

THE INTERPLAY BETWEEN COPYRIGHT PROTECTION AND THE EXPANSION OF EDUCATION IN ETHIOPIA

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ABSTRACT

The *Ethiopian Copyright Law* was promulgated in 2004. The law has introduced stronger rights protection and enforcement mechanisms for creators. Though Ethiopia is not yet a signatory to the major international intellectual property instruments, the national copyright and neighbouring rights law is in line with the minimum standards set out in these instruments. The exceptions and limitations to copyrights favour copyright holders by restricting the scope of protection. As a result, one can say that the law restricts access to knowledge. Since the provisions of the exceptions and limitations to copyrights are construed narrowly in Ethiopian law, the writer contends that a systematic revision has to be conducted. The objective of such revision would be to redraft the pertinent provisions on exceptions and limitations, so that the country's laws reflect the less restrictive standards of international treaties. This would ensure its citizens right to have access to knowledge. This is vital for achieving the Ethiopian Government's vision, which *inter alia*, is to expand tertiary education to a significant portion of the population.

Ethiopia: a nation in transformation

According to *The Economist* magazine, Ethiopia is currently one of the top five fastest growing economies in the world (2010). Having maintained a double digit growth rate for more than six consecutive years, Ethiopia is currently the largest economy in East Africa. However, eight of the higher ranking economies boost their incomes with oil revenues.

For the first time in 2009, the service sector's 45.1 per cent contribution to the national GDP exceeded that of agriculture and other industries at 43.2 per cent and 13 per cent respectively. Foreign exchange earnings from services (from companies and sectors such as Ethiopian Airlines, Ethiopian Shipping Lines, insurance, tourism, communications, and financial services) exceeded that of all goods exported.¹

Aside from the other untapped energy-generating resources of the country, Ethiopia is known as the 'Water Tower of Africa'. The country is in a position to develop a hydroelectric power capacity of 45,000 megawatts. This ranks it second only to the Democratic Republic of the Congo. To exploit this natural and environmentally friendly source of energy, several hydroelectric dams have been built within the last five years (Giggle Gibe I at 184MW, Giggle Gibe II at 420 MW, Giggle Gibe III, which is under construction, at 1800 MW, Tekeze at 300 MW, and Tina Belles at 460 MW are some of the recent projects). Many more are in the pipeline.²

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¹ *The Ethiopian Macroeconomic Handbook*, (Access Capitals, 2010), page 4.

² Ministry of Finance and Economic Development, Federal Democratic Republic of Ethiopia, 'Growth and Transformation Plan 2010/11–2014/15', November 2010, pp. 7-75.

Above and beyond satisfying the growing energy needs of the country, Ethiopia will soon resume power exports to neighbouring countries. Infrastructural preparations, including the construction of gigantic towers connecting to Djibouti, Sudan and Kenya are already in progress.

The development of modern telecommunications infrastructure in the last five years has been remarkable. Over 18,000 km of fibre optic cable have been installed in the country so far. This makes up 30 per cent of the total installed in Africa.

In terms of healthcare facilities, more than 5,000 clinics and several large referral hospitals have been built. To improve the human resources capacity of the healthcare sector, institutions that train nurses, health officers, and medical doctors are being built in different parts of the country.³

Policy on the expansion of education

In the education sector, there have been significant achievements. In 1990 there were 8,256 elementary schools, 275 high schools, 17 technical schools, and only two universities. The total figures as of 2009 were 25,212 elementary schools, 1,202 high schools, 458 technical schools, and 22 universities. There are also around ten universities in the pipeline. These developments have helped to increase the intake capacity of universities, which could only accommodate about 3,500 students in 1995. As of the previous academic year, there were 79,575 new students enrolled in the various degree programmes at the nation's universities. These figures do not include students at private educational institutions. The Government's plan is to increase the intake capacity of State universities to 112,000 students within the next two years.⁴

Historically, the percentage of female students has been low. In 1995, female students made up only 12 per cent of the student population. In the 2008-2009 calendar year, female university students made up 41 per cent of the student population.

The other new development is the introduction of the so-called '70/30 ratio'. Under this new system, 70 per cent of the student population will join science and engineering streams, whereas only 30 per cent will join social science streams.

The major challenge that the nation faces in the delivery of quality education is the training of qualified teachers. Apart from this, the other major challenge is the availability of educational materials for instructors and students.

