

ADDIS ABABA UNIVERSITY
College of Law and Governance Studies
School of Law



**Copyright Infringement in User Generated Contents: A
Critical Analysis of YouTube's Terms of Service and
Policies Vis-à-vis Ethiopian Copyright Standards**

By: Bulcha Nigussie

Advisor: Biruk Haile (Ph D)

May 2021
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**A Thesis Submitted to Addis Ababa University, the School of
Law: in Partial Fulfillment of the Requirements for the Degree
of Master of Laws (L.L.M) in Business Law.**

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APPROVAL SHEET

Copyright Infringement in User Generated Contents: A Critical Analysis of YouTube's Terms of Service and Policies Vis-à-vis Ethiopian Copyright Standards

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Declaration

I hereby declare that this thesis is my original work, has not been submitted in any other university and materials used in it have duly been acknowledged.

This LLM thesis meets every standard required by the Addis Ababa University School of Law LLM thesis Guidelines.

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I praise you the almighty God for everything you gave me and blessing me with a family that have never doubted me in difficult times given me courage, hope and supported me with everything in every step I take. Mom and Dad this belongs to you, thank you for the unwavering love, support, encouragement and understanding.

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Acronyms

CMS's	Collective Management Societies
CSP's	Communication Service Providers
DMCA	Digital Millennium Copyright Act of USA
DSMD	Copyright and Related Rights in the Digital Single Market Directive of EU
ICT	Information Communication Technology
ISP's	Internet Service Providers
OECD	Organization for Economic Co-operation and Development
RAM	Random Access Memory
TOS	Terms of Service
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property
UGC	User Generated Content
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Office

ABSTRACT

Ordinary individuals have become active participants in the creation and dissemination of creative works on social media. User generated content (UGC) is a terminology that describes various works uploaded by users on platforms like YouTube and Facebook. This culture triggers the application of copyright law since some of the contents users engage with involve productions copyright protects. Social media websites also attempt to regulate user's adherence to copyright while using their service by incorporating some legal conditions in their TOS.

This thesis examined Ethiopia's copyright standards and copyright related legal conditions in YouTube's TOS and policies to investigate the convergence and divergence between these regulatory factors in regulating user's content-generative behaviors, UGC licenses, and online copyright enforcement. To some extent YouTube's TOS are aligned with Ethiopia's copyright law as they require users to respect copyright while using its service by informing them not to upload or use third-party copyrighted works in their contents and by making available an online take-down notification procedure copyright owners can use to enforce their rights on the website.

However, YouTube's UGC licenses which allow users to retain the copyright ownership of contents they upload by requiring them to license their rights for YouTube and its users, have several flaws that make them at odds with Ethiopia's copyright law. These include; formality related defects, their applicability on every content users upload including those that might not be copyrightable in Ethiopia, and they deny user's legal right under Ethiopia's copyright law since users license all of their exclusive economic rights freely for YouTube and other YouTube users with whom they have no contractual relationship. Vesting on user's ownership of copyright on contents that are not copyrightable might lead users to have wrong understanding about copyright. Giving other YouTube users extensive rights to use UGC far beyond their rights under Ethiopia's copyright law exceptions might encourage users to make various uses that are infringing under Ethiopia's copyright law and compromise its effectiveness while regulating user's behavior by elevating the probability of mass-scale infringement on the website.

CHAPTER ONE: INTRODUCTION

1.1 Background of the study

Advancement in digitalization and internet mainly that of 'Participative Web' or Web 2.0 internet model has made internet a user-friendly forum they can easily and actively participate. The emergence of various social media websites like Facebook, YouTube, and Twitter is the most notable development in this regard.¹ Technological features developed by such platforms are easy to use and enable ordinary individuals with modest knowledge to actively participate by creating and sharing content in the online social media world.² Services provided by social media platforms usually involve facilitating user's participation and communication, based on mediums like text, photo, audio, and video. User generated Content (UGC) is the main component of such platforms.³ UGC is defined as 'any data or media created by individual users of a website and available for others to use'.⁴

Individuals utilize UGC for purposes such as social interaction, expressing ideas and opinions, creating, sharing, and accessing works and information either with a selected group of people or the whole world.⁵ Everywhere in the world, individuals are fond in love with social media culture as evidenced by the ever-growing number of active users and UGC.⁶ UGC has enabled individuals to create and share expressive works by increasing their potential to reach enormous audiences.⁷ Ordinary individuals who were consumers of entertainment industry works have

¹ Sacha Wunsch-Vincent and Graham Vickery, 'Participative Web: User-Created content' (2007) Organization for Economic Co-operation and Development (OECD) <<https://www.oecd.org/sti/38393115.pdf>> accessed 9 November 2020

² Corinne Tan, *Regulating Content on Social Media: Copyright, Terms of Service and Technological Features* (UCL press 2018) 139

³ Babovic Mihajlo 'The Emperor's New Digital Clothes: the Illusion of Copyright Rights in Social Media' (2015) 6(1) *Cybaris* 140, 142

⁴ Oxford Advanced Learner's Dictionary <<https://www.oxfordlearnersdictionaries.com/definition/english/ugc>> accessed 25 February 2021

⁵ Edward Lee, 'Warming Up to User-Generated Content' (2008) 5 *University of Illinois Law Review* 1459, 1500

⁶ *ibid*

⁷ Yahong Li and Weijie Huang, 'Taking Users' Rights Seriously: Proposed UGC Solutions for Spurring Creativity in the Internet Age' (2019) 6 *Queen Mary Journal of Intellectual Property* 61, 62

become producers and distributors of their own works.⁸ Pervasive growth of UGC is partially attributable to its ability to serve as a common place where everyone can freely participate in the production and consumption of works.⁹

UGC needs consideration in the realm of copyright as it is part of Intellectual Property Rights (IPR), which is devoted to protecting creative works produced in artistic, literary, and scientific fields.¹⁰ Copyright applies to UGC because some of such contents involve productions copyright protects. Copyright law aims at achieving two equally important policy objectives, i.e. protecting the interest of authors by granting them a bundle of exclusive rights over their creative works and the public's interest in accessing and using creative works.¹¹ Accordingly, UGC can help in achieving these objectives, as a potential medium for creation and dissemination that continuously contributes creative works.¹² However, in the absence of adherence to copyright UGC can pose a grave threat to copyright by serving as an avenue for infringement.¹³

Despite Ethiopia's government's recent attempts for partial privatization of telecommunication sector, Ethio telecom is the only telecom service provider in the country. According to its recent report, Ethio telecom claims to have 44.5 million mobile users and 23.8 million internet and data subscribers.¹⁴ These enabling developments have paved the way for Ethiopians to participate in social media culture. The number of social media users in the country is estimated to be more

⁸ Daniel J. Gervais, 'The Tangled Web of UGC: Making Copyright Sense of User-Generated Content' (2009) 11 VAND J ENT & TECH L 841, 849

⁹ Lee (n 5) 1506.

¹⁰ Copyright and Neighboring Rights Proclamation, 2004, Art 2(30) Proc No. 410 Fed. Neg. Gaz., year 10, no 55 (Copyright Proclamation)

¹¹ John Palfrey and others', 'Youth, Creativity, and Copyright in the Digital Age' (2009) 1(2) IJLM 79, 81 <<http://nrs.harvard.edu/urn-3:HUL.InstRepos:3128762>> accessed 13 February 2021

¹² Steven D. Jamar, 'Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context' (2010) 19 WINDLJ 1 <<https://www.researchgate.net/publication/228172738>> accessed 13 September 2020

¹³ Lee (n 5) 1499.

¹⁴ Ethio Telecom, '2012 EFY (2019/20) Annual Business Performance Summary Report' (31 July 2020) <<https://www.ethiotelecom.et/ethio-telecom-2012-efy-2019-20-annual-business-performance-summary-report/>> accessed 28 February 2021

than 6 million, while Facebook and YouTube are the most widely utilized websites.¹⁵ Heated campaigns and discourses on various socio-political issues that take place on social media have made it a powerful tool in shaping the countries socio-political landscape and a great concern at the same time.¹⁶ The government has been blaming social media activism for causing disturbances and societal uprisings and responded by blocking internet several times as part of measures to maintain order.¹⁷ Prevalence of social media culture can be evidenced from the legislature's intervention by enacting the Hate Speech Proclamation which provides rules that regulate certain aspects of social media use.¹⁸ Despite the prevailing focus on the negative socio-political effects of social media, it will certainly have its contribution and challenges to Ethiopia's copyright system.

Increasing the number and active participation of users is beneficial for social media platforms. Contents users interact with on social media may raise various legal liabilities, thus they attempt to regulate user's adherence to law while using their service.¹⁹ YouTube, the website selected for this study is the second most popular website globally as of August 2020.²⁰ YouTube is a USA-based online video hosting platform that claims to have more than two billion active users that watch more than a billion hours of videos everyday while uploading more than 500 hours of video every minute.²¹ YouTube allows users to upload and make certain uses of contents such as videos.²² The relationship between YouTube and its users is governed by the agreement

¹⁵ DATAREPORTAL, 'Digital 2020 Ethiopia' <<https://datareportal.com/reports/digital-2020-ethiopia>> accessed 17 February 2020

¹⁶ Elefelious Getachew Belay, Getachew Hailemariam Asale and Moges Ayele, 'The Tributes and Perils of Social Media Use Practices in Ethiopian Socio-political Landscape' Stephanidis C and other(eds.) in *International Conference on Human-Computer Interaction* 205, 199-209 (Springer Cham, 2020) <<https://www.researchgate.net/publication/345748675>> accessed on 14 February 2021

¹⁷ ibid 205.

¹⁸ Hate Speech and Disinformation Prevention and Suppression Proclamation 2019, see Arts 2(8 & 10), 4-8, Proc No. 1185 *Fed. Neg. Gaz.*, year 26, no 26

¹⁹ Tan (n 2) 5.

²⁰ Alexa Internet 'Top 500 Sites on the Web' <<https://www.alexa.com/topsites>> accessed 24 November 2020

²¹ YouTube Official Blog, 'YouTube by the Numbers' <<https://blog.youtube/press>> accessed 24 February 2020

²² YouTube, 'Terms of Service' (as of December 10 2019) <<https://www.youtube.com/static?template=terms>> accessed 2 September 2020 (YouTube's TOS)

concluded according to YouTube's Terms of Service (TOS).²³ Some legal conditions in this agreement regulate copyright-related aspects of the service. YouTube was selected for this study because it is one of the popular online locations for accessing Ethiopian origin works. By simply browsing YouTube we can find numerous copyrighted works owned by Ethiopian-based entrainment industries such as; movies, music, and news along with various contents uploaded by individual users.

1.2 Statement of the problem

The emergence and pervasive growth of UGC have various socio-economic impacts that affect every facet of society's life. This raises novel issues and challenges in different areas of laws such as privacy, taxation, disinformation, defamation, and perhaps copyright which is the focus of this study and the biggest issue.²⁴ UGC is a phenomenon associated with digitalization and internet, developments that came with both attractive opportunities and severe challenges to the traditional copyright system.²⁵ Addressing digitalization-related challenges and making copyright law applicable in the digital environment have lead international organizations and several countries to craft additional rules to the traditional copyright laws.²⁶ Similarly, UGC has brought its opportunities and multifaceted challenges.²⁷ From the outset accommodating such innumerable production of contents by numerous users was considered an unbearable burden to accommodate under established copyright framework that was designed to govern limited number of professional's works.²⁸ Mostly being amateur's creations involving varying levels of creativity, raises the question if UGC can be regarded as a proper subject matter of copyright under legal requirements designed for professionals works.²⁹ UGC has expanded application of copyright which was limited to professionals into a subject applicable in ordinary individual's daily activities.³⁰

²³ *ibid*

²⁴ OECD 2007 (n 1) 43.

²⁵ *ibid*

²⁶ WIPO Copyright Treaty, adopted 20 December 1996 preamble (WCT)

²⁷ Gervais (n 8) 846.

²⁸ *ibid* 848.

²⁹ Mihajlo (n 3) 144.

³⁰ Gervais (n 8) 856.

Traditionally, copyright owners control appropriations of their works by licensing their rights for certain institutions. However, controlling use of works as such in UGC where millions participate as creators and distributors of works will be difficult for copyright owners.³¹ Collective licensing system was alternatively used for regulating use of works in situations involving several creators and users.³² Regarding UGC, most social media TOS agreements require users to license their rights on UGC for themselves and their users.³³ As one objective of copyright is economically rewarding authors such licenses are scrutinized for granting these platforms excessive right on UGC without giving proper reward for users.³⁴ Legality of such licenses is assessed based on domestic laws which regulate contracts and licensing of copyright.³⁵

UGC is not limited to original works since the practice of using third-party works in UGC with varying degrees is prevalent.³⁶ Users make use of each other UGC or any third-party copyrighted works as building blocks to create secondary works or they may simply upload such works without adding their creativity. If such uses are made without the owner's authorization they might potentially infringe more than one exclusive right.³⁷ Despite, individual's right to make certain unauthorized uses of works under established copyright principles like exceptions, UGC raises concerns owing to its mass production and circulation.³⁸ Copyright owners are concerned with such uses of their work fearing the resulting damages, while users make massive unauthorized appropriation of works despite uncertainties about their legal rights.³⁹ This raises a

³¹ *ibid* 848.

³² *ibid*

³³ Tan (n 2) 99.

³⁴ Mihajlo (n 3) 179-181.

³⁵ Tan (n 2) 121.

³⁶ Lee (n 5) 1506.

³⁷ Gervais (n 8) 856.

