (Broadcast Music, Inc.) in the United States of America, which was originally founded by broadcasting organizations, is typical example of copy right collecting societies which are categorized as private entities(private business organizations). Ibid

Finally, some copyright collecting societies, especially in developing countries, are legally established as public or semi public entities; i.e. collecting societies are legally established and controlled their functions by governments of the states like other government institutions.¹⁴¹ Government agencies play proactive role in the establishment and operation of collecting societies by extending financial and technical assistance.

CHAPTER THREE

Experience of some jurisdictions

3.1 Introduction

In this part of the paper, the writer deals with experience of some jurisdictions in relation to copyright collecting societies and specific discussion would be made on the legislative supports and regulatory frameworks of the jurisdictions. Specifically, legal status of copyright collecting societies; the legislative support given to copyright collecting societies in acquisition of rights (legislative support for copyright collecting societies' rights acquisition processes); state support and control in formation and operation of copyright collecting societies, and legislative support in the course of setting tariffs and distribution of royalties will be dealt.

¹⁴¹ Ibid

Thus, in this chapter the experience of the jurisdictions would be presented to show the extent of the governments support, through enactment of legislations or other ways, for successful establishment and operation of copyright collecting societies. This discussion is of importance to show especially the existing and potential challenges of the emerging Ethiopian copyright collecting society which may arise from the existing legislative and institutional frame work of Ethiopian copyright system.

When we talk about the experience of some jurisdictions, therefore, it is worth to mention that the discussion would focus on substantive regimes and institutional frame work thereof. The jurisdiction for discussions are selected based on their relevance to Ethiopia and well developed experiences. In view of that, the experience of Canada, France, South Africa, and Kenya are selected to be dealt in the sections to follow.

3.2 The French experience

As the history of copyright collecting societies indicates, France is a pioneer in establishing copyright collecting societies which termed, in France, as royalty collection and distribution societies.¹⁴² These days France has numerous categories of collecting societies which are generally categorized as primary and intermediary collective societies.¹⁴³ The first category, primary management societies¹⁴⁴ are in direct contact with the copyright and related right holders and, in addition to collection and distribution of royalties, they often involve in other

¹⁴² In France, The development of copyright collecting society dates back to the second half of 18th century and that shows that the development of copy right collecting societies in France is parallel with copy right legislation of the state. The first copy right collecting society was established, in 1777, to collectively manage rights of performers of theaters and it is through time that other copy right collecting societies came in to existence –for example composers collecting society (SACEM) was formed in 1847. Daniel J. Gervais(ed), cited above at note 3, p 154.

¹⁴³ Id, p156

¹⁴⁴ primary management collective societies includes the following,: authors societies such as SACEM (which is the oldest copy right collecting society in the world and its mandate is to operate and administer all rights involving public execution, public performance, and mechanical reproduction; society of civile des auteurs multimrdias(SCAM) which manages multimedia works other than plays and musical works; societe des auteurs et compositeurs dramatiques(SACD) which has three catagories of members i.e authors and composers ,heirs and legatees,and assigeens;the societe des auteurs dans les arts graphiques(ADAGP) that manages graphic art works; neighboring rights societies such as the sound recording producers societies(SCPP and SPPF); artist societies (ADAMI and SPEDIDAM);producers societies (ANGOA and PROCIREP). Id, pp 159 -163

activities such as defense of their members' economic and legal rights and legal action to protect moral rights of copyright holders; while intermediary societies ¹⁴⁵engage in distribution of collected royalties and are a kind of a common get way for one category of works.¹⁴⁶

French intellectual property code, which was enacted in July, 1985, has devoted an entire chapter to collecting societies so as to govern the establishment, operation and regulation of collecting societies. With respect to the establishment and legal status of copy collecting societies, it has stated that all collecting societies, whether they are administrating copyright or neighboring rights, must be established as civil- law companies whose members are the holders of the copyright or neighboring rights, depending on the case.¹⁴⁷ The fact that copyright collecting societies shall be established and treated as non- profit companies (civil companies) also clearly stated under article 1.321-2 of the intellectual property code which provides for "contracts concluded by the civil law societies of authors or of neighboring rights, in implementation of their purpose, with the users of all or part of their repertoire shall constitute civil law instruments".¹⁴⁸ Thus, collecting societies are treated as civil associations which are established to realize its member's interest. The question that one may pose here is that what is the consequence of determining legal status or nature of collecting societies to be non-profit companies? Daniel Gervies points out three consequences of collecting societies legal status¹⁴⁹: first, the courts with jurisdictions if there is dispute are the common law civil courts;

¹⁴⁵ These sort of collecting societies are different from primary management collective societies because they constitute an extra layer in the flows of remuneration and their members are primarily collecting societies. They are designed to realize economic scale. The collecting societies categorized under intermediary collecting societies are: *societe pour l'administrartion du droit de reproduction me'canique (SDRM)* (manages the mechanical reproduction rights of authors, composers, and publishers of music), *SESAM* which groups together authors societies (*SACEM, SCAM, ADAGP*), *copy France* and *SORECOP*, *centre francais d'exploitation du droit de copie (CFC)* (administers, under legal license, the reprography rights assigned or entrusted to it by authors), and *societe civile pour la perception de la remuneration equitable (SPRE)* that groups the two sound-recording- producer societies ,*SCPP* and *SPPF*. Id, pp 163-165

¹⁴⁶ Id, p 157

¹⁴⁷ French intellectual property code (1985), Article L. 321-1, (<http://www.wipo.int/clea/en/details.jsp?id=5563>), last visited on September 16, 2012

¹⁴⁸ Ibid

¹⁴⁹ Daniel Gervias , cited above at note 3 , p166

second, collecting societies are not supposed to involve in profit making activities and make profit; third, collecting societies are not subject to taxation or to commercial legislations¹⁵⁰. Thus, the management of artistic and literary works is treated as civil activities which are regulated by civil law. In addition, one may also observe that the intellectual code of France (article L.321-1 and sub-article two of the same article) not only determines the legal status of collecting societies but also those who can establish collecting societies, i.e. copy right and neighboring rights holders.

When one looks at the legal position of intellectual property code of France as to legal limits to the function of collecting societies, the principle is that collective societies may act freely if they are duly authorized by their members unless the government ministry of culture has demanded its dissolution at the high court.¹⁵¹ There are also specific requirements that collecting society must observe in the stage of its establishment or while it is functional. Once a collecting society is established, it must obtain from its members the right to administer copyrights and related rights on their behalf.¹⁵² There are also circumstances, especially for certain types of collections, where collecting societies obliged to obtain approval from the concerned government organ, ministry of culture.¹⁵³ The requirement that the establishment of collecting societies must be approved by ministry of culture is exceptionally implemented for copyright and neighboring rights under obligatory collective management. That means it is applicable to collecting societies established to manage copyrights and neighboring rights that the law stipulates to be administered by collecting society.

¹⁵⁰ As it has shown by the case brought before French cassation bench regarding SDRM, their civil character, does not allow them to evade competition law and hence they are prohibited from abusing their *de jure* or *de facto* monopoly status as well as engaging in other anti-competitive act. Ibid

¹⁵¹ Ibid

¹⁵² Ibid

¹⁵³ Approval must be issued for instance for collective management of the reprography right for which act 95-4 of 3 January 1995 that provides approval according to the criteria of professional qualification of the officers, the human and material resources proposed, and the equitable nature of the proposed nature of distribution; and for collective management of rights for simultaneous, complete, unchanged retransmission of works broadcast on television. Id

It is clearly stated, as mentioned earlier, that all collecting societies must obtain mandates from their members. Members are at liberty either to exclusively transfer their rights or select the rights to be administered collectively. They are also entitled to revoke the mandates they transferred, that mean they may withdraw from the collecting society. The code, to protect copyright and neighboring right holders, goes further and put a limitation on the assignment of mandates that “total transfer of future works shall be null and void”.¹⁵⁴ Thus, the legal regime also tries to regulate the relationship between the collecting society and its members.

A, Collection and distribution of remunerations/royalties

In France, The act of collecting and distributing remuneration or royalties is regulated by the French intellectual property code. The means that collecting societies may use to collect remuneration is not the same for all sorts of copyrighted works. There are different methods that are legally recognized to be followed by collecting societies while they involve in collection of royalties from users. The same is true with distribution of remunerations.

With respect to collection of royalties, different sort of mechanisms are recognized. The first one is contractual which is applicable for collection of copyright and neighboring rights royalties.¹⁵⁵ In the second way of collection of royalties¹⁵⁶, the users and collecting societies are not at liberty to negotiate and reach in to agreement as to the amount of fees to be paid against the use of copyrighted works. There are legally established committees by the government to determine the amount of tariff or royalties to be paid to collecting societies and such sort of licenses is called legal license. In relation to contractual mechanism, which is recognized as a first tool to collect remunerations under the French intellectual property code, Article L 321-2 provides that contracts concluded with users by collecting societies of authors in the implementation of their objective for all or part of their repertoire are civil acts. This definition was aimed to differentiate the acts of collecting societies are different from other constraining legislations applying to

¹⁵⁴ Id, Article L.131-1

¹⁵⁵ Id, Arts 1321-2 and 1321-10

¹⁵⁶ Id, Arts 214-1 and 214-4

commercial organizations.¹⁵⁷ The nature of the remuneration to be paid by the users as per the contract they concluded with collecting societies may consist of the users' receipts or take the form of lump -sum payment.¹⁵⁸ This is being true both for collecting societies of copyright as well as collecting societies of neighboring rights. However, it has to be noted that the terminologies used to describe the contract that copyright collecting societies and related rights collecting societies may use to collect remunerations are different. The contract to be concluded by copyright collecting societies is termed as 'general representation contract',¹⁵⁹ while in case of neighboring rights the term denoted the contract is 'general contract of join interest'.

The system for collection of remunerations in case of fair remuneration¹⁶⁰ and remuneration for private copying (which are also termed as legal licenses/ non-voluntary licenses) is also different from the above stated ways. The intellectual property code of France points out the grounds and the concerned government organ responsible to set up the amount of remuneration to be paid by users. Article L214-1 of the intellectual property provides the bases for the fair remuneration, which must be based on the user's operating receipts or accessed on a lump-sum basis. There is an administrative committee which is established as per article L214-4 and mandated with determining the schedules for fair remuneration. The same is true with collection of remunerations for private copy, i.e. the means of collection and schedules for collection of remuneration for private copying is determined by the intellectual property code of France and decisions of administrative committee respectively.

Coming to the distribution of collected royalties, French intellectual property code predetermines the distribution methods and the fate of the funds which cannot be distributed among the copyright and related right holders. though it recognizes that the management costs of collecting

¹⁵⁷ Daniel Gervias, cited above at note 3, p170. See also article 213-18 which defines the nature of the contract that collecting societies can conclude with users of copyrighted works.

¹⁵⁸ Daniel Gervias, cited above at note 3, p171

¹⁵⁹ Article 132-18 defines representation contract as " contract under which a professional body of authors grants to an entertainment the rights to perform, for the duration of the contract ,the existing or future works constituting the repertoire of such body under the conditions stipulated by the author or his successors in title". Id

¹⁶⁰ In France Fair remuneration refers to 'the royalties due for direct communication of a recording in a public place, when it is not used in a show, on radio broadcast, or in the simultaneous and complete cable retransmission of this broadcast'. Daneil Gervias, cited above at note 3, p173.

societies should be covered by the remunerations to be distributed to copyright holders, it has left the amount of maximum management costs of collecting societies to be determined by the decision making bodies of the same (board of directors and annual general meetings).

Specifically, the distribution formulas that collecting societies should follow are enumerated under article L214-4 and L 311-7 of French intellectual property code:

- Fair remuneration shall be shared half and half between sound recording producers and performing artists;
- Remuneration of private copying of sound recordings shall go one half to authors, one quarter to performing artists and one quarter to recording producers;
- Distribution of remunerations for private copying of audio-visual material goes in equal thirds to authors, producers and artists;
- Remuneration for private copy of books should go one half each to authors and publishers.

In addition to these formulas the law also permits to be determined by the internal regulation of the collecting society and as a result collecting societies have set up formulas and schedules that classify the works and authors.¹⁶¹ “When the declarations of are too imprecise to use or do not exist, some societies use sampling or surveys.”¹⁶²

Moreover, intellectual property code of France deals with the nature of undistributed funds and the areas to which such funds may use up. The sources of these undistributed sums can be legal license and obligatory management. As per the intellectual property code provides that the collecting societies should use such undistributed funds to assist to creation, dissemination of live shows and training of artists.¹⁶³

B, Oversight of collecting societies

¹⁶¹ Id, p175

¹⁶² Ibid

¹⁶³ French Intellectual Property Code, cited above at note 233, Art. 321-9

With respect to regulation or oversight of copyright collecting societies, French intellectual property code provides for two ways, i.e. internal and external oversight. The first mechanism, internal oversight, is performed by the members of the collecting society and that includes: monitoring by the members of the society, and the audit performed annually by the statutory auditor (internal auditor of the collecting society).¹⁶⁴

Right of individual members to obtain information as to the operation of the collecting society is set out as one mechanism to assure the internal oversight is effective. This principle is provided under article 321-5 of French intellectual property code which reads the right to communication provided for in Article 1855 of the Civil Code shall apply to royalty collection and distribution societies, but without a member being able to obtain communication of the amount of royalties distributed on an individual basis to any other right holder than himself. The right to information has two aspects which are permanent aspect and recurrent aspect. In the first case, permanent right to obtain information, members of collecting societies have the right to ask the society, at any time, to communicate the list of managers, a table showing over a five year period the annual amounts collected and distributed and the management cost; and a document that describes the remuneration distribution rules. The second sort of right to obtain information is limited and it can be exercised by the members only at the annual general meeting. As per this principle, members, up on written application and before annual general meeting, have the right to see documents to be provided before the annual general meeting for approval. Any member who is refused communication has a right ‘to appeal to a special committee composed of at least five members elected from at the annual general meeting from among those who are not corporate officers’.¹⁶⁵

As already mentioned, external oversight mechanism is also recognized by the intellectual property code of France and that includes audit by public authorities; audit through right to information when the collecting society is formed, at key times in the life of collecting societies and through surveillances of the formation of certain kinds of remuneration.¹⁶⁶

¹⁶⁴ Daniel Gervias, cited above at note 3, p179

¹⁶⁵ Daniel Gervias, cited above at note 3, p181

¹⁶⁶ French intellectual property code, cited above at note 233, Art 321-11

The code provides for the mechanisms that must be implemented to supervise collecting societies and entrusts institutions to carry out the same. Institutionally, the code mandates two institutions, standing committee to be appointed by decree and ministry of culture, to oversight the operations of collecting societies. The ministry of culture has a mandate to evaluate, when the collecting society is formed, the draft statutes and general rules of the collecting society and it may, within a month after receiving them, demand its dissolution before a court if it feels that there are real and series obstacles to the creation of society.¹⁶⁷ The power of minister of culture to request for dissolution of collecting societies may also exercise after the establishment of collecting societies. It also sets other monitoring system which is internal monitoring systems i.e. performed by the members of their society and the audit performed annually by the statutory auditor.¹⁶⁸

Public authorities also assist collecting societies especially in determining remunerations linked to non voluntary license or obligatory collective management. The intellectual property code provides for the creation of administrative committees with the mission of determining the amount of remuneration and terms of collection.¹⁶⁹

Finally, it is worth mentioning that French collecting societies are also subject to the European Union competition rules. The European competition rules, as traditionally applied by the European court of justice, have been applied to regulate: first, the relationship between collecting management societies and their members¹⁷⁰; second, the relationship between collecting societies and users¹⁷¹; third, the reciprocal relationship between different collecting societies¹⁷².

¹⁶⁷ The criteria for evaluation are essentially linked to the professional qualifications of the founders of such society, the human and material means that they intend to use to collect royalties and to exploit their repertoire (article L.321-3). The ministry of culture has also other mandates such requesting annually report of collecting societies (article L.321-12) and approving establishment of mandatory collecting societies. Id

¹⁶⁸ Id, Arts 321-4, and 321-5

¹⁶⁹ Id, Arts 214-4, and 311- 5

¹⁷⁰ There are principles, which develops from the decisions of the European commission that regulates the relationship between collecting societies and their members among which the first is that collecting societies may not require their members to assign unduly broad category of rights. The other principle is that collecting societies

3.3, the Canadian experience

In Canada there is a special legal regime which regulates the establishment and function of copy right collecting societies. There is also government institution established to follow up the enforcement of copy right collecting societies' legal regimes. the copy right legal regime of the country devises not only a law which regulates the establishment and operation of copy right collecting societies but also came up with different sections, which regulate copy right collecting societies differently, by considering the difference among the copyrighted works that are collectively administered by copyright collecting societies. It also provides for special institution, copyright board, which is entrusted to supervise the function of copyright collecting societies and to protect the interest of users by determining tariffs according to the criteria stated in the copyright act.

