

# Some Worrisome Issues Surrounding the Ambit of the Copyright and Neighboring Rights Law of Ethiopia: A Comparative Legal Analysis

Aschalew Ashagre\*

## Abstract

*In 2004, Ethiopia proclaimed the Copyright and Neighboring Rights Protection Proclamation, which is still operational, to give adequate safeguards to copyright and neighboring rights in the country. To this end, the law made several commendable departures as compared to the provisions of the 1960 Civil Code of Ethiopia (which were meant to regulate the rights of authors of artistic and literary works). One of the conspicuous improvements the Copyright Proclamation made is determining its scope of application (defining the ambit of the law), since doing so is instrumental for the proper implementation of the law which in turn helps to furnish proper protection to the rights of authors and owners of neighboring rights recognized under the law. Nonetheless, a close examination of the of the relevant provisions of the law under consideration reveals that there are certain critical problems in relation to its scope of application which may overshadow the apt enforcement of the law. Hence, this author feels that it is time to analyze the problems and suggest relevant remedies that may be utilized by the Ethiopian legislature in the course of amending the law. This piece is aimed at making a thorough analysis of the provisions of the Copyright Law germane to the agenda under*

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\* LL.B, LL.M, Lecturer in Law at the School of Law, College of Law and Governance Studies, Addis Ababa University; consultant and attorney-at-law at the Federal Courts of Ethiopia.  
E-mail: [gakidan.ashagre335@gmail.com](mailto:gakidan.ashagre335@gmail.com).

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*discussion, and forwarding possible recommendations to the problems so identified in the course of this research.*

**Key Words:** Copyright, neighboring rights, audiovisual works, performers, sound recording, broadcasts, broadcasting organization

## **Introduction**

Copyright and neighboring rights (otherwise known as related rights) are among the most important intellectual property rights, playing a remarkable role in the cultural, social, economic and scientific progress of individual countries and the world. On account of this, various countries have put in place both legal and institutional frameworks to accord adequate protection to copyright and neighboring rights.<sup>1</sup> At the international level, there are several international conventions<sup>2</sup> that are designed to safeguard these rights.

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<sup>1</sup>Goldstein, P., *International Copyright: Principles, Law and Practice*, Oxford University Press, 2001, pp 3-44. See also McKeown, J. S., *Canadian Intellectual Property Law and Strategy*, Oxford University Press, 2010; Chafee, Z., Reflections on the Law of Copyright, *Columbia Law Review*, Vol. 45, No. 4, July 1945, pp. 503-529; Darmstadt, B. G., Limiting Locke: A Natural Law Justification for the Fair Use Doctrine, *Yale Law Journal*, Vol. 112, No. 5, March 2003, pp. 1179-1221.

<sup>2</sup>Relevant in this regard are: Agreement on Trade-Related Aspects of Intellectual Properties, which was adopted in 1994 [hereinafter the TRIPS Agreement]; Berne Convention for the Protection of Literary and Artistic Works, which was originally adopted in 1886,[hereinafter the Berne Convention]; World Intellectual Property Organization (WIPO) Copyright Treaty, which was adopted in Geneva on 20 December 1996 and entered in force in March 2002; Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted on 26 October 1961 [hereinafter the 1961 Rome Convention]; WIPO Performances and Phonograms Treaty, which was adopted in December 1996 and entered into force in May 2002; and the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, adopted in Brussels on 21 May 1974 [hereinafter the 1974 Brussels Convention].

In Ethiopia, the 1960 Civil Code broke new ground as far as protection of literary and artistic works was concerned<sup>3</sup> despite the fact that the Code did not cover what we call neighboring or related rights such as the rights of performers, producers of sound recordings, broadcasts of broadcasting organizations and the like. Also, the 1995 FDRE Constitution declared the right to property in general and copyright and neighboring rights in particular to be fundamental constitutional rights.<sup>4</sup> In addition to the general principles of the Constitution, in 2004 Ethiopia put in place a relatively modern and comprehensive proclamation, the Copyright and Neighboring Rights Protection Proclamation (hereinafter the Ethiopian Copyright Proclamation).<sup>5</sup> This proclamation has made certain improvements which are expected to ensure adequate protection and enforcement of copyright and related (neighboring) rights in the country. The Copyright Proclamation has, *inter alia*, defined its scope of application with respect to the protection of copyright *per se* and neighboring rights by incorporating

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<sup>3</sup>The Civil Code of the Empire of Ethiopia, 1960, Proclamation No. 165, *Negarit Gazeta*, Year 19, No. 2. Title XI (11) under book three of the Code was devoted to regulation of literary and artistic ownership. See Arts. 1647-1674 of the Civil Code. Regarding history of copyright in Ethiopia, see the following works: Sileshi Zeyohannes, *The Ethiopian Law of Literary and Artistic Property*, unpublished, Faculty of Law, Addis Ababa University, 1983; Molla Mengistu and Mandefro Eshete, Exceptions and Limitations under the Ethiopian Copyright Regime: An Assessment of the Impact on Expansion of Education, *Journal of Ethiopian Law*, Vol. 25(1), September 2010, pp 160-168.

<sup>4</sup> The Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art. 40, Proclamation No. 1/1995, *Federal Negarit Gazeta*, Year 1, No. 1. This constitution was approved on December 8, 1994 by a Constitutional Assembly and entered into force as of 21 August 1995. [hereinafter the FDRE Constitution]. Part two of chapter three of the Constitution has embodied what are called fundamental rights and freedoms, to which the right to property, including copyright and neighboring rights, belong.

<sup>5</sup> Copyright and Neighboring Rights Protection Proclamation, 2004, Proclamation No. 410/2004, *Federal Negarit Gazeta*, Year 10, No. 55 [hereinafter the Copyright Proclamation].

general and specific criteria for the qualification of works (copyright and neighboring rights) to be protected in Ethiopia. The general grounds of qualification are nationality or residence of the author(s), but there are specific grounds of qualification for audio-visual works, works of architecture, performances, sound recordings and broadcasts of broadcasting organizations.

In spite of this, the author argues that there are several critical problems surrounding the scope of application of the Ethiopian Copyright Proclamation that will lead to unwanted controversies in the course of implementation of the Proclamation. Because of this, the author has embarked on this modest research work to analyze the problems and put forward some recommendations that will have significant importance for the amendment of the Proclamation and/or filling the gaps through secondary legislation-regulations and directives.

This piece is, therefore, meant to answer the following general research questions: What are the grounds of qualification for the protection of copyright and neighboring rights in Ethiopia? Are there clear criteria of eligibility (qualification criteria) for both copyright and neighboring rights under the proclamation? Has the Ethiopian Copyright Proclamation dealt with issues surrounding its scope of application as exhaustively as possible? What solutions might remedy any problems in the Copyright Proclamation with regard to its scope of application?

In order to furnish answers to these queries, the principal method of research employed by the author is legal analysis (doctrinal analysis), as there are no court decisions in Ethiopia on the scope of application of the Ethiopian Copyright and Neighboring Rights Law to the best of the author's knowledge.

To this end, the author consulted works of various writers (books and journal articles) and selected copyright laws of foreign jurisdictions such as Germany, Italy, the Netherlands, Norway, USA, UK and Tanzania. Pertinent international conventions such as the Berne Convention on the protection of literary and artistic works, the TRIPS Agreement, the 1961 Rome Convention on the rights of performers, producers of phonograms (sound recordings) and broadcasts of broadcasting organizations, the World Intellectual Property Organization's Performance and Phonographic Treaty and Convention relating to the Distribution of Program- Carrying Signals Transmitted by Satellite have also been utilized as appropriate. The author used these conventions extensively because they help us to understand the spirit of the provisions of the Ethiopian Copyright Proclamation. This is so because the Copyright Proclamation was, in one way or another, influenced by these conventions,<sup>6</sup> despite the fact that Ethiopia is not yet a member of most international intellectual property protection conventions.<sup>7</sup>

With regard to its organization, this piece contains three parts. Part one examines the essence of copyright and neighboring rights, believing that this discussion will help us properly understand the discussion and analyses that follow. Part two of the paper is devoted to the analysis of the general and specific criteria for qualification of works to be protected by the Copyright Proclamation of Ethiopia. This part investigates points of attachment of works

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<sup>6</sup>Telephone Interview with Ato Getachew Mengistie, former Director General of the Ethiopian Intellectual Property Office, EIPO, 27 April 2012.

<sup>7</sup>See Getachew Mengistie, *Intellectual Property Assessment in Ethiopia*, December 2006, p.28. Ethiopia has been working towards acceding to the WTO for the last ten years. If her accession appeal is accepted, accepting international conventions dealing with copyright will be automatic.

with the Ethiopian Copyright Law such as nationality, residence, publication of the work in Ethiopia and erection of architectural works in Ethiopia. Under Part three of the paper, attempt has been made to analyze the criteria of protection for neighboring rights- performances, sound recordings and broadcasts. In so doing, territoriality of performance, fixation and publication of sound recordings, location of headquarters in Ethiopia and the transmission of broadcasts from a transmitter located in Ethiopia have been touched discussed as critically as possible. Finally, the works comes to an end with brief concluding remarks and recommendations to the problems identified in the course of conducting this research work.

## **1. The Conceptual Underpinning of Copyright and Neighboring Rights: An Overview**

Because copyright and neighboring rights are closely related intellectual properties, they are generally treated together. The former are termed “primary works” while the latter are referred to as “derivative works.” As the focus of this article is on both copyright and neighboring rights, this section of the article is meant to frame and elucidate these two concepts very briefly.

Furnishing a universally accepted definition of the term “copyright” has proven an arduous task. For this reason, the nature of copyright has remained a source of doctrinal controversies and there is no authoritative definition to serve all purposes. This is because each and every legal system provides different conditions and procedures that pertain to the definition of

the term.<sup>8</sup> Nevertheless, certain definitions shed light on the concept. According to Black's Law Dictionary,<sup>9</sup> copyright pertains to:

the right to copy; specifically, it is a property right in original work of authorship, including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, architectural, motion pictures, audiovisual works and sound recordings, fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform and display the works.

From the above definition, it is possible to understand that copyright is a right to property, which confers upon the author exclusive rights over this property. The exclusive rights of the author extend to reproduction, adaptation, distribution, performance, display of the work and the like. This definition enumerates the works that are covered by copyright. However, it should be borne in mind that the enumeration made by the dictionary is not exhaustive, although it incorporates the major works that have been copyrightable in many jurisdictions,<sup>10</sup> including the Ethiopian legal system.<sup>11</sup> The other important matter that this definition addresses is the fact that copyright subsists in an original work, which is fixed in any tangible medium

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<sup>8</sup>Ploman, E. W. and Hamilton, L. C., *Copyright: Intellectual Property in the Information Age*, Routledge, London, 1980, p. 26.

<sup>9</sup>Garner, B. A. (ed.), *Black's Law Dictionary*, 8<sup>th</sup> ed., West Academic, 2008, p. 361.

<sup>10</sup>Works enumerated by *Black's Laws Dictionary* are commonly protected in other jurisdictions. See Prime, T., *The Law of Copyright*, Tolley Publishing, 1992, pp. 20-41. See also, Bainbridge, D. I., *Intellectual Property*, 7<sup>th</sup> ed., Longman, 2009, pp. 31-82.

