

Exceptions and Limitations under the Ethiopian Copyright Regime: An Assessment of the Impact on Expansion of Education

Mandefro Eshete* and Molla Mengistu**

Introduction

Exceptions and limitations to copyright are legal restrictions on the exclusive right of owners not to be applicable on certain specified situations. Since copyright law governs the right of control and distribution of copyrighted works the owner gets complete monopoly right over the use of materials which would be prejudicial to the interest of users to have access to knowledge in the absence of the authorization of the owner. As a result of the existence of these two conflicting interests, viz. the right of the owner to have monopoly right over the work and the right of users to have access to knowledge through the free flow of information, the role of the appropriate copyright law is to strike the correct balance incorporating flexibilities in the protection and use of the works to accommodate these interests.

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. The protection of exclusive copyright ownership in the absence of exceptions and limitations prohibits unauthorized access to copyrighted content and affects education in general and higher education in particular.

Particularly in the current situation where we are witnessing the development of stronger national as well as international copyright enforcement mechanisms, higher education establishments the mission of which is promoting human and economic development through dissemination of knowledge would be restricted from achieving their objectives due to lack of access to materials unless adequate exceptions and limitations, including limitation of the period of protection and permission for free use of protected works for educational and research purposes, are put in place. Most importantly, without exceptions and limitations the problem could be severe in developing countries like Ethiopia where universities and colleges are in the beginning phase with serious scarcity of materials and resources to secure the necessary collections through purchases.

*Dr. jur. & LL.M., University of Munich; LL.B., Addis Ababa University; Assistant Professor of Law, Addis Ababa University, School of Law.

**LL.M., University of Turin; M.A. & LL.B., Addis Ababa University; Assistant Professor of Law, Addis Ababa University, School of Law.

The main objective of this article is examining the Ethiopian legal regime governing exceptions and limitations to copyright in light of its adequacy to give access to materials for the achievement of the goal of higher education in the country. The article analyses the relevant provisions of the copyright law of the country, international instruments, and literature.

The article consists of three parts. The first part deals with the historical development of copyright regime and the fundamental features of copyright protections under the past copyright system of Ethiopia. The second part deals with exceptions and limitations as enshrined under the provisions of the current Ethiopian copyright law in light of its adequacy to strike the balance in protecting the rights of the copyright owner and providing access to knowledge to develop higher education. The third part provides the conclusion of the article setting out important findings including the gaps and weaknesses in the law, and the present status of universities in terms of access to materials. The third part also provides recommendations for improvement to benefit universities from exceptions and limitations.

Part I: Historical Development of Copyright Protection in Ethiopia

A. Pre-Civil Code Development

The need for the establishment of a copyright system in a certain jurisdiction is interrelated with the level of development of literature and education coupled with the founding of the printing press. This means the legal recognition of property rights in literary and artistic works in the modern sense presupposes a well developed society.

The history of literature in Ethiopia is believed to have strong linkage with the introduction in to the country and development of Orthodox Christianity in the fourth century. According to one writer, after the acceptance of Christianity even the fortune of kings was interwoven by historical association and mutual interest with those of the church.¹ Another authority argues that 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 Christianity².

The main reason for such development of writing after this period may be attributed to the conviction of religious fathers of the role of religious writings to spread the religion in the country. Thus, the translation of the religious books into the language of the country was found to be necessary. Sources

¹ Margery Perham, *The Government of Ethiopia* (Oxford: Oxford University Press, 1948) p. 104.

² Amsalu Aklilu, *A Short History of Ethiopian Literature* (Addis Ababa: Addis Ababa University, 1984).

assert that the New Testament and the Old Testament were translated consecutively from the Syrian language in to Geez Language which was the language of communication of the then government of the Axsumite Empire³. Since then, the Ethiopian literature became a literature of translation⁴ and the engagement of writers almost fully into the activity of translation could have been one of the factors that undermined the emergence of the literature of national origin.

The unique characteristic of the then Ethiopian translators was the deliberate omission of their names from appearing in the translated work, probably an act of modesty.⁵ Moreover, some present religious practices indicate that there was strong belief that translations or works done with the view of serving the religion were considered as public domain. This means the main objective of works of translation was to serve religious purposes. As a scholar observed, there is no country like Ethiopia where religion had put strong influence on literature.⁶ The situation had given the freedom to subsequent translators and writers to use the anonymous works or works bearing the name of the author. As a result the indigenous concept of copyright could not easily develop for a long time.

Moreover, the fact that religious practices and ceremonies were conducted orally led to the development of the belief within the religious community that copying was not an act to be condemned. Therefore, one can argue that the initial stage of the development of literature, which was almost exclusively devoted to religious writings, particularly to translation, was not against copying from previous works since it was considered as an act of spreading the religion. In fact the copying of the scholarly works by others gave the author the feeling of being recognized and respected rather than that of an infringement of his right. The only customary obligation imposed on users of such works, particularly traditional church school students, was the responsibility of copying down without the slightest alteration, which could

³Amsalu Aklilu, *supra* note 2, pp.31-32. According to Dr. Amsalu since the religion was imported from abroad (Middle East) the writings about the religion were also written outside Ethiopia in foreign language. He further argues that, as sources indicate, these books were translated into Geez by Syrian monks who fled to Ethiopia for fear of religious persecution.

⁴ Amsalu Aklilu, *supra* note 2, p. 31.

⁵ *Id*, p. 3.

⁶ *Ibid*.

serve the purpose of passing down literary and artistic heritages to generations⁷.

The ancient development of art in Ethiopia is also mainly attached to the paintings and drawings in churches and monasteries which were considered as public domain as soon as the completion of the work without giving any room for the emergence of the concept of the protection of the rights of the creator. Artists of religious works used to draw or paint as an aspect of their religious duty and to dedicate their works as the exclusive property of the church and the same is true for next drawers and painters who may even follow or copy the styles of previous creators but still dedicating the work for the service of the church. The striking similarity of the ancient church drawings and paintings that one can observe till present is probably the result of the free reproduction of previous works due to the absence of the prohibition of copying.

The other contributing factor for the absence of any restrictions on the use of literary and artistic works in ancient Ethiopia was the absence of economic value of the creations of the mind because of the non existence of the printing press and the low level of literacy of the society.

However, unlike the case of other literary creations and artistic works, the church requires the creation of *Quene*⁸ to be absolutely original without any tolerance even to the smallest addition from previous works of others. Since each created *quene* is attributed to the name of the author and a title of distinction is designated to the creator, no body was allowed to make use of any expression or part of it.

Along with the development of *queen*, strong customary social sanction by the church community against users of the works of others developed making the act shameful and disgraceful.⁹ The *quene* has been required to be created instantly at the time of the happening of a certain event and the practice of the creation of *quene* has been the exclusive domain of the Ethiopian Orthodox Christian Church for the last several years. The language used to create *quene* has been *Geez*, which was the language of ancient Ethiopia and which is currently used only as the liturgical language of the Ethiopian Orthodox

⁷ Seleshi Zeeyohannes, *The Ethiopian Law of Literary and Artistic Property*, Faculty of Law, Addis Ababa University (unpublished), 1983, pp. 1-2.