Though the current system of collective management of copyright and related rights in Canada is by and large a voluntary system it provides for both voluntary and compulsory copyright collecting societies. For instance it stipulates non voluntary licensing regime with respect to retransmissions and certain uses by educational institutions¹⁷³ and private copying¹⁷⁴.

The provisions that deal with copyright collecting societies are incorporated in the Canada copy right act and divided in to four parts according to the sort of copy rights and related rights involved: viz, Music performing rights and certain neighboring rights; General regime,

may not discriminate among members as to distribution of incomes. Daniel Gervias, cited above at note 3, p121-122.

¹⁷¹ The objective of principles developed from the decisions of European commission to regulate the relationship between collecting societies and users is to protect users and it includes principle of non discrimination of users and prohibition not to fix excessive fees against users. Id ,pp122-123

¹⁷² Generally the principle of the European commission as to the relationship of collecting societies is that collecting societies of the member states shall compete against each other in accordance to rules and principles of the commission's competition law. ibid

¹⁷³ The Canadian copyright act (1985), section 71, (<http://www.justice.gc.ca/eng/contact.htm>) last visited on September 24, 2012.

¹⁷⁴ Id , Arts 79-88

Retransmissions and certain uses by educational institutions; and □Private copying. These copy right collecting societies' legal regimes are classified according to the rights they involved. The first category is stated under section 67 of the copy right act and applicable to the copy right collecting societies established to collectively manage performers' rights and neighboring rights. This section also points out specific criteria to be used in fixing tariffs that collective management organizations of performing rights and certain neighboring rights and copy right board should take in to account.¹⁷⁵

It is section 70.1 of the copy right act that is termed as general regime which applies to all voluntary copy right collecting societies except to copy right collecting society of performers and neighboring rights. It is also applicable to the collective management of rights of reproduction, adaptation, rental, publication and public performance in the area of copyright and to the rights of performers concerning first fixation of their performances, reproduction and communication to the public of live performances; and to certain rights of sound recording producers and broadcasters.¹⁷⁶ Copyright collecting societies operating under this regime can file tariffs for approval by the Board¹⁷⁷ or conclude agreements with users¹⁷⁸ that will take precedence over tariffs.¹⁷⁹ They may also file a copy of an agreement concluded with a user with the Board¹⁸⁰. In this regard, collecting societies can ask the board to determine the royalty applicable in individual cases (for instance in case of arbitration).¹⁸¹

In Canada , when we look at the legislative support for establishment of new copyright collecting society, there is no specific requirement in copyright legal regime which determines

¹⁷⁵ Id, Art 68(2)

¹⁷⁶ Daniel J. Gervais, Collective Management of Copyright and Neighboring rights in Canada: An international perspective, (http://cjlt.dal.ca/vol1_no2/pdfarticles/gervais.pdf) last visited on July 5, 2012, p 15

¹⁷⁷ Canada copy right act, cited above at note 173, article 70(13)

¹⁷⁸ Id , Art 70.12(b)

¹⁷⁹ Id ,Art 70.191

¹⁸⁰ The benefit of including such provision in the copy right act (Canada copyright act) is to prevent the application of completion act dealing with conspiracies to limit competition. However, the Commissioner of Competition may ask the Copyright Board to examine the agreement if he considers it is contrary to the public interest. Id , Art 70.5(2) - (5)

¹⁸¹ Id, Arts 70.2 and 70.3

the legal status or nature of the collecting society. In other terms, the legal system doesn't impose a particular legal form for copy right collecting societies- some of copy right collecting societies are for Profit Corporation while several others are not for profit entities.¹⁸² Thus, there is no special support provided to the establishment of copy right collecting society in Canada. It is up to the members to determine the nature of copyright collecting societies since the law is silent as to the legal status or nature of collecting societies.¹⁸³ The government's role in this regard is not different from the role that has played in establishment of other for profit corporations and not-for-profit entities.

The other point worth mentioning here is the position of copyright legal regime of the nation in determining monopoly of copyright collecting society. It is silent as to the monopoly position of copy right collecting society which operates in a specific field. However, the practice demonstrates the existence of defacto-monopoly and competition among copy right collecting societies in a specific field.¹⁸⁴ That means, there are cases in Canada where a single collecting

¹⁸² Daniel Gervais , cited above at note 176, p 24

¹⁸³ In most developed countries the situation is similar. Most jurisdictions, like Canada legal regime, don't impose a specific legal form for copy right collecting societies. For instance, In Europe, only two of the 15 European Union countries' legislation requires a specific legal form for copy right collecting societies; i.e. In Italy, the Italian Society of Authors and Publishers and principal Collective Management Organization in the country is in fact a public authority, while in Greece copy right collecting societies are commercial (for-profit) company. Greek law also allows copy right collecting societies to operate as a "cooperative company". The reason is that it is believed that the success or failure of collectives does not seem to be linked to their legal status. Successful collectives operate under various legal configurations, and the same could be said of less successful ones. Report on the Collective Management of Copyright in the European Union, by Deloitte & Touche, EU document 98/B5/3000/E/79, made available May 11th, 2000 by the European Commission's Directorate-General Internal Market (unit E3). www.wipo.com , last visited on September 14, 2012.

¹⁸⁴ Daniel j. Gervais points out, by providing specific practical examples, that all the above mentioned methods of acquisition are applicable in Canada: For instance, in the music field, composers and lyricists assign their copyrights, while authors and publishers usually give a non-exclusive mandate to license reprographic uses. In the area of theatrical rights, the Collective Management Organization is usually an agent who will negotiate with the user on behalf of an author. A *sui generis* regime applies to non-member rights holders, who are given a right to the royalties based on an approved tariff (section 76) or whose enforcement options outside of the collective regime are limited to those available within the regime. Finally, in the area of retransmission rights, a legal license is imposed

society operates in a given field. On the other hand, competition is possible between two Collective Management Organizations, that is, two or more copyright collecting societies operate in the same field.¹⁸⁵

The first task of copy right collecting society after its establishment is acquisition of rights from the copy right holders. Transfer of copyright to collecting societies, in Canada, is to be made voluntarily by the right holders and there are different methods used by collecting societies i.e. full assignment of rights to copy right collecting societies; non- exclusive license; an authorization to act as agent; a *sui generis* (mixed) regime; and legal (non-voluntary) license.¹⁸⁶

The copyright act provides for the creation of institution called copyright board and outlines functions of the same.¹⁸⁷ The Board is empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective-administration society.¹⁸⁸ In other terms the principle as to fixation of fee or remuneration is that collecting societies and users are free to agree. It is only when collecting societies and users fail to agree on the terms of the licenses that copyright board, up on the request of either party, set up fees and the related terms and the conditions. The Board has also an authority to supervise agreements between users and licensing bodies and issues licenses when the copyright owner cannot be located.¹⁸⁹ Moreover, it has a power to file proposed tariffs which, after their approval, apply to all users who have not reached separate agreement with collecting societies.¹⁹⁰ Finally, it has a power to resolve disputes that may risen among users and collecting societies.¹⁹¹ It has to be noted that Copy right board is not the only regulatory

and its management can only be done through a collective management organization. Daniel J. Gervais, cited above at note 176 , pp 25-26

¹⁸⁵ Ibid

¹⁸⁶ Id, p28

¹⁸⁷ Canada copy right act, cited above at note 173, Art 42

¹⁸⁸ Id , Arts 70(12) , 75 and 83

¹⁸⁹ Id

¹⁹⁰ Id, See articles 38(2), 76(1) and (3) and 83(12)

¹⁹¹ Id, Arts 67(1)(3),70(14), 71(4), 83(5), and 70.(2)-(4)

body that oversees the operation of collecting societies. The commissioner of the competition and the competition tribunal also oversees collecting societies. However, the regulatory power of commissioner of the competition is limited to the relationship of collecting societies and users; it would not review for instance the royalties and related terms and conditions set by copy right board.¹⁹²

A, Collection and distribution of remunerations/royalties

There are no specifically predetermined mechanisms that collecting societies shall use in collecting royalties and distribution collected remuneration among its members. Thus collecting societies can choose the means which is appropriate to collect royalties through contractual agreements to be made with the users. However, since the Canadian copyright recognizes private levying system which actual needs determination of tariffs by the concerned government organ and collecting society, collecting societies and users may not be at liberty to reach in to agreement as to the amount of royalties.

With respect to administration costs, the law says nothing and the practice collecting societies in determining the amount of administrative costs has not uniformity. Canadian collecting societies account their administrative expenses in variety of ways. some of the collecting societies pay their expenses before allocating royalties for distribution; while others ‘generally charge a straight commission, something that is truly possible when individual transactions are tracked’.¹⁹³ Similarly, the ratio to be allocated for administrative costs is different; from as low as 5% to 20% or even more.¹⁹⁴

As far as distribution of collected remuneration or royalties collecting societies are not obliged to use any particularly methodology. To distribute royalties among their members, collecting society may use census or surveys or work-by-work or combination of these methodologies. Put differently, the task to determine a methodology which should be applied in case where more copyright holders are entitled to share the collected remunerations is left to the individual

¹⁹² www.competitionbureau.gc.ca , last visited on September 15,2012

¹⁹³ Daniel Gervias, cited above at note 3, p293

¹⁹⁴ Ibid

collecting societies. Another aspect of distribution is the use of undistributed funds. In this regard, the Canadian copyright act doesn't provide any obligation on the collecting societies.

B, Oversight of collecting societies

Coming to the oversight mechanisms of collecting societies, as already mentioned, in addition to internal oversight mechanisms, the Canadian copyright act recognizes two government oversight mechanisms, an oversight by competition law authorities and oversight by copyright board. The power of Canadian competition authority's power to oversee the operation of collecting society is limited areas which aren't given to the copyright board. That means the authority cannot review the royalties and related terms, and conditions set by the copyright board.¹⁹⁵ The power of competition authority essential limits to dealing of collecting societies and copyright holders.¹⁹⁶

The special task to oversight collecting societies is granted to copyright board which is an independent administrative tribunal. It can oversee any dispute between collecting societies and users. In addition the copyright act gives the board the power to issue interim decisions, to vary earlier decisions, to make regulations governing its procedure and to cause the publication and distribution of notices.¹⁹⁷ It has also the power to ensure that the payment of royalties for the performance or communication of sound recordings of musical works is made in a single payment and that the private copying levy collected by a single collecting society.¹⁹⁸ Moreover, it has a power to certify royalties and related terms and conditions.¹⁹⁹

3.4 The South African experience

In South Africa, collective administration of copy right and related rights is legally recognized and regulated business. There are two copy right collecting societies, namely the South African Music Rights Organization (SAMRO) and the South African Music Performance Rights Organization (SAMPRA) which were established to administer those rights on behalf of the copy

¹⁹⁵ Id, p298

¹⁹⁶ Ibid

¹⁹⁷ Canada copyright act, cited above at note 259, Arts 66 (51), 66(52), 66(6), 66 (71)

¹⁹⁸ Daniel Garvias, cited above at note 3, p 303

¹⁹⁹ Ibid

right holders.²⁰⁰ Both of these societies have been established in terms of the Copyright Act²⁰¹ and have the necessary accreditation in terms of the Regulations to the Act²⁰². Both the copy right act and regulation of collecting societies set out the conditions for the establishment of collecting societies, the principles for the operation of collecting societies and an institution, registrar of copyright at the Companies and Intellectual Property Registration Office (here in after registrar of copyright) , which oversees function of collecting societies.

With an aim to protect copy right holders and users, as mentioned earlier, the regulation points out requirements for establishment and operation of collecting societies. To establish a collecting society, one must apply and get accreditation from the registrar of copyright. The regulation provides for the requirements that registrar of copyright must take in to consideration before it grants accreditation to collecting societies. Specifically the requirements to be evaluated by the registrar of copy right act are: first, the technical and financial capacity of the collecting society to effectively administer across the nation; second membership must be open; third, the collecting society must afford appropriate right and opportunity to participate in the decision making to the members; and the appointed managers or representative must fit to administer the collecting society.²⁰³ What this meaning is that the regulation has tried to check up the appropriateness and technical efficiency of collecting societies starting from the stage of their establishment.

The power to regulate collecting societies after their establishment (operation of collecting societies) is also entrusted to registrar of copyright. Collecting societies are supposed to submit annual report of their operations, any modification of their documents (including memorandum and article of associations), tariffs, list of members, reciprocal agreements made with foreign

²⁰⁰ South African collecting societies ,(<http://www.billboard.biz/bbbiz/industry/publishing/two-of-south-africa-s-largest-royalty-c>.) last visited on September 23, 2012

²⁰¹ The South African copy right act(1978), (<http://www.wipo.int/wipolex/en/details.jsp?id=4067>) last visited on september23, 2012

²⁰² The south African regulations on the establishment of collecting societies,(2006) (<http://www.wipo.int/wipolex/en/details.jsp?id=9444>) last visited on September 24, 2012

²⁰³ South African regulation on the establishment and operation of collecting societies, cited above at note 288, Art 3(1)-(8)

collecting societies, and annual audited financial statements.²⁰⁴ In addition to these requirements, the regulation provides for obligations of collecting societies and measures to be taken by the registrar of copyright which include withdrawal of the accreditation and court action.²⁰⁵ It further sets principles, such as principle of non discrimination and principle of non-exclusive licenses, to make sure that the relationship between collecting societies and its members and the relationship between collecting societies and users is fair and unbiased.²⁰⁶

Finally, the sort of collecting society adopted in South Africa is voluntary collecting society, i.e the establishment of collecting society is not mandatory. Copy right holders are at liberty either to establish collecting societies or individually administer their rights.

3.5 The Kenyan experience

Kenya has given legal recognition to the establishment and operation of copyright collecting societies. In Kenya, the issue of establishment, legal status, regulation of collecting societies and other related issues are governed by the copyright act. The nation has also established institutions which are entrusted with the mandate to provide assistance for establishment of copy right collecting societies and regulation of the same.

To begin with establishment of copyright collecting societies, to qualify as a CMO under s. 46 of the Copyright Act, the collecting society must first be incorporated as a company limited by guarantee; it should also be registered (or licensed) by the Kenya Copyright Board so as to have the authority of collecting and distributing royalties.²⁰⁷ In addition, it must be non-profit making organization; its memorandum and articles of associations should be fair and drafted in way to realize the interest of its members.²⁰⁸ Thus, it's after they qualify for registration and certified

²⁰⁴ Id, Art 4

²⁰⁵ Id ,Art 5

²⁰⁷ Kenya copy right act (2001) , Art 46 (1)-(4), (http://portal.unesco.org/culture/en/files/30229/11416612103ke_copyright_2001_en.pdf/ke_cop...) last visited on September 25, 2012

²⁰⁸ Id

that copyright collecting societies can perform their functions such as: Monitoring copyright transactions and act as watchdogs on copyright use and infringement or piracy; Training their members on their copyright and remedies for infringement Collecting and storing copyright products; and Collecting and distributing royalties on behalf of copyright.

The copyright legal regime of the nation seems distinct from other jurisdiction on two issues; i.e. the role of copyright board in establishment of copyright collecting societies and the number of collecting societies that may establish in the nation. Kenyan copy right board is entrusted not only with the power to regulate the establishment and operation of collecting societies but also empowered to provide assistance for their establishments.²⁰⁹ Establishment of copyright collecting society in respect of the same bundle of rights and category of works is not permitted if there is another collecting society that has been licensed and functions to the satisfaction of its members.²¹⁰

With respect to institutional frame work, there are two organs, copy right board and standing committee, responsible to supervise the establishment and operation of copy right collecting societies. the power to certify and register collecting societies, follow up their operations using different mechanisms such as audit report, and order dissolution of copy right collecting societies is granted to the copy right board of the nation²¹¹; while the power of standing committee is limited to review the decisions of copyright board²¹².