³⁸ Li and Huang (n 7) 71.

³⁹ Warren B. Chik, 'Paying it Forward: the Case for a Specific Statutory Limitation on Exclusive Rights for User-Generated Content under Copyright Law' (2011) 11(2) *John Marshall Review of Intellectual Property Law* 240, 250

question about the ability of copyright law to protect the interests of copyright owners and users in UGC.⁴⁰ Compatibility of such culture with copyright owner's exclusive rights and user's right in the exceptions to make such uses and as valid defense in infringement claims is one controversial issue.⁴¹

Compared to earlier times when limited individuals commit infringement, UGC places copyright owners in difficult position by elevating probability of mass-scale infringement.⁴² Infringement liability of users that directly infringe copyright in UGC doesn't involve complicated legal issues. However, enforcing their right by identifying and proceeding against individual infringers is difficult for copyright owners.⁴³ In such cases, owners can proceed against social media by invoking their role to hold them liable under secondary infringement liability.⁴⁴ Social media platforms have their own role in the enforcement of copyright. A solution to addresses copyright-related challenges of UGC is sought under existing International copyright instruments that set minimum standards for copyright protection. However, regarding the role ISP's (Internet Service Providers) in the enforcement of copyright and their secondary infringement liability is mostly a matter governed by different domestic laws of states.⁴⁵ ISP's provide indispensable services for the proper function of societies' by facilitating communication and exchange of information.⁴⁶ Customers may use their services for conducting illegal activities including copyright infringement.⁴⁷ ISP's can be exposed to exaggerated liability under secondary

⁴⁰ Jordan Sundell, 'Tempting the Sword of Damocles: Reimagining the Copyright/DMCA Framework in a UGC World' (2011) 12(1) MINN JL SCI & TECH 335, 340

⁴¹ Gervais (n 8) 856.

⁴² Sundell (n 40) 340.

⁴³ Will Clark, 'Copyright Ownership and Control of User-Generated Content on Social Media Websites' (2009) Kent Law 10 <<http://www.kentlaw.edu/perritt/courses/seminar/papers>> accessed 7 September 2020

⁴⁴ Truan Savage, 'Avoiding the Next Napster: Copyright Infringement and Investor Liability in the Age of User-Generated Content' (2015) 4(2) MICH BUS & ENTREPRENEURIAL L REV 261, 266

⁴⁵ Kristofer Erickson and Martin Kretschme, 'This Video is Unavailable: Analyzing Copyright Takedown of User-Generated Content on YouTube' (2018) 9 JIPITECH 78, 80

<http://www.dipp.nrw.de/lizenzen/dppl/dppl/DPPL_v2_en_06-2004.html> accessed 13 September 2020

⁴⁶ Chris Reed (ed.), *Computer Law* (7thedn, OUP 2011) 310

⁴⁷ *ibid*

copyright infringement liability for user's direct infringement.⁴⁸ The need for protecting the interest of copyright owners, enabling individuals to utilize new technologies, and mitigating ISP's liability risks has led to the adoption of new laws which provide rules that regulate the role and liability of ISP's in the enforcement of laws including copyright.⁴⁹ Social media websites are one category of ISP's recognized by laws of jurisdictions like the USA and European Union (EU). Laws of these jurisdictions provide different obligations such platforms need to comply with to enforce copyright on their website to avoid secondary infringement liability.⁵⁰

Until recently, Ethiopia has not made major legal developments aimed at addressing the application of copyright in the digital environment or governing liability of ISP's.⁵¹ However, the recent Electronic Transaction Proclamation has brought important changes by introducing rules that limit the liability of Communication Service Providers (CSP's).⁵² Hosting intermediaries like social media are one category of CSP's incorporated in this law.⁵³ It establishes a take-down notification procedure hosting intermediaries need to comply with by removing unlawful contents to avoid liabilities arising from uses of their service.⁵⁴ This law is adopted as general law applicable to every activity performed by CSP's thus it includes copyright.⁵⁵

⁴⁸ Savage (n 44) 272-273.

⁴⁹ Walter Rodriguez and Liseann M. Christman-Goerl, 'Managing Intellectual Property Protection in the Digital Age' (2015) 11(2) *The Journal of Global Business Management* 121, 123
<<http://www.jgbm.org/page/15%20Walter%20Rodriguez.pdf>> accessed 18 December 2020

⁵⁰ Jack Lerner, 'Secondary Copyright Infringement Liability and User-Generated Content in the United States' (2020) *Oxford Handbook of Online Intermediary Liability* 19(forthcoming) <<https://ssrn.com/abstract=3600322>> accessed 13 September 2020

⁵¹ Kinfe Michael Yilma and Halefom Hailu, 'The Internet and Ethiopia's IP Law, Internet Governance and Legal Education: an Overview' (2015) 9 *MIZ L REV* 154, 162

⁵² Electronic Transaction Proclamation, 2020, Arts 23-27 Proc No. 1205, *Fed. Neg. Gaz.*, year 26 no 57 (E-Transaction Proclamation)

⁵³ *ibid*, Art 25.

⁵⁴ *ibid*, Art 27.

⁵⁵ *ibid*, see art 3.

YouTube tries to regulate user's adherence to copyright by incorporating some legal conditions in its TOS, copyright and fair use policies. It also provides copyright owners with tools to enforce their rights on its website. YouTube requires users to license their rights on UGC for itself and its users.⁵⁶ However, some regard YouTube as a venue of copyright infringement and it has been a party in a popular copyright infringement case.⁵⁷ YouTube's copyright-related legal conditions can serve as potential regulatory factors that shape users behavior on the website, thus they have their own implication on copyright.⁵⁸ Alignment of YouTube's legal conditions with Ethiopia's copyright standards may enhance the effectiveness of the law in regulating user's content-generative behaviors, while their divergence may compromise its effectiveness.

In line with these problems, this study will examine relevant copyright standards of Ethiopia to investigate how it regulates, protects, and enforce copyright in UGC. YouTube's copyright-related legal conditions will be studied as regulatory factors, to assess the compatibility and divergence between the two. Accordingly, this study will investigate Ethiopia's copyright law rules governing protected works and eligibility requirements for copyright to assess its suitability to extend protection for UGC, to examine whether or not the issue of copyright can be a proper subject matter in users dealing with YouTube. This study will examine legality of YouTube's UGC licenses under Ethiopia's licensing regime. Users rights under YouTube's UGC license for users and fair use policy for using UGC uploaded on YouTube will be measured against copyright owners exclusive rights and users right in Ethiopia's copyright law exception, since their compatibility may enhance users adherence to latter while their divergence might encourage users to disregard Ethiopia's copyright law by making infringing uses. The study will examine enforcement and remedies for copyright infringement in Ethiopia to investigate copyright owner's recourse to address infringement in UGC, user's infringement liability risks, and secondary infringement liability of YouTube. Compliance of YouTube with the take-down procedure established by the E-transaction proclamation will be investigated to examine the

⁵⁶ YouTube's TOS (n 22).

⁵⁷ Kurt Hunt, 'Copyright and YouTube: Pirate's Playground or Fair Use Forum?' (2007) 14(1) MICH TELECOMM & TECH L REV 197, 202

⁵⁸ Tan (n 2) 98.

availability or absence of online enforcement opportunities for Ethiopian copyright owners to address infringement on YouTube.

1.3 Research Questions

Based on the brief problem analysis set forth above this thesis examines the following specific research questions:

1. Does Ethiopia's copyright law extend protection for UGC uploaded by Ethiopians on social media as copyrightable subject matter?
2. Do user's rights for using UGC, under YouTube's fair use policy and UGC license for users, enhance user's adherence to Ethiopia's copyright law by giving them compatible rights with those they have under Ethiopia's copyright law exceptions?
3. Do Ethiopian users that upload copyrighted UGC on YouTube license their rights under YouTube's TOS UGC licensing provisions in compliance with legal requirements provided by Ethiopia's copyright licensing regime?
4. Does YouTube comply with the take-down notification procedure established by the E-Transaction proclamation and give copyright owners online enforcement opportunity to address infringement in UGC on the website?
5. To what extent is YouTube liable for user's direct copyright infringement in UGC they upload using its service under Ethiopia's laws?

1.4 Objectives the study

The main objective of this study involves investigating Ethiopia's copyright standards along with legal conditions in YouTube's TOS to find out their similarities and differences for examining whether the latter compromises or enhances user's adherence to the former while undertaking content-generative activities on YouTube.

In line with this the study has the following specific objectives:

- Examining the room in Ethiopia's copyright law to extend protection for UGC.
- Examining legality of YouTube's TOS copyright-related legal conditions and UGC licenses under Ethiopia's copyright standards.

- Examining how users infringe copyright in UGC, right holders recourse to enforce their right in such cases and liability risks users might face for such infringement.
- Examining Ethiopia’s copyright law exceptions to investigate the breathing space individuals have to use copyrighted work for UGC and if they can serve as a valid defense for users accused of infringement in UGC.
- Examining the role of websites such as YouTube in the enforcement of copyright and their secondary infringement liability under Ethiopia’s laws.

1.5 Methodology of the Study

This study is doctrinal legal research. It will make use of both primary and secondary sources. Copyright and neighboring rights proclamation, its amendment proclamation,⁵⁹ E-Transaction proclamation, and other relevant domestic legislations will be used as primary sources to investigate how Ethiopia’s laws regulate, protect and enforce copyright in UGC. For this purpose, some popular types of UGC on different social media platforms will be used as examples to illustrate the application of copyright in UGC. Legal conditions in YouTube’s TOS will be studied as a regulatory factor that shapes the behavior of users while using YouTube. To illustrate how YouTube’ TOS enhance or compromise the effectiveness of Ethiopia’s copyright law while regulating user’s behavior in UGC, this study will make a doctrinal analysis on how the resemblance and divergence between these regulatory factors shape users understanding towards copyright, affect their copyright interest and copyright owners online enforcement opportunities to address infringement on YouTube.

Books, cases, law review and journal articles, researches, and online materials will be used as secondary sources to back up the analysis and provide a firm understanding of the subject matter. To enrich the study by offering insights on legal developments and the experience in addressing the application of copyright in UGC, and the role and liability of social media in relation to copyright, selected international copyright instruments and laws of USA (as the home of leading social media websites) European Union and Canada will be used.

⁵⁹ Copyright and Neighboring Rights (Amendment) Proclamation, 2014, Proc No. 872 Fed. Neg. Gaz., year 21, no 20(Copyright Amendment Proclamation)

1.6 Significance of the study

This study will

- Spread awareness among Ethiopian YouTube users about; copyright and its application on YouTube, their rights, and obligation under TOS agreements and copyright infringement risks associated with UGC.
- Acquaint copyright holders about online copyright enforcement procedures for addressing infringement in UGC on YouTube and their recourses to address infringement in UGC.
- Serve as a basis for further studies in the area.

1.7 Scope of the Study

This study is limited to addressing the issue of copyright infringement in UGC by focusing on Ethiopia's copyright law and legal conditions in YouTube's TOS. The analysis will not cover every possible aspect of the TOS will neither be exhaustive in the aspects of Ethiopia's law, as this is beyond the scope of the study. While conducting analysis and drawing conclusion based on law, the focus will be on selected parts of the TOS that hold importance for copyright protection and enforcement from the user's and copyright owner's perspective. Laws that aimed at protecting rights other than artistic and literary will not be covered in the study. The study is limited to the free version of YouTube's service. TOS are not static documents they are frequently modified by the platform. TOS used here are those of YouTube on December 10, 2019.⁶⁰ To keep the focus of the study more concentrated out of copyright owners' exclusive rights the study will be limited to reproduction, distribution, preparing derivative works, communication to the public, and moral rights of authors under Ethiopia's law.

1.10 Organization of the Paper

The study will have six chapters, this introduction is chapter one. Chapter two will proceed by giving introductory remarks on UGC. Chapter three is devoted to briefly explaining how Ethiopia's copyright standards regulate, protect and enforce copyright in UGC by focusing on

⁶⁰ YouTube's TOS (n 22).

important parts of the law. Chapter four will address how legal conditions in YouTube's TOS regulate and enforce copyright on the website. Chapter five will be the main theme of the study as it makes analysis by pointing out potential convergence and divergence between the two regulatory factors. Chapter six will wind up the study by giving concluding remarks and recommendation.

CHAPTER TWO: INTRODUCTORY REMARKS ON UGC

2.1 Definition, Characteristics, and Types of User Generated Content (UGC).

Despite various attempts of different authorities to define UGC, there is no single widely accepted definition. Frequently evolving nature of the concept makes it difficult to adopt all-inclusive definition that accommodates every aspect of the phenomena.⁶¹ Definition of User Created Content (UCC) another designation for UGC in OCED's 2007 study is widely cited in various works.⁶² OECD defined UCC as '(I) content made publicly available over the internet, (II) which reflects a certain amount of creative effort and, (III) which is created outside of professional routines and practices.'⁶³

OECD's three layers definition mentions three accepted characteristics of UGC.⁶⁴ Firstly, UGC is public media published online this excludes bilateral conversations like emails and texts.⁶⁵ Secondly, UGC is either original or transformative creative work which is produced by the effort of content creating user.⁶⁶ Thirdly, UGC is non-professional work created by amateurs without the intention of receiving commercial gain.⁶⁷ UGC is characterized as non-commercial content and users participate mainly for social incentives like; self-expression, communication, or fame. Credibility of the third characteristic is questioned due to developments like monetization of UGC and availability of UGC created by professionals on the internet.⁶⁸

The term "user" in the phrase UGC describes anyone, whether amateur or professional that participates in UGC. "Generated" describes the user's creative effort and the process of producing UGC. While "content" describes the output creative work as defined by copyright law or any other expressive content.⁶⁹

⁶¹ OECD 2007 (n 1) 8.