The *Copyright Law* and its impact on the expansion of education

The Ethiopian Copyright Law: general discussion

The period before 2004 was predominantly characterized by a growing grey area business in the copyright industry. This industry was beyond the reach of law enforcement bodies. As a result, infringement of copyright was so widespread that rights holders had to resort to public appeals through demonstrations and other activities.

³ Ministry of Finance and Economic Development, Federal Democratic Republic of Ethiopia, 'Growth and Transformation Plan, 2010/11–2014/15', November 2010, page 17.

⁴ Ibid.

As a result of developments in the creative industries (especially in the music industry) and the growing demand for newer and more robust legislation, the *Copyright and Neighbouring Rights Proclamation (Copyright Law)* was passed in 2004. The law entered into force on 24 July 2004. The legislation defines important terminologies, circumscribes its scope of application, and outlines subject matter that is not protected. The law also acknowledges the economic and moral rights of authors.

According to Article 7 of Proclamation 410/2004, the author or owner of a work has the exclusive right to carry out or authorize the following acts in relation to the work: reproduction; translation; adaptation, arrangement or other transformation of the work; distribution of the original or a copy of the work to the public by sale or rental; importation of original or copies of the work; public display of the original or a copy of the work; performance of the work; broadcasting of the work; and other communication of the work to the public.

The law also introduces originality and fixation as the two requirements for protection; stipulates what moral rights entail; lists the limitations and exceptions to copyright; details the manner in which economic rights can be licensed or assigned; governs neighbouring rights; and sets the parameters for copyright enforcement.

The Copyright Law and its impact on the expansion of education

General discussion

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

Teaching exceptions

Reproduction versus utilization: under Article 11 of the Ethiopian *Copyright Law*, the copyright owner cannot forbid 'without exceeding fair practice and the extent justified by the purpose a reproduction of a published work or sound recording for the purpose of teaching'. Further, the law requires that a copy made for the purposes of teaching shall indicate, as far as practicable, the sources of the work or sound recording as well as the name of the author.

The corresponding provision in the Berne Convention can be found in Article 10(2). It uses the term 'utilization', which provides for the reproduction, translation, adaptation, and exemptions from other related rights. Unfortunately, the same is not true under Ethiopian law. In contrast to the Berne Convention, teaching exceptions apply only to the reproduction of works and sound recordings. This conclusion can be based on the definition of the term 'reproduction' as used in the same law.⁵ It could be argued that the pertinent provision under the Ethiopian *Copyright Law* limits the types and forms of utilization. Among the categories of rights available, the teaching exception is limited to the

⁵ According to Article 2(26) of the Ethiopian *Copyright Law*, 'reproduction' means the making of one or more copies of a work or sound recording in any manner or form, including any permanent or temporary storage of work or sound recording in an electronic form.

right of reproduction. The result is that one cannot invoke the teaching exception provision in order to translate copyrighted works.

Amount to be reproduced: the teaching exception under the Ethiopian *Copyright Law* does not put any limitation on the amount which may be reproduced from a given work. Arguably, the absence of such a restriction (so-called limitations on limitations) allows for the possibility of reproducing the whole or a substantial part of a copyrighted work. This is providing that the reproduction does not exceed fair practice and that the extent of reproduction is justified by the purposes for which it was made. There is also an opposing view which argues that reproduction of a whole or substantial part of a copyrighted work is forbidden.⁶

Teaching - conventional versus other formats of teaching: the other important point in this regard is the meaning attached to the word 'teaching'. As per Article 11 of the Ethiopian *Copyright Law*, the word 'teaching' could be interpreted to cover both conventional face-to-face instruction as well as distance education. On the one hand, the wording of Article 32(c) suggests that the limitation imposed on the rights of performers, producers of sound recordings, and broadcasting organizations, relates, *inter alia*, to reproduction solely for the purpose of face-to-face teaching. Under this interpretation, the exception would cover performances, sound recordings and broadcasts that have been published as teaching or instructional materials. As a result, performances and sound recordings meant for distance education would not enjoy the teaching exception under Article 32(c).

