



Fair practice standard under copyright law of Ethiopia: The case of education

Daniel Mitiku

Lecturer, School of Law, Wolkite University, Wolkite, Ethiopia

Abstract

Copyright means a property right that subsists in a certain specified type of works. These specified types of works in which copyright subsists are like original literary works, films and sound recordings. The owner of copyright subsisting in a work has the exclusive right to do certain acts in relation to the copyrighted work like making a copy, broadcasting or selling copies to the public. Other persons, unless authorized by the owner, are restricted by the copyright law from doing such acts. However, the copyright law does not totally ensure the owner of copyright the maximum economic benefit. It balances between the interest of copyright owner to obtain a fair return and society's interest in access to and use of information. Thus the copyright law does not only provide exclusive right to the copyright owner, but also exceptions to the exclusive right and allow the use of copyrighted work by third parties in certain circumstances, such as, education, without the permission or license of copyright owner. The exceptions by themselves do have their own limits. These exceptions and limits to the exceptions are generally guided by the doctrine or standard known as "fair practice" in Ethiopian legal system, "fair use" in USA, and "fair dealing" in UK. But, the Ethiopian copyright law does not define and provide a standard for the doctrine fair practice. It is not an easy task as such to differentiate what practice is fair and what is not in the absence of precedent developed on the area. In the absence of a clear definition and standard, it may end up in uncertainty and inconsistent application of it. So, dealing with the contents of the standard fair practice is quite vital.

Keywords: fair-practice, standard, copyright, exclusive-right, education

1. Introduction

Historically, at the international level, copyright law is a recent development compared to other developments^[1]. Two inventions in the late 15th century: the invention of movable type writer in 1455 and the development of printing press in 1478 changed history and contributed for the development of copyright^[2]. The invention of the art of printing (in the time of the first copying industry) was the first situation that gave rise to the need for copyright legislation^[3]. But, the concept in which the author should have an exclusive copyright gets its firm shape at the beginning of the 18th century when the statute of Anne was enacted in England in 1710^[4]. This statute was considered to be the first true copyright law in copyright history of the world^[5]. Then in 1790, United States of America congress copied the statute of Anne and form common law copyright^[6]. Since 1710 attempt was made to limit as well as to create copyright protection^[7]. and then the scope of copyright was gradually increased to include other works^[8]. Limiting the right of author was also expressed in the first true copyright law i, e Statute of Anne. In addition, in practice, judges further limited the right of authors by permitting some

copying by the reason of "fair dealing"^[9]. Then the American judges learn from English precedent and developed the concept of "fair use", which is the counter part of England's "fair dealing"^[10]. Thus England was sighted as the origin of the doctrine "fair dealing". It can be said that the origin of the concept fair practice were in common law countries, specifically UK and USA. Like in common law countries of England and USA, the historical development of copyright in civil law countries such as France was not substantially different as such^[11].

In Ethiopia, compared to pioneers of it, intellectual property in general and copyright in particular were a very recent development. The introduction of policy, legal and institutional frame work in the country relating to intellectual property is a recent phenomenon^[12]. The first organized rule on copyright and concerning publishing contracts was given in 1960^[13]. The 1957 penal code also used to protect copyright and provided penal remedies in case of copyright infringement. However, the laws were not sufficient to cover all issues relating to copyright and to effectively protect the right of authors and owners of copyright. When time passes and technology develops, changing the existing laws is necessary to accommodate new situations and creative. At present the country,

¹.Corpus Juris Secundum, Copyright and Literary rights, vol.18, 1935, p.161.

².David Bainbridge, Intellectual Property, p.31.

³.Supra note 1.

⁴.W.R.Cornish, Intellectual Property: patents, copyright, trademarks and allied right, p.393.

⁵.Supra note 2.

⁶.David Bainbridge, Supra note 2,p.34.

⁷.Arthur R.Miller and Michael H.Davis, Intellectual Property: patents, trademarks and copyright in nutshell, p.286.

⁸. Supra note 2,p.34.

⁹.Copyright Fair Use: Case law and legislation, Duke law journal, vol. 1, Feb. 1969, p.75.

¹⁰.Ibid.

¹¹. <http://eh.net/encyclopedia/article/khan.copyright>, an economic history of copyright in Europe and the United States.

¹².Getachew Mengistie, Intellectual property assessment in Ethiopia, Ethiopian intellectual property office, p. 10.

¹³.The 1960 civil code of Ethiopia, consisting of 28 provisions on the title literary and artistic ownership, and concerning publishing contracts dealing with the transfer or assignment of copyright was provided.

Ethiopia, have no a consolidated national intellectual property policy ^[14]. It is provided in fragmented manner. The 1997 cultural policy clearly states the need for protection of copyright in order to promote the creation of literary and artistic works. Primarily, The Federal Democratic Republic of Ethiopia (FDRE) Constitution recognizes the protection of intellectual property. According to the FDRE Constitution, matters relating to intellectual property (patent and copyright) are given to the Federal Government ^[15]. As a result, the House of Peoples' Representatives is empowered to enact law on copyright ^[16]. The Council of Ministers is made to be responsible for the protection of copyright ^[17]. In addition, the FDRE Constitution under its cultural objectives provision (i.e. Article 91(3)) obliges the Federal Government to support the development of copyright. This article states that "government shall have the duty to the extent its resource permit to support the development of the arts, science and technology". The words "arts", "science", and "technology" constitute part of intellectual property. Then in 2004 a better comprehensive law to protect copyright and related rights was enacted ^[18]. This new law and its amendment proclamation ^[19], introduced new concepts and rights, widened the scope of copyright and related rights, and provided a better mechanism of enforcement and protection of copyright. It provides, without prior registration requirement, protection of literary works, musical works, artistic works, maps and technical drawings, photographic works, cinematographic works, and computer programs. It introduced the moment of fixation than publication to protect the copyright ^[20]. There are scholars who argue against this fixation requirement. They argue that this fixation requirement affects negatively the interest of the people who create copyrightable works but does not have access to new technologies to fix them. Rather it creates good opportunity to other who has the access to technologies to benefit easily from which they did not create ^[21]. The new Ethiopian criminal code (i.e. Proclamation No. 414/2004) also applies to protect infringement of rights relating to literary, artistic or creative works ^[22]. These laws include comprehensively all matters related to copyright and to be consistent with the requirement of international conventions. Of course Ethiopia is not a member to almost all multilateral international conventions on intellectual property(IP).The only exception to this is that in 1982 the country accepted the 1981 Nairobi treaty on the protection

of the Olympic Symbol and in 1998 the country only accede the convention establishing the World Intellectual Property Organization(WIPO).At present the Government of Ethiopia is on the process of accession to world trade organization(WTO) since 2003.Thus, to be WTO consistent, the country's IP laws must recognize and meet the requirements provided under the Agreement on Trade-Related Aspects of Intellectual Property Rights(TRIPS) which are a multilateral treaty on IP.

