

Copyright and Tertiary Education for Human Development: Rethinking the Policy, Law and Practice in Ethiopia

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Abstract

This thesis explores the interplay between copyright and tertiary education, and their roles for sustainable human development in Ethiopia. Access to learning materials is used as a context for the exploration. Despite its recognition of development as a human and constitutional right, Ethiopia emphasizes economic growth as the core of its national development objectives. To this end, tertiary education is often considered for its instrumental role in human capital formation. Given this narrow lens of development, the thesis observes the neglect of human development as the enlargement of human capabilities.

It is underscored that development-oriented copyright and tertiary education are both vital in themselves and complementary for sustainable human development. Nonetheless, their complementing roles depend upon relevant policy and legal flexibilities that facilitate access to learning materials. As a major context for the interplay, access to learning materials is essential for both sustainable creative innovation and quality tertiary education. Noting a restrictive copyright system as one of the impediments, the thesis thus inquiries into the regime and finds out the non-incorporation of relevant international copyright-related flexibilities. Adopting a TRIPs-plus approach, the existing national copyright law in Ethiopia has left out a number of legal flexibilities relevant for increased access to learning materials. Stifling creative and learning freedoms or capabilities, this has serious ramifications for sustainable human development.

From human development perspective, the thesis further unveils lack of coherence in the regimes and proper orientations towards human development. Therefore, it is imperative to revisit the regimes, forge a coherence, and retract the excessive protection. A comprehensive integration of appropriate flexibilities is recommended to promote creative and learning capabilities for enhanced human development.

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Select Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
ACHPRW	African Charter on Human and People’s Rights on the Rights of Women
ACHPR	African Charter on Human and Peoples’ Rights
Art.	Article
AU	African Union
CA	Capabilities Approach
CEARL	Consortium of Ethiopian Academic and Research Libraries
CC	Creative Commons
CESCR	Committee on Economic, Social, and Cultural Rights
CMS/Os	Collective Management Societies or Organizations
CRPD	Convention on the Rights of Persons with Disabilities
DA	Development Agenda
DRD	Declaration on the Right to Development
ECL	Extended Collective Licensing
ECRA	Ethiopian Custom and Revenue Authority
ESC	Education Strategy Centre
ESTC	Ethiopian Science and Technology Commission
EIPO	Ethiopian Intellectual Property Office
ETP	Education and Training Policy
FDRE	Federal Democratic Republic of Ethiopia
GA Res	General Assembly Resolution
GPL	General Public Licensing
GTP	Growth and Transformation Plan
HERQA	Higher Education Relevance and Quality Agency
LAMs	Libraries, Archives and Museums
L&Es	Limitations and Exceptions
MDGs	Millennium Development Goals
MOSHE	Ministry of Science and Higher Education
NCP	National Cultural Policy

PDRE	People’s Democratic Republic of Ethiopia
Proc.	Proclamation
OA	Open Access
RTD	Right to Development
STI	Science, Technology and Innovation
TPMs	Technological protection measures
TRIPs	Trade-Related Aspects of Intellectual Property Rights
UCC	Universal Copyright Convention
UDHR	Universal Declaration on Human Rights
UNTS	United Nations Treaty Series
UN SDGs	United Nations Sustainable Development Goals
ICESCR	International Covenant on Economic, Social and Cultural Rights
UNCPD	UN Convention on Persons with Disabilities
UNCRC	United Nations Convention on the Rights of the Child
UNWCED	United Nations World Commission on Environment and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

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Chapter I: The Conceptual Framework of the Study

1.1. Copyright, Education and Development: Introduction

From various areas of interlinkage, copyright, education and development are interlinked in the context of human capital, human capabilities and access to knowledge. In their interdependence, human development remains the ultimate objective and an inclusive context. Its elaboration slated for later, the notion of human development is noted to denote the expansion of human capabilities or freedoms.¹ As defined in the *Human Development Report (1990)*, human development is “a process of enlarging people’s choices or opportunities.”² In essence, what constitute human development are people’s actual abilities or freedoms *to do* and *to be* in order to lead worthwhile lives.³ From among others, access to knowledge is essential for the realization of human development.⁴ Integral to access to knowledge, access to learning materials is thus a crucial point of nexus between copyright and education, and their roles for human development. In so doing, human rights and constitutional dimensions are useful.

Constituting an essential input, access to learning materials is vital for the knowledge-intensive tertiary education, scientific research and innovation. Taking this as a context, this thesis seeks to explore the interplay between tertiary education and the protection of copyright, and their roles for human development. To this end, the thesis adopts capability approach (CA) as its organizing theoretical framework. As explained further in the subsequent chapter, the approach emphasizes the actual abilities of a person for valuable achievements. That said, this chapter is limited to highlighting

¹ Amartya Sen, *Development as Freedom* (New York: Anchor Books, 1999) at 3 & 8[Sen, *Development as Freedom*].

² UNDP, *Human Development Report 1990* (New York & Oxford: UNDP & Oxford University Press, 1990) at 1&10.

³ Sen, *Development as Freedom*, *supra* note 1 at 75; see Martha C. Nussbaum, *Women and Human Development: The Capability Approach* (Cambridge: Cambridge University Press, 2000) at 84-85 [Nussbaum, *Women and Human Development*].

⁴ Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven, CT: Yale University Press, 2006) at 1[Benkler, *The Wealth of Networks*].

the normative dimensions of education, copyright and development. Further, it points out, *inter alia*, the research problems, Ethiopian socio-economic and legal context, and the major research questions.

1.2. Education in the Context of Access to Learning Materials

1.2.1. Education as a Human Right

Education is of a fundamental significance for human beings. Framed as a basic right, the right to education is a multifaceted right. In its manifold dimensions, the right cuts across civil, political, social, economic and cultural rights.⁵ The right has been incorporated in major human rights instruments.⁶ The embodiment of the right in legal regimes at various levels affirms the importance of education. For instance, the right to education has been enshrined in the relevant provisions of the Universal Declaration on Human Rights (UDHR),⁷ the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁸ and the UN Convention on the Rights of the Child (UNCRC).⁹ Serving as a blueprint for subsequent human rights instruments, art. 26(1) of the UDHR states that “everyone has the right to education.” In the same vein, art.13(1) of the ICESCR—a binding international human rights instrument—reiterates an explicit recognition of “the right of everyone to education.” At a regional level, the African Charter on Human and Peoples’ Rights (African Charter) is the major

⁵ Katarina Tomasevski, “Has the Right to Education a Future in the United Nations?: A Behind-the-Scene Account by the Special Rapporteur on the Right to Education 1998-2004” (2005) 5:2 Hum Rights L Rev 205 at 224; Katrina Tomasevski, *Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable, Right to Education Premiers No.3* (Gothenburg: Novum Grafiska AB, 2001) at 8-9 [Tomasevski, *Human Rights Obligations*]

⁶ See Fon Coomans, “Exploring the Normative Content of the Right to Education as a Human Right: Recent Approaches” (2004) 50 *Persona & Derecho* 61 at 61.

⁷ See *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3d Sess, 1st plen mtg, UN Doc A/810 (Dec.12, 1948) at art. 26 [UDHR].

⁸ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS No 3 (entered into force Jan. 3, 1976) at art.13 [ICESCR].

⁹ *UN Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force on 2 September 1990) at art.28 & 29 [UNCRC]. In particular, in the recognition and progressive realization of the right of the child to education on the basis of equal opportunity, State parties are required to “make higher education accessible to all on the basis of capacity by every appropriate means.” See *ibid* at art.28(1)(c).

regional human rights instrument that recognizes every individual's right to education.¹⁰ In contrast to its international counterparts, the African Charter makes a generic reference to the right to education without a distinction among its various levels. Further, the African Charter on the Rights and Welfare of the Child (ACRWC) is another important regional human rights instrument that recognizes the right to education.¹¹ Given its distinctive approach, the African Charter places all categories of human rights, including the right to education, on a par to command an immediate application.

In its detailed treatment of the various levels, the ICESCR underscores the importance of the right to education.¹² In fact, the realization of education at all levels will be critical for the fullest enjoyment of the right to education. In principle, education must be made available at all levels.¹³ As opposed to the approach under the African Charter, the ICESCR embodies a significant variance in the weight attached to each level of education. For example, the Covenant obligates members to ensure an *immediate* provision of free and *compulsory* primary education.¹⁴ As such, the immediacy and compulsory requirements underline the unconditional nature of the right to basic education. In other words, the right to basic education is affirmed as the minimum essential or core level of education. In

¹⁰ *African Charter on Human and Peoples' Rights*, 27 June 1981, 21 ILM 58 (entered into force on 21 October 1986) at art.17 (1) [African Charter].

¹¹ *African Charter on the Rights and Welfare of the Child*, 01 July 1990, OAU Doc.CAB/LEG/24.9/49 (entered into force 29 November 1999). Ethiopia has been a party to the Charter since its ratification of the charter in 2002.

¹² See ICESCR, *supra* note 8 at arts.13(2)(a)-(c). As one can readily observe from the articles of the Covenant, the article on human right to education (art. 13) is the longest provision in the Covenant. The inclusion of such a lengthy provision in the Covenant is neither accidental nor insignificant. Rather, it is an indicative of the weight attached to the significance of the right and its detailed treatment. See generally Committee on Economic, Social and Cultural Rights, *General Comment No.13: The Right to Education*, UN Doc E/C 12/1999/10 (Dec. 8, 1999) [CESCR General Comment No.13]

¹³ ICESCR, *supra* note 8 at art.13; See *General Comment No.13*, *supra* note 12 at para 6; Klaus Beiter, *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* (Leiden & Boston: Martinus Nijhoff, 2006) at 478[Beiter, *The Protection of the Right to Education*].

¹⁴ ICESCR, *supra* note 8 at art.13(2)(a); *General Comment No.13*, *supra* note 12 at paras 8-10; Beiter, *The Protection of the Right to Education*, *supra* note 13 at 510-16.

contrast, secondary education is required to be made *generally* available and accessible to all by *progressive* introduction of free education.¹⁵ This variance is more pronounced for tertiary education.

1.2.2. Tertiary Education as an Integral Element of Right to Education

As noted from various human rights instruments, a tertiary (higher) education is articulated as one of the levels of education. As per the ICESCR known for its variance on the levels of education, the recognized right of equal access to tertiary education is conditioned upon the requirements of *capacity* and *merit*.¹⁶ In its departure from the African Charter that avoids these condition precedents, the ACRWC still follows the ICESCR to mirror its requirements. In so doing, art.11 of the ACRWC requires State parties to take “all appropriate measures” in order to “make higher education accessible to all on the basis of capacity and ability by every appropriate means.”¹⁷

In the event such a variance exists among the human rights instruments, it is incumbent upon the States to take a more progressive approach to ensure a better implementation of the right to education. Taking an opposite measure is tantamount to a regressive action that requires an adequate justification to remain lawful. Integral to the human right recognized under the African Charter on the same footing with other rights, the equitable provision of tertiary education is thus required to be of an immediate application as the Charter avoids the notion of progressive realization animating the ICESCR.¹⁸ Unless African states, including Ethiopia, take this approach to ensure an equal and immediate access to tertiary education, the resource-contingent principle of progressive realization

¹⁵ ICESCR, *supra* note 8 at art.13(2)(b); *General Comment No.13*, *supra* note 12 at paras 11-14; Beiter, *The Protection of the Right to Education*, *supra* note 13 at 516-21.

¹⁶ ICESCR, *supra* note 8 at art.13(2)(c); *General Comment No.13*, *supra* note 12 at paras 17-20; Beiter, *The Protection of the Right to Education*, *supra* note 13 at 521-26.

¹⁷ ACRWC, *supra* note 11 at art.11 (3)(c).

¹⁸ Chidi Anselm Odinkalu, “Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights under the African Charter on Human and People’s Rights”(2001) 23:2 Hum Rts Q 327 at 349-50. As Odinkalu points out, given their equal status under the Charter, obligations assumed for implementation of economic, cultural and social rights are “*clearly stated as of immediate application.*”(emphasis added). *Ibid* at 349.

entrenched in the ICESCR remains a significant drawback. Embodied in the Covenant, the principles of non-discrimination and progressive realization are the governing rules for the required access. Despite the need for its immediate application, the operation of the principle of equal access is subject to objective criteria nations might set to determine capacities for admission.¹⁹ For the resource-and-time-contingent rule of progressive realization, concrete and progressive steps are required to achieve the full enjoyment of all the rights enshrined in the ICESCR.²⁰ From among levels of education, tertiary education is subject to even a more flexible degree of progressive realization.²¹

In effect, all the foregoing pragmatic qualifications militate against the claimed human rights status of tertiary education. This in part is attributed to both past and current trends. In its traditional evolution, tertiary education was treated as a privilege reserved for the elites.²² In the present context of globalization, it is regarded as a tradable commodity or service in the global trade regime.²³ In both situations, access to the education is not within the reach of the public at large to claim it as of a right. In effect, the human right status is often disputed for, *inter alia*, lack of a universal recognition as such.²⁴ In the positivist international law, the reluctance on the status is a reminder about the nature of human

¹⁹ Beiter, *The Protection of the Right to Education*, *supra* note 13 at 403-06, 457 & 522-526; Beiter notes the equal access to tertiary education as an issue of substantive equality that requires equal opportunities and equal treatment. *Ibid* at 404. As noted in the General comment No.13, capacities of individuals “should be assessed by reference to all their relevant expertise and experience.” *General Comment No.13*, *supra* note at 12 para 19.

²⁰ See ICESCR, *supra* note 8 art.2(1); *CESCR General Comment No.3: The Nature of States Parties Obligations (Article 2(1))*, UN Doc. E/1991/23(14 December 1990) at paras 1, 2 &9 [*CESCR General Comment No.3*]; *General Comment No.13*, *supra* note 12 at paras 43-48; Beiter, *The Protection of the Right to Education*, *supra* note 13 at 374-91; Katrina Tomasevski, *Education Denied: Costs and Remedies* (New York: zed books, 2003) at 53 [Tomasevski, *Education Denied*]. Tomasevski points out that “‘progressive realization’ was the key phrase used for the right to education in international human rights treaties.” *Ibid*.

²¹ Beiter, *The Protection of the Right to Education*, *supra* note 13 at 390-91.

²² Tristan McCowan, *Education as a Human Right: Principles for a Universal Entitlement to Learning* (London, UK: Bloomsbury, 2013) at 122-24.

²³ Katrina Tomasevski, “Globalizing What: Education as a Human Right or as a Traded Service?” (2005) 12:1 *Ind J Global Leg Stud* 1 at 8-15[Tomasevski, “Globalizing What”]; Tomasevski *Human Rights Obligations*, *supra* note 5 at 9; Tomasevski, *Education Denied*, *supra* note 20 at 2. In noting the implication of other laws such as trade law, Tomasevski pointed out how “the advent of trade in education services challenged the very notion that education is a human right.” Tomasevski, “Has the Right to Education a Future Within the United Nations?” *supra* note 5 at 224 & 229.

²⁴ See generally Tomasevski, “Globalizing What” *supra* note 23. The major grounds of the criticism against the assertion of a tertiary education as a right relate to: its resource-intensive and specialized nature, its historical restriction to the elites, lack of universal desire or capacity to pursue the study at this level, and the inability of states to ensure its universal access. See McCowan, *supra* note 22 at 122.

instruments as embodiments of global norms recognized or developed through consensus.²⁵ Without a clear recognition, a norm remains a mere moral standard short of a legal obligation. Yet a state is free to provide for a legal right to tertiary education within its jurisdiction. For instance, Venezuela has taken this approach to recognize a constitutional right to tertiary education.²⁶

Critical of the conceptual deficit in the global norms, some scholars construe tertiary education as an integral part of the general right to education.²⁷ For instance, Tristan McCowan criticizes the distinction among levels of education for its arbitrariness and views tertiary education as a component of the right to education.²⁸ Likewise, Katrina Tomasevski—the first Special Rapporteur on the right to education—appeared to suggest this view. For her, “the right to education may be defined in terms of access to free-of-charge schooling at all levels—from the nursery to postgraduate studies.”²⁹ Nonetheless, both take note of the cumbersome financial implication for its realization.³⁰ Further, seen through a lifelong learning process as a continuum, the conceptual distinction might run counter to the

²⁵ See Tomasevski, “Has the Right to Education a Future?” *supra* note 5 at 212 (pointing out how states’ consensus matters even for adoption of resolutions related to the right to education). This is not to suggest that human rights are creations of treaties. Rather, “[i]nternational treaties are meant to be tools to vindicate human rights.” *Ibid* at 229.

²⁶ See Venezuela (Bolivarian Republic of)’s Constitution of 1999 with Amendments through 2009, art.103. The relevant part of art. 103 reads: “*Every person has the right to a full, high-quality, ongoing education under conditions and circumstances of equality (.....) Education is obligatory at all levels from maternal to the diversified secondary level. Education offered at State institutions is free of charge up to the undergraduate university level.*” Emphasis added.

²⁷ McCowan, *supra* note 22 at 119-126. Defined by its overarching purpose, the right to education can be regarded as a unitary right with multiple levels of enjoyment or implementation. Beiter also tends to treat tertiary education as an element of the right to education. See generally Beiter, *The Protection of the Right to Education*, *supra* note 13.

²⁸ McCowan, *supra* note 22 at 118-22. McCowan contends that “[a]ny threshold of educational development established to mark the ending of the entitlement would be arbitrary. (.....) The right to education—if it is a right at all—must apply in some way through life.” *Ibid* at 119.

²⁹ Tomasevski, *Human Rights Obligations*, *supra* note 5 at 17. Elsewhere, Tomasevski also cites an early jurisprudence of African Commission on the art.17 of the African Charter, wherein the Commission held the closure of universities and secondary schools in Zaire to be in violation of the Charter. *Ibid* at 19. See *African Commission on Human and Peoples’ Rights –Free Legal Assistance Group, Lawyers Committee for Human Rights, Union Interafricaine des Droits del’Homme, Les Témoins de Jehovah v. Zaire, Communications 25/89, 47/90, 56/91 and100/93* (joined), Decision of the Commission adopted at its 18th ordinary session at Prais (Cape Verde), *Ninth Annual Activity Report of the African Commission on Human and Peoples’ Rights 1995/96, Assembly of Heads of State and Government, Thirty-second Ordinary Session, 7–10 July 1996, Yaounde, Cameroon.*

³⁰ Tomasevski, *Human Rights Obligations*, *supra* note 5 at 17. McCowan, *supra* note 22 at 127.

progressive, continuing, nurturing nature and objective of education.³¹ The conceptual conundrum aside, the existing human rights instruments tend to be pragmatic in their approach to reflect the variance among the levels of education. This is evident from the readings of the provisions and the conditions attached to each level of education. In line with the distinctive approach in the African Charter and the concomitant progressive jurisprudence of the African Human Rights Commission, the variance under the ICESCR and the ACRWC should wane for human development to flourish in its fullest sense.

1.2.3. Purpose and Significance of Education

Given its fundamental importance, the purpose of education irrespective of its levels is articulated in all the major international human rights instruments— the UDHR, the ICESCR and the UNCRC. A clear articulation of the objective of education is relevant to determine the nature, content and scope of education at all levels. As a precursor to the subsequent binding instruments, the UDHR under its art.26 (2) states that “[e]ducation shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.” In the same vein, art. 13(1) of the ICESCR, while echoing the same purpose of education in verbatim, intertwines the development of human personalities with the “sense of dignity” as an intrinsic purpose of education.³²

In respect of its instrumental role, education advances other human rights values that, in turn, further the respect for human rights and fundamental freedoms.³³ In particular, education promotes an

³¹ McCowan, *supra* note 22 at 119-20; David N. Aspin & Judith D. Chapman, “Lifelong Learning: Concepts and Conceptions,” in Aspin, ed, *Philosophical Perspectives on Lifelong Learning* (The Netherlands: Springer, 2007) 19 at 34-35.

³² ICESCR, *supra* note 8 at art.13(1); General Comment No.13, *supra* note 12 at para 4. Beiter, *The Protection of the Right to Education*, *supra* note 13 at 463-75.

³³ Laurence R. Helfer & Graeme W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge & New York: Cambridge University Press, 2011) at 321 [Helfer & Austin, *Human Right and Intellectual Property*].

effective and informed participation in a free society as well as understanding, tolerance and friendship among all nations, racial, ethnic and religious groups.³⁴ In effect, education fosters the maintenance of national, regional and global peace. Further, education is a catalyst for and driver of socio-economic development. In view of its holistic purpose, the effectiveness of the intrinsic and instrumental roles of education should be measured by the successful realization of its fundamental purpose—the fullest development of the human personalities.³⁵ In this regard, Nussbaum reminds us of the critical role of “a higher education [as] a part of every human being’s self-realization.”³⁶

In furtherance of the same core objective it shares with other levels,³⁷ tertiary education is thus notable for its role in the progressive realization of other human rights and human development.³⁸ Sharing the 4-A features of the right to education, tertiary education must also be available, accessible, acceptable and adaptable.³⁹ As can be noted from the ICESCR, the significance of tertiary education is implicit in the need for its *accessibility to all on equal basis*. To this effect, States are encouraged to ensure a progressive introduction of free education.⁴⁰ As emphasized in the *General Comment No.13*, States are expected to embrace the *progressive realization* approach that requires them to ‘move...

³⁴ See ICESCR, *supra* note 8 at art.13 (1); UDHR, *supra* note 7 at art.26 (2).

³⁵ UDHR, *supra* note 7 at art. 26(2); ICESCR, *supra* note 8 at art.13 (1). See also *CESCR General Comment No.13*, *supra* note 12 at para 4.

³⁶ Martha Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (Cambridge, MA: Harvard University Press, 1997) at 30[Nussbaum, *Cultivating Humanity*].

³⁷ ICESCR, *supra* note 8 art.13(1); *General Comment No.13*, *supra* note 12 at para 4; Beiter, *The Protection of the Right to Education*, *supra* note 13 at 463-75.

³⁸ See *CESCR General Comment No.13*, *supra* note 12 at para 1. Despite its textual omission, the notion of progressive realization has been introduced via the jurisprudence of African Commission on the interpretation of the African Charter in the light of the ICESCR. See Abdi Jibril Ali, “Interpretation of Economic, Social and Cultural Rights under the African Charter on Human and People’s Rights” (2018) 30 *Journal of Ethiopian Law* 1 at 3-12 & 17-26[Ali, “Interpretation”].

³⁹ *General Comment No.13*, *supra* note 12 at paras 6-7;

⁴⁰ ICESCR, *supra* note 8 at art.13(2)(c). The provision reads: Higher education shall be made equally accessible to all, on the basis of capacity, *by every appropriate means*, and in particular *by the progressive introduction of free education*. *General Comment No.13*, *supra* note 12 at para 20.

towards the full realization of art.13.⁴¹ Given its empowering potential, education is considered a multiplier.⁴² Over a period of time, the *progressive steps* towards the *full realization of education at all levels* will facilitate the progressive realization of other human rights, including the right to development.⁴³ From a lifelong learning perspective, the progressive realization of tertiary education and its significance are noted as an integral part of lifelong learning opportunities.⁴⁴

Noting the fundamental role of education, several countries, including Ethiopia, accord education a legal recognition at national levels. In Ethiopia, the legal recognition is made through the ratification of the relevant human rights instruments and the latter's incorporation into the national constitution. In fact, the Federal Democratic Republic of Ethiopia's (FDRE) Constitution underscores the need for the progressive realization of education through 'an ever increasing' allocation of available resources.⁴⁵ As noted above, this approach of lower but increasing threshold appears to be somehow regressive in contrast to the African Charter that preempts such a drawback. Further, tertiary education is often considered a vital tool for development through advanced human capital. As will be argued further, this role should rather be reframed and understood in the context of human capabilities.

1.2.4. Education's Dependence upon Access to Learning Materials

⁴¹ *General Comment No. 13*, *supra* note 12 para 44. Drawn from *General Comment No.3*, "[p]rogressive realization means that States parties have a specific and continuing obligation "to move as expeditiously and effectively as possible" towards the full realization of article 13." *Ibid*.

⁴² Tomasevski, *Human Rights Obligations*, *supra* note 5 at 10.

⁴³ *Ibid*. As Tomasevski notes, "[e]ducation operates as a multiplier, enhancing the enjoyment of all individual rights and freedoms where the right to education is effectively guaranteed, while depriving people of the enjoyment of many rights and freedoms where the right to education is denied or violated." *Ibid*.

⁴⁴ See generally Christopher Knapper & Arthur Cropley, *Lifelong Learning in Higher Education*, 3rd ed (London: Kogan Page, 2000). Lifelong education is important to promote equal educational opportunities, democratization and self-actualization. *Ibid* at 9 &10. The core features of life learning include universal access to learning opportunities, learning throughout lifespan, a stronger emphasis upon the intrinsic value of education, due recognition of learning in diverse settings, a focus on interactive learning process, etc.

⁴⁵ Proclamation on the Constitution of the Federal Democratic Republic of Ethiopia, Proc.No.1/1995, Fed. Negarit Gazetta, 1st Year No. 1, Addis Ababa, 21st August, 1995, art.41(4) [*FDRE Constitution*].

Whether noted as a human right or an instrument for development, or a combination thereof, the realization of education at all levels depends, *inter alia*, on access to learning materials.⁴⁶ In particular, a quality education at a higher level requires an adequate access to relevant and advanced learning materials. As articulated in the so-called 4-A scheme,⁴⁷ the availability, accessibility and acceptability (quality) of education are strongly linked to an adequate availability of the relevant learning materials. For instance, a human rights-based report by the United Nations Educational, Scientific and Cultural Organization (UNESCO) highlights the provision of books and equipment as a fundamental prerequisite for education and its quality.⁴⁸ Likewise, the Committee on Economic, Social, and Cultural Rights (CESCR) underlines an access to learning materials as one of the essential inputs required for the realization of the right to education in its relevant general comments.⁴⁹

It should thus be noted that access to learning materials is an essential resource for the realization of tertiary education that remains instrumental for the achievement of a holistic development with its economic, social and cultural dimensions.⁵⁰ As Ruth Okediji observes, both education and access to basic scientific knowledge are essential to create an enabling environment for “domestic initiatives and development policies to take root.”⁵¹ In sum, the realization of a tertiary

⁴⁶ *CESCR General Comment No.13*, *supra* note 12 at para 6; see Sharon E. Foster, “The Conflict between the Human Right to Education and Copyright” in Paul Torremans, ed, *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (The Netherlands: Kluwer Law International, 2008) 287 at 288.

⁴⁷ Developed by the first special rapporteur on the human right to education, the essential elements of the right to education comprises the availability, accessibility, acceptability and adaptability of an education. The scheme is very important as it offers an important substantive and evaluative framework for the domestic implementation of the right. See generally Tomasevski, *Human Rights Obligations*, *supra* note 5.

⁴⁸ UNESCO, *A Human Rights-Based Approach to Education for All*, 56 & 77 (2007), online: UNESCO <<http://unesdoc.unesco.org/images/0015/001548/154861E.pdf>>.

⁴⁹ See *CESCR General Comment No.13*, *supra* note 12 at para 6; *CESCR General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any scientific, Literary or Artistic Production of Which He or She is the Author (Art.15 (1) (c) of the Covenant)*, UN Doc E/C12/GC/17 (Jan.12, 2006) at para 35 [*CESCR General Comment No. 17*].

⁵⁰ Margaret Chon, “Intellectual Property “from Below”: Copyright and Capability for Education” (2007) 3 UC Davis L Rev 805 at 819 [Chon, “Intellectual Property from Below”].

⁵¹ Ruth L. Okediji, “The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries” (2006) UNCTAD-ICTSD Issue Paper No.15 [Okediji, *The International Copyright System*].

education and its role depend, *inter alia*, up on the availability of or access to relevant learning materials.

1.3. Copyright and Education in the Context of Access to Learning Materials

1.3.1. *Copyright as an Instrument of Public Interest*

In principle, copyright protection is premised on the desire to promote the production and dissemination of creative works for the purpose of public interest. Integral to the notion of public interest are the twin interests of authors and users. That is, copyright system is a means devised to promote both the protection of, and access to, the creative works.⁵² In fact, the dual aspects of the public interest are inextricably interlinked that one aspect cannot be treated in isolation from the other. As Rebecca Tushnet notes, both rights and limitations are designed to serve public interests by providing the necessary incentive for creative innovation and the users' (the public) freedom of access to the creative works, respectively.⁵³ In reality, there is a disproportionate emphasis on authors' aspect of public interest to promote the production of knowledge without a due attention to users' access to the knowledge—another essential aspect of public interest.⁵⁴ Further, nations adopt a slightly different approaches towards the intended public interest. For instance, the Anglo-American utilitarian objective of promoting “the progress of useful arts” emphasizes the primacy of the interest of the public at

⁵² *Ibid* at ix.

⁵³ Rebecca Tushnet, “Intellectual Property as a Public Interest Mechanism,” in Rochelle C. Dreyfuss & Justine Pila, eds, *The Oxford Handbook of Intellectual Property Law* (Oxford: Oxford University Press, 2018) 95 at 99. Tushnet also notes the notion of public interest as “the aggregated interest of the people who may be affected by some private action, as opposed to the concentrated interest of that private actor.” *Ibid* at 95.

⁵⁴ *Ibid*.

large.⁵⁵ In contrast, the continental copyright system emphasizes the natural-right based individual and creative autonomy of the authors with an indirect contribution to the interest of the society.⁵⁶

Despite the existence of different degrees of emphasis, the legal protection underpinning both systems is driven by legally recognized public and private interests. Indeed, both conceptions of copyright protection are instrumental for their direct or indirect role of advancing public interest for socio-economic development.⁵⁷ In this sense, the hitherto conceptual distinction in the copyright traditions has almost waned in the global copyright system.⁵⁸ That said, the instrumentalist purpose of copyright is embedded in the rights and limitations intended to advance the interest of the society at large. An issue of a protracted debate is however the extent to which the existing copyright system serves its intended purpose as an instrument of public interest. The issue is even more pressing at national levels.

1.3.2. Education as One of the Public Interests

From among various societal interests, education is one of the vital public interests that interact with copyright protection in the context of access to learning materials. For the interaction, the reason is twofold. First, most learning materials required for education are subject to copyright protection.⁵⁹ Second, the protected materials are an essential input for education to advance societal goals. In particular, learning materials constitute a vital prerequisite for quality tertiary education and scientific research. It is this context that brings to the fore the relationship between copyright and tertiary

⁵⁵ See Paul Goldstein, *International Copyright: Principles, Law and Practice* (New York: Oxford University Press, 2001) at 3 [Goldstein, *International Copyright*].

⁵⁶ *Ibid* at 4.

⁵⁷ *Ibid*.

⁵⁸ See generally Gillian Davis, “The Convergence of Copyright and Authors’ Rights—Reality or Chimera?” (1995) 26 IIC 964 [Davis, “The Convergence”].

⁵⁹ See Okediji, “The International Copyright System,” *supra* note 51 at 8 & 31-32.

education. From copyright perspective, the production and dissemination of creative works including learning materials are integral to the purpose of copyright protection. Indeed, promoting learning was one of the early intended objectives of the Statute of Anne (1710).⁶⁰ Despite its increasing marginalization, this age-old public interest aspect of copyright is instrumental for access to copyrighted learning materials. Education is thus one of the public interests that may be served through different mechanisms.

For example, both international and national copyright regimes allow various flexibilities that aim to facilitate access to copyrighted learning materials for educational purposes. In the international trade regime, members states might invoke education as one of the vital public interests integral to their development objectives. In this regard, art.8(1) of the TRIPs Agreement can be construed to embrace education a public interest in ‘sectors of vital importance’ for socio-economic and technological development.⁶¹ In view of its crucial role, Margaret Chon contends that “the key term ‘development’ in the TRIPs preamble and objectives should include the provision of basic education.”⁶² Despite the absence of an explicit reference to education or other aspects of the public interest in the provisions of the TRIPs Agreement or its negotiation record, this can be inferred from the incorporation of the Berne Convention into the TRIPs Agreement. In addition to the TRIP Agreement’s flexible notion of public interests in ‘sectors of vital importance,’ this inference ensues from the Convention’s unequivocal recognition of education from among the various public interest aspects of copyright. In this regard,

⁶⁰ Helfer & Austin, *Human Right and Intellectual Property*, *supra* note 33 at 316. The Statute of Anne is the first copyright statute that marked the beginning of the statutory copyright system.

⁶¹ Chon, “Intellectual Property from Below,” *supra* note 50 at 820. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 ILM1125 (1994) at art. 8 [TRIPS Agreement]

⁶² *Ibid.* Margaret Chon, “Intellectual Property and the Development Divide” (2006) 27:6 Cardozo L Rev 2813 at 2893-2908 [Chon, “IP and Development Divide”].

Okediji notes educational purpose as one of the “enduring aspects of public interest in access to protected works.”⁶³

It is worth mentioning that the WIPO Internet Treaties—special agreements in accord with the Berne Convention—make a literal reference to education as an aspect of public interest that needs to be considered in maintaining the necessary balance as required by the Berne Convention. As regards the provisions of the WIPO Treaties, Okediji points out the significance of the Treaties in the interpretation of the TRIPs Agreement that has embraced the Berne Convention.⁶⁴ Further, art.10 (2) of the Berne Convention and its Appendix are instances of the relevant pre-TRIPs development-oriented copyright flexibilities designed to promote an access to learning materials. Due to the Berne Convention’s integration into the TRIPs Agreement, all the aforementioned instances of access to protected works indicate the existence of an implicit substantive link between access to learning materials and the copyright provisions of the TRIPs Agreement.⁶⁵ However, the access prong of copyright is considered inadequate as its actual extent depends upon the constrained content and scope of the flexibilities.⁶⁶

Given their role to facilitate access to learning materials, it is thus imperative to explore the relevant flexibilities and its domestic incorporation in a manner that suits the development needs of Ethiopia. Framed within the broad context of access to knowledge that might be regarded as a human right,⁶⁷ access to learning materials is also treated as users’ right which, in turn, is deemed integral to

⁶³ Okediji, “International Copyright System,” *supra* note 51 at 8.

⁶⁴ See Ruth L. Okediji, “Regulation of Creativity under the WIPO Treaties” (2009) 77 Fordham L Rev 2379 at 2394 [Okediji, “Regulation of Creativity”]. For detailed analysis of the relationship between the WIPO Internet Treaties and the TRIPs Agreement, see generally WIPO, Implications of the TRIPs Agreement on Treaties Administered by WIPO, at 164, WIPO Publ’n No. 464(E) (1996); Neil W. Netanel, “The Next Round: The Impact of the WIPO Copyright Treaty on TRIPs Dispute Settlement” (1997) 37 Va J Int’l L 441 (1997) [Netanel, “The Next Round”].

⁶⁵ See Chon, “Intellectual Property from Below,” *supra* note 50 at 827-46.

⁶⁶ See Okediji, “The International Copyright System,” *supra* note 51 at 10-19.

⁶⁷ See Marcelo Thompson, “Property Enforcement or Retrogressive Measure? Copyright Reform in Canada and the Human Right of Access to Knowledge” (2007) 4:1&2 UOLTJ 163 at 212-41.

copyright system.⁶⁸ In particular, the notion of users' right marks an emerging right-based approach towards an enhanced access to learning materials required for tertiary education. It is a useful approach as it allows the exploration of the relevant flexibilities through a right-based and development lens.

1.4. Licensing Models as a Means for Access to Learning Materials

In addition to the flexibilities embedded in the treaties and national laws, a set of contract-based flexibilities are also useful to facilitate access to learning materials. While the law remains the baseline, an access to copyrighted learning materials is obtained through various licensing schemes. Individual/direct, blanket and extended collective, and open access (OA) licensing schemes are the major licensing models that operate to facilitate a legitimate access to copyrighted content in general and learning materials in particular. From among the licensing schemes, OA constitutes an emerging aspect of access-oriented flexibilities based on a private ordering. Including OA, the set of voluntary licensing models is distinct from a compulsory or statutory license issued against the consent of the authors or right holders. Central to their point of distinction, a blend of copyright and contract laws is used to regulate the contractual licensing models to facilitate access to knowledge. In terms of the licensing fees, except OA licensing model that allows a free access to digital content, the remaining licensing models operate subject to royalties for all protected works. From within the proprietary licensing schemes, a direct/individual licensing model function on the basis of a direct contractual negotiation between right holders such as publishers and users in respect of a copyrighted work.⁶⁹

In contrast, a collective licensing scheme is known among collective management organizations (CMOs) that use the model to grant users an access to a catalogue of copyrighted works in their

⁶⁸ See David Vaver, "Copyright Defenses as User Rights" (2013) 60:4 Journal of the Copyright Society of the USA 661 at 672 [Vaver, "Copyright Defenses"]. Having underscored the solid judicial recognition of user's right, Vaver argues that "equating users rights with human rights would certainly help transform user rights beyond mere defenses and give them substantive content." *Ibid.*

⁶⁹ See Ivan L. Pitt, *Direct Licensing and the Music Industry: How Technology, Innovation and Competition Reshaped Direct Licensing* (New York: Springer, 2015) at 135-155 [Pitt, *Direct Licensing*] (making a detailed treatment of a direct licensing as an emerging alternative to the blanket licensing for musical works).

repertoire.⁷⁰ In particular, a collective blanket licensing is used in this regard to authorize users an access to ranges of works in the repertoire in a single transaction.⁷¹ Similar to the conventional collective licensing, albeit with enhanced benefits, an extended collective licensing (ECL) allows CMOs to license works of non-members with the discretion of the latter to opt out.⁷² Despite the varying benefits attached to individual, collective licensing and ECL schemes in terms of the associated costs and the degree of flexibility, the latter two schemes are more cost-efficient to facilitate access to learning materials required for a tertiary education.

In contrast to the proprietary licensing schemes, the OA licensing scheme has recently attracted a greater interest due to its potential to facilitate access to knowledge. An OA is often understood as “a free online access to scholarly literature and scientific publications.”⁷³ As adopted in the *Budapest Open Access Initiative* (2002),⁷⁴ the notion of open access goes beyond peer-reviewed articles to encompass a “barrier-free” access to *any* digital content that can be used for tertiary education such as journals, monographs, textbooks, periodicals, and research reports.⁷⁵ In the words of Peter Suber, open access content is “digital, online, free of charge, and free of most copyright and licensing restrictions.”⁷⁶ Subject to the consent of right holders, an open access allows users to overcome the

⁷⁰ See Johan Axhamn, “Exceptions, Limitations and Collective Management of Rights as Vehicles for Access to Information,” in Dana Beldiman, ed, *Access to Information and Knowledge: 21st Century Challenges in Intellectual Property and Knowledge Governance* (Cheltenham, UK: Edward Elgar, 2013) at 177.

⁷¹ See Glen A. Clark, “Blanket Licensing: The Clash Between Copyright Protection and the Sherman Act” (1980) 55 *Notre Dame L Rev* 729 at 732-33 & 747.

⁷² See Axhamn, *supra* note 70 at 185-186. For a further discussion of an extended collective licensing scheme, see Daniel Gervais, “Collective Management of Copyright: Theory and Practice in the Digital Age,” in Daniel Gervais, ed, *Collective Management of Copyright and Related Rights*, 2nd ed (The Netherlands: Kluwer Law International, 2010) 1at 21-26 [Gervais, “Collective Management of Copyright”].

⁷³ Mikael Laakso et al., “The Development of Open Access Journal Publishing from 1993 to 2009” (2011) 6 *PLOS ONE* at 6.

⁷⁴ See *Budapest Open Access Initiative*, February 14, 2002, Budapest, Hungary, online: < <http://www.budapestopenaccessinitiative.org/read>> (last visited September 15, 2019).

⁷⁵ Peter Suber, *Open Access* (Massachusetts: MIT Press, 2013) at 9 &17 [Suber, *Open Access*].

⁷⁶ *Ibid* at 4. An open access can be taken to mean any digital access to scholarly works that are free from financial, technical and legal barriers. See Leslie Chan and Eve Gray, “Centering the Knowledge Peripheries through Open Access: Implications for Future Research and Discourse on Knowledge for Development,” in Matthew L. Smith and Katherine M.A. Reilly, eds, *Open Development: Networked Innovations in International Development* (Cambridge, MA: The MIT Press, 2013)197 at 203.

significant access barrier imposed on most learning materials by copyright protection.⁷⁷ Nonetheless, given an access to internet, the actual benefits of an open access depend upon the effective functioning of the appropriate licensing schemes such as creative commons (CC) and General Public Licensing (GPL). Inspired by the GPL that was developed for software,⁷⁸ the CC licensing scheme created for digital contents is the most dominant form of an open content licensing scheme as “it offers users series of an easy to use, standardized and automated licenses” attached to the work.⁷⁹ In view of its significance, Eric Priest regards such a nonexclusive licensing scheme as “the lifeblood of open access.”⁸⁰

Therefore, the strategic combination and utilization of the various licensing models is important to supplement other flexibilities to allow more access to educational or learning materials required for tertiary education.⁸¹ In these regards, this thesis explores the appropriate policy and legal options that are necessary to harness the potential of the various licensing models in Ethiopia. In particular, due to its growing popularity in the education sector at a tertiary level, an in-depth exploration of the prospects and challenges of the OA model is made from a human development perspective.

⁷⁷ In this respect, both Bethesda and Berlin Open Access initiatives underscore the significance of authors’ advance consent to enable users to “copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship.” See Bethesda Statement on Open Access Publishing, June 20, 2003, online: <<http://legacy.earlham.edu/~peters/fos/bethesda.htm>> (last visited December 10, 2017); Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, October 23, 2003, online: <<https://openaccess.mpg.de/Berlin-Declaration>> (last visited March 10, 2017).

⁷⁸ See Volker Grassmuk, “Towards a New Social Contract: Free-Licensing into the Knowledge Commons,” in Lucie Guibault & Christina Angelopoulos, eds, *Open Content Licensing: From Theory to Practice* (Amsterdam: Amsterdam University Press, 2011) 21 at 52-58.

⁷⁹ Lucie Guibault, “Owning the Right to Open Up Access to Scientific Publications,” in Guibault & Angelopoulos, *Open Content Licensing*, *supra* note 78 at 158[Guibault, “Owning the Right to Open Up Access”].

⁸⁰ See Eric Priest, “Copyright and the Harvard Open Access Mandate,” (2012) 10:7 *Nw J Tech & Intell Prop* 377 at 418 [Priest, “Copyright”].

⁸¹ See Axhamn, *supra* note 70 at 185-186

1.5. Copyright and Education for Development: An Overview of the Nexus

As indicated above, both copyright and education share common objectives of promoting development. Copyright contributes to development by promoting creative innovation and scientific progress. In the same vein, education promotes development through the development of human personalities, advanced skills and human capabilities. Thus, development is the ultimate end of both regimes. Indeed, development is an important issue at global, regional and local levels. In Ethiopian context, the issue of development is not a mere aspirational or policy objective. It is rather a binding human and constitutional right that demands concrete and progressive measures for its realization. Given its central significance in African context, the right to development has been embodied in the African Charter and the FDRE Constitution.⁸² Within the broader context, the instrumental function of copyright and tertiary education for development is pivotal to facilitate the realization of human development in Ethiopia.

As noted above, the linkage between the instrumental roles of copyright and tertiary education for development converges upon access to learning materials. In other words, the need for an access to learning materials constitutes a ground for the interaction between copyright and education. As a result, the interaction between the regimes requires a careful examination in the light of their intended common goals towards human development. In particular, the issue of access to copyrighted learning materials underpins the interplay between the legal protection of copyright and tertiary education.⁸³ Given access to copyrighted learning materials as their immediate context of linkage, the competing interests of the users/learners and that of the right holders on the same materials underline the linkage between education and copyright system.⁸⁴ Their substantive nexus is grounded in the human rights

⁸² African Charter, *supra* note 10 at art.22; *FDRE Constitution*, *supra* note 45 at art. 43.

⁸³ See Helfer & Austin, *Human Right and Intellectual Property*, *supra* note 33 at 318

⁸⁴ *Ibid.*

and human capabilities dimensions of copyright protection and the right to education. These dimensions are vital for the realization of the right to sustainable human development.

As regards the human rights attributes of copyright, both arts. 27(2) of the UDHR and 15(1) (c) of the ICESCR provide for an authoritative legal and normative basis to ensure the protection of authors' material and moral interests over their literary, scientific and artistic works.⁸⁵ As the CESCR pointed out in its general comment, copyright is however neither a human right in itself nor the only means to secure the required legal protection.⁸⁶ Yet the legal protection of the authors' interests is required to be guaranteed at a national level by the members. It is noted that the legal protection of the material interests is essential to ensure the authors an adequate standard of living.⁸⁷ In this regard, the linkage between authors' 'adequate living standard' and their materials interests can be used to determine the core minimum human rights threshold for the required protection.⁸⁸

In so doing, setting the required level of protection can free up more space to strike the necessary balance between copyright and other fundamental rights such as the right to education in the ICESCR.⁸⁹ In particular, the *General Comment No.17* states that members "have a duty to prevent unreasonably high costs for (...) schoolbooks and learning materials from undermining the rights of

⁸⁵ *Ibid* at 173.

⁸⁶ See *CESCR General Comment No.17*, *supra* note 49 at paras 3 &16.

⁸⁷ Helfer & Austin, *Human Right and Intellectual Property*, *supra* note 33 at 189; *CESCR General Comment No.17*, *supra* note 49 at para 3.

⁸⁸ Despite the lack of a specific definition, the notion of 'adequacy,' as noted by the CESCR in relation to the right to food, is a dynamic and flexible notion the precise meaning of which is determined by the prevailing social, economic and cultural conditions. See *CESCR General Comment No.12: The Right to Adequate Food* (Art. 11 of the Covenant), (12 May 1999) at para 7[*CESCR General Comment No. 12*].

⁸⁹ *CESCR General Comment No.17*, *supra* note 49 at para 35. Given the human rights aspects of copyright and education, it is important to consider the possible human rights implications of the interaction between the regimes. Nonetheless, it is noted that the human rights implication of the interplay between copyright and education is less compelling at a tertiary level than at a basic level.

large segments of the population to (...) education.”⁹⁰ Furthermore, the issue of interface would arise in respect of access to learning materials within the broad context of access to knowledge as the latter is considered to involve a human rights dimension.⁹¹ Although it is not as urgent and essential as an access to medicines that carries a stronger ethical force, an access to learning materials is critical to implicate an issue of human rights.⁹² In particular, its significance is evident in the context of the foundational role of education for a decent life.⁹³ As James Nickel notes, “[s]aving people’s lives will often have special priority, but life loses much of its value if the other requirements of making it decent are not met.”⁹⁴

Emphasizing the instrumental role of intellectual property (IP) to serve a ‘social function’,⁹⁵ the CESCR also underscores the direct interface between the protection of a copyright and the right to education in the context of access to learning materials. To this effect, the Committee stresses the need to strike a balance between the human rights aspects of copyright protection and the right to education.⁹⁶ In this respect, it is essential to direct copyright and tertiary education towards human development as their shared objective. This shared objective constitutes a compelling ground to carve

⁹⁰ *Ibid.* Likewise, the *General Comment No. 13* on the right to education includes access to ‘teaching materials’ among the illustrative list of determining factors for the availability and quality of education, both of which constitute the essential elements of the core of the right. See *CESCR General Comment No.13*, *supra* note 12 at para 50; see also Helfer & Austin, *Human Right and Intellectual Property*, *supra* note 33 at 332.

⁹¹ See Thompson, *supra* note 67; Peter K. Yu, “Ten Common Questions About Intellectual Property and Human Rights” (2007) 23:4 Ga St U L Rev 709 at 719-20 [Yu, “Ten Common Question”]; Jeremy de Beer et al, “Copyright and Education: Lessons on African Copyright and Access to Knowledge” (2009/10) 10 African Journal of Information and Communication 37 at 38 [de Beer et al, “Copyright and Education”].

⁹² Yu, “Ten Common Questions,” *supra* note 91 at 719-20.

⁹³ *Ibid.* James Nickel, *Making Sense of Human Rights*, 2nd ed (Malden, MA: Blackwell Publishing, 2007) at 67 [Nickel, *Making Sense of Human Rights*]; Chon, “Intellectual Property from Below” *supra* note 50 at 819.

⁹⁴ *Ibid* at 67.

⁹⁵ *CESCR General Comment No. 17*, *supra* note 49 at para 35; see Christophe Geiger, “Reconceptualizing the Constitutional Dimension of Intellectual Property,” in Paul L.C. Torremans, ed, *Intellectual Property and Human Rights*, 3rd ed (The Netherlands: Kluwer Law International, 2015) 115 at 119-24 & 128-29 [Geiger, “Reconceptualizing”].

⁹⁶ See the joint reading of *CESCR General Comment No.13*, *supra* note 12 at paras 6 & 50 *cum CESCR General Comment No. 17*, *supra* note 49 at para 35.

out the necessary flexibilities for a reasonable access to the relevant copyrighted materials required for the tertiary education. Nonetheless, this requires a holistic exploration of the linkages between the tertiary education and copyright regimes. In particular, the analysis and reframing of the flexibilities should emphasize the need to direct the complementary objectives of the regimes towards human development in Ethiopia. In this respect, this thesis undertakes to examine, *inter alia*, the aforesaid core issues from a right-based human development perspective.

1.6. The Research Problem in Contexts

1.6.1. Practical Problems in the Socio-Economic Context

It is important to frame the research problem within the relevant contexts. In terms of its human development, Ethiopia is still one of the least developed countries (LDCs) in Africa with a very low-ranking human development index.⁹⁷ That is, Ethiopia's rapid economic growth has not led to a comparable level of human development. This is a source of concern due to an exponential growth in its population. As the second most populous country in Africa, Ethiopia's current demographic size is estimated to be over 110 million. Ethiopia is one of the countries with a significant number of young population.⁹⁸ Yet, the total literacy rate among adults is below 60 per cent of the population.⁹⁹ As the latest national report on human development points out, "adult illiteracy is a fact that holds back Ethiopia's human development."¹⁰⁰ Correlated to the low literacy rate, the Gross National Income

⁹⁷ In 2019, Ethiopia was ranked 173rd out of 189 countries. Its GNI per capita income is 1,782 which is twice and seven times less than that of Kenya (3, 052) and South Africa (11,756), respectively. *UNDP Human Development Report 2019, Beyond Income, Beyond Average and Beyond Today: Inequalities in Human Development in the 21st Century* (New York: UNDP, 2019) at 302 & 306 [HDI 2019]; see also UNDP, *Human Development Indices and Indicators: 2018 Statistical Update* (New York: UNDP, 2018) at 24 [HDI 2018].

⁹⁸ Based on a statistical data, about 23 per cent of the population are young adults between 15-24 years of age. See Ethiopia, UNESCO Institute for Statistics, online: UNESCO <www.uis.unesco.org/country/et> [Ethiopia-UNESCO] (last visited on May 4, 2020).

⁹⁹ *Ibid.* For instance, the literacy rate among the population aged 15 years and above, but below 65 years, was 51.8 per cent in 2017.

¹⁰⁰ Ethiopia, *National Development Report 2018: Industrialization with Human Face*, at 23, online: UNDP <http://hdr.undp.org/sites/default/files/ethiopia_national_human_development_report_2018.pdf>(last visited May 10, 2020)[Ethiopia, *National Development Report 2018*].

(GNI) per capita of the population is around \$1,782.¹⁰¹ Worse still, around 30 per cent struggles below poverty line with a daily average income of \$1.25.¹⁰² In fact, this figure represents a significant number of the population with impoverished living conditions.

Although education is not new to a country with an ancient civilization, Ethiopia's introduction of a modern education dates back to the beginning of the twentieth century.¹⁰³ The major impetus for its introduction was the increasing role of education as an instrument of development. In the aftermath of the World War II (WWII), Ethiopia introduced a tertiary education system intended to enrich modernization and foster economic growth.¹⁰⁴ In particular, this policy objective has drawn an increasing degree of emphasis and resulted in structural reforms since the turn of the millennium. As such, a quality and inclusive education is thus regarded as a key development instrument to end the age-old poverty and to ensure a sustainable development in Ethiopia.¹⁰⁵ Despite its traditional neglect and the previous skepticism on its role, tertiary education is proving vital for development in the knowledge-based economies. Built upon a robust basic and secondary education, a quality tertiary education plays a key role to foster a sustainable development through advanced skills, quality scientific research and increasing social returns. It is considered to have ranges of positive spillovers.

¹⁰¹ HDI 2018, *supra* note 97 at 24.

¹⁰² Ethiopia, *National Development Report 2018*, *supra* note 100 at 23 ('one out of four people is under poverty line').

¹⁰³ Seyoum Teferra, "Education and Development in Ethiopia" (2005) 8:2 Economic Focus 18 at 19.

¹⁰⁴ Tekeste Negash, *Education in Ethiopia: From Crisis to the Brink of Collapse* (Stockholm: Elanders Gotab, 2006) at 11-15. According to Tekeste Negash, the education system in place between 1941-74 was influenced by the UNESCO's endorsement of the instrumental role of education for economic development. He also notes that "Ethiopia's growing integration with the Western world in general and the African continent in particular was an additional factor that encouraged the growth of the modern school in the urban and semi-urban areas of the country." *Ibid* at 13.

¹⁰⁵ *Ibid* at 22-25. Both World Bank's recent reports and scholars working on the role of tertiary education emphasize its private and public benefits. In particular, its contribution to a nation's growth through human capital includes increased efficiency, innovation and improved competitiveness. See World Bank, *Accelerating Catch-Up: Tertiary Education for Growth in Sub-Saharan Africa* (Washington, DC: World Bank, 2008); David E. Bloom et al, Higher Education and Economic Growth in Africa" (2014) 1:1 International Journal of African Higher Education 23 at 48-49.

Moreover, the advent of the integrative lifelong learning paradigm has re-affirmed the significance of tertiary education. In this regard, tertiary education is instrumental for the development of the whole education system due to its linkage with all levels of education.¹⁰⁶ In particular, its linkage with the secondary education is essential as the latter is supposed to bridge and facilitate an access to the tertiary education while preparing the learners for an active life.¹⁰⁷ Like other levels of education, the expansion of tertiary education—public and private—has been among Ethiopian government’s top development priorities for the last two decades.¹⁰⁸ The education reform has been planned with clear objectives of an economic growth and poverty reduction. In fact, both objectives constitute the driving force behind the national development goals.

Despite the intensified effort in the recent expansion of the tertiary education and the unabated trend in the secondary education, the gross enrolment ratio for tertiary education in Ethiopia is still below 10 per cent.¹⁰⁹ Thus, both the urgent need to raise the enrolment rate and the recent expansion efforts are subject to the insurmountable challenges of resource constraints, including the limited

¹⁰⁶ World Conference on Higher Education, *Higher Education in the Twenty-first Century: Vision and Action*, UNESCO Paris 5-9 October 1998, Volume I: Final Report, at para.5, online: UNESCO < <http://unesdoc.unesco.org/images/0011/001163/116345e.pdf>> (last visited May 10, 2020). Further, a quality tertiary education is also crucial in order to improve the professional development of the teaching staff of primary and secondary schools through a continuous and advanced training. Joel Samoff & Bidemi Carrol, *From Manpower planning to the Knowledge Era: Conditions, Coalitions and Influence: World Bank Policies on Higher Education in Africa*, UNESCO Secretariat, Paris, October 2003 (ED-2004 W/S/8) at 15-16.

¹⁰⁷ *Ibid.*

¹⁰⁸ The government has taken a massive step in the opening of new universities while upgrading the existing colleges and institutes in the country. In fact, the plan for the present reform in and the expansion of tertiary education in Ethiopia was conceived quite early in 1997. See Kate Ashcroft & Philip Rayner, *Higher Education in Development: Lessons from Sub-Saharan Africa* (Charlotte: Information Age Publishing, 2011) at 54.

¹⁰⁹ Ethiopia-UNESCO, *supra* note 98. As can be noted from the global ranking, this enrolment ratio places Ethiopia far behind the first ranking Norway (74.1 per cent) from the world and behind Mauritius from Africa (41.2 per cent). *Ibid.* See also HDI 2018, *supra* note 97.

government budget allocation for education.¹¹⁰ In particular, the budget constraint is a big challenge for a quality tertiary education in Ethiopia.¹¹¹ It is true that this remains a persistent problem across Africa.

In addition to its far-reaching implications for human development, the acute resource constraint affects the quality of education and the global competitiveness of the educational institutions in Ethiopia. For example, in terms of their regional ranking from among African universities, seven universities alone have managed from Ethiopia to feature in the top 200 African universities in 2020.¹¹² The low-ranking of the institutions is in part due to the limited quality of their education and research output. From among several factors, poor educational quality and limited research outputs are attributed to lack of the essential resources such as relevant learning materials. In this regard, evidence affirm the positive correlation between essential learning materials, and the quality of tertiary education and scientific research. As a contributing factor, the restrictive impact of copyright protection poses a significant legal and financial barrier. In Ethiopia, access to the relevant learning materials is cost prohibitive for students and educators with limited incomes. As a result, students are overburdened to bear the increasing costs.¹¹³ Despite lack of empirical evidence, the dire economic conditions and the exacerbating effect of restrictive copyright constitute impediments against access to quality education.

It is true that the lack of an adequate learning materials is a general problem at all levels of education in Ethiopia. Nevertheless, this thesis is confined to examine the problems at a higher

¹¹⁰ See, e.g., *Higher Education for Development in Ethiopia: Pursuing the Vision*, World Bank Sector Study, January 20, 2003, at 19-30, online: World Bank < <http://documents.worldbank.org/curated/en/235071468752056917/pdf/290960PAPER0Hi1lopment0AFRHD0no1065.pdf>> (last visited September 2019) [*Higher Education for Development in Ethiopia*].

¹¹¹ Ashcroft & Rayner, *supra* note 108 at 29-30. The percentage of educational expenditure is quite significant for developed nations with high GDP. For instance, Norway's education expenditure of 2013 was 7.37% of its GDP and 17.3% of its total government expenditure. In contrast, Ethiopia's education expenditure was 4.5 of its GDP and 27.02 of its total government expenditures. Given its very low GDP, high population and underdeveloped education, the amount of the budget allocated in the year was almost negligible when compared to the budget required.

¹¹² See 2020 Top 200 Universities in Africa, online: uniRank <www.4icu.org/top-universities-africa/> (last visited May 10, 2020). In contrast, Kenya and South Africa has 12 and 23 universities in the top 200 ranking universities, respectively. *Ibid*

¹¹³ See Ashcroft & Rayner, *supra* note 108 at 36-37.

education level. In Ethiopian context, there are several justifications for a deliberate emphasis on a tertiary education in this thesis. First, as mentioned earlier, there has been an ongoing mass expansion of a tertiary education in Ethiopia. Over the last two decades alone, the number of public universities has risen from 2 to 50. Further, the limited initial number of private higher educational institutions has reached over 130 as of this writing. Occurring in the aftermath of Ethiopia's liberalization of its national economy, the mass expansion of tertiary education is a policy direction taken to produce skilled human resources for economic growth and national competitiveness.¹¹⁴ Although the quantitative investment in tertiary education is commendable, this exponential expansion has led to an increasing demand in the required educational facilities such as learning materials.

Second, the increasing demand for access to learning materials places a mounting pressure upon learners and educators at higher educational institutions in Ethiopia. In a surprising neglect of the essential resources, there is a limited government's intervention in the provision or supply of relevant learning materials. For instance, the Ministry of Education distributes locally published textbooks to almost all primary and secondary public schools in Ethiopia. In contrast, a similar measure does not exist for a tertiary education.¹¹⁵ Rather, all public higher educational institutions are left with the limited budget to procure the necessary learning materials.

Third, related to the above challenges is the lack of domestic publishing industry in Ethiopia. In fact, this is a general problem across Africa that forces the continent to remain the largest consumer and importer of knowledge produced in the West. Both academic and commercial publishers operating in

¹¹⁴ See Ashcroft and Rayner, *supra* note 108 at 30. It is also worth mentioning that the current higher education policy requires higher educational institutions to enrol 70 per cent of their students to study science and technology with a view to producing graduates trained in scientific knowledge and technological skills. *Ibid.*

¹¹⁵ The only attempt made at governmental level to facilitate access to learning materials for a tertiary education is the government-funded preparation of textbooks or modules for a legal education between 2006/07-2009/10. The initiative was taken by the Justice and Legal Research System Institute (JLRSI) that organized and coordinated the preparation of the materials by few professors and most lecturers selected from law schools across the country. Though the initiative was one of its kind, it was quite limited to select law courses and the materials so prepared were criticized due to their poor qualities. See also Abdi Jibril, "The Need to Harmonize Ethiopian Legal Education and Training Curricula" (2011) *Journal of Ethiopian Legal Education* 1 at 7-8, online: SSRN <<https://ssrn.com/abstract=1941256>> (last visited on 15 May 2020) [Ali, "The Need to Harmonize"].

Ethiopia lack the required capabilities to produce quality and relevant learning materials for tertiary education. In fact, the existing local publishers are often limited to producing supplementary materials that are used for primary and secondary education in the country. Given the limited financial capacities of the potential customers, Ethiopia lacks a robust local market to attract competitive publishers and distributors.

Further, for some fields of study such as legal education in Ethiopia, both foreign curricular influence and the county's history of continuous legal transplantation necessitate an access to the relevant copyrighted legal commentaries, journals and treatises developed in the corresponding foreign countries. In the same vein, the need for affordable access to relevant and up-to-date learning materials produced abroad is quite pressing for other disciplines in the field of science and technology, which Ethiopia emphasizes as a matter of policy objective. In terms of their curricular approach and content, these fields bear a significant foreign influence. In addition to curricular influence, language is another factor for the increasing relevance of and demand for foreign learning materials. In this regard, Ethiopia's use of English as an official medium of instruction for tertiary education necessitates access to learning materials published abroad in English.

Fourth, as mentioned above, a tertiary education is emphasized as a key instrument for the production of capable and potential human resources for the human development. Considered as an 'engine for growth' by Ethiopian government,¹¹⁶ tertiary education is among the top priorities of the national development policy objectives of Ethiopia. Moreover, the achievement of the development objectives is primarily entrusted to the higher educational institutions such as universities and colleges. As central hubs for, and active agents in, the creation, advancement and dissemination of knowledge, educational institutions are expected to produce skilled labor power and conduct relevant research

¹¹⁶ See Ashcroft & Rayner, *supra* note 108 at 30.

required for a sustainable human development.¹¹⁷ Given its role for knowledge production, technological catch-up and diffusion, tertiary education is instrumental for human development in Ethiopia. The instrumental role of education for development has long been affirmed by the country's integration of the UN Sustainable Development Goals¹¹⁸ into its national development objectives.¹¹⁹ In particular, integral to Goal-4 of the UN SDGs and pertinent to tertiary education are the targets that underscore: (a) the need to ensure an equal access to affordable and quality tertiary education including university, and (b) the significance of the education for acquisition of the knowledge and skills needed to promote sustainable development and human rights.¹²⁰

Therefore, the foregoing reasons highlight the practical challenges and the intended instrumental role of a tertiary education for development in Ethiopia. The education and research policies of the higher educational institutions in Ethiopia are intended to ensure the achievement of those objectives. Nonetheless, the actual realization of a quality tertiary education and its vital role for development are contingent upon the prevailing socio-economic realities. Noted within this broader

¹¹⁷ Higher Education Proclamation, Proc. No. 650/2009, Federal Negarit Gazetta of the Federal Democratic Republic of Ethiopia, 15th Year No.64, Addis Ababa, 17th September, 2009 at art.4 (1-4) [*Higher Education Proc. No. 650/2009*]; Higher Education Proclamation No. 351/2003, Federal Negarit Gazetta of the Republic of Ethiopia, 9th Year No.72, Addis Ababa, 3rd July 2003, at Preamble, para.1, arts. 6(1), 6(5) & 14(2) [*Higher Education Proc. No. 351/2003*]; see *FDRE Constitution*, *supra* note 45 at arts.43&89-91.

¹¹⁸ UN Sustainable Development Goals, online: UNDP < <http://www.un.org/sustainabledevelopment/education/> > [UNSDGs] (last visited 04 May 2020).

¹¹⁹See Federal Democratic Republic of Ethiopia, Growth and Transformation Plan II (2015/16-2019/20), Volume I: Main Text, National Planning Commission, May 2016, Addis Ababa, online: <http://dageethiopia.org/new/images/DAG_DOCS/GTP2_English_Translation_Final_June_21_2016.pdf> [GTP II] (last visited 08 October 2019).

¹²⁰ UNSDGs, *supra* note 118 at Goal 4. From among the various Goal 4 targets, those cited above (target # 3&7) are reproduced below in full:

“By 2030, ensure that all learners acquire the knowledge and skills needed to promote sustainable development, including, among others, through education for sustainable development and sustainable lifestyles, human rights, gender equality, promotion of a culture of peace and non-violence, global citizenship and appreciation of cultural diversity and of culture's contribution to sustainable development;
By 2030, ensure equal access for all women and men to affordable and quality technical, vocational and tertiary education, including university.” *Ibid.*

context, lack of access to learning materials has implications both for tertiary education and the expansion of human capabilities required for a human development.¹²¹

1.6.2. Legal and Policy Problems in Development Context

A. Ethiopia's Approach to International Legal Regime

In addition to the socio-economic conditions, the overall legal context in Ethiopia has its own implications for the progressive realization of tertiary education and its role in the achievement of the national development objectives. Ethiopia is among nations that adopt a monistic approach towards the domestic implementation of international law.¹²² That is, Ethiopia's legal regimes are constituted of both domestic laws and ratified treaties with an immediate national application upon its official recognition.¹²³ The FDRE Constitution makes unequivocal embrace of the monistic approach that regards all ratified regional and international treaties as the integral parts of Ethiopia's legal regimes.¹²⁴ Further, the Constitution arguably places the major human rights instruments on the same footing with

¹²¹ See UNDP, *Human Development Report 2016: Human Development for Everyone* (New York: UNDP, 2016) at 67-69[UNDP, *Human Development Report 2016*]. (“Inequality in access to advanced, high quality education, health care and other services restricts the ability of some people to expand their capabilities. Access to information is crucial to high-quality education and thus for expanding opportunities and capabilities among children and youth.”). *Ibid* at 68 & 69.

¹²² See generally Takele Soboka Bulto, “The Monist-Dualist Divide and the Supremacy Clause: Re-visiting the Status of Human Rights Treaties in Ethiopia” (2009) 23:1 *Journal of Ethiopian Law* 132-59.

¹²³ *FDRE Constitution*, *supra* note 45 at art. 9(4). The self-executing nature of ratified treaties is more evident from the human rights instruments. As a matter of procedure, the direct application of the ratified treaties begins upon its official approval by the legislative body and its public notice through the *Negarit Gazetta*.

¹²⁴ *Ibid* at art. 9(4). It also important to note that the FDRE Constitution, which heavily draws from the international bill of rights, devotes one-third of its provisions to human rights and democratic freedoms. Out of 106 provisions, human rights provisions constitute 32 articles (arts.13-44). *Ibid*.

or superior to its relevant human rights provisions.¹²⁵ In particular, the FDRE Constitution under its art. 13(2) requires the interpretation of the fundamental rights and freedoms in a manner conforming to the principles of international human rights instruments adopted by Ethiopia.¹²⁶ Thus, the joint readings of arts. 9(4) & 13(2) of the FDRE Constitution underscore the integration of the ratified international human right instruments. In the same vein, this reading affirms their superior normative significance as a set of guiding principles for the interpretation of the human rights provisions of the national constitution.¹²⁷

In effect, this integrative approach makes the list of the human rights an all-inclusive and a broader omnibus of rights than those indicated in the FDRE Constitution. Given Ethiopia's ratification of the major human rights instruments, the FDRE Constitution envisages all the rights—including the right to protection of author's material and moral interests, and the right to education—enshrined in the relevant human right treaties such as the UDHR, the ICESCR, and the African Charter. In contrast to the rest, the African Charter goes further to enshrine the rights to property and development. As a result, authors' right to the legal protection of their material and moral interests (art. 15(1)(c) of the ICESCR), everyone's right to education (art.13 of the ICESCR) and the right to development (art.22 of the African Charter) are all recognized on the same level with the provisions of the FDRE Constitution.

B. Right to Education in Ethiopia

As mentioned above, the right to education is integrated into Ethiopia's legal regime through its ratification of human rights instruments. With respect to Ethiopia's realization of the right, art.41 of the

¹²⁵ Bulto, *supra* note 122 at 150-59. For an argument to the contrary, see Ibrahim Idris, "The Place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE Constitution)" (2000) 20 *Journal of Ethiopian Law* 113 at 132-134 (holding the view that all ratified human rights instruments have a similar legal status with other ordinary legislations).

¹²⁶ *FDRE Constitution*, art.13(2) reads as following:

The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia.

¹²⁷ Bulto, *supra* note 122 at 150-59.

FDRE Constitution states that “the State has the obligation to allocate an ever increasing [resources to] the public health, education and other social services.” It is worth mentioning that the Constitution’s avoids an explicit use of the term ‘right’ in reference to education. This might cast a doubt upon Ethiopia’s recognition of the human rights status of the education. Nonetheless, the reference to and the interpretation of the aforementioned provisions of the FDRE Constitution is required to be made in the light of the major human rights instruments. Given Ethiopia’s monistic approach, the instruments are both integral to, and guiding interpretative principles for, the human rights provisions of the Constitution. Read against this backdrop, the FDRE Constitution’s recognition of the right to education is made through integration. Further, the recognition is implicit in its imposition of an obligation upon the government to achieve the realization of education at all levels.

In a broader context, it should be emphasized that tertiary education is vital both as a crucial instrument of development and an important level of education that requires concrete, targeted and progressive measures in Ethiopia.¹²⁸ Despite the debate on its human rights status, a development-oriented approach to tertiary education is useful to highlight the intrinsic and instrumental purposes of the education.¹²⁹ Indeed, the progressive realization of tertiary education is quite significant both for its intrinsic value and instrumental role for human development. It bears mentioning that this approach does not *necessitate* the treatment of tertiary education as a human right *per se*. Subject to the available resources, what matters most for tertiary education is government’s allocation of resources, appropriate policy and legislative measures for its progressive realization. In this regard, the FDRE Constitution

¹²⁸ CESCR General Comment No.3, *supra* note 20 at para 2. As noted in the *General Comment*, it is now well established that the notion of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights would generally be achieved over a longer period of time. *Ibid* at para. 9. However, this fact should not be taken by states as a pretext to neglect or postpone their legal obligation to take a concrete step nor should it be construed to overlook the existence of immediate effect of the obligations to ensure equal access. Singling out tertiary education from among other levels of education recognized in the ICESCR and neglecting its progressive realization may run contrary to the very object and purpose of the Covenant. See Magdalena Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2003) at 120-29.

¹²⁹ See McCowan, *supra* note 22 at 172-83.

obligates the Ethiopian government to ensure all Ethiopians an access to education at all levels “to the extent the available resources permit.”¹³⁰ In so doing, the Constitution reflects the progressive realization approach enshrined in the ICESCR and the existing economic realities. Though consistent with the ICESCR, this approach however deviates from art.17(1) of the African Charter that recognizes an immediate application without distinction. Since the constitutional provisions should be read, *inter alia*, in the light of the African Charter, Ethiopia is expected acknowledge and conform to the level of protection under the Charter. This interpretation is consistent with the ICESCR as long as it is not regressive.

In Ethiopia, educational policy and legislative measures have been adopted for the provision and expansion of, *inter alia*, a quality tertiary education.¹³¹In its legislative measure, Ethiopia has taken a step to translate the policy into a legal framework that regulates the provision of a quality and relevant tertiary education in the country. To this effect, the higher education legislation underscores the need to ensure the relevance and quality of higher education and research for development.¹³² In both regimes, it is however emphasized as a mere driver of economic growth. Hence, questions remain regarding the appropriateness of the policy and legislative measures for the realization of tertiary education and the latter’s central focus as a vital tool for sustainable human development.

C. The Legal Basis of Copyright Protection

In Ethiopia, copyright protection has a statutory legal basis for decades. Further, it has acquired both human rights and constitutional dimensions upon the adoption of the FDRE Constitution in 1995.

¹³⁰ *FDRE Constitution*, *supra* note 45 at art. 91(1).

¹³¹ Federal Democratic Republic of Ethiopia, *Education and Training Policy*, 1st ed, 1994 (Addis Ababa: April 1994) online:UNESCO<<http://www.unesco.org/education/edurights/media/docs/8bee116313a86cc53420f01a7fa052bd5e40bf3d.pdf>> at 3-5 (last visited August 08, 2017)[ETP]. See also *GTP II*, *supra* note 119 at 78-79 & 185. See generally *Higher Education for Development in Ethiopia*, *supra* note 110.

¹³² *Higher Education Proc. No. 650/2009*, *supra* note 117, Preamble at paras 2 & 5, and art. 4(1-4).

The human rights dimension of authors' right has been incorporated into Ethiopia's legal regime through its ratification of the ICESCR. Pursuant to art.15(1)(c) of the Covenant, Ethiopia is under obligation to ensure the protection of authors' right to material and moral interests over their creative works. Consistent with art.14 of the African Charter, art.40 of the FDRE Constitution enshrines the right to property with human rights and constitutional dimensions. In effect, both authors' right and copyright as such are grounded in the human rights and constitutional dimensions. Nonetheless, the assertion of authors' right under the ICESCR is not equivalent to its assertion within the ambit of the right to property as the latter might be subjected to broader limitations on account of public interest.

To highlight the latter in Ethiopian legal context, the right to protection of copyright is implicit within the ambit of 'the right to property.' As noted from the definition of property under the FDRE Constitution, 'private property' is defined to encompass "any tangible or intangible product which has value and is produced by labor, creativity, enterprise or capital."¹³³ From this constitutional definition, the '*intangible*' and '*creativity*' elements can be construed to embrace the subject matters of copyright protection. Nonetheless, the ownership of the private property recognized in the Constitution is subject to a legal restriction on account of public interest.¹³⁴ As an tangible form of private property, the scope of copyright protection under the property clause is determined with a due regard for public interests. Despite its embodiment in the relevant rights, unilateral public interest considerations with a regressive effect require justifiable, necessary and proportionate measures consistent with the ICESCR. Given this normative dualism with a possible variance in the scope of protection, an articulation of the appropriate legal boundaries needs a concrete and rich corpus of jurisprudence.

