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

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1. Introduction

There are least developed countries (LDCs) including Ethiopia on WTO accession negotiation. This requires them, among others, to bring their copyright rules compatible to the norms of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) that prescribes minimum standards national legislations should meet. On the other hand, there is strong desire in these countries to promote education and knowledge through dissemination of copyright materials by crafting copyright limitations in a manner that reflects their domestic socio-cultural and economic realities. Especially the need for bulk access to copyright works in their languages is tremendous. This requires a harmonious understanding and application of standards of copyright limitations incorporated in the TRIPS Agreement which has incorporated the Berne Convention for Protection of Literary and Artistic Works (1971) (Berne Convention). Such undertaking also requires utilization of the TRIPS flexibilities in proper manner.

This article seeks to evaluate the system of copyright limitation in Ethiopia which is currently tabled for WTO accession negotiation in the light of the TRIPS Agreement. In doing so, the article argues the Ethiopian copyright law in many instances failed to craft appropriate system of copyright limitation in tune with its domestic realities within the framework of TRIPS flexibilities. It also argues the system of limitation in the TRIPS system fails to adequately systematize copyright limitations and guarantee availability of copyright works at affordable prices in local languages.

Copyright limitation may be seen from various perspectives including the subject matter covered, requirements for protection, duration of protection, etc. But this article examines only limitations to the exclusive rights. Similarly, this article will not deal with other international instruments like WIPO Copyright Treaty 1996 (WCT) and bilateral treaties that provide standards on copyright (limitations) which are not directly intertwined with the TRIPS system.

Section II examines the place of copyright limitations in the copyright system. Section III explores issues relating to incorporation of the Berne Convention in

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to TRIPS Agreement. Section IV examines the triple test and, finally, section V examines limitations under the Ethiopian law in the light of TRIPS standards.

2. Limitations as Integral Part of Copyright System

Various terminologies are used in different jurisdictions and international instruments to refer to dealings permitted with respect to copyrighted works. These include limitations, exceptions, exemptions, users' rights, rights of the public, permitted acts, defenses etc.[1] Setting aside doctrinal differences, all of these refer to acts the law allows users of copyrighted works to undertake which otherwise would amount to copyright infringement. In the context of the North-South dialogue there is a growing enthusiasm especially on the part of developing countries to use copyright limitations as balancing instruments to the ever strengthening system of copyright protection. We should note at this stage that currently the main argument surrounding copyright limitations is not whether or not to have them as part of copyright system, but the debate is on the nature and scope of limitations.

Writers like Hugenholts identify three justifications that explain copyright limitations.[2] First, there are limitations intended to mitigate the adverse effect of copyright protection on such fundamental rights and freedoms as freedom of expression, freedom of press, right to information, and right to privacy. Secondly, there are limitations explained on account of protection of public interests which can be met by use of copyright works by institutions engaged in dissemination of knowledge such as libraries, archives, museums, and educational establishments. Thirdly, there are limitations motivated by market dysfunction in those areas where the copyright owners cannot effectively exercise their rights and levy price. We can also include limitations meant to foster dissemination of knowledge and expansion of education like limitations for research and education and compulsory license embraced with enthusiasm in developing countries.

On the part especially of copyright systems founded on 'author's right' doctrine there is inbuilt assumption that copyright limitations are in principle

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[1] Legal literature also distinguishes between exceptions and limitations based on whether the permitted dealing eliminates or limits a given exclusive right. However, such distinction is said to be immaterial for TRIPS purposes because as will be seen later, the same requirement is applicable whether the dealing comes in the form of exception or limitation. Articles 9-19 of the Ethiopian Copyright Proclamation No. 410/2004 do not engage in to choice of any of such terminologies.

[2] B. Hugenholtz, The Future of Copyright in a digital Environment, (1996), pp. 94 et seq., in Anne Lopage, "Overview of Exceptions and Limitations to Copyright in the Digital environment," UNESCO e-Copyright Bulletin, 2003, p.4.

opposed to ideals of copyright protection and weaken copyright system.[3] This bias can also be discerned from the various revisions of the Berne Convention that emboldened the rights accorded and broadened the subject matters protected and enhanced author's grasp on new media of expression and dissemination.[4] Moreover, limitations are not firmly established in the preamble of the Convention though they appear in substantive provisions of the Convention.

Similarly, in the TRIPS Agreement while the rights are specifically provided and mandatory,[5] limitations are not systematized and are optional.[6] This means the TRIPS system does not guarantee minimum limitations and members are allowed to craft their copyright systems without limitations. Furthermore, there is no clear regulation of contractual arrangements (supported by technological methods of restricting access (digital lock-ups)) that may outlaw the exceptions as between the parties. The fact that national systems are left with 'free hand' with regard to copyright limitations under major international instruments including the TRIPS Agreement has raised two major concerns from the point of view of especially LDCs.[7] Firstly, generally these countries lack the technical human resource and institutional competence to systematically provide coherent and acceptable system of limitations in their domestic laws and whatever room for flexibility is left for domestic legislation usually remains highly unexploited.[8] Even the specific limitations provided in the Berne Convention are flexibly worded and need national adaptation in line with local realities. That is, developing countries lack capacity to implement the full range of limitations available to them under international law; ten of eleven countries in Asia Pacific had not

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[3] Lucie M.C.R. Guibault, Copyright Limitations and Contracts: An Analysis of Contractual Overridability of Limitations on Copyright, (2002).

[4] It is important to stress that the 1908 Berlin Act prohibits formalities as a condition of enjoyment and enforcement of rights. It broadened subject matters to include photographic works; recognized the exclusive right of adaptation in relation to musical works, and guaranteed minimum duration of protection. The 1928 Rome Act also recognized exclusive right of broadcasting and moral rights. Similarly, the 1967 Stockholm Act expressly recognized the exclusive right of reproduction.

[5] See Articles 9-11, TRIPS Agreement

[6] See Article 13, TRIPS Agreement

[7] This is said to have resulted in bewildering differences even in European national copyright Acts in areas of limitations. See Robert Burrel and Allison Coleman, Copyright Exceptions; the Digital impact (Cambridge Studies in Intellectual Property Rights), (2005), p.2.

[8] Ruth L. Okediji, International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries, (UNCTAD-International Center for Trade and Development, Issue Paper No. 15), (2006), p. 6.

incorporated teaching exceptions to extent allowed and none of the eleven countries had taken advantage of all the limitations available to them under international copyright instruments.[9] Secondly, bilateral agreements being concluded with developed countries tend to emphasize on enhancing rights and enforcement than systematizing limitations.[10] We should also note the current wave of influence from copyright industry and some national copyright systems for protection of technological measures of protection used by right holders that will have the obvious effect of undermining permitted uses.[11]

National copyright systems, too, do not embrace limitations in the same footing as the rights. In the Ethiopian context, like in the case of other countries, the Constitution protects proprietary rights both for tangible and intangible property in depth but copyright limitations (or limitations to intellectual property in general for that matter) are not well grounded except that reference is made to 'public interest'.[12] Similarly, 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.[13]

Such limited space accorded to copyright limitations in international instruments and national legislations raises the question whether the prevailing copyright systems reflect a proper balance between the need to protect authors and the need to ensure access or exploitation of the works. It is advocated that there is a dire need on the part of developing countries to correct such imbalance.[14]

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[9]Consumer International, Copyright and Access to Knowledge; Policy Recommendations on Flexibilities in Copyright Law, (Kuala Lampur, 2006) in Gaele Krikorian and Amy Kapczynski (eds.,), Access to Knowledge in the Age of Intellectual Property, (Zone Books, New York), (2010), p. 518

[10] Okediji, supra note 8, p. 4.

[11] For example see the US Digital Millennium Copyright Act 1998, sec. 1201, Article 18 of WPPT, and Article 11 of WCT.

[12] Federal Democratic Republic of Ethiopia (FDRE) Constitution (1995), Article 40 (1)

[13] Copyright and Neighboring Rights Protection Proclamation, 2004, preamble para. 1 & para. 2, Proc. No. 410/2004, Federal Negarit Gazetta, 10th year, No. 55.