Copyright law majorly balances two interests: interest of the author or owner of copyright and interest of the society at large to have access to and use of information of copyrighted works. Copyright law was developed to encourage creativity by protecting the interest of the author or owner of the copyrightable work. The protection given by copyright law is expressed through entrusting the author or owner of copyrightable work the exclusive right of reproduction, sale, rent, transfer, and other communication of the work to the public. The governing legislation of Ethiopia to protect copyright and neighboring (related) rights, that is, Proclamation No.410/2004(here in after throughout the article called the proclamation) provided exclusive right for the copyright owner as well as exceptions to it. Article 7 of this states that the copyright owner has the exclusive right to carry out or authorize another third parties acts like:

- reproduction and translation of the work,
- adaptation, arrangement or other transformation of the work,
- distribution of the work to the public
- importation of the work, and
- public display, performance, broadcasting, and other communication of the work to public

These rights are only given to the owner and third parties are restricted from doing such acts unless they get authorization or permission from owner. However, not all uses without the consent of the owner of copyright are infringement. These exclusive rights are not without exception.

2. Copyright Exceptions in General

As it is stated in the above, protecting the interest of the copyright owner of the copyrightable work is not the only purpose of the copyright law. The copyright law has to also take in to account the interest of the society at large. The copyright law has to allow some access to and use of information of the copyrighted work. Thus, to balance the interest of the copyright owner and the public, the copyright law provides exceptions. The Proclamation provided exceptions to the exclusive right of copyright owner ^[23]. The exceptions include:-

- reproduction for personal purpose
- reproduction of a quotation of a published work
- reproduction for the purpose of teaching
- reproduction by libraries, archives, and similar institutions
- reproduction, broadcasting and other communication to the public for information purposes,
- reproduction and adaptation of computer program

¹⁴.Supra note 12,p.17.

¹⁵.FDRE Constitution, Article 51(19).

¹⁶.Ibid, Article 55(29).

¹⁷.Ibid, Article 77(5).

¹⁸. Copyright and neighboring rights protection proclamation, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, Proclamation No.410/2004.

¹⁹. Copyright and neighboring rights protection Amendment proclamation, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, Proclamation No.872/2014.

²⁰.Supra note 18, article 6(1)(b).

²¹.Mandefro Eshete and Mola Mengistu, Exceptions and limitations under the Ethiopian copyright regime: an assessment of the impact on expansion of education.

²².Article 721(1) of the criminal code of Ethiopia provides that "whoever, apart from cases punishable more severely by another provision of this code, intentionally violates laws, regulations or rules issued in relation to rights on literary, artistic or creative works, is punishable with rigorous imprisonment not exceeding ten years". On the other hand sub article (2) of this article provides that "where, the act is committed negligently, the punishment shall be simple imprisonment not exceeding five years".

²³.Mainly beginning from Article 9 of Copyright and Neighboring rights protection proclamation, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, Proclamation No.410/2004

- importation for personal purpose
- private performance of copyrighted work

In addition, issues of exhaustion also settled by the proclamation under Article 19 and a copy of a published work may be redistributed by means of sale if once it is sold to the public. Exhaustion means once the published work is put in the market, the owner of this copyrighted work has no power to control it concerning the sold work ^[24]. It is considered that the owner exhausted his/her right. According to the proclamation, Ethiopia follow the principle of national (territorial exhaustion). Importation of the original or copies of the work is exclusively given to the owner of the copyright. Thus, parallel importation is not allowed ^[25]. Parallel importation means importing a work copyrighted from abroad available at low price ^[26]. This would be possible if the country's copyright system follows the principle of international exhaustion. There are scholars who argue in favor of adopting the principle international exhaustion to maximize the interest of the public than the owner of copyright. Furthermore, the case of compulsory license also provided under Article 17 of the proclamation. And similarly, exception to the exclusive rights of performers, producers of sound recording and broadcasting organizations are considered in the proclamation ^[27]. However, by the name of exception, the third party users of the copyrighted works should not be made to free ride and unreasonably affects the interest of the copyright owner. Thus limits to the exceptions, that is exceptions to the exceptions are necessary. Here, the standard fair practice comes in to picture to balance the above contending interests.

3. Fair practice Standard

It is discussed in the above that copyright is the exclusive right given to the owner of a copyright work and when unauthorized non-owner transgresses the rights of the owner, infringement takes place and the owner gets remedy to that effect. However, the scope of copyright monopoly has to be kept reasonable. Several principles have evolved to limit copyright protection. Extended scope of protection would undermine the public benefit policy of copyright. The most significant exception is the fair practice standard ^[28]. Intellectual property policy, especially copyright policy, serves as policy tool that structures the use and flow of information. It plays a major role in an information age ^[29]. The copyright regime seeks to balance the public's desire for broad access to copyrighted works with the need to provide a pecuniary incentive for the copyright holder to disseminate the work (considered as twin aim of copyright system). An important tool in maintaining the copyright system's equilibrium has been the standard of fair practice, which authorizes certain uses of copyrighted materials without the need to obtain the copyright holder's permission ^[30]. But there is no perfect consensus on how to maintain a

perfect equilibrium between the two competing interests ^[31]. The copyright system should provide the appropriate level of economic incentives to copyright holders to motivate creativity without hindering society's interest in the wide spread dissemination of works and the free flow of ideas and information. The precise contours of such balancing are of great importance because they (the precise contour) will determine whether the copyright system will fulfill or frustrate its goal by either hindering or encouraging the full potential for learning and creation ^[32].

The notion of fair practice would encourage original research and the creation of new works. The standard fair practice should be adapted to further principles of education and dissemination, thus advancing the stated goals of copyright ^[33]. Fair practice is a limitation on copyright monopoly to further on the utilitarian objective of copyright law. It is part of a defense available to the accusation of copyright owner.