⁸ *Quene* is a unique literary creation built of two or more semantic layers which as a unit conveys twofold meanings.

⁹ Seleshi Zeyohannes, *supra* note 7, p. 3.

church.¹⁰ The important point worth noting at this juncture is that even though the secular aspect of *quene* literature has developed in other Ethiopian languages through time, the religious instant creation of *quene* has not been inherited by other major Ethiopian languages.

The other important point in this connection is the uniqueness of the prohibition in the sense that it does not make distinctions between fair and unfair uses; and authorized and unauthorized users. In other words, authorized or fair practice, a term introduced under the Ethiopian Copyright Law of 2004, was not known in the domain of *quene*. This shows that the purpose of the customary prohibition against the use of the *quene* of another person was not the protection of the right of creator; it was rather to ensure the originality of the creation and to ensure that the creator qualifies to be designated as a *quene* creator. Thus, contrary to the case of translated or original works and paintings, the protection granted to queen creations in traditional Ethiopia was absolute without giving any room for the development of the concept of authorized use or fair practice based on which the later generation could build the knowledge from the previous achievements. However, there has not been clear customary prohibition of faithful reproduction of a *quene* by indicating the creator so long as it is not incorporated into a new work, and available sources also do not indicate that its translation into any other Ethiopian language was condemned.

The history of education in Ethiopia is as old as the introduction of Orthodox Christianity into the country. But for several hundred years, the education system was limited only to church education until the introduction of modern education system and the opening of the first school in the country in 1908.¹¹ History shows that the church developed an elementary system of education based on exclusively religious curriculum which served the needs of the

¹⁰Sample text in Ge'ez in Ethiopian script reads as follows.

ቃለ በረከት ዘሃኖክ ዘከመ ባረከ ገሩያነ ወጸድቃነ እለ ሀለው ይኩኑ
በሰለተ ምገዳቤ ለአሰሰሎ ኩሉ እኩያገ ወረሲዓገ።

Transliteration

Kalā bārākāt zā-Henok zākāmā barrākā ḥeruyanā wāṣadkanā 'alā hālāw yekunu
bā'elātā mendabe lā'āsāslo kwilu 'akuyan wārāsī'an

Translation: Word of blessing of Henok, wherewith he blessed the chosen and righteous who would be alive in the day of tribulation for the removal of all wrongdoers and backsliders. (*The first sentence of the Book of Enoch*). Available at <www.omniglot/writing/ethiopic>.

¹¹John. Markakis, *Ethiopia: Anatomy of a Traditional Polity* (Oxford: Oxford University Press 1974) p. 144.

church as well as the spiritual and secular needs of the society in general.¹² Since the church education was based solely on the religious books, the question of access to other materials for teaching and the problem of copyright protection were not relevant issues of the day.

Modern elementary education was introduced in 1908 and by 1950 there were about 500 elementary schools with 56 000 students.¹³ The endeavor to establish modern elementary education had gradually led to the founding of the first secondary school in 1941.¹⁴ Thus secondary education expanded only after 1941.¹⁵ Since elementary and secondary education in the country was in the formative stage, the problem of access to materials and copyright protection was not a critical issue at the time. It should be underlined here that Ethiopia at this time was not a party to the Berne Convention. Moreover, there was no domestic legal instrument recognizing copyright protection.

Following the development of modern elementary and secondary education, higher education was introduced into the country in 1950 when the University College of Addis Ababa was founded.¹⁶ This required the importation of foreign materials for teaching and research purposes. In addition the employment of expatriate staff who had the orientation about the concept of copyright protection lead to the appreciation of the need for the establishment of a copyright regime to govern the production and reproduction of relevant materials in sufficient quantity for use in the institutions for the purpose of dissemination of knowledge.

The other important factor which had contributed for the adoption of the copyright system in Ethiopia is the establishment of the printing press, a long time after the beginning of church education in the country. However, the introduction of the printing technology for the first time in 1906 could not have huge impact on the development of literary works in Ethiopia because the first machine introduced was not in such a level to be used for publishing books except small newspapers and government proclamations.¹⁷ Nevertheless, the limited experience gained in using this technology had encouraged the

¹² *Id.*, p. 143.

¹³ *Id.*, p. 147.

¹⁴ *Ibid.*

¹⁵ Bahru Zewde, *Pioneers of Change in Ethiopia: The Reformist Intellectuals of the Early 20th Century* (Athens: Ohio University Press, 2002) p. 34.

¹⁶ Markakis, *supra* note 11, p. 151.

¹⁷ Mahtemeselassie Woldemeskel, *Zekre Neger*, 1950, p. 683.

government officials and as result a modern printing press, named *Berhanena Selam*, was established in 1921.¹⁸

The introduction and gradual expansion of this industry has proved to be useful in many respects, *inter alia*, in facilitating the publication of religious books translated into the language of the country, the expansion of literary horizon, and the extensive dissemination of knowledge in religious as well as secular life in the country. The status and conditions of literary and artistic works was determined by tradition until the passage of the law of the department of copiers in 1919.¹⁹

This new development and the increasing number of printing press as well as the production of newspapers led to the need to regulate their establishment and production.²⁰ It is also possible that a change of attitude came about as a result of increased contacts with the outside world during the nineteenth century.²¹ A combination of these could obviously lead to the inception of the concept of copyright in the country that gradually developed into the recognition of the rights of authors by legislation.

From what has been discussed above we can understand that until early 1950s the concept of copyright was little understood in Ethiopia, let alone its exceptions and limitations.²² But unlike this situation which hindered the development of indigenous copyright protection, *quene* creation obtained absolute protection as an exception due to the established prohibition within the learnt religious community of the use of a work by others including the creator himself.

In appreciation of the ancient protection granted to *queen*, one of the prominent religious scholars has stated that "had similar customary protection been

¹⁸ <www. bspe. com.et> accessed on 5th September 2009.

¹⁹Assefa Endeshaw, *Intellectual Property; Legal Development in Ethiopia: An Analysis Within the Framework of a Proposed Policy for Non-Industrial Countries*, Ph.D. Dissertation, Queen Mary and West Field College, University of London (1993), p. 320. According to Seleshi, *supra* note 7, p. 3, "The law required prior legal permit either to set up a printing press or publish newspapers or books. To hold liable for any injuries acts of authors and publishers, the law provided the necessity to put down the name of the author or news paper editor on every edition of a publication. Although the main purpose of this law was to control publications, it is believed that it could as well have developed into recognition of author's rights, had Ethiopia not decided to adopt ready-made laws from the west."

²⁰ Seleshi Zeyohannes, *supra* note 7, p. 2.

