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**Exceptions and Limitations under Ethiopian Copyright Law: A
Comparative Analysis**

By: Taame Berihu

Advisor: Mandefro Eshete (Phd)

Addis Ababa

February, 2013

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Submitted in Partial Fulfillment of the Requirements for the Master of Laws Degree at the School of Law, Addis Ababa University

Addis Ababa

February, 2013

Approval Sheet by the Board of Examiners

Exceptions and Limitations under Ethiopian Copyright Law: A Comparative Analysis

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Addis Ababa

February 2013

Declaration

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

Taame Berihu

Signature _____

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Acknowledgments

Above all, I want to thank God for making everything possible. I want to take this opportunity, with pleasure, to follow the good tradition of recognizing all those who, in one way or the other, contributed to make my study successful. I greatly value the intellectual guidance, thought provoking and invaluable comments, incisive and constructive comment I got from my advisor Doctor Mandefro Eshete, in which his assistance and cooperation starts from workable topic selection.

I also want to thank all my families for their moral support. Finally I want to extend my heartfelt thanks to my friends for their constructive comments and material support during the study.

Abbreviations and Acronyms

GDP	Gross Domestic Product
TMPs	Technological Measures of Protection
DMCA	Digital Millennium Copyright Act of USA
Ethiopian Copyright Law	Copyright and Neighboring Rights Proclamation No.410/2004
Civil Code	The Civil Code of The Empire of Ethiopia 1960
Convention	Berne Convention for the Protection of Literary and Artistic works 1886
WTO	World Trade Organization
TRIPs	Trade Related Intellectual Property Rights
US or U.S	United State of America
BC	Berne Convention
WIPO	World Intellectual Property Organization
WCT	WIPO Copyright Treaty
WPPT	WIPO Performers and Phonograms Treaty
FDRE	Federal Democratic Republic of Ethiopia
NAFTA	North America Free Trade Agreement
USA	United States of America
U.S.T.R	United states Trade Representative
FTA	Free trade Agreement
WBU	World Blind Union
KEI	Knowledge Ecology International
UNCTAD	United Nations Conference on Trade and Development
IPRs	Intellectual Property Rights
IP	Intellectual Property
ICTSD	International Centre for Trade and Sustainable Development

WHO	World health organization
EFA	Education for all
UNESCO	United Nations Economic, Social and Cultural Organization
EU	European Union
EIPO	Ethiopian Intellectual Property Office
TEACH Act	Technology, Education and Copyright Harmonization Act of 2002

Abstract

With the development of importance of creative works, protection of works of mind comes in to practice at national and international levels at different times. Right holders are given legal protection over their artistic and literary works in the form of exclusive rights in production, reproduction, distribution, performance, public display etc or exclusive rights of granting authorization to other to do the same. The ultimate goal of copyright protection is to provide incentives for people to produce scientific and creative works that benefit society at large. As far as the public is part of copyright system, the exclusive rights of copyright holders are not made to be absolute because exceptions and limitations of copyright in the form of specific exceptions and limitations, fair use, fair dealing and fair practice are an integral part of copyright policy so that users are free to utilize works of authors without authorization and with or without payment as the case may be. Over protection of works has similar negative effect as under protection and hence, balanced protection is inevitable. Due to different reasons, copyright protection remains territorial with the exception of the development of International Conventions and Agreements to harmonize copyright laws across the world. The degree of protection given to copyright holders and users vary from jurisdiction to jurisdiction. Some jurisdictions provide strong protection to the moral and economic interests of copyright holders while others have balanced protection with utilitarian orientation.

There exists also a difference in duration of protection of moral and economic rights which affects the limitations on the exclusive rights of copyright holders. Copyright in general and exceptions and limitations in particular have significant contribution to the development goals through creation of employment, service and contribution to the GDP even though scholars did not give attention for longer times. Ethiopia has no study so far about the economic contribution of copyright law. But currently there are areas of works dependent on copyright exceptions and limitations. International copyright instruments provides exceptions and limitations compatible with the three step test without identifying which exception should comply with the test or not as there are exceptions which should not fall under the test such as reproduction for quotation, research, criticism, reporting current events etc. International copyright instruments have an adverse effect on the legislative flexibility of national law makers. The existing copyright exceptions and limitations are under threat of elimination due to the development of self help measures of copyright holders of digital works to control access through TPMs. The Ethiopian copyright law needs amendment to balance the interests of copyright holders and users by incorporating flexible and comprehensive exceptions and limitations as creators a head by using works of predecessors and to accommodate changes taking place in technology on the availability, use and mode of protection of creative and innovative works of mind. Amendments should take place on the exceptions and limitations term of protection, education, library, file sharing in digital contents etc. Amendment is mandatory to incorporate provisions for enforcement of rights of users in case of violation of users' rights by copyright holders, liability exclusion provisos for internet service providers and librarians, to regulate use of technological protection measures for digital works by copyright holders in comply with exceptions and limitations.

Introduction

Copyright legislation is part of the body of law known as intellectual property which protects the interests of creators of artistic, literary and scientific works by providing them property rights called copyright over their works. Copyright law protects artistic, literary and scientific works of authors for limited period of time. Intellectual property rights policy depends on the rights of copyright holders and users of protected works. Robust IP policy in general and copyright in particular is maintained when adequate rights are granted to the public in the form of exceptions and limitations in balancing the conflicting interests to have exclusive rights over their creative works by copyright holders and free use by users.

The development and justifications of copyright law varies from jurisdiction to jurisdiction for different reasons. Different states use different theoretical justifications and theories to justify why creative works are protected. Those justifications emanate from different theories like natural law theory, cultural, economic and social arguments, personality and utilitarian theories. The economic contribution of copyright laws which includes exceptions and limitations for industries and sectors relying on exceptions and limitations of copyright law also varies greatly from states to state. To achieve objective of copyright law, national and international legislatures enact copyright laws. Ethiopia enacts its first modern copyright law in 1960 and copyright laws are incorporated under the Civil Code. The provisions of the copyright law found in the Civil Code are repealed by the Copyright and Neighboring Rights Proclamation No. 410/2004. Foreign states also enact national copyright laws in different times. For the harmonization of nations copyright laws, different conventions and agreements were signed at different times.

For the successful accomplishment of the paper, I have divided it in to five chapters. Chapter one deals with the proposal of the paper. Chapter two of the paper deals with theories and rationales of copyright exceptions and limitations. The Third chapter deals with the economic importance of copyright in general and exceptions and limitations in particular and the challenges or threat posed on it. Chapter Four of the paper attempts to explain and explore the Ethiopian copyright exceptions and limitations which is a kind of comparative analysis with some selected foreign countries copyright laws with incidental inclusion of international intellectual property conventions and agreements. The last chapter is all about concluding remarks and recommendations.

Chapter One

Proposal of the Paper

1.1 Back ground of the Study

Copyright legislation is part of the body of law known as intellectual property which protects the interests of creators of artistic, literary and scientific works by providing them property rights called copyright over their works. These rights of property are recognized under the laws of most countries in order to stimulate human intellectual creativity, to make the fruits of such creativity available to the public, and to ensure that international trade in goods and services protected by intellectual property rights is allowed to flourish on the basis of a smoothly functioning system of harmonized national laws.¹ Even though, the why intellectual property and copyright protection emerged questions are subject to scholarly debates, it can be argued that both come in to existence as a result of the emergence of ownership claim related with labor theory of Locke.² When a person adds his labor to unoccupied property, he automatically acquires ownership over it and excludes others and hence, according to the principle of natural justice, the creator of a work is entitled to the fruits of his labor. This is called ‘National law Theory’³.

The Economic Principle of copyright seeks to provide an incentive to individuals who make creative works available to the public by giving them a reasonable expectation of recouping their investments and making a reasonable profit. This theory advocating creative workers deserve a reward for their effort in the form of economic incentives. The economic incentive can be providing exclusive right to reproduce, sell or carryout other financial transactions. In articulating the reach of the author's exclusive rights over reproduction, distribution, and public performance and display, the copyright statute and the judges who interpret the

¹ Basic Notions of Copyright and Related Rights: WIPO International Forum on “Intellectual Property and Traditional Knowledge: Our Identity, Our Future”: Document Prepared by the International Bureau of WIPO in Cooperation with the Government of the Sultanate of Oman, 2002, p.3

² Natural Rights available at <http://www.wisegeek.com/what-is-natural-law-theory.htm> accessed on 3/5/2012. Generally, there are four principles where by the creator is entitled to the fruits of his work namely principles are principle of natural justice, the economic argument, the cultural argument and the social argument.

³ Id. Natural law theory is a philosophical and legal belief that all humans are governed by basic innate laws or laws of nature, which are separate and distinct from laws which are legislated. Natural law theory has heavily influenced the laws and governments of many nations, including England and the United States, and it is also reflected in publications like the Universal Declaration of Human Rights

statute should attempt a balance between the conflicting interests through which the creators should maintain sufficient control over new markets to keep the copyright incentive meaningful but such control should not stifle the spread of the new technologies in the dissemination of knowledge and information. The setting of the copyright balance is not unchangeable rather each significant change within the system of copyright like technological progress may alter the balance of control between authors and users in turn eventually prompting a new legal standard. For example, until the advent of the photocopier, copyright owners substantially controlled the production and dissemination of copies of works of authorship as the public could not obtain the work without purchasing a copy, or borrowing one from a library or a friend.⁴

The cultural argument⁵ advocates that the public interest may encourage creativity with the view of developing the national culture. According to this argument or principle the very purpose of copyright law is to foster the development and distribution of cultural values through dissemination of creative works. The social argument asserts that social cohesion is made easier through the dissemination of ideas and works to a wide public and through the links forged between social, racial and age groups.⁶ Therefore, copyright law is designed to foster cultural transformation, diffusion and exchange among different cultural societies.

The exclusive rights given allow copyright owners to benefit from the property they have created, providing a financial incentive for further creation and investment in intellectual property and thereby the public at

⁴ Jane, C. Ginsburg (2001). Copyright and Control over New Technologies of Dissemination. *Columbia Law Review*, Vol. 101, No. 7. (Columbia Law Review Association, Inc) available at <http://www.jstor.org/stable/1123809>, accessed on 15/09/2012, p.1614. Copyright and its related rights are essential to human creativity by giving creators incentives in the form of recognition and fair economic rewards. Under this system of rights, creators are assured that their works can be disseminated without fear of unauthorized copying or piracy. This in turn helps increase access to and enhances the enjoyment of culture, knowledge, and entertainment all over the world. According to Article 27 of the Universal Declaration of Human Rights, "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."⁴ This declaration seems to advocate the economic theory of copyright protection as far as the protection is the economic and moral interests of the authors or copyright holders and this clearly shows the protection is an economic incentive of copyright holders.

⁵ Id

⁶ Jean-Luc, Piotraut (2006), An Authors' Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared, *Cardozo Arts & Entertainment*, Vol. 24:549,p.6. Scholars who argue social value as justification for copyright protection advocates that the very purpose of copyright protection is authors/creators will not have sufficient incentive to invent unless they are legally entitled to capture the full social value of their inventions and works of their mind.

large will be benefited from those works according to ‘utilitarian theory’⁷. Accordingly, copyright protection promotes government policy, creativity and fair trading which contribute to economic and social development when such works are utilized by the general public. Different national and international legislations incorporate provisions why artistic and literary works should be protected. The preamble of the Ethiopian copyright law states that, literary, artistic and similar creative works have a major role to enhance the cultural, social, economic, scientific and technological development of a Country and needs the protection of the law. From this we can understand that the primary objective of protecting copyrightable works is to promote public interest. The proclamation seems to advocate the principles of utilitarianism.

The history of copyright is full of changes in purpose, objective, degree of protection, scope of protection and other changes with changes in technology and other changes. This is true because the first copyright law was purposefully enacted to protect the rights of printers while in the later developments; authors were given protection for short period of time.⁸ Conflict of interest shifts from publishers and authors as a result of copyright infringement from among printing companies to copyright holders and users. But this does not mean that there is not copyright infringement between printing companies and copyright holders.

Users tend to infringe copyright due to the an affordable price set by the copyright holders; the excessive transaction cost incurred by users to get permission of every use for entertainment, research, private study etc, market failure or lack of adequate supply due to monopoly of the copyright holders; the advancement of technology which makes digital contents vulnerable to infringement like file sharing through email; the

⁷ Ibid, p.7. see also John, Vaughn and etal, *Campus Copyright Rights and Responsibilities: A basic Guide to Policy Considerations*, p.7. According to utilitarian theory, copyright is an incentive system which encourages the creation and dissemination of ideas and information products as widely as possible, by giving a creator/author an exclusive right, for a limited period, to control reproduction by third parties of the form in which the idea is expressed. That grant is meant to be balanced by limitations and exceptions, especially the right of reproduction and distribution for educational purposes. In practical terms, copyright law serves public ends by providing individuals with an incentive to pursue private ones: copyright rewards authors for the creative exercise of their talents through the provision of proprietary rights for the commercial exploitation of their works, which provides an economic incentive for them to create new works that advance the public welfare through the proliferation of knowledge and ideas. According to Jeremy Bentham, Actions were right if they tended to produce the greatest happiness for the greatest number of people. According to him legal protection of creative works is justified if it able to benefit the majority of the public. In one way or another, protecting copyrighted works is protecting the interests of the copyright holders and the public who is the consumer of copyright products or services.

⁸ Jean-Luc, Piotraut (2006), *supra* note 6, p.7. The Statute of Anne which comes in to force in United Kingdom in 1710 grant copyright protection for 14 years which renewable for addition 14 years and after 28 years such works fall under the public domain.

nearly absence of legal infrastructure which impend copyright holders to bring legal remedy against actual or potential copyright infringers; the nearly absence of legal infrastructure to bring legal suit against copyright holders for copyright misuse and the increasing economic importance of copyright works especially on the copyright based industry intensifies copyright infringements because currently, the life of man is dependent on artistic and literary works.

Economic growth, the creation of employment, social, technical, commercial and cultural progress, all depend on the genesis and exploitation of new ideas, techniques, products and processes and protecting the creation and development of ideas lies at the heart of intellectual property.⁹ Intellectual Property¹⁰ means intangible property or a property which has no physical existence. Copyright law as a branch of Intellectual Property provides in principle, copyright holders exclusive rights over copyrighted works for a limited period of time to reproduce, publish, sell, perform or prepare derivatives of an original fixed work such as literary, artistic, musical, dramatic or related works. And hence, unauthorized use of copyrighted material constitutes an infringement of these rights, unless the use is excused by a statutory exceptions and limitations. Those exceptions and limitations on the exclusive rights of copyright holders are means to balance the public interest with copyright holders.

⁹ Colston, Catherine (1999). Principle of Intellectual Property Law (Cavendish Publishing Limited, London), p.20

¹⁰ Id. Even though it has no standard definition, scholars define it by splitting the terms in to intellectual and property. The term intellectual implies the fruits of human intellect as opposed to physical labor. Or intellectual magnifies works of mind of a physical person in which such works of mind falls under the dichotomy of artistic and literary works. This shows that it has an incorporeal or intangible feature. The second element is the word 'property'. This word gives the term all the characteristics of ordinary property. Intellectual property can be sold, bought, leased, and transferred to another through different means of ownership transfer. Therefore, intellectual property means a branch of private law which gives protection for intellectual creations and innovations. Intellectual property when broadly defined may be considered as the legal property which results from intellectual activity of a person in the industrial, scientific and artistic fields. The contemporary international community attaches an ever increasing importance to intellectual property for three compelling reasons. This is because, the objects of international trade are changing hugely where the place of intellectual property is increasing and the value of information products has been enhanced greatly by the new technologies of computer software and other technologies. Besides, commerce has become even more interdependent, and the need for cooperation between states has called for a broadening of international agreements or arrangements in which in one way or another involves intellectual property becomes inevitable. Intellectual property as part of private law incorporates copyright law, patent, trade mark, industrial design and geographic indications. Copyright law as part of intellectual property protects the rights of copyright holders or it protects artistic and literary works.

Copyright ensures certain minimum safeguards of the rights of authors over their creations, thereby protecting and rewarding creativity to facilitate public access of such works. Creativity being the keystone of progress, no civilized society can afford to ignore the basic requirement of encouraging the same and economic and social development of a society is dependent on creativity.¹¹ The protection provided by copyright to the efforts of writers, artists, designers, dramatists, musicians, architects and producers of sound recordings, cinematograph films and computer software, creates an atmosphere conducive to creativity, which induces them to create more and motivates others to create too.

The strict application of the principle of protection of copyright hampers economic and cultural development of the society when free flow of knowledge and information is restricted due to the exclusive rights of copyright holders. However, copyright laws are enacted with necessary exceptions and limitations to ensure that a balance is maintained between the interests of the creators and of the community. But difficulty arises how to delimitate the exceptions and limitations of copyright as to how, when and where are such works of others used by the public or individuals. There are no common standards of exceptions and limitations in the world because of the territoriality nature of copyright law. This shows that the purpose of copyright protection, the degree of protection of economic and moral rights, exceptions and limitations varies from jurisdiction to jurisdiction. The enactment of copyright law of different jurisdictions is influenced by different copyright theories which such theories affects the purpose of copyright laws of different countries.

Copyright legislations grant economic and moral rights to copyright holders and/or authors. By economic rights is to mean that copyright holders rights to collect money from their investment and such rights are intended to give authors the opportunity to use their works to earn an income and only the owner of the copyright may do unless the owner grants permission to others. As the name indicates, economic rights protect the economic or pecuniary interest of the author. It is a right or an interest that has monetary value or that can be expressed in terms of money. Moral rights on the other hand are designed to protect authors' noneconomic interests in their creations like the right of integrity, attribution etc of authors. It is something related to the personality of the creator and its basis is the special relationship between the work of the mind and its creator in the sense that works of the mind are manifestations of the personality of the creator.

¹¹ Colston, Catherine (1999), supra note 9,p.20

While moral rights always stay with the creator of the work, economic rights may belong to a person or an entity other than the creator of the work. Therefore it is not always the case that the author or creator of the work is the owner of economic rights. The objective of laws regardless of the category of law as public, private or other is to protect the public interest so that there will be a balance of interests between individuals rights and the public. Creative works of authors may be limited from the exclusive economic use by copyright holders through different mechanisms.

Some of the mechanisms of limiting copyright protection are:

1. Exclusion of works from subject matter of copyright protection and hence certain works may not be protected and used freely by the public.
2. The term of protection is granted for a limited period of time and the expiry of such period makes artistic and literary works to fall under the category of public domain accessible freely to the public.
3. Legislative and judicial measures grants exceptions to the exclusive rights of copyright holders for certain cases and hence users can freely use the works of copyright holders without getting permission. The legislative measures relate with the making of copyright laws with either specific exceptions applicable to a particular free use or general exceptions like fair use, fair dealing and fair practice to enable the public to use works covered under copyright law without authorization and for free and such use amounts to no copyright infringement. The inclusion of mandatory license is also one aspect of legislative measure to provide the public access to copyrighted materials. But this does not mean that there is no voluntary licenses because, copyright holders may voluntary allow users to have license to use copyrighted works through bilateral contractual agreement. Copyright holders may require compensation or grant for free the license to use certain works. On the other hand the judicial organ through interpretation of copyright laws may develop users' rights as precedent especially in common law legal system.

Copyright law as part of intellectual property determines who to reproduce, produce, publish, perform, adopt and collect benefits from the work in relation to the original work of authorship. Exclusive rights can be defined as rights given only to the copyright holder and the copyright holder is free to exercise those rights, and others are prohibited from using the work without the copyright holders' permission or in certain exceptional cases. The start of copyright protection and copyright exceptions are subject of scholarly debates. This is because there is no clear evidence showing where exactly copyrights started. Copyright has emerged as one method to cope with the issues of cultural and economic life, the social attitude towards

intellectual creations and their uses and the position of the creator in society.¹² It is a means of organizing and controlling the flow of information to the society.

Copyright depends on drawing lines between works, on saying where one text ends and another begins. What much current literary thought emphasizes, however, is that texts permeate and enable one another, and so the notion of distinct boundaries between texts becomes difficult to sustain.¹³ Once upon a time information was free. Before the right of copyright was recognized, information was circulated amongst communities and it was believed that such information belonged to the society not to an individual creator.¹⁴ Furthermore, at this early stage there was no statute which controls the contents of manuscripts or regulated their production nor were there any legal decisions on literary property.¹⁵ But later on, individual who created literary works for the education and entertainment of society came to be recognized as the originators of that work, and the permission of this originator had to be obtained if an individual wished to copy his work.¹⁶ In England, the first printing privilege was granted in 1518, but as in Venice most of the privileges were issued to printers.¹⁷

¹² Colston, Catherine (1999), *supra* note 9, p.21

¹³ Rose, M.(1993), *Authors and Owners: The Invention of Copyright*,(London, Harvard University Press), p. 3

¹⁴ Dinusha, Mendis(2003), *The Historical Development of Exceptions to Copyright and its Application to Copyright Law in the Twenty-First Century*, EGCL, Vol. 7.5, p.6 available at <http://www.ejcl.org/75/art75-8.html> accessed on 11/9/2012. Strikingly and significantly, early Indian history is the history of societies rather than of persons. History records that the first form of protection for intellectual literary creation took place in ancient Egypt. The recording of human communication lay at the hands of the priest or holy man who was considered to be the first to lay claim to knowledge. But their writings where not marketed rather the community used such works freely.

¹⁵ Id

¹⁶ Dinusha, Mendis (2003), *supra* note 14, p.6

¹⁷Id. But In the Sixteenth-century information belonged to printers in Britain. A Royal Printer appeared in 1485, and from 1518 onward came a stream of royal grants of privileges and patents for the exclusive printing of particular books. The first author's privilege, in the form of a seven-year patent was awarded to the royal chaplain, John Palgrave in 1530, for a textbook on the French language. In 1709 the British Parliament produced the most significant breakthrough in the history of copyright law and introduced the first piece of copyright legislation in the world 'An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such Copies and the legislation was called the Statute of Anne. The Statute of Anne which came into force on 10 April 1710, provided that existing printed books would be protected for a period of 21 years and the Stationer's Company would hold the sole right to these books. With the coming of the Statute of Anne 1710 in Eighteenth-century in Britain, the stationers, whose property by that time 'consisted of all the literature of the Kingdom; for they had contrived to get all the copies into their own hands' 'came up to Parliament in the form of petitioners, with tears in their eyes, hopeless and forlorn; they brought with them their wives and children to excite compassion, and induce Parliament to grant them a statutory security.

Even though different theories were developed to justify the need for the promulgation of copyright laws, generally the objective of copyright laws can be sketched in to two broad categories. The first one is copyright laws are enacted to protect the interest of the authors of artistic and literal works or to protect rights of owners of the copyrightable works by giving exclusive right to exploit the economic values attached to the copyrightable material for limited period of time. This limited period of time is to mean temporary grant of protection for copyright holders. The second justification emanates from the fact that artistic and literary works are not created in a vacuum.¹⁸ There is public constitutional and other legitimate right to have access to information, knowledge and use and in the furtherance of science and arts and authors have to be encouraged through economic incentive and hence the public will be benefited from the works of authors available for use. This will be realized if the authors are encouraged to create new creative works and make the same accessible to the public. As far as exclusive rights are given to the author or copyright holders, public interest to free use of those works has to be maintained through statutory legislation of exceptions and limitations and hence, there are cases where by others can use the works of copyright holders with or without the prior permission/authorization through the defenses of exceptions and limitations of copyright.

Exceptions and limitations to copyright are legal restrictions on the exclusive right of owners not to be applicable on certain specified situations.¹⁹ Copyright legislations at international and national levels incorporate provisions which afford use right of copyrightable works without the authorization of copyright holder for specified purposes. These exceptions and limitations appear differently in different jurisdictions in accordance with the type of the legal system. Some jurisdictions give detailed exceptions and limitations to the copyright while other jurisdictions contain limited specific exceptions and limitations and ‘open ended exceptions’²⁰ and the copyright regime has confronted with two equivalently the same conflicting interests; public interest to consume and exclusive economic interest of copyright holders.²¹

¹⁸ Dinusha, Mendis (2003), supra note 14, p.7

¹⁹ Mandefro Eshete and Mola Mengistu (2011), Exceptions and Limitations under the Ethiopian Copyright Regime: An Assessment of the Impact of Expansion of Education, *Journal of Ethiopian law*, Vol.25, p. 159. The development of strong national and international enforcement mechanisms may be come hurdle of achievement of educational missions.

²⁰ Those are fair use, fair dealing and fair practice. There are also jurisdictions that provide specific exceptions and limitations because for example under the US Copyright Act, there are certain specific exceptions and limitations in addition to the general fair use exception.

²¹ Mandefro Eshete and Mola Mengistu(2009), supra note 19, p. 2

Limitations on copyright serve copyright laws basic goal to put copyrighted works to their most beneficial use by enabling new generations of authors to build on the works of authors who preceded them.²² The interests of users should also maintained to cop up with the ever increasing dissemination of knowledge important for the overall changes in the life of the society in general and individuals in particular through new creations of works of mind using previously published or fixed works of others. The modern Ethiopian copyright law dates back to the time of intense legislations in the 1960s. This is to say that modern Ethiopian copyright law was incorporated in the 1960 civil code. But the code was not comprehensive and in a position to ensure rights of copyright owners. To rectify these problems, new copyright law has been proclaimed in 2004 to regulate both copyright and neighboring rights. Therefore, The purpose of providing exceptions and limitations to copyright is therefore to allow users to have lawful access, under certain conditions, to use a work without requiring authorization from the copyright holder but respecting the basic rights of the latter'.²³

1.9 Statement of the Problem

There are different arguments concerning the category of copyright protection. Some scholars advocate that copyright is not an inevitable, divine, or natural right that confers the absolute ownership of their creations.²⁴ While other scholars argue that copyright as part of Intellectual Property is natural right as property rights are natural rights. Universal Declaration of Human Rights under its article 27 declares that literary and artistic works as natural and human rights. If this argument is logical and legitimate, the free and full access of users to information and knowledge give rise to a question which rights should copyright law give emphasis in the protection. This needs critical study of the copyright law spirit. Because there are scholars who argue artistic and literary works are economic rights of copyright holders and copyright holders should have exclusive ownership over their rights.

²² Paul, Goldstein(2001), International Copyright: Principles, Law, and Practice, (Oxford University Press, New York),P.293

²³ Mandefro Eshete and Mola Mengistu (2011), supra note 19, p 159. But to balance the equally important interests, exceptions and limitations are introduced to the copyright regime while protecting the economic interest of the copyright holders.

²⁴ Daniel Mitku(2010), Fair Practice under the Copyright Law of Ethiopia: the Case of Education, LL.M Thesis Graduate School of Law, AAU(unpublished), P.33

Others argue that for the development of social and cultural value of a nation, rights incorporated in copyright works have to be considered as social rights. There are also scholars who advocate that copyright is a law which balances the interests of copyright holders and users/the public in general and hence, copyright law has got two extreme interests to be protected. On one side the economic and moral interests of authors or copyright holders has to be protected by giving exclusive rights to exploit which can serve as economic incentive for further creation of artistic and literary works and other moral rights. On the other side there is equally important public interest issue to freely use the copyrightable works. Therefore, a striking balance to these extreme interests is necessary both at national and international levels.²⁵ For this purpose copyright legislations come up with exceptions and limitation of copyright.

Ethiopia has codified the Civil Code in 1960 which incorporate copyright law provisions. But the copyright law provisions in the code were repealed by the enactment of the new proclamation of 2004. The Ethiopia copyright law enshrines in principle exclusive rights to copyright holders and certain exceptions and limitations of copyright. The proclamation provides detail and specific provisions dealing with copyright exceptions and limitations even though general principle of fair practice is used rarely. The researcher in dealing with the exceptions and limitation of copyright protection in Ethiopia wants to address different questions.

The applicability of the exceptions and limitations, the beneficiaries of such exceptions and limitations, conditions to avail the defense of exceptions and limitations, exceptions covered and not covered by the Ethiopian copyright law, the flexibility or rigidity of the Ethiopian copyright law etc in comparison with the copyright law of selected states and International Agreements and Conventions will be studied. In addition to this, there are disparities among states as to the degree of protection afforded to published and unpublished works because in some countries strong protection is given to unpublished works than published for different reasons like it is not fair to use for quotation from literary work unpublished. For example French authors law allows free use of copyrighted works if only such works are published. This implies that it is prohibited to freely use unpublished works. While the Berne convention under article 9(2) governs as exceptions and limitations of copyright are allowed for both published and unpublished works. Ethiopian copyright proclamation also gives use of copyrighted works without the permission of the copyright holder for certain purposes of published works. This shows that strong protection is devoted to

²⁵ Mandefro Eshete and Mola Mengistu(2011), supra note 19, p.159

unpublished works. How this is conceived in Ethiopian copyright law while there are different constraints of publication.

1.3 Research questions

Legislatures use different theoretical justifications for the laws they make. What are the theoretical rationales or justifications for copyright protection under the copyright law of Ethiopia? Is copyright law a means of creating economic monopoly of works or other policy objectives? Who are the beneficiaries of copyright exceptions and limitations? What is the scope of exceptions and limitations granted to users? What rights are allowed under free use rights? Is formatting, adaptation etc of works of others possible to make such works accessible to persons with disability? Are those exceptions applicable for unpublished works of authorship or limited only to published works? How the fair practice copyright exception is determined? What sort of use amounts fair practice/how fair practice in exceptions and limitations? What are the challenges to the advantages of use exceptions and limitations and legal frameworks to enforce such rights and effects of violations of those rights? How are users rights enforced? What remedies are available under the Ethiopian copyright law when copyright holders violate rights of users? How is the Ethiopian copyright law balancing the interests of copyright holders and users in the digital environment? Is anti circumvention law necessary to Ethiopia so that digital contents protected from piracy?

These questions have to be addressed if Ethiopia is committed to ratify international conventions and agreements like BC, WTO, TRIPs Agreement, WCT and WPPT in the near future. How can contemporary users of copyrighted works obtain access to copyrighted digital works and engage in uses that copyright law permits if technological measures restrict access and the use of such works? How can users benefit from the new flow of out of copyright and free to disseminate information enabled by peer-to-peer networking on the internet if the availability and permissibility of powerful communication technology is conditioned and threatened by the implementation of copyright enforcement measures?

According to the preamble of the copyright law of Ethiopia, literary, artistic and similar creative works have a major role to enhance the cultural, social, economic, scientific and technological development of a country, so that such works should be recognized and protected. Is using works of others considered as exception, users' right or affirmative defense for suits of copyright infringement?

1.4 Significance of the study

With the successful completion of this paper, the researcher believes the paper will be used as a bench mark for further in detail and comprehensive study in related areas. The paper may also help readers to have a clue and knowledge on who are the beneficiaries of free use, which free use amounts fair practice, how and what type of works are subject to free use and generally readers will be acquainted with basic knowledge of exceptions and limitations of the Ethiopian copyright legal regime, other international conventions and agreement and exceptions and limitations of selected foreign countries. This study may also have significance as an input for law makers. Finally, this paper may be used students as reference material.

1.5 Objective of the Study

Proclamation No. 410/2004 has been promulgated in 2004 to protect artistic and literary works. The enforcement of the proclamation is entrusted to the Ethiopian Intellectual Property Office which is established by Proclamation No. 320/2003. Owners of literary and artistic works can enforce their right through the proclamation but there is no legal framework where by users are entitled to enforce their use rights against violations of their rights. Therefore, the research has the following general objectives: To identify the theoretical rationales for the protection of artistic and literary works and the position of Ethiopian copyright regime; to identify the beneficiaries of the advantages of exceptions and limitations; to explore the coverage of exceptions and limitations: whether use advantages of exceptions and limitations of copyright applicable to all artistic and literary works in addition to indentifying the beneficiaries of copyright exceptions and limitations. Identifying the conditions under which fair practice exceptions and limitations is applicable in the proclamation and other issues.