<sup>11</sup>See Art. 2(30) of the Ethiopian Copyright Proclamation, *supra* note 5.

of expression. Thus the definition in Black's Law Dictionary includes the two cornerstones of the protection of copyright, i.e., originality and fixation.<sup>12</sup>

According to Bainbridge, copyright is a property right that subsists (exists) in various composition works such as literary, artistic and musical works, sound recordings, films and broadcasts.<sup>13</sup> Like Black's Law Dictionary, Bainbridge tries to explain the term by enumerating copyrightable works although the enumerations here are more general. At this juncture, it should be clear that the dictionary definition of copyright and the list of works provided are based on the American legal system,<sup>14</sup> whereas Bainbridge's list is based on the British legal system. A comparison of these lists reveals the similarities of the two legal systems with regard to copyright and its coverage. Thus, the author will henceforth refer to the Anglo-American systems, as these two systems are essentially the same with minor exceptions.<sup>15</sup>

The laws of countries with civil law legal systems do not as such try to define copyright directly. Rather the laws try to show what copyrightable works are by providing extensive enumeration of the works. For instance, Article 1(1) of the Italian Copyright Statute<sup>16</sup> provides copyright pertains to:

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<sup>12</sup>These are two tests of copyrightability of a work under the Ethiopian Copyright Proclamation. See article 6 of the Ethiopian Copyright Proclamation, *supra* note 5.

<sup>13</sup>Bainbridge, *supra* note 10 at 5.

<sup>14</sup>*Black's Laws Dictionary* is acclaimed worldwide. However, the dictionary provides meanings of legal terminology predominantly on the basis of the America legal system, while Professor David I. Bainbridge essentially gives his analysis based on the UK Copyright, Design and Patent Act of 1988.

<sup>15</sup>In order to understand the conspicuous similarities between the American Copyright Law and the English Copyright law, refer to Miller, A. R. and Davis, M. H., *Intellectual Property: Patents, Trademarks and Copyright in a Nutshell*, West Group, 2000, pp. 285-422. See also Bainbridge, *supra* note 10, and Prime, *supra* note 10.

<sup>16</sup>Italian Copyright Law for the Protection of Copyright and Neighboring Rights, 1941, Law No. 633 of April 22, as last amended by Legislative Decree No. 68, of April 9, 2003 [hereinafter the Italian Copyright Law].



works of the mind having a creative character and belonging to literature, music, figurative arts, architecture, theatre or cinematography, whatever their mode or form of expression, shall be protected in accordance the law.<sup>17</sup>

Article 2 of the statute declares that copyright protection shall extend to:

- 1) literary, dramatic, scientific, didactic and religious works, whether in written or oral form;
- 2) musical works and compositions, with or without words, dramatic-musical works, and musical variations that themselves constitute original works;
- 3) choreographic works and works of dumb show, the form of which is fixed in writing or otherwise;
- 4) works of sculpture, painting, drawing, engraving and similar figurative arts, including scenic art;
- 5) architectural plans and works;
- 6) works of cinematographic art, whether silent or with sound form, provided they are not mere documentaries protected in accordance with [this law];
- 7) works of photographic art and works expressed with processes analogous to photograph;

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<sup>17</sup>*Ibid.* Sub-article 2 of the same law states that computer programs shall also be protected as literary works, within the meaning of the Convention for the Protection of Literary and Artistic Works, ratified and enforceable pursuant to Law no. 399 of June 20, 1978, as well as databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright.

- 8) databases meant as collections of works, data or other independent materials which are systematically or methodically arranged and can be individually accessed by electronic or other means;
- 9) works of industrial design which themselves have a creative and artistic value.

According to Article 1 of the Copyright Law of the Netherlands,<sup>18</sup> copyright is the exclusive right of the author of a literary, scientific or artistic work, or of his assignees, to make such work public and to reproduce it, subject to the limitations provided in the law. Article 10 of the same law provides that copyrightable works include books, pamphlets, newspapers, periodicals and all other writings, dramatic and dramatic-musical works, lectures, choreographic works and entertainments in dumb show, the acting form of which is fixed in writing or otherwise, musical works, with or without words, drawings, paintings, works of architecture and sculpture, lithographs, engravings and the like, geographical maps, plans, sketches and three-dimensional works relating to architecture, geography, topography or other sciences, photographic and cinematographic works, and works produced by analogous processes, works of applied art and industrial designs and the like.<sup>19</sup>

When we come to the notion of neighboring rights, the notion is not used expressly in common law legal systems, although their laws have accorded protection to the rights which are commonly called neighboring

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<sup>18</sup>Copyright Act of the Netherlands, 1912, as last amended by the Law of October 27, 1972 [hereinafter the Copyright Act of the Netherlands].

<sup>19</sup>*Ibid.*, Art. 10.

rights in civil law countries. Giving a comprehensive definition to these rights is not possible.<sup>20</sup> However, it is not difficult to understand what neighboring rights are when we have a close look at the enumerations made by various national as well as international legal instruments dealing with them. For instance, Part Two of the 1965 Copyright Law of the Federal Democratic Republic of Germany, which was amended in 1998,<sup>21</sup> deals with neighboring rights which include rights of performers, producers of audio recordings, photographs, broadcasts of broadcast organizations, scientific editions, databases and the like.<sup>22</sup> By the same token, Part II of the Italian Copyright Statute,<sup>23</sup> which includes eight chapters, is devoted to the recognition and protection of neighboring rights. According to this law, these rights include the rights of producers of phonograms, producers of cinematographic works, producers of audio-visual works, rights of radio and television broadcasting, rights of performers, rights in works published or communicated to the public after the author's economic rights have expired, rights in critical and scientific editions of works in the public domain, rights in the public domain, rights for designs in stage sets, rights in photographs, and so forth.<sup>24</sup>

At the international level, some important conventions have been devoted to various types of neighboring rights. The first organized international response to the need for the legal protection of neighboring

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<sup>20</sup>For a detailed account of neighboring rights, see Bodenhausen, G. H. C., *Protection of Neighboring Rights*, Contemporary Problems, Vol. 19, No. 2, Spring 1954, pp. 156-171.

<sup>21</sup>Copyright Law of the Federal Democratic Republic of Germany, 1965, as last amended in 1998 [hereinafter the German Copyright Law].

<sup>22</sup>*Id.*, See part two of the law which covers Arts. 70-87, dealing with neighboring rights.

<sup>23</sup>Italian Copyright Law, *supra* note 16.

<sup>24</sup>*Id.* See Arts. 72-102 of the law, which has incorporated various neighboring rights in a very detailed fashion.

rights was the conclusion of the 1961 Rome Convention, the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations.<sup>25</sup> Unlike most international conventions, which follow in the wake of national legislation and are intended to synthesize existing laws, the Rome Convention was an attempt to establish international regulations in a new field where few national laws existed at that time. This means that most states would have to draft and enact new laws before adhering to the convention. Since the adoption of this convention, a large number of states have legislated on related matters.<sup>26</sup> Other relevant international conventions in the field of neighboring rights are the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, Geneva 1971;<sup>27</sup> the Convention Relating to Distribution of Program-Carrying Signals Transmitted by Satellite, Brussels 1974;<sup>28</sup> and the TRIPS Agreement, which also contained provisions on neighboring rights.<sup>29</sup>

The purpose of neighboring rights is to protect the legal interests of certain persons and legal entities that either contribute to the making of works available to the public or produce subject matter which expresses creativity or technical and organizational skill sufficient to justify recognition of copyright-like property rights. The law of neighboring rights deems that productions which result from the activities of such persons and entities

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<sup>25</sup>The 1961 Rome Convention, *supra* note 2.

<sup>26</sup>See WIPO, *WIPO Academy on Intellectual Property*, 1999, pp.95-118.

<sup>27</sup>Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, Geneva, 1971, [hereinafter the Convention for the Protection of Producers of Phonograms].

<sup>28</sup>Convention Relating to Distribution of Program-Carrying Signals Transmitted by Satellite, *supra* note 2.

<sup>29</sup>The TRIPS Agreement, *supra* note 2.

deserve legal protection in and of themselves, as they are “neighbors” to the protection of authorship under copyright.<sup>30</sup>

Although literary and artistic works have had long historical significance in the religious and secular life of the Ethiopian people, copyright was dealt with for the first time, in Ethiopian legal history, under the 1960 Civil Code.<sup>31</sup> However, the Civil Code did not try to define the term under consideration except by enumerating copyrightable works.<sup>32</sup> As explained previously, because the Civil Code was not comprehensive, the Ethiopian government made a new proclamation, the Copyright and Neighboring Rights Protection Proclamation, Proc. No. 410/2004. The title of the Proclamation indicates that it has given recognition to both copyright and neighboring rights, following the civil law tradition, as civil law countries invariably use both copyright and neighboring rights.<sup>33</sup> Moreover, although Ethiopia is not yet a party to any of the international conventions dealing with neighboring rights, our law seems to have been influenced by these conventions as it has given recognition to some of the major neighboring rights which are internationally recognized. Article 2(8) of the Proclamation defines copyright as an economic right subsisting in a work and where appropriate includes moral rights of an author.

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<sup>30</sup>See WIPO Academy, *supra* note 26 at 95.

<sup>31</sup>See Arts. 1647–1674, book three of the 1960 Civil Code, *supra* note 3. See also the discussions by Mengistu and Eshete, *supra* note 3 at 160-168.

<sup>32</sup>*Id.* See Art. 1648 of the Civil Code of Ethiopia, *supra* note 3, which has enumerated several artistic and literary works such as books, booklets, articles in review, newspapers, lectures, speeches, sermons, theatrical and other dramatic works, musical compositions with or without text, dramatic-musical works, radio phonic or radio visual works, choreographic works or pantomimes, drawings, paintings, engravings and sculptures, photographic and cinematographic works, illustrations, maps, plans, sketches, and plastic works pertaining to geography, topography, architecture or other sciences.

<sup>33</sup>See, e.g., Italian Copyright Law, the Copyright Act of the Netherlands and the German Copyright Law, *supra* notes 16, 18 and 21, respectively.

While the approach followed by the aforementioned copyright laws of different countries is enumeration of works which are subsumed by the term copyright, under the Ethiopian Copyright Proclamation the definition accorded to the term has capitalized on the term “work” which is one of the core elements of copyright since copyright is not conceivable without work.<sup>34</sup> However, it is understandable that the enumerations in various laws regarding copyright and the copyrightable works included in the term work under the Ethiopian Copyright Law are similar, if not identical in all respects.

Therefore, it is necessary to understand the term work in the context of this proclamation. Work has been defined under Article 2(30) of the same Proclamation as:

a production in the literary, scientific and artistic fields and includes works such as books, booklets, articles in reviews, newspapers, computer programs, speeches, lectures, addresses, sermons, and other oral works, dramatic works, dramatic-musical works, pantomime, choreographic works, works created for stage production, musical compositions, audiovisual works, works of architecture, works of drawing, painting, sculpture, engraving, lithography, tapestry and other works of fine art, photographic works, illustrations, maps, plans, sketches, three-dimensional works related to geography, topography, architecture or science.