[14] 'Balance' is susceptible to different meanings in different jurisdictions as a reflection of the state of economy, culture and technology. We are simply referring to the appropriate scale of weight each legal system has to attribute to both interests.

Some times it is viewed that the two policies, i.e., the policy of protecting individual authors and public access to such creative works are distinctly antagonistic. However, this is not shared by the author because protection accorded to authors is in the interest of public to the extent it can be explained as providing incentive for creation of works which are ultimately consumed by the public. Similarly guaranteeing access to protected works is in the interest of authors to the extent that creation is an incremental process where any new creation is derived in one way or the other from existing creations, i.e., creation is partly derivative process.[15] Thus, it seems plausible to conceive that both copyright protection and limitations do serve to promote and protect both interests.

The notion of copyright limitation is known to both the civil law and common law countries. However, the conception and approach varies in the two systems. While the common law system maintains a closed system of rights and open system of limitations, the civil law tradition maintains a reverse system where rights are defined broadly and limitations are strictly defined and closed.[16] The former approach provides broadly worded limitation that leaves courts the space and task of establishing whether a specific circumstance falls within the wording, but the latter provides specific and carefully defined exceptions. This is mainly because the European continental system (especially that of France) is founded on natural right theory where right of the author is understood as absolute and unrestricted individual right whereas the American system is crafted on utilitarian considerations mainly to promote social good.[17]

It should also be stressed that there is diversity within each system including the 'fair use' doctrine in the U.S and semi-closed 'fair dealing' system in UK. Within the continental European legal tradition some countries like Germany and Holland, although they primarily subscribe to ideals of natural right theory, concede wider latitude for public interest motivated limitations. There is also diverging attitude towards copyright limitations between the

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[15] Judith Sullivan, Study on Copyright Limitations and Exceptions for the Visually Impaired, Standing committee On Copyright and Related rights, (WIPO, SCCR/15/7, 2007) p. 12.

[16] Guibault,cited above at note 3, p. 17.

[17] This means in systems predicated on utilitarian considerations rights will be restricted in any case where it does not help attain a given social goal or negatively affects it; but in system of 'author's right' exceptions will highly be restricted. On the other hand, there is recently a growing question as to whether the two systems today markedly vary in substance or methodology towards exceptions.

developed and developing countries in the history of international copyright instruments including the TRIPS Agreement.

3. The Incorporation of the Berne System of Limitations in to the TRIPS

One of the most challenging tasks for domestic lawmakers and courts is to craft and apply domestic copyright limitations compatible with the intricate system of limitations within the TRIPS system. The difficulty mainly stems from the fact that the TRIPS Agreement does not have a self-contained system of copyright limitation. It rather develops on the system of limitation already existing under the Berne convention. Therefore, it is imperative to explore the relevance of the Berne system of limitations in the TRIPS context.

Article 13 of the TRIPS Agreement provides that members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. Thus, limitations to the exclusive rights should pass the so called three-step test. Firstly, limitations should be confined to certain special cases; secondly, they should not conflict with the normal exploitation of the work, and thirdly, they should not unreasonably prejudice the legitimate interests of the right holder. The wording of Article 13 of the TRIPS Agreement takes inspiration from and resembles Article 9 (2) of the Berne Convention.[18] The three-step test standard expanded, though with some variations, to other areas of intellectual property and international instruments as a model.[19]

Article 9.1 (first sentence) of the TRIPS Agreement requires members to comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.[20] The Berne Convention, in those substantive provisions

[18] However, the two provisions are different because while Article 9 (2) of Berne Convention provides yardsticks for limitations to the exclusive right of reproduction, Article 13 Article 13 of TRIPS Agreement seems meant to affect limitations to all exclusive rights. Moreover, while the former provision does not exclude other limitations, the latter is restrictive in its formulation and does not leave any space for other specific limitations that may not pass the three-step test. Furthermore, while Article 9 (2) makes reference to 'legitimate interest of the author', under Article 13 TRIPS Agreement reference is made to 'legitimate interests of right holders'.

[19] We can see Article 30 of TRIPS (patents), Article 26 (2) TRIPS (industrial designs), Article 10 (WIPO Copyright Treaty (WCT)),and Article 16 (WIPO Performances and Phonograms Treaty (WPPT)

[20] Incidentally, it should be reckoned that for countries like Ethiopia on WTO accession process accession to the Berne Convention is not required for TRIPS compliance.

incorporated in the TRIPS Agreement, provides, apart from the three-step test limitation to the reproduction right under Article 9 (2), specific limitations to exclusive rights.[21]

When we see article 2 (2) of the TRIPS Agreement, it provides that nothing in Parts I to IV of this Agreement shall derogate from existing obligations that members may have to each other under the Berne Convention. This seems to suggest that members of the TRIPS Agreement did not intend to undermine the protection in the Berne Convention by providing diminished protection. This is compatible with Article 20 of the Berne Convention (that is already incorporated in the TRIPS agreement) which provides the Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. It can be argued that the TRIPS Agreement, by incorporating Article 20 of the Berne Convention, does not allow its members to provide exceptions in excess of those provided in the Berne convention. Thus in principle the application of the three-step test in the TRIPS Agreement can be understood as not entailing broader exceptions. This particularly is the case if we subscribe to the argument that the role of the TRIPS triple test with respect to rights recognized in the Berne Convention is to discipline the so called *minor exceptions*.

There was argument that the TRIPS three-step test applies only with respect to new rights recognized in the TRIPS Agreement, i.e., the exclusive right of commercial lending under Article 11 and not with respect to rights that existed under the Berne convention. However, the WTO Panel in the United States-Section 110 (5) case has clarified that TRIPS three-step test is applicable also with respect to rights that existed even in the Berne convention. It provides:

> *In our view, neither the express wording nor the context of Article 13 or any other provision of the TRIPS Agreement supports the interpretation that the scope of*

[21] These are 1) reproduction by the press or broadcasters of lectures, addresses and other works, of same nature (2bis (2)), 2) quotation from work that has already been made available to the public as long as it is compatible to fair practice and its extent justified by purpose (Art. 10 (1)), 3) use of literary or artistic works for teaching provided that the use is compatible with fair practice (art. 10 (2)), 4) reproduction by the press , the broadcasting or communication to the public of articles published in newspapers or periodicals on current economic, political, or religious topic (art. 10bis (1)), and 5) reproduction of works for purpose of reporting current events to extent justified by informatory purpose (art. 10bis (2)).

application of Article 13 is limited to the exclusive rights newly introduced under the TRIPS agreement.[22]

In fact, as noted by many commentators, Article 13 of TRIPS refers to limitations or exceptions to 'exclusive rights', not just only to the new rights brought about by the TRIPS Agreement.

Another issue relates to whether the TRIPS three-step test further applies in relation to the specific limitations provided in the Berne Convention. One may argue that the Berne specific limitations cannot prevail in the TRIPS context unless they further pass the TRIPS three step test. However, several authors including Professor Carlos Correa have argued that Article 9 (1) of the TRIPS Agreement incorporates into the TRIPS system not only rights but also limitations in the Berne Convention, i.e., Articles 1 through 21.[23] This means there is no need to test those specific Berne limitations against the TRIPS three step test. This also means that with respect to the exclusive right of reproduction it is the three-step test in Article 9 (2) of the Berne Convention than article 13 of the TRIPS that applies.

The next logical question will be whether the creation of further TRIPS three-step-test- compliant limitation in relation to the rights provided in the Berne Convention will be justified under the latter instrument. In this connection most writers observe that the system of limitation in the Berne Convention is not limited to those specifically provided exceptions but also the instrument tolerates the so called minor exceptions (*de minimis* doctrine).[24] In the US-Section 110 (5) case the Panel observed the following:

We note that, in addition to the explicit provisions on permissible limitations and exceptions to the exclusive rights embodied in the text of the Berne convention (1971), the reports of successive revision conferences of that convention refer to "implied exceptions" allowing member countries to provide limitations and exceptions to certain rights. (i.e., the so called "minor reservations" or "minor exceptions" doctrine).[25]

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[22] United States-Section 110 (5) of the US copyright Act, Report of the Panel, (World Trade Organization, 2000, WT/DS160/R, Para 6.80).