1.6 Scope of the Study

The study is limited to the exceptions and limitations of copyright regime of Ethiopia under the proclamation and the civil code and a comparative analysis of copyright laws of United States, France, South Africa, Brazil and Canada. In certain cases, international IP instruments (Berne Convention, TRIPS Agreement, WCT and WPPT) may be taken for comparison.

1.7 Research Design and Methodology

The researcher plans to use secondary and primary sources. Secondary sources may be collected from books, journals and articles, literatures and internet and those sources may be used to describe the

theoretical legal frame work of copyright exceptions and limitations, the purpose of the exceptions and limitations, the beneficiaries of the exceptions how and where the free use exceptions and limitations are allowed. Primary sources like national copyright legislations, the Berne conventions and TRIPS agreement and other treaties such as WIPO and WCT will be used to explore the existing legal frameworks on the exceptions and limitations of copyright on how, when and for what purpose these exceptions and limitations are allowed.

1.8 Organization of the Study

In this study an attempt has been made to explore and explain theoretical rationales of the exceptions and limitations of copyright in general and in Ethiopia in comparison with some foreign countries copyright laws and international conventions and agreements. Therefore, the paper is organized in to five chapters as follows: Chapter one deals with the proposal of the paper. Chapter two of the paper deals with the theories and rationales of copyright exceptions and limitations. Under this chapter, the historical development of copyright in general and exceptions and limitations in particular, the justifications of copyright protection and the theories underlining copyright protection are analyzed. The third chapter deals with the economic importance of copyright in general and exceptions and limitations in particular. This chapter will also deal with the challenges and threats of copyright exceptions and limitations. Chapter four of the paper attempts to analyze the Ethiopian copyright exceptions and limitations in comparison with the copyrights laws of United States, France, South Africa, Brazil and Canada. The last chapter deals with concluding remarks and recommendations.

Chapter Two

Theories and Rationales of Copyright Protection and Exceptions and Limitations

2.1 Introduction

The history of copyright law in Ethiopia in its modern sense was emerged with the introduction of printing machine in the 20th century even though the beneficiaries were not the authors.²⁶ Translation from one language to another was started during the time of Atse Za'raYa'eqob (1434-1468) when Arabic old testaments was translated in to Ge'ez to enact law of kings/Fetha Negest while the other development is the translation of Ge'ez to Amharic during the reign of Atse Tewodros.²⁷ But both translations were not covered by copyright because such works were considered as public property and for religious matters, translators did not claim authorship and ownership. The 1863 is the year of the introduction of printing machine to Ethiopia even though, the issue of copyright unfunded still. Legislations from Yekatit 7, 1927, however, require that all printed works should contain the name of the author and publisher.²⁸

The FDRE Constitution of 1995 addresses the issue of intellectual property under article 40. According to article 40(1) of the FDRE Constitution, every Ethiopian citizen has the right to the ownership of private property. Unless prescribed otherwise by law on account of public interest, this right shall include the right to acquire, to use and, in a manner compatible with the rights of other citizens, to dispose of such property by sale or bequest or to transfer it otherwise.

²⁶ Sebel Demissew (2008), Historical development of copyright in Ethiopia, *African Intellectual Property Journal*.Vol.1, No.1, P.66.

²⁷ Id

²⁸ Id. The establishment of the first radio broadcasting station in 1926 and other related technical devices were of a great significance in relation to the development of copyright in Ethiopia. It made the massive duplication, distribution and public performance of copyrightable works possible. The establishment of the first theater, *Yehager Fekir* Theater in 1928 in Addis Ababa was the turning point in the lives of artists of traditional music. This is true because the musicians start to perform their works and earn income thereof even though their work remained unprotected. Intellectual property gets a lesser protection with the enactment of the 1957 penal code of Ethiopia. The code under articles 671-679 made an offence reproduction of intellectual works of others. According to article 675 of the penal code of Ethiopia 1957, whosoever intentionally counterfeits or reproduction, even in part, by print, lithography, photography, engraving or photogravure or by other coping process, a literary, musical, pictorial or plastic composition, or any other intellectual work protected by author's, copyright; or sells offers for sale, imports, exports, places on the market infringements of such works is punishable upon complaint with simple imprisonment or fine. Performance of copyrighted works of authors is also prohibited under article 676 of the same code. The civil code of 1960 also contains provisions dealing with artistic and literary works.

The Constitution tries to balance private interests with the public interest in the property. In addition to the general concept of intellectual property under article 40, article 51(19) deals with the power of the Federal government to patent inventions and protect copyright. Article 55(2) (g) of the constitution under powers and functions of the House of Peoples' Representatives states that the House of Peoples' Representatives shall enact specific laws on the Patents and Copyrights. The FDRE Criminal Code of 2005 prohibits the intentional infringement of copyrighted works as provided under article 717 to 724. The code protects both moral and economic rights of copyright holders. Prohibitions of infringements of artistic and literary works are stated under article 721 of the Code. Accordingly, whoever, apart from cases 'punishable more severely by another provision of the this Code, intentionally violates laws, regulations or rules issued in relation to rights on literary, artistic or creative works, is punishable with rigorous imprisonment not exceeding ten years. Where, the act is committed negligently, the punishment shall be simple imprisonment not exceeding five years.

Even though Ethiopia had its own *Sabian* scripts by which some engravings were made on stones, there are evidences that formal writing started after the acceptance of Christianity.²⁹ The increasing number of printing press and production of newspapers in the 1920s is believed to have led the appreciation of the need to regulate their establishment and production.³⁰ For different reasons, artistic and literary works have been given copyright protection for fixed period of time to provide copyright holders exclusive rights over their works. But these exclusive rights are subject to limitations and exceptions. Limitations on copyright ensure that the advancement of knowledge and the creation of new works are not hindered by copyright owners using copyright law to limit legitimate access to the works they have created. This is because ensuring access to copyright works also enhances the general good of society and encourages the creation of new works.³¹ Such limitations may be imposed on the exclusive rights of copyright holders in terms of term of protection, subject matter of copyright protection, limitation of protection to certain acts like rent or loan or other specific or general copyright exceptions and limitations.

²⁹ Mandefro Eshete and Mola Mengistu (2011), supra note 19, p. 161. The history of literature has strong relation with the introduction of Orthodox Church and formal writing was started with Ethiopian acceptance of Christianity due to the convictions of religious fathers to spread religion. The New and Old Testaments were translated from Syrian to Geez during the Axsumite Empire. But the then writings were with no name of authors since such writings have religious ends.

³⁰ Seleshi Zeyohannse(1983), The Ethiopian law of Literary and Artistic Property, AAU, Law Faculty(unpublished) mentioned in Mandefro Eshete and Mola Mengistu(2011), p.4

³¹ Caroline, Morgan (2005), Copyright for Creators and Copyright in Asian Countries, p.31

Copyright limitations and exceptions are a means of balancing protection of copyright works and access to such works. Copyright limitations and exceptions allow copyright material to be used for certain purposes without the permission or authorization of the copyright holders if the use of that material meets certain conditions. Copyright laws of different jurisdictions use different terms to define users' rights on copyrighted works such as exemption, limitation and limitations and exceptions. The Ethiopian copyright law uses limitations and exceptions while the United States copyright Act uses both exemptions and limitations and exceptions. The Brazilian copyright law uses the term limitation while the South African Copyright Act uses exception. The term limitation in the case of exclusive economic rights of copyright holders is to mean that exclusive rights granted to copyright holders are not absolute because there are certain cases whereby exclusive rights of copyright holders may be limited in terms of term of protection and subject matter of copyright protection. Users are not at full liberty and freedom to use copyrighted materials freely and hence use has a limit because there are conditions to be satisfied³² and this is limitation on the free use rights.

The exclusive rights granted to copyright holders allow copyright holders to benefit from the property they have created, providing a financial incentive for further creation and investment in copyright works which are important for the economic development of a given state and copyright is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in Science and useful arts.³³ Similar objective is provided under the preamble of the Ethiopian copyright law. Copyright system currently shifts from the protection of printers to protection of copyright holders provided that copyright holders may be authors, printers or other persons who acquire ownership of copyrighted work.

³² Copyright and Neighboring Rights Protection Proclamation, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 2004, Proclamation No. 410/2004, Articles 9, 10 and 11. Accordingly, the use would conflict with or unreasonable harm the normal exploitation of the work or the legitimate interest of the author. In other cases, the use should be compatible with fair practice and should not exceed the extent justified by the purpose. At international level, for example, the reproduction of copyrighted material should comply with the three step test of the Berne Convention. Those are the use must be in certain special case, the use should not conflict with the normal exploitation and the use should not jeopardize the legitimate interest of the copyright holder. Free use should also comply with fair practice, fair use and fair dealing which are evaluated on case by case basis.

³³ Jean-Luc, Piotraut, Supra note 6. In addition to the financial incentive and economic growth, protection of copyrighted works, facilitate the growth of democracy through the dissemination of creative literary works to be accessed by the general public paving the way to freedom of expression. Copyright law also promotes government policy, creativity and fair trading which would contribute to economic and social development.

Even though the development of copyright law is not clear, copyright holders got protection due the economic importance of their works, or the innovation of printing or publishing industries.

2.2 Theories of Copyright Protection and Exceptions and Limitations

Recently, controversy has come to surround the copyright ‘exceptions’ or ‘defenses’ or ‘permitted acts’ or ‘users’ rights’ that all modern copyright systems provide so as to privilege certain acts that would otherwise amount to an infringement of copyright.³⁴ This gives rise to the development of different theories. Legal scholars developed different theoretical justifications or rationales whereby legislatures stick to use for the promulgation of domestic intellectual property in general and copyright laws in particular. There are many principles in which the modern national and international copyright systems are founded. The conventional questions such as what is the purpose of copyright law, whose interest is protected under the copyright law, why copyright law is needed and who is the beneficiary of copyright protection needs an answer even though those questions could not have a single answer. The theory of intellectual property has not until recently, attracted much philosophical interest or been the subject of deep controversy.

I want to deal with the theory of intellectual property in which copyright law is part of it because the theory justifies why intellectual property has to be protected through the promulgation of intellectual property law in general and copyright law in particular to protect artistic and literary works. Some scholars justify the protection of copyright law as property law which is natural rights of owners of such property while other justify the protection of copyright law is to create maximum satisfaction the public as far as the primary objective of law is promoting and protecting the public interest. Still other scholars justify copyright law as a special property which is connected to the personality of its creator. This is called theory of personhood

³⁴ Robert, Burrell and Allison, Coleman (2005), *Copyright Exceptions: The Digital Impact* (Cambridge University Press, UK), pp.1-10. One of the problems that confronts anyone who wishes to write about copyright ‘exceptions’ is that there is no neutral language with which to describe the subject matter under consideration. This is because disagreements about how the ‘exceptions’ ought to be described have formed part of the broader dispute between pro-owner and pro-user commentators. On the one hand, proponents of increased copyright protection tend to prefer the language of copyright ‘exceptions’. This indicates that these provisions run counter to the ordinary rule and hence that they ought to be interpreted narrowly – that these provisions are to be treated as ‘exceptional’. On the other hand, pro-user commentators tend to prefer to style the ‘exceptions’ as ‘users’ rights’ or as ‘rights of the public’. This suggests that such provisions are to be treated on an equal footing with the rights given to copyright owners with broader interpretation.

which considers that economic and moral rights of copyright holders are inseparable. But this may be true if the author is copyright holder as well or the author does not transfer copyright to other person.

2.2.1 The Natural Law Theory

The natural law theory sometime called fairness theory is deeply rooted on the works of Locke.³⁵

According to Locke, everyone has a property right in the labour of his own body and that the appropriation of vacant object arises out of the application of human labour to that object. But Locke believed that there must remain objects of similar quality in sufficient quantity to supply others and there must be no wastage of resources. It rests upon the assumption that ideas ownerless before their appropriation. This can be considered as private interest justification of copyright. From the reward perspective, just reward for labour is legal right since creative works enrich our lives and authors deserve to be remunerated when their work is exploited by others. It enables the author to continue working to reap a profit from his investment. The heart of this theory is the principle that the creators of literary, artistic and other original works deserve either to control their creations or to be rewarded for their efforts. Put slightly differently, to deny legal protection to creators would be unfair.³⁶

According to Peter S. Menell:

Much of the force of Locke's argument derives from the intuitive appeal of the story upon which it is based. I come upon a tract of wild, uncultivated land that no one person yet owns. I work hard to remove the stones, trees, or prairie grass. I plow the land and plant seeds. I nurture the plants until

³⁵ William, Fisher, Theories of Intellectual Property, p.6 available at

<http://cyber.law.harvard.edu/people/tfisher/iptheory.pdf> accessed on 11/9/2012. Theoretical literature springs from the propositions that a person who labors upon resources that are either un owned or "held in common" has a natural property right to the fruits of his or her efforts and that the state has a duty to respect and enforce that natural right. These ideas, originating in the writings of John Locke, are widely thought to be especially applicable to the field of intellectual property, where the pertinent raw materials (facts and concepts) do seem in some sense to be "held in common" and where labor seems to contribute so importantly to the value of finished products. Locke argues that the individual ownership of goods and property is justified by the labour exerted to produce those goods or utilize property to produce goods beneficial to human society. Locke stated that nature on its own provides little of value to society; he provides the implication that the labour expended in the creation of goods gives them their value. The heart of the first theory is the principle that the creators of literature, art, and other original works deserve either to control their creations or to be rewarded for their efforts. In other words, creators have moral entitlements that the law should recognize and enforce.

³⁶ Copyright for Librarians an Online Open Curriculum on copyright Law: *The Berkman Center for Internet and Society at Harvard University Law School with EIFL*, p.6

*they mature. Finally, I harvest the crops and use them to sustain myself and my family. Surely it would be wrong if an interloper, who has done nothing to make the land productive, could now oust me. Locke offered various more formal arguments – some of them grounded in Christian theology – to buttress this moral intuition, but the story itself gives Locke’s theory most of its enduring power.*³⁷

*John Locke offered strong natural rights justification for private property which remains a central pillar of property theory today. Beginning with the proposition that all humans possess property in their own ‘person’, Locke argued that the ‘labour’ of his body and the ‘work’ of his hands, we may say, are properly his. Whatsoever, then, he removes out of the stat that Nature hath provided and left it in, he hath mixed his labor with it and joined to it something that is his own and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this ‘labour’ being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to, at least where there is enough and as good left in common for others.*³⁸

The Lockean theory fails to meet the public interest consideration if an author has absolute exclusive rights over the fruits of his labor while the main purpose of copyright protection is to stimulate the production of creative works to benefit the public at large. Creation of new ideas expressed in different forms will be stimulated if the creator is rewarded for the effort and expenditure of creation; the investment needed to develop the idea for a commercially viable proposition is protected from unfair competition and dissemination of the new idea is enhanced if its exploitation does not lay it open to immediate imitation, thus ensuring public access to new knowledge and ideas, whereas, without protection, the natural alternative would be to turn to secrecy and thus deprive the public of the idea.

2.2.2 Utilitarian or Welfare Theory of Copyright

The central principle of ‘welfare theory or utilitarianism’³⁹ is that the law should be organized to maximize total human welfare or the law should be arranged in a manner that provides greatest satisfaction to the

³⁷Supra note 36, ,p.7

³⁸Peter, S. Menell(1999), Intellectual Property: *General Theories*, p. 157

³⁹ William Fisher, Supra note 35, P.7. The foundation of utilitarianism is widely credited to the English philosopher and jurist Jeremy Bentham (1748 – 1832). Utilitarianism is often described through the phrase “the greatest good for the greatest number of people”. The essence of welfare theory is that the performance of economic institutions can and should be judged according to whether they provide economic goods in quantities that accord with people's

greatest number advocated by Jeremy Bentham and John Stewart Mill. A widely accepted justification for IP protection comes from utilitarian theory also known as economic theory.⁴⁰ The conventional utilitarian justification for IPR protection is, without such protection, the market will not be able to provide sufficient incentives to undertake costly and risky investments that generate new ideas and technology which are the main sources of economic development.⁴¹

This theory when extended to the modern concept of copyright is to mean the public should use literary and artistic works in the form of exceptions and limitations and the very purpose of protection is to increase public satisfaction. To enjoy this right, copyright law should protect the interest of authors or owners of copyrighted works and this protection could be achieved through granting of exclusive economic rights as an incentive for further innovation and creativity as far as the protection benefits the public at large. But the rights of copyright owners have limitations to enable the public to enjoy the works free of charge and without permission of copyright holders saving the case of compulsory licensing.

The social value of utilitarian works lies principally if not exclusively in their ability to satisfy desires of users more effectively or at lower costs and hence, society would seek to protect such works within a governance regime that itself is based upon utilitarian precepts.⁴²

relative desires for those goods. The central principle of that tradition is that the law should be organized to maximize total human welfare.

⁴⁰ Fikremarkos Merso (2012), *The Ethiopian Intellectual Property Rights: Copyright, Trademarks, Patents, Utility models and Industrial Designs*, A Textbook (School of Law, Addis Ababa University), p.22

⁴¹ Merges, R.P et al(1997), *Intellectual Property in the New technological Age* Cited in Fikremarkos Merso at, p.22

⁴²Peter, S. Menell (1999), *supra* note 38, p.130. See also Robert, Burrell and Allison, Coleman (2005), *Copyright Exceptions: The Digital Impact* (Cambridge University Press, UK), p.1. The “author’s right” tradition of civil law countries with principles of natural right and the “copyright” tradition of common law countries with the principle of utilitarianism has almost lost its political importance currently. But moral rights of authors are more deeply rooted and firmly protected in the author’s rights laws of civil law countries than in common law jurisdictions as waiver of moral rights may be allowed in common law countries while will be permitted in civil law jurisdictions only under the strictest of conditions. Article L.111-1 of the French Intellectual Property Code states that, the author of a work of the mind shall enjoy in that work, by the mere fact of its creation, an exclusive incorporeal property right which shall be enforceable against all persons. Civilian lawyers find additional justification for author’s rights in the argument that a work of authorship bearing the personal imprint of its creator is in effect an extension of the author’s personality. The United States Constitution expressly conditions the grant of power to Congress to create patent and copyright laws upon a utilitarian foundation: ‘to promote the progress of Science and useful arts.

Copyright law, which implicates a broader array of personal interests of the creator than patent law benefits from the application of the utilitarian framework to the extent that society seeks the production and diffusion of literary and artistic works.⁴³ The flourishing of science and art will be realized when artistic and literary works are changed in to innovative and creative ends by users. The utility gained from increased incentives for innovation must be weighed against the losses incurred from monopolization and their diminished diffusion.⁴⁴ Even though the difference between utilitarian and natural law or labor theory justifications of copyright law have shown significance convergence today, it continues to explain certain substantive differences between the national laws of countries following the two traditions namely common law and continental. For instance, the preeminently utilitarian fair use doctrine of the United States invites courts to permit a broad spectrum of socially and culturally valuable unauthorized uses so long as they do not disproportionately harm the market for the copyrighted work. On the other case by contrast, courts in author's rights countries or civil law legal system following states such as France, incline to interpret statutory limitations to copyright as exceptions that are to be narrowly construed.⁴⁵

2.2.3 Personhood Theory of Copyright Law

The central idea of this theory is that intellectual products are manifestations or extensions of the personalities of their creators.⁴⁶ A related justification for IPRs is their origin in personhood or personality theory based on the writings of Kant and Hegel, relying on the basic premise that private rights in property are important for the satisfaction of human needs.⁴⁷ Intellectual works express the personality of the creator and hence, are inalienable from the personhood of the later, thus authors and inventors should be allowed to earn respect, honor, admiration and remuneration from the expression of their inalienable personhood to the public with exclusive control over their works.⁴⁸

⁴³ Peter, S. Menell (1999), supra note 38, p. 130

⁴⁴ Garima, Gupta & Avih, Rastogi(2002), *Intellectual Property Rights: Theory and Indian Practice*(Working Paper Series Centre for Civil Society), p.4

⁴⁵ Peter, S. Menell (1999), supra note 38, p.132

⁴⁶ William, Fisher, supra note 35, P.30.

⁴⁷ Netanel, N.W (1996), *Copyright and a Democratic Civil Society*, *106 Yale law journal*, pp. 283-287 Cited in Fikremarkos Merso (2012), Supra note 33, at p.20

⁴⁸ Ibid, Pp.20-21

A painter or novelist defines oneself in through once own art and the legal system, sensitive to this phenomenon, should grant artists the power to control uses or modifications of their creations.⁴⁹ Moral rights of authors include a right to be given credit for things you have created and a right to prevent the mutilation, alteration, distortion or destruction of your creations.⁵⁰ This theory has widest acceptance in continental legal system countries but it has less acceptance and recognition in the common law legal system.

Civil law legal system countries have grounded intellectual property protection for such intellectual effort within non-utilitarian theories of rights. This difference in philosophical perspective is reflected in part in the ways in which intellectual property systems are designated because, some jurisdiction provide better protection to copyright owners by following the non-utilitarian theory while some other states provide better protection to copyright users on the basis of public interest so that the public at large should have to be benefited from the works protected by copyright laws. But currently it is very difficult to conclude that one state follows only one theory of intellectual property because there is a need to balance the interest of copyright holders and users even though there is a difference of emphasis given to either of the contending interests.

Personhood theory assumes that copyright is necessary in order to warrant the author's development as a person. By considering personhood as a necessary condition of human autonomy, this theory leads to the conclusion that granting copyright to authors is morally necessary. The theory also takes an assumption that creating a work results in a psychological relation between the author and the work.⁵¹ In other words, the intellectual work is part of the author's personality and should be considered an integral part of his own identity.⁵² In order to prevent harmful interferences with the author's identity or to avoid the creation of psychological pathologies, this relation needs to be protected by legal means, i.e., by copyright.⁵³ According to Emanuel Kant and Hegel, if one's artistic expressions are synonymous with one's personality, then they

⁴⁹ Supra note 37,p.8

⁵⁰ William, Fisher, supra note35, P.9

⁵¹ Id

⁵² Christian, G. Stallberg(2007), Towards a New Paradigm in Justifying Copyright: An Universalistic-Transcendental Approach, *Fordham Intellectual Property, Media and Entertainment Law Journal*, Volume 18, Issue No.2, pp.347-348

⁵³ Ibid, p.348

are deserving of protection just as much as the physical person is deserving of protection since in a sense they are a part of that physical person.⁵⁴

2.3 Rationales of Copyright Protection and Exceptions and Limitations

The primary purpose of laws is to maintain peace, security and order. Copyright law as a law regulating the use and exploitation of artistic and literary properties, controls claims on it. From its outset, copyright law protects artistic and literary works of authors by providing exclusive rights to use or permit others to use. Therefore, Copyright law is a careful balance which gives protection for both right holders and users. Copyright conception currently is changed from the rights of authorship to the concern of public interest. Copyright law grants economic and moral rights to authors or copyright holders. As economic rights, copyright holders have exclusive rights to reproduce, distribute, display, perform etc of their works and hence, copyright holders derive monetary benefit from their works. On the other side, copyright protects the moral or non-monetary interest of authors and hence, others could not do any act that affects the morality of authors. Sue Lott in this connection has the following say:

*One of the critical factors underlying the resurgence or rebirth in importance of copyright is the increased importance of information as an economic driver. The shift in the developed world from industrial-based economies to knowledge-driven economies is a well-documented phenomenon. The concept of a knowledge based economy is rooted in the increasing importance of human capital as a source of economic growth. Some of the factors influencing this change include globalization, the effect of technological change on production, and the falling cost and rising efficiency in the transmission, retrieval and analysis of information.*⁵⁵

The increase of the economic values of information and knowledge intensifies the existing tension between protection and access underlying copyright and information becomes a more valuable economic resource, the desire on the part of the content industries (or the representatives of the creators of content) to reap the

⁵⁴ Garima, Gupta & Avih, Rastogi (2002), supra note 44, p. 3. However Palmer counters this by saying that if works of art were part of an individual's personality then they would cease to exist after the person died. But copyright law protects copyrighted works even after the death of copyright holders for life of the author plus greater or equal to 50 years for economic rights and moral rights up to the expiry of economic rights or beyond.

⁵⁵ Sue, Lott (2003), The Consumer's View of Copyright: *The Public Interest Advocacy Centre*, (Canadian Cataloguing and Publication Data), p.47

benefits from ownership and control of this information intensifies.⁵⁶ This is because with the advancement of technology, industries become dependent on copyright works. Legislatures and courts have long recognized that allowing some reasonable uses of copyrighted works without permission or compensation is fully consistent with and sometimes required by the ultimate goal of copyright to promote the progress of knowledge and to inspire new creations which in turn inspire others.⁵⁷ In other words, the ultimate aim of copyright law is protection of public interest in disseminating knowledge. It is in pursuance of this aim that the authors are rewarded so that further creativity is encouraged.⁵⁸ There are certain public interests that on balance outweigh copyright rights in certain circumstances. But there is lack of defined rights to the public while rights of copyright holders are well defined. Promotion of science and art and fostering economic, social, cultural and democratic developments are some of the rationales for the protection of copyrighted works. The public interest in copyright law may be promoted through the promulgation of comprehensive and flexible copyright law granting rights to users in search of knowledge and information, freedom of expression and privacy.⁵⁹ The rationales for promulgation of copyright law granting flexible exceptions and limitations are dealt separately below.

2.3.1 Public Interest Considerations

Copyright law should balance two equally conflicting interests. On the one hand, copyright holders' interest on their creative works should be protected and they should get an economic incentive for their intellectual efforts and investment. For this purpose, copyright law should balance the exclusive rights copyright holders have on their works and exceptions and limitations as rights of users and hence, in the absence of international copyright obligations emanated from multilateral or bilateral agreements and conventions, states should have sufficient flexibility to shape their copyright law to their own cultural, social and economic development needs.

Copyright exceptions and limitations at international levels should be modified to the domestic needs of the public and provide the most important legal mechanism for the achievement of an appropriate, self-determined balance of interests at national level. The interest of copyright holders to have exclusive rights

⁵⁶Sue, Lott (2003), supra note 55,p.43

⁵⁷ Id

⁵⁸ T. G., Agitha(2012), Compulsory Licensing and the Indian Copyright Law, *The Journal of World Intellectual Property Vol. 15, No. 1*,(Blackwell Publishing Ltd), P.26

⁵⁹ Sue Lott (2003), supra note 55, p.47

and the interest of the public access to knowledge and information, privacy rights and freedom of expression looks conflicting. This conflicting interest needs a balance at a point. The public interest is not well served if copyright law neglects the more general interests of individuals and groups in society while establishing incentives for right holders. Limitations and exceptions are the most important legal infrastructures to reconcile the conflicting interests of copyright holders and users. But Berne Convention sets out three step test to determine application of limitations and exceptions for reproduction of copyright works. Accordingly, it shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.⁶⁰ This may affect the flexibility of copyright law in the interest of the public to use protected works for free and without the authorization of copyright holders.

TRIPs Agreement have also narrowed down the discretion states to enact limitations and exceptions and would significantly constrain the ability of member countries to preserve balanced copyright regimes tailored to local needs and conditions even though the agreement considers the existence of difference in national legal systems in its preamble. TRIPs Agreements also used three step test to allow unauthorized and free use of copyrighted works. The agreement states that, members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.⁶¹ The WCT⁶² also use three step test which should be compatible with the Berne Convention exceptions and limitations. As a result, the Agreed Statement attached to WCT article10 underlined that some policy space should be maintained for member countries to implement new limitations and exceptions to adopt digital environment

⁶⁰ Berne Convention for the Protection of Artistic and Literary Works of 1886, Article 9(2). The test used cumulative requirement and the test is considered by scholars so restrictive because it limits the flexibility in domestic copyright laws. The interpretation of the three step test may also affect the public interest in copyright law.

⁶¹Trade Related Aspects of Intellectual Property Agreement, Article 13. This article follows the three step test for exceptions and limitations incorporated in member states.

⁶² WIPO Copyright Treaty 1996, Article 10. Article 10(1) of the WCT states that contracting parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. In addition article 10(2) states that Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

in a manner of flexibly interpreting the three-step test. If Copyright law aims to benefit the public interest, how this could be realized if there is strict application of the three step test of the international legislations and national copyright laws enacted in line with the international legislations? So, in the interest of the public, courts may interpret the three step test with adequate flexibility in the harmonization of both interests.

2.2.2 Open Access as Public Interest Consideration

Open access is access right of the public to copyrightable works through the voluntary act of copyright owners or holders.⁶³ Open access as public interest consideration which enables unrestricted use and utilization of copyrightable works like journal articles. Under this circumstance, authors publish in any journal and then self archive a version of the article for free public use in their institutional repository/storehouse or authors publish in an open access journal that provides immediate open access to all of its articles on the publisher's website for the maximization of their research impact on the community. This implies that the motive of creators is not money. Because there are scholars whose works are freely accessed by everyone. Authors who wish to make their work openly accessible have two options.⁶⁴ For the most part, the direct users of research articles are other researchers.

All researchers benefit from open access journals as no library can afford to subscribe to every scientific journal and most can only afford a small fraction of them.⁶⁵ One of the great beneficiaries of open access

⁶³ E.S, Nwauche (2007), *Open Access and the Public Interest in Copyright*, p.3. Open Access can be said to be a reaction to the failure of the public interest in copyright. Open Access and the public interest both serve the public domain. Open Access is intimately linked to the public interest and one cannot achieve its purpose without the other.

⁶⁴ Open access in copyright law available at www.internationalscholarsjournals.org/policies/Open-Access last visited on 11/5/2012. One option is to publish in an open access journal. An open access journal may or may not charge a processing fee and open access publishing does not necessarily mean that the author has to pay. Traditionally, many academic journals levied page charges, long before open access became a possibility. When open access journals do charge processing fees, it is the author's employer or research funder who typically pays the fee not the individual author and many journals will waive the fee in cases of financial hardship or for authors in less-developed countries. The other option is author self archiving. To find out if a publisher or journal has given a green light to author self-archiving, the author can check the publisher copyright policies and self-archiving list.

⁶⁵ *Supra* note 64. Open access journals may be made available by copyright holders or other organizations and hence, such works can be used freely and without the permission of copyright holders. For example, instructors or researchers may publish their works and upload in the websites like in Google and every person can use it.

may be users in developing countries, where currently some universities find it difficult to pay for subscriptions required to access the most recent journals.⁶⁶ Researchers benefit from open access as no library can afford to subscribe to every scientific journal.⁶⁷ And open access can be said to be a reaction to the failure of the public interest in copyright and open access and the public interest both serve the public domain by which artistic and literary works are freely accessible to the public without which science and art could not be promoted. And hence, copyright is about the private and public interest.⁶⁸ As far as the public is the widest consumer of works of mind of authors, the public interest to consume such works is best protected through exceptions and limitations which may include fair use, fair dealing, fair practice and specific exceptions and limitations, judicial interpretation, parody as an exception, exceptions and limitations in a digital environment and users' rights provided at international and domestic levels.

Since information is the building block of knowledge, it is of such crucial importance that its availability or restriction should be of concern to all societies.⁶⁹ The ability of copyright to affect access to information and knowledge can be understood in two principal ways. On the one hand, copyright protection is an incentive for creative minds to continue in their work, ensuring that they can in turn generate new works in the market based on the information and knowledge that their novelty has brought.⁷⁰ This is an issue of crucial public interest because without incentive if not exceptionally creators will not invest their time, skill and knowledge in producing creative works. On the other hand, the exclusive rights of exploitation of economic rights of copyright holders can reduce or inhibit access to information and knowledge because such economic rights restrict access to the copyrighted work to the public as the copyright regime grants exclusive rights for exploitation or to authorize others to use except exceptions and limitations to the copyright

⁶⁶ Open access, supra note 64

⁶⁷ Id

⁶⁸ Id

⁶⁹ Enynna. S, Nwauche (2009), The public Interest in Namibian Copyright Law, *Namibia Law Journal*, Vol 1, p.57.