The copyright and neighboring rights proclamation No.410/2004 of Ethiopia introduced the concept fair practice. The phrase fair practice only is mentioned in the proclamation twice without defining and providing a standard to apply it. The proclamation provided the fair practice standard only for the cases of quotation and reproduction for teaching under articles 10 and 11, respectively. The problems here are two fold. First, the fair practice standard is not provided for other exceptions stated in the proclamation. Second, the meaning and the detail standards to interpret and apply it are not provided.

The standard which help to interpret and apply the fair practice concept are provided extensively under section 107 of the 1976 copyright act of USA ^[34]. However, the standards are not exhaustive. The extensive standards and the non- exhaustive nature of them help judges to entertain each case in relation to various public policy reasons.

Provision of extensive standards for fair practice under the Ethiopian copyright proclamation helps the judges to consider various socio-economic policies of the country in entertaining each case. For instance, the country has several social policies in areas such as education and health. Since the country is under developed, there are problems relating to education and health care services. Finding of fair practice imply important public policy considerations ^[35]. Education is one of the important public policies of almost all countries of the world. The country has policies to expand education and betterment of health care services. Thus, providing standards to fair practice concept have an impact on the implementation of these policies. Allowing, for example, reproduction of books for the purpose of expanding education, research and experiment has a positive impact on the provision of social services. At the same time the task of judges becomes easy in interpreting and applying the fair practice concept to particular cases.

Ethiopia, as a result of the new copyright proclamation, seems to follow a mixture of Anglo-Saxon (common law) and continental Europe (civil law) trend relating to

²⁴. Biset Beyene, the impact of the doctrine of exhaustion of intellectual property rights on international trade: the Ethiopian perspective, p.25.

²⁵. Exceptionally, Article 15 of the proclamation allows importation for personal purpose.

²⁶. Supra note 21.

²⁷. Article 32 of the proclamation.

²⁸. Will fair use function on the internet, Columbia law review, vol.98, No.1 (Jan.1998), p.181.

²⁹. Ibid, p.170.

³⁰. Ibid.

³¹. Ibid, p.216.

³². Ibid, p.170.

³³. Ibid, p.173.

³⁴. IIC, International review of intellectual property and competition law, vol.31, No.5, 2000, p.511.

³⁵. What's fair here is not fair everywhere: does the American fair use doctrine violate international copyright law? Stanford law review, vol.6, (Jul.1999), p.1636.

copyright exception and their limits. Like continental Europe the proclamation lists down those copyright exception and their limits. At the same time, like Anglo-Saxon introduced the standard fair practice. A modern copyright law has to incorporate important concepts either from civil law or common law tradition. Even the international conventions on the area attempted to reconcile the differences and provided a mild position^[36]. Thus, these international conventions influenced national laws who follow either of the two traditions. Ethiopia is not different from this process. By proclamation No.410/2004, attempts were made to meet the minimum standards set by international copyright convention called Berne Convention^[37].

The proclamation does not provide the fair practice standard for important exceptions like cases of criticism, review, libraries, archives and similar institutions. However, fair practice exception is a known exception in other countries in cases of library, research and experiment. The fair practice standard does not work for all purposes. There have to be special purposes justifying fair practice standard. The known special areas which justify fair practice exception to the exclusive right of the owner of copyright are:-

1. Fair practice for the purpose of research or private study
2. Fair practice for the purpose of criticism or review
3. Fair practice for the purpose of reporting current events
4. Education; and
5. Libraries and archives

Because fair practice standard covers a broad range of subject matter, this article focuses only on education.

4. What is Fair Practice in Education?

The main objective of protecting copyright is not only rewarding the copyright author or owner. Promoting and expanding education for the benefit of the public is also the main objective of protecting copyright. The copyright system allow the way others to learn from the creative works of prior author so that to develop their own new works. The copyright system allows for the public to have access to new creative works and get information which is learning-education.

Intellectual property law, particularly copyright law, is given in order to accelerate the growth of knowledge and science. This can be attained, first, by encouraging creative individuals by rewarding monopoly right over their work. And, second, is by limiting the monopolistic control of the author and allowing others to have fair access to copyrighted works to develop new work important to the society. There is a saying "a dwarf on the back of the giant looks far than the giant itself". This second objective of copyright law is best reflected by educators and educational institutions^[38].

In many jurisdictions, the issue of education is recognized in their copyright law. The same is also true under international copyright conventions. One of the important exceptions to the exclusive right of the copyright owner is education. One of the major issues raised by developing

countries at Stockholm and Paris revision of Berne convention and Universal copyright convention (UCC) is education^[39]. And as a result exception to the exclusive right of the copyright owner for the purpose of education is allowed.

Fair practice is essential to education, research, and scholarship. However, few educators fully understand copyright law and fair practice standard^[40]. Others do not worry and simply use the works of other.⁴¹ Everyone at the educational institutions should be aware of the implications of copyright law and the critical role of fair practice of copyrighted materials in the teaching, research, and scholarship^[42].

Fair practice is not limited to any particular group of users as many other limitations are. However, some groups, such as educational institutions and non-profit libraries, enjoy greater latitude under fair practice than others^[43]. Fair practice of copyrighted materials for education extends certain rights to published and copyrighted works that are not extended otherwise.

Individuals may think that copying the work of other for educational purpose is free. On the other hand, some of them do not know what the law says so and simply fear the rule "ignorance of law is not an excuse". Copying the work of another for the purpose of education is a known exception to exclusive right of the copyright owner. Of course, copying for education is not without limit. Some control is needed especially in case of reprographic copying. Reprographic copying is prohibited. However, reprography of a small part for the purpose of instruction may be allowed^[44]. And reprographic copying may be also permitted in educational establishments like schools. Hence, such copy has to be made by any person who gives and any person who receives instruction. So, subsequent dealing with the copied material, i.e. subsequent sale or offer for sale will amount to infringement. In addition, sufficient acknowledgement is necessary^[45].