²¹ Endeshaw, *supra* note 19, p. 316.

²²Tamiru Wondimagen, *Some Aspects of the law of Literary and Artistic Property: An Inquiry into the Source and Scope of Protected Rights* (unpublished) Faculty of Law, Addis Ababa University, 1971.

extended to other types of literary and artistic works, higher cultural development than what we have achieved so far would have been possible"²³. According to this scholar had the customary protection granted to *quene* been extended to other literary works a better indigenous copyright system could have developed to encourage more original works.

The basis for the development of the said free translation of works could be the assumption that religious works, whoever the translator might be, were deemed to be public domains as of their creation without the monopoly of anyone so that all the believers should have access. The content of *quene* creation on the other hand is not necessarily religious as it could be a praise or condemnation of something though the event in most cases could take place in relation to religious exercises so that the individual original creation must be protected in recognition of the creator and to encourage others to create absolutely original *quene* works. However, this approach of the ancient protection of *quene* works has not been transplanted into nor made any influence on the first modern copyright law of Ethiopia as it will be discussed in section B below.

Consequently, the long journey of underdevelopment in the area had ultimately led to the adoption of a copyright regime in the country. It is therefore necessary to briefly consider the development and salient features of the first copyright law of Ethiopia in the following section.

B. The Adoption of the Civil Code

Ethiopia had undertaken legal reform by adopting different substantive and procedural modern laws substantially imported from Europe in 1960s replacing the existing customary rules. The copyright law of the country was issued as an aspect of this reform and a component part of the country's Civil Code but limited only to 28 Articles. Therefore, it should be noted that the law of copyright appeared for the first time in the legal history of the country with the issuance of this Civil Code.

One of the fundamental features of this copyright law is its heavy dependence on foreign and more particularly, French legal concepts of the Law of March 11, 1957.²⁴ This copyright law, though incomprehensive, lays down the basic principles of copyright protection. More importantly, the law has provided about exceptions that restrict the rights of authors in favor of public interest. These limitations relate to, *inter alia*, the use of a work for education and

²³ Aleka Ayalew Tamiru, as quoted by Selesh Zeyohannes, *supra* note 7, p. 4.

²⁴Tsehai Wada, *Translation and Translators' Rights under Ethiopian Law*, Journal of Ethiopian Law, Vol. 19, 1999, p. 57.

research purposes, free performance of a work at family gatherings or schools, free reproduction of public speech but only for fifteen days, free reproduction in the mass media of articles of topical interest.²⁵

However, this law has taken a unique position in denying the author the exclusive right of translating his work and preventing others from undertaking unauthorized translation by others. Thus, unlike copyright laws of many countries and major copyright conventions, the copyright law of Ethiopia of 1960 has denied authors of their rights to authorize the translation of their original literary works.²⁶ But there were only limited attempts during the period of the applicability of this civil code to translate foreign works in to an Ethiopian language which could benefit the public in general to have access to knowledge. Had this right of translating existing works without seeking the permission of the author provided under the 1960 civil code been maintained by the present Ethiopian law, several works could have been translated into different languages of nations and nationalities of Ethiopia which are currently used in secondary schools and in university level educational system to some extent to make scarce materials available and facilitate access to knowledge.

The important question in this connection relates to the source of this unique stand of the 1960 Ethiopian copyright law. Firstly, from the reading of the relevant provisions of the 1957 Copyright Law of France, which has heavily influenced other provisions of the Ethiopian law, we understand that it expressly grants authors the exclusive right to authorize translation of their works. Thus it may be concluded that the copyright law of France is not the source of the unique stand of the Ethiopian copy right law that denies authors the right of prohibiting unauthorized translation of their works.²⁷

It is therefore possible to argue that one of the possible sources of this unique position of the civil code on the restriction of right of translation of the author is the influence of the practice in ancient Ethiopia which fully permitted the translation of religious or other anonymous works of either the drafter or the legislative organ of the time to deny the author to prohibit translation of his work. In addition to this it is also possible to argue that the denial of the exclusive right of the author to prohibit the translation of his work is an indigenous origin which was deliberately incorporated into the law by the drafter to give the people easy access to knowledge through translation with due consideration of the multi-lingual society of Ethiopia.²⁸ This conclusion is in line with Tsehai's argument that in determining the restriction of translation

²⁵Please see the provisions of Civil Code Articles 1656-1658, 1661-1662.

²⁶Tsehai Wada, *supra* note 24, p. 58.

²⁷*Id.*, p. 59.

²⁸ Assefa, *supra* note 19, p. 336.

rights the legislature might have intended to enrich the literary culture of the nation by allowing translators to translate any work without the necessity of seeking authorization or formal licensing to make their works available to the general public.²⁹ However, in the absence of any dependable source, it is difficult to be certain to conclude as to which of these two possible sources influenced the Ethiopian civil code to adopt this unique position

It is under these circumstances that the internal and external dynamics including the development of literary works, expansion of the music industry, the introduction of the copying technology, the expansion of education, and Ethiopia's preparation to join the WTO necessitated the issuance of a more comprehensive copyright law in 2004. Following, we shall analyze the exceptions and limitation that are enshrined in this law in light of their adequacy to access knowledge and contribute for the development of the higher education system in Ethiopia.

C. Developments since 2004

1. The 2004 Copyright and Neighboring Rights Proclamation

The period preceding the promulgation of the Ethiopian Copyright Law of 2004 was predominantly characterized by a growing gray business in the copyright industry of which the music industry (both audio and visual media) is the strongest. The music industry was not even within the reach of the law enforcement bodies and as a result of which infringement of copyright was widespread. In order to get the attention of the public in general and the law maker in particular, stakeholders in the copyright related industry led by those in the music industry even went to the extent of deciding not to publish their works. It was with this background that the lawmaker finally decided to enact the 2004 copyright law which is strongly shaped by considerations of the music industry.

Because of developments in the copyright related industry, especially in the area of the music industry,³⁰ the law maker issued Proclamation No. 410/2004, the Copyright and Neighboring Rights Proclamation referred to as 2004 copyright law or Ethiopian copyright law). The preamble of this legislation stipulates that the law acknowledges the fact that literary, artistic and similar creative works have a major role to enhance the cultural, social and technological development of the country. Further, the law stipulates that it

²⁹ Tsehai, *supra* note 24, p.61

³⁰The music industry we are talking about focuses on indigenous Ethiopian music. Before this period a new album used to generate the artist some where between birr ten and twenty thousand (four to eight thousand USD).

was also found necessary to protect works that make literary, artistic and similar creative works productive by recognizing neighboring rights by law.

The 2004 copyright law determines the scope of application and the subject matter not protected. The law acknowledges the protection of economic and moral rights of authors. According to Article 7 of the law, the author or owner of a work has the exclusive right to carry out or authorize the following acts in relation to the work: reproduction of the work; translation of the work; adaptation, arrangement or other transformation of the work; distribution of the original or a copy of the work to the public by sale or rental; importation of original or copies of the work; public display of the original or a copy of the work; performance of the work; broadcasting of the work; and other communication of the work to the public.