The above enumeration indicates that copyright relates to various artistic, literary and scientific works of the mind. In addition, we can safely conclude that because defining copyright is a tough task, the Ethiopian lawmaker has tried to make clear what copyright is by making an extensive

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<sup>34</sup>See Colston, C., *Principles of Intellectual Property Law*, Routledge, 1999, pp. 167-168.

list of copyrightable works. The point, however, is whether neighboring rights incorporated under the Ethiopian law are works. In other words, isn't a performance, a sound recording or a broadcast a work? If we stick to Bainbridge's explanation of the term copyright,<sup>35</sup> which reflects the English legal system, we can contend that what are called neighboring rights under the Ethiopian Copyright Proclamation are definitely works. In this regard, the Ethiopian Intellectual Property Establishment Proclamation<sup>36</sup> is relevant because Article 2(4)<sup>37</sup> of the proclamation stipulates that copyright pertains to a right over creative works such as literary and artistic works and includes neighboring rights. Article 2(5)<sup>38</sup> of the same proclamation has provided that neighboring rights are the rights of performers, printers of phonograms and producers of audio-visual and broadcasting cable distributions over their works. We have already said that copyright is unthinkable without works of the mind. Under this proclamation, the term work has also subsumed neighboring rights. If that is the case, it is possible to argue that neighboring rights are also works under the proclamation that established the Ethiopian Intellectual Property Office. However, this argument may not be acceptable in light of the definition given to work under Article 2(30) of the Copyright Proclamation, as the latter law does not seem to have covered neighboring rights.

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<sup>35</sup>See Bainbridge, *supra* note 10 at 31-82. Refer also to Miller and Davis, *supra* note 15 at 285-322.

<sup>36</sup>See Ethiopian Intellectual Property Office Establishment Proclamation, 2003, Proc. No. 320/2003, *Federal Negarit Gazeta*, Year 9, No. 40.

<sup>37</sup>*Ibid.*

<sup>38</sup>*Ibid.*

In any case, according to Article 2(14) of the Copyright Proclamation, neighboring rights pertain to the rights of performers,<sup>39</sup> producers of sound recordings<sup>40</sup> and broadcasts of broadcasting organizations over their works.<sup>41</sup> Besides, the Ethiopian Copyright Proclamation has devoted some provisions pertinent to the scope of its application to neighboring rights.<sup>42</sup> Moreover, Part Five of the same Proclamation deals with the protection of the rights of performers, producers of sound recordings and broadcasting organizations.<sup>43</sup> To sum up, though copyright and neighboring rights are related, they are distinct. That is why the Ethiopian Copyright Law of 2004 has given recognition to neighboring rights. The stance taken by the Ethiopian Copyright Proclamation in this regard is the same as countries with civil law legal system.<sup>44</sup>

## 2. Analysis of the Scope of Application of the Ethiopian Copyright Law

### 2.1. General Remarks

Any legislation is expected to clearly define its scope of application so that it is possible to properly enforce the law. This is true in all jurisdictions. However, since national copyright law is territorial in nature, every author

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<sup>39</sup>As per Art. 2(19) of the Copyright Proclamation of Ethiopia, *supra* note 5, the term pertains to actors, singers, musicians, dancers and other persons, who act, sing, deliver, declaim, play in or otherwise perform literary and artistic works. The enumeration in our law is exactly the same as the list in Art. 3(a) of the 1961 Rome Convention, *supra* note 2.

<sup>40</sup>This phrase, pursuant to Art. 2(21) of the Ethiopian Copyright Proclamation, *supra* note 5, means a person that takes the initiative and the responsibility for the making of sound recordings.

<sup>41</sup>*Id.* According to Art. 2(4) of the Copyright Proclamation, *supra* note 5, the term refers to a radio, television, and cable television station or satellite.

<sup>42</sup>*Id.* at Art. 3 sub-articles 4, 5 and 6.

<sup>43</sup>*Id.* See Arts. 26-32.

<sup>44</sup>See the copyright laws of Italy, the Netherlands and Germany, *supra* notes 16, 18 and 21, respectively.



and/or owner of copyright on earth, be it a physical person or a legal person, cannot be protected. Therefore, the scope of application such law needs to be defined, as doing so is instrumental to differentiate works which are protected by the copyright law of a given country from those works which are not protected by the same law. For instance, when we look at the UK Copyright Act,<sup>45</sup> US copyright law<sup>46</sup> and German copyright law,<sup>47</sup> we realize that these laws have carefully defined their scope of application. By the same token, the 2004 Ethiopian Copyright Proclamation of Ethiopia, unlike the 1960 Civil Code of Ethiopia, has tried to define its scope of application by providing criteria of eligibility for works to be protected by this law. The question, therefore, is as to why we worry about the scope of application of the Ethiopian Copyright Law.

We must be cognizant of its scope of application because without this knowledge, we cannot properly enforce the proclamation. The corollary to this is that if we are not able to clearly understand the scope of application of the law, we may consider third parties who use the works of all copyright holders in the whole world to be violators of copyright, and we may compel them to pay compensation and we may expose them to criminal liability. For this reason, the following sub-sections are meant to analyze the scope of application of the Ethiopian Copyright Proclamation with regard to the protection of copyright *per se* as the relevant provisions of the law dealing

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<sup>45</sup> Copyright, Designs and Patent Act of the United Kingdom, 1988 [hereinafter the UK Copyright, Designs and Patent Act].

<sup>46</sup> Copyright Act of the United States of America, 1976.

<sup>47</sup> German Copyright Law, *supra* note 21.

with the scope of application of neighboring rights will be dealt with under part three of this paper.

## 2.2. Nationality of Authors as a Connecting Factor

The concept of nationality is important because it determines the benefits to which persons may be entitled and the obligations they must discharge, as there is a strong link between a country and its nationals.<sup>48</sup> Because of this connection, nationals owe a duty of allegiance to their country and the country has a corresponding duty to bestow wide-ranging protections to its nationals. Accordingly, copyright laws of different countries provide protection to their nationals when they come up with a copyrightable work. For instance, under UK law, a work is protected if it comes from a British citizen.<sup>49</sup> By the same token, section 104 of the 1976 USA Copyright Code makes it clear that nationals (citizens) of the USA are protected by the law.<sup>50</sup> And Article 185 of the Italian Copyright Statute<sup>51</sup> protects authors who are Italian nationals. The same thing is true under the copyright laws of Germany<sup>52</sup> and the Netherlands.<sup>53</sup> By the same token, Article 3(1)(a) of the Tanzanian Copyright and Neighboring Rights Act<sup>54</sup> provides that works whose authors are Tanzanian nationals are protected by the law.

In Ethiopia, works created by nationals are protected by virtue of Article 3(1)(a) of the Copyright Proclamation. Therefore, knowledge as to

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<sup>48</sup>See Shaw, M. N., *International Law*, 5<sup>th</sup> ed., Cambridge University Press, 2003, p. 584.

<sup>49</sup>UK Copyright, Designs and Patent Act, *supra* note 45.

<sup>50</sup>The Copyright Act of USA, *supra* note 46.

<sup>51</sup>Italian Copyright Law, *supra* note 16.

<sup>52</sup>See German Copyright Law, *supra* note 21.

<sup>53</sup>See the Copyright Act of the Netherlands, *supra* note 18.

<sup>54</sup>The Copyright and Neighboring Rights Act of Tanzania, 1999 [hereinafter the Copyright Act of Tanzania].

who are nationals of Ethiopia is a prerequisite to fully understand works protected by the Ethiopian Copyright Proclamation. In this regard, the 1995 Constitution of the Federal Democratic Republic of Ethiopia and the Ethiopian Nationality Proclamation are relevant. According to Article 6(1) of the FDRE Constitution, any person of either sex shall be an Ethiopian national where both or either parent is an Ethiopian. In addition, by virtue of Article 6(2) of the Constitution, foreign nationals may acquire Ethiopian nationality. These constitutional principles have been further supplemented by the Ethiopian Nationality Proclamation, which declares that irrespective of the mode of acquisition of Ethiopian nationality, every Ethiopian national has a right to the enjoyment of all rights, protections and benefits derived from Ethiopian nationality as preserved by law.<sup>55</sup> Therefore, one of the protections accorded to national is protection of copyright as this is a fundamental constitutional right entrenched under the FDRE Constitution.<sup>56</sup>

To sum up, the Ethiopian Copyright Proclamation accords protection to works whose authors are nationals of Ethiopia irrespective of where they (the nationals) come up with the copyrightable works. Yet, it must be clear

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<sup>55</sup>Ethiopian Nationality Law, 2003, Proc. No 378/2003, *Federal Negarit Gazeta*, Year 10, No. 13. This proclamation contains detailed provisions regarding modes of acquisition of Ethiopia nationality, right of nationality, loss of Ethiopia nationality and the like.

<sup>56</sup>See Art. 40(2) of the FDRE Constitution, *supra* note 4, in which tangible as well as intangible property such as patents, copyrights, trademarks, industrial designs and the like are envisaged. The rights of persons to property in general and to intellectual property rights in particular were recognized by the Universal Declaration of Human Rights (UDHR), 1948, in Art. 17. The UDHR has become an integral part of the laws of Ethiopia since the adoption of the 1991 Transitional Period Charter of Ethiopia. See the Transitional Period Charter of Ethiopia, 1991, Art. 1, Proc. No 1, *Negarit Gazeta*, Year 50, No. 1. See also, Art. 13(2) of the FDRE Constitution, *supra* note 4, which stipulates that chapter three of the FDRE Constitution (which includes tangible and intangible properties), should be interpreted in light of international human right conventions including the UDHR.

that the Ethiopian Copyright Proclamation cannot give protection extra-territorially to works of authors who are nationals of Ethiopia. Rather, it means that the Ethiopian Copyright Proclamation accords protection to works of Ethiopian nationals in the Ethiopian territory, regardless of the country where the work is created and regardless of the author's country of residence.

One question worth raising here is whether or not an individual who has co-authored a work with an Ethiopian national is protected by our law although such person does not have any nexus whatsoever with Ethiopia. In other jurisdictions, this issue has been clearly dealt with. For instance, the British Copyright Law provides that a work of joint authorship qualifies for protection if, “*at the material time,*” any of its authors is a qualifying person (emphasis added).<sup>57</sup> At this juncture, the phrase material time requires explanation since it is essential to clearly understand the scope of application of law in the case of joint authorship. The material time in relation to a literary, artistic, musical, or dramatic work is the time when the work is made, and for a published work the time when the work is first published. For sound recordings and films, the material time is when the work was made, while for topographical arrangements it is when the edition was first published.<sup>58</sup>

By the same token, Article 120(1) of the German Copyright and Neighboring Rights Law clearly states that in the case of a work created by joint authors, it shall be sufficient to give protection to the work if one of the joint authors is a German national. However, the Ethiopian Copyright Proclamation has not dealt with the issue of protection of a work which is created by an Ethiopian national and a foreign national without any nexus

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<sup>57</sup> Prime, *supra* note 10, at 45.