⁶² Tan (n 2) 18.

⁶³ OECD 2007 (n 1) 4.

⁶⁴ Sundell (n 40) 338.

⁶⁵ OECD 2007 (n 1) 8.

⁶⁶ *ibid*

⁶⁷ *ibid*

⁶⁸ *ibid* 9.

⁶⁹ Mihajlo (n 3) 141.

UGC can be classified based on various factors including, type of the content or the platform.⁷⁰ UGC is created and shared in many forms and mediums including; text (e.g. blogs, articles, wikis, and comments), image (e.g. pictures, photos, and drawings), audio, and/or video.⁷¹ The focus of this study is limited to the issue of copyright, thus depending on the user's creative effort and appropriation of preexisting work while creating UGC the following classification is employed.⁷²

- A. Pure UGC;- is entirely new content created by users from the scratch or originally authored content created independently without using any preexisting work.⁷³
- B. Transformative UGC;- is a content users create relaying on one or more preexisting work and the resulting secondary work manifests creative value added by the content creating user and a certain amount of originality. Mash-up videos and music remixes are examples of such UGC, where users take portions of several works and reuse them to create a secondary work.⁷⁴
- C. User Copied UGC; refers to third-party copyrighted works users simply upload without any modification or adding their creativity. Some suggest that such content cannot be regarded as UGC since it lacks creativity.⁷⁵ But in this study it is regarded as UGC.

2.2 Social Media and TOS Agreements

Social media is a terminology that describes various internet-based websites and applications which allow users to utilize their service for purposes such as communication, creating, sharing, and accessing works and information, creating a profile, forming communities, or collaborating by creating and modifying works.⁷⁶ Social media websites share common characteristics being user-oriented platforms. However, they have differences and can be classified based on the type of service or contents they provide. Popular categories of social media include; social networks

⁷⁰ See OECD 2007 (n 1) 15-20.

⁷¹ *ibid*

⁷² Lee (n 5) 1506-1509.

⁷³ *ibid*

⁷⁴ *ibid*

⁷⁵ Gervais (n 8) 859.

⁷⁶ Mihajlo (n 3) 141.

websites that allow users to create a profile and form communities (e.g. Facebook), wikis websites that enable users to collaborate by creating and modifying works (e.g. Wikipedia), and content hosting websites that allow users to create and upload works (e.g. YouTube).⁷⁷ However, categorizing one platform into a single category may lead to a wrong conclusion as most of these platforms engage in more than one of these activities.⁷⁸

Use of social media service is governed by a contract concluded according to the website's TOS which provides users obligations and rights in connection with the use of their service.⁷⁹ TOS are 'click wrap' electronic agreements that give users the opportunity before they start using the service to read, understand and require them to accept it as binding contracts.⁸⁰ They are adhesive contracts users need to accept to use social media services. Despite individual's tendency of simply accepting such agreements without properly reading and understanding their content, some court decisions have upheld contracts with similar nature as binding contracts. Users need to carefully examine and understand such agreements before accepting as they may conclude legally enforceable obligation.⁸¹ Some TOS documents provide links for other documents that form part of the agreement that users are required to examine to get the whole picture of their rights and obligations.⁸²

2.3 Importance of UGC

UGC has created various opportunities for society and individuals.⁸³ UGC is becoming the public's preferred way of social interaction either for staying close with loved ones or participating actively in wider societal affairs. Social media platforms are widely utilized as forums of discussion for initiating changes to the socio-economic, cultural, and political aspects of society's life. Accordingly, UGC is justified by its ability to facilitate and enhance

⁷⁷ OECD 2007 (n 1) 16.

⁷⁸ Mihajlo, (n 3) 141.

⁷⁹ Tan (n 2) 99.

⁸⁰ Mihajlo (n 3) 158

⁸¹ *ibid*

⁸² Tan (n 2) 99.

⁸³ OECD 2007 (n 1) 6.

constitutional freedoms of expression and press.⁸⁴ Technological empowerment created by UGC has enabled individuals to participate in the creation and distribution of expressive works and information on a global scale.⁸⁵ Individuals can communicate, exchange works, ideas, and opinions or collaborate by creating works with those they share common interests with.⁸⁶ Individual's active participation as such has resulted in the accumulation of a pile of works and the emergence of new internet-based media which can serve as an alternative source of creative works and information to those provided by the mainstream industries.⁸⁷ Active engagement of users in UGC will increase the genuineness and acceptance of such contents by the public. Consequently, UGC is becoming widely utilized content by consumers.⁸⁸

UGC has eliminated various barriers that used to hinder individuals from reaching consumers and entering markets. Ease of use and free service provided by social media has enabled various individuals to become; journalists, filmmakers, or performers who create and share their works for enormous audiences. Some talented amateurs who showcased their talent through UGC have become popular, while others have been discovered by entertainment companies and signed a deal that launched their professional career.⁸⁹ Despite characterization of UGC as non-commercial, some platforms like YouTube have a monetization policy through which they reward users for their content, thus it can serve as a source of revenue for content creators.⁹⁰

2.4 UGC in the Realm of Copyright

Copyright is an incorporeal property right that protects the owners' interest by granting them certain exclusive property rights over their work, by prohibiting others from making unauthorized uses affecting these rights, and by providing redress when these rights are infringed.⁹¹ Some consider UGC as mere amateur's self-expression attempts unworthy of

⁸⁴ Lee (n 5) 1504.

⁸⁵ *ibid* 1505.

⁸⁶ *ibid* 1502.

⁸⁷ OECD 2007 (n 1) 31.

⁸⁸ Li and Huang (n 7) 61.

⁸⁹ Lee (n 5) 1508.

⁹⁰ Li and Huang (n 7) 61.

⁹¹ David Vaver(ed.), *Principles of Copyright: Cases and Materials* (WIPO 2002) 11

copyright, but such outright denial of protection is at odds with the spirit of copyright law.⁹² Determining whether or not a particular UGC is copyrightable requires assessing it with categories of works protected and fulfillment of eligibility requirements provided in the law.⁹³

In UGC users partake as both producers and consumers. Knowledge of copyright law enables users to know; whether their original UGC entitles them to copyright, their rights to use others UGC or any copyrighted content to create transformative UGC and their rights on secondary works they created, and copyright infringement liability risks associated with UGC.⁹⁴ Based on the classification of UGC adopted above, pure UGC cannot raise a claim of copyright infringement. User-copied UGC is regarded as apparently infringing. Transformative UGC raises copyright infringement claims involving complicated issues.⁹⁵

⁹² Lee (n 5) 1505.

⁹³ Mihajlo (n 3) 144.

⁹⁴ Tan (n 2) 32.

⁹⁵ Lee (n 5) 1486.

Chapter Three: Ethiopian Copyright Standards and UGC

3.1 Copyrightable Subject Matter and Requirements for Protection

Property right over incorporeal properties that are fruits of mental creativity such as copyright is a constitutional right in Ethiopia.⁹⁶ Copyright is defined as ‘a bundle of economic and moral rights (in certain cases) that subsists in some categories of works to protect the interest of authors’.⁹⁷ The following subsections will assess compatibility of Ethiopia’s copyright law to extend protection for UGC.

3.1.1 Protected Works and Subject Matters

Copyright subsists in works that are produced ‘in artistic, scientific, and literary fields’.⁹⁸ Ethiopia’s copyright law doesn’t define what constitutes artistic, scientific, or literary work but provides an open-ended list of creations it protects as works. The list consists of; text-based works (books, articles, and newspapers), image-based works (photographs, drawings, paintings, and maps), audio and/or video-based works (oral works, dramatic, cinematographic, musical compositions, and audiovisual works) and computer programs.⁹⁹

Compilations of preexisting materials or databases that are original either by selection or arrangement and derivative works created by transforming or adaptation of preexisting works are protected as independent works.¹⁰⁰ However, protection of such works is made without hindering protection of the underlying works.¹⁰¹ Copyright law is founded on principle that ideas are not protectable rather the form of expression of ideas is protected.¹⁰² Ideas contained in copyrighted

⁹⁶ Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art 40 (1 & 2), Proc No 1, *Fed. Neg. Gaz.*, year 1, no 1

⁹⁷ Copyright Proclamation, Art 2(8).

⁹⁸ *ibid*, Art 2(30), see also Copyright Amendment Proclamation, Art 1(1(j)).

⁹⁹ *ibid*.

¹⁰⁰ *ibid*, Art 4(1).

¹⁰¹ *ibid*, see Arts 4(2) & 7(1(b & c)).

¹⁰² Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Vol.31, 1994, International Legal Materials Art 9(2) (TRIPS), see also WCT Art 2

works can be utilized as raw materials for creation of further works.¹⁰³ Accordingly, Ethiopia's copyright law doesn't extend protections for productions such as; ideas, formulas, procedures, and concepts.¹⁰⁴

Concerning UGC the laws open-ended approach for protected works leaves a humble room to extend protection for UGC. Furthermore, the illustrative list of works is suitable for UGC since it includes works created through similar mediums with those used for creating UGC and it consists of some popular forms of UGC such as: photographs, audiovisual works like videos, articles such as blogs, and oral works like songs.¹⁰⁵ Accordingly, users have legal ground for getting copyright over their pure UGC as works and transformative UGC as derivative works, upon of fulfillment other eligibility requirements.¹⁰⁶

3.1.2 Subsistence of Authorship

Copyright law vests initial ownership of copyright over works for the author it defines as 'a person who creates a work intellectually'.¹⁰⁷ When two or more authors create a work together, the law differentiates between collective works and joint works. Collective works are created under the initiative and supervision of one person who collaborates with additional persons, with an understanding that work will be disclosed in the former's name without mentioning the others' contribution and he becomes the owner of copyright.¹⁰⁸ Works of joint ownership are created by several authors in a manner that is not considered as a collective work and they become joint owners of copyright.¹⁰⁹ The law also governs ownership of 'hired works',¹¹⁰ and establishes different ownership arrangements for 'Audiovisual' works.¹¹¹

¹⁰³ Vaver (n 91) 15.

¹⁰⁴ Copyright Proclamation, Art 5(1).

¹⁰⁵ Mihajlo (n 3) 148.

¹⁰⁶ Copyright Proclamation, Arts 2(30) & 4.

¹⁰⁷ *ibid*, Arts 2(2 & 16) & 21(1).

¹⁰⁸ *ibid*, Arts 2(5) & 21(3).

¹⁰⁹ *ibid*, Arts 2(29) & 21(2).

¹¹⁰ *ibid*, Arts 2(12 & 16) & 21(4).

¹¹¹ *ibid*, Arts 2(1 & 20) & 21(5).

Authors will be awarded copyright, upon satisfaction of one of the connecting factors provided in the law, which relates either qualification of the copyright owners (nationality, principal residence, and headquarter) or the work involved (location, initial, or subsequent publication) with Ethiopia.¹¹² Furthermore, the law is applicable in accordance with international agreements to which Ethiopia is a party.¹¹³ Publication is one of such connecting factors and definition of published work in the law requires availability of some tangible copies of works that are going to be distributed to the public through commercial transaction that results in either transfer of ownership or possession.¹¹⁴ UGC is mostly available for free in digital form which doesn't require having tangible copies of such work and can be accessed simultaneously by several users. Furthermore, UGC uploaded anywhere in the world is instantly available in Ethiopia and vice versa. Thus, determining application of copyright law through publication requirement it sets is not compatible with the very nature of digital contents like UGC.

Individual users that create and share UGC will be identified as authors through their social media user account and acquire copyright ownership over their content as provided in the law. Such is the case videos uploaded on YouTube or photos on Facebook.¹¹⁵ However, collaborative platforms like Wikipedia are designed in ways that facilitate user's active participation by continuously contributing new works, modifying, and updating earlier works.¹¹⁶ Such works don't exist as final products and individual users are incapable of maintaining integrity of their original works or their earlier contributions on works because several users continuously update and modify such content with varying degrees of contribution.¹¹⁷ This might make the task of identifying the contribution of each user and designating either joint or collective authorship over such works under Ethiopia's copyright law difficult.

¹¹² *ibid*, see Art 3.

¹¹³ *ibid*, Art 3(2).

¹¹⁴ *ibid*, Arts 2(22) & 3(1(b)).

¹¹⁵ Tan (n 2) 38.

¹¹⁶ *ibid*

¹¹⁷ *ibid*

3.1.3 Originality

To qualify for copyright work has to be original.¹¹⁸ Originality requires the work to be author's independent creation (not copy of others work) and manifest certain amount of creativity. Countries use different tests to determine satisfaction of originality requirement, some use tests that require minimum standard of originality, while others employ tests that require some or high creativity. These tests also vary depending on the nature of the particular work involved.¹¹⁹ Ethiopia's copyright law neither defines nor provides tests that guide the judiciary while measuring originality, thus interpreting and applying this principle is a task left for Ethiopian courts. Accordingly, the Federal Supreme Court Cassation Bench has given a binding interpretation of law, on the meaning of originality in the case between 'Samuel Hailu(2) Vs W/ro Simret Ayalew(others.9)'.¹²⁰ In this case, the respondents (plaintiffs in the lower court) instituted infringement action on the applicants (defendants in the lower court) by claiming that they compiled in a book and published religious articles of their late father previously published in Ethiopian Orthodox Church magazine without their authorization by infringing copyright and required an award of moral and material damage. After going through appeal the case was finally decided by the bench. While deciding the case the bench interpreted the meaning of originality as follows:

In line with the content and spirit of the copyright law, creative work to be considered as a proper work in which copyright protection subsists has to be either a first work or work with a unique nature. Work is regarded as a first work (original) or to have a unique nature, if it is the result of the person's creative effort.¹²¹

The interpretation given by the bench appears to require a very high standard of originality which requires authors to manifest their creativity by creating either 'first work or work with unique nature'. Findings of a study conducted on the subject matter reveal the application of similar standards of originality in other cases involving similar issues among Federal Courts and

¹¹⁸ Copyright Proclamation, Art 6(1(a)).