The ability of copyright to affect access to information is multi-dimensional and can be understood in two principal ways. On the one hand, copyright protection is an incentive for creative minds to continue in their work, ensuring that they can, in turn, generate new works in the market, based on the information that their novelty has brought. This is an issue of crucial public interest. It is also in the public interest in the other hand that, in certain defined conditions, the public should have free access to copyrighted works because this sustains the innovation cycle that feeds societal development and renewal.

⁷⁰ Supra note 64

protection. Barriers of access to knowledge including the price of the work and other permissions requirements constitute the private interests of the author.⁷¹

2.3.3 The First to Sale Doctrine as Public Interest Consideration

The first to sale doctrine or the doctrine of exhaustion is a doctrine whereby copyright holders rights of distribution, controlling distribution and importation ends with the first sale of their works.⁷² The first to sale doctrine or the doctrine of exhaustion allows the continuous distribution of copyright works once sold by the copyright holders without the permission of copyright holders in pursuance of public interest. According to the right of exhaustion or the first sale doctrine, those who purchase books do not get copyright in the books. But they can read them. They can also sell them or give them away. And when they do this, they pass on similar rights to the new owner.⁷³ The copyright holder cannot prevent them from doing this. The copyright holder's right to control these activities ends (is exhausted) the first time he or she sells the book.⁷⁴ This doctrine is on the basis of distribution of copyrighted works once sold in the market and the copyright holders could not control the reselling, renting or lending to others. First to sale doctrine provisions allow libraries to loan copies of works and receive gifts from donors.

Prior to the first authorized sale, the copyright owner maintains the right to control distribution including the right to control importation under section 602(a) (1) of the US copyright Act. But there are controversies as to the applicability of the first to sale doctrine to digital works. If this principle is not applicable, the public interest will be at risk with the development of technological protection measures/TPMs which are used lock digital works. This hinders access and use of such works even for allowed uses.

⁷¹ Enynna. S, Nwauche (2009), supra note 69, p.58. The cost from the perspective of affordability and transaction cost in getting authorization in every fraction of use are against the public interest consideration of copyright.

⁷² The First Sale Doctrine available at <http://www.publicknowledge.org/tutorial/copyright-for-musicians> last visit on 16/11/2012. This doctrine embodies a limitation on the distribution right. Under this doctrine, a person who purchases a copy of a copyrighted work can sell, lend or lease that copy without the permission of the copyright owner. This provision does not apply to the rental or leasing of sound recordings. However, sound recordings can be rented or leased for non-profit purposes by a non-profit library or educational institution. This provision responds to concerns that the first sale doctrine would enable people to rent a record and copy it on to a blank tape thereby displacing record sales.

⁷³ Id

⁷⁴ Julien, Hofman(2009), Introducing Copyright: A Plain Language Guide to Copyright in the 21st Century (Commonwealth of Learning, Canada), p.68

Chapter Three

The Economic Importance of Copyright Exceptions and Limitations and Threats Posed on It

The increasing economic contributions to individuals and to the entire over all developments of a given country resulted in the protection of creative artistic, literary and scientific works of authors. So, the overall importance of copyright protection and its exceptions and limitations with special emphasis to its economic contribution will be analyzed briefly.

3.1 The Economic Importance of Copyright Protection and Exceptions and Limitations

The life of human being is currently dependent on knowledge and information as development policies are shifted for industry based to knowledge based. Poverty can be alleviated when there is skilled man power. The skill is generated from learning. Every effort in the development is based on innovation and creativity. This innovation and creativity has covered under the system of intellectual property and copyright law. The economic incentives for consumption, production and the distribution of numerous goods and services depend on the way in which intellectual property rights are designed and implemented. View from the point of view of copyright protection, the protection serves as an incentive for further creativity and innovation thereby contributing a lot to the economic development. Exclusive rights granted to copyright holders such as rights to reproduce, distribute, publish, perform or authorize others to do the same enables copyright holders to earn economic benefits and thereby their income counted to the GDP of their country.

The economic argument in favour of granting rights has been based on standard information theory according to which in the absence of some form of monopoly for original creative works on the expression of an idea rather than on the idea itself, there would have little creativity incentive.⁷⁵ This is due to the fact that once a work has been disclosed it is very difficult to deny access to it to those who have not paid for such access, since they will be able to enjoy it without paying for it; and in such circumstances creators would not be sufficiently rewarded through the workings of the market to cover the costs incurred in creating the work, or to stop them from putting their efforts and talent into other more lucrative activities.⁷⁶ Copyright provides producers of content with exclusive rights to their work and enables them to be rewarded for its production.

⁷⁵ Carlos, M. Correa (2000), Methodologies for Evaluating the Economic Importance of Copyright and Neighboring Rights in Latin America, *Economic Importance of Author's Rights, Copyright bulletin, Vol. XXX/V, No. 2, p.8*

⁷⁶ Id

The most widely used economic justification for copyright is that creative content exhibits some of the characteristics of a public good which is both non-rival and non-excludable.⁷⁷ On the other hand, there are industries whose function is dependent on the existence of copyright exceptions and limitations. The trading of music, films, translations and preparations of derivative works contribute a lot to the economic development of a given state. Copyright exceptions play vital role for the economic developments when the public use such works for further creativity, research and other productive activities. The creation of copyrighted works and materials constitutes a starting point for the economic impact of the copyright.⁷⁸ After their creation, works may be modified, packaged, reproduced, and distributed to the consumers. This process primarily involves exclusive rights of copyright holders. This may also involves copyright exceptions and limitations in the form of free use or use with compensation. For example, compulsory license is copyright exception which enables users to use copyrighted works upon payment of compensation to copyright holders. After the creation of copyrighted works, other economic activities take place for the utilization of such works. For example, to use digital work, computer software should be produced to read the content, to use at home; CD, flash or other devise should be produced.

The government of Ethiopia enacted modern Intellectual Property Laws including copyright law. The protection of copyright law has given due attention since 2004. The copyright law is believed to have high economic, social and cultural contribution to the country. Copyright law a part of property law is currently playing a great role in the overall developments of the country. But there is no study conducted in Ethiopia on the economic contribution of copyright law to the entire economic development of the country. I prefer to use copyright contribution to the economic development because exceptions and limitations are an integral part of the copyright system. But if we take, separately the economic contribution of copyright exceptions and limitations, different studies are showing progress in its contribution to GDP, per capita and employment. It can be witnessed that many educational establishments, libraries, museums are rendering service on the basis of copyright exceptions and limitations in Ethiopia which can be considered as the service sector.

⁷⁷ An Economic Analysis of Copyright: Secondary Copyright and Collective Licensing, March, 2011, p.12, available at <http://www.ipo.gov.uk/ipreview-c4e-sub-plsreport.pdf> accessed on 11/9/2012. Intellectual property main features are non-rival and non-excludable. When we say non-rival, the consumption of one work does not affect the consumption of other works and hence, there is no rivalry between creative works whereas non-excludability nature of intellectual property is the inability of somebody to prohibit use by others.

⁷⁸ Id

The economic contribution of the music industry which involves copyright exceptions and limitations is also high in Ethiopia. We can say that the music and film industry is booming in Ethiopia and one can guess the economic importance of copyright protection in the generation of income and creation of employment. Currently, songs and films worth millions and becomes costly. The publications, distribution and transmission of artistic and literary works are also affected by copyright exceptions and limitations which have significant economic contribution to the Ethiopian economy. The copyright industry may include publishing of books, publishing of newspapers, publishing of journals and periodicals, publishing of sound recordings, development of new software and publishing of software, data processing, film and video production, telecommunications, radio and television activities, artistic and literary creation and interpretation, internet, software development industry etc. So, the writer recommends detail study to be made to assess the economic importance of copyright protection.

At international level, intellectual property trade is making tremendous contribution to the economic development of the world. The economic developments in intellectual property are triggered by the adoption of the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) which reflect the growing economic importance of such rights, especially in areas of computer programs, multimedia works, cable broadcasting etc.⁷⁹ The increasing attention paid towards the economic dimension of copyright rights is largely the result of the growing importance that this branch of intellectual property has acquired as a consequence of the spread of digital technology as a means for the creation, fixation and communication of authors' works.⁸⁰ From an economic point of view, the main function of copyright may be defined as providing incentives for intellectual creation in such a way as to maximize the difference between the value of the protected result and the social cost of its creation, including the cost of administering the system. Studies on the 'economic contribution of copyright industries'⁸¹, shows that copyright industries are playing a great role in contributing to the GDP and creation of employment.

⁷⁹ Copyright + Creativity = Jobs and Economic Growth (*WIPO Study on the Economic Contribution of the Copyright Industries, World Intellectual Property Organization, 2012*), 12

⁸⁰ Id

⁸¹ Id. The economic importance of copyright exceptions and limitations in particular may be seen from its contribution to GDP and employment creation. In Philippines and Mexico the employment creation contribution is 11% while its contribution to GDP is about 5% for both countries. The GDO contribution of copyright in USA is 11% and 8.5% employment creation. Copyright is now of crucial importance in some of the fastest growing economic sectors, such as the software industry, with annual worldwide sales in excess of \$100 billion.

The economic importance of copyright law may be assessed from its contribution to the GDP/GNP, its per-capita contribution and creation of employment. An analysis of the contribution of copyright to GNP was first undertaken in the United States at the end of the 1950s.⁸² According to the study made by Thomas Rogers and Andrew Szamoszegi, fair use industries generated revenue of \$4.7 trillion in 2007⁸³. Different studies show that the economic importance of copyright based industries in the world is increasing. Copyright exceptions enable industries relying on copyright exceptions to carry creation of new works. There are different copyright industries whose creativity is dependent on the works of others and hence, protected works when used by copyright users help in the creation of new work. The preparation of derivative work from a book in the form of film is an instant of creativity. The development of software from preexisted software is also another creativity which helps for economic development. The development of Google and other webs helps a lot in the economic development of many countries as far as Google and other webs help users to carry further creativity and innovation.⁸⁴

⁸² Carlos, M. Correa(2000), *Supra* note 75, p.15. According to the study, the industries based on copyright accounted for a 2% share of GNP. About twenty years later a new study indicated a 2.8% share. In quantitative terms, the industries involved, taken together, were second only to the medical and health services, but ahead of agriculture, the automobile industry and electrical equipment. In another later study, in 1982, the percentage of GNP attributable to the copyright-based industries amounted to 4.6%. To take an example, the added value of the industries involved in the use of copyright represented 6.6% of GNP in Sweden in 1982. In that same year the figure was 2.4% in the Netherlands, greater than that attributable to the chemical industry, the hotel industry or marine transport and steel combined. Those industries accounted for 2.6% of GNP in the United Kingdom, greater than the share of the automobile industry and the food industry, and employing 500,000 workers. In 1985, in Finland, the percentage was 3.98, representing 3.36% of the working population.

⁸³ Thomas, Rogers and Andrew, Szamoszegi (2010), *Fair Use in the U.S Economy: Economic Contribution of Industries Relying on Fair Use*, (Computer and Communication Industry Association), p.8. Fair use-related industry value added in 2007 was \$2.2 trillion, 16.2 percent of total U.S.GDP. Fair use industries also grew at a faster pace than the overall economy. From 2002 to 2007, the fair use industries accounted for 23 percent of U.S. real economic growth. Employment in industries benefiting from fair use increased from 16.9 million in 2002 to 17.5 million in 2007. About one out of every eight workers in the United States is employed in an industry that benefits from the protection afforded by fair use. From 2002 to 2007, the productivity of U.S. fair use industries increased to nearly \$128,000 per employee, far exceeding economy-wide average productivity of \$100,000 per employee. Numerous researchers have determined that companies dependent on fair use, such as information technology companies, have stimulated U.S. productivity growth. Exports of goods and services related to fair use industries increased by 41 percent from \$179 billion in 2002 to an estimated \$252 billion in 2006 and then increased by an additional \$29 billion to \$281 billion in 2007. Within this overall increase, exports of trade related services, including Internet or online services, were the fastest growing segment, increasing nearly ten-fold from \$578 million in 2002 to \$5.2 billion in 2007.

⁸⁴ Thomas, Rogers and Andrew, Szamoszegi (2010), *supra* note 83, p.9

Unlimited grant or exercise of rights without corresponding and appropriate limitations and exceptions has serious adverse long-term implications not only for development priorities but indeed for the creative and innovation process itself.⁸⁵ This is because if knowledge is legally constrained by copyright law, it is impossible to foster dissemination of information and knowledge important for further creativity and innovation by other individuals. As users, creators themselves need an appropriate level of access and as potential creators; users also require an appropriate incentive structure.⁸⁶ And hence, copyright law should balance the conflicting interests of copyright holders and users as both are equivalently important for the economic developments of a given state. Copyright exceptions and limitations play an important for economic growth and development through dissemination of information and promoting welfare which can be effectively realized when copyright law maintains a balance between the economic and moral interests of authors/copyright holders and users of copyrighted materials. The limitation imposed on the non protection of formulas, methods, ideas etc enable others to construct their innovation and creativity on. When everyone gets access to scientific and creative works, everyone tends to create new works. This engagement in such works results in the creation of new employment opportunities, contributes to the GDP of a given states, increases trade, increases income of citizens etc and this leads to the economic development of a given state.

Copyright is a powerful source of economic growth because it creates jobs and stimulates trade at national and international levels. The WTO borne TRIPs agreement is intended to regulate trading of intellectual property. WIPO study on the assessment of the economic contribution of copyright-based industries to the United States of America indicates that copyright industries added \$626.6 billion or 6% of the US economy and creates an employment for 5.48 million workers or 4.02% of workforce. Other studies indicate US economy is dependent on copyright.⁸⁷

⁸⁵ Ruth, L. Okediji(2006), *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries*,(UNCTAD - ICTSD Project on IPRs and Sustainable Development, Issue Paper No. 15, International Centre for Trade and Sustainable Development (ICTSD), Switzerland), p. X

⁸⁶ Ruth, L. Okediji(2006), supra note 85

⁸⁷ Rob, Van Der Noll and Joost, Poort (2010), *Assessing the Economic Contribution of the Copyright-Based Industries: Remarks and alternatives*, *SEO Economic Research*, p.4. The U.S. copyright industries, including music, television, film, book, radio, and newspaper and magazine industries employed more than 10.6 million workers and contributed more than \$1.6 trillion to the U.S. economy in 2010, or 11.1% of GDP, according to a new report commissioned by the National Music Publishers' Association and the Recording Industry Association of American other major copyright trade organizations as part of the International Intellectual Property Alliance. Within those totals, the core copyright industries employed 5.1 million workers, or nearly 4% of the U.S. workforce, and produced \$931.8 billion in value, or 6.4% of the U.S. economy, according to the study copyright industries in the U.S. economy.

Copyright law has great role in the creation of employment. Therefore, the effective diffusion of knowledge goods is directly related to the limitations placed on the proprietary rights of owners of such goods in favor of the public and maintaining an appropriate balance of rights is necessary by crashing the saying small protection is good and more protection is better. But this saying is still functioning as rights of copyright holders are expanding with the overall technological, social, economical, cultural etc changes taking place in the world while the rights of users/exceptions and limitations are stagnant and even narrowed through time. In addition to this, rights of copyright holders are specifically identified and articulated while limitations and exceptions which are considered as users' rights are general and ambiguous. Furthermore, users' rights are under the threat of elimination with the development of technological measures of protection/TPMs which have an adverse effect on the economic importance of copyright exceptions and limitations.⁸⁸ But the advent of technology should have to be considered as an opportunity since it fosters economic growth through creativity and innovation.

The presence of flexible copyright exceptions fosters not only economic growth but also promotes economic efficiency. Economic efficiency indicates that there should be greater copyright protection for works that

⁸⁸ Sue, Lott (2003), supra note 55, pp.47-48. The Internet is directly involved in the economic ascendancy of information. It is the location where much of this information will be concentrated and disseminated. The Internet is becoming an important focal point of economic and social organization as evidenced by the rise of electronic commerce and the Internet as a source for communication, information and cultural content. The evolution of a network-based economy is desirable and inevitable as a social, cultural and economic engine. Important measures of the success of this economy will be the amount of creative content available on-line and the use made of it. See also Ratnaria, Wahid(2011),The Fairness of 'Stealing' Knowledge for Education, *Journal of International Commercial Law and Technology Vol. 6, Issue 2*, School of Law, University of East Anglia, pp.86-93. Despite the success of technology in terms of making it much more convenient to gain education, copyright law seems to hamper the strength and opportunity of information technology in relation to providing access to knowledge and education due to the development of TMPs or DRM while recent developments in relation to information technology have invariably shifted traditional methods of knowledge delivery from verbal communication and chalkboards to a more visually enhanced experience. More advanced classroom activities today rely upon a variety of both basic and advanced telecommunications technologies, such as one-way and two-way open or scrambled broadcasts, cable and satellite delivery, fiber optics and microwave links, CD-ROMS, and the Internet. Higher educational institutions are increasingly implementing the use of information communication technology in teaching activities. This is owing to the fact that it is convenient, self-paced, individualized, interactive, faster, cheaper, and has the ability to provide learning everywhere and at any time, overcoming geographical barriers. Education, ICT and copyright law have great potential in encouraging learning and promoting research and development for the benefit of the community at large. The increasing use of technology in educational systems should be supported by copyright law and not hampered by it. Copyright law and information technology should be an ideal combination that works well together in order to disseminate knowledge and information for the benefit of the society.

have greater social value.⁸⁹ This is true because works will have greater social value if the protected work benefits the general welfare of the public. Abolition of exclusive economic rights of authors in the form of exceptions and limitations would not produce a large and harmful decline in production of copyrighted works rather it would benefit readers by producing lower prices, eliminate the need to incur permission costs in copying and increase the circulation of the vast majority of books that would continue to be produced. This may also achieve economic efficiency. In modern copyright regime, it is impossible to exclude free riders, except at a cost. This aspect is in a way manifested in the concept of exceptions and limitations of copyright, which recognizes the need for a certain portion of copyright to be available at no cost at all given its public or social importance in the pursuance of some economic activities. Copyright law defines, recognizes and protects the copyright of original works. It outlines the scope of the goods to be marketed and sets out the general rules for their trade. In this way, copyright law becomes a prerequisite for market transactions as it enables trade with the access to the underlying intellectual property.⁹⁰ Copyright law tries to balance ‘productive efficiency’ with ‘distributive/allocative efficiency’⁹¹.

⁸⁹ Christian, Handke (2010), *The Economics of Copyright and Digitalization: A report on the Literature and the need for further research*, *Strategic Advisory Board for Intellectual Property Policy*, p.38. According to Landes and Posner, an excessively strong copyright regime that tolerated little fair use would raise transaction costs and copyright-based earnings. Excessive protection would transfer rents from users to artists and raise the costs of creation to artists that seek to build on previous works. Some of the costs associated with the copyright system increase with the strength of the rights defined and the strength of enforcement. When transaction cost exceeds net gain of the work, there is economic inefficiency.

⁹⁰ Guide on Surveying the Economic Contribution of the Copyright-Based Industries, (*World Intellectual Property Organization, Geneva, 2003*), p. 20

⁹¹ Productive efficiency is concerned with producing goods and services with the optimal combination of inputs to produce maximum output for the minimum cost. Allocative efficiency is concerned with the optimal distribution of resources. Allocative efficiency occurs when there is an optimal distribution of goods and services. This involves taking into account consumer's preferences. Allocative efficiency exists when the price of goods is equal to the marginal cost of production. This is because the price that consumers are willing to pay is equivalent to the marginal utility that they get. Therefore the optimal distribution is achieved when the marginal utility of the good equals the marginal cost. Allocative efficiency or distributive efficiency has an importance in balancing copyright conflicting interests of users and copyright holders. Allocative efficiency is achieved when the value consumers place on a good or service (reflected in the price they are willing to pay) equals the cost of the resources used up in production. Pareto defined allocative efficiency as a situation where no one could be made better off without making someone else at least as worth off. See also <http://www.economicshelp.org/dictionary/a/allocative-efficiency.html> or <http://tutor2u.net/economics/content/topics/competition/efficiency.htm> accessed on 21/8/2012.

The economic view of fair dealing is concerned with efficiency questions in contrast to the justice approach taken by lawyers. Economists have two notions of efficiency.⁹² The first notion of efficiency is private efficiency which is the optimal use of resources where all costs and benefits are paid through the market and the second notion of efficiency is social efficiency which encompasses private efficiency but recognizes that all of society's aspirations cannot be met through unregulated market exchange and, in addition, markets cannot always price costs and benefits. State intervention seeks to achieve social efficiency where markets do not do so.⁹³ Intervention, however, alters relative prices and therefore incentives to producers and consumers and these distortions must be minimized.⁹⁴ Economically efficient outcomes do not generally arise when commodities are free of charge because private and social needs should be maintained.

Exception holds the potential to increase consumer surplus and consumers will have free access to copyrighted materials lowering the effective cost of accessing such material. This could be channeled into commercial pursuits ultimately increasing the productivity of the economy or simply be channeled into non-commercial recreational ones. There is a speculation that reduction in income of copyright holders from educational licensing schemes may reduce the incentive to create and publish new works. However, it is stated that the US already permit copying without licenses and there appears to be no evidence that this has reduced incentives to create new works in those countries.⁹⁵

Fair dealing and fair use may be viewed as a means of compensating consumers for higher prices. This from the point of view of efficiency may be treated as efficient when users of copyrighted materials use such high price materials which are not affordable for every user. Beyond the limits of fair dealing, there is a market for copies let us say photocopies for teaching purposes and we can see that major purchasers of photocopying such as local educational authorities and universities, may well scrutinize this use of their budgets and decide between the number of copies of a book they purchase and how much photocopying of it they are prepared to pay for.⁹⁶ The fair practice copyright exception for teaching under the Ethiopian copyright law is not defined and it is difficult to locate which use is based on fair practice or not and hence,

⁹² Ruth, Towse (2001), *Creativity, Incentive and Reward: An Economic Analysis of Copyright and Culture in the Information Age*(Edward Elgar Publishing Limited, UK), p.141

⁹³ Id

⁹⁴Ruth, Towse (2001), *supra* note 92

⁹⁵ Consultation on Copyright: Comments on Economic Impacts,(*A Report for the Alliance against IP Theft, Oxford Economics*), p.29

⁹⁶Ruth, Towse(2001), *Supra* note 92, p.143

it is subject to judicial interpretation. But fair practice as tolerated copyright exceptions for the public interest has its own economic importance. Renting, lending, producing, distributing etc play an important role in the dissemination of created works to the public and such acts may be under the ambit of exceptions and limitations or fair practice.

In order copyright works to have economic value, copyright products have to be produced and distributed in a manner that can make their continued production and distribution economically sustainable and hence provide income for their creator.⁹⁷ The fair use doctrine of copyright law permits unauthorized reproduction and adaptation of copyrighted materials for different purposes. According to economists, fair use may be allowed as an exception to exclusive rights of copyright holders when the transaction costs of negotiating with the copyright holder for permission exceed the value of the use to the would be user and when the social value of the use exceeds the value to the copyright holder of preventing the use which in turn exceeds the value to the individual user. The presence of flexible copyright exceptions and limitations help to minimize abuse of monopoly and promotes competition in the general welfare of consumers.

Microeconomic theory suggests that social welfare is maximized under conditions of perfect competition.⁹⁸ In this scenario, copyright law giving exclusive rights to copyright holders is creation of monopoly over copyrighted works which is against social welfare because, in the absence of competition, public interest could not be maximized. Therefore, copyright tries to balance this through exceptions and limitations and licensing schemes so that copyright holders will not have absolute monopoly and chance to raise price as they wish. In a competitive market, there will equilibrium of supply and demand of copyrighted materials for public consumption as ‘economists have traditionally focused on social or total welfare and they do not make a value judgment between consumers or producers’.⁹⁹ Consistent with this, efforts to support competitive markets should, therefore, take the interests of both consumers and producers into account.¹⁰⁰

There are scholars who argue that copyright law through encouragement of exclusive rights to copyright holders increase price of copyrighted materials in the market because copyright holders have exclusive right

⁹⁷ Supra note 90,P. 20

⁹⁸Id

⁹⁹ Supra note 95, p.10

¹⁰⁰ Supra note 90, P. 21

to publish, distribute, reproduce etc of their works and accordingly, the public interest in copyright is better protected by competition law than copyright law.¹⁰¹ On the other extreme there are scholars who argue that copyright law do not make price of copyrighted materials to increase.

The economic contribution of copyright protection may be seen from the point of view of market failure and creative works are not contributing to the economy or other development issues. Therefore, the economic rationale for copyright exceptions has connection with market failure¹⁰². Market failure occurs when the transaction costs of licensing are so high that a licensing market will not operate voluntarily. In this case, economic theory provides guidance on when exceptions should be allowed. It would be efficient to allow an exception when the transaction costs of licensing exceed the value consumers attach to the use of the material. The exception would, therefore, have no impact on incentives to create as the users would not have been paid anyway.¹⁰³ Gordon gives the size of transaction costs in relation to the value of copying to the user as the main economic rationale for fair use and the same reasoning is used to justify ‘blanket’ and compulsory licensing.¹⁰⁴

The economic importance of copyright exceptions and limitations may also seen from the point of view of transaction cost. If users had to contact authors/publishers individually for authorization to legally copy each work, for example, by photocopying, the value of the copy would be greatly exceeded by the costs of compliance and transacting and no market would exist.¹⁰⁵ Seen from the perspective of consumers or users of copyrighted materials, coping is more convenient than purchasing because important copyrighted materials are costly and impossible to afford. In addition to this asking permission to copyright holders in every event of coping small part of a book is very costly and even difficult to do it due to different reasons. Therefore, let the students copy a copyrighted work for their educational study, research and private use without permission to avoid the social transaction cost.

¹⁰¹ Ruth, Towse(2001), supra note 92, p.143

¹⁰² Id

¹⁰³ Supra note 77, p.51

¹⁰⁴ Id. Blanket licensing means a license that gives the licensee the right to perform reproduce or distribute all of the works in the repertory for a single stated fee that does not vary depending on how much protected work from the repertory the license actually uses.

¹⁰⁵Ruth, Towse(2001), Supra note92,p.143

Transaction cost affects copyright holders when investing much money to secure their interest on their works because the cost of suing, researching, enforcing etc may exceed the benefit which may be lost due to copyright piracy and hence, the availability of flexible copyright exceptions and limitations avoid economic waste in the form of transaction cost. An economic analysis of fair dealing based on private efficiency predicts that fair dealing is tolerated in any area covered by copyright where the value to the individual of copying part of a work for her own use is less than the cost of transacting a deal.¹⁰⁶ Copyright protection increases the cost to consumers of using existing copyright material.¹⁰⁷ However, this is balanced by the incentive functions of the system that produce a larger quantity and a wider variety of outputs. For this reason, creators and consumers have a common interest in effective copyright legislation.

The economic importance of exceptions and limitations may be seen from the point of view of competition. Copyright grants the author of a work a certain degree of monopoly power on selling, reproduction etc of copies of their work. The rationale for this is to provide the incentive to create the work. However, monopoly power comes with a disadvantage for social welfare because the number of copies sold to consumers is reduced in monopoly. Also, it raises the costs for the creation of other works and thereby reducing productivity since creators are access denied. This has negative effect on social welfare. Therefore, any policy analysis on copyright should take the balance between creation and dissemination and the costs imposed by protection and enforcement into account. From this we can understand that exceptions and limitations to copyright may help to strike a welfare improving balance between creation and dissemination as exceptions and limitations boost dissemination of information and knowledge for consumers of copyrighted materials. In the welfare analysis of economic contribution of copyright, “consumer surplus”¹⁰⁸ should be taken in to consideration.

To summarize the economic importance or contribution of copyright protection and exceptions and limitations, scholars used different approaches to assess the economic contribution of copyright to the entire developments of a country. The first approach is to consider the impact from a policy perspective and focus

¹⁰⁶Ruth, Towse(2001), Supra note 92,p.152

¹⁰⁷ Id

¹⁰⁸ Supra note 77, p.13. The amount that consumers benefit from purchasing a product or service (calculated as the amount they would be willing to pay less what they actually pay); producer surplus – the amount that producers benefit by selling a product or service (calculated as the price they receive less the cost they incur); and deadweight loss – when people who value a product or service more than its marginal cost are not able to consume it.

on the contribution of copyright to economic welfare.¹⁰⁹ This measure captures the level of consumer benefits or surplus from the copyrighted work or their willingness to pay less than what they actually pay and the level of copyright holders' benefits or surplus. The second approach is to treat copyright content as an asset and estimate the value of the investment in copyright content by measuring the time spent by authors, artists and musicians creating original works and then estimating the expected return.¹¹⁰ The third approach is to assess the value added by those parts of the economy which depend on copyright.¹¹¹

The digital revolution has opened up new sources of knowledge through the information and communication technologies such as the internet, on-line libraries and databases, multimedia educational software programmes and so on.¹¹² The opportunities offered in terms of availability to educational materials are immense but access is denied by the high cost of the materials available.¹¹³ Scientific and technical education is crucial for the development of human resources in order to contribute to the economic progress of developing countries. In order to educate people, schools, universities and libraries need access to affordable teaching and learning materials. Access is determined not only by the availability of a product but also by its affordability or the ability of users to purchase it.

3.2 Threats of Copyright Exceptions and Limitations

The exclusive rights granted to the owner of original works include, principally, the right of reproduction, adaptation, public distribution and public performance. But those rights are not absolute as copyright legislations for public interest considerations on the copyrighted works incorporate a variety of exceptions limiting the author's rights. But those use rights or exceptions and limitations are posed to different threats both in the digital and analogue works. In the digital world, technology protection measure/TPMs are used to control and monitor unauthorised access by copyright holders. National copyright laws also come with legal provisions prohibiting circumvention of TPMs. Such protection mechanism eliminates the legal rights of use under copyright exceptions and limitations even though states in their domestic copyright legislations for example United States allow circumvention of TPMs for the use by persons with disability, libraries and other nonprofit institutions.

¹⁰⁹ Supra note 77, p.13.

¹¹⁰ Id

¹¹¹ Id

¹¹² Id

¹¹³ Ibid, p.2

Each of the WIPO treaties (WCT and WPPT) contains virtually identical language obligating member states to prevent circumvention of technological measures used to protect copyrighted works, and to prevent tampering with the integrity of copyright management information. Article 11 of the WCT states that, contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law. Article 18 of the WPPT contains nearly the same obligation on member states. However, there are times when certain limitations and exceptions would have allowed users to access and make use of certain work but for the technological protection measures. As such, national lawmakers must not incorporate such anti-circumvention provision without expressly linking the provision to copyright infringement, or without the simultaneous inclusion of corresponding limitations or exceptions. States fail to regulate the expiry of such protection measures with the expiry of copyright protection.

In the analog world, there are different threats posed on exceptions and limitations. Market failure may be occurred due to monopoly or exclusive economic rights granted to copyright holders in distribution, publication, reproduction, renting, selling or authorization to others to do the same which is dependent on the will of copyright holders , exaggerated term of protection and continuous extension of term of protection, imposition of sever criminal liability for copyright infringements without regard to the damage caused to copyright holders which may create fear to use even the lawful rights to use protected works, absence of legal framework for users to exercise their rights in case of abuse of monopoly, prohibition of photocopying unpublished works in academic institutions, the continuous pressure from copyright holders on government to strengthen protection in their favor, the existing copyright bias both at national and international levels which favors copyright holders because rights of copyright holders are expanding continuously while users rights are ignored, ‘the influence of developed states in the case of bilateral or multilateral agreements with developing states’¹¹⁴, the increase of cost of copyrighted works coupled with accessibility questions may hinder access to knowledge users in developing states.