<sup>58</sup> Colston, *supra* note 34, at 193-119.

whatsoever with Ethiopia. This problem can be solved by incorporating a provision in our law which stipulates that a non-national of Ethiopia shall enjoy copyright protection if he/she co-authors a work with an Ethiopian national.<sup>59</sup>

### **2.3. Principal Residence of Authors as a Criterion of Qualification**

Article 40(2) of the FDRE Constitution has provided that property includes any tangible or intangible product which has value and is produced by the labor, creativity, enterprise or capital of an individual citizen,<sup>60</sup> associations which enjoy juridical personality under the law or, in appropriate circumstances, by communities specifically empowered by law to own property in common. It is clear from the wording of the constitution that in the Ethiopian context private property (be it tangible or intangible) is only to be owned by Ethiopian citizens. This means that foreign nationals, though they are residents or domiciliary of Ethiopia, do not have the right to own property of any sort in Ethiopia.

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<sup>59</sup>See German Copyright Law, *supra* note 20. As a matter of fact, the Ethiopian Copyright Proclamation, *supra* note 5, has given recognition to joint authorship in Art. 21(2), which stipulates that where the work is a work of several authors, the co-authors shall be the original joint owners of the economic rights. Does this mean, however, that a foreign national who is a co-author with an Ethiopian national is protected by the Copyright Proclamation by virtue of this article? In the opinion of this author, the answer to this question does not seem to be affirmative, as the provision is not meant to deal with the issue of joint authorship by an Ethiopian national and a foreign national. Rather, had the Ethiopian law-maker desired to deal with this issue, it would have included a clear provision in the proclamation, i.e., under Art. 3, which deals with the scope of application of the law. In the opinion of this author, it is advisable to follow the British approach if we encounter such a problem in Ethiopia, as giving protection to the share of the Ethiopian citizen alone would have a devastating effect on the rights of the co-owner, i.e., the Ethiopian national.

<sup>60</sup> See Art. 40(1) of the FDRE Constitution, *supra* note 4.

However, the Ethiopian Copyright Proclamation has given protection to authors who are residents of Ethiopia irrespective of their nationality. So, can we say that the Copyright Proclamation is compatible with the spirit of the constitution? The Proclamation seems to be contradictory to the Constitution. However, it can safely be argued that the makers of the Constitution did not intend to limit property ownership to citizens alone, as the outcome would be ridiculous. Therefore, the scope of application of the Ethiopian Copyright Proclamation is not contradictory to the spirit of the FDRE Constitution as far as according protection to works created by residents of Ethiopia irrespective of their nationality (citizenship).

When we examine the law of other jurisdictions, we can see that protecting authors transcends citizenship as it extends to cover those with domicile or residence in a given country.<sup>61</sup> By the same token, the Ethiopian Copyright Proclamation gives protection to works whose authors have principal residence in Ethiopia, regardless of their nationality.<sup>62</sup> For that matter, even a stateless person can be protected by the Ethiopian Copyright Proclamation, provided that he or she has his or her principal residence in Ethiopia although this is not clearly articulated in the Proclamation. In contradistinction to the Ethiopian Copyright Law, the German Copyright Law clearly declares that stateless persons who are habitually resident in the territory to which German law applies shall enjoy, with respect to their works, the same copyright protection as German nationals. Stateless persons who are not habitually resident in the territory to which the German law applies shall enjoy with respect to their works the same copyright protection as the

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<sup>61</sup> Bainbridge, *supra* note 10, at 44.

<sup>62</sup> Ethiopian Copyright Proclamation, Art. 3(1)(a), *supra* note 5.

nationals of the foreign state in which they habitually reside.<sup>63</sup> The German copyright law has gone further and given protection even to refugees who have that status under relevant German law or other international conventions.<sup>64</sup>

The Ethiopian Copyright Proclamation is also silent regarding the protections to be given to authors who have refugee status in Ethiopia as per the relevant domestic law<sup>65</sup> and international conventions to which the country is a party.<sup>66</sup> It is quite clear that Ethiopia has remained a sanctuary for refugees from the Sudan, Burundi, Kenya, Djibouti, Mali, Rwanda, Nigeria, Somalia and the like.<sup>67</sup> However, the issue that needs to be raised at this juncture is whether or not it would be detrimental to the national interest of the country if Ethiopia gives copyright protections to authors who are stateless persons and refugees, if such persons come up with copyrightable works in Ethiopia.

This writer believes that there is no conceivable jeopardy to the national interest of Ethiopia if the country gives protection to the works of authors who are refugees in Ethiopia, as long as they are present in Ethiopia in accordance with the relevant laws of the country and other multilateral or bilateral treaties to which the country is a party. To this end, it may be

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<sup>63</sup> German Copyright Law, *supra* note 21.

<sup>64</sup> *Ibid.*

<sup>65</sup> See generally, Refugees Proclamation, 2004, Proc. No.409, *Federal Negarit Gazeta*, Year 10, No. 54.

<sup>66</sup> See the 1951 UN Convention relating to the Status of Refugees and the 1967 UN Protocol, to both of which Ethiopia acceded in December 1969. Ethiopia was also a signatory to the 1969 Organization of African Union Convention Governing the Specific Aspects of Refugee Problems in Africa.

<sup>67</sup> See Hailesellassie G/Mariam, *The Ethiopian Asylum Policy Review*, Addis Ababa University Student Law Review, Vol. 1, No. 2, December 2010, pp. 86-108.

necessary to revisit the scope of application of the Ethiopian Copyright Proclamation although it may be concluded that refugees who have principal residence in Ethiopia are protected by the law as it stands now, since this criterion is applicable to all persons with principal residence in Ethiopia.

As it can easily be discerned from the reading of Art.3(1(a) of the Copyright Proclamation of Ethiopia, not every resident author is protected. Rather, it is those authors having principal residence in Ethiopia who are protected by the Copyright Proclamation which means that those persons who have secondary residence in Ethiopia are not within the ambit of the Copyright Proclamation. In other words, the Ethiopian Copyright Proclamation has retained the classification made on residences as principal and secondary by the 1960 Civil Code of Ethiopia.<sup>68</sup> Therefore, this classification of residences into principal and secondary obliges us to pose these questions: How do we differentiate principal residence from secondary residence? Why are authors who have secondary residence in Ethiopia not protected by the Ethiopian Copyright Proclamation?

The copyright laws of more advanced jurisdictions such as the UK and the USA have given satisfactory answers to the above questions, establishing that residents of these countries are protected, without making distinctions between principal and secondary residence.<sup>69</sup> By the same token, the German copyright law has not made distinctions between principal and secondary residence although it has made clear that protection is given to habitual

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<sup>68</sup> See Civil Code of Ethiopia, Arts.174-182, *supra* note 3.

<sup>69</sup> See Section 154 of UK Copyright, Design and Patent Act, *supra* note 45. See also Prime, *supra* note 10 at 44. Regarding the approach of the USA Copyright Act, see section 104 of the Act, *supra* note 46.



residents of Germany.<sup>70</sup> In Tanzania, works of authors who have habitual residence in the country are protected by the Tanzanian Copyright and Neighboring Rights Act of 1999.<sup>71</sup>

Article 185 of the Italian Copyright Law also provides that the law shall apply to the works of foreign authors domiciled in Italy which are first published in Italy.<sup>72</sup> But the Italian law uses domicile as a connecting factor to accord protection to the works of foreign authors, unlike the laws of the USA, the UK, Germany and Ethiopia, which use residence as a connecting factor for the same purpose. In addition, the Italian law uses more stringent criteria as it has combined the requirement of domicile with first publication of the work in Italy. In any case, the question of principal residence and secondary residence cannot arise as an issue in Italy since residence is not a basis of qualification for a work to be protected by the Italian Copyright Proclamation. The Berne Convention, on literary and artistic works, also makes no dichotomy between principal and secondary residence despite the fact that this convention uses the expression habitual residence.<sup>73</sup>

In Ethiopia, Article 174 of the Civil Code provides that the residence of a person is the place where he normally resides, and Article 177 stipulates that a person may have several residences and that one of these may have the character of principal residence while the others are secondary residences. Yet, the Civil Code does not provide any criterion which may help us to categorize residences of a person into principal and secondary, and this has

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<sup>70</sup>German Copyright Law, *supra* note 21.

<sup>71</sup>Tanzanian Copyright Act, Art. 3, *supra* note 54.

<sup>72</sup>Italian Copyright Law, *supra* note 16.

<sup>73</sup>Berne Convention, Art. 3, *supra* note 2.

serious repercussions for proper implementation of the Copyright Proclamation with regard to copyright protection for residents of Ethiopia who are non-nationals.<sup>74</sup>

However, as the adjective ‘principal’ suggests, this residence may be understood to mean the place where the individual resides most of the time, has various social interactions, economic establishments and the like, as opposed to occasional presence in the area. Nonetheless, in the future the best solution to this problem will be either defining principal residence clearly or simply according protection to authors so long as they are residents of

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<sup>74</sup>For instance, let us suppose that Mr. X is a Congolese national who is a well-known writer on African history. He teaches “African History during the Colonial Era” in Kenya. In Kenya, he has a wife and two children. He is also a permanent staff member of the Department of History and Heritage Management, Addis Ababa University, Ethiopia. In Ethiopia, he has another wife who is a Ugandan national with whom he has three children. Mr. X has been accomplishing his task of teaching by travelling from Kenya to Ethiopia and vice versa. Recently, he wrote a book on the *Contribution of Ethiopian Brothers to Anti-colonial Struggle in Africa*. However, to the dismay of Mr. X, Smart Publisher PLC, which is located in Ethiopia, published the manuscripts of Mr. X and distributed the work to the public without obtaining the consent of the author. The most important question, therefore, is whether or not Mr. X can be protected by the Ethiopian Copyright Proclamation. In other words, can Mr. X legitimately petition the Ethiopian Courts to give injunctive relief, ordering the infringer to refrain from the publication and distribution of the work? Can Mr. X be awarded both material and moral compensation? Additional issues in this connection are whether the police can conduct an investigation of violation of such work, whether the public prosecutor can prosecute individuals involved in the publication and distribution of Mr. X’s work, and whether the criminal benches in Ethiopia can convict the infringer of the rights of Mr. X. In this hypothetical case, if we conclude that Mr. X has secondary residence in Ethiopia, it means that his work is not protected. Hence, Smart Publisher PLC is not required to pay material as well as moral compensation to Mr. X. Individuals involved in the publication and distribution of the work of Mr. X cannot also be held criminally liable. If, on the other hand, we conclude that Ethiopia is the principal residence of Mr. X, it automatically follows that his work is protected, which enables him to seek civil as well as criminal remedies in Ethiopia against violations of his rights. Therefore, a clear distinction between principal and secondary residence is instrumental to arrive at the right decision regarding copyright protection to be given to non-nationals of Ethiopia, while misconception regarding the difference between principal residence and secondary residence does entail undesirable consequences.