¹³³ *FDRE Constitution*, *supra* note 45 at art. 40(2).

¹³⁴ *Ibid* at art. 40(1).

The normative dualism aside, the FDRE Constitution requires the federal government to enact a law to ensure the protection of copyright.¹³⁵ To this effect, the existing copyright law of Ethiopia has been amended to provide an adequate protection of a copyright. In stating copyright's objective, the law underlines its "major role to enhance the cultural, social, economic, scientific and technological development of the country."¹³⁶ In so doing, the preamble to the copyright law re-affirms the protection of copyright, subject to the requirement of the public interest contemplated in the FDRE Constitution.¹³⁷

D. Right to Sustainable Development

Concretized in clear terms, sustainable development has a concrete legal aspect. Indeed, the right to development has been integral to Ethiopia's legal regime as a binding right. It has both human rights and constitutional bases. Its human rights dimension has been introduced through Ethiopia's ratification of the African Charter that embodies the right to development. For its constitutional dimension, the right to sustainable development is enshrined in the FDRE Constitution. It is worth mentioning that the FDRE Constitution makes an explicit reference to 'the right to sustainable development.' As such, art.43 of the FDRE Constitution provides that "the people of Ethiopia (...) have the right to improved living standards and to sustainable development." Further, underlining the process aspect of the development, the FDRE Constitution states that "nationals have the right to

¹³⁵ *Ibid* at arts. 51(19) & 55(2) (g). It should be noted here that the notion of "public interest" is quite flexible to be defined based on the relevant context and development needs of the country.

¹³⁶ *Copyright Proclamation No.410/2004, Federal Negarit Gazette*, 10th Year No. 55, Addis Ababa, 19th July, 2004, Preamble at para 1 [*Copyright Proc. No. 410/2004*].

¹³⁷ In the context of IP legal regime at a global level, what constitutes grounds of a public interest is left to the discretion of the member states as long as their actions remain consistent with their international obligations. For instance, this is the case with the TRIPS Agreement. See Carlos M. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Oxford: Oxford University Press, 2007) at 105-106[Correa, *Trade Related Aspects*].

participate in the national development” and “the basic aim of development activities shall be to enhance the capacity of citizens for development and to meet their basic needs.”¹³⁸

E. Development Policy Regime

At the policy level, the issue of development has been the driving force behind all policy measures and initiatives that often echo series of development objectives. The overriding national significance of development is evident from the country’s national development plan. In particular, the grand development plan underscores the role of a higher education and copyright protection in the context of creative innovation for the realization of sustainable development. For instance, the Growth and Transformation Plan II (GTP II), which integrates the UN development goals in the context of the country’s priority needs, emphasizes the role of a quality education,¹³⁹ innovation,¹⁴⁰ and human development.¹⁴¹ In the policy document, both education and innovation are considered to be the key instruments to promote human development towards the realization of Ethiopia’s vision to become a middle-income country by 2025.¹⁴² It is stated in the GTP II that “due emphasis will be given to human capital capacity development supported by technology and innovation to sustain the rapid economic growth registered during the preceding years.”¹⁴³ These policy objectives have been re-affirmed in the so-called ‘homegrown economic growth agenda.’ In this respect, this thesis intends to examine the

¹³⁸ *FDRE Constitution*, *supra* note 45 at art. 43(2) & (4).

¹³⁹ See *GTP II*, *supra* note 119 at 42-43, 79 & 185-189.

¹⁴⁰ *Ibid* at 142 & 192-194. See also *Science, Technology and Innovation Policy, Federal Democratic Republic of Ethiopia*, February 2012, Addis Ababa, at 4-7, 3-15 & 21, online: Ministry of Science and Technology < <http://www.most.gov.et/documents/147431/186418/STI+Policy/0318b250-6bac-4883-95be-8ad6c553552b>(last visited 15 May 2020)[STIP].

¹⁴¹ *Ibid* at 80 & 88-89.

¹⁴² *Ibid* at ix & 76.

¹⁴³ *GTP II*, *supra* note 119 at 79.

relevant policy frameworks to point out the existence or otherwise of appropriate 'collaboration or coherence' between the policy underpinnings.

F. Copyright and Tertiary Education: A Snapshot of the Interplay

As explained above, copyright and tertiary education are interlinked in the context of human development. Against this backdrop, analyzing the interplay between copyright protection and tertiary education and their contributions for the realization of the right to development requires a careful examination of the legal, constitutional and policy implications of the rights. As a study has shown, the existence of restrictive copyright legal regimes in Africa constitutes significant legal barriers.¹⁴⁴ A restrictive copyright system is one of the impediments affecting access to learning materials due to the limited scope of or lack of the relevant flexibilities required to facilitate access to the materials.¹⁴⁵ One example of such restrictive measures in Ethiopia's copyright law is its prohibition of the parallel importation of copyrighted learning materials that are lawfully sold on a foreign market.

Further, very important is the exploration of the international aspects of the interplay among copyright, tertiary education and development in the legal context of Ethiopia. At present, Ethiopia is not a member to the WTO despite its ongoing accession process since 2003. As part of its accession process, the country has submitted a preliminary review report on the conformity between its IP law including copyright and the TRIPs Agreement. Given Ethiopia's inevitable accession to the WTO, the prospective ratification of the TRIPs Agreement will have its own implications on the achievement of the national objectives of copyright and tertiary education for human development.

¹⁴⁴ See de Beer et al., *Copyright and Education*, *supra* note 91.

¹⁴⁵ Chon, "Intellectual Property from Below," *supra* note 50 at 821; see also Joseph P. Farrell & Stephen P. Heyneman, "Textbooks in Developing Countries: Economic and Pedagogical Choices," in Philip G. Altbach & Gail P. Kelly, eds, *Textbooks in the Third World: Policy, Content and Context* 19 at 33-39. See Chris Armstrong et al., eds, *Access to Knowledge in Africa: The Role of Copyright* (Cape Town: University of Cape Town Press, 2010)

In a nutshell, it is noted that the interplay between copyright and tertiary education often entails competing policy objectives in a nation's efforts to design the appropriate policy and legal frameworks to strike a balance.¹⁴⁶ In examining the interplay mapped above, the central hypothesis of this thesis assumes Ethiopia's incomplete incorporation of the various flexibilities under the relevant international and national legal regimes. In the absence of a comprehensive integration, the thesis further argues that the exclusion or restrictive incorporation of the flexibilities continues entailing far-reaching ramifications for sustainable human development in Ethiopia.

1.7. Exploring Flexibilities in the Context of Access to Learning Materials: Literature Review

1.7.1. A Brief Exposition of Key Concepts

A. Delineating Learning Materials

As mentioned earlier, learning materials are one of the essential inputs required for education in general and tertiary education in particular. At this juncture, it is important to elaborate what constitutes or comprises learning materials. Indeed, there is no standard definition of learning materials with a delineated scope. From the existing literature, one often observes an interchangeable reference to learning materials to mean teaching materials or educational materials. Further, in the international documents and major reports such as the General Comment No.17 and the report prepared under the auspices of UNESCO, the term 'learning materials' is used along with terms such as schoolbooks or textbooks.¹⁴⁷ In general, there is a variance in the meaning, scope and usage of the terms across literature and documents.

¹⁴⁶ See Foster, *supra* note 46 at 356-64.

¹⁴⁷ See *CESCR General Comment No.17*, *supra* note 49; see also Ian Montagnes, *Textbooks and Learning Materials 1990-99*, 2000, online: UNESCO<<http://unesdoc.unesco.org/images/0012/001234/123487e.pdf>> (last visited 22 September 2019).

Despite the lack of their consistent usage, the terms essentially refer to educational resources that are required for a formal education. In fact, the meaning of the term “education” itself varies depending upon how broad or narrow one construes it. Defined in its narrow sense with learning as its primary objective, education refers to a learning process within formal educational settings.¹⁴⁸ It is argued that this narrow construction of education is envisaged in the human right to education.¹⁴⁹ In contrast, learning— an ongoing lifelong process— is a broader notion that applies to both formal and informal settings. This holds true for learning materials that are produced and used both within and outside a formal educational environment. Nonetheless, the term “learning materials” is used in this thesis in its narrow sense as a notion that encompasses educational resources such as textbooks, reference books, journal articles, software products, research reports, and course-packs used in a formal educational environment. These learning materials may exist in either digital or non-digital, or in both formats. Irrespective of their formats, this thesis focuses on those learning materials that are both relevant for tertiary education and often subject to copyright protection.

As such, various educational resources that can be regarded as learning materials such as laboratory equipment, technological devices and similar physical objects lie outside the scope of this research. Hence, the *educational relevance* of the materials and the *potential or actual involvement of copyright as the primary legal protection* will be used as the major criteria in delineating the content and scope of learning materials in this thesis. This purposive delineation of the scope of learning materials is intended to maintain the objective of this thesis to explore the interaction between copyright and tertiary education in depth. To this end, the notion of “learning materials” is not only important in the context of the right to education,¹⁵⁰ but also more consistent with the development and

¹⁴⁸ The term ‘education,’ in its wider sense, refers to “the process by which a society endeavors to transmit beliefs, culture, and other values.” Heller and Austin, *Human Rights and Intellectual Property*, *supra* note 33 at 319.

¹⁴⁹ See Beiter, *The Protection of the Right to Education*, *supra* note 13 at 19.

¹⁵⁰ See Helfer and Austin, *Human Right and Intellectual Property*, *supra* note 33 at 332-36.

objective of copyright law.¹⁵¹ Thus, adopting the narrow notion of learning materials offers a useful context for exploring the relationship among copyright, tertiary education and the human development.

B. The Notion of Flexibilities

Despite the wide use of the term ‘flexibilities’ both in scholarly literature and various international instruments, neither the literature nor the instruments do provide for a working definition. Nonetheless, the notion of flexibilities can be gleaned from its various usages in the existing literature as well as in binding and non-binding documents. Given the central significance of the notion in this thesis, it is essential to elaborate on its normative scope and its instrumental role based on its usage in select IP-related literature and documents. Despite the frequent reference to the term “limitations and exceptions” (L&Es) to mean flexibilities, such a reference is not indicative of their conceptual equivalence and normative scope. Hence, this section intends to delineate the notion of flexibilities used in this thesis while highlighting its inconsistent usage.

To begin with, some scholars refer to the L&Es provided or permitted by copyright regimes as the core elements of flexibilities. For instance, Ruth Okediji makes a frequent use of the term in her an in-depth exploration of copyright-related flexibilities under the international copyright system.¹⁵² It is noted that Okediji’s persistent reference to L&Es in that aforesaid work reflects her comprehensive approach to underscore the need for a set of minimum international L&Es under the international copyright system.¹⁵³ As is evident from her recent work, she underscores the deficit in the system and argues for a broader reformulation of copyright flexibilities as development tools designed to address

¹⁵¹ *Ibid* at 39.

¹⁵² See generally Okediji, “International Copyright System,” *supra* note 51.

¹⁵³ *Ibid* at 23.

national development needs.¹⁵⁴ In their joint work on the promise of the U.S fair use doctrine for Europe, Bernt Hugenholtz and Martin Senftleben refer to flexibilities as a “policy or breathing space” that includes the statutory L&Es as well as the flexibilities inherent in the requirement of originality.¹⁵⁵

In another seminal work, Sam Ricketson prefers using the term L&Es to “flexibilities” in his extensive exploration of the various copyright flexibilities under the major copyright-related treaties.¹⁵⁶ In contrast, Paul Goldstein & Bernt Hugenholtz make a generic reference to the copyright flexibilities as “limitations” on exclusive rights that are designed to “accommodate a variety of cultural, social, technological, economic, and political needs and objects.”¹⁵⁷In terms of their interpretative significance, “flexibilities” are referred to as “constructive ambiguities”¹⁵⁸ or “normative elasticities”¹⁵⁹ inherent in a treaty. In this respect, Peter Yu argues that these constructive ambiguities “can be strategically interpreted and deployed to provide less-developed countries with an additional ‘wiggle room’ to implement their obligations under the TRIPS Agreement.”¹⁶⁰ The content and extent of such flexibilities are thus determined subject to the appropriate customary rules of treaty interpretation that

¹⁵⁴ Ruth Okediji, “Reframing International Copyright Limitations and Exceptions as Development Policy,” in *Copyright Law in an Age of Limitations and Exceptions* (Cambridge: Cambridge University, 2017) 429 [Okediji, “Reframing International Copyright”].

¹⁵⁵ See generally Bernt Hugenholtz and Martin Senftleben, “Fair Use in Europe: In Search of Flexibilities,” (2012) Amsterdam Law School Research Paper No. 2012-39; Institute for Information Law Research Paper No. 2012-33, online: SSRN <<https://ssrn.com/abstract=2013239>> (last visited 10 September 2019).

¹⁵⁶ See Sam Ricketson, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, Standing Committee on Copyright and Related Rights, Ninth session, Geneva, June 23-27, 2003, online: <www.wipo.int/edocs/mdocs/copyright/en/scrr_9/scrr_9_7.pdf> (last visited on 10 September 2019)[Ricketson, “WIPO Study on L&Es”].

¹⁵⁷ Paul Goldstein and P. Bernt Hugenholtz, *International Copyright: Principles, Law and Practice*, 3rd ed (New York: Oxford University Press, 2013) at 371-75[Goldstein & Hugenholtz, *International Copyright*].

¹⁵⁸ Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries* (Oxford: Oxford University Press, 2001) at 7; see also Peter K. Yu, “TRIPS and Its Discontents,” (2006) 10 Marq Intell Prop L Rev 369 at 387[Yu, TRIPS and Its Discontents”].

¹⁵⁹ Daniel Gervais, “IP, Trade and Development: The State of Play” (2005) 74 Fordham L Rev 505 at 528-34 [Gervais, “IP, Trade and Development”] (highlighting the potential use of the “normative elasticity” of TRIPS by developing countries to design a policy suited to their needs).

¹⁶⁰ See Peter K. Yu, “The Objectives and Principles of the TRIPS Agreement” (2009) 46 Hous L Rev 979 at 1023 [Yu, “The Objectives and Principles”].

primarily take into account the context, purpose and object of the treaty.¹⁶¹ Taking a comprehensive approach, other scholars construct the notion of flexibilities quite broadly as a combination of rights, safeguards and options. For instance, Carolyn Deere refers to “flexibilities” as a set of rights, safeguards and options that can be exploited by the WTO members in their implementation of the TRIPs Agreement.¹⁶²

At a multilateral level, given its instrumental role of socio-economic development of the state parties, the language of flexibilities has been used both in the preamble and provisions of the TRIPs Agreement.¹⁶³ For instance, the objectives and principles laid down under arts.7 and 8 of the TRIPs Agreement along with its preamble provide for a broad picture of IP-related flexibilities that are equally applicable for the major IPRs including copyright.¹⁶⁴ Further, the three-step test is another general rule of flexibilities within the purview of the objectives and the principles of the TRIPs Agreement. At this juncture, it is important to note that the three-step test is now applicable to almost all exclusive rights that have been further integrated into the TRIPs Agreement along with other emerging rights.¹⁶⁵

Indeed, the three-step test itself is a binding and blanket rule of circumscription. Yet, the test is regarded to have a potential to offer members ‘considerable’ flexibilities in relation to designing the

¹⁶¹ See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, 8 ILM 679 (entered into force 27 January 1980) at art. 31 [Vienna Convention].

¹⁶² See Carolyn Deere, *The Implementation Game: The TRIPs Agreement and the Global Politics of Intellectual Property reform in Developing Countries* (Oxford: Oxford university Press, 2009) at 68[Deere, *The Implementation Guide*].

¹⁶³ See e.g., Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 ILM1125 (1994) [TRIPs Agreement], Preamble, para 6 and art.66.1 [Read in light of paragraph 6 of the Preamble of the TRIPs Agreement, art.66.1 states: “In view of the special needs and requirements of the least-developed country members, their economic, financial and administrative constraints, and their need for *flexibility* to create a viable technological base, such members shall not be required to apply the provisions of this Agreement, other than art.3, 4 and 5, for a period of...”(emphasis added).

¹⁶⁴ See Yu, “The Objectives and Principles,” *supra* note 160 at 1020-46.

¹⁶⁵ It is argued that the three-step test under art.9 (2) of the Berne Convention is not applicable for the self-contained exceptions such as the exceptions for news reporting and teaching purpose and under arts. 10(1) & (2), compulsory licensing under its art.11 bis (2) and sound recordings under art.13 (1). See Christophe Geiger, Daniel Gervais & Martin Senfleben, “The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law” (2014) 29:3 Am U Int’l L Rev 581 at 583-88[Giger, Gervais & Senfleben, “The Three-Step Test Revisited”]; see also Chon, *Intellectual Property from Below*, *supra* note 50 at 842-44.

appropriate L&Es at a national level.¹⁶⁶ As embodied in the TRIPs Agreement, Members are allowed to devise L&Es that shall conform to the three steps.¹⁶⁷ First, the permitted L&Es to exclusive rights are required to be confined to *certain special cases*. Second, the L&Es shall *not conflict with a normal exploitation* of the work. Third, the L&Es shall *not unreasonably prejudice the legitimate interests of the right holder*. As will be discussed in this thesis, the three-step test is considered to have both constraining and accommodative aspects. In general, embracing the Berne Convention, the TRIPs Agreement envisages flexibilities that comprise rights, safeguards, measures, substantive L&Es, and policy options subject to the requirement of compliance with its provisions and principles.¹⁶⁸

As the foregoing discussion reveals, it is evident that the precise meaning and the scope of flexibilities are not fully developed. The conceptual conundrum aside, the broad notion of flexibilities and the essential elements thereof can be gathered from both binding and non-binding instruments. From among the non-binding documents, the notion is also at the heart of both Doha Declaration on Public Health¹⁶⁹ and the WIPO Development Agenda.¹⁷⁰ Further, the notion has the tendency to embrace the various licensing models such open access. If integrated well, OA has the potential to augment the existing copyright flexibilities and enhance access to knowledge required for education and creative innovation. In this context, OA licensing scheme can be considered an emerging aspect of flexibilities that is worth exploring to address development needs.

¹⁶⁶ See Geiger, Gervais and Senftleben, “The Three-Step Test Revisited,” *supra* note 165 at 617 & 625.

¹⁶⁷ TRIPs Agreement, art. 13.

¹⁶⁸ Correa, *Trade Related Aspects*, *supra* note 137 at 103-106; see also TRIPs Agreement, *supra* note 163 at art.8 (2).

¹⁶⁹ See World Trade Organization, Declaration on the TRIPs Agreement and Public Health, WT/MIN (01)/DEC/2, 41 ILM 755 (2002) [Doha Declaration].

¹⁷⁰ The Doha Declaration was one of the official attempts to identify and clarify the various flexibilities available under the TRIPs Agreement in relation to patent protection and in order to promote access to medicines for health concerns in the developing and least developed countries. See Yu, “The Objectives and Principles,” *supra* note 160 at 995.

Indeed, an integrative approach to the existing and emerging flexibilities has the potential to offer an added layer of policy space needed for sustainable human development. Yet, this integration will require appropriate policy and legal measures within the broad domains of the existing global copyright system. In this respect, the guiding elements of the notion of flexibilities should be its instrumental role and the public interests or goals intended by the relevant legal regimes to advance. As a result, the meaning and scope of ‘public interests’ and ‘sectors of vital importance,’ and the flexibilities they justify at a domestic level depend upon the particular socio-economic needs and priorities of the concerned nation.¹⁷¹ In this regard, the WIPO secretariat has also noted the inevitable variance in the copyright flexibilities across nations based on the socio-economic needs of each nation.¹⁷² Therefore, the notion of flexibilities is used in this thesis in its broadest possible sense as long as the flexibilities are relevant and applicable to copyright. Further, the exploration of the flexibilities is kept to be consistent with the existing international legal regimes that serve as a standard framework.

1.7.2. The Instrumental Role of Flexibilities for Education and Development

A. The Role of Copyright Flexibilities for Tertiary Education

The significance of copyright flexibilities for tertiary education is two-fold. First, the flexibilities facilitate users’ access to existing copyrighted learning materials. Second, they allow prospective authors an access to the copyrighted content for future production of relevant learning materials. In so doing, the flexibilities promote a sustainable access to learning materials required for a quality tertiary education. As noted in her recent work, Pamela Samuelson articulates the various

¹⁷¹ See Correa, *Trade Related Aspects*, *supra* note 137 at 105-106.

¹⁷² The WIPO Secretariat states:

Flexibilities regarding the scope and exercise of copyright and related rights vary from one country to another. Being based on the particular social or economic needs of each country, the diversity of exceptions to copyright has been permitted, and even promoted at [the] international level, notably by the standards provided under the Berne and Rome Conventions and, more recently, the WCT [WIPO Copyright Treaty] and the WPPT [WIPO Performances and Phonograms Treaty]. WIPO Comm. on Dev. & Intellectual Prop. [CDIP], *Initial Working Document for the Committee on Development and Intellectual Property*, Annex III at 26, WIPO Doc CDIP/1/3 (3 March 2008) [hereinafter, *CDIP Working Document*].

justifications underpinning copyright limitations and exceptions. From among several rationales, worth mentioning are: (a) promotion of authorial interests and ongoing authorship, (b) recognition of users' rights and ownership interests of consumers, and (c) the advancement of broader set of public interests such as public access to information and education.¹⁷³In relation to the potential of scientific opportunities in the digital environment, both Ruth Okediji and Jerome Reichmann underscore the essential role of copyright flexibilities to foster creative innovation and trade for production, and dissemination of knowledge goods.¹⁷⁴

Despite their potential instrumental role, the actual significance of the flexibilities for tertiary education is subject to the existing restrictive and right-holders-oriented copyright system. For instance, Margaret Chon has undertaken a critical exploration of the relevant copyright flexibilities for education from capability perspective. In so doing, Chon laments the restrictive impact of the contemporary international copyright system on access to knowledge required for education.¹⁷⁵ Noting its resonance with development needs, she recommends the adoption of a bottom-up and development-oriented reform approach at a national level in the utilization of the existing flexibilities under the international copyright regimes.¹⁷⁶ Exploring the flexibilities from the WIPO DA's perspective, Andrew Rens also underlines the role of the international flexibilities for education in developing countries. Further, Rens highlights the need for adopting multilateral treaty provisions on minimum L&Es that can facilitate

¹⁷³ Pamela Samuelson, "Justifications for Copyright Limitations and Exceptions," in Okediji, *Copyright Law in an Age of Limitations and Exceptions*, *supra* note 154 at 25-53 [Samuelson, "Justifications"]. Samuelson also makes a detailed discussion of other justifications such as advancing economic goals such as fostering competition and innovation, serving politically expedient ends, and providing flexibility and adaptability to accommodate future developments. *Ibid.* See also Okediji, "International Copyright System," *supra* note 51 at 29-34.

¹⁷⁴ See Jerome H. Reichmann & Ruth L. Okediji, *Empowered Digital Integrated Scientific Research: The Pivotal Role of Copyright Law's Limitations and Exceptions* (2009), online: < http://policydialogue.org/files/events/Reichman_Okediji_Empowering_Digitally_Integrated_Scientific_Research.pdf > [Reichman & Okediji, "Empowered Digital"] (last visited on 20 September 2019).

¹⁷⁵ See generally Chon, "Intellectual Property from Below," *supra* note 50.

¹⁷⁶ *Ibid.*

access to learning materials for education.¹⁷⁷ Given the slow move towards the anticipated negotiation on a comprehensive L&Es, such a proposal might be regarded as a strategic move with uncertain success. In the meantime, it is wise to make an effective use of the existing policy and legal space in manner that suits development needs.

At a continental level, the comprehensive study by the Open African Innovation Research (Open AIR) underlines the significance of copyright flexibilities for enhanced access to learning materials for tertiary education.¹⁷⁸ As the findings reveal, most national copyright systems in Africa do not only leave out relevant flexibilities but also adopt extra restrictive conditions.¹⁷⁹ In a related study that examines the interplay among copyright and education in the context of access to knowledge in Southern Africa, Andrew Rens, Achal Prabhala and Dick Kawooya affirm similar copyright-related challenges that affect access to learning materials required for education in the region.¹⁸⁰ The researchers stress the need to adopt a context-based approach that integrates the emerging options such an open access.¹⁸¹ At a national level, Mandefro Eshete and Molla Mengistu shed a light on the importance of copyright flexibilities for education in Ethiopia.¹⁸² In their study, Eshete and Mengistu identify the problem of inadequate incorporation of the flexibilities for the purpose of education. In the same vein, Biruk Haile reaches a similar conclusion in relation to Ethiopia's anticipated utilization of

¹⁷⁷ See generally Andrew Rens, "Implementing WIPO's Development Agenda: Treaty Provisions on Minimum Exceptions and Limitations for Education," in in Jeremy de Beer, ed, *Implementing WIPO's Development Agenda* (Ottawa: Wilfred University Press, 2009)158.

¹⁷⁸ See generally Armstrong *et al.*, eds, *Access to Knowledge in Africa*, *supra* note 145.

¹⁷⁹ *Ibid.*

¹⁸⁰ See generally Andrew Rens, Achal Prabhala and Dick Kawooya, Intellectual Property, Education and Access to Knowledge in Southern Africa, ICSTD-UNCTAD and tralac, 2006, online: < <https://www.iprsonline.org/unctadictsd/docs/06%2005%2031%20tralac%20amended-pdf.pdf>> (last visited on March 23, 2017).

¹⁸¹ *Ibid.*

¹⁸² See generally Mendefro Eshete & Molla Mengistu, Exceptions and Limitations under the Ethiopian Copyright Regime: An Assessment of the Impact on Expansion of Education (2011) 25 *Journal of Ethiopian Law* 24.

the three-step test under the TRIPs Agreement. Nonetheless, both studies do not look at the broad development context of the country.¹⁸³

It is noted that all the aforementioned works explore the instrumental role of the flexibilities and the need for their optimal utilization in various contexts. In the exploration, a comprehensive approach is however not taken to examine the roles of copyright and tertiary education for the sustainable human development. Building upon the existing works, this thesis endeavors to fill in the gap in undertaking an in-depth exploration of the issues from the perspective of human development with human rights and constitutional dimensions in Ethiopia.

B. The Role of Flexibilities for Development

In her recent study, Okediji notes the lack of adequate alignment between the design of copyright system and the requirements for socio-economic development.¹⁸⁴ For instance, she laments the limited capacity of the existing flexibilities to facilitate access to copyrighted materials.¹⁸⁵ In particular, Okediji stresses the significance of development-oriented copyright flexibilities for educational institutions and libraries in order to promote the formation of human capital.¹⁸⁶ To this effect, she underscores the need to reframe copyright L&Es as development policy tools so as to allow developing countries more policy space for their domestic development needs.¹⁸⁷ In exposing the limits of L&Es and calling for a reform, Okediji underlines the development-inducing roles of copyright

¹⁸³ See generally Biruk Haile, “Scrutiny of the Ethiopian System of Copyright Limitations in the Light of International Legal Hybrid Resulting from WTO Membership: Three-Step Focus” (2012) 26 *Journal of Ethiopian Law* 159.

¹⁸⁴ See generally Okediji, “Reframing International Copyright,” *supra* note 154.

¹⁸⁵ *Ibid* at 475.

¹⁸⁶ *Ibid*.

¹⁸⁷ *Ibid*.

flexibilities for human development.¹⁸⁸ In the same vein, several scholars underscore the role of the flexibilities while noting their inadequate incorporation into the international copyright regime.¹⁸⁹

In the international legal regime, the role of flexibilities for development evident in the increasing reference to the term “development.” Despite its inadequacy, the TRIPs Agreement both mention the issue of development and recognizes the significance of a policy space for members to “adopt measures necessary (...) to promote the public interest in sectors of vital importance to their socio-economic and technological development.”¹⁹⁰ In other words, the recognition of members’ discretion to adopt the necessary measures or flexibilities underlines the significance of the flexibilities to offer a policy space for promoting sustainable development.

Moreover, the instrumental role of flexibilities to promote development is central to the WIPO DA and the Doha Declaration, both of which have attempted to integrate development policy considerations intended to facilitate development.¹⁹¹ In relation to the WIPO DA, Okediji notes that “the Development Agenda is an institution-wide mandate dedicated to the integration of development considerations into its substantial normative and capacity-building activities.”¹⁹² In this regard, Jeremy de Beer, examining the prospects of the practical implementation of the WIPO DA, highlights the relevant development-related flexibilities integrated into the WIPO DA and their linkages with those of pertinent UN agencies.¹⁹³ It is also important to bear in mind that the implementation of the WIPO DA

¹⁸⁸ Ruth L. Okediji, “The Limits of International Copyright Exceptions for Developing Countries” (2019) 21:3 Vand J Ent & Tech L 689 [Okediji, “The Limits of International Copyright”].

¹⁸⁹ See, e. g., Annette Kur, “Of Oceans, Islands, and Inland Water – How Much Room for Exceptions and Limitations Under the Three-Step Test? (2009) 8 Richmond Journal of Global Law & Business 287; Geiger, Gervais and Senftleben, “The Three-Step Test Revisited,” *supra* note 165.

¹⁹⁰ See TRIPs Agreement, *supra* note 163, Preamble at paras 6&7 and Art. 8; Correa, *Trade Related Aspects*, *supra* note 137 at 104-107.

¹⁹¹ Chon, “Intellectual Property and Development,” *supra* note 50 at 35-41.

¹⁹² Okediji, “Reframing International Copyright,” *supra* note 154 at 439.

¹⁹³ de Beer, “Defining WIPO’s Development Agenda,” de Beer, ed, *Implementing WIPO’s Development Agenda*, *supra* note 177 at 4-6 [de Beer, “Defining WIPO’s Development Agenda”].

is expected to promote the interpretation and application of the flexibilities in the context of sustainable development goals.¹⁹⁴

From the development-oriented perspective of the interaction between copyright and education, it must be emphasized that the copyright flexibilities such as the various limitations and exceptions along with the three-step test are integral to this general framework of flexibilities.¹⁹⁵ Yet, what remains questionable is the extent to which these flexibilities are fully and appropriately tailored to the development needs of a nation. Important as it is, the scrutiny of this issue is central to one of the core questions this thesis seeks to address in its subsequent chapters. In sum, the relevant flexibilities in general and copyright flexibilities in particular are quite instrumental to promote human development.

1.8. Framing Research Questions

Building upon the existing research and in view of the problems highlighted above, this thesis seeks to answer three major but interrelated questions. The following are the questions along with a brief description.

1.8.1. Exploring Relevant Flexibilities under the Relevant International Legal Regimes

What flexibilities are available under the relevant international legal regimes to address the interplay between copyright and tertiary education for development?

This question will attempt to point out the relevant flexibilities under the international copyright and related legal regimes. Addressing this issue helps to identify the legal space and the extent to which their incorporation into the domestic legal regimes would facilitate access to learning materials for tertiary education. An answer to the question will reflect the pertinent international flexibilities and

¹⁹⁴ See Chon, “IP and Development Divide,” *supra* note 62 at 2838;

¹⁹⁵ See Geiger, Gervais & Senftleben, “The Three-Step Revisited,” *supra* note 165 at 3, 16-19&44.

their role for sustainable human development through quality tertiary education and creative innovation.

1.8.2. Examining the Flexibilities Incorporated into the National Legal Regimes

What flexibilities are already incorporated into the domestic copyright and related legal regimes of Ethiopia and how broad are the flexibilities to facilitate more access to learning materials for the realization of tertiary education towards development?

This research question is another important issue of inquiry intended to identify the flexibilities that are already in place at the national level to facilitate access to learning materials for the achievement of tertiary education. Exploration of those flexibilities will not only demonstrate the status quo in Ethiopia through an in-depth scrutiny of the domestic policy and legal regimes, but also reveal the (non-)incorporation of the relevant flexibilities available under the international legal regimes. In short, an answer to the question seeks to evaluate the extent to which Ethiopia has leveraged the existing international flexibilities.

1.8.3. Exploring Strategies for Comprehensive Incorporation of Flexibilities for Development

What strategies should be adopted for the comprehensive incorporation of the available flexibilities into Ethiopia's policy and legal regimes in order to (re-)direct copyright and tertiary education towards sustainable development?

This last research question builds on the previous questions and seeks to identify the possible options and strategies for a coherent and comprehensive incorporation of the relevant flexibilities. Facilitating enhanced access to learning materials for tertiary education is the immediate objective of the integration of appropriate flexibilities. In a broader context, the question seeks to point out what

relevant approach can be taken to reframe the policy and legal regimes of copyright and tertiary education towards sustainable human development in Ethiopia.

1.9. The Methodology of the Study

This thesis adopts a doctrinal legal research methodology to analyze the relationship between copyright protection and tertiary education for the human development in Ethiopia. In principle, a doctrinal legal research is characterized by a systematic analysis of law and study of legal institutions through ‘legal reasoning or rational deduction.’¹⁹⁶ It often involves the formulation of legal doctrines in particular contexts that are in turn used to “clarify ambiguities within rules, place them in a logical and coherent structure, and describe their relationship to other rules.”¹⁹⁷ The exposition, logical analysis and interpretation of the legal rules are thus the core methods of doctrinal legal research.¹⁹⁸ Accordingly, this methodology will be deployed to examine the policy and legal regimes related to copyright and tertiary education in the context of access to learning materials required for educational and research purposes at higher educational institutions in Ethiopia. The examination of the policy and the legal regimes will help identify the incorporation or otherwise of the relevant flexibilities and their role in facilitating access to the relevant learning materials. To this end, the research method will involve reference to, interpretation and the analysis of, relevant statutes, cases, the national constitution, and policy documents. The doctrinal analysis will also draw on relevant international treaties both due to their significance for copyright flexibilities and their integration into the national constitution. Further, relevant secondary sources such as relevant journals, books, commentaries and electronic resources will be consulted.

¹⁹⁶ See S. N Jain, “Doctrinal and Non-Doctrinal Legal Research” (1975) 17: 4 J Indian L Inst 516 at 516.

¹⁹⁷ Paul Chynoweth, “Legal Research,” in Andrew Knight & Les Ruddock, eds, *Advanced Research Methods in the Built Environment* (Oxford: Wiley-Blackwell, 2008) 28 at 29.

¹⁹⁸ See generally Mark Van Hoecke, “Legal Doctrine: Which Method(s) for What Kind of Discipline?” in Van Hoecke, *Methodologies of Legal Research: Which Method for What kind of Discipline?* (Oxford: Hart Publishing, 2011).

1.10. Justification, Scope and Contribution of the Study

As can be noted from the literature review, most of the existing research and the literature reviewed in this thesis are quite relevant for their insights and important findings. Nonetheless, most of the research do not address the issues from Ethiopia's perspective. Nor do the relevant works examine the interplay between copyright and tertiary education, and their roles for human development in Ethiopia. Therefore, this thesis seeks to fill in the gap and explore the unaddressed issues. Adopting a different approach, the research examines the interplay between copyright and tertiary education, and their instrumental roles for development in the context of access to copyrighted learning materials in Ethiopia. In this context, the scope of this research is limited to Ethiopia. Further, the reference to tertiary education in this thesis is understood as a postsecondary education offered by higher educational institutions in Ethiopia.¹⁹⁹ As stated in the relevant law, the institutions are constituted of universities, colleges and research institutes.²⁰⁰ Another important point is the scope of learning materials. Serving as a context for the interplay, the scope of the learning materials dealt with in this thesis is confined to subject matters of copyright law. As explained above, most laboratory and other related equipment relevant for tertiary education are thus excluded from its ambit.

There are two major reasons for this conceptual and pragmatic circumscription. First, taking a broader scope involves multiple IP rights that cannot be adequately addressed in this research. Second, the interplay between copyright and education is less involved in the public provision of most equipment and computers. In terms of its theoretical framework, this research adopts a human development perspective to examine the relevant copyright-related flexibilities in the development

¹⁹⁹ As defined under art.2(8) of the Higher Education Proc. No.650/2009, 'higher education' (tertiary education in this thesis) means "education in the arts and sciences offered to undergraduates and graduate students who attend degree programs through any of the delivery modes stated under Article 19 of this Proclamation." The delivery modes stated under art.19 of the proclamation are regular, continuing and distance or virtual education. *Higher Education Proclamation No. 650/2009, supra* note 117.

²⁰⁰ *Ibid* at art.9 (higher education institutions may have the "status of university, university college, college and institute.").

context of Ethiopia. In sum, this research is distinct from the existing ones in terms of its scope, approach and geographical orientation.

One of the significances of this thesis lies in its intended original contribution to the existing corpus of knowledge in the fields of copyright, education and development. This research might serve as a steppingstone for further research in the fields. Further, it is hoped that the findings and recommendations will prove significant to demonstrate the national status quo of the existing flexibilities and suggest options for their appropriate integration into Ethiopia's copyright law in order to promote enhanced access to learning materials. Another significance of this thesis lies in its timely contribution to inform Ethiopia's future policy and legislative measures upon its anticipated membership to the WTO. Once acceded to the WTO, Ethiopia will be required to reform its copyright law in consonance with the TRIPs Agreement. To this effect, this thesis is relevant to provide evidence-based findings for the inevitable policy and legal reforms in a manner that promotes sustainable human development in Ethiopia. The utilization of the research outcomes might be facilitated, *inter alia*, through policy briefs, publications and presentations to the relevant stakeholders.

1.11. Chapter Synopsis

As noted above, the present chapter highlights the conceptual framework of the study. As such, it highlights the major areas of the study while situating the research problem within the framework. Further, it makes a brief delineation of key concepts along with the relevant literature review. In sum, this chapter lays down a conceptual foundation for the research questions the thesis intends to explore in the subsequent chapters of the study.

In Chapter Two, the thesis highlights the major theoretical justifications of copyright, human rights, education and development. In so doing, a brief exposition of pertinent philosophical underpinnings is intended to reflect the importance and objectives of the subject matters under

consideration. The insights from the theoretical justifications are important to inform and guide the objectives of copyright and tertiary education and their complementarities for human development. Further, the theoretical and analytical framework adopted for this thesis is also explained along with its limitations. Intended to be descriptive in mapping the global development context, Chapter Three examines the international copyright and human rights system in the context of development. A thorough scrutiny of the national regimes cannot be made in isolation from their global contexts. As such, this chapter makes a general overview of the international copyright and human rights systems from the perspective of development.

Building upon the normative objectives of copyright and tertiary education and the in-built legal strategies, Chapter Four looks into the relevant international copyright flexibilities that can be used at a national level to facilitate access to learning materials for tertiary education. In examining the existence and normative extent of the flexibilities, both human development and human rights perspectives are deployed to make a critical analysis of the linkage between the flexibilities and the underlying objectives to advance human development.

In view of the discussions made under the preceding chapters, Chapter Five makes an in-depth analysis of the existing national policy, legal and institutional frameworks that are in place for the protection of copyright, the right to tertiary education and the right to development. To this effect, a thorough discussion of the relevant national policy and legal regimes is made in the light of its international and regional counterparts and through Ethiopia's development context. In so doing, the discussion highlights the objectives of the legal frameworks, and the legal strategies embodied in the legal regimes to achieve their intended objectives.

In Chapter Six, the thesis explores the various copyright-related flexibilities that bridge the linkage between copyright and tertiary education, and their complimenting roles for sustainable human

development. An in-depth exploration of the pertinent policy and legal regimes is made to point out the flexibilities incorporated therein. Taking a human development perspective, the analysis is intended to show the extent to which the existing regimes incorporate the relevant international flexibilities that are instrumental for sustainable human development.

Drawing on the findings under the preceding chapters, the discussion under Chapter Seven underlines the need to rethink the existing policy, legal and institutional frameworks of copyright and tertiary education towards a sustainable human development in Ethiopia. To this end, the thesis explores the possible options or strategies that can ensure a coherent and comprehensive integration of the relevant conventional and emerging flexibilities to facilitate access to learning materials.

As a concluding chapter, Chapter Eight offer a concise synthesis of the major findings of this thesis that emerge from the preceding chapters. In so doing, the chapter attempts to present a comprehensive concluding summary of the findings and recommendations.

Chapter II: Theoretical and Normative Frameworks for Copyright, Education and Human Development

2.1. Introduction

The emergence and development of copyright, education and human development are grounded in their respective philosophical foundations. The theoretical foundations are useful to offer insights into the purpose, significance and attributes of each of the subject matters under consideration. As such, highlighting the major theories underpinning copyright and education is important to inform the analysis of the interaction between the copyright and tertiary education to advance human development. In the same vein, it is important to shed a light on theories of human rights and development. As an in-depth treatment of the theories is outside the ambit and purpose of this thesis, the discussion is limited to a brief account of the major theories. In the end, the theoretical framework adopted for this thesis will also be elaborated. Except for completeness, it is acknowledged that not all theories discussed in this chapter are of a direct relevance to the issues analyzed in this thesis.

2.2. Theories of Copyright Protection

Despite the inevitable philosophical debates related to each of them, the legal protection of copyright is justified on the basis of various theories. A concise exposition of the relevant theories is offered to reflect the role and purpose of copyright protection. From the broad economic theories and theories of rights used to justify IP's protection,²⁰¹ the discussion is limited to the major theories applicable to copyright protection.

²⁰¹ Julie E. Cohen, "Creativity and Culture in Copyright Theory" (2007) 40 UC Davis L Rev 1151 at 1155-58[Cohen, "Creativity and Culture"]. Despite the emergence of other theories of copyright such as culture-related theory that do not squarely fit into the categories, both the rights and economic theories dominate the normative framework of copyright system. *Ibid* at 1156 &58.

2.2.1. The Utilitarian Theory

Entrenched in IP system, the utilitarian theory is one of the major theoretical justifications for the legal protection of a copyright. This theory traces its roots back to Bentham's classic principle of utility. Drawing on its classic version, the central tenet of the theory is the promotion of the "greatest good for the greatest number."²⁰² In its consequentialist approach, the utilitarian theory justifies an action or a measure in terms of its consequence as long as the action or measure maximizes the happiness or welfare of the majority.²⁰³ As a dominant economic theory of IP, the utilitarian justification is invoked to underpin the legal protection of IP in order to promote welfare maximization or optimal efficiency.²⁰⁴

In a copyright system, the legal protection of a copyright is thus justified both as a recoupment for the creator and a necessary incentive for further creative innovation contemplated to advance a social welfare. In so doing, the overriding objective is to benefit the society as a whole.²⁰⁵ Adopted in the Anglo-American legal systems, the theory underlies a statutory right granted to creators primarily for the benefit of the society.²⁰⁶ For instance, it is believed to be embodied in the U.S Constitution's purpose of IP "to promote the progress of science and useful arts."²⁰⁷ In contrast, the continental authors' right is anchored in the natural rights tradition. Given the growing convergence, both

²⁰² Jeremy Bentham, "Of the Principle of Utility," in Jonathan Glower, ed, *Utilitarianism and Its Critics* (Macmillan, 1990) 9 at 10.

²⁰³ *Ibid.*

²⁰⁴ William Fisher, "Theories of Intellectual Property," in Stephen Munzer, ed, *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001)168 at 177 [Fisher, "Theories of IP"].

²⁰⁵ Orit Fischman-Afori, "Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law" (2004) 14: 2 Fordham IP Media & Ent L J 498 at 498 [Fischman-Afori, "Human Rights and Copyright"].

²⁰⁶ *Ibid* at 502.

²⁰⁷ *U. S Constitution*, art. I, §8, cl.8; Goldstein & Hugenholtz, *supra* note 157 at 6.

economic and natural rights theories underpin the international copyright system.²⁰⁸ Nonetheless, the utilitarian justification has been the driver of the global copyright system since the latter's integration into the trade regime.²⁰⁹ In the trade regime, utilitarianism serves to underpin wealth maximization.

The utilitarian theory has long been critiqued for its obsession with utility and economic efficiency. Its wealth-maximization and efficiency criteria are both incommensurable and narrow in their conception of social welfare.²¹⁰ Further, the theory is instrumental and aggregative in its orientation. In a copyright system, this orientation overlooks the intrinsic values of individual creativities integral to copyright objectives.²¹¹ In the same vein, the theory tends to entrench an exclusive monopoly over creative works without a due consideration for distributive issues. In effect, an excessive monopolization of, and a limited access to, creative works would hamper further creative innovation and affect other vital public interests such as education.

2.2.2. The Labor Theory

Grounded in the natural law, the labor theory is attributed to the British classical philosopher John Locke. Often referred to as Lockean theory, the theory was developed as a justification for the protection of physical property. For its appropriation, a property is considered a product of individual's labor mixed with the natural commons.²¹² It is premised upon the fact that a labor belongs to one's

²⁰⁸ Glodstein & Hugenholtz, *supra* note 157 at 6 & 7.

²⁰⁹ *Ibid* at 8&9. Daniel Gervais, "Human Rights and the Philosophical Foundations of Intellectual Property," in Christophe Geiger, *Research Handbook on Human Rights and Intellectual Property* (Cheltenham: Edward Elgar Publishing, 2015) at 92-93[Gervais, "HRs & Philosophical Foundations"].

²¹⁰ Fisher, "Theories of IP," *supra* note 204 at 177.

²¹¹ *Ibid* at 503-05.

²¹² See Justin Hughes, "The Philosophy of Intellectual Property" (1988) 77 *Geo L J* 287 at 297-98[Hughes, *The Philosophy of IP*].

body over which the person has a natural control.²¹³ According to the justification, the owner of a labor is thus entitled to the ownership of the property acquired through the labor.²¹⁴

Given the value added through the labor mixed with commons,²¹⁵ Justin Hughes notes the appropriateness of the theory for protection of intellectual property over intangible objects.²¹⁶ In a copyright system, the labor theory is invoked to justify the legal protection of creative works as the product of intellectual labor mixed with ideas—an intellectual commons for the intangibles.²¹⁷ That is, the legal protection of an author’s right over a creative expression of ideas is a reward for the creative labor of the author.²¹⁸ It is often difficult to measure the amount of the labor invested in a creative work. To reward the creative labor, a minimum level of creativities suffices to merit a legal protection.²¹⁹ Once met, an author is thus justified to assert a natural right of ownership over the creative work. In this context, the author is entitled to the right upon a mere creation.

Nevertheless, as the theory is operative subject to the provisos of “enough and as good for others” and “the non-waste conditions,”²²⁰ the protection of a copyright so justified is subject to the necessary limitations. In particular, the condition inherent in the first proviso reflects the interest of the public as a

²¹³ *Ibid.* Edwin C. Hettinger, “Justifying Intellectual Property” (1989) 18 *Phil & Pub Aff* 31 at 37 (“A person owns her body and hence she owns what it does, namely, its labor. A person’s labor and its product are inseparable, and so ownership of one can be secured only by owning the other.”)

²¹⁴ *Ibid.* As Hettinger argues, “if a person is to own her body and thus its labor, she must also own what she joins her labor with—namely, the product of her labor.” *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ *Ibid.* at 297-300.

²¹⁷ Peter Drahos, *A Philosophy of Intellectual Property* (Aldershot: Ashgate, 1996) at 47-50[Drahos, *A Philosophy of IP*]; Hughes, *The Philosophy of IP*, *supra* note 212 at 314-16.

²¹⁸ Gervais, “HRs & Philosophical Foundations,” *supra* note 209 at 89. Thus, author’s ownership of his creative works is based on a similar argument premised on the ownership of a body from which a labor is derived. The acquisition of the right is considered as a just reward for the author’s creative contribution through his intellectual labor.

²¹⁹ See Robert Merges, *Justifying Intellectual Property* (Cambridge: Harvard University Press, 2011) at 144 [Merges, *Justifying IP*].

²²⁰ Hughes, *supra* note 7 at 297-98.

possible ground of limitation against the exclusive legal protection of a copyright.²²¹ This in turn reflects the non-absolute character of the authorial rights. From among other reasons, the theory is still disputed for want of an authoritative interpretation and the misfit between ‘commons’ and ideas.²²²

2.2.3. The Personality Theory

As a natural-law-derived justification, the personality theory is used to justify the legal protection of copyright over creative works. Credited to Frederick Hegel and Immanuel Kant for their contribution to its development, this deontological justification underpins protection of property as “a mechanism for self-actualization, for personal expression, and for dignity and recognition as an individual person.”²²³ In other words, the protection of a property is considered to reflect an expression or embodiment of the self.²²⁴ According to this justification, ownership of things is essential for the manifestation and actualization of human will and personal freedom as the core values of individual’s existence .²²⁵ From author’s perspective, the ownership of a creative work is an expressive embodiment of human will and creative freedom.²²⁶

²²¹ *Ibid* at 319-25 & 329-30. As argued by Lockean theorists, reproduction or copying of a protected work is justified to the extent required by the proviso of ‘enough and as good’ for others’ use. Further, the idea-expression dichotomy is considered to serve the purpose. *Ibid* at 313-19. See Wendy J. Gordon, “A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property” (1993)102 Yale LJ 1533 at 1581-83 [Gordon, “A Property Right in Self-Expression”].

²²² Fisher, “Theories of IP,” *supra* note 204 at 184. For instance, what constitutes “intellectual labor” is not clear from the theory due to multiple lines of interpretation. In the same vein, it is difficult to determine and apply the conception of “commons” to the field of IP though it is often equated with “ideas.” *Ibid* at 185-86.

²²³ Hughes, *The Philosophy of IP*, *supra* note 212 at 310-311; Jeremy Waldron, *The Right to Private Property* (Clarendon Press, 1988) at 352-78.

²²⁴ Hughes, *The Philosophy of IP*, *supra* note 212 at 330; Waldron, *supra* note 223 at 361-74.

²²⁵ *Ibid*.

²²⁶ *Ibid* at 331-333. See also Drahos, *A Philosophy of IP*, *supra* note 217 at 75-77; Waldron, *supra* note 223 at 361-65 & 371-77.

In his analysis of Kant's theory, Merges notes "legal ownership [to be] central to human freedom."²²⁷ In this sense, it is argued that protection of creative works serves as an essential instrument for self-actualization and human development.²²⁸ In other words, the legal protection is considered vital in order to "promote human flourishing by protecting or fostering fundamental human needs or interests."²²⁹ As the manifestation of an individual autonomy/liberty²³⁰ and the creative freedom of an author,²³¹ the author's right is viewed to subsist by virtue of his personality.²³² In this context, the justification has a stronger relevance for artistic and literary works as the creative expression of the creator's personality.

Nonetheless, there are contrasting views on the appropriateness of the theory for functional objects. For instance, Justin Hughes finds the personality theory as a weak justification for the copyright protection of scientific works such as a computer software.²³³ In contrast, Peter Drahos disagrees with this view. In Drahos' functional view of the subject matters, the theory is rather well-suited for both artistic and utilitarian objects.²³⁴ One of the critiques levelled against the theory lies in its abstract conceptions of the personhood or the self.²³⁵ Given its historical roots in the continental legal tradition,

²²⁷ Merges, *Justifying IP*, *supra* note 219 at 17. Merges observes that "ownership confers both control and the prospect of compensation" that constitute the two important practical dimensions of Kantian notion of autonomy. In his view, Kantian conception of individual ownership also acknowledges a need for "a deep and true engagement with the interest of third parties." *Ibid* at 18.

²²⁸ Fishman-Afori, "Human Rights and Copyright," *supra* note 205 at 504.

²²⁹ Fisher, "Theories of IP," *supra* note 204 at 189.

²³⁰ Hettinger, *supra* note 213 at 45. As Hettinger notes, "Private property can be justified as a means to sovereignty. Dominion over certain objects is important for individual autonomy." *Ibid*.

²³¹ Gervais, "HRs & Philosophical Foundations," *supra* note 209 at 90.

²³² Drahos, *A Philosophy of IP*, *supra* note 217 at 80.

²³³ Hughes, *The Philosophy of IP*, *supra* note 212 at 341-342.

²³⁴ Drahos, *A Philosophy of IP* *supra* note 217 at 80-81.

²³⁵ Fisher, "Theories of IP," *supra* note 204 at 191. Further, missing is a parameter to identify the various human needs or interests such as self-realization, identity and privacy that need to be promoted. See Neil Wilkof, Editorial, "Theories of Intellectual Property: Is It Worth the Effort?" (2014) 9:4 *Journal of Intellectual Property Law and Practice* 257 at 257.

the theory remains a solid normative justification for the protection of author's moral rights. That is, an author's right to the integrity, paternity, and divulgation, of his work is justified on this ground.

2.2.4. The Contractarian/Social Contract Theory

Rooted in the works of Thomas Hobbes, John Locke and Jean-Jacques Rousseau, the contractarian theory was developed to justify the formation of the government and people's voluntary submission to its acquired sovereign power.²³⁶ In Rousseau's view, an implicit social contract underpins individual's exchange of natural liberty for a civil liberty and proprietorship.²³⁷ In so doing, individuals admit restraint upon their liberty. Individual's contractual freedom was also integral to Locke's conception of men as "equal, free and independent beings" that are subject only to political authority by their consent.²³⁸ John Rawls further developed the social contract theory by elaborating the principles of distributive justice to underlie the basic structure of a fair and rational society.²³⁹ According to Rawls, the "principles of justice for the basic structure of a society are the object of the original agreement."²⁴⁰

Drawing on the Rawlsian conception of justice, Robert Merges articulates a distributive justice as a justification for IP rights. Merges conceives IP right as a primary right integral to the "total system of basic liberties" due to IP's benefits to the society with a "net positive distributional effect."²⁴¹ Noting the centrality of distributional concerns in IP system, Merges contends that these concerns can be

²³⁶ Thomas Hobbes, *Leviathan* (Penguins Classics 1985) (1651) at 228-29.

²³⁷ John-Jacques Rousseau, *The Social Contract and Discourses* (1762) at 195.

²³⁸ Alina Ng, "The Social Contract and Authorship: Allocating Entitlements in the Copyright System" (2008) 19:2 *Fordham IP Med & Ent L J* 414 at 470.

²³⁹ John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971) at 11.

²⁴⁰ *Ibid.* For Rawls, the principles of justice are "the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association." *Ibid.*

²⁴¹ Merges, *Justifying IP*, *supra* note 219 at 136. Underscoring the significance of desert (individual's will to create being the core) as a ground for IP rights, Merges asserts that "creators truly deserve some sort of property right" and "it is appropriate to include well-deserved IP rights among the list of basic liberties that people are entitled to in a just society." *Ibid.* at 127-28.

addressed through L&Es to a copyright such as a fair use doctrine.²⁴² In this contractarian justification, the creators are granted a legal protection in return for their creative contribution to the benefit of the society.²⁴³ Central to the justification is thus an exchange of a limited legal right for a promised access to creative works after a specified duration.²⁴⁴ In so doing, the social contract theory attempts to strike a balance between the interests of authors and the public interests through a just reward for the authors and the public's consequent access to the works.²⁴⁵ For instance, the public interests might be served through reasonable limits to the protection and eventual enrichment of the public domain after its expiration. In contrast to patent regime, the theory is less evident in copyright due to its longer terms of protection and for want of disclosure requirements in its protection.²⁴⁶

2.2.5. Social Planning Theory

The social planning theory is an emerging theory that is still under construction. Yet, it is important to offer a valuable insight into the purpose and role of copyright. Inspired by the works of “an eclectic cluster of political and legal theorists”²⁴⁷ and underpinning all forms of IP, the theory holds that IP “can and should be shaped so as to foster the achievement of a just and attractive culture.”²⁴⁸ As William Fisher observes, an attractive intellectual culture “would be one in which citizens [have] access to a

²⁴² *Ibid* at 129.

²⁴³ *Ibid* at 122-23.

²⁴⁴ Chidi Oguamanam, “Beyond Theories: Intellectual Property Dynamics in the Global Knowledge Economy” (2009) 9:2 Wake Forest Intellectual Property Law Journal 105 at 116 [Oguamanam, “Beyond Theories”].

²⁴⁵ Ng, *supra* note 238 at 478-80. Based on this implicit social contract authors are entitled to the legal protection of their creative works that guarantees them a fair and just reward for their contribution to the public interest through: (a) reasonable public access to the works during the legal protection, and (b) free access to the works upon their entry into and consequent enrichment of the public domain after the expiry of the protection. With an emphasis on distributive justice, the contractarian theory is thus considered to address the relationship between the interests of authors, users and distributors/publishers in their entitlements to the rights over creative works and their respective duties towards the society at large. *Ibid* at 479. See Oguamanam, “Beyond Theories,” *supra* note 244 at 113-14.

²⁴⁶ Oguamanam, “Beyond Theories,” *supra* note 244 at 112-14.

²⁴⁷ Fisher, “Theories of IP,” *supra* note 204 at 172-73.

²⁴⁸ *Ibid* at 172.

wide array of information, ideas and forms of entertainment” vital for the attainment of self-determination and self-expression.²⁴⁹ Emphasizing the criterion of distributive justice as its core element, Fisher highlights the equitable access of all persons to informational and artistic resources.²⁵⁰ While it shares the utilitarian objective of advancing a net social welfare, the social planning theory takes a broader perspective to accommodate a broader visions of a desirable society.²⁵¹

In his seminal contribution to the theory, Neil Netanel underlines the role of a copyright law to foster creative expressions and support a sector of creative activities needed for a democratic culture.²⁵² In Netanel’s view, copyright is instrumental to serve “robust, participatory and pluralist civil society.”²⁵³ To this end, he suggests promoting public domain through reduction of both copyright term and control over derivative works.²⁵⁴ Fisher claims that social panning arguments are useful to inform the debate on the appropriate scope of copyright on internet, commentary and education.²⁵⁵ Nonetheless, the social planning justification has its own draw backs. For example, the theory is critiqued for (a) its emphasis on ‘the amorphous concept of culture’ and (b) the indeterminate character of the desired social vision it seeks to advance.²⁵⁶

²⁴⁹ *Ibid* at 192.

²⁵⁰ *Ibid* at 193.

²⁵¹ See Neil Netanel, “Copyright and a Democratic Civil Society” (1996) 106:2 *The Yale L J* 283 at 341-64[Netanel, “Copyright”].

²⁵² See generally *ibid*. See also Fisher, “Theories of IP,” *supra* note 204 at 172.

²⁵³ Netanel, “Copyright,” *supra* note 251 at 343. Among the list of his pluralist civil society are educational institutions. *Ibid*.

²⁵⁴ *Ibid* at 366-85.

²⁵⁵ Fisher, “Theories of IP,” *supra* note 204 at 175.

²⁵⁶ *Ibid* at 193-194. Fisher also points out the “paternalistic” nature of the theory as one of its limitations. That is, a prior determination of a particular social vision limits persons’ freedom to hold their own conception of what is “good for them.” *Ibid* at 194. Oguamanam, “Beyond Theories,” *supra* note 244 at 130. As Oguamanam observes, “the social planning approach puts too much emphasis on the amorphous concept of culture as if it is the only intellectual property paradigm.” *Ibid*.

In sum, subject to their respective limitations,²⁵⁷ the aforementioned major theories of copyright are useful to enrich valuable conversations in law-making process.²⁵⁸ The theories are also valuable to “catalyze useful conversations among the various people and institutions responsible for the shaping of the law.”²⁵⁹ In this thesis, the discussion of the theories is thus intended to highlight the purpose of the copyright. In highlighting its goals, the theoretical justifications are relevant to examine the existing copyright regime and inform the necessary legal reforms towards sustainable human development in Ethiopia.

2.3. Theories of Human Rights

In the human rights regime, there are several theories or schools of thought. To mention them, the major ones are the natural, deliberative/social justice, protest/redressal and discursive schools of thought. In addition to the variance among the schools of thought, the nature and the philosophical underpinnings of human rights are still debatable.²⁶⁰ For instance, there lacks a consensus on “rationality, sentience or artifacts of state action” as the foundation of human rights.²⁶¹ In the same

²⁵⁷ Apart from the specific limitations applicable to each theory, both personality and social planning theories are critiqued due to their indeterminacy and the latter’s “paternalistic” element with regard to what is “good” for people. In contrast, labor and utilitarian theory are considered to be free from indeterminacy. The utilitarian justification is rather considered to be neutral and objective. *Ibid* at 194.

²⁵⁸ *Ibid* at 194. For the detailed discussion on the value of theories, see *ibid* at 194-99.

²⁵⁹ *Ibid* at 198.

²⁶⁰ See generally Michael Freeman, “The Philosophical Foundations of Human Rights” (1994) 16:3 Hum Rts Q 491; Martha Nussbaum, “Capabilities and Human Rights” (1997) 66 Fordham L Rev 273 at 273-275 [Nussbaum, *Capabilities and Human Rights*].

²⁶¹ *Ibid* at 273.

vein, contested is whether or not rights are necessarily correlated to duties.²⁶² Further, scholars disagree on the universality of human rights and split into the camps of moral universalism and cultural relativism. In short, there are several unsettled philosophical issues that permeate the notion of human rights and its normative foundations. Despite the lack of a consensus on the theoretical foundations of human rights, what remains undisputed is the significance of human rights. Thus, it is imperative to make a brief discussion of the major theories that are often reflected in the contemporary notion of human rights. Despite the importance of all theories, the natural and social justice theories are selected for discussion due to their historical dominance and general relevance to the issues in this thesis.

2.3.1. The Natural Rights Theory of Human Rights

The modern theory of natural rights draws on John Locke's claim that people are endowed with certain natural rights by virtue of their creation by the Creator.²⁶³ In the contemporary human rights system, the theory stresses the human dignity/nature as the foundation of human rights.²⁶⁴ Although the notion of human dignity/ nature itself is an issue of philosophical debate,²⁶⁵ the theory is arguably the dominant philosophical justification that underlies the contemporary human rights.²⁶⁶ Its central tenet lies in its justification of the notion of human rights and their legal protection as natural rights inherent in the human dignity.²⁶⁷ The proponents of the natural rights theory assert the unconditional existence

²⁶² *Ibid* at 274.

²⁶³ John Locke, *The Second Treatise of Government* Para 6, in Thomas P. Peardon (ed.), *The Liberal Arts, Inc.*, 1952 (1690).

²⁶⁴ Freeman, *supra* note 260 at 497-98. Freeman observes that classic claim about the foundation of natural rights as a grant from God is now substituted with the notion of "human dignity/nature" due to the ontological debate related to God. *Ibid*.

²⁶⁵ *Ibid* at 501-02. See Rowan Cruft, S. Matthew Liao & Massimo Renzo, "The Philosophical Foundations of Human Rights: Overview" in Cruft, Liao & Renzo, eds, *Philosophical Foundations of Human Rights* (Oxford: Oxford University Press, 2015) at 1-40.

²⁶⁶ Jack Donnelly, "Human Rights as Natural Rights" (1982) 4:3 *Hum Rts Q* 391 at 391 [Donnelly, "Human Rights"].

²⁶⁷ *Ibid*. See generally Jean Porter, "From Natural Law to Human Rights: Or, Why Rights Talk Matters" (2000) 14:1 *JL & Religion* 77 at 77-96.

of human rights, their universal nature, and equal inherence in human beings by virtue of human dignity.²⁶⁸ These are considered the basic attributes of human rights.

Nevertheless, the basic attributes and the inherent features deriving thereof are often contested. As mentioned above, the debate stems from the disputed cogency of human dignity/nature as a normative basis for human rights.²⁶⁹ Critics argue that its contested foundation would expose the subject to a “philosophical insecurity” for its international protection.²⁷⁰ Further, a critique is levelled against the theory due to its roots in the “Western” liberalism and its consequent individualistic conception.²⁷¹ In this context, the theory is considered ill-suited to the protection of social, economic and cultural rights.²⁷²

2.3.2. Social Justice Theory of Human Rights

The social justice theory is another major theory that has emerged as an alternative to the natural rights theory of human rights. The theory emphasizes the principles of social justice as a normative basis for human rights instead of a human nature.²⁷³ As David Miller notes ‘social justice’ is a broad notion that generally deals with “the distribution of benefits and burdens throughout a society as it results from social institutions.”²⁷⁴ Thus, the principle of social justice includes the possession and

²⁶⁸ Donnelly, “Human Rights” *supra* note 266 at 397-401.

²⁶⁹ Freeman, *supra* note 260 at 501-02. Amartya Sen, “Elements of a Theory of Human Rights” 32:4 *Philosophy and Public Affairs* 315 at 315-316 [Sen, “Elements”]; Cruft, Lio & Renzo, *supra* note 265.

²⁷⁰ Charles Beitz, “Human Rights and Social Justice,” in Peter G. Brown & Douglas Maclean, *Human Rights and U.S Foreign Policy* (Massachusetts: Lexington Books, 1979) at 55 [Beitz, “Human Rights and Social Justice”].

²⁷¹ Freeman, *supra* note 260 at 495.

²⁷² *Ibid.* See generally Beitz, “Human Rights and Social Justice,” *supra* note 270.

²⁷³ Beitz, “Human Rights and Social Justice,” *supra* note 270 at 59.

²⁷⁴ David Miller, *Social Justice* (Oxford: Clarendon Press, 1976) at 22.

protection of persons' rights as well as the allocation of welfare benefits.²⁷⁵ Rawls opines that the primary subject of social justice is to guide “the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.”²⁷⁶ As developed by Charles Beitz, the social justice theory of human rights conceives human rights as “entitlements to the satisfaction of various human interests guaranteed to members of a group by principles of social justice.”²⁷⁷

In drawing on Rawls' conception of social cooperation, the social justice theory of human rights treats human rights as a subset of social justice and products of social cooperation.²⁷⁸ The idea of international concern that calls for a concrete action is central to this theory of human rights in order to distinguish the latter from the broad conception of social justice.²⁷⁹ In Beitz's opinion, “a satisfactory theory of human rights is better conceived as an aspect of a more general theory of global justice.”²⁸⁰

The social justice theory of human rights is regarded to offer a solid basis to accommodate factors such as culture and socio-economic development, in particular, for the protection of social, economic and cultural rights.²⁸¹ Emphasizing their roots in the claims of basic human needs, Miller notes the strong relation between this category of human rights and the social justice as the latter guides the

²⁷⁵ *Ibid.*

²⁷⁶ See Rawls, *supra* note 239 at 6.

²⁷⁷ Beitz, “Human Rights and Social Justice,” *supra* note 270 at 59. Although this conception of human rights is grounded in the general theory of social justice, Beitz emphasizes the idea of international concern as a constitutive element of his theory to distinguish human rights from social justice. *Ibid.*

²⁷⁸ Donnelly, “Human Rights,” *supra* note 266 at 401.

²⁷⁹ Beitz, “Human Rights and Social Justice,” *supra* note 270 at 59-60; Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009) at 136[Beitz, *The Idea of Human Rights*]; Beitz regards human rights as “standards intended to play a regulative role for a range of actors in the political circumstances of the contemporary world.” Charles Beitz, “Human Rights as Common Concern” (2001) 95:2 *American Political Science Review* 269 at 276-77[Beitz, “Human Rights as Common Concern”].

²⁸⁰ Beitz, “Human Rights as Common concern,” *supra* note 279 at 281.

²⁸¹ Beitz, “Human Rights and Social Justice,” *supra* note 270 at 59-60.

distribution of benefits on the basis of entitlements and needs.²⁸² The social justice theory of human rights is however critiqued both for its rejection of the universality of human rights and the reduction of human rights to the “dictates of social justice.”²⁸³

2.4. The Theories of Education

Like copyright and human rights, the protection and promotion of education as a fundamental entitlement are based on various philosophical foundations. Elucidating the nature, purpose and function of education, the theoretical justifications are often used to underline the intrinsic and instrumental significance of education. From among the theories, three major theories or approaches are selected to highlight the fundamental importance of the right to education.

2.4.1. ‘Liberal’ Theory of Education

From among several variants of theories of education, the reference to the ‘liberal’ theory is noted here to mean the general theory of education anchored in the modern conception of liberal and democratic education.²⁸⁴ Traced to Greek philosophers and developed during an era of Enlightenment, the modern notion of liberal education is primarily attributed to Jean-Jacques Rousseau from among the liberal thinkers of the era.²⁸⁵ According to his philosophical thought, the purpose of education is to develop the ‘general will’ of citizens while preserving their freedom.²⁸⁶ In Rousseau’s observation, a

²⁸² Miller, *supra* note 274 at 79.

²⁸³ Donnelly, “Human Rights,” *supra* note 266 at 403-404.

²⁸⁴ See generally Overton Taylor, “Liberal Education and Liberalism” (1945) 55:2 *Ethics* 88-109; Charles Bailey, *Beyond the Present and the Particular: Liberal Theory of Education*, Volume 2 (London & New York: Routledge, 2010).

²⁸⁵ Patrick Riley and Jennifer Welchman, “Dewey, Rousseau and Democracy,” in Randall Curren, ed., *A Companion to the Philosophy of Education* (Oxford: Blackwell, 2003) 94 at 96. The liberal conception of education which traces its roots back to the philosophical thought of ancient Greek philosophers such as Plato. *Ibid.*

²⁸⁶ *Ibid.*

liberal education is useful to transform the egoistic nature of human beings.²⁸⁷ Despite his contested notion of ‘will’, Rousseau’s conception of liberal education underscores the intrinsic and instrumental value of education to develop individual’s freedom and collective common good.

John Dewey is one of the contemporary philosophers credited for further development and alignment of the liberal thought of education with the modern conception of democracy. For Dewey, democracy is the most important element of social and political life that enables human beings to flourish.²⁸⁸ In its alignment with democracy, education is considered a necessary cause for a free or democratic society and a vital instrument for promoting social freedom.²⁸⁹ In this regard, both Rousseau and Dewey share the view that learning is essential for human beings to survive and flourish with a freedom.²⁹⁰ Dewey also notes the nature of education as “a fostering, a nurturing, and a cultivating process.”²⁹¹ In addition to his instrumentalist view of education’s role for growth and democracy,²⁹² he acknowledges the learning process as the intrinsic value of education.²⁹³ For him, an education should aim to enable individuals’ pursuit of life-long learning as a social process that caters to a continued capacity for growth both as its object and reward.²⁹⁴

Given its emphasis of a democratic individual freedom and social interaction, this theory resonates well with the conception of human rights that shares similar philosophical foundations. This

²⁸⁷ *Ibid.* For Rousseau, education is useful to transform the egoistic nature of human beings so as to make them ‘what they out to be’ in the pursuit of their ‘general will’—the will a person has as a citizen. *Ibid.*

²⁸⁸ *Ibid* at 96. See also John Dewey, *Democracy and Education: An Introduction to Philosophy of Education* (New York: Macmillan Company, 1916) at 94-108.

²⁸⁹ Riley and Welchman, *supra* note 285 at 96.

²⁹⁰ In particular, Dewey stresses the necessity of education as “the means of social continuity of life.” Dewey, *supra* note 288 at 3.

²⁹¹ *Ibid* at 12.

²⁹² Riley and Welchman, *supra* note 285 at 104.

²⁹³ *Ibid* at 106-07. See also Dewey, *supra* note 288 at 54.

²⁹⁴ Dewey, *supra* note 288 at 117-121.

philosophical thought appears to have made its way into the human rights instruments. For instance, both the UDHR and ICESCR underline the fundamental purpose of education for “the full development of the human personality and its sense of dignity.”²⁹⁵ In particular, Dewey’s view on the aim of education in a democratic society is evident from the ICESCR under its art. 13(1) that emphasizes the purpose of education to “enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups.” As will be discussed below, liberal education is also central to ‘a richer, more humanistic, multifaceted approach to development’ through expansion of human capabilities.²⁹⁶

2.4.2. Human Capital Theory of Education

Emerging from the works of Gary Becker and Theodore Schultz in the 1960s, human capital is an economic justification for the role of education. The human capital theory offers a justification for an investment in the development of human capital as a means of an increased productivity.²⁹⁷ As a functional theory of education, the theory emphasizes the instrumental role of education in the production of skilled manpower required for an economic growth.²⁹⁸ Thus, an investment in a quality education is justified due to its functional significance to enhance an economic return in the long-run. In this era of knowledge-based economy, the knowledge and skills produced through a quality education are essential inputs for the economic development. In this respect, knowledge and innovation

²⁹⁵ See UDHR, *supra* note 7 at art.26(2); ICESCR, *supra* note 8 at art.13.

²⁹⁶ Martha Nussbaum, “Cultivating Humanity in Legal Education” (2003) 70 U Chicago L Rev 265 at 268 [Nussbaum, “Cultivating Humanity in Legal Education”]; see generally Nussbaum, *Cultivating Humanity*, *supra* note 36. For Nussbaum, education cultivates humanity through the development of the capacities for, *inter alia*, critical self-examination and thinking. *Ibid.*

²⁹⁷ See Ingrid Robeyns, “Three Models of Education: Rights, Capabilities and Human Capital” (2006) 4:1 Theory and Research in Education 69 at 72 [Robeyns, “Three Models of Education”].

²⁹⁸ Gary Becker, Human Capital Revisited, in *Human Capital: A Theoretical Analysis with Special Reference to Education* (The University of Chicago Press, 1994)15 at 17-25.

are both interdependent and the drivers of a knowledge-based economy.²⁹⁹ Underscoring, *inter alia*, the role of education, Paul Romer concludes that “the stock of human capital determines the rate of growth.”³⁰⁰

The instrumental role of education for an economic growth is also highlighted in the CESCR General Comment No.13. For instance, the General Comment notes the increasing recognition of education as ‘one of the best financial investments states can make.’³⁰¹ In this context, the human capital theory is pointed out to underline the instrumental importance of education for its contribution to an economic development.³⁰² As a critic of this theory, Amartya Sen himself acknowledges the significance of the theory to underline the instrumental role of education for economic growth through the enhancement of human capital.³⁰³ Nonetheless, the major critique is levelled against the theory due to: (a) its neglect of the non-economic dimensions of education, and (b) its treatment of human beings as a mere means for an economic growth.³⁰⁴

In his critique, Sen, while noting the theory as inadequate, goes further to suggest the integration of the theory into the human capability approach that encompasses ‘both the direct and indirect consequences of human abilities.’³⁰⁵ As such, the human capital theory of education can be used to

²⁹⁹ See generally Paul Romer, “Endogenous Technological Change” (1990) 98:5 *Journal of Political Economy* 71 [Romer, “Endogenous Technological Change”]. See Kingsley C. Moghalu, *Emerging Africa: How the Global Economy’s ‘Last Frontier’ Can Prosper and Matter* (London: Penguin Books Ltd, 2014) at 202.