[23] Carlos M. Correa, Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement, (2007).

[24] Peter Tobias Stoll, Max Plank Commentaries on World Trade Law (WTO): Trade Related Aspects of intellectual Property Rights, (2008), P. 279.

[25] United States-Section 110 (5) of the US copyright Act, cited above at note 22, Paras. 6.48-6.49. And Article 9 (1) of TRIPS Agreement incorporates the Berne exclusive rights together with the possibility of drawing minor exceptions on them (i.e., Berne *aqcuis-Berne interpretation and doctrine)*) (as no reference is made otherwise).

This means it is allowed for members of the TRIPS Agreement to provide any limitation to the rights provided in the Berne Convention (in addition to those limitations specifically provided) as long as such limitations are compatible with the requirements of the three-step test. This may evoke an argument that such approach opens up the door for WTO members to expand the scope of limitations beyond what Berne Convention provides. However, in the above WTO case the argument of the US against the European Union is that the three-step test will not yield limitations in excess of the Berne compliant regime of minor exceptions.[26]

4. Analysis of the three-step test under the TRIPS Agreement

The three-step test is extensively analyzed by WTO Panel in relation to the Section 110 (5) of the US Copyright Act 1976 (as amended by the Fairness in Music Licensing Act of 1998, which entered into force in 1996) challenged by European Union as not complying with the test. Section 110 (5) puts certain limitations on the exclusive rights provided in Section 106 of the Act in respect of certain performances and displays. The "home-style exemption" under sub paragraph (A) of Section 110 (5) relates to the communication of transmission embodying performance or display of a dramatic musical work by public reception on a single receiving apparatus of the kind commonly used in private homes. The "business exemption" in Section 110 (5) (B) relates to communication by an establishment of a transmission or retransmission embodying a performance or display of non-dramatic musical work intended to be received by the general public, originated by a radio or television broadcast station or by a cable system or satellite carrier. The Panel, after making factual analysis, found out the former to be in compliance with Article 13 of TRIPS and the later to be in violation of the triple test.

The Panel provides that the three requirements under Article 13 of the TRIPS Agreement are independent and cumulative requirements that member countries have to satisfy.[27] This means even though a limitation/exception/ is confined to certain special case, it may conflict with normal exploitation of works or unreasonably prejudice the legitimate interests of the right holder. Conversely, an exception /limitation/ that does not conflict with normal exploitation of the work and that does not prejudice the legitimate interest of the right owner may not be limited to certain special cases. This approach

[26] We can even otherwise argue that such conclusion results from the clear language of the TRIPS Agreement and that the freedom of members should not be curtailed simply on account of implied argument.

[27] United States-Section 110 (5) of the US copyright Act , cited above at note 21, Para. 6.79.

seems to be in tune with the wording of Article 13 even though some writers would like to argue otherwise as will be seen hereunder. As long as it meets these requirements, the TRIPS Agreement leaves national legislators (judiciary) to set limitation to any exclusive right as reflection of their peculiar social, economic and cultural realities. One may be tempted to argue that TRIPS Agreement leaves members free to define these requirements as they like. However, the very requirement set out in the agreement means that members cannot design a limitation that does not pass these criteria assessed objectively (taking into account national realities).

The first task in this analysis is to establish what is meant by 'certain special cases'. In this regard it is important to examine the interpretation provided by the WTO Panel in *United States- Section 110 (5) of the US Copyright Act* that embarked on establishing the ordinary meanings of individual words 'certain', 'special', and 'cases'.[28] In this regard it seems to be agreed between both the US and EU (and affirmed by the Panel) that the fact that the word 'special' is not defined in the agreement means that it is up to national legislature/judiciary to determine whether particular case represents an appropriate base for the exception as long as it falls within the definition of the first test. Accordingly, the Panel provided that the ordinary meaning of the word 'certain' is "known and particularized, but not explicitly identified", "determined, fixed, not variable; definitive, precise, exact".[29] The Panel (in the same paragraph) further explained that this element of the first requirement means that as long as the limitation is clearly defined and the scope of the exception is known and particularized there is no need to identify explicitly each and every possible situation the exception could apply.

It can be noted that the system of copyright limitation in countries following the continental European tradition where the legislature provides limited list of exceptions this first requirement in the first condition of the three-step test will easily be met. However, in the common law tradition with an open ended 'fair use' or 'fair dealing' doctrine serious questions can be raised as to their compatibility with the TRIPS-three- step test even though, so far, no such a

[28] Even though the Panel's decisions do not have the effect of precedent (as it can be reversed by AB under article 17 of DSU), its analysis has significant persuasive value. In its attempt to find out the ordinary meanings of these words as per Article 31 of the Vienna Convention on Law of Treaties (VCLT), the Panel relied on dictionary meaning (Oxford English Dictionary)

[29] United States-Section 110 (5) of the US copyright Act, cited above at note 22, Para. 6.108.

challenge has been launched before the WTO Dispute Settlement Body (DSB).[30]

The Panel also tried to define the ordinary meaning of the second word in the first test. It stated:

> *the term 'special' connotes "having an individual or limited application or purpose", "containing details; precise, specific', "exceptional in quality or degree; unusual; out of the ordinary", or "distinctive in some way". This term means that more is needed than a clear definition in order to meet the standard of the first condition. In addition, an exception or limitation must be limited in its field of application or exceptional in its scope. In other words an exception or limitation should be narrow in quantitative as well as qualitative sense.*[31]

This part of the Panel's reasoning is obliterated by some commentators as the most incoherent. Professor Daniel Gervais, for example, argues the phrases 'limited in its field of application' and 'exceptional in its scope' are not equivalent (as connected by disjunction 'or') for the reason that while the former is not very restrictive, the latter is.[32] He further argues that the fact that a limitation is 'limited in its field of application' does not necessarily lead us to a conclusion that it must therefore be 'narrow in quantitative as well as qualitative sense'. This concern will be much reinvigorated when we consider the Panel's final remark that this requirement of the first condition, in the context of the second condition, means the limitation should be the opposite of non-special, i.e., normal.[33] This is unhelpful approach in that it accommodates a very wide range of limitations and refutes earlier suggestion that the limitation should be limited in its field of application or exceptional in its scope. The opposite of non-special (normal) may not necessarily be exceptional in its scope. That is why Professor Gervais argued that the definition of the word 'special' given by the Panel will ultimately render the requirement useless because any exception short of complete repeal of Copyright Act would arguably be 'limited in its field of application.'[34] He

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[30] Christophe Geiger, "The Role of Three Step test in the Adaptation of Copyright law to the Information Society," UNESCO, e-Copyright Bulletin, (2007), p. 5

[31] United States-Section 110 (5) of the US copyright Act, cited above at note 22, Para. 6.109.

[32] Daniel J. Gervais, Toward and new Core International copyright Norm: The Reverse Three-Step Test, (2004), p.17

[33] United States-Section 110 (5) of the US copyright Act, cited above at note 22, Para. 6.109.

[34] Gervais, cited above at note 32, p.17.

further argued that because of the above deficiency in definition the three-step test is in reality a two-step test (and the requirement that limitation should be confined to certain 'special' case shall be ignored). For him the two tests that can be operationalized are interference with commercial exploitation and unreasonable prejudice to the legitimate interests of the author. However, this approach raises serious questions regarding the long embraced tradition of construction of the Panel not to resort to technique of interpretation that yields redundancy or inutility.[35]

One important inference that can be drawn at this stage is that the absence of binding or acceptable definition of the requirement that limitations shall be limited to certain 'special' cases creates room for uncertainty and compounds the difficulty of countries like Ethiopia with limited expertise. The problem partly emanates from different formulation of Article 13 compared to Article 30 which refers to 'limited exceptions'. However, it is still possible to understand the first requirement as referring to diminution of the right itself than the economic effect of exception (i.e., non-economic test), which has to be weighed against the second and third tests.