Ethiopia without making any distinction between principal and secondary residences.<sup>75</sup>

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<sup>75</sup> As the law now stands, denial of protections to persons who have secondary residence in Ethiopia seems to be justified on the grounds that these persons do not have sufficient connections (links) to Ethiopia. This, in effect, means that if a person who has a secondary residence in Ethiopia has created an artistic or literary work, every individual in Ethiopia shall have every freedom to use, reproduce, distribute or otherwise exploit the work without getting the permission of the author, since such work is considered to be property without an owner. One issue that seems to be worrisome in Ethiopia is whether or not works of authors who are domiciled in Ethiopia are protected by the Ethiopian Copyright Proclamation, since the term domicile has legal significance under the Ethiopian Civil Code. According to *Black's Law Dictionary*, *domicile is the place at which a person has been physically present and that the person regards as home, a person's true home; a person's true fixed, principal and permanent home to which that person intends to return and remain even though currently residing elsewhere.* For Russell J. Weintraub, *'a person's domicile is the place with which that person is closely associated –his or her 'home' with all the connections of that word.'* The Ethiopian Civil Code also gives a similar definition to the term domicile in Art. 183, which states that *'the domicile of a person is the place where such person has established the principal seat of his business and of his interests, with the intention of living there permanently.'* Art. 184(1) of the same Code further provides that where a person has his normal residence in a place, he shall be deemed to have the intention of residing permanently in such place. Consequently, an intention to the contrary expressed by such person shall not be taken into consideration unless it is sufficiently precise, and it is to take effect on the happening of an event which will normally happen according to the ordinary course of things. On the basis of these definitions of the term domicile, it is possible to infer that domicile creates a stronger link between the individual and the country where he has established his domicile as compared to the link established between a resident person and the country of residence. Therefore, it may be argued that if works of authors who have principal residence in Ethiopia are protected by the Ethiopian Copyright Proclamation, works of authors who are domiciled in Ethiopia should also be protected by our law, and for stronger reasons, even if the law has omitted the issue of domicile. On the other hand, it may be argued that since the law-maker has not included domicile under the scope of application of the law under discussion, the law-maker intended to deny copyright protection to works of authors who are domiciled in Ethiopia. However, this argument does not, in the opinion of this author, seem to be cogent as it creates unwarranted discrimination between persons domiciled in Ethiopia and persons who have a principal residence in the country. In addition, this argument does not seem to reflect the purpose of the Ethiopian Copyright Proclamation. In the final analysis, this writer opines that the best way to give an unequivocal answer to the question of whether or not works of authors who are domiciled in Ethiopia are protected by the Copyright Proclamation

## 2.4. Publication of a Work in Ethiopia as a Basis of Qualification

Where a work belongs to authors who are nationals or residents of a given country, or domiciled there, the work is protected by copyright law because of one of these connecting factors, as long as the work has met the requirements of originality and fixation, as the case may be. In the absence of these connecting factors, a work of an author may be qualified for protection by virtue of publication, which is the case in many jurisdictions and relevant international copyright conventions. Under the UK Copyright Law, if an author's status is non-qualifying for protection by the law on other grounds, qualification may be by first publication. According to this law, a literary, dramatic, musical or artistic work, a sound recording or film or topographical arrangement qualify if it is first published in the UK or a country to which the Act is extended by order.<sup>76</sup>

However, according to the Italian Copyright and Neighboring Rights Law, publication alone does not suffice for the protection of a work of an author who is not a national of Italy. Instead, first publication of the work in Italy may be a basis of qualification for the work where such work belongs to an author who is domiciled in Italy.<sup>77</sup> Under § 57 (chapter eight) of the 1961 Copyright Law of Norway, works of an author that are first published in the country are brought within the ambit of this law and protected by it. Works that are simultaneously published in Norway and in another country are also

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is by making clear reference to the issue in the article dealing with the scope of application of the Copyright Proclamation, which can be accomplished by amending the proclamation.

<sup>76</sup> See Colston, *supra* note 34 at 194.

<sup>77</sup> Italian Copyright Law, Art.185, *supra* note 16.

protected.<sup>78</sup> At the international level, for instance, Article 3(1)(b) of the Berne Convention provides that the convention applies to authors who are not nationals of any of the countries of the union if their work is first published in one of those countries or simultaneously outside the union and in a country of the union.<sup>79</sup>

In Ethiopia, even if an author is neither a national nor a resident of the country, his or her work enjoys protection under the Copyright Proclamation where the work is first published in Ethiopia. In addition, even if a work is first published abroad, it is protected by the Ethiopian Copyright Proclamation where it is also published in Ethiopia within 30 days of the date of publication abroad.<sup>80</sup>

The other relevant issue concerns when a work is considered to be published. Publication is defined as the act of declaring or announcing to the public, the offering or distribution of copies of a work. Publication may be

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<sup>78</sup>The Copyright Act of Norway, 1961, last amended in 2006, available at [wwwhttp://www.ub.uio.no/ujur/ulovdata/lov-19610512-002-eng.pdf](http://www.ub.uio.no/ujur/ulovdata/lov-19610512-002-eng.pdf), accessed on 20 January 2014.

<sup>79</sup>Berne Convention, *supra* note 2.

<sup>80</sup>Nonetheless, the Ethiopian Copyright Proclamation has not unambiguously dealt with the issue of simultaneous publication of a work by the same author in Ethiopia and abroad, unlike the stance taken by the Berne Convention and national copyright laws of other countries, which have clearly dealt with the issue. Yet, it seems safe to conclude that if a work is first published abroad and also published in Ethiopia within 30 days, reckoned from the exact date of publication, it is given protection in Ethiopia by the Ethiopian Copyright Proclamation, then a work which is simultaneously published abroad and in Ethiopia must be protected by the law of Ethiopia. Though this might be a cogent argument, the law should be crystal clear in this regard, to do away with future controversies arising between the one who claims protection and other persons who may believe that they have the liberty to exploit such work without obtaining the consent of the author. See generally the analysis given by Skone James, E. P., Mummery, J. F., Rayner, J. E. and Latman, A., *Copinger and Skone James on Copyright*, Sweet & Maxwell, 1980, p. 26. See also Bainbridge, *supra* note 10 at 69-70.

divided into general publication, which involves distribution of an author's work to the public, as opposed to selected group, whether or not restrictions are placed on the use of the work and limited publication which pertains to distribution of copies of a work to a limited group for a limited purpose.<sup>81</sup> According to Article 3(3) of the Berne Convention, the expression "published work" pertains to works published with the consent of their authors the means of manufacture of the copies may be, provided that the availability of such copies satisfies the reasonable requirements of the public with regard to the work.<sup>82</sup> Similarly, the WIPO Performances and Phonograms Treaty, in Article 2(e), defines publication of a fixed performance or phonogram as the offering of copies of the fixed performance or the phonogram to the public, with the consent of the right holder, and provided that copies are offered to the public in reasonable quantity.<sup>83</sup>

As an example of national copyright laws, Section 175(1)(g) of the UK Copyright Act defines publication as the issue of copies to the public in general, and in the case of literary, dramatic, musical or artistic works, publication pertains to making copies available to the public by means of an electronic retrieval system.<sup>84</sup> In Ethiopia, the Copyright Proclamation has defined published works in Article 2(22), which provides that:

published work means a work or a sound recording, tangible copies of which have been made available to the public in a reasonable quantity for sale, rental, public lending or for the transfer of the ownership or the possession of the copies, provided that, in the case of a work, the

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<sup>81</sup> Garner, *supra* note 9, at 1264.

<sup>82</sup> Berne Convention, *supra* note 2.

<sup>83</sup> WIPO Performances and Phonograms Treaty, *supra* note 2.

<sup>84</sup> Bainbridge, *supra* note 10, at 69-70. See also, UK Copyright, Designs and Patent Act, *supra* note 45, section 175.

making available to the public took place with the consent of the author or other owner of copyright, and in the case of sound recording, with the consent of the producer of the sound recording.

When we compare the elements of publication incorporated into the Ethiopian Copyright Proclamation, we see that the definition accorded to publication by our law is similar to the afore-mentioned definitions although the Ethiopian law does not seem to deal with works available to the public online. Finally, we should bear in mind that there are some acts which may not be considered as publication although the works are available to the public. Under the Berne Convention, for instance, the performance of a dramatic, dramatic–musical, cinematographic or musical work, the public recitation of literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture do not constitute publication.<sup>85</sup> This means that in countries that are party to the Berne Convention, one cannot claim protection by merely doing these acts. This conclusion cannot, however, be buttressed by the Ethiopian Copyright Proclamation since it does not contain exceptions to publication. Nevertheless, the exceptions to publication will be applicable in Ethiopia if the country becomes a member to this convention in the future.<sup>86</sup>

## **2.5. Qualification of Audio-visual Works to be Protected in Ethiopia**

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<sup>85</sup>Berne Convention, Art. 3(3), *supra* note 2.

<sup>86</sup>Circumstances seem to suggest that Ethiopia may be allowed to join WTO and hence to become a member to the Berne Convention in the near future, although one cannot assert this with certainty given the ever-changing global situation.

An audio-visual work is a work consisting of related images that are presented in a series, usually with the aid of a machine and accompanied by sound.<sup>87</sup> In Ethiopia, the term has been defined by the Copyright Proclamation as a series of related images which impart the impression of motion with or without the accompanying sounds, and can be made visible by any appropriate device and includes cinematographic or other film.<sup>88</sup>

Coming to the issue of protection, audio-visual works are protected by the Ethiopian Copyright Proclamation where the headquarters or principal residence of the producer is Ethiopia.<sup>89</sup> The stance taken by the Ethiopian Copyright Law is the same as the position held by the copyright laws of other jurisdictions. For instance, Article 3 of the Tanzanian Copyright and Neighboring Rights Law clearly stipulates that audio-visual works are protected if the producer has his headquarters or habitual residence in the United Republic of Tanzania.<sup>90</sup>

At this juncture, the issue worth-raising concerns the meaning of “producer,” since it has repercussions for the protections accorded to audio-visual works. Neither the Berne Convention nor any other convention on the protection of copyright and neighboring rights have defined the term. However, the Ethiopian Copyright Proclamation has tried to provide a statutory definition. Accordingly, as provided in Article 2 (20), a producer “[is] a person that undertakes the initiative and the responsibility for the making of the audio-visual works.”

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<sup>87</sup>Garner, *supra* note 9 at 1636.

<sup>88</sup>Ethiopian Copyright Proclamation, *supra* note 5, Art. 2(1).

<sup>89</sup>*Id.*, Art. 3(1)(c).

<sup>90</sup>The Copyright Act of Tanzania, *supra* note 54.



Here we are again obliged to ask whether the term “person” pertains to both physical persons and legal persons. Does it make any difference whether the producer is a physical person or an artificial person as far as the protection of the work under discussion is concerned? Under the Ethiopian Copyright Proclamation, the word has been defined as either a physical person or an artificial person, in which case there is a strong argument that a producer of an audio-visual work could be either of these persons. From this, it may be inferred that where the producer of the audio-visual work is an Ethiopian national, this work is protected by virtue of Article 3(1)(a) of the Copyright Proclamation irrespective of the location of the headquarter and residence of producer. On the other hand, we may validly conclude that where the producer of the audio-visual work is a foreign national, the work is to be protected by the Ethiopian Copyright Proclamation where the Headquarter is located in Ethiopia or the producer has principal residence in Ethiopia.

