



JIMMA UNIVERSITY COLLEGE OF LAW AND GOVERNANCE
SCHOOL OF LAW

Program: LLM in commercial and investment law

*A CRITICAL ANALYSIS OF EXCEPTIONS AND LIMITATIONS
TO COPYRIGHT: SPECIAL EMPHASIS TO EDUCATION*

By

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Abstract

This paper examines the issue of exceptions and limitations under the Ethiopian copyright proclamation. Specifically it examines those exceptions and limitations provisions that have direct or indirect link to education from the view point of the subject matter covered by the exceptions, types of exclusive rights fall under the exceptions, nature or types of works covered by the exceptions, beneficiaries of the exceptions, the conditions attached to those provisions and consider whether the proclamation inculcate exceptions and limitations provisions in full-fledged manner and the adequacy of this provision in facilitating educational undertaking.. To undertake it is examination the thesis adopted analytic approach.

After thoroughly examining those exceptions and limitations provisions the study finds that although the copyright and neighboring right protection proclamation No.410/2004 inculcate a long list of exceptions and limitation the systems of exceptions and limitations under the copyright law as it stand know is inadequate to address stakeholders need of using copyrighted work for educational purpose without undergoing the cumbersome procedure of authorization. The exceptions and limitations is framed by employing wrong and restrictive terminologies, due to this the the system of exceptions and limitations lacks clarity and leads to confusions. Furthermore, there is no proper link between and among exceptions and limitations provisions. There exist a huge logical gap among those provision. Copyright law as it stands know fail to incorporates exception and limitation in full-fledged manner. The system of exceptions and limitations under the proclamation is entirely built on to rigid and inflexibly provisions that may not respond to the need of stakeholders.

The paper recommends the legislator to rethink the issue of exceptions and limitations and makes amendment to avert the flaws, weakness and shortcomings of the know existing exceptions and limitations provisions. Specifically it call the legislator to employee appropriate terms, to create a proper link among the provisions and to come up with new exceptions and limitations provisions.

Acronyms

BC: Berne Convention

CR: Copyright

FDRE: Federal Democratic Republic of Ethiopia

ICESCR: International convention on Economic, Social, and Cultural Rights

IP: Intellectual Property

SCCR: Standing Committee on Copyright and Related Rights

UDHR: Universal Declaration of Human Right

WIPO: World Intellectual Property Organization

WTO: World Trade Organization

TRIPS: The Agreement on Trade Related Aspects

Of Intellectual Property Rights

WPPT: WIPO Performances and Performances and Phonograms Treaty

WCT: WIPO Copyright Treaty

Table of Contents

Acknowledgement	i
Acronyms	iii
Table of Contents	iv
CHAPTER ONE	1
1. INTRODUCTION	1
1.1. BACKGROUND OF THE STUDY	1
1.2 Statement of the problem	3
1.3 Research questions.....	5
1.4 Objective of the study	5
1.4.1 General objective	6
1.4.2 Specific objectives	6
1.5 Significance of the study.....	6
1.6 Scope of the study	8
1.7 Literature review	8
1.8 methodology of the study.....	11
1.9 Limitation of the study.....	12
1.10 organization of the paper.....	12
CHAPTER TWO	14
OVER VIEW OF EXCEPTIONS AND LIMITATIONS RELATED TO EDUCATION UNDER MAJOR INTERNATIONAL COPYRIGHT INSTRUMENTS, MODEL COPYRIGHT LAW AND FOREIGN COPYRIGHT LAWS	14
2.1 Introduction.....	14
2.1.1 Overview of Copyright and Theoretical or Philosophical Justification Underpinning Copyright	14
2.1.2 What is exception and limitation	18
2.1.3 Rational for exceptions and limitations to copyright	20
2.1.4 Approach towards copyright exceptions and limitations	22
2.1.5 The concept of education	25
2.2 Over view of exceptions and limitations for education under model law, major international copyright instruments and foreign copyright laws	26
2.2.1 Tunis Model Copyright Law of 1976.....	26
2.2.2 Berne convention	29
2.2.3. Exceptions and limitations for teaching under Rome convention	33
2.2.4 Overview of Exceptions and limitations under WCT and WPPT.....	34
2.2.5 Limitations and exceptions for Teaching under TRIPS Agreement.....	36
2.2.6 Overview of exceptions and limitations for education under Directive 2001/29/EC	38
2.2.7 Overview of Exceptions and limitation for teaching under the Australian copyright Act of 1968	39
CHAPTER THREE.....	43
EXAMINATION OF EXCEPTIONS AND LIMITATIONS UNDER ETHIOPIAN COPYRIGHT LAW WITH SPECAIL EMPHASIS TO EDUCATION.....	43

3.1 INTRODUCTION	43
3.1.1 An Overview of subject matter protected under Copyright Proclamation.....	43
3.1.2 Requirement for protection and Scope of Application of Copyright Proclamation	44
3.2 Scrutiny of Exceptions and Limitations to Exclusive Rights under the Copyright Law with Special Emphasis to Education.....	49
3.2.1 Reproduction for teaching.....	49
3.2.2 Quotation.....	56
3.2.3 Reproduction by Libraries, Archives, Museum and Other Similar Institution	58
3.2.4 Reproduction for personal purpose and private performance free of charge.....	62
3.2.5 Importation for Personal Purpose and redistribution of work by sale	65
CHAPTER- FOUR	67
CONCLUSION AND ECOMMENDATION	67
4.1 Conclusion	67
4.2 Recommendations.....	69
Bibliography	1

CHAPTER ONE

1. INTRODUCTION

1.1. BACKGROUND OF THE STUDY

The link between copyright and education is indeed an old one, and the free dissemination of knowledge and culture has always informed the normative spirit of copyright law.¹ The significance of educational activities and the interests of educators, students and educational institutions in the law of copyright has always been given due recognition in the law of copyright.² The first copyright statute, the Statute of Anne was titled “An Act For Advancement of Learning.”³ This act placed great emphasis on the continued accessibility of books in public libraries and their affordability to university staff and members.⁴ Furthermore, the utilization of copyrighted material for educational purposes is given due recognition under the major international copyright instrument via the instruments of copyright exceptions and limitations. Besides, all jurisdictions recognize the utilization of copyrighted work for educational purpose via the instruments exceptions and limitations in various forms. Each jurisdiction has a system of exception and limitation to exclusive rights of copyright holder.

Exception and limitation refers to the mechanism of utilization of copyrighted work without seeking and acquiring permission from the right holder. They refer to acts the law allows users of copyrighted works to undertake which otherwise would amount to copyright infringement.⁵ In other words the term exception and limitation connotes those permitted acts by the law for various grounds. They are an important part of an effectively functioning copyright system. If there is no exceptions and limitations

¹ Lawrence Liang. ”Exceptions and Limitations in Indian Copyright Law for Education: An Assessment.” *The Law and Development Review* Vol.3,Issue 2.(2010):p.209

² Daniel, Seng. Study on the Exception and Limitation for the Benefit of Educational activities for Asia and Australia,WIPO Standing Committee on Copyright and Related Rights.SCCR19/7(2009),p.6 available at <http://www.wipo.int/copyright/en/limitations/> last accessed(5/20/2017)

³ Lawrence, cited above at note 1,p.210

⁴ Daniel cited above at note 2, p.1, see also U.K. Copyright Act 1709, 8 Anne c.19, ss. 4 and 5.

⁵ Biruk Haile (PHD)”Scrutiny of the Ethiopian system of Copyright Limitations in the Light of International Legal Hybrid resulting from (the Impending) WTO Membership: Three-Step Test in Focus.” *journal of Ethiopian law* XXV No.2.(2012):p.160

copyright protection will seriously undermine socially, culturally and economically significant uses such as, uses for scholarship, education, research and above all undermine the creation.⁶ As creation is based on the preexisting work in the absence of system of exception and limitation its seriously undermined. In nutshell, exception and limitation is instrument for balancing public interest with that of exclusive right given to the right holder.

Specifically, in developing and least developed countries like Ethiopia where educational deficiencies are main cause for many of the most pressing socio-economic problem copy right exceptions and limitations are crucial national policy tools to overcome developmental shortfalls.⁷ A wisely crafted copyright regime with a system of exception and limitation play crucial role in facilitating access to educational material. Beyond access it enables least developed countries to adapt the material to its prevailing reality. Furthermore, it opens the way to communicate the material to the learners in case of distance education. Stated in another way by way of exception and limitation accesses to education material and dissemination is facilitated.

Currently, for Ethiopia the issue of exceptions and limitations is of great concern for various reasons. The most prominent justification is the proliferation and establishment of new educational institution in the country. The mounting of educational institution necessitate the utilization of copyrighted work for the creation of new teaching or instructional material, escalates the need to quote excerpts of or entire copyrighted work, to translate or adapt copyrighted work to the need of their students, compile copyrighted works, etc. Cognizant of this fact the constitution recognizes the possibility of limiting rights over property for public purpose. As stated under constitution every Ethiopian citizen has the right to ownership of private property ,unless prescribed otherwise by law on account of public interest...⁸ The rights includes any tangible or intangible product

⁶ Tobias Schonwetter and Caroline, B Ncube New hope for Africa? Copyright and Access to Knowledge in Digital Age p.6 available at <https://open.uct.ac.za/bitstream/item/21460/New%20Hope%20for%20Africa.pdf?sequence=1> last accessed March 8,2017

⁷ Ibid

⁸ The constitution of federal democratic republic of Ethiopia, 1995, Art 40(1)Proc.No 1, Neg Gez. Year 1,

which has value and is produced by the labor, creativity, enterprise or capital of an individual citizen...⁹ Besides, Copyright and Neighboring Rights Protection Proclamation No. 410/2004 (herein after copyright law), come up with a number of exceptions and limitations to exclusive rights of copyright holder.

Therefore, this study is conducted to examine in detail the system of exception and limitation under the copyright law with special emphasis to education and at the end to come up with measures needs to be taken to address the shortcoming prevalent under current copyright law system of exception and limitation if any.

1.2 Statement of the problem

To relieve from its long lasting and currently existing multi-faceted socio-economic problem the government is trying to take some kind of measures. Considering educational deficiencies as main cause of those mulit-faceted socio-economic problems the government turns it face at the expansion of the education in the country. As the result, in the country the Establishment of educational institutions is expanding from time to time. Private educational institution and public educational institution is proliferating. In turn, this leads to the use of copyrighted work by this educational institution, by individuals engaged in educational activities and by any interested body. There exist two available alternatives to these educational institutions, individuals and any other interested party to use copyrighted work.¹⁰ They may require and acquire authorization of the right holder or they may rely on the system of exceptions and limitations.¹¹

To get permission from the right holder the users of copyrighted work may face problems like:-locating copyright holder, inability to get expeditious response and above all exaggerated fee.¹² Thus, Copyright exceptions and limitations are the best tool for

no.1.

⁹ Id art.40(2)

¹⁰ Xalabarder, Raquel. “*Copyright Exceptions for Teaching Purposes in Europe*” [online working paper].IN3:UOC. Working Paper Series: WP04-004(2004) <http://www.uoc.edu/in3/dt/end/20418.html> last accessed: 04/02/2017 p.2

¹¹ Ibid

¹² Ibid

educational institution, individual and other interested party to overcome problems related to permission and get access to important and quality learning materials. Furthermore, exceptions and limitations play a pivotal role in balancing public interest with that of author and/or owner. Cognizant of this fact the system of exception and limitation are inculcated under copyright and neighboring right protection proclamation no 410/2004 with its amendment proclamation. Although the proclamation inculcates the system of exception and limitation, it's with many pitfalls. In *principo*, the system of exception and limitation under the proclamation is not adequate enough to address stakeholder's need of using copyrighted work for educational purpose without undergoing the cumbersome procedure of permission from the right holder as the proclamation adapts very restrictive approach regarding exclusive rights fall under exception. The proclamation makes many rights (distribution/transmission, reception, broadcasting, importation, adaptation, display, performance, etc.) out of the realm of exceptions and limitations. Besides, regarding the rights fall under the exceptions and limitations the proclamation uses wrong terminology, restrictive terms that may lead to confusion as to the scope (i.e. works, rights, use, extent) of copyright exceptions and limitations.

Furthermore, the system of exception and limitation incorporated under the proclamation lacks clarity regarding the beneficiaries (institution and persons) fall under the system of exceptions and limitations. For this reason, there is a debate concerning the beneficiaries of the exceptions and limitations. Another debatable and unsettled issue is with regard to versions in which those permitted works are utilized. Are those works fall under the exceptions and limitations utilized in its original versions or in another versions like translation. The law lacks clarity as to the form of utilization of those works. For this reason, there is misunderstanding and exclusion of some forms by which those works fall under exceptions and limitations is exploited.

Beyond the law, the interpretation made on those exceptions and limitations by the scholars are creating confusion on the stake holders, as they are interpreting exception and limitation provision in extended manner and sometimes in restrictive way in contrary

to the intention of the legislator and spirit of the law. Via their interpretation they include institution and person which are not entitled by the law to reap the benefit from the exceptions and limitations. Furthermore, others include works which fall outside the scope of exceptions and limitations, while some others exclude some category of works and some forms of utilization. This kind of interpretation has adverse impact on both holders and users of copyrighted work and above all undermines copyright law regime.

Therefore, it is imperative to make analysis of copyright law exceptions and limitations with special emphasis to education.

1.3 Research questions

This research has sought to answer the following questions:

- I. What is the scope of exceptions and limitations provision for educational purpose under the copyright proclamation? Specifically with regard to subject-matter covered by the exceptions, beneficiaries entitled to the benefit from the exceptions, exclusive rights, types or nature of works and the extent to which it is covered by the exceptions and is there any exception regarding the forms by which the works fall under the exceptions can be used?
- II. Are those exceptions and limitations provision full-fledged to address educational need of the country? In particular can they pave the way under which copyrighted work is utilized by distance education similar to that of conventional face to face teaching?
- III. Are those exceptions and limitations effective tool in balancing the exclusive rights of the author or owner with that of public right of access to copyrighted work?

1.4 Objective of the study

There is positive and negative correlation between copy right protection and education. A wisely crafted copyright law has the potential to facilitate the education and enable accesses to copyrighted work but, a narrowly and badly crafted copy right law has the potential to negatively affect the education system. Thus, this study has general and specific objective.

1.4.1 General objective

- The general objective is to examine those exceptions and limitations under the copy right law with special emphasis to education.

1.4.2 Specific objectives

To achieve the general objective several specific objectives are addressed. The following are the specific objectives entertained under the paper:

- To determine subject-matter covered by the exceptions and scrutinize the system of exceptions and limitations introduced by the law from the perspective of exclusive rights covered by the exception;
- To determine the beneficiaries (persons and institution) that may entitled to reap the benefit from exceptions and limitations;
- To examine categories/nature of works covered by the exceptions and limitations and determine the extent of use allowed by the exception
- To examine the forms by which the work covered by exceptions and limitations can be used;;
- Examine as to whether copyright proclamation incorporates exceptions and limitations in full-fledged manner;
- Examine whether the copyright proclamation made a proper balance between exclusive right of the author or the owner of copy right work with that of public right to access and utilize copyrighted work;
- Examine whether those exceptions and limitations are adequate enough to address the countries need of using copyrighted work for educational purpose and in particular pave the way under which copyrighted work is utilized by distance education;
- Last but not the least to come up with new exceptions and limitations needed to address the existing problem and facilitate greater access to copyrighted work and forward possible recommendation that may avert the problem.

1.5 Significance of the study

This study will have multifaceted benefit for many stake holders, as it makes contribution

on the issue of exceptions and limitations under the copyright law. Firstly, it has a great significance for the users and holders of copyrighted work. It enables the users of copyrighted work to have clear picture regarding permitted uses that fall under copyright exceptions and limitations. It enables the users to use those work without any fear of infringement. The study also enables the holder of copyrighted work to have clearly understand regarding the extent and scope of exceptions and limitations. In doing that the study makes easy for copy right holder to understand the scope and extent of his exclusive right. Therefore, it enables copyright holder to take measure in case of infringement without any doubt. In short it give clear image to the stake holders regarding subject matter, beneficiaries, forms of utilization, nature of work covered under the system of exception and limitation and the conditions attached to those exceptions and limitations.