Some commentators argued that national public policy (special purpose) justification behind copyright limitations will be relevant in determining whether limitations meet the first requirement of the three-step test.[36] However, the WTO Panel in the *United States-Section 110 (5) of the US Copyright Act* has justifiably distanced itself from such approach relying on the wording of Article 13 of TRIPS which refers to 'certain special case' not 'special purpose'.[37]

The Panel, in the same paragraph, very well affirmed its position based on earlier Appellate Body (AB) decisions that prohibit interpretative tests which were based on the subjective aims or objectives pursued by national legislation; otherwise the Panel or AB would have been given unacceptable role of overseeing national policies. However, the Panel noted public policy purposes stated by law makers when enacting a limitation or exception may be useful from factual perspective for making inferences about the scope of a limitation or exception or the clarity of its definition.[38]

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[35] United States-Standards for Reformulated and Conventional Gasoline, (Appellate Body Report, 1996, WT/DS2/AB/R), p. 23.

[36] See S. Ricketson, The Berne Convention for the Protection of Literary and Artistic Work: 1886-1986, (1987), p.482.

[37] United States-Section 110 (5) of the US copyright Act, cited above at note 22, Para. 6.111

[38] Id., Para. 6.112

When we see the second requirement of the three-step test, limitations should not conflict with the normal exploitation of the work. The Panel in the United States-*Section 110 (5) of the US Copyright Act* went on expounding the ordinary meanings of the words 'exploitation (exploit)', 'normal', 'work', and 'conflict'. Accordingly, the Panel enunciated the dictionary meaning of the term 'exploit' to connote'making use of' or 'utilizing for one's own ends.'[39] In the context of the case at its disposal the Panel further explained that 'exploitation of musical works refers to the activity by which copyright owners employ the exclusive rights conferred on them to extract economic values from their rights to those works.'

The Panel also pronounced the ordinary (dictionary) meaning of the word 'normal' as 'constituting or conforming to a type or standard; regular, usual, typical, ordinary, conventional---.'[40] The Panel, in the same paragraph, elaborated the definitions reflect both empirical (i.e., what is regular, usual, typical, ordinary, conventional---) in the factual sense and normative (dynamic) (i.e., conforming to a type or standard) connotations. The question to ask under the empirical approach is said to be whether the exempted use would otherwise fall within the range of activities from which the copyright owner would usually expect to receive compensation.[41] However, such approach is not much helpful in that right owners normally exploit their works only in those areas the law guarantees them legal rights and this automatically excludes market for exempted uses. Therefore, this approach will not help us identify those uses the right holder will not normally expect to exploit. Accordingly, it is suggested that a better way of understanding the empirical approach is to postulate that the owner has the capacity to exercise his right in full, without being inhibited by the presence of an exemption, and to ask simply whether a particular usage is something that the copyright owner would ordinarily (reasonably) seek to exploit.[42] This goes in line with the Panel's finding that 'normal' exploitation means something less than full use of an exclusive right.[43] This is said to be an approach that takes into account only present modes of exploitation and excludes potential modes of exploitation.

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[39] Id., Para. 6.165.

[40] Id., Para. 6.166.

[41] Sam Ricketson, The Three-Step test, Deemed Quantities, Libraries and Closed Exceptions, (Center for Copyright Studies ltd., 2002), p.32.

[42] Ibid

[43] United States-Section 110 (5) of the US copyright Act, cited above at note 22 Para. 6.167.

On the other hand, the normative approach is understood to embrace potential modes of utilization (that might be brought about by business models and technological developments) but which so far have not been common or normal in empirical sense. For instance, as per the prevailing technological and economic reality in a particular jurisdiction right holders may not reasonably expect to assert their rights against private copiers (due to the cost of monitoring such uses) but such potential use may be conceivable standing on today's economic, cultural, and technological realities. In the language of the Panel 'one way of measuring the normative connotation of the normal exploitation is to consider, in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance'.[44]

One may seriously question the wisdom behind extending the reach of the second requirement of the three-step test to (qualitative) normative approach. It seems to be needless rush to prohibit a given limitation that currently does not conflict with normal exploitation of the work, simply because there is a 'plausible' possibility of conflict in the future. Such an approach may render the exception meaningless as the condition will cover each and every possibility of deriving profit from protected subject matter.[45] Rather it would have been better to amend the laws when such conflict actually arises.

The fact that the Panel emphasized on the economic effect on the right holder of limitations in defining the second requirement of the three-step test[46] has provoked concern as to whether the TRIPS system of copyright limitation leaves any latitude to members to design limitations to accommodate their peculiar policy priorities and balance protection and access.[47] It should be stressed that this approach undermines our earlier assertion that copyright

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[44] Id.,para. 6.180. The Berne Convention revision in Stockholm in 1968 also makes reference to normative connotation.

[45] Correa, cited above at note 23, p.307 (in relation to Patent provision Article 30 of TRIPS).

[46] See United States-Section 110 (5) of the US copyright Act, cited above at note 22, Para. 6.183. It provides that limitation in domestic legislation rises to extent of conflict with normal exploitation of the work if uses, that in principle are covered by the right but exempted under the limitation or exception, enter in to economic competition with the ways that the right holders normally extract economic value from the right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains.

[47] This becomes much more catastrophic in the current technological world that promises to enable the right holder to control any form of exploitation.

limitations form part and parcel of copyright system on account of various (superior) reasons like protection of freedom of expression. In the Panel's approach whatever superior (non-economic) explanations a country may invoke (for example promotion of education, research, freedom of expression etc) any limitation that enters into economic competition with the right holder will not be tolerated. If we stick to the Panel's economic definition of the test simply because TRIPS is a trade agreement and if the technology enables the right holder to control any kind of exploitation, there will not be any room for exceptions. However, it would be unwarranted interpretation of TRIPS to disregard public policy considerations under Articles 7 and 8. In this regard the Berne Convention that allows specific exemptions to exclusive rights irrespective of their economic impact on the author can be seen as adopting clearer approach and conceding greater flexibility.[48] It sounds hypocritical that freedom for national policy choice appeared to have been endorsed by the Panel in relation to the first requirement as seen above.

Finally, it should be mentioned that whether a limitation conflicts with normal exploitation of the work has to be assessed against each exclusive right and not against the aggregate of all exclusive rights. Conflict with normal exploitation of a particular exclusive right cannot be counterbalanced or justified by the mere fact of the absence of conflict with normal exploitation of another exclusive right. Similarly, the absence of any exception with respect to one right cannot be invoked to justify exceptions on other rights even if its exploitation would generate more income.[49] This is justifiable in that each right is granted separately by the law and any impairment should be assessed separately; otherwise huge suppression of economically less important rights may be covered by light restraint on the economically important ones.

When we come to the third element of the three step test, it requires limitation not to 'unreasonably prejudice the legitimate interest of the right holder.' The formulation of the third condition of the three-step test slightly varies across various international instruments. While both Articles 13 and 30 of the TRIPS Agreement and Article 5 (5) of the European Union Information Society

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[48] See Articles 2(4), 2bis (1), 10(1) & (2), 10bis (2) etc of Berne Convention. Moreover, unlike the Panel's approach to the second requirement under article 13, preparatory works to Berne Convention (article 9 (2)) are said to accommodate non-economic considerations especially in view of the then national laws that provide exceptions to reproduction right on account of non-economic reasons (to be determined by national legislation). See Ricketson, cited above at note 41, pp. 34-36.

[49] United States-Section 110 (5) of the US copyright Act, cited above at note 22,Para. 6.172-73.