Reproduction (mostly by photocopying), the work of another, by a teacher or student of a small part of a work to illustrate a lesson is a fair practice^[46]. What amount of taking is small or more is left undefined. Even if it is difficult to provide the exact rule, it is possible to set standards which help to determine whether the taking is fair or not. These standards by no means would be definitive or determinative, but they use to balance competing interests. Even multiple copies of a copyrighted work may be fair practice for the purpose of class room use. The reproduction of multiple copies has to be only for members of the class^[47]. By the name of fair practice standard, teachers have access to works far beyond class rooms or text books and thereby may expand and enrich learning opportunities for

³⁶. Supra note 11.

³⁷. Fair practice standard introduced under Article 10(Quotation) and Article 11(reproduction for teaching) of the proclamation are almost copied from Berne Convention.

³⁸. http://www.amherst.edu/academiclife/dean_faculty/fph/policies/fairuse

³⁹. Supra note 4, p.302.

⁴⁰. I have made interview with instructor at Science Faculty of Addis Ababa university, Ethiopia, who wrote and published a book used for education. And he told me that students, teachers and librarians of higher education in Ethiopia reproduce the book without getting permission from him.

⁴¹. http://www.ehow.com/about_4812899_fair-use-copyright-laws-education.html

⁴². <http://www.brown.edu/Administration/Copyright/faq.html>

⁴³. Supra note 38.

⁴⁴. Supra note 7, p.372.

⁴⁵. Supra note 2, p.177.

⁴⁶. http://www.loc.gov/copyright/circular_21, united states copyright office, reproduction of copyrighted works by educators and librarians

⁴⁷. Ibid.

use of case law. Even, it is not defined under English copyright, designs and patents Act of 1988. However, the U.S copyright Act under section 107 provides, better than others, certain standards in which copyrighted materials to be used without the consent of the copyright owner^[55]. Such standards stated under U.S copyright Act and England legal system are developed by the case law. Without having clear definition and standards, it is difficult to apply the fair practice. How much does the fair practice standard allow one to take from the original copyrighted work is the prevailing question behind the application of fair practice.

From the above assertions, we can understand that the fair practice requires a certain standard to apply it. That means there have to be certain tests/conditions/ factors in order to determine whether the taking of a copyrighted material does or does not exceed the limits of fair practice or whether or not the taking of copyrighted material imbalances between the right of the author and the right of the public in the dissemination of knowledge and the promotion of science and artistic progress^[56]. The governing standards used for fair practice should not be out of the objectives of the copyright law. They exist in the objectives of copyright law^[57]. Fair practice involves a balancing process and considers a complex of variables to determine whether other interests should override the rights of authors^[58]. The variables are used as tests to determine whether the practices are fair or not. Setting standards, in order to determine whether the use made of a work in any particular cases is a fair practice or not, is important. Each standard is used to test the cases brought before court whether to grant or reject defense of fair practice in line with the objectives of the copyright^[59].

Uncertainty about the scope and nature of fair practice will create confusion among the courts and users^[60]. The absence of a clear standard for fair practice result in lack of a reliable guide to writers, publishers, and other would be fair practice users on how to govern their conduct. And clear standard backed by objectives of copyright result in greater consistency and predictability of court decisions. By the standards of fair practice; a fundamental policy of the copyright law will be reflected^[61]. The standards should balance between the right of the author to the product of his creative intellect and the right of the public in the dissemination of knowledge and the promotion and progress of science and useful arts^[62]. Rather than listing exact limits of fair practice, copyright law should provide standards for determination of the fair practice exemption^[63]. Here under the important and major standards which help to determine a fair practice with their brief discussions are stated.

A. The purpose and character of the use

This standard raises the question of justification. The important question here is that does the use fulfill the

objective of copyright law? Simple justification is not sufficient. The justification has to be powerful or persuasive. And the court should weigh the strength of the secondary user's justification against factors favoring the copyright owner. The justification will be outweighed if the taking are excessive and other factors favor the copyright owner^[64].

Here it is clear that the purpose behind copying has to be education. It has been said in the above that the Proclamation No.410/2004 encourages education. In addition Article 11 of the Proclamation states that copying has to be for the purpose of teaching. But the phrase "the extent justified by the purpose" stated in Sub-Article 1 of the same Article warn everybody that no one can simply copy the work in the name of education or one cannot copy the work simply because he is a teacher or a student.

The educational use must have a clearly defined purpose. Fair practice for education allows the copying of parts of a copyrighted work as long as there is a very specific educational purpose at work and the copies are used only temporarily. A very important element is that the teacher himself must want to use the copyrighted work because the school does not have access to it^[65].

This standard is based on dual concepts. These are concepts of commercial versus non-commercial and public versus private uses^[66]. This test focuses on whether the practice is for commercial or for non-profit educational purposes, transformative and productive or duplicative purposes^[67]. It is fair practice to take the whole work for the purposes of research or private study. The use for educational and non-commercial are encouraged^[68]. Non commercial nature of the use and its private character are highly persuasive in favor of fair practice to use as a defense by the defendant before court.

Private nature of the use favors fair practice but it is not a legitimate component of it. Article 9(1) of the proclamation No.410/2004 considers the private use of a single copy of a work. Thus it is fair to reproduce a single copy of a work for private use. But Sub Article 2(e) of the same Article has to be taken care of. By this Sub-Article, if a reproduction of a single copy conflict with or unreasonably harm the normal exploitation of the work or the legitimate interest of the author, the practice would be unfair. And the commercial nature of the claimed use by itself is not conclusive, but considered as one factor^[69].

Finally, it can be said that the purpose and character test notify us that the profit motive of the defendant may weighs against fair practice, but the use for educational, critical purposes or otherwise may be used as a legitimate defense in favor of fair practice. Even though materials may be copied for educational purposes, the other standards must be met.

B. The amount and substantiality of the use

This is in relation to the portion used from the copyrighted work. That means the amount used in relation to

⁵⁵. Supra note 34, p.108.

⁵⁶. Yoseph Mulugeta, the Doctrine of Fair Use and Its Application under the Ethiopian Copyright Law, 1997, P.42.

⁵⁷. Pierre N. Leval, *Towards a Fair Use Standard*, Harvard Law Review, vol.103, no.5, (March, 1990), p. 1105.

⁵⁸. Supra note 7, p.355.

⁵⁹. Supra note 57, p.1110.

⁶⁰. Dan Thu Thi Phan, *Will Fair Use Function on the Internet*, Columbia Law Review, Vol.98, No.1(Jan.1998), p. 216.

⁶¹. Supra note 57, p.1135.