³⁰⁰ Romer, “Endogenous Technological Change” *supra* note 299 at 71.

³⁰¹ *CESCR General Comment No.13*, *supra* note 12 at para 1.

³⁰² *Ibid* at 72.

³⁰³ Amartya Sen, “Human Capital and Human Capability” (1997) 25:12 *World Development* 1959 at 1959-60 [Sen, “Human Capital and Human Capability”].

³⁰⁴ *Ibid* at 1959-60. See also Robeyns, “Three Models of Education,” *supra* note 297 at 72-73.

³⁰⁵ *Ibid* at 1959-60.

complement other theories of education and emphasize the intrinsic values of education. Further, it can also be aligned with the economic aspects of the theories of copyright and the right to development.

2.4.3. The Capability Approach to Education

Conceived as a framework for human development, the capability approach (CA) has attracted the attention of scholars in various fields such as health and education.³⁰⁶ In fact, education has been one of the components of CA-driven human development index since 1990s. Given the limitation of the human capital theory, the CA is adapted to the field of education to highlight both the intrinsic and instrumental values of education.³⁰⁷ According to the approach, the central functions of education are: (a) expansion or enhancement of human capabilities and opportunities, and (b) the development of the capacity to make reasoned and valuable choices in the exercise of the capabilities.³⁰⁸ The latter represents the agency aspect of human freedom. In this respect, Nussbaum highlights the role of tertiary education to cultivate critical and self-reflective human capabilities.³⁰⁹

In its departure from other theories, the CA underscores the significance of a quality education for the expansion of individual's capability or freedom through development of specific abilities and

³⁰⁶ Madoka Saito, "Amartya Sen's Capability Approach to Education: A Critical Exploration" (2003) 37:1 *Journal of Philosophy of Education* 17; Elaine Unterhalter, "The Capabilities Approach and Gendered Education: An Examination of South African Complexities" (2003) 1:1 *Theory and Research in Education* 7[Unterhalter, "The Capabilities Approach"]; Melanie Walker, *Framing Social Justice: What Does the 'Capabilities' Approach Offer?* (2003) 51:2 *British Journal of Educational Studies* 168 [Walker, "Framing Social Justice"].

³⁰⁷ See generally Melanie Walker, "Widening Participation in Higher Education: Lifelong Learning as Capability," in David N. Aspin, ed, *Philosophical Perspectives on Lifelong Learning* (The Neverlands: Springer, 2007)131[Walker, "Widening Participation in Higher Education"].

³⁰⁸ McCowan, *supra* note 22 at 145.

³⁰⁹ See generally Nussbaum, *Cultivating Humanity*, *supra* note 36.

skills.³¹⁰ In this context, tertiary education is “understood as a capability in itself, and constitutive of other capabilities now and in the future.”³¹¹ In turn, the enhanced capabilities or freedoms will empower learners to make reasoned and effective choices of valuable achievements for meaningful and dignified lives.³¹² In underscoring the intrinsic and instrumental roles of tertiary education,³¹³ the CA offers ‘a method to evaluate real educational advantage.’³¹⁴ According to CA, tertiary education should be evaluated in terms of learners’ expanded capabilities or opportunities for ‘valued beings and doings.’³¹⁵ In the process of expansion, resources such as learning materials are considered important inputs for the development of the capabilities.³¹⁶

For the effective realization of the right to education, the approach surpasses a mere formal entitlement to underline the need for combined capabilities that encompass both internal abilities and external conditions.³¹⁷ In a right-based approach to education that specifies duty-bearers, the CA offers a vital normative tool for evaluating real opportunities for the full realization of tertiary education and its contribution to human development. In this sense, CA is considered useful to remedy the state-focused limitation of the rights-based approach.³¹⁸ To this end, the CA can highlight the importance of

³¹⁰ McCowan, *supra* note 22 at 145.

³¹¹ Walker, “Widening Participation in Higher Education” *supra* note 307 at 132.

³¹² *Ibid* at 131-34 & 138-45.

³¹³ *Ibid*.

³¹⁴ *Ibid* at 135.

³¹⁵ *Ibid* at 138.

³¹⁶ *Ibid* at 134. As Walker points out, “[r]esources such as bursaries for students, teaching facilities, books and journals, computers, the staff-student ratio, academic scholarship, and so on, might be considered capability inputs.” *Ibid*. Also important are other social arrangements or external conditions, such as institutional and policy designs. *Ibid* at 135-37.

³¹⁷ *Ibid*. See Marth C. Nussbaum, “Capabilities and Human Rights” (1997) 66 *Fordham L Rev* 273 at 289-97 [Nussbaum, “Capabilities and Human Rights”].

³¹⁸ Robeyns, *Three Models of Education*, *supra* note 297 at 76-77. See Amartya Sen, “Human Rights and Capabilities” (2005) 6:2 *Journal of Human Development* 151 at 152-57 [Sen, “Human Rights and Capabilities”].

a moral imperative for a quality education at all levels and the need for concerted actions towards its realization.³¹⁹

In sum, the above major theories of education highlight the objective, instrumental role and intrinsic value of education that hold true for an education at all levels. Although the liberal approach emphasizes the free will of the learner, it is quite related to the CA that essentially underscores the value of education for the expansion of individual and collective freedoms. Indeed, the constitutive and instrumental aspects of the CA have the potential to accommodate and reflect the central tenets of the other two approaches. As such, this thesis affirms this approach as a better perspective in Ethiopia.

2.5. Theories of Development

Over the last several decades, various modern theories of economic development have evolved to shape economic systems both at national and global levels. Despite the gradual refinement of some of the theories to embrace non-economic aspects, an economic growth has remained the central focus of most of the theories. An attempt is made here to highlight the salient features of the major theories. Although the discussion is made for the sake of comprehensiveness, not all theories are of a direct relevance.

2.5.1. The Linear-Stages or Modernization Theory of Development

The emergence of the modernization theory occurred at a period when the agenda of economic development came to the fore on a global level. Drawing on the classical economic theories, the theory regards an economic development as a product of series stages of economic growth. For a transition from underdevelopment to development, Walt Rostow asserted that all nations must pass through series of stages of economic growth. Among his five stages of economic growth are the stages of “traditional

³¹⁹ Leon Tikly & Angeline Barret, “Social Justice, Capabilities and the Quality of Education in Low Income Countries” (2011) 31 International Journal of Educational Development 3 at 7-10.

society,” “take-off into self-sustaining growth” and “the age of high mass consumption.”³²⁰For Rostow, the initial stage is an era of a limited productivity.³²¹ In contrast, he claimed the final stage to be a period of mass production of consumers’ goods and diffusion of services.³²²

For an accelerated economic growth, it was argued that less developed nations that ranked either at the traditional stage or “preconditions” to take-off should follow the experience of developed nations that have already advanced past the stage of self-sustaining growth.³²³ The linear stages theory emphasizes savings, investment and foreign aid as instrumental inputs for capital formation. For the growth model, capital formation is regarded vital for an economic growth through investment and industrialization.³²⁴ As such, it is dubbed “capital fundamentalism” due to its overemphasis on the instrumental role of capital accumulation. To this effect, the theory underlines the need for domestic and foreign savings and their investment for a rapid economic growth.³²⁵ In a related and nonlinear Robert Solow’s model,³²⁶ technological progress is rather considered the engine of sustained economic growth in the long-run.³²⁷ Quite disputed is Solow’s assumed convergence in economies to a constant ‘steady-state’ level of growth.³²⁸

³²⁰ See generally Walter W. Rostow, “The Stages of Economic Growth” (1959) 12:1 *The Economic History Review* 1 [Rostow, “The Stages of Economic Growth”]. Rostow’s five stages of development are: (a) traditional society, (b) the preconditions for take-off, (c) take-off, (d) drive to maturity, and (e) the age of high mass consumption. *Ibid*

³²¹ Walter W. Rostow, *The Stages of Economic Growth: A Non-Communist Manifesto*, 2nd (London: Cambridge University Press, 1960) 5&11 [Rostow, *The Stages of Economic Growth*].

³²² *Ibid*.

³²³ Michael P Todaro & Stephen C. Smith, *Economic Development*, 11th ed (Boston: Addison-Wisely, 2012) at 112.

³²⁴ *Ibid* at 113&115. It was assumed that increasing national savings and investment would be sufficient for economic growth and development. *Ibid* at 115.

³²⁵ Todaro & Smith, *supra* note 323 at 113. See Richard Peet & Elaine Hartwick, *Theories of Development: Contentions, Arguments and Alternatives*, 3rd ed (New York: The Guilford Press, 2015) at 71-72.

³²⁶ Robert Solow, “A Contribution to the Theory of Economic Growth” (1956) 70:1 *The Quarterly Journal of Economics* 65-94 [Solow, “A Contribution”].

³²⁷ *Ibid*. Todaro & Smith, *supra* note 323 at 113.

³²⁸ See generally Bradford De Long, “Productivity Growth, Convergence and Welfare: Comment” (1988) 78:5 *The American Economic Review* 1138-54.

Rostow's linear growth model is useful to justify increasing capital transfer or foreign aid for investment in developing nations. The model has however long drawn ranges of criticisms. For instance, its simple assumption of a linear growth trajectory ignores the realities of nations as part of the integrated and complex international system.³²⁹ The assumed linear-transition of nations through each stages of growth is not true for all nations.³³⁰ Further, increased savings and investment are not sufficient for an accelerated economic growth without the necessary infrastructure and human capital.³³¹ In particular, this is the case in Ethiopia due to its low rate of savings and investment.

2.5.2. Structural-Change Theory of Development

According to this theory, structural constraints stifle economic development. To overcome the constraints, structural transformation is thus emphasized. As its tenet, the theory underlines the need for an economic transformation from a traditional subsistence agriculture to a modern manufacturing and service economy. For the transformation, the theory stresses the role of industrialization and human resource development through government intervention.³³²In the proponents' view, the existing economic structure is assumed to constitute a barrier to a rapid economic growth. Hence, a government intervention is deemed critical to facilitate the structural transformation. The dualistic or two-sector and the patterns-of-development models are the most common variants of the structural-change theory.

Credited to William Lewis for its evolution, the Lewis two-sector model categorizes underdeveloped economies into traditional rural agricultural and modern urban industrial sectors. This dualistic model assumes the existence of a surplus labor with a low productivity in the rural agricultural

³²⁹ Todaro & Smith, *supra* note 323 at 116.

³³⁰ Samuel P. Huntington, "The Change to Change: Modernization, Development and Politics" (1971) 3:3 *Comparative Politics* 283 at 298.

³³¹ Todaro & Smith, *supra* note 323 at 116.

³³² Richard Peet & Elaine Hartwick, *Theories of Development: Contentions, Arguments and Alternatives*, 3rd ed (New York: Guilford Press, 2015) at 76-81.

sector.³³³ It is further assumed that a gradual transfer in labor to a modern sector with high productivity would occur at the same rate of wages.³³⁴ According to this model, industrial investment and capital accumulation are considered the drivers of the labor transfer and output expansion in the modern sector.³³⁵ Nonetheless, contested are the model's emphasis on the process of labor transfer from a subsistence to the modern sector and its assumed consequent increase in the output and employment in the modern sector.³³⁶ The growing unemployment and the need for advanced skills run counter to the assumption. Furthermore, the role of a subsistence agriculture is neglected.

As a related variant, the patterns-of-development model notes the role of sequential process for the transformation of economic and institutional structures towards a modern industrial economy.³³⁷ For the proponents, an economic development is “an interrelated set of long-run processes of structural transformation.”³³⁸ The transformation is thus needed to cause a transition from an agrarian economy to a modern and industrialized one with an increase in per capita income.³³⁹ To this end, highlighted is the need for changes in a nation's economic structure, international trade, resource utilization and socio-

³³³Todaro & Smith, *supra* note 323 at 116-17. Given its underlying assumptions about labor, the Lewis model was regarded as a relevant general theory of development for less developed countries in the 1960s. *Ibid.* See William A. Lewis, *Theory of Economic Growth* (London: Routledge, 2003) at 206-07.

³³⁴ *Ibid.*

³³⁵ See Lewis, *supra* note 333 at 206-12& 264-310. Todaro & Smith, *supra* note 323 at 117. In other words, the existence of a direct correlation among the rates of capital accumulation, growth and job creation is assumed. *Ibid* at 120.

³³⁶ Todaro & Smith, *supra* note 323 at 121. Both the assumptions of surplus labor in the rural areas and the existence of a competitive modern sector labor market to absorb the labor transfer expected are without concrete empirical evidence to reflect the contemporary economic reality of developing countries. In most countries, the labor market in the industrial sector is competitive enough to absorb the labor force that migrate from rural areas to urban places. Hence, there is a need for rethinking the model to fit the current economic realities of the countries. *Ibid.*

³³⁷ *Ibid* at 121. The desired economic transformation is constituted of “the set of structural changes required to sustain a continuing increase in income and social welfare.” Hollis Chenery, *Structural Change and Development Policy* (New York: Oxford University Press, 1979) at 6[Chenery, *Structural Change*].

³³⁸ Moshe Syrquin, “Patterns of Structural Change,” in Hollis Chenery & T.N Srinivasan, eds, *Handbook of Development Economics*, Vol. I (The Netherlands: Elsevier Science BV, 1988) 205 at 205 [Syrquin, “Patterns of Structural Change”]. Built upon the pioneering work of Simon Kuznets, the main features of this model are industrialization, urbanization, and agricultural transformation—elements regarded as modern economic growth by Kuznets. *Ibid.*

³³⁹ *Ibid.*

economic conditions.³⁴⁰ Further, the model defines “development patterns” as “a systematic variation in any significant aspect of economic and social structure associated with a rising level of income or other index of development.”³⁴¹

Although the model assumes the existence of a certain common development patterns across nations,³⁴² it recognizes variations arising from national and international development constraints. It also acknowledges the impact of developing countries’ integration into the international system.³⁴³ Yet, the model has its own limitations. Among others, it is critiqued for its undue emphasis on patterns and the consequent risk of erroneous conclusion about the causation effect.³⁴⁴ The emulation of the development “success” is not effective and is less befitting other nations’ contexts.

2.5.3. Dependency Theory of Development

In contrast to other theories, the dependency theory is known for its rejection of the assumptions of neoclassical and modernization theories. In rejecting the assumptions, the theory attributes underdevelopment to unequal or exploitative relationships between developed and less developed nations.³⁴⁵ Influenced by the Marxist school of thought, the theory regards the economic relationship as

³⁴⁰ Todaro & Smith, *supra* note 323 at 122. In particular, physical and human capital accumulation, resource allocation and demographic factors are important to describe the growth processes. In so doing, the model notes the insufficiency of savings and investment for an economic growth.

³⁴¹ Hollis B. Chenery & Moises Syrquin, *Patterns of Development: 1950-1970* (London: Oxford University Press, 1975) at 4[Chenery & Syrquin, *Patterns of Development*].

³⁴² See Syrquin, “Patterns of Structural Change,” *supra* note 338 at 216-218. It is argued that the existence of transnational factors is important to justify the assumed uniformities across the development process of nations. *Ibid.* The universal factors include: common technological knowledge, similar human wants, access to global markets, and capital accumulation. *Ibid.* at 216-17. Hollis B Chenery, “Patterns of Industrial Growth” (1960) 50 *American Economic Review* 624 at 626[Chenery, “Patterns of Industrial Growth”].

³⁴³ Todaro & Smith, *supra* note 323 at 122.

³⁴⁴ *Ibid.* at 123. Thus, developing countries cannot draw a conclusion and adopt similar trend for their economic sector based an observation of the declining trend of labor force in the agricultural sector of developed countries. *Ibid.*

³⁴⁵ Andre Frank, “The Development of Underdevelopment” (September 1966) 18:4 *Monthly Review* 17 (widely known as the leading dependency theorist, Frank attributes underdevelopment to the historical and continuing exploitation of the poor nations by the rich nations).

a means of capitalist domination and exploitation.³⁴⁶ In so doing, it points out the historical conditions and their profound impact on the structure of world economy.³⁴⁷ In particular, the theory explains the economic development of a state in terms of external political and economic factors and their ramifications for its national development objectives.³⁴⁸ The technological and commercial predominance of rich countries and the consequent inflexible division of labor are considered the major factors for the continued exploitation and subjugation of the poor countries.³⁴⁹ It is argued that resources flow from the ‘periphery’ of poor states to and enrich the ‘core’ of the rich states. In such an exploitative relation, the poor states are further impoverished.

From among several variants of the dependency theory, worth mentioning are the neocolonial dependence, the false-paradigm and the dualistic-development models. Sharing the basic tenets of the theory, the neocolonial dependence model considers underdevelopment as the effect of a continued exploitative capitalism. In contrast, the false-paradigm model attributes underdevelopment to ill-informed and biased economic policy advice from experts affiliated with international donors and agencies. Yet, the dualistic-development model highlights the existence of increasing disparities not only between rich and poor nations but also within societies at different levels. In general, the contribution of the dependency theory lies in its detailed account of the impact of external factors on a national development and the rejection of an exclusive emphasis on GNP as an index of development. Further, this model is used to highlight the impact of the capitalist-driven globalization of IP protection

³⁴⁶ See Vicky Randall & Robin Theobald, *Political Change and Underdevelopment* (London: Palgrave, 1985) at 99-136.

³⁴⁷ Theotonio Do Santos, “The Structure of Dependence,” in K.T Fann & Donald C. Hodges, eds, *Readings in U.S Imperialism* (Boston: Porter Sargent, 1971) at 226. Dating back to the beginning of the colonial era, this historical condition has been exploited by some countries to the detriment of other countries in a manner that limits the latter’s development possibilities. Ibid.

³⁴⁸ Osvaldo Sunkel, “National Development Policy and External Dependence in Latin America” (1969) 6:1 *Journal of Development Studies* at 23. It is argued that underdevelopment results from a conditioning situation of dependence that subjects the economies of poor countries to that of dominant countries. Do Santos, *supra* note 120 at 226.

³⁴⁹ Sunkel, *supra* note 348 at 23.

that makes the rich even richer. Nonetheless, it is critiqued for its overemphasis on the external factors and its consequent suggestion of a policy of autarky without a concrete and viable solution.

2.5.4. Neoliberal Theory of Development

Since its emergence in the 1980s, the neoliberal theory of economic development has attained a predominance over its predecessors. According to this theory, the persistent underdevelopment in the less developed nations is attributable to an inefficient allocation of resources and the distorting effect of an excessive action of state intervention.³⁵⁰ Drawing on the classical economic theories, the neoliberal theory underlines the need for liberalization of the national economy and the instrumental role of a free market. The proponents claim that economic efficiency and growth require free and competitive markets, trade liberalization, foreign direct investment, privatization of state-owned enterprises, deregulation of financial sectors, etc.³⁵¹ Entrenched as an ideology, this theory underpins IP system.

From among its variants, the three major ones are the free-market approach, the public choice approach and the market-friendly approach. The free-market approach considers market as an efficient mechanism for resource allocation, investment and effective competition. Dubbed as “market fundamentalism” by its critics, the approach views a government action as a distorting and counterproductive one.³⁵² Sharing the same tenets, the public choice approach goes further to assume politicians and bureaucrats to be self-interested actors who use public resources to serve their selfish political ends. Considering it as distorting, the proponents hold that a government intervention must be

³⁵⁰Todaro & Smith, *supra* note 323 at 128. The theory assumes the existence of efficient market, perfect competition, information symmetry and rational decision-making or expectations.

³⁵¹ All these economic policy prescriptions are included in the so-called Washington Consensus adopted in 1989. The Bretton Woods Institutions (World Bank and International Monetary Fund (IMF) are considered to be proponents and agents of the Washington Consensus. See John Williamson, “A short History of the Washington Consensus” (2009) 15 *Law & Business Review of the Americas* 7. For a critique on the Washington Consensus, see generally Joseph Stiglitz, *More Instruments and Broader Goals: Moving Towards the Post-Washington Consensus* (Helsinki: World Institute for development Economics Research, 1998).

³⁵² Todaro & Smith, *supra* note 323 at 129. The approach tends to assume the existence of an efficient market in the developing countries.

kept to a minimum.³⁵³ In contrast, the market-friendly approach is a recent variant that recognizes the facilitative role of government intervention and the existence of market failures in the less developed nations.³⁵⁴ In effect, an appropriate government intervention is considered vital to create an enabling environment for investment and free markets through its investment in the physical and social infrastructure such as education.³⁵⁵ Although disputed, Ethiopia now appears to embrace this approach.

Despite the respective contributions of its variants, general criticisms are directed at the neoliberal theory of development. First, it is critiqued for its neglect of the deep-seated realities in the less developed nations. Second, it is disputed for its emphasis on the GDP/GNP as a sole measure of development. Third, the theory's aggregative measure is inattentive to the consequent distributive inequalities. In the context of market, its over-reliance on a free market mechanism overlooks the inevitable realities of a market failure. For instance, this is an issue for copyright and tertiary education in less developed nations with an inefficient market. For want of purchasing power due to low income, the market is ineffective to address the issue of learning materials in those nations. Further, the theory tends to entrench an expansive copyright protection.³⁵⁶ In effect, the public interests are often undermined due to lack of a reasonable access to creative works relevant for quality tertiary education. As recognized in one of its variants, the role of state intervention is thus critical to address the socio-economic realities in the less developed nations. Ethiopia should thus be cautious about the drawbacks.

2.5.5. Contemporary Theories of Development

³⁵³ See Peet & Hartwick, *supra* note 332 at 90-95.

³⁵⁴ *Ibid* at 96-97. See Ray Kiely, "Neoliberalism Revised?: A Critical Account of World Bank Concepts of Good Governance and Market Friendly Intervention" (1998) 28:4 International Journal of Health Services 683 at 684-88.

³⁵⁵ Todaro & Smith, *supra* note 323 at 129. The approach acknowledges the information asymmetries, lack of absorptive capacity for technology and economies of scale in production in the less developed nations.

³⁵⁶ See Netanel, *supra* note 42 at 306-11& 314-24 (making a critical analysis of the neoliberal approach to copyright).

For their emergence, the contemporary theories draw on the insights and principles of the classical theories of development. From among the modern theories of economic development, the new (endogenous) growth and the coordination failure models are the major variants. In drawing on Solow's model, the new growth theory emphasizes the instrumental role of knowledge accumulation and technology for a sustained economic growth.³⁵⁷ The leading proponent of the theory, Paul Romer considers "ideas as the source of economic progress" and "technological progress as the product of economic activity."³⁵⁸ In contrast to Solow's model, the technological progress is noted to be endogenous and market-driven.³⁵⁹ As such, the new growth theory highlights the shift from a physical resource-based economy to a knowledge-based economy.³⁶⁰

Thus, central to the new growth theory are knowledge creation, investment in human capital and innovation through research and development as the drivers of economic growth.³⁶¹ That is, an economic growth is a function of investment in human capital and technological progress. In the context of copyright and tertiary education for development, the endogenous growth model is thus useful to underscore their role for knowledge production and human capital. In particular, the theory underlines the importance of human capital and knowledge creation for innovation and technological progress.³⁶²

³⁵⁷ See generally Paul Romer, *The Origins of Endogenous Growth* (1994) 8:1 *Journal of Economic Perspectives* 3-22 [Romer, "The Origins of Endogenous Growth"]; Robert E. Lucas, "Ideas and Growth" (2009) 76 *Economica* 1 [Lucas, "Ideas & Growth"] (underscoring the contribution of knowledge of individuals for economic growth).

³⁵⁸ *Ibid*; see generally Romer, "Endogenous Technological Change" *supra* note 299.

³⁵⁹ Romer, "Endogenous Technological Change," *supra* note 299 at 72-73. In Romer's view, "technological change arises in large part because of intentional actions taken by people who respond to market incentives. Thus, the model is one of endogenous rather than exogenous technological change." For him, "the stock of human capital determines the rate of growth." *Ibid* at 71.

³⁶⁰ *Ibid*.

³⁶¹ *Ibid* at 74. Romer argues that capital, labor, human capital and technology are central to this model of growth. *Ibid* at 78-88. Robert E. Lucas, "On the Mechanics of Economic Development" (1988) 22 *Journal of Monetary Economics* 3 at 17-41 [Lucas, "On the Mechanics"]. For Robert Lucas, human capital (accumulated both through schooling and learning by doing) is 'the engine of growth.' *Ibid* at 35.

³⁶² See Linda Yueh, "Global Intellectual Property and Economic Growth" (2007) 5:3 *Northwestern Journal of Technology and Intellectual Property* 436 at 443-44.

The coordination failure is another variant of the contemporary theories of economic development. The coordination failure model indicates a scenario where the market may fail to coordinate among complementary activities.³⁶³ The model describes the economy as an ecosystem wherein economic activities are interdependent and subject to general economic conditions.³⁶⁴ The coordination problem stems from the interdependence between individual investors for production and investment decisions.³⁶⁵ Since market mechanism is not effective enough to coordinate all economic activities, the model holds that such a market failure will result in multiple and inefficient equilibria with sub-optimal allocation of resources.³⁶⁶ In order to mitigate the effect of the market failure, the model highlights the role of a strategic government intervention to coordinate complementary economic activities towards the desirable equilibria and optimal resource allocation.³⁶⁷ Hence, the model calls for complementarities between market mechanism and government action.³⁶⁸

This model is useful to justify an appropriate government measure to channel copyright protection and tertiary education towards human development. Such a measure is vital for less developed countries where market mechanism is less effective to facilitate efficient allocation of resources. In its recognition of government's role, the model is related to the developmental state model. Credited for the stated-led economic success in South East Asian countries such as Japan and

³⁶³ Karla Hoff, "Beyond Rosentein-Rodan: The Modern Theory of Coordination Problem in Development," in Boris Pleskovich & Nicholas Stern, eds, *Annual World Bank Conference on Development Economics* (Washington, DC: The World Bank, 2001) 145 at 145-46 & 152-59. The modern coordination failure model draws on the insights of Rosentein Rodan. In view of externalities or spillovers, the model identifies instances of coordination failures such as spillovers related to the technology of an agent, social or political interactions, information, and a search process. *Ibid* at 146.

³⁶⁴ *Ibid* at 151. The coordination failure occurs due to a complex economic ecosystem in which the action of an individual or a firm depends upon the behavior of others.

³⁶⁵ Dani Rodrick, "Getting Interventions Right: How South Korea and Taiwan Grew Rich" (1995) 10 *Economic Policy* 53 at 79-80.

³⁶⁶ Karla Hoff & Joseph Stiglitz, "Modern Economic Theory and Development," in Gerald Meier & Joseph Stiglitz, eds, *Frontiers of Development Economics: The Future in Perspective* (Washington, DC: World Bank, 2000) 389 at 390.

³⁶⁷ Hoff, *supra* note 363 at 165-68.

³⁶⁸ *Ibid* at 170.

Korea,³⁶⁹ the developmental state model is premised on the crucial role of state-led industrialization for an economic growth in the long-run.³⁷⁰ Noting the coordination problems and the need for developmental strategies designed in an international context,³⁷¹ the model underscores the leading role of the government to coordinate economic activities in the development process.³⁷² Yet, the success of the industrialization sought depends upon the existence of effective institutional arrangements.³⁷³

In sum, each of the above theories of economic development offers relevant insights to inform development policies and objectives. For instance, it is crucial to note the instrumental role of capital and investment, the need for an appropriate structural economic transformation, the impact of unequal and exploitative relationship between nations and the importance of liberalization. From among the contemporary theories the new growth model is more important to highlight the significance of an investment in a human capital, knowledge creation and innovation for development. Also, crucial is the issue of technological progress. Given its justification of extensive state intervention and for its success story elsewhere, knowledge-driven developmental state model could be appealing to less developed countries in Africa for a state led-development. In emulating China, Ethiopia has espoused this model and is thus regarded a developmental state in Africa.³⁷⁴ At present, Ethiopia claims to infuse its developmental state model with the neoliberal approach. Nonetheless, the failure of the economic growth models to address distributive issues and their overemphasis on an economic aspect are few of the common limitations that necessitate an alternative holistic approach to development.

³⁶⁹ See generally Chalmers Johnson, *Japan, Who Governs?: The Rise of Developmental State* (New York: Norton, 1995).

³⁷⁰ Stephan Haggard, *Developmental States* (Cambridge: Cambridge University Press, 2018) at 2-6 & 10-12.

³⁷¹ *Ibid* at 4 & 28-34; Rodrick, *supra* note 365 at 79-80.

³⁷² Haggard, *supra* note 370 at 13-14.

³⁷³ *Ibid* at 29-32.

³⁷⁴ See generally Christopher Clapham, "The Ethiopian Developmental State" (2018) 39:6 *Third World Quarterly* 1151. Given its new economic reforms, Ethiopia seems to be embracing a liberal economic approach to promote private sectors.

2.5.6. Human Development Approach: An Emerging Framework for Development

In the 1990s, the human development approach (HDA) emerged as an alternative framework to the existing and predominant neoliberal theory of development.³⁷⁵ In the emergence of human development approach, the pioneers of the CA such as Amartya Sen and Martha Nussbaum have played a key role through their monumental contribution to the conceptual and philosophical foundations of the approach.³⁷⁶ As is evident from their extensive works, both have been critical of the liberal/utilitarian development theory for its emphasis on GNP (wealth or income) as a measure of development.³⁷⁷ Further, they often lament the theory's undue emphasis on an economic growth and its neglect of other dimensions of development.³⁷⁸ Sen also notes the limitations of the dominant liberal theory for its exclusive focus on market mechanism and calls for an integrated approach to market and other relevant institutions.³⁷⁹ Operating within the framework of political liberalism, both proponents have developed a robust and an alternative approach that conceptualizes development as an expansion of freedoms or capabilities.³⁸⁰ Indeed, this is one of the basic points of departure from the neoliberal theory that underpins economic growth or wealth as a measure of development.

³⁷⁵ Sakiko Fukuda-Parr, "Theory and Policy in the International Development: Human Development and Capability Approach and the Millennium Development Goals" (2011) 13 *International Studies Review* 122 at 125-26 [Fukuda-Parr, "Theory and Policy in International Development"].

³⁷⁶ Sakiko Fukuda-Parr, "The Human Development Paradigm: Operationalizing Sen's Ideas on Capabilities" (2003) 9:2/3 *Feminist Economics* 301 at 303-04[Fukuda-Parr, "The Human Development Paradigm"].

³⁷⁷ See Amartya Sen, *Commodities and Capabilities* (New Delhi: Oxford University Press, 1999) at 1-16 [Sen, *Commodities and Capabilities*]; Martha Nussbaum, "Capabilities and Human Rights," *supra* note 317 at 276 &281-83; Sen, *Development as Freedom*, *supra* note 1 at 5&57-62. In his critique of utilitarian conception of efficiency, Sen argued for the evaluation of efficiency in terms of people's capabilities. *Ibid* at 117-26&43.

³⁷⁸ Sen, *Development as Freedom*, *supra* note 1 at 117-26 &43. Sen recognizes the role of industrialization, technological progress and social modernization for the expansion of human freedom. Nonetheless, he argues that there are many other factors that are important such as social and economic arrangements (e.g. facilities for education), and civil and political rights. *Ibid* at 3.

³⁷⁹ *Ibid* at 11-142. In particular, Sen points out the limitation to address social opportunities such as provision of education to the poor. *Ibid* at 127-33 & 42. In addition to markets, the HDA recognizes the role of institutions such as government, civil society, and global institutions. Paul Streeten, "Human Development: Means and Ends" (1993) 21:4 *The Bangladesh Development Studies* 65 at 68.

³⁸⁰ Nussbaum defines the CA to human development as "an approach to comparative quality of life assessment and to theorizing about basic social justice." Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge: Harvard University Press, 2011) at 18 [Nussbaum, *Creating Capabilities*]. She observes that Sen and this collaborators regard "capability as the most pertinent space of comparison for purposes of quality of life assessment." *Ibid* at 19. Sen, *Development as Freedom*, *supra* note 1 at 74-86.

Noting the importance of economic growth, Sen goes further to articulate development as “a process of expanding the real freedoms that people enjoy.”³⁸¹ Placing human beings at its epicenter, the advancement of freedom or expansion of capability is thus regarded as the overarching objective of development.³⁸² As an approach to development, the HDA is founded upon the core concepts of human capabilities and functionings developed within the broader capability approach.³⁸³ In simple terms, capabilities are noted as an alternative combination of what a person is actually able to achieve while functionings refer to the actual achievements.³⁸⁴ In the HDA, human development is measured in terms of the expansion of people’s capabilities and functionings. As noted in the HDA-inspired Human Development Reports (1990), human development refers to both “the process of enlarging people’s choices” and “the level of their achieved well-being.”³⁸⁵ In Ul Haq’s observation, “the objective of development is to create an enabling environment for people to enjoy long, healthy and creative lives.”³⁸⁶

In dealing with people and development, central to HDA are the fundamental notions of evaluative and agency aspects. An evaluative aspect underscores the assessment of progress in terms of

³⁸¹ Sen, *Development as Freedom*, *supra* note 1 at 3 & 14.

³⁸² *Ibid* at xii & 3.

³⁸³ Both concepts constitute the conceptual foundations of the human development approach. Fukuda-Parr, “The Human Development Paradigm,” *supra* note 376 at 303-04. Despite the interchangeable reference to both human development approach and the capability approach, the latter is a broader framework that is used in various disciplines and for a number of additional issues such as social justice, development, and ethical theory and practice. Ingrid Robeyns views the capability approach as “an umbrella, or a family, of normative theories.” Ingrid Robeyns, “Capabilitarianism” (2016) 17:3 *Journal of Human Development and Capabilities* 397 at 403 [Robeyns, “Capabilitarianism”].

³⁸⁴ Sen, *Development as Freedom*, *supra* note 1 at 75. Sen defines capability as a kind of “substantive freedom to achieve alternative combination of functionings” and functionings “things a person may value doing or being.” *Ibid.* Nussbaum, *Creating Capabilities*, *supra* note 380 at 20-25.

³⁸⁵ UNDP, *Human Development Report 1990*, *supra* note 2 at 9-10. Started in 1990 and published annually since then, Human Development Reports (HDRs) is founded on the conceptual framework of Sen’s capability approach for its analysis of contemporary development challenges. Fukuda-Parr, “The Human Development Paradigm,” *supra* note 376 at 301-02. Inspired by Sen’s capability approach, Mahbub Ul Haq in collaboration with Sen further developed the HDA to underpin both the Human Development Reports and Human Development Index (HDI). See Mahbub Ul Haq, *Reflections on Human Development* (New York: Oxford University Press, 1995) at 24-65 [ul Haq, *Reflections*].

³⁸⁶ Mahbub ul Haq, “The Human Development Paradigm” in Fukuda-Parr & Shiva Kumar, eds, *Readings in Human Development: Concepts, Measures and Policies for a Development Paradigm*, 2nd ed (New Delhi: Oxford University Press, 2005) at 17&18 [ul Haq, “The Human Development Paradigm”].

the expansion of people's freedoms.³⁸⁷ In its agency aspect, people are considered free and active agents of their valuable choices that entail policy changes for development.³⁸⁸ As "the real wealth of a nation," people's active role is thus crucial for social and economic development.³⁸⁹

In stressing capabilities as a measure of human well-being, HDA deviates from its predecessors, including the basic needs approach—its precursor—that prioritizes meeting the basic needs of all people.³⁹⁰ In view of its significance for the human development index (HDI) and its holistic perspective, the HDA is comprehensive enough to embrace sustainable development.³⁹¹ In the same vein, the HDA also embraces the recognition and promotion of human rights due to the latter's intrinsic and instrumental values for human development.³⁹² In addition to its holistic feature, the HDA is distinctive, *inter alia*, for its (a) conception of development as an expansion of human capabilities, (b) treatment of a person as an end and central focus of development, and (c) pluralistic approach to values.³⁹³ In general, as Richard Jolly observes, the HDA departs from its predecessors in "[its] objectives, assumptions, constraints and in the main areas for policy and in the indicators for assessing

³⁸⁷ Fukuda-Parr, "The Human Development Paradigm," *supra* note 376 at 303-07. Sen, *Development as Freedom*, *supra* note 1 at 4.

³⁸⁸ Fukuda-Parr, "The Human Development Paradigm," *supra* note 376 at 303 & 308-09. Sen, *Development as Freedom*, *supra* note 1 at 53. From the perspective of the human development approach, human beings are autonomous to make their decisions and advance key social and economic objectives that promote development. Sabina Alkire & Severine Deneulin, "The Human Development and Capability Approach," in Severine Deneulin & Lila Shani, eds, *An Introduction to the Human Development and Capability Approach: Freedom and Agency* (London: Earthscan, 2009) at 27-28.

³⁸⁹ Fukuda-Parr, "The Human Development Paradigm," *supra* note 376 at 308-09. For instance, this justifies an investment in human resource development such as education for the people to play an instrumental role in the process of development. Fukuda-Parr notes that "the concept of human capital or human resource development is typically about individual agency for material production." *Ibid* at 309.

³⁹⁰ *Ibid* at 304. For the details regarding the basic needs approach to development, see Frances Stewart, *Panning to Meet Basic Needs* (London: Macmillan, 1985) at 1-13.

³⁹¹ Ul Haq, *Reflections*, *supra* note 385 at 76-92. Ul Haq was forerunner of the concept of sustainable development through his integration of environmental concerns and development into a single concept. Paul Streeten, "Foreword," in Mahbub Ul Haq, *ibid* at ix.

³⁹² Fukuda-Parr, "The Human Development Paradigm," *supra* note 376 at 310. See also Nussbaum, "Capabilities and Human Rights," *supra* note 317 at 277-79.

³⁹³ Nussbaum, *Creating Capabilities*, *supra* note 380 at 18-19. Nussbaum identifies five elements as the essential features of CA: respect for the principle of treating each person as an end; a focus on choice or freedom rather than on achievements; pluralism about value; a deep concern with entrenched social injustice and inequality; and a commitment to describe an urgent task to government and public policy. *Ibid*. In contrast, Robeyns points out many more core elements of the CA such as the difference in abilities (conversion functions), human diversity, structural constraints (e.g. effect of laws or norms), and human agency. See Robeyns, "Capabilitarianism," *supra* note 383 at 405-10.

results.”³⁹⁴ Nonetheless, HDA is critiqued for want of operationalization.³⁹⁵ Yet its increasing application to diverse studies seems to counter the critique. In this regard, more evidence is emerging.

2.6. The Capability Approach as the Normative and Analytical Framework

2.6.1. The Notion of Development and Capability Approach

As noted above, development is an elusive notion understood, theorized and applied in various perspectives and contexts.³⁹⁶ For instance, from the perspective of the dominant neoliberal theories of development, the notion is often construed to mean an economic growth.³⁹⁷ For instance, the dominant metrics of development such as GDP/GNP, wealth, and utility are primarily framed in economic terms.³⁹⁸ In effect, the socio-cultural and ecological aspects of development are often neglected. In fact, these hitherto marginalized aspects of development have been embraced in the now-popular and inclusive notion of sustainable development. In its articulation, sustainable development is defined to mean “a development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”³⁹⁹ Underscoring both the intergenerational equity and the comprehensive nature of development, the notion of sustainable development is built upon three major pillars: economic, social and ecological development.⁴⁰⁰ It is this holistic conception of sustainable

³⁹⁴ Richard Jolly, “Human Development and Neoliberalism: Paradigms Compared,” in Sakiko Fukuda-Parr and A. K. Shiva Kumar, eds., *Readings in Human Development: Concepts, Measures and Policies for a Development Paradigm* (New Delhi: Oxford University Press, 2003) at 106.

³⁹⁵ Robert Sugden, “Welfare, Resources and Capabilities: A Review of Inequality Examined by Amartya Sen” (1993) 31:4 *Journal of Economic Literature* 1947 at 1953.

³⁹⁶ See Margaret Chon, “Global Intellectual Property Governance (Under Construction)” (2011) 12:1 *Theor Inq L* 349 at 368 [Chon, “Global Intellectual Property”].

³⁹⁷ Sen, *Development as Freedom*, *supra* note 1 at 3.

³⁹⁸ *Ibid.*

³⁹⁹ See Hans Bugge Christian, “1987-2007: “Our Common Future” Revisited,” in Hans Bugge Christian & Voigt Christina (eds.), *Sustainable Development in International and National Law: What Did the Brundtland Report Do to Legal Thinking and Legal Development, and Where Can We Go From Here?* (Groningen: Europa Law Publishing, 2008) 3 at 7.

⁴⁰⁰ See United Nations World Commission on Environment and Development, *Our Common Future: World Commission on Environment and Development* (Oxford: Oxford University Press, 1987) at 43-66[UNWCED, *Our Common Future*].

development that resonates well with the CA/HDA. Having human beings as the central focus of their common concern, both emphasize the intrinsic and instrumental roles of human beings and their overall well-being.⁴⁰¹

As developed by the pioneers—Sen and Nussbaum, the CA rejects the narrow economic conception of development. To reiterate what is mentioned above, the CA is founded upon two core concepts—the human capabilities and functionings. Conceptualized as the *ability to do or to be*, human capabilities are a kind of the substantive freedom or real opportunities required for a set of valuable achievements or functionings.⁴⁰² It follows that functionings are “beings or doings” that a person has a reason to value, such as being educated or healthy.⁴⁰³ As essential constitutive elements of human development, both concepts are thus interlinked in such a manner that human capabilities are vital for valuable achievements. Despite the slight variance in their versions of the CA,⁴⁰⁴ both Sen and Nussbaum stress the expansion of human capabilities as the basis for human development.

As an alternative framework, the CA disputes the dominant welfare approach confined to an economic growth and welfare maximization. In so doing, the CA reframes development as “a process of expanding the real freedoms that people enjoy.”⁴⁰⁵ The CA does recognize economic growth as a means for human development. It however critiques the overemphasis on the economic growth and considers indicators such as economic efficiency, wealth and income as a poor measure of well-

⁴⁰¹ See generally Sudhir Anand and Amartya K. Sen, *Sustainable Human Development: Concepts and Priorities*, at 46, online: UNDP <http://hdr.undp.org/sites/default/files/anand_sudhir_-_sustainable_human_development-concepts_and_priorities.pdf> (last visited on 20 September 2019) [Anand and Sen, *Sustainable Human Development*].

⁴⁰² See Sen, *Development as Freedom*, *supra* note 1 at 75. Martha Nussbaum has developed basic, internal and combined capabilities as the categories of human capabilities. The basic capabilities are innate as compared to the internal and combined ones that are contingent on external conditions for their development. Nussbaum, *Women and Human Development*, *supra* note 3 at 84-85.

⁴⁰³ *Ibid.*

⁴⁰⁴ In her treatment of CA, Nussbaum has developed list of ten central human capabilities as a minimum set of capabilities required for a person to live a dignified and meaningful life. In contrast, Sen prefers leaving the formulation and determination of capabilities subject to public reasoning or deliberative dialogue. See Nussbaum, “Capabilities and Human Rights,” *supra* note 317 at 285-88.

⁴⁰⁵ Sen, *Development as Freedom*, *supra* note 1 at 3.

being.⁴⁰⁶ Noting the advancement of individuals' freedom as the core objective of development, Sen emphasizes the expansion of freedom both as “the *primary end and the principal means* of development.”⁴⁰⁷ From CA's perspective, development is thus understood as “an expansion of human capabilities” or “expansion of freedom.”⁴⁰⁸ Embracing both the intrinsic and instrumental elements of freedom, the CA underscores the instrumental role of rights, opportunities and entitlements to promote human development. In so doing, the CA places a human development at the center of its normative and analytical remit. Indeed, the CA is a normative framework suited to conceptualize and measure individual and collective well-being as well as evaluate the impact of legal norms, policies and practices upon human development.⁴⁰⁹

2.6.2. Situating Copyright, Education and Development within the CA

Given the evolving notion of development as a right anchored in the dignity and freedom of human beings,⁴¹⁰ central to the CA are thus both human beings and human development as its focal points of development analysis. In its recognition of the right to development as a human right, the Declaration on the Right to Development (DRD)⁴¹¹ defines the right as “a comprehensive economic,

⁴⁰⁶ Amartya Sen, “Development as Capability Expansion,” in Sakiko Fukuda-Parr & A.K. Shiva Kumar, eds, *Readings in Human Development*, *supra* note 394 at 44-45[Sen, “Development as Capability Expansion”].

⁴⁰⁷ Sen, *Development as Freedom*, *supra* note 1 at 36.

⁴⁰⁸ *Ibid* at 3 & 18.

⁴⁰⁹ Ingrid Robeyns, “The Capability Approach in Practice” (2006) 14:3 *The Journal of Political Philosophy* 351 at 352[Robeyns, “The Capability Approach in Practice”]. The CA is not a theory, but a framework for conceptualization and evaluation of well-being and inequality. *Ibid* at 353.

⁴¹⁰ See generally Arjun K. Sengupta, “Conceptualizing the Right to Development for the Twenty-First Century: Situating the Right to Development,” at 1, online: <<http://www.ohchr.org/Documents/Issues/Development/RTDBook/PartIChapter4.pdf>> (last visited on 20 September 2019).

⁴¹¹ Declaration on the Right to Development, GA Res 41/128, Annex, UNGAOR, 41st Sess, No 53, UN Doc A/4/53 (Dec. 4, 1986), Preamble at paras 1&5 [hereinafter DRD]. It worth mentioning that a consensus has been reached during the Vienna Declaration and Program of Action (1993) affirming the indivisible, interdependent and universal human right status of the right to development along other human rights. See World Conference on Human Rights, Vienna Declaration and Program of Action, 12 July 1993, GA A/CONF157/23 (Vienna: 14-25 June 1993) at para 5 [Vienna Declaration].

social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals.”⁴¹² Aiming at the constant improvement of the well-being of human beings, the DRD seems to draw on the feature of CA to underline development as a process for enhanced capabilities to achieve human development. In this respect, a tertiary education can be regarded both as a capability in itself and a crucial means for enhancing other human capabilities required for a sustainable human development.

Indeed, “[e]ducation is critical for promoting sustainable development.”⁴¹³ In particular, the instrumental role of quality and inclusive education for sustainable development is underlined by its treatment as one of the UN SDGs.⁴¹⁴ As an important level of education, a quality tertiary education is thus instrumental for sustainable development. In the same vein, copyright protection can be a useful for promoting development through enhanced creative and learning capabilities.⁴¹⁵ Through their crucial roles for expansion of human capabilities, both copyright and tertiary education contribute to foster human development. Nonetheless, their effective role for expansion of human capabilities depends, inter alia, upon the existence of an adequate access to knowledge or access to learning materials.⁴¹⁶ In this respect, the CA offers a useful normative and analytical tool to explore and evaluate the material conditions, policies and legal frameworks and their role for human development. Thus, the CA is more suitable to analyze and direct the objectives of the protection of copyright and the

⁴¹² DRD, *supra* note 411, Preamble at para 2. See also Sengupta, *supra* note 410 at 68-69; James C. N. Paul, “The Human Right to Development: Its Meaning & Importance” (1992) 25 *John Marshall L Rev* 235.

⁴¹³ Johannesburg Plan of Implementation, Report of the World Summit on Sustainable Development, UN Doc A/CONF199/20 (Johannesburg: 26 August-4 September 2002) [World Summit on Sustainable Development (2002)].

⁴¹⁴ See UNSDGs, *supra* note 118 at Goal 4.

⁴¹⁵ Okediji, “Reframing International Copyright,” *supra* note 154 at 494.

⁴¹⁶ See Sen, *Development as Freedom*, *supra* note 1 at 4&39. Sen points out the instrumental role of social opportunities such as educational facilities (e.g. learning materials) for expansion of freedom through education. See *ibid.*

promotion of education towards their intended intrinsic and instrumental goals of fostering human development.

As a theoretical framework underpinning the human development, the CA embraces both the instrumental and intrinsic aspects of copyright, education and development. In fact, the CA recognizes the role of human beings as individual and collective agents of development. In contrast to the narrow instrumental view of the human capital approach, the CA however goes further to emphasize the freedom or enhanced capability of human beings as the primary objective of development.⁴¹⁷ As integral elements of the human development, copyright protection and tertiary education must be treated in a complementary manner. In this sense, human development undergirds their reinforcing roles.

In the light of their respective central objectives, the promotion of creative innovation and scientific progress, and the fullest development of human personality reinforce each other to advance human development. Thus, the CA treats both as important capabilities for human development. In this regard, Nussbaum asserts that “all rights are understood as entitlements to capabilities.”⁴¹⁸ In accordance with this view, rights attached to copyright and tertiary education can be noted as entitlements to capabilities.⁴¹⁹ As noted above, the actual realization of rights or the enhancement of capabilities depends upon material and institutional support through government action.⁴²⁰

⁴¹⁷ *Ibid* at 293-96. Nussbaum, *Women and Human Development*, *supra* note 3 at 78-79.

⁴¹⁸ Martha Nussbaum, “Human Rights and Capabilities: Twentieth Anniversary Reflections” (2007) 20 Harv Hum Rts J 21 at 21[Nussbaum, “Human Rights and Capabilities”].

⁴¹⁹ For instance, McCowan argues that the right to education should be conceptualized in terms of capabilities. McCowan, *supra* note 22 at 144-48.

⁴²⁰ Nussbaum, “Human Rights and Capabilities,” *supra* note 418 at 21. Understood as entitlements to capabilities, Nussbaum observes that all rights “have material and social preconditions” that require government action. *Ibid*.

To this effect, the CA offers a common normative framework to examine the constitutive and functional aspects of copyright protection and tertiary education towards the realization of the human development. As Nussbaum notes “capabilities, like human rights, supply a moral and humanly rich set of goals for development.”⁴²¹ In relation to human rights framework, she states that “capabilities are complementary to, and augment, rather than compete with, human rights.”⁴²² As noted earlier, framing socio-economic rights such as education in terms of capabilities can also strengthen the rationale for allocating resources for the effective realization of the rights.⁴²³ In spite of its disputed human rights status, the CA is also useful to enrich the content, the role, and actual realization of tertiary education for human development. In doing, CA can have a remedial function to augment the inadequate treatment of tertiary education in the human rights regime.⁴²⁴ In sum, the CA reinforces the complementary contribution of copyright and tertiary education for human development.

2.6.3. CA’s Analytical Suitability and Limitations

As noted above, the CA is a useful analytical framework to examine the interplay between copyright and tertiary education, and their roles for the human development. Further, relevant constitutional and human rights dimension can be drawn into the discussion. In interrogating these multiple dimensions, the CA offers a broad perspective to evaluate the effective realization of relevant

⁴²¹ Martha Nussbaum, “Capabilities as Fundamental Entitlements: Sen and Social Justice” (2003) 9:2-3 *Feminist Economics* 33 at 35-36 [Nussbaum, “Capabilities as Fundamental Entitlements”].

⁴²² Martha Nussbaum, “Capabilities, Entitlements, Rights: Supplementation and Critique” (2011) 12:1 *Journal of Human Development and Capabilities* 23 at 23 [Nussbaum, “Capabilities”]. In Nussbaum’s opinion, capabilities are important human entitlements, inherent in the idea of basic social justice, and can be viewed as one species of human rights approach.” *Ibid.* Amartya Sen, “Human Rights and Capabilities” (2005) 6:2 *Journal of Human Development* 151 at 151. Sen notes the consonance between the concepts of human rights and capabilities as long as one concept is not subsumed within the confine of the other. *Ibid.*

⁴²³ Nussbaum, *Women and Human Development*, *supra* note 3 at 99.

⁴²⁴ See McCowan, *supra* note 22 at 135.

rights or capabilities for human development in Ethiopia. Indeed, central to the CA is its consideration of rights as entitlements to capabilities. In Ethiopian context, the approach is important to examine the interaction between the relevant policies, legal regimes and practices. Stressing access to learning materials as a direct context for the interaction, the CA is helpful to explore the existing copyright flexibilities. The approach can also guide appropriate reforms.

From among the essential resources, the CA recognizes the instrumental value of access to learning materials for the enhancement of the capabilities to acquire a quality tertiary education. In the same vein, the approach goes further to acknowledge the acquisition of the education both as a functioning in itself and an instrumental capability for related functioning.⁴²⁵ For example, such a capability is vital for a robust creative innovation. The CA is thus more suited to analyze the linkage and direct copyright and tertiary education towards human development. Furthermore, the conceptual affiliation between capabilities and human rights and their complementing roles are other reasons that make the approach a useful normative tool to examine the human rights dimensions in a development context.⁴²⁶

In fact, the analytical relevance of the CA for development-oriented study has been confirmed in various contexts.⁴²⁷ In view of its potential to offer a multivariate metrics of development, CA is used in a wide range of field of studies, including international development. Its contribution is quite evident in the UN Human Development Index since 1990. In IP and development-related research, the

⁴²⁵ Sengupta, *supra* note 410 at 71.

⁴²⁶ See Nussbaum, “Capabilities and Human Rights,” *supra* note 317 at 292-97. For instance, the intrinsic and instrumental aspects of the CA showcase the normative reach of the approach to explore the multifaceted roles of the human right to education. As is aptly elaborated by the CESCR, the human right to education is essential both for the development of human personality and the enjoyment of other fundamental human rights. See *CESCR General Comment No.13*, *supra* note 12 at para 1.

⁴²⁷ See Robeyns, “The Capability Approach in Practice,” *supra* note 409 at 360-70.

approach has drawn a significant interest from leading scholars such as Yochai Benkler,⁴²⁸ Jeremy de Beer⁴²⁹ and Margaret Chon⁴³⁰ for their respective works on the treatment of linkages between information policy, information markets, implementation of WIPO Development Agenda (DA), and intellectual property and development. Several other studies are emerging to evidence its relevance. In particular, Chon's adoption of the approach for the subsequent work on copyright and education in the context of development as a normative guide is a specific instance of the significance of the CA for this research. Emphasizing the expansion of freedom in terms of development of human capabilities, the CA helps underline the contingency of the realization of the human development upon access to resources and the availability of real opportunities.⁴³¹

Nevertheless, like every approach or theory, the CA's analytical significance is not immune to limitations and criticisms. For instance, its incompleteness, the difficulty for its operationalization and other related issues are considered as major limitations.⁴³² Further, it is critiqued for its weakness to make inter-personal comparisons of well-being where there arise disagreements on the valuation of capabilities.⁴³³ Despite the limitations of the CA, it has managed to draw an increasing acceptance among scholars in various areas of studies. In particular, the combination of Sen's and Nussbaum's perspectives of the CA attenuates limitations. That said, the CA offer a better framework to examine the

⁴²⁸ See generally Benkler, *The Wealth of Networks*, *supra* note 4; Tzen Wong & Graham Dutfield, eds, *Intellectual Property and Human Development: Current Trends and Future Scenarios* (Cambridge: Cambridge University Press, 2011).

⁴²⁹ See de Beer, "Defining WIPO's Development Agenda," *supra* note 193.

⁴³⁰ See generally Chon, "IP and the Development Divide," *supra* note 62.

⁴³¹ See Sen, *Development as Freedom*, *supra* note 1 at 70-85.

⁴³² See Robert Sugden "Welfare, Resources and Capabilities: A Review of Inequality Re-examined by Amartya Sen" (1993) 31 *Journal of Economic Literature* 1947 at 1953.

⁴³³ Charles C. Beitz, "Amartya Sen's Resources, Values and Development" (1986) 2:2 *Economics and Philosophy* 282 [Beitz, "Amartya Sen's Resources"].

interplay among copyright, tertiary education and the human development in Ethiopia. Furthermore, the research may also draw on other appropriate theories to augment the theoretical framework.

2.7. Conclusion

As can be noted from the brief exposition of relevant theories or approaches, the notion and significance of copyright, education, human rights and development are each grounded in different philosophical foundations. Although some of them are somehow related, each theoretical justification has evolved to advance different or related values and interests. Nonetheless, all the theoretical justifications share one basic objective—economic growth or development.

To start with, copyright protection is justified on a utilitarian ground to advance an aggregate welfare of the society. To this end, a legal protection is considered a necessary incentive to ensure the continued production of creative works. Central values of the theory are thus efficiency and maximization of utilities. In contrast, the labor theory is used to justify copyright protection as a product of an author's labor mixed with commons. The protection is deemed a legal guarantee for a reward that is due to the author for his labor that belongs to his body. Grounded in a similar natural rights tradition, the personality theory justifies the protection of author's right, *inter alia*, for the purpose of self-actualization. In contrast, the contractarian theory underpins copyright protection on the basis of an implicit social contract that serves to guide the mutual interests of the public and the author. Intended to fill in the gaps in the existing theories, the social planning theory goes further to achieve a just and democratic culture. As such, it emphasizes the need to strike a balance and accommodate social goals. In short, one or more of these theories underpin the existing legal protection of copyright.

From among several schools of thought, two major theories underpin the protection of human rights. Commanding a normative dominance, the natural rights theory grounds human rights in a human dignity. That is, a human person is entitled to human rights by virtue of humanity upon birth. In

contrast, the social justice theory regards human rights as a subset of social justice and products of social cooperation. Although the philosophical grounds of both theories are disputed, the contrast is indicative of the distinction between the *inherency* and the *acquisition* of human rights. In addition to other schools of thought, each of these theories thus offers relevant perspectives.

In the same vein, the significance of education is justified both on intrinsic and instrumental grounds. For instance, the liberal (general) theory of education underscores the value of education for the development of a democratic individual freedom and social interaction. That is, education is deemed essential for human beings to survive and flourish in a democratic society. This stands in contrast to the human capital theory that emphasizes the instrumental role of education for an economic growth. The latter has drawn a criticism for its treatment of human beings as a mere means for economic purposes. Drawn from other fields of studies, the CA fares better to embrace both intrinsic and instrumental values of education. As a robust approach, it regards education as one of the essential human capabilities that is vital both for its enhancement of individual freedom and instrumental role for a socio-economic development. It bears mentioning that the proponents of the approach tend to construe the right to education as an entitlement to human capabilities.

As noted above, a human development is central to the objectives of copyright, education at all levels and their respective human rights dimensions. Despite the recent shift in the notion and theoretical foundations of development, almost all the theories that evolved in the last several decades focus on an economic development. This is true of the linear growth, structural-change, dependency, neoliberal and the contemporary theories of economic development. Capital accumulation, technological progress, investment and markets are all common to most of the theories. The extent of the roles of the market and government intervention are the points of distinction among the theories and within their major variants. Save for the dependency theory that attributes underdevelopment to an

equal and exploitative relations between rich and poor nations, most of the theories point out endogenous factors as the causes for underdevelopment.

In its clear departure from most of the theories of economic development, the HDA has emerged to be comprehensive enough to accommodate the hitherto neglected social aspects of development. Indeed, the HDA has made a major shift both in the notion and the conventional metrics of development. Placing human beings at its center, HDA defines development as the expansion or enlargement of individuals' freedom to lead worthwhile lives. The measure of human development is thus the expansion of the capabilities that are essential for valuable functionings. In line with this notion, the CA is adopted in this thesis both as a normative and analytical framework to explore the interplay between copyright and tertiary education, and their roles for a sustainable human development. The relevance of CA for the issues under consideration is buttressed in its increasing application of the approach in those fields.

Chapter III: The Development Context for International Copyright and Human Rights Systems

3.1. Introduction

The contemporary IP and human rights systems are the results of reformative evolutions since their inception. Each system has its own historical accounts and distinguishing features. The evolution of copyright as a major component of IP system was primarily driven by the need to promote an economic progress.⁴³⁴ In addition to the holocaust and the devastating effect of the WWII, a socio-economic development was one of the reasons for the emergence of the socio-economic human rights. In this context, both copyright and human rights systems somehow share common development objectives. It is thus important to highlight the theoretical foundations and operation of the systems through a development context. In subsequent chapters, the role of copyright and tertiary education for development will be examined against this backdrop.

To begin with the overall context, development has remained an important issue of a common concern at international, regional and national levels. It is central to the national policy agenda of both developed and developing nations. In fact, the issue of development is at the top of the national policy objectives of developing nations. Both for states and non-state actors, development issue is often central to undergird or constitute the primary objective of most IP or human rights-related policy initiatives. Despite the variance in the scope and degree of emphasis, development is an overarching objective both for IP and human rights systems. At a specific level, this general objective, *a fortiori*, holds true for copyright protection and education. For example, both copyright and education contribute to human development through creative innovation and human capital.⁴³⁵ As such,

⁴³⁴ Goldstein & Hugenholtz, *supra* note 157 at 6 & 8; see Orit Fischman-Afori, “The Evolution of Copyright Law and Inductive Speculations as to Its Future” (2012) 19 J Intell Prop L 231 at 242-45 & 253-258 [Fischman-Afori, “The Evolution of Copyright Law”].

⁴³⁵ Further, a study shows that higher education levels are strongly correlated with development through “slower population growth, better disease control, more stable and robust political systems” both at national and international levels. Inge Kaul et al, “How to Improve the Provision of Global Public Goods,” in *Providing Global Public Goods: Managing Globalization* (New York: Oxford University Press, 2003) at 46.

development has been one of the major driving forces behind the evolution of both systems at national and global levels. Nonetheless, there is a significant variation in the notion and scope of development that underpins copyright and human rights systems. For instance, despite its instrumental role to promote non-economic aspects of development such as socio-cultural developments,⁴³⁶ the existing author-centered international copyright system is unduly skewed towards an economic growth.⁴³⁷ In contrast, human rights system has been shaped by a broad notion of development encompassing political, social, economic and cultural aspects. The variance in the scope and degree of emphasis on development in the systems might be attributed, *inter alia*, to the historical contexts of their evolution.

Nonetheless, development constitutes a shared context for both systems. As mentioned in the preceding chapter, the notion of development context is noted in its broadest sense to mean a sustainable human development with its holistic approach. Given its transformative integration into the existing notion of development and its central emphasis on human beings, the objective of sustainable human development offers an important framework or context to examine copyright and human rights systems at international and national levels. In mapping the development context in the light of the objective of sustainable development, a rights-based human development approach is vital to keep in view.

⁴³⁶ Goldstein & Hugenholtz, *supra* note 157 at 8. It is noted that copyright is useful to “advance the important goals of authorial autonomy and cultural diversity.” In so doing, “copyright fosters democracy and free speech...” *Ibid* at 7.

⁴³⁷ See Okediji, “The International Copyright System,” *supra* note 51 at 12.

3.2. The Development Context for International Copyright System

3.2.1. An Overview of the International Copyright System

Prior to exploring the development context, in order is a brief account of the international copyright system. The contemporary international copyright system is the product of a long-time legal and institutional developments. Driven by the economic imperative and the desire to prevent copyright infringements in other jurisdictions, the international copyright system emerged from the consolidation of the existing bilateral agreements between European countries.⁴³⁸ The adoption of the Berne Convention⁴³⁹ was the first step towards a multilateral legal regime to mark the emergence of the international copyright system. In underpinning the international system, the Convention had drawn on the basic principles of the existing bilateral agreements and national copyright systems. Anchored in an economic reason embedded in the one-sided and expansive minimum standards,⁴⁴⁰ the international copyright system was designed to coordinate the protection of authors and right holders across national jurisdictions.⁴⁴¹ Setting an increasing trajectory in the standards and development of the system, the Berne Convention had thus served a coordinative function.⁴⁴² The principle of national treatment is central to the Berne system as a rule of non-discrimination between foreigners and nationals with regard to protection of their copyright in a member-state's jurisdiction.⁴⁴³

⁴³⁸ Goldstein & Hugenholtz, *supra* note 157 at 32-33. Given the limited effectiveness of the bilateral treaties, the adoption of the Berne Convention was urged by the expansion of the markets for copyrighted works, the growth of media that facilitated the global dissemination of the works and the consequent desire to ensure their transnational protection against acts of infringement. *Ibid* at 10.

⁴³⁹ *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, as revised at Paris on 24 July 1971, and amended on 29 September 1979, 828 U.N.T.S. 221 [hereinafter Berne Convention].

⁴⁴⁰ Okediji, "The International Copyright System," *supra* note 51 at 8&9.

⁴⁴¹ Goldstein & Hugenholtz, *supra* note 157 at 10.

⁴⁴² Okedjii, "International Copyright System," *supra* note 51 at 5&7; see also Berne Convention, *supra* note 439 at art. 20.

⁴⁴³ See Paul Goldstein, *International Copyright*, *supra* note 55 at 72-100.

Since its adoption in 1886, the Berne Convention has been revised several times in order to address the impact of the emerging media and technologies on the international copyright system.⁴⁴⁴ In the opinion of learned scholars, the emergence and expansion of information technologies as well as the driving economic interest were the compelling impetus for the revision or adoption of major international treaties,⁴⁴⁵ including the TRIPs Agreement.⁴⁴⁶ The TRIPs Agreement that embraces the Berne Convention is another significant legal regime to shape the substantive legal framework of the international copyright system.⁴⁴⁷ To-date, the Agreement has remained the most comprehensive and effective trade agreement devoted to protection of IPRs within the global trade regime. Of a particular significance is its injection of an enforcement aspect into the existing IP system. In the digital environment, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)—jointly known as the WIPO Internet Treaties⁴⁴⁸—are important treaties adopted for the international protection of copyright and neighboring rights. Adopted within the framework of the Berne Convention, the WIPO Internet Treaties were designed to maintain and adapt the existing principles of the Berne Convention and its in-built expansive protection in the digital environment.⁴⁴⁹

⁴⁴⁴ *Ibid.* The new technological developments that led to series of revisions over a period of time include the emergence of technologies such as phonograph, photography, radio, cinematography, television, reprography, and video-technology.

⁴⁴⁵ Goldstein & Hugenholtz, *supra* note 157 at 10.

⁴⁴⁶ *Ibid.*

⁴⁴⁷ The TRIPs Agreement has extended the three-step test to all economic rights, included new subject matters such as computer programs and databases, and additional substantive rights such as rental rights. It has also increased the term of protection from 20 to 50 years for the rights of performers and producers of phonograms. See P. Bernt Hugenholtz & Ruth L. Okediji, “Conceiving an International Instrument on Limitations and Exceptions to Copyright” (2012) Amsterdam Law School Research Paper No. 2012-43 at 16-17&20[Hugenholtz & Okediji, “Conceiving an International Instrument”].

⁴⁴⁸ *World Intellectual Property Organization [WIPO] Copyright Treaty*, 20 December 1996, 36 I.L.M. 65 (entered into force 6 March 2002) [hereinafter WCT]; *WIPO Performances and Phonograms Treaty*, 20 December 1996, 36 I.L.M. 76 (entered into force 20 May 2002) [WPPT].

⁴⁴⁹ Okediji, “The Regulation of Creativity,” *supra* note 64 at 2388-92 (describing the constraining effect of the requirements under art. 20 of the Berne Convention and its impact on the WIPO Internet Treaties). Okediji recounts that “the driving principle of the WCT was to give authors the right to control access to and use of their works on digital networks.” *Ibid* at 2399.

In addition to the substantive frameworks, the need to ensure the international implementation of the Berne Convention and other treaties resulted in the establishment of an institutional framework. As a successor to the previous institution vested with the power to oversee both the Berne and Paris Conventions,⁴⁵⁰ the WIPO was established in 1967 to reform the existing institutional framework and to promote the global protection of international IP.⁴⁵¹ Since its establishment, the Organization has been the most dominant IP institution for the administration of the international copyright system. In the global trade regime, the WTO has emerged as a powerful trade institution with a significant role in the global protection of IPRs through the TRIPs Agreement.

In particular, the integration of the Berne and the Rome Conventions into the TRIPs Agreement has ushered the WTO into the existing copyright system as a global institution with an effective enforcement mechanism.⁴⁵² Thus, both the WTO and the WIPO play key roles in shaping the international copyright system.⁴⁵³ Given their overlapping roles, both are expected to operate in cooperation towards their common objective of promoting global protection of copyright.⁴⁵⁴ In general, since the inception of the international copyright system, both the substantive legal and institutional

⁴⁵⁰ The United International Bureau for the Protection of Intellectual Property (BIRPI) was the first international organ established to administer both the Berne Convention and the Paris Convention. BIRPI was established in 1893 in order to exercise administrative functions related to both conventions whose initial administration was entrusted to their respective secretariat offices. See Ruth L. Okediji, “The International Relations of Intellectual Property: Narratives of developing Country Participation in the Global Intellectual Property System” (2003) 7 *Sing JICL* 315 at 330 [Okediji, “The International Relations of IP”]. Adopted in 1883, Paris Convention is the first multilateral agreement that deals with an international protection of industrial property such as patents and trademarks. See Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference, 14 July 1967, 828 U.N.T.S. 303 [Paris Convention].

⁴⁵¹ Convention Establishing the World Intellectual Property Organization, 14 July 1967 (as amended on 28 September 1979) (entered into force 26 April 1970) at paras 2 & 3 cum art. 3 [WIPO Convention].

⁴⁵² See generally Ruth L. Okediji, “WIPO-WTO Relations and the Future of Global Intellectual Property Norms” (2008) 39 *Netherlands Yearbook of International Law* 69 [Okediji, “WIPO-WTO Relations”]. Although the agreement can serve as a formal commitment to avoid a conflict between the two institutions, it does not clarify the structure of the cooperation with regard to the power to govern IP-norm setting in the future. *Ibid* at 95.

⁴⁵³ Despite its limited role after the establishment of the WIPO and the WTO, the UNSECO was another important organ that forms the broad institutional framework for international copyright system. In particular, its role was instrumental for the adoption and administration of the Universal Copyright Convention for the latter's focus on the interests of less developed countries. Okediji, “WIPO-WTO Relations,” *supra* note 452 at 76.

⁴⁵⁴ *Ibid* at 87. See *Agreement Between the World Intellectual Property Organization and the World Trade Organization*, 22 December 1995, 35 I. L. M. 754 (1996) [WTO-WIPO Agreement] (concluded for a cooperation on legal and technical assistance to promote IP protection).

frameworks have been further strengthened, expanded and consolidated through series of legal and institutional reforms. In effect, relevant flexibilities are both neglected and constrained.

3.2.2. The Encounter Between Development and International Copyright System

As mentioned above, an economic development is central to IP system. In particular, copyright—one of the major forms of IP—has long been underpinned by the utilitarian assumption of economic development. In principle, the design and functioning of a copyright system are supposed to be guided by its role to foster creative innovation and facilitate the dissemination of the creative works, both of which are essential for development. Nonetheless, its narrow focus on the economic aspect of development, the long-felt reform in its right holders-oriented system and its unabated globalization have all brought IP system into the spotlight. In particular, the emerging notion of human development has underscored the need to revisit the very purpose and operation of IP in the light of the development needs and context of nations.⁴⁵⁵ Given the expansive scope of IP and the exclusive nature of the rights with a global impact, the implication of IP for development has been an issue of a heated debate. From among several development issues, the debate has been spotlighted in the context of access to essential medicines for chronic diseases, affordable seeds for food security and access to knowledge or learning materials for education in the developing nations.⁴⁵⁶ In general, the increasing globalization of the system and its impact on the ability of the developing nations to address their domestic development priorities such as education underpin the current encounter between copyright and development.

Though the encounter between IP and the concept of economic development has been more persistent since the early twenty-first century,⁴⁵⁷ it is argued that development concerns are not

⁴⁵⁵ See Chon, “IP and the Development Divide,” *supra* note 62 at 2815.

⁴⁵⁶ Yu, “Ten Common Questions,” *supra* note 91 at 719.

⁴⁵⁷ Chon, “IP and the Development Divide” *supra* note 62 at 2814. In the context of economic development, innovation and economic growth are the major economic justifications for IP protection. *Ibid* at 2817.

adequately addressed in the contemporary IP system.⁴⁵⁸ The issue of development has however remained a recurring concern ever since the evolution of a copyright system at national and international levels. This is evident from both national and international copyright regimes. For instance, the U.S. Constitution underlines the need to promote ‘the progress of science and useful arts’ through a legal protection of copyright for a limited duration.⁴⁵⁹ This utilitarian approach nevertheless overemphasizes the role of copyright protection for economic growth. Yet, emphasizing a broad development objective underscores copyright’s role to promote learning and foster autonomy, cultural diversity and democracy.⁴⁶⁰

A. Development Context for Copyright under Berne, Rome and Related Conventions

At the international level, starting with the Berne Convention, aspects of economic development feature in the international copyright regime either as a driving reason or an intended objective.⁴⁶¹ Shaped by the national copyright systems of developed nations,⁴⁶² all the major treaties comprising the international copyright system have embraced a similar utilitarian development objective.⁴⁶³ This objective is embedded in most copyright treaties, including the Berne Convention and the TRIPs Agreement that constitute the bedrock of the international copyright system. The economic aspect of copyright system is thus the major development context for all copyright treaties.

⁴⁵⁸ *Ibid* at 2815.

⁴⁵⁹ *U.S Constitution*, art.1, Sec.8, cl.8. See Goldstein & Hugenholtz, *International Copyright*, *supra* note 1 at 17.

⁴⁶⁰ See Goldstein & Hugenholtz, *supra* note 157 at 7; see generally Netanel, “Copyright,” *supra* note 251.

⁴⁶¹ It is noted that international copyright system has been driven by the global expansion of markets for knowledge goods and the emergence of multimedia for their dissemination across nations. Goldstein & Hugenholtz, *supra* note 157 at 10.

⁴⁶² *Ibid*.