(InfoSoc) Directive[50] refer to unreasonable conflict with the legitimate interests of the 'right holder', Article 9 (2) of the Berne Convention and Article 10 of the 1996 WIPO Copyright Treaty (WCT) refer to the legitimate interests of 'the author.' Thus for the purpose of the latter two instruments both economic and moral interests will be considered.

The WTO Panel in the *United States-Section 110 (5) of the US copyright Act* also went on ascertaining the ordinary meanings of the words 'interest', 'legitimate', 'prejudice' and 'unreasonable'. The word 'interest' is understood to encompass 'a legal right or title to a property or to use or benefit of property (including intellectual property).'[51] The Panel added it may also refer to 'a concern about a potential detriment or advantage, and more generally to something that is of some importance to a natural or legal person.' The Panel added in same paragraph that the notion of 'interest' 'is not necessarily limited to actual or potential economic advantage or detriment.'

The Panel went on to state the meanings of the word 'legitimate' as: a) 'conformable to, sanctioned or authorized by, law or principle; lawful; justifiable; proper; b) normal, regular, comfortable to recognized standard type.'[52] In the same paragraph it further elaborated that 'the term relates to lawfulness from a legal positivist perspective, but it has also the connotation of legitimacy from more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of objectives that underlie the protection of exclusive rights'. This goes in line with another Panel's finding in relation to Article 30 of TRIPS that defined the term legitimate 'as a normative claim calling for protection of interests that are 'justifiable' in the sense that they are supported by relevant public policies or other social norms.'[53]

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[50] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the
Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society

[51] United States-Section 110 (5) of the US copyright Act, cited above at note 22, Para. 6.223.
[52] Id., Para. 6.224.

[53] Canada-Patent Protection of Pharmaceutical products, (World Trade Organization, Panel Report, 2000, WT/DS114/R,) para.7.69. The fact that this Panel was partly influenced by reference to legitimate interests of 'third parties' cannot be invoked against this finding because Articles 13 of TRIPS and 9 (2) of the Berne Convention also take in to account the 'legitimate' interests of users of protected works.

'Prejudice' is defined by the Panel as connoting damage, harm, or injury.[54] The Panel also defined 'not unreasonable' to connote 'slightly stricter threshold than reasonable.'[55] In the same paragraph the word 'reasonable' is defined by the panel as "proportionate", "within the limits of reason, not greatly less or more than might be thought likely or appropriate", or "of a fair, average, or considerable amount or size."

Hence, the TRIPS allows exceptions to exclusive rights that prejudice the legitimate interest of the right holder as long as such prejudice is reasonable. The Panel clarified that 'prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner.'[56] This approach is condemned by commentators like Professor Gervais as conflating the third step requirement in the three-step test with the second step.[57] Their contention is that a limitation will be acceptable under the third condition as long as it is 'reasonable' or 'justified' by public policy considerations even though it may entail economic loss or loss of revenue.[58] However, in any case the choice of public policy considerations should be left to national government.

5. Copyright Limitations under Current Ethiopian Law

Domestic laws of member countries of international instruments like the Berne Convention and the TRIPS Agreement do not explicitly adopt the three-step test rather provide limitations (in specific terms and/or general manner) that they deem to be compatible with the triple test. Under the current Ethiopian Copyright Proclamation No 410/2004 (the 'Proclamation' hereunder)[59] limitations to copyright are provided under Articles 9 through 19. Except for compulsory license under Article 17, all of the limitations are not compensated limitations. In addition, except in relation to limitations to the exclusive right of reproduction under Article 9 (2) (e) the Proclamation does not provide for the three-step test. This may be due to the fact that the legislature foresaw the need to conform to the standards of Article 9 (2) of Berne Convention up on WTO membership. We will see that the other

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[54] United States-Section 110 (5) of the US copyright Act, cited above at note 22, para. 6.225.

[55] Ibid

[56] Id., Para. 6.229.

[57] Gervais, cited above at note 32, p.20.

[58] They reiterate that what is meant by 'not unreasonable prejudice', if properly translated from the French text, should mean 'unjustified prejudice.'

[59] Copyright Proclamation, cited above at note 13.

exceptions in the Proclamation can be traced to the specific limitations in the Berne Convention and do not need to be weighed against the triple test.

From the preceding we can also see that in Ethiopia the judiciary is not empowered to go beyond the limitations explicitly stated by the legislature and derive triple-test-compliant limitations that may be necessitated by changes in technological and market landscape.[60] There is no common law-style open system of fair use limitation in the Ethiopian copyright legislation. The following paragraphs briefly analyze some of the main exceptions provided in the Ethiopian Copyright Proclamation.

a) Reproduction for personal purposes

Article 9 (1) of the Proclamation states:

> *Notwithstanding the provisions of Article 7 (1) (a) of this Proclamation, the owner of copyright cannot forbid private reproduction of a published work in a single copy by a physical person exclusively for his won personal purposes.*

This provision allows every user of copyright material to reproduce a copy of the work without being constrained by copyright considerations. It does not require that the copy from which a reproduction is made has to be acquired lawfully.[61] Furthermore, there is no requirement that the copy be made by the consumer himself, i.e., it can be made even by third parties acting for commercial considerations as long as the reproduction is made on individual request and for personal purposes of the consumer.[62] Such approach benefits those who do not have their own means of reproduction.

Three justifications have been invoked in various jurisdictions for retaining exception for private reproduction of copyright works. These are: its insignificant adverse economic effect on copyright owner, market failure

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[60] On the other hand, it is not possible for the legislature to foresee circumstance that may occur in the future thereby upsetting the balance between protection and exploitation.

[61] One of the justifications for allowing copying for private use is that a person who has lawful access to the work has an implied right to enjoy the work in a manner convenient to him does not seem to be strictly adhered to.

[62] This point is more vivid from the Amharic text that does not have any indication as to how the reproduction is made; the phrase 'by a physical person exclusively for his own personal purposes' in the English text itself is simply meant to stress on the purpose/use the copy has to be destined for; however, this does not condone those who, acting on their own, commercially engage in reproduction and distribution of works. The author reckons that the formulation does not say 'by or for' but it will be far away from the legislative intent to argue otherwise.

(enforcement difficulty) and protection of public (users') right to privacy. Before the emergence of new technologies, private reproduction basically refers to hand copying or type writing of a manuscript and this was believed to cause only minimal effect on right holders.[63] However, now technologies related to reprography, home taping and the current digital and network have tremendously made private reproduction easy. This implies that its economic impact on the right holders has become significant and the above justification is waning out of favor.[64] Especially on the Internet private users are directly reached out by right holders without the need for intermediaries (distributors) and private reproduction constitutes the main market for right holders. This also means that in such cases even if the limitation may pass the first test of the TRIPS triple test, there is no way that it will pass the other two (economic) tests.

The idea behind market failure justification is that the costs of exercising rights against private copiers (which includes myriad of measures ranging from negotiation to enforcement) may exceed the benefits so much that it is not efficient to assign proprietary rights (as it cannot be assigned by private bargain).[65] Such is said to have become worse with the emergence of private reproduction technologies that make each house hold license impracticable and the price system unworkable.[66] This led in some jurisdictions to imposition of levies on copying machines and recordable formats to compensate right holders. In other words, private copying was reckoned as a kind of compulsory license. However, with coming into prominence of encryption technology that enabled right holders to monitor exploitation of their works and block unlicensed utilization the market failure justification has become at least partially defunct.

The third justification in favor of private use exception is that right holders would have to physically enter, search and possibly seize material in individuals' homes thereby intruding into people's privacy.[67] In the era of digital and network technology rather than physical privacy it is the 'information privacy' of users that is at stake. That is, the right holders will be

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[63] Guibault, cited above at note 3, p. 52.

[64] Not only that it is possible to reproduce indistinguishable copies for virtually zero expense and with least inconvenience but also copies can be distributed world wide instantly.

[65] There is an assumption that in principle users should pay as long as market allows such transaction (and right owners should be given opportunity to address such failures including through collective societies).

[66] Giuseppe Mazziotti, EU Digital Copyright Law and the End-User, (2008), P. 28.

