



Balew Mersha Desta

Enforcement of Producer's Rights

Causes, Challenges and Prospects in
Enforcing Rights of Producers

VDM

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Dr. Müller

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This book is dedicated to Enemayehu Alemayehu (my mother), Wubirst Mersha (My sister) and Mersha Desta (My Father) who were eager to see my success but didn't.

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Acronyms

WTO-	World Trade Organization
WIPO-	World Intellectual Property Organization
EIPO –	Ethiopian Intellectual Property Office
TRIPS-	Trade-Related Aspects of Intellectual Property Rights
CD-	Compact Disc
VCD-	Visual Compact Disc
DVD-	Digital Visual Disc
EAVPA –	Ethiopian Audio Visual Producers Associations
IPR –	Intellectual Property Right
UDHR –	Universal Declaration of Human Rights
FDRE –	Federal Democratic Republic of Ethiopia

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CHAPTER ONE: INTRODUCTION

1.1 Background of the Problem

As a result of the industrial revolution and rapid developments made in the fields of science, technology and culture, new kinds of property came in to existence. The concept of property has undergone a sea change especially after the Second World War¹. New rights and properties like patent, copyright and industrial designs, which came to be known as Intellectual Property Rights (IPRs) have received a great attention. An intellectual property right is a "mere right lacking tangible substance and pertains to incorporeal property which owes its existence to recognition accorded to it by law and has no existence except as a legal right"².

Copyright, among the bundles of IPRs, refers to the intangible rights of creators of the works³ (literary and artistic in nature) of the mind. The unique and fragile nature of copyright and its possible exploitation all over the world made the industrially and scientifically developed and the developing countries took the necessary measure to protect these rights by international cooperation and domestic legislation in their respective countries.⁴ Consequently, various international conventions and treaties have been signed into law and countries have also stretched the legal platform for the effective protection of copyrights domestically.

The reason for countries to safeguard and ensure the protection of copyrights is two-fold:⁵

One is to give statutory expression to the moral and economic rights of creators in their creations and such rights of the public access to those creations (as the public desire for entertainment, propagation of education, cultural progress, transfer of information and so forth). The second is to promote, as a deliberate act of government policy, creativity

¹ Reddy's G.B, *Intellectual Property Rights and the Law*, (1st ed., 2000), p.2

² Ibid

³ Work is the term used in the Ethiopian copyright law to describe the various objects that are protected by copyright

⁴ *WIPO Intellectual Property Reading Material*, (2000), p.3.

⁵ Ibid

and the dissemination and application of its results and to encourage fair dealing, which would contribute to economic and social development.

These policies behind copyright protections invariably work true for Ethiopia too.

The history of legal platform for copyright protection in Ethiopia dates back to the enactment of the Civil Code in 1960. It is, however, a paradox why laws dealing with copyright were legislated at a time when the circumstances in the country did not warrant them. Truly speaking, copyright protection had little relevance and protection of copyrightable works in the country was far from the scene. The infrastructural and other institutional supports and facilities needed for the development and promotion of creative works were virtually lacking, and the few existing ones were poorly equipped and their impact was hence negligible.

Despite the aforementioned scenario in the country, the laws dealing with copyright protection were incorporated in the 1960 Civil Code of Ethiopia. However, the Civil Code failed to put the types of works protected, requirements for copyright protection, the rights of authors and their limitations with sufficient precision. Even the law never touched neighboring rights: rights of performers, producer of sound-recordings and rights of broadcasting organizations and their limitations. Not surprisingly, the law of literary and artistic ownership is silent on the subject of assignment and licensing of economic rights. The remedy made available in the Civil Code to any violations of the right was not adequately addressed. The enforcement measures provided under art 1674 of the Civil Code and the cross reference to the provisions of Law of Extra-Contractual Liability and Unjust Enrichment were not therefore adequate in remedying violations or preventing the same.

Towards the late 1990s, Ethiopia came up with some fresh initiatives to revise and enforce copyright laws. However, revising and enacting a copyright law takes a long time. The sudden upsurge of the music market and the downfall of the audiovisual producers in the country over the past few years prompted some prominent commercial artists and phonogram producers to organize themselves to put pressure on the government for effective copyright protection of their works. The developments ultimately culminated in the

enactment of a new Copyright and Neighboring Rights Proclamation No 410/2004 (hereinafter Proclamation).