⁴⁶³ Goldstein, *International Copyright*, *supra* note 55 at 8-10

In this regard, adopted with the primary purpose of ensuring the effective and uniform protection of “the rights of authors in their literary and artistic works,”⁴⁶⁴ the Berne Convention seeks to safeguard the economic and personal interests of the authors across member states.⁴⁶⁵ In so doing, the Convention underscores the instrumental significance of copyright for the generation of advanced creative works that are prerequisites for economic, social and cultural development.⁴⁶⁶ Indeed, the issue of development has been integral to the Berne Convention since its inception.⁴⁶⁷ Nonetheless, the Berne Convention is critiqued for its undue emphasis on a narrow aspect of development—economic growth and the overriding interests of authors.⁴⁶⁸

In response to the critiques, some efforts, *albeit* insufficient, were made to reflect the development needs of member states. For instance, the adoption of the Berne Appendix was one such an effort made to address the development needs of developing countries.⁴⁶⁹ Despite its limited practical significance, the Appendix was intended to facilitate a bulk access to copyrighted works for the purpose of education, scholarship and scientific research.⁴⁷⁰ Circumscribed in its scope, a similar purpose was embedded in the Berne Convention’s design to allow member states a discretion to devise

⁴⁶⁴ See Berne Convention, *supra* note 439 at Preamble, para 1& art. 1.

⁴⁶⁵ *Ibid.* Goldstein, *International Copyright*, *supra* note 55 at 26.

⁴⁶⁶ See Guide to the Berne Convention for the Protection of Literary and Artistic Works (Geneva: WIPO, 1978) at 3 [WIPO Guide to the Berne Convention].

⁴⁶⁷ See Sara Bannerman, “Development and International Copyright: A History” (2016) 8:1 The WIPO Journal 11 at 11&14-16 (tracing the history of development agenda and development elements as incorporated in the Berne Convention with an increasing emphasis through its revisions).

⁴⁶⁸ Okediji, “The International Relations of IP,” *supra* note 450 at 320-25 (describing the driving commercial interests that led to its inception and continued multilateralism).

⁴⁶⁹ See Peter K. Yu, “A Tale of Two Development Agendas” (2009) 35 Ohio NUL Rev 465 at 468-511 [Yu, “A Tale of Two”] (describing the first major development agenda that led to the adoption of the Berne Appendix).

⁴⁷⁰ See Berne Convention, *supra* note 439 at art.21 cum the Appendix adopted in Paris (1971) that forms an integral part of the Convention. Although the Appendix provides for a scheme of compulsory license to facilitate the reproduction and translation of copyrighted works for educational purposes in the developing countries, the effective utilization of the Appendix has been limited due to lack of transparency and functionality inherent in its “complex and arcane” provisions. See Chon, “Intellectual Property “from Below,” *supra* note 50 at 828-29; Okediji, “International Copyright System,” *supra* note 51 at 12-19.

appropriate L&Es to the rights within their respective jurisdictions.⁴⁷¹ That is, it is within the ambit of the member states to formulate and utilize appropriate flexibilities in order to address their socio-economic development needs.

Given the difference in the level of development across nations, this cabined discretion may allow member states to consider their respective domestic development contexts. As Okediji notes, the discretion forms part of “the reserved powers of the state to protect the welfare of its citizens.”⁴⁷² However, the exercise of this sovereign discretion has been subjected to the principle of the three-step test incorporated in the Berne Convention.⁴⁷³ In addition to its structure, a development element can be gleaned from its the substantive provisions. For instance, the exception for educational purpose under art.10 (2) of the Convention indicates the latter’s recognition of the instrumental role of education for socio-economic development.⁴⁷⁴

Although the adequacy and effective utilization of the permitted flexibilities in the Berne Convention are debatable, these instances of development imperatives and the very purpose of copyright protection can be considered as the development context of the international copyright system under the Convention. In other words, the collective combinations of the dominant economic and the limited socio-cultural aspects embedded in the Berne Convention reflect the scope and depth of its development context. In the same vein, the Universal Copyright Convention (UCC)⁴⁷⁵also embodies

⁴⁷¹ Okediji, “International Copyright System,” *supra* note 51 at 5 (“The absence of a set of minimum exceptions and/or limitations to copyright in the Berne Convention reflected the practice and understanding that the precise nature of such limitations and exceptions was to be left to the reserved powers of the state to protect the welfare interests of its citizens.”)

⁴⁷² *Ibid.*

⁴⁷³ According to the principle of three-step test under art. 9(2) of the Berne Convention, the limitations and exceptions to reproduction right must: (a) limited to certain special cases, (b) not conflict with the normal exploitation of the work, and (c) not unreasonably prejudice the legitimate interests of the author.

⁴⁷⁴ It is also important to note the roles of the exceptions for quotation and reporting of current events under arts. 10(1) & 10 *bis* of the Berne Convention to promote social, economic and cultural development in a democratic society.

⁴⁷⁵ *Universal Copyright Convention*, 6 September 1952, 216 U.N.T.S. 132 (entered into force 16 September 1955 and revised 24 July 1971) [Universal Copyright Convention].

similar elements integral to the development context for the international copyright system. In particular, the Convention recognizes “the temporary need[s] of some states to adjust their level of copyright protection in accordance with their stage of cultural, social and economic development.”⁴⁷⁶ Once regarded to be more flexible for and favorable to developing countries, the now-defunct UCC is of a little significance due to the TRIPs Agreement’s embrace of the Berne Convention to bind all members.⁴⁷⁷

Moreover, the major copyright treaties adopted within the framework of the Berne Convention enshrine various development elements that form part of the overall development context for international copyright system. Guided by a similar approach, the Rome Convention (1961)⁴⁷⁸—adopted for the international protection of neighboring rights⁴⁷⁹—permits member states to design the appropriate L&Es to the rights. Member states are thus allowed to provide L&Es corresponding to those provided for copyright protection within their jurisdictions.⁴⁸⁰

Subject to the guiding principles of the Berne Convention, member states can exercise a similar sovereign discretion to design the appropriate L& Es. In the same vein, the Phonograms Convention (1971)⁴⁸¹—dedicated to the rights of producers of phonograms— allows member states to provide

⁴⁷⁶ Universal Copyright Convention, 1971 Paris Text, Appendix Declaration Relating to Article XVII.

⁴⁷⁷ Okediji, “The International Relations of IP,” *supra* note 450 at 333. The UCC was considered favorable due to its lenient standards that offer a room for flexibility in addressing development concerns. For instance, in addition to the shorter term of protection, developing states may provide for compulsory licenses as a limitation to reproduction and translation rights in certain circumstances. See Universal Copyright Convention, *supra* note 475, 1971 Paris Text, arts. *Vter & Vquater*.

⁴⁷⁸ *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, 26 October 1961, 496 U.N.T.S. 43[Rome Convention].

⁴⁷⁹ The neighboring rights that have been regulated by the Rome Convention consist of rights of performers, producers of phonograms and that of broadcasting organizations. See Guide to the Rome Convention and to the Phonograms Convention (Geneva: WIPO, 1981, reprinted 1994 & 1999) at 7-9[WIPO Guide to Rome and Phonograms Conventions]. Goldstein, *International Copyright*, *supra* note 55 at 10-11& 36-37.

⁴⁸⁰ Rome Convention, *supra* note 478 at art.15. See WIPO Guide to Rome and Phonograms Convention, *supra* note 46 at 57-59. Goldstein, *International Copyright*, *supra* note 55 at 40.

⁴⁸¹ *Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms*, 29 October 1971 (entered into force 18 April 1973) [Geneva Phonograms Convention (1971)].

L&Es corresponding to those prescribed for authors of literary and artistic works.⁴⁸² Although it lacks a general rule of compulsory license, the Convention allows a compulsory license intended for the purpose of teaching or scientific research, subject to the prescribed conditions. As noted from both conventions, the flexibilities inherent in the discretion to design the appropriate L&Es, and the latter's instrumental role to address development needs are the elements integral to the development context.

B. Development Context for Copyright under WIPO Internet and Marrakesh Treaties

As in the basic treaties, similar elements indicative of the development objective of the copyright system are enshrined in the most recent copyright treaties. Indeed, there is an increasing tendency to make an explicit mention of development aspects in the treaties. For instance, the WIPO Internet Treaties recognize the need to orient copyright protection in the digital environment towards their intended objectives. Adopted within the framework of the Berne Convention⁴⁸³ and embracing its approach for devising the appropriate exceptions,⁴⁸⁴ the WIPO Internet Treaties make an explicit reference to “development” and related terms in their preambles.

Viewed from the perspective of right holders, both Treaties recognize the need to introduce new rules “in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments.”⁴⁸⁵ From users' perspective, they acknowledge “the need to maintain a *balance* between the rights of authors and the larger *public interest*, particularly *education*,

⁴⁸² *Ibid* at art.6. See WIPO Guide to the Rome and Phonograms Conventions, *supra* note 479 at 105-06. Goldstein, *International Copyright*, *supra* note 55 at 42.

⁴⁸³ Following the upward trajectory built into the Berne Convention, the primary purpose of the WIPO Internet Treaties is to ensure an extensive copyright protection for the right holders in the digital environment. See WCT, *supra* note 448 at art. 1(1).

⁴⁸⁴ See WCT, *supra* note 448 at art.10 & WPPT, *supra* note 448 at art. 16. (See, e.g., WCT under its art.10 (1): “Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”) See Chon, “Intellectual Property from Below,” *supra* note 50 at 840.

⁴⁸⁵ WCT & WPPT, *supra* note 448 at Preamble, para 2.

research and access to information, as reflected in the Berne Convention.”⁴⁸⁶ In this respect, Pamela Samuelson notes the WCT’s desire to maintain the traditional balance within the global digital copyright environment for the purpose of education as embedded within the Berne Convention.⁴⁸⁷

In theory, the WIPO Internet Treaties hint at the need for enhanced access to the protected works for the purposes of education and research as the basic aspects of public interest and vital prerequisites for development.⁴⁸⁸ As such, the Treaties highlights their intended objectives to maintain a balance and address the emerging economic, social, cultural and technological developments. Nonetheless, the actual scope of the permitted flexibilities under the WIPO Internet Treaties and their effective role to address development needs are subject to the combined restrictive effect of the existing copyright system and the introduction of technological protection measures (TPMs).⁴⁸⁹ In this regard, Okediji observes that the Treaties have so far delivered “too little too early” and would “serve a more technocratic and political—rather than substantive and legal—role in the future of digital copyright.”⁴⁹⁰

In general, the (in)adequacy of the development policy space retained under the various copyright treaties remains debatable. In spite of its status as the UN agency and the consequent development mandate, the WIPO’s explicit commitment to address development issues is an act of a recent phenomenon.⁴⁹¹ As articulated in its UN-driven development mandate soon after its establishment, the WIPO is required to “facilitate the transfer of technology related to industrial

⁴⁸⁶ WCT&WPPT, *supra* note 448 at Preamble, paras 5&4, respectively (emphasis added).

⁴⁸⁷ Pamela Samuelson, “The U.S. Digital Agenda at WIPO” (1997) 37 Va J Intl L 369 at 409.

⁴⁸⁸ Okediji, “International Copyright System,” *supra* note 51 at 8. In particular, the explicit recognition of education, research and access to information underscores their significance as vital elements of public interest in the course of striking the balance offers a broader and important development context.

⁴⁸⁹ See Okediji, “The Regulation of Creativity,” *supra* note 64 at 2408-09 (“The impact of TPMs on access to digital content has also been noted by WIPO as being of great concern to DCs and LDCs.”). *Ibid* at 2403.

⁴⁹⁰ *Ibid* at 2409. (“The tendency of global copyright regulation to marginalize the public interest priorities that make copyright law both necessary and relevant is evident in the compromises that yielded the WIPO Internet Treaties.”)

⁴⁹¹ Chon, “IP and the Development Divide,” *supra* note 62 at 2836-41 (describing the encounter between WIPO and development).

property to the developing countries in order to accelerate economic, social and cultural development.”⁴⁹² Further, the WIPO’s development commitment is implicit in its establishment objectives and institutional mandate to assist developing countries in promoting their cultural, scientific and technological development through ‘modernization’ of, *inter alia*, copyright system.⁴⁹³

Long after several decades of reluctance and resistance, the WIPO has taken a reform initiative to enunciate its development mandate in its Development Agenda—an IP-related development policy objective that is supposed to embrace the UN development goals.⁴⁹⁴ Hence, the relevant parts of both the WIPO DA and the UN SDGs are vital to inform a broad development context for the international copyright system.⁴⁹⁵ Indeed, the WIPO DA marks an explicit linkage between copyright and development. Should it succeed in its implementation, the WIPO DA will constitute a significant step in re-orienting the global copyright system towards broad development objectives.⁴⁹⁶ Despite the promise, it remains incomplete without similar efforts from the WTO.

From the recent copyright treaties adopted under the auspices of the WIPO, an important and visible development context has been reflected in the Marrakesh Treaty to Facilitate Access to

⁴⁹² Agreement Between the United Nations and the World Intellectual Property Organization, art. 1, 17 December 1974, online: WIPO <<http://www.wipo.int/treaties/en/agreement/index.html>> [UN-WIPO Agreement], available at; see also WIPO Convention, *supra* note 451 at art.13 (1).

⁴⁹³ See Rami M. Olwan, *Intellectual Property and Development: Theory and Practice* (Heidelberg: Springer, 2013) at 52. Although the potential promise of ‘development’ in the context of innovation and technology transfer in developing countries is central to WIPO’s strategy in the global administration of IP treaties, its commitment to address the development needs of developing countries is often compromised due to its budgetary dependence upon and a pressure from developed countries. See *ibid* at 53-54&56.

⁴⁹⁴ WIPO, The 45 Adopted Recommendations Under the WIPO Development Agenda, online: WIPO <<http://www.wipo.int/ip-development/en/agenda/recommendations.html>> [WIPO DA]. See also Christopher May, *The World Intellectual Property Organization: Resurgence and the Development Agenda* (London: Routledge, 2007) at 76 (pointing out the need for WIPO’s explicit integration of the overall development priorities and goals of the UN and its special agencies into its areas of competence).

⁴⁹⁵ See Chon, “IP and Development Divide,” *supra* note 62 at 2902-06. See Peter K. Yu, “Five Decades of Intellectual Property and Global Development” (2016) 8:1 *The WIPO Journal* 1 at 4-5 [Yu, “Five Decades of Intellectual Property”] (stating how the SDGs such as SDG 4, 8, 9 and 17 were indicated to be relevant to the DA). For UNSDGs, *supra* note 118.

⁴⁹⁶ See Ruth L. Okediji, “History Lessons for the WIPO Development Agenda,” in Neil Netanel, ed, *The Development Agenda: Global Intellectual Property and Developing Countries* (New York: Oxford University Press, 2009)137 at 140 [Okediji, “History Lessons for the WIPO Development Agenda”] (describing the history of development efforts at WIPO and its DA while reflecting upon its future implications).

Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (Marrakesh Treaty).⁴⁹⁷ Although its scope is limited to specific categories of users, the adoption of the Marrakesh Treaty is both historic and a positive gesture for future steps towards a broader development context.⁴⁹⁸ In affirming it as an important context, the Marrakesh Treaty itself mentions the significance of the WIPO DA for the integration of development considerations into WIPO's work.⁴⁹⁹

In contrast to its predecessors, the Marrakesh Treaty is the first multilateral treaty of its kind to provide mandatory L&Es to copyright.⁵⁰⁰ Informed by the WIPO DA to address the development needs of member states,⁵⁰¹ the Treaty stresses the appropriate consideration of the broad aspects of public interest such as education, research and access to information in maintaining a balance between the effective protection of rights of authors and the larger public interest.⁵⁰² It is also the first copyright treaty to make a reference to the relevant human rights instruments. Indeed, the Marrakesh Treaty is considered to signify the instrumental role of copyright to advance human rights ends.⁵⁰³ Nonetheless,

⁴⁹⁷ *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, 27 June 2013, 52 I.L.M1312 (entered into force 30 June 2016) [Marrakesh Treaty].

⁴⁹⁸ Margaret Wilkinson, "Copyright Users' Right in International Law" (2014) 60:3 Copyright Column 9 at 11-13 [Wilkinson, "Copyright Users' Right"]; Margaret Wilkinson, "International Copyright: Marrakesh and the Future of Users' Rights Exceptions," in Mark Perry, *Global Governance of Intellectual Property in the 21st Century: Reflecting Policy Through Change* (Switzerland: Springer, 2016)107 [Wilkinson, "International Copyright"].

⁴⁹⁹ See Marrakesh Treaty, *supra* note 497 at Preamble, para 11. See also Okediji, "History Lessons for the WIPO Development Agenda," *supra* note 496 at 155-160.

⁵⁰⁰ Laurence R. Helfer, "Intellectual Property and Human Rights: Mapping an Evolving and Contested Relationship," in Rochelle C. Dreyfuss & Justine Pila, eds, *The Oxford Handbook of Intellectual Property Law* (Oxford: Oxford University Press, 2018)117at 135; Laurence R. Helfer, et al, *The World Blind Union Guide to the Marrakesh Treaty: Facilitating Access to Books for Print-Disabled Individuals* (New York: Oxford University Press, 2017) at xxiii [Helfer et al, *The World Blind Union Guide*]. The adoption of the Treaty may set an example for future adoption of a comprehensive set mandatory copyright limitations and exceptions that has remained a distant possibility for a decade. See Wilkinson, "Copyright Users' Right," *supra* note 498 at 11.

⁵⁰¹ Marrakesh Treaty, *supra* note 64 at Preamble, para 11 (recalling the importance of the DA recommendations that aim to ensure the integration of development considerations into the WIPO's work).

⁵⁰² See Marrakesh Treaty, *supra* note 497 at Preamble, para 9. It is also important to note that the Marrakesh Treaty goes further to embrace the core principles of non-discrimination, equal opportunity, accessibility, and effective and inclusive participation as embodied in the relevant UN human rights and related regimes. In particular, the Treaty makes an explicit reference to the basic principles embodied in the UDHR and the UN Convention on the Rights of Persons with Disabilities. *Ibid* at para1; see UN Convention on the Rights of Persons with Disabilities, 30 March 2007, 2515 UNTS 3 (entered into force 03 May 2008) [CRPD].

⁵⁰³ Helfer, *The World Blind Union Guide*, *supra* note 500 at xxiii.

it remains unclear should this positive step lead to a much more comprehensive treaty on the long-neglected issue of copyright L&Es in the near future. It is hard to speculate at the moment.

C. Development Context for Copyright under the TRIPs Agreement

Outside the WIPO-administered copyright treaties, the TRIPs Agreement forms an important part of the international copyright system due to its: (a) integration of the Berne Convention into the international trade regime, and (b) explicit embodiment of elements of a broader development context. As a result, the development elements enshrined both in the preamble and the relevant provisions of the TRIPs Agreement constitute a development context for the implementation of its copyright provisions at a national level.⁵⁰⁴ In its affirmation of the development needs of member states, the TRIPs Agreement makes an explicit reference to development objectives both in its preamble and substantive provisions.⁵⁰⁵ For the realization of their respective national development objectives, the Agreement allows member states to adopt measures necessary, *inter alia*, to promote “the public interest in sectors of vital importance to their *socio-economic and technological development*.”⁵⁰⁶ In the same vein, art. 7 of the TRIPs Agreement recognizes the expected contribution of the IPRs to the promotion of technological innovation (...) in a manner conducive to social and economic welfare and, to a balance of rights and obligations.”

It is noted that the notions of ‘public interest’ and ‘sectors of vital importance’ are left to the determination of the member states in light of their development needs within the ambit of the TRIPs

⁵⁰⁴ See Chon, “IP and the Development Divide,” *supra* note 62 at 2831-36 (analyzing the relevant development features embedded in the TRIPs Agreement as an instance of the encounter between the WTO and development).

⁵⁰⁵ See TRIPs Agreement, *supra* note 163 at Preamble, paras 5&6 and arts. 7&8.

⁵⁰⁶ TRIPs Agreement, *supra* note 13 at art. 8. Carlos Correa notes that the application of art. 8(1) of the TRIPs Agreement is broad enough to accommodate issues arising within and outside IPR regime with implication on IPR. The application of art. 8(1) of may be used as a justification for designing special exceptions that promote public interests in the vital sectors of socio-economic and technological development. See Correa, *Trade Related Aspects*, *supra* note 137 at 106.

Agreement.⁵⁰⁷ As regards the scope of the development context, Carlos Correa observes that “the concept of ‘socio-economic and technological development’ is broad enough to embrace any sector, socially, economically or technologically relevant.”⁵⁰⁸ In the light of this development context, Peter Yu underscores the significance of art. 8 of the TRIPs Agreement for less developed member states to promote the public interest in their respective sectors of socio-economic and technological development.⁵⁰⁹ Nonetheless, Yu acknowledges the constrained scope of the provision due to the necessity and consistency requirements attached to its application.⁵¹⁰

Despite the debate on their normative scope, the development principles and objectives set in the TRIPs Agreement will play an important role to guide the recalibration and interpretation of the Agreement. As re-affirmed in the Doha Ministerial Declaration, in its review of implementation-related issues, the TRIPs Council “shall be guided by the objectives and principles set out in Articles 7 & 8 of the TRIPs Agreement and shall fully take into account development dimension.”⁵¹¹ In particular, integral to the development context for copyright system are the interpretation and application of the infamous three-step test under Article 13 of the TRIPs Agreement in a manner that suits the development needs of a member state.⁵¹²

3.2.3. Placing Copyright Within Sustainable Human Development Context

⁵⁰⁷ Correa, *supra* note 137 at 104-06; Yu, “The Objectives and Principles,” *supra* note 160 at 1011-13.

⁵⁰⁸ Correa, *supra* note 137 at 106.

⁵⁰⁹ Yu, “Objectives and Principles,” *supra* note 160 at 1009-12. Apparently, Art.8 of the TRIPs Agreement recognizes the special development needs of least-developing countries to maintain maximum flexibility in their domestic implementation of laws and regulations in order to create a sound and viable technological base.

⁵¹⁰ *Ibid* at 1013-15.

⁵¹¹ WTO Doha Ministerial Declaration, at para.19, WT/MIN (01) DEC/1/ (20 November 2001), online: WTO<https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> [Doha Ministerial Declaration].

⁵¹² The interpretation and application of the three-step test under art.13 of the TRIPs Agreement should also be informed by the WIPO DA given the institutional cooperation between WIPO and the WTO, and their respective roles to address development concerns. See WIPO-WTO Agreement, *supra* note 454.

In all the major copyright treaties, the development instances or elements should be understood in the broad context of *sustainable human development*. As its title runs, this infused notion represents the overall context of this research. Despite the frequent emphasis of IP regime on the economic growth—a narrow lens of development, the notion of sustainable development has been enshrined in the international copyright system. Indeed, the preamble to the WTO Agreement recognizes the notion of sustainable development as a guiding objective for member states in their trade and economic endeavor.⁵¹³ Such a normative guidance is useful for states to direct their trade and economic activities towards raising standards of living and optimal use of world’s resources in a manner consistent with their respective needs and concerns at different levels of economic development.⁵¹⁴

The significance of the sustainable development objective was further affirmed in the Doha Declaration that underlined members “commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement.”⁵¹⁵ Moreover, the practical importance of the sustainable development objective was underscored as an overarching interpretative guide of WTO agreements in the US-Shrimp case.⁵¹⁶ In the case, the WTO Appellate Body pointed out the significance of a reference to the objective of sustainable development for the interpretation of the agreements annexed to the WTO Agreement.⁵¹⁷ The TRIPs Agreement is one of the agreements that should lend itself to the objective and notion of sustainable development in its interpretation and

⁵¹³ WTO Agreement, *supra* note 163 at para 1.

⁵¹⁴ *Ibid.*

⁵¹⁵ Doha Ministerial Declaration, *supra* note 511 at para 6.

⁵¹⁶ See *WTO Appellate Body Report: United States—Import Prohibition of Certain Shrimp and Shrimp Products*, adopted 12 October 1998, WT/DS58/AB/R, para 129&152-55 [*The US Shrimp/Turtle Case*]. The AB opined that considering the specific language of the preamble to the WTO Agreement would give “color, texture and shading to the rights and obligations of members under the WTO Agreement.” *Ibid* at para.155. Robert Howse, “The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate” (2002) *Colum J Envtl L* 27:2 489 at 500& 518 (noting how the AB dealt with the issue of “exhaustible natural resources” in the light of the principle of sustainable development as incorporated in the preamble to the WTO Agreement).

⁵¹⁷ *The US Shrimp/Turtle Case*, *supra* note 516 at paras 153&55. The AB also noted the general acceptance of the concept of sustainable development “as integrating economic [,] social and environmental protection.” *Ibid* at para.129, foot note 107.

implementation. As Henning Ruse-Khan correctly notes, the reference to the sustainable development objective in the WTO Agreement is meant to inform and guide the interpretation of all agreements annexed thereto, including the TRIPs Agreement.⁵¹⁸

In this regard, Ruse-Khan observes the existence of an overlap between the WTO sustainable development objective and Articles 7 and 8.⁵¹⁹ In his opinion, both serve an equivalent interpretative function in the integration and reconciliation of economic, social and environmental issues in order to address the linkage between IP protection and other development goals.⁵²⁰ Indeed, some scholars construe the reference to “sustainable development” and “socio-economic and technological development” in order to assert the WTO’s mandate to accommodate “human rights norms or human development goals.”⁵²¹ Hence, the WTO’s theoretical embodiment of the overarching objective of sustainable development constitutes a holistic development framework for the international copyright protection.

Further, the UN SDGs that form part of the national development objectives of the member states are important norms within the broad development context for copyright system. In this respect, both the WTO and WIPO are expected to integrate the SDGs into their respective administrative and norm-setting processes.⁵²² For instance, their respective development agenda should be aligned with the appropriate SDGs. In particular, as a special agency of the UN, the WIPO is expected to integrate the UN SDGs into its areas of competence that includes the international copyright system. It is imperative

⁵¹⁸ Henning Grosse Ruse-Khan, “The Principle of Integration in WTO/TRIPs Jurisprudence” in Marie-Claire Cordonier Segger & C.G Weeramantry (eds), *Sustainable Development Principles in the Decisions of International Courts and Tribunals (1992-2012)* (London & New York; Routledge, 2017) 398 at 406[Ruse-Khan, “The Principle of Integration”].

⁵¹⁹ *Ibid* at 407.

⁵²⁰ *Ibid*.

⁵²¹ Margaret Chon, “Global Intellectual Property Governance (Under Construction)” (2011) 21:1 *Theor Inq L* 349 at 360[Chon, Global IP Governance”]; see Yu, “Objectives and Principles,” *supra* note 160 at 1008-13 & 1018-44 (explaining at length multiple uses of articles 7 & 8 of the TRIPs Agreement).

⁵²² Okediji, “WIPO-WTO Relations,” *supra* note 452 at 110-12; see Chon, “IP and the Development Divide,” *supra* note 62 at 2831-41.

for the global copyright system to advance a sustainable development through creative innovation and access to knowledge at national levels.⁵²³In order to achieve this end, the interpretation and implementation of copyright treaty provisions should be tailored towards the objective of sustainable development.⁵²⁴ Building upon the rich notion of human development, the objectives and operation of the copyright system should thus be seen through the prism of sustainable human development.

3.3. The Development Context for International Human Rights System

3.3.1. An Overview of the International Human Rights System

The inception of the international human rights system is traced back to the adoption of the UN Charter that underscored nations' commitment to promote respect for human rights.⁵²⁵ In this regard, central to the UN Charter are the re-affirmation of nations' faith in fundamental human rights and the significance of international cooperation for the promotion of the rights without a discrimination.⁵²⁶ Further, the UN Charter underlines the international commitment of the UN and all members to "promote universal respect for, and observance of, human rights and fundamental freedoms."⁵²⁷ In this sense, the emergence of the international human rights system is integral to the foundation of the UN system itself. In particular, the adoption of the UDHR in 1948 was vital to set in motion the human

⁵²³ See Henning Grosse Ruse-Khan, "Sustainable Development in International Intellectual Property Law-A New Approaches From EU Economic Partnership Agreements?" (2010) ICSTSD Program on Intellectual Property and Sustainable Development, Issues Paper No. 29 at 8-9 [Ruse-Khan, "Sustainable Development"]. In his detailed scrutiny of the relevant provisions of the EC economic partnership agreements, Ruse-Khan points out the protection and enforcement of IP as a means to foster creativity and innovation that, in turn, serve as means to achieve sustainable development. *Ibid* at 10.

⁵²⁴ *Ibid* at 8-10. See Chon, "IP and the Development Divide," *supra* note 62 at 2828.

⁵²⁵ See Philip Alston, "The UN's Human Rights Record: From San Francisco to Vienna and Beyond" (1994) 16 Hum Rts Q 375 at 375[Alston, "The UN's Human Rights Record"].

⁵²⁶ The Charter of the United Nations, Preamble, para 1 & art.1 (3), 26 June 1945, Can TS 1945 No.7 (entered into force 24 October 1945) [The UN Charter].

⁵²⁷ *Ibid* at art.55&56.

rights system and was thus foundational to serve as a blue-print for the subsequent adoption of the International Covenants.⁵²⁸

Although the ICCPR and ICESCR deal with different but interdependent sets of human rights, both covenants stemmed from the UDHR. In the common parlance, the three basic human rights instruments are all together dubbed an “International Bill of Human Rights.”⁵²⁹ From the twin covenants, the ICCPR is dedicated to ensure the protection of civil and political rights such as the right to life, liberty, privacy and freedom of expression.⁵³⁰ In contrast, the ICESCR is committed to the realization of socio-economic rights such as the right to adequate standard of living, education, protection of material and moral interests of an author, and the right to benefit from scientific progress and applications.⁵³¹ As noted in the opening chapter, more relevant to this thesis are the right to tertiary education and the authors’ right to protection of their material interests. Both rights have been elaborated in-depth in the general comments issued on the respective provisions. Indeed, the intended analysis of the interaction between copyright and tertiary education might draw on pertinent human rights dimensions. For all the rights enshrined therein, the ICESCR obligates member states to ensure the progressive realization of the rights, subject to the available resources.⁵³² Given the socio-economic

⁵²⁸ See UDHR, *supra* note 7 art. 26. See Alston, “The UN’s Human Rights Record,” *supra* note 525 at 376. Not intended to be a binding legal instrument, the UDHR was a declaration of nations’ aspirations and moral commitment towards respect for human rights. Despite its initial adoption as a mere declaration of “common standard of achievement for all peoples and all nations,” the legal status of the UDHR has now transformed from a soft-law into a binding hard law through its evolution into rules of international customary law. See generally Bruno Simma and Philip Alston, “The Sources of Human Rights Law: Custom, Jus Cogens, General Principles” (1992) 12 Australian Year Book of International Law 82.

⁵²⁹ See John P Humphrey, “The International Bill of Rights: Scope and Implementation” (1975) 17 Wm & Mary L Rev 527. See ICESCR, *supra* note 8; International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S 171, 6 I.L.M 368 [ICCPR].

⁵³⁰ See ICCPR, *supra* note 529 at arts. 6, 9, 17 & 19.

⁵³¹ ICESCR, *supra* note 8 at arts 11, 13 & 15.

⁵³² Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (Oxford: Oxford University Press, 1995) at 129-34 &136-44.

conditions of the continent, the blend of ICESCR and the African Charter constitutes a cornerstone for human rights regime in Africa.⁵³³

Despite the initial categorization, the demise of the once ideological-based bifurcation between the international covenants was heralded in the Vienna Declaration Program of Action.⁵³⁴ To this end, the Declaration made an emphatic re-affirmation of the universal, indivisible, interrelated and interdependent attributes of all human rights as anchored in human dignity.⁵³⁵ From binding human rights instruments, the African Charter is first instrument to reject the fictitious bifurcation and adopt a holistic approach to human rights. In addition to the international bill of human rights, there are several human rights instruments adopted both at international and regional levels. At a continental level outside Africa, prominent are the regional human rights instruments such the European Convention for the Protection of Human Rights and Fundamental Freedoms⁵³⁶ and the American Convention on Human Rights.⁵³⁷ Besides the UDHR and ICESCR, the human rights instruments of paramount relevance to this thesis are the conventions on children's rights and the African Charter.

For instance, the African Charter is relevant both for its (a) foundational significance to the African human rights system, (b) incorporation of binding rights to education, property copyright and development, and (c) binding effect upon African nations. Further, it is the first regional human rights instrument to articulate both the individual and collective human rights in a manner that reflect African

⁵³³ See generally Shedrak C Agbakwa, "Reclaiming Humanity: Economic, Social and Cultural Rights as the Cornerstone of African Human Rights" (2002) 5 Yale Hum Rts & Dev LJ 177. See African Charter, *supra* note 10 (articulating socio-economic rights under arts 14-29).

⁵³⁴ See Vienna Declaration and Programme of Action, *supra* note 411 at para 5.

⁵³⁵ *Ibid.* Indeed, several scholars have underscored the interdependence between and the mutually reinforcing nature of the rights incorporated in the ICCPR and ICESCR. See Craven, *supra* note 532 at 9.

⁵³⁶ *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted 4 November 1950, 213 U.N.T.S 221 (entered into force 3 September 1953).

⁵³⁷ *The American Convention on Human Rights*, adopted 22 November 1969, 9 I.L.M 673 (entered into force 18 July 1978) [The American Convention].

context and traditions.⁵³⁸ In the same vein, both the UN Convention on the Rights of the Child (UNCRC) and its regional counterpart—the African Charter on the Rights and Welfare of the Child (ACRWC)—are quite significant for their incorporation of the right to education, including tertiary education.⁵³⁹ In particular, the ACRWC obligates state parties to take “all appropriate measures” in order to “make higher education accessible to all on the basis of capacity and ability by every appropriate means.”⁵⁴⁰

In all the international and regional human rights instruments, enshrined are the three core obligations or duties: (a) the duty to respect, (b) the duty to protect, and the duty to fulfill. Given a state as the principal duty-bearer, the duty to respect requires states to refrain from encroaching upon the human rights of individuals.⁵⁴¹ Whereas, the duty to protect obligates states to protect individuals against the infringing acts of third parties.⁵⁴² On the other hand, the duty to fulfill requires the states to provide the available resources and take the appropriate measures to ensure the realization of the human rights.⁵⁴³ Although the degree of the action required varies, an effective compliance with the triple obligations requires the states to take the necessary actions to ensure the respect for, protection and fulfillment of the human rights.⁵⁴⁴ As noted in the General Comment No. 3 on the nature of obligations under the ICESCR, the ultimate objective of the Covenant is the full realization of the

⁵³⁸ See Richard N. Kiwanuka, “The Meaning of ‘People’ in the African Charter on Human and Peoples’ Rights” (1988) 82 Am J Intl L 80; see Makau Mutua, “The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties” (1995) 35 Va J Intl L 339 [Mutua, “The Banjul Charter”] (describing the cultural, historical and conceptual justifications for the imposition of the duties).

⁵³⁹ See ACRWC, *supra* note 11 at art. 11(3) (c); UNCRC, *supra* note 9 at art. 28(1)(c). Ethiopia has been a party to the ACRWC and the UNCRC since its ratification of the conventions in 2002 and 1991 respectively.

⁵⁴⁰ ACRWC, *supra* note 11 at art. 11(3) (c).

⁵⁴¹ Frans Viljoen, *International Human Rights Law in Africa*, 2nd ed (Oxford: Oxford University Press, 2012) at 6.

⁵⁴² *Ibid.*

⁵⁴³ *Ibid.*

⁵⁴⁴ See—— “Maastricht Guidelines on Violations of Economic, Social and Cultural Rights” (1998) 20:3 Hum Rts Q 691 at 693-94 [The Maastricht Guidelines]; *CEESCR General Comment No.13*, *supra* note 12 at paras 46-47 & 50; *CEESCR General Comment No. 17*, *supra* note 49 at paras 28 &30-34.

rights.⁵⁴⁵ To this end, a state is required to ensure the progressive realization of the rights to the maximum of its available resources.⁵⁴⁶ Further, the progressive realization of the rights calls for other nations' effective compliance with their obligation of international cooperation and assistance as enshrined in the ICESCR.⁵⁴⁷ An issue that still remains unsettled is the legal status of the international cooperation enshrined in the Covenant and other documents.⁵⁴⁸ Intriguing is its extraterritorial effect.

Although the various human rights instruments highlighted above are vital to provide the substantive content of the rights, their effective implementation depends upon the existence of appropriate institutional frameworks. In this regard, the Human Rights Council (HRC) is responsible for the promotion and protection of human rights and fundamental freedoms.⁵⁴⁹ In the execution of its mandate, the HRC depends upon the GA for the adoption of new treaties, declarations and resolutions pertaining to human rights. Also, the UNESCO is another important UN organ with an explicit mandate on the promotion and protection of human rights falling under its areas of competence in the fields of

⁵⁴⁵ *CESCR General Comment No.3*, *supra* note 20 at para 9; Craven, *supra* note 532 at 128.

⁵⁴⁶ ICESCR, *supra* note 8 at 2(1). *CESCR General Comment No.3*, *supra* note 20 at para 9. Craven, *supra* note 99 at 129-34 & 136-44.

⁵⁴⁷ See Craven, *supra* note 532 at 144-50. —“The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights” (1987) 9:2 Hum Rts Q 122 at 126 (paras 29-34) [The Limburg Principles]. Another issue of debate related to the obligations of states in the context of international cooperation is the extraterritorial obligations of states to ensure the realization of human rights outside their jurisdictions. This obligation requires the states to refrain from measures that entail a transnational encroachment on human rights in other nations. In the same vein, states are required to regulate the conduct of third parties such as corporations under their jurisdiction, but that operate in foreign nations. See Klaus D. Beiter “Is the Age of Human Rights Really Over?: The Right to Education in Africa-Domestication, Human Rights-Based Development, and Extraterritorial State Obligations” (2018) 49 Geo J Intl L 10 at 48-54[Beiter, “Is the Age of Human Rights Really Over?”].

⁵⁴⁸ Beiter, “Is the Age of Human Rights Really Over?” *supra* note 547 at 51-54. General Comment No.3 considers international cooperation for development as an obligation incumbent upon states that are capable to offer assistance. *CESCR General Comment No. 3*, *supra* note 20 at para.14. In the same vein, *CESCR General Comment No. 13* highlights states' obligation of international assistance and cooperation for the full realization of the right to education. General Comment No.13, *supra* note 12 at para. 56.

⁵⁴⁹ Like its predecessor, the UN Commission for Human Rights (UNCHR) and since 2006, the HRC has been entrusted with the task to serve the core purpose of the UN from among its major pillars. The mandate of HRC includes the responsibility to “address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon.” See Human Rights Council, GA Res 60/251, UNGAOR, 60th Sess, UN Doc A/Res/60/251 (2006) at Preamble (para 6) & Main Text, para 3.

science, education, culture and information.⁵⁵⁰ From among relevant subsidiaries, the CESCR is instrumental for the implementation and interpretation of the ICESCR through its general comments.

At a continental level, the African Human Rights Commission and the African Human Rights Court have been the principal organs established for the implementation and interpretation of the African Charter and other supplementary human rights instruments. Entrusted with protective, interpretative and promotional functions,⁵⁵¹ and irrespective of its limitations,⁵⁵² the African Commission is the most important regional human rights institution in Africa.⁵⁵³ Besides, the African Court of Justice and Human Rights (ACJHR)—replacing the African Court of Human Rights—is a judicial organ vested with a broader jurisdiction to decide on human rights violations, including international criminal crimes committed in the continent.⁵⁵⁴ Outside Africa, the European Court of Human Rights⁵⁵⁵ and the Inter-American Court of Human Rights⁵⁵⁶ are notable regional human rights institutions that have generated a rich corpus of human rights jurisprudence.

In sum, both the substantive and institutional frameworks constitute the human rights system both at global and regional levels. The human rights systems at both levels function in tandem with the

⁵⁵⁰ See David Weissbrodt & Rose Farley, “The UNESCO Human Rights Procedure: An Evaluation” (1994) 16 Hum Rts Q 391 at 394. In this regard, the UNESCO established a procedure in 1978 to deal with complaints from imprisoned authors, educators, scientists, and other persons facing human rights violations within its purview. In March 1993, it released a report that summarized the results of its procedure. *Ibid* at 391.

⁵⁵¹ Makau Mutua, “The Construction of African Human Rights System: Prospects and Pitfalls,” in Samantha Power and Graham Allison, eds, *Realizing Human Rights: Moving from Inspiration to Impact* (New York: St. Martin’s Press, 2000) 143 at 149 [Mutua, “The Construction of African Human Rights System”]. Substantially drawing on the procedures and experiences of its international counterparts, the African Commission’s primary functions are: reception and examination of state reports, consideration of complaints on allegation of violations and elaboration or interpretation of the Charter, when requested. *Ibid*.

⁵⁵² States’ lack of compliance with the decision of the African Commission is one of its basic limitations. Daniel Abebe, “Does International Human Rights Law in African Courts Make a Difference?” (2017) 56 Va J Intl L 527 at 551-52; see generally Rachel Murray & Debra Long, *The Implementation of the Findings of the African Commission on Human and People’s Rights* 74 (2015); see Mutua, “The Construction of African Human Rights System,” *supra* note 551 at 151-52.

⁵⁵³ Abebe, *supra* note 119 at 540.

⁵⁵⁴ *Ibid* at 576-77. See Protocol of the Court of Justice of the African Union, 11 July 2003 (entered into force 11 February 2009), *reprinted* in 113 African Journal of International & Comparative Law 115 (2005).

⁵⁵⁵ See generally Alona E. Evans, “European Court of Human Rights,” (1967) 61 Am J Intl L 1075.

⁵⁵⁶ See generally Thomas Buergenthal, “The Inter-American Court of Human Rights,” (1982) 76 Am J Intl L 231.

systems at the national level. As such, the development context for the international human rights system offers an important lens for the human rights dimensions of copyright, education and development in Ethiopia. This also comports with Ethiopia's monistic approach towards the international and regional human rights law.

3.3.2. Development and Human Rights

In spite of the variation in the degree of emphasis and the approaches, the notion of development is central to the international human rights system as it is to copyright system. It is thus essential to frame human rights within the context of sustainable development as informed by the human development approach. Both human rights and development are among the pillars of the UN system that mutually reinforce each other for their realization. In this regard, the UN Charter lays down the basic legal framework that stresses "the importance of social justice and human rights as the foundation for a stable international order."⁵⁵⁷ In the same vein, the objective of the UN Charter "to promote social progress and better standards of life in larger freedom" envisages the relations between human rights and development.⁵⁵⁸ In so doing, the UN Charter highlights the fundamental relationship between human rights and development. The relationship was further underlined in the UN General Assembly's affirmation of the contribution of "a balanced and integrated social and economic development (...) towards (...) social progress and better standards of living, and observance of, and respect for, human rights and fundamental freedoms for all."⁵⁵⁹

⁵⁵⁷ The UN Charter, *supra* note 526 at art.55. Isabella D. Bunn, "The Right to Development: Implications for International Economic Law" (2000) 15 Am U Intl L Rev 1425 at 1428-29[Bunn, "The Right to Development"].

⁵⁵⁸ Bunn, "The Right to Development," *supra* note 557 at 1429.

⁵⁵⁹ See Balanced and Integrated Economic and Social Progress, GA Res 1161 (XII), UNGAOR, 3rd Comm., 12th Sess, Agenda Item12, UN Doc. A/3716 (1957) at para 4.

Further, the Vienna Declaration confirms the interdependent and reinforcing features of development, and the respect for human rights and fundamental freedoms.⁵⁶⁰ As pointed out in the 2000 UN Human Development Reports, both human development and human rights envision “to secure the freedom, well-being and dignity of all people everywhere.”⁵⁶¹ Seen from the perspective of human development, the realization of human rights is thus considered vital for advancing human development.⁵⁶² Indeed, the proponents of the CA construe rights as entitlements to human capabilities.⁵⁶³ It is thus contended that both human rights and capabilities are apt to complement each other towards sustainable human development.⁵⁶⁴ In particular, human rights are useful for their moral urgency, specification of duty-bearers and accountability mechanisms.⁵⁶⁵ Hence, instrumental is the linkage between human rights and development. In this respect, the intrinsic value of human rights offers development actors normative and analytical frameworks for the achievement of development objectives.

An important point worth highlighting is the affiliated evolution of human rights and development. The affiliation is in fact evident from the inception of the international human rights system. As mentioned above, there exists an early reference to human rights and development in the

⁵⁶⁰ Vienna Declaration and Program of Action, *supra* note 411 at para 8 (“Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.”).

⁵⁶¹ UNDP, *Human Development Reports 2000: Human Rights and Human Development* (New York: UNDP & Oxford University Press, 2000) at 1[UNDP, *Human Development Report 2000*].

⁵⁶² See Sen, “Human Rights and Capabilities,” *supra* note 422 at 152-55; Nussbaum, “Capabilities and Human Rights,” *supra* note 317 at 293-97.

⁵⁶³ *Ibid.* Both Sen and Nussbaum underscore the importance of reframing human rights as entitlements to capabilities for human development. Nussbaum notes that “analyzing economic and material rights in terms of capabilities would thus enable us to understand, as we might not otherwise, a rationale we might have for spending unequal amounts of money on the disadvantaged, or creating special programs to assist their transition to full capability.” Nussbaum, “Capabilities and Human Rights,” *supra* note 317 at 295.

⁵⁶⁴ See Sen, “Human Rights and Capabilities,” *supra* note 422 at 163.

⁵⁶⁵ Nussbaum “Capabilities and Human Rights,” *supra* 317 at 295-96. Nussbaum points out four important roles of the language of rights: (a) justifying claims to capabilities, (b) emphasizing the significance of the capabilities, (c) offering extra emphasis on people’s choice, and (d) settling a disagreement about claims of utility, resources and capabilities. *Ibid.* See also McCowan, *supra* note 22 at 138-40 & 142 (noting the importance of framework of rights for its, *inter alia*, “procedural aspects,” universality and “explicit specification of duty-bearer”).

UN Charter. Elements of development also appear in the UN human rights instruments such as the UDHR. Despite their concurrent mention, over two decades had elapsed before the articulation of their linkage and the conceptualization of development as a right in the post-World War II period.⁵⁶⁶ In particular, an explicit recognition and articulation of the nexus between the two regimes started in the 1970s.⁵⁶⁷ It is true that the human rights instruments consist of principles and rights that constitute essential components of development.

Nevertheless, even the most relevant rights—the socio-economic and cultural rights—as enshrined in the UDHR and the ICESCR were not explicitly framed in terms of development.⁵⁶⁸ In subsequent normative developments, drawing on the principles incorporated in those instruments and under a mounting pressure from the emerging independent states, the notion of right to development emerged in the 1970s in the context of the New International Economic Order (NIEO).⁵⁶⁹ Adopted to change the existing imbalanced international economic relations, the NIEO provisions are deemed to have shaped the development of the right to development.⁵⁷⁰ Further, the Charter of Economic Rights and Duties of States (CERDS) underlined the responsibility of every state to promote economic, social

⁵⁶⁶ It should however be borne in mind that a development agenda was at the top of the list of global issues since the early post-WWII period and was thus integral to the new world order embraced by the UN system. See Richard Warren Perry, “Rethinking the Right to Development: After the Critique of Development, After the Critique of Right” (1996) 18: 3/4 Law & Pol’y 225 at 236-240.

⁵⁶⁷ Bonny Ibhawoh, “The Right to Development: The Politics and Polemics of Power and Resistance” (2011) 33 Hum Rts Q 76 at 81. Arjun Sengupta, “On the Theory and Practice of the Right to Development” (2002) 24:4 Hum Rts Q 837 at 839[Sengupta, “On the Theory and Practice”].

⁵⁶⁸ *Ibid.* Also, development was not informed by human rights as the development studies that emerged to be a distinct field of study in 1960s largely focused on policy interventions required to change the existing social orders. See John Harris, “Great Promise, Hubris and Recovery: A Participant’s History of Development Studies” in Uma Kothari (ed), *A Radical History of Development Studies: Individuals, Institutions and Ideologies* (London; Zed Books, 2016) 17.

⁵⁶⁹ Declaration on the Establishment of a New International Economic Order, adopted 1 May 1974, U.N. GAOR, 6th Spec. Sess., 2229th plen. mtg., U.N. Doc. A/RES/S-6/3201 (1974). The Declaration intended to ‘eliminate the widening gap between developed and developing countries and ensure steadily accelerating economic and social development...’ As Ibhawoh points out “[b]y redressing the disadvantages of former colonized developing countries in the international economic system, the NIEO agenda aimed to further their economic advances by changing their economic relations with the developed countries.” Ibhawoh, *supra* note 567 at 90. For detailed accounts of NIEO, see generally Ruth Gordon, “The Dawn of a New, New International Economic Order?” (2009) 72 Law & Contemp Probs 131.

⁵⁷⁰ Bunn, “The Right to Development,” *supra* note 557 at 1430-31. For instance, Georges Abi-Saab maintained that the NIEO would be “the only blue-print of the right to development which stands a realistic chance of hardening into law.” See Georges Abi-Saab, “The Legal Formulation of a Right to Development,” in Rene-Jean Dupuy, ed, *The Right to Development at the International Level* (1980) Hague Academy of International Law Workshop at 167.

and cultural development.⁵⁷¹ Thus, the reference to the notion of development was quite recurrent in various human rights instruments. For instance, the DRD is important for its articulation of right to development as a soft norm. Enshrined in the African Charter, the notion is enshrined as a binding human right with both individual and collective as well as intrinsic and instrumental dimensions.

3.3.3. Human Rights Approaches to Development

In the analysis of human rights and development with a human development as their shared core objective, two major approaches are often used to elucidate the linkage between human rights and development. The first approach is a right-based approach to development that underscores the integration of human rights into development efforts or initiatives for sustainable human development.⁵⁷² An important example of this strategic approach is “the human rights approach to development assistance.”⁵⁷³ In several development assistance projects, the human rights-based approach requires the integration of human rights standards and principles into all programs of development cooperation in order for the latter to further the realization of human rights.⁵⁷⁴ In this integrated approach, the principles of human rights are helpful to guide development policies towards

⁵⁷¹ *The Charter on Economic Rights and Duties of States*, G.A. Res. 3281 (XXIX), U.N. GAOR, 2d Comm., 29th Sess., Agenda Item 48, art. 7, U.N. Doc. A/RES/3281 (XXIX) (1975)[CERDS]. See also Sushanta K. Chatterjee, “The Charter of Economic Rights and Duties of States: An Evaluation after 15 Years” (1991) 40:3 ICLQ 669.

⁵⁷² Ibhawoh, *supra* note 567 at 84. In UNICEF’s definition of human rights-based approach to programming, “human rights determine the relationship between individuals and groups with valid claims (rights holders) and State and non-state actors with correlative obligations (duty-bearers). It identifies rights-holders and their entitlements, [] corresponding duty-bearers and their obligations, and works towards strengthening the capacities of rights-holders to make their claims, and of duty-bearers to meet their obligations.” UNICEF, *THE STATE OF THE WORLD’S CHILDREN 2004*, Annex B, at 91-92 (2004), online: UNICEF <www.unicef.org/sowc04/files/AnnexB.pdf>.

⁵⁷³ Obiora Chinedu Okafor, “The Status and Effect of the Right to Development in Contemporary International Law: Towards a North-South ‘Entente’” (1995) 7 *African Journal of International & Comparative Law* 865 at 870. The human rights approach to development assistance offers an international framework for international development cooperation in the delivery, utilization and evaluation of development assistance. See Stephen P. Marks, “The Human Rights Framework for Development: Seven Approaches,” in Arjen Sengupta *et al* (eds), *Reflections on the Right to Development* (New Delhi: Sage Publications, 2005) [Marks, “The Human Rights Framework”]. at 27-33.

⁵⁷⁴ Philip Alston, “Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals” (2005) 27 *Hum Rts Q* 755 at 799-801 [Alston, “Ships Passing in the Night”]. The integration of human rights standards and principles can provide accountability mechanisms and a system-based response to sustainable development.

the achievement of sustainable human development.⁵⁷⁵ The second approach frames development as a human right in and of itself. In the 1970s and 1980s, the right to development emerged as one of the so-called ‘third generation’ of human rights.⁵⁷⁶ Since its conception as a right in the 1970s, the right to development is considered to be the right of individuals, peoples and states.⁵⁷⁷ Conceptualizing both as an individual and collective right, the DRD and the African Charter are the two major human rights instruments that recognize the right to development as a human right.⁵⁷⁸ In contrast to the right-based approach to development, this approach goes further to recognize the intrinsic value of development as an entitlement with a corresponding obligation.⁵⁷⁹

Given its holistic, interrelated and indivisible attributes akin to all human rights, the right to development is a comprehensive right with political, social, economic and cultural aspects.⁵⁸⁰ In this respect, the DRD states that “[a]ll human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.”⁵⁸¹ By the same token,

⁵⁷⁵ *Ibid* at 807-13. The approach is useful for asserting rights against the duty-bearer and the consequent accountability. Nevertheless, if not rethought to focus on targeted and selective priorities, the approach is critiqued to offer a little guidance due to its all-embracing, untargeted, and abstract criteria. *Ibid* at 802-07.

⁵⁷⁶ Stephen Marks, “The Human Right to Development: Between Rhetoric and Reality” (2004) 17 *Harv Hum Rts Journal* 137 at 138 [Marks, “The Human Right to Development”]. As per one of the categorizations of human rights, and based on their chronological sequence of emergence, civil and political rights are called first generation rights while economic, social and cultural rights are called second generations rights. The third-generation rights include the right to development and environment. *Ibid*. See generally Stephen P. Marks, “Emerging Human Rights: A New Generation for the 1980’s?”, (1981) 33 *Rutgers L. Rev.* 435, 435–52 [Marks, “Emerging Human Rights”].

⁵⁷⁷ Philip Alston, “International Trade as Instrument of Positive Human Rights Policy,” (1982) 4:2 *Hum Rts Q* 155 at 167 [Alston, “International Trade as Instrument”].

⁵⁷⁸ From the scholars of the time, the Senegalese jurist Keba M’Baye is often regarded as the “father” of the right due to his instrumental role in the conceptualization and the subsequent declaration of the right to development as such. M’Baye’s conception of the right drew on African context and his belief of a “necessary nexus between the individual and collective rights.” See Perry, *supra* note 566 at 227. See generally DRD, *supra* note 411; African Charter, *supra* note 10 at 22.

⁵⁷⁹ Ibhawoh, *supra* note 567 at 86.

⁵⁸⁰ DRD, *supra* note 411, Preamble, para 2, 10, art.1& 6(2) (“...that all human rights and fundamental freedoms are indivisible and interdependent...”). See Arjun Sengupta, “Realizing the Right to Development” (2000) 31 *Development and Change* 553 at 555 & 563 [Sengupta, “Realizing the Right”].

⁵⁸¹ DRD, *supra* note 411 at art.6 (2).

the African Charter stresses the indivisible and interdependent nature of the right to development and other human rights.⁵⁸² A unique feature of the right to development is its conception both as individual and collective entitlements.⁵⁸³ As an integral element of a collective right to self-determination,⁵⁸⁴ the right to development thus envisages people's right to "freely pursue their economic, social and cultural development."⁵⁸⁵ Besides its constitutive and instrumental elements, the collective aspect of the right is what befits African context constituted of collective interests, values and traditions.

Further, unlike the right-based development approach that stresses the sole duty of the state,⁵⁸⁶ the collective entitlement inherent in the "right to development" approach underscores the corresponding international dimension of a collective duty.⁵⁸⁷ In highlighting the significance of an effective international cooperation, the DRD recognizes the extraterritorial obligation of states towards the enjoyment of the right to development.⁵⁸⁸ Despite its debatable legal status, the duty of international cooperation is believed to embrace both state and non-state actors such as corporations, international

⁵⁸² African Charter, *supra* note 10, Preamble, para 7 ("[I]t is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.")

⁵⁸³ Ibhawoh, *supra* note 567 at 85. In particular, the conception of the right to development as a collective entitlement encompassing people or community epitomizes a significant departure from the other individual-centered human rights instruments. *Ibid.*

⁵⁸⁴ Ruth L Gana, "The Myth of Development, The Progress of Rights: Human Rights to Intellectual Property and Development" (1996) 18:3&4 Law & Pol'y 315 at 336[Gana, "The Myth of Development"]. Bunn, "The Right to Development," *supra* note 557 at 1446.

⁵⁸⁵ *Ibid.* See ICESCR, *supra* note 8 at art.1 (1); ICCPR, *supra* note 96 at art.1; UDHR, *supra* note 7 at art.28; African Charter, *supra* note 10 at art.22 (1). Ibhawoh, *supra* note 567 at 91.

⁵⁸⁶ See Ibhawoh, *supra* note 567 at 98-100. See generally Morten Broberg & Hans-Otto Sano, "Strengths and Weaknesses in a Human Rights-Based Approach to International Development: An Analysis of a Right-Based Approach to Development Assistance Based on Practical Experiences" (2018) 22:5 Intl JHR 664 (explaining the concept of the approach, its importance and limitations).

⁵⁸⁷ Ibhawoh, *supra* note 567 at 101. Most developing countries emphasize a collective commitment that undergirds the national and the international obligations for the realization of the right to development.

⁵⁸⁸ DRD, *supra* note 411 at art 3, 4&6. This provision should be read in conjunction with ICESCR, art. 2(1). For instance, art.4 (1) states: "As a complement to the efforts of developing countries, effective international cooperation is essential to providing these countries with appropriate means and facilities to foster their comprehensive development." In this regard, Ibhawoh notes that "[states] have the duty to cooperate in order to achieve this right, and are required to act *collectively* to formulate development policies oriented to the fulfillment of this right." Ibhawoh, *supra* note 567 at 97.

financial institutions and multilateral organizations.⁵⁸⁹This understanding is however not shared among developed nations that dismiss both the right to development and its implication for a corresponding international obligation. As one writer sums it up, the grounds for their opposition relates to “the foundational basis of the right, its legitimacy, justiciability and coherence.”⁵⁹⁰

As a result, the right-based approach finds much prominence among the developed nations in contrast to the “right to development” approach that better suits developing countries such as those in Africa.⁵⁹¹ Yet the rights-based approach is important to complement the “right to development” approach.⁵⁹² Eschewing the contentious philosophical and legal issues related to the right at international level,⁵⁹³ the combination of both approaches will thus offer a broader normative and analytical framework for international human rights in the context of sustainable human development.⁵⁹⁴ Given its all-embracing approach, the sustainable development context provides a

⁵⁸⁹ UNDP, *Human Development Report 2000*, *supra* note 561 at 1 & 10. Ibhawoh, *supra* note 567 at 101. Sengupta, “Realizing the Right,” *supra* note 580 at 559-60 & 564-66.

⁵⁹⁰ Ibhawoh, *supra* note 567 at 87.

⁵⁹¹ In this regard, the African Charter is the sole binding human rights instrument that has espoused the right to development as such. This right has further been interpreted and applied at regional level. The *Endorois* decision is the case in point. In confirming the significance and practical application of the right to development, the African Commission on Human and Peoples’ Right has interpreted art. 22 of the African Charter as a constitutive and instrumental right, wherein the violation of either aspect amounts to the violation of the right. See Karin Arts & Atabongawung Tamo, “The Right to Development in the International Law: New Momentum Thirty Years Down the Line?” (2016) 63 *Nethl Intl L Rev* 222 at 245-46. Given the dedicated role of African jurists such as K’ Mabaye in the conceptualization of the right to development both for the DRD and the African Charter and its embodiment in the latter, the right to development is regarded as one of Africa’s contribution to the global human rights discourse. See Leslye Obiora, “Beyond the Rhetoric of the Right to Development” (1996) 18:3/4 *Law & Pol’y* 356 at 358.

⁵⁹² Ibhawoh, *supra* note 567 at 98.

⁵⁹³ The central debate on the right to development relates to its legal status. That is, its evolution to a binding legal right has faced a persistent and stiff resistance from developed nations. Philip Alston, “Making New Space for Human Rights: The Case of the Right to Development” (1988) 1 *Harvard Human Rights Year Book* 3 at 20-38[Alston, “Making New Space for Human Rights”]. For instance, the U.S has been the persistent objector of the human right status of the right to development. Marks, “The Human Right to Development,” *supra* note 576 at 141-51. Bunn, “The Right to Development,” *supra* note 557 at 1435. See Anthony Carty, “From the Right to Economic Self-Determination to the Right to Development: A Crisis in Legal Theory” (1984) 3 *Third World Legal Studies* 73 at 75. Perry, *supra* note 566 at 241-42. Obiora, *supra* note 591 at 385-87.

⁵⁹⁴ Indeed, it has been reiterated time and again in several UN resolutions that sustainable development is a key element of the overarching framework of the UN activities. As such, it is an overarching context and principle for development and human rights that constitute the pillars of the UN objectives. See, e.g., GA Res 64/236, UNGOR, 64th Sess, UN Doc A/Res/64/236 (2010) at paras 8 & 15.

better framework for addressing development challenges in an interconnected and comprehensive manner.”⁵⁹⁵

3.3.4. Sustainable Development Context for the Right to Development

It has been re-affirmed that the right to development as a human right and all human rights are interrelated and interdependent rights.⁵⁹⁶ It is thus imperative to frame the right to development in the light of sustainable human development with the human beings at its center. Indeed, the central place accorded to the human person in the right to development and the latter’s holistic nature as embodied in the DRD reflect the notion of sustainable development.⁵⁹⁷ Thus, the holistic and interdependent nature of the right to development can be enriched further by the norms of sustainable development.

Placed within the sustainable development context, the right is vital for an integrative realization of the relevant socio-economic rights such as the right to education and author’s right to protection of material and moral rights as enshrined in the UDHR and the ICESCR. As the UN resolution on the ‘Future We Want’ reaffirms, “a full access to quality education at all levels is an essential condition for achieving sustainable development.”⁵⁹⁸ In the same vein, the protection of author’s material and moral interests is both important in itself and instrumental for sustainable development. In effect, the right to education and author’s rights are integral to the broader right to

⁵⁹⁵ Inga T. Winkler & Carmel Williams, “Editorial, The Sustainable Development Goals and Human Rights: A Critical Early Review” (2017) 21:8 Intl JHR 1023 at 1024.

⁵⁹⁶ See Vienna Declaration and Program of Action, *supra* note 411 at para. 5. (The Declaration states: All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”) Sengupta, “Realizing the Right,” *supra* note 580 at 556-58.

⁵⁹⁷ Obiora, *supra* note 591 at 362. This is evident from the very definition of the right to development. See DRD, *supra* note 411 at arts 1(1), 2(1) & 9(1). Nonetheless, given its anthropocentric approach, the ecological aspect of the notion of sustainable development is missing from the definition.

⁵⁹⁸ See *Resolution on the Future We Want*, GA Res 66/288, UNGOR, A/Res/66/288 (2012) at para 229.

development. In this regard, the right to development underlines the role of an integrated approach to address issues of human rights and development.⁵⁹⁹

As highlighted above, there is an increasing emphasis on the linkage between human rights and development in various human rights instruments and related documents. For instance, the Vienna Declaration and Program of Action (1993) is instrumental to highlight the link in its re-affirmation of the right to development as a human right that shares the basic attributes of human rights.⁶⁰⁰ The Declaration went further to reiterate the right to development as a “universal and inalienable right and an integral part of the fundamental human rights.”⁶⁰¹ In the same vein, well-noted in the World Summit on Sustainable Development is the essential role of human rights, including the right to development for achieving sustainable development.⁶⁰² From African perspective, the World Summit emphasized the need for actions at all levels to create “an enabling environment” in order to achieve sustainable development and the respect for human rights, including the right to development.⁶⁰³

Moreover, the global development initiatives such as the UN Millennium Development Goals (MDGs) and the UN SDGs constitute an important global development context with an explicit reference to human rights.⁶⁰⁴ At the turn of the millennium, the Human Development Report (2000) also underlined the existence of a shared motivation and concern between human development and

⁵⁹⁹ Isabella D. Bunn, *The Right to Development and International Economic Law: Legal and Moral Dimensions* (Oxford and Portland: Hart Publishing, 2012) at 5[Bunn, *The Right to Development and International Economic Law*].

⁶⁰⁰ *Vienna Declaration and Program of Action*, *supra* note 411 at para 10. Sengupta, “Realizing the Right,” *supra* note 580 at 557.

⁶⁰¹ *Vienna Declaration and Program of Action*, *supra* note 411 at para 10. In the same resolution, the Office of the High Commissioner for Human Rights was entrusted with the responsibility that includes “the promotion and protection of the right to development.” See GA Res 48/141, U.N. GAOR, 48th Sess., Supp. No. 49, at 261, U.N. Doc. A/48/141 (1993). In so doing, the Declaration underscores the existence of the interdependent and mutually reinforcing relationship amongst “democracy, development and respect for human rights and fundamental freedoms.” *Ibid.*

⁶⁰² *Report of the World Summit on Sustainable Development*, Res. 2, Annex: Plan of Implementation of the World Summit on Sustainable Development, at 9, para. 5, U.N. Doc. A/CONF.199/20 (2002).

⁶⁰³ *Ibid* at 44, para 62(a). The enabling environment is expected to be created at the regional, sub-regional, national and local levels. *Ibid.*

⁶⁰⁴ See *UN Millennium Development Goals*, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (2000), online: UN <www.un.org/millenniumgoals/index.html>[UNMDGs].

human rights.⁶⁰⁵ In particular, human freedom is pointed out as a central and the common purpose of human rights and human development.⁶⁰⁶ It is thus stressed that “a broad vision of human rights must be entrenched to achieve sustainable human development.”⁶⁰⁷In view of their common objective, “human development is essential for realizing human rights, and human rights are essential for full human development.”⁶⁰⁸

From among the global development norms, worth mentioning are the arguable international customary status of MDGs⁶⁰⁹ and its complementarity with human rights.⁶¹⁰ In this regard, Philip Alston highlights the significance of MDGs context to facilitate the introduction of human rights considerations into the development process and the appropriate discussion on the extent of the applicable human rights obligations.⁶¹¹ Likewise, the *Human Development Report (2003)* stated that MDGs would both "mirror the fundamental motivation for human rights," and "reflect a human rights agenda—rights to food, education, health care and decent living standards.”⁶¹²

⁶⁰⁵ UNDP, *Human Development Report 2000*, *supra* note 561 at 19. (The HDR stated: “Human development and human rights are close enough in motivation and concern to be compatible and congruous, and they are different enough in strategy and design to supplement each other fruitfully. A more integrated approach can thus bring significant rewards, and facilitate in practical ways the shared attempts to advance the dignity, well-being and freedom of individuals in general”). *Ibid.*

⁶⁰⁶ *Ibid* at 2.

⁶⁰⁷ *Ibid* at iii.

⁶⁰⁸ *Ibid* at 2.

⁶⁰⁹ See Alston, “Ships Passing in the Night,” *supra* note 574 at 771-78.

⁶¹⁰ *Ibid* at 759-61. In her report submitted to the UN in 2002, the UN High Commissioner for Human Rights also stated that “[t]he strategies to reach the Millennium human rights goals and the Millennium development goals reinforce and complement each other.” See *Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council*, U.N. ESCOR, 40th Sess., Agenda Item 14(g), para. 10, U.N. Doc. E/2002/68 (2002). Nonetheless, there are criticisms leveled against the MDGs as a top-down, selective and one-size-fits-all framework. Alston, “Ships Passing in the Night,” *supra* note 574 at 764-66. See generally Thomas Pogge, “The First United Nations Millennium Development Goal: A Cause for Celebration?” (2004) 5:5 *Journal of Human Development* 377.

⁶¹¹ Alston, “Ships Passing in the Night”, *supra* note 574 at 809-10. From among various instrumental roles of MDGs, Alston observes that “the MDGs can, up to a point, be taken as reflecting the minimum content of certain economic and social rights, so that states that fail to achieve their MDG commitments cannot easily seek to excuse themselves by relying upon a lack of available resources or arguments based on progressive realization.” *Ibid* at 823. Hence, he concludes that “there is a sufficiently clear relationship between the explicit MDGs and economic, social and cultural rights norms that the language of rights can be utilized appropriately in many relevant MDG contexts.” *Ibid* at 788.

⁶¹² See UNDP, *Human development Report 2003: Millenium Development Goals-A Compact Among Nations to End Human Poverty* (New York: Oxford University Presss, 2003) at 27 & 29[UNDP, *Human Development Report 2003*].

With a particular emphasis on the right to development, the Working Group on the Right to Development also underlined the contribution of the Millennium Declaration and MDGs for the progressive realization of the right to development.⁶¹³ Further, the 2009 UN GA resolution on the Right to Development reaffirms “the objective of making the right to development a reality for everyone, as set out in the United Nations Millennium Declaration.”⁶¹⁴ To this end, the resolution calls upon the UN Human Rights Council to ensure the promotion and advancement of sustainable development. In this respect, the Council was reminded about facilitating the achievement of the MDGs towards raising the right to development to the same level with all other human rights and fundamental freedoms.⁶¹⁵ Nonetheless, the integration of human rights into MDGs was found inadequate, *inter alia*, due to the former’s lack of effective engagement and its prescriptive norms.⁶¹⁶

In contrast, the SDGs is considered to have made a better integration of human rights into sustainable development objectives.⁶¹⁷ Drawing on a deeper theoretical basis and calling for a domestic institutional reform,⁶¹⁸ the SDGs represent a comprehensive development agenda with a universalist conception of sustainable development.⁶¹⁹ As such, the realization of the right to development is

⁶¹³ See Report of the Working Group on the Right to Development on its fifth session (Geneva, 11-20 February 2004), U.N. ESCOR, Comm’n on Hum. Rts., 60th Sess., 43(g), U.N. Doc. E/CN.4/2004/23 (2004).

⁶¹⁴ *UNGA Resolution on the Right to Development*, A/RES/63/178, 26 March 2009, Preamble at para 6. In the Millennium Declaration, the states expressed their commitment ‘to making the right to development a reality for everyone and to freeing the entire human race from want.’ MDGs, *supra* note 604 at para 11.

⁶¹⁵ *Ibid* at para 4.

⁶¹⁶ Alston, “Ships Passing in the Night,” *supra* note 574 at 755.

⁶¹⁷ See Malcolm Langford, “Lost in Transformation? The Politics of the Sustainable Development Goals” (2016) 30:2 *Ethics and International Affairs* 167 at 172-73. See also Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (New York: Cambridge University Press, 2009).

⁶¹⁸ Langford, *supra* note 617 at 172. Langford notes that “the normative gains within the SDGs provide, therefore, a political resource for selectively defending and promoting targets that require greater attention or legitimation.” *Ibid* at 175.

⁶¹⁹ *Ibid* at 167. Nonetheless, Langford points out two principal criticisms directed against the SDGs: ‘sheer number of commitments’ and ‘various political compromises’ that may undermine the effectiveness of the institutional commitment. *Ibid* at 168. See also Frances Stewart, “The Sustainable Development Goals: A Comment” (2015) 11:3 *Journal of Global Ethics* 288 (highlighting problems related to the national implementation, failure to address the existing economic structure and lack of a true integration between suitability and economic goals).

integral to the SDGs. Indeed, recent developments vindicate the existence of a strong nexus between the right to development and the SDGs, and the instrumental role of the latter for the realization of the right to development. For instance, the Special Rapporteur on the RTD is mandated to contribute towards the realization of the right in the context of the integrated implementation of the SDGs.⁶²⁰ Thus, the SDGs offers a comprehensive and integrative development context for human rights system that in turn informs the interaction among copyright, tertiary education and human development.

It is also vital to note the significance of international cooperation that remains central to international copyright, human rights and development systems. Although its legal status in each of the systems varies, the principle or duty of international cooperation has been enshrined in the relevant international copyright,⁶²¹ human rights⁶²² and development-related treaties, declarations and global policy instruments, including WIPO DA, Doha DA, and MDGs/SDGs.⁶²³ From a legal perspective, the duty of international cooperation is a long-standing element of international law,⁶²⁴ and its due consideration is relevant for the interaction between human rights and copyright in the global context of development.

⁶²⁰ Human Rights Council, 'Resolution on the Right to Development', UN Doc. A/HRC/33/L.29, 27 September 2016, para. 14(b). The Special Rapporteur on the RTD is mandated to make contribution to "the promotion, protection and fulfillment of the rights to development in the context of the coherent and integrated implementation of the 2030 Agenda for Sustainable Development and other internationally agreed outcomes of 2015." Furthermore, the special rapporteur is expected to "engage and support efforts to mainstream the right to development among various United Nations bodies, development agencies, international development, financial and trade institutions, and to submit proposals aimed at strengthening the revitalized partnership for sustainable development from the perspective of the right to development." *Ibid* at para.14(c).

⁶²¹ See TRIPs Agreement, *supra* note 163 at arts. 66(2), 67 & 69; Marrakesh Treaty, *supra* note 497 at art.9.

⁶²² See ICESCR, *supra* note 8 art.2(1); UNCRC, *supra* note 9 art.4, 17(a & b), and 23(4); *The Convention on the Rights of Persons with Disabilities*, GA Res.61/106, 24 January 2007, Preamble, para (1), arts. 4(2), 32, 37&38. See also *CESCR General Comments No. 3*, *supra* note 20 at paras. 13-14.

⁶²³ WIPO DA, *supra* note 494; *Doha Ministerial Declaration*, *supra* note 511; MDGs, *supra* note 604, Goal 8(global partnership for development); SDGs, *supra* note 62, Goal: 17(global partnership for development). At regional level, of similar importance is the African Union (AU) Agenda 2063 that articulates African development aspirations to be achieved over 50 years for the realization of AU's vision of "an integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in international arena." Keys among the major aspirations are ensuring "a prosperous Africa based on inclusive and sustainable development" and "...the respect for human rights." See *Agenda 2063: The Africa We Want*, adopted by the 21st Ordinary session of the Assembly of Heads of State and the Government of the African Union, Addis Ababa, 26 May 2013[AU Agenda 2063].

⁶²⁴ See Arts & Tamo, *supra* note 591 at 239-41

In conclusion, the foregoing discussion sheds light on the notion of development as a common and overarching context for copyright and human rights systems. Despite the variance in the scope and approaches adopted by the systems, the need for development was a major *raison d'être* and the ultimate objective for the emergence, development and perpetuating operation of the systems. Indeed, this reality is evident from the various elements or aspects of development. The elements feature in the global policy, legal and institutional frameworks which constitute both copyright and human rights systems. Nonetheless, what remains an issue is the extent to which the systems are responsive to accommodate development concerns. To this end, a sustainable human development context is instrumental to examine the systems and the interaction thereof at global and national levels.