⁶². Leon R. Yankwich, *What Is Fair Use?* The University Of Chicago Law Review, Vol.22, No.1(autumn, 1954), p. 213

⁶³. Supra note 2, p.67.

⁶⁴. Supra note 57, p.1111.

⁶⁵. Supra note 41.

⁶⁶. Supra note 7, p.358.

⁶⁷. Carlos M Correa, Fair Use in the Digital Era, International Review of Intellectual Property And Competition Law (IIC), Vol. 33, No. 5/2002, P. 574.

⁶⁸. Supra note 2, p.172.

⁶⁹. Supra note 7, p.358.

copyrighted work as a whole. In such a case the general principle is “the more the taking, the more the infringement.”^[70] But, first one must define what “more” means. It can simply be said that the greater the taking of the copyrighted material, the weaker the claim of the fair practice would be successful^[71]. “More” can be defined meaningfully by considering the proportional substance or quality of the taking^[72]. In such a case, the amount taken, its significance to the copyrighted work and to the work in which it is incorporated have to be considered.

Here, as it is stated in the above, not only quantity but also the quality of the material taken has to be considered. That means, even if the taking is relatively small in quantity, it may amount to substantial taking, if it is a valuable or core portion of the copyrighted work^[73].

A whole work may be taken, first, if there is a powerful justification for quotation of the entirety. Education would be a powerful justification. Second, if the original work is done for private motive and not for publication, quotation will not diminish the author’s interest to create works for the public benefit. And thirdly, if there is no effect on the market of the author and most unlikely to be marketed as a work of author^[74]. However copying an entire work can never be fair practice for the same function of the work^[75].

Article 10 of the Ethiopian copyright proclamation No.410/2004 allows the reproduction of a quotation from a published work. This has to be done with fair practice. It provides a qualitative test. But the former copyright law, civil code of 1960, provided a quantitative test^[76]. It is not appropriate to provide only a qualitative test. Taking forty lines from a poet may amount to a core part of the original work which would constitute substantial taking. So quoting from a work for the purpose of education is permissible if it is done with fair practice. This fair practice limit has to be guided by the contour substantial taking, which follows either qualitative or quantitative test as appropriate. This substantial taking is included under Article 9(2c) of the proclamation No.410/2004 in case of reproducing a single copy for private use of data base. This has to also extend to determine the amount of quotation from other works.

Additionally, paraphrasing the original work will not make one free from a claim of infringement and may not be a guarantee to use the defense of fair practice. The paraphrased portion will be added with the literally copied portions to calculate the proportionality test^[77].

There are no absolute rules as to how much of a copyrighted work may be copied, but there are some rules of thumb that may be considered by educational institutions in other jurisdictions like America^[78]. At present new technologies, computer and internet or electronic fences, help to determine whether the amount of taking is fair or not. Educational institutions by using such technologies provide

rules of plagiarism and excess of taking amounts to infringement. In Ethiopia, many educational institutions prohibit plagiarism. However, the problem is with regard to the specific standard and guidelines to implement it. The first and oldest higher education of Ethiopia, Addis Ababa University, provided and implemented anti-plagiarism policy frame-work for the first time in November 2019 to implement it in research works and to test the amount of taking that constitute plagiarism. This policy frame work also require for further detailed guidelines to effectively handle the issue.

C. Nature of the copyrighted work

This standard implies that certain types of copyrighted material are more amenable to fair practice than others. Copyright protection is available to different categories of, such as, writings. A novel and also private letters are protected by copyright. Even if the two works are protected by copyright, they may have difference in case of fair practice application. A document for private purpose not for publication (like love letters) and artistic creations do not weigh same and serve the purpose of copyright. The owners of a document for private purposes are incidental beneficiaries’. But artistic creative form the heart of copyright purpose (i.e. stimulation of creativity). So this standard favors to the original author in cases of works created for publication than in cases of documents written for private reasons which have nothing to do with the objectives of copyright law^[79]. Because of this that Article 11(1) and also Article 10(1) of the proclamation No.410/2004 prefer to use the phrase “published works”. By these Articles reproduction of quotation or for the purpose of teaching of a published works are allowed.

The creative and original nature of the work indicates how much the author has invested on it. Works that reveal creative and original characteristic less support the defense of fair practice. But if the work requires a simple labor or trivial creativity and originality, the room for the use of fair practice defense becomes broader. A work more of diligence than creativity or originality gives a greater license to the defendant to use the fair practice concept^[80].

If a work is simply a compilation or a book of quotations, it is easy for the defendant to support his claim of fair practice. But, using from a work of a poem or musical composition would not be easy to support the defense of fair practice^[81].

The copyright proclamation No.410/2004 of Ethiopia made a distinction on this respect. It distinctively protects original creative and derivative works. Article 4 of the proclamation protects derivative works such as translation, adaptation, arrangement and other transformation or modification of works, collection of works such as encyclopedia or anthologies or databases whether in machine readable or other form in which such collections are original by reason of the selection or arrangement of their contents. Even the duration of economic right between original creative works and derivative works are different^[82]. So the proclamation

⁷⁰. Ibid, p.363.

⁷¹.Supra note 67, p.574.

⁷².Supra note 7, p.363.

⁷³.Supra note 56, p.44.

⁷⁴.Supra note 57, p.1123.

⁷⁵. Supra note 9, p.108.

⁷⁶. Article 1661 of the 1960 civil code of Ethiopia states that “the author cannot forbid short quotation from his work provided they do not exceed, in the work in which they are included, **forty lines** in the case of a poetical work or **ten thousand** letters in the case of any other work”.(emphasis mine).

⁷⁷.Supra note 7, p.365.

⁷⁸.Supra note 41.

⁷⁹.Supra note 57, p.1116.

⁸⁰.Supra note 7, p.361.

⁸¹.Ibid.

⁸². Article 20(1) of the proclamation provides that “economic rights shall belong to the author during his lifetime and to the heirs or legates for fifty years from the date of death of the author”. On the other hand Sub Article (4) of this Article states that “where the work is a work of collective work,

looks those original works stated under Article 2(30) and derivative works under Article 4 differently. And it provided a greater protection to the former than the later. As a result fair practice should be looked distinctively to these kinds of works. Derivative works open widely for the acceptance of fair practice defense than original creative works.

D. Status of the work

This test relies on whether the original work is published or unpublished. And it is unlikely to be fair practice if the taking is from the work which has not been published. Taking a material from unpublished work weighs against fair practice^[83].