Furthermore, it will be a base for those future researchers that need to conduct their study on the issue of exception and limitation. Besides, the study will serve as an input for the legislator to reconsider and make amendment on current copyright exception and limitation in a way it creates better balance between copyright holder and larger public interest.

1.6 Scope of the study

This study is primarily aimed at scrutinizing the system of exception and limitation inculcated under Ethiopian copyright law with special emphasis to education. The study is conducted based on copyright and neighboring right protection proclamation No.410/2004 with its amendment proclamation No.827/2014. Under these laws various kinds of limitations and exceptions are recognized. Among other things the law excludes certain works from protection as stipulated under article 5 of the proclamation, imposes certain kinds exception and limitation on exclusive rights of the author by allowing certain kinds of free use, provides certain duration for protection and lastly give recognition to non-voluntary license

Among these four categories of limitations and exceptions, the scope of this study is confined to the second categories of exceptions and limitations which, imposes exceptions and limitations on exclusive rights of the author by allowing certain kinds of free use. In this study those exceptions and limitation that do not require permission from the right holder and free of charge alone is scrutinized with especial emphasis to education. All other limitations is out of the scope of the study. In other way subject matter not protected, limitation with regard to duration and non-voluntary license is out of scope of study.

1.7 Literature review

There are few researches conducted in the area of exceptions and limitations under the Ethiopian copyright law with especial emphasis to education. Those researchers who conducted researches on the area of copyright exception and limitation indicated that there are a plenty of shortcomings of those exceptions and limitations provision in general and specifically viewed from educational perspective.

Mandefro Eshete in his work entitled the interplay between copyright protection and the expansion of education in Ethiopia try to indicate some of the shortcomings of exceptions

and limitations.¹³ They states that the law has introduced stronger right protection and enforcement mechanisms to the copyright holders.¹⁴ They provide that the exception and limitation to copyright favors copyright holder by restricting the scope of protection.¹⁵ Furthermore, by examining teaching exception they provides that, as the teaching exception is limited to reproduction right only one cannot invoke the teaching exception to translate the work.¹⁶ Besides, they reached on the conclusion that the word teaching could be interpreted to include both conventional face-to-face instructions as well as distance education. They states that, exception under article 11 of copyright law could be enjoyed both by conventional face-to-face teaching and other modes of education, including distance education. On the other hand based on article 32(c) they states that the limitation imposed on rights of performers, producers of sound recordings, and broadcasting organizations, relates, inter alia, to reproduction solely for the purpose of face- to- face teaching.¹⁷ They argued that, the exception under article 32(c) cover performances, sound recordings, and broadcasts that have been published as teaching or instructional materials. The writer provides that such distinction is unfair and as a result has to be avoided. The writer argued that exception and limitation should be possible for both categories of work.

They also tried to determine the types of works that fall under exception for libraries, archives and similar institution and the requirement that needs to be fulfilled to rely on the exception. The author regarding quotation exception argued that, the quotation exceptions under the Berne Convention and Ethiopia's *Copyright Law* use different terminologies. They argued that like that of Berne convention the Ethiopian copy right law fail to recognize the making of quotation itself. Under the proclamation it is only the

¹³ Dr.Mandefro Eshete, The Interplay between Copyright Protection and the Expansion of Education in Ethiopia,(WIPO-WTO colloquium for teachers of intellectual property law) (2010):p.27-35. See also Mandefro Eshete and Mola Mengsitu, "Exceptions and limitations Under The Ethiopian Copyright Regime:An Assessment of the Impact on Expansion of Education," *Journal of Ethiopian Law*,Vol.XXV No.1, (2011): p.159 ff .NB:as the content of both material is the same the citation is made based on the former.

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Id.p.30

¹⁷ Ibid

reproduction right of copyright owner which is affected.¹⁸

Lastly, according to the author, 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

Biruk Haile in his article entitled, *Scrutiny of the Ethiopian System of Copyright Limitations in the Light of International Legal Hybrid resulting from (the Impending) WTO Membership: Three-Step Test in Focus*, also provided that, the preamble of the Ethiopian copyright proclamation stresses the importance of protecting copyright and neighboring rights but express reference is not made about the importance of dissemination and exploitation of the protected works through limitations.¹⁹

The author regarding quotation exception argued that, since quotation is understood as (partial) reproduction of a work, the Ethiopian law as it stands does not allow quotation in the course of performance, broadcasting etc. With regard to the teaching exception they argued that, the exception applies to all works protected by copyright.²⁰ Furthermore, the author argued that the teaching limitation applies irrespective of whether it is face to face or distance teaching.²¹ They founds that education and library limitation are unnecessarily restricted to exclusive right of reproduction.²²

Taame Berihu in his dissertation thesis entitled, *Exception and limitation under Ethiopian Copyright law: A Comparative Analysis*, also argued that as to 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 be it formal or informal.²³ Furthermore, regarding library exception the author argued that, the reproduction is dependent on the

¹⁸ Ibid

¹⁹ Biruk Haile, cited above at note 5, p.162

²⁰ Id. p.180

²¹ Id.181

²² Ibid

²³ Taame Berihu, *Exception and limitation under Ethiopian Copyright law: A Comparative Analysis*, (2013), p.87.

request of physical person.

Despite their contribution these studies made to the understanding of the concept of exceptions and limitations, viewed from education certain questions still remain unanswered by these studies.

To begin with the studies conducted by Mandefro Eshete, the author regarding the beneficiaries of the exception states as both conventional face -to- face and distance education are entitled to use the exception. However, they does not deal with the issue of commercial and noncommercial education. Besides, they does not examine those exceptions and limitations provision dealing with reproduction for personal purpose, private performance free of charge, importation for Personal Purpose and redistribution of work by sale. Biruk Haile makes his examination in light of three-step test in. Thus,his point of focus in examining the provision and his finding is not targeted at the education. Thus, those exceptions and limitations provision under the Ethiopian copyright law needs to be examined in light of education. With regard Taame Berihu as his work is confined to comparison of Ethiopian copy right law with that of other countries, he did not analyze exceptions and limitation provision in light of education. Thus, examination of exceptions and limitations provision is needed with special to education.

Therefore, this paper entitled, A Critical Analysis of Ethiopia's Copyright Law Exception and Limitation: Special Emphasis to Education is believed to be unique in that, as it sought to fill the gaps and shortcomings in the aforementioned and other previous researches.

1.8 methodology of the study

As the topic is doctrinal and theoretical analysis in nature, the ambit of my paper take the form of an analytic approach to the problem and I will conduct my analysis on those exceptions and limitations under the Copyright law with special emphasis to education. In conducting the paper mainly I will rely on relevant literature review and analysis of relevant domestic, foreign and international copyright instruments including Tunis Model

Law on Copyright of 1976 for developing countries.

Regarding kind and source of data, in conducting the research I will rely on both qualitative primary data and secondary data. Regarding the primary source mainly I rely on Copyright and Neighboring Rights Protection Proclamation No. 410/2004, Copyright and Neighboring Right Protection (amendment) proclamation No.872/2014 and if necessary I will also consult the relevant provision of the Constitution of Federal Democratic Republic of Ethiopia. Besides, I will consult major international copyright instruments and selected foreign copyright legislation with regard to copyright exception and limitation with special emphasis to education. With regard to secondary source of data the researcher will employ any relevant literature to topic at hand. I will utilize those literature related to the issue of exceptions and limitations under the copyright regime. Concerning issues related to collection procedures, selection and access to relevant material I will consult official website of concerned organ for legislation's if possible. For other literature I will rely on enternate and library.

1.9 Limitation of the study

There is a problem related to accessing relevant literature because of internate related obstacle. Besides, some of the material is inaccessible due the problem of on-line payment system.

1.10 organization of the paper

I will conduct the paper by organizing under four major chapters. Under Chapter one which entitled introductory chapter, I incorporate background of the study, statement of the problem, research questions, objectives of the study both general and specific objectives, significance of the study, scope of the study, literature review, methodology of the study and limitation of the study.

Under chapter two, I will deal with some points related to exception and limitation including main justification that necessitates incorporation of exception and limitation under the copyright law regime. Furthermore, under this chapter I will consider the

exception and limitation under the major international copyright instruments and few selected foreign jurisdiction with special emphasis to education.

Under chapter three, I will scrutinize those exception and limitation under the Ethiopian copyright regime. Lastly, under fourth chapter I will provide conclusion and come up with recommendation that needs to be taken to avert problem with regard to the system of exceptions and limitations.

CHAPTER TWO

OVER VIEW OF EXCEPTIONS AND LIMITATIONS RELATED TO EDUCATION UNDER MAJOR INTERNATIONAL COPYRIGHT INSTRUMENTS, MODEL COPYRIGHT LAW AND FOREIGN COPYRIGHT LAWS

2.1 Introduction

This study comprises some conceptual terms that deserves clarification. The study on the one hand revolves around the issue of exception and limitation, and on the other hand education. To have a clear road map of the study first of all these terminologies must be and need to be delineated. Besides, under this part of the paper I will provide some some points concerning copyrights in genera and theoretical or philosophical justification underpinning copyright. Furthermore,I will provide main underpinnings necessitating exceptions and limitations and approach towards copyright exceptions and limitations. Additionally, I will consider the exceptions and limitations under major international copyright instruments, model laws and foreign copyright laws.

2.1.1 Overview of Copyright and Theoretical or Philosophical Justification Underpinning Copyright

Copyright is part of an area of law known as intellectual property. Intellectual property law is one among the categories of property law designed to protect property rights in creative and inventive endeavors and gives creators and inventors certain exclusive economic rights, generally for a limited period of time, to deal with their creative works or inventions.²⁴ It is primarily designed to protect the category of property termed as intangible property. IP law protects rights not the physical property itself.²⁵ There is clear demarcation between physical objects and rights protected by IP. Thus, CR being sub-part of IP in the same token

²⁴ Australian Government. Attorney-General's Department. *Short Guide to Copyright*, available at <https://www.ag.gov.au/RightsAndProtections/Documents/ShortGuidetoCopyright-October2012.pdf> last accessed on March 20,2017

²⁵ Ibid

it is a type of property that is founded on a person's creative skill and labor. More specifically, it is designed to protect creation of literary, artistic and scientific works. It is the right given to creator of an original work to authorize or prohibit certain uses of the work or to receive compensation for its use. It may be an exclusive right to control certain uses such as reproduction, or a right to receive compensation, such as communication to the public or performance in public of a sound recording.²⁶

It gets its existence 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. It is a means of organizing and controlling the flow of information in a society.²⁷ Besides, it is considered as balancing instrument of interest of creator or owner on the one hand and public interest on the other hand. The very rationale for this consideration lies on original purpose of copyright to promote learning and public consumption of works as well as to protect works in order encourage authors to create works.²⁸

The fundamental principle underlying copyright is, it does not entitle exclusivity on mere abstract ideas, and rather its exclusivity extends only to the way ideas are expressed.²⁹ This principle is often termed as, “idea-expression dichotomy.”³⁰ It is the expression and not the ideas which are protected under copyright law, as opposed to patent and trade secret where it is ideas itself which is protected.³¹ It is primarily designed and intended to protect the form or way an idea or information is expressed, not the idea or information itself. Stated in

²⁶ Industry Canada, Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act (October 2002), In Sue, Lott, “The Consumer’s View of Copyright. *The Public Interest Advocacy Center* (2003),p.5 available at <https://www.piac.ca/wp-content/uploads/2014/11/piaccopyrightreport.pdf> last accessed on April 2,2017

²⁷ Dinusha Mendis, “The Historical Development of Exceptions to Copyright and Its Application to Copyright Law in the Twenty-first Century. *Electronic journal of comparative law* Vol.7 No.5 (2003),p. Available at <http://www.ejcl.org/ejcl/75/art75-8.html> last accessed April4,2017

²⁸ Lott, cited above at note 26 p.5

²⁹ Justin Hughes, “The Philosophy of Intellectual Property *Georgetown Law Journal* Vol.77 No.287(1998):p.6,

³⁰ Consumers international, *Copyright and Access to Knowledge*, Open Society Institute Development Foundation (OSI) and the International Development Research Center (IDRC)(2006). Available at www.ciroap.org/A2K accessed March 8,2017

³¹ Mendis, cited above at note 27, p.

another way under the copyright regime ideas are not protected rather copyright protects the way ideas are expressed in. Furthermore, Copyright is not a tangible thing instead it is intangible.

CR is made up of a bundle of exclusive economic rights to do certain acts or authorize others with an original work or other copyright subject-matter. Besides, they also confer on the copyright creators a number of non-economic rights known as moral rights. Exclusive economic rights inculcates among other rights of reproduction of the work, translation of the work, adaptation, arrangement or other transformation of the work, importation of original or copies of the work, distribution of the original or copies of the work to the public, public display of the original or copy of the work, performance of the work, broadcasting of the work and other communication of the work to the public.³² These economic rights are primarily designed to protect pecuniary interest of the creator whereas, non-economic rights are designed in order to safeguard the right of paternity. These moral rights among other things includes the right to claim authorship over his work, to remain anonymous or to use a pseudonym; and 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.³³

There exist different theoretical and philosophical underpinnings forwarded by different jurists, theoreticians, and philosophers concerning the protection given to IP in general and copyright in particular. To begin with those theoretical and philosophical justification underpinning property, IP and specifically copyright let us have a look at natural law justification propagated by John Locke and its successors. John Locke natural law theory state:³⁴ as one owns the labor of his body and the work of his hands, so when one takes something and mix with his labor he makes it his own property. For this labor is

³² Stanley M. Besen and Leo Raskind, "An Introduction to the Law and Economics of Intellectual Property." *The Journal of Economic Perspectives*, Vol. 5, No. 1 (Winter, 1991), p.12, & see also art.7 of copyright law

³³ See art 8 of copyright law

³⁴ John Locke, *Second Treatise of Government*, March 2008 amendment ,p.11 ff, available at <http://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf> ,last accessed March 18,2017, see also Justin Hughes cited above at note 30,p.7 ff

unquestionably the property of the laborer, so no other man can have a right to anything the labor is joined to—at least where there is enough, and as good, left in common for others. According to Lockean justification everyone deserves to own the fruits of their own labor, and therefore in case of literary, artistic and scientific creation, the creator of such artistic, literary and scientific work is entitled to own the product he created by exertion of his efforts, time, skill and the like. Accordingly the law needs to provide protection for those creators who exerted their effort, time, skill and the like to create work.

According to Lockean justification there exist further requirement in order a person enjoy ownership over the property. There must remain enough and as good for others and no spoilage or wastage of property.³⁵ This enough and as good conditions protects Lockean justification from any critique asserting that properties introduce immoral inequalities.³⁶ Specifically the enough and as good condition is equal opportunity provision, whereas the no spoilage condition is intended to hinder the accumulation of so much property that some is destroyed without used.³⁷

The other theory concerning the very rational for the protection of property in general and copyright in particular is personality theory³⁸ advocated by Hegel and his successors. According to Hegelian personality theory, property provides a unique or especially suitable mechanism for self-actualization, for personal expression, and for dignity and recognition as an individual person. Hegelian's asserts that creative works are part of an author and they are necessary vehicle for self-actualization, to express oneself and for personal dignity.³⁹ Besides, they asserts that creators have moral claim over their IP as they mixed up their own self or their creativity with the work they created. Furthermore, they consider property as the expression of the self. In light of this they consider as if an idea belongs creator and creative works as manifestation of the creators personality or self.

³⁵ Ibid

³⁶ Hughes, cited above at note 29, p.7

³⁷ Hughes, cited above at note 29, p.7

³⁸ Id P.24

³⁹ Ibid

The above provided justification is termed as right based justification for the protection of intellectual property in general and copyright in particular. They are primarily intended at protection of the rights of the creators and inventors of intellectual property whereas, the second sect of justification is aimed at the protection and promotion of public interest and it is termed as Utilitarianism. According to utilitarian, without IP protection adequate incentives for the creation of a socially optimal output of intellectual products would not exist.⁴⁰ For them IP protection is needed to stimulate and promote the genesis, development and dissemination of the ideas necessary to progress.⁴¹ This can be done by preventing the value of an idea being misappropriated by others.⁴² According to their outlook new ideas will be stimulated if:⁴³ the creator is rewarded for the effort and expenditure of creation; the investment needed to develop the idea for a commercial viable proposition is protected from unfair competition and dissemination of new idea is enhanced if it is 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. If competitors could simply use creation and take one another inventions and business techniques, there would be no incentive to spend the vast amounts of time, energy, and money necessary to develop these products and techniques.⁴⁴ It would be in each firm's self-interest to let others develop products, and then mimic the result. No one would engage in original development, and consequently no new writings, inventions, or business techniques would be developed.⁴⁵ To avoid this disastrous result, the argument claims, we must continue to grant intellectual property rights.⁴⁶ In Hittenger's view utilitarianism is the strongest and the most widely employed justification for IP.