The 2004 copyright law has introduced originality and fixation as the two requirements for protection; stipulates what moral rights are³¹; lists down the limitation and exceptions to copyright; the manner of assignment and licensing of economic rights; governs neighboring rights; and how copyrights are enforced.

2. Criminal Sanctions

In relation to criminal sanctions, Article 36 of the 2004 copyright law provides that unless otherwise heavier penalty is provided for under the criminal law, whosoever intentionally violates a right protected under [the Copyright] law shall be punished with rigorous imprisonment of a term not less than five years and not more than ten years.³² When the criminal act is attributable to gross negligence, the act is punishable with rigorous imprisonment of a term not less than one year and not more than five years.³³ In addition to the punishment of imprisonment, the seizure, forfeiture and destruction of the

³¹To the catalogue of moral rights belong the following rights: to claim authorship of a work, except where the work is included, incidentally or accidentally, in reporting current events by means of broadcasting; to remain anonymous or to use a pseudonym; to object any distortion, mutilation or other alteration of his work, where such an act is or would be prejudicial to his honor or reputation, and to publish his work. These rights are not transmissible during the lifetime of the author. The author or his heirs or legatees may waive any of these rights in writing. Moral rights shall be enjoyed by heirs or legatees until the expiry of economic rights.

³²Article 36(1) of the 2004 Copyright Law. The severe penalty is for cases which involve intention of violating a copyright and violating it in order to make financial gain. The law through this provision targets infringement in the music industry.

³³Article 36(2) of the 2004 Copyright Law.

infringing goods and of any materials and implements used in the commission of the offence are part of the punishment.³⁴

Following the promulgation of the 2004 copyright law, the Ethiopian Criminal Code Proclamation No. 414/2004 (criminal code) was issued. Title II of this criminal code deals with economic and commercial crimes. Chapter I of this title addresses crimes against intangibles which include trademarks infringements, declaration of origins, designs or models (Article 720) and infringement of rights relating to literary, artistic or creative works (Article 721). Sub-Article (1) of Article 721 of the criminal code on the other hand provides that "[w]hoever, apart from cases punishable more severely by another provision of 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. Sub-Article (2) of Article 721 provides that, [w]here, the act is committed negligently, the punishment shall be simple imprisonment not exceeding five years"³⁵.

D. Ethiopia's Accession to IP-Related International Treaties

Currently the Government of Ethiopia is making preparations to join the World Trade Organization (WTO). In order to undertake studies and facilitate accession to WTO, the pertinent ministry which auspices the accession process, i.e. the Ministry of Trade and Industry, has formed a technical committee and a steering committee. These committees, among other things, have in the past examined whether the IP legislations of the country are in line with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Since the major laws on intellectual property issues are recently issued and drafting of these laws was done by consulting pertinent international instruments³⁶ as yardstick, the need to conduct a major revision, including the provisions on exceptions and limitations, in line with TRIPS Agreement might not be necessary. However, there is a need to conduct a systematic revision so that local laws won't grant more rights to authors than what is stipulated in international instruments as minimum rights.

³⁴Article 36(3) of the 2004 Copyright Law.

³⁵The majority of cases pending with the Federal High Court, the court which has material jurisdiction on the matter, is on music and is of a criminal nature.

³⁶The Inventions, Minor Inventions, and Industrial Designs Proclamation was issued in 1995 and regulates as the name indicates patents, utility models and industrial designs. Apart from the three, the law also governs what is called patent of introduction. The Copyright and Neighboring Rights Proclamation was issued in 2004.

Despite its readiness to join WTO, Ethiopia has not yet acceded to international instruments in the area of intellectual property in general and copyright in particular. Accession to these international treaties is under consideration by the Ethiopian Government. The Government is also studying the impact of those international treaties whose accession by the country is necessary for the compliance of the national intellectual property system with the TRIPS Agreement. One such instrument is the Berne Convention. TRIPS Agreement in Article 9 provides as follows: "Members shall comply with Article 1 through 21 Berne Convention (1971) and the Appendix thereto.

However, members shall not have rights or obligations under this agreement in respect of rights conferred under Article 6^{bis} of that Convention or the rights derived therefrom." As a result, national copyright laws of Member Countries must comply with the substantive copyright law provisions of Berne Convention. This obligation applies also to Ethiopia³⁷ if it joins the WTO.. The following discussions on exceptions and limitations to copyright in Ethiopia are made in light of the applicability of the pertinent provisions of the TRIPS Agreement and the Berne Convention.

Part II: Exceptions and Limitations to Copyright

A. General Discussion

Besides the definition of terms, the rights copyright creates and the criminal sanctions it imposes, the 2004 copyright law also regulates the limitations and exceptions imposed on the rights of authors. The major limitations and exceptions are reproduction for the following purposes: reproduction for teaching;³⁸ reproduction by libraries, archives, and similar institutions;³⁹ quotation;⁴⁰ reproduction, broadcasting and other communication to the public for informatory purpose;⁴¹ reproduction and adaptation of computer

³⁷The revision of the 2004 Copyright Law is the result of domestic pressure from right holders. This revision was conducted with the assistance WIPO and other donors from the north. Meaning this has given those interested to draft the revised copyright law compatible with internationally set standards.

³⁸The teaching exception is dealt in Article 11 of Ethiopian Copyright Law and is the subject of discussion in this paper.

³⁹This exception is dealt in Article 12 of Ethiopian Copyright Law and is the subject of discussion in this paper.

⁴⁰ This exception is dealt in Article 10 of Ethiopian Copyright Law and is the subject of discussion in this paper.

⁴¹According to Article 13 of Ethiopian Copyright Law, the owner of copyright cannot forbid 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

program;⁴² importation for personal purposes⁴³; reproduction for personal purposes⁴⁴; and other reasons⁴⁵.

B. Nature and Extent of Copyright Exceptions and Limitations

1. Teaching Exceptions and Exceptions in favor of Libraries

a) Teaching Exceptions

i) Reproduction vs. Utilization

According to Article 11 of the Ethiopian copyright law, the owner of copyright cannot forbid without exceeding fair practice and the extent justified by the

current economic, political, social or religious or similar topics unless the right or authorize reproduction 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; reproduction and broadcasting or other communication to the public of short excerpts of a work seen or heard for the purpose of reporting current events; the reproduction in a newspaper or periodical, the broadcasting or other communication to the public of a political speech, lecture, address, sermon or other work of a similar nature delivered in public, or a speech delivered during legal proceedings, to the extent justified by the purpose of providing current information.

⁴²As per Article 14 of Ethiopian Copyright Law copyright owner cannot forbid a single copy reproduction or adaptation of a computer program. Such exception is possible if it is found necessary to make use of a computer program with a computer for the purpose and extent for which the computer program has been obtained; 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 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.