¹¹⁴ Sue, Lott (2003), *Supra* note, 55, P.40. The conclusion of regional intellectual property related treaties like NAFTA certainly creates problems on the application of exceptions and limitations crafted by national legislatures pursuant to their cultural, social, economic, political and educational backgrounds. Because powerful states like USA compels contracting states to comply with the USA copyright act to protect the interest of copyright holders of US nationals. On 23 May 1993, the U.S.T.R. commenced section 301 investigations against Brazil for failing to provide adequate

There may be market failure due the monopoly of distribution by the copyright holders or misuse of exclusive rights and hence, copyright works may not be accessible due to absence, scarcity or lack of accessible format for some group of users or unaffordable due to high price. Modern technologies permit right holders to exercise control over access to copyrighted digital works, and also to control and regulate the utilization of such works once accessed by providing access barriers or anti copy mechanisms. These technological measures constitute a sort of electronic fence which can help in fighting against piracy and allow owners of digitalized intellectual works to seek payment for the access or utilization of them. This could be part of the exercise of their legitimate right to be rewarded for their investment and could help the development of electronic commerce. However, it may also represent a powerful means which could allow absolute control over copyrighted works, permit right holders to impose barriers to access without respecting statutory exceptions and prevent access to information and knowledge. In addition to this, right holders are now able to interact directly with users, therefore the utilization of contractual agreements to regulate the access to and the utilization of copyrighted works is growing: today each single use of a work can be negotiated and licensed.¹¹⁵

The new Digital Millennium Copyright Act herein under called DMCA of the United States Section 1201 introduced two new prohibitions; prohibition of any act of circumvention of copyrighted works and prohibition of the dissemination of technologies designed to circumvent access controls. Therefore, not only the act of circumvention of protected copyrighted works but also production or manufacturing of technological devices used to circumvent protected works is copyright infringement provided that the devices should be manufactured with an intention to use for circumvention of protected works. Section 1201 of the DMCA also includes provisions regarding exceptions for certain classes of activities where by circumvention is allowed. But these exceptions have been extensively criticized as being too narrow, and libraries and non-profit groups have expressed their concern about the impact of anti-circumvention

intellectual-property protection to American products. The U.S.T.R. terminated the investigation on 28 February 1995, after the Brazilian government agreed to implement a course of legislative action that assuaged American demands. This situation was mirrored in 1994 with China. On 30 June 1994, the U.S.T.R. named China a “priority foreign country” and launched a section 301 investigation. China finally capitulated and promised to improve its enforcement of intellectual property laws. Examples of other countries that have agreed to comply with American special 301 pressures include Thailand, India, Egypt, South Africa, Korea, Poland and Italy.

¹¹⁵ Claudia, Sarrocco, Intellectual Capital in the Information Society,p.15, available at <http://www.itu.int/osg/spu/visions/free/ITUIntCapitalpaper.pdf> accessed on 11/9/2012

provisions on the public access to information. To address the concerns of these institutions, the Act includes a specific exception enabling non-profit libraries and educational institutions to circumvent technical protection measures to make a good faith determination of whether to acquire a copy of a work. Librarians do not see the value of this provision, which has little application in practice; given that vendors of technically protected and copyrighted works generally already give incentives to allow their potential customers to take a decision¹¹⁶

Section 1201(a) (1) of the DMCA provides that no person shall circumvent a technological measure that effectively controls access to a work protected under this title. However, in response to concerns that section 1201 which may undermine Congress's commitment to fair use if developments in the marketplace relating to use of access controls result in less access to copyrighted materials that are important to education, scholarship, and other socially vital endeavors, it was determined that a triennial rulemaking proceeding should take place to monitor the use of access controls.

Section 1201 divides technological measures into two categories. Those are measures that prevent unauthorized access to a copyrighted work and measures that prevent unauthorized copying of a copyrighted work. Making or selling devices or services that are used to circumvent either category of technological measure is prohibited. Since copying of a work may be a fair use under appropriate circumstances, section 1201 does not prohibit the act of circumventing a technological measure that prevents copying. By contrast, since the fair use doctrine is not a defense to the act of gaining unauthorized access to a work, the act of circumventing a technological measure in order to gain access is prohibited. Circumvention is allowed pursuant to section 1201 (d) for nonprofit library, archive and educational institution, for encryption research under section 1201(g) and protection of minors stated under section 1201(h) to facilitate access of minors to material on the internet. Circumvention for personal privacy is allowed when the technological measure or the work it protects, is capable of collecting or disseminating personally identifying information about the online activities of a natural person as stated under section 1201(1) of the Act. Furthermore, section 1201(j) permits circumvention of access control measures, and the development of technological means for such circumvention, for the purpose of testing the security of a computer, computer system or computer network, with the authorization of its owner or operator.

¹¹⁶ Claudia, Sarrocco, supra note 115, p.18

The exceptions to the law of anti circumvention without enforcing mechanism is valueless because the DMCA does not incorporate provisions which enable users to sue copyright holders in case of abuse of rights.

The Free Trade Agreement is derived its provisions from the United States DMCA to prohibit circumvention of TPMs used by copyright holders.¹¹⁷ For the first time in any United States trade agreement, the United States is proposing a new provision, consistent with the internationally recognized three step test that will obligate parties to seek to achieve an appropriate balance in their copyright systems in providing copyright exceptions and limitations for purposes such as criticism, comment, news reporting, teaching, scholarship, and research.¹¹⁸ Is this three step test applicable for developing countries for the purpose of criticism, comment, news reporting, teaching, scholarship, and research as those exceptions should pass without the requirement of satisfying the test? This kind of agreements seriously affects flexibility options of exceptions and limitations in national copyright legislations.

Regional copyright agreements also affect the opportunity of national legislations to have flexibility on exceptions and limitation. Only very limited exemptions are permitted to the FTA provisions aimed at providing adequate legal protection and effective legal remedies to fight against circumvention of effective technological measures, an example being for reverse engineering to achieve interoperability between computer programs.¹¹⁹ This may hamper the dissemination of knowledge and information in the developing world like Ethiopia where every scholar activity is dependent on foreign copyrighted works and could not be accessed for the reason of economic problems and other barriers. The North America Free Trade Agreement hereinafter called NAFTA which was signed between the United States, Canada, and Mexico in 1994 is a typical example of this. NAFTA article 1705 states that each Party shall confine limitations or exceptions to the rights provided for in this article to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

¹¹⁷ Cyrus, Farivar (2012), For First Time Ever, US Seeking International Limits on Copyright available at <http://arstechnica.com/tech-policy/2012/07/us-proposes-new-copyright-provision-in-major-international-treaty/> last visited on 11/8/2012

¹¹⁸Id

¹¹⁹ Pedro, Roffe and Maximiliano ,Santa Cruz (2007), Intellectual Property Rights and Sustainable Development: A Survey of Major Issues, (United Nations Economic Commission for Latin America and the Caribbean), p.22

The bilateral agreement America is a party has also a negative effect on national copyright legislations. The three step test of the TRIPs Agreement is replicated under article 4 of the United States-Jordan Free Trade Agreement as it obliges parties to the agreement confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holders. This shows that how the developed states can adversely affect the interest of developing states.

International treaties and agreements obligates that all limitations and exceptions to the exclusive rights of copyright owners should comply with the three-step test of the Berne Convention, TRIPS Agreement, the Rome Convention while there are exceptions and limitations outside the three-step test. The Berne Convention, for example, includes the following specific limitations and exceptions: Article 2(4) official texts of legislative, administrative and legal nature, and to official translations of such texts; article 2(8) News of the day or miscellaneous facts having the character of mere items of press information; article 2bis(1) political speeches and speeches delivered in the course of legal proceedings; article 2bis(2) lectures, addresses and other works of this nature delivered to the public may be reproduced by press, broadcast, communicated to the public by wire and made subject of public communication when the use is justified by the informatory purpose; article 10 quotations or uses for illustration or teaching, provided it is compatible with fair practice and the use does not exceed that justified by the purpose; article 10bis reproduction by the press or broadcasting on current economic, political or religious topics or current events; article 13(1) compulsory licenses of sound recordings and the appendix to the Berne Convention.

Therefore, the regional and bilateral or multilateral copyright treaties should not undermine the existing flexible and broad exceptions and limitations at national and international legislations. This shows how the US copyright law can influence the exercises of exceptions and limitations found at national and international copyright legislations. The scope of copyright limitations and exceptions became a subject of significant controversy and debate due to the impact of digital technology, the changes in national copyright legislations for compliance with international agreements and conventions. Accordingly, technology and contract law may undermined copyright law and reduce the scope of important exceptions which can harm creativity and dissemination of knowledge. Limitations and exceptions are also the subject of significant regulation by global treaties. Copyright should benefit the creator of the work. Life plus 70 years protection is above two generations of people who benefit is ridiculous.

Chapter Four

Exceptions and limitation in Ethiopian copyright law: A Comparative Analysis

4.1 Introduction

Exemption or exceptions to the exclusive right of copyright holders or copyright protection means that the user does not need permission from the copyright holders to use the work and exemptions or exceptions to copyrights protection apply to all forms of literary and artistic works. The Ethiopian copyright regime dates back to the time of immense codification of laws in the 1960s. The copyright law was incorporated in the Civil Code of the 1960. The Code grants exclusive rights to authors to use their works and include certain copyright exceptions and limitations even though the code was not comprehensive. To rectify the shortcomings of the Code, the 2004 Copyright and Neighboring Rights proclamation was proclaimed. The period before 2004 was predominantly characterized by a growing grey area of business in the copyright industry and the copyright industry was beyond the reach of the Code and law enforcement bodies.¹²⁰ As a result, infringement of copyright was so widespread that rights holders had to resort to public appeals through demonstrations and other activities.¹²¹ But this does not mean that artistic and literary works were not regulated because the Civil Code of Ethiopia of 1960 devotes provisions for artistic and literary works under title XI of the code articles 1647-1674 and articles 2672-2697 of the Code. But the Code is not comprehensive to regulate every activity of right holders and users.

Copyright law has long emphasized that copyright protection does not exist for its own sake but rather to serve the public interest. A balance between the interests of copyright owners in receiving fair reward for their efforts and the interests of consumers in receiving reasonable access to copyright materials has been traditionally maintained in a number of ways. One of the most important of these is the implementation of a series of exemptions or limitations and exceptions to the copyright owners' exclusive rights. Without limitations and exceptions, there would be no balance. Because, limitations and exceptions are legal flexibilities under which the copyright law allows in certain circumstances, protected works to be used without the rights holder's permission and with or without payment of compensation to copyright holders.

¹²⁰ Mandefro Eshete(2010), *The Interplay between Copyright Protection and the Expansion of Education in Ethiopia: WIPO-WTO Colloquium Papers: Research Papers from The WIPO-WTO Colloquium for Teachers of Intellectual Property Law, World Trade Organization - Intellectual Property Division*, p.28

¹²¹ Id

The copyright system of the world countries varies depending on different factors such as the legal tradition which can be common law or continental, the purpose of copyright and economic, social, technological etc developments of each country.

4.2 General overview of the Civil Code Copyright Provisions

As briefly discussed above, the Code incorporates rights of authors and users of copyrighted works. Protected subject matters are listed under article 1647 of the Code. Accordingly (1) the author of a work of the mind shall have on the work he created, by the mere fact of his creation, an incorporeal right of ownership; (2) He shall have such right regardless of the nature, form of expression, merit or purpose of the work and (3) He shall have such right notwithstanding that he executed the work in pursuance of a contract of employment or a contract for the performance of a project entered into with a third party.

The code innumerate what constitutes works of mind subject to copyright law under article 1648. According to article 1648, the following works shall be deemed to be works of the mind: (a) literary works such as books, booklets, articles in reviews and newspapers, lectures, speeches, sermons, theatrical and other dramatic works and (b) musical compositions with or without text, dramatic-musical works, radiophonic or radiovisual works, choreographic works or pantomimes the production of which is reduced to writing or otherwise; and (c) the works of the figurative arts such as drawings, paintings, engravings and sculptures, as well as photographic and cinematographic works; and (d) illustrations, maps, plans, sketches, plastic works pertaining to geography, topography, architecture or other sciences; and (e) any other work created by the intelligence of their author and presenting an original character. Translations and adaptations, Encyclopedia and anthologies are also protected by the code provided that the interest of the authors should not be affected as provided in the code. This shows that the code incorporates limitations based on protected subject matter by leaving other works unprotected and falling on the public domain to serve the public interest.

4.3 Copyright Exceptions and Limitation in the Civil Code

The Civil Code incorporates provisions relating exceptions and limitations whereby users may use copyrighted works without the authorization of authors as the code uses the term author instead of copyright holders/owners. This may have effect as all authors may not be considered as copyright holders. The term of protection of protected works is not indicated but it can be inferred from the provisions of the Code and

hence, the term of protection is up to the life of the author while the right to publish a work may be transferred to heirs after the death of the author. The Code provides certain limitations on the protection of artistic and literary works and provides exceptions to the protection. As a limitation of protection, certain works are not protected by the Code. Official texts of a legislative, administrative or judicial nature, photographic works not form part of collection or unpublished and do not contain the name of the author, speeches delivered in political assemblies, at public meetings or on the occasion of official ceremonies are not be protected and hence can be freely reproduced without the permission of their authors as stated under article 1651. This is mandatory limitation to copyright protected subject matter. Article 1652 of the Civil Code provides that it is only the author that can produce and reproduce his work during his life time. The author is also given exclusive right to make adaptations or authorize others to adapt a given work of mind. According to article 1655 of the Code, the author could not object the translation of his mind work because; the Code states that anyone can translate without having license to translate with an express words in the translated work indicating the works is translated. This is a limitation or exception to the exclusive rights of the author.

According to article 1656, the author may not forbid private performances of his work given free of charge at a family gathering or in a school which can be for entertainment or educational purpose. Article 1657 of the Code states that articles of topical interest published in newspapers and reviews may be reproduced in the press, whether printed or broadcasted, unless such reproduction was expressly reserved provided that the source shall always be clearly stated. The express reservation that reproduction is to be made by the author is against freedom of expression and free access to information as it connotes if expressly reserved, use without permission and payment is infringement. The Code under sub article 3 declares daily news articles on current events which are mere press information are not protected and may be freely reproduced. According to article 1658 of the Civil Code, speeches delivered in political assemblies, at public meetings or on the occasion of official ceremonies may be freely reproduced by the press, whether printed or broadcasted, during fifteen days from the day on which they were made. Article 1660 of the Code allows reproduction of copyrighted works without the permission of author for analysis and press reviews of the work and reproductions of the work made in a single copy intended for private use only. The Code under Article 1661 allows users to quote the works authors with line limit without the authorization of authors. These two article are highly restrictive and against the free flow of information.

The Civil Code under article 1673 provides for right of public authorities to authorize the reproduction of protected works without authors' permission. This is compulsory license granted by public authorities provided that the work should be published and fair compensation paid to the copyright holder while forms and conditions and fair compensation to be determined by a special law. But public authorities shall not allow the alternation of work. The Civil Code also sets remedies for violation of the code or infringement of copyrights of authors under article 1674. Those remedies extend from demanding cessation of infringement, destruction of illegally reproduced works to claim of damage through extra contractual provisions of the Code. But the Code failed to set remedy against misuse of exclusive rights of authors which is against the rights of users.

Under the publishing contracts stipulated under article 2672, the author has right to authorize through contractual agreement to assign his rights to publishers where by the publisher will acquire right of production, reproduction and distribution to the public which can be considered voluntary license. An authorization to reproduce or produce a work shall not imply an authorization to adapt it, to modify it or to authorize its translation according to article 2680 of the Code. An authorization to broadcast a work shall not imply an authorization to record by means of a machine involving the fixation of sounds or image, the work broadcast as stated under article 2681. When rights of publications are transferred to publishing companies, the author shall be entitled to a certain number of free copies provided that in the absence of any provision in the contract, the number of these copies shall be fixed by the court in an equitable manner pursuant to article 2693. This may be probably a special privilege granted to the author to use his works freely. As far as this privilege is free reproduction right, it can be considered as an exception. This exception is not available in the active copyright law of Ethiopia.

4.4 General Framework of the 2004 Copyright Proclamation of Ethiopia

The government of Ethiopia proclaims new law to regulate Copyright and Neighboring rights in 2004 called Copyright and Neighboring Rights Protection Proclamation, Proclamation No. 410/2004, herein after called the proclamation or the Ethiopian copyright law. The preamble of the proclamation states that artistic, literary and other related works should be protected taking in to consideration the economic, cultural, social and technological advancement significance of such works. From this we can understand that the proclamation is crafted based on the natural, utilitarian and personhood theories of copyright. This is true because, first the proclamation provides protection in the form of exclusive rights to copyright holders so

that copyright holders may be benefited from their investment as stated under article 7. Secondly, numerous exceptions and limitations are providing for free use of such works in pursuance of development agenda. Thirdly, the proclamation provides protection for moral rights of authors under article 8 so that moral rights of authors should be protected which can trace back to the theory of personhood. This indicates that the proclamation is crafted based on the justifications of different theories. Copyright law puts certain limitations on the exclusive rights of copyright holders so that the public can use copyrighted works. The most known and recognized limitations are discussed below.

4.4. 1 Protected Subject Matter under the Proclamation

The proclamation gives protection to literary, artistic and scientific works which include: books, pamphlets, articles, computer programmes and other writings; speeches, lectures, addresses, sermons, and other oral works; dramatic, dramatico-musical works, pantomimes, choreographic works, and other works created for stage production; musical works, with or without accompanying words; audiovisual works and sound recordings works of architecture; works of drawing, painting, sculpture, engraving, lithography, tapestry, and other works of fine arts; photographic and cinematographic works; illustrations, maps, plans, sketches, and three dimensional works related to geography, topography, architecture or science; derivative works; collection of works, collection of mere data (databases) whether readable by machine or other form as stated under article 2(30). Therefore, the reproduction or use of those works without authorization or payment is copyright infringement.

According to Article 7, the exclusive economic rights of copyright holders/authors are: a) reproduction of the work; b) translation of the work; c) adaptation, arrangement or other transformation of the work; d) distribution of the original or a copy of the work to the public by sale or rental; e) importation of original or copies of the work; f) public display of the original or a copy of the work; g) performance of the work; h) broadcasting of the work and i) other communication of the work to the public. But the proclamation provides limitations and exceptions to the exclusive economic rights of copyright owners. The proclamation excludes certain works of mind such as methods, formulas etc from the scope of application of copyright law as stated under article 5 and hence such works can be freely used by the public and individuals and hence, no one can claim ownership rights over such works.

The idea- expression dichotomy is also a limitation on copyright protection because copyright law protects only expressions and ideas are under the public domain. This also relates with freedom of expression as one

fundamental human right. In conformity with international law, reproduction is to be interpreted widely, covering all possible ways of copying a work, either known or yet to be discovered. Conventional examples include the printing or photocopying of books or articles as well as the recording of music and films. In other words, Copies and phonorecords are the tangible forms in which reproductions of a work can be made; copies communicate to the eye while phonorecords communicate to the ear.¹²² Reproduction may also include storage of a work in digital form using an electronic medium even though the result is not visible or the medium is not tangible. This conception is stated under article 2(25) of the copyright law of Ethiopia.

Public performance is not limited to only live concerts, staging of theatre plays and projection of films in the cinema, but it also extends to the background music we hear in bars and shops whether they are live or recorded. This conception is also stated under article 2(24). The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted there under, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention. Taking this to the case in Ethiopia, it states reproduction in any form or manner so that storage or digital reproduction is also allowed.

4.4.2 Duration of Copyright Protection

The proclamation guaranties copyright holders' exclusive economic rights for limited period of time. The limited duration in the protection of copyrighted works is on the basis of public interest on such works. According to article 20(1) of Ethiopian copyright law, economic rights shall belong to the author during his lifetime and to the heirs or legatees for fifty years from the date of death of the author. The term author should have to be interpreted to mean the copyright holder because, copyright may be transferred to other person from the author of the works and the author may have no right even though there is presumption that the person in whose name the work was published shall be deemed to be the author thereof according to article 22(1). For example if the author transfer his works to publisher, the copyright owner of the work will be the publisher not the author. If the author dies before the publication of his work, the 50 year should count from the time of publication. If the work is a work published anonymously or under a pseudonym, the economic rights shall be protected for fifty years from the date on which the work was either made or first made available to the public or first published, which ever date is the latest as stated under article 20(5).

¹²² Robert, A. Gorman (2006), Copyright Law (*Second Edition*), (Federal Judicial Center, USA), p.101

But it is difficult to locate the beneficiary for 50 years in case of anonymous works and who is to permit free use of the work. For me such works should fall under the public domain as far as IP protection is an incentive while no one to receive in the case of anonymous works.

The economic rights relating to a photographic or an audiovisual work shall be protected for twenty five years from the making of the work or for fifty years beginning from the date of making of the work or communication of the work to the public whichever date is the latest according to article 20(7) and (8) respectively. The rights of performers on their performance is protected until the end of the fiftieth Calendar year, following the year in which the performance was fixed in a sound recording or in the absence of such fixation, from the end of the year in which the performance took place as per article 26(5), while rights of sound recorders or phonogram producers is protected from the publication of the sound recording until the end of 50 years from the end of year of publication, or when the sound recording has not been published until the expiry of 50 years from the end of the year of fixation as stated under article 27(2) of the proclamation.

Finally, rights of broadcasting organizations is protected from the moment the broadcast takes place until the expiry of 20 years following the year in which the broadcast took place pursuant to article 31(2). The discrimination in duration of protection is not justifiable if copyright right does not protect works on the merit or quality of a work as far as the copyrightability requirements set under article 6 are satisfied. The variations in term of protection in the case of joint ownership and collective works are not reasonable.

Apart from the definition of terms, the rights created by copyright and the criminal sanctions it imposes in the event of infringement, the Ethiopian Copyright Law also regulates the exceptions imposed on rights holders. The major exceptions are: (a) reproduction for teaching; (b) reproduction by libraries, archives, and similar institutions; (c) quotations; (d) reproduction, broadcasting and other communications to the public for information purposes; (e) reproduction and adaptation of computer programs for personal use; (f) importation for personal use; (g) reproduction for personal use; and (h) other reasons.¹²³

The exclusive rights granted to performers, producers of sound recordings and broadcast organizations stated under articles 26-31 shall not apply to acts related to using short excerpts for reporting current events

¹²³ Mandefro Eshete, Supra note 120, p.29

to the extent justified by the purpose of providing current information; reproduction solely for scientific research; reproduction solely for the purpose of face to face teaching activities, except for performances and sound recordings which have been published as teaching or instructional materials and cases where, under part two of the proclamation, a work can be used without the authorization of the author or other owner of copyright. This shows the exceptions provided under part two from article 9 to 18 and hence, reproduction for teaching, reproduction in the form of quotations, reproduction for personal use, importation for personal use, reproduction by libraries, museums and other similar institutions etc are allowed without the permission of copyright holders pursuant to article 32 of the proclamation.

The proclamation also protects the public interest through the incorporation of protected subject matter/as some works of mind are not covered by the copyright; duration of protection/ protection for limited period of time the expiry of such period make such works fall under the public domain and specific exceptions and limitations including licensing schemes. The requirement of fixation and originality are also limitations in the form of condition for granting copyright protection in Ethiopia. At international level, the Berne convention insists on original works of authorship as a condition through which a work that reflect some level of intellectual creativity will be protected in addition to the requirement of fixation.

4.4.3 Copyright Limitations and Exceptions in Ethiopia: A Comparative Analysis

Different states enact copyright laws to protect the economic and moral interest of copyright holders. The public interest in general and users' rights in particular is also safeguarded through the incorporation of exceptions with limitations. Some states provide open ended exceptions such as fair use, fair dealing and fair practice determined on case by case basis for the benefit of users while other states incorporates specific provisions in their copyright laws. Still other states have copyright law incorporating general and specific exceptions. Ethiopian copyright law deals public interest on copyrighted works by incorporating specific exceptions even though fair practice is rarely used in the proclamation.

4.4.3.1 Exceptions and Limitations for Library, Archives and Other Similar Institutions

Libraries are especially important now when the whole idea of education is stressing more and more independent learning and acting. All citizens must be able to find and use information. The unique function of libraries is to acquire, organize, offer for use and preserve publicly available material irrespective of the form in which it is packaged in print, cassette, CD-ROM, network form in such a way that, when it is

needed, it can be found and put to use. Libraries, museums, galleries and archives are primary cultural and scientific institutions that provide information as a public good. Libraries and archives are serving as gateways for education, research, scholarship, creativity and discovery¹²⁴ and leisure. Exceptions and limitations to copyright benefit society by safeguarding fundamental user rights concerning the individual, including freedom of expression; reflecting commercial interest, industry practice and competition and promoting the dissemination of knowledge and information.

Exceptions and limitations for libraries and archives enable intellectual freedom and facilitate democratic exchange by providing access to information, ideas and works of the imagination in any medium to all members of society; enrich the lives of individuals enabling further creativity, support education and teaching as well as scientific research and development; help to bridge the digital divide through the provision of new technologies to access the internet and other digital resources, provide services to people with reading disabilities and have a unique role to preserve the historical record to enable understanding of the past, efficient management and proper oversight in the present and to inform the future.

Exceptions and limitations, which are an integral part of national copyright systems, play a critical role in enabling libraries and archives to meet the needs of the public, helping individuals to achieve their full potential and engage with others. Exceptions and limitations for libraries and archives help these institutions to assist individuals in seeking, receiving and imparting information so that they may participate meaningfully in public life and advance knowledge by preserving and providing access to the world's cultural, artistic, and scientific heritage.¹²⁵ Every day, libraries, museums archives and other similar institutions in all parts of the world help hundreds of millions of people meet their work, study, research and leisure needs. The services rendered by such institutions enrich people's lives and support important public policy goals such as literacy, education, scientific research, employability and health awareness. By collecting and providing access to information libraries and archives support society in general and the cultural and scientific sectors in particular.

¹²⁴A Draft Treaty on Copyright Exceptions and Limitations for Libraries and Archives,(*International Federation of Library Associations and Institutions,2011*),p.2

¹²⁵ WIPO Standing Committee on Copyright and Related Rights (Twenty-third Session, Geneva, November 21 to 25, 28, 29 and December 2, 2011), (*Objectives and Principles for Exceptions and Limitations for Libraries and Archives: Document presented by the United States of America*), p.2

Those institutions foster the sharing and spread of ideas, stimulating and enabling new creations around the world. Therefore, prohibitions to circumvent technological protection measures by those institutions to preserve, archive and enable permitted use of lawfully acquired digital content should be lifted because such prohibitions are hampering research and other important creativities leading to an incomplete cultural, scientific and historical record. Saving the exclusive economic rights of author/owner stipulated under article 7 of the proclamation, reproduction by library, archives and other similar institutions is allowed without the authorization of the author/owner. The proclamation used nonprofit test or criteria to prove whether the free use is on the basis of the spirit of the law or not as accorded under article 12(1) of the proclamation. The reproduction under this exception is dependent on the request of physical persons.

According to article 12(2); a library or archive can make a reproduction of a published Article, short work or short extract of a work to satisfy the request of a physical person. This means these institutions may reproduce if there is a request for reproduction by physical persons. What if there is a need for reproduction by institutions working for persons with disability? With respect to the purpose of reproduction, the proclamation has stipulated three requirements under article 12(3). Accordingly reproduction should be to preserve and, if necessary to replace a copy which has been lost, destroyed or rendered unusable in the permanent collection of another similar library or archive; where it is impossible to obtain a copy under reasonable conditions and the act or reproduction is an isolated one occurring and if repeated on separate and unrelated occasions.¹²⁶

The absence of adequate copy for consumers can be taken as a reason for reproduction even though ignored in the proclamation. The proclamation put preconditions under which reproduction by libraries, archives and other similar institutions under article 12(2) as follows: a)the library or archive is satisfied that the copy will be used solely for the purpose of study, scholarship or private research, b)the act or reproduction is an isolated case occurring, if repeated, on separate and unrelated occasion, and c)there is no available administrative organization which the educational institution is aware of which can afford a collective license of reproduction in addition to the non commercial nature of such institutions. The use exception here applies three step tests in order such reproduction eligible for the exception. First, there must be demand or request for copy of the copyrighted work for public consumption and secondly there is no institution to issue license of reproduction and the third is the reproduction is separate or repeated but in unrelated occasion.

¹²⁶ Supra note 32, Article12(3) .See also Mandefro Eshete(2010), supra note 120 at p.31

Article 12 of the Ethiopian Copyright Law does not regulate the manner in which reproduction through the institution's photocopy machine can be made by users. The writer contends that when these institutions make photocopiers available, they must be required to display a notice to the effect that reproduction may be subject to copyright Law. In cases where such copyright notice has been displayed, these institutions should disclaim any liability for copyright violations.¹²⁷

The practice of reproduction in Ethiopia is not supervised rather the practice is reproduction made by service seekers in private copying machine and even through no notification of copyrightability. Although the Berne Convention does not contain an explicit limitation for libraries, this exception can be justified under the broad recognition of teaching or educational exceptions. This is also true under the article 13 of TRIPs agreement.

The Proclamation is not clear whether such reproduction is also allowed for digital copyrighted works with the development of digital library. This is because reproduction of digital content may include posting in a given web address so that user may use it or scanning of works to make available on internet. What would happen if students in private teaching institutions make copies for their study and research? Since private higher educational institutions are accredited to deliver education, students in private universities should be allowed to make copies for teaching purpose. In the light of competition, should private universities allowed to make copies for their libraries to help in fostering educational development in Ethiopia. And hence, the requirement of non commercial establishment should be avoided. In the digital content of copyrighted works, protection of copyright holders' rights through prohibition of reproduction is changed in to prohibition of access by using technological measures like password. Reproduction is allowed only to preserve and, if necessary to replace a copy which has been lost, destroyed or rendered unusable in the permanent collection of another similar library or archive so that patrons can use the library.

The Ethiopian copyright law should allow reproduction for libraries not only for replacement and preservation but to collect unavailable materials to the library for users since new educational libraries are under establishment in higher education. This is true because, the newly established universities will have empty library and could not full through market involvement and hence, should be allowed to reproduce to

¹²⁷Supra note 120, p.31

update the library with books. Therefore, 'open collection'¹²⁸ library exception should be incorporated in the proclamation. Are Ethiopian libraries, archives and museums allowed to digitalize books or to carry out format shifting for users with disability? Is the requirement whose activity directly or indirectly is not for gain to distinguish public and private institutions? In Ethiopia, private teaching institutions with library service are flourishing. Though private institutions are profit oriented, there are private institutions established by NGOs to render public service through dissemination of knowledge and information for free. So, all libraries and other similar institutions should benefit the exceptions under the proclamation.