3.4. The Interface Between Copyright and Human Rights

As can be noted from their respective nexus with development, evident is the existence of an interface between IP and human rights. The connection is also affirmed in the human rights regimes. For instance, both the UDHR and the ICESCR make an explicit mention of the human rights dimensions of IP despite the silence of the existing international IP regimes.⁶²⁵ In particular, the interface between copyright and human rights is explicit from the relevant provisions of the human rights instruments.⁶²⁶ Nonetheless, both IP and human rights regimes had remained isolated for quite a long period of time until their recent interactive developments. There are two major developments that are considered to have triggered a deep interaction between the regimes. The developments are: (a) the increased expansion of IP standards upon its entry into the global trade regime, and (b) the consequent

⁶²⁵ UDHR, *supra* note 7 at art.22; ICESCR, *supra* note 8 at art. 15(1)(c). Both provisions state that “everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” Helfer & Austin, *Human Rights and Intellectual Property*, *supra* note 33 at 32.

⁶²⁶ See Philippe Cullet, “Human Rights and Intellectual Property Protection in the TRIPs Era” (2007) 29:2 Human Rights Quarterly 403 at 407-10 (describing the relationship among the right to culture, the right to the benefits of scientific progress and applications, and author’s right to protection of material and moral interests under Art. 15 of the ICESCR).

changes in the human rights law, including an increased concern due to the adverse consequences of the expansive IP globalization.⁶²⁷

As a central cause, the TRIPs Agreement is at the forefront due to its introduction of a stringent set of IP standards and enforcement mechanisms.⁶²⁸ In turn, this is further exacerbated through the subsequent proliferation of TRIPs-plus bilateral trade agreements.⁶²⁹ Indeed, these IP-related trade agreements have increased the tension between IP and human rights regimes with substantive and procedural effects. In so doing, the effects tend to undermine the human rights dimensions for a compliance with the stringent requirements of IP.⁶³⁰ The effects are manifested in several contexts such as in IP's impact on access to medicines, food, and learning materials. Against this backdrop, the interface between IP and human rights regime has been an ongoing issue of a global debate. Given the burgeoning scholarship on the interface, a concise discussion is made here to highlight the perspectives.

At the global level, the debate on the interaction between human rights and IP is generally framed in three major approaches. The first approach is based on the assumed existence of a fundamental conflict between human rights and IP.⁶³¹ In its endorsement of this approach, the UN Sub-Commission on the Promotion and Protection of Human Rights presumes the existence of “actual or potential conflicts [...] between the implementation of the TRIPs Agreement and the realization of

⁶²⁷ Helfer & Austin, *Human Rights and Intellectual Property*, *supra* note 33 at 34 & 48-64.

⁶²⁸ *Ibid* at 40.

⁶²⁹ *Ibid*.

⁶³⁰ *Ibid* at 40-41.

⁶³¹ Laurence R. Helfer, “Human Rights and Intellectual Property: Conflict or Coexistence?” (2003) 5 *Minnesota Intellectual Property Review* 47 at 48 [Helfer, “Human Rights and Intellectual Property”].

economic, social and cultural rights.”⁶³² As a solution, the conflict approach upholds the “primacy of human rights over economic policies and agreements.”⁶³³ In contrast, the second approach stresses the possible co-existence between the two regimes.⁶³⁴ That is, both IP and human rights are regarded to be essentially compatible despite a tension over the point of necessary balance between incentives and access in IP regime.⁶³⁵ Endorsed by the CESCR in its General Comment No.17 on creator’s right,⁶³⁶ the co-existence approach emphasizes the possibility to strike a balance between the two legal regimes based on the presumed existence of a common objective.⁶³⁷ Given the narrow vision of human rights and the reliance of the interface on constrained L&Es,⁶³⁸ Okediji finds this approach too inadequate to allow a reform in IP regime in order to promote human development in the developing countries.⁶³⁹

Considered complementary in its perspective, the third approach looks beyond the first two approaches to underscore the shared goals and the complementary objectives of both regimes.⁶⁴⁰ The

⁶³² ECOSOC, *Sub-Commission on the Promotion and Protection of Human Rights, Intellectual Property Rights and Human Rights*, para. 3, Res. 2000/7, U.N. Doc.E/CN.4/Sub.2/RES/2000/7(Aug.17, 2000) [UN Sub-Commission Resolution 2000/7]. In Helfer and Austin’s opinion on the endorsed approach, the primacy of human rights urged by the UN human rights bodies overlooks (a) the need for identifying the nature of the conflict, and (b) a legal justification in support of the proposed primacy of human rights. Helfer & Austin, *Human Rights and Intellectual Property*, *supra* note 33 at 65.

⁶³³ See *Intellectual Property Rights and Human Rights, Sub-Comm’n on Human Rights Res 2000/7*, 913, UN Doc E/CN 4/Sub 2/RES/2000/7 (2000).

⁶³⁴ Helfer, “Human Rights and Intellectual Property,” *supra* note 631 at 48-49.

⁶³⁵ *Ibid.* Helfer & Austin, *Human Rights and Intellectual Property*, *supra* note 33 at 73.

⁶³⁶ CESCR *General Comment No.17*, *supra* note 49 at para 35.

⁶³⁷ Helfer & Austin “Human Rights and Intellectual Property,” *supra* note 33 at 73-79. Audrey R. Chapman, “Approaching Intellectual Property as a Human Right (obligations related to Article 15(1)(c))” (2001) 35 Copyright Bulletin 4 at 14-17 & 28-30.

⁶³⁸ Ruth L. Okediji, “Does Intellectual Property Needs Human Rights?” (2018) 51:1 International Law and Politics 1 at 10, 17, 24 & 25[Okediji, “Does Intellectual Property Needs Human Rights?”].

⁶³⁹ *Ibid* at 10-37 & 66-67. See generally Ruth L. Okediji, “Intellectual Property in the Image of Human Rights: A Critical Review,” in Rochelle Cooper Dreyfuss & Elizabeth Siew-Kuan Ng, *Framing Intellectual Property Law in the 21st Century* (Cambridge: Cambridge University Press, 2018)234[Okediji, “IP in the Image of Human Rights”]. Underscoring the unintended restrictive effect of the narrow human rights framework and the inadequacy of the existing L&Es, Okediji suggests policy initiatives for ‘a more complete vision’ and realization of material conditions envisaged and guaranteed the economic, social and cultural rights. She argues that ‘those conditions’ are “necessary for the exercise of freedoms that make possible the creation, use and enjoyment of knowledge assets in pursuit of development.” *Ibid* at 234-240.

⁶⁴⁰ See Laurence R. Helfer, “Toward a Human Rights Framework for Intellectual Property” (2007) 40 UC Davis L Rev 971 at 1018-20 [Helfer, “Toward a Human Rights Framework”].

complementary approach comprises slightly different but related views. Among the views, the first one holds that IP protection can be used as a means to promote the realization of human rights.⁶⁴¹ In this respect, copyright protection—as a form of IP—is required to advance human rights ends. This approach is noted to be adopted in the Marrakesh Treaty that “employs the legal doctrines and policy tools of copyright to achieve human rights objectives.”⁶⁴² A related view stresses the instrumental role of human rights to justify the intended objectives of IP and the legitimacy of the system.⁶⁴³ Given a strong correlation between copyright and human rights goals,⁶⁴⁴ the latter may be used to set an internal limit within the copyright system.⁶⁴⁵ To this end, human rights approach to IP is understood in the context of development.⁶⁴⁶ The third line of argument notes the possible existence of both conflict and co-existence between the two regimes due to the overlapping human rights and non-human rights attributes.⁶⁴⁷ For instance, authors’ right is understood to possess both attributes to entail variance.

⁶⁴¹ *Ibid.*

⁶⁴² Helfer et al, *The World Blind Union Guide*, *supra* note 67 at xxiii. Intersecting both human rights and international copyright law, the implementation and interpretation of the Marrakesh Treaty “must strive to comply with both sets of legal obligations.” *Ibid.* See Molly K. Land, “The Marrakesh Treaty as “Bottom Up” Lawmaking: Supporting Local Human Rights Action on IP Policies” (2018) 8 UC Irvine L Rev 513 at 549-51.

⁶⁴³ Ruth L. Okediji, “Securing Intellectual Property Objectives: New Approaches to Human Rights Considerations,” in Margot E. Salomon et al, eds, *Casting the Net Wide: Human Rights, Development and New Duty-Bearer* (Intersentia, 2007) 211 at 213-14 & 234 [Okediji, “Securing Intellectual Property Objectives”].

⁶⁴⁴ *Ibid* at 227-229.

⁶⁴⁵ *Ibid* at 234.

⁶⁴⁶ See generally Ruth L. Gana, “The Myth of Development, the Progress of Rights: Human Rights to Intellectual Property and Development” (1996) 18 Law & Pol’y 315. In particular, Gana argues that ‘any human rights to IP must be understood in the context of the right to development’ in order to allow developing countries to design IP regimes consistent with their development objectives. *Ibid* at 323-28.

⁶⁴⁷ Peter K. Yu, “Re-conceptualizing Intellectual Property Interests in a Human Rights Framework” (2007) 40 UC Davis L Rev 1039 at 1077-78 [Yu, “Re-Conceptualizing Intellectual Property”]. It is argued that only some attributes of intellectual property rights are regarded as human rights while the remaining attributes have no human rights basis. Further, as pointed out in the *General Comment No. 17*, IP regimes “that primarily protect business and corporate interests and investments” lack human rights basis as corporate entities’ “entitlements ... are not protected at the level of human rights.” *CESCR General Comment No.17*, *supra* note 49 at para 2&7.

Taking a human rights framework towards IP, this variant suggests the adoption of different mechanisms that take into account the attributes to address the issue of interface.⁶⁴⁸ From among the proposed solution is the core minimum approach that limits protection of author's material and moral interests to the minimum essential levels of protection.⁶⁴⁹ That is, the approach underscores the core minimum obligation that requires the protection of the "basic material interests which are necessary to enable authors to enjoy an adequate standard of living."⁶⁵⁰ In drawing from the General Comment No. 3,⁶⁵¹ the core minimum approach is considered to benefit future authors, users and individuals as it sets a maximum limit on IP protection.⁶⁵² Setting such a limit is believed to facilitate greater access to protected knowledge in order to promote creative innovation and development.⁶⁵³ In particular, it is argued that a reduction of copyright protection to the core minimum obligations would facilitate increased access to copyrighted textbooks and software for the realization of the right to education.⁶⁵⁴ Nonetheless, conceded as the major limitations of the approach are (a) the difficulty to determine the exact minimum core protection, (b) its lack of guidance on the progressive and maximum limits of protection, and (c) the temptation for a state to transform the floor of the right to a maximum ceiling for the sake of a mere compliance with its obligations.⁶⁵⁵

⁶⁴⁸ *Ibid*. The three mechanisms suggested as possible solutions are (a) the just remunerative approach, (b) the core minimum approach, and (c) the progressive realization approach. While the first approach focuses on the protection of the core minimum level of human rights, the progressive realization approach aims at state's increasing utilization of available resources for the full realization of economic, social and cultural rights as incorporated in the relevant human rights instruments. In contrast, the just remunerative approach highlights author's right to receive a fair remuneration for a limitation imposed on the enjoyment of his human rights over creative works. *Ibid* at 1095-1130.

⁶⁴⁹ *Ibid* at 1105-09.

⁶⁵⁰ *CESCR General Comment No.17, supra* note 49 at para 2.

⁶⁵¹ *CESCR General Comment No.3, supra* note 20 at para 10.

⁶⁵² Yu, "Re-conceptualizing Intellectual Property," *supra* note 647 at 1108.

⁶⁵³ *Ibid* at 1109.

⁶⁵⁴ *Ibid* at 1118.

⁶⁵⁵ *Ibid* at 1109-1113.

In the context of access to knowledge in general and access to learning materials in particular, the practical implication of the interface is quite pressing at a national level. It is important to highlight the appropriate approach that directs the objectives of the protection of copyright and tertiary education towards the realization of a human development in Ethiopia. It is noted that copyright, education and development have important human rights dimensions. Furthermore, the issue of interface would arise in respect of access to learning materials within the broad context of access to knowledge as the latter involves a human rights dimension. As a noted scholar observes, an access to learning materials are considered to be an essential input for education to implicate human rights.⁶⁵⁶ In fact, this holds true in Ethiopian context where access to relevant learning materials required for education and research is limited due to economic and legal constraints. Although the determination of the appropriate approach is subject to “the nature of the conflict, the type of rights involved, the amount of resources available and the urgency of the situation,”⁶⁵⁷ a complementary approach to the interface fares better to facilitate an access to learning materials. In order to emphasize the complementarities between the various dimensions, this thesis makes a deliberate choice to exclude the intricacies of normative hierarchies. Noting the limited effect of human rights/IP interface framework,⁶⁵⁸ Okediji rightly underscores the need to re-define the human framework for IP in order to promote human development.⁶⁵⁹ To this end, as this thesis will suggest, the framework can be integrated into the more holistic CA to re-direct copyright and tertiary education towards sustainable human development in Ethiopia.⁶⁶⁰

⁶⁵⁶ Yu, “Ten Common Questions,” *supra* note 91 at 719-20.

⁶⁵⁷ Yu, Re-Conceptualizing Intellectual Property, *supra* note 210 at 1123.

⁶⁵⁸ Okediji, “Does Intellectual Property Needs Human Rights?” *supra* note 638 at 10-37.

⁶⁵⁹ *Ibid* at 57-67. Okediji, “IP in the Image of Human Rights,” *supra* note 639 at 363-89.

⁶⁶⁰ *Ibid* at 62-67. In this regard, Okediji concludes that “[p]rogress toward attaining the highest levels of human flourishing will require novel approaches in the IP and in the human rights legal space.” *Ibid* at 67.

3.5. Conclusion

Despite the difference in the scope and degree of emphasis, the issue of development has been central to both international copyright and human rights systems. In fact, development was the major driving force behind the emergence of both systems. The emergence of international copyright system that dates back to the adoption of the Berne Convention was driven by the economic interests of the right holders and the intermediaries. In the same vein, the issue of development was among the pillar objectives of the UN Charter that include the respect for human rights and fundamental freedoms. This objective was taken further through its incorporation into the UDHR and the ICESCR, among others.

To this end, tracing the breadth and depth of development embedded within the systems requires a closer look at the international copyright and human rights regimes. As noted above, both international copyright and human rights systems evolved in isolation from each other. That is, both emerged at different periods to undertake their own course of development. For instance, the emergence of the international copyright system with the Berne Convention in the 1880s has since then led to series of revisions and proliferation of other international copyright treaties. Guided by the expansive trajectory and author-centric approach set in the Berne Convention, the Rome Convention, the Geneva Phonograms Convention, and the WIPO Internet Treaties altogether constitute the major substantive regimes for the international copyright system. Designed to operate both in the analog and digital environments, all the treaties are dedicated to ensure the protection of the rights of authors or right holders. To this end, developed is a binding set of minimum substantive standards for the rights.

In contrast, the L&Es are left to member states to design despite their vital role to serve the public interest through facilitating access to the protected works. Nonetheless, the reserved policy space is subject to the constraining requirements of the three-step test. An exception to the permissive approach to L&Es is the Marrakesh Treaty that prescribes for a mandatory set of L&Es for a specific

class of users. Marking IP's shift to the trade regime, the TRIPs Agreement has both globalized and reinforced the existing international copyright system through its incorporation of the major copyright treaties, including the Berne Convention. Further, the international copyright system has been injected with an effective enforcement mechanism under the auspice of the WTO system. In spite of the circumscribed policy and legal space, the TRIPs Agreement leaves some development related-flexibilities relevant to development needs.

In addition to the substantive legal regimes, the international copyright system has witnessed an institutional transition and consolidation from the BIRPI to the UN-affiliated WIPO. In comparison to its predecessor with a limited administrative scope, the WIPO is rather vested with a broad mandate to promote the global protection of IP, including copyright. Indeed, it has played a key role in facilitating and overseeing the adoption and implementation of major copyright treaties. In the aftermath of the linkage between copyright and trade regimes, the WTO has also emerged as another strong institutional framework to facilitate the globalization of the international copyright protection and enforcement.

As regards the international human rights system, its emergence is integral to the foundation of the UN system. Enshrined in arts. 55 & 56 of the UN Charter, one of its purposes is to “promote a universal respect for, and observance of, human rights and fundamental freedoms for all” without a discrimination. To this end, all members have pledged themselves to take a joint and separate action in cooperation with the UN. Despite the prior existence of few specific human rights instruments on slavery and labor rights, the adoption of the International Bill of Human Rights marked the emergence of a comprehensive set of human rights. Indeed, beginning with and founded upon the objectives of the UDHR and its principles, the consequent International Covenants and series of other international human rights instruments are all dedicated to articulate the various human rights and fundamental freedoms. This momentum was taken further to facilitate and shape similar developments at regional

levels. A case in point is the adoption of, *inter alia*, the African Charter, the European and the American Conventions on Human Rights. In African context, African Charter is a regime of utmost significance.

In most of the major human rights instruments, enshrined are authors' right and the right to education. In this regard, the UDHR and the ICESCR articulate both rights while the UNCRC is another important international human rights instrument dealing with the right to education. In particular, the ICESCR and the UNCRC are of a special significance for their detailed articulation of the right to education at all levels. From among the regional human right instruments, worth mentioning is the African Charter that guarantees both the right to education and the right to development. Indeed, the African Charter is the sole binding regional human rights instrument to recognize the right to development. At international level, the DRD is dedicated to the right to development. Nonetheless, the transformation of the instrument and the right enshrined therein into a binding status is still contested. In addition to the substantive human rights regimes, there are several international, regional and national human rights institutions that are mandated to promote the protection of human rights. For instance, important among the international and regional levels are the UN HRC, the CESCR, and the African Human Rights Commission.

In both international copyright and human rights regimes, the issue of development has garnered an increasing attention over the recent several decades. Besides the socio-economic rights enshrined in the ICESCR, the prominence of the issue is evident from the subsequent articulation of development as a right in itself. Further, the emerging development norms within the UN system such as the MDGs and SDGs are important initiatives for the enrichment, concretization and operationalization of the right to development. In the international copyright regime, important development contexts are the various development-oriented provisions and the WIPO DA that incorporate numerous flexibilities. As is the case with its adoption, the implementation of the WIPO

DA is expected to draw a guidance from the UN development goals and priorities. Noting their complementarities, the contributions of copyright and quality tertiary education must be explored within the broader context of sustainable human development.

In sum, all those elements of development context can be consolidated in the light of the principle of sustainable human development. It is a robust and flexible notion. Still evolving, it is noted as a process of change that involves, *inter alia*, the direction of investments and orientation of technological development in order to advance both current and future capability to meet human needs and aspirations.⁶⁶¹ Seen through the enriching guidance of CA, the broader and holistic notion of sustainable human development offers a useful context for copyright and tertiary education.

⁶⁶¹ See UNWCED, *Our Common Future*, *supra* note 400 at 48. Yu, “Re-conceptualizing Intellectual Property,” *supra* note 647 at 1117.

Chapter IV: International Copyright Flexibilities for Tertiary Education and Creative Innovation

4.1. Introduction

From the CA-driven human development perspective, the objectives of both authors' right and tertiary education should be understood to complement each other in order to advance sustainable human development. As noted from the development context of the international legal regimes and the underpinning theoretical justifications, both rights share a common human rights framework. In addition to their intrinsic values, both tertiary education and copyright—a means for protection of author's right—are instrumental for human development. For the advancement of their respective purpose—creative innovation and development of human personalities, both copyright and tertiary education depend upon each other in the production, access to, and dissemination of knowledge. In this regard, critical is a set of copyright-related flexibilities under the international legal regimes for quality tertiary education and a sustainable creative innovation.

At this juncture, it is important to describe the usage of the notion of “creative innovation” in this thesis. This term was once used by the Supreme Court of Canada in the *Theberge* case to underscore a balance in the public objectives underpinning copyright.⁶⁶² The term “creative innovation” is adopted in this thesis for two major reasons. First, the term is suggestive of the overlapping aspects of creativity and innovation associated with copyright. Second, the usage of the term is opted for a convenience and to avoid the joint or interchangeable usage of the terms “creativity” and “innovation.” It is however conceded that the preferred term remains a loose combination of the two terms with their own conceptual reach. Further, it is not in a perfect fit with the firm-oriented conventional notion of

⁶⁶² In its reasoning on the need for balanced public policy objectives underpinning copyright, the Court pointed out how excessive copyright protection would unduly limit the ability of the public domain to foster and embellish ‘*creative innovation*’ in the long-term of society as a whole, or create practical obstacles to proper utilization.” *Theberge v Galerie d’Art du Petit Chaplain Inc, et al*, 2S.C. R 336, 2002 SCC 34, para 32.

innovation embodied in the Oslo Manual.⁶⁶³ Noted in a broader sense and without a universal definition, the term “innovation” has been a buzzword among scholars, businesspersons and policy makers.⁶⁶⁴ Leaving aside the definitional conundrum, the notion of creative innovation has been central to IP and development.

In both realms of copyright and tertiary education, the notion of creative innovation is undergoing a significant transformation. With the converging roles of authors and users in the process of creative innovation, there emerges the notion of innovation as an open, collaborative and dynamic process. For instance, Bengt Lundvall—a well-established expert in the field—has long observed innovation “not primarily as a single event, but rather *as a process*.”⁶⁶⁵ In this dynamic process, the sustainable production and diffusion of knowledge are integral to the cumulative and interactive learning process of creative innovation.⁶⁶⁶ In particular, subsequent to its inception in Henry Chesbrough’s seminal work that emphasizes the inflow and outflow of knowledge or ideas between firms to drive innovation,⁶⁶⁷ the notion of open innovation has garnered a significant traction. Further, consistent with an open innovation is Eric von Hippel’s notion of “users-driven innovation” that underscores individual users’ role and their collaborative efforts to drive a collective creative innovation.⁶⁶⁸

⁶⁶³ *Oslo Manual: Guidelines for Collecting and Interpreting Innovation Data*, 3rd ed (OECD Publishing, 2005) at 46.

⁶⁶⁴ Jeremy de Beer, Chidi Oguamanam & Tobais Schonwetter, “Innovation, Intellectual Property and Development Narratives in Africa,” in De Beer et al, eds, *Innovation and Intellectual Property Collaborative Dynamics in Africa* (Cape Town: UCT Press, 2014) at 9 [de Beer, Oguamanam & Schonwetter, “Innovation, IP and Development”].

⁶⁶⁵ Bengt-Ake Lundval, *The Learning Economy and the Economics of Hope* (London: Anthem Press, 2016) at 93(emphasis in the original).

⁶⁶⁶ *Ibid* at 93-94.

⁶⁶⁷ See generally Henry Chesbrough, “The Era of Open Innovation” (2003) 44:3 MIT Sloan Management Review 35; Henry Chesbrough, *Open Innovation: The New Imperative for Creating and Profiting from Technology* (Massachusetts: Harvard Business School Press, 2006). An open innovation is defined “a paradigm that assumes that firms can and should use external ideas, as well as internal ideas and internal and external paths to market, as the firms look to advance their technology.” *Ibid* at xxiv.

⁶⁶⁸ See Eric Von Hippel, *The Sources of Innovation* (Oxford: Oxford University press, 1988) at 11-26; Hippel, “Innovation by User communities: Learning from Open-Source Software” (2001) MIT Sloan Management Review 82; Hippel, *Free Innovation* (Massachusetts: MIT Press, 2017).

In the context of copyright, illuminative of users' creative and collaborative role is Benkler's articulation of commons-based peer production of creative works relevant for education.⁶⁶⁹ With the advent of internet as its enabler, an open and collaborative innovation marks the democratic, cumulative and dynamic nature of creative innovation.⁶⁷⁰ In effect, this conceptual shift demands a similar reorientation in copyright, tertiary education and the relevant copyright-related flexibilities that underpin their linkage. Further, the role of an open approach to a creative innovation and its resonance with open access models⁶⁷¹ underline the need for a suitable normative and policy framework to align with the relevant copyright flexibilities.

Seen as their common objective, creative innovation is integral to the linkage between tertiary education and copyright, and their contribution for sustainable human development. As noted in this thesis, a tertiary education is critical to generate relevant knowledge, produce human capital and foster human capabilities that altogether constitute essential inputs for creative innovation. Indeed, quality tertiary education and scientific research are instrumental to nurture the capabilities required for translating the knowledge generated into a creative innovation.⁶⁷² As an instrument of human development, an advanced education is a key to unlock and unleash the creative potential of the learners. The intellectual development of a nation through an advanced education expands the human capabilities of the people to engage in a sustainable creative innovation. In the same vein, a balanced copyright protection is crucial to incentivize the production, dissemination and efficient utilization of knowledge for creative innovation, advanced education and scientific research. For a creative

⁶⁶⁹ Yochai Benkler & Helen Nissenbaum, "Commons-Based Peer Production and Virtue" (2006) 14:4 *Journal of Political Philosophy* 394-419 [Benkler, "Common-Based"]; see generally Benkler, *The Wealth of Networks*, *supra* note 4.

⁶⁷⁰ See Eric von Hippel, *Democratizing Innovation* (Cambridge, MA: MIT Press, 2006); Benkler, *The Wealth of Networks*, *supra* note 4 at 2-10[Hippel, *Democratizing Innovation*].

⁶⁷¹ See Henry Chesbrough & Melissa Appleyard, "Open Innovation and Strategy" (2007) 50:1 *California Management Review* 57 at 61-73.

⁶⁷² Rohinton P. Medhora, *New Thinking on Innovation: Introduction*, Center for International Innovation Governance, Special Report 2017, at 5&8.

innovation to flourish through a robust copyright system, quite crucial is a continuous investment in human beings through a quality education.⁶⁷³ Both learning and an active participation in a creative culture are thus vital to enrich people's creative capabilities required for human development through creative innovations.

In a nutshell, the promotion of creative innovation and quality tertiary education are interdependent for, and contingent upon access to knowledge and human capital.⁶⁷⁴ This linkage extends to human capabilities. In turn, this multidimensional linkage is interwoven through and dependent upon the role of copyright flexibilities permitted under the existing international copyright regime. In particular, copyright flexibilities are instrumental for promoting a quality tertiary education and a robust creative innovation through enhanced access to knowledge or learning materials.

4.2. Tertiary Education and Creative Innovation for Human Development

Noted within the broad framework of the CA, human development is measured in terms of enhanced freedoms or expansion of capabilities. As emphasized in this thesis, essential for a human development to flourish are educational and creative capabilities. Further, both tertiary education and creative innovation are noted as interdependent and constitutive elements of human development. From among various instances of interdependence, what remain vital are the linkages between the regimes in the context of (a) access to knowledge, (b) human capital, and (c) human capabilities. The first two contexts tend to highlight the instrumental aspects of the linkage as vital resources. In contrast, the third context reflects the substantive linkage between both tertiary education and creative innovation as important human capabilities with both instrumental and intrinsic values. For example, education of all

⁶⁷³ Michael Spence, *Innovation and Prosperity in an Age of Transition: Foreword*, in CIGI Special Report 2017, *supra* note 672 at xiii (“[P]eople as [the] most important investable resource... are the source of innovation, creativity and dynamism.”).

⁶⁷⁴ See Stuart Cunningham and Luke Jaaniste, “The Policy Journey Toward Education for Creative Economy,” in Daniel Araya and Michael A. Peters, eds, *Education in the Creative Economy: Knowledge and Learning in the Age of Innovation* (New York: Peter Lang, 2010) 29 at 36-41.

levels is integral to the indicators of HDI that measures human development as an enlargement of real opportunities or expansion of capabilities.

In the same vein, cultivated through an advanced education and understood as a form of capabilities or freedom, creative innovation is instrumental to enlarge a set of other real opportunities.⁶⁷⁵ In the CA, the freedom “to produce one’s own expressive work” is among Nussbaum’s central human capabilities.⁶⁷⁶ In this context, the linkage between tertiary education and creative innovation is further based upon access to knowledge and human capital. In fact, both access to knowledge and human capital are essential elements of or inputs for expansion of human capabilities.

Noted in terms of human capabilities, knowledge is “central to human freedom and human development.”⁶⁷⁷ Within this broad framework, highlighted in the *Human Development Report (2016)* is the crucial role of access to relevant learning materials for quality tertiary education to advance quality human development.⁶⁷⁸ As “the stock of knowledge in all its multiple forms that contribute to productive work,”⁶⁷⁹ human capital is thus another important element of human capabilities that links tertiary education and creative innovation. In recognizing the instrumental significance of human capital, Sen goes further to underscore the need for its integration into the broader framework of human capabilities.⁶⁸⁰ Therefore, the expansion of human capabilities remains a common denominator for

⁶⁷⁵ See Sen, *Development as Freedom*, *supra* note 1 at 75-76.

⁶⁷⁶ Nussbaum, *Creating Capabilities*, *supra* note 380 at 33.

⁶⁷⁷ Benkler, *The Wealth of Networks*, *supra* note 4 at 1.

⁶⁷⁸ UNDP, *Human Development Report 2016*, *supra* note 121 at 67-69.

⁶⁷⁹ Orly Lobel, “The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property” (2015) 93 *Tex L Rev* 789 at 834.

⁶⁸⁰ Sen, *Development as Freedom*, *supra* note 1 at 292-97. As Sen points out, “we must go beyond the notion of human capital, after acknowledging its relevance and reach.” *Ibid* at 296. Given the inclusive potential of the capability perspective, “there is a strong need to go well beyond that rather limited and circumscribed role of human capital in understanding development as freedom.” *Ibid* at 297.

tertiary education, creative innovation and their linkages towards a sustainable human development. Against this backdrop as a normative context, this chapter thus explores the international copyright flexibilities. It also highlights the instrumental role of the flexibilities to facilitate or bridge a linkage between tertiary education and copyright towards human development.

4.3. International Copyright Flexibilities

As noted in the preceding chapter, the international copyright regime is constituted of series of multilateral copyright and trade agreements. Beginning with the Berne Convention that sets the minimum standards for authors right with an in-built expansive trajectory,⁶⁸¹ the international copyright regime has since then evolved both in its breadth and depth to ensure an ever-increasing protection of author's/right holder's right. An epitome of these developments is the international copyright regime's aggressive venture into the global trade and digital environments that now form a complex web of interlinkage and enforcement mechanisms.

Leaving aside the proliferating free trade agreements (FTAs) with a TRIPs-plus effect,⁶⁸² the TRIPs Agreement and the WIPO Internet Treaties have paved the way for copyright's entry into the respective trade and digital environments. In particular, the TRIPs Agreement's integration of the trade-sanctioned enforcement mechanism and the WIPO Internet Treaties' introduction of technological protection measures (TPMs) into the copyright regime are worth noting. In all these right-holders' interest-driven expansive efforts, the issue of the flexibilities has been largely left to an individual state to handle, *albeit* subject to the circumscribing effect of the three-step test.

⁶⁸¹ See Okediji, "The International Copyright System," *supra* note 51 at 7-8.

⁶⁸² *Ibid* at 4 & 23-24. Peter K. Yu, "The International Enclosure Movement," (2007) 82 Indiana LJ 827 at 867-70[Yu, "The International Enclosure"]; Yu, "TRIPs and Its Discontents" *supra* note 158 at 383-86; Peter Drahos, "BITs and BIPs: Bilateralism in Intellectual Property" (2001) 4 Journal World Intellectual Property 791.

As elaborated in this chapter, the three-step test has been cast wider to encompass all exclusive rights and entrench the minimum standards enshrined in the treaties. To this effect, the TRIPs Agreement has set itself in a firm foundation with an enforcement mechanism as its unwavering safeguard. The three-step test is thus both a determinative and preemptive test intended to curb the ‘discretionary’ power of the states. Although the interpretative guidance of the objectives and the preamble is noted to offer some policy space, the breadth and depth of flexibilities are required to be determined on the basis of the requirements of the test within the overall consistency requirement of the TRIPs Agreement. In this chapter, the various flexibilities relevant to education will be explored from the perspective of human development while the importance of the flexibilities for creative innovation will also be highlighted.

4.3.1. General Flexibilities for Education and Creative Innovation

In the absence of a harmonized set of international copyright flexibilities, various flexibilities are permitted or embodied in the international copyright system. The flexibilities are of various categories. In addition to the flexibilities inherent in the relevant preamble, objectives and principles, the categories are based on the protected subject matter, conditions of protection, duration, the type of use and beneficiaries. In particular, the most common form of flexibilities is composed of compensated and uncompensated L&Es to the exclusive rights.⁶⁸³ Below are the various and relevant flexibilities enshrined in the major treaties.

A. General Flexibilities under the Berne and Rome Conventions

As the major international copyright treaties, both Berne and Rome conventions are foundational for the international protection of copyright and related or neighboring rights. In setting minimum standards for a legal protection, both conventions have reserved to member states the

⁶⁸³ Okediji, “International Copyright System,” *supra* note 51 at 12-14.

freedom to formulate their respective flexibilities. In addition to its specific exceptions, *inter alia*, for private use and uses for teaching or scientific research,⁶⁸⁴ the Rome Convention leaves member states with a discretion to emulate the Berne Convention's approach in devising appropriate and corresponding flexibilities.⁶⁸⁵ As such, the discussion on the Berne Convention is *mutatis mutandis* applicable to the flexibilities envisaged under the Rome Convention. Given its authors'-centric approach that underpins the primacy of exclusive rights, Okediji notes the Berne Convention's approach to flexibilities as "an explicit expression of retained sovereignty as well as its deference to such sovereignty."⁶⁸⁶ Further, she also observes the Convention's implicit recognition of the inherent limiting effect of the public interest on authors' rights.⁶⁸⁷ Although the permissive approach in itself appears to be an aspect of flexibilities, the Berne Convention marks the baseline for a set of mandatory minimum standards for the authors' right.⁶⁸⁸

In effect, the exercise of the discretion deferred to member states is circumscribed within the initial in-built copyright protection trajectory and the mandatory nature of the minimum standards.⁶⁸⁹ Further, the Convention's introduction of the three-step test in its later revision is another significant

⁶⁸⁴ *Rome Convention*, *supra* note 478 at art.15 (1).

⁶⁸⁵ *Ibid* at art.15 (2).

⁶⁸⁶ Okediji, "International Copyright System," *supra* note 51 at 7.

⁶⁸⁷ *Ibid*. In particular, Okediji argues that "the narrow set of limitations recognized in the Berne Convention reflected enduring principles of access to copyrighted works in the interest of the public at large." *Ibid* at 7 & 8. For example, the limitation for educational purposes and dissemination of scientific works places education and scientific advancement among "the still enduring aspects of the public interest in access to protected works." *Ibid* at 8; Sam Ricketson, "U.S Accession to the Berne Convention: An Outsider's Appreciation" (1993) 8 *Intellectual Property Journal* 87[Ricketson, "U.S Accession"].

⁶⁸⁸ See *WIPO Guide to Berne Convention*, *supra* note 466 at 5-11; Bernt Hugenholtz & Ruth Okediji, "Contours of an International Instrument on Limitations and Exceptions" in Neil Weinstock Netanel, ed, *The Development Agenda: Global Intellectual Property and Developing Countries* (Oxford: Oxford University Press, 2008) 474 at 475[Okediji & Hugenholtz, "Contours of an International Instrument"]; see Alan Story, "Burn Berne: Why the Leading International Copyright Convention Must Be Repealed" (2003) 40 *Hous L Rev* 763 at 788-90.

⁶⁸⁹ The in-built expansive trajectory was explicitly set in the Berne Convention in order to prohibit an agreement with a regressive effect on the minimum standards set in the Convention. Berne Convention, art.20. In the absence of a corresponding mandatory set of flexibilities, the mandatory minimum standards underpinned by the principle of national treatment is another structural restraint on the sovereign discretion of member states. See Okediji, "International Copyright System," *supra* note 51 at 12.

restraint on L&Es to reproduction right.⁶⁹⁰ Fenced within this structural confine, the flexibilities under the Berne Convention relate to the subject matter of copyright, its duration, conditions of protection and specific flexibilities for copyrighted works. The Convention stipulates or allows for various specific flexibilities in the form of compensated and uncompensated limitations.⁶⁹¹ Depending upon the type of the L&Es, the exercise of the flexibilities can thus be permitted with or without remuneration. Save for quotation exception,⁶⁹² most of the L&Es incorporated in the Berne convention are permissive in nature.

From the general flexibilities related to the copyrightable subject matter, the Berne Convention provides for mandatory and permissive exclusions. An instance of the former is art.2 (8) of the Berne Convention that excludes “news of the day or miscellaneous facts having the character of a mere press of information.”⁶⁹³ In Okediji’s observation, this provision refers to a factual content of the news that cannot fit into the notion of works of authorship.⁶⁹⁴ From within the eligible subject matters of protection, the Convention also leaves member states with a discretion to determine the protection of official texts of legislative, administrative and legal nature as well as the official translations thereof.⁶⁹⁵ Likewise, member states are at liberty to exclude, in whole or in part, from a legal protection both “political speeches and speeches delivered in the course of a legal proceedings.”⁶⁹⁶ In both cases, the

⁶⁹⁰ Berne Convention, *supra* note 439 at art.9 (2). Okediji, “International Copyright System,” *supra* note 51 at 13.

⁶⁹¹ Goldstein & Hugenholtz, *supra* note 157 at 372. Okediji, “International Copyright system” *supra* note 51 at 12. For example, use of Berne Appendix is an instance of compensated limitations while uncompensated limitations include quotations (art.10(1)), uses for teaching purposes (10(2)), press usage (art.10 *bis* (1)), reporting of current events (art.10 *bis* (2)), etc. Okediji & Hugenholtz, “Contours of an International Instrument”, *supra* note 688 at 480.

⁶⁹² Okediji & Hugenholtz, “Contours of an International Instrument” *supra* note 688 at 481 (noting the mandatory nature of the exception for quotation and its rationale to lie in the freedom of expression).

⁶⁹³ Hugenholtz & Okediji, “Contours of International Instrument” *supra* note 688 at 478.

⁶⁹⁴ Okediji, International Copyright System, *supra* note 51 at 10. Both Hugenholtz and Okediji point out lack of a clear evidence in the historical record. Hugenholtz & Okediji, “Contours of an International Instrument” *supra* note 688 at 478.

⁶⁹⁵ Berne Convention, *supra* note 439 at art.2 (4).

⁶⁹⁶ *Ibid* at art. 2*bis* (1).

permissive exclusion relates to subject matters that are eligible for protection, but which are available for exclusion *ab initio* when the public interest so demands.⁶⁹⁷

Another mode of exclusion is based upon the principle of idea/expression that limits protection to the *expression* of ideas and excludes the protection of *mere* ideas, facts, procedures, methods of operation, and mathematical concepts as such.⁶⁹⁸ Developed in the US and recognized in several jurisdictions, this doctrine of idea/expression distinction is used to distinguish between eligible and ineligible subject matter.⁶⁹⁹ Prior to its explicit incorporation in the TRIPs Agreement,⁷⁰⁰ the principle was implicit in the notion of authorship, creative or original works and in the exclusion of factual works under the Berne Convention.⁷⁰¹ Subject to a judicial determination, the application of this principle relates to the condition of protection that excludes a work for want of originality. As a rule, copyright is limited to an original expression of ideas.

For all copyrightable works, originality is an essential requirement for the legal protection of the works.⁷⁰² In contrast, despite its wide acceptance among states, fixation constitutes an optional requirement for copyright protection.⁷⁰³ In effect, the requirements of originality and fixation constitute the two conditions of copyright protection. The strict application of the criteria has the potential to offer a room for flexibilities. In this regard, apart from formalities or administrative requirements that are

⁶⁹⁷ See Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London: Kluwer, 1987) at para.6.67 [Ricketson, *The Berne Convention*].

⁶⁹⁸ See TRIPs Agreement, *supra* note 163 at art 9(2).

⁶⁹⁹ See J.A.L. Sterling, *World Copyright Law*, 3rd ed (London: Sweet and Maxwell, 2008) at 221.

⁷⁰⁰ See TRIPs Agreement, *supra* note 163 at 9(2) &10(2).

⁷⁰¹ Berne Convention, *supra* note 439 at art. 2(1) & (8); As Goldstein and Hugenholtz observes, this principle was embedded in the in the Berne Convention's requirements of authorship and originality. Goldstein & Hugenholtz, *supra* note 157 at 220; Okediji, "International Copyright System" *supra* note 51 at 11; Okediji, "The Regulation of Creativity," *supra* note 64 at 2394 & fn. 82.

⁷⁰² Daniel Gervais, *(Re)structuring Copyright: A Comprehensive Path to International Copyright Reform* (Cheltenham: Edward Elgar, 2017) at 94-118 [Gervais, *Restructuring Copyright*].

⁷⁰³ Berne Convention, *supra* note 439 at art. 2(2).

excluded, the Berne Convention allows members states to impose the conditions of protection.⁷⁰⁴ For instance, the requirement of originality, though not mentioned, is already implicit in the notion of works of authorship under the Berne Convention.⁷⁰⁵ In fact, the requirement of originality remains integral to the protectable subject matter and its qualification for protection. It is undisputed that originality constitutes the essence of copyright protection as a work of independent intellectual creation.⁷⁰⁶ Nonetheless, its actual application offers member states a considerable freedom to determine the appropriate threshold with inevitable variance across nations.⁷⁰⁷ Related to the principle of idea/expression dichotomy that leaves out ideas and mere facts for free use,⁷⁰⁸ a stringent application of originality could exclude unoriginal works from a legal protection. This is true of a merger doctrine.

In contrast to its implicit embodiment of originality, the Berne Convention makes an explicit mention of the *optional* requirement of fixation.⁷⁰⁹ In the opinion of a distinguished commentator, the Convention's optional approach to the requirement is indicative of its deference to the natural-law based justifications that entitle an author to authorship right upon a mere creation of the work.⁷¹⁰ Yet,

⁷⁰⁴ Okedi, "International Copyright System" *supra* note 51 at 11. The condition of originality is implicit in the notion of authorship. Hugenholtz & Okediji, "Contours of an International Instrument" *supra* note 688 at 478.

⁷⁰⁵ See Berne Convention, *supra* note 439 at art. 2(1). In particular, one can infer the implicit requirement from the reading of art.2 (3) that reads "...a literary or artistic work shall be protected as *original works* without prejudice to the copyright in *the original work (emphasis added)*." Okediji, "International Copyright System" *supra* note 51 at 11.

⁷⁰⁶ See Berne Convention, *supra* note 439 at art.2 (3). See also TRIPs Agreement, art.10 (2) in reference to the protection of compilations of data or other material as long as they constitute "intellectual creations." As a manifestation of 'creative choices' made by the author of his own free will, originality is the only adequate and determinative test for the protection of a work. Gervais, *Restructuring Copyright*, *supra* note 702 at 114-19.

⁷⁰⁷ For the requirement of originality and its evolution in the U.S legal system, see Robert Brauneis, "The Transformation of Originality in the Progressive-Era Debate over Copyright in News" (2009) 27 *Cardozo Arts & Ent LJ* 321. For instance, in the U.S an independent creation with a modicum of creativity is required. In the EU, expression 'intellectual creation' is used as a test. In the UK, 'the skill, judgement and/or labor' of the author is the standard. As a middle ground, in Canada, an original work must 'originate from an author and must be the product of an author's exercise of skill and judgement.' Ruth L. Okediji, "Creative Markets and Copyright in the Fourth Industrial Era: Reconfiguring the Public Benefit for a Digital Economy," ICTSD, Issue Paper No.43 at 15-16 [Okediji, "Creative Markets and Copyright"].

⁷⁰⁸ See Goldstein & Hugenholtz, *supra* note 157 at 5.

⁷⁰⁹ Berne Convention, art 2(2). Okediji, "International Copyright System" *supra* note 51 at 11.

⁷¹⁰ Jane Ginsburg, "A Tale of Two Copyrights: Literary Property in Revolutionary France and America" (1990) 64 *Tul L Rev* 991 at 994. As Ginsburg notes, for an author's right justified by the natural rights or personality theory, "the sole relevant act is the work's creation." *Ibid*; Gervais, *(Re)structuring Copyright*, *supra* note 702 at 259-60.

fixation in a material form, as required in common law jurisdictions, is of a manifold practical importance. For instance, it is significant for its evidentiary benefit in “the objective determination of the existence of a work.”⁷¹¹ It is also instrumental for its facilitative role for innovation, preservation and dissemination of copyrighted works.⁷¹² Given its significance, most states require fixation of a creative work in a tangible medium.⁷¹³ As a result, creative works that do not meet the statutory requirements will fall into the public domain for all to use. Thus, the conditions of copyright protection can offer a state a policy space to exploit in devising flexibilities.

The other general limitation is based on the duration of the copyright protection. Despite its longer term, the protection of copyright is not perpetual. The longest required term of protection under the Berne Convention is a minimum duration of author’s lifetime plus fifty years for most works.⁷¹⁴ The shortest duration the Convention sets is a minimum of twenty-five years for photographic works and works of applied art.⁷¹⁵ Given the EU and U.S’ extension of the *post-mortem* duration to seventy years and their persistent effort for its integration into other jurisdictions through FTAs, the flexibility related to the duration is already under threat. For a member state that avoids the Berne-plus obligation, the duration under the Berne Convention remains the governing rule for protection. Once the term of protection elapses, the works will be available for free access and utilization. A shorter duration is thus vital to ensure a quick return of the works to the public domain for the latter to flourish. Vital as it is,

⁷¹¹ Gervais, *Restructuring Copyright*, *supra* note 702 at 120.

⁷¹² *Ibid* at 120. Fixation ‘serves as an expression of author’s intent to create a more or less permanent work’ and as a means for its consequent commercial exploitation. *Ibid.* Okediji, “International Copyright system” *supra* note 51 at 11.

⁷¹³ For instance, fixation is a constitutional requirement for copyright protection in the United States. *Ibid.* Sam Ricketson and Jane Ginsburg, *International Copyright and Neighboring Rights: The Berne Convention and Beyond*, Volume I, 2nd ed (Oxford: Oxford University Press, 2006) at 417-19[Ricketson & Ginsburg (Vol. I)].

⁷¹⁴ Berne Convention, *supra* note 439 at art.7(1)

⁷¹⁵ *Ibid* at art.7(4).

the enrichment of a public domain in turn promotes a sustainable creative innovation and other public interests such as education.

In addition to the flexibilities highlighted above, the three-step test that will be explored in depth after a while is often considered as an aspect of general flexibilities. Introduced in 1967, the three-step test was enshrined under art.9(2) of the Berne Convention as a parameter for a limitation on author's reproduction right. As indicated below, the test has now morphed into an all-encompassing parameter under the TRIPs Agreement. Under the Convention, the test leaves member states with an *option* to permit the reproduction of protected works. The test operates "in certain cases, provided that such reproduction does not conflict with a normal exploitation of the works and does not unreasonably prejudice the legitimate interests of the author."⁷¹⁶ Indeed, as Okediji notes, the cumulative three-step test was rather intended to serve both as a limit on the discretion of member states and a parameter for their formulation of L&Es to the exclusive right.⁷¹⁷

Adopted in a response to the demand of developing countries,⁷¹⁸ the disputed and less-utilized Berne Appendix is another aspect of flexibilities that operates subject to remuneration.⁷¹⁹ In its intended application for reproduction and translation right, the purpose of the Appendix was to facilitate a bulk access to and utilization of copyrighted works for development purposes, including

⁷¹⁶ *Ibid* at art.9(2).

⁷¹⁷ Okediji, "International Copyright System" *supra* note 51 at 13-14; Chon, "Intellectual Property 'from below,'" *supra* note 50 at 842-43.

⁷¹⁸ See Sara Bannerman, *International Copyright and Access to Knowledge* (Cambridge: Cambridge University Press, 2016) at 24-25[Bannerman, *International Copyright*].

⁷¹⁹ Okediji, "International Copyright System" *supra* note 51 at 15; Chon, "Intellectual Property 'from Below,'" *supra* note 50 at 835.

education.⁷²⁰ Given its complex procedure and administrative costs, the Appendix has failed to serve as an effective element of the permitted flexibilities.⁷²¹

In addition to other specific L&Es that will be examined below, the various general flexibilities enshrined under the Berne Convention are instrumental both for tertiary education and creative innovation that necessitate access to existing works. Nevertheless, most of the flexibilities are both permissive and subordinate to the overriding author-oriented approach of the Berne Convention. In effect, the general flexibilities embodied in the Convention are not sufficiently oriented towards human development. Noting this gap, Margaret Chon recommends the application of the principle of substantive equality for “the fullest exploitation of the Berne-endorsed exception.”⁷²² In so doing, Chon calls for deference to a flexible interpretation and application of the relevant flexibilities in order to promote access to educational materials for the purposes of human development.⁷²³

B. Flexibilities under the TRIPs Agreement

Marking a significant shift in the international copyright regime into the global trade system, the TRIPs Agreement has made an explicit integration of the Berne Convention into the trade-sanctioned system.⁷²⁴ As such, the TRIPs Agreement has introduced several changes to the existing copyright flexibilities. First, it has expanded both the subject matter and the scope of exclusive

⁷²⁰ *Ibid.*

⁷²¹ Okediji, “International Copyright System” *supra* note 51 at 15; Chon, “Intellectual Property ‘from Below’” *supra* note 50 at 829 & 835; Ruth Okediji, “Sustainable Access to Copyrighted to Digital Information Works in Developing Countries, in Keith Maskus & Jerome Reichman, eds, *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Cambridge: Cambridge University Press, 2005) 142 at 162-66 [Okediji, “Sustainable Access”].

⁷²² Chon, “Intellectual Property ‘from Below’” *supra* note 50 at 815 & 838. Informed by the CA, the substantive equality or an “approach from below” not only emphasizes distributive justice outcomes, but also underscores the inclusion of the perspectives and actions of the least empowered people to go beyond a formal equality in shaping a normative legal agenda. *Ibid* at 815.

⁷²³ *Ibid* at 833-834 & 843-44. Chon argues that “a decision maker should explicitly consider and defer to a developing country’s stated policy of promoting education for development.” *Ibid* at 844.

⁷²⁴ TRIPs Agreement, *supra* note 163 at art. 2(1). Daniel Gervais, *The TRIPs Agreement: Drafting History and Analysis* (London: Thomson Reuters/Sweet & Maxwell, 2008) at 175-76 & 213 [Gervais, *The TRIPs Agreement*].

economic rights with a profound impact upon the existing flexibilities.⁷²⁵ Second, the TRIPs Agreement has transformed the author's right into the expansive notion of right-holder's right that entitles corporate entities to acquire exclusive economic rights.⁷²⁶ Third, the Agreement has expanded the scope of the three-step test to encompass all existing and new exclusive economic rights.⁷²⁷ The ramification of the expansive test has been an issue of heated debates in the existing legal scholarship with multiple suggestions for its interpretation and application at national levels.⁷²⁸ Fourth, it has introduced an effective enforcement mechanism including criminal measure against violation of the exclusive rights.⁷²⁹

Nevertheless, the TRIPs Agreement has made explicit the hitherto implicit principle of idea/expression distinction that helps delineate between copyrightable and non-copyrightable works.⁷³⁰ One cannot but admit the role of the explicit reiteration of the principle and the flexibilities in its preamble, objectives and principles. In its overall effect, the TRIPs Agreement is however a Berne-plus special agreement with expansive rights that constrain the space for flexibilities.⁷³¹ In particular, the restrictive aspects have the tendency to generate a perceived or actual restraint on the freedom of states to devise

⁷²⁵ See Ricketson & Ginsburg (Vol. I), *supra* note 713 at 850-56. For instance, both computer program (subject matter) and rental right (exclusive right) are introduced.

⁷²⁶ See TRIPs Agreement, *supra* note 163 at art. 1(3) and its fn 1 that indicate the term 'nationals' to include 'legal persons.' In particular, this is evident from a specific reference to the term 'right holder' in Arts. 8(2), 13 & 14(4). Okediji, "International Copyright System," *supra* note 51 at 1.

⁷²⁷ TRIPs Agreement, *supra* note 163 at art.13. Ricketson & Ginsburg, *supra* note 713 at 852.

⁷²⁸ For a discussion on the various approaches suggested, see Geiger, Gervais & Senftleben, "The Three-Step Test Revisited," *supra* note 165 at 605-09; Kamiel Koelman, "Fixing the Three Step Test" (2006) 28 Eur IP Rev 407 at 410; Christophe Geiger et al., "Towards a Balanced Interpretation of the 'Three-Step Test' for Copyright Exceptions" (2008) Eur IP Rev 489[Geiger et al., "Towards a Balanced Interpretation"].

⁷²⁹ See TRIPs Agreement, *supra* note 163 at arts.41-61 &63-64.

⁷³⁰ *Ibid* at art.9(2) & 10(2).

⁷³¹ Gervais, *The TRIPs Agreement*, *supra* note 724 at 175. Adopted within the framework of art. 20 of the Berne Convention, the TRIPs Agreement cannot derogate from existing obligations while it "can curtail flexibilities contained in the pre-existing conventions." The main reason is that most flexibilities were not part of the existing obligations. *Ibid*.

flexibilities for fear of trade sanctions or due to their integration into the TRIPs-plus FTAs. A brief exploration of some of the relevant general flexibilities is thus in order.

To start with its objectives and principles, the TRIPs Agreement provides for a set of general flexibilities. As elaborated elsewhere in this thesis, a development-oriented reading of the preamble, art.7 & 8 of the TRIPs Agreement and their interpretative guidance for the substantive provisions would offer member states some rooms for flexibilities that serve their development needs.⁷³² In this respect, a critical policy and legislative space relevant to advance a quality tertiary education and creative innovation is the open-ended notion of the public interest in sectors of vital importance for socio-economic and technological development.⁷³³ Further, similar flexibilities can be carved out from the core objectives enshrined in art. 7 that highlights the purpose of IP to promote innovation and dissemination of knowledge, a respect for the mutual advantage of producers and users, an account for social and economic welfare, and the notion of a balance between rights and obligations.⁷³⁴

Despite the TRIPs Agreement's disputed 'one-size-fit-all approach,'⁷³⁵ the interpretation and application of these open-ended words or principles with due regard to a nation's specific context has the potential to provide a "wobble room" or general flexibilities for human development.⁷³⁶ Indeed, several commentators agree that a strategic application of the aforementioned provisions within the framework of the overarching principle of sustainable development has the potential to generate

⁷³² See Yu, "The Objectives and Principles," *supra* note 160 at 1018-46; As Correa notes, arts.7 & 8 constitute "a central piece for the implementation and interpretation of the TRIPs Agreement." Correa, *Trade Related Aspects*, *supra* note 137 at 108.

⁷³³ See TRIPs Agreement, *supra* note 163 at art.8. Gervais, *The TRIPs Agreement*, *supra* note 724 at 209-10; Correa, *Trade Related Aspects*, *supra* note 137 at 105-107; Yu, "The Objectives and Principles" *supra* note 160 at 1008-1012.

⁷³⁴ Gervais, *The TRIPs Agreement*, *supra* note 724 at 203-24 & 207; Yu, "The Objectives and Principles," *supra* note 160 at 1000-1008; Correa, *Trade Related Aspects*, *supra* note 137 at 105-106.

⁷³⁵ Yu, "The Objectives and Principles," *supra* note 160 at 981; James Boyle, "A Manifesto on WIPO and the Future of Intellectual Property" (2004) 9 *Duke L & Tech Rev* at 3-4.

⁷³⁶ Correa, *Trade Related Aspects*, *supra* note 137 at 105-106; Hugenholtz & Okediji, "The Contours of an International Instrument" *supra* note 688 at 477-89; Yu, "TRIPs and Its Discontents", *supra* note 158 at 387; Jerome H Reichman, "From Free Riders to Fair Followers: Global Competition under the TRIPs Agreement" (1997) 29 *NYUJ Intl 7 Pol* 11 at 28 (claiming the existence of sufficient 'wobble room' in the TRIPs Agreement for public interest in free competition).

considerable flexibilities that serve nation's development goals.⁷³⁷ Nonetheless, attached to the general flexibilities are the constraining effect of the necessity and consistency requirements embedded in the TRIPs Agreement.⁷³⁸

In relation to the protected subject matter or set of exclusive rights, the flexibilities under the TRIPs Agreement are rather more constrained than its predecessor due to the Agreement's extension to new subject matters. In terms of subject matters, included are computer programs as literary works and original compilations of data or other material that constitutes intellectual creation.⁷³⁹ In the same vein, the recognition of rental right as an exclusive right for computer programs and cinematographic works is an instance of the expansion in the economic rights.⁷⁴⁰ Nonetheless, a Berne-minus approach is taken to exclude the corresponding moral rights.⁷⁴¹ With regard to the conditions and duration of protection, the TRIPs Agreement maintains similar minimum standards set under the Berne Convention. In the course of integration, a constraining ceiling has been placed upon the corresponding flexibilities. From among permitted and compensated limitations, the Berne Appendix has been made integral to the TRIPs Agreement without the long-sought reform.⁷⁴² One notable exclusion is however the principle of

⁷³⁷ Yu, "TRIPs and Its Discontents," *supra* note 158 at 387-95; Yu, "The Objectives and Principles," *supra* note 160 at 1018-46; Grosse Ruse-Khan, "The (Non)Use of Treaty Object and Purpose in Intellectual property Disputes in the WTO" (2012) Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 11-15 at 1-35; Gervais, *The TRIPs Agreement*, *supra* note 724 at 202-11; Correa, *Trade Related Aspects*, *supra* note 137 at 105-109; Carlos Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPs Agreement and Policy Options* (London & New York: Zed Books, 2000) 6-8 & 21; Jerome Reichman, "Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?" 46:4 *Hous L Rev* 1115 at 1125-1176 & 1182 (also emphasizing the need for developing countries' optimal utilization of the flexibilities).

⁷³⁸ TRIPs Agreement, art.8. The measures to be adopted by members under art.8 are required to be "consistent with the provision of the Agreement." Gervais, *The TRIPs Agreement*, *supra* note 724 at 204& 209; Yu, "Objectives and Principles," *supra* note 160 at 1013-18.

⁷³⁹ TRIPs Agreement, *supra* note 163 at art.10. Ricketson & Ginsburg (Vol. I), *supra* note 713 at 514-22.

⁷⁴⁰ TRIPs Agreement, *supra* note 163 at art.11. Ricketson & Ginsburg (Vol. I), *supra* note 713 at 690-92.

⁷⁴¹ TRIPs Agreement, *supra* note 163 at 9(1). Ricketson & Ginsburg (Vol. I), *supra* note 713 at 615-19.

⁷⁴² TRIPs Agreement, *supra* note 163 at art.9(1). Gervais, *The TRIPs Agreement*, *supra* note 724 at 213; Okediji, "International Copyright system," *supra* note 51 at 15-16 & 19; Gervais, *Restructuring Copyright*, *supra* note 702 at 41-43.

exhaustion. Left to the sovereign discretion of member states to regulate, states are thus free to tailor the application of the principle to their domestic needs.⁷⁴³

Another copyright-related aspect of general flexibilities worth noting is art.40 of the TRIPs Agreement that prohibits anti-competitive practices. In its flexible application, the prohibition is treated as a disciplinary measure setting an external limit to copyright.⁷⁴⁴ It is thus important to prevent an abusive exploitation of the exclusive right to the detriment of the users.⁷⁴⁵ In its enforcement measures, TRIPs Agreement offers some flexibilities in the modes, standards of enforcement and remedies as well as in the notions of ‘infringement’ and ‘commercial scale’.⁷⁴⁶

C. Flexibilities under the WTO Internet Treaties

Adopted within their respective framework of the Berne and Rome Conventions,⁷⁴⁷ the WCT and the WPPT have extended the substantive minimum standards of copyright protection into the digital environment. Given their developments in the post-TRIPs Agreement regime, their adoption was subject to the overbearing effect of the Agreement,⁷⁴⁸ and the emerging socio-economic and

⁷⁴³ Gervais, *The TRIPs Agreement*, *supra* note 724 at 198-201; Correa, *Trade Related Aspects*, *supra* note 137 at 78-89.

⁷⁴⁴ Okediji, “International Copyright System,” *supra* note 51 at 16-17

⁷⁴⁵ *Ibid* at 17-19. Subject to the existence of a robust competition law regime and a competitive market, Okediji points out the potential of art.40 to serve as a policy tool in order to facilitate access to affordable copyrighted works. *Ibid*.

⁷⁴⁶ See generally Peter Yu, “The TRIPs Enforcement Dispute” (2011) 89 Neb L Rev 1046-1131[Yu, “The TRIPs Enforcement”]; Jerome Reichman, “Enforcing the Enforcement Procedures of the TRIPs Agreement: Comments” (1997) 37 Va J Intl L 335-56. See Correa, *Trade Related Aspects*, *supra* note 137 at 410-50.

⁷⁴⁷ Okediji, “The Regulation of Creativity,” *supra* note 64 at 2388-89; Mihaly Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation* (Oxford: Oxford University Press, 2002) at 409-10 & 591[Ficsor, *The Law of Copyright*]. See WCT, *supra* note 448 at art.1 & Berne Convention, *supra* note 439 at art.20; WPPT, *supra* note 448 at art. 1 & Rome Convention, *supra* note 478 at art.22.

⁷⁴⁸ Not only have the WIPO Treaties carried forward the new rights that emerged under the TRIPs Agreement, the contracting parties which are members to the TRIPs Agreement have also issued a set of agreed statements to ensure consistency with the Agreement. For WCT, this is evident from the agreed statements concerning art.4 (computer programs), art.5 (databases), and art.7 (rental rights).

technological development for a much more extensive and stronger protection.⁷⁴⁹ For instance, pursuant to art. 20 of the Berne Convention, the WCT has further entrenched the expansive scope of minimum standards for digital copyrighted works through the addition of making available right.⁷⁵⁰ As noted from the consistency requirement indicated in the Agreed statements, the WCT epitomizes a continuing momentum created under the TRIPs Agreement to consolidate and strengthen the protection of copyright in the digital environment.⁷⁵¹

Indeed, both WCT and WPPT have added another layer of protection called ‘para-copyright’ through their introduction of the rights against circumvention of TPMs and alteration or removal of rights management information (RMI).⁷⁵² While these technological measures have a far-reaching effect to frustrate or undermine the legitimate use of the existing flexibilities, states are left with the discretion to determine the legal means for their protection.⁷⁵³ The criteria of *adequacy* and *effectiveness* of the digital locks and their use for *legitimate rights* alone might offer some flexibilities. With regard to the flexibilities, the WIPO Internet Treaties emulate their respective predecessors in permitting or providing for set of general flexibilities. To this effect, Both WCT and WPPT allow states to provide for L&Es, subject to the all-encompassing three-step test inherited from the TRIPs Agreement.⁷⁵⁴

⁷⁴⁹ Okediji, “The Regulation of Creativity,” *supra* note 64 at 2388-91 (noting the in-built maximalist approach for an ever-increasing protection of authors’ right). See Ricketson, *The Berne Convention*, *supra* note 697 at 683-85; Berne Convention, *supra* note 439 at art. 20; Rome Convention, *supra* note 478 at art. 22 (stating states’ right to enter into special agreements ‘so far as such agreements grant more extensive rights....’).

⁷⁵⁰ WCT, *supra* note 448 at art. 8; see also WPPT, *supra* note 448 at arts. 10 & 14.

⁷⁵¹ See the Agreed Statements concerning the art. 4, 5 & 7 of the WCT; Okediji, “The Regulation of Creativity,” *supra* note 64 at 2393-95. While they can serve as source of interpretation for TRIPs Agreement, as Okediji notes, the provisions of the WCT are however not formally subject to the WTO dispute settlement mechanism. *Ibid* at 2394.

⁷⁵² WCT, *supra* note 448 at art. 11 & 12; WPPT, *supra* note 448 at art. 18 & 19.

⁷⁵³ Okediji, “The Regulation of Creativity,” *supra* note 64 at 2400-01; Jane Ginsburg, “Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience” (2005) 29 Columbia Journal of Law & Arts 11 at 20 [Ginsburg, “Legal Protection of Technological Measures”]. For example, outside copyright law, *sui generis* law or unfair competition law can be used to comply with the obligation.

⁷⁵⁴ WCT, *supra* note 448 at art 10; WPPT, *supra* note 448 at art. 16.

As elaborated above, all the general flexibilities pertaining to the subject matter and conditions of protection, term limits, and the three-step test would thus be applicable, *mutatis mutandis*, for the protection under the WIPO Internet Treaties. In contrast to their predecessors, the WIPO Internet Treaties make an explicit reference to and recognition of the need to *maintain balance* between the rights and *the public interest*, such as education, research and access to information in their preambles.⁷⁵⁵ In this sense, some flexibilities can be derived from a pro-development interpretation of the *notion of balancing* and *the public interest* along with a particular mention of education and research. To this end, a right-based human development perspective is useful to offer a flexible and inclusive normative tool for the balance sought to advance public interest. Further, as the relevant established rule of interpretation dictates,⁷⁵⁶ the aforementioned paragraphs in the preamble would be used to inform the interpretation and application of the substantive provisions. The policy space envisaged in the preambles is however undercut by the combined effect of the restrictive legal and pervasive technological mechanisms embedded in the substantive provisions.⁷⁵⁷

D. Flexibilities under the Marrakesh Treaty and the Beijing Treaty

As the first international copyright treaty on L&Es, the Marrakesh Treaty primarily deals with the various flexibilities that promote special class of users' access to copyrighted works. In fact, the Treaty remains distinct and historic due to (a) its provision of mandatory L&Es to the exclusive rights of copyright owners, and (b) its designation of print-disabled individuals as the beneficiaries.⁷⁵⁸

⁷⁵⁵ WCT, *supra* note 448 at Preamble, para 5; WPPT, *supra* note 448 at Preamble, para 4.

⁷⁵⁶ See Vienna Convention, *supra* note 161 at art.31(1) & (2). See Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed (Oxford: Manchester University Press, 1984) at 119-35.

⁷⁵⁷ Okediji, "The Regulation of Creativity," *supra* note 64 at 2400-2410. As Okediji remarks, "the WIPO Internet Treaties have considerably fell short [in their mission] to provide a relevant and credible source of norms to facilitate knowledge creation in the global digital context." *Ibid* at 2380; Gervais, *Restructuring Copyright*, *supra* note 702 at 55-56 (pointing out the reference to maintaining 'balance' as a 'rhetorical nod').

⁷⁵⁸ Helfer et al, *The World Blind Union Guide*, *supra* note 500 at xix.

Further, the Marrakesh Treaty is the sole copyright treaty that makes an explicit reference to international human rights instruments such as the UDHR and CRPD.⁷⁵⁹ From among a long list, it is worth noting that both human rights instruments make a specific mention of the right to education,⁷⁶⁰ and the right to participate in cultural life.⁷⁶¹ Adopted within the domain of international copyright system, the Treaty is useful for the realization of these fundamental rights, among others.⁷⁶² In this context, the Marrakesh Treaty is regarded as “an international agreement that employs the legal doctrines and policy tools of copyright to advance human rights ends.”⁷⁶³

While noting the importance of the prevailing economic justification,⁷⁶⁴ its embrace of the human rights approach to the copyright flexibilities marks a significant step towards human development. The Treaty is thus pivotal for (a) incorporation of basic principles of access and effective participation, and (b) its reference to the WIPO’s Development Agenda recommendations that reflect relevant flexibilities.⁷⁶⁵ Further, the Treaty’s acknowledgement of the need for a balance between the rights of authors and public interests, such as education, research and access to information, is another important aspect of general flexibilities.⁷⁶⁶ Quite relevant, the Treaty’s preamble refers to education

⁷⁵⁹ *Ibid* at 1, 15 & 21; Land, *supra* note 642 at 548-50; Marrakesh Treaty, *supra* note 497 at Preamble, para 1.

⁷⁶⁰ UDHR, *supra* note 7 at art. 26; CRPD, *supra* note 502 at art.24.

⁷⁶¹ UDHR, *supra* note 7 at art.27; CRPD, *supra* note 502 at art.30.

⁷⁶² Helfer et al, *The World Blind Union*, *supra* note 500 at 8-19. As observed by Helfer and others, the “overarching object and purpose” of the Marrakesh Treaty is “to promote the human rights of individuals with print disabilities by expanding access to copyrighted works.” *Ibid* at 13.

⁷⁶³ *Ibid* at xviii, 1 & 8-15. *See generally* Land, *supra* note 642.

⁷⁶⁴ Marrakesh Treaty, *supra* note 497 at Preamble, para 3.

⁷⁶⁵ *Ibid* at para 1&11.

⁷⁶⁶ *Ibid* at para 9.

both in the context of right and the larger public interest.⁷⁶⁷ Such an emphasis mirrors the weight attached to the importance of education and access to copyrighted works for its realization.

In its substantive part, the Marrakesh Treaty requires the contracting parties to provide for L&Es to the exclusive economic rights in order to facilitate the availability of works in accessible formats. The Treaty's requirement for mandatory L&Es, the provisions on cross-border exchange of accessible formats, and the restriction on the use of TPMs are key flexibilities that can be used to facilitate access to copyrighted learning materials.⁷⁶⁸ Nonetheless, the utilization of these flexibilities requires a state's compliance with its existing obligations under the international copyright regime. In particular, the implementation of the flexibilities is subject to the requirements of the three-step test drawn from the Berne Convention, TRIPs Agreement and the WCT.⁷⁶⁹ Given the human rights-oriented objectives of the Treaty, the broader interpretation of its three-step test may however offer states a better room to devise L&Es consistent with the Treaty's objectives.⁷⁷⁰ Outstanding are the Treaty's embrace of users' rights approach and its lesson for a future comprehensive approach to flexibilities. Nonetheless, its implementation still remains within the expansive international copyright framework.

From among recent treaties, the Beijing Treaty is a right-holders-oriented treaty intended to ensure the effective protection of rights of performers in the audiovisual works.⁷⁷¹ In a departure from its predecessors, the Treaty's preamble makes an explicit recognition of the importance of the WIPO

⁷⁶⁷ *Ibid* at para 2&9. The enjoyment of "the right to education and the opportunity to conduct research" are noted along with other rights for "the complete development of persons with visual impairments or with other print disabilities." *Ibid* at para 2.

⁷⁶⁸ *Ibid* at arts. 4, 5, 6, 7&9; Land, *supra* note 642 at 547; see Helfer et al, *The World Blind Union Guide*, *supra* note 500 at 38-66.

⁷⁶⁹ Helfer et al, *The World Blind Union Guide*, *supra* note 500 at 67-70. Marrakesh Treaty, *supra* note 497 at Preamble, para 10.

⁷⁷⁰ Helfer et al, *The World Blind Union Guide*, *supra* note 500 at 71-74. It is argued that a flexible application of the three-step test can further be informed by international human rights law, including art.30(3) of the CRPD that obligates states "to take all appropriate steps" to prohibit unreasonable or discriminatory barrier on access to cultural materials. *Ibid* at 73.

⁷⁷¹ See Beijing Treaty on Audiovisual Performances, 24 June 2012, 51 ILM 1211(2012), Preamble, para 1& 3[Beijing Treaty] (not in effect at the moment).

DA's recommendations and the need for maintaining a balance.⁷⁷² As regards the balance, the Treaty mimics the WPPT to underscore the need for a balance between the rights of performers and the larger public interest.⁷⁷³ In its substantive content, the Beijing Treaty allows contracting parties to provide for L&Es corresponding to those provided for literary and artistic works subject to the requirement of the three-step test.⁷⁷⁴

Therefore, the development-oriented interpretation and implementation of general flexibilities embodied in both treaties can be exploited to facilitate access to learning materials for tertiary education towards human development. In its integrative approach, the Marrakesh Treaty combines both the economic “incentive and reward” justification for right-holders and the “enhancement of “opportunities” for everyone.⁷⁷⁵ More resonant with the latter prong and quite instrumental for the effective use of the flexibilities, the CA-driven human development perspective offers a better normative and evaluative guidance than the utilitarianism underpinning narrow economic considerations. In fact, the CA is apt to embrace both aspects and frame the underpinning objectives in terms of capabilities for human development.

⁷⁷² *Ibid* at para 2. Silke von Lewinski, “The Beijing Treaty on Audiovisual Performances” (--) Max Plank Research Institute for Intellectual Property and Competition Law Research Paper No.13-08 at 8-9 (noting the limited impact but ‘symbolic value’ of the reference to the WIPO DA for developing countries).

⁷⁷³ Beijing Treaty, *supra* note 771 at para 5.

⁷⁷⁴ *Ibid* at art. 13.

⁷⁷⁵ Marrakesh Treaty, *supra* note 497 at Preamble, para 3.

4.3.2. *Specific Flexibilities for or Related to Tertiary Education*

Within the ambit of the general flexibilities explored above, there are flexibilities with a specific reference to education. In the same vein, there are other specific flexibilities that are quite related to education without an explicit mention of the term as a ground. Hence, below is an in-depth exploration of the relevant flexibilities under international copyright regime.

A. Utilization for Teaching Purposes

Given the compelling need for access to most copyrighted works for educational purposes, an exception to this end was long recognized in the Berne Convention. Despite its subsequent marginalization, promoting learning was in fact central to the very purpose of copyright upon its inception.⁷⁷⁶ Incorporated under Art.10(2) of the Berne Convention, the exception for the purpose of teaching is one of the most important specific flexibilities permitted for education. As such, the relevant part of the afore-cited article reads as follows:

It shall be a matter for legislation in countries of the Union...to permit the utilization, *to the extent justified by the purpose*, of a literary or artistic works *by way of illustration* in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is *compatible with fair practice* [emphasis added].

As is evident from the reading of this provision, it is up to a member state to formulate an exception that facilitates the utilization of copyrighted works for educational purpose in its jurisdiction within the permitted limit.⁷⁷⁷ In doing so, member state can thus design appropriate L&Es in a manner that promotes access to copyrighted learning materials for education at all levels.