3.6 General experience on the preconditions for effective setting up and operation of new copy right and related rights collecting society

Before they establish copyright collecting societies and entering in to operation, there are preconditions that must be considered by the copy right and related right owners. Put differently, since copy right and related rights collecting society is an entity which needs cooperation among

²⁰⁹ Id, Art 46(6)

²¹⁰ Article 46(5)

²¹¹ Id, Arts 45,46 and 47

²¹² Id , Article 48

right owners and government participation as well as other concerned organs participation, it is essential to assess whether or not there is basic conditions which must exist in order to a certain copyright collecting society's establishment and operation effective. Reviewing the experience of different member countries' copy collecting societies, WIPO identifies five preconditions for setting up of copy right collecting societies; viz, legislation (well developed copyright regime), the bundling rights, economic sufficiency, the role of government, and competent staff.²¹³

I, well developed copyright legal regime

first and foremost, existence of copyright legal regime that properly recognize the rights of copy right and related right holders owners is crucial for effective establishment and operation of copyright collecting societies. What one may question is; what are the elements that help to determine whether a certain copy right copy right legal regime is well developed and helpful for effective establishment and operation of copy right collecting societies. In other terms, what are the elements that proper or well developed copy right legal regime should incorporate?

The answer is that broadly speaking there must be well developed legal regime which properly protects copyright and related rights of authors. Copy rights and related rights, in other terms, can be collectively administered by copy right collecting societies where such rights are properly guaranteed by legal regime of the state. So in the absence of well developed legal regime which properly recognizes or guarantees copy rights and related rights of authors or creators of copy righted works establishment and functioning of collecting societies would not be effective.

A copy right legal regime should also extend legal protection to copy right-protected works of foreign author's because absence of such protection indirectly affects the interest of the national authors.²¹⁴ That is to say that copy right collecting society will be successful if national and foreign works are protected in the same manner, that is to say, if the country undertakes to treat works by national authors and works by foreign authors on an equal footing by acceding to the international conventions. The problem in the absence of equal protection to foreign copy right-protected works interestingly summarizes Dr. Ulrich Uchtenhagen that "where foreing works are

²¹³ Ulrich Uchtenhagen, cited above at note 12, p4

²¹⁴ Id , p4

not treated in the same way and therefore remain without protection, they will constitute a kind of “dumping”, since no royalties have to be paid for them, and will thereby undermine any reasonable utilization of domestic works”.²¹⁵

In addition to the above stated general elements, there are also some specific requirements that well developed copy right legal regime shall incorporate, i.e.:²¹⁶

- The copyright legal regime should contain a chapter which deals with the establishment and operation of copy right collecting society;
- Monopoly of the copyright collecting society, especially in developing countries, should be legally declared; and
- It shall determine the relationship of the copyright collecting society and government with respect to the establishment and operation of copy right collecting society.

II, the bundling of rights:

This prerequisite refers to the copyright collecting societies’ monopoly, de jure or de facto, over the administration of particular sort of copy right and related rights (world of copy rights and related rights).thus, it is concerned with the issue whether or not the copyright legal regime provides for de jure or de facto monopoly of copy right and related rights collecting society over a particular sort of copy right or related rights. In other terms, the legal regime should either explicitly recognize monopoly of copy right collecting societies on all rights in a given legal area in respect of a given category of works, for instance all rights of public performance of music. It is worth to note that legal monopoly of copy right collecting societies in a given legal area has got a wide acceptance in most jurisdictions especially when copy right collecting society is newly introduced entity.²¹⁷ However, some jurisdictions also left the issue of monopoly of copy

²¹⁵ Id , p 3

²¹⁶ Id , p 4

²¹⁷ Denmark, Finland, Iceland, Malawi, Norway, Russia, Sweden, France etc are States which legally provide monopoly position to copy right collecting societies in a given legal area. World Intellectual Property Organization (WIPO) and International Federation of Reproduction Rights Organization (IFRRO), Collective Management in Reprography (2005)(opentraining.unescoci.org/cgi-bin/page.cgi?g...html;d=1pdf), last visited on July 20, 2012.

right collecting societies to be determined by the voluntary union of all national and foreign right holders, thereby leading to a de facto monopoly position.²¹⁸

The rationale behind such precondition is that where several societies for the same rights and the same works in a country exist, it is not possible to make a precise demarcation between their activities. That is to say a plurality of copyright societies for the same rights and the same works in a country leads to uncertainty and disputes which could paralyze the development of the collective management of copyright. Legally permitting to be established a number of copy right collecting societies or being silent as to the monopoly position of collecting societies seem to be against the very reason behind the development collecting societies; i.e. to provide easy access and certainty to users. Let's make clear such problem by one example to follow: Who manages the rights in a work that has been created by co-authorship, if one author belongs to Society A and the other to Society B? Or in the case where the composer of the music of a song is a member of society A and the writer of the song text a member of society B? Or in the case where a work, created by an author, member of Society A, has been published by a publisher belonging to Society B? These examples show that it is difficult to put clear demarcation between the works administered by copy right collecting societies if there are multiple collecting societies for the same sort works and rights which would actually affect the interest of users.

III, government support

Financial, technical and other sorts of government supports have a lot to do with the effective establishment and operation of copy right collecting societies. The measures taken by government of the country especially in the establishment process of new copy right collecting society is of extreme importance. Without the assistance and cooperation of government it is difficult to make the establishment process of copy right collecting society effective. There are many reasons to hold such assertion of which the first is that the activities of a copyright society impact on several State institutions such as the national radio and television companies, cultural

²¹⁸ United states of America, united kingdom, Canada, Argentina ,Brazil etc are States which left the issue of monopoly position of copy right collecting societies to be determined by voluntary agreement of right holders. Id, p17

programs, State registers, laws and regulations.²¹⁹ The copyright society can get paralyzed in all these areas if the State is not in favor of its activities. So, to prevent that from happening, it must be ensured from the very beginning that the copyright society agree with the State on the principle of collective management of copyright. Government support is especially crucial in developing countries where the capacity of copyright holders is not in a position to ensure effective establishment and successful operation of copyright collecting societies.²²⁰

IV, competent staffs

To achieve the objective of copy right collecting societies, existence of well developed copy right legal regime, bundling of rights and strong government support are not enough. An emerging copy right should also be staffed with qualified human power. Particularly, its managers must have legal analysis skill practical problem solving ability and familiarity with the cultural terrain.²²¹

CHAPTER FOUR

Challenges and prospects of the emerging Ethiopian copyright collecting society

4.1 Introduction

In the field of copyright, for a copyright enforcement to be effective, it is necessary to set up a functioning collective management organization. Such organization is eminently necessary

²¹⁹ Dr. Ulrich , cited above at note 12 , p8

²²⁰ Ibid

²²¹ Ibid

because it helps the copyright holders to control the use of their works in an increasingly developing mass market. Without effective collective administrative system, copyright and related right holders would not be able to reap any proper benefits from their creativity. However, establishment of copyright collecting society solely will not enable to achieve the goals, i.e. enforcement of copyright holders and realizing the economic interest of copyright holders. For a certain copyright collecting society to be effective there must be appropriate legal and institutional frame work which could facilitate the successful establishment and operation of the same. Awareness of the users and the public in general, and governments' commitment to provide necessary assistance especially if the copyright collecting society is an emerging one are other factors for successful establishment and operation of copyright collecting societies.

Though Ethiopia has enacted new and relatively comprehensive copyright proclamation in 2004, the level of copyright violation has been rampant and as a result copyright holders couldn't get appropriate economic reward out of their creative works. To minimizing the level of copyright violation and realize their economic benefit, copyright holders and their professional associations have established a collective administration mechanism known by the name Ethiopian Copyright and Neighboring Rights Collective Management Society(ECNRCMS) in November 2009. The initiative to establish such collecting society was taken by nine professional associations, namely the Ethiopian musicians association; the Ethiopian audiovisual producers association; the Ethiopian film producers association ;the Ethiopian film makers association; the Ethiopian theatre professionals association; the Ethiopian book publishers association; the Ethiopian writers association; the Ethiopian comedians association and film professionals association. Though the establishment of ECNRCME dates back to 2009, i.e. three years ago, it only exists in name. It has done, one can say, nothing to collect and distribute royalties among its members since its establishment. It has not been involved in collection and distribution of royalties and other activities that contribute to combat the prevalent copyright violation. Simply put, ECNRCME is not functional yet due to different challenges among which the existing legal and institutional frame works are the main obstacles. To state an instance, it was registered and acquired legal personality as per the charities and societies proclamation like other civil societies and professional associations which have actually very distinct objective from the former. The very challenge to the copyright collecting society especially in its establishment process was the

legal regime of the country. That means it was obliged to be established like other civil societies while its nature and function is totally different. Such legal regime still continues to be main obstacle to the operation of the collecting society since it contains provisions which are totally contrary to the objective and the very nature of the collecting society, for instance the charities and societies proclamation prohibits the collecting society from distributing collected royalties among its members.

Thus, under this chapter the writer will examine the legal and institutional challenges that hold back the emerging copyright collecting society. An attempt will also be made to examine problems other than legal and institutional challenges. Besides, an assessment of existing and possible opportunities for successful operation of the emerging Ethiopian copyright collecting society will be made.

4.2 Challenges

4.2.1 Challenges relating to the existing legal regimes and institutional frameworks

In this part, a discussion will be made as to the problems that arise from the existing copyright legal regime and the government institutions in general and institutions established to enforce copyright legislations in particular. On top of this, the challenges of the collecting society associated with its registration (the challenges associated with charities and societies proclamation) will be dealt, i.e. the problem that arises due to the fact that the operation of the collecting society has been made under the regulation of charities and societies agency following its registration as per charities and societies proclamation.

4.2.1.1 Challenges associated with the copyright legal regime

Historically, the development of copyright law is not different from other sorts of laws. It is since the 1960 that the concept of copyright legal regime has been introduced, i.e. the 1960 Ethiopian civil code contains detail provisions which deal with copyright and other intellectual property

rights.²²² This indicates or reveals that the development²²³ of copyright legal regime in Ethiopia is relatively a recent one when it is compared with other jurisdictions.²²⁴

After 40 years, Ethiopian, to fit the copyright law with the developments and changes that had been evolved since the codification of 1960 Ethiopian civil code, has enacted new copyright proclamation in 2004, copyright and neighboring rights proclamation(here in after copyright proclamation). Though it is undeniable fact that the copy right proclamation has come with a lot of developments which, among other things, try to provide substantive provisions that recognize rights of copyright holders and related right holders and sanctions against infringers; it is not in a position to facilitate the establishment and operation of the emerging Ethiopian copy right collecting societies. In other words, the proclamation has some loopholes which can have substantial effect on the function of the collecting society. The discussion in this section thus would be about the gaps of the copyright proclamation and effects of the same in the establishment and operation of the emerging copy right collecting society.

Absence of special provisions which deal with the establishment and operation of copyright collecting societies has a lot to do with effective establishment and operation of the same in a certain nation. Taking their social, economic and political realities in to consideration, different jurisdictions have incorporated a part in their copyright legal regime or enacted separate legal regime to regulate the establishment and operation of copyright collecting societies. The justifications they have used to inject provisions that regulate the establishment and operation of copy right collecting societies may be different, but they have one reason in common, that is, to ensure establishment and operation copyright collecting societies is effective and in line with

²²² However, it has to be noted that, though it was not comprehensive like that of civil code, the concept of intellectual property which includes the concept of copyright was first introduced through the provisions on intellectual property right in Ethiopia penal code of 1957 (articles 671-679 of the penal code deal with the offences against intangible rights). Until 20th century, ‘queen’ was the only area where the concept of copyright had been applied. For more on this See Sebele Demissew, Historical development of copy right in Ethiopia, African intellectual property journal, vol.1 , no 1/2008, p 63

²²³

²²⁴ The development of copyright law in other jurisdiction was come after the development of printing industry. For instance the first copyright legal regime of England was enacted 1709. An international copyright convention (Berne convention) was also devised in 1886. Catherine Colston, principles of intellectual property law, (1999) p28.

interests of copyright holders and users as well as the public in general. Specifically, the benefit of incorporating a special part in copyright legal regime or enacting a separate act which regulates establishment and operation of copyright collecting societies in developing countries, where the capacity of copy right holders is not suffice to create a successful collecting society, is not subject to controversy.²²⁵

If one asks the existence of special legislation that regulates establishment and operation of copyright collecting societies in our nation, the answer would be definite no. The copyright proclamation contains only substantive rights of copyright owners and doesn't include provisions which deal with establishment and operation of copyright collecting societies. Lack of a special legal regime or provisions which deal with the establishment and operation of copyright collecting societies in general is the first and the most challenging issue to the emerging Ethiopian copyright collecting societies.²²⁶ It causes for instance an obstacle to provide government support to the emerging Ethiopian copyright collecting society since the copyright proclamation states nothing in this regard. The Ethiopian intellectual property organization has been trying to extend technical supports to the collecting society. However, according to head of the copyright directorate of Ethiopian intellectual property organization (EIPO), Ato Tedla Mamo, absence of provisions in the copyright proclamation which determine the role of the organization (EIPO) causes their support to be limited. Not only that, it also becomes difficult to supervise and regulate its operation because the collecting society is to be registered by the Ministry of Justice like other charity organizations.

Ato Uqubay shares the above stated views and added that the very challenge during the establishment process of the collecting society was not only technical and financial constraints but also absence of special legal regime which regulates the establishment of collecting society.²²⁷ Such problem obliged the members of Ethiopian copyright and neighboring rights collective management society to register as an association like other charities and societies by

²²⁵ World Intellectual Property Organization (WIPO), Establishment and Functioning of Collecting Management Organizations, www.wipo.com (last visited on November 20, 2012),p3

²²⁶. Interview with Ato Tedla Mamo, Head of Copyright and Traditional knowledge Directorate of Ethiopian intellectual property(EIPO), on October 12, 2012.

²²⁷ Interview with Ato Uqubay Berhe, President of Ethiopian Copyright and Neighboring rights Collective Management Society (ECNRCMS), on October 15, 2012

modifying its memorandum of associations and internal rules of the collecting society; such as rules which deal with succession of members' economic benefit.²²⁸

Existence of copyright collecting societies legal regime is essential not only for ensuring effective support of the government in the establishment and operation of copyright collecting societies but also to resolve disputes that arise between members and the collecting society or between users and the collecting society. According to a research conducted by WIPO, in 2006, for those countries, like ours, where institutions and the economy are not developed and stable, special legislation and other government measures is not only helpful but a necessary ingredient of successful copyright collecting societies.²²⁹ One can understand here is that for successful establishment and operation of copyright collecting societies, legislation and government support are very essential ingredients especially in developing nations like Ethiopia. It is a matter of fact that Ethiopian copyright holders' technical and financial capacity is far from adequate to establish a successful collective administration mechanism for their rights. Due to rampant copyright violations in the nation, let alone to provide financial support for the establishment of collecting society, the economic benefit that majority of copyright holders actually earn from their works is not sufficient to cover their means of livelihood. Though there is a promising change in some areas like audio-visual works, still there are 'starved copyright holders'.

Absence of such legislation / provisions in the copyright proclamation not only hinders the successful establishment of collecting society but also its operation. This is so because existence of legal regime is essential for the copyright collecting society and members and users. For copyright collecting society because, taking the economic and social realities of the nation, the legal regime / provisions enables to determine the level of the government support that should be extended to the collecting society and regulatory role of the government. For members of the copyright collecting society because it outlines rules that must be respected by the copyright collecting society which serves to accountability and responsibility thereby protect the interest of members of the collecting societies. In other terms it provides an obligation over the collecting society which enables to realize transparency and good governance within the collecting society.

²²⁸ Ibid

²²⁹ Daniel Gervias, cited above at note 3, p 475

Besides, existence of legislation is of importance for users since it provides limits to the acts of the collecting society in order to avoid unreasonable exploitation of users.

It is worth mentioning that the draft copyright proclamation had incorporated a special part which deals with the establishment and operation of copyright collecting societies as well as the role of the government.²³⁰ The copyright society that was proposed to be established under the draft copyright proclamation was known by the name “Ethiopian authors, performers and producers of sound recording collective copyright and neighboring rights management association (EAPPSRCC)”.²³¹ Generally speaking, under the draft copyright proclamation, it was recognized the involvement of the government in the establishment and operation of EAPPSRCC. For instance it was proposed that the government should have active role in the governance of EAPPSRCC. Part of the seats in the board of directors of the copyright collecting society is given to the government organs. Article 35 of the draft proclamation reads “the society’s board shall consist of a representative of EIPO, a representative of Ministry of Justice, a representative of Ministry of Industry and Trade, a representative of Ministry of Information, a representative of Ministry of Youth, Sport and Culture and eight persons elected from the members of the society in such manner as the society may decide”. This shows that the role of government in the governance of the society had been intended to be extensive.²³² That seems justifiable for the development of the copyright collective administration system in Ethiopia is at its infancy stage compared to other jurisdiction.