Article 11 of the copy right proclamation No.410/2004 of Ethiopia requires the work to be published in order to reproduce for teaching purpose without the consent of the owner. But publication is not the requirement to get protection by the copyright proclamation. According to this article fair practice of unpublished work for the purpose of teaching is not allowed. This provision is not consistent with the fixation requirement of the proclamation. It has to be amended and allow fair practice of unpublished works for the purpose of teaching. However, bear in mind that article 13 of the proclamation provided an exception in which reproduction, broadcasting and other communication of unpublished work to the public for informatory purpose, reporting and providing current events or current information. The Federal Supreme Court Cassation Division of Ethiopia on file number 68369^[84], decided that publishing and reproduction of unpublished work of author without his consent is an infringement and does not fall under this exceptional provision, that is, article 13 of the proclamation^[85]. Publishing the whole work of the author in book form and distributing of it to the public is not for the purpose of informing the public, rather it amount to economic benefit which is exclusive right of author. In such a case the condition that is for the purpose of informing the public can never be a defense for the third party users.

Thus reproduction of a short excerpt of unpublished work for the purpose of education is not infringement.

E. Effect of the use on the potential market or value of the copyrighted work

This test tries to consider more the interest of copyright owner. It powerfully opposes a finding of fair practice. The impact of the use of a copyrighted work on the economic interest of owner has to be analyzed. It has been said that the most important purpose of copyright law is to protect the interest, mainly the market interest, of the owner. And the fair practice concept balances such interest with the societies. This test stand more from the side of the owner of copyright and it tells us that fair practice is not a concept only allows the use of a copyrighted work without limit^[86].

The excessive interference with an author's incentive affects negatively the aims of copyright. There is an assumption that

other than an audiovisual work, the economic rights shall be protected for fifty years from the date on which the work was either made or first made available to the public, or first published, whichever date is the latest".

⁸³. Supra note 2, p.171.

⁸⁴. The Ethiopian Federal Supreme Court Cassation Division's publication book vol.13, p.576.

⁸⁵. The Ethiopian Federal Supreme Court Cassation Division is empowered to interpret the laws of the country and will be binding on all lower courts of the country.

⁸⁶. Supra note 56, p.48.

the author created the copyrighted matter with the hope of generating rewards^[87].

This test is the most important standard that brings all the other standards to play simultaneously. The proportionality test whether it is qualitative or quantitative, has to be seen in line with the economic impact of the claimed fair practice. A small part of a large work may constitute the economic core and may defeat the claim of fair practice. And if the nature of the use is for profit, it has an impact on the potential economic market of the author so that the defense of fair practice may be rejected. The economic impact of the use up on the plaintiff has to be proved well and has to be balanced with other guidelines or factors of fair practice^[88]. But the healthy competition and creation of new works outweighs the minor economic loss that the original copyright owner might suffer^[89].

Here, not every types of market impairment oppose fair practice, only when the market is impaired because the quoted material serves the consumer as a substitute or supersede the use of the original^[90].

The objective of the Ethiopian copyright proclamation No.410/2004 is not only protecting the interest of the public. The interest of the copyright owner has to be balanced. Because of this that the limit fair practice is provided under Article 11(1) of the proclamation. Economic interest is the important interest of the copyright owner. This interest has to be taken in to account in allowing reproduction of his work for the purpose of education without his consent. This intention of the legislature can be derived from Article 9(2e) of the proclamation. By this sub- article a reproduction of a single copy of a work for personal purpose is limited if it conflicts with or unreasonably harm the normal exploitation of the work or the legitimate interest of the author. This will apply to all individuals including educators. So it can definitely be said that reproduction of a single copy of a work by teachers or students be unfair if it affect the economic interest or harm the normal exploitation of the owner of copyrighted work.

F. De minimis principle

That means too small for fair practice. In some cases, the amount of material copied is so small (or "de minimis") that the court permits it without even conducting a fair practice analysis^[91]. Trivial takings do not have place in fair practice analysis.

Applying the above, one or more standards weigh against the author's exclusive right^[92]. They are general standards. They lack complete and precise list of exempted acts and as a result may make difficult the application of them in a particular case. However, it provides a flexible frame work to reach at decision to new cases and to adopt solutions when new technologies are emerged. Here, even if fair practice can be used as a defense for the accusation of copyright infringement by taking in to account the above standards, it has to be noted that sufficient acknowledgement in case of fair practice is necessary^[93].

These are the general standards that help to determine

⁸⁷. Supra note 57, p.1125.

⁸⁸. Supra note 7, p.367.

⁸⁹. Supra note 60, p.185.

⁹⁰. Supra note 57, p.1125.

⁹¹. Ibid, p.1126.

⁹². Supra note 7, p.357.

⁹³. Supra note 67, p.574.

whether copying for educational purpose is fair or not. Further detailed guidelines (including numerical limits), by taking in to account the general standards, can be also provided particular to uses by educators and educational institutions. To do this all interested individuals and institutions have to agree on that. And the agreed guidelines have to be adopted by educational institutions as their own copyright policy. But they would be very detail to provide in the copyright law (Proclamation).

Courts must consider these standards, at a minimum, once if it is provided in the copyright law. Even with in these standards, courts, on case by case bases, have a great deal of discretions in determining whether a practice is fair or not. By now, education is expanding in the country, Ethiopia. Many schools and higher institutions are opened and also will be opened in the future. So, providing fair practice standards and the guidelines, by taking into account the countries policies is necessary for quality education and protecting the interest of authors.

6. Comparison with International Copyright Conventions: the three-step-test standards

Even if Ethiopia is not a party to almost all international copyright convention, by now the country is on the process of accession to the WTO and her application was accepted in February 2003. If Ethiopia becomes a member of WTO, automatically be obliged by the TRIPS Agreement since the TRIPS Agreement form part of the GATT/WTO (General Agreement on Tariff and Trade/World Trade Organization) document^[94].

So, under WTO, we have TRIPS Agreement which is not substantially different as such from the Berne convention. Even, Article 9 of the TRIPS Agreement recognizes the 1971 Berne convention to be part of the agreement.

Concerning the topic, Article 13 of TRIPS agreement provides limitations and exceptions to the exclusive right of the author and it reads as follows: *“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”*.