The Proclamation is structurally well organized, and is more extensive and up-to-date than the former one, though it is not perfect. It contains more detailed provisions concerning types of works protected, economic and moral rights of authors and/or owners and their limitations. The Proclamation also encompasses enforcement measures, which, to a considerable extent, conform to the minimum requirements set by the TRIPS Agreement. Standardizing the law to conform to the minimum requirements laid down in the TRIPS Agreement is indeed a crucial step and helps a lot Ethiopia's accession process to the WTO. In this last piece of legislation protection is also extended to the neighboring rights of the performers, phonogram producers and broadcasting organizations, which is a first of its kind in the copyright history of the country.

Different legal systems have furnished definitions for the term copyright. In the common law legal system, copyright is taken as a right to copy, i.e., to print and reprint the work⁶; and it is dependent upon an existing work that has a material form so as to be copied, or printed and reprinted. In this legal system, it is only the economic aspect of copyright and not the moral rights that has been given more recognition. However, in the continental legal systems, copyright is conceived of as comprising dual rights: economic and moral rights⁷. Moral rights are attached to the very person of the author, whereas economic rights are associated with the exploitation of the work.

The position of the Ethiopian law can be sought from Art.2 (8) of the Proclamation, which defines copyright as "an economic right subsisting in a work and *where appropriate* includes moral right of an author." [Emphasis mine] Truly, the definition allotted to the term copyright impinges upon the scope of the legal protection accorded to the subject. Does the Proclamation recognize the importance of moral rights? Is the definition provided a comprehensive one? To which legal system does our copyright law conform to?

Articles 7 and 8 of the Proclamation are wholly devoted to the rights/economic and moral rights/ of the authors. There are bundles of economic rights given to authors (owners) such

⁶ Edward Wilhelm Ploman and L-Clark Hamilton, *Copyright: Intellectual Property in the Information Age*, (1980), p.26

⁷ Id, p.108

as reproduction, translation, adaptation, arrangement, distribution by sale or rent, importation, public display, performance, broadcasting and other communication to the public. Besides, the Proclamation explicitly recognizes moral rights: right to paternity, right to integrity, right to modify, right to remain anonymous or to use pseudonym and the right to publish. The incorporation of these rights in such a great detail is the major departure from the 1960 Civil Code of Ethiopia.

On top of this, Arts 9-19 of the Proclamation deal extensively with limitations and exemptions. Unlike the Anglo-American system where statutory limitations and exemptions are further supplemented by the so-called doctrine of "fair use", the Ethiopian copyright and neighboring rights law, like continental law, has opted for a number of statutory exemptions allowing the user to make short excerpts or reproductions from the published copyrighted materials for specific purposes without the approval of the copyright owners. These exemptions basically relate to such uses as research and teaching, quotations, reproductions for personal purposes, reproduction by library, archives and similar institutions, reproduction, broadcasting and other communication to the public for informatory purpose, importation for personal purpose, private performance free of charge, issuance of non-voluntary license, display of works, distribution of works and time limitation.

In this regard, as indicated earlier, one of the main purposes of copyright protection is to encourage authors by rewarding them with incentives for their work. In doing so, their works, in principle, can't be reproduced, copied, displayed, performed, or broadcasted, etc without their consent. However, it is a public secret that many copyrighted works that include sound recordings are copied everywhere under the guise of private purpose other reasons against the consent of the author and producers of sound recordings. Likewise, the rights of performers and producers are grossly overlooked in so many nightclubs, hotels, bazaars and exhibitions.

It should be underscored that the rights of authors and producers must be determined by delicate balance between two socially useful but opposed interests: there should be sufficient protection to encourage the production of works vital to the cultural needs of the society and this protection should not be so extensive to frustrate reasonable access⁸. It is

⁸ J.S Lawrence, and Timberg, *Fair Use and Free Inquiry, Copyright Law and the New Media*, (1980), P.222

here that the limitations to rights of authors come to play. Thus any limitation on the exclusive rights of copyright owners is to strike the often required balance between the interests of the users of copyrighted works and that of the authors of such works.

Arts 21-25 of the Proclamation deal with subjects of copyright, i.e. who own the copyright in a work; the nature and scope of assignment and license of economic rights. It is generally accepted that the first owner of economic right is the author. However, there may be co-authors who enjoy economic rights jointly. Copyrightable works may also be created during employment or through payment of commission. From these works there follows a debate about on whom economic rights arising there from should be vested. Is it for the employer or the employee or the commissioned author?