⁷⁷⁶ See Myra Tawfik, "History in the Balance: Copyright and Access to Knowledge," in Michael Geist, ed, *From Radical Extremism to Balanced Copyright: Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 69 at 70-74[Tawfik, "History in the Balance"]; Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in the Eighteenth Century (1695-1775)* (Oxford: Hart publishing, 2004) at xxiv. Deazley notes "the encouragement and spread of education with the continued production of useful books" as an aspect of public interest that underpinned the Statute of Anne. *Ibid.*

⁷⁷⁷Ricketson, "WIPO Study on L & Es," *supra* note 156 at 14-15.

Embedded in the teaching exception are several flexibilities worth mentioning. First, the permitted utilization is applicable for all relevant works in publications, broadcasts and sound or visual recordings. In this respect, Ricketson & Ginsburg note the utilization to be technology-neutral whose scope can now encompass a digital fixation of works.⁷⁷⁸ In the same vein, the authors opine that the ambit of the embraced broadcast can extend to its public performance, *albeit* to the exclusion of distribution of a work and digital or on-demand transmissions.⁷⁷⁹ In terms of the categories of works, the exception is applicable to all works protected under the Berne Convention.⁷⁸⁰ Second, the references to ‘the extent justified by the purpose’ and ‘compatible with fair practice’ render the provision an open-ended and a flexible exception. There is no quantitative limitation, except for the restriction related to the words “by way of illustration.”⁷⁸¹ In addition to the flexible interpretation of the words ‘purpose’ and ‘fair practice’ as dictated by the relevant national context, commentators note that the restriction ‘would not exclude the use of the whole work in appropriate circumstances.’⁷⁸² As a result, multiple copies of a copyrighted work can be made for teaching purposes, subject to the qualification of ‘fair practice.’⁷⁸³

There still remains unclear whether or not the scope of the phrase “by way of illustration” is broad enough to allow the use of compilations (anthologies) or a course-pack consisting of book chapters.⁷⁸⁴ In this respect, the practice varies. For instance, some jurisdictions such the US and the UK

⁷⁷⁸ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 793.

⁷⁷⁹ *Ibid* at 794.

⁷⁸⁰ *Ibid* at 795.

⁷⁸¹ *Ibid* at 793-95; Ricketson, “WIPO Study on L & Es,” *supra* note 156 at 14.

⁷⁸² *Ibid* at 792 & 794. The contemplated circumstances may justify the use of an artistic work or a short literary work in its entirety. *Ibid* at 794.

⁷⁸³ Ricketson, “WIPO Study on L & Es,” *supra* note 156 at 15.

⁷⁸⁴ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 794.

adopt a licensing scheme to cover course-packs for higher education.⁷⁸⁵ In contrast, the recent jurisprudence in Canada and India allow the use of course-packs for the purpose of education under the liberal reading of a fair dealing exception.⁷⁸⁶ A much more liberal interpretation of the exception is imperative for education in the developing countries. As such, a development-oriented and context-based approach is important for the assessment of fairness to balance the interests of both authors and users. Third, the word ‘teaching’ is interpreted to encompass teaching at all levels and in all modes—classroom instruction, distance and online education as “there is no reason to exclude” the latter from its ambit.⁷⁸⁷ In a restrictive interpretation of the term, ‘teaching’ is noted to include a formal education in all educational institutions and universities excluding general teaching that takes place outside the institutions.⁷⁸⁸

Furthermore, as a specific exception provided in the Berne Convention, debatable is whether or not the teaching exception is subject to the requirements of the three-step test. Noting the requirement of ‘fair practice’ as a question left for the national tribunals to address, the first line of interpretation views the possible evaluation of the exception in light of the test.⁷⁸⁹ The other line of interpretation regards the exception as a self-contained and particular exception that is not subject to the curtailing effect of the three-step test.⁷⁹⁰ Bearing in mind the guiding significance of the jurisprudence on the test

⁷⁸⁵ Gervais, *Restructuring Copyright*, *supra* note 702 at 90-91.

⁷⁸⁶ *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37; *University of Oxford v. Rameshwari Photocopy Services (2016)* 2016 SCC OnLine Del 5128 (India); Okediji, “Creative Market and Copyright” *supra* note 707 at 35&39.

⁷⁸⁷ Ricketson & Ginsburg, *supra* note 713 at 792-93. Ricketson, *supra* note 36 at 15; Okediji, “International Copyright System” *supra* note 51 at 21.

⁷⁸⁸ Ricketson & Ginsburg (Vol. I), *supra* note 51 at 792-93.

⁷⁸⁹ *Ibid* at 793&858. Ricketson and Ginsburg argue that the reference to ‘compatible with fair practice’ may correspond to the second and third steps of the three-step test while its limited scope is regarded to be within the first step. *Ibid* at 858. Gervais, *(Re)structuring Copyright*, *supra* note 702 at 90-93 & 227-29. In order to determine the issue of ‘fair practice,’ Gervais opines that ‘a WTO panel is likely to apply a rule of reason compatible with the three-step test.’ *Ibid* at 93.

⁷⁹⁰ Okediji, “International Copyright System,” *supra* note 51 at 14; Chon, “Intellectual Property from Below,” *supra* note 50 at 843; Ricketson, “WIPO Study on L & Es,” *supra* note 156 at 21.

as found appropriate, I subscribe to the latter view. It is rightly argued that the superimposition of the three-step test upon a specific exception would rather entail a double restriction of the exception on top of the latter's an in-built limitation.⁷⁹¹ For a teaching exception with its own specific conditions, its further subjection to the three-step test would unduly narrow its scope and undermine the intended purpose of its contemplated flexibilities.⁷⁹²

According to Correa, the imposition of an additional scrutiny through the test upon an exception provided under the Berne Convention does not concur with the intention of the drafters and the literal meaning of art.13 of the TRIPS Agreement.⁷⁹³ In case an issue of compliance arises, Margaret Chon underscores the need to determine the alignment between art.10 (2) and the three-step test in the light of arts.7 &8 of the TRIPs Agreement that refer to development.⁷⁹⁴ In so doing, as Chon argues, it is important for a decision maker to consider the public policy behind the exception and defer to the country's stated purpose of promoting education for development.⁷⁹⁵

B. Quotation Exception

From among the specific flexibilities, relevant for educational purpose is the exception that allows quotation of copyrighted works for scholarship, review and criticism. As enshrined in the Berne Convention, the relevant part of art.10 (1) provides that "it shall be permissible to make quotations from a work which has already been lawfully made available to the public." As a basic and mandatory

⁷⁹¹ Geiger, Gervais & Senfleben, "The Three-Step Test Revisited," *supra* note 165 at 617-18(noting the restrictive effect of the test upon specific exceptions and limitations).

⁷⁹² Correa, *The Trade Related Aspect*, *supra* note 137 at 145; Pamela Samuelson, "The US Digital Agenda at WIPO" (1997) 37 Va J Intl L 369 at 370 & 402-03.

⁷⁹³ Correa, *Trade Related Aspects*, *supra* note 137 at 139.

⁷⁹⁴ Chon, "Intellectual Property 'from Below,'" *supra* note 50 at 843; Andres Moncayo von Hase, The Application and Interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights, in Carlos M. Correa & Abdulqawi A. Yusuf eds., *Intellectual Property and International Trade: The TRIPS Agreement* (The Netherlands: Kluwer, 1998) 93 at 134.

⁷⁹⁵ Chon, "Intellectual Property 'from Below,'" *supra* note 50 at 844.

exception to exclusive rights, quotation is integral to several intellectual activities, including for ‘scientific, critical, informatory and educational purposes’⁷⁹⁶ In addition to the *lawful availability of a work to the public* by ‘any means,’ including a compulsory licensing,⁷⁹⁷ the operation of the exception is further required to be “compatible with fair practice” and limited to the extent “justified by the purpose.”⁷⁹⁸ In the absence of a quantitative limit, commentators observe that ‘an objective appreciation’ of the purpose is determinant for a compliance with ‘fair practice’ although the length of the quotation is still relevant for the assessment.⁷⁹⁹ In fact, the word ‘fair practice’ itself is a flexible concept that remains subject to a judicial determination.⁸⁰⁰

In principle, quotation is deemed a self-contained exception.⁸⁰¹ Nevertheless, the determination of the fairness criterion may draw on a jurisprudence related to the three-step test’s requirements of non-conflict with normal exploitation and absence of unreasonable prejudice with author’s legitimate interests.⁸⁰² The requirement of ‘the extent justified by purpose’ is also flexible as its determination depends upon the purpose that necessitates the quotation. For instance, a lengthy quotation could remain compatible both with ‘fair practice’ and the ‘purpose’ if its use is sought for a critical review or work of scholarship.⁸⁰³ In sum, three points are worth noting in relation to its interpretation. First, the quotation exception is applicable for all kinds of use, work and exclusive rights in the absence of a

⁷⁹⁶ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 785-86.

⁷⁹⁷ *Ibid* at 785& 786. That is, its scope is not limited only to copies of the works made available, but also extends to the public performance or broadcast of dramatic or musical works. *Ibid* at 785.

⁷⁹⁸ Berne Convention, *supra* note 439 at art. 10(1).

⁷⁹⁹ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 786&788.

⁸⁰⁰ *Ibid*

⁸⁰¹ Okedji, “International Copyright System,” *supra* note 51 at 14.

⁸⁰² Ricketson & Ginsburg (Vol. I), *supra* note 713 at 786-88.

⁸⁰³ *Ibid*.

restriction to suggest otherwise.⁸⁰⁴ Second, there is no limitation on the length of quotation. Subject to the requirements, a quotation of the whole work may thus be justifiable in some circumstances.⁸⁰⁵ Third, the exception is mandatory in its character and is an exception “that comes closest to embodying a ‘user right’ to make quotations.”⁸⁰⁶

C. Compulsory Licensing including the Berne Appendix

For the exploitation of exclusive economic rights, voluntary licensing is a rule integral to the freedom of the right holder. In most cases, this freedom or mode of exploitation is exercised through the active role of collective management organizations (CMOs).⁸⁰⁷ Nonetheless, the exploitation of the economic rights through the licensing scheme is subject to the existence of a relevant market as well as an efficient and effective CMOs. Due to a market failure, lack of efficient CMOs, or the abusive use of the copyright, a compulsory licensing may be granted without the consent of the right holder in order to serve the public interests.⁸⁰⁸ Justified on the ground of public interest, compulsory licensing is thus an important form of copyright flexibilities relevant for tertiary education. In addition to the uncompensated statutory exceptions for teaching, quotation, press usage and news reporting,⁸⁰⁹ the international copyright regime incorporates few instances of a statutory compulsory licensing with an equitable remuneration.

⁸⁰⁴ *Ibid* at 786 & 788; Okediji, “International Copyright System,” *supra* note 51 at 13. In concert to other limitations under the Berne convention, Okediji observes that “Article 10(1) is not limited by prescribed uses—quotations may be made for any purpose so long as they are done within the stipulated context (citation omitted).” *Ibid*.

⁸⁰⁵ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 788. From among the various uses, the quotation exception can be used liberally for ‘books reviews, criticism and news commentary. Okediji, “International Copyright System” *supra* note 51 at 13.

⁸⁰⁶ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 788-89; Goldstein & Hugenholtz, *supra* note 157 at 392.

⁸⁰⁷ See Gervais, *Restructuring Copyright*, *supra* note 702 at 237-56.

⁸⁰⁸ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 844-47.

⁸⁰⁹ Hugenholtz & Okediji, “Contours”, *supra* note 27 at 480. In most jurisdictions, national exception for private use is also regarded as an instance of a statutory compulsory license without remuneration. Okediji, “Sustainable Access” *supra* note 721 at 147-52.

For instance, the Berne Convention permits a compulsory licensing with an equitable remuneration for the broadcast of literary and artistic works, recording of musical works and making of a cinematographic works.⁸¹⁰ For the operation of the compulsory licenses often regarded as statutory licenses, the required equitable remuneration may be fixed in the relevant legislation or its determination might be entrusted to a competent authority.⁸¹¹ As commentators note, a compulsory license related to broadcasts is underpinned by public interest considerations.⁸¹² Despite its limited practical utility and subject to the overdue reform, the Berne Appendix is a special compulsory licensing scheme designed for educational purposes in developing countries.

Intended to facilitate a bulk access to copyrighted materials, the Berne Appendix—now integral to the TRIPs Agreement and WCT—imposes a limitation on the reproduction and translation rights of authors under certain conditions for teaching, scholarship and scientific research purposes. Nonetheless, the utilization of the compulsory licensing is subject to both an equitable remuneration and a compliance with set of complex procedures, including notification requirement.⁸¹³ From among the cumbersome conditions, the major conditions under the Appendix are:⁸¹⁴ (a) a long waiting period of three to seven years, with a further grace period, (b) the need for a competent authority to issue the license, and (c) the restriction on parallel imports and the translation license, and (d) the limitation of the license to use in connection with systematic instructional activities. The use of Berne Appendix is

⁸¹⁰ Berne Convention, *supra* note 439 at art.11*bis*, 13 & 14 *bis* 2(b). Guide to the Berne Convention, *supra* note 466 at 70 &79-80 & Michael Freegrad, “The Berne Convention, Compulsory Licensing and Collecting Societies” (1986) 11 Columbia-VLA Journal of Law and the Arts 137 at 140-42; Okedji, “International Copyright System” *supra* note 20 at 14-15 & 20. For detailed discussions, see Ricketson & Ginsburg, *supra* note 51 at 808-24.

⁸¹¹ See Carlos Correa, “Intellectual Property Rights and the Use of Compulsory Licenses: Options for Developing Countries” (1999) South Centre Working Paper No.5 at 4-5; Guide to the Berne Convention, *supra* note 466 at 70 & 80.

⁸¹² Ricketson & Ginsburg (Vol. I), *supra* note 713 at 819 (pointing out the emphasis placed upon the educational and informatory role of broadcasting).

⁸¹³ Okediji, “International Copyright System” *supra* note 51 at 15-16; Okediji, “Sustainable Access” *supra* note 721 at 162-69 &177-78; Chon, “Intellectual Property from Below” *supra* note 50 at 829-35; Gervais, *Restructuring Copyright*, *supra* note 702 at 43-46.

⁸¹⁴ Berne Appendix to Paris Act (1971), *supra* note 439 at arts. I-IV; Gervais, *Restructuring Copyright*, *supra* note 702 at 341-44; Okediji, “Sustainable Access,” *supra* note 721 at 163-69.

limited due to the high transaction costs arising from its complex requirements and the unaffordable equitable remuneration required. Hence, the Berne Appendix is critiqued for its failure to achieve its intended purpose of facilitating a bulk access to learning materials and for its arguable exclusion of ‘private study, research and distance education.’⁸¹⁵ Subject to the practical limitations, the Berne Appendix and other instances of compulsory licensing schemes constitute part of the relevant flexibilities.⁸¹⁶

D. The Principle of Exhaustion and Parallel Importation

Developed in the first decade of the 20th century, the principle of exhaustion is known as the “first-sale” doctrine in the U.S or the doctrine of exhaustion in other jurisdictions.⁸¹⁷ In facilitating the distinct economic exploitation of tangible and intangible property, the principle of exhaustion serves as “a public policy tool that limits an economic exploitation of intellectual property rights following the first lawful transfer of a physical object in which the intellectual property is embodied, unless otherwise prescribed in the law.”⁸¹⁸ As its regulation lies within the ambit of a state’s discretion, the application of the principle remains an important aspect of the relevant flexibilities.⁸¹⁹ Noted as the exhaustion of an author’s exclusive economic rights to the copies of a copyrighted work after their lawful sale (with the

⁸¹⁵ Okediji, “International Copyright System” *supra* note 51 at 15-16 &29; Okediji, “Sustainable Access” *supra* note 721 at 162-69; Chon, Intellectual Property ‘from Below’, *supra* note 50 at 829&835; Susan Isiko Strba, *International Copyright Law and Access to Education in Developing Countries: Exploring Multilateral Legal and Quasi-Legal Solutions* (Leiden: Martinus Nijhoff, 2012) at 203–240.

⁸¹⁶ Okediji, “International Copyright System,” *supra* note 51 at 19; Okediji, “Sustainable Access” *supra* note 721 at 166-68.

⁸¹⁷ Jeremy de Beer & Robert Tomkowicz, “Exhaustion of Intellectual Property Rights in Canada” (2009) 25 CIPR 3 at 6.

⁸¹⁸ *Ibid* at 7(citation omitted).

⁸¹⁹ Okediji, “Creative Markets and Copyright,” *supra* note 707 at 24; see Peter Mezei, *Copyright Exhaustion: Law and Policy in the United States and the European Union* (Cambridge: Cambridge University Press, 2018) at 6-58.

author's consent), the principle allows the resale or transfer of the copies without further authorization.⁸²⁰

Although the application of the principle may encompass any potential 'use' of the material object or copies transferred,⁸²¹ most common is the exhaustion of the distribution right of an author in respect of the lawful copies sold.⁸²² In terms of its geographical scope of application, the principle of exhaustion can operate as a domestic/national, regional and international exhaustion. The national principle of exhaustion is applicable for copyrighted works first sold on the national market to allow their further unimpeded distribution or use within that jurisdiction.⁸²³ As a result, the application of national exhaustion precludes parallel imports of copyrighted works without authors' consent to the detriment of the users or consumers. In jurisdictions that prohibit parallel importation, right holders derive an additional economic benefit from the practice of price discrimination through market segregation across nations based on the variance in the demand and purchasing power.⁸²⁴

In contrast, the application of the regional exhaustion exhausts authors' distribution right over the resale or alienation of the copies throughout the jurisdictions of all the states that constitute the regional union or regional market.⁸²⁵ For instance, the principle of regional exhaustion has been central to the EU's internal market founded on free movement of goods.⁸²⁶ Clarified in its recent jurisprudence

⁸²⁰ Goldstein & Hugenholtz, *supra* note 157 at 311. For its application in the digital environment, as the emerging jurisprudence in the EU indicates, the principle of exhaustion covers *both tangible and intangible copies* of works, such as computer programs. Mezei, *supra* note 819 at 94-98; Ricketson & Ginsburg (Vol. I), *supra* note 713 at 658.

⁸²¹ de Beer & Tomkowicz, *supra* note 817 at 7-8. Nonetheless, the scope of the principle may be limited for copyrighted works by a statute that can exclude uses such as rental, lease and lending of certain works including computer programs or in the case of a patent, an act of making the invention that corresponds to a reproduction right in a copyright. *Ibid* at 8-9.

⁸²² *Ibid*. In contrast to art.6 of the WCT, it should be noted that there is no general recognition of the distribution right in the Berne Convention. Ricketson & Ginsburg (Vol. I), *supra* note 713 at 659, 666 & 694.

⁸²³ *Ibid*. Frederick Abbot, Thomas Cottier & Francis Gurry, *International Intellectual Property in an Integrated World Economy* (New York: Aspen Publishers, 2007) at 513.

⁸²⁴ *Ibid*.

⁸²⁵ *Ibid*.

⁸²⁶ See Domenico Sindico, "On Parallel Importation, TRIPs and European Court of Justice Decisions" (2002) 5:4 *The Journal of World Intellectual Property* 505-516; Correa, *Trade Related Aspects*, *supra* note 137 at 79. de Beer & Tomkowicz, *supra* note 817 at 10-11.

related to a copyright over textbooks,⁸²⁷ the U.S has adopted the principle of international exhaustion that facilitates the global distribution of the protected copies once the works are put on a market by or with the consent of the right-holder.⁸²⁸ Central to regional and international exhaustion, it is thus crucial for developing nations to utilize unimpeded parallel imports and benefit from the consequent price reduction through competition.⁸²⁹ In general, the principle of exhaustion is important to “create secondary markets for used knowledge goods.”⁸³⁰ In so doing, it promotes a competition that in turn enables consumers or users to purchase the knowledge goods such as learning materials at a lesser price.⁸³¹

From the international copyright legal regimes, the incorporation of principle of national exhaustion is argued to be implicit in the Berne Convention due to the underpinning principle of territoriality. Further, the relevant provisions on the seizure of infringing copies and sound recordings imported without a permission as well as the prohibition of exportation of copies made under the Berne Appendix are cited to corroborate the argument while several countries dispute this assertion in the absence of an explicit obligation.⁸³² In contrast, art.6 (2) of the WCT, art.12 (2) and art.6 of the TRIPs Agreement make an explicit mention of the principle without imposing an obligation to regulate it. In particular, the TRIPs Agreement leaves member states the discretion to adopt the principle of exhaustion with a geographical reach of their choice. Except in the context of the principles of non-

⁸²⁷ *Kistaeng v. John Wiley & Sons, Inc.*, 568 U.S.---133 S.Ct. 1351(2013); Shubha Gosh, “The Implementation of Exhaustion Policies: Lessons from National Experiences” (2013) International Centre for Trade and Sustainable Development Issue Paper No.40 at 21-23.

⁸²⁸ Gervais, *TRIPs Agreement*, *supra* note 724 at 199.

⁸²⁹ Mezei, *supra* note 819 at 21. See Gervais, *TRIPs Agreement*, *supra* note 724 at 198-201.

⁸³⁰ See Okediji, “International Copyright System” *supra* note 51 at 2; Okediji, “Creative Markets and Copyright” *supra* note 707 at 24.

⁸³¹ Ruth Anthony Reese, “The First Sale Doctrine in the Era of Digital Networks” (2003) 44 Boston College L Rev 577 at 585-89. For consumers, affordable retail price competition, secondary markets, rental markets and public lending are the benefits that drive from the application of the principle of exhaustion. *Ibid*.

⁸³² Gervais, *TRIPs Agreement*, *supra* note 724 at 200. The relevant provisions cited in this regard are art.16 on seizure of infringing copies despite its lawful nature in the country of importation, art.13(3) on the seizure of sounding recordings imported without permission and art. IV(4)(a) of the Berne Appendix. In contrast, there is no explicit provisions of this sort nor is there a specific provision on the principle under other copyright treaties. *Ibid* at 201.

discrimination, the issue of the exhaustion is not subject to the dispute settlement under the Agreement.⁸³³

In terms of its economic benefit, the reserved policy space is thus very critical for developing countries to adopt an international exhaustion that facilitates importation of relevant learning materials for education.⁸³⁴ In adopting international exhaustion, developing countries can provide for specific legal provisions permitting parallel imports in order to enjoy the benefit of consumer choice and lower prices from the application of the principle.⁸³⁵ Nonetheless, its extension to works in the digital environment is still not settled and needs a careful policy consideration.⁸³⁶

E. Regulation of Anti-competitive Practices for Bulk or Affordable Access

Intended to foster a fair competition, a reasonable restraint on the exclusive rights is relevant both for a follow-on creative innovation and tertiary education. Premised upon the existence of a market for the works, a regulatory measure related to anti-competitive practices can be used as an instrument to facilitate an affordable access to learning materials for educational purposes. In this regard, member states were left with the freedom to regulate anticompetitive practices or abuses of monopoly under the Berne Convention.⁸³⁷ An explicit introduction of the measure was later made

⁸³³ TRIPs Agreement, *supra* note 163 art.6; Correa, *Trade Related Aspects*, *supra* note 137 at 69. Nonetheless, the application of the preferred principle of exhaustion is subject to the non-discriminatory principles (art.3& 4) under the Agreement. In the Doha declaration on Public Health, the principle of international exhaustion has been confirmed to enable member states to benefit from the flexibilities with regard to patents. *Ibid* at 80 &86.

⁸³⁴ Okediji, “Creative Markets and Copyright,” *supra* note 707 at 31. As Okediji notes, the principle ‘plays a critical role in the overall architecture of copyright law by ensuring that secondary markets of lower-cost copyrighted goods remain available to the consuming public.’ *Ibid*. Chon, “Intellectual Property from Below” *supra* note 50 at 839.

⁸³⁵ Correa, *Trade Related Aspects*, *supra* note 137 at 86-89. Gervais, *TRIPs Agreement*, *supra* note 724 at 200.

⁸³⁶ Okediji, “Creative Markets and Copyright” *supra* note 707 at 28-31. In the absence of an action to adapt the principle to the digital environment, Okediji observes that “the gradual shift to digital content distribution threatens the vitality of exhaustion and its concomitant benefits.” *Ibid* at 31.

⁸³⁷ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 844-47.

through the TRIPs Agreement within the framework of a trade regime.⁸³⁸ It is noted that regulation of anti-competitive practices is not an exception or limitation internal to the international copyright system.⁸³⁹ In effect, the regulatory action is not subject to the three step test that is intended to serve as a general rule for L&Es internal to the copyright system.⁸⁴⁰

As a public policy that lies within the ambit of competition law and that marks the latter's interface with copyright system, the regulation of the anti-competitive practice is called for and intended to prevent the abusive action of the exclusive rights.⁸⁴¹ Noted within the framework of the basic principle under art.8(2) of the TRIPs Agreement that allows the adoption of measures intended to prevent abuses of IPRs, developing countries with strong domestic competition law and policy may exploit the flexibility in regulating anti-competitive practices related to copyright.⁸⁴² In the digital environment, the regulatory measure on this ground can include the prevention or restricted use of technological controls that inhibits a legitimate access to learning materials.⁸⁴³

Further, adhesive and restrictive contractual terms such as click-wrap agreements that are intended to limit a lawful use of copyrighted works may constitute anti-competitive practice in the digital environment.⁸⁴⁴ In particular, a concern relates to licensing agreements for software that prevent reverse-engineering or use of non-copyrightable aspects of the software.⁸⁴⁵ In general, art.40 of the

⁸³⁸ TRIPs Agreement, *supra* note 163 at art.40.

⁸³⁹ Goldstein & Hugenholtz, *supra* note at 157 at 403-05.

⁸⁴⁰ Okediji, "International Copyright System, *supra* note 51 at 14.

⁸⁴¹ *Ibid.*

⁸⁴² Okediji, "International Copyright System," *supra* note 51 at 33.

⁸⁴³ *Ibid.*

⁸⁴⁴ See generally Nathan Davis, "Presumed Assent: The Judicial Acceptance of Click-wrap" (2007) 22 BTLJ 577; Dale Clapperton & Stephen Corones, "Unfair Terms in 'Click-wrap' and Other Electronic Contracts" (2007) 35 Austl Bus L Rev 156.

⁸⁴⁵ Okediji, "International Copyright System" *supra* note 51 at 17.

TRIPs Agreement is an enumerative list. Thus, similar anti-competitive practices can be invoked to restrict an excessive impediment against access.⁸⁴⁶ As the relevant jurisprudence evolving elsewhere indicates, refusal to license on reasonable terms, excessive pricing and price fixing might constitute anti-competitive practices to justify the grant of a compulsory license, subject to an equitable remuneration.⁸⁴⁷ It is argued that the effective use of art.40 of the TRIPs Agreement may serve the purpose of facilitating bulk access to copyrighted materials for educational purposes.⁸⁴⁸

Nonetheless, the potential benefits of the flexibilities related to anti-competitive practice are quite limited in the context of developing countries. First, there is lack of a robust competition policy and strong judicial systems in developing countries.⁸⁴⁹ Second, it is difficult to satisfy the product market requirement that requires the availability of substitute goods for the copyrighted works with a monopoly price relative to the market.⁸⁵⁰ In fact, the main problem in most developing countries is the unavailability or lack of affordable access to copyrighted works on the market due to low purchasing power and infrastructural problems that are further exacerbated by stringent copyright protection.⁸⁵¹

As for works in the digital environment that are available online, the access to the works is further precluded due to technological controls.⁸⁵² Further, access to internet and computers are among the infrastructural barriers against access to the relevant learning materials available online in digital

⁸⁴⁶ *Ibid.* Correa, *Trade Related Aspects*, *supra* note 137 at 398-404.

⁸⁴⁷ Correa, *Trade Related Aspects*, *supra* note 137 at 399. Ricketson & Ginsburg, *supra* note 51 at 846-47; For a jurisprudence on refusal to license as a form of anti-competitive practices, see *Joined Cases C-241/91 P radio Telefis Eirean and Independent Television Publications Ltd v. EC Commission* [1995] ECR I-743, [1995] All ER (EC) 4161;

⁸⁴⁸ Okediji, "International Copyright System" *supra* note 51 at 16-19. Its potential to facilitate a bulk access is however subject to the existence of a robust competition policy and law with competent enforcement authorities both of which are often missing in the developing countries. *Ibid* at 17-18.

⁸⁴⁹ *Ibid* at 16-18.

⁸⁵⁰ *Ibid* at 33.

⁸⁵¹ *Ibid* at 17-18&33; Chon, "Intellectual Property from Below" *supra* note 50 at 821-28.

⁸⁵² Okediji, "International Copyright System" *supra* note 51 at 17-18.

formats for users and educators. From reasons related to copyright, an actual access to, and the acquisition of, the digital learning materials are thus restricted due to digital locks and exorbitant price or subscription fees. The cumulative effect of these factors generates anti-competitive practices that stifle a robust competition to the detriment of the users or potential consumers.

F. Exception for Library and Archival Uses

In addition to their mission of collecting, preserving and disseminating knowledge, the role of libraries and archives is critical for educational purposes.⁸⁵³ In particular, in developing countries with a limited access, libraries are instrumental for their facilitative or enabling access to learning materials.⁸⁵⁴ In this context, although there is no explicit exception for library and archival uses under the Berne Convention, the exception can be justified both within the broad context of educational purposes and the three-step test under art.9(2) of the Convention and art.13 of the TRIPs Agreement.⁸⁵⁵ Indeed, the increasing role of libraries and the lack of explicit L&Es in the international copyright regime are among the major reasons for the ongoing WIPO's consideration of the L&Es for libraries, archives and museums.⁸⁵⁶ It is indisputable that an explicit exception that facilitates the role of library and archives is crucial to complement the relevant flexibilities for tertiary education. In the meantime, the three-step test in the light of art.7 & 8 of the TRIPs can be used to provide for appropriate flexibilities that facilitate access to copyrighted learning materials for promoting, *inter alia*, tertiary education towards development.

⁸⁵³ Okedij, "International Copyright System" *supra* note 51 at 22.

⁸⁵⁴ Bannerman, *supra* note 718 at 75-76. Armstrong et al, *Access to Knowledge in Africa*, *supra* note 178 at 324 & 335-36;

⁸⁵⁵ *Ibid.* Ricketson & Ginsburg (Vol. I), *supra* note 713 at 783; Geiger, Gervais & Senftelben, "The Three-Step Test Revisited," *supra* note 165 at 617.

⁸⁵⁶ Bannerman, *supra* note 718 at 75-77.

In conclusion, the effective operation of the aforementioned flexibilities in the form of L&Es such as the exceptions for educational and quotation purposes depend upon the availability of access to the protected works. For digital learning materials, the implementation of anti-circumvention of TPMs is a challenge that undermines the flexibilities due to its indiscriminate impediment of access to the works even for the legitimate uses. As Okediji observes, this challenge can be overcome through a permitted circumvention of the TPMs in order to allow an access to relevant digital copyrighted materials.⁸⁵⁷ This observation is in line with the Agreed statement to the WCT/WPPT that emphasizes member states' freedom to "devise new L&Es that are appropriate in the digital network environment."⁸⁵⁸ For works in the digital environment, "developing countries should carefully consider what new limitations and exceptions are needed to encourage access to digital works in a manner consistent with identified development goals and the general public interest."⁸⁵⁹ For example, Okediji suggests the formulation of an exception that allows the circumvention of technological controls to facilitate access to and use of works for educational or personal purposes.⁸⁶⁰ Under the TRIPs Agreement, member states are free to prevent anti-circumvention measures as it is not subject to the Agreement.⁸⁶¹

4.3.3. The Three-Step Test: A Flexibility and Parameter for Flexibilities?

As noted above, the emergence of the three-step test dates back to the revision of the Berne Convention at Stockholm in 1967. With the advent of the TRIPs Agreement, its initial application for a reproduction right under the Convention was further expanded in its reach to encompass all exclusive

⁸⁵⁷ Okediji, "International Copyright System" *supra* note 51 at 33. Gervais, *Restructuring Copyright*, *supra* note 702 at 222-23.

⁸⁵⁸ Okediji, "International Copyright System" *supra* note 51 at 33.

⁸⁵⁹ *Ibid.*

⁸⁶⁰ *Ibid* at 27 & 33.

⁸⁶¹ Correa, *Trade Related Aspects*, *supra* note 137 at 35.

economic rights both within the international copyright and the IP regimes as a whole. In the international copyright regime, the test has been seen as an overarching principle for L&Es under all subsequent copyright treaties and the TRIPs Agreement. In the aftermath of its entrenchment in the TRIPs Agreement for all exclusive economic rights, the three-step test has made its way into the WIPO Internet Treaties, the Marrakesh Treaty, and the Beijing Treaty. Given its vague construction, the three-step test tends to entail a double-edged effect of enabling and limiting the utilization of relevant flexibilities. In particular, the application of the test has a significant implication both for tertiary education and creative innovation in the context of access to copyrighted materials. In order is thus the exploration of the test and its dual functions for the domestic utilization of the relevant flexibilities.

A. The Content of the Three-Step Test

In its extensive embodiment of the test, art.13 of the TRIPs Agreement that enshrines the three steps reads as follows:

Members shall confine limitations and exceptions to exclusive rights to *certain special cases* which do *not conflict with a normal exploitation of the work* and do *not unreasonably prejudice the legitimate interest* of the right holder [emphasis added].

i. Certain Special Cases

As the first condition of the test, the wording ‘certain special cases’ has been interpreted to require a clear delineation of limitation or exception under the national legislation.⁸⁶² In its interpretation of the step, the WTO Panel emphasized the term ‘certain’ to include an exception whose scope is ‘known and particularized’ in order to ‘guarantee a sufficient degree of legal certainty.’⁸⁶³ The WTO Panel has also interpreted the term ‘special’ as an additional requirement on the defined

⁸⁶² *Ibid* at 151. See also WTO Report of the Panel WT/DS160/R of 15 June 2000 on *United States-Section 110(5) of the US Copyright Act*, para 6.108-109.

⁸⁶³ WTO Panel, *supra* note 862 at para 6.109.

exception to be “limited in its field of application or exceptional in its scope.”⁸⁶⁴ That is, the exception ‘should be narrow in a quantitative as well as qualitative sense.’⁸⁶⁵ In contrast to the Panel’s dictionary meaning approach, Ricketson noted ‘special’ to mean an exception with a purpose and public policy justification.⁸⁶⁶ In the recent edition of their joint commentary, Ricketson and Ginsburg interpret the condition to endorse exceptions that are “finite and limited in scope.”⁸⁶⁷ Despite the disputed open-ended U.S fair use exception’s compliance with the condition,⁸⁶⁸ most purpose-specific exceptions such as private uses, and uses for research and scholarship are considered to meet the condition as certain special cases.⁸⁶⁹

ii. Not Conflict with a Normal Exploitation

As noted in the WTO Panel’s interpretation of this condition, the condition of the test derives its meaning from the words ‘exploitation’ and ‘normal.’ As obvious as it appears, the term ‘exploitation’ is understood as copyright owners’ use of the exclusive rights “to extract economic value from their rights to those works.”⁸⁷⁰ That is, the exploitation of the work covers any use intended to maximize the value of the rights.⁸⁷¹ The term ‘normal’ which, *inter alia*, means ‘regular’ or ‘conventional’ is noted

⁸⁶⁴ *Ibid* at para 6.109. The WTO Panel indicated the interpretation to suggest ‘a narrow scope as well as an exceptional or distinctive objective.’ *Ibid*.

⁸⁶⁵ Correa, *Trade Related Aspects*, *supra* note 137 at 151.

⁸⁶⁶ Ricketson, *The Berne Convention*, *supra* note 697 at 482.

⁸⁶⁷ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 767.

⁸⁶⁸ Gervais, *Restructuring Copyright*, *supra* note 702 at 64-66. For instance, Okediji points out the apparent inconsistency between fair use and the test. Ruth Okediji, *Towards International Fair Use Doctrine* (2000) 39 *Columbia Journal of Transnational Law* 75[Okediji, “Towards International Fair Use Doctrine”]. In contrast, Correa points out its possible compliance with the test. Correa, *Trade Related Aspects*, *supra* note 137 at 146-8; In a recent work, Geiger, Gervais and Senftleben, suggest the fair use to be ‘seen as three steps forming a whole’ to justify a legislative approach of using open-ended exceptions and limitations. Geiger, Gervais & Senftleben, *The Three-Step Test Revisited*, *supra* note 165 at 581-626.

⁸⁶⁹ Gervais, *Restructuring Copyright*, *supra* note 702 at 64; Goldstein & Hugenholtz, *supra* note 157 at 380-83; Ricketson & Ginsburg (Vol. I), *supra* note 713 at 766; Jane Ginsburg, “Towards Supranational Copyright Law? The WTO Panel: Decision and the ‘Three-Step Test’ for Copyright Exceptions” (2001) 187 *RIDA* 3.

⁸⁷⁰ WTO Panel, *supra* note 862 at 44.

⁸⁷¹ Ficsor, *The Law of Copyright*, *supra* note 747 at section 5.56.

to reflect two possible connotations—empirical nature and normative standard.⁸⁷² The phrase ‘normal exploitation’ is thus interpreted to include both current forms of exploitation with tangible revenue and “those forms of exploitation which have acquired, or could acquire considerable economic or practical importance.”⁸⁷³ According to this line of interpretation, an exception or limitation interferes with the normal exploitation of the exclusive economic rights when it entails *an economic competition* with the owners and deprives them of *significant* market or commercial gains.⁸⁷⁴

Thus, as the WTO Panel has made it clear, not all uses of the work covered by the scope of exclusive rights and that involve commercial gains would necessarily lead to a conflict with the normal exploitation requirement.⁸⁷⁵ In addition to the covered uses but that fall below the threshold, uses such as private use or uses for non-commercial research seem to pass muster under the condition.⁸⁷⁶ An economic competition with an owner and the consequent loss of significant commercial gains are determinative of the condition.⁸⁷⁷ Once found, a violation of the condition warrants the proscription of an exception.⁸⁷⁸ The overriding economic considerations of the step tend to make it an issue of less importance in countries without a significant commercial exploitation or in those with a market failure

⁸⁷² Gervais, *Restructuring Copyright*, *supra* note 702 at 66; Ricketson & Ginsburg (Vol. I), *supra* note 713 at 768-69; WTO Panel, *supra* note 862 at para 6.178-80; Ficsor, *The Law of Copyright*, *supra* note 747 at 285.

⁸⁷³ WTO Panel, *supra* note 862 at para 6.180. Ricketson & Ginsburg (Vol. I), *supra* note 713 at 769.

⁸⁷⁴ WTO Panel, *supra* note 862 at para 6.183; The consideration of both actual and potential impacts of an exception or limitation was emphasized in the ruling. *Ibid* at para. 6.183-84; Gervais, *Restructuring Copyright*, *supra* note 702 at 67; Ficsor, *The Law of Copyright*, *supra* note 747 at 516.

⁸⁷⁵ WTO Panel, *supra* note 862 at para 6.182.

⁸⁷⁶ Gervais, *Restructuring Copyright*, *supra* note 702 at 88-89 & 213; Ricketson & Ginsburg (Vol. I), *supra* note 713 at 779-82.

⁸⁷⁷ See Gervais, *Restructuring Copyright*, *supra* note 702 at 67; Goldstein & Hugenholtz, *supra* note 157 at 378; Ficsor, *The Law of Copyright*, *supra* note 747 at 516;

⁸⁷⁸ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 773 (pointing out the interference with the normal exploitation, both economic and non-economic, as the end of the matter and a sufficient ground for prohibiting an exception).

due to users inability to pay.⁸⁷⁹ In some cases, this market situation may be relied upon to justify a liberal application of the flexibilities to facilitate the non-commercial use of copyrighted materials for education and scientific research.⁸⁸⁰

Given the WTO Panel's emphasis on the economic aspect in its interpretation of the test, Ricketson and Ginsburg point out the unaddressed issue of non-economic normative considerations. Noting the existing exceptions with strong non-economic normative aspects, the commentators suggest taking a contextual treaty interpretation to embrace both economic and non-economic normative considerations.⁸⁸¹ In this respect, Ricketson and Ginsburg draw attention to the overriding non-economic normative aspect of the public policy-driven exceptions such as free speech, education and scholarship.⁸⁸² Indeed, their interpretation seems to be premised upon the application of the three-step test to all other exceptions to the reproduction right. That is, the non-economic normative considerations of exceptions or limitations subject to the three-step test should be given a due weight in the evaluation of the second condition that animates an economic justification.⁸⁸³

It is argued that the inclusion of the non-economic normative considerations is useful to offer a more flexible policy space to accommodate public interests within the stated objective of the Berne Convention.⁸⁸⁴ Inherent in the notion of public interest and development objectives contemplated in the TRIPs Agreement, the non-economic normative considerations should take into account relevant

⁸⁷⁹ Foster, *supra* note 46 at 305-06; see Wendy Gordon, "Fair Use as a Market Failure: A structural and Economic Analysis of the Betamax and Its Predecessors" (1982) 82 Colum L Rev 1600 at 1614-21[Gordon, "Fair Use"]; Gervais, *Restructuring Copyright*, *supra* note 702 at 71.

⁸⁸⁰ See Gervais, *Restructuring Copyright*, *supra* note 702 at 88-93.

⁸⁸¹ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 771-72.

⁸⁸² *Ibid* at 772-73.

⁸⁸³ *Ibid* at 772.

⁸⁸⁴ *Ibid* at 772-773. It is also noted that 'normal exploitation' is of no guidance to assess the non-economic normative justifications the determination of which will be matter for national legislation, subject to a public interest justification. *Ibid* at 773.

human rights.⁸⁸⁵ Further, in view of the variance in nation's conception of public interest and different levels of development,⁸⁸⁶ the determination of the normative considerations should be made in the light of human development.

iii. No Unreasonable Prejudice to the Legitimate Interest

In the event of a non-interference with the normal exploitation of the work, there will arise a need for the assessment of unreasonable prejudice to right holder's legitimate interests. As a logical extension of the second step, the third step is deemed to be the most difficult condition to interpret.⁸⁸⁷ Further, it is considered the most important prong of the three-step test as its examination involves public policy considerations.⁸⁸⁸ To this end, both unreasonable prejudice and legitimate interests are important elements. In the WTO Panel's interpretation of 'legitimate interests' of the right holder, it is noted to "encompass a legal right" wherein the connotation of 'interests' is "not necessarily limited to actual or potential economic advantage or detriment."⁸⁸⁹ Not confined to a legal positivist perspective, the protection of the 'legitimate interests' requires a normative justification "in the light of the objectives that underlie the protection of exclusive rights."⁸⁹⁰ As Gervais observes, taking a broader view "could reflect a systemic option to balance the rights of copyright holders and users."⁸⁹¹

⁸⁸⁵ For the WTO's possible considerations of human rights in its jurisprudence, see Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13:4 *Eur J Intl L* 753-814.

⁸⁸⁶ Correa, *Trade Related Aspects*, *supra* note 137 at 105-108 (articulating the possible variance in the notion of 'the public interest' contemplated in Art.8(1)). As he notes, "the definition of what constitutes the 'public interest' rests with the concerned member." *Ibid* at 105.

⁸⁸⁷ Gervais, *Restructuring Copyright*, *supra* note 702 at 67.

⁸⁸⁸ Geiger, Gervais & Senfleben, "The Three-Step Test Revisited," *supra* note 165 at 604. For Ricketson and Ginsburg, the second step seems to be more important. Ricketson & Ginsburg (Vol. I), *supra* note 713 at 767.

⁸⁸⁹ WTO Panel, *supra* note 862 at para 6.223. As articulated in the ruling, "'interest' may encompass a legal right or title to a property or to use or benefit of a property (including intellectual property)." *Ibid*.

⁸⁹⁰ *Ibid* at para 6.224. As the WTO Panel noted, "'legitimate'.... has also the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights." *Ibid*. Ricketson & Ginsburg (Vol. I), *supra* note 713 at 774.

⁸⁹¹ Gervais, *Restructuring Copyright*, *supra* note 702 at 67; Martin Senfleben, *Copyright, Limitations and the Three Step Test: An Analysis of the Three Step Test in International and EC Copyright Law* (The Netherlands: Kluwer, 2004) at 226-27.

Once the legitimate interest is determined, important is assessing the occurrence of ‘unreasonable prejudice’ to the legitimate interests of the right holder. As is evident from the condition, not all levels of prejudice are relevant to determine a compliance between an exception or a limitation and the condition. Rather, critical is the existence of ‘unreasonable’ level of prejudice that entails a ‘substantial’ harm or damage. In its reference to the term as an economic loss, the WTO Panel held the view that a “prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner.”⁸⁹² In this respect, as prejudice *per se* is not prohibited, leading commentators argue that the “unreasonable prejudice” can be avoided through an equitable remuneration system.⁸⁹³ In particular, Correa contends that the Panel seemed to agree with this view as long as “a system of compulsory licensing or equitable remuneration is available.”⁸⁹⁴

As Foster observes, the absence of a relevant market for normal exploitation in the LDCs or a market failure makes the ‘unreasonable level of prejudice’ a matter of limited occurrence due to insignificant loss of income and a strong public interest considerations such as the human right to education.⁸⁹⁵ It is contended that the criterion of reasonableness or justifiable prejudice offers a room for public interest justification that allows legislators to strike a balance between the rights of the right holders and the needs or interests of users.⁸⁹⁶ In this context, Gervais points out the importance of

⁸⁹² WTO Panel, *supra* note 862 at para 6.229.

⁸⁹³ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 775-77; Gervais, *Restructuring Copyright*, *supra* note 41 at 69; Goldstein & Hugenholtz, *supra* note 157 at 379.

⁸⁹⁴ Correa, *Trade Related Aspects*, *supra* note 137 at 155; WTO Panel, *supra* note 862 at para.6.229, fn 205.

⁸⁹⁵ Foster, *supra* note 46 at 306. Given the issue of a market failure in the developing countries, Foster regards the relationship between copyright and the right to education as an instance of ‘false conflict’ to point out the lack of actual conflict. *Ibid* at 305-06; see Gordon, *supra* note 879 at 1618-19.

⁸⁹⁶ Gervais, *Restructuring Copyright*, *supra* note 702 at 69-70 (noting a public interest imperative for a government to impose justifiable exception to copyright despite a loss of revenue for copyright holders); Daniel Gervais, “Towards a New Core International Copyright Norm: The Reverse Three-Step Test,” (2005) 9 Marq Intell Prop L Rev 1 at 18–19 (2005)[Gervais, “The Reverse Three-Step Test”]; Ricketson & Ginsburg (Vol. I), *supra* note 713 at 775; Ficsor, *The Law of Copyright*, *supra* note 747 at 516.

human rights principles to inform the interpretation of the public interest considerations.⁸⁹⁷ In concurring with this view, Goldstein and Hugenholtz argue that “the word legitimate and reasonable inject normative meaning into the test and admit a variety of public interest into the equation.”⁸⁹⁸

Some writers also observe that the step permits the WTO members to resolve a conflict between fundamental rights through the application of a proportionality test that offers states a margin of appreciation.⁸⁹⁹ In the same vein, the Munich’s declaration on the balanced interpretation of the three step test calls for the consideration of *the legitimate interest of third parties* akin to the test provided for patent under Art.30 of the TRIPs Agreement.⁹⁰⁰ Despite the significance of its holistic approach that treats the steps as “individual elements informing one overall assessment,”⁹⁰¹ the proposed interpretation is critiqued for its ‘overemphasis’ on the users’ aspect of public interest without a ‘due’ regard for that of right holders.⁹⁰² Favoring a sequential approach to the application of the test,⁹⁰³ this critique tends to mask the long entrenched private rights in the copyright system. Given copyright’s

⁸⁹⁷ Daniel Gervais, “Intellectual Property and Human Rights: Learning to Live Together,” in Paul Torremans, ed, *Intellectual Property and Human Rights*, *supra* note 46, 3 at 18[Gervais, “Intellectual Property and Human Rights”].

⁸⁹⁸ Goldstein & Hugenholtz, *supra* note 157 at 378. See Declaration: Balanced Interpretation of the “Three Step Test” in Copyright Law 39 IIC 107 (2008)

⁸⁹⁹ Martin Senftleben, “Towards a Horizontal Standard for Limiting Intellectual Property Rights? WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law” (2006) 37 *International Review of Intellectual Property & Competition Law* 407 at 438 [Senftleben, “Towards a Horizontal Standard”]; Christophe Geiger, “Fundamental Rights: A Safeguard for the Coherence of Intellectual Property Law?” (2004) *International Review of Intellectual Property & Competition Law* 268 at 277. For a discussion on the principle of proportionality, see Henning Ruse-Khan, “Proportionality and Balancing within the Objectives for Intellectual Property,” in Torremans, ed, *Intellectual Property and Human Rights*, *supra* note 46 at 161-93.

⁹⁰⁰ Christophe Geiger et al., “Declaration: A Balanced Interpretation of the Three-Step Test in Copyright Law” (2010) 1 *Journal of Intellectual Property, Information Technology and E-Commerce* 119 at 121 [hereinafter Geiger et al., Declaration]

⁹⁰¹ *Ibid* at 119-20.

⁹⁰² Geiger, Gervais and Senftleben, “The Three-Step Test Revisited,” *supra* note 165 at 609-10.

⁹⁰³ For the critique on this line, see Mihály Ficsor, “Munich Declaration on the Three-Step Test—Respectable Objective, Wrong Way to Try to Achieve It” (2012), cited in Geiger, Gervais and Senftleben, “The Three-Step Test Revisited,” *supra* note 165 at 609.

twin public interest aspects, a holistic or an integrated approach to the test is rather both flexible and reasonable to maintain the balance that remains central to the purpose of copyright itself.⁹⁰⁴

In sum, the application of the conditions of the three-step test would determine whether or not an exception or a limitation to an exclusive right is justifiable. In contrast to the first condition which most purpose-specific exceptions would readily meet,⁹⁰⁵ the two remaining conditions demand a rigorous act of balancing competing interests. As the criteria are both open-ended and abstract, their actual application at the national level could entail a variance within the overarching requirements of necessity and consistency with the TRIPs Agreement. It should be noted that the application of the test under other copyright treaties such as the WIPO Internet Treaties would essentially remain similar to the three-step test under the TRIPs Agreement.⁹⁰⁶

B. The Dual Function of the Test as Flexibility and Parameter for Flexibilities

As is evident from the burgeoning scholarship and the jurisprudence it has generated, there seems to be a consensus about the dual aspects of the test. From users' perspective, the significance of the three-step test has drawn both skepticism and support. For instance, mindful of its emergence as a compromise and its limited flexibilities,⁹⁰⁷ Okediji views the three-step test as a constraint on member states' freedom to design the permitted national flexibilities.⁹⁰⁸ This observation stems from the adoption of the test within an overarching parameter of the right-oriented framework and its subsequent

⁹⁰⁴ Geiger, "Declaration" *supra* note 900 at 120; Geiger, Gervais and Senftleben, "The Three-Step Test Revisited" *supra* note 165 at 610-11; Andre Lucas, "For a Reasonable Interpretation of the Three-Step Test" (2010) 32 Eur IP Rev 277 at 277-78.

⁹⁰⁵ Gervais, *Restructuring Copyright*, *supra* note 702 at 64.

⁹⁰⁶ Ficsor, *The Law of Copyright*, *supra* note 747 at 517-20.

⁹⁰⁷ See Okediji, "International Copyright System," *supra* note 51 at 5&7.

⁹⁰⁸ *Ibid* at 9.

expansive integration into the TRIPs Agreement.⁹⁰⁹ Taking the TRIPs Agreement as a ‘given,’⁹¹⁰ other scholars consider the three-step test an open-ended norm or balancing instrument that offers a ‘considerable room’ for flexibilities.

For example, in their recent joint work entitled ‘The Three-Step Test Revisited,’ Geiger, Gervais and Senftleben argue that the three-step test “was intended to serve as a flexible balancing tool offering national policy makers *sufficient* breathing space to satisfy economic, social, and cultural needs.”⁹¹¹ In their observation, the three-step test can be used to devise exceptions such as those for libraries, archives and museums as well as exemptions of reproduction required for judicial, administrative or parliamentary proceedings.⁹¹² To this effect, Gervais suggests a reverse application of the test with an emphasis upon the importance of the third step.⁹¹³ In his argument for a model fair use doctrine based on the three-step test for the EU, Senftleben regards the test as a ‘flexible framework’ with the ‘function of creating room for the introduction of copyright limitations at the national level.’⁹¹⁴ In his opinion, the three-step test is a ‘flexible balancing tool’ with a ‘fundamental role in enabling limitations and enhancing the flexibility of the copyright system.’⁹¹⁵ Subject to the overall consistency requirement, it is true that the three-step test allows members ‘some’ rooms to devise domestic flexibilities in order to balance private and public interests.⁹¹⁶

⁹⁰⁹ *Ibid.*

⁹¹⁰ Gervais, “TRIPs and Development,” in *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPs-Plus Era* (Oxford: Oxford University Press, 2007) 3 at 4; Gervais, *Restructuring Copyright*, *supra* note 702 at 284.

⁹¹¹ Geiger, Gervais & Senftleben, “The Three-Step Test Revisited,” *supra* note 165 at 582.

⁹¹² *Ibid* at 617;

⁹¹³ See Gervais, “The Reverse Three-Step Test”, *supra* note 896 at 27-35.

⁹¹⁴ Martin Senftleben, “The International Three-Step Test: A model Provision for EC Fair Use Legislation” (2010) 1 *Journal of Intellectual Property and Information Technology* 67 at 75[Senftleben, “The International Three-Step Test”].

⁹¹⁵ *Ibid* at 75 &77.

⁹¹⁶ Correa, *Trade Related Aspects*, *supra* note 137 at 139.

Nonetheless, as its evolution and intended effect suggest, the purpose of the test was not to ‘create’ or ‘enable’ the creation of ‘sufficient’ flexibilities. Instead, it was primarily designed and then was extended further to place a ceiling upon the hitherto sovereign discretion reserved to states.⁹¹⁷ In fact, the issue of flexibilities somehow inherent in the test seems to be subordinate to its primary function although the objective of a copyright system requires equivalent considerations. As a parameter, the test stands to serve its primary function. After all, this is the overriding reason that makes a compliance with the test a matter of serious concern to developed nations.

In this respect, the purpose of the test is explicit in the international copyright regime. That is, the prime function of the three-step test is to confine the scope of the national copyright flexibilities such as L&Es.⁹¹⁸ Operating as such, the test is an international rule with the most direct constraint on the discretion of policy makers in designing new L&Es.⁹¹⁹ Adopted within the global copyright system underpinned by the primacy of the interest of authors/right holders,⁹²⁰ the test is *primarily* intended to set a limit on the freedom of the states to regulate the permitted flexibilities.⁹²¹ Construed to reflect the desire to maintain the status quo and intended to govern the flexibilities appropriate in the digital environment,⁹²² the three-step test’s guiding function was emphasized in the Agreed Statement to Art. 10 of the WCT. Adopted against a backdrop of an intended, but disputed restrictive approach,⁹²³ the

⁹¹⁷ See Okediji, “International Copyright System,” *supra* note 51 at 7-9.

⁹¹⁸ See Correa, *Trade Related Aspects*, *supra* note 137 at 134-145; TRIPs Agreement, art.13 (stating ‘[m]embers shall confine...’) [emphasis added]; Guido Westkamp, “The Three-Step Test and Copyright Limitations in Europe: European Copyright Law between Approximation and National Decision Making” (2008) 56 *Journal of Copyright Society of USA* 1 at 3-12;

⁹¹⁹ Gervais, *Restructuring Copyright*, *supra* note 702 at 59.

⁹²⁰ Okediji, “International Copyright System,” *supra* note 51 at 1-2 & 7.

⁹²¹ *Ibid* at 7-9.

⁹²² Ricketson & Ginsburg (Vol. I), *supra* note 713 at 868 & 871-72.

⁹²³ *Ibid* at 868-69. As Ricketson & Ginsburg recount, what was suggested in the initial proposal may imply greater restrictions on the scope of permissible exceptions. *Ibid. Comp. Correa, Trade Related Aspects*, *supra* note 137 at 143-45 (arguing that the test under art.10 of WCT and art.13 of the TRIPs Agreement does not impose additional requirements on those specific exceptions under the Berne Convention).

Statement makes clear that Art.10 (2) ‘neither reduces nor extends’ the scope of L&Es permitted under the Berne Convention.⁹²⁴

Although this reading seems to maintain the existing scope, it reaffirms the objective of the test to circumscribe the scope of the exceptions. Intended to preserve or extend the scope of protection, the statement rules out a room for the expansion of flexibilities. Further, despite the Treaty’s central aim to advance the human rights of the beneficiaries,⁹²⁵ the integration of the three-step test into the Marrakesh Treaty reinforces the test’s restrictive function as a parameter for flexibilities. Designed to be more of a constraining parameter than an ‘enabling’ one, the test stands firm to preempt legislative or judicial inroads into the expansive exclusive domains once secured.

For its operation within the broad parameter of the global copyright system, below are the salient points related to the application of the three-step test as a specific parameter for flexibilities. First, including for unpublished works,⁹²⁶ the application of the test is vital for L&Es that are not specified under the international copyright treaties.⁹²⁷ Except for those specified under the existing international copyright regime, the formulation of L&Es is required to meet the conditions of the three-step test to qualify as permitted flexibilities. For instance, L&Es that are subject to the guidance of the test for their formulation and application include private use, exceptions for scientific research and scholarship as well as those for libraries, archives and museums.⁹²⁸

⁹²⁴ Agreed Statement to Art.10 of the WCT, *supra* note 448.

⁹²⁵ Helfer et al, *The World Blind Union Guide*, *supra* note 500 at 8-15.

⁹²⁶ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 777-78 (in the absence of a specific reference to published work or otherwise, the three-step test is deemed to cover both published and unpublished works).

⁹²⁷ *Ibid* at 779-83; Correa, *Trade Related Aspects*, *supra* note 137 at 134-145; Ricketson & Ginsburg (Vol. I), *supra* note 713 at 852-57.

⁹²⁸ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 779-783.

Despite its dubious compliance with the test,⁹²⁹ the application or adoption of the four-factor US fair use doctrine⁹³⁰—called a bundle of L&Es—is subject to the guidance of the three-step test.⁹³¹ Second, the application of the three-step test as a parameter should be understood within the broad development objectives and principles of the TRIPs Agreement.⁹³² This understanding comports with the established rule of treaty interpretation and is useful to take into account the national development context.⁹³³ Given the public interest considerations inherent in the test, its interpretation should draw a guidance from the relevant human rights principles as recognized in the Marrakesh Treaty.⁹³⁴

Third, member states are free to adopt a user-right or human development-oriented approach as an appropriate ‘legal means’ for compliance with the test. Fourth, it is contended that the domestic application of the three-step test would not govern the specific L&Es such as the teaching exception under the Berne Convention.⁹³⁵ In this regard, Ricketson and Ginsburg note the overlap between Art.13 of the TRIPs Agreement and the exception for all practical purposes as the reference to ‘fairness’ corresponds with the requirements of the three-step test.⁹³⁶ As long as it is not required as such, its application to those specific exceptions should be resisted. Five, outside the ambit of the test is perhaps

⁹²⁹ Okediji, “Toward an International Fair Use Doctrine” *supra* note 868 at 78-79&85-87.

⁹³⁰ The four factors integral to the US fair use doctrine are: the purpose or character of the use, the nature of the copyrighted work, the amount of the work used, and the effect of the use on the potential market. See U.S Copyright Act, §107; see generally Pierre Laval, “Toward a Fair Use Standard” (1990) 103 Harv L Rev 105-1136.

⁹³¹ Okediji, “Toward an International Fair Use Doctrine,” *supra* note 868 at 114-36.

⁹³² *Ibid* at 141; Ricketson & Ginsburg (Vol. I), *supra* note 713 at 852-53; see Yu, “Objectives and Principles” *supra* note 70 at 1000-1046.

⁹³³ Okediji, “Toward an International Fair Use Doctrine,” *supra* note 868 at 139-41; See generally Susy Frankel, “The WTO’s Application of ‘the Customary Rules of Interpretation of Public International Law’ to Intellectual Property” (2005) 46 Va J Intl L 563-431.

⁹³⁴ Gervais, “Intellectual Property and Human Rights” *supra* note 897 at 18. Heller et al, *The World Blind Union Gide*, *supra* note 500 at 8-18.

⁹³⁵ Correa, *Trade Related Aspects*, *supra* note 137 at 140 & 145.

⁹³⁶ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 858.

the regulation of exhaustion of exclusive rights as such a regulation was excluded from the dispute settlement mechanism.⁹³⁷

It could be contended that the principle could entail a competition with the normal exploitation of the right and a loss of income. But, central to the justification of exhaustion and important to reject such an argument is the right holder's recoupment through the income once derived from a prior exploitation. Thus, its exclusion from the WTO dispute settlement would foreclose a legal challenge on this ground at international level. By the same token, as Okediji observes, outside the reach of the test is the regulation of anti-competitive practices that falls within the ambit of a national competition law.⁹³⁸

From the foregoing discussion on its dual functions the test is *primarily* designed to set a limitation on nation's discretion to devise the permitted flexibilities. While this restrictive parameter is intended to advance the interests of the right holders, the test is noted to leave 'some 'flexibilities.' Given its in-built dual features, the test can be considered both a parameter for, and a form of, flexibilities.⁹³⁹ As there is no 'one-size-fits-all' approach for a mechanical implementation of the abstract criteria, developing countries could benefit from an appropriate implementation of the test in a manner that ensures the fullest utilization of its inherent and related flexibilities. To this effect, as noted above, scholars have suggested a number of approaches ranging from reversing the steps with an emphasis on the third one,⁹⁴⁰ reading into the third step the interests of third parties⁹⁴¹ to the adoption

⁹³⁷ See Correa, *Trade Related Aspects*, *supra* note 137 at 79-83; Gervais, *TRIPs Agreement*, *supra* note 724 at 198-202.

⁹³⁸ Okediji, "International Copyright System," *supra* note 51 at 14. In this regard, Okediji argues that measures taken pursuant to art.40 of the TRIPs Agreement will not be subject to the scrutiny of the three-step test as such measures are not deemed proper limitations or exceptions within the international copyright system. *Ibid.*

⁹³⁹ See Christophe Geiger, "From Berne to National Law, via the Copyright Directive: The Dangerous Mutations of the Three-Step Test" (2007) 29 *Eur IP Rev* 486 at 489 (stating both the enabling and restricting functions of the test).

⁹⁴⁰ Gervais, "The Reverse Three-Step Test," *supra* note 896 at 27-35; Geiger, Gervais & Senftleben, "The Three-Step Test Revisited," *supra* note 165 at 625-26.

⁹⁴¹ See generally Geiger et al, "Declaration," *supra* note 900; Kur, *supra* note 189 at 340-50.

of the three-step-test infused with fair use doctrine.⁹⁴² In this regard, the emerging user-right based approach as informed by human development perspective and human rights norms can help countries leverage the flexibilities for the realization of quality tertiary education and users-driven creative innovation.

In sum, a balanced approach to creative innovation and tertiary education requires a due consideration of the twin—protection and access—aspects of the public interests to be integral to the *intended* objective of a copyright protection. Due to their conceptual overlap, the infusion between human rights norms and the CA-driven sustainable human development is useful to offer a normative guidance that informs the utilization of the flexibilities.⁹⁴³

4.4. Conclusion

The utilization of international copyright flexibilities is instrumental both for a sustainable creative innovation and quality tertiary education in the context of access to knowledge and human capital. Further, much more important is the role of the flexibilities for the expansion of human capabilities that constitute an enriching and overarching conceptual framework for a sustainable human development. From this perspective, the set of relevant flexibilities under the existing international copyright system is neither directed towards nor informed by the core objective of human development. Given the primacy of exclusive rights under the existing international copyright legal regime, there lacks a harmonization for the corresponding flexibilities that should be treated as an integral part of the regime. For instance, the Berne Convention which sets the international baseline for the international copyright system leaves the matter to member states, subject to its in-built upward trajectory of authors’

⁹⁴² See generally Senftleben, “The International Three-Step Test” *supra* note 914; Okediji, “Toward an International Fair use Doctrine” *supra* note 868 at 151-175.

⁹⁴³ Helfer & Austin, *Human Rights and Intellectual Property*, *supra* note 33 at 211; Gervais, “Intellectual Property and Human Rights,” *supra* note 897 at 18-23; see Chon, “IP and Development Divide,” *supra* note 62 at 2874-2911; Martha Nussbaum, Capabilities and Social Justice (2002) 4 *International Studies Review* 123 at 132(stating that ‘human capabilities extent a moral claim that they should be developed’).

right. Nonetheless, it provides for a specific teaching exception, exception for quotation and the contested Berne Appendix for the purposes of education.

Further, general flexibilities related to the subject matter, conditions of protection, and duration are embodied in the Convention. In accordance with the compliance requirements, the various general flexibilities enshrined in or permitted under other treaties such as TRIPs Agreement and the WIPO treaties could also be utilized for further creative innovation and tertiary education in order to promote human development. From among the existing international copyright treaties, the Marrakesh Treaty is the sole legal regime that provides for mandatory set of international L&Es. Yet, common to all copyright treaties is the all-encompassing application of the three-step test. The test serves as a parameter designed *primarily* to limit and somehow allow the utilization of copyright flexibilities contemplated under the international copyright system.

In view of their central role for human development, various approaches have been highlighted in the legal scholarship and emerging jurisprudence. In addition to the traditional approach that subordinates flexibilities to the exclusive rights, the emerging approaches to copyright flexibilities regard the flexibilities as development policy tools and/or users' rights.⁹⁴⁴ Going further and with the potential to embrace them, the CA-based human development perspective is important to enhance the instrumental role of the international copyright flexibilities for tertiary education and creative innovation. Given its normative reach to encompass the emerging approaches to the copyright flexibilities, CA/human development approach reinforces the significance of the flexibilities to facilitate access to knowledge or learning materials for tertiary education. Accommodative and multifaceted in its nature, the CA is suited to serve as a policy and normative tool to balance authors'

⁹⁴⁴ Okediji, "Reframing International Copyright," *supra* note 154 at 475 & 482-89. See TRIPs Agreement, *supra* note 163 at Preamble at paras 6&7 and Art. 8; Correa, *Trade Related Aspects*, *supra* note 137 at 104-107; Vaver, "Copyright Defenses," *supra* note 68 at 661-672; Carys Craig, "Globalizing User Rights-Talk: On Copyright Limits and Rhetorical Risks" (2017) 33:1 Am U Intl L Rev 2 at 71-73[Craig, "Globalizing User Rights-Talk"].

and users' interests. Indeed, the CA is crucial to inform flexibilities whether framed as public policy goals or rights grounded in human rights norms. Further, human development perspective is more useful for the interpretation and application of the notion of "development" in the TRIPs Agreement and other international copyright treaties. In particular, the CA is pivotal for an explicit articulation of human development as the core objective of international copyright and reframing its flexibilities as an instrumental aspect of human capabilities.

As noted in the preamble to the WTO Agreement, the interpretation and application of the development objectives and relevant flexibilities embodied in the TRIPs Agreement is required to be guided by the principle of sustainable development. Indeed, this principle is well-suited to embrace human development out of which emerges a notion of sustainable human development. For the international copyright regime, the principle can serve as an entry point for a coherent reintegration of the flexibilities in the light of a broad framework of sustainable human development.

Chapter V: Copyright, Tertiary Education and Development Regimes in Ethiopia: The Status Quo

5.1. Introduction

Located in the Horn of Africa and constituted of ten regional states,⁹⁴⁵ Ethiopia is a multinational federal state with legal and institutional frameworks set up at both federal and regional-state levels.⁹⁴⁶ To this end, the FDRE Constitution has apportioned powers between the Federal and the regional state governments. Outside those powers specified and vested in the Federal government, residual powers are reserved to the regional states for the states to exercise them in compliance with the Federal Constitution.⁹⁴⁷ In designing national policies, legal and institutional frameworks related to copyright, tertiary education and sustainable development, the Federal government is vested with an ‘exclusive’ legislative mandate over copyright.⁹⁴⁸ In contrast, the Federal government has a ‘principal’ mandate over tertiary education and sustainable development as embodied in the FDRE Constitution.⁹⁴⁹ Within the national framework, the regional states have the power to formulate, enrich and administer policy and legal regimes over matters falling within their jurisdictions. Given the nation-wide application of ratified human rights instruments at both levels, the regional states are also required to enshrine the instruments into their respective regional legal frameworks. In so doing, the regional states have overlapping mandates to formulate and execute the policies and legal regimes related to education

⁹⁴⁵ See *FDRE Constitution*, *supra* note 45 at arts.46 & 47. From among the regional states, Oromia is the largest state in terms of both its geographical and demographic size. As the tenth regional state established through a landslide referendum vote for its formation in 2019, the Sidama regional state has been added to the existing nine regional states enshrined in the Constitution. Pending an official power transfer from the existing regional government, the new regional state is yet to be inaugurated to function as of this writing. Despite an apparent resistance from the government, there are still a number of demands from other nations and nationalities in the region for similar statehood status within Ethiopia. Sooner or later, this might result in an increasing number of regional states in the country. By the way, Ethiopia is a home to over 80 nations and nationalities. Given their historical existence as autonomous nations and nationalities for centuries, almost all of them have their own language, culture and traditions nurtured over several centuries long before their integration to form the present day Ethiopia.

⁹⁴⁶ *Ibid* at arts.50-52.

⁹⁴⁷ *Ibid* at arts.50 &52.

⁹⁴⁸ *Ibid* at art.51 (19) & 55(2) (g).

⁹⁴⁹ See *ibid*, art.13, 41(4), 43, 85 &89-91.

and development.⁹⁵⁰ In particular, the promotion of sustainable development has been a critical issue of national priorities for the governments at all levels.

For over a decade, Ethiopia has been hailed for its ‘record’ and ‘continuous’ economic growth at an average annual rate of 10 percent.⁹⁵¹ Considered one of the fastest economies in the Sub-Saharan Africa,⁹⁵² Ethiopia—setting development objectives and targets—has envisioned to join middle-income countries. Despite its ‘fast’ economic growth and ambitious vision to reach a middle-income level in 2025, Ethiopia has been stuck in the bottom half of the low-ranking human development index (HDI) for decades.⁹⁵³ As affirmed in its constant low-ranking of HDI for decades, Ethiopia’s increasing economic growth has not translated into human development. Indeed, economic growth is not equivalent to, *albeit* an essential element of, human development.⁹⁵⁴ As a result, Ethiopia is still adrift of even a medium level of human development. Further, the country’s lagging human development efforts have been under formidable challenges of an overwhelming population growth, improving but still lower rate of literacy and its deepening poverty. Noted as an enlargement of people’s choices or expansion of individuals’ freedoms,⁹⁵⁵ the human development is thus essential to remove or eradicate an abject poverty that entails deprivation of human capabilities.⁹⁵⁶

⁹⁵⁰ *Ibid* at arts.13 (1), 51(2), 52(2) (c), 55(10) &85. From the state regional constitution, e.g., see Oromia National Regional State Constitution (2002), arts.13, 41(4), 43 &102.

⁹⁵¹ Mulu Gebreeyesus, “Industrial Policy and Development in Ethiopia” in Carol Newman, ed, *Manufacturing Transformation: Comparative Studies of Industrial Development in Africa and Emerging Asia* (Oxford: Oxford University Press, 2016) at 28. But see Logan Cochrane & Yeshtila Bekele, “Contextualizing Narratives of Economic Growth and Navigating Problematic Data: Economic Trends in Ethiopia (1999–2017)” (2018) 64:6 *Economies* 2-14.

⁹⁵² See generally Cochrane & Bekele, *supra* note 951.

⁹⁵³ See, e.g, UNDP, *HDI 2019*, *supra* note 97 at 302 & 306; *HDI 2018*, *supra* note 97 at 56; UNDP, *Human Development Report 2000*, *supra* note 561 at 160. Over the last two decades, Ethiopia’s rank in human development index has been oscillating between 171th in 2000 and 173th in 2019. Hence, no significant change has occurred over the period.

⁹⁵⁴ UNDP, *Human Development Report 1991*(New York: UNDP & Oxford University Press, 1991) at 13[UNDP, *Human Development Report 1991*].

⁹⁵⁵ *Ibid* at 1; UNDP, *Human Development Report 1990*, *supra* note 2 at 10.

⁹⁵⁶ Sen, *Development as Freedom*, *supra* note 1 at 85-110(articulating ‘poverty’ as ‘deprivation of capability’).

To this effect, constitutive of and instrumental for human development are expanded human capabilities through a quality tertiary education.⁹⁵⁷ In the same vein, an appropriate copyright system is critical for enlargement of human creative freedom. Anchored in the human freedoms—the ‘freedom to develop and realize one’s human potential’ and the ‘freedom of creative expression,’ tertiary education and copyright are thus both interlinked and instrumental to complement each other in the advancement of human development. For this purpose, access to learning materials is an essential point of linkage between copyright and tertiary education. In all nations, both tertiary education and ‘appropriate’ copyright regimes are instrumental for human development. In principle, both are valued for their roles to expand human capabilities of learning and creative freedoms. This integrated development approach is even more imperative for Ethiopia—a country that has long been in a dire need of sustainable human development.

In order to promote its development, Ethiopia has both designed successive development plans and set several development policy objectives. Moreover, it has set up both legal and institutional frameworks for various sectors. In this regard, at the forefront is its educational sector. Like other levels of education, the expansion of tertiary education is regarded integral to a lifelong learning process and instrumental for advanced human capital in Ethiopia. Yet, it is not viewed as an important aspect of human capabilities. Rather, tertiary education is considered a key instrument for economic development in Ethiopia. In the same vein, the protection of copyright is recognized as an important instrument for creative innovation, scientific and technological development.