By this provision the TRIPS Agreement provided the three-step-tests in which state members should confine the exception by their national legislation^[95]. These tests are:

1. Exception should be given to certain special cases
2. Copying should not conflict with the normal exploitation of the work; and
3. Copying should not unreasonably prejudice the legitimate interest of the author.

Unfortunately, the conventions offer no guidance as to what constitute a “special case”, a “normal exploitation of the work”, or a “legitimate interest of the author”. The determination of these standards is left to member countries or in the event of conflict between countries, to an ICJ (international court of justice) or WTO (world trade organization) panel. The member states copyright law becomes WTO consistent if they confine the exceptions to

meet the three step-tests stated under Art.13 of the TRIPS agreement.

It is also expected from Ethiopia to see her copyright and neighboring rights Proclamation No. 410/2004, the exception provisions from the perspective of Article 13 of the TRIPS, specifically, to the three-step- test requirements. Concerning the first test, the proclamation provided exceptions to certain special cases like for private study, teaching, library and archival use, and for broadcasting and informatory purposes.

Concerning the second test, i.e. the exceptions should not conflict with a normal exploitation of the work requirement; the proclamation included this test only for the cases of one exception: reproduction for personal purpose. Art. 9(2e) of the proclamation states that reproduction for personal purposes should not conflict with or unreasonably harm the normal exploitation of the work. However, this test is not provided under the proclamation for other exceptions. Art.11 (teaching exception) of the proclamation does not mention this test. But the standards of fair practice have to include or take in to account this test.

The same is true concerning the third test, i.e. the exceptions should not unreasonably prejudice the legitimate interests of the right holder. The proclamation, under Article 9(2e), uses this test only for the reproduction of a work for personal purposes like the second test. Therefore, the proclamation does not use the tests consistently throughout its exceptional provisions. Even if the use is for educational purpose, it has to be reasonable. It should not make persons related with education to free ride.

To be consistent with TRIPS agreement, the exceptional provisions of the proclamation have to be revised in line with the three-step-tests provided in the TRIPS agreement. The fair practice interpretation has to take in to account also such three tests. The standards that are to be introduced in the future into the Ethiopian copyright law have to consider also such three-step-test required by the TRIPS. The standards have to take in to account these three tests provided by the TRIPS. This is because the three test requirements are provided by the TRIPS in order to balance between the rights of copyright owner and the interest of the public in access to copyrighted works. And the function of the fair practice standard is the same: to balance between the interest of the copyright owner and the public at large.

7. Conclusions and Recommendations

The purpose of copyright law is not to ensure the owner of copyright a maximum economic benefit, rather to balance the right of the copyright owner to obtain a fair return and society’s interest in access to and use of information. As a result, the copyright law does not only provide exclusive right to the copyright owner, but also exceptions to the exclusive right and allow the use of copyrighted work by third parties in certain circumstances. One of the important exception is education. An exception to the exclusive right of the owner can be given for the purpose of education. Article 11 of the Ethiopian copyright proclamation No.410/2004 allows the reproduction of a work by persons other than the owner for the purpose of teaching.

Such exception by itself does have its own limit. The exception, education, is generally guided by a limit known as fair practice. Fair practice is an equitable rule of reason that helps to balance the interests between the copyright owner and the public.

⁹⁴. Art.3 (2) of the proclamation also provides that the proclamation shall apply to works that are eligible for protection under international conventions in which Ethiopia is a party.

⁹⁵. Peter Van Den Bossche, The Law and Policy of the World Trade Organization: Text, Cases and Materials, 2nd ed., 2008, p. 767

Even if the fair practice is provided in the proclamation, its meaning and standards to apply it are not known. Without these it is difficult to implement.

As a result many individuals do not know about fair practice. Even, they do not know as it is stated in the copyright proclamation. So, if they do not know, they do not observe and respect. Educational institutions, teachers and students may take for granted that they can copy the work of another without limit if it is for the purpose of education. The owner of the work can claim and accuse the user of his work. Then determining whether there is infringement or a fair practice is left to be determined by the courts. However, fair practice is rarely known practically in courts of Ethiopia. Copyright cases related to education do not appear before court. Most cases that appear before the courts are related to infringement of musical and audio-visual works. This happened neither because the standard is known nor because it is respected by the people. The problem here is there is no standard for judges to interpret and apply fair practice. Even the individuals have to be certain about the outcome of the cases before court.

Therefore, the following recommendations have to be taken into account to avert the problems:

1. The appropriate standards which help to interpret and apply the fair practice have to be provided by a regulation. Standards by taking in to account the spirit of the proclamation No.410/2004 and the policy of the country have to be given specifically for the case of education by adapting relevant experience of other countries considered in this article.
2. While providing standards to fair practice, the three step test requirements of the international copyright conventions, specifically TRIPS, have to be considered.
3. Higher education institutions, in line with the standards provided by the regulation, have to provide detail guidelines, by using computer and new technologies called as electronic fences, in using copyrighted materials to their teachers and students.
4. The standards that would be determined by the regulation should not be exhaustive. They have to be illustrative and should give discretion for judges to include similar standards to handle new cases.
5. The fair practice concept and its standards for the cases of education have to be interpreted broadly, which inclines to the interest of the public in education. This will resolve the negative impact of strict copyright rules on the expansion and quality of higher education, since our country is a developing country. However, this has to be done to the extent of the three-step-test limit of international conventions permits.
6. Article 11 of the proclamation No.410/2004 provides that a fair practice for the purpose of teaching is allowed for "published" works. This limit the use of works unpublished but protected by copyright for the purpose of education. And there is no such requirement under international copyright conventions. So this has to be amended and fair practice of unpublished works has to be also allowed for the case of education. The same is true with regard to the word "reproduction" and it has to be replaced with a broad word –"exploitation" as it is provided in the Berne Convention, Article 10(2).
7. The Ethiopian Intellectual Property Office (EIPO) has to do activities to increase the awareness of individuals

in educational institutions in relation to copyright in general and fair practice standards in particular.