There are different views as to the reason that the legislator forwarded to exclude such part from the proclamation. The reason for such rejection was that the draft copyright proclamation did not include the regulatory role of the government in the establishment and operation of copyright

²³⁰ The draft copyright proclamation was known by the name ‘literary, artistic and neighboring rights proclamation’ enacted in 2004 as Copyright and Neighboring Rights Proclamation.

²³¹ Serawit Eshetu, Protection of Literary works under Ethiopian law: Problems and Prospects (2004, Unpublished, AAU library), p94

²³² This clearly shows that the society intended to be established by the draft proclamation is a quasi-governmental body which is advisable for countries like ours for two reasons: first, the development copyright industry in Ethiopia is at its infancy stage; second, to maintain the balance between the interest of the public at large and interest of copyright holders that usually, especial in developing nations, needs involvement of government.

collecting societies.²³³ However, Ato Uquay Berhe argued that the reason was absence of awareness among the legislators as to the nature and benefits of copyright collecting society.²³⁴ The latter argument seems to be sound because the draft proclamation permits greater involvement of government in the establishment and administration of the collecting society. As already mentioned, part of the seats of board of member was given to representative of government organs.²³⁵

In addition to the above mentioned challenges which are posed by the existing copyright legal regime and institution, there are also other challenges that arise from the substantive provisions of the same.

Failure of the copyright legal regime to recognize “levy system”²³⁶ is the other challenge for the copyright collecting society. Levy system refers to the right of copyright holders to remuneration for private copying of copyright-protected works and most of the time it is applicable for private copying of phonograms and audiovisual works. This system mainly applied in the form of levies imposed on equipments and/ or recording materials used for private copying. Usually the levy or remuneration for private reproduction is paid by manufacturers of the equipments or importers of such equipments and media.

The development of such system is not without justification. In other jurisdictions, such system is included in their copyright legal regime after a number of studies which show that in certain

²³³ Interview, cited above at note 226

²³⁴ Interview, cited above at note 227

²³⁵ See article 35 of the draft proclamation to protect literary, artistic and neighboring rights

²³⁶ This sort of remuneration is developed by Germany in 1985. The remuneration in this regard is paid by manufacturers or importers of the Equipments that users could use reproduce copyrighted works. This sort of remuneration is also paid by large-scale users, like schools, universities, research institutes and copy shops. The amount of tariffs to be paid by manufacturers or importers of the equipments and by large scale users is determined by the legislator/ by the copyright law. Private levying system is recognized in a large number of jurisdictions, including Austria, Spain, Poland, The Czech Republic, Slovakia, Romania and Nigeria. Greenfield Chilongo, the administration of reprographic rights and the establishment and role of reproduction rights organizations, (2003), p5

cases, in particular in the case of phonograms and audiovisual works, private copying has become so wide spread that it is already unreasonable and prejudices to the legitimate interest of the copyright owners. and it has been proved that such violation of legitimate interest of copyright holders may not effectively controlled through the legal principles like civil and criminal remedies since it was very extensive and impractical to enforce those remedies. It is thus devised to combat the violation of copyright on the guises of exceptions and limitations specifically private reproduction of copyright-protected works. To put differently, the reason behind evolution of private levying system is to reduce the prejudices or violation of copyright in the name of exceptions and limitations to reasonable level.

It is well known that the copyright proclamation has been enacted to reduce the pervasive violation of intellectual works of artists, musicians and other individual copyright holders which had been existed for a long period of time. Though it is undeniable fact that the proclamation incorporates new concepts and principles which furthers the copyright protection in the nation, there are some concepts that didn't incorporate in the proclamation one of which is the levy system. As already discussed, the rationale of levy system is to reduce violation of copyright in the guise of exceptions and ensure the economic benefit of copyright holders. It is a matter of fact that ,before and after the promulgation of the proclamation, the level of piracy and copyright violation in Ethiopia is very high which needs a long period of time and cooperation among the public, government and copyright holders to reduce such violation. However, the legislator fails to include the levy system as one mechanism to secure the economic benefits of copyright holders.

Moreover, since Ethiopia did not sign international agreements which were devised to extend copyright protections to copyright holders at international level, Ethiopian copyright holders are not subject to protection abroad. Similarly, foreign copy right works are not protected in Ethiopia. In here one may ask the effect of such in the successful operation of the emerging Ethiopian copyright collecting society. That is the subject of discussion in the paragraphs to follow.

Ethiopia has not signed the international agreement or Convention concerning Copyright and neighboring rights and hence Ethiopian copyright holders are not eligible for copyright protection at the international level. For a long period of time Ethiopia has been reluctant to sign the international copyright conventions. The reason that is raised to justify Ethiopian government's rejection is that Ethiopia has nothing to lose by not signing the relevant international instruments. Seble interestingly summarizes the reasons raised by the governments to reject the proposal for acceding to the copyright international treaties and its negative effect on the development of Ethiopian copyright as follows:²³⁷

...proposal to become a party to international treaties was always rejected by prominent personalities. The proposal to become a party to international treaties was raised during the reign of emperor Hailelassie I, the Derg regime and the incumbent government. The major concern which always leads to the rejection of such proposals was that if Ethiopia becomes a party to international treaties the price of books will become too expensive due to the fees to be paid to foreign collecting societies. The argument "we have nothing to lose but a lot to gain" always seems to have been the motto of the group rejecting this proposal. This has contributed negatively to the development of copyright in the country, since there was no pressure on the government to update its legislation to meet the international standards.

The reason that Ethiopia did not sign the relevant international conventions was to secure its interest, i.e to get foreign copyright-protected works such as books with less cost. However, such justification, in my opinion, seems not sound for two reasons. Firstly, though the nation has justifiable need for access to the world's accumulated knowledge and information, getting such through illegal way would encourage copyright infringement and rent seeking behavior among the potential copyright users that will cause copyright users to turn their face to foreign works since foreign works are for free. That ultimately affects the economic benefit of the copyright holders. This also discourages the local copyright holders for they would not get appropriate economic reward for their works because the users will prefer foreign copyrighted works for the latter is for free. Secondly, it will affect the relation of the country with other nations which give due emphasis for copyright protection.

²³⁷ Sebele Demesew, cited above at note 222, p73

Having said these much as to the current status of our nation in relation to international copyright conventions and its impact in general, it is important to show the impact of such thing to the emerging Ethiopian copyright collecting society. The question in this regard is that what is the negative effect of absence of copyright protection to Ethiopian copyright holders at the international level and foreign copyright holders in Ethiopia to successful operation of the emerging Ethiopian copyright collecting society?

As experience of other jurisdictions shows, the function of copyright collecting societies is not limited to domestic copyright administration. These days copyright collecting societies are trying to ensure their members economic and moral rights abroad through reciprocal agreements and regional cooperation. However, legal protection to copyright holders must first ensured by the state by signing international copyright conventions and it is after that collecting society/ ies of the nation can create reciprocal agreements or regional cooperation to protect their members interest abroad. Though the first task which the emerging Ethiopian copyright collecting society should focus on is securing economic and moral rights of copyright holders with in the country, to fully secure interest of its members, there will be a need to create international cooperation and reciprocal agreements.

In addition to the above mentioned challenges, there is another problem related to the failure of Ethiopia to sign relevant international conventions, i.e. foreign copyright works are not subject to protection in Ethiopia. Absence of legal protection to foreign works has a lot to do with the operation of copyright collecting societies. The problem is that when foreign woks are not equally protected, they will constitute a sort of dumping and users will turn their face to the foreign works since they will not be obliged to pay remunerations for such works. That would have negative effect on the income of the copyright collecting society. These days, for instance, in our nation, a number of producers have started to provide films produced abroad, by translating in to Amharic from different languages such as English and Hindu, to users and this will perhaps substantially hamper the development of the film industry in the nation. In the absence of legal protection to foreign works, the potential users from which the emerging Ethiopian copyright collecting society would collect royalties will prefer to use foreign works and such act would negatively affect the effective operation of copyright collecting society. This

is so because existence of pirated works on the market not only affects the remuneration to be paid to copyright collecting society but also creates obstacle to the protection of Ethiopian copyright holders at abroad. Therefore, successful operation of copyright collecting society could be ensured where foreign and domestic works are protected in the same manner, that is to say if the nation undertakes to treat domestic and foreign works on an equal footing by acceding to the international conventions.

In sum, the existing Ethiopian copyright legal regime is not in a position to cope up with the emerging copyright collecting society and this in turn negatively affects the successful establishment and operation of the latter. Failure of the concerned government organ, EIPO, to extend guidance and support for the emerging Ethiopian copyright collecting society is also another obstacle. Since the establishment process was not regulated, it was sluggish and out of the concerned government organs, Ethiopian intellectual property office (EIPO), supervision and guidance. The collecting society is not yet operational due to such and other problems. Though there is an attempt to provide technical supports, absence of legislation also causes confusion as to the role of Ethiopian intellectual Property office in the operation of the collecting society. It is worth mentioning that EIPO has been conducting a research to devise legal regime for collection and distribution of royalties though such act of the office has no legal back up. That is because there is no clear provision which mandates the organization to supervise the operation of the collecting society. as already mentioned, there is only one provision in the establishment proclamation which only states the duty of the office to extend support in the establishment and operation of copyright and related rights associations that may include professional associations and copyright and related right collecting societies.²³⁸ It is based on that provision that EIPO has been trying to provide technical assistances to the emerging Ethiopian copyright collecting society. What is the pits in here is that the power to regulate function of Ethiopian copyright and neighboring rights collective management society is bestowed to charities and societies agency for the former is registered as according to charities and societies proclamation.

4.2.1.2 Challenges associated with the charities and societies proclamation

²³⁸ Establishment Proclamation of Ethiopian Intellectual Property Office, 2003, Proc. No. 320, Art 9(4), Neg. Gaz, year 9, no. 40

Ethiopian copyright and neighboring rights collective management society was established and registered by the Ministry of Justice and later re-registered by Charities and Societies agency in accordance with Charities and Societies proclamation. Due to absence of special provisions in the copyright proclamation or separate legal regime, the establishment of copyright and neighboring rights collective management society in Ethiopia was in accordance with the procedures and rules of the Ethiopian Charities and Societies Proclamation. As a result, the power to supervise and regulate operation of the collecting society is vested in the Charities and Societies agency. So, the issue here is that what are the problems related to such status of the collecting society?

In here it is of importance to briefly deal with the legislative history, rationales and peculiar feature of the charities and societies proclamation because it enables to reveal its negative effect on the successful operation of the latter. The Government has expressed the rationale for the enactment of the Charities and Societies Proclamation in the preamble of the proclamation, that is ; to ensure the realization of citizens' right to association enshrined in the Constitution of the Federal Democratic Republic of Ethiopia; to aid and facilitate the role of charities and societies in the overall development of Ethiopian people; to provide varieties of measures to be taken against charities and societies in case of fault; to ensure the accountability, transparency, and consistency of charities and societies to the public; to provide the legal basis for the relationship between charities and societies and sector administrators; and to determine the amount of money charities and societies spend for administrative purposes and project activities.

These rationales reveal that the law is not of much relevance to the emerging Ethiopian copyright collecting society. The very objective of collective administrative system of copyright and related rights is to realize economic interest of its individual members, i.e. owners of the copyright works. Though indirectly it has a positive contribution to the public in general, the direct beneficiaries are individual copyright holders not the public or part of the society who are not members of the collecting society. One of the functions that may have a direct connection with the public in general is the collecting society's responsibility to finance certain amount of its income for cultural development of the nation. Again such obligation/ responsibility of collecting societies are not widely accepted. It is limited to some jurisdictions.

Let's look at the compatibility of rationales of the proclamation and function of the collecting society specifically. One of the rationales for the enactment of the proclamation is to determine the amount of money spent for administrative purposes and project activities of nongovernmental organizations and other civil societies. This clearly strengthens the assertion that the proclamation is not meant for copyright collecting societies since its general purpose is contrary to the functions and objectives of the latter. Though there is an indirect benefit for the society, as mentioned many times, the principal objective of collecting societies is to realize economic interest of its members but not the public at large. The income of collecting societies is not to be financed for projects which would have benefits to the group of individuals who are not members of the collecting society. So, to begin from the very rationales of the proclamation, it is not in line with the nature and function of collecting societies. Similarly, there are a number of specific provisions which stop the emerging Ethiopian copyright collecting society from engaging in to operation. In other words, since the charity and societies proclamation is not enacted taking the nature and operation of copyright collecting society; it incorporates provisions that obstacles the successful function of copyright collecting society. The Charity and society proclamation contains provisions that put strict regulations for establishment and operation of the collecting society, limit the extent of foreign support/ international organizations support, and prohibit distribution of benefits among members of the society.

As per the charities and societies proclamation, societies are entitled only to generate income from their members, donation and other income generating activities approved by the agency and such incomes may not be distributed among members of the society.²³⁹ This is in contrary to the very objective of copyright collecting societies which is collecting of royalties from users and distribution of such royalties to the copyright holders. It seems nonsense to prohibit a copyright collecting society, which is actually established with an aim to collect and distribute royalties, to distribute profits or royalties to its members. However, since the copyright collecting society is established as per charity and societies proclamation and there is no exceptional provision clearly applicable for copyright collecting society, the law that will regulate the operation of the

²³⁹ Charities and Societies Proclamation, 2009, Art 103, Proc. No 12/2009. See also article 7 of directive 7-2003 enacted to regulate income generating activities of charities and societies.

copyright collecting society is charity and societies proclamation; and hence there is no way to escape such restrictive provision. Thus, this is one instance that shows the proclamation has created an obstacle which totally stops the copyright collecting society from engaging in collection and distribution of activities.²⁴⁰

In addition to the above stated problems, the charities and societies proclamation would create an obstacle to collect royalties from abroad because there is a limitation with respect to the amount of income that charity organizations and societies may get from abroad, i.e 10 %.²⁴¹ This limits the function of the collecting society to the domestic market. Now a days, copyright collecting societies of different nations are devised a reciprocal agreement to be made by their collecting societies with other nations' copyright collecting societies to protect the copyrighted works of their members abroad and collect royalties from foreign users.