⁴³The owner of copyright cannot forbid importation of a copy of a work by a physical person for his personal purposes (Article 15 of Ethiopian Copyright Law).

⁴⁴Article 9 of Ethiopian copyright law allows the private reproduction of a published work in a single copy. Such copy could be made only by a physical person for his/her own purposes. However, this exception does not extend to reproduction: of a work of architecture in the form of a building or other construction; of 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; of the whole or substantial part of a database in digital form; of a computer program except as provided in Article 14 of the same law which regulates reproduction and adaptation of computer programs, and which would conflict with or unreasonably harm the normal exploitation of the work or the legitimate interest of the author.

⁴⁵Private performance free of charge (Article 16) and issuance of non-voluntary license (Article 17) are just two examples out of the list of limitations imposed upon copyright owners.

purpose a reproduction of a published work or sound recording for the purpose of teaching. Further, the law requires that a copy made for purposes of teaching shall indicate as far as practicable the sources of the work or sound recording reproduced and the name of the author. The corresponding Berne Convention provision is Article 10(2). According to this provision, it shall be a matter of legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sounds or visual recordings for teaching, provided such utilization is compatible with fair practice. This exception introduced by the Berne Convention has not been touched upon by subsequent international instruments.

With regard to the types and forms of utilization, both legal instruments use different terminologies. Article 10(2) of the Berne Convention uses a concept which allows broader interpretation. The key concept in this regard is the concept "utilization". Accordingly, reproduction, translation, adaptation of the work, and other related rights fall within the meaning of utilization used in this provision. Unfortunately, same is not true under Ethiopian Law. Here, as opposed to the Berne Convention, teaching exceptions apply to the reproduction of published works and sound recordings only.

This conclusion could be arrived at based on the definition of the term "reproduction" in the same law⁴⁶. According to Article 2(25) of Ethiopian Copyright Law, "reproduction" means 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 an electronic form. It could be argued that the pertinent provision under the Ethiopian Copyright Law limits the types and forms of utilization and does not cover, for example, the translation, and adaptation of a work. The result is that one can not invoke the teaching exception provision in order to translate copyrighted works.

ii) Amount to be reproduced

The teaching exception under the Ethiopian Copyright Law does not put any limitation with regard to the amount which can be reproduced from a given

⁴⁶Bereket Bashura, *Exception and Limitations to Copyright and Related Rights in Copyright and Neighboring Rights Protection Proclamation, Proclamation No. 410/2004 of Ethiopia*, uses the terms "reproduction" and "utilization" interchangeably and makes no distinction between the two. He writes: "In the Berne Convention, this is a matter left in the discretion of the national legislators to decide whether to make a reproduction for teaching purpose under the exceptions." In another place, he writes: "This clearly shows that it is a matter left to the countries to permit utilization of the work for teaching purpose" (emphasis the writers).

work. The absence of such restriction (so-called limitations on limitations) allows the possibility of reproducing the whole or substantial part of a copyrighted work. So long as the reproduction does not exceed "fair practice"⁴⁷ and so long as the extent of reproduction is justified by the purpose, reproduction of the whole or substantial part of a copyrighted work is allowed. There is also an opposing view which argues that reproduction of a whole or substantial part of a copyrighted work is not allowed⁴⁸.

iii) Teaching: conventional vs. other teachings

The other important point in this regard is the meaning attached to the word "teaching". As per Article 11 of the Ethiopian copyright law, the word "teaching" could be interpreted to cover both conventional face-to-face teachings and distance education. But according to the wording of Article 32(c) of the same law the rights of performers, producers of sound recordings, and broadcasting organizations does not cover, *inter alia*, the 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 materials⁴⁹. As a result, performances and sound recordings meant for distance education do not enjoy the teaching exceptions under Article 32(c).

Since it is not possible to depart by way of interpretation from the spirit of the law which is clearly formulated, we have to accept the rather restrictive limitation put on the rights of performers, producers of sound recordings, and broadcasting organizations. But one can legitimately ask why the legislator has not defined the term "teaching" in Article 11 of the copyright law. The writers argue that the absence of such definition like the one we have in Article 32(c)

⁴⁷Since the law is silent on the meaning of the term "fair practice", the term has to be defined by case law in the future.

⁴⁸Yemane Gesesew (Commander), *The Defense Available for Alleged Violator under the Ethiopian Copyright Law*, at p. 3 argues that "when the whole or substantial part of the copyrighted work has been taken a defense under Article 11 of Proclamation 410/2004 is unlikely to succeed." Unfortunately, no reason was forwarded to substantiate such a position. The existence of opposing views does not mean that everyone has to fear the possibility of a jail sentence stipulated in the law. As discussed earlier, the law is strongly shaped by considerations of the music industry and the criminal sanctions apply more to infringements that happen in this industry.

⁴⁹One 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 can not 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.

should allow a broader interpretation to be accorded to the term "teaching" under Article 11. Accordingly, the exception under Article 11 could be enjoyed both by conventional face-to-face teaching and other modes of education, including distance education.⁵⁰

iv) Number of copies

Surprisingly, neither the Ethiopian Copyright Law, nor the Berne Convention restricts the number of copies which could be made for the purpose of teaching⁵¹. It is possible to infer from this silence of the laws that so long as the copy is made for teaching purposes making as many copies as necessary for the purpose is governed under the exception.

b) Libraries, Archives and Similar Institutions

i) Open collection requirement

In line with the teaching exceptions, one has to raise the exception provided to the libraries, archives and similar institutions. This issue is governed under Article 12 of the Ethiopian Copyright Law. Accordingly, an owner of a copyright cannot forbid a reproduction of a work by a library, archive, memorial hall, museum or similar institutions whose activity directly or indirectly is not for gain. Such reproduction is allowed only of a published

⁵⁰According to Andinet Girma, *Copyright and its Relevance to the Right of Education in Ethiopia*, pp. 11 ff. "[s]o long as it does not exceed fair practice and is for the purpose of teaching, a reproduction of copyrightable material or sound recording is allowed. The phrase 'fair practice' and 'teaching purpose' are not defined in the proclamation. ... The proclamation seems to allow absolutely free any reproduction for teaching /educational/ purpose. But the use of the term fair practice as a condition implies that in addition to being for educational purpose the reproduction should not exceed fair practice. As to the second phrase used in the proclamation, i.e. 'teaching purpose' or 'educational purpose' it is defined as non-commercial instruction or curriculum based teaching by educators to students at non-profit educational institution, planned non-commercial study or investigation directed toward making a contribution to a field of knowledge or presentation of research finding at non-commercial peer conference. [...] But in our proclamation the use of the term 'teaching' instead of 'education' has made it as if, for example, presentation of research finding at non-commercial peer conference, workshops or seminars are not included. But given the close relationship between Articles 11 and 12 which is indicated by the use of the term 'educational institution' in Art. 12(2)(c), it does not seem that the phrase 'teaching purpose' excludes the above activities. Generally, in Ethiopia, so long as it does not exceed fair use as explained above, teachers have access to works beyond text books so that they enrich learning opportunities."