[67] Guibault, cited above at note 3, p. 51.

able to use monitoring technique and track the use of their work and detect acts of infringement by placing electronic device inside works to record every use by a person, as well as frequency and duration of such use and uncover overall consumption patterns of users.[68] Tracking private use through technologies is also feared to have the effect of discouraging use of works and further affect right to information (and expression).

It is not clear if private copy exception as enshrined in Article 9 would pass the first requirement of the triple test. One may argue it is clearly defined as it applies to 'single copy for one's own use.' But the problem is that such exploitation is rule of exploitation for digital works made available online and generally exclusive right of reproduction is supposed to be effective via private copies ultimately falling in private hands.

Article 9 (2) (e) of the Copyright Proclamation prohibits reproduction for personal purposes that 'would conflict with or unreasonably harm the normal exploitation of the work or the legitimate interest of the author.' This seems a clumsy way of incorporating the Berne second and third steps of the triple test because it will be unwise to treat the words 'conflict' and 'unreasonably harm' used in the Copyright Proclamation as equivalent. Therefore, under the current Ethiopian copyright system because of application of the second and third steps of the triple test in the Berne Convention/TRIPS Agreement, reproduction for personal uses seems to be excluded in relation to digital copies. This is particularly the case in the context of exploitation of creative works on the Internet.[69] Judges should confine the exception to works exploited in physical copies even though serious objections can be anticipated regarding reprography and tape recording.

Therefore, any concern that the private use exception under Article 9 of the Copyright Proclamation may conflict with the Berne/TRIPS triple test[70] is simply unfounded concern because sub-Article (2) (e) of same provision itself requires that such exception should comply with the test.

b) Quotation

Article 10 (1) of the proclamation provides:

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[68] Id., p. 55. However, technologies that merely prohibit copying and blocking access may not have such privacy concerns.

[69] Also this limitation can not be invoked against works made available only online; because while the exception applies only to published works, publication is defined under article 2 (22) of the proclamation only in terms of tangible copies.

[70] Such concern is raised by the members of the Working Party on the Ethiopian accession to the WTO.

Notwithstanding the provisions of Article 7 (1) (a) of this Proclamation, the owner of copyright cannot forbid the reproduction of a quotation of a published work.

Quotation is useful tool to convey a message accurately in various fields like political arena, in media, in research, assemblies, in art and culture etc. For instance, it may be important for news reporter or critique to capture the mood, the tone or nuances of an address which may not be possible without reproducing part of the speaker's expression. Similarly, historians, biographers, and scientists also need to be able to portray reality in truthful manner in their own work by relying on prior writings.[71] It has to be stressed that the purpose of quotation is not specified as long as the limitations in sub-article (2) are satisfied.[72] The purpose can be scientific, educational, critical, informatory, or educational, judicial, political and entertainment purposes. It can also be made in historical or scholarly works by way of illustration or evidence of a particular view, and quotations for artistic effect.

Since this exception is specifically provided under the Article 10 of the Berne Convention there is no need to examine the compatibility of this exception with the TRIPS triple test. However, under the Ethiopian law the limitation seems to be unnecessarily restricted to 'published' works whereas the Berne Convention refers to 'works lawfully made available to the public.'[73] Under the Ethiopian system quotation from useful unpublished sources (including most research works in libraries) is not allowed and this seems to be unwarranted in Berne/TRIPS-plus approach. Similarly, 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.

Sub-article (2) of Article 10 of the Proclamation provides the limit of quotation. That is, it has to be 'compatible with fair practice and does not exceed the extent justified by the purpose.' Moreover, sub-article (3) provides the duty to indicate the source and the name of the author where the quotation is taken from a source which contains the name of the author. These requirements are

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[71] Dr. Lucie Guibault, "The Nature and Scope of Limitations and Exceptions to Copyright and Neighboring rights with regard to General Interest Missions for the Transmission of Knowledge: Prospects for Their Adaptation to the Digital Environment," UNESCO e-Copyright Bulletin, (October-December 2003) p. 6.

[72] This is important in view of the fact that the proclamation does not provide specific limitations for purposes like review and criticism.

[73] We have to recall our earlier discussion that publication is understood under Article 2 (22) of the Proclamation in terms of availability to public of adequate tangible copies of work (by sale, rental or public lending).

also provided under Article 10 (1) & (3) of the Berne Convention. In the absence of specific standards provided by the legislature whether a practice of quotation is 'fair' has to be determined on case by case basis by applying 'fair use' standards used in common law countries.[74]

c) Reproduction for Education

Article 11 (1) of the Proclamation states:

> *Notwithstanding the provisions of Article 7 (1) (a) of this Proclamation the owner of copyright cannot forbid, without exceeding fair practice and the extent justified by purpose, a reproduction of published work or sound recording for the purpose of teaching.*

This exception also does not need to be evaluated against the triple test as it can be specifically traced under Article 10 (2) of the Berne Convention. This exception applies to all works protected by copyright and this seems to be in line with Article 10 (2) of the Berne Convention that refers to literary and artistic works. However, reference to sound recording in the Proclamation may provoke controversy. We understand from Article 32 (d) of the Proclamation that limitations to copyright are also applicable to neighboring rights.[75] We can only speculate that probably the legislature wanted to clarify a situation where reproducing a work also entails reproducing a sound recording.

Educational institutions (particularly higher learning institutions) are main producers of teaching materials. They also intensely use such materials in the course of dissemination and creation of knowledge. They also use contemporary books, newspapers, magazines, photographs, films, slides (and sound recordings), broadcasts and other media products, and make compilations in their effort to create and disseminate knowledge to students. The main outstanding question is whether this exception should apply to materials prepared for teaching and instructional purposes. There is real risk that allowing educators and the educated (i.e., the main market/consumers of such materials) to invoke this limitation to reproduce such materials (without compensation) takes away the very incentive to produce such materials and entail counterproductive effect. In fact, the legislature follows a different approach in case of limitations on neighboring rights under Article 32 (2)

[74] These are nature of the copyrighted work, the purpose and character of the use, the amount and substantiality of portion used, the effect of the use up on potential market.

[75] Sound recordings are protected by neighboring rights under article 27 of the proclamation.

where educational limitations do not apply to performances and sound recordings which have been published as teaching or instructional materials.

The Proclamation does not clearly provide who benefits from the exception, except that reference is made to 'teaching'. It can be understood as referring to teaching in the context of educational establishments[76] and home-teaching/private instruction irrespective of commercial motive and it appears that use by commercial educational establishments does not contravene from the outset the requirements of 'fair practice' as will be seen later. Similarly, this limitation applies irrespective of whether it is face to face or distance teaching. It also seems to benefit both the learner and educator. For example, the educators can copy materials on black board or on slide presentation and preparation of lecture notes (and learners can copy the same), photocopy a book or extract of it and distribute to students, reproduce works for examinations, etc. It should be reckoned that the law does not restrict the means of reproduction whether it is manual, reprographic or otherwise.

Article 10 (2) of the Berne Convention allows members to permit utilization by way of illustration in publications, broadcasts or sound or visual recordings for teaching. This provision does not seem to allow such acts as translation for teaching purpose (except in the context of the Berne Appendix) as reference is made to 'utilization by way of illustration in publications, broadcasts or sound or visual recordings for teaching'. However, members can allow for teaching such acts as broadcasting, performance, communication to public, display etc. Article 11 of the Proclamation is unnecessarily restrictive as it confines the scope of the limitation only to exclusive right of reproduction. This means educators cannot perform, broadcast, lend, display, communicate etc works for purpose of teaching and this will surely curtail the noble objective of promoting education. This will only add pressure on already overstretched libraries acting under severe resource constraints and copyright hurdles as will be seen below.