Neighboring rights are given protection in our law for the first time in 2004 by virtue of the Proclamation. They are often closely associated with copyrights; hence copyright laws have to take in to account these associated rights. To put it differently, neighboring rights are rights that are related to but not identical with copyrights. Accordingly, they cover other categories of owners' rights, namely, performers, the producers of sound recordings and broadcasting organizations as provided under Arts 26-31 of the Proclamation. The performers, producers of sound recordings (hereinafter called producer) and broadcasting organizations have their own exclusive rights with certain limitations. The thesis focuses on the rights of producers of sound recordings and the enforcement of such rights.

Sound recordings may incorporate music alone, words alone, or both music and words. The right to authorize the making of sound recording belongs to the owner of the copyright in the music and also to the owner of the copyright in the words. If the two owners are different, then in the case of a sound recording incorporating both music and words, the producer of the sound recording must obtain the authorization of both owners through the contract concluded between the performers and producers of sound recordings. In other words, originally the producer of sound recording must obtain the authorization of the performers who play the music and who sing or recite the words.

It is true that the increasing technological development of sound recordings and cassettes and, more recently, compact discs (CDs), and their rapid proliferation, was pointing to the need of protection of producers of sound recordings. The appeal of sound recording

coupled with the easy availability in the market of the variety of increasingly sophisticated recording devices, created the growing problem of piracy, which by now has become a worldwide scourge. In addition, there is increasing use of records and discs by broadcasting organizations. The use of records and discs by the latter provides publicity for the sound recording and for their producers, which in turn is an essential ingredient of the daily programs of broadcasting organizations. Consequently, just as the performers were seeking their own protection, the producers of sound recordings began to pursue their protection against unauthorized duplication of their sound recordings, as also for remuneration for the use of sound recordings for purposes of broadcasting or other forms of communication to the public.

In Ethiopia, even after the enactment of the Proclamation, it appears that both the right-holders and consumers of intellectual works do not have a good understanding of the contents of such rights and their outer limits. Public media, business undertakings that mainly provide secretarial and computer service and those which run the underground business of reproducing cassette in CD, VCD or DVD forms, or one in the form of another, music shops and private users of works of the mind are some of the outstanding infringers. There is a rampant infringement which is not given attention to the extent it demands by the state, the people and right – holders. Hence, the problems and prospects associated with enforcement of rights of producers among the neighboring right will be given due consideration.

Under Art 3(4) of the Proclamation protection of sound recordings is available to producers that are nationals of Ethiopia, producers whose works were first fixed or published in Ethiopia.

Lastly, Arts 33-36 deal with remedies available in cases where there are infringements of rights. The enforcement mechanisms shall be ensured so as to permit effective actions against any act of infringement of copyright and neighboring rights. These measures have to be streamlined so as to effectively prevent infringements, and when they occur, adequate remedies have to be made available regard being made to deterrence of further conducts. However, those mechanisms shall be applied in such a manner as to avoid the creation of barriers to fair trade and to provide for safeguards against their abuse. The

enforcement mechanisms in our law are: provisional measures, civil remedies, border measures and criminal sanctions.

1.2 Statement of the Problem

With the above stated background, the research primarily seeks answers to the questions posed herein under.

1. What are the rights of producer of sound recordings and their limitations?
2. What are the enforcement mechanisms designed under Ethiopian law to protect the rights of producers?
3. How and to what extent do such enforcement mechanisms effectively provide remedy for the producer whose rights is infringed?
4. Are there any legal and practical problems, which are bottlenecks for the enforcement of the rights of producers?

1.3 Objectives

The book has the general objective of critically examining the enforcement mechanisms of protecting the rights of producers of sound recordings. It has the following as its specific objectives:

1. Analyze the nature of neighboring rights of performers, producer of sound recording and broadcasting organization, especially the rights of producers of sound recordings with their limitation.
2. Examine the infringement and types of remedies available for the enforcement of the rights of producers.
3. Assess the practical observance of the law and factors, which are drawbacks to the effective realization of rights of producers of sound recordings?

1.4 Significance of the Book

Although almost two years and six months have passed since the enactment of the Proclamation, a book dealing with this law is hardly available. The aim of this book is, therefore, to contribute to an informed debate whether the new copyright legislation has