2.1.2 What is exception and limitation

Despite conferring exclusive economic right on the copyright holder and moral rights on

⁴⁰ Edwin C. Hettinger, 'Justifying intellectual property' Vol.18 No.1 *Philosophy & Public Affairs* (1989) p.37&38 available at <http://www.jstor.org/stable/2265190>

⁴¹ Catherine Coloston, *Principles of Intellectual Property Law*. London, Sydney: Cavendish Publishing Limited (1999).p.20

⁴² Ibid

⁴³ Id p.21

⁴⁴ Hettinger, cited above at note 40,p.48

⁴⁵ Ibid

⁴⁶ Ibid

the author, copyright law recognize the mechanism through which those economic rights are used without prior authorization from the right holder. Copyright law do this through the mechanism of exceptions and limitations to exclusive rights with the aim of balancing authors interest over their work and public interest of accessing and utilizing copyrighted work without infringing legal provisions providing economic and moral rights of the author or copyright holder. The term applies first and foremost to statutory limitations that curtail the rights of right holders in specific circumstances to cater for the interests of certain user or the public at large.⁴⁷ Statutory limitations and exceptions are but one, albeit very important, way of creating balance inside copyright⁴⁸ This need to balance the interests of intellectual creators and the public was recognized not long after the British Parliament introduced the first piece of copyright legislation in 1709.⁴⁹ Besides Numa Droz, the chair main of 1884 Berne conference in his closing speech state:⁵⁰

. . . due account did also have to be taken of the fact that the ideal principles whose triumph we are working towards can only progress gradually on the so-varied countries that we wish to see joining the Union. Consideration also has to be given to the fact that limitations on absolute protection are dictated, rightly in my opinion, by the public interest. The ever-growing need for mass instruction could never be met if there were no reservation of certain reproduction facilities, which at the same time should not degenerate into abuses . . .

These terms connotes different things according to the established doctrine.⁵¹ To begin with the term exception, it connotes the condition under which the acts fall under the exclusive right of copyright holder is performed without his consent with no payment of any royalties, while the term limitation refers to a situation where the utilization of

⁴⁷ P.Bernt Hugenholtz & Ruth L. Okediji, Conceiving an International Instrument on Limitation and Exception to copyright (2008).p.18 available at https://www.ivir.nl/publicaties/download/limitations_exceptions_copyright.pdf last accessed March 22,2017

⁴⁸ Ibid

⁴⁹ Mendisa, cited above at note 27, p.

⁵⁰ Numa Droz, .Closing Speech Addressed to the participants of the Berne Conference. on the Significance of Limitation to the the Public interest (1884), as cited in Mendisa,cited above at note 27,p.,

⁵¹ A and H.-J. Lucas,*Traité de la propriété littéraire et artistique*, 3rd edition, Litec, (2006), No. 314 and 321, pp. 256 and 259. Cited in Joseph fometeu, Study on Limitations and Exceptions For Copyright and Related Rights for Teaching in Africa, Standing Committee on Copyright and Related Rights, (WIPO, SCCR/19/5,2009) p.8 <http://www.wipo.int/copyright/en/limitations/> last accessed May 20,2017

copyrighted work pave the way to compensation. This two terms for the first time appear together under the Trade Related Aspects of Intellectual Properties (TRIPS) agreement, then after taken up by the two WIPO treaties, namely WIPO performances and phonograms Treaties (WPPT) and WIPO Copyright treaties(WCT) aimed at ensuring the fair balance between the public interest and right holders.⁵²

Various terminologies are utilized by different jurisdiction, model laws and international instruments concerning those acts permitted with regard to copyrighted work.⁵³ This includes limitation, exception, fair use, exemptions, permitted acts, etc.⁵⁴ For the purpose of this study the term exceptions and limitations are used cumulatively as the Ethiopian Copyright and neighboring right protection proclamation simple provided the types of permitted acts with no separate heading. Therefore, the term limitation and exceptions is used cumulatively for the purpose of this study and they connote mechanism of utilization of copyrighted work without seeking and acquiring permission from the right holder. They refer to acts the law allows users of copyrighted works to undertake which otherwise would amount to copyright infringement.⁵⁵

2.1.3 Rational for exceptions and limitations to copyright

Exceptions and limitations are an important part of efficiently functioning copyright regime. Just as much as rules are significant and important for the creation and existence of organized societies, so are exceptions to these rules - to ensure the smooth running of a society.⁵⁶ They should not be considered as tolerated departure from the monopoly of the author, rather as a necessary part of the design of copyright policy.⁵⁷ Cognizant of this fact the very first copyright statute of Anne recognize a kind of exception and limitation to exclusive right of the author. Besides, all international copyright instruments, model laws and each jurisdiction inculcate the system of exception and limitation. The very

⁵² Joseph fometeu, Study on Limitations and Exceptions For Copyright and Related Rights for Teaching in Africa, Standing Committee on Copyright and Related Rights, (WIPO, SCCR/19/5,2009) p.8 available at <http://www.wipo.int/copyright/en/limitations/> last accessed May 20,2017

⁵³ Biruk , cited above at note 5, p.160

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ Mendisa, cited above at note 27,p_

⁵⁷ Lucie M.C.R. Guibault, *Contracts and Copyright Exemptions, IMPRIMATUR*, Institute for Information Law, Amsterdam, December 1997 # 4.2, available at http://www.imprimatur.net/IMP_FTP/except.

rational of this exception and limitation may vary from exception to exception and from jurisdiction.

According to different writers there are three main underpinnings necessitating exceptions and limitations to the exclusive rights.⁵⁸ The first type of limitations and exceptions is framed to promote fundamental rights and freedoms. This category of exception and limitations is justified by the desire to promote fundamental rights and freedoms. More specifically, they are designed to promote freedom of expression, privacy, the right to information, freedom of press. According to Anne Lepage⁵⁹ this category of exception and limitation is guarantees for the continuous existence of democratic society and they need to be preserved. This category of exceptions and limitation is justified from the perspective of ensuring citizens' right to access information on fair terms and safeguarding fundamental freedoms.

The second category of exceptions and limitations to copyright is justified from the perspective of public interest. Under the copyright laws of various nations there exist limitations and exceptions designed to meet the various need of the society. Educational or teaching exception, exception for libraries, archives, and museums are incorporated under the copyright laws to meet the various societal needs. This category of exception and limitations are devised to meet certain national interests and public priorities. They are vital tool for the realization of national public policy such as the enforcement of development targets, the stimulation of domestic creativity, the dissemination of knowledge, the access to educational material and the promotion of welfare as a whole.⁶⁰ Without them copyright protection will seriously undermine socially, culturally, and economically significant uses such as educational uses, use for scholarship and

⁵⁸ Lucie Guibault. Discussion Paper on the Questions of exceptions to and limitations on Copyright and Neighboring Rights in the Digital Era, Steering Committee on the Mass Media, with the financial support of Norwegian government(1998) p.16 ff ,available at, see also B. Hugenholtz, The Future of Copyright in a digital Environment, (1996), pp. 94 ff, in Anne Lepage, "Overview of Exceptions and Limitations to Copyright in the Digital environment," UNESCO e-Copyright Bulletin, 2003, p.4., available at <http://unesdoc.unesco.org/images/0013/001396/139696E.pdf> last accessed May 1,2017, & see also Biruk H. Cited above at note 5,p.160

⁵⁹ Lepage p.4

⁶⁰ See Tobias Schonwetter and Caroline,. B Ncube, cited above at note 6

research.⁶¹

The third set of exceptions and limitations is justified by the need to respond to market dysfunction in those areas where copyright holder is unable to control and exercise its rights. This category of exceptions and limitations is inculcated under the law for the mere fact that it is impossible for the copyright holder to control and exercise exclusive right for various reasons. Stated in another way there are exceptions and limitations justified by the impossibility of monitoring and charging for some category of uses.

Whatever their justification is copyright exceptions and limitations is an important balancing legislative tool of copyright law. A wisely crafted copyright law with a system of exceptions and limitations has the potential to respond to market dysfunction, public interest and enable the realization of fundamental rights and freedoms of citizen's. To the contrary a badly crafted copyright law by utilization of wrong terminology and restrictive terms may seriously undermine the entire regime of copyright law. The use of wrong terminology in framing copyright exception and limitations may lead to confusion regarding the scope of copyright exceptions and limitations. In nutshell the system of exceptions and limitations to copyright is maintained to respond to market dysfunction, adhere public interest and to enable the realization of citizen's fundamental rights and freedoms.

2.1.4 Approach towards copyright exceptions and limitations

The approach countries employed towards copyright exceptions and limitations may vary from jurisdiction to jurisdiction. Countries taking in to consideration their reality and contexts opt for one approach and let the other or they may employee a blend of different approach to respond to their existing reality. According to the available literature dominantly there are three major approaches of copyright exceptions and limitations to the exclusive rights. They can be made either in the form of closed system of exceptions and limitations or in the form of an open system of exceptions and limitations to

⁶¹ Ibid

copyright.⁶² The third approach is the blend of closed and open system of exception and limitations to copyright and it may be termed as hybrid system of exceptions and limitations to the exclusive rights.⁶³

A closed system of exceptions and limitations to copyright as its name indicates based on an exhaustive list of lawful acts.⁶⁴ A country employing this approach identifies specific and enumerated lists of permissible activities.⁶⁵ They provide for an exhaustive list of acts that do not constitute copyright infringements.⁶⁶ They incorporate in to their copyright laws long list of specifically phrased provisions. In those countries following the closed system of copyright exception and limitation the exclusive rights are restricted only for those provided acts and in compliance with the condition provided by the law. In all other cases the utilization of copyrighted work for whatever purpose with no authorization from the copyright holder constitute copyright infringement and it may trigger legal measures for violation. Stated in another way in those countries employing the closed system of exceptions and limitations no one is entitled to utilize the work without securing authorization of the right holder except on those cases specifically provided by the law.

Besides, in those countries the system of exceptions and limitation is subjected to the stringent rule of interpretation.⁶⁷ In other way those exceptions and limitations provisions inculcated under the copyright laws are construed very narrowly. Shortly in those countries employing the closed system of exceptions and limitations copyright holder monopoly rights are restricted only in specified cases and subjected to the stringent rule of construction.

⁶² See Tobias Schonwetter and Caroline, B Ncube, cited above at note 6,p.4 &ff ,see also Lepage, cited above at note 58,p.5&ff

⁶³ Ibid

⁶⁴ Ibid

⁶⁵ Rashmi Rangnath and Carrolin Rosin, Copyright Limitations and Exceptions and the Trans--Pacific Partnership Agreement available at https://www.eff.org/files/filenode/limitationsandexceptionsintpp-fnl_0.pdf last accessed February 10,2017

⁶⁶ Ibid

⁶⁷ Lepage cited above at note 58, p.6

In contrary, in open system of exceptions and limitation, exceptions and limitations are provide in general term. Under this approach there is no exhaustive lists of permitted acts, rather exceptions and limitations to the exclusive rights are provide in the form of statement. It involves a general clause outlining exceptions and limitations to copyright.⁶⁸ An open system of exception and limitation is open-ended, very broad and flexible. The most typical example is the fair use doctrine of US copyright Act of 1976 under section 107.⁶⁹

The third approach of exception and limitations to the exclusive right is the blend of closed system and open system of exceptions and limitations to the exclusive rights. In those countries employing hybrid system of copyright exceptions and limitations their copyright laws incorporates both types of exceptions and limitations. While their copyright law contains specific copyright exceptions and limitations, they also inculcate the broader so called fair- dealing provisions.⁷⁰ Under this approach even though the act is not specifically provided by the law the utilization of the work may still covered under the fair dealing provision. The users of copyrighted work have two alternatives to use the work without the authorization of the copyright holder. Firstly, they may rely on specific provision dealing with copyright exceptions and limitation. Secondly, they may rely on the catch-all, fair dealing provision.

Each approach has their own merits and demerits and countries before taking certain approach need to weigh its merits and demerits. To begin with open system of exceptions and limitation, it is favored for it is flexibility.⁷¹ In this technological era legal flexibility is crucial to respond to rapid technological changes and developments. Despite its flexibility this approach is criticized for its underlying vagueness.⁷² It is vagueness results in legal uncertainty which is hardly tolerable.⁷³ As it invites for different kinds if interpretation by the courts it leads to confusion thus, users may not rely on it in fear of

⁶⁸ Ibid

⁶⁹ Tobias Schonwetter and Caroline,. B Ncube, cited above at note 6,p.7, see also Lepage cited above at note 58,p.5

⁷⁰ Ibid

⁷¹ Tobias Schonwetter and Caroline,. B Ncube, cited above at note 6,p.8

⁷² Ibid

⁷³ Ibid

copyright infringement.⁷⁴ Users may not know in advance the exact scope of their free use rights as the power to interpret the provision is vested on the court. So owing to its vagueness the provision designed to promote users right may at the same time restricts users from utilizing copyrighted work. So it is advisable for the country not to rely solely on open- ended approach of copyright exceptions and limitations.

Coming to the closed system of exceptions and limitation though it specifically provided the coverage of free use rights, it is criticized for it is rigidity. In this era of rapid technological developments it is inappropriate to rely on closed system of exceptions and limitations. Thus, to overcome or if not to minimize the demerits of each approach and at the same time to reap from their merits it is preferable for developing countries to rely on hybrid system of exceptions and limitations.⁷⁵ To realize the high degree of legal certainty it is better to incorporate specific copyright exception and limitation to the exclusive rights. In line with specific provision fair use provision is needed to cover those areas left outside the ambit of specific copyright exception and limitation. In nutshell it is preferable to make hybrid system of copyright exception and limitation the backbone of copyright legislation.

2.1.5 The concept of education

The right to education is recognized by major international human right instruments as fundamental human rights. Besides, each jurisdiction gives due recognition to it. Specifically, UDHR recognize that everyone has the right to education, that education shall be free, at least in elementary and fundamental stages and elementary education shall be compulsory.⁷⁶ Furthermore, ICESCR require the state to recognize the right of everyone to education.⁷⁷ Besides, major international copyright instruments, model copyright laws, and each jurisdiction recognizes the utilization of copyrighted work for education or teaching purpose via the force of exceptions and limitations.

⁷⁴ Yeyoung Chang, "Debates on Introduction of "Fair use" to the Copyright Act of Japan and Korea. Do Japan and Korea need Fair use?", Comparative IP Academic Workshop Working Paper No. 2, 2009, p.10&ff,<http://www.law.washington.edu/Casrip/WWIP/Papers/2009/ Debates on Introduction of Fair use to the Copyright Act of Japan and Korea - Do Japan and Korea need Fair use.pdf>

⁷⁵ Tobias Schonwetter and Caroline, B Ncube, cited above at note 6,p.9

⁷⁶ See art.26(1) of UDHR

⁷⁷ See art.13 of ICESCR

Despite their recognition this instruments does not define what education is. In fact defining and providing one working definition to this fluid concept is not an easy task as various Dictionaries, literature and scholars define education in different ways. Some define very broadly, while others define it narrowly. For various reason and difficulties of defining the term I am not going to deal with its definition aspect in detailed manner rather to have a clue I will consult only few of them. To begin, Oxford Dictionaries of English define the term education, as a process of teaching, training and learning, especially in schools or colleges to improve knowledge and develop skills. Besides, Webster defines the term education, as the process of Educating or teaching. Furthermore, French dictionary Le Robert defines education, as the action or art of teaching, of transmitting knowledge to the student.⁷⁸ From these definitions one infer that, education is an undertaking to achieve knowledge and skill. In the word of Fometeu,it involves the transmission of knowledge from the supervisors to the learners or students.⁷⁹ Thus, for the purpose of this study the term education connotes the art of transmitting knowledge and skill by the supervisors to their pupils or learners.