4.2.1.3 Lack of government support and absence of special institutional backup

Government support is decisive for successful operation of collective administration system of copyright and related rights especially in developing countries like Ethiopia where the copyright holders are not well organized and have weak financial and technical capacity. In addition to the traditional roles²⁴² especially in developing countries where the awareness and financial capacity of the copyright holders is low, governments should provide proactive assistance to the

²⁴⁰ Where a copyright collecting society found to have distributed its income among its members, the charities and societies agency may cancel the license of the copyright collecting society. Id, Arts 103 and 92

²⁴¹ The amount of income that Ethiopian societies including Ethiopian copyright and neighboring collective management society can legally get from foreign source is limited to 10 % of their funds. Any income that a society receives from government, agency, company of any foreign company, international agency and any person in a foreign country is considered as foreign funds. This includes the income that Ethiopian copyright collecting societies can receive from foreign collecting societies. Id, Arts 2(2), 2(15)

²⁴² Traditionally the role of Government in copyright systems is granting intellectual property rights by enactment of legislation; putting a balance between copy right owners and user interests (e.g.by creating exceptions and limitations to the exclusive right of copyright holders); offering International Protection through membership of the multilateral conventions such as Berne, Universal Copyright Convention, Rome Convention, and TRIPS and enforcement of the copyright law. Paul Goldstein, International Copyright: Principles, Law and Practice (2001), p14

establishment and operation of collective administration system of copyrights and related rights. Put differently, Establishment of copyright office or institution which gives support and guidance in the establishment process and operation of copyright collecting society, especially in developing countries, is a prerequisite for successful operation of copyright collecting societies. The roles that government should play to ensure effective operation of copyright collecting societies, among other things, comprise: participating in the establishment process as well as in the operation of copyright collecting societies by providing technical and financial supports; specific incorporation of the collective administration system in copyright legislation; sponsoring or endorsing the training of personnel of copyright collecting society; advocating the importance and benefits of copyright collecting society for right owners, users and the general community; and the formulation of policy as to the copyright right system in general and copyright collecting society in particular.²⁴³

In addition, whenever it is possible, for any support of the government to be effective in ensuring successful establishment and operation of copyright collecting society, it is recommended that the government should establish special institution charged with the responsibility of formulating policy, providing legal advice on copyright matters to the Government, coordinate with police and customs officers and state prosecutors with respect to anti-piracy enforcement and initiating public education and awareness programs about copyright.²⁴⁴ Moreover, a Government should set the example to the rest of the population by ensuring that all Government ministries, departments and state agencies who use copyright or neighboring rights (in particular state-owned broadcasting companies) comply with the provisions of the copyright law, i.e the government should show its cooperation to the copyright collecting society by respecting the copyright law and paying remunerations.²⁴⁵

The establishment process of Ethiopian copyright collecting society was started after the promulgation of the copyright proclamation, in 2004. Copyright holders are those who took the initiative to establish the copyright collecting society. The role of the government in terms of

²⁴³. Allison Demas, Opportunities and Challenges for Collective Management of Copyright in the Caribbean Region, www.wipo.com (last visited on November 14, 2012), p5

²⁴⁴ Id, p 6

²⁴⁵ Ibid

technical and financial support was none.²⁴⁶ Since its establishment, the government has not been providing any financial support for the emerging copyright collecting society. Rather the government has been an obstacle in the establishment process of the collecting society.²⁴⁷ It delayed the establishment process because the collecting society's establishment process and its registration were ordered to be, like other professional associations, in accordance with the charity and societies proclamation. It is also worth to mention that the charities and societies agency doesn't and couldn't provide special financial and technical support because its mandate is to supervise or oversee the operation of charities and societies including Ethiopian copyright and neighboring rights collective management society. This is so because there is no legal ground to provide financial and technical assistance to the collecting society and the agency has not a capacity to provide technical assistance.

When we look at the role that the concerned government institution (i.e. Ethiopian intellectual property office (EIPO)) has been playing in the effective establishment and operation of the Ethiopian copyright collecting society, it is limited to technical support which is far from adequate. The technical support provided by EIPO to the collecting society is limited to assigning expertise based on the request of the collecting society especially in case where the later organized trainings and awareness creations programs to concerned government and non government organs.²⁴⁸ In addition to absence of competent staff, who can provide technical assistance to the collecting society, and financial constraints of the office, the reason that EIPO's support is limited to technical assistance is because of the absence of legal regime which clearly and in detail determines the role of the same in the establishment and operation of copyright collecting societies.²⁴⁹ The technical support that EIPO provides to the Ethiopian copyright collecting society is based on its establishment proclamation, Ethiopian Intellectual Property Office Establishment Proclamation No. 320/2003(herein after the establishment proclamation). Specifically it is based on article 9(14) of the establishment proclamation provides that Ethiopian intellectual property office has a duty to facilitate the establishment of, support and strengthen inventors, authors and musicians associations as well as similar societies. This

²⁴⁶ Interview , cited above at note 227

²⁴⁷ Ibid

²⁴⁸ Interview , cited above at note 226

²⁴⁹ Ibid

provision only points out a general duty of the office to support any associations which could be collecting societies or other professional associations of copyright holders and hence it doesn't guarantee a special government support to copyright collecting societies.

As already mentioned, the institution established to follow up and provide support in the enforcement of intellectual property in general is Ethiopian intellectual property organization (EIPO). It has a mandate to ensure enforcement of the copyright proclamation and such mandate of the origination is vested on its copyright unit /department. When we review the support that the copyright department/unit has extended since its establishment, they are insufficient and weak which contributes, one can say, less for the successful establishment and operation of copyright collecting society. The works that has been done by EIPO are related to awareness creation which will have of course its own positive impact in the function of the emerging Ethiopian copyright collecting society. EIPO has also tried to create coordination with police and customs officers and state prosecutors with respect to anti-piracy enforcement and initiating public education and awareness programs about copyright seems to be hopeful move. The copyright department of EIPO, which is responsible for issues related to copyright, to reduce copyright infringements, tried to build integrated working system with Ethiopian revenue and customs authority, Addis Ababa cultures and tourism office, Oromya culture and tourism office, and Ethiopian Broadcast Authority.²⁵⁰ It also prepared awareness creation programs and trainings to youth, women and small and micro enterprises about the socio-economic, cultural, and political and tourist attraction benefits of copyright. In addition to such awareness creation programs, it uses print and electronic media to create awareness as to benefit of copyright thereby reduce copyright violation. It has two radio programs broadcasted on radio Fana and short messages (SMS) were transmitted to 25,000 mobile telephone customers.²⁵¹ Though one may not say such awareness creation activities of the office have nothing to do with the function of the emerging Ethiopian copyright collecting society, it is not unsound to hold that such measures are not sufficient to ensure successful operation of the collecting society. The office has not taken practical measures to alleviate the technical, legal and financial problems of the collecting society. And also it has made no practical steps in the establishment process of

²⁵⁰ Copyright and Community knowledge Protection and Development Core Process of EIPO ,Fiscal performance Report (2012, unpublished, EIPO), p2

²⁵¹ Id, p3

Ethiopian copyright and neighboring rights collective management society. Besides, as stated here in above, the support provided by the office (EIPO) to the copyright collecting society is not different from the support extended to other professional copyright associations because there is no specific rules which determine the mandate of the office in this regard.

Coming to the incorporation of laws in the copy right legal regime which deals with the establishment and operation of copyright collecting societies, as already mentioned, the government fails to devise such special legal regime or incorporate provisions in the copyright proclamation. However, since 2011, copyright and community knowledge directorate of EIPO has been conducting a research to propose an amendment to the copy right proclamation so as to incorporate provisions which deal with copyright collecting societies. Such proposal is not yet submitted to the concerned government organ, ministry of justice. According to the head of the copyright directorate, it has planned to conduct further research and panel discussions on the area with concerned government organs and other stakeholders.²⁵² Though there is a good start, taking the human and financial resource of the organization, EIPO; it will take long time for the amendment of the copyright legal regime.²⁵³

Thus, In Ethiopia, there is no legally recognized special institutional buck up to the emerging Ethiopian copyright collecting society. The absence of an institution responsible to strive for effective establishment and operation of copyright collecting societies causes the emerging Ethiopian copyright collecting society to be inoperative though its establishment is dated back to 2009.

Moreover, to ensure successful establishment and operation of copyright collecting societies, as already stated, a Government should set the example to the rest of the population by ensuring that all Government ministries, departments and state agencies who use copyright or neighboring rights (in particular state-owned broadcasting companies) comply with the provisions of the copyright law, i.e. the government should show its cooperation to copyright collecting society by respecting the copyright law and paying remunerations. The fact in Ethiopian in this regard is

²⁵² Interview, cited above at note 226

²⁵³ Still the copyright proclamation has not regulation though it has been 8 years since its promulgation

in contrary. Government owned broadcasting organizations are not different from the public in general. Due to lack of awareness or other reasons, it is common to observe that the government owned broadcasting organizations, such as Ethiopia television and Ethiopia radio, use copyrighted works without paying remuneration to the owners and modify some copyrighted works such as songs without getting prior permission from the copyright owners.²⁵⁴ Thus, the government is failed to set the example for other users by respecting the copyright law.

At the nutshell, Existence of copyright law without effective system of enforcement is meaningless. Undoubtly, for a certain system of copyright enforcement to be complete and successful, as already mentioned, existence of functional copyright collecting society charged with a duty to collect and distribute royalties and ensure moral rights of copyright holders is crucial. Regrettably, the Ethiopian copyright and neighboring rights collective management society established about three years ago is not yet functional. The problem requires the involvement of government. Though there are some promising initiatives and proposals by Ethiopian intellectual property office, there are no practical steps that have been taken by the government to support the copyright collecting society. The government has also failed to devise appropriate legal regime, establish a special institution to deal with copyright collecting societies' matters. Besides, It fails to remunerate the copyright holders when it uses their works for instance by the government owned broadcasting organizations. It has also done less in creating awareness among the public as to the importance and significance of copyright protection in general and collective administration system of copyright and related rights in particular.

²⁵⁴ When they use copyrighted works like music and modify to fit their programs, employees assume that they have the right to do so. Such misconception is mainly due to the act of the copyright holders, that is they always give their works voluntary to monopoly owned government broadcasting organizations' libraries to be used by the latter. Such act of copyright holders doesn't amount to permission to modify copyrighted works in order to fit the programs of the broadcasting organizations. Interview with Ato Getachew Melaku, Journalist and senior editor of Addis Ababa FM, FM97.1, on November 19, 2012; and Interview with Ato Fikir Yilka, Deputy Director General of Entertainment and Sports , Ethiopian Television Agency, on November 19, 2012.

4.2.2 Challenges other than legal and institutional problems

4.2.2.1 Lack of awareness

In addition to existence of well developed copyright legal regime and government support, the awareness of the public with regard to copyright and function and significance of copyright collecting societies is another good input in the effective operation of copyright collecting society. Apart from educating the public and users of copyright-protected works, the awareness creation campaigns should include: creators and other right owners and the concerned government officials so as to foster awareness, appreciation and respect for such rights. Copyright holders must also arm themselves with knowledge of their rights and ensure that they obtain the best possible return for the commercial exploitation of their rights by engaging the services of professionals such as lawyers, accountants and managers. According to WIPO report, creating awareness as to the importance of copyright and neighboring rights is not suffice for a copyright collecting societies to be effective; intensive awareness creation regarding the existence of collecting activities for the use of copyright and related right works and the existence of copyright collecting society mandated to carry out such activities is also crucial.²⁵⁵

However, as the concept of copyright collecting societies is new phenomenon to Ethiopia, there is lack of awareness within the society as to the function and significance of copyright collecting society. What is worse is that such problem is also evident on the copyright holders' professional associations and government owned institutions like radios and television agencies which are expected to be main potential customers from where the copyright collecting society would begin to conclude an agreement and specifically collect royalties.²⁵⁶ The awareness creation that has done since the establishment of Ethiopian copyright and neighboring rights collective management society is limited. Let alone the potential users of copyright works, the copyright professional associations and their members are not aware of the functions and importance of the

²⁵⁵World Intellectual Property Organization(WIPO), Collective Management Society: Challenges and Opportunities, (www.wipo.int/.../Singapore/2011JuneCMForum/Report_of_the_Forum.pdf) last visited on October 5,2012, p1

²⁵⁶ Interview with Ato Getachew Melaka, Journalist and Senior editor of Addis FM, FM 97.1, on November 19, 2012

copyright collecting society.²⁵⁷ As the writer observes from interviews made with copyright holders' professional associations, even the heads of the associations are not well aware of the functions and importance of the collecting society. Lack of awareness among the copyright holders causes other problem to the collecting society, i.e. financial constraint. The members are not willing to financially support the function of collecting society which in turn makes the operation of the collecting society ineffective.²⁵⁸

Unless the public in general and copy right holders and potential customers of the emerging Ethiopian copyright collecting society internalizes the importance and function of copyright collecting society, it will be difficult to ensure successful operation of the same. therefore, the first thing to be done by the collecting society and the government is creating awareness as to the ultimate objective of the collecting society, i.e. protecting copyright holders interest and providing legal access of copyrighted works to the potential users of the same. In general, if successful function of the emerging Ethiopian copyright collecting society is what is required, a lot of work must be done to further the awareness of the copyright holders, potential users of copyright-protected works and the various organs of the government. In this regard, there is a need to organize seminars, workshops, symposiums, lecture and other awareness creation campaigns to the stakeholders.

4.2.2.2 Absence of competent staffs

As it is already mentioned, effective management and operation of collecting societies is a key factor in the success of the copyright system. It is a matter of fact that not only copy right collecting society but any sort of organization, to be successful in their operation and achieve

²⁵⁷ Interview with Ato Desalegn Seyum, president of authors association, on noctobor23, 2012; interview with W/ro yemwedish Bekele, president of Ethiopian female authors association, on November 7, 2012; interview with ato Tomas getachew, president of Ethiopian film makers association, on November 2, 2012; interview with Ato haylay Taddase, president of the Ethiopian audio- visual producers association, on November 2, 2012; interview with Ato Abebe Beyene, president of Ethiopian film producers association, on October 23, 2012; interview with Ato Dawit Yiferu, President of Ethiopian musician associations, on October 23, 2012; and interview with Ato Uqubay berhe, president of Ethiopian copyright and Neighboring rights collecting management society, on October 15, 2012.

²⁵⁸ Interview, cited above at note 227

their ultimate goal, should be managed and staffed by persons whose skills in management and technical expertise are equivalent with those persons otherwise engaged in the private sector. In addition to an executive manager, a new copyright collecting society must have staffs that can put the objective of the collecting society in to effect. As experiences of other jurisdictions show, executive manger of a new copyright collecting society should have legal analysis skills, practical problem solving ability and familiarity with the ‘cultural terrain form’.²⁵⁹

The problem of the Ethiopian copyright and neighboring collective management society in relation to human resources is very chronic. It has only two staffs, the chief executive manager, Ato Uqubay Berhe, and his secretary. According to the chief executive of the collecting society, the professional associations which took the initiative to establish the collecting society and other members of the collecting society are not voluntary to contribute for the administrative costs of the collecting society.²⁶⁰ He serves the collecting society without any payment since its establishment.²⁶¹ Even the salary of the secretary is paid by the chief executive manger of the collecting society from his pocket.²⁶² Financial constraints and absence of coordinated effort by its members (both copyright holders and their professional associations) are the main causes for the current status of the collecting society, i.e. weak staff composition. Thus, the problem of human resource, in addition to other challenges, paralyzes the function of the emerging copyright collecting society.

4.2.2.3 High level of copyright infringement

Due to a number of reasons the extent of copyright violation in the nation is rampant even after the promulgation of the copyright proclamation. Some of the reasons are that the societies awareness and economic capacity. Absence of well organized professional associations, lack of

²⁵⁹ Ulrich Uchtenhagen, cited above at note 12,p11

²⁶⁰ The reason for the members’ hesitation to contribute and actively participate in the effort to make the collecting society functional, in addition to financial incapacity, is the inoperativeness of the collecting society which causes the members to lose a hope on the collecting society. Interview with Ato Uqubay Berhe , President of ethiopian copyright and neighboring rights collective management society, on October 15, 2012 and interview with Yemwedish Bekele, President of Ethiopian Female Authors Association, on November 7, 2012

²⁶¹ Ibid

²⁶² Ibid

government support may also be other causes for rampant violation of copyright. Existence of rampant copyright violation not only affects the copyright holders but also the public at large.²⁶³

The copy right infringement before 2004 E.C was rampant when copyright holders like musicians had been stopped from producing their works due to fear of illegal reproduction and producers changed their production business in to other sort of business.²⁶⁴ Though there is an improvement in the copyright violation in our country after the enactment of the copyright and neighboring rights collective management, the level of infringement even in these days ranked our nation among the jurisdictions where copyright infringement is high. A recent assessment of copyright violation specifically the rate of copyright infringement of audio-visual works conducted by Ethiopian intellectual property office in nine cities²⁶⁵ shows that the level of copyright infringement is high, 64.7 %.²⁶⁶ As per the research conducted this year by EIPO, The level of copy right violation in the nine cities of the nation is the following²⁶⁷:

Harer	86.45 %
Diredawa.....	80.19 %
Adama.....	83.3%
Dessie.....	68.55 %
Hawassa.....	72.69 %
Gonder.....	54.4 %

²⁶³ The effect of copyright violation is multidimensional. It discourages potential authors and creators since it robs the creative authors and artists of their economic and moral rights. Besides, existence of rampant copyright violation not only negatively affects copyright holders and the government but also hinders the consumers for they usually get poor quality of copyrighted products on the market.