However, it is not advisable to adopt an interpretation that departs from the spirit of a law. Therefore, an interpretation that extends the Article 32(c) exception to distance education must be accepted. That said, one could legitimately ask why the legislators did not define the term 'teaching' in Article 11 of the *Copyright Law*. The author argues that the absence of a definition, such as that found under Article 32(c), should allow the term 'teaching' to enjoy a broader interpretation under Article 11. Accordingly, the exception under Article 11 could be enjoyed both by conventional face-to-face teaching and other modes of education, including distance education.⁷

Exceptions for libraries, archives, and similar institutions

Open Collection Requirement: in line with the teaching exceptions are the exceptions provided to libraries, archives, and similar institutions. This issue is governed by Article 12 of the Ethiopian *Copyright Law*. Accordingly, a copyright holder cannot forbid the reproduction of a work by a library, archive, memorial hall, museum or similar institutions whose activities do not provide for

⁶ Gesesew, in 'The defense available for alleged violator under the Ethiopian Copyright Law', on page 3 argues that, 'when the whole or substantial part of the copyrighted work has been taken a defence under Article 11 of Proclamation 410/2004 is unlikely to succeed.' Unfortunately, no reason was forwarded to substantiate such a position.

⁷ According to Girma, 'Copyright and its relevance to the right of education in Ethiopia', pp. 11 ff. 'As to the second phrase used in the proclamation, i.e. "teaching purpose" or "educational purpose" it is defined as non-commercial instruction or curriculum based teaching by educators to students at non-profit educational institution, planned non-commercial study or investigation directed toward making a contribution to a field of knowledge or presentation of research finding at non-commercial peer conference ... But in our proclamation the use of the term "teaching" instead of "education" has made it as if, for example, presentation of research finding at non-commercial peer conference, workshops or seminars is not included. But given the close relationship between Articles 11 and 12, which is indicated by the use of the term "educational institution" in Art. 12(2)(c), it does not seem that the phrase "teaching purpose" excludes the above activities. Generally, in Ethiopia, so long as it does not exceed fair use as explained above, teachers have access to works beyond text books so that they enrich learning opportunities.'

direct or indirect commercial gain. Such reproduction is permitted only for published articles, short works or short extracts of a work. Further, it can only be made 'to satisfy the request of a physical person'.

Before libraries, archives or similar institutions may qualify for the exception, the following conditions must be met: the library or archive must be satisfied that the copy will be used solely for the purposes of study, scholarship or private research; and the act or reproduction is an isolated case, which if repeated, occurs on a separate and unrelated occasion and there is no available administrative organization which the educational institution is aware of, which can grant a collective licence for reproduction.

Another condition to the exception is that the entities must be non-profit institutions. This means that they must fulfil the 'open collection' requirement. Such a limitation, if improperly applied, has the potential danger of negatively affecting the libraries of private educational institutions. Since these libraries are part of commercial institutions, the requirement of 'working not for gain' could restrict these institutions from the application of this exception.

Purpose of the reproduction: the reproduction exceptions provided to the libraries, archives and similar institutions are permitted only for the preservation and, if necessary the replacement of a copy which has been lost, destroyed, or rendered unusable in the permanent collection of another similar institution. Further, such reproduction is also permitted, where it is impossible to obtain a copy under reasonable conditions. However, the act of reproduction must be either an isolated event, or if it is repeated, must be on separate and unrelated occasions.

Supervised reproduction: Article 12 of the Ethiopian *Copyright Law* does not regulate the manner in which reproduction through the institution's photocopiers can be made by users. The writer contends that when these institutions make photocopiers available, they must be required to display a notice to the effect that reproduction may be subject to *Copyright Law*. In cases where such copyright notice has been displayed, these institutions should disclaim any liability for copyright violations.⁸

Quotation exceptions

The 2004 Ethiopian *Copyright Law* introduced the 'quotation' exception. Article 10 of this law provides that the owner of copyright cannot forbid the reproduction of a quotation from a published work. The quotation shall be compatible with fair practice and should not exceed the extent justified by the purpose. The source and name of the author must be indicated.

The corresponding Berne Convention provision is Article 10(1). According to this provision, it shall be permissible to make quotations from a work which has already been lawfully made available to the public. This is provided that any quotation is compatible with fair practice, and that its extent does not exceed that justified by the purpose. This provision includes quotations of newspaper articles and periodicals in the form of press summaries. As was the case with the teaching exception discussed above, quotation exceptions under the Berne Convention and Ethiopia's *Copyright Law* use different terminologies.

Under the Ethiopian *Copyright Law*, it is the reproduction of a quotation which falls within the clause's exception. Under the Berne Convention, it is the making of quotations which falls within

⁸ This is a matter to be governed by subsequent legislation.

the meaning of Article 10(1). Quotations could be made in different mediums, including books, booklets, articles, newspapers, speeches, lectures, sermons, broadcasts, and performances. As a result of the variety of ways available to make quotations, there are various rights which could be affected by such an exception. It is in light of this possibility that the Berne Convention uses the term 'making', which is a term with a broader meaning. Following the wording of Article 10 of the Ethiopian *Copyright Law*, it is only the reproduction right of copyright owners which is affected.