¹¹⁹ Vaver (n 91) 30.

¹²⁰ Samuel Hailu(2) Vs. W/ro Simret Ayalew(others), (FSC Cassation Bench, Civil Case No. 68369, Tir/4 2004 E.C), FSC Cassation Bench Decisions Compilation, vol.13 (2005), p. 576

¹²¹ *ibid* 578 (translation mine).

equate such judicial experience with patent laws concept of ‘novelty’.¹²² Fulfilling such originality threshold by creating a first work or work with unique nature is not an easy task. Copyright law has its own role in the creation of similar works because it doesn’t protect ideas in copyrighted work as such several works which share common characteristics can be created on similar ideas. Copyright law only prohibits unauthorized copying of others’ work it doesn’t prohibit independent creation of works under the guises of similarity with preexisting works. Similarity of works may exist even in the absence of copying.¹²³ Such a definition of originality may end up discouraging creativity the law was supposed to protect by unjustly denying protection for sufficiently creative works. The bench interpreted originality while deciding a case involving the compilation of preexisting works. Applying such originality threshold derivative works will most probably make them unoriginal, unprotected and with potential infringement liability.

Creativity being one characteristic of UGC makes the originality of such contents is very important.¹²⁴ If we apply the above interpretation of originality for UGC, pure UGC may not pose serious concerns in meeting such originality requirement, except those present in relation to any other work. However, the user’s probability of getting copyright over transformative UGC by meeting such high originality standards is minimal.

3.1.4 Fixation

Original works will be automatically protected upon creation without additional formality requirements when they are fixed.¹²⁵ Fixation is defined as ‘the embodiment of works or their representations thereof, from which they can be perceived, reproduced or communicated through a device prepared for the purpose’.¹²⁶ This definition seems to require placing the work in some

¹²² Teklehaymanot Dagne, ‘Originality in Copyright and the Judicial Jurisprudence in Ethiopia’ (LLM Thesis, AAU, 2018) 48

¹²³ Vaver (n 91) 136.

¹²⁴ OECD 2007 (n 1) 8.

¹²⁵ Copyright Proclamation, Art 6(1(b)).

¹²⁶ *ibid*, Art 2(11).

physical medium that represents and enables its appropriation after it is created.¹²⁷ Strict application of this requirement amounts to imposing additional requirements (fixation over fixations) ‘because copyright protects expression of ideas which are incorporeal assets as a work, not their physical representations whose only purpose is serving as manifestations of works that are already fixed before it was incorporated in the medium’.¹²⁸ Such requirement may negatively affect creativity by denying protection for important creative works such as oral works or cerography unless they are simultaneously recorded.¹²⁹ Such view of fixation is also difficult to apply for digital contents which are intangible in their very nature.¹³⁰ Digital technology can be used for permanently storing digital contents on hard disks which enable their use with aid of digital tools, in a way that constitutes fixation.¹³¹ Digital technology can also be used to create, distribute, and consume works without being fixed in any permanent medium.¹³²

In the international jurisprudence issues involving whether or not temporary storage of a file on RAM or live transmission of events without simultaneously recording constitutes fixation have been litigated in some cases.¹³³ Some courts have decided that temporary storage of works in RAM constitutes fixation as long as it enables to perceive, use, and access the content.¹³⁴ If Ethiopian Courts hold this view, UGC can easily meet fixation requirement. In the process of creating, sharing, and accessing UGC it is potentially fixed in three places respectively: firstly the device in which the user created UGC, secondly in the servers the social media, and thirdly the viewing user device either on the hard disk or RAM.¹³⁵

¹²⁷ Mandefro Eshete, ‘The Interplay Between Copyright Protection and the Expansion of Education in Ethiopia’ Tavengwa Runyowa(ed.) in *Research Papers from the WIPO-WTO Colloquium for Teachers of Intellectual Property* 32, 27-35 (WIPO-WTO 2010)

¹²⁸ Douglas J. Masson ‘Fixation on Fixation: why Imposing Old Copyright Law on New Technology will not Work’ (1996) 71 *Indiana LJ* 1049, 1054

¹²⁹ *ibid*

¹³⁰ *ibid*

¹³¹ Nkem Itaniy, ‘Expanding the Frontiers of Nigerian Copyright Laws in the Age of Social Media’ (2017) 8 *NAUJILJ* 89, 95

¹³² *ibid*

¹³³ Mihajlo (n 3) 144.

¹³⁴ *ibid*

¹³⁵ Clark (n 43) 6.

3.2 Current Scope of Protection for UGC

Despite some shortcomings in Ethiopia's copyright law, based on the above analysis it is plausible to argue that UGC will not be subjected to outright denial of protection as the law leaves a humble room to extend protection as long such works fulfill the eligibility requirements. Users will not be denied rights they would have been given otherwise by creating or sharing their work on social media.¹³⁶ UGC involves vast number of production with varying degrees of creativity ranging from simple expressions of feelings or comments to concrete creative works. Thus, all UGC cannot copyrightable because some of such contents aren't protected subject matters, while some may not fulfill eligibility requirements provided in the law. However, there will be some copyrightable UGC that fulfill every legal requirement.¹³⁷

Mostly created by amateurs UGC may not have high qualities like those we expect from works produced by professionals.¹³⁸ Furthermore, users create UGC within permissions and restrictions set by social media they use such as 'Twitters 140 maximum characters limitation in a tweet'. Such limitations can make most UGC short in length and perceived as insignificant works in the eyes of viewers.¹³⁹ Such factors are irrelevant for the subsistence of copyright in UGC, because Ethiopia's copyright law protects works irrespective of their quality or the purpose for which they are created if they meet other requirements.¹⁴⁰

3.3 The Exclusive Rights

Copyright protects the economic and moral rights of authors over their work.¹⁴¹ Economic rights are transferable property rights that can be assigned or licensed by the owners to gain financial benefit from the uses of their work by others.¹⁴² Exclusive economic rights enable the owners 'to carry out or authorize others; to reproduce, distribute, import, make derivative work based on

¹³⁶ Mihajlo (n 3)143.

¹³⁷ *ibid* 145.

¹³⁸ OECD 2007 (n 1) 53.

¹³⁹ Mihajlo (n 3) 146.

¹⁴⁰ Copyright Proclamation, Art 6(1).

¹⁴¹ *ibid*, Arts 2(8), 7 & 8.

¹⁴² *ibid*, see Arts 7(1) &23-25.

their work and communicate their work to the public in any manner'.¹⁴³ While moral rights are non-assignable rights of authors which allow them to take certain actions to preserve their relationship with and reputation in their works.¹⁴⁴

Reproduction right enables owners to prohibit anyone from making copies of their work without their authorization.¹⁴⁵ Definition of reproduction in the copyright law is technologically neutral as it encompasses 'making of copies of work through any manner or form including temporary or permanent storage in electronic form'.¹⁴⁶ Distribution of 'original or copies of works to the public by sale or rent' is exclusive right of copyright owners.¹⁴⁷ The law approaches distribution right by anticipating existence of contracts for consideration (sale or rent) to reward copyright holders, this appears to disregard their right to distribute works freely as in UGC.¹⁴⁸ Furthermore, it anticipates distribution of works through either temporary transfer of possession or permanent transfer of ownership which requires physical copies.¹⁴⁹ Such approach of distribution is not at phase with digitalization where digital contents are distributed instantly and simultaneously at global level without any physical transfer of works.

Preparation of derivative (secondary) works through translation, adaptation, transformation or any other modification of their work is exclusive right of copyright owners.¹⁵⁰ Despite the room in the law to protect derivative works, this right is a restraint against others from making any derivative use of copyrighted works without the owner's authorization.¹⁵¹ Any communication of the work to the public including through; performance, public display, and broadcasting are exclusive rights of copyright owners.¹⁵² Definition of communication to the public in the

¹⁴³ *ibid*, Art 7(1).

¹⁴⁴ *ibid*, Art 8.

¹⁴⁵ *ibid*, Art 7(1(a)).

¹⁴⁶ *ibid*, Art 2(25), see also Art 2(26)

¹⁴⁷ *ibid*, Art 7(1(d)).

¹⁴⁸ *ibid*, Arts 7(d) & 2(27).

¹⁴⁹ *ibid*, see Art 2(27).

¹⁵⁰ *ibid*, Art 7(1(b &c)).

¹⁵¹ *ibid*, see Arts 7(1(a &b) &14.

¹⁵² *ibid*, Art 7(1(F-I)).

copyright law is technologically neutral to accommodate distribution of works through UGC as it encompasses ‘wireless mediums for transmission of works and accommodates possibility of transmission at similar or different locations and/or time’. The wording of the law ‘any communication’ leaves a wide room that enables copyright owners to utilize any present or future technological innovations for communicating their work.¹⁵³ In this definition public consists of ‘any persons outside the normal circle of family and closest social acquaintances.’¹⁵⁴

3.4 Licensing of Copyright and TOS Agreements

Copyright law regulates certain aspects of contracts for the assignment and licensing of economic rights.¹⁵⁵ These are contracts through which copyright owners give their permission for others to carry out all or some of their exclusive economic rights.¹⁵⁶ Copyrights owners derive economic benefit and control uses of their work by others through these contracts. The law requires written form for concluding these contracts.¹⁵⁷ Accordingly, it has to be signed by all contracting parties and attested and signed by two witnesses.¹⁵⁸ Such contracts need to clearly specify the rights assigned or licensed.¹⁵⁹

Licensing is among the biggest issues in UGC, from two perspectives. Firstly, users make various appropriations of copyrighted works in UGC in principle such uses need the owners’ authorization. Traditionally, the focus of copyright licensing was governing the relationship between professional creators and some mainstream industries, while consumers stayed far from such contractual arrangements. The need for licensing consumers was minimal due to passive natures of their uses and their limited ability to make massive appropriations, even to fully utilize their rights under exceptions.¹⁶⁰ However, empowerment created by digitalization and UGC has enabled consumers to make unencumbered appropriations of works beyond their rights under

¹⁵³ *ibid*, Art 7(1(i)) & 2(6).

¹⁵⁴ *ibid*

¹⁵⁵ *ibid*, Arts 23-25.

¹⁵⁶ *ibid*, Arts 23 & 24(1).

¹⁵⁷ *ibid*, Art 23(2).

¹⁵⁸ Civil Code of the Empire of Ethiopia, 1960, see arts 1678(3), 1719(2), 1720(1), 1727 & 1728, Proc No. 165 Neg. Gaz. year, 19, no 2 (Civil Code)

¹⁵⁹ Copyright Proclamation, Arts 23(3) & 24(1).

¹⁶⁰ Gervais (n 8) 849.

exceptions. Participation of numerous users that utilize various works makes it difficult for copyright owners to control uses of their work in UGC by licensing every user for every minimal use.¹⁶¹ In USA Collective Rights Organizations were considered as one alternative to address this problem, however, they came up short since their mandate is limited to collecting and distributing revenue in relation to uses of certain works by representing several right holders from several users. They have no authority to license user's rights for using works in UGC.¹⁶² Similarly, in Ethiopia Collective Management Societies cannot help to deal with this problem as their mandate is limited to collecting royalty in relation to commercial use of protected works which doesn't include UGC which is characterized as non-commercial and they have no authority to give license.¹⁶³

Secondly, UGC raises issue of licensing from the perspective of social media TOS agreements that incorporate UGC licensing provisions.¹⁶⁴ Despite, retaining ownership of UGC users are required to license all of their exclusive rights for the websites and some for their users. Such licenses enable the platforms to make excessive appropriation of user's content, without rewarding users anything.¹⁶⁵ Other users who are not parties to such contacts are also given a license with extensive right to use UGC.¹⁶⁶

If UGC is copyrighted, contracts licensing economic rights have to be made in accordance with the copyright law as it leaves no exception.¹⁶⁷ Written form requirement implies importance the law attaches to such contracts by requiring contracting parties to bind themselves with a document specifically addressing the issue. TOS are electronic contracts that regulate every aspect of social media service and UGC licensing provision is treated as one part of these contracts.¹⁶⁸ Written form requirement in the traditional understanding of the term, may not render such contracts void due to their electronic nature because Ethiopia has recently adopted

¹⁶¹ *ibid* 853.

¹⁶² Gervais (n 8) 848.

¹⁶³ Copyright Amendment Proclamation, see Arts 1(2(32 & 33)) & 34(1).

¹⁶⁴ Tan (n 2) 99.

¹⁶⁵ *ibid* 201.

¹⁶⁶ *ibid*

¹⁶⁷ Copyright Proclamation, see Art 23(2).