The Proclamation also failed to clearly provide what is known in other jurisdictions as exceptions for research and private study. It is obvious that such exceptions have firm public interest explanations and are likely to be TRIPS complaint. One may argue that part of such interests can be accommodated under other limitations like reproduction for personal use or for teaching or by libraries and similar institutions as will be seen later. However, such limitations do not fully accommodate the desire for limitations

[76] However, it is submitted that libraries within the educational establishments shall be treated under exceptions dedicated for libraries to be discussed later.

for research and study. Given such problems and in the absence of clear legislative guidelines, it becomes odious task for the judiciary to define the scope of such limitations.[77]

Regarding the limits of the teaching exception, Article 11 requires that reproduction for teaching shall be compatible with fair practice and extent should be justified by purpose. These notions are not defined by the legislature and should be explained by the judiciary in light of the yardsticks for 'fair use' employed in common law countries (as we have seen in relation to quotation above).[78] Close scrutiny of such factors reveals that multiple copies for class room use of entire work may be justified.

d) Reproduction by Libraries, Archives and Similar Institutions

This exception is not specifically provided in the Berne Convention. But it is not difficult to trace it within the ambit of the so called *minor exceptions* as manifested widely by the practice of member sates.

Article 12 (1) of the Proclamation states:

> *Notwithstanding the provisions of Article 7 (1) (a) of this Proclamation, the owner of copyright cannot forbid reproduction of a work by a library, archive, memorial hall, museum, or similar institutions whose activity directly or indirectly is not for gain.*

This exception follows particular users. That is, these institutions are engaged in collecting, preserving, archiving, and dissemination of information.[79] This means the main public interest justification behind this exception is dissemination and preservation of knowledge, culture, and heritage.[80] However, it is not clear why such exceptions do not benefit private individuals and other entities that may be engaged in similar activities. We may ponder the provision is justified in view of the extensive effect such broader approach may have on the copyright owner, especially such is the

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[77] For instance should a court condone reproduction for commercial research? Does research include both preparatory (like material collection) and final stages like (presentation and publication)? Is this purely restricted to the researcher or does it cover also others who may be involved in one way or other? What should be the quantitative restrictions, if any, and the kind of works it applies?

[78] See supra note 74

[79] The traditional role of these institutions as repositories of printed materials has also broadened to embrace audiovisual and digital materials accessible online (i.e., expansion in terms of both holdings and facilities).

[80] Robert Burrell and Alison Coleman, Copyright Exceptions: the Digital Impact, (2005), p. 136.

case in view of the fact that library exception entails reduction in book purchase to some extent.

One may also wonder why the Ethiopian law distinguishes between libraries acting for gain and those that do not have profit motive. This is particularly true in view of small number and budgetary constraints of (public) non-profit oriented libraries. On the other hand we can imagine the adverse effects it may entail to rights of copyright owners when profit motivated institutions are encouraged into such business. There are authors who interpret the above provision to include libraries of private schools and universities.[81] They argue that since such educational establishments to which the libraries belong benefit from teaching exceptions under Article 11 of the Proclamation, their libraries should also benefit from the library exceptions under Article 12. However, this author finds it difficult to see how it leads to a conclusion that libraries of profit motivated establishments benefit from library exceptions simply because the establishments they belong benefit from teaching exception unless we show any law which defines libraries separately from the institutions they belong.

The fact that this exception allows libraries and similar institutions only to reproduce works is simply inadequate. Such institutions cannot properly discharge their activities without exceptions to other exclusive rights like performance, display, communication to public, broadcasting etc. For instance, a public gallery cannot properly discharge its function as center for exhibition unless it benefits from exception to exclusive right to display works.

Furthermore, the role of libraries will seriously be compromised without exception to the excusive right of public lending. One can also make strong case against putting the public lending as part of the exclusive right of the right holder in the first place as this right is not recognized under the Berne/TRIPS system.[82] In fact the approach of the Proclamation towards the exclusive right of public lending is utter anomaly. Article 2 (23) defines 'public lending' as a temporary transfer of possession of an original or copy of a work or sound recording by libraries, archives, or similar institutions whose service is available to the public without making profit. So, does this mean that those

[81] Mandefro Eshete and Molla Mengistu, 'Exceptions and Limitations under the Ethiopian Copyright Regime: An Assessment of Impact on Expansion of Education, Journal of Ethiopian Law, vol. XXV, No 1, (2011), p. 176.

[82] The fact that public lending is part of right holder's exclusive right can easily be deduced from Article 7 (2) of the proclamation.

libraries and similar institutions, working for profit, are not inhibited by this right? Or, do such acts automatically constitute rental?

Sub-article (3) of Article 12 of the Proclamation provides conditions to be satisfied under which the beneficiaries avail themselves of the library exception provided under sub- article (1). Accordingly, a copy can be made: a) to preserve and, if necessary to replace a copy or a copy which has been lost, destroyed, or rendered unusable in the permanent collection of another similar library, b) where it is impossible to obtain a copy under reasonable conditions,[83] and c) the act of reproduction is an isolated one occurring and if repeated on separate and unrelated occasion. Despite the clumsy formulation, this provision allows libraries to reproduce works to enrich (and preserve) their own collection or supply copies to other libraries (interlibrary reproduction for stock). This is an important exception especially in view of the fact that physical copies are susceptible of dilapidation and wear and tear and such is even more important when the work is out of market. This exception also facilitates (cross boarder) digitization projects. One apparent logical jump in this exception is that it does not clearly allow libraries to reproduce and supply copies of works to other libraries to enable them acquire copies they never had while it is possible for a library to reproduce a work to acquire copy itself. If it is allowed for a library to reproduce a work and retain copy it does not have, logically it should be also possible for it to reproduce or authorize reproduction to enable other libraries to acquire a copy. Therefore, there is no copyright infringement if libraries of (older) public universities with richer stocks authorize their counterparts in younger universities to copy books and other materials their collections and acquire copies of such works.

There is no clear requirement that such work be published. One may argue that it will contravene the author's moral right to 'publish' the work if libraries acquire and make available such works to public without the consent of the author.[84] Furthermore, it is not clear if this provision imposes obligation on the supplying library not to refuse request by other libraries. Had that been the case, it would have also provided for terms of reproduction including settlement of expenses it incurs in the course.

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[83] In the Amharic version we cannot easily trace the qualification 'reasonable conditions'.

[84] However, such argument will not be much strong with respect to materials kept in the library with the consent of the right holder who has not placed contrary instructions.

Sub-article (2) of the provision under consideration allows libraries to directly reproduce and supply works or part of works to individuals. It provides conditions for reproduction of a published article, short work or short extract of a work to satisfy the request of a physical person. Such is possible under the following conditions: a) the library or archive is satisfied that the copy will be used solely for the purpose of study, b) the act of reproduction is an isolated case occurring, if repeated, on separate and unrelated occasion, and c) there is no available administrative organization which the educational institution[85] is aware of, which can afford a collective license of reproduction.

The major handicap under this exception is that it allows reproduction of only published articles, short work or short extract of a work.[86] There is no doubt that library users usually require the entirety of (other) works for use. Also the Proclamation does not define what is meant by article nor is the quantitative benchmarks of what constitutes short (extract of) works provided; this not only subjects users to arbitrary restrictions by libraries but also exposes libraries to infringement actions. It is not also known how much time has to elapse for a person to request various parts of a work (or even same copy for that matter) without being blamed for seeking reproduction on related occasions.

The requirement of 'publication' is also difficult to explain; library collections may not necessarily be published materials. For that matter museums and archives are known for their rich collection of unpublished materials. There are also ample instances of copyright owners of such works who deposit them in archives and museums do not place any explicit prohibition of copying. This issue becomes particularly strong if one subscribes to argument that libraries and similar institutions are allowed to acquire and retain unpublished materials under sub Article (1) because in such case there is no much point in preserving materials users cannot take copy when needed for private study.

As to the requirement that copy shall be used solely for the purpose of study, libraries usually satisfy themselves by requiring their clientele to sign declaration forms.[87] There are libraries that (additionally) require prima-facie

[85] Reference to 'educational institution' is a slip of pen; same can be discerned from the Amharic version.