⁵¹Bereket, *supra* note 46, p. 18.

article, short work or short extract of a work to satisfy the request of a physical person.

Before libraries could grant permission the following conditions have to be met: that the library or archive has to be satisfied that the copy will be used solely for the purpose of study, scholarship or private research; the act or reproduction is an isolated case occurring, if repeated, on separate and unrelated occasion; and there is no available administrative organization which the education institution is aware of which can afford a collective license of reproduction.

For libraries to enjoy this exception, they have to be institutions which are not working for gain. Meaning these institutions must fulfill the "open collection" requirement. Such a limitation, if not properly applied, has the potential danger of negatively affecting the libraries of private educational institutions. Since these libraries are part of commercial institutions, the requirement of "working not for gain" could put a restriction to the application of this exception to such institutions. The writers argue that the libraries have to be seen as an extension of the teaching institutions which enjoy the teaching exception under Article 11. If one is allowed to meaningfully utilize the exception under Article 11, even libraries of private educational institutions should be allowed to enjoy the exception under Article 12.

ii) Purpose of the reproduction

The right of reproduction provided under Article 12 as exception to copyright protection 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. Further, such reproduction is allowed where it is impossible to obtain a copy under reasonable condition, and the act of reproduction is an isolated occurring, and if repeated on separate and unrelated occasions. With regard to reproduction for another library or archive, there are practical problems the writers have discovered. Following the establishment of new law schools in the regions, lack of teaching and reference materials became acute. In order to address this problem, the new law schools had to deploy staff, both academic and administrative, in some cases, together with copy machines to Addis Ababa University School of Law, the oldest law school in the country, in order to make new copies of materials available at the later facilities.

These actions were not conducted to preserve or replace a copy which has been lost, destroyed or rendered unusable in the permanent collection of the newly established law libraries. The new institutions which were involved in the reproduction of these materials are public institution and fulfill the "open collection" requirement discussed above. And the reproduced materials are

materials which cannot be obtained in any market⁵². Despite the fact that one of the requirements, i.e. impossibility of obtaining in the market, is met, the whole activity is even in light of the standards set in the Ethiopian Copyright Law illegal. Given the reality on the ground, the writers appeal for the relaxation of this exception.

iii) Supervised reproduction

Article 12 of the Ethiopian Copyright Law does not regulate the manner how supervised reproduction, i.e. reproduction by using copy machines of the libraries, archives, museums, etc, is to be made by users of these institutions. The writers contend that when these institutions make copy machines available, they have to display a notice to the effect that reproduction may be subject to copyright law. In these cases, meaning where such a display of copyright notice has been made, these institutions should not assume any liability for copyright violations⁵³.

2. Quotation Exceptions

The 2004 copyright law has introduced the quotation exception. Article 10 of this law provides that the owner of copyright cannot forbid the reproduction of a quotation of a published work. The quotation shall be compatible with fair practice and does not exceed the extent justified by the purpose. Source and name of the author shall be indicated. The corresponding Berne Convention provision is Article 10(1). According to this provision, it shall be permissible to make quotations from a work which has already been lawfully made available to the public⁵⁴ that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries. Like the issue of teaching exception discussed before, quotation exceptions under both legal instruments use different terminologies.

Under the 2004 copyright law, it is the reproduction of a quotation which falls within the exception clause. Under the Berne Convention it is the making of quotations which falls within the meaning of Article 10(1). Quotations could be

⁵²The materials are senior theses written by senior students as part of the requirement towards their law degree.

⁵³This is a matter to be governed by subsequent legislations.

⁵⁴The phrase "making available" refers to the making available of published works to the public in Ethiopia. The understanding in Ethiopia is such that as long as the country is not a member to any international instrument, utilization of published works which are made available to the public outside Ethiopia could be made. This of course will change once the country becomes signatory to such instruments. Same applies to translation of works made available to the public outside the country.

made at different occasions. They could be made in books, booklets, articles, newspapers, speeches, lectures, sermons, broadcasts, performance, etc. As a result of the variety of ways available to make quotations, there are various rights which could be affected by such an exception. It is as a result of this possibility that this provision of the Berne Convention uses the term "making", a term which has a broader meaning. Following the wording of Article 10 of the Ethiopian Copyright Law, it is only the reproduction right of copyright owners which is affected.

Quotations could be made only from a published work.⁵⁵ The corresponding provision of the Berne Convention allows the making of quotations from a work. Apart from the general requirement of fair practice and purpose, nothing has been regulated with regard to the size of the quotation and the purpose for which the quotation could be made.

3. Works of Oral Nature

Works of oral nature are those works like speeches (could be political speech and/or speech delivered in the course of legal proceedings), lectures, addresses, and sermons. Ethiopian Copyright Law, by virtue of Article 2(30)(b) in conjunction with Article 6, has defined oral works as works within the meaning of the 2004 copyright law. Hence, oral works enjoy copyright protection. The corresponding provision of the Berne Convention is Article 2(1) which defines lectures, addresses, sermons and other works of the same nature within the meaning of the expression "literary and artistic works". Further Article 2^{bis}(1) of the Convention provides that members of the Union have the right to exclude, wholly or in part, political speeches and speeches delivered in

⁵⁵According to Article 2(22) of the Ethiopian Copyright Law, "published work" means a work or a sound recording, tangible copies of which have been made available to the public in a reasonable quantity for sale, rental, public lending or for other transfer of the ownership or the possession of the copies, provided that, in the case of a work, the making available to the public took place with the consent of the author or other owner of copyright, and in the case of sound recording, with the consent of the producer of the sound recording. This definition should be seen in light of the fixation requirement introduced in Article 6. Personal materials are materials which are not made available to the public. Hence, quotations can not be made from these materials. The Berne Convention uses the phrase "make available to the public". Cf. According to Bereket Bashura, *supra* note 46, at p. 35, "the provision applies only to published works unlike the convention that covers a quotation from newspaper articles and periodicals in the form of press summaries. ... Hence in the absence of this mandatory requirement, any reproduction or use of the work by way of quotation will be infringement and may entail various kinds of liabilities."

the course of legal proceedings from the list of works which are considered oral work and enjoy protection.⁵⁶

Unfortunately, the 2004 copyright law has defined the term "works of oral nature" so broadly so as to include political speeches and speeches delivered in the course of legal proceedings within the meaning of works of oral nature which enjoy copyright protection. The copyright law does not have a special provision which governs the manner limitations are imposed on works of oral nature. As a result, resort has to be made to the general exception clauses which apply to teaching, libraries, quotations, etc. Besides defining political speeches, lectures, sermons as works of oral nature, the law has provided the manner how such works could be enjoyed by the public without violating the right of the copyright holder. Accordingly, Article 13(3) of the Ethiopian Copyright Law allows the reproduction in a newspaper or periodical, the broadcasting or other communication to the public of a political speech, lecture, sermon, or other work of a similar nature so long as it is delivered in public. Such reproduction or broadcasting is allowed only to the extent justified by the purpose of providing current information. Such a limitation allows the mass of illiterate citizen living in rural Ethiopia to listen through radios⁵⁷ to political speeches they could not hear because of poor infrastructure.