Finally, it should be borne in mind that the location of headquarter (the head office) or the principal residence of the producer is what determines copyright protection under Ethiopian law. In other words, it does not make any difference whether the audio-visual work is created in another country so long as the producer has his/her/its headquarters or principal residence is in Ethiopia. But as discussed previously, the thorny issue is the difficulty of demarcating the difference between principal and secondary residences. In addition, domicile of the producer remains an equally baffling issue with respect to audio-visual works. On the basis of the analysis made previously, this author argues that if a “person” domiciled in Ethiopia is a producer of an audio-visual work, that work should be accorded protection by the Copyright

Law of Ethiopia, as this point of attachment is arguably stronger than the point of attachment created by residence within Ethiopia.

## 2.6. Architectural Works When Protected

The Significance of architecture in a society should not be overemphasized as it has been playing meaningful roles in money life aspects of a society. In this regard, Winick wrote that:<sup>91</sup>

The importance of architecture as an art form is not doubtable. Architects throughout history have viewed their craft as both expressing and driving culture. Architecture and society have a profoundly interdependent relationship. Architecture expresses the values of its cultural context and at the same time helps create the culture that it inhabits. Architecture plays more than an aesthetic role in society. For example, architecture performs invaluable utilitarian functions. Intelligent and creative architectural design makes everyday tasks infinitely easier. In addition to its direct economic importance, architecture also promotes scientific advancement. The needs of architecture provided the impetuses for varied technical advancements such as the flush toilet, the elevator, reinforced concrete, plate glass, and the air conditioner, to name just a few.

The social importance of architecture led most European nations to extend some copyright protection to architectural works. The scope of the protection offered by these nations ranges from quite limited to very broad. For example, Article 1 of the Norwegian Copyright Law,<sup>92</sup> Article 2(4) of the

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<sup>91</sup>Winick, R., Copyright Protection for Architecture after the Architectural Works Copyright Protection Act of 1990, *Duke Law Journal*, Vol. 41, No. 6, at 1600-1601.

<sup>92</sup> Copyright Law of Norway, *supra* note 78.

German Copyright Law,<sup>93</sup> Article 10 of the Copyright Law of the Netherlands<sup>94</sup> and Article 2(5) of the Italian Copyright Law<sup>95</sup> expressly provide for the protection of architectural works. In Ethiopia, such works are protected because the term copyrightable work covers architectural works as stipulated in Article 2(30)(f) of the Copyright Proclamation.<sup>96</sup> Internationally, the Berne Convention is the most important instrument for the protection of architectural works because the definition of literary and artistic works subsumes these works, too.<sup>97</sup>

Various jurisdiction of the world have provided tests of qualification for the protection of architectural works. For example, Article 57 of the Norwegian Copyright Law<sup>98</sup> states that such works are protected by this law where they are incorporated in a building erected in the country. Similarly, Article 3(1)(d) of the Tanzanian Copyright Act declares that works of architecture and other artistic works are protected where such works are erected in a building or other structures located in Tanzania. The Ethiopian Copyright Law demonstrates a close resemblance to the Tanzanian Law. Article 3(1) (d) of the Copyright Law of Ethiopia states that works of architecture and other artistic works incorporated in a building or other structures erected in Ethiopia are protected. Nonetheless, this author argues that architectural works belonging to an Ethiopian national or to an author whose principal residence is located in Ethiopia are to be protected

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<sup>93</sup> German Copyright Law, *supra* note 21.

<sup>94</sup> Copyright Act of the Netherlands, *supra* note 18.

<sup>95</sup> Italian Copyright Law, *supra* note 16.

<sup>96</sup> Ethiopian Copyright Law, *supra* note 5.

<sup>97</sup> See Berne Convention, Art. 2(1), *supra* note 2.

<sup>98</sup> Copyright Law of Norway, *supra* note 78.

automatically by virtue of Article 3(1) (a) of the Copyright Proclamation, despite the fact that such works are not erected in Ethiopia. Therefore, this author also contends that the requirement of the erection of the architectural work in Ethiopia applies to protection for non-national authors of architectural works and other authors of architectural works who do not have principal residence in Ethiopia. This is without prejudice to the stance of other individuals who maintain that architectural works should be protected by the Ethiopian Copyright Proclamation only when such works are erected in Ethiopia.

Other pertinent issues in relation to protection of architectural works are as to how artistic works can be combined with architectural works and as to what is meant by “other structures” - other than a building. As to the first issue, engravings, paintings, woodcuts and the like may be incorporated in a building, along with the architectural works. But “other structures” are not defined under the Ethiopian law; as far as the reading of this author goes, nor have the laws of other jurisdictions defined this phrase,. Despite this absence of definition, we can imagine that the phrase pertains to dams, towers, statues, tunnels, swimming pools, railroads, aerodromes, runways, bridges and the like constructed in Ethiopia.

Finally, before we close the discussion on the protection of architectural works, one more important issue is in order. Can an author of architectural works claim protection in Ethiopia by invoking first publication or simultaneous publication or publication within 30 days in Ethiopia? In this connection, the Berne Convention provides that construction of a work of

architecture does not constitute publication,<sup>99</sup> which means that the author of an architectural work cannot claim protection by invoking the rule of first publication in the country concerned. In Ethiopia, this situation does not seem to be entirely clear since the definition accorded to published works by the Copyright Proclamation does not make exclusions.<sup>100</sup> However, a close scrutiny of the definition given to the term published work reveals that publication is confined to works such as sound recordings, audio-visual works, books, booklets, newspapers, book reviews and the like. Art. 3(1.d) of the Proclamation seems to indicate that authors of architectural works are protected by the Copyright Proclamation regardless of publication as far as works of architecture are erected in any part of the Ethiopian territory. The same applies to other artistic works incorporated in buildings or other structures located in Ethiopia.. The same applies to other artistic works incorporated into buildings or other structures located in Ethiopia.

### **3. Scope of Application of the Law on Neighboring Rights: Performances, Sound Recordings and Broadcasts**

#### **3.1. General Remarks**

When we compare and contrast the provisions of the 1960 Civil Code with the 2004 Copyright Proclamation of Ethiopia, we can see significant departures made by the latter law. One of such departures of the latter law is the incorporation of what are called neighboring rights such as performances, sound recordings and broadcasts of broadcasting organizations which were

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<sup>99</sup> See Berne Convention, Art. 3(3), *supra* note 2.

<sup>100</sup> See the definition given to published works given by the Ethiopian Copyright Proclamation, Art. 2(22), *supra* note 5.

not clearly incorporated in the Civil Code of Ethiopia.<sup>101</sup> The new proclamation has also attached significant weight to neighboring rights. Accordingly, Part Five of the Copyrights Proclamation, which contains articles 26-32, is devoted to the protection of performers, producers of sound recordings and broadcasts of broadcasting organizations.

With regard to the scope of application the new proclamation for protection of such rights, sub-articles 3, 4, 5 and 6 of Article 3 are relevant. The first three sub-articles provide the qualification criteria for performances, sound recordings and broadcasts of broadcasting organizations. The last sub-article makes it clear that the provisions of the proclamation shall also apply to performers, producers of sound recordings and broadcasts of broadcasting organizations that are eligible for protection under the proclamation and any international conventions or other agreements to which Ethiopia is a party.

Now, let us proceed to the analysis of the conditions that must be satisfied so that these neighboring rights are protected by the Copyright Proclamation.

### **3.2. Qualification for Performances to be Protected in Ethiopia**

Internationally, performers are protected by the 1961 Rome Convention, which is officially called the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.<sup>102</sup> According to this convention, performers are actors [or actresses], singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works.<sup>103</sup>

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<sup>101</sup> See Arts. 1647-1674 of the Civil Code of Ethiopia, *supra* note 5.

<sup>102</sup> The 1961 Rome Convention, *supra* note 2.

<sup>103</sup> *Id.*, Art. 3(1)(a).

This definition of performers has been repeated verbatim in the Ethiopian Copyright Proclamation.<sup>104</sup>

Such works are qualified for protection when they meet the requirements set forth by the copyright law of a country concerned. In this regard, under German Copyright Law it is provided that German nationals enjoy protection with respect to all of their performances, irrespective of the place where they take place.<sup>105</sup> In addition, foreign nationals shall enjoy protection with respect to all of their performances that take place in territory to which the German Law applies.<sup>106</sup> Moreover, if performances by foreign nationals are lawfully fixed on video or audio recordings, and if such recordings have been published, foreign nationals shall enjoy protection, with respect to such video or audio recordings unless they have been published outside the territory to which the German Law applies more than 30 days before their publication within that territory.<sup>107</sup>

In Tanzania, the Copyright Law of the country is applicable to a performance where the performer is a Tanzanian national or the performance took place in the territory of Tanzania. The law is also applicable to performances fixed in a phonogram or audio-visual form if the original performance qualifies for protection or the performance itself (which is not fixed in a phonogram or audio-visual form) is embodied in a broadcast qualifying for protection.<sup>108</sup>

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<sup>104</sup> See Copyright Proclamation of Ethiopia, Art. 2(19), *supra* note 5.

<sup>105</sup> German Copyright Law, Article 125(1), *supra* note 21.

<sup>106</sup> *Id.*, see Art.125(2).

<sup>107</sup> *Id.*, see Art.125(3).

<sup>108</sup> Copyright Act of Tanzania, Art. 3(3), *supra* note 51.

In Ethiopia, the Copyright Proclamation gives due recognition to performances as long as they meet the requirements of the law for protection, which means that not every performer is protected by our law. Rather the law has put in place the conditions to be satisfied by a performer so that he or she is able to claim protection for his or her performance. According to Article 3(3)(a) of the Copyright Proclamation,<sup>109</sup> performers are protected where the performances take place in the territory of Ethiopia or when the performances are incorporated in sound recordings that are protected under the proclamation or included in a broadcast qualifying for protection though the performances have not been fixed in a sound recording.<sup>110</sup> From this, it is possible to gather that the requirements for qualification of performances to be protected by the Copyright Law of Ethiopia are very much akin to the qualification requirements set forth under the Tanzanian Copyright Act of 1999.<sup>111</sup>

### **3.3. Eligibility of Sound Recordings for Protection in Ethiopia**

As we have said previously, production of sound recordings otherwise known as phonograms is an important neighboring right that has been recognized by international conventions and the domestic laws of various countries. Traditionally, protections were given to these categories of beneficiaries because their creative, financial and organizational resources are required to make recorded sound available to the public in the form of commercial sound recordings or phonograms and because of their legitimate interest in having the legal resources necessary to take action against

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<sup>109</sup>See the discussions in section 2.2 of this paper with regard to nationality as grounds for protection for the works of an author who is an Ethiopian national.

<sup>110</sup> The Ethiopian Copyright Proclamation, Art. 3(3)(b)(i)-(iii), *supra* note 5.