2.2 Over view of exceptions and limitations for education under model law, major international copyright instruments and foreign copyright laws

2.2.1 Tunis Model Copyright Law of 1976

The committee of governmental experts in a meeting held in Tunis from February 23-March 2, 1976 with the assistance of WIPO and UNESCO adopted a model copyright law for developing countries. The model law incorporates among other things works protected, works not protected, economic rights of the author, moral rights, fair use or exceptions and limitations etc. The model law inculcates several exceptions and limitations that have relevance for educational purpose.

⁷⁸ As cited in Joseph Fometeu, cited above at note 52,p.9

⁷⁹ Ibid

More specifically, under section 7 which entitled fair use, the model law provides cases under which copyrighted material is utilized without requiring and acquiring permission from the copyright holder. It allows the utilization of protected work, either in its original language or in translation without the author's consent.⁸⁰

Specifically, it empowers the users of copyrighted material to reproduce, translate, adapt, arrange or transform for their own personal and private use without being constrained by the exclusive right holders.⁸¹ The model law does not make lawful availability of the work to the public a precondition rather; if the work is lawfully published it is sufficient for the users to rely on the exceptions and limitation.⁸² Besides, it requires that the act is conducted exclusively for the user's own personal and private use. Despite making private and personal use as a requirement the model law does not provide what personal and private use connotes. According to the committee the term personal and private use is, the reverse of collective use and it presupposes that no profit-making purpose is pursued.⁸³ The model law does not indicate as to the person entitled to reproduce, translate, adapt or transform. Thus, as there is no restriction by the model law anybody can make it as long as it is for personal and private use. Any person, be it learners, and teachers may rely on the exceptions and limitations to conduct their education activities.

Furthermore, the model law allows quotation of a work in compliance with fair practice and extent justified by the purpose.⁸⁴ According to commentary to the model law quotation is word-for-word reproduction of passages from a work with a view of reviewing or criticizing the work or using it for the purpose of illustration or explanation.⁸⁵ This exception and limitation is of great significance to educational institutions and to the learners and supervisors as a whole. Regarding the amount of the work quoted there is no restriction by the model law and as far as the quotation is justified by the purpose and compatible with fair practice it is permitted to use without any hindrances. This

⁸⁰ See Tunis Model Law of 1976 for developing countries, art .7

⁸¹ Id art.7(1)(a)

⁸² Ibid

⁸³ United Nations Educational Scientific and Cultural Organizations & World Intellectual Property Organizations Secretary , a Commentary on Tunis Model Law of 1976, for Developing Countries, p. 10

⁸⁴ See Tunis Model Copyright Law art.7(1)(b)

⁸⁵ Supra at note 83,p.10

requirement of fair practice and extent justified by the purpose is determined on case by case basis. It is the court that determines whether the use is compatible with fair practice and justified by the purpose of the use.⁸⁶ Furthermore, the model law requires the users to indicate the source and the name of the author. This is made a condition to protect the right of paternity or moral rights of the author.

More importantly, the model law permits the utilization of copyrighted work for the purpose of teaching.⁸⁷ However, it does not define what amounts to teaching and teaching purpose. Instead it lists out the types of institution entitled to reap the benefit of the exception in an illustrative manner. Accordingly, it allows utilization of the work by way of illustration for teaching purpose in schools, education, universities, and professional training. Any educational establishments ranging from Kg to universities and professional training center can rely on the exception. The type of teaching can be conventional face-to-face teaching and distance learning be it in analogue world or digital world. Very interestingly, it allows the communication of the work for teaching purpose. Thus, distance education can rely on this exception and reap the benefit from provision.

The model law provides illustration for teaching as the condition to utilize the work. Furthermore, the use must be compatible with fair practice and must not exceed the extent justified by the purpose. This requirement is examined on case by case basis by the court. Furthermore, it imposes on the beneficiaries of exception and limitation to indicate the source and the name of the author.⁸⁸ This is designed to safeguard the right of paternity or moral right of the author. In nutshell the model law permits the utilization of any work for teaching provided that such use is compatible with fair practice, does not exceed the extent justified by purpose up on indication of source and name of the author.

⁸⁶ Id p.11

⁸⁷ Art. 7(i)(c) of the model law permits, the utilization of the work by way of illustration in publication, broadcasts sound or visual recordings for teaching, to the extent justified by the purpose, or the communication for teaching purpose of the work broadcast for use in schools, education, universities, and professional training, provided that such use is compatible with fair practice and that the source and the name of the author are mentioned in the publication, the broadcast or the recording;

⁸⁸ Ibid

Additionally, the model law permits the reproduction of works lawfully made available to the public by public libraries, noncommercial documentation centers, scientific institutions, and educational establishments.⁸⁹ However, it excludes private libraries from the ambit of the exceptions. It opens a room for developing countries to have wide ranging exception that is directly or indirectly correlated with educational activities. Once the work is lawfully made available to the public the users of copyrighted work can utilize the work provided that such reproduction is limited to the needs of their activities, do not conflict with normal exploitation of the work and do not unreasonably prejudice the legitimate interest of the author.⁹⁰

2.2.2 Berne convention

Berne convention is a foundation up on which exceptions and limitations for education are rooted. But, under this topic I am not going to deal with those exceptions and limitations under the conventions in detailed manner rather I will consider only those exceptions and limitation that have direct link with education in a brief manner. Specifically, I will consider teaching and quotation exceptions under the conventions. Under the teaching exceptions it permits the utilization of literary or artistic works for the educational purpose.⁹¹ This teaching exceptions serves as a blue print for those national legislator to incorporate exceptions and limitations for education as it sets an outer limit with in which national legislator act to draft their own teaching exceptions.⁹² The convention left to the state concerned to permit the utilization of literary or artistic work by way of illustration for teaching. Despite this permission it fails to define what utilization, teaching, and illustration connotes. According to Sam Ricketson, it is up to the state concerned to determine what utilization stands for by their national legislation, or by bilateral

⁸⁹ See Tunis Model Copyright Law art.7(V)

⁹⁰ Ibid

⁹¹ Art. 10(2) of BC state: It shall be a matter for 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 sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

⁹²Sam Ricketson, Study on Limitations and exceptions of Copyright and Related Rights in The Digital Environment, Standing Committee On Copyright and Related Rights, (WIPO, SCCR/9/7,2003) p.14 available at <http://www.wipo.int/copyright/en/limitations/> last accessed May 20,2017

agreements between Union members, and all that article 10(2) did is, it sets the outer limits within which such regulation is carried out.⁹³

The convention stipulates for the utilization of the work, by way of illustration, for teaching, to the extent justified by the purpose and is compatible with fair practice. Despite these requirements set by the convention there is no any quantitative restriction on the amount of the work to be used. The incorporation of purpose and fair practices make the provision an open ended and based on this terms it is possible to infer the absence of quantitative restriction.⁹⁴ Furthermore, what constitutes fair practice is a matter determined on case by case by the national tribunal. The tribunal may take in to consideration whether the use conflict with the normal exploitation of the work and whether the use unreasonable prejudice the legitimate interest of right holder in determining the compatibility of the use to fair practice. According to Ricketson the use is not compatible with fair practice if it conflicts with normal exploitation of work and unreasonable prejudice the legitimate interest of right holder.⁹⁵ The words by way of illustration may impose some restriction but may not exclude use of the entire work if necessary.⁹⁶ Concerning the work any literary or scientific work can be utilized as long as it's in line with the condition set by the convention.⁹⁷

Regarding the term teaching, despite it is recognition of utilization for teaching by way of illustration in publication, broadcasts or recording there is no indication of its scope by the convention. At the Stockholm conference, the delegates of the conference explained the term teaching as follows:

“The word ‘teaching’ was to include teaching at all levels—in educational institutions and universities, municipal and State schools, and private schools. Education outside these institutions, for instance general teaching available to the

⁹³ Ibid

⁹⁴ Id p.15,

⁹⁵ Ibid

⁹⁶ Id p.14

⁹⁷ See Raquel Xalabarder, Study on Copyright Limitations and Exceptions For Educational Activities in North America, Europe, Caucasus, Central Asia and Israel, (WIPO, SCCR/19/8, 2009), p.16 available at <http://www.wipo.int/copyright/en/limitations/> last accessed May 20,2017

general public but not included in the above categories, should be excluded.”⁹⁸

The definition given to the term teaching by the committee restricts the utilization of teaching exceptions as it indicates the type of teaching entitled to use teaching exceptions and the one not entitled to reap the benefit of exceptions. According to Sam Ricketson both conventional face-to face teaching and distance education are entitled to reap the benefit of teaching exceptions.⁹⁹ In his view any form of distance education are entitled to reap the benefit of teaching exceptions.

Furthermore, the convention allows making of quotation from works that is lawfully made available to the public.¹⁰⁰ Despite allowing the making of the quotation, it does not define what quotation stands for. According to the commentary to the Tunis model Copyright law of 1976, quotation is word-for-word reproduction of passages from a work with a view of reviewing or criticizing the work or using it for the purpose of illustration or explanation.¹⁰¹ Though the definition given by the committee on the Tunis model copyright law of 1976 considers quotation as word-for word reproduction, under both instruments the making of quotation is not restricted to reproduction only. Regarding the type of exclusive rights fall under the exception the convention is silent thus; it must be interpreted broadly to inculcate any acts of exploitation: reproduction, translation, adaptation, communication to the public.¹⁰² Users of copyrighted material may rely on quotation exception to translate the quoted work, or to use it any other manner of exploitation.

For a quotation to be made with in ambit of article 10.1 first and foremost the work must be and need to be lawfully made available to the public. The convention does not make the publication a requirement, rather lawfully disclosure of the work is suffice for a quotation purpose. Once a work is disclosed to the public by any other means regardless of

⁹⁸ Records of Intellectual Property, Conference of Stockholm, June 11 to July 14, 1967 at 1148. In Daniel Seng, cited above at note 2, p.7 and see also Sam Ricketson cited above at note 92, p. 15

⁹⁹ Ricketson cited above at note 92,p.15

¹⁰⁰ It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided 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.

¹⁰¹ supra at note 83,p.10

¹⁰²WIPO Reports on the Work of the Five Main Committees of the Intellectual Property Conference of Stockholm 1967, WIPO Publication 209(E), in Raquel Xalabarder, cited above at note 97,p.18

publication it is suffice for the beneficiaries of the exception to rely on quotation exception. The requirement of lawfully made available to the public is different from publication as it includes the making available of works by any means, not simply through the making available of the copies of the work. Making the work available through public performances, broadcasting or by any other means to the public is suffice to reap the benefit of quotation exception.¹⁰³

Besides, the making of quotation must be compatible with fair practice and does not exceed the extent justified by the purpose. Despite this condition, the convention does not set any quantitative restriction on the amount of the work quoted. As long as quotation is justified by the purpose and compatible with fair practice it is possible to make a lengthy quotation.¹⁰⁴ There are also instances where quoting of the entire work is justified by the purpose and compatible with fair practices.¹⁰⁵

Furthermore, article 10.3 of the convention stipulates other criteria for both a quotation and teaching exceptions to be legitimate. It requires the indication of source and name of the author if it appears thereon. The convention stresses on the need to respect the moral right of the author, specifically the right of paternity.¹⁰⁶ Beneficiaries of quotation and teaching exception are obliged to indicate the source and the name of the author if it appears thereon.

Furthermore, under article 9.2 the convention allows the reproduction of copyrighted material in compliance with the three-stage test. Namely reproduction is confined to certain special cases, the reproduction does not conflict with the normal exploitation of work and it does not unreasonable prejudice the legitimate interest of the author. In line with this three stage test set by the convention member can draft their own national exceptions and limitations to the reproduction rights of the author. Any limitations and exception is permitted if they are crafted in compliance to the three step test set by the conventions.

¹⁰³ Ricketson, cited above at note 92, p.12

¹⁰⁴ Ibid

¹⁰⁵ Ibid

¹⁰⁶ Fometeu, cited above at note 52,p. 19

2.2.3. Exceptions and limitations for teaching under Rome convention

The 1961 Rome convention is designed by the contracting states with the desire to protect the rights of performers, producers of phonograms, and broadcasting organizations. Besides, the convention incorporates exceptions and limitation with a view to protect the interests of public. Among those exceptions and limitation under this part I will provide that have some nexus to educational activities. The convention incorporates two main categories of exceptions and limitation. Under article 15.1 the convention enumerates specific type of exceptions and limitations while under article 15.2 it allows the member state to have the same kind of exception and limitation under copyright law regime and neighboring right law regime.

Article 15.1 of the convention entitles a member state to inculcate private use exception under their national laws or regulation designed for protection of related rights. Though the convention does not provide the meaning of private use, it connotes uses that is neither public nor for profit.¹⁰⁷ Furthermore article 15.1.d of the convention allows the member state to have exceptions and limitation allowing use solely for the purpose of teaching or scientific research. This provision opens the room for the member state to inculcate exceptions and limitation that foster research activities. Besides, the convention allows member states to devise their related rights law in a way conducive for educational activities.

Furthermore, it entitles member state to have an alternative set of exception and limitation with regard to the protection of performers, producers of phonograms and broadcasting organizations.¹⁰⁸ They are allowed to provide the same kind of limitations with regard to the protection of performers, producers of phonograms and broadcasting organizations as that made with regard to copyright in literary and artistic work. Furthermore, the adoption

¹⁰⁷ S. Stewart, *International Copyright and Neighboring Rights*, Butter worth's, London (2nd Ed., 1989), paragraph 8.41, in Ricketson, cited above at note 70,p.44

¹⁰⁸ See Rome Convention art.15(2)

of alternative set of exception and limitation with regard to related right is made irrespective of paragraph 1 of article 15.1. As long as education is concerned any member state to the Rome convention is at liberty to provide the same kind of exceptions and limitation she provided under the copyright law regime for the related rights. In nutshell the convention allows the member state to extend exception and limitations under the copyright law regime to related rights regime.

2.2.4 Overview of Exceptions and limitations under WCT and WPPT

As provided under their preamble this two instruments are devised to govern copyright and related right works respectively and issue of exception and limitation in digital world. They are enacted with the intention of introducing new international rules and clarify the interpretation in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological development in copyright and related right regime respectively.¹⁰⁹ Both instruments stressed on the issue of utilizing creative works for the teaching purpose in the form of exception and limitations. They are enacted with the aim of maintaining a balance between rights of the creators and larger public interest particularly, education, research and access to information.¹¹⁰ This balance of interest can be realized through provision of protection to the economic and moral interests of the creators and public right of accessing and utilizing copyrighted material.

Concerning WCT it is not a standalone instrument rather it is highly attached to the Berne convention of 1971. As stipulated under article 1.1 of the convention it is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works. Beyond this article 1.2 of the convention clearly provided that nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works. Beside, as stipulated under article 1.4 of the convention contracting parties are required to comply with article 1 to 21 and appendix of the Berne convention. Thus, it may not affect the teaching exception already provided or to be provided in national law of contracting

¹⁰⁹ See WCT, preamble, paragraph 2 & see also WPPT ,preamble, paragraph 2

¹¹⁰ See WCT ,preamble, paragraph 5& see also WPPT preamble, paragraph 4

states in compliance with Berne conventions. Therefore, it does not provide further condition and complying with Berne convention is suffice as long as teaching exception is concerned.

Furthermore, WCT cannot on its own provide the necessary autonomy to justify the exception and limitation rather it open the room for the state concerned to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention.¹¹¹ Besides, the convention empowers the member state to devise new exceptions and limitations that are appropriate in the digital network environment.¹¹² Concerning those exception and limitation inculcated under the Berne convention ,WCT cannot extend or restrict the room provided by the Berne convention to the member state, rather it simple empower member state to utilize them in digital world. However, concerning new exceptions and limitations adherence to the Berne convention is not needed. To be specific concerning right of distribution, right of rental, right of communication to the public provided under article 6,7&8 of the convention respectively, they are not required to adhere the Berne convention instead they are subjected to article 10.1 of WCT.