United States of America follows common law legal system and hence, the source of their law can be legislation and judgments made by the judicial organ. Article I, Section 8, Clause 8 of the U.S. Constitution states that "the Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."¹²⁹ The public interest on copyright works has been reflected in the US constitution whereby the constitution authorizes to enact laws promoting science and art which the Copyright Act steams its provisions from the utilitarian theories of copyright. The exclusive rights provided by the Copyright Act to the owner of copyrights are subject to certain limitations. In some cases, the limitations are exemptions from copyright liability.¹³⁰ One of the most important limitations is the doctrine of fair use and compulsory license, under which certain limited uses of the work are permitted upon payment of specified royalties and compliance with statutory conditions.¹³¹

Fair use which is not an infringement can involve reproduction or any other uses that might otherwise be infringement. The criteria to determine the fair use are based on a balanced application of these four factors. Those are the purpose or character of the use, the nature of the work being used, the amount of the work used, and the effect of the use on the potential value of or market for the work.¹³² Fair use and other free use

¹²⁸ Mandefro Eshete and Mola Mengistu (2011), supra note 19, p.175. The purpose of reproduction and the type of material which can be reproduced like published and the absence of supervised reproduction by using the institutions copy machine may create problem on the accessibility and dissemination of knowledge.

¹²⁹ Kenneth, WEISSBERG and Aurélie, ROUX, French Copyright Law, p.6 available at <http://weissbergavocats.com/articles/copyright-law.html> accessed on 9/8/2012

¹³⁰ Kenneth WEISSBERG and Aurélie ROUX, Supra note 129, p.6

¹³¹ Id

¹³² Kenneth, D. Crews and Jacque, Ramos (2005), Comparative Analysis of International Copyright Law

limitations and exceptions in National Copyright Act of US maintains a balance between the individual interests of creators of works and other copyright holders, and the public interest in fostering a culturally productive exchange of information and ideas.¹³³ In the United States, fair use makes it possible for individuals to quote or reproduce from copyrighted materials without seeking permission from the copyright holder. It allows instructors to photocopy excerpts from books, journals, newspapers, and other works for classroom teaching, to quote from works in their publications, and to place course materials on reserve in print and electronically.¹³⁴

According to section 106 of the US Copyright Act, subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: to reproduce the copyrighted work in copies or phonorecords; to prepare derivative works based upon the copyrighted work; to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission. A compilation is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship¹³⁵ and hence, enjoy copyright protection. Section 107 of the US Copyright Act deals with the limitations on exclusive rights and fair use used as one means of exceptions to the exclusive rights of copyright owners. Fair use is a kind of public policy exception to the usual standard for determining copyright infringement; that is, there is an infringing use of a copyrighted work but because of countervailing public interest that use is permitted and is not

Applicable to University Scholarship, p.34

¹³³ Kenneth, WEISSBERG and Aurélie, ROUX, supra note 129,p.7

¹³⁴ Id. See also John, Vaughn and etal, Campus Copyright Rights and Responsibilities: A basic Guide to Policy Considerations, p.15. Under the US fair use exception, commercial use of protected work may qualify non infringing use of protected works if the use does not affect the legitimate interest of the copyright holder..

¹³⁵ Maria, A. Pallante(2011), Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code, p.17

infringement.¹³⁶ Any use that is deemed by the law to be “fair” typically creates some social, cultural, or political benefit that outweighs any resulting harm to the copyright owner. Accordingly, fair use of copyright materials without the authorization of copyright holder is not considered as copyright infringement. Scholars start to develop new theory that reconceptualizes fair use as a collective user right in copyright law. It first argues that the fair use doctrine has not yet unleashed its full potential in protecting the public interest. The failure is caused by a firmly ingrained notion in copyright law that treats fair use as an affirmative defense against allegations of copyright infringements and such a fixed characterization of fair use has led legislators and judges to define it as merely an individual right enjoyed by each user of copyrighted works.¹³⁷ This characterization has also lead to a wide range of harms to the public interest in the free flow of information and knowledge and there is a misunderstanding that fair use is considered as individual right.¹³⁸ To rectify this, section 107 of the Copyright Act should be read as conferring a collective right to fair use upon members of the public. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The US Copyright Act uses four step test in determining whether a certain use of copyright material without the authorization or permission of copyright holders is fair use or not. The following criteria are used to determine whether the use is fair use or not: The purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole and the effect of the use upon the potential market or value of the copyrighted work.¹³⁹ The first factor is regarding whether the use in question helps fulfill the intention of copyright law to stimulate creativity for the enrichment of the public, or whether it aims to only supersede the objects of the original for reasons of personal profit. This factor for the determination of fair use may include whether such use is of a commercial nature or is for nonprofit educational purposes.¹⁴⁰ Accordingly, if the use of the copyright material is in pursuance of commercial activity or is for profit, such use is not under the ambit of fair use and it amounts to copyright infringement. If the use for non commercial and private purpose, it may fall in to fair use taking in to account the other factors. But it does not mean that in all case whether the use is

¹³⁶ Lee, Wilson(2005), Fair Use, Free Use and Use by Permission: *How to Handle Copyrights in All Media* (Allworth Press, New York), p. 67

¹³⁷ Lee, Wilson(2005), supra not 136

¹³⁸ Id

¹³⁹ Id

¹⁴⁰ Id

commercial, it would automatically become out of the ambit of fair use. By the same token, the fact that the use is for non commercial does not automatically make it fair. If for example, the use involves reproduction of multiple copies of the work for non commercial purpose, it may not necessary be considered as fair use.¹⁴¹

The second requirement is the nature of the copyrighted work which can be whether it is fictional or non-fictional or published or unpublished. With respect to the nature of the work, Fikremarkos divide works in to two; works strictly personal to the author like diaries and letters and, literary and artistic works produced for publication and dissemination to the public.¹⁴² The third criteria is the amount and substantiality of the portion used in relation to the copyrighted work as a whole which assesses the quantity or percentage of the original copyrighted work that has been imported into the new work. In general, the less that is used in relation to the whole for example a few sentences of a text for a book review, the more likely that the sample will be considered fair use. Lastly, the effect of the use upon the potential market for or value of the copyrighted work should be taken in to account. This factor measures the effect that the allegedly infringing use has had on the copyright owner's ability to exploit his or her original work. If the court determines the use to be fair under the first three factors, it will not revisit that determination based upon the fourth. On the other hand, if the use is found not to qualify under any of the first three factors, a court will typically examine the economic impact of the use as part of its ultimate determination because free use which does not affect the economic interest of copyright holder is fair use.¹⁴³ The court not only investigates whether the defendant's specific use of the work has significantly harmed the copyright owner's market, but also whether such uses in general, if widespread, would harm the potential market of the original.

In 1998, copyright protection was again extended in the Sonny Bono Copyright Term Extension Act. The most comprehensive reform of United States Copyright Act since 1976 was the Digital Millennium Copyright Act of 1998 intended to make the copyright law of the United States applicable to issues concerning protection in a digital or electronic medium and to fulfill obligations to the World Intellectual Property Organization Copyright Treaty. The DMCA makes it illegal to provide products or services that

¹⁴¹ Fikremarkos Merso (2012), Supra note 40, p.112

¹⁴² Id

¹⁴³ Ibid, p.113

circumvent the technological measures used by copyright owners to protect their work. It also prohibits breaking encryption or other technologies to gain access to copyrighted material.

The law provides for criminal and civil enforcement of the anti-circumvention provisions. According to Section 108 of the US copyright Act, making single copies and phonorecords of copyrighted works is subject to certain conditions. Most significantly, the library must be open to the public or to specialized researchers, and the copying must not be for commercial advantage.¹⁴⁴ The reproduction in three copies must serve one of these purposes, preservation and security of an unpublished work; replacement of a copy or record that is damaged, deteriorating, lost or stolen when an unused replacement is unavailable on the market; furnishing a single periodical article or a small part of a larger work to a person using it for private study, scholarship or research; furnishing to a person for such private use a copy or record of an entire work, or a substantial part of it if the work is not available at a fair price.¹⁴⁵ A library can protect itself altogether against liability for copying done independently on the premises by library users. It need only provide a photocopy machine for unsupervised use by library patrons and place a notice on the machine that the making of copies is subject to the copyright law.¹⁴⁶

Copyright exceptions and limitations for libraries and archives in US copyright Act is found under section 108 with eligibility requirements. The amendments to section 108 in the DMCA 1998 indicate that libraries and archives should have physical premises and hence virtual library or digital libraries are not eligible to those exceptions and limitations.¹⁴⁷ Copyright exceptions for museums are not allowed currently in US copyright Act even though the fair use exception may be applied. Despite the exclusive right of the copyright owner to sell or otherwise dispose of copies and phonorecords, the first-sale doctrine set forth in section 109(a), gives immunity to subsequent owners who transfer title or lend to others. And despite the exclusive right of public display, the owner of a copy is free by virtue of section 109(c) to display it to

¹⁴⁴ Robert, A. Gorman (2006), *supra* note 122, p.156. To qualify for any of the section 108 exceptions, (1) the library or archives must be open to the public, or at least to researchers in a specialized field; (2) the reproduction and distribution may not be for direct or indirect commercial advantage; and (3) the library or archives must include a copyright notice on any copies provided, or if no notice appears on the original copy, a legend that the work may be protected by copyright.

¹⁴⁵ *Id*

¹⁴⁶ *Id*

¹⁴⁷ *Ibid*, p.157

viewers present at the place where the copy is located. Section 109(b) in turn limits the first-sale doctrine by barring the commercial renting of musical recordings and computer software.¹⁴⁸

Under the US Copyright Act, reproduction by libraries and archives is not infringement provided that the reproduction should fulfill certain requirements.¹⁴⁹

¹⁴⁸Id. See also John, Vaughn and etal, *Campus Copyright Rights and Responsibilities: A basic Guide to Policy Considerations*. Section 110(1) provides that the performance or display of a copyrighted work by instructors or pupils in the course of face to face teaching activities of a nonprofit educational institution are not infringement of copyright, notwithstanding the rights of the copyright owner provided that, the performance or display must be in a classroom or similar place devoted to instruction and performance or display of a motion picture or other audiovisual work or an image from such a work must be from a lawfully made copy (or one that the person making the performance or display had no reason to believe was unlawfully made). Under Section 109(c), the owner of a particular lawfully made copy, or any person authorized by such owner, may display that copy publicly, either directly or by projection of no more than one image at a time, to viewers present at the place where the copy is located but other person who acquired the copy through rental, lease or loan may not perform of publicly display it. Such performance and display is allowed when done under the direct supervision of instructor and made to students enrolled only.

¹⁴⁹ United States Copyright Act 1976, Section 108. According to this section, it is not infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work or to distribute such copy or phonorecord if— (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage; (2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and (3) the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section. The rights of reproduction and distribution under this section apply to three copies or phonorecords of an unpublished work duplicated solely for purposes of preservation and security or for deposit for research use in another library or archives of the type if (1)the copy or phonorecord reproduced is currently in the collections of the library or archives and (2) any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives. The right of reproduction under this section applies to three copies or phonorecords of a published work duplicated solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete, if (1) the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and (2) any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy. A format shall be considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace. The rights of reproduction and distribution under this section apply to a copy, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if (1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose

The rights of reproduction and distribution under Section 108(e) applies to the entire work, or to a substantial part of it, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives. The Act allows the reproduction of protected works in more than one copy for libraries and archives depending on the purpose of the reproduction, the type of work to be reproduced etc. Libraries and archives are allowed to engage in the systematic reproduction or distribution of single or multiple copies or phonorecords of material provided, that nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.¹⁵⁰ Under this condition, the libraries, archives and their employees should not be held liable for the unsupervised use of reproducing equipment located on its premises provided that such equipment displays a notice that the making of a copy may be subject to the copyright law.

The Act under Section 108(3)(b) allows reproduction of unpublished works for library and the rights of reproduction and distribution under this section apply to three copies or phonorecords of an unpublished work duplicated solely for purposes of preservation and security or for deposit for research use in another library or archives. The Act prohibits reproduction, distribution, display or performance if the work is subject to normal commercial exploitation; a copy or phonorecord of the work can be obtained at a reasonable price; or the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights.¹⁵¹ Generally, the Act allows the reproduction of published and unpublished works. The US copyright act under section 117 allows reproduction for interlibrary loan.

The French Intellectual Property Code is enacted on the basis of natural law and personhood theories of copyright with more protection given to the author. The name of French copyright by itself is the law of authors and this shows that emphasis and better protection is given to authors. The Code does not incorporate detailed exceptions for the benefit of users. According to article L122-1, the right of

other than private study, scholarship, or research; and (2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form a warning of copyright.

¹⁵⁰ Supra note 135, pp.35-36

¹⁵¹ Supra note 149, Section 108(h)(2)

exploitation belonging to the author shall comprise the right of ‘performance’¹⁵² and the right of ‘reproduction’¹⁵³.

Any complete or partial performance or reproduction made without the consent of the author or of his successors in title or assigns shall be unlawful. The same shall apply to translation, adaptation or transformation, arrangement or reproduction by any technique or process whatsoever as per article L122-4. Even though libraries and other similar institutions like archives and museums are not allowed to make reproduction for different goals like preservation and carry format shifting of works to meet the demands of persons with disability, the code mention library lending exception under article L133-1. Accordingly, when a work is subject to a publishing contract for its publication and distribution in a book form, the author may not object to the lending of copies of this publication by a library open to the public. There are no provisions dealing exceptions for the benefit of persons with perceptual disability or visually impaired persons who could benefit from copyrighted works if modification or format shifting is not made to the existed contents of works of authors. But, article 5 of the EC Information Society Directive in which French government is a signatory contains list of exceptions on the right of reproduction and the right of public communication including on demand availability right and it covers exceptions like reproduction for personal or private uses, scientific, educational goals including exceptions for libraries, information and social purposes including exceptions for disabled persons provided that such use should be for neither directly nor indirectly commercial ends and right holders receive fair compensation.

The Canadian Copyright Act provides general open ended exceptions to the exclusive rights of copyright holders in the form of fair dealing. Fair dealing reproduction of a copyrighted work is not an infringement for the purposes of research or private study, criticism or review and news reporting if the appropriate

¹⁵² French Intellectual Property Code of 1992, article L122-2. According to article L122-2, performance shall consist in the communication of the work to the public by any process whatsoever, particularly: public recitation, lyrical performance, dramatic performance, public presentation, public projection and transmission in a public place of a telediffused work; telediffusion/distribution by any telecommunication process of sounds, images, documents, data and messages of any kind. Transmission of a work towards a satellite shall be assimilated to a performance.

¹⁵³ Ibid, article L122-3. Reproduction shall consist in the physical fixation of a work by any process permitting it to be communicated to the public in an indirect way. It may be carried out, in particular, by printing, drawing, engraving, photography, casting and all processes of the graphical and plastic arts, mechanical, cinematographic or magnetic recording. In the case of works of architecture, reproduction shall also consist in the repeated execution of a plan or of a standard project.

information of the source is mentioned. In addition to these specific uses, the court balances or determines whether the dealing is fair or not on the basis of the purpose or the character of the dealing, the amount of the dealing, the alternatives of the dealing, the nature of the work and the effect of the dealing on the work.¹⁵⁴ This means the Act use five step test in determining fair dealing. According to the purpose for which the user is using the copyright holder's work, the court should make an objective assessment of the user's real purpose or motive in using the copyright holder's work. Some dealings, even if for an allowable purpose, may be more or less fair than others; research done for commercial purposes may not be as fair as research done for charitable purposes. In assessing the character of the dealing, courts may examine how the works were dealt with. If multiple copies of works are being widely distributed, this will tend to be unfair. If, however, a single copy of a work is used for a specific legitimate purpose, then it may be more appropriate to conclude that it was a fair dealing.

The amount of work used in the work of other may be assessed whether it is fair or not taking in to consideration the purpose of the dealing. For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision. However, if a work of literature is copied for the purpose of criticism, it will not likely be fair to include a full copy of the work in the critique.¹⁵⁵ According to the effect of the dealing on the work fairness assessment criteria, if the reproduced work is likely to compete in the market of the original work, this may suggest that the dealing is not fair.¹⁵⁶ The nature of the work may also determine the fairness of a work reproduced. If a work has not been published, the dealing may be fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work. This is very important in countries like Ethiopian where the cost of publication is high. Finally, the availability of alternatives like the presence of similar work not protected by copyright makes dealing unfair. This can be assimilated with good faith copyright infringement because a person who has an opportunity to use a similar work which is not protected to make reproduction of copyrighted work has not good faith provided that both materials are equally accessible.¹⁵⁷

¹⁵⁴ Kenneth, D. Crews and Jacque, Ramos (2005), Supra note 132, p.11. See also John, S. McKeown(2010),Canadian Intellectual Property Law and Strategy: Trademarks, Copyright, and Industrial Designs(Cambridge University Press Inc, New York), p.291. Alternatives to dealing with the infringed work may affect the determination of fairness. If there is a non-copyrighted equivalent of the work that could have been used instead of the copyrighted work, this should be considered by the court.

¹⁵⁵ Id

¹⁵⁶ Id

¹⁵⁷Id

The fair dealing exception is applicable for library, museums and archives so that those institution can reproduce or make use copyrighted works. According to section 30.1 (1) of the Act, it is not an infringement of copyright for a library, archive or museum or a person acting under the authority of a library, archive or museum to make, for the maintenance or management of its permanent collection or the permanent collection of another library, archive or museum, a copy of a work or other subject-matter, whether published or unpublished, in its permanent collection if the original is rare or unpublished and is deteriorating, damaged or lost, or at risk of deterioration or becoming damaged or lost; for the purposes of on-site consultation if the original cannot be viewed, handled or listened to because of its condition or because of the atmospheric conditions in which it must be kept; in an alternative format if the original is currently in an obsolete format or the technology required to use the original is unavailable; for the purposes of internal record-keeping and cataloguing; for insurance purposes or police investigations; or if necessary for restoration.¹⁵⁸

Reproduction is also allowed in an alternative format if the original is currently in an obsolete is not applicable where an appropriate copy is not commercially available in a medium and of a quality that is appropriate.¹⁵⁹ According to section 30.2(1) of the Act, it is not an infringement of copyright for a library, archive or museum or a person acting under its authority to do anything on behalf of any person that the person may do personally under section 29(1).

¹⁵⁸ Copyright Act of Canada R.S.C., 1985, C. C-42 Last Amended on December 12, 2005, Section, 30.1 (2). See also John, S. McKeown(2010),Canadian Intellectual Property Law and Strategy: Trademarks, Copyright, and Industrial Designs(Cambridge University Press Inc, New York), p.300. The meaning of the word “research” is not restricted by the reference to “private study” and all fair research, whether in a private setting or not is included under section 29 of the Act and hence, Research is not limited to non-commercial or private contexts. Research carried out for profit is not automatically excluded from the exemption. A library, archive, or museum or a person acting under the authority a library, archive, or a museum to make, for the maintenance or management of its permanent collection or the permanent collection of another library, archive, or museum, a copy of a work or other subject-matter, whether published or unpublished, in its permanent collection may take advantage of the exception as provided under section 30.2(1) of the Act provided that such institutions should be nonprofit establishments and the purpose of the use should be if the original is rare or unpublished and is deteriorating, damaged, or lost, or at risk of such a fate; for the purposes of on-site consultation, if the original cannot be viewed, handled, or listened to because of its condition or because of the atmospheric conditions in which it must be kept; in an alternative format if the original is currently in an obsolete format or the technology required to use the original is unavailable; for the purposes of internal record-keeping and cataloguing; for insurance purposes or police investigations; or if necessary for restoration. But some of the acts are prohibited if a copy is commercial available.

¹⁵⁹ Supra note 158

This shows that the institutions can reproduce copyrighted works for research or private study. It is not also an infringement of copyright for a library, archive or museum or a person acting under the authority of a library, archive or museum to make, by reprographic reproduction, for any person requesting to use the copy for research or private study, a copy of a work that is contained in an article published in a scholarly, scientific or technical periodical; or a newspaper or periodical, other than a scholarly, scientific or technical periodical, if the newspaper or periodical was published more than one year before the copy is made pursuant to section 30.2(2) of the act. A library, archive or museum may make a copy under subsection (2) only on condition that the person for whom the copy will be made has satisfied the library, archive or museum that the person will not use the copy for a purpose other than research or private study and a single copy of the work.

According to section 30.2(5) of the Act, a library, archive or museum or a person acting under the authority of a library, archive or museum may do on behalf of a person who is a patron of another library, archive or museum, anything under subsection (1) or (2) in relation to printed matter that it is authorized by this section to do on behalf of a person who is one of its patrons, but the copy given to the patron must not be in digital form. That means the institutions or their employee may reproduce a copyrighted work for customers of other institutions only in analogue format.

It is not also an infringement of copyright for an archive to make a copy of an unpublished work that is deposited in the archive provided that, the archive may only copy the work if the person who deposited the work, if a copyright owner did not, at the time the work was deposited, prohibit its copying; copying has not been prohibited by any other owner of copyright in the work; and the archive is satisfied that the person for whom it is made will use the copy only for purposes of research or private study and makes only one copy for that person.¹⁶⁰ But the reproduction is dependent on the will of the copyright owner during depositing. This may be considered as restriction because the owner depositing may prohibit reproduction of his unpublished works. Allowing format shifting and destroying the copy after five days use without communicated to others are points in which the Ethiopian copyright diverges because the Ethiopian copyright law does not allow format shifting and order destroy of the copy after use and under the Ethiopian copyright law, those institutions are allowed to make or reproduce only on the request of physical persons.

¹⁶⁰Supra note 158, Section, 30.21 (1)

South African Copyright Act 1978 (Act No. 98 of 1978) herein after called the Act contains limited exceptions to copyright protection. The Act also includes fair dealing exception. The Act does not permit the scanning, translation, adaptation or conversion of works for the sensory-disabled or persons with visual impairment without the permission of the copyright holder.¹⁶¹ However, the Constitution of South Africa expressly provides for the right to education, which arguably places a duty on the state to facilitate access to learning materials required to exercise the right to education.¹⁶² In addition to this, the Act also failed to adequately address fair dealing exception in the digitized works of copyright holders. The current set of copyright exceptions and limitations, particularly in relation to educational uses of copyrighted materials are vague, fragmentary and in many instances outdated.¹⁶³ The use of modern technologies for educational purposes, for example in distance education, remains largely unconsidered.¹⁶⁴ This shows that the existing copyright limitations and exceptions are not applicable to distance education and reproduction of digital contents is not regulated.

The Act excludes certain works from the subject matter of protection. According to section 12 (8) (a) of the Act, no copyright shall subsist in official texts of a legislative, administrative or legal nature, or in official translations of such texts, or in speeches of a political nature or in speeches delivered in the course of legal proceedings, or in news of the day that are mere items of press information. According to article 12(1) of the Act, copyright shall not be infringed by any fair dealing with a literary or musical work— (a) for the purposes of research or private study by, or the personal or private use of, the person using the work; (b) for the purposes of criticism or review of that work or of another work; or (c) for the purpose of reporting current events— (i) in a newspaper, magazine or similar periodical; or (ii) by means of broadcasting or in a cinematograph film: provided that, in the case of paragraphs (b) and (c) (i), the source shall be mentioned, as well as the name of the author if it appears on the work. According to article 12 (2) of the Act, copyright shall not be infringed by any fair dealing with a literary or musical work for the purposes of judicial proceedings or by reproducing it for the purposes of a report of judicial proceedings.

¹⁶¹ Andrew, Rens(2010), *Realizing Human Rights in South African Copyright Legislation :Report on Fundamental Rights, and Global Copyright Legislative Best Practice for Access to Knowledge in South Africa*, p.13, available at http://www.apc.org/en/system/files/Model%20Legislation_Advocacy%20for%20A2K.pdf accessed on 12/9/2012

¹⁶² Ibid,p.16

¹⁶³ Andrew, Rens(2010), supra note 161, p.16

¹⁶⁴Id

The fair dealing exception of the Act allows the reproduction of protected works without the authorization of copyright holders. A librarian or library may make a single 'fair dealing' copy for a user, or obtain a copy from another library through interlibrary loan and multiple copies may not be made by a librarian unless permission has been obtained.¹⁶⁵ Digital copying and digitization even for preservation purposes is not permitted without permission.¹⁶⁶ So, without permission one may only reproduce works under these limited exceptions or only if it specifically says it is free to use or if it is in the public domain or if the work is under an open source license like creative commons freely accessible to the public.

The Brazilian copyright law does not incorporate any provision dealing with limitation for the purpose of use by libraries, archive and other similar institutions.

4.4.3.2 Reproduction in Quotations

The Ethiopian Copyright Law introduced quotation exceptions. Article 10 of this law provides that the owner of copyright cannot forbid the reproduction of a quotation from a published work. The quotation shall be compatible with fair practice and should not exceed the extent justified by the purpose. The source and name of the author must be indicated. But the proclamation failed to define fair practice. Reproduction of quotations from the original copyrighted work is allowed without the need to get authorization pursuant to article 10. Here reproduction is allowed with quotation exception only when the work is published. The protection accorded by the proclamation is stated under article 3. It states that works of authors who are nationals of, or have their principal residence in Ethiopia enjoy protection.

The requirement under article 3(1) (b) is to make distinction between Ethiopian and foreign nations. This is because artistic and literary works may be created in Ethiopia by foreign nationals and will be protected when first published in Ethiopia or published in Ethiopia after 30 days first publication abroad. Since publication is not a requirement for protection pursuant to article 6 of the proclamation, quotation as an exception from either from published or unpublished should be allowed otherwise using without the authorization of author or owner of copyrighted work but unpublished may not amount infringement or to the worst it may amount quotation from unpublished is not allowed. But in other jurisdictions, quotation is allowed even form unpublished works as far as publication is not requirement for protection provided that the works is lawfully made available.

¹⁶⁵Andrew, Rens(2010), supra note 161

¹⁶⁶Id

The Ethiopian Copyright law introduces two step tests: fair practice to justify the legibility of quotation exception and purpose of the quotation under article 10(2). The proclamation also requires inclusion of the name of the author or source during quotations. The rationale behind is that direct copying of works of others amounts plagiarism and hence, the source of the quotation should have to be dully acknowledged. The requirement of published work is against access to knowledge because most literary and artistic works in Ethiopia do not published on time due to financial problems. Under the proclamation, reproduction as an exception is allowed if the work is published. But the Berne Convention states that the works should be lawfully made available to the public. So, the proclamation should use lawfully made available to the public so that unpublished works like reports, press conference, lectures political speeches etc could be quoted as far as copyright protection is granted. The absence of the size of quotation from the proclamation enables users to quote freely but without violating the requirements of fair practice and without exceeding the justified purpose.

The US Copyright Act does not contain specific provision dealing with quotation but quotation exception is determined based on the fair use exception and hence, the fair use criteria states above are applicable to this exception.

The French Code allow exceptions for the reproduction of protected works in the form of analyses and short quotations justified by the critical, polemic, educational, scientific or inforamatory nature of the work in which they are incorporated; press reviews; dissemination of works even in their entirety through the press or by broadcasting, as current news, of speeches intended for the public made in political, administrative, judicial or academic gatherings, as well as in public meetings of a political nature and at official ceremonies; complete or partial reproductions of works of graphic or three-dimensional art intended to appear in the catalogue of a judicial sale held in France, in the form of the copies of the said catalogue made available to the public prior to the sale for the sole purpose of describing the works of art offered for sale is allowed pursuant to article L122-6-1 provided that the name of the author and sources are mentioned.

The Brazilian copyright law allows the reproduction of quotations from protected works under article 46. According to article 46(III), the reproduction quotations from books, newspapers, magazines or any other medium of communication of passages from a work for the purposes of study, criticism or debate, to the extent justified by the purpose, provided that the author is named and the source of the quotation is given is

not an infringement. The law is not clear whether quotation from unpublished works is allowed or not. The reproduction of small excerpts of preexisting works of any nature, or of an entire work of visual art, is allowed within the context of a larger work. The reproduction itself must not be the main object of the larger work, and must not interfere with the normal exploitation of the work or cause unjustified harm to the legitimate interests of the author. Quotations from protected works like books, magazines or other publications are allowed for the means of study, criticism or polemics. Since Brazil is Member State to the Berne Convention, the three step test requirement stated under article 9 for unauthorized reproduction should be satisfied.

The South Africa Copyright Act under its fair dealing exception allows reproduction in quotations. The fair dealing exception is not defined in the act. In addition the criteria to determine fair dealing are not provided in the Act. According to article 12(3)of the act, the copyright in a literary or musical work which is lawfully available to the public shall not be infringed by any quotation there from, including any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work. But the extent of use should be justifiable as stated under article 12(4) even though which use is justifiable is debatable. That means, the copyright in a literary or musical work shall not be infringed by using such work to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching provided that such use shall be compatible with fair practice and that the source shall be mentioned, as well as the name of the author if it appears on the work and hence, the fair dealing exception under Section 12(b) of the Act of could apply to the above situation, if it is specifically for purposes of criticism or review, or commentary of the work. However, if the teacher takes the whole work as it is and translates it into a more visual format without permission, rather than picking sections and commenting on each of them, then this would be infringement.¹⁶⁷

¹⁶⁷ Denise, Rosemary Nicholson, *Copyright: Are Deaf Persons Getting a Fair Deal?*(Copyright Services Librarian, University of the Witwatersrand, Johannesburg), p.4, available at available at http://www.westerncape.gov.za/Text/2012/4/7_jf2012-copyright.pdf accessed on 12/10/2012

Using the whole work though, or large sections of the work, for example, chapter for chapter, without permission, would be copyright infringement, and if not acknowledged, it would also be plagiarism.¹⁶⁸ The Act does not distinguish whether quotation is allowed from both published and unpublished works or not. The act allows reproduction of a work shall also be permitted in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright pursuant to section 13 of the Act.

4.4.3.3 Importation for Personal Use

Importation means bringing in from abroad literary and artistic works. Importation has usually commercial ends. Ethiopian Copyright Law acknowledges control over importation of originals or copies of works as part of the bundle of rights granted to copyright owners. By doing so, Ethiopian Copyright Law has adopted the principle of national exhaustion and this negatively affects access to knowledge.¹⁶⁹ There are two types of doctrines of exhaustion namely international and national exhaustion. A country which adopts the principle of international exhaustion allows the importation of copyright works from abroad if and only if such works are marketed in any country abroad. But if a country opts for the principle of national exhaustion such is not possible.¹⁷⁰ That means, if a country opts for the principle of national exhaustion, it is not possible to make parallel importation of marketed copyrighted works without the consent of the copyright holder. According to national exhaustion, IPRs only exhaust when the first to sale or marketing of the goods and service occurs within the territory of the concerned country.¹⁷¹ Article 19 of the Ethiopian copyright law also shows there is principle of national exhaustion. Accordingly, where a copy of a published work has been sold to the public such a copy may, without authorization and payment of remuneration, be

¹⁶⁸ Denise, Rosemary Nicholson, supra note 167

¹⁶⁹ Mandefro Eshete(2010), Supra note 120, p.32

¹⁷⁰ Mandefro Eshete and Mola Mengistu (2011), Supra note 19, pp.181-182. But international agreements like TRIPS under article 6 makes it optional by which member states can opt either while Ethiopian copyright adopts national exhaustion. And hence, a book published and marketed in USA could not be imported to Ethiopia by a trader without the consent of the copyright holder.

¹⁷¹ Fikremarkos Merso (2012), Supra note 40, p.101. See also Kuala, Lumpur(2005), Copyright and Access to Knowledge: Policy Recommendations on Flexibilities in Copyright Laws (Consumers International Asia Pacific Office), p.5. Copyright law should incorporate provisions with flexibility to allow parallel importation of artistic and literary works without the authorization of copyright holders once placed on the market of one country, which is subsequently imported into a second country without the permission of the copyright owner in the second country. For instance, the copyright owner of a book produced in India places the book on the market in India. A trader buys 100 copies of the book from India and imports them to China without the permission of the copyright owner of the book in China.

redistributed by means of sale. This shows that first the work should be sold to the public by the copyright holder so that others can make redistribution of the work. This shows Ethiopia opts to principle of national exhaustion.