In furtherance of their instrumental roles, legal and institutional frameworks have been laid down for both copyright protection and tertiary education. Envisaged as their ultimate objective, the promotion of sustainable development is central to the FDRE Constitution and implicit in the relevant legal and institutional regimes. Despite lack of a proper integration and reorientation, references are

⁹⁵⁷ See UNDP, *Human Development Report 1990*, *supra* note 2 at 12 & 25-26.

however made to copyright protection, tertiary education and sustainable development in the relevant policy, legal and institutional frameworks. That said, it is imperative to make an in-depth exploration of the interaction between copyright and tertiary education and their contribution for sustainable human development. This Chapter will thus undertake a thorough examination of the respective the policy, legal and institutional frameworks of copyright, tertiary education, and sustainable human development in Ethiopia. In so doing, it will also highlight the relevant constitutional and human rights dimensions. In drawing on the discussions under the preceding chapters, this chapter will look into the regimes from the perspective of human development as articulated in the CA.

5.2. The Policy, Legal and Institutional Frameworks of Copyright System

As a land of civilizations for millennia, Ethiopia has a long history of creative works generated for socio-cultural and religious purposes. In particular, it has rich traditions of artistic works such as paintings, engravings, sculptures and indigenous creative works.⁹⁵⁸ Despite its long-standing tradition of creative works, the emergence of a formal copyright system in Ethiopia is a recent phenomenon. Over the last decade, a couple of amendments were made to revamp the existing copyright law that was first imported from abroad in the 1960s. While a comprehensive policy framework is yet to emerge, the establishment of the Ethiopian Intellectual Property Office in 2003 constitutes a solid foundation for an institutional framework. Ethiopia has been a member of the WIPO for decades. Except for the Marrakesh Treaty ratified February 2020, Ethiopia has however not made a ratification of all other international copyright treaties. Quite contrary to its domestic realities, Ethiopia has built a strong copyright system that emulates the systems in developed nations. From among several possible factors, this perplexing and unwise approach might be attributed to Ethiopia's liberal tradition of legal transplants, the influence of WIPO's technical assistance, lack of evidence-based lawmaking tradition,

⁹⁵⁸ See Teodros Kiros, "Ethiopian Literature," in Francis Abiola Irele & Simon Kikandi, *The Cambridge History of African and Caribbean Literature*, Vol I (Cambridge: Cambridge University Press, 2008)164 at 164-177; Eshete & Mengistu, *supra* note 182 at 160-63; Amsalu Aklilu, *A Short History of Ethiopian Literature* (Addis Ababa: Addis Ababa University, 1984).

and insufficient engagement of all stakeholders through a public deliberation in the lawmaking process. In what follows, highlighted are the salient issues related to the policy, legal and institutional frameworks in the country.

5.2.1. The Policy Framework

In spite of its half century-long history of a modern copyright system, Ethiopia has no specific and comprehensive policy framework for copyright protection. No different is the situation for other IP legal regimes that have evolved over the last two decades. As a result, the country lacks a comprehensive IP policy that guides the protection of IPRs towards the realization of their objectives. In the absence of IP policy, it is thus relevant to draw on some pertinent aspects of the national innovation and cultural policies. With regard to creative innovation, worth exploring is the current Ethiopian national science, technology and innovation policy (STI) that has been in place since 2012.⁹⁵⁹ As of this writing, a policy review is underway in order to revise the STI and align it with the national economic growth agenda with a view to promoting sustainable development.

Prior to the development of the current STI policy under the auspices of the Ministry of Technology and Innovation, the formulation of a similar policy was long envisaged upon the establishment of the Ethiopian Science and Technology Commission (STC) in 1975. Further, the STC was re-constituted in 1994 with the mandates, *inter alia*, to formulate policies for the promotion of scientific and technological development.⁹⁶⁰ From among the objectives of the STC, at the forefront was the objective to encourage scientific and technological progress to enable the realization of the national socio-economic development objectives.⁹⁶¹ In this regard, an attempt was made to issue

⁹⁵⁹ See STI, *supra* note 140.

⁹⁶⁰ Ethiopian Science and Technology Commission Establishment Proc. 91/1994, Federal Negarit Gazeta, 53rd Year No.77,14 March 1994, Addis Ababa, art.5(1) & (2) [Ethiopian Science and Technology Commission Proc.No.91/1994].

⁹⁶¹ *Ibid* at art.4 (1).

science and technology policies in 1993. At the moment, Ethiopia has a comprehensive national STI policy to promote scientific and technological development.

In the previous legislation that mandated the STC to issue a relevant policy, there existed a specific reference only to a patent system in relation to innovation.⁹⁶² Although it is deemed instrumental for scientific and technological innovation since its inception in 1995, the patent system itself has no specific policy to date. It is true that knowledge, science and technology constitute the broad domains of IP. From this perspective, a relevant provision mentioned in the legislation is the provision related to the STC's mandate of facilitating research and development.⁹⁶³ Its relevance to copyright lies in the latter's role in the production, utilization and dissemination of the research outputs or scientific knowledge indicated therein. Yet, the mandate was indicated in terms of the contribution of research and development for scientific and technological development.⁹⁶⁴ As such, it was not directed to the objective and role of copyright protection.

In contrast, the current STI policy is pertinent for its identification of relevant policy priorities and objectives. The policy objectives include the establishment of a coordinated and an integrated governance framework, the development of research, and commercialization of knowledge and technologies.⁹⁶⁵ For the realization of the objectives, IPRs have been indicated as one of the strategies to be deployed in order to accomplish the STI's mission. As stated in the policy, the relevant mission is creating “a technology transfer framework that enables the building of national capabilities in technological learning, adaptation and utilization.”⁹⁶⁶ In particular, the STI makes an explicit mention

⁹⁶² *Ibid* at art.5 (17).

⁹⁶³ *Ibid* at arts.5 (4), (5), (13), (19) & (20).

⁹⁶⁴ *Ibid* at art.5 (4).

⁹⁶⁵ STI, *supra* note 140 at 4.

⁹⁶⁶ *Ibid* at 3.

of copyright protection as a strategy intended to ‘encourage and promote creative works.’⁹⁶⁷ Nonetheless, the STI does not go further to address how copyright protection should be designed or be used to promote a creative innovation. In consequence, the STI does not constitute a solid policy framework for copyright system. Elsewhere, a similar general reference to IP is made in the GTPII—the grand national development policy—as a strategic tool for science and technological development.⁹⁶⁸

In the context of the national cultural policy (NCP) designed in 2015, a generic reference to IP is made as a strategic tool for the promotion of cultural development.⁹⁶⁹ In principle, copyright is more suited to cultural development. One would thus seek to gather some copyright-related policy objectives from the NCP. Relevant to copyright are the specific policy objectives of the NCP for (a) the intended development of creative cultural industries, and (b) citizens’ free, equal and beneficial participation in the ‘cultural or creative activities.’⁹⁷⁰ It is also important to note the NCP’s multiple mention of subject matters of copyright and the strategic roles of IP legal regimes.⁹⁷¹

Further, a frequent reference is made to the role of appropriate institutional frameworks for the production and utilization of the cultural or creative works.⁹⁷² In developed nations, copyright is regarded as an instrument for creative cultural products and industries.⁹⁷³ In Ethiopia, the preamble to

⁹⁶⁷ *Ibid* at 15.

⁹⁶⁸ See GTP II, *supra* note 119.

⁹⁶⁹ Cultural Policy of the Federal Democratic Republic of Ethiopia, Ministry of Culture and Tourism, 2016, Addis Ababa, §2.2.11, at 11. From among other factors, this policy was adopted in part in order to ensure Ethiopia’s implantation of relevant international instruments. Ratified by Ethiopia on September 2, 2008, one of the international instruments is the UN Convention on the Promotion and Protection of the Diversity of Cultural Expressions that was adopted in Paris on October 20, 2005[CPPD].

⁹⁷⁰ See NCP, *supra* note 969 at §1.4.2 & 1.4.5(at 7).

⁹⁷¹ *Ibid* § 2.5.11(at 15), § 2.9.5 & 2.9.8(at 19), 2.11 & 2.11.3(at 20& 21), § 3.2 &3.4(at 23 & 24).

⁹⁷² *Ibid*.

⁹⁷³ See Sean Pager, “The Role of Copyright in Creative Industry Development” (2017) 10:2 Law and Development Review 1-51; *see generally* Cohen, “Creativity and Culture,” *supra* note 201.

copyright law makes a mention of its role for cultural development. Yet, the NCP is limited to highlighting the instrumental role of creative works and other pertinent legal regimes for the purpose of cultural development. As a rule, the NCP should be read in the light of the cultural policy guidance in the FDRE Constitution that requires the government “to support the development of arts, science and technology”—a broad domain that includes copyright.⁹⁷⁴

In sum, despite the Ethiopia Intellectual Property Office (EIPO)’s current effort to develop a comprehensive IP policy that would encompass copyright, there lacks a formal policy framework for the protection of copyright and its role for creative innovation. In effect, the objective set out in the preamble of the copyright law remains the sole guiding policy statement without a prior or subsequent policy framework.

5.2.2. The Legal Framework

A. The Historical Evolution of Copyright Protection in Ethiopia

In the mid-20th century, the adoption of the Civil Code in 1960 was integral to Ethiopia’s massive project of modernization through legal transplantation.⁹⁷⁵ Consisting of a corpus of laws on diverse civil matters including copyright, the promulgation of the Civil Code marks the introduction of the first modern legal regime for copyright protection.⁹⁷⁶ For the era predating the inception of the copyright system, some scholars assume the existence of an access-oriented traditional practice. For instance, the scholars point out the prevalence of customary practices that would rather encourage the reproduction, translation and free use of creative works for religious and cultural purposes.⁹⁷⁷ Indeed,

⁹⁷⁴ FDRE Constitution, *supra* note 45 at art.91 (2).

⁹⁷⁵ See Rene David, “Sources of the Ethiopian Civil Code” (1967) 4:2 *Journal of Ethiopian Law* 341-49; John Beckstrom, “Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia” (1973) 21 *Am J Comp L* 557-83.

⁹⁷⁶ David, *supra* note 975 at 346.

⁹⁷⁷ Eshete & Mengistu, *supra* note 182 at 161-66.

there is no comprehensive account of the various traditional practices in Ethiopia—a multinational state homing multiple nations and nationalities with rich cultural traditions. Setting aside the cultural variance, undisputed is Ethiopia’s recent reception of the western conception of copyright system. In spite of its long tradition of massive legal transplants, the emulation still lacks proper customization.

In particular, the notion of an exclusive right does not comport with the indigenous conception of collaborative creation and the culture of sharing ingrained in the fabric of Ethiopian society. Perhaps, the moral right of attribution and recognition would remain the most significant aspect of copyright with a long tradition in Ethiopia.⁹⁷⁸ Given the lack of a developed printing technology, publishing industry and advanced literacy in Ethiopia, a matter of less significance is the economic value of copyright and its legal protection.⁹⁷⁹ In fact, the technological developments that led to the evolution of copyright system elsewhere emerged late in Ethiopia. In effect, the dominant market-driven utilitarian justification was less significant for the copyright system.

In contrast, a modern education was introduced into Ethiopia much earlier and took a root to serve its intended function of promoting literacy. In consequence, the role of modern education was considered to be a significant impetus for the development of the modern copyright system.⁹⁸⁰ In the 1960s, both technological and educational factors started to evolve in Ethiopia. In the end, the combined effects of the educational and technological developments, and the desire to promote creative innovation seem to be the major factors for the adoption of the modern copyright system.⁹⁸¹

⁹⁷⁸ *Ibid.*

⁹⁷⁹ *Ibid* at 162.

⁹⁸⁰ *Ibid* at 164.

⁹⁸¹ *Ibid* at 164-66.

Owing its draftsmanship to a French jurist—Rene David, the copyright regime under the Civil Code had heavily drawn on the French copyright law of the time.⁹⁸² It is worth noting that the French copyright law has been an epitome of the continental tradition of author’s right. In this sense, the natural-law based theories of copyright were thus the dominant philosophical underpinnings of the previous copyright regime of Ethiopia. In the Copyright Section of the Civil Code that had its opening provision dedicated to moral rights, the various provisions were indeed imbued with the attributes of the theories related to author’s right. Despite its debatable practical significance, the legal regime had remained intact for almost half a century. In its revamp of the previous legal regime in 2004, Ethiopia enacted the present copyright legislation now in force along with its recent amendment. In terms of its legal tradition, the current copyright regime seems to mirror a mix of the common-law copyright and continental authors’ right traditions.

B. Constitutional and Human Rights Basis for Copyright Protection

As noted in Chapter One, there exists no specific constitutional clause comparable to that of the US Constitution for copyright protection in Ethiopia. From among relevant regimes, the possible use of copyright to promote creative activities has been envisaged in the recent two consecutive national constitutions of Ethiopia. For instance, art.41 of the PDRE Constitution had recognized Ethiopians’ freedom to “engage in creative activities in science, technology and arts.” Further, the provision had imposed upon the state the duty to encourage and support the creative activities in order to improve the living standards of the people.⁹⁸³ As a legal means for the regulation of creative activities, copyright or appropriate regime might be used to promote the ‘creative activities’ embodied in the Constitution. In

⁹⁸² *Ibid* at 166; David, *supra* note 975 at 346; Tsehay Wada, translation and Translators’ Rights Under Ethiopian Law: a comparative Study (1999) 19 Journal of Ethiopian Law 50 at 57-59 (noting that the 1957 Copyright Law of France as the main legislative source for Ethiopian Copyright Law and this fact was already admitted by the French drafter himself who was entrusted with the task of drafting the Ethiopian Civil Code).

⁹⁸³ *PDRE Constitution*, *supra* note 45 at art.41 (2).

its broader sense, the freedom of creative activities in science, technology and arts was intended to advance the living standards of the people.

In the FDRE Constitution, a corresponding provision of similar objective is art.41 with its heading titled ‘economic, social and cultural rights’ that appears to mirror some rights in the ICESCR. Relevant for its inclusion of an economic aspect of copyright, art.41 (1) of the FDRE guarantees every Ethiopian “the right to freely engage in economic activity.” In fact, the constitutional freedom to engage in economic activity is essential for creative activities that have an economic value worth protecting under copyright or other regimes. To this effect, art.41 (1) of the FDRE Constitution is broad enough to encompass creative works generated through economic activities. As the products or fruits of the economic activities, the protection of the creative works can be secured through either proprietary or non-proprietary regime or a combination of both regimes. Despite its all-encompassing breadth, the provision can thus serve as a basis to justify the protection of the material interests of an author as recognized in the ICESCR.

In the same vein, a more relevant constitutional basis is implicit in art.40 (1) & (2) of the FDRE Constitution. Enshrining a constitutional right to property, art.40 (1) of the FDRE Constitution recognizes every Ethiopian’s right to the ownership of private property. In its unique approach with no explicit parallel in the ICESCR, it is worth mentioning that art.14 of the African Charter recognizes the right to property. Integrating the African Charter as per its art.9(4) &13(2), the FDRE Constitution accords a similar legal protection to a private property with both constitutional and human rights dimensions. In so doing, art.40 (2) of the Constitution defines “private property” to mean “any tangible or intangible product which has value and is produced by the labor, creativity, enterprise or capital.” From the definition, an *inference* can be made about copyright as *one of the possible mechanisms* for the protection of an intangible product with a value, the creation of which involves a *creative labor and*

capital. As indicated, the potential creators or right holders are (a) individual citizens, (b) juridical persons or (c) communities specifically empowered by law to own a property in common. Given its extension to juridical persons, the scope of protection envisaged under the FDRE Constitution exceeds that of the African Charter. As human right inheres in human beings alone, the right vested in juridical persons does not have a human rights dimension. Nonetheless, its constitutional dimension might remain valid to be invoked.

Further, the ownership and exploitation of copyright as a private property are subject to public interest and the rights of other citizens.⁹⁸⁴ Indeed, a legal limitation on the ground of public interest is recognized under art.14 of the African Charter. As a federal subject matter,⁹⁸⁵ the FDRE Constitution envisages a possible legal limitation to copyright in order to protect public interests and the rights of third parties. For instance, a related public interest aspect to be weighed in is government's obligation to promote "the development of arts, science and technology."⁹⁸⁶ Likewise, access to education is another vital public interest consideration to be drawn from the social objectives envisaged in the Constitution.⁹⁸⁷ Hence, it is a constitutional requirement to strike a balance between private rights and the public interest, including the rights of others.

In the context of balancing constitutional rights or freedoms, copyright protection can also be justified as a means for freedom of expression. The two relevant sub-provisions in this regard are art.29 (2) & (3) of the FDRE Constitution. Art.29(2) underscores 'the freedom to (...) impart information and ideas of all kinds (...) in writing or in print, in the form of art or through any media of his choice.' In the same vein, art.29(3) guarantees the 'freedom of artistic creativity' and 'access to information of

⁹⁸⁴ *Ibid* at art.40 (1).

⁹⁸⁵ In Ethiopia, the power to enact laws to protect copyright is vested in the Federal government. See *ibid* at arts.51 (19) &55(2) (g).

⁹⁸⁶ *Ibid* at art.91(2)

⁹⁸⁷ *Ibid* at art.90.

public interest’ as aspects of the freedom of expression. Despite its uneasy relationship with copyright regime, the exercise of freedom of expression depends upon copyrightable works—creative expression of ideas. In this respect, the freedom of expression overlaps with the instrumental function of copyright system—a mechanism intended to incentivize the creation and dissemination of creative expressions of ideas to the public.

Hence, the guaranteed freedom of expression can be another *albeit* limited constitutional basis for copyright protection in Ethiopia. Nonetheless, the copyright protection accorded in this context might rather be deemed subservient to advance the constitutional freedom of expression. In their full-fledged relationship, the respective limitations attached to both freedom of expression and copyright protection are intended to strike a balance in their intricate interface. Delving into the intricacies lie outside the ambit of this work.

As noted in Chapter One of this thesis, another relevant constitutional basis of a copyright protection in Ethiopia is derived from the FDRE’s integration of authors’ human right to the protection of their material and moral rights. From among the major international and regional human rights instruments, Ethiopia has long ratified the UDHR, the ICESCR and the African Charter. In its monistic approach to an international law,⁹⁸⁸ the FDRE Constitution both integrates into the national law⁹⁸⁹ and regards as an interpretative guidance all the ratified international human rights instruments.⁹⁹⁰ That is, the relevant provisions of the human rights instruments have a direct application for the human rights attributes of author’s right. Further, the principles enshrined therein have an authoritative and

⁹⁸⁸ See generally Bulto, *supra* note 122.

⁹⁸⁹ *FDRE Constitution*, *supra* note 45 at art.9 (4). The provision reads: “All international agreements ratified by Ethiopia are an integral part of the law of the land.”

⁹⁹⁰ *Ibid* at art.13 (2).

interpretative significance for the implementation of the human rights incorporated in the national constitution.

Integrated through the art.9(4) of the FDRE constitution, art.15(1)(c) of the ICESCR enjoys a direct application to ensure an author's right to protection of the material and moral interests resulting from scientific, literary and artistic production. As noted in the *General Comment No.17*, the protection of author's material and moral interests "seeks to encourage the active contribution of creators to the arts and sciences and to the progress of society as a whole."⁹⁹¹ The moral interest underpins the personal link between an author and the work created.⁹⁹² In contrast, the human rights to protection of material interests is imperative to enable authors to enjoy an adequate standard of living.⁹⁹³ As pointed out in the *General Comment*, the human rights of an author are interlinked with other human rights in the Covenant that their linkage is 'mutually reinforcing and reciprocally limitative.'⁹⁹⁴

In this regard, the CESCR enunciates the linkage and balance between the protection of the authors' material and moral interests, and other rights.⁹⁹⁵ The substantive linkage arises in the context of, *inter alia*, the right to culture, the right to enjoy the benefits of scientific progress and its applications,⁹⁹⁶ the freedom indispensable for scientific research and creative activities.⁹⁹⁷ Further, authors' right is required to be balanced against other rights in the Covenant, including the right to education.⁹⁹⁸ Thus, like the constitutional provision, the ICESCR—now an integral part of the national law—recognizes the existence of possible limitations on account of public interests and rights of

⁹⁹¹ *CESCR General Comment No.17*, *supra* note 49 at para.4.

⁹⁹² *Ibid* at para 12.

⁹⁹³ *Ibid* at paras 15-16, 23, 30, 39(c), 44 &45.

⁹⁹⁴ *Ibid* at para 4.

⁹⁹⁵ *Ibid* at para 4.

⁹⁹⁶ *Ibid* at para 4; ICESCR, *supra* note 8 at art.15, para 1(b).

⁹⁹⁷ *CESCR General Comment No.17*, *supra* note 49 at para 4; ICESCR, *supra* note 8 at art.15, para 3.

⁹⁹⁸ *CESCR General Comment No.17*, *supra* note 49 at para 4, 22 & 39(e); ICESCR, *supra* note 8 at art.2(1)

others.⁹⁹⁹ There however exists a distinction in the scope. That is, the constitutional provision confers upon both natural and juridical persons the right to private property that is inclusive of authors' right.¹⁰⁰⁰

In contrast, the *General Comment No.17* makes clear that an individual or a group of individuals is the sole bearer of the human rights aspects.¹⁰⁰¹ Not being a human right *per se* but a legal means for the protection of author's rights,¹⁰⁰² the expansive copyright regime is distinct from the human rights aspects in its scope and nature.¹⁰⁰³ As opposed to the exclusive statutory rights, authors' human rights is a universal entitlement vested in all natural persons without a discrimination.¹⁰⁰⁴ In its protection, essential for an author to enjoy an adequate standard of living is the entitlement to an equitable remuneration and attribution.¹⁰⁰⁵

In sum, the legal protection of copyright in Ethiopia can be justified both on constitutional and human rights bases. Indeed, the FDRE Constitution provides for two overlapping dimensions and bases *albeit* with different scopes. As a detailed discussion of the distinction lies outside the ambit of this thesis, two major points are worth noting. First, implied in the general constitutional right to private property is the object of copyright within the broad domain of private property and its possible

⁹⁹⁹ *CESCR General Comment No.17*, *supra* note 49 at para 22-24 &35. As noted in the General Comment, “[i]n striking this balance, the private interests of authors should not be unduly favored and the public interest in enjoying broad access to their productions should be given due consideration.” *Ibid* at para 35.

¹⁰⁰⁰ FDRE Constitution, *supra* note 45 at art.40(2).

¹⁰⁰¹ *CESCR General Comment No.17*, *supra* note 49 at para 1-3 & 7&8.

¹⁰⁰² For opposing views on this debate, see, e.g., Paul Torremans, “Is Copyright a Human Right” (2007) *Mich. St L. Rev.* 271.

¹⁰⁰³ *CESCR General Comment No.17*, *supra* note 49 at paras 2&10.

¹⁰⁰⁴ *Ibid* at para 1 & 2; see Yu, “Re-conceptualizing Intellectual Property,” *supra* note 647 at 1111.

¹⁰⁰⁵ Helfer & Austin, *Human Rights and Intellectual Property*, *supra* note 33 at 193-94; Yu, “Re-conceptualizing Intellectual Property,” *supra* note 647 at 1095-1105.

ownership by *both natural and juridical persons*.¹⁰⁰⁶ That is, both individuals and corporate entities have a constitutional right to claim the ownership of copyright as a private property.

Second, for the human rights dimension, the human rights provisions are rather limited to the protection of *natural persons'* right to material and moral interests over creative works under appropriate regimes, including copyright legislation. In principle, human rights vest in a *human* person alone. Hence, the scope of the constitutional right to property and author's human rights over creative works may not necessarily coincide. However, common to both constitutional and human rights aspects are the triple duties of the Ethiopian government to ensure the respect for, protection of and the fulfillment of the rights.¹⁰⁰⁷

Despite the differences in their scope, both legal regimes recognize similar grounds of possible limitations to the legal protection. For the human rights dimensions, the provisions of the human rights instruments and relevant jurisprudence will guide the interpretation of the constitutional provisions. Given its dual constitutional basis—private property and author's right via the ICESCR, the legal protection of copyright in Ethiopia might assume a dual character—proprietary and non-proprietary—under the FDRE Constitution. In contrast, its protection under the latter—ICESCR—is neither *required* to be proprietary nor is a copyright the *sole mode or means* of its legal protection.¹⁰⁰⁸ That is, relevant non-proprietary or compensatory regimes that recognize and ensure adequate protection of author's right can also be used for a compliance with the human rights obligations.¹⁰⁰⁹

¹⁰⁰⁶ *FDRE Constitution*, *supra* note 45 at art.40 (2). The provision, in its relevant part, reads: “‘Private property’, for the purpose of this Article, shall mean *any tangible or intangible product* which has value and is produced by *the labor, creativity, enterprise or capital* of an individual citizen, associations which enjoy juridical personality under the law....” [emphasis added].

¹⁰⁰⁷ *Ibid* at art.13 (1); ICESCR, *supra* note 8 at art. 2(1); *CESCR General Comment No.17*, *supra* note 49 at paras 28-34.

¹⁰⁰⁸ See *General Comment No.17*, *supra* note 49 at paras 1&2.

¹⁰⁰⁹ Yu, “Re-conceptualizing Intellectual Property,” *supra* note 647 at 1087-92. Jerome H. Reichmann, “Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation” (2000) 53 Vand L Rev 1743 at 1746-47[Reichmann, “Of green Tulips”]; see Guido Calabresi & A. Douglas Melamed, “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral” (1972) 85 Harv L Rev 1089.

C. Statutory Regime for Copyright Protection

From the international perspective, the present copyright legislation draws a substantial inspiration from the existing corpus of the international copyright regime. In its substantive content and approach, the current law marks a stark departure from the previous regime in several aspects. First, the current copyright law is much more comprehensive to encompass subject matters of copyright and related or neighboring rights. In addition to the latter that exist over performances, sound recordings and broadcasts, the enumerative subject matters of copyright stem from a ‘work’. Defined as a generic term, a ‘work’ refers to ‘a production in the literary, scientific and artistic fields.’¹⁰¹⁰ The long list of works includes books, computer programs, audiovisual and photographic works. In the previous copyright law, an open-ended list of the subject matters was encapsulated in the ‘works of the mind’ that would extend to embrace “any other work created by the intelligence of their author and presenting an original character.”¹⁰¹¹ For an obvious reason, computer programs and original databases were missing from the open-ended list of the 1960 copyright law *albeit* with a room available for their inclusion.

Second, in terms of the categories of creators, the current copyright law makes an explicit definition and categorization of neighboring rights as “the rights of performers, producers of sound recordings and broadcasting organizations over their works.”¹⁰¹² In its reference to ‘works’, the law appears to subsume the subject matters of the rights within the broad domains of copyright. Despite this apparent conflation, the neighboring rights are protected *as such* under the current law with the provisions drawn from the relevant international copyright treaties. In contrast, the prior law that resembled the common law approach in its structure (form) lumped up all the works under copyright

¹⁰¹⁰ Copyright Proc. No. 410/2004, *supra* note 136 at art.2 (30).

¹⁰¹¹ Civic Code, Proclamation No. 165 of 1960, Addis Ababa, 5 May 1960, art.1648[Civil Code 1960].

¹⁰¹² Copyright Proc. No. 410/2004, *supra* note 136 at art. 2(14).

without a mention of neighbouring rights. Irrespective of its strong substantive continental law origin, a there was a structural variance between the law and its foreign source. A sign of deviance from its roots was the conspicuous omission of the neighboring rights from the previous copyright law regime.

Third, the current copyright law makes an explicit embodiment of the principle of idea/ expression distinction to exclude, *inter alia*, ideas, procedures, method of operation and concept “even if expressed, described, explained, illustrated or embodied in a work.”¹⁰¹³ Further, excluded are official texts of legislative, administrative or of legal nature and the official translations thereof.¹⁰¹⁴ In what appeared to be a recognition of public interests, the official texts were likewise excluded from the prior law *albeit* without a mention of the translations thereof.¹⁰¹⁵ In effect, all those excluded works would fall in the public domain for users to enjoy free consumptive or creative uses.

Fourth, there exists a clear difference with regard to the conditions for legal protection. Under the previous copyright law, an author of the ‘work of the mind’ was entitled to the ownership of the work upon its “mere creation, ... regardless of the nature, form of expression, merit or purpose of the work.”¹⁰¹⁶ As a strong reminiscent of the natural law theories rooted in the continental legal system, the provision in effect excluded the requirement of fixation. Hence, suffice for a legal protection was a mere act of creation. As to the condition of originality, the law made it implicit in the act of creation as a ‘work of the mind’— ‘intellectual creation.’ In particular, this is evident from the wording intended to embrace a “work created by *the intelligence of their author* and *presenting an original character*.”¹⁰¹⁷ That is, the reference to a *work of intelligence* and *original character* would echo the requirement of

¹⁰¹³ *Ibid* at art.5 (a).

¹⁰¹⁴ *Ibid* at art.5 (b).

¹⁰¹⁵ *Civil Code 1960, supra* note 1011 at art. 1651.

¹⁰¹⁶ *Ibid* at art.1647(1) & (2)

¹⁰¹⁷ *Ibid* at art.1648 (e). Further, the requirement of originality is implicit in art.1649 and 1650 that respectively refer to ‘.... original works’ and ‘intellectual creations’ in their respective provisions.

originality as a criterion for protection. In its significant deviation from its predecessor, the current law provides for explicit requirements of both originality and fixation.¹⁰¹⁸

Despite a tangential mention of the criterion in the scant jurisprudence, there is no authoritative statutory or judicial guidance/definition for the requirement of originality. In contrast, ‘fixation’ is in part defined as “the embodiment of the works” in a material form or device that enables their perceptible and reproducible use or dissemination.¹⁰¹⁹ For all copyrighted works, a regulation and a directive have been issued for their registration at the discretion of the right holders.¹⁰²⁰ In the event its issuance is sought or opted for, the registration certificate—valid for five years and subject to successive renewals—is intended to serve as a *prima facie* evidence of ownership.¹⁰²¹

Fifth, while both economic and moral rights are central to both the previous and the current copyright law,¹⁰²² the latter provides for a boarder scope of economic rights.¹⁰²³ In what appears to reflect the existing tradition¹⁰²⁴ and the desire to enrich the literary culture in a multilingual nation,¹⁰²⁵ the previous copyright law used to allow a translation of a work without an authorization as long as a

¹⁰¹⁸ *Copyright Proc. No. 410/2004*, *supra* note 136 at art.6 (1). For photographic works, an additional requirement of either publication or the designation of the author or his agent is required for protection. *Ibid* at art.6 (2).

¹⁰¹⁹ *Ibid* at art.2 (11). It reads: “‘Fixation’ means the embodiment of works or images or sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device prepared for the purpose.” *Ibid*.

¹⁰²⁰ *Registration of Works Entitling Copyright and Neighboring Rights Council of Ministers Regulation No.305/2014*, arts. 3(1) & 5 [*Copyright Registration Regulation No.305/2014*]. In addition to the certificate issued to the right holders, the registration is important for preservation of sample works by the EIPO. *Ibid* at art.3(2);

¹⁰²¹ *Ibid* at arts.11, 12(2) &13.

¹⁰²² *Civil Code 1960*, *supra* note 1011 at arts. 1652 (reproduction right), art. 1654 (adaptation rights); arts.1647, 1652, 1665 and 1671(moral rights).

¹⁰²³ *Copyright Proc. No. 410/2004*, *supra* note 136 at arts. 7&8.

¹⁰²⁴ Eshete and Mengistu argue that the dispensation with the exclusive right to translation is an indication of a legislative will to allow the continuation of the prior traditional practice as an indigenous element to the system. See Eshete & Mengistu, *supra* note 182 at 182 &166-67.

¹⁰²⁵ Wada, *supra* note 982 at 60-61. In dismissing the existence of any customary influence and noting lack of a legislative indication to this effect, Wada maintains that the legislature might have intended to facilitate the enrichment of the literary culture of the nation without restriction. He further adds that this would be useful to strengthen the cultural integration between peoples of different cultures and languages in Ethiopia.

due recognition of the work would be made.¹⁰²⁶ In contrast, the current copyright law provides for all exclusive economic rights under the Berne Convention and the TRIPs Agreement.¹⁰²⁷ Furthermore, the law provides for *exclusive* rental right, public lending and remunerative resale right.¹⁰²⁸ With regard to moral rights, the current law has reverted to a monistic approach from its previous French dualistic approach of perpetual protection.¹⁰²⁹ For all economic rights acquired over works of employees or commissioned works, the current law has reversed the previous approach and adopted the doctrine of work-for-hire, unless agreed otherwise.¹⁰³⁰

Six, unlike the preceding law that provided for an indiscriminate term of lifetime-plus fifty years for all works,¹⁰³¹ the current copyright law has adopted varying terms for different works. There is a duration of lifetime-plus fifty years for most works,¹⁰³² fifty-years for a collective work,¹⁰³³ anonymous work,¹⁰³⁴ and neighboring rights.¹⁰³⁵ A shorter term of protection is provided for broadcasters that enjoy a protection for a term of 20 years from the year of broadcast.¹⁰³⁶ Likewise, a

¹⁰²⁶ *Civil Code 1960*, *supra* note 1011 at art.1655. In this regard, it is correctly argued that the restriction would not divest an author of the right to make a translation, but the right to authorize the translation by third parties. Further, contentious under the previous law was whether the author would be entitled to an equitable remuneration for a translation made without his authorization. See Wada, *supra* note 982 at 61-62.

¹⁰²⁷ *Copyright Proc. No. 410/2004*, *supra* note 136 at art.7.

¹⁰²⁸ *Ibid* at arts.7 (1) (d), 7(2) & (3).

¹⁰²⁹ *Ibid* at art.8 (4) [“Moral rights shall be enjoyed by heirs or legatees of the author until the expiry of economic rights.”]; *Contra. Civil Code 1960*, *supra* note 1011 at art.1671. For the difference between monism and dualism on moral rights, see Michel Walter, “Dualistic Aspects in Monistic Systems of Moral Rights” (2019) *Journal of Intellectual Property Law & Practice* 1 at 3-9; Adolf Dietz, “The Moral Right of the Author: Moral Rights and the Civil Law Countries” (1995) 19 *Columbia-VLA Journal of Law & the Arts* 206. *But see*, Cyrill Rigamonti, “The Conceptual Transformation of Moral Rights” (2007) 55:1 *Am J Comp L* 67-122.

¹⁰³⁰ *Copyright Proc. No. 410/2004*, *supra* note 136 at art.21 (4). *Contra. Civil Code 1960*, *supra* note 1011 at art.1647 (3).

¹⁰³¹ *Civil Code 1960*, *supra* note 1011 at art. 1670. The exception to the rule is the indefinite duration for moral right that was intended to be exercised in perpetuity. *Ibid* at art.1671.

¹⁰³² *Copyright Proc. No. 410/2004*, *supra* note 136 at art.20 (1).

¹⁰³³ *Ibid* at art.20 (4).

¹⁰³⁴ *Ibid* at art.20 (5).

¹⁰³⁵ *Ibid* at art.20 (8), 26(2) & (5), 27(2).

¹⁰³⁶ *Ibid* at art. 31(2).

term of twenty-five years is secured for photographic works.¹⁰³⁷ In setting the terms of protection, the current law draws on the existing international copyright treaties.

In terms of flexibilities that will be explored in-depth in Chapter Six, both the current law and its predecessor provide for a list of L&Es.¹⁰³⁸ Nonetheless, there remain significant differences in their scope. Another similar point of distinction relates to the exploitation and enforcement of copyright. In view of its comprehensiveness and strictness, the current law departs from its predecessor that was somehow incomplete. Given its incompleteness, the law was supplemented by a special publishing contract for its exploitation and had few enforcement mechanisms.¹⁰³⁹ For instance, the current copyright law includes enforcement measures ranging from injunctive relief, broader measures, and civil remedies to severe criminal measures.¹⁰⁴⁰ In particular, the law has taken a TRIPs-plus approach for its indiscriminate criminalization of all intentional and *negligent* acts of infringement.¹⁰⁴¹

In effect, such unwise and wholesale criminalization of acts of infringement would both stifle a robust creative innovation and frustrate the objectives of an appropriate copyright system. Given its resource constraints, Ethiopia's uncritical embrace of the ill-advised approach is rather tantamount to an extravagant expenditure and misallocation of the country's meagre public resources. The stringent approach to the current law might be attributed to the influence of WIPO's technical assistance.¹⁰⁴² The

¹⁰³⁷ *Ibid* at art.20 (7).

¹⁰³⁸ *Ibid* at arts.9-20&32; *Civil Code 1960*, *supra* note 1011 at arts.1655-1661.

¹⁰³⁹ See *Copyright Proc. No. 410/2004*, *supra* note 136 at arts.23-25 (for assignment and licensing) and arts.33-36(enforcement measures); *Civil Code 1960*, *supra* note 1011 art.1664 &1674 (for reference to publishing contracts in the Code and enforcement measures respectively). The statutory regime of special contracts of publication was designed to regulate the relationship between authors and publishers. *Ibid* at at arts.2672-2697.

¹⁰⁴⁰ *Copyright Proc. No. 410/2004*, *supra* note 136 at arts.33-36.

¹⁰⁴¹ *Ibid* at art.36.

¹⁰⁴² Okediji, "Reframing International Copyright," *supra* note 154 at 436. For the impact of WIPO's technical assistance, see generally Carolyn Birkbeck & Santiago Roca, *An External Review of WIPO Technical Assistance in the Area of Development Cooperation, Final Report*, 31 August 2011.

other factors relate to lack of public deliberation and limited engagement of pertinent experts in the law-making process.

5.2.3. The Institutional Framework

For quite a long period of time, there was no specific institutional framework in place for the promotion and protection of copyright in Ethiopia. In the absence of a coordinated institutional framework with a specific mandate, matters related to copyright were either included or implied in the mandates of various ministers or agencies in a fragmented manner. For instance, more pertinent for its mandate of promoting cultural development was the previous Ministry of Youth, Sports and Culture. Now re-organized as the Ministry of Culture and Tourism, the Ministry used to and still continues to, in part, oversee the administration of copyright and related matters.¹⁰⁴³ Upon its re-establishment, the specific and relevant mandates of the Ministry make an explicit reference to (a) the promotion of creative artistic works and fine arts, and (b) facilitating the development of a film industry and theatrical arts.¹⁰⁴⁴ Thus, the Ministry is entrusted with the *promotion* of relevant copyright matters as an instrument of cultural development.

From the IP perspective, the EIPO has been dedicated to the advancement of IP protection since its establishment in 2003. As the first comprehensive IP Office in Ethiopia, the EIPO was established with the objective to, *inter alia*, “facilitate the provision of adequate legal protection for and exploitation of IP in the country.”¹⁰⁴⁵ For a copyright, the EIPO that has been entrusted, *inter alia*, with the protection and promotion of copyright in Ethiopia. To this end, this specific institutional

¹⁰⁴³ *Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 471/2005*, art. 30(1) (c) & (2), Federal Negarit Gazette, 12th Year No.1, 17th November, 2005, Addis Ababa, Ethiopia.

¹⁰⁴⁴ *Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 691/2010*, art. 31(6) & (7), Federal Negarit Gazette, 17th Year No.1, Addis Ababa, 27th October, 2010, Addis Ababa, Ethiopia.

¹⁰⁴⁵ *Ethiopian Intellectual Property Office Establishment Proclamation No.320/2003*, Federal Negarit Gazette, 9th Year No.40, Addis Ababa 8th April 2003, Ethiopia, art. 5(1) [*EIPO Establishment Proc. 320/2003*].

framework has now a directorate/department dedicated to the issue of copyright. From among its long list of mandates, the EIPO is required to facilitate and strengthen the establishment of authors' association and collective management societies.¹⁰⁴⁶ In support of its mandate, the Office has established the special IP Tribunal and approved the establishment of the Collective Management Society (CMS). Being the main reason for the recent copyright law amendment, the establishment of these subsidiary institutions constitutes a significant institutional development.

With legal provisions stipulated for its establishment and operation since 2014,¹⁰⁴⁷ the CMS can be formed by the owners of copyright and neighboring rights for a joint administration of their rights.¹⁰⁴⁸ Subject to the approval of the EIPO for its formation and operation, the CMS in Ethiopia is a not-for-profit association vested with the power to license the economic rights of the right holders, collect royalties and distribute the revenue to the right holders after the necessary reductions.¹⁰⁴⁹ Further, the CMS is also entrusted with the duty to collect royalties from orphan works after courts' determination of the status of the works as such. In contrast to other works, the revenue collected from the orphan works will be delivered to the EIPO for its exclusive use in the promotion and protection of copyright and neighboring rights.¹⁰⁵⁰ In the course of its operation, the CMS is required to submit to the

¹⁰⁴⁶ *Ibid* at art.6 (14).

¹⁰⁴⁷ *Copyright Amendment Proc. No. 872/2014*, Federal Negarit Gazette, 21st Year No. 20, Addis Ababa, Ethiopia, 14 January 2014, arts. 32-34[*Copyright Amendment Proc. No. 872/2014*]. The formation of CMS was long contemplated upon the establishment of EIPO in 2003. See *EIPO Establishment Proc. No.320/2003*, *supra* note 1045 at art.6(14). For the operation of the CMS, a regulation has been drafted. See Copyright and Related Rights Collective Management Society Registration and Recognition Regulation, online: EIPO<http://www.eipo.gov.et/documents/147455/1746299/CMOs+Regulation_english.pdf/50897c09-24c7-bf15-c8bb-2be0b0474a0b?version=1.0>.

¹⁰⁴⁸ *Ibid* at art.2(1); *Copyright Proc. 410/2004*(as amended in 2014), *supra* note 136 at art. 32(1). It is worth mentioning that an association for copyright and related rights was established in 2009. Nonetheless, it took a while for the association to function as CMS, in part, due to lack of appropriate legal framework at the time. At the moment, it is a member of the CISAC.

¹⁰⁴⁹ *Copyright Proc. 410/2004*(as amended in 2014), *supra* note 136 at art. 34(1-4) &35(2).

¹⁰⁵⁰ *Ibid* at art.39 (1-3).

office for approval a royalty scheme or proposals on the category of all works and list of users.¹⁰⁵¹ This would preempt concerns of an excessive pricing that might constitute anticompetitive practice.

For the adjudication of civil matters, the IP Tribunal established under the EIPO is vested with a first instance jurisdiction on IP-related civil matters, except for cases of extra-contractual liability that fall under the jurisdiction of the regular federal courts.¹⁰⁵² It is stipulated that a party aggrieved by the decision of the Tribunal would be entitled to lodge an appeal before the Federal High Court within two months. In short, the Tribunal's power of adjudication seems to cover administrative and contractual matters, to the exclusion of acts of infringement and other related matters.

In conclusion, despite the regime's lack of a specific policy framework, both legal and institutional frameworks have been laid down for the protection and promotion of copyright in Ethiopia. In particular, the legal regime is constituted of relevant constitutional, human rights and statutory provisions. The statutory regime provides for an expansive and stringent legal protection along with a range of severe enforcement measures. In spite of the overlapping matters vested in pertinent institutions for promotional activities, the EIPO, CMS and the IP Tribunal comprise the core of the institutional framework for the national copyright system.

¹⁰⁵¹ *Ibid* at arts.34 (2) & 38(2).

¹⁰⁵² *Copyright Amendment Proc.No.872/2014*, *supra* note 1047 at art. 2(12); *Copyright Proc. 410/2004*(as amended in 2014), *supra* note 136 at art.44 (1).

5.3. The Policy, Legal and Institutional Basis of Tertiary Education

Given its rich history of civilization, the emergence of a traditional or religious education in Ethiopia was integral to the country's historical evolution.¹⁰⁵³ Nonetheless, its history of 'western-like' modern education is of a recent phenomenon that dates back to the introduction of a secular primary education in 1908.¹⁰⁵⁴ In the aftermath of its liberation from the short-lived Italian occupation in 1941, Ethiopia had embarked upon its heightened era of 'modernization' that led to the introduction of the first secondary education in 1943.¹⁰⁵⁵ Within a range of a decade, there followed the emergence of a tertiary education in Ethiopia. As this development soon gathered a momentum, the establishment of the Addis Ababa University College in 1950 was later upgraded into a full-fledged university in 1961.¹⁰⁵⁶ With a nascent modern tertiary education system in place in the 1950s,¹⁰⁵⁷ the consequent establishment of the Addis Ababa University (AAU) thus marked the beginning of a significant development of tertiary education in Ethiopia.¹⁰⁵⁸ For decades, the AAU had remained the sole national university and served as a center of administrative unit for few other colleges run under its umbrella.

Over the course of its unabated tumultuous periods of conflicting ideological transformations, Ethiopia has issued and overseen the implementation of several educational policies imbued with

¹⁰⁵³ Fassil Kiros, "Implementing Educational Policies in Ethiopia" (1990) Africa Technical Department Series /World Bank Discussion Papers No.84 at 1; Habtamu Garomssa, "The Missing Link in Donor Prescribed Educational Reforms: Lack of Ownership (The Case of the World Bank in Ethiopian Higher Education)" (2016) 5:2 International Journal of Higher Education 12 at 13.

¹⁰⁵⁴ Eshete & Mengistu, *supra* note 182 at 164; William Saint, "Higher Education in Ethiopia: The Visions and Its Challenges" (2004) 2:3 JHEA/RESA 83 at 84.

¹⁰⁵⁵ Kiros, *supra* note 1053 at 4-8.

¹⁰⁵⁶ *Ibid* at 9&44; Saint, *supra* note 1054 at 84.

¹⁰⁵⁷ Kiros, *supra* note 1053 at 1.

¹⁰⁵⁸ *Ibid* at 44, 54 &65.

different socio-economic and political orientations.¹⁰⁵⁹ Despite the continuous efforts made to expand and promote tertiary education since its inception, the post-millennium period has set in motion a massive expansion of both public and private tertiary education in Ethiopia. In this respect, the educational policy put in place in 1994 has been a major blueprint for the intensified focus on tertiary education as an instrument of development. In order is thus a brief account of the policy, legal and institutional frameworks of tertiary education in Ethiopia.

5.3.1. The Policy Framework

As indicated above, Ethiopia has put in place a series of policy frameworks related to tertiary education ever since the latter's emergence in the second half of the twentieth century. Prior to the current educational policy, Ethiopia had various educational policies/plans adopted both under the Imperial and the Socialist regimes.¹⁰⁶⁰ In spite of the different ideological beliefs that dictated their orientations,¹⁰⁶¹ the policies underscored the instrumental role of tertiary education for development.¹⁰⁶² Further, the educational policies highlighted the persistent issues of educational expansion and its quality.¹⁰⁶³ To start with the current policy framework in operation, Ethiopia adopted a comprehensive education and training policy (ETP) in 1994 after the downfall of the Socialist regime. As embodied in the ETP, one of the aims of education at all levels is “to strengthen the individuals’ and society's

¹⁰⁵⁹ *Ibid* at 38, 42, 66, 77-82 & 111. For instance, during the socialist regime, one of the objectives of higher education set out in the Higher Education Institutions Administration Proclamation of 1976 was “to teach, expound and publicize socialism and formulate methods to carry out these functions...” In this respect, Kiros noted the inclusion of the ideology of socialism in education curricula at all levels. *Ibid* at 111. See Girma Amare, “Current Trends in Higher Education in Ethiopia” (1988) 10:1 *Northeast African Studies* 47 at 48-51, 60-62 & 67.

¹⁰⁶⁰ See generally Kiros, *supra* note 1053.

¹⁰⁶¹ *Ibid* at 65-66, 77 & 79-81; Amare, *supra* note 112 at 60-62 & 67 (describing how education was used as an instrument of ideological indoctrination).

¹⁰⁶² See Kiros, *supra* note 1053 at 13, 16, 34 & 79-81;

¹⁰⁶³ See generally *ibid*.

problem-solving capacity, ability and culture.”¹⁰⁶⁴ The ETP has also acknowledged the role of education in the promotion of respect for human rights and democratic values.¹⁰⁶⁵

Setting both aims of education as part of its general objectives,¹⁰⁶⁶ the ETP’s specific objectives are all geared towards meeting the country’s demand for skilled human resources through training in various skills and at different levels.¹⁰⁶⁷ In this respect, the ETP is said to reflect the knowledge intensive development discourse of the World Bank—Ethiopia’s long-time and major global donor with an overwhelming influence.¹⁰⁶⁸ In addition to its central objective, the ETP’s long list of specific objectives includes the role of education to develop and enrich students’ creative skills.¹⁰⁶⁹ In line with its objectives, a development research-oriented tertiary education is intended to enable students to “become problem-solving professional leaders in their fields of study and in overall societal needs.”¹⁰⁷⁰ In order to promote the quality, relevance and expansion of education, the ETP points out the need for the provision, distribution and utilization of educational materials, technology and facilities.¹⁰⁷¹ Except for the issue of learning materials, the aforementioned policy objectives have been clearly enshrined in the subsequent higher education legislations.

As set out in its detailed implementation guide issued in 2002, the implementation of the policy has been carried out in series of five-year education sector development programs or plans (ESDP). To this end, the need for a relevant and quality tertiary education, and its alignment with the national

¹⁰⁶⁴ See ETP, *supra* note 131 at 1.

¹⁰⁶⁵ *Ibid.*

¹⁰⁶⁶ *Ibid* at § 2.1 & 2.2 (at 7&8).

¹⁰⁶⁷ *Ibid* at 9.

¹⁰⁶⁸ Garomssa, *supra* note 1053 at 17-18; Tebeje Molla, “External Policy Influence and Higher Education Reform in Ethiopia: Understanding Symbolic Power of the World Bank” (2013) 2:2 International Journal of Sociology of Education at 167-192.

¹⁰⁶⁹ See ETP, *supra* note 131 at § 2.1.5(at 8).

¹⁰⁷⁰ *Ibid* at § 3.2.4 (at 15).

¹⁰⁷¹ *Ibid* at § 3.7.1&3.7.2 (at 27).

development policy direction were both emphasized from the start.¹⁰⁷² For the realization of the policy objectives of tertiary education, the guide elaborates as key strategies, *inter alia*, the revision of the existing curriculum, upgrading or establishment of colleges and universities, professional staff development, undertaking development-oriented research, and introduction of cost-sharing scheme for universities' financial development.¹⁰⁷³ In a recent (draft) education roadmap under consideration since 2018, an attention has been drawn to the increased expansion of equitable, efficient, relevant and research-oriented quality tertiary education.¹⁰⁷⁴ In order to produce skilled labor in the fields, Ethiopia's tertiary education system allots a quota of 70 % admissions for science, technology and engineering.

In its deviation from the ETP's generic reference to learning or educational materials, the implementation guide overlooks the importance and provision of learning materials for quality tertiary education. In practice, the ETP's generic reference to the need for distribution and utilization of learning materials for education is limited to those for basic and pre-tertiary levels of education. Established under the Ministry of Education, the Educational Materials Production and Distribution Enterprise (EMPDE) has been entrusted with the provision and distribution of textbooks to schools for both levels of education. In contrast, the Higher Education Proclamation is silent on the sustainable supply and distribution of learning materials to higher educational institutions for tertiary education.

5.3.2. The Legal Framework

The evolution of the relevant legal framework of tertiary education has a recent origin in Ethiopia. The Charter for the establishment of AAU was the first relevant piece of legislation that came into existence in 1961. Limited in its scope and purpose, the Charter was intended for the establishment and operation of the University as the first higher education institution in the country. It took a decade

¹⁰⁷² See *The Education and Training Policy and Its Implementation*, Ministry of Education, February 2002 (ETPI) at 102.

¹⁰⁷³ *Ibid* at 102-108.

¹⁰⁷⁴ See *Ethiopian Education Development Roadmap (2018-2030): An Integrated Executive Summary*, at 49-60, Education Strategy Center, Ministry of Education, July 2018, Addis Ababa (Draft for Discussion).

and half for the first general legislation to emerge. Adopted in 1976, the Higher Education Proclamation was intended to ensure a coordinated administration of higher educational institutions. There was a significant development in the legal framework of tertiary education after Ethiopia's adoption of its FDRE Constitution and ratification of human rights instruments in the 1990s. It however took a while for a comprehensive statutory regime to emerge in the first decade of the post-millennium period. In this respect, the current statutory regime in force since 2009 has evolved from its preceding higher education legislation that was enacted in 2003. Given the developments in the relevant constitutional, human rights and statutory regimes, it is important to highlight the salient legal aspects related to the objectives, promotion and administration of tertiary education in Ethiopia.

A. Constitutional and Human Rights Basis

In its legal history of constitutional development, Ethiopia had two monarchial constitutions adopted in 1931 and 1955 before its recent ones. In both constitutions, there existed no reference to the right to education. From Ethiopia's recent two constitutions, an explicit mention of the right to education was made in the People's Democratic Republic of Ethiopia (PDRE) Constitution of 1987.¹⁰⁷⁵ For instance, art.40 (1) of the Constitution stipulated stating: "Ethiopians have the right to free education." Further, the same provision imposed an obligation upon the state to progressively expand schools and vocational institutions of various kinds and levels. In the PDRE Constitution, it is worth mentioning that art.40 was placed under a Chapter titled 'fundamental freedoms, rights and duties of citizens.'

As stated in the Constitution's chapter related to a social and cultural policy, the Socialist government was bound to 'ensure the expansion of education and other means of enriching knowledge

¹⁰⁷⁵ "The Constitution of the People's Democratic Republic of Ethiopia" (1988) 14:2 Review of Socialist Law 181-208, arts. 19(1) & 40[PDRE Constitution].

in order to develop a new culture and lay a foundation for socialism.’¹⁰⁷⁶ Entrenched in Ethiopia as unabated practice of series of governments to date, the previous Socialist government used education as an instrument of ideological indoctrination. Nevertheless, the PDRE Constitution’s generic reference to education and the state’s corresponding obligation for its expansion can be construed to include access to tertiary education. Divested of its legal effect upon the collapse of the Socialist government and the discard of the Constitution in 1991, the afore-cited constitutional provision is, at present, of a mere historical significance meant to highlight the legal evolution.

In this thesis, it is vital to make an inquiry for a similar or better reference to tertiary education in the current FDRE Constitution. As noted under Chapter One of this thesis, the FDRE Constitution makes a generic reference to education under a provision dealing with economic, social and cultural rights. In this regard, art.41 (4) rather emphasizes the obligation of the State to allocate resources and provide access to education. Intended to serve as a policy guidance for its implementation,¹⁰⁷⁷ art.90(1) of the FDRE Constitution further requires the State to formulate policies that aim to provide all Ethiopians an access to, *inter alia*, education, subject to the extent the country’s resources permit. In contrast to its predecessor that is explicit in its language of both the right and the corresponding obligations, the FDRE Constitution underscores the State’s obligation for its *progressive realization* without a reference to education as a right and its levels.¹⁰⁷⁸ In terms of its wording that evades the conventional language of right, the FDRE Constitution appears to be somehow regressive in its approach.

¹⁰⁷⁶ *Ibid* at art.19 (1).

¹⁰⁷⁷ *FDRE Constitution, supra* note 45 at art.85.

¹⁰⁷⁸ Indeed, the FDRE Constitution is somehow obscure in its language of the right. Although education is not stated in the language of right, in Hofeldian classic conception of a claim-right, one might argue that the explicit statement of the obligation presupposes the existence of a right or right implies a corresponding obligation. See Wesley Hohfeld, “Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1917) 26 *Yale LJ* 710 at 710–770.

Nonetheless, this reading is not tantamount to the non-recognition of the right to education enshrined in various human rights instruments. In principle, reading a provision in isolation from its context is both untenable and afoul of the established rule of interpretation. In this regard, an important backdrop for the interpretation of art.41 (4) derives from the pertinent human rights instruments and the monistic approach of the FDRE Constitution itself. In its affirmation of Ethiopia's ratification of, *inter alia*, the International Bill of Human Rights and the UNCRC, the FDRE Constitution draws on the provisions of the human rights instruments that do recognize right to education in general and equal access to higher education in particular.¹⁰⁷⁹ Furthermore, the FDRE Constitution both integrates the human rights instruments into the law of the land and subordinates its corresponding provisions to the interpretative guidance of the human rights instruments.¹⁰⁸⁰

Read in tandem, the relevant provisions of the human rights instruments on the right to education and art.41(4) are thus crucial to highlight the significance of individual's equal access to and realization of tertiary education.¹⁰⁸¹ From within the FDRE Constitution, the interpretation of art.41(4) should take into account the placement of the provision under the Chapter dedicated to 'Fundamental Rights and Freedoms.' In particular, the provision is situated under a section allotted for 'democratic rights' and the heading titled 'Economic, Social and Cultural Rights.' For its progressive implementation, art.90 of the FDRE Constitution is pertinent as a provision of an interpretative constitutional policy guidance.¹⁰⁸² As discussed in Chapter One of this thesis, save in African Charter,

¹⁰⁷⁹ *FDRE Constitution*, *supra* note 45, Chapter Three, Fundamental Rights and Freedoms, arts. 13-44. Note that Ethiopia had already adopted the UDHR in 1948, while it took more than two decades to ratify the ICCPR & ICESCR on 11 June 1993. Ethiopia ratified the UNCRC on 14 May 1991.

¹⁰⁸⁰ *FDRE Constitution*, *supra* note 45 at art.9(4) & 13(2); see Bulto, *supra* note 122 at 150-159; Sisay Yishanew "The Constitutional Protection of Economic and Social Rights in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution" (2008) 23 *Journal of Ethiopian Law* 135; But see Idris, *supra* note 125 at 132-34.

¹⁰⁸¹ See UDHR, *supra* note 7 at art.26; ICESCR, *supra* note 8 at art.13(1) & 2(c); UNCRC, *supra* note 9 at art.28(1)(c) & 29; *African Charter*, *supra* note 10 at art.17; ACRWC, *supra* note 11 at art.11; *Women's Rights Protocol to African Charter*, art.12(1)(a), and 2(a)&(b).

¹⁰⁸² *FDRE Constitution*, *supra* note 45 at art.85.

tertiary education is not recognized as a human right in most international human rights instruments. Often times, its human right status is either rejected outright, glossed over or treated more of as an academic issue than a concrete right.

One major reason might be lack of a clear international jurisprudence that affirms tertiary education as an integral part of the right to education. In fact, there seems to be a regressive practice that undermines even the right to basic education itself due to an increasing commodification of education as an object of traded service rather than a fundamental right.¹⁰⁸³ The denial of a due recognition to tertiary education does not preclude a state's discretion to provide for a constitutional or legal right to tertiary education. Given its legal context that includes African Charter, Ethiopia is however not entitled to sidestep it, but is under obligation to recognize it better than the ICESCR does.

In need of a clear articulation in Ethiopian context, art.17(1) of the African Charter is quite important to reinforce a more stronger argument for human right to education at all levels. As pointed out in this thesis, Ethiopia's monistic and integrative approach to African Charter offers an added significance to articulate and assert the human rights dimension of tertiary education. An interpretative reading of art.41(4) of the FDRE Constitution should be aligned with a holistic interpretation of art. 17(1) of the African Charter that recognizes the right to education without a distinction. Yet, there lacks a concrete corpus of jurisprudence specific to tertiary education, except the general references made to it along with other levels of education. Despite its positive impact for future jurisprudential development as desired, the existing jurisprudence of African Commission might still be inadequate to settle this issue. That is, the skepticism on the issue might militate against the domestic assertion of tertiary education as a human right with an immediate application. In Ethiopia legal context, the issue thus generates two lines of interpretation with different scopes.

¹⁰⁸³ See generally Tomasevski, "Globalizing What," *supra* note 23 (highlighting the challenges of globalization and nations' tendency to treat education as an object of trade as opposed to fundamental human right).

Despite its disputed status to command an immediate application, the strict implementation of the ICESCR and the UNCRC is still relevant due to recognition of individuals' right of *equal access* to tertiary education and the need for its *progressive realization*, subject to available resources and on the basis of capacity or merit.¹⁰⁸⁴ Short of the unconditional and immediate attributes of fundamental human rights, the progressive realization of equal access to tertiary education can still be useful as an important lever to promote the education. Further, the justification for its progressive realization might be strengthened due to its role for the progressive realization of, *inter alia*, the right to development. That is, placing tertiary education in the context of the right to development offers the former a normative force for its progressive realization.

For the implementation of the ICESCR & UNCRC, Ethiopia's unique monistic and interpretative approach to the human rights instruments would thus import the notion of progressive realization through its integration of the instruments, the interpretation and application of the constitutional provisions.¹⁰⁸⁵ In effect, the overlapping constitutional and the relevant provisions of the human rights instruments would underscore the importance of the progressive realization of tertiary education in itself and as an instrument, *inter alia*, for the constitutional right to development in Ethiopia. In this regard, art. 41(4) of the FDRE Constitution is clear in its general reference to education without a hierarchical distinction and the need for its progressive realization. Notwithstanding the government's prioritization of levels of education, the notion of progressive realization would thus prove important for equal access to tertiary education. Except for its clawback clause, the Constitution's avoidance of a hierarchical distinction comports with the African Charter.

¹⁰⁸⁴ See ICESCR, *supra* note 8 at art.13 (1) & 2(c); UNCRC, *supra* note 9 at art.28 (1) (c) & 29.

¹⁰⁸⁵ See generally Bulto, *supra* note at 122; Sisay Yeshanew, "The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia" (2008) 8:2 African Human Rights Law Journal 273-293.

In a stark contrast to its international counterpart, the African Charter itself makes a generic reference to the right to education.¹⁰⁸⁶ As its authoritative interpretation, the relevant jurisprudence of the African Commission¹⁰⁸⁷ is indicative of the provision's reach to encompass all levels of education.¹⁰⁸⁸ As mentioned above, it is however conceded that this interpretation is not well established to ensconce the status of tertiary education. To start with a baseline, the obligation imposed upon the government to promote education in its generic sense can however be construed to include the progressive realization of tertiary education. Given its low threshold, this line of interpretation appears to be envisaged in the corresponding provision of the FDRE Constitution. In addition to the similar generic reference, as explained above, arts.41(1) & 90(1) of the FDRE Constitution stipulate for the obligation of the government to make the progressive realization of education through increasing allocation of the available resources. As reiterated in this thesis, this deviates from the African Charter.

In the human rights regime, an explicit stipulation of government's obligation is vital for the realization of the rights. It bears noting that the significance of a right lies in its clear articulation along with a corresponding obligation for its realization. In the African Charter, there is no provision comparable to art.2(1) of the ICESCR to underpin the notion of progressive realization.¹⁰⁸⁹ Indeed, avoiding a similar drawback from its ambit is one of the Charter's distinctive features. Nonetheless, the evolving jurisprudence of the African Commission has imported the concept of progressive realization

¹⁰⁸⁶ African Charter, art.17 (1) ["Every individual shall have the right to education"].

¹⁰⁸⁷ See *Free Legal Assistance Group and Others v Zaire*, (2000) AHRLR 74 (ACHPR 1995); *Union Interafricaine des Droits de l'Homme and Others v Angola*, (2000) AHRLR 18 (ACHPR 1997). In the former case, the African Commission found the closure of universities (tertiary education) and secondary schools to be in violation of the right to education. See Obiora Okafor & Basil Ugochukwu "Have the Norms and Jurisprudence of the Human Rights System Been Pro-Poor?" (2011) 22: 2 African Human Rights Law Journal 396 at 410-12.

¹⁰⁸⁸ In view of the significance of education as a lifelong learning that embraces all levels, the variance in the immediate realization of levels of education or the weight and the consequent conditions attached thereto should not be construed to deprive a tertiary education of its progressive realization element.

¹⁰⁸⁹ See generally Ali, "Interpretation," *supra* note 38.

and this might bear upon the interpretation of arts.17 and 22 of the Charter.¹⁰⁹⁰ The Commission’s act of reading the concept into the Charter is both regressive and unwarranted. Should the jurisprudence stand firm, Ethiopia—having embraced it in advance—will be expected to endorse or re-affirm the approach to cement the instrumental role of tertiary education for human development.

In this respect, art.13 (1) of the FDRE Constitution is vital as it underscores the obligations of all government organs at all levels “to respect and enforce the provisions of [the] Chapter” that includes art.41. Critical are the role and duties of the legislative and judicial organs to ensure the enforcement of the constitutional and human rights provisions through legislative articulations and judicial interpretations.¹⁰⁹¹ An unequivocal and indiscriminate constitutional provision, art.13 (1) is a reminiscent of the triple obligations of the state organs to respect, protect and fulfill the realization of human rights.¹⁰⁹² For enhanced and equal access to tertiary education, and its instrumental role for human development in Ethiopia, critical are: (a) its interpretative assertion as a constitutional right and (b) the consequent obligation imposed upon the government for its progressive realization. In effect, the triple duties associated with the human rights and embodied in the FDRE Constitution should then be applicable for the constitutional provisions on education, including tertiary education.

In sum, despite its disputed status, competing lines of interpretation and the effect thereof, at least the progressive realization of tertiary education should be encapsulated in both constitutional and human rights dimensions in Ethiopia. Imbuing tertiary education with normative dimensions is useful to underscore appropriate policy and legislative measures for its full realization. In so doing, its contribution will be instrumental for human development. As noted in the HDR (2000), “the tradition

¹⁰⁹⁰ *Ibid.*

¹⁰⁹¹ See Bulto, *supra* note 122 at 138-40.

¹⁰⁹² *Ibid.*; For an articulation of triple obligations, see “The Maastricht Guidelines,” *supra* note 544 at 693-97; For an African human rights jurisprudence on the triple duties, see *Communication 155/96, The Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*, 15 Annual Activity Report 2001, paras 44-48.

of human rights brings legal tools and institutions (...) as means to secure freedoms and human development.”¹⁰⁹³ In Ethiopia, embracing this approach needs a progressive and experienced judiciary.

B. Statutory Regime for Tertiary Education

As elaborated above, tertiary education is considered a vital policy instrument of human development that in turn has constitutional and human rights dimensions in Ethiopia. Indeed, tertiary education’s treatment as an instrument of development goes back to its very inception. Its instrumental significance has been central to the educational and relevant development policy instruments. In the same vein, it is evident from the relevant legislation. For instance, one of the objectives of the first *Higher Education Proclamation of 1976* was ‘to teach, expound and publicize socialism and to formulate methods to carry out these functions.’¹⁰⁹⁴ Thus, tertiary education was seen as a powerful tool for the propagation and entrenchment of the socialist ideological orientation among the educated elites. To this effect, quite pervasive in the then legal framework and determinative of its intended objective were the basic tenets of socialism that undergirded the country’s political and socio-economic development objectives.

In contrast to the previous practice of compulsive ideological affiliation, the post-millennium higher education legal framework is somehow depoliticized to regard tertiary education as an instrument for socio-economic development.¹⁰⁹⁵ For its contribution, the instrumentalist approach of the legal framework is noticeable from the set of objectives laid down in the recent legislations that draw on the policy objectives embodied in the ETP.¹⁰⁹⁶ In this regard, both the respective preambles

¹⁰⁹³ UNDP, *Human Development Report 2000*, *supra* note 561 at 2. It has long been pointed out that “human development is essential for realizing human rights, and human rights are essential for full human development.” *Ibid.*

¹⁰⁹⁴ Kiros, *supra* note 1053 at 79.

¹⁰⁹⁵ *Higher Education Proc. No. 351/2003*, *supra* note 117 at arts.6(1,5 &8), 13, 14(2), 15, 82, 87 & 94(7); *Higher Education Proc. No. 650/2009*, *supra* note 117 at arts. 4, 8(2) & (3), 24(1), 53(d) &90(8).

¹⁰⁹⁶ See *Higher Education Proc. 650/2009*, *supra* note 117 at art.4; ETP, *supra* note 131 at § 2.2.5, 2.2.8 &2.2.9.

and objectives of the recent consecutive higher education legislation emphasize the significance of higher education or tertiary education for the production of quality and skilled human resource to meet Ethiopia's development needs.¹⁰⁹⁷ As indicated in the ETP and for the realization of its objectives, all higher education institutions have been entrusted with three core functions: teaching, research and community services.¹⁰⁹⁸

To this end, the latest higher education legislation constitutes a comprehensive legal framework for the establishment, governance and operation of higher education institutions.¹⁰⁹⁹ Further, the legislation provides for guiding values,¹¹⁰⁰ the core business,¹¹⁰¹ research directions,¹¹⁰² research and innovation link,¹¹⁰³ rights and duties of academic staff and students,^{1104a} guidance for curricular development,¹¹⁰⁵ and kinds and modes of education programs, including distance or virtual education.¹¹⁰⁶ Against this backdrop, the points of emphasis in the current statutory substantive framework are the expansion of a research-oriented quality tertiary education and its instrumental role for development through skilled human capital and technology transfer.¹¹⁰⁷ As such, visible from the legal framework is the predominance of both the endogenous economic growth model and the human capital theory.

¹⁰⁹⁷ *Higher Education Proc No.351/2003*, *supra* note 117 at Preamble Para 1-2, & art. 6(1) 7(5); *Higher Education Proc. 650/2009*, *supra* note 117 at Preamble, paras 1, 2& 5, and arts.4 (1-2) & (4).

¹⁰⁹⁸ *Higher Education Proc. 650/2009*, *supra* note 117 at arts. 19(1), 24, 26, 31(1) (b), 32(1) (a) & (b), and 53(1) (h).

¹⁰⁹⁹ Under the higher education legislation, 'higher education institutions' include both public and private institutions and 'higher education' is defined as "'education in the arts and sciences offered to undergraduates and graduate students through [regular, continuing and distance or virtual education programs].'" *Higher Education Proc. No.650/2009*, *supra* note 117 at arts. 2(8), 2(9) & 19.

¹¹⁰⁰ *Ibid* at art.7.

¹¹⁰¹ *Ibid* at 19(1), 24, 26, 31(1) (b), 32(1) (a) & (b), 53(1) (h).

¹¹⁰² *Ibid* at art.24.

¹¹⁰³ *Ibid* at art.25.

¹¹⁰⁴ *Ibid* at arts.31, 32, 37 &38.

¹¹⁰⁵ *Ibid* at art.21.

¹¹⁰⁶ *Ibid* at arts. 10&19.

¹¹⁰⁷ *Ibid* at arts.4(1-2) & (4), 8(1) & (2), 24(1-4) & (7), 25(2), 32(1)(b) & (e), 42(2), 53(1)(d), (f), (h) &(k), 88(1), (10) & (12), 89(4) & (5), 90(2) & (8).

Yet, there are few instances of liberal model or conception of tertiary education. From students' perspective, the legislation under consideration states that "students shall have the right to free inquiry of truth... in the process of learning and conducting research."¹¹⁰⁸ In the same vein, students are entitled to "the right to enjoy *the freedom to learn with appropriate opportunities and conditions...*"¹¹⁰⁹ From the educators' perspective, the entitlement to an academic freedom is relevant in the execution of their responsibilities.¹¹¹⁰ Indeed, the rights and freedoms guaranteed to the learners and educators include 'the pursuit of truth and freedom of expression of truth' from among the guiding values of a higher education institution.¹¹¹¹ As noted in the CA-driven notion of education, freedom and rational or practical reasoning are the core values of education.¹¹¹²

Nonetheless, for both learners and educators, the 'rights' remain a mere theoretical recognition without a practical implementation. It is important to note that the higher education institutions in Ethiopia are expected to be more entrepreneurial in their orientation both for their contribution and sustenance. In furtherance of this function, the existing statutory framework has adopted an instrumentalist approach to underpin the role of tertiary education. In spite of the nominal reference to a few liberal values of education, the overriding emphasis is accorded to tertiary education for its role in promoting economic development.

Even for its intended instrumental role, there still remains a significant gap in the legal framework due to its lack of a provision on the acquisition, supply and significance of learning materials for its intended objective. As mentioned above, the higher education legislation recognizes

¹¹⁰⁸ *Ibid* at art.37 (1) (a).

¹¹⁰⁹ *Ibid* at art.37 (1) (b).

¹¹¹⁰ *Ibid* at arts.31 (1) (a) & 16.

¹¹¹¹ *Ibid* at arts.4 (3) &7(1).

¹¹¹² Félix Lozano *et al*, "Competencies in Higher Education: A Critical Analysis From the Capabilities Approach" (2012) 46:1 Journal of Philosophy of Education 132 at 135 &138; see Merridy Wilson-Strydom & Melanie Walker, "Human Development as an Expansive Perspective on Socially Just Pedagogies and Quality," in Walker & Wilson-Strydom, eds, *Socially Just Pedagogies, Capabilities and Quality in Higher Education: Global Perspectives* (London: Palgrave, 2017) 223 at 223-43.

students' 'freedom to learn with appropriate opportunities and conditions.'¹¹¹³ In this respect, the higher educational institutions' are required to create an 'enabling environment' for an active learning.¹¹¹⁴ In the absence of a further stipulation for an access to learning materials--an essential input for the contemplated 'freedom of active learning,' a couple of generic references to 'conditions of learning' alone do not suffice to address the specific issues of learning materials. In fact, the legislation is limited to a mention of 'teaching materials' or 'educational and research facilities' as a condition for accreditation of universities and colleges.¹¹¹⁵ Hence, the legal framework is mute on the sustainable provision or acquisition of learning materials for realization of the intended objectives of tertiary education.

5.3.3. The Institutional Framework

The instructional framework of tertiary education has been in place since its introduction. For educational matters in general, the Ministry of Education and Fine Arts was in operation from the 1940s.¹¹¹⁶ For a tertiary education, an ad hoc committee came into existence late in 1953 to develop and submit a set of recommendations on the intended development of tertiary education in Ethiopia.¹¹¹⁷ Established in 1977, the Commission for Higher Education was responsible for a coordinated administration of tertiary education.¹¹¹⁸ After the dissolution of the Commission and for several decades, the Ministry of Education (MOE) was the principal institutional organ. Included in its mandates was the power to: (a) ensure the expansion, relevance and quality of tertiary education, (b) formulate and facilitate the implementation of educational policy, and (c) oversee the overall

¹¹¹³ *Higher Education Proc No.650/2009, supra* note 117 at art.37 (1) (b).

¹¹¹⁴ *Ibid* at art.41 (1) & (2).

¹¹¹⁵ *Ibid* at art.11 (1) (d) & 75(2) (h).

¹¹¹⁶ Kiros, *supra* note 1053 at 17.