As indicated herein above WPPT is designed to regulate matters concerning related right specifically in the case of digital world. As provided under article 1.1 of the convention nothing in the convention shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations or Rome convention. Besides, the non-derogation clause under article 1 of the convention, the issue of exception and limitation is stipulated under article 16 of the convention. Article 16.1 of the convention calls the state to apply the same kind of exceptions and limitations with in the copyright to neighboring right. It provides:

Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and

¹¹¹ cited in Fometeu at note 52,p.31

¹¹² Ibid

producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

Both the Rome conventions and WPPT call the member state to extend exception and limitation they provide for copy right to the neighboring right holder. As much as possible exception under the related right is expected to be similar with that of copyright regime and member states are expected to frame their national exceptions and limitation under the neighboring right regime and copyright regime in similar way. As provided by Reckitson the scope of limitations and exceptions to the protection of performers and phonogram producers under national legislation is to be paralleled to those applying under national laws to literary and artistic works but it does not refer to the rights that are to be protected under the WPPT.¹¹³

2.2.5 Limitations and exceptions for Teaching under TRIPS Agreement

Even though it is beyond the scope of this paper to make analysis of TRIPS agreement with regard to exceptions and limitations for teaching and its relation with the other copyright and related right instruments, herein I will provide briefly how the instruments pave the way for utilization of copyrighted material via the mechanism of exception and limitation for education purpose. In it deals with the issue of exceptions and limitations in several ways, particular with regard to teaching exceptions and limitations. The first mode through which the agreement deal with the issue of exception and limitation is by way of reference to the substantive provision of the 1971 Berne convention .Concerning this article 9.1 of the TRIPS agreement state:

Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.

As long as the issue of exception and limitation is concerned TRIPS agreement require it is member state to uphold those specific exception and limitation under the Bern convention regardless of their membership to the Berne convention. Thus, TRIPS member are required to adhere those exception and limitation under the Berne convention in general and

¹¹³ Ricketson, cited above at note 92,p.45

specifically they are required to comply with teaching exception under article 10.2 and the quotation exception under article. Furthermore article 3.1 of the TRIPS require it is members to accord to the national of other countries the treatment they accord to their own national subject to exceptions and limitation provided with in the Berne convention of 1971.

Besides, as stipulated under article 7 the agreement give due recognition both to the interests of producers and users of copyrighted material. The very objective of the TRIPS is to pave the way through which copyrighted material is utilized to realize the best interest of both users and producers of copyrighted material. Every provision dealing with copyrighted work and exceptions and limitation is expected to be interpreted in light of the objective set under article 7 of the agreement. This object clause is of paramount importance with regard to teaching exception. Furthermore, article 8 of the agreement empower member state to adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, while amending or formulating their national laws and regulations, provided that such measures are consistent with the provisions of this Agreement. This clearly indicate the need to offset the interests of the owners of rights with other, opposing public interests such as educational and other developmental concerns when interpreting the TRIPS Agreement¹¹⁴

Lastly, the TRIPS agreement by taking the three stages test applied to reproduction right as per article 9.2 of the Bern convention applied to reproduction right alone extends it is scope of application to all exclusive rights of copyright holder. Article 13 of the TRIPS state:

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

Thus, as per the TRIPS all exclusive rights are limited provided that the limitation is confined to certain special cases which do not conflict with a normal exploitation of the

¹¹⁴ Id p.48

work and do not unreasonably prejudice the legitimate interest of the right holder.

2.2.6 Overview of exceptions and limitations for education under Directive 2001/29/EC

This Directive under preamble recognizes the utilization of protected work in order to realize certain public interests that have vital role in the progress of the community. Specifically, it recognizes the utilization of protected material for teaching purpose via the mechanism of exceptions and limitations. As stated under paragraph 14 the directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching.

Besides, under exception and limitation part it incorporates several exception and limitation that have vital importance to education. To begin article 5.2.5 state:

In respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;

Educational institution can rely on this exception to use copyrighted material for teaching purpose as long as their act is intended for noncommercial purpose. As provide under the preamble of directive, paragraph 46, there are things that needs to be taken in to consideration to rely on exception and limitation and reap it is benefit. Such factors among others includes: the institution relying on exception and limitations needs to be noncommercial institution be it conventional face to face or distance education and the noncommercial nature of their activity is taken in to consideration. However, means of funding of the establishment concerned are not the decisive factors to determine their legibility for exception and limitation purpose.

Furthermore, the directive empowers its member states to reproduce and communicate

copyrighted work for the sole purpose of illustration for teaching or scientific research.¹¹⁵ As provided under the directive, there are two sets of rights which fall under exceptions and limitations. The first set of rights covered by exceptions and limitations is reproduction right. As indicated under article 2 of the directive it is the exclusive right of the right holder to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form. However, as per article 5.3(a) of the convention it is possible for the member state to limit reproduction right of the right holder for the purpose of illustration for teaching or scientific research to the extent justified by non-commercial purpose to be achieved provided that they indicate the name of the author if possible.

The second set of exclusive rights covered under the exception and limitations is right of communication of the work to the public and right of making available to the public other subject matter.¹¹⁶ There is no any restriction as to the amount of the work save the extent justified by the non-commercial purpose to be achieved. Thus educational institution can reproduce, communicate and distribute any protected work within the ambit of exceptions and limitations. Furthermore, there is no any distinction between traditional conventional face-face teaching and distance education.

2.2.7 Overview of Exceptions and limitation for teaching under the Australian copyright Act of 1968

The Australian copyright act is renowned by incorporating various forms of exceptions and limitations that have high relevance to various educational establishments and any one engage in the educational activities. Under its different parts and sections the Act inculcates a whole lot of exceptions and limitation that is of great importance to undertake educational and related activities. To begin under part-two, section 28 the Act permits Performance and communication of works or other subject-matter in the course of educational instruction. Specifically, it allows the free use of a literary, dramatic or musical work for education where it is performed in class, or otherwise in the presence of an audience; and is so

¹¹⁵ See Directive 2001/29/EC art.5(3)(a)

¹¹⁶ Ibid

performed by a teacher in the course of giving educational instruction, not being instruction given for profit, or by a student in the course of receiving such instruction provide that the audience is limited to persons who are taking part in the instruction or are otherwise directly connected with the place where the instruction is given.¹¹⁷ The Act provides that to determine the profit oriented nature or otherwise of the educational institution the remuneration made to the teacher is not taken in to consideration.¹¹⁸ Besides it permits communication of literary, dramatic or musical work, a sound recording or a cinematography film to facilitate performance of the work, recording to be heard, visual images or sounds forming part of the cinematography film to be seen or heard,¹¹⁹ communication of a television broadcast or sound broadcast¹²⁰ and communication of an artistic work.¹²¹ The act empower educational institution to perform and communicate literary, artistic and musical works as long as it is for nonprofit education up on the fulfillment of specific condition set under section 28.

Furthermore, the Act under part three, division three provides acts which may not constitute copyright infringements. Section 40 of the act declares that, a fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for the purpose of research or study does not constitute an infringement of the copyright in the work. In similar fashion section 103c.1 of the act provides a fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item if it is for the purpose of research or study. It does not provide definition of fair dealing instead it provides conditions taken in to consideration in determining the fairness or the vice of the acts. Among other things the act provides purpose and character of the dealing; nature of the work; possibility of obtaining the work within a reasonable time at an ordinary commercial price; effect of the dealing upon the potential market and the amount and extent of the part copied taken in relation to the whole work needs to be taken in to

¹¹⁷ See Australian, Copyright Act art. 28(1) (a)&(b)

¹¹⁸ See Australian, Copyright Act art. 28(2)

¹¹⁹ See Australian, Copyright Act art. 28(5)

¹²⁰ See Australian, Copyright Act art 28(6)

¹²¹ See Australian Copyright Act art 28(7)

consideration in determining the fairness or the vice of dealings.¹²² Besides, the Act allows a fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work or audio-visual works for the purpose of criticism or review¹²³

Furthermore, it recognizes format shifts of a work as long as it is destined for private and domestic use. Section 43C deals with reproduction of works in books, newspaper and periodical publications in in different form for private use.¹²⁴ It paves the way to the owner of the original copy to reproduce it in different form provided that the reproduction is for private and domestic use. In the same vein Australian copyright Act permits format shifting of photographic works¹²⁵, Copying sound recordings for private and domestic use,¹²⁶ Copying cinematography film in different format for private use.¹²⁷ Concerning private and domestic use section 10 provides; private and domestic use means private and domestic use on or off domestic premises. According to Seng private and domestic use encompasses the individual use of work for the study and instructional purposes, in home and even in schools.¹²⁸

Furthermore, the Act permits use of works and broadcasts for educational purpose. Specifically, it recognizes reproduction or adaptation of literary, dramatic, musical or artistic work in the course of educational instruction, where the work is reproduced or the adaptation is made or reproduced by a teacher or student otherwise than by the use of an appliance adapted for the production of multiple copies or an appliance capable of producing a copy or copies by a process of reprographic reproduction; or as part of the questions to be answered in an examination, or in an answer to such a question.¹²⁹ It permits the making of a record of a sound broadcast, being a broadcast that was intended to

¹²² See Australian, Copyright Act art. 40(2)&103c(2)

¹²³ See Australian Copyright Act art 41&103A

¹²⁴ See Australian Copyright Act sec.43c

¹²⁵ See Australian Copyright Act sec.47J

¹²⁶ See Australian Copyright Act sec.109A

¹²⁷ See Australian Copyright Act sec 110AA

¹²⁸ Seng,cited above at note 2 p.33

¹²⁹ See Australian Copyright Act sec.200

be used for educational purposes.¹³⁰

Lastly, the Australian copyright act provides a definition of educational institution and educational purpose very broadly. Concerning educational institution it incorporates an institution at which education is provided at pre-school or kindergarten standard; a school or similar institution at which full-time primary education or full-time secondary education is provided or both full-time primary education and full-time secondary education are provided; a university, a college of advanced education or a technical and further education institution; an institution that conducts courses of primary, secondary or tertiary education by correspondence or on an external study basis; an undertaking within a hospital; a teacher education center; institution providing courses or training for the purpose of general education; the preparation of people for a particular occupation or profession; the continuing education of people engaged in a particular occupation or profession;¹³¹ etc.

As to the educational purpose the act does not limit to particular purpose. It allows a copy of the whole or a part of a work or other subject-matter shall be taken, for the purposes of the provision in which the expression appears, to have been made, used or retained, as the case may be, for the educational purposes of an educational institution if: it is made or retained for use, or is used, in connection with a particular course of instruction provided by the institution; or it is made or retained for inclusion, or is included, in the collection of a library of the institution.¹³²

¹³⁰ See Australian Copyright Act sec 200(2)

¹³¹ See Australian copyright Act sec.10

¹³² See Australian copyright Act sec.10.1A

CHAPTER THREE

EXAMINATION OF EXCEPTIONS AND LIMITATIONS UNDER ETHIOPIAN COPYRIGHT LAW WITH SPECIAL EMPHASIS TO EDUCATION

3.1 INTRODUCTION

Under this chapter I will conduct a brief overview of Ethiopian copyright law with regard to the scope of application of the copyright law, protected subject matter, eligibility requirement for certain work to get protection, types of economic rights conferred on the copyright holder and then after I will thoroughly examine exceptions and limitations to economic rights under the copyright proclamation with special emphasis to education.

3.1.1 An Overview of subject matter protected under Copyright Proclamation

As inferred from its preamble and various provisions, the proclamation does not extend protection to every category of works. Rather for a work to qualify for copyright protection the work must be and need to be literary, artistic, and similar creative works. Upon the creation of original literary, artistic and other similar creative works the law confers on the author a bundle of economic rights and moral right. However, it is difficult to have clear cut criteria regarding what kind of work constitute literary, artistic and similar creative works. Cognizant of this difficulty different copyright instruments provide an illustrative list of works entitled to protection. Accordingly they consider every production of literary, artistic and scientific works, such as, books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico musical works; choreographic works and entertainments in dumb show; musical compositions with or without words, etc. as a literary, artistic and similar creative works, whatever may be their mode or form of expression is.¹³³

¹³³ See BC,art.2(1) and see also Tunis Model Copyright Law for Developing countries of 1976,art.2

In the same token copyright proclamation illustrates what constitute literary, artistic and scientific works. Among the other things it incorporates: books, booklets, articles in reviews and newspaper, computer programs; speeches, lectures, addresses, sermons, and other oral works; dramatic, dramatico-musical works, pantomimes, choreographic works, and other works created for stage production; musical compositions; audiovisual works; works of architecture; works of drawing, painting, sculpture, engraving, lithography, tapestry, and other works of fine arts; photographic works; illustrations, maps, plans, sketches, and three dimensional works related to geography, topography, architecture or science.¹³⁴

However, it does not exhaustively provide the category of works that constitute literary, artistic and other similar creative works. Instead what is provided is an illustrative list of works and there exist other category of works that deserves protection under the proclamation. Besides, it provides other category of works that deserves protection under the proclamation. It extends protection to the category of works termed as derivative work. In particular, it forwards protection to translation, adaptations, arrangements and other transformations or modifications of works and collection of works such as encyclopedia or anthologies or databases whether in machine readable or other form provided that such collections are original by reason of the selection or arrangement of their contents.¹³⁵ Derivative works as their name indicates are the category of works derived from other pre-existing work. This derivative works deserves protection under the copyright law regardless of the status of the work from which they are derived. Besides, as stipulated under article 4(2) of the proclamation Copyright protection for the derivative works does not deprive the person who creates the original work of copyright in that work.

3.1.2 Requirement for protection and Scope of Application of Copyright Proclamation

For a work to get protection under the copyright proclamation being literary, artistic and scientific work is not suffice, rather there exist a pre-conditions set by the law that needs to

¹³⁴ See copyright proclamation art.2(30)

¹³⁵ See copyright proclamation art.4(1)

be fulfilled. In Ethiopia article 6 of copyright proclamation provides requirement for protection of a work. As per the article the author is entitled to protection up on creation of original work without any formality, irrespective of its quality and purpose, provided that the work is fixed.¹³⁶ Quality and purpose of the work is immaterial to extend protection to literary, artistic and scientific works. They are irrelevant factor to forward protection to the work. Whether they are of high quality or low quality is not taken in to consideration to extend protection. Furthermore, the purpose for which the work is created is immaterial for a certain work to get copyright protection. As clearly provided under article 6 of the proclamation, the work is entitled to protection without any formality and upon creation provided that its original and fixed. There is no formality requirement, application for registration, examination, disclosure of the work in any manner and the like to get protection under the copyright regime. Instead, under the proclamation the protection is automatic protection and what is needed is creation of original work and its fixation. Thus, copyright is granted automatically at the time of creation of original work and up on its fixation.

The proclamation despite making originality the main requirement for a work to get protection under the copyright law, it left the concept undefined. This makes the concept bone of contentions among the concerned body and its real meaning is fully of controversy. Thus, reference to countries with well-developed jurisprudence is needed to lower the contentions if not to avoid. There are two major approach applied by different jurisdiction concerning what really originality connotes under the copyright law for the work to get protection. According to first approach termed as Sweat of the Brow¹³⁷ for certain work to be considered as an original work the author must exert his labor, skill and his capital. As per this doctrine, an author gets copyright over the work through simple diligence during the creation of the work and there is no requirement of substantial originality.¹³⁸ Besides, the work in fact originates from the mind of author.