For the applicability of this doctrine, works published abroad should be marketed in Ethiopia and the availability of such works in the market of some foreign countries is not enough. But this does not mean that importation is totally prohibited because, article 15 allows importation of original works of copyright holders for personal use. But Importation for commercial or out of personal use is prohibited while it is allowed under article 19 after lawful sale by the copyright holder. Ethiopian Copyright Law acknowledges importation of original or copies of the work as part of the bundle of rights granted to copyright owners. By doing so Ethiopian Copyright Law has adopted the principle of national exhaustion.¹⁷² The reason why Ethiopian laws follows this principle is not clear because principle of international exhaustion would have tremendous benefits had it been adopted by the Ethiopian copyright law. But principle of international exhaustion may be ignored to encourage national publications.

Ethiopian Copyright Law in Article 15 allows the importation of a copy of a work by a physical person for his own personal purpose. This means that individuals traveling outside the country have the right to import books in their own luggage from places they are widely available and relatively cheap. According to Article 15 of the Proclamation, importation for personal purposes of single copy is only applicable to physical person and hence, artificial persons such as universities, libraries could not benefit from this exception. In addition to this, different non-profit and non-governmental organizations such as the World Blind Union or WBU, Knowledge Ecology International called KEI and other similar organization were established so far in different corners of the world to bring better outcomes and solutions in the allocation and distribution of resources to achieve social justice in the world or in a specified region. In the sophistication of trade by artificial persons, restricting only to personal use importation by physical persons is not justifiable.

The exclusive rights of distribution and importation of copyright owners should be limited to prior to the first sale and owners should not have right to control the distribution and importation of their works once lawful sale is made by the owners. Is the prohibition of importation or distribution after the lawful first sale

¹⁷² Mandefro Eshete and Mola Mengistu(2011), Supra note 19, p.182

applicable for both works done in Ethiopia and abroad by Ethiopian nationals? According to article 3(1) of the Ethiopian copyright proclamation, the provisions of this Proclamation concerning the protection of works shall apply to: works of authors who are nationals of or have their principal residence in Ethiopia; works first published in Ethiopia and, works first published abroad and also published in Ethiopia within 30 days, irrespective of the nationality or residence of their authors and audiovisual works, the producer of which has his headquarters or principal residence in Ethiopia. If we use the first sale doctrine, for example, a book is sold in USA but not in Ethiopia but an Ethiopian in USA purchase it and sale it to his coworker in Ethiopia and the coworker resale it to his friend. Is there copyright infringement because the book is not lawfully sold in Ethiopia?

To make copyright law workable, the sale of a work in one country should suffice the exhaustion doctrine and importation and distribution should not be prohibited on works in every corner of the world. Copyrights cannot be used to prevent parallel imports and hence, copyrights do not grant protection beyond that first sale making them unsuitable to halt the importation of original products. This is especially important to satisfy interests of persons with disability because making accessible works is costly and time taking so that importation and distribution may be efficient by avoiding duplication of effort, time and other scarce resources. This encourages cross border sharing of technology, knowledge and information in accessible formats.

The application of the international first to sale doctrine avoids importation and distribution barriers to the free circulation of materials with special formats. For example if there are about 1 million Ethiopians who speak Amharic at home in USA and if those people want to learn Amharic, they have to get access to works in Amharic and hence their interest can be satisfied if USA allows international exhaustion doctrine because once those works sold in Ethiopia, it is possible to make importation to USA. Limiting the first to sale doctrine certainly hampers libraries functions because rental, lending and gift services are dependent on the doctrine of first to sale as such functions are part of distribution. This may also affect the function of museums, archives and other similar institutions to carry public display of protected works if the doctrine is not allowed. The doctrines of exhaustion of rights and parallel importation allow protected goods to be

imported at a cheaper price from a foreign market.¹⁷³ The flexibility of the TRIPs Agreement as stated under article 7 states that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology and hence, Ethiopia should allow parallel importation. The Berne Convention and TRIPs Agreement do not address this exception.

Even though the US Copyright Act under section 106 provides copyright holders exclusive rights of distribution, once a physical copy of a work has been lawfully distributed under the copyright law, the right for further distribution or the right to exclude further distribution is limited by the First to sale doctrine. Once the copyright owner has parted with the copy of a work, the purchaser can then lawfully distribute that physical copy without further authorization from the copyright holder. The first sale doctrine was at one time judge made law. It was approved by the U.S. Supreme Court back in 1908, in a decision holding that the resale of a book could not be stopped by the copyright proprietor.¹⁷⁴ In the 1976 Copyright Act, the first sale doctrine became Section 109(a), which states:

"Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner is entitled without the authority of the copyright owner to sell or otherwise dispose of the possession of that copy or phonorecord". This establishes that a person owning a lawfully made copy has the right to sell it or dispose of it. Section 602(3) of the Act also allows importation by libraries for scholarly, educational, or religious purposes and not for private gain.

The Canadian copyright Act contains provisions granting exclusive rights of distribution to copyright holders. Section 27(2)(e) of the Act provides that it is an infringement of copyright for any person to import into Canada a copy of a work, for the purpose of selling or distributing the work, that the person knows would infringe a copyright if it had been made in Canada by the person who made it. But precedents in Canada show that there is possibility of parallel importation. Grey marketing, or parallel importation, is the

¹⁷³Alhaji, Tejan-Cole, Flexibilities In The TRIPs Agreement and its Impact on National Intellectual Property Policy, p.6, available at <http://www.belipo.bz/wp-content/uploads/2011/12/TRIPS-FLEXIBILITIES.pdf> , accessed on 12/9/2012

¹⁷⁴ Parallel Importation of Copyright Works in USA available at <http://www.supnik.com/coprpar.htm> accessed on 26/11/2012

importation of legal goods outside of distribution networks authorized by the producer and in its 1984 decision in *Consumers Distributing Company Limited v. Seiko Time Canada*, the Supreme Court of Canada made it clear that the law of passing off could not be used to stop the grey marketing of goods in Canada.¹⁷⁵ The Court wrote that grey marketing was not inherently illegal and stated that consumers should be allowed to benefit from the lower prices and increased choices that more open competition in the marketplace would bring.¹⁷⁶ As stated by the Supreme Court, the apparent purpose of Section 27(2)(e) is to give Canadian copyright owners an added layer of protection where the Canadian copyright owner is not the owner of copyright in foreign jurisdictions it protects Canadian copyright owners against parallel imports by deeming such importation an infringement of copyright even where the imported works do not infringe copyright laws in the country in which they were made.¹⁷⁷

According section 44 of the Act, copies made out of Canada of any work in which copyright subsists that if made in Canada would infringe copyright and as to which the owner of the copyright gives notice in writing to the Canada Border Services Agency that the owner desires that the copies not be so imported into Canada, shall not be so imported.

The French Copyright Law provides the possibility of parallel importation of copyrighted works on the basis of first to sale doctrine. According to Article L122-6(3), the placing on the market for consideration or gratuitously, including rental, of the software or of copies thereof by any process exhausts right holders right to control redistribution. The first sale of a copy of software on the territory of a Member State of the European Community or of a State party to the agreement on the European Economic area by the author or with his consent shall exhaust the right of placing on the market of that copy in all Member States, with the exception of the right to authorize further rental of a copy.

¹⁷⁵ Teresa, Scassa(2006), Using Copyright Law to Prevent Parallel Importation: *A Comment on Kraft Canada, Inc. v. Euro Excellence, Inc.* *LA REVUE DU BARREAU CANADIEN*, Vol.85, p.410. See also John, S. McKeown(2010),*Canadian Intellectual Property Law and Strategy: Trademarks, Copyright, and Industrial Designs*(Cambridge University Press Inc, New York), pp.283-284. Parallel importation refers to books which were legitimately published in their country of origin but have been imported into Canada without the consent of the Canadian rights owner. Section 27.1 of the Act contains two potential claims for infringement relating to the importation of books. The section only applies where there is an exclusive distributor of the book and the acts described in the section take place in the part of Canada or in respect of the particular sector of the market for which the person is the exclusive distributor.

¹⁷⁶ Id

¹⁷⁷ Teresa, Scassa(2006), supra note 175, p.410

The Brazilian copyright law does not deal with importation of protected works. The copyright act under title I, article 4 provides that legal acts relating to copyright shall be interpreted restrictively. This creates scholarly debate on the interpretation of copyright limitations and exceptions. Some scholars argue that copyright limitations and exceptions provisions should be strictly interpreted. In Brazilian copyright literature is the idea that lists of exceptions and limitations are to be strictly construed, with absolutely no room for judges to decide on broader principles. This is because strict interpretation is logically required, since exceptions and limitations by definition deals with exceptions to the general rule. On the other extreme, there are scholars who argue provisions dealing with exceptions and limitations should be broadly interpreted to balance the contending interests of copyright holders and users.

Brazilian law does not explicitly call for strict interpretation of exceptions and limitations. According to those scholars who argue pro broader interpretation, copyright itself is an exception to the rule of public access to content and public domain and hence, it is possible to conclude that exceptions and limitations for public use should be interpreted from the broadest perspective possible. But currently, the Government of Brazil proposed a law which penalizes copyright holders who hinder or impede lawful use of protected works such as fair use or obstructs the use of work that has already fallen into the public domain. This experience should be taken to the IP reform in Ethiopian to amend the existing IP laws.

The South African copyright Act prohibits the importation of protected works without the permission of the copyright holder.¹⁷⁸ It shall be considered as an infringement when any person who, without the license of the owner of the copyright and at a time when copyright subsists in a work imports an article into South Africa for a purpose other than for his private and domestic use, sells, lets, or by way of trade offers or exposes for sale or hire in South Africa protected work.

4.4.3.4 Non-voluntary License for Reproduction, Translation and Broadcasting

Non-voluntary license is also called compulsory license. Article 7(1)(a), (b) and (h) of the Ethiopian Copyright Law recognizes reproduction, translation and broadcasting of work as part of the author's bundle of economic rights. Despite the recognition of these rights, Article 17(1) of the same law empowers the Ethiopian Intellectual Property Office with the right to grant (notwithstanding any opposition by the copyright owner, heir, or legatee) a license to authorize the reproduction, translation, or broadcasting of a

¹⁷⁸ South African Copyright Act No. 98 of 1978, Section 23(1)

published work.¹⁷⁹ Article 17 appears to create a sweeping compulsory licensing authority. However, the author's inquiries at the institution have made it clear that the office does not have such powers.¹⁸⁰ The principle is that through contract, copyright holders may grant license to users to use their works voluntarily. But in certain cases, an organ with legal power may issue mandatory license to users without the permission of the copyright holder.

Taking in to consideration the overall importance of literary and artistic works in a given country, the dissemination of such works is crucial. In doing so, different factors may hinder the public accessibility of such works like language barriers or problem of accessibility for different reasons. Even though the author or owner of such works has exclusive economic right to reproduce or translate, involuntary license may be issued for other persons to make such works available through reproduction or translation. Example a book published in English may not be accessible to Amharic speakers. The author of the book is English speaker who could not translate his work in to Amharic and hence, competent authority may issue compulsory license to other persons for translation. In Ethiopia, compulsory license may be issued for the reproduction, broadcasting or translation of copyrighted works of others to other persons for public interest according article 17(1) of the proclamation. The license may also serve commercial or non commercial ends.

The Berne convention allows issuance of compulsory license for commercial purpose in the appendix.¹⁸¹ According to article IV(1) of the appendix of the Berne Convention, a license under Article II or Article III may be granted only if the applicant, in accordance with the procedure of the country concerned, establishes

¹⁷⁹ Mandefro Eshete(2010), Supra note 120, p.33

¹⁸⁰ Id

¹⁸¹ According to article II (9)(a)of the Appendix of the Berne Convention, a license to make a translation of a work which has been published in printed or analogous forms of reproduction may also be granted to any broadcasting organization having its headquarters in a country referred to in paragraph (1), upon an application made to the competent authority of that country by the said organization, provided that all of the following conditions are met: the translation is made from a copy made and acquired in accordance with the laws of the said country; the translation is only for use in broadcasts intended exclusively for teaching or for the dissemination of the results of specialized technical or scientific research to experts in a particular profession; the translation is used exclusively for the purposes referred to in condition through broadcasts made lawfully and intended for recipients on the territory of the said country, including broadcasts made through the medium of sound or visual recordings lawfully and exclusively made for the purpose of such broadcasts and all uses made of the translation are without any commercial purpose. But the compulsory license under the Ethiopian copyright law possible for both commercial and non commercial purposes as far as the law does not put any prohibition.

either that he has requested, and has been denied, authorization by the owner of the right to make and publish the translation or to reproduce and publish the edition, as the case may be, or that, after due diligence on his part, he was unable to find the owner of the right. Accordingly, the person who wants to make translation or reproduction should request permission to the copyright holder and on refutation, the person may apply to an authority empowered to grant license. But the Ethiopian copyright law does not follow this procedure. It only indicate under article 17 that the office may grant license to authorize the reproduction or translation or broadcasting of a published work with payment of fair compensation even though formality of assignment and scope of license are stated under articles 23 and 24. What would happen if a translation of a work is published by the owner of the right of translation or with his authorization at a price reasonably related to that normally charged in the country for comparable works after license is granted? Shall the license agreement terminated or subsist? This issue is ignored under the Ethiopian copyright law.

Article 11bis (2) and Article 13(1) of the Berne Convention provides legal basis for compulsory licensing at international level to create international harmonization of compulsory license. Members States to the Berne Convention may determine or impose conditions under which exclusive rights may be exercised which can be through compulsory licensing. The Convention states that member states are free to determine the conditions under which certain exclusive rights may be exercised in their national laws. They may also provide for the minimum requirements to be set when compulsory licenses are applied, such as that they must not prejudice copyright holders right to get fair compensation and prejudicial to the moral rights of authors. According to the provisions of the Berne Convention, the fair or equitable remuneration may be determined by the agreement of copyright holders and the party seeking license or in the absence of agreement, it should be fixed by competent authority established by the law.

The convention is flexible as it left the conditions of licensing to be determined by national laws. According to article 11bis (3), the permission granted in accordance with sub article 1 of this article shall not imply permission to record by means of instruments recording sounds or images, the work broadcast, it shall, however, be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts.

The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorized by such legislation. Authors of literary or artistic works shall have the exclusive right of authorizing the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced or the public performance and communication to the public by wire of the works thus adapted or reproduced and hence, there is no compulsory license as per Article 14(3) of the Berne Convention. But Ethiopian copyright law provides general possibility of compulsory licensing.

The incorporation of public interest as a rationale for issuance of compulsory license enables us to interpret the article whether such involuntary license is applicable for library use, education, for commercial or non commercial purpose. The copyright holder is free to license economic rights in whole or part according article 23 of the proclamation. This can be considered as voluntary license. But the Ethiopian copyright law deals only with compulsory license¹⁸² without incorporating adaptation of works for the benefit of persons with disability. This general limitation thus entails transformations into different formats, recitations for audio purposes, or any other way in which a work must be adapted in order to make it accessible. This is an exception that must be more generally incorporated into international and national copyright laws. It is not only a matter of access but of fundamental human rights as well.¹⁸³

The US Copyright Act incorporates provisions dealing with compulsory license for the distribution and other acts of copyrighted works without the permission of copyright holders. In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section¹⁸⁴ as stated under section 115 of the Act. When phonorecords of a nondramatic musical work have

¹⁸² EU Information Society Copyright Directive 2001/29/EU: Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, Article 5(3) (b)

¹⁸³ Ruth, L. Okediji(2006), Supra note 85, p.22

¹⁸⁴ Supra note 135, p.81. See also, John, Vaughn and etal, Campus Copyright Rights and Responsibilities: A basic Guide to Policy Considerations, p. 12. Licenses may be exclusive or nonexclusive. Exclusive licenses grant the right to exercise all or part of the copyright rights to a single person or entity. Exclusive licenses are treated under the law as transfers of ownership of the licensed rights. Thus, they must be in writing and they include the right to sue for infringement. A licensee under a non-exclusive license typically is not the only person or entity granted the right to do the specified actions. A non-exclusive license need not be in writing; it may be oral. But this is not clear whether it is for contractual or compulsory.

been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery.¹⁸⁵ On the other hand, there is what we called it negotiated license or voluntary license. Section 115 of the Act provides a compulsory license to make and distribute phonorecords once a phonorecord of a work has been distributed to the public in the United States under authority of the copyright owner, subject to certain terms and conditions of use. Such a license includes the right of the compulsory licensee to make and distribute, or to authorize the making and distribution of, a phonorecord of a nondramatic musical work by means of a digital transmission, which constitutes a digital phonorecord delivery. As stated under section 115 of the act, compulsory license does not cover making and reproducing of a sound recording rather, it covers the reproduction and distribution of musical compositions.

A compulsory license is available to anyone as soon as phonorecords of a nondramatic musical work have been distributed to the public in the United States and its territories under the authority of the copyright owner. A compulsory license can be obtained only if the primary purpose in making the phonorecords is to distribute them to the public for private use. Cable television and other retransmissions are also subject to compulsory license. Section 111 of the Act creates a compulsory license for cable television retransmissions of copyrighted programs that are shown on broadcast television. Otherwise, such retransmission would be an infringing public performance of the program.

According to section 116 of the US Copyright Act, negotiated licenses apply to any nondramatic musical work embodied in a phonorecord and any owners of copyright in works to which this section applies and any operators of coin-operated phonorecord players may negotiate and agree upon the terms and rates of royalty payments for the performance of such works and the proportionate division of fees paid among copyright owners and may designate common agents to negotiate agree to pay or receive such royalty payments.

¹⁸⁵ Supra note 135, p.81

French intellectual property code allows compulsory license for the reproduction of protected works. According to Article L133-2 of the Code, there exists license for the distribution of protected works with payment of remuneration to copyright holders and the payment shall be collected by one or several collection and distribution companies of royalties who are governed by Title II of Book III and licensed by the Minister responsible for culture as provided under article L133-1. The compulsory license scheme of the EU is applicable because France is member country to the Union.

The Brazilian copyright law put limitations on the exclusive rights of copyright holders on the distribution and other activities on protected works in the form compulsory license. The Brazilian copyright Act allows the transfer of ownership which enables use by third parties or non owners as stated under article 49. Accordingly, author's rights may be wholly or partly transferred to third parties by the author or by his successors, in a universal or individual transfer effected in person or through representatives with special powers, by licensing, concession, assignment or any other means recognized by law, subject to the limitations set forth. This is because the licensing scheme is with time limit if not determined by contract by the parties. According to article 87, the owner of the economic rights in a database shall enjoy the exclusive right to authorize or prohibit complete or partial reproduction by any means or process; translation, adaptation, rearrangement and any other modification; distribution of the original or copies of the database, or communication of the database to the public and reproduction, distribution or communication to the public.

With respect to neighboring rights, the Brazilian copyright law did not provide limitations on the exclusive rights of performers, broadcasting organizations and phonogram producers. The act provides exclusive right to authorize or to prohibit to performers. The law provides exclusive rights to authorize or prohibit for performers, producers and broadcasting organizations under article 90, 93 and 95 respectively and hence, compulsory license is not allowed to related rights.

The use of protected works is permitted for the purpose of producing judicial evidence pursuant to article 46, VII of the law. This exception is unique in which the Ethiopian copyright law and other international instruments did not incorporate. This is not regulated under the Ethiopian copyright law and hence, the writer recommends such exceptions and limitations to be incorporated in the new copyright law if the existing is to be amended. The law also allows the reproduction of protected works found in public place

pursuant to article 48. This exception enables users to take lesson on it through painting exercise. This two limitations on the exclusive rights of copyright holders are absent in the Ethiopian copyright law.

The Canadian copyright Act also incorporates copyright exemptions in the form of compulsory license. There are provisions in the Act which forces the copyright holder to allow others to use their work at a specified royalty rate and hence, the copyright owner does not have control over the use of their work by others, but is nevertheless compensated when that work is used.¹⁸⁶ A compulsory license is also known as statutory license or mandatory collective management which provides that the owner of copyright licenses the use of his/her rights against payment either set by law or determined by agreement.¹⁸⁷

The South African copyright Act allows the reproduction of protected works for the purpose of broadcasting. According to section 12(5)(a) of the act, the copyright in a literary or musical work shall not be infringed by the reproduction of such work by a broadcaster by means of its own facilities where such reproduction or any copy thereof is intended exclusively for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of six months immediately following the making of the reproduction, or such longer period as may be agreed to by the owner of the relevant part of the copyright in the work. According to section 12(5)(b) of the Act, any reproduction of a work made under paragraph (a) may, if it is of an exceptional documentary nature, be preserved in the archives of the broadcaster but shall be subject to the provisions of this Act not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work. In addition to this, the copyright in a lecture, address or other work of a similar nature which is delivered in public shall not be infringed by reproducing it in the press or by broadcasting it, if such reproduction or broadcast is for an informatory purpose as stated under section 12(6)(a) of the act.

Article 12(11) of the Act also allows translation of work even though it does not deal with compulsory license. This exception is similar with article 13 of the Ethiopian copyright law but the difference lies on the applicability of the exception for published and unpublished copyrighted works, rebroadcasting and the duty to destroy after six months.

¹⁸⁶ Jay, Makarenk(2009), Copyright Law in Canada: An Introduction to the Canadian Copyright Act available at <http://www.mapleleafweb.com/features/copyright-law-canada-introduction-canadian-copyright-act#history> accessed on 2/7/2012

¹⁸⁷ Id

The copyright in an article published in a newspaper or periodical, or in a broadcast, on any current economic, political or religious topic shall not be infringed by reproducing it in the press or broadcasting it, if such reproduction or broadcast has not been expressly reserved and the source is clearly mentioned pursuant to section 12(7) of the Act. According to Section 23 (1) of the act, copyright shall be infringed by any person, not being the owner of the copyright, who, without the license of such owner, does or causes any other person to do any act which the owner has the exclusive rights to do or to authorize. This shows the possibility of making distribution or reproduction of protected works when license is granted.

4.4.3.5 Reproduction for Personal Use

Should personal use be defined in the Ethiopian proclamation or determined case by case basis? The Ethiopian copyright law does not define personal use. Personal use can be defined as use of given protected work for oneself with the exclusion of others, or consuming copyrighted work in private settings. According to article 9(1) of the proclamation, the copyright holder or author is not required to permit or give authorization for utilization of copyrighted works for personal objectives. The law limits also who is to use copyright work for personal use only to be physical persons. The law also further limits the types of works to be used without the authorization of the author or copyright holder by indirectly listing copyrightable works not allowed to be used for personal purpose. The law also further put restrictions or limitations on the extent of personal use.

The personal use of protected works should not conflict with or unreasonably harm the normal exploitation of the work or the legitimate interest of the author. The personal use of protected works should not affect the economic interest of the author or copyright holder as stated under article 9(2)(e). Article 9(1) of the proclamation allows reproduction of a single copy by a physical person exclusively for personal purposes. This means a person could not make single copy for other person. But as far as the possibility of reproduction does not affect the economic interest of the copyright holder, making a single copy for the personal use of other person should be allowed because the other person may not be in a position of reproducing the copy. Second the requirement of physical person is not sound and it is not clear why the legislature used it because artificial person may make a single copy and donate to a user for personal use.

Article 9(2) of the article prohibits the reproduction of certain category of protected works like of a work of architecture in the form of a building or other construction; musical work in the form of notation; or of the original or a copy made and signed by the author of a work of fine art, database in digital form. But this

prohibition is not sound as far as the personal use reproduction is compatible with the test stated under article 9(e). Because if the reproduction does not conflict with or unreasonable harm the normal exploitation of the work or the legitimate interest of the author, reproduction in a single copy for personal use should have to allowed. There is no justifiable reason to prohibit reproduction of digital data base for personal use which can be for research or other purpose based on fair practice. This indirectly prohibits translation of copyright work for personal purpose or other exclusive economic rights of the owner or author. The personal use exception should also extend to digital contents and hence, copyright users can have better access and up to date knowledge and information in the information age.

The Copyright Act of the US allows private use reproduction on the basis of fair use and under the exceptions reproduction by libraries and archives as provided under section 108 of the act.

The French Intellectual Code allows reproduction of protected works for the private and personal use of the copier but not applicable to works of art, computer programs (where a single safeguard copy is allowed according to article L122-6-1-II. According to article L122-5 , once a work has been disclosed, the author may not prohibit reproductions reserved strictly for the private use of the copier and not intended for collective use, with the exception of copies of works of art to be used for purposes identical with those for which the original work was created and copies of software other than backup copies made in accordance with paragraph II of Article L122-6-1 as well as copies or reproductions of an electronic database on condition that the name of the author and the source are clearly stated. Article L311-1 states that the authors and performers of copyright works should be entitled to remuneration for the reproduction of those works on the basis of private copying. That means copies or reproductions reserved strictly for the private use of the copier and not intended for collective use, with the exception of copies of works of art to be used for purposes identical with those for which the original work was created and copies of software other than backup copies as well as copies or reproductions of an electronic database are subject to equitable remuneration. In addition to this, reproductions strictly reserved for private use by the person who has made them and not intended for any collective use are subject to remuneration as stated under article L311-1 regardless of the type of use.

The Brazilian copyright law was enacted based on continental legal tradition orientation and incorporates specific limitations to copyright protection which grant exclusive rights to copyright holders. According to

article 5 of the act, reproduction means making one or more copies of a literary, artistic or scientific work or phonogram in any tangible form, including any permanent or temporary storage by electronic means or any other means of fixation that may be devised in the future. The Brazilian copyright law allows the reproduction of protected works for private use. The reproduction in one copy of short extracts from a work for the private use of the copier, provided that it is done by him and without gainful intent is not copyright infringement according to article 46(II). According to this article, reproduction should be made personally and the use of the reproduction should be for non commercial ends. According to article 47, paraphrases and parodies shall be free where they are not actual reproductions of the original work and are not in any way derogatory to it. Finally works permanently located in public places may be freely represented by painting, drawing, photography and audiovisual processes as provided under article 48 which may considered as private or personal use.

The Canadian copyright Act allows the reproduction of protected works for private use. The principle of fair dealing is also applicable to reproduction of protected works for private study, scholarship and research. According to section 29 of the Act, fair dealing for the purpose of research or private study does not infringe copyright. In addition to this, section 30.2 (1) of the Act states that, it is not an infringement of copyright for a library, archive or museum or a person acting under its authority to do anything on behalf of any person that the person may do personally under section 29 or 29.1 which may include reproduction for personal use.

Fair dealing exception Section 12 of the South African copyright Act allows copying without permission for research or private study, personal or private use, criticism or review, reporting current events without distinguishing whether private study, personal or private use is for commercial or non commercial ends. Fair dealing is not defined in the Copyright Act, but the generally accepted amount for reproduction of a work for the above purposes is 10% or one chapter of a book, one journal article from an issue, one case study, or one law report.¹⁸⁸ However, copying one page may not be fair, if it is the essence of the work. Users need to use their discretion when using other people's copyright works. Section 13 of the act allows teachers to give a limited number of single hand-outs to each learner in a classroom, per course, per term, without permission. A learner may make a single fair dealing copy for a teacher, for research, teaching or preparation for teaching.

¹⁸⁸ Andrew, Rens, Supra note161,p.16

4.4.3.6 Reproduction for Teaching

The meaning of teaching is not defined in the proclamation and there is possibility of availing a defense against suits of copyright infringement on the basis of teaching exceptions and limitations. According to article 11(1) of the proclamation, the owner of copyright cannot forbid, without exceeding fair practice and the extent justified by the purpose, a reproduction of a published work or sound recording for the purpose of teaching. The proclamation allows the teaching use exception without the authorization of owner with two step test. The teaching use exception should be based on fair practice and justified by the purpose of the reproduction. Fair practice is not defined in the proclamation. But it can be defined as fair use with reasonable and justifiable manner otherwise on case by case basis. The teaching exception under the proclamation does not distinguish whether copying of reproduction is allowed for both public and private teaching. Since the proclamation is salient in this regard, it is possible to make reproduction for teaching purpose by educational institutions established for profit.

The beneficiaries of teaching exceptions, the type of teaching; distance, face-to-face, on line etc, the purpose of teaching/commercial or noncommercial etc is not indicated in the proclamation. It seems open for all teaching purpose either private or government education institution which can be formal or informal. But other jurisdiction limit reproduction for teaching under the test of fair use, with specified beneficiaries and area of use let only in the premise of the non commercial educational institution. But this may have problem because currently home learning is developed. The fair practice exception serves as exemption where by users can use works of others without the permission of copyright holder in certain cases even though the Ethiopian copyright law does not define it. This leaves high discretional power to courts to determine which use is fair practice or not on case by case basis.

Therefore, fair practice is a limitation on copyright monopoly to further on the utilitarian objective of copyright law. In applying a fair practice doctrine to every particular use, it has to serve the copyright objective of stimulating productivity and learning without excessively damaging the incentive for creativity and public interest. Some scholars consider fair practice, fair use and fair dealing as similar but they have difference in depth and applicability. Even the fair dealing exceptions vary from jurisdiction to jurisdiction. The teaching exception is broader as it does not limit the type of teaching and hence, knowledge seeking activities which can be formal or informal or conventional or face to face or training are all under the category of teaching and hence, one can avail these as a defense against infringement claims. Making photo

copy, printing, scanning, compilations of different materials for a given course a reference, storing in website, burning in to CD or in other manner or form may be considered as reproduction for the purpose of teaching. Students and instructors in private educational establishments may use the teaching exception to reproduce copyrighted works.

The teaching exception under the Berne Convention is provided under article 10 under the general term called utilization. In addition, the teaching exception can be inferred from article 13 of the TRIPs Agreement. There is no reason to conclude that digital means and online teaching or any other means of distance learning should be left out of the scope of copyright exceptions. This is because the word 'utilization' is neutral enough to cover not only reproduction in all formats but also communication to the public and the making available to the public. On the other hand, there is no doubt that digital uses may be included, albeit perhaps subject to different conditions depending on the technology used since digital teaching uses may pose far greater risks for the author's interest, than face-to-face teaching. The use of the word utilization may be to enable educators to take full advantage of the new means of dissemination provided by modern technology and there is no reason today to argue that it should not extend to digital fixations of works.

The term utilization of copyrighted works may encamp reproduction, distribution, communication to the public and making available as well as translation even though, it has left to the discretion of member states. The expression by way of illustration for teaching stated under article 8 of the Berne Convention is not different from educational purposes stated under article 10(2) of the Brussels Act. In this respect the BC failed to clarify whether such exceptions and limitations are with remuneration to copyright holders or not and whether those exceptions are mandatory or not while other states provide mandatory exceptions and limitations.

The absence of a set of minimum exceptions and limitations to copyright in the Berne Convention reflected the practice and understanding that the precise nature of such limitations and exceptions was to be left to the reserved powers of the State to protect the welfare interests of its citizens. Consequently, minimum rights were developed internationally through consensus, while specific exceptions and limitations remained the domain of the state. Moreover, the conditions of education in many developing countries may not fall within the local exceptions for fair use or educational use. For example, under local South African copyright law,

educational exceptions are limited to classroom use and materials have to be used inside a classroom and hence, distance education is not covered by the benefits of exceptions.