²⁶⁴ For more on this see Sebel Demssew, cited above at note 222, p73-78

²⁶⁵ The cities where the Ethiopian intellectual property office accesses the level of copyright infringement are Bahirdar, Harar, Diredawa, Gonder, Hawassa, Adama, Adiss Abeba, Mekelle and Dessie. Fiscall performance report of ethiopian intellectual property office, 2012. Ethiopian Intellectual Property Office(EIPO), Assessment of Copyright Infringement of Audio-visual Works, (2012, unpublished, EIPO), p13

²⁶⁶ Id, p12

²⁶⁷ Id, p14

Bahirdar.....	52.65 %
Adiss Abeba.....	44.75 %
Mekelle.....	40.1 %

Though, this data shows that there is a decrease in the copyright infringement, still the level of copy right violation is high especially in the regional states. One reason for that is the absence of branch office of EIPO and professional associations of copyright holders which help to create awareness and cooperation with the concerned government organs. Relatively speaking, at the capital city, Addis Ababa, there are associations of copyright holders which can claim support and cooperation from the executive organ of the government to enforce their rights and special government organ, EIPO, established to enforce copyright law and other intellectual property rights. The above mentioned improvements are limited to audio-visual works. The level of piracy in other sorts of copyrights such as rights of performers is endemic. Some copyright infringements like broadcasting of music works, public performance and imitation of music works are not considered as copyright violation. It is also common to play music in hotels, cafes and other business centers which is not considered by the business owners as copyright infringement.

In addition to functional judiciary and other administrative measure, existence of strong border measures is crucial to fight copyright violation. Though there are provisions in a proclamation to provide for the establishment of the Ethiopian revenues and customs authority, proclamation No. 587/2008 which deals with the measures that should be taken to combat violation of intellectual property rights, there are no measures taken by the customs authority due to the absences specific regulations and directives that helps to apply the general provisions stipulated in the customs proclamation.²⁶⁸ According to Articles 69-72 of the proclamation, which deals with the measures that should be taken by the authority to protect intellectual property rights at the border, the authority may suspend export or import of goods if it believes that there is an infringement of

²⁶⁸ Interview with Ato Tedla Mamo, head , Head of Copyright and Traditional knowledge Directorate of Ethiopian intellectual property(EIPO), on October 12, 2012; and Interview with Ato Henok Tegegnework , legal expert of copyright and traditional knowledge implementation core process of EIPO, on October 9, 2012.

intellectual property rights. Such measure may also be taken by the authority up on the application of the right holders. The authority's role here is to notify to the concerned person (EIPO or right holder) in order to take legal action against the infringers. So far, the authority has not done such duty because of different reasons. To mention it again, the main reason is absence of regulation and directives which enable to apply the general obligation of the customs authority stated in the proclamation. There is an effort by EIPO to create cooperation with the authority with an aim to enact regulations and directives that would help the above mentioned border measures to put in to practice.²⁶⁹

Economic capacity of the users is probably other reason that aggravates the copyright violation. It is true that the majority of the people in Ethiopia, like other least developed countries, are below the line of poverty and hence they can't afford the cost of acquiring original copyright-protected works. Their economic capacity urges to get pirated copyrighted works which is affordable to the majority of the society. Currently, the difference, for instance in musical works, between original and the pirated one is twenty birr. The price of original works is twenty five birr while the price of pirated one (illegally reproduced musical works) is five birr. Thus, taking their economic position, users would prefer to buy the illegally reproduced copyrighted-products at a lesser cost which in turn encourages the persons who supply illegally reproduced copyrighted- works. So, to alleviate the problem in this regard, it seems important to determine the price of the copyright-protected works by taking the purchasing capacity of the public at large in to account.

Not only the economic position of the users but also the economic position of the copyright holders contributes its part to the absence of strong copyright enforcement in the nation. Simply put, weak economic position of the copyright holders is also a cause for the existence of high level of copyright violation in the nation. It is a matter of fact that Most of the copyright holders are not economically in a position to take legal action against infringers.²⁷⁰ Though there is an improvement, it is well known that in our nation most copyright holders are not well organized to realize their interests;

²⁶⁹ Fiscal performance report of EIPO, cited above at note 250, p5

²⁷⁰ Interview , cited above at note 227

and most of the copyright holder's associations have technical and financial problems that hold them back from successfully implementing their objectives.²⁷¹

Ato Getachew Melaku shares the view stated above. He adds that government owned broadcasting organizations sometimes modify the copyright works and copyright holders have not objected to such act. Some of the copyright infringements made by the broadcasting organizations are with an implied permission of the copyright holders because getting a chance to present copyright works on the media is considered as a privilege and copyright holders want not to negotiate or raise legal action against the broadcasting organizations.²⁷² In other words, they don't want to disappoint such broadcasting organizations which are the only options for the copyright holders to broadcast their works to the public. On the other hand, it is not affordable to pay remuneration to all copyright holders due to the financial capacity of the broadcasting organization.²⁷³

The absence of well organized copyright associations further aggravates the copyright violation in the nation. Though there are about six copyright holders' associations, they are not active in bringing action against infringers on behalf of the copyright holders in case of copyright infringement.²⁷⁴ The main reason that the associations are inactive in bringing legal action is chronic financial constraints. The secretariat of audio-visual producers, Ato Haylay Tadesse, informed this writer that the professional associations are limited to the capital city Addis Ababa and they don't have branch office at the regional states. This would make difficult to fight copyright piracy throughout the nation.²⁷⁵ Though there are some efforts by EIPO and the associations to create cooperation with regional states, it remains a lot to be done in order to avert copyright violation at the regions.

²⁷¹ Ibid

²⁷² interview, cited above at note 255

²⁷³ Ibid

²⁷⁴ Interview with Interview with Ato Haylay Taddese, president of Ethiopian audio visual producers association, on November 2, 2012

²⁷⁵ Ibid

To conclude, despite the enactment of the copyright proclamation, awareness creation campaigns organized by the copyright holders, and administrative measures, the level of copyright infringement in Ethiopia is in its highest level. Thus, high level of copyright infringement or violation will certainly affect the function of the copyright collecting society for this indicates there is low level of copyright law enforcement in the nation. The function of collecting society is to enforce the economic and moral rights of copyright holders and hence its effectiveness depends, among other things, on the existence of strong copyright enforcement system. The reason here is that users would not be interested to pay royalties if they can get the copyrighted works for free through the unlawful channel which is prevalent these days in Ethiopia.

4.2.2.4 Potential Challenges relating to online- environment/ the internet

Development of internet technology, at the international level, has become a very challenging issue for copy right enforcement and function of copyright collecting societies. It threatens copyright collecting society not only because of lack of technical knowhow as to its function but also the difficulties related to individual users sharing of copyrighted works using the internet as mass media.²⁷⁶ That means an individual end users of copyright-protected works such as music, with a view to jeopardize the interest of copyright owner or due to other reasons, may release the work through the internet from which other individuals may have access to the copyright-protected works. What makes very difficult to control such sort of piracy using the internet is that individual users have become content providers, i.e. on the internet they can provide the copyright-protected works to other individual users easily.²⁷⁷ This challenge, the challenge of internet to the copyright system in general and to the copyright collecting society in particular, interestingly expounded by Daniel, j.Gervais , by comparing with the communication of copy right-protected works to the public which actually made through broadcasts, as follows:²⁷⁸

...in the case of broadcasts and of cable transmissions, the intermediary responsible both for the technical operation and of getting content to end users and for selecting the content is a professional. On the internet the function is split. In the vast majority of cases, ISPs [intermediary service providers] do not select the content. They merely provide the means to get the content from one point to other. The point of origin may

²⁷⁶ Daniel J. Gervais, Cited above at note 3, p7

²⁷⁷ Id , p8

²⁷⁸ Id ,9

be professional content provider, but it may also be another individual user. When broadcasters were analogized with theater and concert hall operators, the analogy held because both were making a professional use of copy right content. On the internet individual end users have become “content providers” but they are not professionals. Still, because right holders analogize to professional content providers, they had no hesitation to apply copy right, hitherto purely professional right, to those individuals, and that is when and why the tension emerged. Tension because, on the other side, individual users want to harness the enormous capabilities of the internet to access, use and disseminate information and content.

The development of internet technology, according to Daniel, creates wide and uncontrollable piracy or copyright violation for the reason that both copyright holders and their copyright collecting societies couldn’t identify the infringers because they are individual users. This is because, as mentioned above, individual users, using advanced software developed by others professionals to be used to browse on the internet, may share to copyright-protected works on the internet with other users and such copyright violation may not be identified. It also impracticable to issue licenses, like other professional copyright-protected works providers such as broadcasting organizations, to individual users. Still, this sort of problems has been occurring even in the countries where there are well developed and strong copyright collecting societies.²⁷⁹

Online –environment/ internet system has been spreading fast in Ethiopia. Today the numbers of internet service customers has reached 25,000,000.²⁸⁰ Ethiopian telecommunication has launched its third generation network (3G network) to enable the internet users to be beneficiaries of a modern and efficient service.²⁸¹ This indicates the fast growth of internet users in the nation. With the growth of the Internet users, issues of intellectual property rights protection in general and copyright protection in particular are likely to come to the fore.

The issue that should be considered in the first place is that whether the Copyright and Neighboring Rights Protection Proclamation No. 410/2004, is in position to tackle the challenges associated with development of internet. Since there are no specific provisions dealing with copyright-protected works on the internet, one may hold that the copyright legal regime (the proclamation) is not in a position to combat the challenges that may be posed by the internet.

²⁷⁹ Id ,p8

²⁸⁰ <http://danielberhane.com/2012/06/17/ethiopia-internet-users-no-reached-2-5-million-ministe>

²⁸¹ Ibid

Therefore, the emerging Ethiopian copyright collecting society would face difficulty for there is no specific provisions allowing or prohibiting the transmission or sharing of copyright-protected works on the internet. It has already stated that existence of well developed copyright legal regime that can cope up with the technological developments including internet should be in place in order to ensure effective copyright enforcement and successful operation of copyright collecting societies.

However one may argue that the proclamation is capable of facing the copyright challenges of digital technologies including those of Internet by widely interpreting the definitions of public communication and reproduction stipulated under article 2(6) of the copyright proclamation. Article 2(6) of the proclamation provides for:

Communication to the public" means the transmission by wire or without wire images or sounds or both of a work, a performance, a sound recording or a broadcast in such a way that the images or sounds can be perceived by a person outside the normal circle of a family and its closest social acquaintance at a place or places so distant from the place where the transmission originates, that without the transmission the images or sounds would not be perceivable and, further, irrespective of whether the persons can receive the images or sounds at the same place and time, or at different places and 1 or times individually chosen by them.

This definition may interpret to include the act of sharing of copyright-protected works through internet. Besides, since it prohibits temporary copy of copyright-protected works and Temporary copying is an essential part of the transmission process through Internet without which messages cannot travel through the networks and reach their destinations, The definition of reproduction stipulated under article 2(25) of the proclamation can be interpreted to apply against individual internet users who share copyrighted works.

The above argument seems sound but existence of these two provisions on the proclamation hardly suffice to fight copyright violations in the online- environment/internet which is actual very complex and hence needs a specific provisions or legislation that can cope up with the technical complexity of the subject matter and its dynamic nature. As it has already mentioned, there is technical difficulties to identify the infringers and evolution of software which facilitate

individual sharing of works on the internet. To alleviate such problems, in some jurisdictions, governments and copyright holders, using the principle of machine-by machine, have trying to develop software. They also developed legal mechanisms such as anti- circumvention law.²⁸²

To protect copyright works, extending legal protection to the copyrighted works on the internet is not subject to controversy. Though different jurisdictions could minimize copyright violations in the internet by enacting specific and comprehensive laws and applying other mechanical means, still development of online environment is main threat to copyright protection.²⁸³ Now days, in other jurisdictions, the difficulty is not related to enacting legislations. It is rather the enforcement of copyrights in the internet because the task of enforcement is likely to be cumbersome given the highly sophisticated nature of the technology. Enforcement of copyright on the internet may also need an expensive and advanced electronic device. It is a matter fact thus these problems are too difficult to solve by new collecting society which doesn't have strong technical and financial capacities.

Though it may not be main challenge which needs primary attention like in the developed nations, the emerging Ethiopian copyright collecting society would face similar challenges as the developed nations' copy right collecting societies had encountered; because copyright-protected works has been increasingly delivered in digital form via global networks, internet. What makes this challenge more difficult in Ethiopia is the absence of specific copyright legal frame work which addresses the copyright issue on the internet. A number of jurisdictions, unlike ours, have been taking legislative measures to combat copyright piracy on internet. Therefore, internet poses two challenges on the emerging Ethiopian copy right collecting society. The first challenge

²⁸² Dorian Chiroşca, The role of administrative authorities and collective management societies in promoting creativity and copyright based industries (http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipa_ge_08/wipo_ipa_ge_08_theme08_3.pdf) last visited on November 21, 1012.

²⁸³ For more on this see Daniel , cited above at note 3, pp 3-35; T. C. James ,the internet as a challenge for intellectual property protectionan Indian perspective, http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_int_sin_98/wipo_int_sin_98_2.doc ; and the impact of the internet on intellectual property law, (http://www.wipo.int/copyright/en/ecommerce/ip_survey/chap3.html) p1-3

is related to the legal regime and the other is related to technical matter. It is therefore critical to adjust the legal system to respond to the new technological developments (internet) in an effective and appropriate way.

4.2 Prospects

4.2.1 Introduction

In this section, an attempt will be made to discuss some promising developments that would positively contribute for the successful operation of the Ethiopian copyright collecting society. Ethiopia has joined world intellectual property organization (WIPO) which is an international organization established to promote the protection of intellectual property rights. It is also in its way to join world trade organization (WTO) which contains the Trade related Intellectual Property rights (TRIPS).if the country can succeed to join the WTO and there by member state , some opportunities would be created for the development of copyright collecting society in Ethiopia.

Moreover, there are researches conducted by Ethiopian intellectual property office (EIPO) with a view to strengthen border measures and preparing legal frame work which enables to regulate the copyright collecting society's act of determination, collection and distribution of royalties. On top of this; a national intellectual property council that contains thirteen members from different concerned government organs is established and one of its objectives is to create an integrated copyright enforcement system in general and to facilitate the operation of the emerging copyright collecting society in particular.

All this will have a great role for copyright collecting society to be effectively functional. It is thus the purpose of this section to explore how such developments can help the successful operation of the emerging Ethiopian copyright collecting society.

4.2.2 Ethiopian's membership to World Intellectual Property organization (WIPO)

Due to technological development across the globe, it was not possible to combat copyright infringement by states separately. WIPO came in to existence in order to combat copyright

piracy at international level and to promote protection of copyright-protected works internationally.²⁸⁴ Ethiopia has become member of the organization in February 19, 1998.²⁸⁵

Before we explore the opportunities in this regard, it is important to briefly review the functions and objective of the organization for it helps to understand the effect of membership on the development of the emerging Ethiopian copyright collecting society. In here It is worth mentioning that though Ethiopia is a member state in WIPO, it is not signed any of the conventions administered by the organization.²⁸⁶

The establishing convention of the organization²⁸⁷ lays down the general objectives and functions of the organization. It has the following objectives : to promote the protection of intellectual properties including copyright and related rights across the globe by creating cooperation among the states and in collaboration with other international organizations; to ensure administrative cooperation among the union. To realize this objective article 4 of establishing convention of the organization provides functions of WIPO. Out of such functions those stated under sub article i,iii,iv and v article 4 are relevant one to be discussed. They read as follows; the world intellectual property organization shall:

- ✓ promote the development of measures designed to facilitate the efficient protection of intellectual property throughout the world;
- ✓ offer its cooperation to States requesting legal–technical assistance in the field of intellectual property;

²⁸⁴ WIPO established in 1970 and is a specialized agency in the United Nations while its establishing convention was signed in July 14, 1967. WIPO's internal structure consists of three organs which are: first, the general assembly consisting of state parties to the convention and which are members of any of the unions , either Paris union or Berne union; second, the confers consisting of state parties to the establishing convention ; and third, a coordination committee of the Paris and /or the Berne union. www.wipo.com (last visited on October 25,2012)

²⁸⁵ Ethiopian Intellectual Property Office(EIPO), overview of the concept of copyright and neighboring rights, (2010), p22

²⁸⁶ Ibid

²⁸⁷ The convention is termed as convention for the establishment of World Intellectual Property organization and signed at Stockholm on July 14, 1967 and amended on September 28, 1979. www.wipo.com last visited on october25, 2012

- ✓ encourage the conclusion of international agreements designed to promote the protection of intellectual property; and
- ✓ Assemble and disseminate information concerning the protection of intellectual property, carry out and promote studies in this field, and publish the results of such studies.