¹³⁶ See copyright proclamation art.6(1)

¹³⁷ Shuchi Mehta, Analysis of Doctrines: ‘Sweat of the Brow’& Modicum of Creativity’ vis-a-vis Originality in Copyright Law (2015),p. <http://www.indialaw.in/blog/law/analysis-of-doctrines-sweat-of-brow-modicum-of-creativity-originality-in-copyright/> last accessed April 22,2017

¹³⁸ Ibid

The second approach is termed as Modicum of creativity and dictates originality subsists in a work where a sufficient amount of intellectual creativity and judgment has gone into the creation of that work.¹³⁹ According to this approach, for the work to be considered as original it should exhibit some degree of creativity. The standard of creativity need not be high but a minimum level of creativity should be there for copyright protection.¹⁴⁰ Stated in another way the degree of creativity should be low level not elevated one. These two approaches shares one thing in common. The work is considered as original copyright work as long as it is the result of author's personal effort and it is not copied from the other work. Thus, for a certain work to be considered as original it needs to be the result of authors own intellectual effort and should not be copied from others work. Stated in another way if a work is copied from another work it is definitely not original and does not qualify for copyright protection.¹⁴¹

Besides, the law stipulates fixation as a condition to extend protection to the work. As defined by the proclamation fixation is nothing but the embodiment of the work in material form, from which it's perceived, reproduced or communicated through the device prepared for that purpose.¹⁴² Copyright works can exist without fixation for certain category of work but, the very justification for fixation requirement is to guarantee public access of the work by facilitating the reproduction of the work.¹⁴³ For the reasons of public exploitation the law makes fixation a requirement for copyright protection.¹⁴⁴ If the work remains unfixed it is difficult for the public to get access and exploit that work. Furthermore, for certain category of work fixation is part and parcel of creation of the work and it is not additional requirement.¹⁴⁵ Specifically, for the works like engraving, sculpture, and photographic

¹³⁹ Ibid

¹⁴⁰ Ibid

¹⁴¹ Julien Hofman. *Introducing Copyright: a Plain Language Guide to Copyright in the 21st century* 1055 West Hastings Street, Suite 1200, Vancouver, BC V6E 2E9 Commonwealth of Learning (2009),p.43 available at <http://tigerprints.clemson.edu/cgi/viewcontent.cgi?article=1177&context=chee> last accessed April 10,2017

¹⁴² See copyright proclamation art.2(11)

¹⁴³ Biruk Haile. Lecture on Advanced Intellectual Property law to postgraduate student of Commercial and investment law, Jimma University, January 3,2016

¹⁴⁴ Ibid

¹⁴⁵ Ibid

works it is part and parcel while it is additional requirement for the literary works.¹⁴⁶

Despite making it a requirement for copyright protection by the law, there are many controversies concerning the fixation requirement provided by Ethiopian copyright proclamation. The first controversy with regard to fixation requirement is concerning its constitutional basis. As stipulated under article 40(2) of the FDRE Constitution to get ownership over IP in general and copyright in particular what is expected from the creator is creation. As per the wording of the constitution what is needed from the creator is creation of intangible property through exertion of his labor and intellectual creativity and upon creation of literary, artistic and scientific works the person is entitled to ownership over his work and deserves legal protection over it. The constitution does not make fixation a requirement. Thus, the constitutionality of the fixation requirement is highly challenge-able in Ethiopia.

Furthermore, its suitability to the existing societal situation is highly questionable. It restricts the scope of application of copyright law to those individuals that are literate and have better access to technology.¹⁴⁷ This may seriously affect other sectors of societies that are unable to fix their creative works for a reason of lack of necessary tools and knowledge. In nutshell, it deprives copyright protection over their creative works due to lack of fixation.

Coming to the scope of application of copyright proclamation, its scope of application is confined to those works legible for protection as per the legibility criteria set by the legislator under the proclamation. Accordingly, a work is entitled to copyright protection if it's work of Ethiopian nationals, or if it is the work of a person having principal residence in Ethiopia.¹⁴⁸ Furthermore, the scope of application of the proclamation extends to works first published in Ethiopia, works first published abroad and also published in Ethiopia within 30 days, irrespective of the nationality or residence of their authors;¹⁴⁹ With regard to audiovisual works, the producer of which has his headquarters or principal residence in

¹⁴⁶ Ibid

¹⁴⁷ Supra at note 13, p.33

¹⁴⁸ See art.3(1)(a) of Copyright Proclamation

¹⁴⁹ See art.3(1)(b) of Copyright Proclamation

Ethiopia;¹⁵⁰ and works of architecture erected in Ethiopia and other artistic works incorporated in a building or other structure located in Ethiopia.¹⁵¹

Upon creation of the original work Copyright law confer on the author or holder of copyrighted material a bundle of economic rights. These economic rights are designed to protect the financial and material interest of the author.¹⁵² In light of this aim, a number of exclusive rights are granted to the author for a certain period of time.¹⁵³ The flesh of copyright law lies on exclusive rights and exceptions and limitations to these rights. The emphasis of copyright law is to exclude others people from engaging in the acts conferred on the right holder in the form of exclusive rights. In the same vein, copyright proclamation confer on the author or owner of copyrighted material the exclusive rights to carry out or authorize the 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.¹⁵⁴ Despite its provision of exclusive rights the proclamation does not specify to which category of work they apply. Some of the exclusive rights apply to literary work; some others may apply to artistic work while others may apply to scientific works. Some exclusive rights may apply to all copyrighted material. As the law does not stipulate to which category of works exclusive rights apply it is up to the court, scholars and concerned body to deal with the issue.

¹⁵⁰ See art.3(1)(c) of Copyright Proclamation

¹⁵¹ See art.3(1)(d), see also art 3(3) of copyright Proclamation for other category of work

¹⁵² Jean-Luc Piotraut. "An Authors' Rights- Based Copyright Law: The Fairness and Morality of French and American Law compared." *Cardozo Arts & Entertainment Vol.24 No. 549(2006):p.581*

¹⁵³ Ibid

¹⁵⁴ See copyright proclamation art.7

3.2 Scrutiny of Exceptions and Limitations to Exclusive Rights under the Copyright Law with Special Emphasis to Education

Ethiopian Copyright law or proclamation confers various kind exceptions and limitations on the exclusive rights of copyright owner or holder. As clearly stated under article 7 paragraphs 1 of copyright proclamation exclusive rights conferred on the right holder and/or author may not affect those exceptions and limitations provisions ranging from article 9 to 19. This Exception and limitation is designed to balance public interest with that of exclusive right given to the right holder. Thus, scrutiny of exceptions and limitations provision is crucial to understand as to whether they really balance exclusive right given to the right holder with public interest particular with regard to education

An assessment of exceptions and limitations provision to exclusive rights under the copyright law with specific reference to education involves consideration of various issues. Among the other things in assessing those exceptions and limitations there need examination of the subject matter covered by the exception, benefices entitled to reap the benefit from those exceptions and limitations provisions, economic rights fall under the exceptions, types or nature of works covered therein, the extent to which it is covered by the exception, the condition attached to them and forms in which the works is utilized is entertained thoroughly.

3.2.1 Reproduction for teaching

The teaching exception under Ethiopian copyright law allows reproduction of published work or sound recording for the purpose of teaching provided that, the reproduction is conducted without exceeding fair practice and the extent justified by the purpose.¹⁵⁵ *In Primis*, regarding the teaching exception one need to know the subject matter covered under the exception. Regarding the subject matter covered by the exception all published copyrighted work is covered by the exception. It is clear from the wording of the provision all published literary, artistic and scientific works are covered by the teaching exception under article 11. However, a proclamation restricts scope of applicability of the exception

¹⁵⁵ See copyright proclamation art.11(1)

only to the published work. In doing this the teaching exception is encountering two major criticisms with regard to the subject matter covered by the exception.

In Principo, the proclamation restricts the scope of teaching exception only to published subject matter. In turn, this leads to the exclusion of huge sects of works lawfully made available to the public from the reach of the teaching exception. The proclamation extends its protection to literary, artistic and scientific works up on creation provided it is original and fixed. Publication is not a condition to get copyright protection over the work but, it made publication a pre-condition to use the work via the force of exceptions and limitations. Besides under BC and directive 2001/29/EC there is no publication requirement to utilize the copyrighted work for the purpose of teaching via the exceptions and limitations. Once the work is lawfully made available to the public there is no rational to prohibit the utilization of the work for teaching purpose via the exceptions and limitations. Therefore, the proclamation unnecessarily excludes vast category of works lawfully made available to the public from utilization.

Secondly, the way proclamation defines published work unnecessarily affects and restricts the use of copyrighted work for teaching purpose via exceptions and limitations. It considered Published work as 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.¹⁵⁶ The requirements like tangible copies and reasonable quantity provided by the proclamation seriously undermine the utilization of works made available online to the public. The applicability of the exception is more confined to analog world as opposed to digital technology world. Thus, it severely jeopardizes the utilization of works made available online as it is framed for traditional analog world.

Coming to the type of teaching entitled to reap the benefit of exception and limitation, there is no indication by the exceptions and limitations under the copyright law part save article 32(c) of copyright proclamation. Under article 11 the law simple permits reproduction of a

¹⁵⁶ See art.2(22) of Copyright Proclamation No.410/2004

published work or sound recording for the purpose of teaching. In contrary, article 32(c) clearly provided the institution entitled to reap the benefit of the exceptions and limitations. Accordingly, the reproduction of the work is permitted only for those institution engaged in face-to-face teaching activities. The proclamation put further restriction on those educational institutions engaged in face-to-face teaching activities with regard to the nature or type of work covered under the exceptions and limitations. As per the wording of the law even those educational institution engaged in conventional face-to-face teaching may not rely on the exceptions and limitations to utilize performances and sound recordings which have been published as instructional or teaching material.

In different scholarly writings it is argued as if both conventional face-to-face and distance education is entitled to reap the benefit of the teaching exception. However, this kind of argument may not hold water for various justifications. *In Primis*, exceptions and limitations provisions are construed very narrowly. Owing to this canon of construction of exceptions and limitations provisions one may not construed this provision very broadly to inculcate distance educational institution under the exceptions. In line with this, as provided under the preamble of copyright proclamation the law emphasis on the protection of literary, artistic and scientific works not on the issue of utilization of works via the force of exceptions and limitations. This clearly indicates the law focuses primarily on the protection of economic rights and moral rights of the author. Besides, in case of distance education the learner and the teachers are separated from one another. As they are located in different place in case of distance education beyond the recognition of reproduction right the law also need to recognize some other right. As the law fail to recognize distribution, communication, transmission right needed in case of distance education the law tacitly excludes distance education to benefit from the teaching exception. Thus, exclusion of right of communication to the public and broadcasts from the exception clearly indicates the exclusion of distance education from the exceptions and limitations.

Besides, article 32(c) of proclamation is of great use in determining the beneficiaries of teaching exceptions. The express exclusion of distance education and other forms of teaching under article 32(c) amounts to exclusion of the same under teaching exception

under copyright regime. This line of argument holds true owing to the auxiliary nature of neighboring right holders to the author. As neighboring right holders are auxiliary for the author for the strong reason, those privilege provided to them is extended to the author to. Stated in another way as the rights conferred on the related right holders is based on those of copyright holders it is logical that the exceptions and limitations provision to affect similar prerogatives, if not its discouraging for copyright holder and seriously affect creation. Furthermore, as provided under article 32(d) the law extends exceptions and limitations under the copyright regime to the related right regime. Thus, exceptions and limitations are e parallel in both scenarios. As the result only those institutions and persons engaged in face-to-face teaching activities are eligible under the teaching exception.

Coming to the issue of commercial and non-commercial nature of educational institutions nothing is indicated by the law as to which educational institution is entitled to reap the benefit of exceptions and limitations. Concerning noncommercial educational institution they are entitled to reap the benefit of teaching exception with no doubt. In other word with regard to non-profit educational institution it's obvious they are entitled to reap the benefit of the exceptions and limitations. However, with regard to those educational institutions conducting education for profit generation there is an issue and it is a debatable issue among various scholars. Various scholars in the field, national and international copyright instruments try to restrict the beneficiaries of teaching exceptions to noncommercial teaching. While other category of scholars propagates for the application of the exception to all educational institution regardless of their profit or nonprofit nature as long as they are engaged in the act of teaching. Specifically, scholars like Biruk Haile¹⁵⁷ and G.Karnell¹⁵⁸ advocates for the application of teaching exceptions to all types of teaching regardless of whether or not such teaching is for free, while scholars like L. Guibault and Joseph Fometeu excludes commercial educational institution from the scope of teaching exceptions.¹⁵⁹ Due to the prevailing soci-economic conditions and level of literacy rate of

¹⁵⁷ Supra at note 143

¹⁵⁸G. Karnell, *L'utilisation d'oeuvres protégées par le droit d'auteur aux fins d'activités didactiques et d'enseignement*, Bulletin du droit d'auteur, vol. XX, No. 1, 1986, p. 8. in Fometeu cited above at note 52,p.10

¹⁵⁹L. Guibault, *Nature et portée des limitations et exceptions au droit d'auteur et aux droits voisins auregard de leurs missions d'intérêt général en matière de transmission de connaissances : l'avenir de leur adaptation*

the country scope of application teaching exception extends to all types of teaching regardless of their commercial or noncommercial nature.

Concerning the nature or type of work covered by teaching exceptions, the teaching exception under article 11 is silent, while copyright proclamation expressly excludes reproduction of performances and sound recordings which have been published as instructional or teaching material created for educational purpose.¹⁶⁰ The scope of application of the teaching exception does not extend to educational works for various justifications; instead it is confined to other literary, artistic and scientific works. Firstly, as per the market harm principle the extension of exceptions and limitations to the instructional or teaching material unfairly affects the economic interests of copyright holder as it result in market deprivation (it takes away the main market from the author.¹⁶¹) The absence of strong legal protection for educational or instructional material in the long run dries the source of the material by discouraging the creators. In the absence of market to their creation the creator may not invest their time, skill, knowledge etc. They may not engage in the creation of vital educational work in the absence of market to their creation and strong copyright protection to their works. Most of the time educational institutions engage in the copying of material prepared for educational purpose and letting the potential users to use the material for free via the force of exceptions and limitations run against the interest of the copyright holder.¹⁶² The very rational for conferring economic rights on the copyright holder is to protect financial and material interest of the author. Thus, subjecting instructional material to free use defeats this justification of conferring economic rights on the copyright holders. Secondly, what is stipulated under article 32(c) is of great use in determining the nature of work covered by the exceptions. As neighboring right holders are auxiliary to the author for the strong reason, those protection provided to them is extended to the author to. In another way as the rights conferred on the related right holders is based on those of copyright holders, it is logical that the exception should affect similar prerogatives, if not its discouraging for copyright holder and seriously affect creation. In

à *l'environnement numérique*, under the guidance of B. Hugenholtz, *e.Bulletin* dudroit d'auteur, October–December 2003, p. 4. in Fometeu cited above at note 52

¹⁶⁰ See copyright proclamation art.32(c)

¹⁶¹ Biruk H,cited above at note 5,p.180& also,as cited above at note 143

¹⁶² Ibid

nutshell, teaching or instructional material is out of the realm of the teaching exceptions.

Coming to the issue of economic rights covered by the teaching exception, it is only reproduction right of published work that is expressly restricted via the force of exception and limitation. All other economic rights are out of the realm of teaching exception. Thus, one can not invoke teaching exceptions to adapt, arrange or to conduct other transformation on the work; to distribute the original or a copy of the work to the public by sale or rental; to import 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; other communication of the work to the public. With regard to translation right the law does not expressly permit it rather most of exceptions and limitations provisions deal with the issue of reproduction right. However, the law permits the translation of work tacitly. This line of argument holds true for two main reasons.¹⁶³ Firstly, translation is considered as part and parcel of reproduction and it is allowed and covered by the exception to use the work either in its original form or translated form as long as it is for teaching purpose.¹⁶⁴ When one reproduces the work for teaching reproduction can be made in its original form or translated form. Secondly, restricting the use of the work only in its original form severely affects the use of the provision and renders it ineffective.¹⁶⁵ It is against justification for providing exception and limitation for teaching. Imagine language schools engaged in the delivery of some translation courses how can they pursue their teaching activities effectively in the absence of translation right. Once they reproduce the material for teaching purpose may they seek authorization from the author to translate the work? Certainly, that is not the spirit of the law. Allowing reproduction of the work for teaching via exception and limitation and restricting the translation of the same for teaching is untenable and uneconomic. Furthermore, the reality on the ground that is language diversity justifies the use of the work in its original or translated form as long as it's for teaching purpose.

In contrast to our law major international copyright instruments, model laws and foreign copyright laws permit the restriction of various economic rights given to the author via

¹⁶³ See Ricketson, cited above at note 92, p.37 ff, & see also Xalabarder cited above at note 102, p.16

¹⁶⁴ Ibid

¹⁶⁵ Ibid

force of teaching exceptions. Specifically, Tunis Model Copyright Law of 1976 permits the uses of protected work, either in its original language or translation without the authors consent. The model law also permits broadcasting, communication to the public of the work without the author's consent.¹⁶⁶ In the same token, under directive 2001/29/EC educational institution can reproduce, communicate and distribute any protected work within the ambit of exceptions and limitations for teaching. In similar fashion, The Australian copyright act permits Performance, communication of works or other subject-matter in the course of educational instruction, adaptation, etc. Specifically, it allows the free use of a literary, dramatic or musical work for education where it is performed in class or otherwise in the presence of an audience; and is so performed by a teacher in the course of giving educational instruction. Unlike foreign copyright law, model laws and major international copyright instruments the Ethiopian copyright law adopts very restrictive approach with regard to the economic rights covered under teaching exceptions. It allows only reproduction of published work. All other Economic rights are under exclusive control of the right holder. This severely affects education and educational institution.