Apart from the general requirement of fair practice and legitimate purpose, nothing has been regulated with regard to the size of quotations and the purposes for which they may be made.

Works of an oral nature

By virtue of Article 2(30)(b), and in conjunction with Article 6, Ethiopian *Copyright Law* has defined oral works as those falling within the meaning of the legislation. These include speeches, lectures, addresses, and sermons. The *Copyright Law* has defined the term 'works of an oral nature' broadly, so as to include political speeches and speeches delivered in the course of legal proceedings.

The *Copyright Law* does not have a special provision which governs the manner in which limitations are imposed on 'works of an oral nature'. As a result, resort has to be made to the general exception clauses which apply to teaching, libraries, quotations, etc.

The requirement of fixation

Article 6 of the Ethiopian *Copyright Law* lays down the requirements for copyright protection. According to the first part of this provision, irrespective of the quality of the work and the purpose for which the work may have been created, the author is automatically entitled to protection upon creation, and without any formality. The implication of this is that a song that is sung out loud, or a speech that is delivered in public is immediately protected once they have been made. Authors do not need to fix their creation in any material form in order to attain legal protection.

Unfortunately, the second part of the same provision introduces the fixation requirement in addition to originality. Accordingly, in order to enjoy protection, a work has to be original, and fixed. The requirement of originality, being a universal requirement for copyright protection, has been well received by a number of scholars in Ethiopia. The problem is with the requirement of fixation, which is new to Ethiopian *Copyright Law*.⁹ The same law defines the term 'fixation' to mean the embodiment of works or images or sounds, or of the representation thereof from which they can be perceived, reproduced or communicated through a device prepared for the purpose.¹⁰ The definition makes it possible for any storage medium to facilitate the fixation requirement.

From the Ethiopian practice, at least from the perspective of the music industry, the fixation requirement has negatively affected the illiterate sections of society, and those creators who do not have access to modern technology.

⁹ The position of the Berne Convention in this regard is stipulated in Article 2(2). According to this provision, 'it shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form'. In effect, this provision makes fixation optional.

¹⁰ Article 2(11) of the Ethiopian *Copyright Law*.

The introduction of the fixation requirement is negative in some ways but positive in others. On the one hand, the measure has limited the availability of copyright protection to the few that are literate and have better access to technology. This is most visible in the music industry. On the positive side, the fixation requirement has limited the availability of copyright protection to works embodied in a medium which allows them to be perceived. This allows the public open access to those works that are not embodied in a perceptible medium, which can then be utilized without any restrictions. This has positive implications in ensuring access to knowledge, which is vital in expanding education.

Parallel imports

Ethiopian *Copyright Law* acknowledges control over importation of originals or copies of works as part of the bundle of rights granted to copyright owners. By doing so, Ethiopian *Copyright Law* has adopted the principle of national exhaustion. This is negatively affecting access to knowledge.

Non-voluntary licence for reproduction, translation and broadcasting

Article 7(1)(a), (b), and (h) of the Ethiopian *Copyright Law* recognizes reproduction, translation and broadcasting of work as part of the author's bundle of economic rights. Despite the recognition of these rights, Article 17(1) of the same law empowers the Ethiopian Intellectual Property Office with the right to grant (notwithstanding any opposition by the copyright owner, heir, or legatee) a licence to authorize the reproduction, translation, or broadcasting of a published work.¹¹ Article 17 appears to create a sweeping compulsory licensing authority. However, the author's inquiries at the institution have made it clear that the Office does not have such powers.

Rather the regulation which shall implement the *Copyright Law* will eventually govern the manner in which compulsory licences are granted. The regulation will include the conditions of issuance of non-voluntary licence for the reproduction, translation or broadcasting of a published work, subject to the payment of royalty. Article 17 of Proclamation No. 410/2004 is drafted in line with the Appendix of the Berne Convention, which is incorporated into the TRIPS Agreement.

¹¹ According to Bashura, on page 38, 'this is understood as a limitation in the interest of the public; i.e. access to knowledge.' The Berne Convention in its Appendix contains provisions which allow developing countries two compulsory licencing options. The first one allows governments to issue a licence to make translations. The other one allows governments to issue a licence for reproduction and publishing.

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