The fair use exception of the US copyright Act allows reproduction of protected works for private use. The 1976 copyright act of the United States with respect to education is amended by Technology, Education and Copyright Harmonization Act of 2002, hereafter called the TEACH Act. The TEACH Act was passed in November 2002 as an amendment to the face-to-face performance and display exemption of the Copyright Act of 1976.¹⁸⁹ It covers distance education as well as face to face teaching which has an online component. Distance education exemption under US copyright Act permits accredited nonprofit institutions to transmit copyrighted works during distance education programs without having to obtain the prior permission of the copyright holder, under certain limited conditions and in accordance with specified statutory procedures.¹⁹⁰ In non-classroom based instruction as per section 110(2) includes a provision for the transmission of materials in distance education uses. Early distance education programs were mail based courses for self study but with the advent of television, many courses were broadcast in closed circuit formats and the technology behind the internet now allows for real-time video and audio streaming for students to participate in educational exchanges.¹⁹¹ Only a governmental body or an accredited nonprofit educational institution can invoke the distance education exemption.¹⁹²

Section 110(2) further establishes conditions for a permitted use of a display or performance. First, the performance must be “directly related and of material assistance to the teaching content of the transmission. It allows instruction via digital networks so that instructors may have greater freedom to use copyrighted works in teaching without having to obtain permission from copyright owners.¹⁹³

The TEACH Act primarily facilitates distance learning by expanding the copyright exemption for instruction to distance and digital communication and it permits the performance or display of complete non-dramatic literary or musical works, such as the reading of a poem or short story, or listening to

¹⁸⁹ The 2002 Technology, Education and Copyright Harmonization (TEACH) Act available at <http://www.copyright.mnscu.edu/forms/Teach%20Act%20Handout.pdf> accessed on 19/9/2012

¹⁹⁰ Id

¹⁹¹ Id

¹⁹² Id

¹⁹³ Id

music.¹⁹⁴ The TEACH Act also expands the permissible receiving locations for distance education students beyond the classrooms and computer labs to any location.¹⁹⁵ The law does not equate the use of copyrighted materials in online instruction to the use legally permitted for instruction in a physical classroom; therefore, instructors and institutions should not simply apply copyright law and fair use guidelines prescribed for classroom instruction to online instruction.¹⁹⁶ Materials allowed under the TEACH Act are; display of any work in an amount analogous to a physical classroom setting; performance of nondramatic literary works; performance of nondramatic musical works and performance of reasonable and limited portions of other types of work except digital educational works.¹⁹⁷

In addition digitization of portions of analog works if no digital version is available or if digital version is not in an accessible form is permitted. But the exemptions are not applicable to some materials in the course of distance education for example, works that are marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks. The TEACH Act put requirements for the applicability of the exemptions for distance education and hence, the institution must be an accredited, non-profit educational institution; the use must be part of mediated instructional activities; the use must be limited to a specific number of students enrolled in a specific class; the use must either be for live or asynchronous class sessions and the use must not include the transmission of textbook materials, materials typically purchased or acquired by students, or works developed specifically for online uses.¹⁹⁸ The institution must have developed and publicized its copyright policies, specifically informing students that course content may be covered by copyright, and include a notice of copyright on the online materials; must implement some technological measures to ensure compliance with these policies, beyond merely assigning a password.¹⁹⁹ The new exemptions under the TEACH Act specifically do not extend to electronic reserves, course packs or interlibrary loan; commercial document delivery; textbooks or other digital content provided under license from the author, publisher, aggregator or other entity and conversion

¹⁹⁴Supra note 189

¹⁹⁵Id. See also Alan Story, Commission on Intellectual Property Rights: Study on Intellectual Property Rights, the Internet, and Copyright, Study Paper 5, pp.47-48

¹⁹⁶Id

¹⁹⁷ Id

¹⁹⁸ Id

¹⁹⁹ Id

of materials from analog to digital formats, except when the converted material is used solely for authorized transmissions and when a digital version of a work is unavailable or protected by technological measures.²⁰⁰

The Brazilian Copyright Law puts limitations on the exclusive rights of copyright holders and allows free reproduction of protected works for teaching purposes. According to article 46(IV), notes taken in the course of lessons given in teaching establishments by the persons for whom they are intended are not violations provided that their complete or partial publication is prohibited without the express prior authorization of the person who gave the lessons. That means students should get permission from course instructor to make reproduction for their study.

The Brazilian copyright law allows the reproduction of protected works without the consent of copyright holders and for free for the benefit of persons with visual disability. Reproduction of literary, artistic or scientific works for the exclusive use of the visually handicapped persons provided that the reproduction is done without gainful intent, either in Braille or by means of another process using a medium designed for such users is allowed for free and without authorization according to article 46(d). The law does not make any distinction as to whether the reproduction is for face to face, distance, informal or other type of educational process.

²⁰⁰ Id. Instructors involved in distance education may use copyrighted materials that meet the following as prescribed by the TEACH Act: Avoid use of commercial works that are sold or licensed for purposes of digital distance education; avoid use of pirated works or works where it is otherwise known that the copy was not lawfully made; limit use of works to an amount and duration comparable to what would be displayed or performed in a live physical classroom setting; supervise the digital performance or display, make it an integral part of a class session, and make it part of a systematic mediated instructional activity. Instructors should interactively use the copyrighted work as part of a class assignment in the distance education course. Enrolled students may post to distance education class pages as long as there is actual supervision by the instructor. Actual supervision does not require prior approval for posting nor does it require real-time or constant presence of the instructor. Access to software tools provided by the College should be limited to the use of the students who enrolled in the course and prevents downstream copying by those students, and prevents these students from retaining the works for longer than a class session. In addition to this notifying the students that the works may be subject to copyright protection and that they may not violate the legal rights of the copyright holder through the posting of the message below on all distance education class sites: The materials on this course web site are only for the use of students enrolled in this course for the purposes associated with this course and may not be retained or further disseminated. In this respect the Ethiopian copyright law has got a lot to do with the dissemination of knowledge through education which can include online distance education and digital communication with students.

The fair dealing exception of the Canadian Copyright Act allows reproduction of protected works for educational institutions which may include libraries, archives and museums. The fair dealing exceptions are applicable for educational establishments as stated under section 29.3 of the Act. It should be an educational institution; library, archive or museum, or person acting under its authority does not have a motive of gain. According to section 29.4 (1) of the Act, it is not an infringement of copyright for an educational institution or a person acting under its authority to make a manual reproduction of a work onto a dry erase board, flip chart or other similar surface intended for displaying handwritten material, or to make a copy of a work to be used to project an image of that copy using an overhead projector or similar device for the purposes of education or training on the premises of an educational institution. Accordingly, this exception or exemption is applicable to face to face teaching as far as the reproduction or display is limited to the premises of an educational institution. Reproduction for the purpose of examination pursuant to section 29.4(2) of the Act is not an infringement of copyright for an educational institution or a person acting under its authority to reproduce, translate or perform in public on the premises of the educational institution, or communicate by telecommunication to the public situated on the premises of the educational institution.

To make a copy of a work to be used to project an image of that copy using an overhead projector or similar device for the purposes of education or training on the premises of an educational institution and communicate by telecommunication to the public situated on the premises of the educational institution a work or other subject matter as required for a test or examination is not allowed except in the case of manual reproduction. The Act also allows educational performance of protected works. According to section 29.7(3) of the Act, it is not an infringement of copyright for the educational institution or a person acting under its authority to perform the copy in public for educational or training purposes on the premises of the educational institution before an audience consisting primarily of students of the educational institution if the educational institution pays the royalties and complies with any terms and conditions fixed under this Act for the performance in public.

The fair dealing exception of the South African copyright Act provides reproduction for the purpose of education. According to article 12 (1) of the Act, copyright shall not be infringed by any fair dealing with a literary or musical work for the purposes of research or private study. Section 13 of the Act allows teachers to give a limited number of single hand-outs to each learner in a classroom, per course, per term, without

permission²⁰¹ and without permission of copyright holder, one may only reproduce works under these limited exceptions or only if it specifically says it is free to use or if it is in the public domain or if the work is under an open source license like creative commons.²⁰² Putting in other ways, public domain means information or a work that is both public release and not copyrighted which can be used by everyone, everywhere, every time without permission, license and payment. A work may enter in the public domain either the term of protection is expired or the work is not copyrightable. But teaching exception makes no distinction between face to face and distance education or commercial and noncommercial goals.

The French code allows reproduction for the purpose of teaching under Article L122-5 without distinguishing whether it is for commercial or not or face to face or distance.

4.4.3.7 Reproduction, Broadcasting and other Communication to the Public for Informatory Purpose

Reproduction is defined as the making of one or more copies of a work or sound recording in any manner or form, including any permanent or temporary storage of work or sound recording in electronic form under article 2(25) of the proclamation. From this we can understand that digital reproduction is allowed. Reproduction, broadcasting and communication of copyright works are exclusively reserved to copyright holders under article 7 of the proclamation. But these exclusive economic rights are not absolute because under certain conditions, users are free to do the same with some legal limitations. The reproduction in a newspaper or periodical, the broadcasting or other communication to the public of an article published in a newspaper or periodical on current economic, political, social or religious or similar topics unless the right or authorize reproduction or broadcasting or the communication to the public is expressly reserved on the copies by the author or owner of copyright or in connection with broadcasting or other communication to the public of the work.²⁰³ This article seems to introduce copyright notice on the work.

Therefore, reproduction, broadcasting and communication to the public of copyrighted works is applicable if there is no express notice showing such acts are reserved to the owner or author. This requirement is somewhat problematic because authors or owners may have such interest and may not be voluntary to allow reproduction, broadcasting or communication for public information purpose. What has to be broadcasted,

²⁰¹ Denise, Rosemary Nicholson, *Supra* note 167, p.4

²⁰² *Ibid*, p.3

²⁰³ *Supra* note 32, Article 13(1)

communicated or reproduced for inforatory purpose in newspaper or periodicals is dealt under article 13(1) of the proclamation. Accordingly, lectures, political speeches, or other work of a similar nature delivered in public, or a speech delivered during legal proceedings to the extent justified by the purpose can be used without the permission of the owner.

In certain exceptions reproduction of computer program is allowed. Without regard to whether the reproduction is for personal use, education, library for commercial or noncommercial purpose, making single copy without the authorization of owner is allowed if and only if the requirements under article 14(2) of the proclamation are satisfied. The requirements under this article are the program should be copied to make use a computer, to back up a computer or adaptation of the computer program that is indispensable for using the computer. This exception allows free consumption of such works whether is for profit or nonprofit. Some jurisdictions like France used to compensate copyright holders when teaching, illustration, broadcasting etc exceptions and limitations of copyright are applied. The Ethiopian copyright law regulates broadcasting or rebroadcasting through cable, satellite or television under article 13 of the proclamation by defining broadcasting under article 2(3) without defining the beneficiaries whether controlled or uncontrolled group.

The US copyright Act put limitation on the exclusive rights of transmission and broadcasting and it allows secondary transmissions of broadcast programming by cable and the secondary transmission of a performance or display of a work embodied in a primary transmission is not an infringement of copyright.²⁰⁴ The secondary transmission of a performance or display of a work embodied in a primary transmission is not an infringement of copyright if the secondary transmission is not made by a cable system, and consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment of signals transmitted by a broadcast station and no direct charge is made to see or hear the secondary transmission; the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission and the secondary transmission is made by a satellite carrier pursuant to a statutory license. In addition, the secondary transmission may be made to controlled group according to section 111 of the US Copyright Act. Secondary transmissions of local television programming by satellite is regulated under § 122 of the US Copyright Act which can be in local or foreign market.

²⁰⁴ Supra note 135, p.45

According to section 122(1), secondary transmissions of television broadcast stations within a local market shall be subject to statutory licensing under this section if the secondary transmission is made by a satellite carrier to the public.

The French Intellectual Property Code allows broadcasting of protected works for public informatory goals as stated under article L122-5(3). According to this article, analyses and short quotations justified by the critical, polemic, educational, scientific or informatory nature of the work in which they are incorporated; press reviews; dissemination, even in their entirety, through the press or by broadcasting, as current news, of speeches intended for the public made in political, administrative, judicial or academic gatherings, as well as in public meetings of a political nature and at official ceremonies is allowed.

The fair dealing exception of the South African Copyright Act allows the broadcasting of protected works to the public for informatory purpose under article 12(7). Accordingly, the copyright in an article published in a newspaper or periodical, or in a broadcast, on any current economic, political or religious topic shall not be infringed by reproducing it in the press or broadcasting it, if such reproduction or broadcast has not been expressly reserved and the source is clearly mentioned.

The Brazilian copyright law allows the reproduction of protected works in daily or periodical press of news or informative articles. According to article 46 (a), reproduction in the daily or periodical press of news or informative articles, from newspapers or magazines, with a mention of the name of the author, if they are signed, and of the publication from which they have been taken. Reproduction in newspapers or magazines of speeches given at public meetings of any kind and reproduction of portraits or other forms of representation of a likeness, produced on commission, where the reproduction is done by the owner of the commissioned subject matter and the person represented or his heirs have no objection to it is allowed under article 46(b) and (c) respectively.

The fair dealing exception of the Canadian copyright Act allows the retransmission and broadcasting of protected works to the public. According to section 29.7 (1), subject to subsection (2) and section 29.9, it is not an infringement of copyright for an educational institution or a person acting under its authority to make a single copy of a work or other subject-matter at the time that it is communicated to the public by telecommunication; and keep the copy for up to thirty days to decide whether to perform the copy for

educational or training purposes. According section 31(2) of the act, it is not an infringement of copyright for a re-transmitter to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if the communication is a retransmission of a local or distant signal; the signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada. In the case of the retransmission of a distant signal, the re-transmitter has to pay royalties and complied with any terms and conditions, fixed under this Act; and the re-transmitter complies with the applicable condition.

4.4.3.8 Public Display

Even though the concept of display of works is not defined under the proclamation, artistic and literary original works in principle have to be displayed to the public by the author or owner of such works. Public display may be defined as disclosure of works to the general public knowledge. Exhibition of copyrighted works, posting in public place, marketing etc may be considered as public display. But under certain conditions, original works may be displayed by non owners as stated under article 18 of the proclamation. According to this article, the public display of originals or copies of works, without the authorization of the author or owner of copyright shall be permitted, where the display is made other than by means of a film slide, television image or otherwise on screen or by means of any other device or process and the work has been published or the original or the copy displayed has been sold, given away or otherwise transferred to another person by the author or his successor.

The prohibition of display by film slide or television image may create problem on accessibility of the work. The preconditions for display without permission are, the work has to be published or the original or the copy displayed has to be sold or transferred by the copyright holders. The requirement of being published work for public display creates doubt as to the possibility of no display for unpublished works. The other problem of the proclamation is its failure to include digital display of contents to the public. This article is restrictive because film slides, radio and television transmissions, power point etc may be used in the delivery of education as its prohibition halts teaching. So the proclamation should allow display all works in all forms as far as the display is compatible with the fair practice or the interest of copyright holders is not affected.

The exclusive rights provided for performers, producers of sound recordings and broadcasting organizations stated under article 26, 27 and 31 respectively are subject to exceptions and limitations stated under article 32. Using short excerpts for reporting current events to the extent justified by the purpose of providing current information; reproduction solely for scientific research; reproduction solely for the purpose of face to face teaching activities, except for performances and sound recordings which have been published as teaching or instructional materials is allowed without permission or authorization of owners of the works. According to article 32(c) of the Ethiopian copyright law, there are two types of materials²⁰⁵. The first one is a material for performance and sound recording made for teaching and instruction while the other is not for teaching and instruction. Thus, this article puts limitations to the rights of performers and sound recordings exclusive rights. According to this article, reproduction solely for the purpose of face to face teaching activities, except for performances and sound recordings which have been published as teaching or instructional materials is allowed. But this does not mean that performances and sound recordings which have not been published as teaching or instructional materials may not be used because the purpose of the materials suffice the possibility of using such works for education.

The Ethiopian copyright law, does not make distinction whether the display is religious or scholar or for gain or nonprofit. But it puts restrictions on the methods of display because some methods of display are prohibited under article 18 provided that the work should have been published or the original or the copy displayed has been sold, given away or otherwise transferred to another person.

The US Copyright Act incorporates provisions dealing with public display of protected works as an exception. According to Section 110 of the Act, notwithstanding the provisions of section 106, the following are not infringements of copyright: (1) display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to

²⁰⁵ Mandefro Eshete and Mola Mengistu, *Supra* note 19, pp174-175. One can infer three major points from the wording of Article 32(c). 1. The teaching exception applies to those performances and sound recordings which are published for purposes other than teaching. 2. The exception applies only for "face-to-face teaching activities". Meaning one cannot invoke this provision to use performances and sound recordings in the distance education. 3. This exception does not apply for performances and sound recordings which have been published as teaching or instructional materials. But since the law does not prohibit, we can take the advantage of non prohibition as permission.

instruction, unless, in the case of a motion picture or other audiovisual work, the display of individual images, is given by means of a copy that was not lawfully made.²⁰⁶

The Canadian Copyright Act does not include provisions dealing with public display of protected works by non owners as exceptions. The Act deals only with the possibility of display for educational purpose without permission of copyright holders. According to section 29.4 (1) of the Act, it is not an infringement of copyright for an educational institution or a person acting under its authority for the purposes of education or training on its premises to reproduce a work or do any other necessary act in order to display it.

The French Intellectual Property Code only provides the possibility of displaying software of computer but it has no exceptions for displaying other artistic and literary works. According to article L122-6-1(III), a person having the right to use the software shall be entitled, without the authorization of the author to observe, study or test the functioning of the software in order to determine the ideas and principles which underlie any element of the software if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the software which he is entitled to do. The code is not clear whether the display for public or not.

The South African Copyright Act has no provision dealing with public display but the fair dealing exception stated under article 12 and 13 may be applied.

The Brazilian Copyright law does not incorporate clear provision dealing with the possibility of displaying protected works without permission of copyright holder. But the law under article 77(1) states that ‘unless

²⁰⁶ Supra note 135, p.39. According to section 110 of the Act, display is made by at the direction of or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities of a governmental body or an accredited nonprofit educational institution, the display is directly related and of material assistance to the teaching content of the transmission, the transmission is made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to students officially enrolled in the course for which the transmission is made; or officers or employees of governmental bodies as a part of their official duties or employment except with respect to a work produced or marketed primarily for display as part of mediated instructional activities transmitted via digital networks as stated under subsection 2 of the Act.

otherwise agreed, the author of a work of three-dimensional art, on disposing of the object in which it is embodied transfers to the acquirer the right to display it but not to reproduce it'. This provision is not applicable to all forms of protected works.

4.4.3.9 Distribution of Copyright Works

Making of artistic and literary works eligible to copyright protection alone is not enough. Subject to the purpose of making such works, the works should be disseminated to the consumer as required through distribution. Distribution may be either dissemination of protected works to users through channels of trade or reproduction by teachers to give to their students in the form of reference or handouts. The copyright holder's exclusive rights of distribution saving the exceptional cases whereby others may make distribution to the public for whatever purpose as stated under article 7(1) (d) and 27(1)(c). Where a copy of a published work has been sold to the public such a copy may, without authorization and payment of remuneration, be redistributed by means of sale.²⁰⁷ The redistribution of published work by sale according to this article seems to prohibit redistribution through other means like rental and donation. Because nonprofit organization may make redistribution without sale to the public, donate to educational institutions, libraries etc. So the proclamation may need amendment to include other means of distribution of copyrighted works in fostering knowledge and distribution of information.

The US Copyright Act grants exclusive rights of distribution of protected works to copyright holders but this exclusive right is not absolute as the Act allows the distribution of protected works by non copyright owners. The distribution for example by libraries or archives may not be for direct or indirect commercial advantage as stated under Section 108(1) of the Act. Section 108(3)(b) allows reproduction of unpublished works for library and the rights of reproduction and distribution under this section apply to three copies or phonorecords of an unpublished work duplicated solely for purposes of preservation and security or for deposit for research use in another library or archives and the first to sale doctrine is also applicable for the distribution of protected works. Section 109(d) provides that the first sale doctrine does not apply to copies that are obtained by rental, lease, or loan, without acquiring ownership. Notwithstanding the first sale doctrine, the Act specifically prohibits the rental, lease, lending, or similar temporary disposal of possession of a phonorecord or a copy of a computer program for direct or indirect commercial advantage. However, this prohibition does not apply to nonprofit educational institutions or nonprofit libraries under certain

²⁰⁷ Supra note 32, Article 19

defined circumstances. Specifically, the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or educational institution is not prohibited by Section 109(b).

The Canadian copyright Act contains provisions granting exclusive rights of distribution to copyright holders. But there is no clear provision where distribution by non copyright owners is allowed. Section 27(2)(e) of the Copyright Act provides that it is an infringement of copyright for any person to import into Canada a copy of a work, for the purpose of selling or distributing the work, that the person knows would infringe a copyright if it had been made in Canada by the person who made it except precedents of the doctrine of exhaustion.

The French Intellectual Property Code allows distribution of protected works without the permission of copyright holders. According to article L214-1 of the Code, where a phonogram has been published for commercial purposes, neither the performer nor the producer may oppose its direct communication in a public place where it is not used in an entertainment or its broadcasting or the simultaneous and integral cable distribution of such broadcast. Such uses of phonograms published for commercial purposes shall entitle the performers and producers to remuneration whatever the place of fixation of such phonograms. Such remuneration shall be paid by the persons who use the phonograms published for commercial purposes under the conditions set out in items 1 and 2 of this article. The Code does not incorporate provisions dealing with the possibility of making distribution of protected works by non owners through compulsory license. In addition to this, the exhaustion doctrine of the EU is applicable to France since France is member of the union.

The Brazilian Copyright Law allows distribution of protected works without the permission of copyright holder. According to article 5 of the Brazilian copyright law, “distribution” means making the original or copies of literary, artistic or scientific works, fixed performances and phonograms available to the public by sale, rental or any other transfer of ownership or possession. According to article 29(VI) and (VII) of the law, the express prior authorization of the author of a literary, artistic or scientific work shall be required for any kind of use, such as distribution where it is not provided for in a contract signed by the author with third parties for the use or exploitation of the work; or distribution for the purposes of offering works or productions by cable, optic fiber, satellite, electromagnetic waves or any other system enabling the user to

select a work or production and receive it at the time and place of his choice, provided that the access to the works or productions is made through any system requiring payment on the part of the user.

The Government of Brazil through its legislative body is making proposal to permit for a library or archive to reproduce and to distribute a copy of a copyright work or of material protected by related rights to a library users or to another library or archive for purposes of education, exceptions to reproduce on the requests of users for research or private study and interlibrary document supply provided that such reproduction and distribution is in accordance with existing international obligations under the TRIPs and Berne Convention. But scholars criticize that still the proposal does not benefit libraries, museums and other similar institutions.

The South African copyright Act allows the distribution of programme-carrying signals. According to section 19(1) of the Act, the copyright in programme-carrying signals shall not be infringed by the distribution of short excerpts of the programme so carried that consist of reports of current events; or as are compatible with fair practice, and to the extent justified by the informatory purpose of such excerpts.

4.4.3.10 Reproduction and Adaptation of Computer Program

The Ethiopian copyright law does not define the term adaptation. The law provides adaptations are protected subject matter. According to article 14 of the proclamation, reproduction and adaptation of computer program is allowed to users as an exception to article 7 of the some law. Article 14 states that; 1) notwithstanding the provisions of Article 7 (1) (a) and (c) of this proclamation, the owner or copyright cannot forbid a single copy reproduction or adaptation of a computer program; 2) The reproduction or adaptation of a computer program, under the preceding sub article, is permissible when it is found necessary to make; a) use of a computer program with a computer for the purpose and extent for which the computer program has been obtained, b) a back up copy by a person having a right to use the computer program in so far as it is necessary to ensure future use, or c) adaptation that is indispensable for using the computer program in conjunction with a machine for the purpose, and to the extent of use, for which the program has been lawfully obtained. This article is so flexible because it enables commercial users to benefit from the exception.

The US copyright Act allows the reproduction and adaptation of computer programs. According to Section 117 of the Act, notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful pursuant to section 117 of the US Copyright Act. In addition to this, it is allowed to lease, sale or transfer without the authorization of the copyright holder while adaptation is permitted with consent of the copyright holder as stated at section 117(b) of the Act.

The French Intellectual Property Code provides exceptions where by reproduction, adaptation and translations of computer a program is allowed without the authorization of copyright holders. According to article L122-4, any complete or partial performance or reproduction made without the consent of the author or of his successors in title or assigns shall be unlawful. The same shall apply to translation, adaptation or transformation, arrangement or reproduction by any technique or process whatsoever. According to article L122-6 and subject to the provisions of article L122-6-1, the exploitation of the economic right belonging to the author of the computer software shall include the right to do or to authorize the permanent or temporary reproduction of software by any means and in any form, in part or in whole, loading, displaying, running, transmission or storage of the software necessitate such reproduction, the translation, adaptation, arrangement or any other alteration of software and the reproduction of the results thereof; the placing on the market for consideration or gratuitously, including rental, of the software or of copies thereof by any process.

As an exception, users shall not require authorization by the author where they are necessary for the use of the software by the person entitled to use it in accordance with its intended purpose, including for error correction and other justified purposes according to article L122-6-1 and hence, a person having the right to use the software may make a backup copy where such is necessary to ensure use of the software; shall be entitled, without the authorization of the author, to observe, study or test the functioning of the software in order to determine the ideas and principles which underlie any element of the software if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the software which he is

entitled to do; reproduction of the code of the software or translation of the form of that code shall not require the authorization of the author where reproduction or translation is indispensable for obtaining the information necessary to achieve the interoperability of independently created software with other software, provided that these acts are performed by a person entitled to use a copy of the software or on his behalf by a person authorized to do so; the information necessary to achieve interoperability has not previously been readily available and these acts are confined to the parts of the original software which are necessary to achieve interoperability. The Digital copyright system is regulated by the anti circumvention provisions of article L122-6-2 of the Code. Accordingly, circumvention of technical device protecting software is prohibited and any publication or user's handbook concerning means of removing or circumventing any technical device protecting software shall state that the unlawful use of such means is liable to the penalties laid down for cases of infringement.

The Canadian copyright Act allows the reproduction of computer program without the permission of copyright holders. According to Section 30.6 of the Act, it is not an infringement of copyright in a computer program for a person who owns a copy of the computer program that is authorized by the owner of the copyright to make a single reproduction of the copy by adapting, modifying or converting the computer program or translating it into another computer language if the person proves that the reproduced copy is essential for the compatibility of the computer program with a particular computer, solely for the person's own use and destroyed immediately after the person ceases to be the owner of the copy; or make a single reproduction for backup purposes of the copy or of a reproduced copy if the person proves that the reproduction for backup purposes is destroyed immediately when the person ceases to be the owner of the copy of the computer program. This reproduction may be for commercial or non commercial purposes.

The South African Copyright Act allows reproduction and adaptation of computer program without the authorization of copyright holders even though it is an infringement to acquire an article relating to a computer program as given under section 23(2)(d). But reproduction and adaptation of computer program is allowed without authorization for the purpose of reporting current events, reproduction for criticism, taking quotations, reproduction in judicial proceedings, reproduction for broadcasting and preservation, demonstration by radio and television, making cinematographic films etc as provided under section 19B(1) of the Act. According to section 19B(2) of the Act, the copyright in a computer program shall not be infringed by a person who is in lawful possession of that computer program, or an authorized copy thereof,

if; (a) he makes copies thereof to the extent reasonably necessary for back-up purposes; (b) a copy so made is intended exclusively for personal or private purposes; and (c) such copy is destroyed when the possession of the computer program in question, or authorized copy thereof, ceases to be lawful. Article 13 of the act is also applicable for reproduction of computer program but the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright.

Private coping of computer programs is allowed under the Brazilian copyright laws provided that the single full copy is made for backup or archival purposes and as long as an original copy was legitimately acquired. In addition to this, it is permitted to partially cite from a program's source code for educational purposes provide that the program and its author must be identified as stated under L9609/98, 6, II of Brazilian copyright law. But the law has no provision dealing with the adaptation of computer programs.

4.4.3.11 Private Performance

The Ethiopian copyright law does not define private performance. But private performance from its name shows that such performance is in a private setting and not in public setting. The law also failed to define performance even though it can be defined as acting, singing, dancing, delivering and playing of literary and artistic works from the understanding article 2(19) and (24) of the proclamation. As copyright law is designed to encourage activity and progress in the art for intellectual enrichment of the public, absolute monopoly of copyright prohibits other creators from using preexisted works using the advantages of copyright limitations and exceptions, endangers public access to knowledge and information and it encumbered over all developments such of educational, social, cultural etc as copyright industry currently is basis of human life. The law grants exclusive rights to copyright holders to perform their works with an exception dealt under article 16. Accordingly, notwithstanding the provisions of Article 7 (1) (g), the owner of copyright cannot forbid private performance of his work given free of charge at a family gathering or in a school which can for commercial or non commercial ends.

Students and instructors may be benefited from these exceptions in their performance in the course of learning-teaching process. Is this exception allowed for extended family and schools at different places connected with internet and other teaching technologies like video conferencing or is limited to the physical premises of a school? Does the school performance fall under private performance because, performance in school in the teaching-learning process could not be considered as private performance. Private performance

in family gathering or in school for the purpose of education is allowed. This exception seems as it permit performance of the works of others in schools in the course of teaching even in private educational institutions. In addition to this public performance without the authorization of copyright holder is not regulated under the law because the law only regulates private performance free of charge under article 16 without further requirements like publication or sale.

The US copyright Act allows private performance as given under Section 110. Notwithstanding the provisions of section 106, the following are not infringements of copyright: (1) performance of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made.²⁰⁸

There are different requirements provided in the act in conducting private performance of protected works like the performance or display is made by at the direction of or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities of a governmental body or an accredited nonprofit educational institution, the performance or display is directly related and of material assistance to the teaching content of the transmission, the transmission is made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to students officially enrolled in the course for which the transmission is made; or officers or employees of governmental bodies as a part of their official duties or employment except with respect to a work produced or marketed primarily for performance as part of mediated instructional activities transmitted via digital networks as stated under subsection 2 of the Act. Performance of a nondramatic literary or musical work or of a dramatic musical work of a religious nature of a work, in the course of services at a place of worship or other religious assembly; and performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers is permitted under the Act.

²⁰⁸ Supra note 135, p.39

The French Intellectual property Code allows private performance of copyrighted works without the authorization of copyright holders. Article L122-5 defines the exceptions to French copyright law, which are relatively restricted. Once a work has been published, the author cannot prevent private family performances. According to article L122-5, once a work has been disclosed, the author may not prohibit private and gratuitous performances carried out exclusively within the family circle. Article L311-1 states that the authors and performers of copyright works should be entitled to remuneration for the reproduction of those works on the basis of private performance. The Code does not contain provisions dealing with private performance in schools.

The Brazilian Copyright Law puts limitations on the exclusive rights of performance of copyright holders. Stage and musical performance, where carried out in the family circle or for exclusively teaching purposes in educational establishments, and where devoid of any profit-making purpose according to article 46(VI) of the Act is allowed.

The fair dealing exception of the Canadian copyright Act allows performance of protected works without the permission of copyright holders for educational purpose and other non gain motives. According to section 29.5 of the act, it is not an infringement of copyright for an educational institution or a person acting under its authority to do if done on the premises of an educational institution for educational or training purposes and not for profit, before an audience consisting primarily of students of the educational institution, instructors acting under the authority of the educational institution or any person who is directly responsible for setting a curriculum for the educational institution: the live performance in public, primarily by students of the educational institution, of a work; the performance in public of a sound recording or of a work or performer's performance that is embodied in a sound recording; and the performance in public of a work or other subject-matter at the time of its communication to the public by telecommunication. It is not also an infringement of copyright for an educational institution or a person acting under its authority to make, at the time of its communication to the public by telecommunication, a single copy of a news program or a news commentary program, excluding documentaries, for the purposes of performing the copy for the students of the educational institution for educational or training purposes; and perform the copy in public, at any time or times within one year after the making of a copy before an audience consisting primarily of students of the educational institution on its premises for educational or training purposes.