The proclamation provides stringent condition that needs to be complied with in reproducing the work. Among other things, the reproduction must be and needs to be for the purpose of teaching, without exceeding fair practice and extent justified by the purpose and the work must be published one.¹⁶⁷ In addition, there should be indication of source and name of author if possible.¹⁶⁸ This requirement of publication provided by the proclamation is unnecessary and untenable and thus, no need of attaching it to exceptions and limitations for teaching. To the contrary, requirement of indication of source and author is of a vital importance in particular in safe guarding right of paternity and acknowledging the source. Besides, requirement of fair practice and extent justified by purpose is designed to prohibit unnecessary encroachment to economic rights of the author. The proclamation does not provide what constitute fair practice and extent justified by the purpose thus, it is

¹⁶⁶ See art.7 of Tunis Model Copyright law of 1976 for developing countries, see also BC.art.10,&TRIPS agreement art.13

¹⁶⁷ See art.11(1) of copyright proclamation

¹⁶⁸ See art.11(2) of copyright proclamation

determined on case by cases basis. The use of a whole work may be permitted as long as it is fair and justified by the purpose. In another word there is no quantitative restriction. This requirement of fair practice and extent justified by purpose play a vital role in balancing public interest with that of right holder. In the absence of this requirement the use of copyright work may unnecessarily affect economic interests of the right holder.

3.2.2 Quotation

The exceptions and limitations provisions under the copyright proclamation deals with quotation allows the reproduction of quotation of published work provided that such reproduction is compatible fair practice and extent justified by the purpose.¹⁶⁹ Despite recognizing the reproduction of work via quotation exception upon fulfillment of the provided condition the proclamation does not provide what amounts to quotation. According to the Black's law dictionary, quotation is exact reproduction, attribution, and citation of a statement or passage.¹⁷⁰ Thus, the term quotation connotes taking a part from a certain work for the purpose of critical review, teaching, research or studies and the like. Regarding the subject matter or category of work fall under the quotation exception there is no any restriction by the law. The exceptions apply to all categories of copyrighted work provided that they are published. But, the law restricts the category of works fall under the exception only to published work.

Unlike the copyright proclamation, under the major international copyright instruments, model laws and foreign copyright laws quotation exception applies to all categories of work once the work is lawfully made available to the public. Specifically, the quotation exceptions under the BC cover all works lawfully disclosed to the public.¹⁷¹ Besides, directive 2001/29/EC under article5 (3) (d) allows quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public. Thus, publication requirement under Ethiopian copyright proclamation is very restrictive and untenable. As long as the work is lawfully made available to the public there is no rational to prohibit quotation of the work

¹⁶⁹ See copyright proclamation article 10(1)&(2)

¹⁷⁰ Byran A. Graner, *Black's Law Dictionary* (9th ed.), West, Publishing Co.(2009),p.

¹⁷¹ See BC,art.10(1)

for various purpose via the exception and limitation. Therefore, the proclamation unnecessarily excludes those works lawfully made available to the public from quoting via the operation of quotation exceptions.

Regarding economic rights covered under the exception there is some mismatch between the English and Amharic version of the proclamation. According to the English version what is permitted is reproduction of quotation as opposed to making of quotation, while the Amharic version allows the making of quotation. Still the Amharic version even if it transfer the message in slightly different way from that of English version still encounter flaws as it makes reference to article7(1)(a) of the proclamation. The legislator knowingly or unknowingly employed wrong and restrictive terminology in crafting the provision. In contrary, under the Berne convention what is permitted is making of quotation from works lawfully made available to the public. In the same token, directive 2001/29/EC under article5 (3)(d) allows the making of quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has been lawfully made available to the public. In one way or another quotation exception under Ethiopian copyright law cover reproduction right only as its crafted very narrowly employing wrong and restrictive terminologies.

In contrary to the copyright law, the quotation exception is not limited to the exclusive rights of reproduction alone, instead it extends to other economic rights like translation, adaptation, broadcasting and communication to the public. As provided under section seven caption part of Tunis Model Copyright law the use of copyrighted work is made either in its original language or in translation. Furthermore, as provide under directive 2001/29/EC there is no restriction of quotation exception to the right of reproduction only as result it is possible to extend quotation exception to rights like translation, communication etc. Thus, proclamation unnecessarily restricts the scope of application of quotation exception to reproduction right only.

With regard to beneficiaries as there is no specification anybody or organ can rely on quotation exception. Furthermore, concerning purpose of quotation it can be for any

purpose including teaching, criticism, research or study etc. Concerning the amount or extent of work quoted there is no quantitative restriction on behalf of the law and it is possible to quote some part or the entire work provides that it is compatible with fair practice and does not exceed the extent justified by the purpose. Besides, the law requires indication of source and author of the work in case the work is quoted from work containing source and name of the author.¹⁷² With regard to requirement of fair practice and extent justified by the purpose there is no indication by the law thus, they are examined and determined by the appropriate organ on case by case basis.

3.2.3 Reproduction by Libraries, Archives, Museum and Other Similar Institution

By collecting and providing access to knowledge, libraries and archives are a gateway for education, research, scholarship, creativity and discovery. Their services enrich people's lives and support important public policy goals such as literacy, education, scientific advancement, employment and well-being. This institution play great role in fostering the sharing of ideas that encourages further creativity and development. In order to effectively care out their activities they need a flexible and favorable copyright regime with system of exceptions and limitations. Cognizant of the role of libraries, archives and other similar institutions in collecting, preserving and provision of knowledge material Ethiopian copyright law devices the system of exception and limitation to them. It entitles library, archive, memorial hall, museum or similar institution whose activity directly or indirectly is not for gain to make reproduction of a work for the purpose of preservation or replacement provided that it's impossible to obtain a copy under reasonable condition and the act of reproduction is an isolated occurring and if repeated on separated and unrelated occasions.¹⁷³

Regarding the subject matter proclamation permits a reproduction of a work. A work as provide under article 2.30 includes books, booklets, articles in reviews and newspaper,

¹⁷² See copyright proclamation art.10(3)

¹⁷³ See copyright proclamation art.12(1)&(3)

computer programs; speeches, lectures, addresses, sermons, and other oral works; dramatic, dramatico-musical works, pantomimes, choreographic works, and other works created for stage production; musical compositions; audiovisual works; works of architecture; works of drawing, painting, sculpture, engraving, lithography, tapestry, and other works of fine arts; photographic works; illustrations, maps, plans, sketches, and three dimensional works related to geography, topography, architecture or science. Besides, the proclamation under article 4 provides other category of works that deserves protection under the proclamation. It extends protection to the category of work termed as derivative work. In particular, it forwards protection to translation, adaptations, arrangements and other transformations or modifications of works and collection of works such as encyclopedia or anthologies or databases whether in machine readable or other form provided that such collections are original by reason of the selection or arrangement of their contents. Thus, scope of application of the exception extends to all literary, artistic and scientific works including derivative works but, the law does not indicate whether it applies to published works or to all works lawfully made available to the public.

With regard to requirement of publication or lawfully disclosure as stated under Tunis Model Copyright law for developing countries, once the work is lawfully made available to the public the users of copyrighted material can utilize the work provided that, their making is compatible with fair practice, and their extent does not exceed that justified by the purpose.¹⁷⁴ As long as the work is lawfully made available to the public there is no rational to prohibit the reproduction of the work via the exception and limitation. Restricting the scope of application of the provision to published work is untenable and unnecessary. Whether the work is published or unpublished is a matter of indifferent. For one thing the very purpose of reproduction is to preserve or replace the copy which has been lost or destroyed. For the other thing there is no any restriction by the law. Thus, article 12(1) of the proclamation cover all copyrighted works be it published, unpublished, and those works lawfully made available to the public.

Concerning the beneficiaries of the exception the proclamation provides libraries, archive,

¹⁷⁴ See Tunis Model Copyright law of 1976 for Developing Countries art.7(5)

memorial hall, museum or similar institution whose activity directly or indirectly is not for gain. There are various kinds of libraries like public libraries, libraries of educational institution, etc. Regardless of their public or private ownership the listed and other similar institution are entitled to the benefit of the exceptions and limitations as long as they are conducting their activities for free. The ways these institutions interact with copyright law also differ based on the purpose for which they are established. But, the proclamation regardless of their purpose and functions restricts them to reproduce the work only for the purpose of preservation or replacement of copy which has lost or destroyed or rendered unusable in the permanent collection of another similar library or archive.¹⁷⁵ However, the proclamation disregards very important concerns like reproduction for the purpose of teaching, review, critique, etc. To our dismay the proclamation neglects the intersection between teaching exception and library exception.

Unlike copyright proclamation, under directive 2001/29/EC and Tunis Model copyright law of 1976 for developing countries there is no any restriction of library exception to certain specific purpose, instead they leaves the room open to cover any purpose including educational purpose provided that the act of reproduction is not intended for direct or indirect economic or commercial advantage.¹⁷⁶ The Directive permits specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage.¹⁷⁷ In contrary the copy right proclamation by restricting the act of reproduction only to certain specific purpose close the room to reproduction made for teaching purpose. There exist huge mismatch between teaching exceptions and library exceptions. As the proclamation limits the purpose of reproduction to preservation, replacement and neglects educational purpose there is no way to obtain material for educational purpose by invoking library or teaching exceptions. However, all works used for teaching purposes, either under a teaching exception or under license, must be obtained from somewhere and libraries are usually the source to provide the works to be used for

¹⁷⁵ See Copyright proclamation No.410/204 art.12(3)

¹⁷⁶ See Tunis Model Copyright Law of 1976 for Developing Countries, art 7(4) & see also Directive 2001/29/EC art 5(2)(c)

¹⁷⁷ See Directive 2001/29/EC art 5(2)(c)

teaching purposes. A strict adherence to the library exception closes room for libraries to make reproduction of works for teaching purpose. In nutshell, the restriction of reproduction only to purpose of preservation and replacement and the exoneration of teaching purpose is untenable and makes the teaching exceptions and library exceptions meaningless. The proclamation fails to create a proper link between teaching exceptions and library exceptions. This exclusion of reproduction for teaching purpose seriously undermines educational activities.

Furthermore, article 12(2) which regulates the condition under which physical person benefit from the library exceptions allows library and archive to make a reproduction of a published Article, short work or short extract of a work to satisfy the request of a physical person, provided that: that copy is 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 educational institution is aware of, which can afford a collective license of reproduction. Unlike article 12(1), article 12(2) restricts the category of work covered by the exception only to published article, short work or short extract of work. This provision is very restrictive as it allows only reproduction of published article, short work or short extract of work. It is untenable and unnecessary restriction as it exonerates vast category of copyrighted work from the ambit of exceptions. This is not the only category of work used for research, study or scholarship instead all copyrighted material is of vital importance to undertake research, for study and scholarship. Most of the time unpublished material is very important to conduct research. Furthermore, the requirement of publication stipulated by the law is unjustifiable requirement as it serves no purpose. As long as the work is lawfully made available to the public there is no rational to prohibit the reproduction of the work via the exceptions and limitations. Besides, regarding the beneficiaries as the law restricts only to physical person it seriously affects research centers. Additionally, the restriction to private research goes against the public interest as it excludes public research centers.

Furthermore, restricting the scope of application of the provision only to right of

reproduction run against the very objective of the library to:- collect and provide access to knowledge to foster the sharing of ideas that encourages further creativity and development. To undertake their activities effectively there must be recognition of other rights like inter library lending, library lending to other users or public, translation, reproduction by them for teaching purpose, etc.

3.2.4 Reproduction for personal purpose and private performance free of charge

Article 9 of copyright proclamation which regulates reproduction for the personal purpose permits private reproduction of published work in a single copy by a physical person exclusively for his own personal purpose. It stresses the act is conducted exclusively for the users own personal purpose. Despite making private reproduction and exclusive personal purpose as requirement the proclamation does not provide what private reproduction and personal purpose connotes. As the term private reproduction and own personal purpose is the reverse of collective use, it presupposes that no profit making purpose is pursued. Thus, as there is no any restriction by the provision regarding the beneficiaries save restricting the scope of application to the physical person as opposed to juridical person anybody can make it as long as it is private reproduction and for his own personal purpose. Stated in another way any reproduction made by physical person is permitted provided that it is not for profit making purpose. Thus, Any person, be it learners and/or teachers may rely on the exceptions and limitations to conduct their educational activities.

The scope of application of provision is restricted only to the exclusive rights of reproduction. Unlike copyright proclamation, the Tunis Model Copyright Law for developing countries extends the scope of personal or private use exception to exclusive rights like reproduction, translation, adaptation, arrangement or transformation without being constrained by the economic right holders.¹⁷⁸ The extension of personal or private use exception to these exclusive right is justified for privacy reason and difficult of control over them.

¹⁷⁸ See Tunis Model Copyright Law of 1976 fr developing countries,art.7(i)(a)

Moreover, Copyright and neighboring right protection (amendment) proclamation No.827/2014 come up with additional requirement. Article 1(4) states: a private reproduction of published work in accordance with article 9(1) shall be allowed if that physical person is owner of original copy. This provision severely restricts the applicability of personal use exception as it close the room to those individual with no original copy. The beneficiaries of the exception are only those individual with original copy. The provision is turned towards promotion of convenience of consumption as opposed to promoting access to copyrighted work.¹⁷⁹ As a developing country our main concern need to be and must be about access however, this provision closed the way through which those individual with no original copy accessed copyrighted work.¹⁸⁰ Users of Copyrighted work may not have material for various reason, for example inability to afford the price and unavailability of the material in market. Those users may rely on the system of exception and limitation to get access to cultural material. But, the law precludes them from accessing the material. In contrary under the Tunis Model copyright law the person is not required to own original copy to benefit from the exception. It empowers the users of copyrighted material to reproduce, translate, adapt, arrange or transform without being constrained by the exclusive right holders regardless of owning original copy.¹⁸¹ This requirement of ownership introduced by the proclamation militates those users with no original copy to get access of copyrighted work.

Furthermore, article 16 of the proclamation permits private performances of work given free of charge at a family gathering or in school. Regarding the subject matter covered by the exception there is no any restriction by the law thus, any literary and artistic work lawfully made available to the public that can be performed is covered by the exception. Despite recognizing the private performance of work, the provision does not indicate what constitute private performance, who is allowed to perform under the exceptions, what is the purpose of performances, etc. To dismay the proclamation does not provide definition for the performance instead it defines public performance and lists out the category of person considered as performer. Accordingly, public performance connotes Performing a work to

¹⁷⁹ Biruk H, Cited above at note 143

¹⁸⁰ Ibid

¹⁸¹ See Tunis Model Copyright Law of 1976 for Developing Countries art.7(1)

the public by recitation, playing, dancing, acting, or otherwise, either directly or using any communication media; in case of an audio-visual work, showing the images in sequence and; in case of sound recording making the sound recording audible to the public.¹⁸² While performer connotes among other things actor, singer, musicians, dancer and other person who act, sing, deliver, declaim, play in, or otherwise perform literary and/or artistic works.¹⁸³ As the term private performance is the reverse of public performance thus, one may argue that all performances not considered as public performances is covered with in the ambit of the provision. But, from the wording of the provisions what is permitted is performance at family gathering or in school Provided that they are given free of charge. Thus, all other performances are not covered under the exceptions.

The proclamations despite permitting performance of literary and/or artistic works given free of charge at family gathering or in school fail to indicate the purpose of the performance, the audiences, and the person entitled to perform. Is the purpose of performances targeted towards entertainment, educational or both or is it some other purpose. With regard to performance conducted in school there is no good reason to exclude performance conducted for educational purpose. In principio, performances conducted in school must be targeted towards the successfully accomplishment of educational activities. Thus, regardless of their purpose be it educational or entertainment performances in school is allowed provided that it is conducted free of charge. With regard to audiences in case of performances conducted for educational purpose it includes both teachers and students. In all other cases it incorporates any concerned body as long as no charge is required. But, the proclamation makes unnecessary restriction as it restricts the scope of application to performances made in school. The restriction of performances in school affects performances made out of school premises like rented hall and some other area. Furthermore, it excludes distance education from the coverage of the exceptions and limitations provisions. Only those schools engaged in conventional face-to-face educational activities reap its benefit. Those schools engaged in distance education hardly reap it is benefits.