[86] The situation is much worse when we see that this formulation is not clear enough to allow reproduction of non textual works; on the other hand photographs, films, and other artistic works are important for private study and research.

[87] In fact the legal effect of such declarations is not clear except as reminder to the users of possible action for copyright infringement.

evidence to that effect like by producing letter of cooperation from institutions/patrons that support such study. Such may appear unnecessarily cumbersome requirement that deprives those who cannot produce such evidence of their 'entitlement'. On the other hand, if the libraries simply rely on mere declaration of users, it undermines the legislative requirement that they shall be 'satisfied' that the work will be used solely for study since users will simply get around it by making false declarations. However, in a situation where libraries have no reason to suspect otherwise (like in case of request by students and researchers) such additional requirement will be unnecessary.

e) **Limitations for 'Informative Purposes'**

Article 13 (1) of the Proclamation allows the reproduction in newspaper or periodical, the broadcasting or other communication to the public of an article published in a newspaper or periodical on current economic, political, social or religious or similar topics. Thus this exception applies to limited published works and can be traced under Article 10 *bis* (1) of the Berne Convention. This exception facilitates dissemination of information intended to public. However, it is not clear why both in the Berne Convention and the Proclamation this limitation is conditional upon the absence of contrary reservation by copyright owner. Moreover, the fact that the legislature left undefined such concepts as 'periodical' and 'newspaper' will raise controversy regarding the scope of this exception.

Sub-article (2) allows reproduction and broadcasting or other communication to the public of short excerpts of a work seen or heard for the purpose of reporting current events. We should not confine this provision to textual works; it should include important works like photographic and audiovisual works necessary for news organizations for fully reporting current events. This is highly important for public freedom of expression (to have access to both the substance/idea of the work and its form of expression) which is apparently the main justification for the whole exceptions in Article 13.[88] This provision hardly allows media organizations to freely broadcast interviews or other words spoken and notes taken without the consent of copyright owner although sub-article (3) covers part of such scenario. On other respect, the exception seems to be liberal in that it does not require the work to be published; rather it applies to works 'seen or heard'. In fact the Amharic version of same provision suggests that as long as the work relates to current events heard or seen such work can be reproduced or broadcast for purpose of reporting current event. The works do not need to be seen or heard but relate

[88] Otherwise the problem will be severe especially when we see that there is no provision in the proclamation to use such works in reporting current events even up on payment of compensation.

to events heard or seen. The limitation does not allow borrowing the entire work but excerpts of a work.

The difficult task of defining 'events', when they are regarded as 'current' and what is meant by 'reporting' within the range of media activities is left to the courts.[89]

Sub-article (3) of Article 13 of the Proclamation also allows reproduction in newspaper or periodical, the broadcasting or other communication to the public of a political speech, lecture, address, sermon, or other work of similar nature delivered in public, or a speech delivered during legal proceedings to the extent justified by purpose of providing current information. This exception is drawn from Article 2*bis* (2) of the Berne Convention. This exception helps disseminate information which is put in the public sphere by the author himself.

Finally, in all three cases the Proclamation imposes obligation to indicate the source and name of the author as far as practicable.

f) Compulsory License

Uncompensated limitations we have seen above basically refer to a situation where a person who has access to copies of works can deal with them in the permitted manners. But the main problem in LDCs is access to legitimate copies in their languages in the first place. One way embarked by members of the Berne Convention to address persistent concern by developing world to ensure bulk access to copies of works at affordable price in their language is to recognize a facility of compulsory license that allows them to derogate from the exclusive rights of reproduction and translation. As a result, the Berne Appendix was adopted and later integrated into the TRIPS system. However, lengthy substantive and procedural requirements make the facility scarcely available to LDCs.[90] Moreover, the requirements do not reflect the main problems of LDCs. For instance, both in the cases of compulsory license for translation and reproduction, non-availability of copies at affordable price does not trigger granting of license. License for translation is granted if the work is not published in local language or if all editions of translation

[89] For instance the court has to decide whether local, regional, and national occurrences constitute an 'event', whether commentary or opinion on such event constitute 'reporting', and whether report relating to an event which occurred long in the past constitute report on 'current' event.

[90]See the requirements under Articles II, III, and IV of the Berne Appendix. We can easily observe that the transaction cost involved and the waiting and grace period hugely discourage resorting to the facility.

published in the language concerned are out of print.[91] Compulsory license for reproduction is granted if copies of (published) edition of a work have not been distributed (in that) country) to the general public or in connection with systematic instructional activities at a price reasonably related to that normally charged in the country for comparable works.[92] Given the fact that important copyright works in LDC markets are expensive foreign materials, the price comparison is between expensive materials and this in no way guarantees availability of copyright materials at affordable prices. This means the Appendix has dearly missed to hit its cherished objective of equipping developing countries with means to deal with undersupply and/or unreasonably priced copyright works.

One may argue that Article 40 of the TRIPS Agreement should be used by LDCs to ensure bulk access. Article 40.2 provides that members can specify in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. It is not clear if undersupply due to high prices or absence of supply in local languages would constitute abuse of copyright; such is particularly the point where the copyright owner does not resort to any suspicious licensing practice or does not employ technological mechanisms to restrict access. Further more, historically and doctrinally the copyright has been, as opposed to patent, less a subject of competition law. This means Article 40 of the TRIPS Agreement is no easier route to ensure bulk access compared to the Berne Appendix.

Article 17 of the Proclamation leaves to the regulations the task of determining the 'conditions, forms of such authorization and in particular fair compensation' thereby implementing the Berne procedural and substantive requirements. However, the regulations remain elusive to date and this is a huge gap that tilts copyright balance in favor of protection as the Ethiopian Intellectual Property Office has not lived up to its mandate to initiate such legislation.[93]

Conclusion

Copyright limitations in Ethiopia are grounded on multifaceted monetary and non-monetary justifications. Some are grounded on market failure

[91] Article II (2) (a) & (b), Berne Appendix. Sub-article (5) makes the matter worse by restricting the availability of the facility only for the purpose of teaching, scholarship or research.

[92] Article III (2) (a) (ii), Berne Appendix.

[93] See Article 5 (3), Ethiopian Intellectual Property Office Establishment Proclamation, 2003, Article 5 (3), Proc. No 320, Fed. Neg. Gaz. 9th year, no. 40

explanations thereby adhering to maximalist precepts. Others are designed to balance conflict between proprietary interests of copyright owners and fundamental rights of the public, like freedom of expression, right to information, and privacy. There are also exceptions framed based on the need to pave way to the preservation and dissemination of knowledge and culture and further creativity. However, both international copyright instruments and the Ethiopian copyright law have not integrated copyright limitations within copyright system on same footing as rights. The fact that the international copyright instruments do not adequately systematize limitations and guarantee minimum limitations adversely affects LDCs which are technically ill-equipped. The WTO Panel interpretation of the triple test in terms of purely economic effects of limitation on the right holder has also gone out of way in disregard of the principles and objectives of the TRIPS Agreement. This has the effect of denying members of flexibility for domestic policy options. The wealth of procedural and substantive requirements in Berne Appendix rendered the facility scarcely available. The facility also doesn't guarantee availability of copyright materials at affordable price and mass access cannot be ensured unless the procedural and substantive requirements are eased.

The Ethiopian law unnecessarily adopts a closed system of limitation thereby depriving the judiciary room to derive limitations compatible with the triple test. It also follows unnecessarily restrictive (TRIPS-plus) approach even with respect to those specific exceptions it spells out. Education and library limitation are unnecessarily restricted to exclusive right of reproduction. Limitation for quotation is also unduly confined to published works. Moreover, lack of clear standards for application of limitation for education, quotation and library exception will discourage such uses. The law also fails to provide with adequate clarity limitations for research, review, criticism, incidental reproduction (and broadcasting), caricature etc. The recognition of exclusive right of public lending without appropriate exceptions has also the clear effect of undermining library activities. Above all, copyright balance in Ethiopia is affected due to lack of regulations that would give effect to provisions on compulsory license.