¹⁶⁸ Tan (n 2) 99.

some laws that give legal recognition for electronic contracts and establish functional equivalence of electronic contracts with written formality requirements upon fulfillment of certain requirements.¹⁶⁹ TOS agreements give users the chance to read and understand their content, then concluded by selecting accept option most likely without presence of any witness or user's signature in the traditional understanding of the concept.¹⁷⁰ If we strictly apply formality requirements in Ethiopia's law, such UGC licensing provision being part of wider contract rather than independent contracts specifically addressing licensing, non-fulfillment of signature and witness will render such contracts a mere draft without any legal effect.¹⁷¹ Furthermore, absence of any economic benefit for UGC owners from uses of their work and the license given for other users that are third-parties will likely render such contracts unacceptable in the eyes of the law.¹⁷² After discussing YouTube's UGC licenses, the study will conduct further analysis of this issue in chapter 5.

3.5 Copyright Infringement in General

Copyright infringement exists when the use of copyrighted works affecting any exclusive rights of the owners is made without his authorization. Moral rights of authors can also be infringed in some instances.¹⁷³ Copyright owners have legal right to get redress against those who infringed their rights.¹⁷⁴ Anyone who personally commits acts constituting infringement will be held liable as direct infringers.¹⁷⁵ Liability doesn't stop here because 'Secondary Infringement Theory' extends liability for infringement by the direct infringer into third parties.¹⁷⁶ In USA this theory owes its origin to areas of law such as agency and tort rather than copyright law directly.¹⁷⁷

¹⁶⁹ E-Transaction proclamation, see Arts 7-9.

¹⁷⁰ Mihajlo (n 3) 158.

¹⁷¹ Civil Code, Art 1720(1).

¹⁷² Tan (n 2) 121.

¹⁷³ Nathan Wajzman, Francisco García-Valero and Altair Breckwoldt Jurado, *Online Copyright Infringement in the European Union Music, Films and Tv (2017-2018): Trends and Drivers* (EUIPO 2019) 12-13

¹⁷⁴ *ibid*

¹⁷⁵ Savage (n 44) 267.

¹⁷⁶ Szabo Carl Michael, 'Thwack!! Take That, User-Generated Content!: *Marvel Enterprises v NCSOFT*' (2010) 62(3) *Federal Communications LJ* 542, 547

¹⁷⁷ *ibid* 548

‘Secondary infringement has two forms; contributory and vicarious liability’.¹⁷⁸ Under contributory liability, third parties will be held liable for infringement, if they acted with knowledge of the acts constituting infringement by facilitating or assisting infringement of the direct infringer.¹⁷⁹ Under vicarious liability, third-parties are held liable for copyright infringement committed by individuals upon whom they have authority to supervise their infringing acts and if they obtain financial gain attributable to their infringing conduct.¹⁸⁰ Such extension of infringement liability is justified because it expands copyright owners’ potential for getting meaningful redress by claiming against those who have better economic ability and benefited from or played a role in the infringement.¹⁸¹

Legal ground for applying these theories of infringement in Ethiopia can be found scattered in different laws.¹⁸² Provisions of the civil code dealing with liability without fault can serve as additional legal grounds for copyright owners to claim against direct infringers by merely proving commission of acts in violation their exclusive rights protected by copyright law.¹⁸³ Furthermore, rules governing employer liability for acts of his employee can serve as legal grounds to claim on the basis of vicarious liability.¹⁸⁴ Copyright infringement may also constitute a criminal offense in Ethiopia, thus provisions of the criminal code dealing with participation in criminal offense can be invoked against third parties that assisted or facilitated infringement by the direct infringer under contributory liability.¹⁸⁵

Digitalization is regarded as ‘two edge sword’ in copyright because it can be used to enhance copyright owners’ interest, as it can be used detrimentally to their interest by making

¹⁷⁸ *ibid*

¹⁷⁹ *ibid*

¹⁸⁰ *ibid*

¹⁸¹ Savage (n 44) 269.

¹⁸² Yemane Gesesew, ‘Infringement and Remedies of Economic Rights of Audiovisual Works under the Ethiopian Copyright Law: Law and Practices in Addis Ababa’ (LLM Thesis AAU, 2010) 50-52

¹⁸³ Civil Code, Arts 2027(1) & 2029.

¹⁸⁴ *ibid*, see Arts 2027(1) & 2130.

¹⁸⁵ Criminal Code of the Federal Democratic Republic of Ethiopia Proclamation, 2004, Arts 32, 36 & 37 Proc No. 414 *Fed. Neg. Gaz.*, 9th May 2005 see also Copyright Proclamation, Art 36 and Copyright Amendment Proclamation, Arts 11(4 & 5) & 45

infringement even on mass-scale an easy task.¹⁸⁶ Copyright law needs to be technologically neutral in combating infringement and technology can't serve infringers as a ground to escape infringement liability.¹⁸⁷ In the international jurisprudence, issues involving secondary infringement liability of tech companies that manufacture or operate technologies used for infringement have been litigated and held applicable in some popular cases.¹⁸⁸

3.6 Copyright Infringement in UGC

Social media related use of works requires appropriation of more than one exclusive right.¹⁸⁹ To illustrate with example, when user A uploads video on YouTube its digital copy will be sent from his computer to YouTube's servers where it is stored, these involves reproduction. A's video is available on YouTube from where any viewing users can accesses it on their computer, this amounts to distribution and communication to the public. While viewing users access A's video on their computer it will be temporarily stored in the computers RAM, these amounts to reproduction.¹⁹⁰

Users participate in UGC by creating contents based on each other's content or any third-party copyrighted work which isn't available on social media or by simply uploading third-party works. If such use is made without authorization of copyright owners it can potentially infringe more than one exclusive right.¹⁹¹ Furthermore, UGC can be easily downloaded and reused elsewhere outside social media circle in ways that constitute infringement. UGC involves variety of contents, to give some instances of how users might infringe exclusive rights of; reproduction, distribution, preparation of derivative works, communication to the public and moral rights while making unauthorized use of copyrighted works in UGC, some popular forms of UGC will be used as examples hereunder.

¹⁸⁶ Itaniy (n 131) 90.

¹⁸⁷ Wajzman and others' (n 173) 12-13.

¹⁸⁸ Savage (n 44) 271-273.

¹⁸⁹ Clark (n 43) 9.

¹⁹⁰ *ibid.*

¹⁹¹ Gervais (n 8) 843.

Users will infringe reproduction right for example, when they upload a movie on YouTube or photo of a copyrighted drawing on Facebook or when they share video uploaded on YouTube via their Twitter account.¹⁹² This is because these acts involve appropriations of copyrighted works by making electronic copies which constitutes reproduction within the meaning of Ethiopia's copyright law.¹⁹³ Users will infringe distribution right when they upload copyrighted works on any social media platform, because their act involves giving other users an access to such works. Uploading audiovisual works on YouTube or photograph on Facebook is all it takes to distribute works to the public.¹⁹⁴ Absence of sale or rent while distributing UGC as required in the copyright law cannot render such acts non-infringing, because it is exclusive right of copyright owners and they may suffer damage from such acts.¹⁹⁵

Users will infringe right of any communication to the public in UGC when they upload copyrighted works on any social media, since by doing so they are making the work available for the public via social media. For example, users infringe broadcasting right when they upload a television program on YouTube, they infringe right to perform publicly when they upload a video footage of a concert they recorded on Facebook.¹⁹⁶ Definition of communication to the public in the copyright law is technologically neutral to accommodate communication of works via UGC.¹⁹⁷ Whether the content is available for selected group of people or the entire social media users is irrelevant to establish infringement since the copyright law approaches anything outside the 'normal circle of family and close acquaintances' as public.¹⁹⁸

The right for preparation of derivative works can be infringed when users create transformative UGC by using copyrighted works as raw materials.¹⁹⁹ Even when users are able to create an original transformative UGC by fulfilling the unlikely to achieve originality threshold applied by

¹⁹² Tan (n 2) 42.

¹⁹³ Copyright Proclamation, Art 2(25).

¹⁹⁴ Tan (n 2) 44.

¹⁹⁵ Copyright Proclamation, see Arts 7(1(d)) & 2(27).

¹⁹⁶ Tan (n 2) 44.

¹⁹⁷ Copyright Proclamation, see Arts 2(6, 3 & 24) & 7(1(g, h & i)).

¹⁹⁸ *ibid*

¹⁹⁹ *ibid*, see Arts 4 & 7(1(b & c)).

Ethiopian courts they will end up, infringing this right under the copyright law for example when they; combine portions of several videos and create mash-up video, combine portions of various songs and create remix, or use music as a background for their video.²⁰⁰

As it will be discussed later, any of the above uses might be justified under the exceptions provided for the specific exclusive right in the law, however UGC requires appropriation of more than one exclusive right such uses might infringe other exclusive rights.²⁰¹ Thus, users might not escape infringement liability as each infringement to any exclusive right is a separate wrong.²⁰² User's interaction with protected works in UGC involves continuous uses, reuses and modifications of the underlying work mostly without acknowledging the authors as a source. Such uses might severely affect the original character and erode integrity of the underlying work which constitutes infringement of author's moral right under Ethiopia's copyright law.²⁰³

3.7 Enforcement of Copyright

Copyright is a private property right, owners need to protect their work and enforce their right by instituting infringement action against those who infringed their rights. To be successful in any infringement proceeding the plaintiff has to prove valid ownership of the work used and commission of an act by the defendant either in relation to 'the whole or substantial part of the work' which affects one or more of his rights without his authorization by producing necessary evidences for proving his case.²⁰⁴

Regarding infringement in UGC, copyright owners can proceed against both content creating user and the social media.²⁰⁵ Users that individually committed infringement in UGC will be held liable as direct infringer.²⁰⁶ While, the role social media plays by providing the forum and

²⁰⁰ Tan (n 2) 43.

²⁰¹ Lee (n 5) 1509.

²⁰² Vaver (n 91) 161.

²⁰³ Copyright Proclamation, see Arts 8(1) & 34(4).

²⁰⁴ Vaver (n 91) 133-140.

²⁰⁵ Savage (n 44) 269.

²⁰⁶ *ibid*

technological features that enable and assist users in the process creating and sharing infringing UGC and the profit they drive from users content is sufficient to make them liable under secondary infringement theory.²⁰⁷ Proving existence of infringement in UGC may not pose particular difficulty as the content claimed infringing is accessible through social media link on which it was uploaded.²⁰⁸ Nevertheless, identifying the responsible user and linking him to the social media account on which infringing content was uploaded for establishing liability can be time consuming, costly or even impossible.²⁰⁹ Right holders usually prefer proceeding against the social media on which infringement was committed.²¹⁰

3.8 Remedies

In Ethiopia the remedies for copyright infringement are: pre-trial provisional measures, civil remedies, border measures, and criminal sanctions.²¹¹ This study will look at damages as final civil remedy and criminal sanctions, to show infringement liability risks users might face. After conveying full-scale trial if the court decides the case in favor of the plaintiff it awards damage.²¹² Damage is a courts award ‘whereby it orders the defendant to pay certain amount of money for compensating economic and moral injury the owner suffered due to infringement to retribute him to the position he would have been if the infringement wasn’t committed’.²¹³ In principle the damage awarded has to be sufficient enough to compensate both material and moral injury suffered by the plaintiff. Alternatively to such damages, the plaintiff can claim, unjust enrichment derived or any profits acquired by the defendant through the infringing activities.²¹⁴ One hundred thousand (100,000) birr is fixed as maximum amount of compensation for moral damage.²¹⁵

²⁰⁷ *ibid* 273.

²⁰⁸ Clark (n 43) 10.

²⁰⁹ *ibid*

²¹⁰ Chik (n 39) 250.

²¹¹ Copyright Proclamation, Arts 33-36.

²¹² *ibid*, Art 34.

²¹³ Vaver (n 91) 163.

²¹⁴ Copyright Proclamation, Art 34(1, 2 & 4)

²¹⁵ *ibid*, Art 34(4).

At the international level award of damages is not mandatory, in principle it is awarded against ‘defendant that infringed copyright knowingly or with reasonable ground to know that they were infringing’.²¹⁶ Ethiopia’s copyright law took the exception stand, as damage can be awarded even against innocent infringers because the law considers defendants unawareness or absence of reasonable ground for knowing infringing nature of their acts only as possible ground for mitigating the amount of damage.²¹⁷ UGC is a public media available globally for millions of users, this makes the damage to economic interest of right holders substantial, thus defendants can be held liable to pay large amount of damage.²¹⁸

In Ethiopia infringement committed intentionally or with gross negligence is a criminal offence punishable with rigorous imprisonment and fine.²¹⁹ At the international level countries are required to use criminal sanctions at least in relation to ‘copyright piracy at commercial level’ while they may penalize ‘infringements committed intentionally and at commercial scale’.²²⁰ Ethiopia’s law takes a very strict stand in this regard as it penalizes infringements committed with gross negligence. Users might face criminal sanctions for infringement in UGC as they participate willingly which might be sufficient to establish intentional or gross negligent mental status while committing punishable offence.

3.9 Role of Social Media in the Enforcement of Copyright and Secondary Infringement Liability

Social media websites have their own role in the enforcement of copyright which is tied with their secondary infringement liability. This section will look at laws of USA and EU as they represent two extreme positions on the issue, to have a clear picture of the legal and jurisprudential developments elsewhere since the issue is a recent phenomenon introduced by new legislation in Ethiopia.

²¹⁶ TRIPS, Art 45.

²¹⁷ Copyright Proclamation, Art 34(5).

²¹⁸ Savage (n 44) 268.

²¹⁹ Copyright Proclamation, Art 36, Copyright Amendment Proclamation, Art 11(4 & 5)

²²⁰ TRIPS, Art 61.