<sup>111</sup>See Copyright Act of Tanzania, *supra* note 54.



unauthorized uses.<sup>112</sup> For these reasons, international conventions and national laws have given appropriate protection to sound recordings.

At the international level, the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms [sound recordings] and Broadcasting Organizations was the first pertinent international instrument for safeguarding the rights of producers of sound recordings.<sup>113</sup> The other pertinent international instrument was the 1971 Geneva Convention for the Protection of Producers of Phonograms [sound recordings] Against Unauthorized Duplication of Their Phonograms.<sup>114</sup> In addition to these, another international convention known as the WIPO (World Intellectual Property Office) Performances and Phonograms [Sound Recording] Treaty (WPPT) was adopted in Geneva on December 20, 1996 and entered into force on May 20, 2002.<sup>115</sup> When we have a close look at the preamble of this convention, we realize that the contracting parties were motivated to adopt this convention with a view to developing and maintaining the protection of the rights of performers and producers of sound recordings in an effective and uniform manner; introducing new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural, and technological developments; and balancing the interests of performers and producers of sound recordings in the larger public interest, particularly with regard to education, research and access to information.<sup>116</sup>

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<sup>112</sup> WIPO Academy, *supra* note 26, at 95.

<sup>113</sup> The 1961 Rome Convention, *supra* note 2.

<sup>114</sup> Geneva Convention for the Protection of Producers of Phonograms [sound recordings] Against Unauthorized Duplication of Their Phonograms, Geneva, 1971.

<sup>115</sup> WIPO Performance and Phonograms Treaty, *supra* note 2.

<sup>116</sup> *Id.*, See the preamble of the treaty.

As per Article 2(d) of the WPPT, “producer of a phonogram [sound recording]” pertains to the person or legal entity who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds or representation of sounds.<sup>117</sup> Domestic laws have adopted definitions of the term very similar to the one provided by this convention. A typical example is Article 4 of the Tanzanian Copyright Act of 1999 which states that “a producer of sound recording means the person who, or the legal entity which, first fixes the sounds of a performance or other sounds.”<sup>118</sup> By the same token, the Ethiopian Copyright Proclamation declares that a producer of a sound recording is a person who undertakes the initiative and the responsibility for the making of sound recording works,<sup>119</sup> while sound recording pertains to an exclusively oral fixation of sounds of a performance or other sounds or a representation thereof, regardless of the method by which sounds are fixed or the medium in which sounds are embodied.<sup>120</sup>

Domestic laws and international conventions have also set forth criteria for eligibility for protection of producers of sound recordings. For example, Article 126(1) of the German Copyright Law<sup>121</sup> states that the protection afforded by the law shall be enjoyed by German nationals or German enterprises which have their headquarters in the territory to which the German Copyright Law applies with respect to all of their audio recordings, irrespective of whether and where they have been published. Sub-article 2

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<sup>117</sup> *Ibid.*

<sup>118</sup> Copyright Act of Tanzania, *supra* note 54.

<sup>119</sup> Ethiopian Copyright Proclamation, Art. 2(21), *supra* note 5.

<sup>120</sup> *Id.*, Art.2(28).

<sup>121</sup> German Copyright Law, *supra* note 21.

makes it clear that foreign nationals or foreign enterprises which do not have their headquarters in the territory shall enjoy protection for their audio recordings published in that territory unless the recording was published outside the territory to which the law applies more than 30 days before it was published in that territory. By virtue of sub-article 3 of the German Copyright Law, foreign nationals or foreign enterprises which do not have their headquarters in the territory to which this Law applies shall further enjoy protection as provided by international treaties to which Germany is a party. The same stance was taken by the Copyright Act of Tanzania,<sup>122</sup> because Article 3(4) of the Act provides that protection of phonograms [sound recordings] by the law is available where: (a) the producer is a national of the United Republic of Tanzania; or (b) the first fixation of the sound recording was made in the United Republic of Tanzania; and (c) the phonogram was first published in the United Republic of Tanzania.

In Ethiopia, sound recordings the producers of which are Ethiopian nationals are protected by the Ethiopian Copyright Proclamation, as clearly stated in Article 3(4)(a) of the Proclamation. In addition to the test of the nationality of producer, fixation and publication are relevant considerations. As per Article 3(4)(b) of the Copyright Proclamation, sound recordings that are first fixed (recorded) in Ethiopia are protected by the Ethiopian Copyright Proclamation regardless of the nationality of the producer. Also, Article 3(4)(c) of the Proclamation stipulates that “sound recordings first published in Ethiopia are protected by the law irrespective of the place where they are produced and the residence or nationality of the producer.”

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<sup>122</sup> Copyright Act of Tanzania, Art. 3, *supra* note 54.

Nevertheless, we are confronted with a critical issue when we read Articles 3(4)(b) and 3(4)(c) of the proclamation together. Should the requirements of fixation and publication be satisfied cumulatively or alternatively so that a sound recording may be protected by the Ethiopian Copyright Proclamation? A close reading of the English version of the article under consideration clearly indicates that the requirements should be satisfied cumulatively as the requirements of fixation and publication are connected by a coordinating conjunction- '*and*.' However, when we examine the Amharic version of this sub-article, it is not clear whether these requirements should be met cumulatively or alternatively, as the Amharic equivalent of the coordinating conjunction 'and' (እና) is missing in the Amharic version. On the basis of this, it is possible to contend that sound recordings are protected in Ethiopia where they are either first fixed or first published in the country. When there is a contradiction between the Amharic and English versions of Federal law,<sup>123</sup> the former prevails since Amharic is the language in which the Federal Parliament of Ethiopia deliberates upon the law,<sup>124</sup> which means that it is the Amharic version of the law that best reflects the intention of the legislature.<sup>125</sup>

The other thorny issue is whether or not sound recordings produced by individuals who have principal residence in Ethiopia are protected by the Ethiopian Copyright Proclamation. In other words, can a resident of Ethiopia that has produced a sound recording claim protection of this work by

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<sup>123</sup> See Federal Negarit Gazeta Establishment Proclamation, 1995, Proc. No. 3, *Federal Negarit Gazeta*, Year 1, No. 3.

<sup>124</sup> *Id.*, Art. 2 (4).

<sup>125</sup> See House of Peoples' Representatives of the Federal Democratic Republic of Ethiopia, Rules of Procedures and Members' Code of Conduct Regulation, 2006, Art. 25, Regulation No. 3/2006.

invoking residence as a point of attachment? This question is the result of the fact that Article 3(4) of the proclamation (which deals with the scope of application of law with regard to sound recordings) has only incorporated nationality of the producer, first fixation and first publication of the sound recording in Ethiopia as points of attachment with the Ethiopian Copyright Proclamation. In response to this issue, it may be argued that since Article 3(4) of the proclamation is silent in this regard, sound recordings produced by individuals who have principal residence in Ethiopia are not protected by the proclamation. But the contrary may also be also argued. In the opinion of the author, the latter argument is convincing because if sound recordings which are first fixed or first published in Ethiopia are protected by the Copyright Proclamation, it would be unsound to deny protection to sound recordings produced by individuals that have principal residence in Ethiopia. This is so because if the producer of the sound recording is an Ethiopian resident, he or she is more closely connected with Ethiopia than the requirements of first fixation or first publication of a sound recording entail.

Before we finalize the discussions in relation to protection of sound recordings, one last point should be raised. A close scrutiny of Article 3(4) of the proclamation invites questions about whether both physical persons and legal persons are envisaged by the proclamation as producers of sound recordings. That physical persons are producers of sound recordings and hence deserve protection can be gathered by reading Article 3(4)(a) of the Proclamation which states that sound recordings produced by Ethiopian nationals are protected by the Copyright Law. The question is whether or not sound recordings produced by legal persons (established as per the Ethiopian

Commercial Code or registered here in Ethiopia in accordance with the relevant laws) are protected by Article 3(4)(a) of the proclamation. A close reading of the definition of the term producer of sound recording seems to provide an affirmative answer to this query since the definition does not make any distinction between physical and legal persons.<sup>126</sup>

### **3.4. Qualification of Broadcasts of Broadcasting Organizations**

Broadcasts are essential intellectual properties which are meant to serve a number of purposes for the international community in general and for the people of a given nation in particular. Such intellectual property plays an irreplaceable role in insuring the right to freedom of expression and access to information, which are fundamental constitutional rights in modern democratic countries. Generally speaking, broadcasts play remarkable roles in promoting the economic, social and political well-being of a given society. Therefore, national copyright laws have given recognition and protection to broadcasts of various natures.

At the international level, the most important conventions regulating the protection of broadcasts and hence the rights of broadcasting organizations are the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations,<sup>127</sup> the 1974 Brussels Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite,<sup>128</sup> and the 1994 TRIPS

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<sup>126</sup> See Ethiopian Copyright Proclamation, Art. 2(21), *supra* note 5. It simply states that a producer of a sound recording is a person who takes the initiative and the responsibility for the making of sound recording works.

<sup>127</sup> The 1961 Rome Convention, *supra* note 2.

<sup>128</sup> The 1974 Brussels Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite, *supra* note 2.

Agreement.<sup>129</sup> National laws of various countries have also incorporated pertinent provisions dealing with rights of broadcasting organizations in their broadcasts. Part Two, Chapter Two of the Italian Copyright Law,<sup>130</sup> for instance, is devoted to the protection of rights of broadcasting organizations in radio and television, while Part Two, Section Five of the Copyright Law of Germany deals with the rights of broadcasting organizations in their broadcasts.<sup>131</sup> The Tanzanian Copyright Act has also incorporated provisions which are meant to safeguard the rights of broadcasting organizations over their broadcasts.<sup>132</sup>

Before we discuss the qualification of broadcasts to be protected by the Ethiopian Copyright Proclamation, it is necessary to say a few words about broadcasting. As per Article 3(f) of the Rome Convention, broadcasting means “transmission by wireless means for public reception of sounds or of images and sounds.”<sup>133</sup> According to Article 4 of the Tanzanian Copyright Law, broadcasting pertains to “communication of a work, a performance or a sound recording to the public by wireless transmission, including transmission by satellite.”<sup>134</sup> In Ethiopia, broadcasting is defined by the Copyright Law as “transmission by wireless means for public reception of sounds or images or of sounds and images”, which shows that the definition

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<sup>129</sup> See TRIPS Agreement, *supra* note 2.

<sup>130</sup> Italian Copyright Law, *supra* note 16.

<sup>131</sup> See German Copyright Law, Art. 87, *supra* note 21.

<sup>132</sup> The Copyright Act of Tanzania, *supra* note 54.

<sup>133</sup> The 1961 Rome Convention, *supra* note 2.