The first function of WIPO, as aforementioned, is promoting and assisting measures, including legislative measures, taken by the member nations so as to ensure protection of copyright holders. The question that one may raise here is that how such assistance or promotion accomplishes by the organization? The organization (WIPO) assists its members by organizing trainings, workshops, seminars and other capacity building programs with an aim to strengthen human resources. It also provides legal and technical assistance to the members states especially where they intend to enact laws or introduce a new copyright enforcement mechanism such as establishment of copyright collecting society. Moreover, it extends financial supports to strengthen the legal and institutional frame work of its members. It further deploys online tools and software which helps the enforcement of copyright. It is not hard therefore to clutch the opportunities that the Ethiopian intellectual property system in general²⁸⁸ and the emerging Ethiopian copyright collecting society may get as consequence of Ethiopia's becoming a member of WIPO.

Specifically one of the establishing functions of the organization is providing legal and technical assistance²⁸⁹; capacity building, human resources development and institutional building²⁹⁰; and

²⁸⁸ A legal assistance is once delivered to Ethiopian in the enactment process of copyright proclamation, copy right and neighboring rights proclamation. Ethiopian intellectual property office had asked WIPO to comment on the draft proclamation and the latter had sent its comment which enables EIPO to improve some of the provisions of the then proposed draft proclamation. interview, cited above at note 226

²⁸⁹ WIPO, at the request of the governments or the collecting societies, gives legal assistance to national authorities by preparing draft legislation or by commenting on laws and regulations containing the provisions on the basis of which adequate collective management systems can be established. It may also offer Draft model provisions as guidelines which could serve as model law to facilitate the operation of copyright collecting societies. World intellectual property Organization (WIPO), Promotion and Development of Collective Management of Copyright and Related rights, (www.wipo.int/edocs/mdocs/mdocs/en/pcipd_1/pcipd_1_7.doc) last visited on octobor16,2012

technical and administrative assistance²⁹¹ in the field of copyright collecting society.²⁹² There is a division on WIPO called the Copyright Collective Management Division (CCMD) created to provide these assistances to the developing countries' copyright collecting management, i.e for Africa, Arab Countries, Asia and the Pacific, Latin America and the Caribbean. This division has been providing assistance in the establishment process of copyright collecting society and in the operation of collecting societies to strengthen the same.²⁹³ the assistance that the organization has been providing to developing countries' copyright collecting societies, as already mentioned, range from legal assistance to capacity building, both at the institutional level and by human resources development, and include more specific technical and administrative assistance, such as automation projects up on the request of the member countries.

It naturally follows that the emerging Ethiopia copyright collecting society, as Ethiopia is a member state of the organization, is eligible to get such assistance. The fact that the organization provides assistance to the developing states like Ethiopia to ensure successful operation copyright collecting society enhances the efficiency of the same. To my question is there any assistance that Ethiopia copyright and neighboring rights collective management has acquired from WIPO? Ato uqubay replied that:²⁹⁴

WIPO has delivered an assistance to develop the human resource capacity of Ethiopian copyright and neighboring rights collective management organization. Three board members of the collective management society have got an opportunity to train abroad by WIPO. The organization also provided software which helps for documentation system of copyright collecting societies to Ethiopian collecting society. Moreover, it has provided training to the staffs of EIPO and other participants with an aim to support the establishment of Ethiopian intellectual property academy.

²⁹⁰ The training activities are given to the copyright holders, users, staff of copyright collecting societies and the public in general. They take the form of either national or regional seminars, at an advanced as well as an introductory level, or practical courses intended for specialized management staff of the collecting societies. Ibid p5

²⁹¹ The technical assistance provided by WIPO to developing countries' collecting societies include computer equipment and software. Its program of activities took that need and also the training program on computer use and maintenance into account. Ibid, p6

²⁹² Id , p1-5

²⁹³ Ibid

²⁹⁴ Interview, cited above at note 227

In addition to the above stated assistances, this year (2005), Ethiopian intellectual property office has submitted a proposal to WIPO to get financial and technical support for the collecting society and WIPO has promised to give financial and technical support.

One of the functions of WIPO is adopting international forms of protection of intellectual property by assisting the reciprocal agreements of copyright collecting societies. This helps to the Ethiopian collecting society to internationally create a link with other collecting societies' of member states and to protect Ethiopian copyright holders abroad.

4.2.3 Ethiopia's future accession World Trade Organization (WTO)

Currently, Ethiopia is on its way to join world trade organization (WTO). This as well would contribute its part on the development of country's copyright enforcement system. But, how? This will be the next point of discussion.

Intellectual property is considered as a commodity in the international market and hence protection of intellectual works is of importance for trade. Thus, there is a convention that specifically deals with intellectual property signed by the member states of the world trade organization which is known as trade related intellectual property agreements (TRIPS) to which Ethiopia is in its way to join. It is generally agreed that WTO, which administers TRIPS, would ensure that intellectual property rights including copyright and neighboring rights are properly protected and at the same time measures intended to enforce those rights do not become obstacle to legitimate trade. Thus, If Ethiopian successfully joined WTO, the obligation to introduce and enforce intellectual property laws will be her unavoidable duty by virtue of Article II (3) of the establishing convention which makes the TRIPS agreement binding on all members states. Put simply, the Ethiopian IP legal regime will incorporate principles and measures that should be taken to ensure enforcement of intellectual property right in general and copyright in particular.

The TRIPS agreement obliges governments of the signatory states to enact copyright law which could grant strong protection of copyright, ensure the copyright laws are applicable and relevant to the technological challenges of the digital age.²⁹⁵ Such legislative measures specifically would create an opportunity for creating effective enforcement system within Ethiopia which includes

²⁹⁵ Paul Goldstein, International Copyright: Principles, Law and Practice (2001), p52

effective copyright collecting society. This is so because a copyright legal regime which takes in to account the above factors will facilitate the development of a strong system of copyright collecting society. For instance, when a copyright legal regime incorporates provision which appropriately deal with the right of copyright holder on the internet and effective means of enforcement for the same, there will be less copyright violation which in turn maximizes the amount of royalties to be collected by collecting societies.

The main obligation in the copyright field for a country when it becomes a member of WTO/TRIPS is to ensure that there exists an efficient copyright protection. This means that the legal standards correspond to what is required under TRIPS and that the national treatment principle is applied in relation to right-holders from other WTO members that the requirements as regards enforcement are met, and that sufficiently effective infrastructures exist for the implementation of the obligations; otherwise the protection would not be efficient.²⁹⁶ Based on such premises, it is said that membership of the World Trade Organization and being a party to the TRIPS Agreement entails obligations to set up and operate an efficient enforcement system that, among other things, includes successful copyright collecting society; and breach in this respect may entail dispute settlement procedures within WTO.²⁹⁷ As already mentioned, a certain copyright enforcement system to be effective, in addition to functional judiciary, well developed legal regime and institutional framework, it must have successful copyright collecting societies. Therefore, indirectly, states are under obligation to ensure the successful establishment and operation of copyright collecting society. This shows member states of WTO/TRIPS agreement are obliged to facilitate the establishment and operation of copyright collecting societies by enacting appropriate laws and take relevant administrative measures which allow copyright collecting society to effectively operate. Therefore, the emerging Ethiopian copy right collecting society will be benefited if Ethiopian successfully joined the WTO/ TRIPS agreement since the government will have inescapable obligation to build effective copyright enforcement system.

The other importance of TRIPS agreement is related to the international protection of Ethiopian copyright holders. Ethiopian copyright holders will be eligible to international protection which is not currently extended to works of Ethiopian copyright holders. This will enable the function

²⁹⁶ Id, p58

²⁹⁷ Ibid

of the emerging Ethiopian copyright collecting society to be international through reciprocal agreement because it is not possible to create reciprocal agreement with other nation's copyright collecting society in the absence of copyright protection to Ethiopian copyright holders.

4.2.4 Preparation to draft legal framework for copyright collecting societies

Currently, Ethiopian intellectual property office has been conducting a research to identify the problems of the emerging copyright collecting society in relation to the existing copyright legal regime and in its way to propose a draft law of copyright collecting societies.²⁹⁸ The draft law of copyright collecting societies is expected to be submitted to the concerned government organ and may mark a major breakthrough in the development of copyright collecting societies in Ethiopia.

The purposes of the draft law of copyright collecting society are explained by at Tedla Mamo, head of copyright department of EIPO, as follows;²⁹⁹

- since the establishment proclamation of Ethiopian intellectual property doesn't clearly determine the mandate of EIPO on the establishment and function of Ethiopian copyright collecting society, clearly determining such issue is the very reason of the draft law of copyright collecting societies;
- Though the operation of copyright collecting society, i.e. collection and distribution of royalties, has contained interest of copyright holders, users and the public at large, as experience of other jurisdictions, there is a need for government intervention to strike a balance among those interests. So other main purpose of the draft law of copyright collecting societies is to regulate the collection and distribution of royalties.
- The third reason is to rectify the legal obstacles against the effective operation of the emerging Ethiopian collecting and hence ensure the enforcement of copyright proclamation which is the main objective for which the office is established.

²⁹⁸ Ethiopian intellectual property office (EIPO) has conducted an assessment study to propose for setting up copyright collecting society legal framework. EIPO fiscal performance report, cited above at note 250, p3

²⁹⁹ Interview , cited above at note 226

This preparation, if successfully carried out by the office, would be of great importance for successful establishment and function of copyright collecting societies. As already stated many times, absence of appropriate legal regime is the main cause which holds back the emerging copyright collecting society. The establishment process and registration is made in accordance with the charities and society's proclamation which is very irrelevant since the latter's objective is in contrary to the nature and the very purpose of copyright collecting societies. there are many legal obstacles emerged from charities and societies proclamation such as strict regulatory procedures for collection of royalties and prohibition of distribution of profits among members- this is clearly against the very purpose of the collecting society. So, enactment of the draft law of copyright collecting society prepared by EIPO would certainly rectify these and other legal obstacles and would facilitate the operation of the collecting society.

Over all, if the enactment of law of copyright collecting societies comes in to being, hopefully, it will extract the prevailing problems related to the absence of special legal regime. Though it is quite difficult to say that mere enactment of special and relevant law automatically root out the existing challenges, successful enactment of the law will become an indispensable input to ensure successful operation of the emerging Ethiopian copyright collecting society.

4.2.5 Other Efforts of EIPO

The office also conducted a research to identify the legal gaps which hinder the effective implementation of copyright protection. According to the research conducted by the office Ethiopian copyright legal regime has failed to deal with inspection of copyright violations and the measures that should be taken at border by concerned government organs. Based such findings, it has proposed an amendment of the copyright proclamation. To my question 'what is the reason for incorporating such concepts in the Ethiopian legal regime?' ato Tedla Mamo, head of the copyright directorate of EIPO replied:³⁰⁰

The copy right law is crafted recently and it accommodated recent legal developments. However, since things are changing very rapidly, the law needs to be updated to pace with such developments. While the office begins its research it was intended to point out the legal gaps in relation to copyright enforcement. As result, we found that the copyright legal regime says nothing as to border measures and the power to

³⁰⁰ Interview with Ato Nassir Mohammed , Member of the National Intellectual Property Council, on October 23, 2012

inspect copyright violations. EIPO is not mandated with such responsibility. However, after we realize that such responsibility is essential to carry out our offices objective, ensuring the enforcement of copyright law, it has been starting to conduct inspection of copyright violations in cooperation with the police office which is not effective and hence it is found to propose for incorporation of provisions that deals with the inspection of copyright violations. The office has proposed to have its own department with police staffs mandated with inspection of copyright violations. With respect to the border measures, though the revenue and customs authority has a general responsibility to take legal measures so as to prevent exit or entrance of illegal products, there is specific provisions which empower the customs authority to take measure with a view to protect copyright holders. Experience of other jurisdictions; however, show that border measures such as applying levy system to the import of products which potentially can be used to violate copyright- example photocopy machines and CDS- are crucial to ensure copyright protection. So, strengthening of the border measures is the other reason for amendment of the copyright proclamation 410/2004.

If the proposal to establish police department, which inspects copyright violations and other intellectual property infringements, comes in to reality, it would hopefully facilitate the copyright protection responsibility of the office. Since the police officers usually inspect copyright violations like other crimes, there are unnecessary delays; and sometimes they give less attention to copyright violation because they are not well aware of its effect.³⁰¹ These problems could be solved if the office entrusted with a responsibility to establish inspection office and recruit its own inspectors. It is obvious that existence of strong border measures contributes a lot to the copyright protection within a certain nation. That is the practice in nationals that have well developed copyright legal regimes. It is worth mentioning here the importance of both existences of strong border measures and special department that inspects copyright violation. The former helps to reduce copyright violation in the nation which indirectly encourages legal exploitation of copyright works that in turn enable copyright collecting society to collect appropriate amount of royalties to its members. Existence of inspectors under EIPO would also serve the same purpose, i.e. reduction of copyright violations by effectively applying the sanctions against copyright infringers.

In addition, EIPO has been undertaking different measures which would have positive impact on the development of Ethiopian copyright collecting society. That shows there is good start on side of the government to protect copyright holders. To ensure copyright enforcement and enhance

³⁰¹ Interview, cited above at note 226

the awareness of the public, concerned government organs and copyright holders as to the benefit of copyright to the socio-economic and cultural development of the nation, it has prepared trainings and awareness creation campaigns. For instance to aware the youth, women and small and micro enterprises about the socio-economic, and cultural benefits of copyright industry, the office has given trainings. It also tried to work in cooperation with other government organs like custom and revenue authority with an aim of ensuring copyright protection by taking border measures.

To address the public at large, the office has used two radio programs broadcast on radio Fana. In addition, one SMS message on copyright and neighboring rights was send to telecom 25,000 customers. And, four articles are published by the office on its bulletin. Moreover, it has prepared brochures and booklets and distribute to different government organs and copyright users. Though such awareness creation activities of the office are limited to the capital city of the nation, Addis Ababa, it is a good start to create awareness among the copyright users And concerned government organs.

Besides, it also introduces voluntary copyright registration system. Identifying copyright holders and their works is necessary to provide licenses to users. that means existence of database on copyright holders is advantageous especial for new copyright collecting societies for it is difficult for emerging copyright collecting society like Ethiopia copyright collecting society to reach every individual copyright holders. It will also be of importance to reduce controversy as to the copyright ownership of works and reduce the extensive violation of copyright with in the nation which in turn may have positive impact on the income of the copyright collecting society.

Furthermore, EIPO has planned to establish intellectual property academy and other efforts to achieve that goal. EIPO, in cooperation with WIPO, has prepared trainings for the tutors³⁰² and customizers³⁰³. The office has already started a customization process, i.e. preparation of

³⁰² The tutors are those who will take a responsibility to conduct trainings and teaching activities to be granted to learners by the EIPO.

³⁰³ Customizers refer to the persons who have taken a task to prepare modules on intellectual property law. The preparation of IP modules is of importance to start the IP academy in Ethiopia.

modules on IP which comparatively discuss international intellectual property conventions and Ethiopian intellectual property legal regimes. It has also planned to start the online education of IP in Ethiopia after two months. However, the Establishment of the IP academy is in its process and expected to be fully operative after the completion of the customization process, which is after a year. Generally speaking, the main function of the IP academy is to provide online education on intellectual property law to individuals who are interested on intellectual property. The interesting thing here is that establishment of the academy will enable to create awareness among the copyright holders as well as users of copyrighted works and intellectual property expertise, since one of the main functions of the IP academy is to provide regular education on intellectual property laws which actually include more advanced courses on intellectual property. It would also pave way for development of research on the areas of intellectual property which has positive impact on the development of intellectual property laws in Ethiopia. The other objective of the academy is to develop knowledge and skills in intellectual property, teaching and research of IP.

4.2.6 Establishment of Ethiopian national intellectual property council

Ethiopia has established a National Intellectual Property Council (NIPC), which facilitates the Coordination of intellectual property policy and enforcement, and works on the integration of intellectual property into national development planning. NIPC was established last year, in 2011, which is very late compared to the enactment of Ethiopian copyright and neighboring rights (2004) that dictates the government to establish the national council.³⁰⁴ The main functions of the council according to article 9 of the copyright and neighboring proclamation are: to advise Ethiopian intellectual property office on policy proposals to be submitted to the government; render advice on guidelines, programs and activity reports prepared by the office; advise other matters related to managerial and administrative issues of the office submitted by the director general of the office and draw its own rules of procedures.