3.9.1 USA

The Digital Millennium Copyright Act (DMCA) incorporates rules certain categories ISP's need to apply for addressing copyright infringement claims of owners and rewards compliance with 'safe harbor' which protects ISP's from any monetary awards that might arise in connection with the use of their service under secondary infringement doctrine.²²¹ Safe harbor is not automatic protection ISP's are required to fulfill both general and specific eligibility requirements provided in the law.²²² Those providing service of 'information residing on a system or networks at the direction of users' such as social media are one category of ISP's that are eligible for safe harbor.²²³

Such websites are presumed 'not to have either actual knowledge of the infringing activity or facts and circumstances which makes the infringing activity apparent' until proper take-down notification is made about the claimed infringement which qualify as knowledge of the platform.²²⁴ Thus, they are not legally responsible for monitoring contents users upload for copyright infringement.²²⁵ Right holders need to protect their work by filling DMCA take-down notification if contents on such platform infringe their right.²²⁶ Acting expeditiously by removing or disabling access to infringing content in good faith upon take-down notification or circumstances and facts that make the content apparently infringing entitles UGC intermediaries safe harbor protection.²²⁷

Upon removal of content such platforms are required to give notification for users about removal of their content for the protection to subsist.²²⁸ Users that object the removal of their content have the right to appeal by filing 'counter-notification'.²²⁹ Upon receiving proper counter-

²²¹ Digital Millennium Copyright Act, § 512 (1998) (DMCA)

²²² Rodriguez and Christman-Goerl (n 49) 124.

²²³ DMCA see § 512 (c(1)) and § 512(k(1(b))), § 512(I(1(A & B) and § 512(c(1 & 2)

²²⁴ *ibid*, § 512(c(1(i, ii, iii & C)).

²²⁵ Lerner (n 50) 8.

²²⁶ DMCA, § 512(c(3(a & b)).

²²⁷ *ibid*, see § 512(g(1)).

²²⁸ *ibid*, § 512(g(2(a)).

²²⁹ *ibid*, § 512(g(3)).

notification, such platforms are required to notify the initial claimant and inform him that the removed content will be reinstated in 10 days. The initial claimant can stop such reinstatement, by notifying the platform that he has filed a court action to get an order that will stop the other party from using the work.²³⁰

3.9.2 EU (European Union)

In the EU the role and liability of social media websites used to be governed under the EU Ecommerce Directive which provides relatively similar safe harbor protection with DMCA.²³¹ However, there is fundamental change and different obligation recently because this law was amended by the Copyright and Related Rights in the Digital Single Market Directive (DSMD).²³² This directive refers to such platforms as ‘online content sharing service providers’ and it regards their role in UGC as ‘making the work available or communicating it to the public’, they will be held strictly liable for infringing these rights, for contents users upload on their platform.²³³ They have two options to avoid liability in the directive. The principle (first option) is obtaining authorization of the right holders for such use ‘through a license or otherwise’ and this authorization is considered as allowing users to use such works for non-commercial purpose on the licensee platform.²³⁴ The second alternatively, requires such platforms to demonstrate that they have performed three cumulative requirements under art 17(4) to avoid liability.²³⁵ The second option appears to impose the obligation of monitoring their platform from infringing contents, if they can’t get authorization from owner.²³⁶

²³⁰ *ibid*, § 512(g)(2)(b & c)).

²³¹ Lerner (n 50) 18.

²³² Directive on Copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [109] OJ 2 L130/92 Art 17

²³³ *ibid*, Art 17(1& 3).

²³⁴ *ibid*, Art 17(1 & 2).

²³⁵ *ibid*, Art 17(4).

²³⁶ *ibid*

3.9.3 Ethiopia

Hosting Intermediaries that provide ‘a service comprising the storing of electronic message...’ are one category of CSP’s recognized by the E-transaction proclamation.²³⁷ Hosting intermediaries ‘will not be held liable for damages arising from an activity or information they stored, if they are not aware that it infringes the right of third-party’²³⁸. For subsistence of such protection, they are required to act immediately, either upon becoming aware of the unlawful nature of the information or upon receipt of the right holders take-down notification, by removing the infringing information or disabling its access.²³⁹ Right holder need to file a written take-down notification for the hosting intermediary by providing particulars provided in the law to remove information that violates their rights.²⁴⁰

Provisions of the E-transaction proclamation that limit liability of hosting intermediaries and the take-down notification procedure it establish resemble to those of USA’s DMCA. DMCA is a statute that specifically addresses copyright and its applicability on social media and UGC has been practically established through judicial decisions. However, the E- transaction proclamation is a recent general law. As a general law the E-transaction proclamation will be applicable on copyright, however determining whether or not, it considers social media websites as CSP’s or its applicability on their service and UGC is not straightforward. The law limits the liability of hosting intermediaries that provide ‘service comprising the storage of electronic message’. This wording of the law is not wide enough to accommodate every aspect of the services provided by platforms like YouTube. Because their role is not only storing users content, they also disseminate users content for making it available for other users, a service which resembles to the activity of different category of CSP’s labeled as ‘mere conduit’ in the proclamation.²⁴¹ Unless developed by subsidiary legislation or judicial decisions, as it exists the law appears to be inapplicable on social media websites like YouTube and there compliance with the take-down

²³⁷ E-Transaction Proclamation, see Art 25.

²³⁸ *ibid*, Art 25(1(a)).

²³⁹ *ibid*, Art 25(1(b &c)).

²⁴⁰ *ibid*, Art 27.

²⁴¹ *ibid*, see art 23.

notification procedure it establishes might not serve them to avoid secondary infringement liability for user's infringement in UGC.

3.10 Defenses

Upon prove of 'prima facie' infringement case by the plaintiff, defendants will be given the chance to defend themselves by raising valid defenses to avoid infringement liability. Exceptions or its variants like fair use incorporated in copyright laws are considered as legally established defenses to infringement.²⁴² Regarding infringement claim on use of each other's UGC on social media, concept of implied consent and user's license on UGC are considered as available defense.²⁴³ By drawing from experience of other jurisdictions, the following subsections will investigate availability of this defenses for UGC creating users accused of infringement in Ethiopia, by examining users right in Ethiopia's copyright law exceptions.

3.10.1. Exceptions

Exceptions are the main mechanisms through which copyright law attempts to maintain a fair balance between protecting the interests of copyright owners and the public.²⁴⁴ Exceptions facilitate the public's access to and uses of creative works in certain justified instances without requiring consent of the owners.²⁴⁵ Compared to earlier times, digitalization has made it easier for users to make massive appropriation of copyrighted works.²⁴⁶ As part of shaping copyright standards compatible with the digital era, the WCT at the International level, allows member states to craft exceptions to exclusive rights that are compatible with their use in the digital environment.²⁴⁷ Exceptions have a paramount importance for UGC as they form legal grounds users relay on to make unauthorized use of works that would have been otherwise infringing and set limitations as parameters to determine legality of such use.²⁴⁸

²⁴² Vaver (n 91) 128.

²⁴³ Clark (n 43) 17.

²⁴⁴ Palfrey and others' (n 11) 81.

²⁴⁵ *ibid*

²⁴⁶ *ibid* 80.

²⁴⁷ WCT, Art 10.

²⁴⁸ Gervais (n 8) 843.

In USA exceptions are crafted in the form of open-ended fair use limitations to the exclusive rights, which allows uses of copyrighted work for purposes such as criticism, comment, news reporting or research as non-infringing.²⁴⁹ US courts are required to consider four factors while determining whether a particular use is fair or infringing these are: ‘(a) the purpose and character of unauthorized use; (b) the nature of the protected work; (c) the amount of the protected work used compared to the whole protected work; and (d) the impact of the use on the market of the protected work’.²⁵⁰

User’s appropriation of works in UGC can be either wholesale or transformative. USA’s fair use doctrine is interpreted as allowing transformative use of works including transformative UGC.²⁵¹ Fair use defense can be equally applicable in relation to UGC as in any other infringement case along with its shortcoming.²⁵² What constitutes fair use is not ascertainable with pre-established standards rather it is decided by courts in each case based on particular issues involved. Application of fair use in commercial transformative works in USA judicial precedents is not consistent. In some cases borrowing little from copyrighted work and reusing it in another work is ruled as infringing, while it has been ruled as fair in other cases.²⁵³ Such diverse rulings of US courts makes fair use unreliable defense in its application in UGC.²⁵⁴

By far Canada is the only jurisdiction that gave legal recognition for user right by introducing a clear ‘UGC or mash-up’ exception through its copyright modernization act.²⁵⁵ This law explicitly grants individuals the right to use protected preexisting works that have been made available for the public for creating secondary works in which copyright subsist.²⁵⁶ On secondary works they created individual have the right to use it or authorize intermediaries to disseminate it for non-

²⁴⁹17 U.S.C. § 107 (1976)

²⁵⁰ *ibid*

²⁵¹ Jamar (n 12) 1.

²⁵² Clark (n 43) 16.

²⁵³ Lee (n 5) 1510.

²⁵⁴ *ibid* 1511.

²⁵⁵ Bill-C11, 41st Parliament, 1st session (2011) section 29.21

²⁵⁶ *ibid*, 29.21(1).

commercial purposes.²⁵⁷ Use is defined broadly to include all exclusive economic rights of copyright holders except for the right to authorize anything.²⁵⁸ Canada's UGC exceptions will avoid uncertainty of infringement liability and serves as a valid defense if users acted in compliance with the law.

Copyright law of Ethiopia incorporates a closed list of exceptions which allow certain uses of works that affect certain economic rights.²⁵⁹ These exceptions give certain rights, for individuals and institutions either for personal or public purposes.²⁶⁰ UGC covered in this study is created and shared by individuals, thus exceptions applicable for institutions are irrelevant.²⁶¹ Purely personal exceptions that allow reproduction for personal purpose and private performance aren't suitable for UGC as such content is public media which requires appropriation of other rights.²⁶² Exhaustion exception to distribution right which allows resale of legally owned copies isn't applicable for UGC which is non-commercial.²⁶³

Individuals are not given any right under Ethiopia's copyright law exceptions for creating derivative works like transformative UGC by using copyrighted works in artistic and literary fields, because the exception allowing one of such uses "adaptation" is applicable only for computer programs.²⁶⁴ This makes almost all artistic and literary works immune from any exceptions and places them beyond user reach. Exceptions that allow, reproduction of certain works "for educational purpose and quotation" are not sufficient to accommodate uses like transformative UGC which involves appropriation of additional rights.²⁶⁵ Only the exception that allows "reproduction, broadcasting and any other communication to the public for informatory purposes on current events or information" leaves a little space users can invoke to make use of

²⁵⁷ *ibid*, 29.21 (1(a) & 2).

²⁵⁸ *ibid*, 29.21 (2).

²⁵⁹ Copyright Proclamation, Arts 9-19 & 7(2).

²⁶⁰ *ibid*

²⁶¹ *ibid*, Arts 7(2) & 12.

²⁶² *ibid*, Arts 9, 15 & 16.

²⁶³ *ibid*, Art 19.

²⁶⁴ *ibid*, Art 14.

²⁶⁵ *ibid*, Arts 10 & 11.

specific works if they want to create UGC for informative purpose, if their use only affects reproduction and any communication to the public rights.²⁶⁶

Generally, Ethiopia's copyright law exceptions are applicable for limited categories of works, clearly mentioned exclusive rights and are tied with various limitations and qualification. The law appears to cling on protecting interests of copyright owners than granting the public wide rights.²⁶⁷ The room in the exceptions appears very limited to encompass most uses users need to make for creating and disseminating UGC. These exceptions might not serve content creators as a valid defense which avoids liability. To raise a valid defense users need to comply with the qualifications and exceptions to exceptions provided in the law as parameters to justify or prohibit the application of particular exception and to determine whether or not a particular use is fair or infringing.²⁶⁸ One of such qualifications comes in the form of "fair practice" which is a variant of fair use.²⁶⁹ The law doesn't define or provide factors courts need to consider while interpreting and applying fair practice standard, this may cause uncertainty and inconsistent application of the principle.²⁷⁰ In addition to the narrow breathing space to use copyrighted works for UGC, this legal gap renders Ethiopia's copyright law exceptions unreliable defense in their application in UGC.

3.10.1.2 Implied Consent

Copyright infringement involves unauthorized use of works, if owners claim infringement on uses they consented for, defendants can avoid liability by raising such consent as defense.²⁷¹ Ethiopia's copyright law requires written contracts for giving such authorization of owners, but

²⁶⁶ *ibid*, Art 13.

²⁶⁷ Eshete (n 127) 27.

²⁶⁸ Daniel Mitiku, 'Fair Practice Standard under Copyright Law of Ethiopia: the case of education' (2020) 6 INTJL 335, 336 < www.lawjournals.org > accessed 5 November 2020

²⁶⁹ *ibid*, Copyright Proclamation, Arts 10 & 11.

²⁷⁰ *ibid* 337.

²⁷¹ Vaver (n 91) 146.

some countries give recognition for authorization given expressly (either written or oral) and implied consent from the surrounding circumstances.²⁷²

Concerning UGC, the conduct of users that involve uploading works on social media amounts to granting implied non-exclusive license for other users to make certain uses of the work that would otherwise constitute infringement such as temporary reproduction for displaying the work. Implied consent is used to justify incidental use of UGC required for interactive and participatory social media culture.²⁷³ However, status of implied consent as a valid defense in Ethiopia is uncertain and requires judicial interpretation as there is no legal ground to invoke such defense because the copyright law gives recognition only for written consents. Social media TOS agreements give non-exclusive license for their users to make certain uses of each other's UGC. Such license involves express consent acting within its limits is considered as a valid defense.²⁷⁴ Issue of UGC license for users will be discussed in detail in chapter 5.