<sup>134</sup> Copyright Act of Tanzania, *supra* note 54.

accorded the term by the Ethiopian Copyright Proclamation a verbatim copy of the definition is provided by the Rome Convention.<sup>135</sup>

It should be borne in mind that broadcasts are unthinkable without broadcasting organizations, which means that when we talk about the protection of broadcasts, we are in effect talking about the protection extended to broadcasting organizations. The Ethiopian Copyright Proclamation has tried to define what a broadcasting organization is. As provided in Article 2(4) of the Ethiopian Copyright Proclamation, a broadcasting organization pertains to a radio, television, and cable television station or satellite.<sup>136</sup>

With respect to criteria of qualification for protection, national laws have provided qualification requirements (points of attachments), taking into consideration their national interests and international obligations stipulated by international conventions to which they are parties. In this regard, under the German Copyright Law<sup>137</sup> broadcasting organizations which have their headquarters in the territory to which the German Copyright Law applies shall enjoy the protection afforded by Article 87 of the same law with respect to all of their broadcasts, irrespective of where they are broadcast. In addition, the German Copyright Law has stipulated that broadcasting organizations which do not have their headquarters in the territory to which the German copyright law applies shall enjoy protection for all of their broadcasts which are broadcast from that territory.<sup>138</sup> Moreover, this law has made clear that broadcasting organizations which do not have their headquarters in the

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<sup>135</sup> See the Ethiopian Copyright Proclamation, Art. 2(3), *supra* note 5.

<sup>136</sup> *Id.*, Art. 2(4).

<sup>137</sup> German Copyright Law, Art. 127(1), *supra* note 21.

<sup>138</sup> *Id.*, Article 127(2)



territory to which the law applies shall further enjoy protection as provided by international treaties to which the country is a party.<sup>139</sup> By the same token, according to Article 3(4) of the Tanzanian Copyright Law, protection of broadcasts of a broadcasting organization is available where the headquarters of the broadcasting organization is situated in Tanzania or the broadcast was transmitted from a transmitter situated in Tanzania.<sup>140</sup>

In Ethiopia, broadcasts are protected where the requirements stipulated in Article 3(5) of the Copyright Proclamation are satisfied.<sup>141</sup> Accordingly, broadcasts are protected where they are broadcasts of broadcasting organizations the headquarters of which are situated in Ethiopia. Here, we have to bear in mind that the ownership of the broadcasting organization or the place of the incorporation of such organization does not matter with regard to protection for such works. Rather, what matters is the location of the headquarters of the broadcasting organization. In addition, broadcasts are also protected in Ethiopia where they are transmitted from transmitters situated in Ethiopia.

Here, a close examination of Article 3(5)(a) and (b) of the Proclamation induces the author of this piece to ask whether or not the requirements provided in Article 3, sub-articles 5(a) and (b) of the Proclamation—i.e., location of the headquarters and the existence of the transmitter in Ethiopia—should be met cumulatively or alternatively. As with the case of sound recordings, the English version of this sub-article indicates that in order to extend protection to broadcasts, the broadcasting organization

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<sup>139</sup>Id, Article 127(3)

<sup>140</sup>Copyright Act of Tanzania, *supra* note 54.

<sup>141</sup>The Ethiopian Copyright Proclamation, *supra* note 5.

must have its headquarters in Ethiopia and the broadcast must be transmitted from a transmitter located in Ethiopia. However, the Amharic version of this sub-article seems to indicate that the elements provided in Article 3(5)(a) and (b) should be met alternatively for a broadcast to be protected in Ethiopia, as the conjunction ‘**and**’ is missing in the Amharic version of the Proclamation.<sup>142</sup>

Therefore, on the basis of the Amharic version of the Proclamation, this author argues that broadcasts should be protected in Ethiopia where the broadcasting organization has its headquarters in Ethiopia or where the broadcasts are transmitted from a transmitter located in Ethiopia, since demanding that both requirements be met would be extremely cumbersome to broadcasting organizations, making it difficult for them to obtain protection for their broadcasts. However, in order to avoid the confusion created by the Proclamation, with regard to the protection of broadcasts of broadcasting organizations, we need to amend the proclamation.

## **Concluding Remarks**

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<sup>142</sup>See the Federal Negarit Gazzeta Establishment Proclamation, *supra* note 120. In contradistinction to the Ethiopian Copyright Law, the Tanzanian Copyright Act has made it clear that a broadcast is protected in Tanzania where the headquarters of the broadcasting organization is situated in Tanzania or the broadcast is made from a transmitter situated in Tanzania. In order to better appreciate the problem posed by the confusion involved in this sub-article, let us consider the following illustrative hypothetical case. Let us assume that X is a broadcasting organization (share company) incorporated in accordance with the laws of South Africa. Its headquarters is situated in Addis Ababa. It broadcasts various television programs from a transmitter located in Cape Town. In this hypothetical case, if we stick to the argument that the location of the headquarters and the transmitter should be located in Ethiopia, the broadcasts of X Broadcasting Organization are not protected in Ethiopia. Whereas, if we maintain that for broadcasts to be protected in Ethiopia, either the headquarters of the broadcasting organization or the transmitter should be situated in Ethiopia, the broadcasts of X Broadcasting Organization are protected in Ethiopia.

As compared to the 1960 Civil Code, with regard to protection of copyright, the 2004 Copyright and Neighboring Rights Proclamation has introduced a number of significant changes that are instrumental for the proper protection of copyright and neighboring rights in Ethiopia. One of such improvements is that the Copyright Proclamation has tried to define its scope of application with regard to copyrights and neighboring rights. Consequently, Article 3 of the proclamation, which contains seven sub-articles, is entirely devoted to defining the various grounds of qualification for the protection of copyrights and neighboring rights by the proclamation.

However, there are problems and deficiencies contained in the proclamation with regard to certain points of attachment (criteria of eligibility) of works which will negatively impact appropriate implementation of the law in the future. To begin with, although Article 3(1)(a) of the Copyright Law has declared that works of authors who are nationals of Ethiopia are protected by the proclamation, the law has not regulated the situation where a work is jointly created by an Ethiopian national and a foreign national who (the latter) does not have any nexus whatsoever (point of attachment) with Ethiopia. Therefore, it is imperative to amend the proclamation to ensure protection for such works. The work should be protected by the Copyright Proclamation with a view to safeguarding the interest of the Ethiopian national and encouraging foreign nationals to work with Ethiopian nationals elsewhere in the world.

In addition, the same sub-article of the proclamation has provided that non-nationals are protected by the Copyright Law of Ethiopia where they are residents of Ethiopia. But the Ethiopian law has said nothing about protection

for a work created jointly by a person who has principal residence in Ethiopia and another non-national and non-resident of Ethiopia. Hence, this author recommends that a clear legal provision be put in place by amending the proclamation so as to ensure that the Ethiopian Copyright Proclamation shall be applicable to works which are jointly created by an Ethiopian resident and a non-resident person, just as though they were created by an Ethiopian resident alone.

The Ethiopian Copyright Proclamation has stipulated that works of authors who have principal residence in Ethiopia are protected by the proclamation which unequivocally indicates that works of authors who have secondary residence in Ethiopia are not protected, given that the Ethiopian Civil Code of 1960 divided residences into principal and secondary categories. The problem, however, is that there are no adequate guidelines to help us characterize a person's residence as principal or secondary, which leads to extremely subjective determinations. If we are convinced that it is only those works of authors who have principal residence in Ethiopia that must be protected by our law, then this author believes that we must clearly define what principal residence is for the purpose of implementation of the Copyright Proclamation. If, on the other hand, we believe that distinguishing between principal residence and secondary residence is a difficult task, we have to do away with the distinction and simply provide that those authors who are residents of Ethiopia are protected by the proclamation, as is the case in other jurisdictions.

The Copyright Proclamation of Ethiopia has not said anything about the protection to be accorded to stateless authors who happen to be present in Ethiopia unlike the copyright laws of other jurisdictions, which declare that

stateless persons who are habitually resident in the territory to which the laws apply enjoy the same copyright protection as nationals of the country concerned. Therefore, it is the firm belief of this author that it is important to reconsider our law as far as the rights of stateless persons who have created copyrightable works in Ethiopia are concerned.

We know that there have been influxes of thousands of refugees into Ethiopia, particularly from the Sudan, Somalia, Eritrea and other African countries affected by civil war and unrest. For this reason and others, there may be individuals who create copyrightable works while they are in Ethiopia. The issue, therefore, is whether these individuals are to be protected under the Ethiopian Copyright Proclamation during their stay and after their repatriation to their home countries or their departure to a third country. The Ethiopian Copyright Proclamation is not clear in this regard while the German Copyright Law, for instance, has made it clear that its provisions shall apply to foreigners who are refugees within the meaning of treaties or other statutory provisions. Therefore, despite the fact that it may be contended that since refugees are considered to be residents of Ethiopia, such authors may be protected by virtue of the criterion of principal residence, the author recommends that clear provisions protecting their works be incorporated into our Copyright Proclamation by amending the law.

When we closely examine the English version of sub-article (4.b&c) of Art.3 our Copyright Proclamation, we can realize that the requirements of fixation and publication for the protection of sound recordings are put in a confusing manner. According to the English version, the requirements of first fixation and first publication must be satisfied

cumulatively. This is because these requirements are joined by the coordinating conjunction '*and*,' which indicates that these requirements must be satisfied cumulatively for a sound recording to be protected in Ethiopia. In the Amharic version of this provision, however, the conjunction 'and' is missing. Nor does the Amharic version employ the conjunction '*or*,' which is used to introduce another possibility. In any case, this confusion can best be remedied by amending the Copyright Law of Ethiopia and by stating clearly that the requirements of first fixation and first publication should be met either alternatively or cumulatively for the purpose of protection of sound recordings in the country.

In addition, this provision dealing with grounds of qualification for protection of sound recordings in Ethiopia says nothing about whether or not sound recordings produced by individuals who have principal residences in Ethiopia are protected by the copyright law. What is more, though first fixation and first publication of a sound recording are declared to be grounds of qualification for protection by the Copyright Proclamation, the provision does not address the issue of simultaneous fixation or simultaneous publication of a sound recording in Ethiopia and abroad. In view of this problem as well as the others mentioned above, it is the firm belief of this author that the Ethiopian Copyright Law should be amended to clearly regulate these issues.

Finally, in the case of protection of broadcasts of broadcasting organizations in Ethiopia, a close scrutiny of Art.3(5.a&b) of the Copyright Proclamation reveals that the requirements of location of the headquarter of the broadcasting organization in Ethiopia and transmission of broadcasts from transmitters located in Ethiopia are put confusingly. This is so because these

requirements are joined by a coordinating conjunction ‘*and*’ in the English version, indicating that the requirements must be satisfied cumulatively for such works to be protected by the Ethiopian Copyright Proclamation. But the conjunction ‘*and*’ is missing in the Amharic version of this provision which seems to indicate that either the presence of the headquarters of the broadcasting organization in Ethiopia or the transmission of broadcasts from transmitters located in Ethiopia suffices for broadcasts to be protected by the Ethiopian Copyright Proclamation. Nevertheless, it is important to note that the Amharic version of the provision has not incorporated the conjunction ‘*or*,’ which should have been used to show that the afore-mentioned requirements (grounds of qualification) for the protection of broadcasts could be met alternatively. Therefore, the author recommends that the solution for this confusion be sought by amending the Copyright Proclamation. In the opinion of the author, the amended law should provide without equivocation that broadcasts of broadcasting organizations are to be protected by the Ethiopian Copyright Proclamation where the headquarters of the organization is located in Ethiopia or where the broadcast is transmitted from a transmitter located in the country.