According to section 29.6(2) of the Act, the educational institution must pay royalties for reproduction and performance and destroy the copy. This is unique provision because the Ethiopian copyright law does not oblige educational institutions to pay royalties and destroy the reproduced materials. It is not an infringement of copyright for an educational institution or a person acting under its authority to make a single copy of a work or other subject-matter at the time that it is communicated to the public by telecommunication; and keep the copy for up to thirty days to decide whether to perform the copy for educational or training purposes. And hence, reproduction of broadcast is allowed. The educational institution should destroy the reproduced materials after the expiry of 30 days. In addition to this, it is not an infringement of copyright for the educational institution or a person acting under its authority to perform the copy in public for educational or training purposes on the premises of the educational institution before an audience consisting primarily of students of the educational institution if the educational institution pays the royalties and complies with any terms and conditions fixed under this Act for the performance in public according to section 29.7(3) of the Act.

The South African copyright Act defines performance as follows under section 1:

“Performance” includes any mode of visual or acoustic presentation of a work, including any such presentation by the operation of a loudspeaker, a radio, television or diffusion receiver or by the exhibition of a cinematograph film or by the use of a record or by any other means, and in relation to lectures, speeches and sermons, includes delivery thereof; and references to perform in relation to a work shall be construed accordingly provided that performance shall not include broadcasting or rebroadcasting or transmitting a work in a diffusion service. The Act does not deal with private performance rather it makes an offence public performance of protected works without the permission of copyright holders under section 23(3). According to this article, the copyright in a literary or musical work shall be infringed by any person who permits a place of public entertainment to be used for a performance in public of the work, where the performance constitutes an infringement of the copyright in the work provided that this subsection shall not apply in a case where the person permitting the place of public entertainment to be so used was not aware and had no reasonable grounds for suspecting that the performance would be an infringement of the copyright.

4.4.3.12 Reproduction for Persons with Disability

The Ethiopian copyright does not incorporate provisions dealing with exceptions and limitations for the benefit of persons with disability; disability to use the existing copyrighted works without making modifications and format shifting to make accessible. Recent studies suggest that there are about 1.5 to 3 million youngsters seeking special need in education and there are also around 7.7 million disabled persons in Ethiopia.²⁰⁹ WHO states that of the total world population, 10% are persons with disability.²¹⁰ The naming of persons with disability varies from jurisdiction to jurisdiction. Some jurisdiction name as visually impaired persons while other persons with print disabilities. Still other jurisdiction called such users persons with perceptual disability, persons who are handicapped, persons with physical disability to use a copyrighted work etc. Therefore, exceptions and limitations should be applicable to all forms of disabilities hindering the utilization of copyrighted work in par with persons with no disability.

Higher Education proclamation No.351/1995 of Ethiopia shows that disable students should receive support to fulfill their educational special needs. This includes material and professional support. Material support includes making available copyrighted works in accessible formats for use by the disable persons according to the type of their disability. This is because some of the disable persons may need brail system while other analog works as a result of sound disability. But the existing copyright law has no provision in favor of persons with disability. But the government of Ethiopian to gather with international organization conducted different action plan and policies to assist persons with disability to realize the millennium development goals.²¹¹

According to the World Health Organization (WHO), more than 161 million people worldwide are visually impaired and of this, 37 million persons who are blind and 124 million persons with “low vision and more

²⁰⁹ Including the excluded: Integrating Disability into the EFA Fast Track Initiative Process and National Education Plans in Ethiopia, Advocacy and Communication Division World Vision Ethiopia, 2007, P.V

²¹⁰ Ibid, p.3. Study made by UNESCO under the theme of education for all in 2007 indicates that Nigeria, Pakistan, India and Ethiopia are countries with high population of disable persons nearly 1/3 of their total population.

²¹¹ Supra note 209. For example in 1999, there were about 250 disable persons enrolled in higher education in Ethiopia and 183 disable persons were undergraduate and graduate students in Addis Ababa University. But there are still acute shortage of accessible materials in all levels of Ethiopian educational institutions and the absence of law permitting to the extent possible for utilization by persons with disability.

than 90% of visually impaired persons live in developing countries.²¹² Other studies of the WHO make the total number visually impaired persons 314 million.²¹³ Accessible formats for persons who are visually impaired include Braille printed on paper, audio books, and large-print text for persons with low vision. Despite advances in technology, only a small fraction of existing published works are available in formats that are accessible to persons who are visually impaired. The labor involved in making a new text accessible varies considerably, depending upon the formats in which the work is originally published, as well as the complexity of page layout designs.²¹⁴ This condition is known by some scholars the knowledge famine. Currently, only 5% of published books are available for visually impaired persons while some other persons estimate the number fewer than that.²¹⁵ Copyright law should not impose barriers that prevent visually impaired persons from accessing works under copyright and hence copyright law should allow the making and reproduction in to accessible formats.

The US Copyright Act incorporates exemptions whereby reproduction in accessible format is allowed for the benefit of persons with disability. Section 121 of the Act permits organizations dedicated to serving the blind to make these works accessible to persons with disability. Making works in accessible formats (such as Braille, audio books, and large print books) is expensive, leading to delays in their production and distribution. In addition, these expenses result in publishers making a very small percentage of such works available. Even though copyright holders have exclusive rights for distribution and reproduction as per section 106 of the US copyright Act, it is not an infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities as stated under Section 121 of the Act.²¹⁶

Entities using such exceptions to create accessible works often are prohibited from exporting outside of national boundaries, reducing considerably the access to works that are now in accessible formats. For example, in the United States certain authorized entities are allowed to distribute works that are accessible

²¹² Manon, Ress (2009), Accessible Works, Standards, Director Information Society Projects, Knowledge Ecology International, p.5, available at <http://www.copyright.gov/docs/sccr/comments/2009/ress.pdf> accessed on 12/10/2012

²¹³ Id

²¹⁴ Ibid,p.6

²¹⁵ Ibid,p.5

²¹⁶ Supra note 135, p.113

for the visually impaired without the permission of copyright owners, but this exception only applies to access in the United States. That means exporting such works to other countries is not allowed. The non-profit organization BookShare.org is a leading U.S. provider of books in accessible formats for the blind and visually impaired.²¹⁷ According to Section 121 of the Act, specialized formats means Braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities and with respect to print instructional materials, includes large print formats when such materials are distributed exclusively for use by blind or other persons with disabilities.

The Canadian Copyright Act allows the reproduction of protected works for persons with perceptual disabilities. The degree of disability in both cases varies from low vision to total visual impairment or perceptual disability. The Act incorporates provisions granting copyright exceptions and limitations for persons with perceptual disability. Perceptual disability may be defined as inability to access existing copyrighted works without format shifting. Such disability may be visual impairment, sound impairment or other similar problems.²¹⁸

Pursuant to section 32(1) of the act, it is not an infringement of copyright for a person, at the request of a person with a perceptual disability, or for a non-profit organization acting for his or her benefit, to make a copy or sound recording of a literary, musical, artistic or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability; translate, adapt or reproduce in sign language a literary or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability; or perform in public a literary or dramatic work, other than a cinematographic work, in sign language, either live or in a format specially designed for persons with a perceptual disability.²¹⁹

Format shifting in to any accessible form to persons with perceptual disabilities is permitted under the Act. But those exceptions are not applicable to making of a large print book and where the work or sound recording is commercially available in a format specially designed to meet the needs of the persons with

²¹⁷ Manon, Ress(2009), Supra note 212, p.7

²¹⁸ Daniel, Gervais, Fair Use, Fair Dealing, Fair Principles: *Efforts to Conceptualize Exceptions and Limitations to Copyright*, p.78

²¹⁹ Id

perceptual disabilities in Canada.²²⁰ The Canadian Copyright Act includes fair dealing exceptions in the case of incidental inclusion of works from protected works. According to section 30.7 of the act, it is not an infringement of copyright to incidentally and not deliberately include a work or other subject-matter in another work or other subject-matter; or do any act in relation to a work or other subject matter that is incidentally and not deliberately included in another work or other subject matter. Under the Ethiopian copyright law incidental inclusion of copyrighted works does not result in infringements of moral rights and hence, incidental inclusion of copyrighted works in a given work is not an infringement.

The South African Copyright Act allows reproduction for the benefit of persons with disability without the authorization of copyright holders in the form of fair dealing exception and hence, persons with disability can take advantage of fair dealing stated under Sections 12 and 13. This means the fair dealing exceptions may be applied to reproduce or utilize protected works without permission. However, these are very limited and there are no provisions for visually impaired persons. But the copyright Act prohibits format-shifting of copyrighted works for persons with disability without permission of copyright holder because format shifting to material into a more accessible or visual format, for example, from audiotape to text; from text to video; from video or film to DVD; or from text to a stage play is not permitted by the Act.²²¹ Adaptations or modifications of copyrighted works is under the absolute control of copyright holders and hence, as an exception users could not carry adaptations and modifications of copyrighted works and it is only with prior permission from the rights owner that modifications or adaptations possible because, modifying or adapting a copyrighted work for example, cropping, coloring, distorting, enlarging, substituting or excluding images is the exclusive right of the author or copyright owner.²²² This may be considered as hindrance to the free access and unrestricted flow of information and knowledge.

The French Intellectual Property Code contains no provisions dealing with exceptions in the reproduction and formatting of protected works in to accessible formats except dealing with remuneration paid by persons assisting persons with disability. According to Article L311-8(3) of the Act, the remuneration for private copying shall be refunded when the recording medium is acquired for their own use or production by

²²⁰ Daniel, Gervais, supra note 218

²²¹ Andrew Rens, Supra note 161, p.16

²²² Id

legal persons or bodies, of which the list shall be established by the Minister responsible for culture that use recording mediums for the purpose of assisting persons with sight or hearing disability. From this we can infer that reproduction for personal use of persons with disability is allowed to be made through the assistant other persons with payment of remuneration. But this could not be considered as exception if there is payment for use.

The Brazilian Copyright Law allows reproduction and making accessible protected works to persons with disability without the authorization of copyright holders. Literary, artistic and scientific works may be reproduced in the Braille system or through any other methods devised for the use of the visually impaired, as long as the reproduction is not for profit as stated under article 46(I)(d). This article is inspired by article 9 (2) of the Berne convention. The law allows format shifting of copyrighted materials for making such works accessible to persons with visual impairment without the authorization of copyright holders.

Chapter Five

Conclusion and Recommendations

5.1 Conclusion

The development of intellectual property in general and copyright law including exceptions and limitations in particular varies from jurisdiction to jurisdiction and legal systems. The variation in copyright system ranges from the degree of protection to copyright holders, protection of moral rights of copyright holders and protection of public interest, duration of copyright protection, subject matter of copyright protection and scope of copyright exceptions and limitations. The theories justifying copyright protection also varies from jurisdiction to jurisdiction. The justifications have an effect on the utilization of copyrighted works by the general public. Accordingly some states provide greater protection to copyright holders and limited and confusing exceptions and limitations to users of copyrighted works. Countries who justify copyright from the natural law and personhood theories grant strong protection to copyright holders and limited protection to users while others justify from utilitarian perspective.

The concept of copyright law is a new development in the legal history of Ethiopia. Modern Copyright law emerged in Ethiopian with the codification of the 1960 Civil Code of Ethiopia which incorporates provisions dealing with the protection of artistic and literary works in addition to the 1957 penal code of Ethiopia which incorporates penal provisions in case of infringements of rights of authors. The Civil Code also includes exceptions and limitations to the copyright protection. But the Code was inadequate and incomprehensive. The 1995 FDRE Constitution incorporates provisions dealing with copyright. The government of Ethiopia enacts modern copyright law in 2004 called Copyright and Neighboring Rights Proclamation No. 410/2004 herein after called the proclamation or Ethiopian copyright law.

The Ethiopian copyright law stems its contents from different theories. Accordingly the law has utilitarian, natural law and personhood theories as indicated in the preamble of the proclamation which states that literary, artistic and similar creative works have a major role to enhance the cultural, social, economic, scientific and technological development of a country so that protection of copyright and neighboring rights is mandatory. This is true because the law provides protection to copyright holders in the form of exclusive economic rights and moral rights while providing use rights to the public in the form of exceptions and limitations. But exceptions and limitations are under continuous threats of elimination for different reasons. Protection is on progress and become stronger with time while exceptions and limitations remain as usual. The use of TMPs for digital contents, extension of term of protection, emergence of international

conventions and agreements in addition to the regional and bilateral agreements between different states found at different levels of development which have great negative impacts on the enactment of flexible national copyright laws pursuant to the social, economical, political, cultural and technological demands. The open ended copyright exceptions stated in the form of fair use, fair dealing and fair practice are under the threat in the digital age while digital technology is created to simplify education, research, to bring cultural developments, economic efficiency and technology transfer.

The development of copyright law was accelerated due to the economic contribution of creative artistic and literary works. Copyright policies and legislations currently are crafted on the basis of economic, cultural, social, technological and scientific contribution to the public. Big industries are currently relying on copyrighted works. Copyright exceptions whether specifically provided or put in general open ended exceptions have great contribution to the economic development of a given state and currently copyright trade is intensified with the birth of TRIPs Agreement. The economic contribution of copyright can be assessed taking in to consideration its GDP contribution and creation of employment. But there is no evidence showing the economic contribution of copyright in general and exceptions in particular in Ethiopian even though the copyright industry is showing progress especially in the area of music, film, literature, radio and television broadcasts.

The Ethiopian copyright law provides exclusive rights to copyright holders under articles 7, 26, 27 and 31 for copyright holders, performers, sound recordings and broadcasting organization respectively. But those rights are not absolute because there are exceptions and limitations to the exclusive rights. The term of protection for definite period of time, copyrightability of works, conditions of protection like requirements for protection are the limitations of exclusive rights of copyright holders while uses of copyrighted material without authorization of copyright holders or payment are considered as exceptions even though the exceptions have limitations. The fair practice exception is also applicable.

The law provides rights of reproduction of copyrighted works in any form or manner for teaching, reproduction of quotations, reproduction by library and other similar institutions for replacement and preservation, reproduction for broadcasting as public information, reproduction for personal use, importation for private use, reproduction of computer programs and distribution of copyright works without the need to get permission from copyright holders and for free. The law also incorporates compulsory

license whereby non copyright holders may use works of authors with payment of remuneration for the purpose of distribution, translation etc. But this all rights of users are not free of limitations because there are limitations on the free and unauthorized use of the copyrighted works. For example, reproduction for personal use should be in a single copy and for non commercial purpose, reproduction of computer program should be for backup purpose, importation should be for private use only, performance should be limited to family or school, reproduction by libraries if not established for commercial purpose etc.

Even though the Ethiopian copyright law is modern, it failed to accommodate different issue born with changing conditions and hence, there are different issues not covered by the law. The issues of exceptions and limitations for persons with disability, digital reproduction of copyright works, protection of digital contents of copyrighted works, circumvention of digital protected works, digitalization or digital reproduction of works by libraries and other similar institutions, conditions of granting compulsory license, the possibility of reproduction and making quotations from unpublished works, the applicability of exceptions and limitations for teaching whether formal, informal, conventional or distance, or commercial or non commercial educational institute, reproduction by libraries and other similar institutions established for gain taking in to consideration the importance of those institutions in the promotion of social, economical, technological, cultural life of a given community, the possibility of reproduction of copyrighted works for non educational purpose like entertainment and leisure, etc are not covered with the necessary precision. But the law has positive sides because there are possibilities inviting positive and broad interpretations enabling to settle uncovered issues. For example the teaching exception may include all sorts of educational delivery such of formal, informal, distance or face to face and commercial or non commercial.

Currently, Ethiopia is not a member to any international treaty or convention on intellectual property such as Rome and Berne conventions, TRIPs Agreement, WCT and WPPT. Generally, there exists disparity on the applicability, scope, type etc of exceptions and limitations of copyright in different jurisdictions.

The US Copyright Act contains both general and specific rights of users. The fair use exception provides broad rights to copyright uses provided that users should use the copyrighted work in conformity with the requirements of fair use. The Act also includes specific exceptions for the benefit of users. The act was enacted on the basis public interest or utilitarian and economic theory orientation as it gives less emphasis to

moral rights. In United States, different legislations took place ranging from coverage of copyright protection, extension of term of protection to protection of digital works and regulation of distance education. The Act contains anti-circumvention provisions and limited exceptions of using copyrighted works for distance education of non commercial purpose. The Act prohibits not only circumventing digital protected works but also production and distribution of devices used to facilitate circumvention even though circumvention is allowed for limited uses only. The fair use exception developed from case law is determined based on the purpose or character of the use, the nature of the work being used, the amount of the work used and the effect of the use on the potential value of or market of the work.

The fair use exception is applicable to published and unpublished works. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. The Act permits the fair use exceptions and reproduction of copyrighted works for teaching, scholarship, or research, including multiple copies for classroom use in order to balance the conflicting interests of copyright holders and the public. The specific exception of the United States copyright act allow reproduction by libraries and archive, performance and display for nonprofit purpose, broadcasting by wire or wireless, compulsory license, reproduction for blind or other people with disabilities, reproduction of computer program for nonprofit purpose etc.

The French Intellectual Property Code was enacted on the basis of personhood and natural law theory of copyright law as it provides strong protection to copyright holders and very limited specific exceptions to users even though the copyright law of the EU which has more flexible exceptions is applicable. The French Code provides strong moral rights to authors perpetually. The private copying exception in France is subject to equitable remuneration to be paid to the author. The author may not prohibit private and gratuitous performances carried out exclusively within the family circle. The Code also includes limited exceptions enabling the analyses and taking short quotations justified by the critical, polemic, educational, scientific or informatory nature of the work, broadcasting, and reproduction of software for specific purpose such for error correction. The French Code regulates circumvention and accordingly, circumvention of technical device protecting software is prohibited and any publication or user's handbook concerning means of removing or circumventing any technical device protecting software shall state that the unlawful use of such means is liable to the penalties laid down for cases of infringement. Libraries and other similar institutions like archives and museums are not allowed to make reproduction of copyrighted works preservation,

preservation and carry format shifting of works to meet the demands of persons with disability. The Code has only limited exceptions.

The Copyright Act of Canada provides exceptions to the exclusive economic rights of copyright holders in the form of fair dealing and other specific exceptions. The Act was enacted on the basis of the Lockean theory of labor as emphasis is given to the protection of copyright holders even though utilitarian aspect is developing through judicial interpretation of fair dealing by courts. Fair dealing use is not an infringement for research, private study which can be commercial or non commercial, criticism or review, news reporting, education, performance for nonprofit educational purpose in the premise of the institution provided that the educational institution must pay royalties for reproduction and performance and destroy the copy, reproduction of non digital work by library, museums and archives or their employees whether published or unpublished. Format shifting when the original work is obsolete by libraries, archives and museums, single reproduction of computer program by adapting, modifying or converting the computer program or translating it into another computer language for compatibility and backup whether for gain or not, retransmission or broadcasting of copyrighted works with payment of royalties, reproduction of copyrighted works on the request of persons with perceptual disability or non-profit organization acting on the benefit of such persons with the possibility of format shifting to make accessible and live performance to the public by educational, religious institutions, charitable organizations without payment of royalties is allowed.

The fairness of the dealing is determined on case by case basis taking in to consideration the purpose of the dealing, the character of the dealing, the amount of the dealing, the alternatives of the dealing, the nature of the work and the effect of the dealing on the work. In addition to the fair dealing exception, the Act includes specific exceptions to non-profit educational institutions, libraries, archives, museums, broadcasters, and persons with perceptual disabilities allowing them to reproduce or use copyright material in specific circumstances without paying royalties or obtaining authorization from rights holders.

The Copyright Act of South Africa of 1978 has been enacted on the basis of economic theory. The Act provides limited exceptions to users in the form of fair dealing and specific exceptions. Fair dealing exception under Section 12 allows copying without permission for research or private study, personal or private use, criticism or review, reporting current events in a newspaper, magazine or similar periodical,

judicial proceedings or for reporting judicial proceedings, illustration, broadcasting, rebroadcasting of broadcasts, private study, personal or private use for commercial or non commercial ends which can be considered as good flexibility. Those reproductions should be destroyed after six months. The Act provides quantitative limit on quotation reproduction to be only 10% of a given copyrighted work as parameter of fairness of the use. The Act allows quotation exception without defining whether it is form published or unpublished.

Librarians may make a single fair dealing copy for a user or obtain a copy from another library through interlibrary loan but multiple copies may not be made by a librarian unless permission has been obtained. But digital copying and digitization even for preservation purposes is not permitted without permission. The Act prohibits format shifting without permission. Importing or distributing protected works of others other than for private use, without license is prohibited under the act and hence, license is mandatory to make distribution or importation of protected works even though the act does not deal about the condition of license and does not make mention of the existence of compulsory license.

Brazilian copyright law born out of its Criminal Law and is still relies on it heavily has specific statutory teaching and research exceptions limited to theatrical and musical performances in educational contexts and reproduction of class notes. Reproduction or communication is exclusively for purposes of illustration in research or teaching for noncommercial exploitation and commercial exploitation is permitted on payment of equitable remuneration is paid to the copyright holder. Non-reprographic copying for instruction, copying for filmmaking, copying short passages in collections, preparing or giving examinations, playing or showing works and lending copies is allowed if conducted in educational establishments. Partial or total reproduction of smaller works within the body of a larger work as long as the latter had scientific purposes or is to be used for public learning, reproduction of news articles, newspapers from other periodicals as long as credit was given, reproduction from speeches given in public; reproduction of official documents, reproduction of excerpts from any work in books or newspapers for the purpose of criticism, reproduction of works of figurative art within written works as long their main element was the text itself and as long as credit was given and reproduction of any works of art kept in public spaces are exceptions provided by the law. In addition to this, single full copy private use reproduction of computer programs is allowed for backup or archival purposes; making quotations compatible with fair practice and their extent does not exceed that justified by the purpose, private reproduction for nonprofit purpose, reproduction by libraries,

museums and other similar institutions on the request of users, reproduction in Braille or other system for persons with disability etc are allowed.

5.2 Recommendations

The grant of exclusive rights to copyright holders should not be a departure from exceptions and limitations as the public interest in protected works is a core objective of copyright policy of Ethiopia. Exceptions and limitations should not be considered incidental or unusual to copyright policy as far as copyright should live for reasons of justice, fairness and utility to the public. Exceptions and limitations shall permit the utilization of works and other subject-matter to the extent justified by the purpose of free expression including commentary, criticism, and news reporting, participation in the cultural life of the community, transformative use, teaching, preservation of works by libraries, archives and other similar institutions, research, scholarship, personal use and innovation in the digital environment provided that such utilization is consistent with fair practice and hence, exceptions and limitations should be deemed as the integral part of the copyright system, which has been developed in parallel to authors' rights since the beginnings of the system of copyright.

Creators of new expressions in the form of literary and artistic works are not engaged in creating creative works thinking protection in the form of copyright and researchers and creators never stop creating new expression of creative works in the absence of copyright. The greater the portion of human knowledge in the public domain and flexible copyright exceptions, the greater will be the opportunity for new entrants for creativity and innovation of new artistic and literary works. For this purpose, copyright law should have a principled framework to include flexible exceptions. Users rights put in the form of exceptions and limitations should be considered as deliberate rather than accidental because absolute control is impractical, impossible, and ultimately an inferior to other policy options that ensure that rights holders get paid in return for user access. The judiciary should avoid unbalanced interpretations of copyright that favour the grant of copyright at the expense of users by forgetting that users include authors and other downstream creators.

The Ethiopian copyright law allows copyright users to make reproduction and quotations from published works of right holders without payment and authorization. The law neither prohibits nor allows the reproduction or making quotation from unpublished works. If one uses the positive interpretation of copyright law in the promotion of the authors work and free flow of knowledge, it may be considered as

permitted and hence, reproduction and making quotation from unpublished works is allowed. Therefore, the Ethiopian copyright should allow reproduction and quotation from unpublished works if such works are lawfully made available to the public. The law also allows reproduction of only a single copy for personal use and this may affect the spirit of copyright law in promoting public interest through dissemination of knowledge because a person should be allowed to make multiple reproductions even for other persons who have no access to make reproduction. Therefore, a person who makes multiple copies in good faith should not be held liable for copyright infringement due to the mere fact of reproduction of multiple copies of copyrighted works for his friend engaged in private study, research and scholarship and hence good faith of the reproducing person who reproduces multiple copies of copyrighted works should be considered.

Libraries, archives, museums and other similar institutions are beneficiaries of copyright exceptions and limitations to carry reproduction of copyright works if the work does not exist in their permanent collection. So such institutions should be allowed to make reproduction of materials not available in their permanent collection even though such materials are available in the permanent collection of other similar institutions. Therefore, the precondition of the absence of such work in the permanent collection of similar institution in the proclamation should be amended. In addition reproduction by the institutions should not be dependent on the request of physical persons as stated under article 12(2) because artificial persons may request reproduction for non profit goals or the institutions should have right to reproduce protected works if they think it necessary. The copyright law should also allow exceptions for inter-library loans. This enables a library to make a copy of a work for the purpose of lending to patrons of another library so that the difference in materials for students in all levels of education may be minimized.

Amendment is sought therefore to such institutions to make copy for their patrons or allow the patrons to make copy for personal study, research, and other uses in their own photocopying machines to help researchers in distance places to conduct private study at comfortable time and place and hence, the law should have to include provisions shielding liability of the libraries for violation of copyright while the library should put notice of copyright. Libraries sometimes make materials available to the public on computer websites in case of digital library and post on those websites materials that the public at large can reach via the Internet which can help distance learning which is an increasingly common approach to the provision of educational opportunities in Ethiopia due to different socio-economic and other barriers and distance learning students are particularly in need of good access to materials because they cannot easily

visit a analogue library at their school or university. So, the service of digital library should not be limited to the physical premises of the library and hence, the law should be amended to incorporate exceptions for distance learning, training, conference, e-learning, formal or informal teaching, online and home learning.

The Ethiopian copyright law should be amended to incorporate exceptions for the benefit of persons with disability (blind person, a person having visual impairment or a perceptual or reading disability or any other print disability, which cannot be improved by the use of corrective lenses, a person who is unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading, deaf persons) which may include reproduction in to accessible formats and format shifting.

Amendment is needed to include penal provisions to penalize copyright holders in case of abuse of their exclusive rights or impede lawful use of protected works or obstructs the use of work that has already fallen into the public domain with strong enforcement frameworks so that protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and transfer and dissemination of technology. In addition to this, the amendment should include fair use exception, exceptions for the reproduction of protected works for the purpose of making judicial decision, judicial reports and other administrative works and parallel importation of protected works based on the first to sale doctrine or international exhaustion principle so that distribution of importation of protected work is possible after the copyright holder lawfully marketed his works anywhere in the world as parallel importation may benefit users to get cheap materials while the distribution may avoid market failure.

The concept of fair practice should be defined and appropriate standards which help to interpret and apply should be provided. The fair practice exception should be used to identify whether the practice is fair or not and hence, the fair practice exception should not be used to identify who makes use of or practiced. This is because the term practice connotes not individual acts but rather a practice or overall system. The rule of reason should be applied. The existing copyright law of Ethiopia does not incorporate exceptions for making compilation of different copyrighted works without the authorization of copyright holders. Therefore, the right to make compilations of short works, passages or other works for purposes of teaching by teachers and students should be introduced in to the Ethiopian copyright system.

The copyright should be amended to incorporate comprehensive provisions on compulsory license to promote pro-competitive intellectual property licensing practices, particularly with a view to fostering creativity, innovation and the transfer and dissemination of technology. Because currently, the license is applicable to reproduction, broadcasting and translation but not applicable to performance, importation, distribution, public display and making of derivative works.

The Ethiopian copyright law did not regulate peer to peer file sharing through internet even though reproduction which may include emailing is strictly for personal use. Even though peer-to-peer file sharing of creative works over the internet poses a particularly thorny issue for copyright law, full copyright liability may seem inappropriate in such an environment, since it might inhibit the broad dissemination of creative works promised by the new technology. Copyright law should protect digital environment while at the same time seek to promote rather than limiting new consumer experiences. So, the law should include legal framework of protection of digital works while promoting public interest to use digital technologies and the internet to simplify life. The use of TMP should not affect permitted uses through denial access because, the absence of law regulating digital file sharing and circumventing of technology protection measures and copyright holders self help exercise may adversely affect the use rights, freedom of expression and dissemination and free access to knowledge in Ethiopia. If peer to peer file sharing has no commercial goal, it should be allowed as far the economic interest of the copyright holder are not affected or the outcome of files is not in a position to create competition in the market with the copyright holders.

The protection of digital contents through TMPs should leave enough space to users and should not control access. Taking in to consideration Ethiopian technology and knowledge of technology, accessing or using digital contents blocked by TMPs may be difficult. So, Ethiopia should not include anti circumvention law in its amendments because access control is beyond the scope of copyright law. What copyright law should regulate is use but not access. Copyright has never been concerned about an author controlling how many times the book is read or the movie is seen or the music is heard rather exclusive rights were concerned about how many copies are reproduced, distributed, performed, published, translated etc.

The copyright law should have connection with competition and consumer protection law to protect the interest of consumers. This is true because intellectual property rights policy designates boundaries within which competitors may exercise legal exclusivity or monopolies over their innovations and creation. As

competition is not the end goal of competition law, similarly as intellectual property protection is not the end goal of intellectual property rights policy, rather it is a means to achieve improved efficiency and better welfare in the long run. Competition law and intellectual property rights policies are bound together by the economics of innovation and creativity and an intricate web of legal rules that seek to balance the scope and effect of each policy.

The Ethiopian copyright law does not regulated the fate of protected works if the copyright holder die leaving no successors. So the law should be amended to place such works on public domain as the Brazilian copyright law did. The amendment of the copyright law should incorporate provisions dealing with orphan works or works whose copyright holders could not be located. And hence, such works should fall under the public domain. The amendment should also include definition of performance of artistic and literary works to include playing music, dancing, singing, communicating, reading for someone, music play in hotels, music shops, presentation of a work and show by using amplifying sounds or visual images, transmitting apparatus, any type of electronic retrieval system and any other techniques and systems. So, Competition and Consumer protection Law should also be used to protect abuse of rights by using suits of abuse of monopoly and misuse of rights.

In Ethiopia derivative works are protected provided that the protection of such shall be without prejudice to any protection of a preexisting work incorporated in or utilized for the making of such a work pursuant to article 4. Accordingly, making such transformative work needs authorization of copyright holders. And hence, the amendment should incorporate provisions which allow transformative use of protected works for users without the authorization of copyright holders. Transformative use means the use of publicly accessible protected works for the creation of new artistic or literary work which is not a substitute of the pre existed work and hence, transformative use as a balance between past and future creators should be allowed as far as copyright's exclusive rights are only justifiable to the extent that the costs imposed on future users do not outweigh their benefits since transformative uses are not substitutes for the original work, therefore the use cannot directly harm the market for the original saving there may be some exceptions where copyright owners rely on the prospect of licensing transformative works. The moral rights of authors in transformative use of protected works should be considered in the interest of the totality of copyright policy in the promotion of public interest through encouragement of innovation, creativity and dissemination of knowledge.

The commercial nature of the transformative use and the amount of the original taken do not provide useful guides to evaluating whether a transformative use should be allowed. As far as transformative works are not substitutes of the original work, there is little or no harm to the owners of previous works.²²³

There exists lack of awareness of the existing copyright limitations and exceptions contained in the copyright laws and knowledge and information dissemination will be limited as a result. So, an increasing awareness creation works has to be done by the EIPO.

The Ethiopian government should have to slow ratification of the major international intellectual property conventions and agreements as the three step test cumulative requirement of exceptions and limitations may hamper dissemination of knowledge in Ethiopia found at its infant stage and the difficulty of implementation of TMPs which goes beyond the scope of copyright law.

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