4. The Requirement of Fixation

Article 6 of the 2004 copyright law lays down the requirements for copyright protection. Reading the first half of this provision, one may be tempted to conclude that the author of a work shall irrespective of the quality of the work and the purpose for which the work may have been created be entitled to protection for his work without any additional formality and upon creation. According to this part of the provision, creation of a work gives rise to protection. The implication of this is that a song sung, a speech delivered in public, etc. do give rise to protection immediately upon creation. Authors do not need to put their creation in any material form so as to get legal protection⁵⁸.

⁵⁶According to this provision, "[i]t shall be a matter for national legislation in the countries of the Union to exclude, wholly or in part, from the protection provided by the preceding Article political speeches and speeches delivered in the course of legal proceedings."

⁵⁷Radio is by far the most widely used means to receive information in rural Ethiopia.

⁵⁸Of course according the settled principle in order to get protection a work has to be original.

The second half of the same provision has introduced a new requirement besides the requirement of originality. Accordingly, in order to enjoy protection a work has to be both original, and fixed. The requirement of originality, being a widely accepted requirement for copyright protection, has been well received by a number of scholars in Ethiopia. The problem we have is with the requirement of fixation which is new to the Ethiopian Copyright Law⁵⁹. The same law defines the term "fixation" to mean the embodiment of works or images or sounds, or of the representation thereof from which they can be perceived, reproduced or communicated through a device prepared for the purpose⁶⁰. The definition has made it possible for any storage to be an appropriate storage.

The requirement of fixation considerably restricts the entitlement of creators to secure and enjoy copyright protection. On the other hand, it may be argued that this requirement benefits the expansion of education giving wider access to unfixed works. However, seen from the practice in Ethiopia, at least from the perspective of the music industry, the requirement of fixation has negative effects on the mass of people, who is illiterate, and does not have access to modern technology, but create copyrightable works.

Ethiopia is a country of diverse nations, nationalities, and people, where some 80 ethnic groups live together.⁶¹ These groups speak their own language and have their own culture. The culture of these people has found expression through the copyright industry: books and articles, music albums, documentary films, etc. are written and produced based upon the culture of these groups. In recent years this has given a boom for the copyright industry.

Unfortunately, the majority of the creators is uneducated and has little or no access to technology or know-how as to how they can fix their works and ensure protection. As a result, those few who have the money go around the country and collect 'works' which are not yet fixed and get the economical benefit out of it.⁶² As a result, the masses may be robbed off the economic

⁵⁹The position of the Berne Convention in this regard is stipulated under Article 2(2). According to this provision, it shall be a matter for legislation the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form. Meaning this provision makes the requirement of fixation to be optional.

⁶⁰Article 2(11) Ethiopian Copyright Law.

⁶¹The Federal Constitution has introduced an ethnic federal system.

⁶²These are not mere allegations. It is a known fact to those who understand the language and the traditions of the more than eighty ethnic groups in Ethiopia that much of the albums released recently not only make use of the traditional music in the countryside, but also are misappropriations of works created by illiterate people

benefits out of their creation. Besides, the real authors of these works may not be even recognized as authors of their creation since the requirement of fixation wouldn't allow protection before fixation. As a result of this requirement courts are not allowed to entertain a dispute involving unfixed works.

The implication of the introduction of the requirement of fixation is two-fold: negative and positive. On the one hand, such an introduction has limited the availability of copyright protection to the few literate and who have a better access to technology. This is more visible in the music industry. On the positive side, such an introduction has limited the availability of copyright protection to only works which have found embodiment from which they can be perceived. This allows accessibility of works which have not found embodiment from which they can be perceived to those who want to utilize such works without any restriction. This has a positive implication in ensuring access to knowledge which is vital in expanding education.

5. Parallel Imports

Discussing the issue of parallel imports, Jehoram⁶³ tries to give a working definition of the term parallel import. According to him, parallel import occurs when authentic - not counterfeited - products are imported cheaply, without the consent of the producer who has a trade mark, copyright, patent or other intellectual property right in these products, with the aim to compete with the producer's own products, which he himself had originally marketed abroad at a lower price. Jehoram further states that it now depends on the intellectual property laws of the country of import, whether such an import is an infringement of the rights of the producer⁶⁴. If the intellectual property laws of the country of import follows the principle of national (or territorial) exhaustion⁶⁵, such an import violates the rights of the IP right holder. If the

living in rural Ethiopia. As per the wording of the provision, Ethiopian courts when entertaining such cases are under obligation to look into the date such work was first fixed. Any other evidence from which it is evident that the work was already there long before it was fixed are as a result not admissible. The major reason for introducing the requirement of fixation, as clearly came out from discussion preceding the enactment of the bill into law, was the evidentiary value of fixation when disputes arise.

⁶³Herman Cohen Jehoram, *Prohibition of Parallel Imports Through Intellectual Property Rights*, 1999 IIC 495, at 495.

⁶⁴Ibid.

⁶⁵Exhaustion, which is also known as the first sale doctrine in copyright law, is an intellectual

property principle which limits the monopoly of the right owner to distribute or in the market of

intellectual property laws of the country of import follows the principle of international exhaustion, such an import will not violate the rights of the IP rights holder.

The position of international instruments on this issue is clear. TRIPS in Article 6 provides, *inter alia*, that "nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights"⁶⁶. Meaning Member States can decide for themselves which of the two principles they want to adopt. A country which adopts the principle of international exhaustion allows the importation of copyright works⁶⁷. But if a country opts for the principle of national exhaustion importation will not be allowed unless authorization is given by the right owner. As a result, we can rightly say that parallel import can be an important tool for countries like Ethiopia to gain access to knowledge which is contained in copyrighted materials.

Unfortunately, the 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 the law has adopted the principle of national exhaustion. According to the principle of national exhaustion, a book which is lawfully placed in the market in the US cannot be imported to Ethiopia subsequently by a trader⁶⁸ for sell without the permission of the copyright

the goods once the IP protected particular goods have been put in the market by or with the

consent of the right owner. That is to say, since the rights are exhausted after first sale by the

right owner the latter may not assert its intellectual property rights to restrain the free transfer or

flow of those goods. For example, if X (the IPR owner) sells IP protected goods to Y; then Y can

resell them in the market freely (without restriction by X) even competing with X.