²⁷² *ibid*

²⁷³ Clark (n 43) 16.

²⁷⁴ *ibid*

CHAPTER FOUR: APPLICATION OF YOUTUBE'S TERMS OF SERVICE AND POLICIES

4.1 General Condition for Using Service

Use of YouTube's service is subject to the agreement concluded by the websites TOS, policy, safety, and copyright policies and community guide lines. The TOS provides independent links for the other documents. YouTube requires users to carefully read, understand and accept the agreement before they start using its service.²⁷⁵ YouTube maintains the right for unilaterally modifying this agreement from time to time either by giving advance reasonable notice for users to review proposed changes or in some cases without giving such notice.²⁷⁶

Contents available on YouTube include videos, audio, photos and texts (comments and scripts) uploaded by users. YouTube grants anyone the right to use its service in compliance with the agreement and applicable law. Users are allowed to view or listen to contents for non-commercial personal purpose and show videos by embedding them.²⁷⁷ Unregistered users can browse and view contents on YouTube. For using additional features in the package such as; like, rate, share, subscribing to channels and creating YouTube channel user need to have 'Google Account'. Creating 'YouTube Channel' enables users to generate content i.e. uploading video and commenting on contents, on the website.²⁷⁸ Anyone above 13 years is allowed to use the service.²⁷⁹

YouTube's TOS and copyright policy inform users to respect copyright while using its service by uploading only contents they created or they are authorized to use. Uploading contents they don't own or using third-party copyrighted works in their content without authorization or legal right is prohibited.²⁸⁰ 'Materially or repeatedly infringing' copyright is stated as a ground for terminating or suspending users account.²⁸¹

²⁷⁵ YouTube's TOS (n 22) Applicable terms.

²⁷⁶ *ibid* About this agreement.

²⁷⁷ *ibid* Permissions and restriction.

²⁷⁸ *ibid* Your use of service.

²⁷⁹ *ibid* Who may use the service.

²⁸⁰ *ibid* Uploading Content, see also Rules and Policies, Copyright

<https://www.youtube.com/howyoutubeworks/policies/copyright/>> accessed 5 January 2021

4.2 Ownership and License

Users retain ownership of contents they upload, but they are required to license their rights over any content they upload for YouTube and other users.²⁸² YouTube acquires

... a worldwide, non-exclusive, royalty-free, sub-licensable and transferable license to use that content (including to reproduce, distribute, prepare derivative works, display and perform it) in connection with the Service and YouTube's (and its successors' and Affiliates') business, including for the purpose of promoting and redistributing part or all of the Service.²⁸³

Users get the right of using YouTube's service at the expense of licensing every exclusive right they are entitled by copyright law without receiving any reward not only for YouTube but also its affiliates and successors. UGC owners may have the hope of getting some financial benefits which is conditional on their channels and contents fulfilling various requirements set under YouTube's monetization policy for becoming beneficiaries.²⁸⁴

Except for the rights of sub-licensing and transferring the 'license for YouTube users' gives them similar rights. Thus, YouTube users are given express license on any UGC to make all uses considered by Ethiopia's copyright law as exclusive rights of the owner, which is qualified vaguely by the term 'in connection with and as enabled by the service'.²⁸⁵

Duration of these licenses is not time specific, it lasts for 'commercially reasonable period of time' even after the uploading user deleted or removed his content. User's have the right to remove their content any time, however YouTube has right to retain copies of removed contents with some restriction on its licensed rights.²⁸⁶ YouTube also retains discretion of removing any

²⁸¹ *ibid* Termination and suspension for Cause.

²⁸² *ibid* Rights you grant.

²⁸³ *ibid* License to YouTube.

²⁸⁴ YouTube Channel Monetization Policies (Updated October 2020)

<https://support.google.com/youtube/answer/1311392?hl=en> accessed 5 January 2021

²⁸⁵ YouTube's TOS (n 22) License to other users.

²⁸⁶ *ibid* Duration of License and Removing your Content.

content ‘upon reasonable belief that such content violates the agreement, law or if the content causes harm to the site, users or third-party’.²⁸⁷

4.3 Fair Use Policy

YouTube fair use policy is cognizant of differences that may exist between countries laws as to what constitutes fair use and application of the doctrine is determined by courts on case by case basis.²⁸⁸ Users are advised to get advice from legal experts before uploading contents with third-party copyrighted material.²⁸⁹

4.4 Enforcement of Copyright on YouTube

YouTube encourages copyright owners to file notification on any content they claim infringes their right by promising to respond on such notification.²⁹⁰ YouTube makes available online DMCA take-down notification form copyright owners can use for submitting notification on contents infringing their copyright.²⁹¹ Furthermore, YouTube’s copyright management tools provide copyright owners with sufficient resources additional advanced technological features, such as Content-ID and content verification program which provide better management of their right on the website.²⁹² Some considered such technologies as DMCA plus enforcement.²⁹³

Upon receiving valid take-down notification YouTube proceeds by taking-down the content and applies copyright strike on account of infringing users. It terminates account and channel of users that received three copyright strikes in 90 days.²⁹⁴ Users whose content is removed can appeal on

²⁸⁷ ibid Removal by YouTube.

²⁸⁸ Rules and Policies, ‘what is fair use?’ <<https://www.youtube.com/howyoutubeworks/policies/copyright/#fair-use>> assessed 5 January 2021

²⁸⁹ Fair use on YouTube <<https://support.google.com/youtube/answer/9783148?hl=en>> assessed 5 January 2021

²⁹⁰ YouTube’s TOS (n 22) Copyright Protection.

²⁹¹ Copyright Infringement Notification <https://www.youtube.com/copyright_complaint_form> assessed 5 January 2021

²⁹² Rules and Policies, ‘Making claims’ <<https://www.youtube.com/howyoutubeworks/policies/copyright/#making-claims>> assessed 5 January 2021

²⁹³ Lerner (n 50) 12.

²⁹⁴ Rules and Policies, ‘Enforcing Copyright’ <<https://www.youtube.com/howyoutubeworks/policies/copyright/#enforcing-copyright>> assessed 5 January 2021

such removal by filing the online counter-notification form, if such removal was not result of the claimed copyright infringement rather it is owing to ‘mistake, misidentification or fair use’. Upon receipt of valid counter-notifications YouTube proceeds by forwarding it to the initial claimant and inform him that the removed content will be reinstated in 10 days. The initial claimant will have ten working days to initiate legal proceeding to keep the take-down in effect.²⁹⁵

see also Copyright Management Tools,

<https://support.google.com/youtube/answer/9245819?hl=en&ref_topic=9282364> assessed 5 January 2021

²⁹⁵ Submit a Copyright Counter Notification <<https://support.google.com/youtube/answer/2807684?hl=en>> assessed 5 January 2021

CHAPTER FIVE: ANALYSIS

5.1 Copyright Infringement in UGC under Ethiopia's copyright law.

Ethiopians utilize YouTube for uploading, disseminating or accessing various works. Ethiopia's copyright law leaves a humble room to extend protection for UGC if it involves production in protected categories of works that satisfy eligibility requirements it provides. Thus, user may have their own copyright interest in UGC and they have to respect the copyright of other while using YouTube or any social media. Ethiopians might participate by sharing pure, transformative or user copied UGC on YouTube. If users make unauthorized use of third-party works for transformative and user copied UGC they uploaded on YouTube, it will raise claim of copyright infringement which involve slightly different issues. Simple act of uploading user copied UGC constitutes copyright infringement under Ethiopia's copyright law that potentially infringes more than one exclusive economic right (i.e. reproduction, distribution and communication to the public). When users upload transformative UGC they created relaying on one or more preexisting work, they will infringe the right to create derivative works in addition to the above rights. The nature of such uses may relate to; the whole work or its substantial part or minimal uses, any of such uses may not avoid claim of infringement as this issue is matter that will be settled by final judgment of a court.

Users that directly infringe copyright in UGC will be held liable as direct infringers in Ethiopia. Users accused of infringement for uploading users copied UGC may not have legally established defense to avoid liability. Exceptions or its variants like fair use are regarded as valid defenses regarding transformative UGC. Unlike fair use doctrine of USA and Canada's clear UGC exception, which give users certain rights to use copyrighted works for creating transformative UGC, the exceptions in Ethiopia's copyright law don't give individuals any right to create derivative works by using copyrighted work in artistic and literary fields. Except for the little room left for creating works for inforamatory purposes, these exceptions are very limited exceptions that cannot accommodate uses of works for creating transformative UGC that requires appropriation of more than one exclusive right. This makes them unreliable defense in their application for UGC. Consequently, content creating users accused of infringement in UGC can be held liable to pay hefty amount of damage as the global circulation of UGC might cause

detrimental damage to the owners' economic interest. Users also risk criminal accusation and penalty as they are participating in UGC voluntarily and knowingly. User's continuous engagement with copyrighted works in UGC might also result in uses that infringe author's moral rights.

The role YouTube plays in infringing UGC by providing the forum and technological features that enable users to upload infringing UGC, afterwards by hosting, distributing and making it available for other users and the profit YouTube generates from such content needs to be constructed by Ethiopian courts as providing assistance or facilitating copyright infringement for users direct infringement in UGC, to hold YouTube liable under secondary infringement theory. This will give copyright owners an opportunity to get a meaningful redress by proceeding against YouTube, because identifying and proceeding against users that directly infringe their right by uploading infringing contents on YouTube might be difficult for the owners.

Global nature of internet networks has made possible the presence of foreign based social media websites like YouTube in Ethiopia. Such platforms might not have any physical presence in Ethiopia's territory, as they can provide their services in Ethiopia through sever in other countries and using the domain of other countries, not Ethiopia's '.et' domain. This will raise the issue of whether or not Ethiopian courts have jurisdiction for entertaining claims like copyright infringement that might arise from uses of such platforms in Ethiopia. Concerning disputes involving YouTube and its users YouTube's TOS has provisions that govern choice of law and jurisdiction. YouTube has made its service available for Ethiopian residents through internet connections in Ethiopia. Such services can be used to infringe the copyright of third parties that have no contractual relationship with YouTube or users. It might be difficult or even impossible for such third-parties to enforce their right by instituting infringement action in other countries like YouTube's home USA. Examining, legality of YouTube TOS provisions or Ethiopian court's jurisdiction over such cases in the context of Ethiopia is difficult due to absence legislation governing conflict of law. If such third parties institute a case before Ethiopian courts, deciding whether to entertain or decline hearing such cases on the basis of jurisdictions requires the decision of Ethiopian courts.

Despite non-existence of Ethiopian based hosting intermediaries like YouTube adoption of rules that limit liability of hosting intermediaries by the E-transaction proclamation might encourage

emergence of such platforms in the future. However, it might be too soon to certainly state whether the law considers websites like YouTube as CSP's or its applicability on their service, because the provision defining and limiting liability of such intermediaries only talks about 'intermediaries that provide a service comprising the storage of electronic message..'. The wording of the law appears not to include every activities performed by websites like YouTube as their service involves more than storing users content because they transmit and make such contents available for other users. This calls for interpretation of the law either through subsidiary legislation or Ethiopian court decisions that clarify application of this law on UGC and social media websites. In the absence of such clarification, the law appears not to include platforms like YouTube, thus their compliance with the take-down notification procedure might not help them to avoid secondary infringement liability for user's infringement in UGC. But adoption of this law will certainly have its own positive contribution in providing basic rules that might be interpreted in a way that helps websites like YouTube to conduct their business in an environment that would potentially mitigate their secondary infringement liability risks if they comply with the take-down notification procedure it establishes.

Ethiopian copyright owners may consider Collective Management Societies (CMS's) as alternatives for better management of their rights over uses of their works in UGC. However, the mandate of CMS's in Ethiopia is limited to collecting royalty by representing several right holders from several users for commercial use of protected works, thus it might not include UGC which is characterized as non-commercial. Furthermore, they have no clear legal authority to license rights that will enable users to make uses of works for UGC. Thus, if Ethiopian copyright owners are concerned with uses of their works in UGC, it might be better to lobby for the adoption of laws like the EU's DSMD which requires social media websites to obtain license from the owners which enable their users to use such works for UGC or they have to demand introduction of more rights that enable CMS's to administer uses of their works in UGC.

5.2 Alignment between Ethiopia's Copyright Standards and YouTube TOS.

In addition to Ethiopia's copyright law, YouTube users are required to respect copyright-related legal conditions in YouTube's TOS agreement. YouTube's TOS and copyright policy draws user's attention towards copyright, by informing them to respect copyright while using its service. Users are informed to upload only their own contents and prohibited from uploading or

using third-party copyrighted works in their content without the owners' authorization. YouTube deters user's repeated copyright infringement by terminating their accounts. YouTube's fair use policy educates users about legal differences and judicial uncertainties surrounding application of the doctrine and advice users to get legal advice from experts before uploading contents consisting third-party works. In this regard YouTube TOS, copyright and fair use policies are consistent with Ethiopia's copyright law. This will enhance effectiveness of the law in regulating user's content-generative behavior on YouTube.

YouTube's TOS, copyright policy and copyright management tools evidence the website's strict compliance with DMCA eligibility requirements. Owners whose right is infringed by contents on the website can easily enforce their right by filling take-down notification through the online form, YouTube proceeds by taking-down such contents. This is compatible with the take-down notification procedure established under the E-Transaction Proclamation. Enforcement does not stop here, YouTube proceeds by implementing other DMCA eligibility requirements which includes making available online counter-claim procedure user whose content is removed can use for objecting such removal. However, the E-Transaction proclamation doesn't contain procedures of such nature thus they have no legal ground in Ethiopia, this may deny users online opportunity to object improper removal of their content even when they have legal grounds.