8. References

1. Bainbridge, David, *Intellectual Property*, 4 th ed, Pitman Publishing, 1999.
2. Cornish WR. *Intellectual Property: Patents, Copyright, Trade Marks And Allied Rights*, London (Sweet And Maxwell), 1981.
3. *Corpus Juris Secundum*, Copyright and Literary Property, A Complete Restatement Of American Law, Brooklyn NY, The American Law Book Company, 1939, 18.
4. Den Bossche, Peter Van, *the Law and Policy of the World Trade Organization: Text, Cases and Materials*, 2nd Ed, Cambridge University Press, 2008.
5. Fikremarkos Merso, *A text book on The Ethiopian law of Intellectual Property Rights: copyrights, trademarks, patents, utility models and industrial designs*, master printing press (Addis Ababa), 2012.
6. Goldstein Paul, *Copyright Patent Trademark. Related State Doctrines: Cases and Materials on the Law of Intellectual Property*, 3rded, University Case Book Series, 1993.
7. Kupferman, Theodore R. and Foner, Mathew (Eds), *Universal Copyright Convention Analyzed*, Federal Legal Publications, New York, 1995
8. Miler Arthur R, Michael H Davis. *Intellectual Property: Patents, Trade Marks, and Copyright In Nut Shell*, West Group, 2000.
9. Patterson L Ray. 'Understanding Fair Use: Law and Contemporary Problems', *Duke University School Of Law*, 1992, 55(2).
10. *Quality Of Higher Education In Ethiopian Public Institutions*, Forum For Social Studies, Addis Ababa, Ethiopia, 2009.
11. Senfleben Martin, *Copyright Limitations, And The Three Step Test: An Analysis Of The Three Step Test In International EC Copyright Law*, Kluwer Law International New York, 2004.
12. *World Intellectual Property Organization: Intellectual Property Reading Material*, 2 Ed, Geneva, 1998. Journals
13. *Copyright Fair Use: Case Law and Legislation*, *Duke Law Journal*, Duke University School Of Law, 1969, 1969(1)
14. Correa Carlos M. *Fair Use In The Digital Era*, *International Review Of Industrial Property And Copyright Law (IIC)*. The Max Plank Institute For IntellectualProperty, Competition And Tax Law, Munich, 2002, 33(5).
15. Leval Pierre N. *Towards A Fair Use Standard*, *Harvard Law Review*, the Harvard Law Review Association, 1990, 103(5).
16. Newby Tyler G. *What's Fair Here Is Not Fair Every Where: Does the American Fair Use Doctrine Violate International Copyright Law?* *Stanford Law Review*, 1999, 51(6).
17. Thi Phan, Dan Thu, *Will Fair Use Function on the Internet?* *Columbia Law Review*, 1998, 98(1).
18. Yankwich Leon R. *What Is Fair Use?* *The University Of Chicago Law Review*, 1954, 22(1). Unpublished Articles
19. Biset Beyene, *The Impact of the Doctrine of*

- Exhaustion of Intellectual Property Rights on International Trade: The Ethiopia Perspective (unpublished LL.M Thesis), Addis Ababa University, Addis Ababa, Ethiopia, 2008.
20. Getachew Mengistie. (Director General of Ethiopian Intellectual Property Office), Intellectual Property Assessment in Ethiopia (unpublished), Addis Ababa, 2006
 21. 21. Knights, Roger, Limitations and Exceptions under the 'Three Step Test' and in National Legislation – Differences Between the Analog and Digital Environments, Presented on Regional Workshop on Copyright and Related Rights in the Information Age Organized by the World Intellectual Property Organization (WIPO) in cooperation with Copyright Council of the Ministry of Education and Culture of the Eastern Republic of Uruguay, Montevideo, 2000.
 22. Mandefro Eshete And Mola Mengistu, Exceptions And Limitations Under The Ethiopian Copyright Regime: An Assessment Of The Impact On Expansion Of Education (Unpublished), 2009.
 23. Yoseph Mulugeta, the Doctrine of Faire Use and Its Application under the Ethiopian Copyright Law (Unpublished LL.B Thesis), Addis Ababa University, 1997
 24. National Legislations. Civil Code of the Empire of Ethiopia, Negarit Gazeta, 1960. Proclamation No.165/1960
 25. 25. Copyright and Neighboring Rights Protection Proclamation, Federal Negarit Gazeta of the Federal Democratic Republic Of Ethiopia, 2004. Proclamation No.410/2004.
 26. Copyright and Neighboring Rights Protection Amendment Proclamation, Federal Negarit Gazeta of the Federal Democratic Republic Of Ethiopia, 2004. Proclamation No.872/2014.
 27. Criminal code of Ethiopia, Proclamation No.414/2004 The Constitution of the Federal Democratic Republic of Ethiopia, proclamation No.1/1995
 28. International Conventions Agreement on Trade-Related Aspects of Intellectual Property Rights, (TRIPS) as it is signed in Marrakesh, morocco, on 15, 1994.
 29. Berne Copyright Convention as it is revised at Paris on, 1971.
 30. Universal copyright convention as it is revised at Paris on, 1971.
 31. World Intellectual Property Organization (WIPO) Copyright Treaty, As Adopted In Geneva, 1996.
 32. Internet sources. An Economic History of Copyright in Europe and the United States, <http://eh.net/encyclopedia/article/khan.copyright>, accessed, 2009.
 33. A Teachers Guide to Faire Use and Copyright,
 34. <http://www.brown.edu/Administration/Copyright/faq.html>, accessed, 2009.
 35. Circular. Reproduction of Copyrighted Works by Educators and Librarians, <http://www.copyright.gov>, accessed on, 2009
 36. Copyright Exceptions and Limitations, <http://www.copyright.gov/title17/92chap5.html-72k>, accessed on, 2008.
 37. Definition of Copyright, <http://www.nolo.com/definition.cfm/term/4B5A08FF-555D-4EBF89468COAFF8401F6>, accessed on, 2009.
 38. Educational Guidelines on Fair Use, <http://www.google.com.et/#hl=en&source=hp&p;q=copyright+and+fair+use+in+education&aq=3&oq=copyright+and+fair+use&fp=7ea6e1f422ecf2df>, accessed on, 2009.
 39. Fair Use and Education Copying Guidelines for Teaching and Learning, https://www.amherst.edu/academiclife/dean_faculty/fph/policies/fairuse, accessed on, 2009
 40. Fair Use Copyright Laws for Education, http://www.ehow.com/about_4812899_fair-use-copyright-laws-education.html, accessed on, 2009.
 41. Infringement of Copyright, <http://www.lostquilt.com/soverces.html>, accessed on, 2009.