⁶⁶For a brief introduction to the legislative history of Article 6 TRIPS, Herman Cohen Jehoram, *passim*. Article 6(2) of WIPO Copyright Treaty and Articles 8(2) and 12(2) of WIPO Performance and Phonograms Treaty have same wording as their TRIPS counterpart.

⁶⁷According to Karnell, *Exhaustion of Copyright - Swedish Law in a European Setting*, 1999 IIC 654 at 656), [o]nce a copy has been transferred with the consent of the original right holder, wherever in the world, the distribution right relating to that copy will be exhausted. Verma, *Exhaustion of Intellectual Property Rights and Free Trade - Article 6 of the TRIPS Agreement*, 1998 IIC 534 at p. 566 argues that territorial exhaustion is manifestly incompatible with the new multilateral trading system.

⁶⁸The Ethiopian copyright law in Article 15 allows the importation of a copy of a work by a **physical person for his own personal purpose** [emphasis by the writers]. 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.

holder. Also the same book cannot be imported from elsewhere, where it is cheap, to Ethiopia, where the copyright holder has lawfully put the material in the market but is expensive, without the permission of the copyright holder. Such a restriction imposed by adopting the principle of national exhaustion will negatively affect access to knowledge.

Following the principle of international exhaustion allows the importation to Ethiopia of books from wherever they are lawfully placed in the market. The permission of the copyright holder is not important since the copyright holder is considered to have exhausted his right once the good is sold in the market. Given the fact that TRIPS does not oblige member States to adopt neither of the principles and the fact that Ethiopia has much to benefit from adopting the principle of international exhaustion, the writers recommend its adoption.

6. Non-Voluntary License for Reproduction, Translation and Broadcasting

Article 7(1) lit. (a), (b), (h) of the 2004 copyright law recognize reproduction, translation and broadcasting of work as part of the bundle of economic rights of authors. Despite the recognition of these rights as economic rights belonging to the author, Article 17(1) of the same law gives the Ethiopian Intellectual Property Office the right to grant, notwithstanding the opposition by the copyright owner, heir, or legatee, a license to authorize the reproduction, translation or broadcasting of a published work⁶⁹. This provision, i.e. Article 17, appears to create a sweeping compulsory licensing authority. Because of such fear, the WTO Accession Committee had received a request from a Member State of the WTO for an elaboration on this point. The reply in part reads: "Article 17(1) of Proclamation No.410/2004 gives authority to the Ethiopian Intellectual Property Office [...] to grant a compulsory license to authorize the reproduction, translation or broadcasting of a published work.

Although it is in its early stage a regulation is under preparation as per Article 17(2) of Proclamation No.410/2004 to determine the conditions and forms for the issuance of a compulsory license. In the process of drafting the regulation consideration will be given to the three- step test prescribed in Article 13 of the TRIPS Agreement and they will address the special cases under which a compulsory license may be issued with in the meaning of this Article. The regulation is hoped to include the conditions of issuance of non-voluntary

⁶⁹According to Bereket Bashura, *supranote 46.* at p. 30, "this is understood as a limitation in the interest of the public; i.e. access to knowledge." The Berne Convention in its appendix contains provisions which allow developing countries two compulsory license options. The first one allows governments to issue a license to make translations. The other one allows governments to issue license to reproduce and publish.

license for the reproduction, translation or broadcasting of a published work subject to the payment of royalty. It is clear that Article 17 of the 2004 copyright law is drafted in line with the appendix of the Berne Convention, which is incorporated in to the TRIPS Agreement."

Part III: Conclusion and Recommendations

The Ethiopian copyright law was promulgated in 2004. This law enshrined the criteria of fixation as a requirement to secure copyright protection on the one hand and introduced stronger rights to creators who satisfy the fixation requirement and has put in place a stronger enforcement mechanism on the other. The strength and weaknesses of the provisions of this law should be compared to the benefit the nation would get if these rights are relaxed. From our previous discussion we can understand that, in certain cases, there are imbalances between the rights of the creators and the interest of the public in using literary and artistic works without the authorization of the creator. Keeping this balance is necessary for the protection of the rights of creators and expansion of education. In order to achieve this, the Ethiopian Government should consider revision of the current copyright law.

The objective of such revision has to be to draft the pertinent provisions on exceptions and limitations in such a way that the country fulfills its obligations under international treaties thereby ensuring the rights of its citizens to access to knowledge which is vital in achieving the vision of the Ethiopian Government, which, *inter alia*, is to expand tertiary education to a significant portion of the population. Such a revision, however, should be conducted over a long period of time so that new developments could be considered in the revision process. Following are the major points suggested that such a revision should address.

- Despite the fact that Ethiopia is not yet a signatory to the major IP instruments, national IP laws are in line with the minimum standard set in these instruments. As part of the body of national IP laws, the Copyright Law in place in many instances exceeds minimum standards set under international instruments. In light of the current state of higher education in Ethiopia, the provisions on exceptions and limitations should be revised in such a way that allows minimum protection as stipulated in international instruments.
- The use of the term "reproduction" in Article 11 of the 2004 copyright law has to be replaced by the term "utilization", a term which is employed by the corresponding Berne Convention provision and has a broader meaning. If the latter is adopted the translation and adaptation of a work for the purpose of teaching would be possible.

- Also the amount of work which could be reproduced, as per Article 11 2004 copyright law, should be made clear. Otherwise, the reading of this provision will allow the reproduction of the whole or substantial part of a work. Such a practice has the potential of killing the culture of writing which is right now at an infant stage.
- The distinction which Article 32(c) 2004 copyright law makes should give us also a reason of concern. This provision makes an indirect distinction between performances and sound recordings which have been published as teaching or instructional materials and those works which are not teaching or instructional materials. The distinction is that the exceptions and limitations are imposed on the later while the former products are not the subject of any exception and limitations. Such distinction is not fair and as a result has to be avoided. The writers argue that exceptions and limitations should be possible for both categories of products.
- The definition of those libraries which are "working not for gain" has to be expanded so as to benefit those libraries which are run by private colleges. These libraries should be considered as part of the educational institutions which enjoy the benefit of teaching exceptions stipulated by the 2004 copyright law.
- The exception stipulated under Article 12 of the 2004 copyright law is something which could be enjoyed only by libraries, archives, and similar institutions. The reality on the ground is such that education institutions establish libraries after producing copies from the collection of existing libraries. In order to accommodate this reality, education institutions should be allowed to enjoy the exception provided under this Article.
- The requirement of fixation introduced by the 2004 copyright law has to be abandoned. The introduction of this requirement addresses the difficulties which courts used to face in determining infringing products. This, however, should not be achieved by robbing innocent and illiterate people their right on works created by them. The existing practice goes against the policy the Ethiopian Government is currently working on, viz. poverty reduction.
- In line with granting minimum rights, revision should also address the issue of which of the two principles, i.e. national or international exhaustion principles, should be introduced by the 2004 copyright law.