¹⁸² See Copyright and Neighboring Right Protection Proclamation.art.2(23)

¹⁸³ Id .art.2(19)

3.2.5 Importation for Personal Purpose and redistribution of work by sale

Importation for personal purpose and redistribution of work by sale is a limit to the exclusive rights of importation of original or copies of the work and distribution of the original or copies of the work to the public by sale or rental given to the right holder by the proclamation respectively. They deal with the issue of the exhaustion of exclusive rights of importation and distribution by sale of original or copies of the work. The doctrine of exhaustion revolves around the point at which monopoly right vested on the copyright holder comes to an end. Article 15 of the proclamation which deals with the issue of importation for the personal purpose permits importation of a copy of work by a physical person for his own personal purpose. As clearly stipulated under article 7(1)(e) of Copyright proclamation the law confer on the copyright holder exclusive right to import original or copies of the work. This exclusive rights conferred on the copyright holder is limited only when the importation of copy of the work is undertaken by a physical person for his own personal purpose and in all other cases the copyright holder have import monopoly over his work.

The law permits only those importations of copy of work made by a physical person for his own personal purpose. Thus, in all other cases the law adopts doctrine of territorial exhaustion as opposed to the doctrine of regional and/or international exhaustion. According to the doctrine of territorial exhaustion, the exhaustion of right in a particular market may not deprive his exclusive rights in the rest of the market thus, his monopoly right is alive in all other market. However, as per the doctrine of international exhaustion, once a copyrighted work is put in a single market his right cease to exist in the rest of the market. As per the doctrine of international exhaustion parallel import is allowed as opposed to doctrine of territorial exhaustion. Thus, adoption of the doctrine of national exhaustion severely jeopardizes education and educational institution as whole. It restricts the importation of copyright work from nearby countries or importation of copyright work where it is available at low cost. The adoption of the principle of national exhaustion restricts access to knowledge material. To avert the problem of access to knowledge material it is wise to allow parallel importation through adoption of doctrine of

international exhaustion as opposed to this doctrine of territorial exhaustion.

Besides, article 19 which permit distribution of copies of work by sale state:

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.

It deals with the issue of exhaustion of exclusive rights of distribution of the work through sale with in domestic contexts. Up on the first sale of the work to the public the right of copyright holder is exhausted with regard to that particular material and the buyer can freely redistribute the product to the public by means of sale without requiring authorization and paying royalties to the copyright holder. Thus, a person who bought the copy can freely resale that material however, the buyer can not interfere with other exclusive rights of copyright holder. This provision severely affects institution like libraries that bought the material not for the purpose of resale but, to be accessed and used by the public. Would the libraries, special libraries of educational institution lend copyright material they have acquired lawfully to their students, staffs, to other libraries etc.? Restricting the scope of application of the provision only to right of redistribution by sale alone run against the very objective of the library to:- collect and provide access to knowledge, to foster the sharing of ideas that encourages further creativity and development. To undertake their activities effectively there must be recognition of other rights like inter library lending, library lending to other users or public, translation, etc. To our dismay library exception under article 12 of the proclamation failed to recognize Library lending. There is a huge logical gap under these exceptions. To enable libraries to Carry their function properly and effectively there should be and must be the recognition of library lending without undergoing system of authorization. Above all proper link should be made among the exceptions and limitations provision.

CHAPTER- FOUR

CONCLUSION AND ECOMMENDATION

4.1 Conclusion

Exceptions and limitations has been described as the mechanism of utilization of copyrighted work without requiring and acquiring right holders authorization. They refer to the acts the copyright law allows users of copyrighted work to undertake which otherwise would amount to copyright infringement. They are an important part of effectively functioning copyright system. In their absence the monopoly right given to the copyright holder seriously undermines important and significant uses like educational uses, uses for research, scholarship uses etc.

The main underpinnings necessitating exceptions and limitations includes among other things the need to promote and safeguard fundamental rights and freedoms, public interests and the need to respond to market dysfunction. They are considered as an important part of effectively functioning copyright system. Cognizance of their balancing role major international copyright instruments, model laws, foreign copyright laws and the Ethiopian copyright law recognized and inculcate them.

Due to the mounting proliferation of educational institution in the country the issue of exceptions and limitation is of great concern for Ethiopia. To avert the difficulties attached to the system of authorization and utilize copyrighted work to undertake their educational activities effectively exceptions and limitations is the best tool for the educational institution, learners and teachers. However, the systems of exceptions and limitations under the copyright law which has been discussed so far as it stand know is inadequate to address stakeholders need of using copyrighted work for educational purpose without undergoing the cumbersome procedure of permission from the right holder as the proclamation adopts to restrictive approach regarding subject matters and exclusive rights fall under exception. Besides, scope of application of exceptions and limitations provision which has been discussed so far is limited to published works and

almost all of them is restricted to exclusive rights of reproduction only. Additionally, regarding the rights covered by the system of exceptions and limitations the proclamation uses wrong terminologies, restrictive, and inappropriate terms that may lead to confusion as to the scope of copyright exception and limitation with regard to categories of works, rights, uses and extents of use allowed. Besides, the system of exception and limitation incorporated under the proclamation lacks clarity regarding the beneficiaries fall under the system of exceptions and limitations. Furthermore, the law lacks clarity with regard to the form of utilization of works via the operation of exceptions and limitations.

Exceptions and limitations provision concerning reproduction for teaching, reproduction by libraries, archives, museum or other similar institutions and redistribution of work by sale suffer a lacunae and such a mismatch renders a provision meaningless and seriously undermines educational activities. There is no proper link between this exceptions and limitations provision. There exist huge logical gaps among those provisions.

The copyright law as it stands know fail to incorporates exception and limitation in full-fledged manner. The system of exceptions and limitations under the proclamation is entirely built on very rigid and inflexibly provisions that may not respond to the need of stakeholders. There are no exceptions and limitations provisions for purpose of research, study, review, critique etc. Besides, the law does not have the catch-all, fair use or fair dealing a provision that applies in the absence of any other provisions. The system of exceptions and limitations as it stands know tilts towards the protection of monopoly rights of the author or the right holder over their copyrighted work and may not play its desired balancing role properly.

The exceptions and limitations provision concerning reproduction for teaching, quotation, private/personal use, reproduction by libraries, archives, museum or other similar institution, private performance free of charge, Importation for personal purpose and redistribution of work by sale with no doubt needs serious reconsideration viewed from educational perspective.

All in all the exceptions and limitations provision under the copyright proclamation is not

adequate enough to respond to the need of educational institution and they pave the way for copyright infringement or they may subject the stakeholder to undergo the cumbersome and lengthy procedure of authorization.

4.2 Recommendations

Based on the foregoing discussions and findings, the researcher would like to extend the following points to be considered by the legislator:

- The exceptions and limitations provisions under the copyright proclamations must be and needs to be extended to all copyrighted works save educational works.
- The publication requirement under the exceptions and limitations provision needs to be excluded and replaced by the term lawfully made available to the public or lawfully disclosed to the public.
- The exceptions and limitations provision must include all exclusive rights of copyright holder beyond reproduction right. The law needs to inculcate all exclusive rights of copy right holder under the system of exception and limitations provision to be full-fledged.
- Wrong and restrictive terminologies under the system of exceptions and limitations must be replaced by the appropriate, flexible, and open ended terminologies. Specifically, inappropriate and restrictive terms like reproduction for teaching and reproduction of quotation must be and needs to be replaced by appropriate terms like utilization for teaching purpose and making of quotation respectively.
- The currently prevalent mismatch between and among exceptions and limitations provision dealing with the issue of reproduction for teaching, reproduction by libraries, archives, museum or other similar institutions and redistribution of work by sale must be rectified. The lacuna among these exceptions and limitations provisions defeats the very rational for exceptions and limitations. Thus, the legislator must amend the law to create a proper link among these provisions.
- The law must clearly indicate beneficiaries entitled to reap the fruits of exceptions and limitations provision.
- The law must clearly exclude works prepared for teaching purpose from the reach of exceptions and limitations provision as their subjection to the free use defeats the very

justification of conferring economic rights on the copyright holders.

- With regard to the personal or private use exceptions provision, the ownership requirement of original copy introduced by the copyright and neighboring right protection (amendment) proclamation No.827/2014 must be removed as it militates those users with no original copy to get access to copyrighted work.
- The doctrine of territorial exhaustion adopted by the law permitting only those importations of copy of work made by a physical person for his own personal purpose must be canceled and replaced by the doctrine of international exhaustion.
- Furthermore, the law must come up with new exceptions and limitations provision concerning research, study, critique, review, etc.

Bibliography

A) Books

Catherine Coloston. *Principles of Intellectual Property Law*. London.Sydney:Cavendish Publishing Limited (1999)

S. Stewart, *International Copyright and Neighboring Rights*, Butter worths, London (2nd Ed.)

B) Journals, commentaries and related material

Biruk Haile.”Scrutiny of the Ethiopian system of Copyright Limitations in the Light of International Legal Hybrid resulting from (the Impending) WTO Membership: Three-Step Test in Focus.” *journal of Ethiopian law* XXV No.2. (2012):

B. Hugenholtz, *the Future of Copyright in a digital Environment*, (1996),

Daniel, Seng. *Study on the Exception and Limitation for the Benefit of Educational activities for Asia and Australia, WIPO Standing Committee on Copyright and Related Rights*.SCCR19/7(2009)

Dinusha Mendis, “*The Historical Development of Exceptions to Copyright and Its Application to Copyright Law in the Twenty-first Century*.” *Electronic journal of comparative law* Vol.7 No.5 (2003)

Edwin C. Hettinger, ‘*Justifying intellectual property*’ Vol.18 No.1 *Philosophy & Public Affairs* (1989)

Justin Hughes, “*The Philosophy of Intellectual property*” *Georgetown Law Journal* Vol.77 No.287 (1998)

Jean-Luc Piotraut. “*An Authors’ Rights- Based Copyright Law: The Fairness and Morality of French and American Law compared*.” *Cardozo Arts &Entertainment* Vol.24 No. 549(2006)

John Locke, *Second Treatise of Government*, March 2008 amendment

G. Karnell, *L’utilisation d’oeuvres protégées par le droit d’auteur aux fins d’activités didactiques et d’enseignement*, Bulletin du droit d’auteur, vol. XX, No. 1, 1986

L. Guibault, *Nature et portée des limitations et exceptions au droit d’auteur et aux droits voisins auregard de leurs missions d’intérêt général en matière de transmission de*

- connaissances : l'avenir de leur adaptation à l'environnement numérique,*
- Joseph Fometeu, **Study on Limitations and Exceptions For Copyright and Related Rights for Teaching in Africa**, Standing Committee on Copyright and Related Rights, (WIPO, SCCR/19/5, 2009)
- Julien Hofman. *Introducing Copyright: a Plain Language Guide to copyright in the 21st century* 1055 West Hastings Street, Suite 1200, Vancouver, BC V6E 2E9 Commonwealth of Learning (2009)
- Lawrence Liang. "Exceptions and Limitations in Indian Copyright Law for Education: An Assessment." *The Law and Development Review* Vol.3, Issue 2. (2010):
- Lucie M.C.R. Guibault, *Contracts and Copyright Exemptions*, IMPRIMATUR, Institute for Information Law, Amsterdam, December 1997
- Mandefro Eshete, **The Interplay between Copyright Protection and the Expansion of Education in Ethiopia**, (WIPO-WTO colloquium for teachers of intellectual property law) (2010)
- Mandefro Eshete and Mola Mengsitu, "Exceptions and limitations Under The Ethiopian Copyright Regime: An Assessment of the Impact on Expansion of Education," *Journal of Ethiopian Law*, Vol. XXV No.1, (2011):
- P. Bernt Hugenholtz & Ruth L. Okediji, **Conceiving an International Instrument on Limitation and Exception to copyright** (2008)
- Raquel Xalabarder, **Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel**, (WIPO, SCCR/19/8, 2009)
- Rashmi Rangnath and Carolin Rosin, **Copyright Limitations and Exceptions and the Trans-Pacific Partnership Agreement**
Records of Intellectual Property Conference of Stockholm, June 11 to July 14, 1967 at 1148
- Sam Ricketson, **Study on Limitations and exceptions of Copyright and Related Rights in The Digital Environment**, Standing Committee on Copyright and Related Rights, (WIPO, SCCR/9/7, 2003)
- Shuchi Mehta, **Analysis of Doctrines: 'Sweat of the Brow' & Modicum of Creativity'**

- vis-a-vis Originality in Copyright Law** (2015)
- Sue, Lott, “**The Consumers View of Copyright.**” *The Public Interest Advocacy Centre* (2003)
- Tanley M. Besen and Leo J. Raskind, “**An Introduction to the Law and Economics of Intellectual Property.**” *The Journal of Economic Perspectives*, Vol. 5, No. 1 (winter, 1991)
- Taame Berihu, **Exception and limitation under Ethiopian Copyright law: A Comparative Analysis**, (2013)
- Tobias Schonwetter and Caroline B Ncube, **New hope for Africa? Copyright and Access to Knowledge in Digital Age**
- United Nations Educational Scientific and Cultural Organizations & World Intellectual Property Organizations Secretary, a Commentary on Tunis Model Law of 1976, for Developing Countries
- WIPO Reports on the Work of the Five Main Committees of the Intellectual Property Conference of Stockholm 1967*, WIPO Publication 209(E),
- Xalabarder, Raquel. “**Copyright Exceptions for Teaching Purposes in Europe**” [online working paper].IN3: UOC. Working Paper Series: WP04-004(2004)

C) Laws

Domestic laws

The constitution of federal democratic republic of Ethiopia, 1995, Art Proc.No 1, Neg Gez. Year 1, no.1.

Copyright and Neighboring Rights Protection Proclamation No. 410/2004

Copyright and neighboring right protection (amendment) proclamation No.872/2014

Foreign laws and international instruments

Australian copyright Act of 1968

Directive 2001/29/EC of the European Parliament and of the council of 22 may 2001

U.K. Copyright Act 1709,

Berne conventions for the protection of literary and artistic works.1971

WIPO copyright treaty. 1996

WIPO Performances and Phonograms Treaty.1996

Rome Convention for the Protection of Performers, Producers of Phonograms and

Broadcasting Organizations.1961

The Agreement on Trade Related Aspects of Intellectual Property Rights.1994

Tunis model copyright law of 1976 for developing countries

D) Websites

<http://www.wipo.int/copyright/en/limitations/>

http://www.wipo.int/meetings/en/doc_details.jsp?doc

<http://www.ejcl.org/ejcl/75/art75-8.html>

http://www.imprimatur.net/IMP_FTP/except.

<https://www.piac.ca/wp-content/uploads/2014/11/piaccopyrightreport.pdf>

<http://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf>

https://www.ivir.nl/publicaties/download/limitations_exceptions_copyright.pdf

<http://unesdoc.unesco.org/images/0013/001396/139696E.pdf>

<https://open.uct.ac.za/bitstream/item/21460/New%20Hope%20for%20Africa.pdf?sequence=1>

<https://www.ag.gov.au/RightsAndProtections/Documents/ShortGuidetoCopyright-October2012.pdf>

https://www.eff.org/files/filenode/limitationsandexceptionsintpp-fnl_0.pdf

<http://www.indialaw.in/blog/law/analysis-of-doctrines-sweat-of-brow-modicum-of-creativity-originality-in-copyright/>

<http://tigerprints.clemson.edu/cgi/viewcontent.cgi?article=1177&context=chee>

<http://www.law.washington.edu/Casrip/WWIP/Papers/2009/>

E) Lectures

Biruk Haile.(PHD) Lecture on Advanced Intellectual Property law to postgraduate student of Commercial and investment law, Jimma University, January ,2016

F) Speech

Numa Droz, .Closing Speech Addressed to the participants of the Berne Conference on the Significance of Limitation to the Public interest (1884)

Declaration

I, the undersigned, declare that this thesis entitled, *A critical Analysis of Ethiopian's Copyright Law Exceptions and limitations: with Special emphasis to Education* is my original work and has not been presented for degree in any other university and that all sources of material used to conduct the thesis is properly acknowledged.

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