5.3 Potential Incompatibilities of YouTube's TOS with Ethiopia's Copyright Standards

If UGC is copyrightable contracts transferring economic rights have to be concluded by a written form in line with Ethiopia's copyright law. It has been discussed in chapter three that non-fulfillment of formality requirement provided in the law such as; absence of separate agreement regarding the license, non-existence of witness, and signature will render YouTube's UGC licenses void contract without any legal effect. As children above 13 are allowed to use YouTube's service issue of capacity can also be raised in this regard. Other than such shortcomings, YouTube's UGC licenses raise multifaceted issues which make them apparently in conflict with Ethiopia's copyright standards.

YouTube requires users to license their rights on every single content they upload without any inquiry as to whether such contents are copyrightable or uploading users have valid ownership.

However, everything uploaded on YouTube may not be copyrightable as some of such contents are not works copyright protects or may not fulfill eligibility requirements it provides.²⁹⁶ For instance, fulfilling high standards of originality threshold applied by Ethiopian courts will be difficult to achieve for users uploading transformative UGC or contents like comments may lack sufficient creativity element required for protection. Users may also upload third-party works over which they have no copyright to give such license. Adopting such a wholesale licensing regime may lead users into wrongly believing that they are owners of copyright on contents that cannot be protected at all and to have wrong understanding about copyright as a concept that protects everything they upload.²⁹⁷

Even when user's content is copyrightable, they will not get the treatment they are supposed to have under copyright law. Contents users upload on YouTube may go viral by getting numerous views which brings users fame and recognition for their work. Copyright law grants authors exclusive rights as economic incentives to reward their creativity with the aim of enhancing creation of further works. YouTube's licenses conflict with this aim of the law as they are royalty-free.²⁹⁸ Despite, user's uncertain financial rewards through YouTube's monetization policy, these licenses deny users any financial reward from uses of their work by YouTube or its users. Accordingly, users have to scarify their exclusive economic rights protected by copyright law for using YouTube. This may have the effect of discouraging creativity the law assumes rewarding authors will enhance.²⁹⁹ Users retain ownership of such content but they are required to license their rights for YouTube and its users. Each license gives YouTube or its users the "right to use the content" and mentions some uses it includes. The word "including" indicates that the rights listed are only illustrative examples, thus the license is also applicable on any other rights which aren't specifically mentioned. Such untailed licenses are not acceptable under Ethiopia's copyright law which requires licensing contracts to specifically provide every right licensed.

²⁹⁶ Tan (n 2) 119.

²⁹⁷ *ibid*

²⁹⁸ Copyright Proclamation, see Arts 2(8) & 7(2).

²⁹⁹ Mihajlo (n 3) 188.

YouTube's license which also applies for its affiliates (like YouTube owner Google) and successors is; worldwide, sub-licensable and transferable which enables them to make every use considered as copyright owners exclusive right under copyright law, for the purposes that include but not limited to 'promoting all or part of the service and business'. No one may certainly set the limits of what will be necessary for promoting the service or business of giants like YouTube or Google. Despite characterization of UGC as non-commercial, this license enables YouTube to make massive commercial appropriation of user's content, without rewarding them anything.³⁰⁰ Even if such license is labeled as 'non-exclusive' it will compromise UGC owner's economic interest for otherwise using their content, since potential customers may decline to contract with them by looking at YouTube's license or they may get such license from YouTube which has a sub-licensable and transferrable license. UGC owners will lose their ability to control appropriation of their work made under this license, because they may not know how, where and who used their work to detect infringement and enforce their right both on and beyond YouTube's world. In this process, user's work might be licensed for third parties that make uses that are bad for their reputation and infringing their moral rights protected by copyright law.

Initial acceptance of TOS agreements doesn't settle user's obligations and rights once and for all, since YouTube retains contractual right to unilaterally modify this agreement any time it desires. Users cannot negotiate about rights they forfeit or their benefit every time they upload new content because the initial license governs any content they upload. YouTube requires users to bend their will as it wishes while initially accepting the agreement or afterwards by accepting any future modification. This makes it at odds with the spirit of Ethiopia's copyright law which aims at protecting the interest of owners as far as possible by putting them in similar bargaining positions with their counterparts. This can be inferred from provisions of the law that allow authors to revoke exclusive licenses based on nonuse of economic right detrimental to their interest and duty of licensees to take into account the interests of licensors while deciding on methods for appropriation of works that are not covered in their contract.³⁰¹ User's only way out of this agreement is terminating their account or removing their content. Despite established principle of copyright which provides the difference between copyright and physical ownership

³⁰⁰ *ibid*

³⁰¹ Copyright Proclamation, see Arts 24(4) & 25.

of works,³⁰² users may not totally avoid effects of this license by removing their content because the license lasts ‘for a commercially reasonable time’ even after such removal and YouTube has the right to retain copies of removed contents with some restriction on its licensed rights. Such vague contractual stipulation will force users to accept effects of a contract they clearly objected in violation of their rights protected by copyright law.

License for ‘other YouTube users’ who are third-parties to the TOS agreement gives them every right to make any use affecting the owner’s exclusive economic rights.³⁰³ In principle, Ethiopia’s law of contract limits effects produced by legally concluded contracts only to the contracting parties, thus contracting parties cannot create an obligation or right on third-parties by their contract.³⁰⁴ This license violates this principle of contract law known as ‘relative effect of contracts’. One exception to this principle allows contracting parties to make ‘contractual stipulations for the benefit of third-parties’.³⁰⁵ Scholars argue that the application of this exception is limited to contracts of insurance, thus it is not wide enough to accommodate such license made for the benefit of billions of YouTube users as a legally enforceable obligation in Ethiopia.

If this license is accepted as lawful it will legalize most uses considered as infringing under Ethiopia’s copyright law, because users are expressly authorized to conduct every uses regarded as the owners exclusive right. Granting users such wide rights is not compatible with user’s rights under Ethiopia’s copyright law exceptions that give individuals very limited rights to use others copyrighted works. Granting such untailored rights for every YouTube user will lead them into wrongly believing that they have legally enforceable authorization of UGC owners to make all uses affecting his economic rights. This license is unacceptable under Ethiopia’s copyright standards which aim at protecting the economic interest of authors by prohibiting unauthorized uses of their work. Given the narrow breathing space users have to use copyrighted works for UGC, most uses other YouTube users might undertake relaying on such license will constitute infringing uses which makes them potentially liable. This will compromise effectiveness of the

³⁰² *ibid*, Art 24(2).

³⁰³ Tan (n 2) 121.

³⁰⁴ Civil Code, see Arts 1675, 1731(1) & 1952(1).

³⁰⁵ *ibid*, see Arts1957-1961.

copyright law in regulating user's content-generative behavior by encouraging users to undertake various uses considered as infringing under the law thereby elevating probability of mass-scale infringement on YouTube. This license may not serve as a valid defense concerning uses that require the owners' authorization and which aren't allowed under Ethiopia's copyright law exceptions. Moral rights of UGC authors will also be at stake owing to the elevated probability of massive appropriation of their work by other users relaying on this license. This can result in various uses of the work without acknowledging authors as source, eroding the integrity and original character of the work which constitute moral right infringement under Ethiopia's copyright law.

CHAPTER SIX: Conclusion and Recommendation

6.1 Conclusion

Users participate in UGC by creating and disseminating; original works, derivative works or simply uploading third-party works without any modification. Copyright law of Ethiopia provides a humble room to extend protection for UGC if it involves production in protected category of works that fulfills eligibility requirements it provides. Therefore, users can have their own copyright interest in UGC and they have to respect the copyright of others in their content-generative activities. If users make unauthorized use of copyrighted works in UGC they may infringe more than one exclusive right of copyright owners. Users that directly infringe copyright in UGC will be held liable as direct infringers and the role of social media play in infringing UGC is sufficient to make them liable for secondary copyright infringement in Ethiopia.

YouTube users are required to respect copyright-related legal conditions under YouTube's TOS agreement which governs use of YouTube's service. Thus, Ethiopia's copyright law and YouTube's TOS form two separate regulatory factors that shape user behavior on the website. YouTube's TOS, copyright and fair policy are aligned with Ethiopia's copyright law as they call user's attention to copyright by informing them to respect copyright while using its service by uploading only contents they created and not to upload or use third-party content without authorization. YouTube's three-strike policy will deter users that repeatedly infringe copyright by terminating their account. This will enhance the effectiveness of Ethiopia's copyright law while regulating user's behaviors on YouTube. Despite uncertainties about the application of the E-transaction proclamation on websites like YouTube, YouTube complies with the law by providing copyright owners with online form to file take-down notifications for enforcing their right on the website. Upon receiving such notification YouTube will take-down the content claimed infringing and proceeds by applying other DMCA eligibility requirements beyond what is required in the E-Transaction proclamation. Users can appeal on improper removal of their content by filing a counter-claim. However, users whose content is removed as such hardly have any online procedure for objecting to improper removal of their content established under the E-Transaction proclamation.

Works uploaded on YouTube may go viral by getting numerous views which helps users to get fame and recognition by using YouTube. Users need to know that such benefits come with the

utmost price. Despite retaining ownership of their content, users are required to license all of their exclusive rights over any content they upload, both for YouTube (its affiliates or successors) and other YouTube users, for using YouTube's service. These licensing arrangements have several flaws when examined under Ethiopia's copyright licensing regime. These licenses don't satisfy the written formality requirement provided in the copyright law because they aren't separate documents addressing the issue of license but one part of the larger contract governing use of YouTube's service, they aren't signed by contracting parties and attested by a witness. These licenses are designed as if every content users upload on YouTube is copyrightable, which may not be the case as there will be many contents that cannot be protected because they are not protected subject matters or don't fulfill eligibility requirements provided in the law. This will mislead users into wrongly believing that they are owners of rights they aren't legally entitled to and to have wrong understanding of copyright.

Even when UGC is copyrightable, these licenses deny users proper treatment they are supposed to have under copyright law. These licenses generally give both YouTube and its users 'the right to use the content' and mention some uses it includes as examples. Thus, they are untailed licenses that don't specifically provide every right licensed as required by Ethiopia's copyright law. YouTube's license enables it to make any appropriation of user's content, while users are required to sacrifice all of their copyright entitlements by accepting a royalty-free license that prohibits them from claiming any reward from such uses of their work as precondition for using its service. This is apparently in conflict with one purpose of copyright law i.e. rewarding authors to encourage further creativity because denying users any benefit from the use of their content will not motivate the user's creative spirit as intended by the law. Uncertain financial rewards users might get under YouTube monetization policy cannot be regarded as an equal substitute for their legal rights. This license is worldwide, sub-licensable and transferable, thus the probability for massive commercial appropriation of user's content is evident. This may increase uses which infringe their economic and moral right both on and outside YouTube's world. Once they give this license, users will be unable to control how and when their work is used, this makes them unable to enforce their right by detecting infringement. User's only way out of this contract is terminating their account or removing their content from the website. This may not help users to totally avoid effects of this license because its duration is stipulated vaguely to last for a 'commercially reasonable time' even after such removal and YouTube has contractual right to

retain copies of removed content with some restrictions on its licensed right. Furthermore, YouTube retains contractual right to unilaterally modify the TOS agreement including the licensing provision any time it desires. Such arrangement cannot be legally justified under Ethiopia's copyright law which attempts to create an equal bargaining position while concluding such contracts because users cannot bargain about their benefit or rights they license on UGC, as they are required to bend their will as desired by YouTube while accepting the TOS or afterwards in their dealing with YouTube.

Likewise, other YouTube users who are third-parties to the TOS agreement are given a license that enables them to make every use affecting any economic rights of the owners. YouTube users might make use of UGC that requires authorization of the owners under copyright law by relying on this license. Most of such uses will constitute copyright infringement because such uses cannot be legally justified in Ethiopia as users have no such wide rights under the copyright law exceptions. Such license that was intended to benefit billions of YouTube users that have no contractual relationship with the UGC owner cannot be regarded as a legally binding licensing arrangement under Ethiopia's copyright licensing regime. This license might encourage users to disregard copyright law by making uses that infringing economic and even moral rights under Ethiopia's copyright law and compromises its effectiveness while regulating user's behavior by elevating infringement on YouTube.

6.2 Recommendation

- ❖ Before uploading their works on YouTube Ethiopian users need to make a cost-benefit analysis, about the possible benefits they might get and the copyright entitlements they will forfeit by surrendering control over their works under YouTube's exploitive UGC licenses.
- ❖ Ethiopians need to use YouTube or any other social media by respecting the copyright of others to avoid infringement liability risks they might face.
- ❖ Due to the difficulties of addressing infringement in UGC through judicial litigation, establishing the applicability of the E-Transaction proclamation on UGC intermediaries through clear subsidiary legislation is necessary to give copyright owners a better and efficient enforcement opportunity. This will also settle uncertainties about the application of the law on UGC intermediaries by establishing their role in the enforcement of

copyright clearly and provides a suitable business environment for the emergence and growth of Ethiopian-based UGC intermediaries. Such legislations also need to establish an online counter-claim procedure that enables users to object to improper removal of their contents and to minimize excessive manipulation of the take-down notification procedure by copyright owners.

- ❖ In future copyright law reforms by Ethiopia's legislature revisiting the copyright law exceptions to introduce new rights for individuals that enables them to create transformative UGC by using artistic and literary works needs consideration. This will enhance creativity in Ethiopians social media culture by giving users a breathing space they could rely on to participate in UGC meaningfully and without fear by minimizing their infringement liability risks.

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