Since the idea of intellectual property rights has yet to take root in the consciousness of Ethiopians including government organs, establishment of IP national council will have irreplaceable role to create awareness among the society and the government organs,

³⁰⁴ Interview, cited above at note 146

development of intellectual property policies, promotions and enforcement of intellectual property rights in general and copyright in particular in the nation. Thus, though it is late, it is important step for the national council will hopefully coordinate and oversee the protection and promotion of intellectual property rights in Ethiopia, and carry out a sustained, coordinated and aggressive campaign to ensure intellectual rights enforcement. To achieve its objectives, the national council has established a national technical committee to deal with issues related to copyright enforcement. It comprises thirteen members, i.e. Ethiopian customs and revenue authority, ministry of justice, ministry of industry, federal police commission, Addis Ababa police commission, Addis Ababa justice office, ministry of trade, ministry of culture and tourism, Ethiopian radio and television agency and four members from Ethiopian copy right and neighboring rights. The main aim of the national committee is to discuss the legal and other barriers to the operation of copyright collecting society and provide a solution. To my question what is the role of national committee in solving the challenges of the emerging Ethiopian copyright collecting society? Ato Nassir Replied in a very detail manner as follows:³⁰⁵

In general the committee has mandated to propose solutions by identifying the problems that affect intellectual property in general and copyright enforcement in particular. Since the members are selected taking their relevance to the enforcement of copyright and neighboring rights, they have their own contribution for the successful operation of the emerging copyright collecting society. For instance, ministry of trade helps the copyright collecting society by checking whether the traders have got copyright licenses when they come to reregister their trade licenses. Custom and revenue authority can assist by taking appropriate border measures and to enforce levying system when such system legally recognized. Ethiopian radio and television agency is also expected to assist the emerging collecting society by creating awareness to the potential users. For Ethiopian radio and television agency would be the main user with which the collecting society should agreed first to collect remuneration, such would help the society to start its function and solve its financial problems. And since the functions of the government organs selected to be members of the national council have a lot to do with the function of the emerging copyright collecting society; it is believed that others will contribute their part to facilitate the function of the collecting society by creating awareness and extend cooperation to the collecting society.

³⁰⁵ Interview , cited above at note 300

What one can note here is that if the national council become effective on the ground, its works will have their own contribution to reduce the hindrances of the emerging Ethiopian copyright collecting society. When we look at the functions of Ethiopian intellectual property national council since its establishment, 2010, it has established a technical committee with a mandate to identify the challenges for copyright enforcement. The works that have done by the technical committee are good start. It has a leading role on the research conducted to establish legal frame work for function of copyright collecting society, i.e. collection and distribution of royalties.³⁰⁶ It also follows up the study conducting to strengthen border measures to be taken so as to ensure copyright protection.³⁰⁷

Chapter- five

Conclusion and Recommendation

5.1 Conclusion

With the growth of industrialization and the subsequent technological development and emergence of multiple chains of distribution of copy righted works made individual enforcement of copy right and related rights very difficult. Put differently, the number of users of such works increased and became difficult for the right holders to individually negotiate with users and manage legal exploitation of their works. Users also faced difficulties to negotiate with the right holders due to time and distance constraints. Sometimes it is also hard to know the right holder which, according to some scholars, led users to illegal use of copy righted works. Such difficulties proved the inadequacy of enactment of copyright laws, individual negotiation and enforcement of copy right and related rights, and ordinary judicial system for effective enforcement of copyrighted works and paved a way for evolvement of collective management

³⁰⁶ Interview , cited above at note 226

³⁰⁷ Ibid

system of copy righted works which allows copy right holders to alleviate pervasive violation of their rights and protect their economic interests.

The international historical development of copyright collecting societies dates back to the 18th century and was started in France in 1777, in the field of theatre, with dramatic and literary works. The development of related rights' collecting societies- societies established to collectively administer neighboring rights- has , relatively speaking, recent history when it is compared with copyright collecting societies; and the main reason for that is the absences of any statutory support for neighboring right claims in most jurisdictions. These days, the underlying idea of collective rights management, whereby copyright and related rights are managed collectively, is widely shared and collecting societies have a key role in all developed and developing countries in the enforcement of economic and moral rights of copyright and related rights holders. The role of collecting societies is not limited to the national market of copyrighted works. Following technological development and the global economic integration copyright violations had been extending at the international level which is difficult to avert by the national collecting societies. In order to keep the pace with globalization, copyright collecting societies have also played a critical role to protect their members' interest at international level by creating international cooperation and reciprocal agreements.

The historical evolution and other theories of copyright collecting societies shows that collective societies were developed to protect individual owners of copyrighted works from unlawful exploitation by making their works legally accessible to the potential users. Such development also justified by public interest theory in that collective society reduces the transaction cost incurred by users in negotiating with a number of individual right holders.

The main functions of copyright and related rights collecting society are acquisition of rights from right-owners; licensing of rights to buyers; collection of fees from users for the uses made; and distribution of fees collected to the right-owners. In addition to these principal functions, collecting societies undertake other related activities such as improving and defending the base of rights the organization manages through action for legislative change and court action to establish precedents in law; enforcement by court action of the rights managed where

infringement or piracy occurs; information and education related to intellectual property and the rights managed; social or cultural action in the industry concerned. Though these are the general functions of collecting societies, because of historical, legal, economic and cultural diversity among countries, regulation of collecting societies and the markets where they act vary from one country to another. In some jurisdictions, copyright collecting societies the role of the government is regulating and supervising the functions of the same while in other jurisdictions, especially in developing nations, the government has an extensive role in the operation of collecting societies. In some developing countries' collecting societies are quasi-government organs which mean government has a great role in the establishment and administration of the collecting societies.

Experience of jurisdictions shows that well developed legal regime which fits the realities of the nation, government assistance, bundling of rights or well developed copyright legal regime and competent staffs have to be in place so that copyright collecting societies can be functional and realize both moral and economic rights of copyright and related right holders. Though the degree of government support, and the contents of the laws accorded to copyright collecting societies may vary from country to country, its aim remains the same. It aims at ensuring the successful establishment and operation of copyright collecting societies. Especially in the jurisdictions, where the financial and technical capacity of copyright and related right holders to establish and manage copyright collecting societies is at a rudimentary stage, for a copyright collecting society to be effective and successfully functional, existence of special government support, existence of special legal regime which regulates the establishment and operation of copyright collecting societies, and competent staff are essential prerequisites. These requirements are observed by WIPO as requirements that copyright holders should examine before they strive to establish collective management system.

Though it is late, in Ethiopia, with the same aim (i.e. to protect the copyright and related right holders) copyright and related right holders professional associations (Ethiopian musicians association; the Ethiopian audiovisual producers association; the Ethiopian film producers association ;the Ethiopian film makers association; the Ethiopian theatre professionals association; the Ethiopian book publishers association; the Ethiopian writers association; the

Ethiopian comedians association and film professionals association) and individual copyright holders took the initiative and established Ethiopian copyright and neighboring rights collective management society (ECNRCMS) in November 2009. However, the collecting society is not yet functional. The problems that hold back the collecting society are three sorts: i.e. challenges associated with the existing copyright legal regime and charities and societies proclamation; a problem associated with the existing copyright institutional framework; and challenges other than legal and institutional problems.

The challenges associated with the existing Ethiopian copyright legal regime are: absence of private levying system in the copyright legal regime; and absence of special legislation that regulates the establishment and operation of the emerging Ethiopian copyright collecting society. Levy system refers to the right of copyright holders to remuneration for private copying of copyright-protected works and most of the time it is applicable for private copying of phonograms and audiovisual works. Private levying system is of importance to enforce the copyright holder's economic interest especially where there is rampant copyright violation because its enforcement is less costly and manageable by collecting societies. The existing copyright legal regime also fails to specifically (in a detail manner) deal with copyright protection on the internet. Since the development of infrastructures and number of internet users in Ethiopia have been growing rapidly, absence of specific provisions within the copyright proclamation which enables to regulate such area will be potential challenge for the successful operation of copyright collecting societies in Ethiopia.

Absence of copyright protection to the foreign works in Ethiopia and Ethiopian copyright holders in other jurisdictions is other problem for the emerging collecting society. Absence of legal protection to foreign works has a lot to do with the operation of copyright collecting societies. The problem is that when foreign works are not equally protected, they will constitute a sort of dumping and users will turn their face to the foreign works since they will not be obliged to pay remunerations for such works. That would have negative effect on the income of the copyright collecting society. These days, for instance, in our nation, a number of producers have been starting to provide films produced abroad, by translating in to Amharic from different languages such as English and Hindi, to the users which would substantially hamper the

development the film industry in the nation. Absence of legal protection to Ethiopian copyright holders abroad would also have its own negative effect on the operation of the emerging Ethiopian copyright collecting society. Though the first task which the emerging Ethiopian copyright collecting society should focus is securing economic and moral rights of copyright holders in Ethiopia, to fully secure interest of its members, there will be a need to create international cooperation and reciprocal agreements which is actually dependent on the existence of copyright protection to Ethiopians abroad.

The experiences of other jurisdictions, both developed and developing nations, shows that government support is crucial especially when the collective management system of copyright and related rights is newly introduced to the nation and the capacity of copyright owners is not in a position to assist the establishment and operation of the same. Absence of government support and special institutional back up is other obstacle that holds back the emerging Ethiopian copyright collecting society. In Ethiopia, government support in terms of financial and technical aspects is almost none which in turn causes the establishment process of the collecting society to be sluggish and makes the same inoperative. Though there is an effort to provide technical support by EIPO, the absence of legal regime that clearly determines the role of such institution creates a problem and makes the support of EIPO to be limited and ineffective.

Coming to The challenges associated with charities and society's proclamation, since the proclamation is enacted to achieve different objectives which are not in line with the function of copyright collecting society, it has contained provisions which totally stop the collecting society from being functional. There are provisions that put strict regulations for establishment and operation of the collecting society, limit the extent of foreign support/ international organizations support, and prohibit distribution of benefits or royalties among members of the society.

In addition to the aforementioned legal and institutional challenges, lack of public awareness as to the importance of copyright and related rights protection in general and the function and significance of copyright collecting society in particular, absence of competent staff, existence of high level of copyright violation, and problems related to internet are other challenges for the successful function of the emerging Ethiopian copyright collecting society.

There are also some promising developments that would positively contribute to the successful operation of the Ethiopian copyright collecting society. Ethiopia has joined world intellectual property organization (WIPO) which is an international organization established to promote the protection of intellectual property rights. As a result the emerging Ethiopian copyright collecting society has been already starting to get technical assistances and succeed to win financial supports expected to be released in the coming fiscal year. The country is also in its way to join WTO and hence this will be a great opportunity for the emerging Ethiopian copyright collecting society because the former obliges member states to put appropriate copyright enforcement mechanism which includes effective collective management system of copyright and related rights.

In addition, there are developments in the nation that have a lot to do with the successful establishment and operation of copyright collecting society. there is a process of revising the existing copyright legal regime by Ethiopian intellectual property office (EIPO) with a view to strengthen border measures and incorporate provisions which enables to regulate the copyright collecting society's act of determination, collection and distribution of royalties. On top this; a national intellectual property council that contains thirteen members from different concerned government organs has been established and entered into operation with an aim to identify problems of copyright enforcement and forward solutions. One of its objectives is to create an integrated copyright enforcement system in general and to facilitate the operation of the emerging copyright collecting society in particular. Moreover, Ethiopian intellectual property office is planned to establish Ethiopia intellectual property academy to create public awareness and train individuals and government officials on intellectual property which would pave away for effective enforcement of intellectual property. These developments are good opportunities for the emerging Ethiopian copyright collecting society for they will help to resolve the existing legal, institutional and other problems that hold back the copyright collecting society. For instance, if the copyright collecting society's legal regime prepared by EIPO successfully enacted, it will enable to overcome the legal obstacles which exists due to the subjection of Ethiopian copyright and neighboring rights collective management society to irrelevant law, charities and societies proclamation.

5.2 Recommendations

Based on the findings of this paper, the writer would like to recommend the Following:

1. Among the challenges that the emerging Ethiopian copyright collecting society has been facing in its establishment process and operation, absence of special legal law is the main obstacle that actually stops the collecting society from involving in to its function, i.e. collecting and distribution of royalties. Thus, to avoid such legal obstacles and make the emerging Ethiopian copyright collecting society function, the government should devise special legal regime which specifically deal with the establishment and operation of the collecting society. The government may separately enact special collecting societies' legal regime or incorporate it in the copyright proclamation as was intended during the draft stage of Ethiopian copyright and neighboring rights proclamation.

In relation to copyright collecting societies' legal regime, there is a good start by Ethiopian intellectual property office, i.e. preparation of draft legal regime for collection and distribution of royalties or remunerations. However, the preparation of the legal regime by EIPO is mainly aimed to regulate the collecting society's function that is collection and distribution of royalties. If ensuring effective functioning of copyright collecting society is what is needed, it shall also address the issues of establishment of collecting societies, role of the concerned government organ in the establishment and operation of collecting societies and dispute resolutions mechanisms. Experience of developing countries indicates the role of the government is not limited to regulate the functions of collecting society but also extends to establishment, governance and dispute resolution roles such roles are predetermined by legal regimes of collecting societies. That is because the collecting societies of developing nations are at their infant stage and hence not strong enough to effectively accomplish those tasks.

2. As it has been already observed by intellectual property scholars, combating copyright violation has been starting to be complicated and difficult due to the technological developments and difficulty faced by copyright holders/ their collecting societies to control the exceptionally recognized rights of individual users to reproduce the copyrighted works. Private levying system is devised to control copyright violations on the guise of exceptions by imposing predetermined fees against the products used by users to reproduce copyrighted works. Thus, to facilitate the

function of the emerging Ethiopian copyright collecting society and hence make the copyright holders economic interest in the area of private copying enforceable, private levying system should be recognized under Ethiopian copyright legal regime.

3. Since there is fast internet users growth in the nation, it is crucial to adjust the copyright legal regime to respond to such new technological developments. The existing Ethiopian copyright legal regime has no specific provisions that deal with copyright protection in the internet/ on-line environment and enforcement measures and procedures, including anti-circumvention rules, which are workable in the on-line environment. Thus, it should be amended to cope up with the challenges that are related with online-environment.

Problems associated with on-line environment / internet may not be resolved only by enacting laws. To combat such problems, it is indispensable to equip the emerging copyright collecting society with technical and technological means which have been developed by international organizations like WIPO to resolve the technical problems that collecting societies faced by technological development like internet while exercising their tasks. The emerging Ethiopian copyright collecting society, to resolve technical problems that would rise from on-line environment/internet, should be encouraged to create regional and international cooperation with organizations working to achieve the same objective, like World intellectual property organization.

4. As far as the challenges associated with institutional frame work and government is concerned the writer recommends the following:

The experience of many jurisdictions, especially those of developing countries, shows that effectiveness of enforcement of copyright in general and the successful operation of copyright collecting society in particular needs due attention by the government. In other words, if the government is not committed to the objective of successful establishment and effective operation of copyright collecting society, there is little use of establishing collective management system in developing countries like Ethiopia, where the technical and financial capacity of individual copyright holders and their professional associations are at a rudimentary stage, to administer

copyright and related rights. The existing reality in our nation testifies this assertion. Though it has counted three years since its establishment, Ethiopian copyright and neighboring rights collective management society is not yet functional because of, among other things, financial constraints, legal challenges and technical problems which should address by the government given the fact that Ethiopian copyright holders' economic capacity is not in a position to afford the financial costs and technical functions of the collecting society. Therefore, ensuring legally recognized special institutional backup is crucial to alleviate the existing technical, financial and legal challenges of the emerging Ethiopian copyright collecting society.

The government shall take proactive role to make the emerging Ethiopian collecting society functional. The government should also advocate the importance and benefits of collective administration for right Owners, users and the general community. That kind of government support would be advisable to be extended through special institution which is legally mandated with those tasks. In this regard, taking the economic capacity of the nation, it may not be possible to establish new special institution, rather it seems feasible to bestow the task of providing special government assistance to the collecting society to Ethiopian intellectual property office (EIPO) for the latter has already observed the problems of the collecting society and working to enforce the copyright and other intellectual property rights.

The Government should further set the example to the rest of the population by ensuring that all Government ministries, departments and state agencies who use copyright or neighboring rights (in particular state-owned broadcasting organizations) comply with the provisions of the copyright law.

5. An extensive awareness creation as to the importance of copyright protection in general and functions and significance of copyright collecting societies in particular is of importance to resolve legal, institutional and other challenges of the collecting society.

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