¹¹¹⁷ *Ibid* at 18& 21-22

¹¹¹⁸ *Ibid* at 75 & 78-79. For a detailed discussion on the mandates and operation of the Commission, see Amare, *supra* note 1059 at 51-54.

administration of tertiary education.¹¹¹⁹ At the moment, the Ministry of Science and Higher Education (MOSHE) has an exclusive mandate over matters related to tertiary education.¹¹²⁰ In fact, an exclusive ministerial emphasis on a tertiary education is a significant recent development in its institutional framework.

In addition to the Ministry, relevant and subordinate institutional actors are the Higher Education Relevance and Quality Agency (HERQA), Education Strategy Centre (ESC) and university boards. Founded in 2003 and now accountable to the MOSHE, the HERQA is responsible, *inter alia*, to evaluate the relevance and quality of tertiary education.¹¹²¹ To this effect, the Agency is mandated to monitor and ensure a compliance with the standards set for the relevance and quality of the education.¹¹²² Further, the HERQA has the power to verify a policy alignment between the tertiary education and the economic, social and other relevant national policies.¹¹²³

From among the institutional actors, the ESC is an organ established with the objective to formulate tertiary education's "vision and strategy in order to make higher education compatible with the country's manpower needs as well as with appropriate policies and with due consideration to global situations."¹¹²⁴ Common to both HERQA and ESC are their related mandates on ensuring the relevance and quality of tertiary education, and its compliance with the socio-economic needs of the country.

¹¹¹⁹ *Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No.4/1995, Federal Negarit Gazette*, 1st Year No.4 ADDIS ABABA 23rd August, 1995, art.21; *Proclamation No.471 /2005, Federal Negarit Gazette*, 12th Year No. 1 Addis Ababa 17th November, 2005, art.14(1), 14(2)(a) & (d)& 14(3); *Proclamation No. 916/2015, Federal Negarit Gazette*, 22nd Year No.12 Addis Ababa 9th December, 2015, art.32; *Proclamation No. 691/2010, Federal Negarit Gazette*, 17thYear, No. 1, Addis Ababa 27thOctober, 2010, art. 28(3-5) & (7); *Higher Education Proclamation No. 351/2003, supra* note 117 at art.94; *Higher Education Proclamation No. 650/2009, supra* note 117 at art.88.

¹¹²⁰ For the relevant mandates that were entrusted to the Ministry of Education and which would now devolve upon the MOSHE, see *Higher Education Proclamation No. 351/2003, supra* note 117 at art.94; *Higher Education Proclamation No. 650/2009, supra* note 117 at art.88.

¹¹²¹ *Higher Education Proclamation No. 351/2003, supra* note 117 at art.80, 82(2); *Higher Education Proclamation No. 650/2009, supra* note 117 at art.89 (3) & (4).

¹¹²² *Higher Education Proclamation No. 351/2003, supra* note 117 at art.82 (2) & (9); *Higher Education Proclamation No. 650/2009, supra* note 117 at art.89 (9).

¹¹²³ *Higher Education Proclamation No. 351/2003, supra* note 117 at art.82 (3); *Higher Education Proclamation No. 650/2009, supra* note 117 at art.89 (5).

¹¹²⁴ *Higher Education Proclamation No. 351/2003, supra* note 117 at art.87&89; *Higher Education Proclamation No. 650/2009, supra* note 117 at art.90.

Outside these organs, a board is established for each public university and accountable to the MOSHE for federal university or to the regional government for a state university.¹¹²⁵ For administrative matters, a board is the highest institutional organ at the university or college level.¹¹²⁶ In fact, the board is mandated to oversee the overall administration of the public higher education institution.

In conclusion, all the institutional organs highlighted above are supposed to operate in tandem, and in accordance, with the rules laid down in the legal framework. As pointed out, all the institutional incoherence, limited institutional capabilities and ineffectiveness make clear the need for appropriate reforms in the institutional framework.¹¹²⁷

5.4. The Policy and Legal Frameworks of Sustainable Human Development

Ever since the launch of the ‘massive’ modernization era in the mid-twentieth century, the issue of development has been central to various policy, institutional and legal frameworks in Ethiopia. On a policy level, a series of development policies, plans and strategies have been designed and executed for decades. Further, the need for their implementation has led to the emergence of various institutional frameworks. Likewise, relevant legal frameworks have been put in place to facilitate and promote the national development. It is unfortunate that Ethiopia has undergone through a constant flip-flop in its political ideologies and development models. Yet, the issue of development has been at the forefront of its policies to tackle the challenges of its deepening poverty. Indeed, the issue of development has been central to its post-WWII national constitutions.

Nonetheless, save for the latest one, the preceding two constitutions and the relevant development policies were known for their reference to the narrow conception of economic growth or

¹¹²⁵ *Higher Education Proclamation No. 650/2009*, *supra* note 117 at art.44 (2); *Higher Education Proclamation No. 351/2003*, *supra* note 117 at 35.

¹¹²⁶ *Higher Education Proclamation No. 650/2009*, *supra* note 117 at art.44; *Higher Education Proclamation No. 351/2003*, *supra* note 117 at 35(1).

¹¹²⁷ For a brief assessment of the higher education governance based on the existing legal framework, see Anteneh Melu, “Brief Assessment of Higher Education Governance in Ethiopia: Reflection on the Leap of the Decade” (2016) 14:2 *Journal of Higher Education in Africa* 107 at 116-124.

socio-economic development. In view of its late emergence in the 1980s at a global level, one would not expect a reference to the broad notion of sustainable or human development in the previous constitutional regimes. As indicated under Chapter One of this thesis, it is vital to quest for a sustainable human development under the current policy and legal regimes. To this end, this section explores the pertinent frameworks for the subsequent analysis of the interplay between copyright and tertiary education.

5.4.1. The Policy Framework

In the first decade of the millennium, Ethiopia’s development policy—somehow infused with the MDGs—was driven by the desire to reduce its age-old poverty.¹¹²⁸ Further, intended to facilitate Ethiopia’s economic transition into the long-awaited industrialization, the current Growth Transformation Plan (GTP) was then adopted in 2010 for its implementation into two phases. Phased out in 2015, the GTP I—set to achieve the MDGs by 2015—has given way to the GTP II to run its course. In setting the GTP II in motion, Ethiopia has envisioned its economic transformation into a middle-income level. Despite its emphasis on liberalization, the revised economic growth agenda Ethiopia has adopted in 2019 still embraces the GTP II to achieve sustainable human development.

Hence, the GTP II is the constitutive core of the current policy framework that claims to have ‘integrated’ the SDGs.¹¹²⁹ In running its course since 2015, the GTP II has both carried forward the previous unmet development targets of the MDGs and attempted to bridge them with the SDGs in the light of the national development vision.¹¹³⁰ In the same vein, integral to Ethiopia’s development policy are the AU Agenda 2063 and other relevant regional development goals that make a specific mention of

¹¹²⁸ In particular, worth mentioning are the Sustainable Development and Poverty Reduction Program (SDPRP) for 2002/03–2004/5 and the Plan for Accelerated and Sustained Development to End Poverty for 2005/06–2009/10 (PASDEP) that were formulated as poverty reduction strategies to guide the post-millennium decade of development.

¹¹²⁹ See FDRE, *The 2017 Voluntary National Reviews on SDGs of Ethiopia: Government Commitments, National Ownership and Performance Trends* (Addis Ababa: National Plan Commission, June 2017).

¹¹³⁰ GTP II, *supra* note 119 at 77.

sustainable development.¹¹³¹As summed up in the GTP II that builds upon the success of its predecessor, the policy objective of GTP I was to “[achieve] a rapid, sustainable and broad-based economic growth through creating conducive macroeconomic environment.”¹¹³² At the end of the first phase, the overall evaluation made in light of the objective claims the achievement of a “rapid, broad-based and inclusive economic growth that has led to substantial decline in income poverty.”¹¹³³ This sheer claim is however debatable to endorse.

Despite a range of non-economic aspects of development, the narrow economic growth was ubiquitous in the GTP I and central to its assessment with its principal indicators such as increased income and GDP. In fact, an increase in income is taken to substantiate the ostensible achievement of the GTP I as a measure for poverty reduction.¹¹³⁴ From the CA perspective, human development is noted as an expansion of freedoms. In this light, poverty entails the deprivation of freedoms for which both income and GDP remain poor indicators to evaluate development achievements.¹¹³⁵In the same vein, the narrow metrics of economic growth were used in the GTP I to evaluate the contributions of education, and science and technology. Emphasized for their instrumental roles, education, science and technology lacked a due recognition of their intrinsic values for the expansion of human capabilities or enlargement of choices.

For Ethiopia’s planned transition into a middle-income country level, the GTP II has likewise embraced its predecessor’s narrow and instrumentalist approach. Indeed, this is embedded in the overarching objective of GTP II which is set “to sustain the accelerated [economic] growth and

¹¹³¹ *Ibid* at 77. See *African Union Agenda 2063: The Africa We Want*. Founded upon people-centered development, one of its aspirations is “[a] prosperous Africa based on inclusive growth and sustainable development.” AU Agenda 2063, aspiration No.1.

¹¹³² GTP II, *supra* note 119 at 5.

¹¹³³ *Ibid* at 6.

¹¹³⁴ GTP II, *supra* note 119 at 6-7.

¹¹³⁵ See Sen, *Development as Freedom*, *supra* note 1 at 87-110.

establish a spring board for economic structural transformation.”¹¹³⁶ In the end, the targeted outcome is to realize Ethiopia’s “national vision of becoming a lower middle-income country by 2025.”¹¹³⁷ In principle, all sectoral policy objectives are expected to conform to this national vision.

Seen through the lens of human development anchored in the CA, the GTP II’s overarching development policy objective is rather focused on maintaining an economic growth and transformation. It is further implied in the objective that the sustenance of ‘the accelerated’ *economic growth [and] transformation* would ensure the realization of Ethiopia’s national vision to become a middle-income nation. An increment of income *per capita* is thus set as the central metric for its envisioned development. At best, this overarching objective and the assumed correlation for its realization mirror a very narrow and partial view of development.¹¹³⁸ It is noted that a national development is not limited to economic growth despite the latter’s instrumental significance.

As will be explored below, such a narrow development objective loses sight of the grand policy guidance set in the FDRE Constitution that enshrines the pillars of the holistic notion of sustainable development.¹¹³⁹ In spite of its purported consonance with the constitutional policy guidance, the GTP II’s narrow approach is visible from the strategies identified for its national vision and the specific objectives of various development sectors that constitute the national development. Yet, it is useful to inquire into the specific objectives and strategies of the GTP II for some aspects of human development.

¹¹³⁶ GTP II, *supra* note 119 at 80. For instance, the GTP II has set forth the following specific objectives: (a) increment of annual average real GDP, (b) improved domestic industrial capacity and competitiveness, (c) public participation in development outcomes, and (d) entrenchment of developmental political economy. *Ibid* at 80-81.

¹¹³⁷ *Ibid*.

¹¹³⁸ See UNDP, *Human Development Reports 1990*, *supra* note 2 at 1-7& 9-16.

¹¹³⁹ *FDRE Constitution*, *supra* note 45 at arts. 85-91.

From among the long list of strategic pillars emphasized for their instrumental role in the sustenance of economic growth,¹¹⁴⁰ there remain few strategies that appear to be reflective of human development perspectives. Somehow informed by the attributes of the CA,¹¹⁴¹ the few strategies include (a) the establishment of democratic and developmental good governance through public participation,¹¹⁴² (b) promoting women and youth empowerment through their participation in the development process and equitable share in the outcomes of development,¹¹⁴³ and (c) acceleration of human [resource] development and building sustainable technological capabilities.¹¹⁴⁴ It is important to note that policy strategies that highlight public participation, empowerment, and the issue of equity are all relevant attributes of human development. Further, a reference to the acceleration of ‘human development’ and sustainable technological capabilities seems to reflect the issue of sustainable human development.

Nonetheless, the generic reference to ‘human development’ appears to be a misnomer for ‘human resource development.’ In its further elaboration, the GTP II’s reference to the latter underscores the development of human capital as an instrument “to sustain the accelerated [economic] growth” –GTPII’s an overarching objective.¹¹⁴⁵ In so doing, the development policy neglects the rich notion of human capabilities. Indeed, the principal objective itself is not framed as human development, but as an economic growth that remains instrumental for and an integral element of a human development. Instead, the endogenous economic growth and the human capital theories are intertwined to undergird the present national development policy.

¹¹⁴⁰ See GTP II, *supra* note 119 at 81. For instance, included in the list of strategic pillars are (a) increased productive capacity and efficiency, (b) transformation of domestic private sector, (c) capacity building of various sectors, (d) proper management of rapid urbanization and its potential for sustaining economic growth, and (e) building a climate resilient green economy. *Ibid.*

¹¹⁴¹ See Robeyns “Capabilitarianism,” *supra* note 383 at 400-09.

¹¹⁴² GTP II, *supra* note 119 at 81, 89-91.

¹¹⁴³ *Ibid* at 81, 91-92

¹¹⁴⁴ *Ibid* at 81, 88-89.

¹¹⁴⁵ *Ibid* at 88-89.

From the various development sectors identified in the GTP II, the aspects relevant to our discussion in this regard are the social, economic and technological development. To this end, sectors of vital and direct relevance are education, trade and industry, and science and technology. In respect of tertiary education, the emphasis is placed upon its instrumental role for the production of human capital. In fact, tertiary education is used as a key development strategy almost across various sectors. For instance, the role of tertiary education is emphasized for creative innovation and technological development through a collaborative research, human capital and technology transfer.¹¹⁴⁶ In relation to the innovation, science and technology, the GTP II underlines the need for a greater emphasis upon the development of human capital in order to sustain the ostensible ‘record’ economic growth.¹¹⁴⁷ Considered instrumental for the growth of industrialization, the improvement of STI is required to meet the country’s economic needs.¹¹⁴⁸ To this effect, the GTP II underscores the instrumental roles of tertiary education and STI for economic development.

In sum, the GTP II is devoid of the broad and holistic notion of sustainable human development. Indeed, the development policy is narrow both in its vision and objectives with an overemphasis on economic growth. Further, it lacks appropriate strategies to promote an inclusive and equitable quality education, and foster creative innovation. It is ironical that both are integral to the SDGs the GTP II purports to integrate. In short, the policy framework fails to incorporate the essential attributes of human development that focus on expansion of human capabilities with both intrinsic and instrumental values.

¹¹⁴⁶ *Ibid* at 185 & 189.

¹¹⁴⁷ *Ibid* at 79-80.

¹¹⁴⁸ *Ibid* at 142 & 192.

5.4.2. The Legal Framework

As noted above, Ethiopia lacks a robust policy regime for sustainable human development. Owing to the undue emphasis on economic growth, the national development policy has failed to draw on the enriching notion of human development. In its further inquiry, this section makes an endeavor to shed a light on the relevant legal framework for sustainable human development. As Ethiopia's legal regime is constituted of its constitution, human rights instruments and national laws, highlighted below are the constitutional, human rights and statutory dimensions of the development.

A. The Constitutional and Human Rights Framework

As discussed above, one can observe a trend in Ethiopia's increased focus on the issue of development under the preceding and current regimes. From the law of the land, an explicit reference to 'development' was first made in the 1987 PDRE Constitution. For instance, art.2 (3) of the Constitution encapsulated a declaration about the then Socialist government's commitment to ensure 'development' of nationalities. In highlighting the development objective of the socialist political system,¹¹⁴⁹ art.9 (1) of the Constitution also underscored the state's obligation "to advance the material and cultural development" of the people. In principle, the PDRE Constitution made a mention of 'development' in various contexts and the state's commitment for its realization. The issue of development was however not addressed as a right nor was it referred to as a 'sustainable development'—a global notion that was just emerging at the time.

In contrast, the FDRE Constitution now in force is more advanced and comprehensive in its treatment of the issue. As noted in Chapter One of this thesis, the FDRE Constitution refers to sustainable development both as a right and policy objective. In this respect, it goes further to integrate human rights instruments that make references to development and its various aspects. Enacted almost

¹¹⁴⁹ *PDRE Constitution*, *supra* note 1075 at art.8.

a decade after the adoption of the DRD and over two decades after African Charter, the FDRE Constitution seems to have drawn an inspiration from the international and regional human rights instruments.¹¹⁵⁰In its preamble, the FDRE Constitution underscores a collective and strong commitment to “advancing economic and social development.”¹¹⁵¹ Further, the Constitution makes a detailed articulation of the economic, social, cultural and environmental objectives of the development.¹¹⁵² As mentioned in this thesis, the FDRE Constitution goes beyond the policy objectives to recognize it as the ‘right to sustainable development.’

In this regard, art.43 (1) of the FDRE Constitution bestows upon the people of Ethiopia as a whole, nation and nationalities “the right to improved living standards and sustainable development.” The Constitution also guarantees to the nationals the right to participate in the national development, including the right to be consulted on policy matters affecting their community.¹¹⁵³ It is noted that the FDRE Constitution is not as clear as the DRD in its recognition of individuals’ right to development.¹¹⁵⁴ Further, not evident from the Constitution is the conception of the right as a composite of other rights.¹¹⁵⁵ As an established principle, individuals are the natural bearers of human rights and freedoms that stem from human person or nature.¹¹⁵⁶

¹¹⁵⁰ It is worth reminding that Ethiopia has been a party to the African Charter since 1998 and as such, the African Charter has been integral to the law of the land since then.

¹¹⁵¹ *FDRE Constitution*, *supra* note 45 at Preamble, para 1.

¹¹⁵² *Ibid* at arts.89-92.

¹¹⁵³ *Ibid* at art. 43(2).

¹¹⁵⁴ Abdi Jibril Ali, “The Right to Development in Ethiopia,” in Evra Brems, Christophe Van der Beken & Solomon Abay Yimer, eds, *Human Rights and Development: Legal Perspectives from and for Ethiopia* (Leiden: Brill/Nijhoff, 2015) 68 at 87[Ali, “Right to Development”]. Despite the individual and collective dimensions of the right, one writer argues that the right to development under the FDRE Constitution is a collective right. *Ibid* at 89. In the writer’s opinion, even the Constitution’s reference to ‘nationals’ is reference to Ethiopian nationals as ‘a group’, not as individuals. *Ibid* at 90. If this assertion holds true, it means that the Constitution’s references to “people”, “nation”, “nationalities” and “nationals” are somehow repetitive references to the same category—a group! This interpretation would in effect deviate from the understanding about the right as defined in the UNDRD.

¹¹⁵⁵ Ali, *supra* note 1154 at 77.

¹¹⁵⁶ *FDRE Constitution*, *supra* note 45 at art.10. In particular, art.10 (1) of the Constitution states “[h]uman rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable.” (Emphasis added).

Its philosophical contestation aside, this principle is useful to inform the interpretation of the constitutional provisions. In particular, the FDRE Constitution's embodiment of nationals' constitutional right to participation in developmental matters underlines the essential attribute of development as a process that must be participatory, transparent and inclusive.¹¹⁵⁷ In their reference to nationals and people, the constitutional provisions are noted to highlight the individual and collective aspects of the right to development. In the same vein, the provisions embrace both substantive and procedural aspects of the sustainable development as the constitutive and instrumental elements of the right.¹¹⁵⁸ In so doing, the FDRE Constitution dovetails with the provisions of its international and regional counterparts.

In terms of the ultimate goal of sustainable development, the essential elements enshrined in the FDRE Constitution are the *enhancement of the capacity of citizens and satisfaction of their basic needs as the basic aim of development activities*.¹¹⁵⁹ As such, individuals and the enhancement of their capacities are at the heart of the development objective. Further, a more significant approach is the FDRE Constitution's conception of development as a sustainable development with all its economic, social, cultural and ecological dimensions.¹¹⁶⁰ That is, the principle of sustainable development would underpin the human development that has become the core focus of development. Therefore, the constitutional right to development must be construed as the right to sustainable human development. As noted in Chapter Three of this thesis, human development as a freedom accommodates the

¹¹⁵⁷See Mesenbet Assefa Tadege, "Reflections on the Right to Development: Challenges and Prospects" (2010) 10 African Human Rights Law Journal 235 at 322; see Communication 276, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2003) 27th Activity Report of the African Commission, paras 277, 297 & 298 [*Endorois Case*].

¹¹⁵⁸ Ali, "Right to Development" *supra* note 1154 at 78.

¹¹⁵⁹ *FDRE Constitution*, *supra* note 45 at art.43 (4).

¹¹⁶⁰ Ali, *supra* note 1154 at 81. For its ecological aspects, worth noting is art.44 (1) of the FDRE Constitution that entitles everyone to clean and healthy environment. At regional level, art. 19 of Protocol to the African Charter on Human and people's Rights on the Rights of Women in Africa makes a literal reference to the right to sustainable development. See Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, signed on 11 July 2003[ACHPRW].

beneficiaries' right to active, free, equitable and inclusive participation in the process and benefits of development¹¹⁶¹ for the constant improvement of their well-being.¹¹⁶²

For the realization of the right to sustainable development, the Ethiopian government is bound to ensure a compliance with the right in its engagement with other nations. To this end, the FDRE Constitution makes clear that all international agreements and relations the State adheres to shall protect and ensure Ethiopians' right to sustainable development.¹¹⁶³ As noted elsewhere in this thesis, the FDRE Constitution both integrates international human rights instruments and requires a compliance with the right to sustainable development.¹¹⁶⁴

From the perspective of the right holders, a closer reading of the constitutional provisions suggests the inclusion of the state among the nation, people and individuals/nationals as beneficiaries.¹¹⁶⁵ In the human rights context, a state is however a primary duty-bearer. Treating a state as a right holder is at odds with the inherent nature of human rights in human beings alone.¹¹⁶⁶ As one writer has pointed out this misattribution in the light of the relevant jurisprudence on the African Charter, the Constitution's reference to the 'state' should rather be construed to mean the people as a

¹¹⁶¹ *FDRE Constitution*, *supra* note 45 at arts.43 (2) & 89(6). After all, citizens' inclusive and democratic participation in the development process is central to CA that frames development as freedom, both instrumental (agency) and substantive (wellbeing). See Sen, *Development as Freedom*, *supra* note 1 at 17-18 &190-92.

¹¹⁶² In its reference to "improvement of well-being", the UNDRD adopts a broader concept than the FDRE Constitution's terminology of 'living standards.' The former concept is central to the notion of human development and the normative framework of the CA.

¹¹⁶³ *Ibid* at art.43 (3).

¹¹⁶⁴ *FDRE Constitution*, *supra* note 45 at arts. 9(4), 13 & 43(3).

¹¹⁶⁵ For the constitutional definitions of nations, nationalities and people in Ethiopia, see art. 39(5) of the FDRE Constitution. Despite the limited exhaustive list of factors for the definition of people, the evolving jurisprudence on the African charter adopts a broader definition of people that would guide the interpretation of art.43.

¹¹⁶⁶ *FDRE Constitution*, *supra* note 45 at art.10; *African Charter*, *supra* note 10 at Preamble, para.6.

whole for which a state remains an agent.¹¹⁶⁷ Acting on behalf of its people, a state would enjoy its long-established sovereign right over the exploitation of its resources for development.¹¹⁶⁸

From among the relevant human right instruments, the African Charter is both at the forefront and the sole regional instrument for its treatment of the right to development as a binding individual and collective human right.¹¹⁶⁹ In the same vein, non-binding human rights instruments including the DRD and subsequent resolutions are relevant to inform the application and interpretation of the right to sustainable human development. Human beings are thus the epicentre of the right to sustainable development. Human beings at the core of their common objective—advancing human freedom, both human rights and human development are vital to reinforce each other in promoting sustainable human development.¹¹⁷⁰

Despite the debate on the binding and justiciable nature of the right at international level,¹¹⁷¹ the issues have now settled in the African Charter and its concomitant jurisprudence.¹¹⁷² Articulated in the *Endorois* case to have both constitutive and instrumental elements, the realization of the right to development is required to be made in African states. In Ethiopia, art. 13 (1) of the FDRE Constitution makes unequivocal that all government organs are responsible to *enforce, inter alia*, the right to

¹¹⁶⁷ Ali, “Right to Development” *supra* note 1154 at 90-92.

¹¹⁶⁸ See Karol Gess, “Permanent Sovereignty over Natural Resources: An Analytical Review of the United Nations Declaration and Its Genesis” (1964) 13:2 ICLQ 398-449.

¹¹⁶⁹ African Charter, art.22. Further, the Charter remains distinct in its articulation of the implied duties of individuals in the enjoyment of their rights. *African Charter*, *supra* note 10 at preamble, par.7. In fact, the Charter also imposes duties upon individuals for some rights. *Ibid* at art.27-29. For a direct reference to ‘the right to sustainable development,’ see ACHPRW, *supra* note 1160 at art.19.

¹¹⁷⁰ See UNDP, *Human Development Report 2000*, *supra* note 561 at 19-26.

¹¹⁷¹ See Jack Donnelly, “In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development” (1985) 15 Cal W Intl LJ 475[Donnelly, “In Search of the Unicorn”].

¹¹⁷² Tadeg, *supra* note 1157 at 337-38. An important jurisprudential development in this regard has been marked by the African Commission’s rulings/interpretations in the *Endorois* and DRC cases. See *Endorois* case, *supra* note 1157; *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19(ACHPR 2004); Okafor & Ugochukwu, *supra* note 1087 at 417-20.

sustainable development.¹¹⁷³ Given its dependence upon available resources and time for practical implementation, the effective enjoyment of the right is subject to a progressive realization.¹¹⁷⁴ That is, the right to development shares the features of its constitutive or related socio-economic rights for its full realization. For the interpretation and application of the right, arts.89-92 can serve as a policy directive or guidance. Further, policies are required to reflect this conception of sustainable human development. Nonetheless, as noted above, the practice in policy formulation indicates otherwise.

B. Statutory Framework

Outside the constitutional and human rights provisions, the statutory legal framework for sustainable human development is constituted of the whole gamut of the national legal regimes that deal with various aspects of development. Indeed, the issue of development is integral to the legal regimes *albeit* with a variance in dimensions and degree of emphasis. As such, this section does not purport to examine the swathes of the relevant legal provisions. From the select legal regimes, more relevant to the issues in this thesis are the legal regimes that deal with tertiary education, scientific research and copyright protection. As noted above, the legislation that underpin tertiary education make multiple references to national development as the overarching objective of tertiary education. In the Higher Education Proc No.351/2003, one of the objectives of tertiary education was “to provide higher education and social services that are compatible with the needs and development of the country.”¹¹⁷⁵ In the same vein, its successor, Higher Education Proc No.650/2009 underscores the instrumental role

¹¹⁷³ As regards its judicial enforcement, it is important to note that art.37 of the FDRE Constitution entitles individuals and groups to the “right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power.”

¹¹⁷⁴ Ali, “Right to Development” *supra* note 1154 at 93; Quoting the African Commission’s ruling in *Gunme v. Cameroon* (para. 206), Ali notes the jurisprudential insertion of the notion of progressive realization into the African Charter. The notion is also evident from the provisos of the DRD. See DRD, arts. 2, 3, 7& 10; Ali, “Interpretation” *supra* note 38 at 3-17.

¹¹⁷⁵ *Higher Education Proc No.351/2003*, *supra* note 117 at art. 6(5). For the list of objectives, see art.6 as a whole.

of education for national development through skilled labor, research and technology transfer.¹¹⁷⁶ Thus, both legislation emphasize the national development needs as the ultimate policy objectives of tertiary education.

In adopting a similar approach, the Copyright and Neighboring Rights Proc.410/2004 contemplates the role of creative works for the nation's 'cultural, social, economic, scientific and technological development.'¹¹⁷⁷ From both legal regimes, two points are worth noting. First, the crude reference made to development as the overarching objective is framed as a national development objective. The statutory legal regimes do not refer to development as a right. Second, neither are the substantive legal regimes indicative of the holistic notion of sustainable development as envisaged in the FDRE Constitution. Rather, central to the legal frameworks is the narrow economic development. Nonetheless, as legislations are subordinate to the FDRE Constitution, both the interpretation and application of the legislation are required to conform to the afore-cited constitutional provisions and pertinent human rights instruments. In so doing, the pertinent statutory frameworks should be read in accordance with the constitutional provisions. This will guide their instrumental role in the achievement of sustainable human development.

5.5. The Linkage Between Copyright and Tertiary Education for Development in Ethiopia

As noted above, the issue of development undergirds the evolution of and the linkage between both copyright and tertiary education in Ethiopia. In particular, the desire to promote economic growth pervades Ethiopia's policy and legislative practices. It remains a driver to underscore the instrumental roles of copyright and tertiary education. Nonetheless, their obvious linkage through economic growth is not conclusive of their proper alignment with human development. It is indisputable that economic growth constitutes an essential element of human development. An excessive focus on economic

¹¹⁷⁶ *Higher Education Proc No.650/2009*, *supra* note 117 at art.4.

¹¹⁷⁷ *Copyright Proc.No.410/2004*, *supra* note 136 at Preamble, para 1.

growth however falls short of human development. In what follows, an attempt will be made to review the relevant policy and legal regimes explored above to map the linkages in the light of the broader notion of human development. In this respect, worth bearing in mind is the FDRE Constitution's articulation of the "*basic aim of development activities... to enhance the capacity of citizens for development.*"¹¹⁷⁸

5.5.1. The Linkage Between Copyright and Human Development in Ethiopia

From the perspective of the CA, copyright protection involves both instrumental and intrinsic values that are integral to human development. Its dual roles are often grounded in the utilitarian and natural rights theories that underpin the respective economic and human rights dimensions. Nonetheless, a more nuanced perspective drawn from the CA goes beyond this theoretical dichotomization to highlight the nexus between copyright and human development. As noted in Chapter Four, a creative freedom that drives creative innovations and the latter's re-conceptualization in terms of human capabilities are vital to foster human flourishing.¹¹⁷⁹ In addition to its concern with the issue of distributive justice that is often neglected in the utilitarian approach,¹¹⁸⁰ the CA underscores the freedom of both authors' and users' access to knowledge and their inclusive participation in the creative process of knowledge production and dissemination.¹¹⁸¹

¹¹⁷⁸ FDRE Constitution, *supra* note 45 at art.43 (4).

¹¹⁷⁹ Janewa Osei-Tutu, "Human Development as An Intellectual Property Metric" (2016) 90 St. John's L Rev 711 at 743 [Osei-Tutu, "Human Development"]. As Osei-Tutu notes, "human development is an implicit objective of patent and copyright law and policy because these laws regulate innovation, creativity, and the production of goods that promote human flourishing." *Ibid.* J. Janewa Osei-Tutu, "Human Development as a Core Objective of Global Intellectual Property" (2016) 105 Ky LJ 1 [Osei-Tutu, "Human Development as a Core Objective"].

¹¹⁸⁰ Madhavi Sunder, "Intellectual Property and Development as Freedom," in Netanel, ed, *The Development Agenda*, *supra* note 688 at 470. Chon, "IP and the Development Divide," *supra* note 62 at 2877; Chon, "Intellectual Property 'from Below'" *supra* note 50 at 806-820.

¹¹⁸¹ Sunder, *supra* note 1180 at 470-72. As Sunder notes, "[r]ecognizing access to knowledge as consisting of both products and processes is essential as we integrate development into our international intellectual property law and policy." *Ibid* at 471. That is, both access to knowledge and participation in the process of its creation are vital to the freedom and agency aspects of human development.

Further, the spillovers that flow from the creative innovation and sustainable access to knowledge through various copyright flexibilities are “critical social investments in the capabilities of others.”¹¹⁸² Indeed, this human-centric orientation requires a significant shift from the age-old and narrow utilitarian metric of welfare to the multivariate capabilities as a measure of wellbeing.¹¹⁸³ In other words, human development should be regarded as an overarching metric and ultimate objective of copyright protection.¹¹⁸⁴ In so doing, copyright protection will be noted as a legal means designed to allocate rights and freedoms that advance both individual and collective capabilities for the promotion of human development. Thus, vital for human development are both the intrinsic and the instrumental values inherent in the protection of author’s material and moral interests over creative works in terms of human capabilities.

Seen through this CA-driven lens of human development, what remains visible from the national copyright regime is its overemphasis on the presumed link between copyright and economic development in the context of creative innovation. As in other jurisdictions, the utilitarian justification that underpins the global copyright and development systems is thus central to the copyright system in Ethiopia and its development objectives. In its preamble, the current copyright legislation contemplates the role of creative works to “enhance” Ethiopia’s “cultural, social, economic, scientific and technological development.”¹¹⁸⁵ From this preambular reference and the substantive content, two points deserve a mention. First, the nexus between copyright and development is deemed instrumental for, and refers to, the nation’s overall development. For authors, their entitlement to economic and moral rights

¹¹⁸² Brett Frischmann, “Capabilities, Spillovers, and Intellectual Progress: Toward a Human Flourishing Theory for Intellectual Property” (2017) 14:1/2 *Review of Economic Research on Copyright Issues* 1 at 30[Frischman, “Capabilities”]. For a discussion on spillovers as a critical social investment in capabilities, see *Ibid* at 29-35.

¹¹⁸³ *Ibid* at 4. Sunder, *supra* note 1180 at 470. Sunder observes the significance of intellectual property law for development, “not just in the narrow sense of efficiency but in this broader view of expanding capability for central freedoms.” *Ibid*.

¹¹⁸⁴ Osei-Tutu, *supra* note 1179 at 734-43. In Osei-Tutu’s opinion, “[t]he advantage of human development as a metric is that it moves human interests to the center of global IP law.” *Ibid* at 731. She further argues that “the use of human development as a metric, which could be adopted under either a utilitarian or natural rights framework for IP law.” *Ibid* at 742.

¹¹⁸⁵ *Copyright Proc. No.410/2004*, *supra* note 136 at Preamble, para.1.

is however relevant to promote their individual human development. Second, despite the reference to its instrumental aspects, there is no direct reference to the notion of human development or its attributes. It is true that all the various development aspects mentioned therein are essential for human development. Yet, the reference made in the preamble is an indication of a mere partial linkage.

As an overarching objective of all sectoral regimes including copyright, it can be argued that a reference to development should rather be reframed in the light of the broader notion used in the FDRE Constitution. In this respect, the FDRE Constitution is important to guide the adoption of the notion of sustainable development both as a constitutional right and policy objective.¹¹⁸⁶ From the perspective of policy objective of copyright, a vital interpretative and application guidance lies in the Constitution's reference to the multidimensional aspects of sustainable development enshrined in the constitutional policy principles and objectives.¹¹⁸⁷ From among international instruments, the CPPD is relevant to copyright and cultural development for its integration of the notion of sustainable development.¹¹⁸⁸

In particular, an attention is drawn to this notion in the subsequent operational guidelines that elaborate on the integration of the cultural aspect into the principle of sustainable development.¹¹⁸⁹ In so doing, the 'Guidelines' points out that the integration should be made "in order to achieve human development goals."¹¹⁹⁰ Further, the NCP purports to mimic the CPPD in its reference to sustainable development in one of its strategies for cultural development.¹¹⁹¹ Given the normative disconnect

¹¹⁸⁶ *FDRE Constitution*, *supra* note 45 at art.43(1)

¹¹⁸⁷ *Ibid* at arts. 85 & 89-92. In particular, art.85(1) makes it clear that "[a]ny organ of Government shall, in the implementation of the Constitution, other laws and public policies, be guided by the principles and objectives specified under this Chapter." (Emphasis added).

¹¹⁸⁸ *CPPD*, *supra* note 969 at art.2 (6).

¹¹⁸⁹ See Basic Texts of the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Paris: UNESCO, 2017) at 59-61.

¹¹⁹⁰ *Ibid* at 59.

¹¹⁹¹ In particular, the NCP points out the strategic role of indigenous knowledge on the use, protection and management of natural resources and traditional knowledge for sustainable development. *NCP*, *supra* note 969 at 2.3.1(at 11). Another reference to sustainable development is made in the NCP in relation to the protection of cultural identity and diversity. *Ibid* at 2.4(at 13).

between the national copyright and development, and lack of the former's orientation towards human development, it is imperative to reframe the nexus between the two in the light of sustainable human development.

5.5.2. The Linkage Between Tertiary Education and Human Development in Ethiopia

In this era of knowledge economy, the contribution of tertiary education to development is often measured in terms of its instrumental role in the production of human capital, knowledge generation and transfer, and its entrepreneurial functions. Scholars such as Ronald Barnett has long noticed the increasing neglect of the inherent role of tertiary education for personal development and empowerment towards intellectual freedom.¹¹⁹² Given its immense contribution to human capital, knowledge production and creative innovation, tertiary education has been considered vital for economic growth. In turn, the latter is deemed pivotal for human development. This approach thus emphasizes an indirect linkage. In contrast, in a significant conceptual shift from the utilitarian or instrumental view, the CA goes further to underscore both the intrinsic and instrumental values of education.¹¹⁹³ In this more direct linkage, tertiary education is both valued for its contribution to achieved 'functionings' and expansion of individual's capabilities or freedoms to choose between alternative combinations of 'functionings.'¹¹⁹⁴

Hence, a quality tertiary education is valued for its immense contribution in the expansion of the freedoms that advance human development as an enlargement of choices or opportunities.¹¹⁹⁵ In Jon Nixon's words, the expansion of human capabilities or freedoms is "the core business—the edifying

¹¹⁹² See Ronald Barnett, *The Idea of Higher Education* (Buckingham: The Society for Research into Higher Education & Open University Press, 1990) at 3-203;

¹¹⁹³ Flavio Comim, "Concepts of Development: The Role of Education," in David Bridges et al, *Higher Education and National Development: Universities and Societies in Transition* (London & New York: Routledge, 2007) 87 at 94. As noted by Comim, tertiary education "becomes a central element in the flourishing of human beings." *Ibid* at 95.

¹¹⁹⁴ Jon Nixon, *Higher Education and the Public Good: Imagining the University* (London: Continuum, 2011) at 70.

¹¹⁹⁵ Comim, *supra* note 1193 at 95.

business—that defines the ends and purposes of higher education.”¹¹⁹⁶ In this sense, a complete measure of the link must be composed of both its instrumental and intrinsic purposes.¹¹⁹⁷As noted above, its instrumental role for economic growth dominates the link between tertiary education and development in Ethiopia. Despite the occasional references to some intrinsic elements, both the policies and the legal frameworks emphasize the role of tertiary education for the national development through skilled human capital, research, community services and technology transfer.¹¹⁹⁸

From the policy regimes, both the GTP II and the ETP make a frequent mention of tertiary as a key instrument for economic development.¹¹⁹⁹ Nonetheless, there are a couple of generic policy statements in the ETP that reflect the intrinsic values of education. Stated in the ETP, one pertinent general objective of education is cultivating the ‘cognitive, creative and appreciative’ potential of citizens.¹²⁰⁰ From the specific objectives set out in the policy, the desire to develop and enrich students’ inquisitive capacity is another instance that reiterates the intrinsic purpose of tertiary education.¹²⁰¹ Despite these policy objectives and the ETP’s sole passing remark on ‘education as a very important factor to human development,’¹²⁰² the policy documents are permeated with the human capital oriented view of tertiary education. Likewise, the same instrumentalist view underpins the consequent legislative frameworks put in place to achieve the policy objectives.

For instance, the preamble to the Higher Education Proc N.650/2009 highlights the need for “an appropriate legal framework to guide institutions’ focus on critical issues of relevance and quality of education and research to contribute with efficacy to the Ethiopian peoples’ aspirations of peace,

¹¹⁹⁶ Nixon, *supra* note 1194 at 83.

¹¹⁹⁷ As Nixon notes, tertiary education can be justified not only for its contribution to economic growth, but also for its contribution to the well-being and self-understanding of society as a whole. *Ibid* at 114

¹¹⁹⁸ *Higher Education Proc.No.650/2009*, *supra* note 117 at arts.4 (1-2) & (4), 24 &26.

¹¹⁹⁹ See, e.g., GTP II, *supra* note 119 at 185, 187, 189, 192 & 194; ETP, *supra* note 131 at § 3.2.4 (at 15).

¹²⁰⁰ ETP, *supra* note 131 at § 2.1.5 (at 8).

¹²⁰¹ *Ibid* at § 2.2.2(at 8).

¹²⁰² *Ibid* at 4.

democracy and development.”¹²⁰³ In the same vein, the objectives of tertiary education are directed towards a demand-driven production of skilled graduates, and the promotion of research for knowledge and technology transfer consistent with the country’s priority needs.¹²⁰⁴ From within the functional-oriented guiding values of the higher education institutions, the values that reflect the attributes of human development are the students’ (a) rational reasoning, and (b) free pursuit of truth and freedom of expression of ideas.¹²⁰⁵ As an aspect of freedoms central to CA, these few attributes of personal intellectual development highlight the intrinsic linkage between tertiary education and human development.¹²⁰⁶ From educators’ perspective, similar instances are the nominal references to the institutional autonomy and academic freedom.¹²⁰⁷

Indeed, the liberal and democratic conception of tertiary education is vital for the role of learners and educators as agents of human development.¹²⁰⁸ As argued above in relation to copyright, the link between tertiary education and human development must be seen in the light of the notion of sustainable development as embodied in the FDRE Constitution. Further, the contribution of tertiary education to the notion of sustainable development must be sufficiently guided by the CA-driven human development. In effect, an integrated notion of sustainable human development should be set as an explicit and overarching objective of tertiary education.

¹²⁰³ *Higher Education Proc.No.650/2009*, *supra* note 117 at Preamble, para 2.

¹²⁰⁴ *Ibid* at art.4 (1) & (2).

¹²⁰⁵ *Higher Education Proc. No.650/2009*, *supra* note 117 at art.4 (3), 7(1), 37(1) (a) & (b).

¹²⁰⁶ *Ibid* at arts. 4(3), 7(1) &37(1). See Comim, *supra* note 1193 at 96-100

¹²⁰⁷ *Higher Education Proc. No.650/2009*, *supra* note 117 at arts. 4(5), 7(4) &16-18.

¹²⁰⁸ See Brigita Janiunaite & Dalija Gudaityte, “Higher Education as an Agent of Social Innovation,” in Bridges, *supra* note 243 at 215-226 (articulating the role of high as agent of social innovation which is critical for human development).

5.6. Policy and Legal Flexibilities for the Linkages Between Tertiary Education and Copyright

From the foregoing discussions, both policy and legal frameworks that underpin tertiary education and copyright have been highlighted. Further, an attempt has been made to shed some lights on their respective linkages with human development. Despite the predominance of their instrumental roles and the neglect of human development, ‘development’ remains a common denominator. Within this overarching framework of linkage, worth noting is their immediate linkage in the context of access to knowledge, human capital and human capabilities. In the same vein, the constitutional and human rights dimensions of copyright and tertiary education underscore another layer of linkage that manifests itself in the subsequent analysis of the policy and legal flexibilities. Noted in terms of human capabilities, the nexus between copyright and tertiary education that stems from the substantive interlinkage between creative innovation and learning is essential for human development. Yet, the policy and legal regimes lack the latter perspective to inform the linkages. Further, linkages can be mapped through the appropriate flexibilities built into the regimes. In this regard, the CA is useful for its extensive reach to embrace various aspects of the linkages and the pertinent flexibilities.

5.6.1. Policy Flexibilities for Policy Linkages Between Tertiary Education and Copyright

In the absence of a comprehensive policy framework for copyright protection, the limited and relevant policy flexibilities are drawn from the STI, NCP and the constitutional policy objectives. Seen in view of the guiding function of a preamble,¹²⁰⁹the preamble of the copyright legislation can be regarded as statutory policy objectives. In contrast, the tertiary education drives its policy objectives from the concise ETP, its implementation guide and the subsequent legislative frameworks. As discussed above, the generic statutory policy objective stated in the preamble to the Copyright Proc. No.410/2004 highlights the role of creative works to ‘enhance’ Ethiopia’s ‘cultural, social, economic,

¹²⁰⁹ See Kevin Stack, “Preambles as Guidance” (2016) 84:5 Geo Wash L Rev 1252-92.

scientific and technological development.¹²¹⁰ In so doing, it sums up the instrumental role of copyright indicated in the STI and the NCP.

Nonetheless, the generic policy statement is left crude without further articulations and systematic integration into the relevant innovation and cultural policies. Neither the afore-cited preamble nor the fragmented and scant policy statements gathered from the STI and the NCP are fully guided and informed by the relevant constitutional policy objectives. For instance, in formulating policies, the FDRE Constitution requires the government to ensure Ethiopians to benefit from the country's intellectual and material resources.¹²¹¹ Further, the government is under obligation to allow all Ethiopians an equal opportunity to improve their economic conditions.¹²¹² Despite the constitutional policy guidance and its significance for the incorporation of appropriate policy flexibilities to ensure equal opportunities and benefits to the citizens, the specific policy regimes under consideration have failed to take into account the guidance and the flexibilities it entails.

As encapsulated in the *Higher Education Proc. No.650/2009*, ensuring relevant and quality tertiary education is the central policy objective of tertiary education intended to promote Ethiopia's development.¹²¹³ Cognizant of the objectives of education stated in the ETP, the higher education legislation reiterates the instrumental role of tertiary education for development. For the policy linkages between copyright and tertiary education, relevant instances are the ETP's stated objectives of cultivating the creative potential of citizens¹²¹⁴ and making education a supportive tool for the development and utilization of technology.¹²¹⁵ In addition, the higher education legislation emphasizes the role of tertiary education for innovation and technology transfer through scientific research.

¹²¹⁰ *Copyright Proc. No.410/2004*, *supra* note 136 at Preamble, at para.1.

¹²¹¹ *FDRE Constitution*, *supra* note 45 at art.89 (1).

¹²¹² *Ibid* at art.89 (2).

¹²¹³ See *Higher Education Proc. No.650/2009*, *supra* note 117 at arts.4 (1) & (2), 24(1-3), 53(1) (d) & 90(8).

¹²¹⁴ ETP, *supra* note 131 at §2.1.5(at 8).

¹²¹⁵ *Ibid* at §2.2.8(at 10).

Likewise, the STI policy highlights the role of tertiary education for the achievement of its objectives. It is useful that these policy reiterations underscore the importance of the instrumental linkage between the two policy regimes. Nonetheless, the instrumental linkages so envisaged appears to be tenuous and ineffective, *inter alia*, for want of: (a) an appropriate coherence, (b) strategic flexibilities, and (c) mutual and collaborative support between the educational and STI policies. In particular, the contemplated linkage between the policies of tertiary education and copyright or creative innovation is more important and direct in the context of copyrighted materials. That said, the ETP is however limited to a mere mention of the importance of learning materials for quality education.

In consequence, there is lack of a substantive articulation or strategic directions to map the policy linkage between copyright and tertiary education to achieve the stated policy objectives. In the same vein, the STI's tangential and the NCP's implicit references to copyright as a tool for creative innovation and cultural development do not incorporate appropriate policy flexibilities to highlight the linkage between copyright and tertiary education in the context of access to knowledge or learning materials. Thus, the lack of a horizontal policy coherence or coordination between the two regimes has eliminated a room for coherent policy flexibilities. Indeed, this emanates from the absence of or limited institutional coordination and public engagements that constitute the core factors affecting IP reforms in developing countries.¹²¹⁶ In experts' observation, an internal or inter-departmental coordination is often critical to ensure a coherence between related policies and laws in a manner that advances human development.¹²¹⁷

Nonetheless, development, which remains the overarching common objective, can be considered as a compelling and overall national policy ground that dictates the necessary policy flexibilities for its realization. It is true that a general set of policy flexibilities is expected to be

¹²¹⁶ Carolyn Deere, "The Politics of Intellectual Property Reform in Developing Countries: The Relevance of the World Intellectual Property Organization," in Netanel, ed, *The Development Agenda*, *supra* note 688 at 113-15 & 117[Deere, "The Politics of IP"].

¹²¹⁷ *Ibid* at 128. In particular, coordination within the national sectors is important in the areas of innovation, education, and technological development. *Ibid*.

extracted or inferred from the mechanisms that highlight the contribution of copyright and tertiary education to development in the national development policy. Yet, the aggregative national development policy is primarily vertical in its approach with a less emphasis on the horizontal/sectoral linkages between the regimes under consideration. In this respect, the GTP II itself is less holistic and integrative of a useful strategic approach. Indeed, this is evident from the GTP II's undue focus upon the instrumental role of development sectors. All sectors share the mantra of 'accelerating and maintaining economic growth.' It is also central to the so-called homegrown economic reform agenda.

In an utter failure, the incomplete policy strategies related to copyright for creative innovation and that of tertiary education for human capital are not crafted in a mutually reinforcing and interdependent manner to offer a room for policy flexibilities. As elaborated in thesis, copyright and tertiary education are interlinked in the context of access to knowledge, human capital and human capabilities. In Ethiopia, these instrumental areas of linkages are, however, not supported with a coherent and integrated set of policy flexibilities built into the respective regimes. Furthermore, the GTP II—the grand policy framework—neither maps their linkage nor does it incorporate relevant policy flexibilities to highlight their linkages. In effect, the failure to integrate appropriate development flexibilities constitutes a significant policy gap in channeling copyright and tertiary education towards a sustainable human development.

5.6.2. Legal Flexibilities for the Linkages Between Tertiary Education and Copyright

In principle, legal flexibilities are derived from or informed by relevant policy flexibilities to achieve the intended objectives. Nonetheless, the incorporation and application of the legal flexibilities have more serious implications than their explicit or implicit policy justifications. For copyright and tertiary education, the incorporation or otherwise of the various flexibilities are thus critical to facilitate or hamper the realization of both their respective and common objectives. In turn, the realization of their objectives constitutes their collective contributions to human development.

As discussed in this thesis, the legal flexibilities that map the linkage between tertiary education and copyright, and their contribution towards human development are constituted of the various general and specific flexibilities embedded in the ratified international or regional instruments, the FDRE Constitution and relevant legislations. Despite the apparent overlap between the general legal flexibilities and those explored in relation to policy regimes, the general flexibilities incorporated or embedded in the various legal instruments have both a relative permanence and better legal significance. Hence, the legal flexibilities—both general and specific—are distinct from the mere policy flexibilities that are somehow transient in nature and devoid of legal effects.

In the legal linkage between copyright and tertiary education, the various general flexibilities embodied in the international legal regimes are useful to guide or inform the interpretation and application of the specific copyright flexibilities. At this juncture, it is important to mention that this section is a mere overview of the legal flexibilities. In its detailed analysis, Chapter Six is dedicated to a comprehensive and an in-depth exploration of the pertinent domestic legal flexibilities that are illustrative of the linkage between tertiary education and copyright in the context of access to learning materials. From a human development perspective, it suffices to note here that the possible nexus between the two regimes and their interaction through relevant legal flexibilities. To this end, the linkage should be grounded in the notion of sustainable human development both as a guiding objective and legal right with a constitutional basis. In view of its embodiment in the FDRE Constitution and pertinent human rights instruments,¹²¹⁸the principle of sustainable human development must be considered an overarching framework of the various flexibilities.

It is thus important to keep in view the Constitution’s incorporation of the principle to underline the basic aim of development ‘to enhance the capacity of citizens for development.’¹²¹⁹ In other words,

¹²¹⁸ *FDRE Constitution*, *supra* note 45 at art.43 cum arts.89-91; *African Charter*, *supra* note 10 at art.22.

¹²¹⁹ *FDRE Constitution*, *supra* note 45 at art.43 (4). The FDRE Constitution, under the cited provision, reads: “The basic aim of development activities *shall be to enhance the capacity of citizens for development* and to meet their basic needs.” (Emphasis added).

the flexibilities embodied or implied in the legal regimes are explored for their facilitative role in enhancing sustainable human development through copyright and tertiary education. In this regard, the notion of human development underscores the complementarities between copyright and tertiary education and directs them towards the realization of sustainable human development.

5.7. Conclusion

In Ethiopia, the emergence of both tertiary education and copyright systems dates back to the mid-twentieth century. In particular, the evolution of copyright system is a product of legal transplants. For both systems, the onset of the millennium has marked significant developments in the relevant policy, legal and institutional frameworks that undergird the respective systems. One exception is however Ethiopia's lack of a comprehensive policy framework for its copyright system. Outside a fragmented set of policy objectives embedded in the general STI and national cultural policies with little significance, the brief preamble to the copyright law remains its sole statutory policy statement to highlight its development policy objectives. In contrast, the tertiary education derives its policy guidance from the general educational policy designed in 1994. However, in place for both tertiary education and copyright are the respective legal and institutional frameworks. An issue of paramount importance that pertains to the legal frameworks of both regimes is their constitutional and human rights dimensions. In this regard, the implicit references to copyright and tertiary education are inferred from the relevant provisions. Corroborative of the inference is Ethiopia's monistic approach to international law.

As their common and overarching objective, both copyright and tertiary education are further interlinked in their contributions for sustainable human development. In Ethiopia, the issue of development predates the emergence of both systems. Yet, the promotion of economic growth has been central to Ethiopia's policy and legal regimes. This narrow approach is at odds with the more holistic approach encapsulated in Ethiopia's constitutional pillars of policy guidance for sustainable

development. In terms of a legal framework, the adoption of the FDRE Constitution has now transformed the hitherto mere policy objective into a concrete right with constitutional and human rights dimensions. In a massive conceptual departure from the incomplete and entrenched narrow view of development, of a particular significance is the FDRE Constitution's explicit embrace of the holistic notion of sustainable development. As mentioned above, there remains a clear gap between the constitutional provisions, and the legislative and policy practices.

Further, the policy and legal linkages between copyright and tertiary education are not informed by the relevant attributes of human development. For instance, despite their linkage in the context of access to learning materials or knowledge, there is lack of appropriate set of general policy and legal flexibilities. It is thus imperative to create or restore a proper coherence between the policy and legal frameworks. The coherence or linkage can be established through the incorporation or integration of appropriate flexibilities in the light of the CA-driven human development. In this regard, the people-centered notion of sustainable development can draw on the normative framework of human development to inform copyright and tertiary education systems. To this end, the CA is useful to recalibrate and re-orient the respective objectives towards sustainable human development. In addition, the approach can help integrate into the policy and statutory frameworks both human rights and other pertinent dimensions. Indeed, the FDRE Constitution offers a relevant legal framework and policy guidance to articulate and incorporate the appropriate flexibilities that direct copyright and tertiary education towards sustainable human development.

Chapter VI: Copyright and Tertiary Education in Ethiopia: The Quest for Flexibilities

6.1. Introduction

As noted in the preceding chapters, development-oriented copyright and tertiary education are both essential in themselves and critical for sustainable human development. Despite the existence of several gaps in the frameworks, Ethiopia has formulated a set of policies and put in place legal and institutional frameworks in order to promote sustainable development. To this end, the role of relevant legal flexibilities is vital to facilitate the complementary and mutually reinforcing contributions of copyright and tertiary education towards their common objective—human development. Thus, this chapter inquires the extent to which the relevant flexibilities are articulated and incorporated into the national legal regimes to promote the realization of the intended objectives. In this regard, the inquiry will be made into the FDRE Constitution, pertinent ratified human rights instruments, the national copyright law and other related legislations that enshrine various legal flexibilities. Further, the chapter explores the relevant domestic flexibilities in the light of the corresponding international flexibilities.

6.2. General Flexibilities with Constitutional and Human Rights Dimensions

It is observed that copyright is a possible legal means for the enjoyment of the constitutional right to ownership of private property and the ‘right to engage freely in economic activity’ or enterprise. In this context, it is crucial to note that a private property regime is an integral part of the broader economic freedom. In consequence, both constitutional rights are interlinked and operate in tandem to reinforce each other. In fact, the freedom to engage in economic activities is essential for the acquisition and exploitation of private property. In turn, the process of, and incentives for, acquisition and exploitation of private property promote creative innovation. To this effect, the advancement of economic freedom serves as an organizing tenet to undergird both natural and economic-based theories

of private property. From human development perspective, both categories of the theories are accommodated within the extensive reach of the freedom-based CA to reflect the instrumental and intrinsic aspects of human freedoms.¹²²⁰ Known as a freedom of economic enterprise or competition,¹²²¹ the economic freedom is further related to the freedom of expression, both of which constitute the two pivotal constitutional freedoms that underpin creators' and users' interests.¹²²² In the context of these freedoms, this section highlights a set of pertinent general flexibilities that affirm the need for access-oriented copyright.

6.2.1. Freedom of Expression-Related Constitutional Flexibilities

In the FDRE Constitution, copyright can be implicated as a means or tool for advancing freedom of expression that includes (a) the freedom to seek or impart information in writing or in the form of art, and (b) the freedom of artistic creativities.¹²²³ It is noted that the freedom of expression includes both “the right to have access to, as well as the right to disseminate, ideas.”¹²²⁴ In this respect, a due regard for freedom of expression as an end is vital in the broad context of access to knowledge relevant to tertiary education. In order to advance the freedom, the FDRE Constitution requires “the free flow of information, ideas and opinions which are essential to the functioning of a democratic order” through the freedom of press and mass media. In addition to the normative equivalence between authors' right and freedom of expression as human/constitutional rights, the dominant utilitarian

¹²²⁰ See Sen, *Development as Freedom*, *supra* note 1 at 10-11 & 85-86. As Sen notes, ‘the freedom-based perspective can take note of, *inter alia*, utilitarianism’s interest in human well-being, libertarianism’s involvement with process of choice and the freedom to act, and Rawlsian theory’s focus on individual liberty and the resources needed for substantive freedoms.’ *Ibid* at 86. See also Otei-Tutu, “Human Development,” *supra* note 1179 at 730-34. Cohen, “Creativity and Culture,” *supra* note 201 at 1158-62 (explaining how both rights and economic theories of copyright fit into the CA).

¹²²¹ See Gustavo Ghidini, *Rethinking Intellectual Property: Balancing Conflicts of Interest in the Constitutional Paradigm* (Cheltenham: Edward Elgar, 2018) at 1. In Ghidini’s observation, the freedom of economic enterprise or competition underscores the right of each individual to access the market and to operate there under conditions of equal treatment. As he notes, the rationale is to promote innovative capabilities and consumer choices or welfare. *Ibid*.

¹²²² *Ibid* at 1-2. In its broadest sense, the freedom of expression is understood as freedom “of ‘producing and disseminating as well as ‘receiving’ information, opinions [,] and the fruits of thought [,] artistic and scientific endeavor.” *Ibid* at 2.

¹²²³ *FDRE Constitution*, *supra* note 45 at art.29 (2) & (3).

¹²²⁴ See Lyman Ray Patterson, “Free Speech, Copyright and Fair Use” (1987) 40 *Vand L Rev* 1 at 2.

approach considers copyright as an instrument for freedom of expression and democratic discourse.¹²²⁵

In this respect, copyright's role stems from its function of incentivizing creative expression and dissemination of ideas. In both cases, the instrumental role of copyright for the advancement of freedom of expression in turn reinforces the economic justification for its reasonable protection.¹²²⁶

In an apparent overstatement of its instrumental role, the US Supreme Court had once referred to copyright as 'the engine of free speech.'¹²²⁷ In the *Harper & Row Publishers*, the Court noted that "[b]y establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."¹²²⁸ In concurring with the role of copyright as 'an engine of free speech', Neil Netanel articulates copyright's structural, production and expressive functions. In its production function, copyright provides "an economic incentive for the creation and dissemination of original expression."¹²²⁹ In the same vein, its expressive function "reinforces the social and political importance of individuals' original contributions to public discourse."¹²³⁰

In its structural function, copyright protection is instrumental to 'support a sector of authors and publishers' to ensure their financial sustenance and independence.¹²³¹ To this extent, both freedom

¹²²⁵ *Ibid* at 5 & 64-66. See generally Lyman Patterson & Stanley Birch, "Copyright and Free Speech Rights" (1996) 4:1 J Intell Prop L 1; Netanel, "Copyright," *supra* note 251; Neil Netanel, *Copyright's Paradox* (Oxford: Oxford University Press, 2008). As Neil Netanel has pointed out, copyright's historical role is to advance three pillars of liberal democracy: (a) the Enlightenment ideal of self-expressive and transformative individual, (b) individuals' expressive contributions to public deliberation, and (c) the Enlightenment ideal of scientific progress. *Ibid* at 106-107.

¹²²⁶ See Netanel, *Copyright's Paradox*, *supra* note 1225 at 82-95. It should be noted that author's human rights that ensures the protection for its own intrinsic value places on the same footing both freedom of expression and author's right. Further, there are different view/approaches in Europe and the US on the relationship. See Michael Birnhack, "Copyrighting Speech: A Trans-Atlantic View," in Paul Torremans, ed, *Copyright and Human Rights: Freedom of Expression-Intellectual Property-Privacy* (the Hague: Kluwer International, 2004)37 at 48-53.

¹²²⁷ See *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985). The Court stated: "In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression." *Ibid*. Netanel, *Copyright's Paradox*, *supra* note 1225 at 82-84. To this end, copyright has production, structural and expressive functions that serve both as means for promoting free speech and metrics for measuring its actual role. *Ibid* at 82-83. *Comp.* Patterson, "Free Speech," *supra* note 1224 at 54 (articulating the 'creative, distributive and learning functions' of copyright).

¹²²⁸ Netanel, *Copyright's Paradox*, *supra* note 1225 at 82-83.

¹²²⁹ *Ibid*.

¹²³⁰ *Ibid*.

¹²³¹ *Ibid* at 82.

of expression and copyright protection share the same objective—advancing individuals’ self-expression through creative works.¹²³² In addition to copyright’s role for expressive speech, its inbuilt flexibilities such as the fair use/dealing doctrine, the requirements of originality, idea/expression distinction and term limits are all instrumental to promote free speech.¹²³³ In this context, copyright is in part regarded as an ‘integral element’ of the broad system of freedom of expression.¹²³⁴

Nevertheless, copyright’s protection of creative expression of ideas tends to encroach upon expressive free speech.¹²³⁵ That is, as opposed to its instrumental role in the advancement of authors’ freedom of expression, copyright protection restricts the freedom of others’ due to its prevention of unauthorized use of the works and the creation of derivative works. Recent developments have exacerbated this inherent tension to pose a growing potential threat to the freedom of expression and other rights. The exacerbating factor is the cumulative effect of the unabated ratchet of copyright, its stringent enforcement measures, the prohibited circumvention of digital locks and the latter’s abusive use as a tool of private censorship.¹²³⁶ In consequence, the tension morphs into a real conflict in the competing interests between freedom of expression and copyright protection.¹²³⁷ The conflict is a manifestation of the uncurbed expansion of copyright and the consequent erosion of the appropriate flexibilities.¹²³⁸

¹²³² *Ibid* at 105-108.

¹²³³ P.B. Hugenholtz, “Copyright and Freedom of Expression in Europe,” in Rochelle Dreyfuss, Harry First & Daine Zimmerman, eds, *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford: Oxford University Press, 2001)343.

¹²³⁴ Netanel, *Copyright’s Paradox*, *supra* note 1225 at 38.

¹²³⁵ *Ibid* at 172-74.

¹²³⁶ *Ibid* at 56-81& 186-91.

¹²³⁷ See Robert Burrell & Allison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge: Cambridge University Press, 2005) at 15-41(articulating the interface between copyright and freedom of expression)

¹²³⁸ Netanel, *Copyright’s Paradox*, *supra* note 1225 at 56-81&186-91.

In the absence of an appropriate balance, the relationship between copyright and freedom of expression remains paradoxical. As Netanel observes, “[c]opyright both fosters original expression and impedes uses of existing expression.”¹²³⁹ Crafting a set of appropriate copyright flexibilities is thus important to maintain the appropriate balance and resolve the legal quagmire. Further, a similar attention must be given to the fundamental freedom of expression that constitutes an external human rights/constitutional constraint on copyright’s expansive scope.¹²⁴⁰

For the purpose of education, the constitutional flexibilities related to the freedom of expression are relevant due to their spillover effects that can be beneficial to tertiary education in the broad context of enhanced access to knowledge.¹²⁴¹ In Netanel’s observation, the various provisions intended to promote free expression would entail ‘statutory licenses’ that facilitate use of copyrighted materials to the benefit of, *inter alia*, educational institutions and libraries.¹²⁴² In addition to the copyright’s exception for informatory purpose or reporting of current events,¹²⁴³ Ethiopia’s national press law purports, *inter alia*, to ‘facilitate the free flow of information and ideas among citizens’ for the advancement of their freedom of expression.¹²⁴⁴ As a general aspect of constitutional flexibilities, the freedom of expression can be invoked against an expansive copyright protection in order to facilitate an

¹²³⁹ *Ibid* at 38. Helfer & Austin, *Human Rights and Intellectual Property*, *supra* note 33 at 222.

¹²⁴⁰ Helfer & Austin, *Human Rights and Intellectual Property*, *supra* note 33 at 222. As the authors rightly note, “the right to freedom of expression imposes legal and normative limits on the scope of intellectual property rights.” *Ibid*. Goldstein & Hugenholtz, *supra* note 157 at 406-07.

¹²⁴¹ Netanel, *Copyright’s Paradox*, *supra* note 1225 at 38.

¹²⁴² *Ibid*. In this regard, Netanel notes that the statutory licenses may be allowed for free or subject to fees and the beneficiaries include “public broadcasters, cable and satellite television operators, webcasters, commercial radio and television broadcasters, libraries, educational institutions, and record labels.” *Ibid*.

¹²⁴³ *Copyright Proc. No.410/2004*, *supra* note 136 at art.13.

¹²⁴⁴ See Freedom of the Mass Media and Access to Information Proclamation No. 590/2008, Preamble, para.7. Nevertheless, the scope of the press law is primarily limited to information in the possession of public bodies. For instance, excluded is an access to the ‘commercial information’ of third party without the latter’s consent. *Ibid* at art.17. Likewise, access to information regulated in other legislations (e.g., copyright law) is outside its scope. *Ibid* at art.15. Hence, no proper alignment exists between both legislations. For a detailed discussion on freedom of expression in Ethiopia, see Gedion Thimotheos, “Freedom of Expression in Ethiopia: The Dearth of Jurisprudence” (2010) 4:2 Mizan Law Review 201-31.

access to copyrighted materials for the purposes of critique, review and scholarship that promote education.¹²⁴⁵

6.2.2. Private Property-Related Public Interest Constitutional Flexibilities

From the perspective of copyright protection as a private property, the FDRE Constitution provides for two relevant limitations that can be construed as general flexibilities applicable to copyright. First, the Constitution envisages a legal restriction to ownership of private property when so prescribed “by law on account of public interest.”¹²⁴⁶ Although the FDRE Constitution does not define what amounts to public interest, a limitation intended for access to learning materials at all levels of education can be justified on the basis of a public interest consideration embodied in a law. In its interpretation of a similar constitutional provision,¹²⁴⁷ the German Federal Constitutional Court once found a public interest as a justifiable limit on copyright.¹²⁴⁸

Called upon to rule over the constitutionality of the copyright limitations introduced in 1956, the Court examined the limitations in the light of art.14(2) of the Basic Law that incorporates public interests. In its ruling over unauthorized use of copyrighted materials, the Constitutional Court pointed out public interests to justify the incorporation of published works into a collection intended for educational purposes.¹²⁴⁹ Given the parallel between the provisions of Basic Law and art.40(1) of its FDRE Constitution, Ethiopia might draw a lesson from this foreign constitutional jurisprudence. In addition to its intrinsic significance, the instrumental role of tertiary education for human development

¹²⁴⁵ See Netanel, *Copyright's Paradox*, *supra* note 1225 at 172. Netanel notes that “copyright law touches directly and consistently on literature, art, film, television broadcasts, photographs, political polemic, criticism, scholarship, and other expression lying at the core of First Amendment protection.” *Ibid.*

¹²⁴⁶ *FDRE Constitution*, *supra* note 45 at art.40 (1).

¹²⁴⁷ See *German Basic Law*, §14.

¹²⁴⁸ See Federal Constitutional Court, 7 July 1971 “Kirchen-und Schulgebrauch” [1971] 3 I.I.C.395. It was held that the author would be entitled to payment of remuneration. Gillian Davis, *Copyright and the Public Interest*, 2nd ed (London: Sweet & Maxwell, 2002) at 204-10; Sunimal Mendis, *Copyright, the freedom of Expression and the Right to Information: Exploring a Potential Public Interest Exception to Copyright in Europe* (Baden-Baden: Nomos Verlagsgesellschaft, 2011) at 54-57.

¹²⁴⁹ *Ibid.*

constitutes a legitimate ground of public interests. In furtherance of its instrumental role of serving the public interest,¹²⁵⁰ copyright or a pertinent law can thus provide for appropriate limitations to the exclusive rights. In so doing, the limitations would facilitate a reasonable access to copyrighted materials relevant for tertiary education.

Second, subject to an advance payment of a ‘commensurate compensation,’ the FDRE Constitution provides for a possible expropriation of private property for public purpose.¹²⁵¹ In the context of copyright, this administrative action could take the form of a non-statutory compulsory licensing or a state’s total acquisition of the right for public purposes.¹²⁵² It should be noted that an expropriation of a copyright is rare in practice. Further, no specific prior legal prescription is contemplated in the FDRE Constitution. The sole governing rule is the requirement of public purpose or interest to warrant the action. For an execution of the envisaged expropriation, the measures should be transparent and in accordance with the appropriate legal or administrative rules.

Nonetheless, in both cases (art.40 (1) & (8)), the bottom-line is the existence of a public interest to justify the limitation. Given the overriding public interest, copyright must be made to serve its intended primary social functions of promoting learning and creative innovation for human development.¹²⁵³ In their determination of public interests, courts have a decisive role to carve out a room for appropriate flexibilities that advance the intended social function.

¹²⁵⁰ Davis, *supra* note 1248 at 53-74, 99-128, 202-32 & 353-54 (elaborating on how public interest is central to the copyright systems of the UK, the US, and Germany, among others).

¹²⁵¹ *FDRE Constitution*, *supra* note 45 at art.40 (8).

¹²⁵² Davis, *supra* note 1248 at 209 & 223; Carlos Correa, “Investment Protection in Bilateral and Free Trade Agreements: Implications for the Granting of Compulsory Licenses” (2004) 26 *Michigan Journal of International Law* 331 at 345-53 (articulating how compulsory licenses could be used, in lieu of expropriation, to serve a public interest). For a foreign jurisprudence related expropriation of a copyright on the ground of public interest, see, e.g., Jhonny Antonio Pabo’n Cadavid, “Expropriation of copyright: an ill-thought-out strategy for cultural heritage policy” (2015) 10:5 *Journal of Intellectual Property Law & Practice* 330 at 330-32.

¹²⁵³ *CESCR General Comment No.17*, *supra* note 49 at para 35 [“intellectual property is a social product and has a social function.”]. See generally Christophe Geiger, “The Social Function of Intellectual Property Rights, Or How Ethics Can Influence the Shape and Use of IP Law” in Graeme Dinwoodie (ed.), *Intellectual Property Law: Methods and Perspectives* (Cheltenham: Edward Elgar, 2013) at 153-176 [Geiger, “Social Function of IP”]; Patterson & Birch, “Copyright and Free Speech Rights,” *supra* note 1225 at 7.

6.2.3. *Human Rights-Related Flexibilities*

Integral to Ethiopia’s domestic law, the other grounds of general flexibilities related to copyright and tertiary education stem from the flexibilities embedded in the ICESCR. First, the general rule of flexibilities is inherent in the need to strike an overall balance between the rights recognized in the Covenant.¹²⁵⁴ As articulated in the *General Comment No.17*, “[i]n striking this balance, the private interests of authors should not be unduly favored and the public interest in enjoying broad access to their productions should be given due consideration.”¹²⁵⁵ In our case, the two relevant aspects of the balance are author’s rights to protection of material and moral rights, and individual’s equal access to tertiary education or higher education.¹²⁵⁶ Second, the limitation imposed upon author’s right in order to allow others the right to culture and the right to share the benefits of scientific progress constitutes another relevant general limitations integral to Ethiopia’s law.¹²⁵⁷ In both instances, the limitations to author’s rights are warranted to allow a reasonable access to the protected works for further creative innovation and educational purposes.

It is thus imperative that the limitations should inform the interpretation and application of the copyright legislation in order to facilitate affordable access to learning materials.¹²⁵⁸ In its articulation of states’ obligations related to art.15 (1) (c) of the ICESCR, the *General Comment No.17* underscores a state’s “duty to prevent unreasonably high costs for access to...schoolbooks and learning

¹²⁵⁴ See *CESCR General Comment No.17*, supra note 49 at para 4 & 35.

¹²⁵⁵ *Ibid* at para 35.

¹²⁵⁶ ICESCR, supra note 8 at art.15 (1) (c) & art.13 (2) (c). See *CESCR General Comment No.17*, supra note 49 at paras 4, 22-24 & 35; *CESCR General Comment No.13*, supra note 12 at paras 17-20 &43-59.

¹²⁵⁷ *CESCR General Comment No.17*, supra note 49 at para 35; See generally *CESCR General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21[*CESCR General Comment No.21*].

¹²⁵⁸ *CESCR General Comment No.17*, supra note 49 at para 35. Helfer & Austin, *Human Rights and Intellectual Property*, supra note 33 at 189.

materials.”¹²⁵⁹ In addition, the *General Comment No.17*’s interpretation of author’s right to material interests for the purpose of *adequate* living standard offers a room for flexibilities.¹²⁶⁰ First, apart from a partial overlap, there is no *necessary* coincidence between author’s ‘material interests’ and the expansive pecuniary interests protected under the international copyright system.¹²⁶¹ Second, an interpretation of what amounts to an author’s *adequate* living standard itself is context-specific. In effect, the variance in the context across countries would offer a flexible room within the reach of the Covenant. In particular, a contextual assessment of an adequate living standard that safeguards the core minimum author’s rights can be used to push back the corporate-driven excessive protection of copyright.

Therefore, the articulation of the flexibilities made in the *General Comment* to draw a distinction between the respective scopes is pertinent despite its non-binding status. In fact, the *General Comment* has a strong interpretative significance for member states in their implementation of the ICESCR. In consequence, states can draw on this interpretative guidance to free up a balancing space for realization of other rights. Indeed, the FDRE Constitution requires government organs to *enforce* all the provisions of its Chapter on fundamental rights and freedoms in the light of the international human rights instruments.¹²⁶² Further, this obligation implies the need for a balanced implementation of the rights recognized in the Constitution. Both the preamble and provisions of the relevant copyright and tertiary education legislations should thus be read in light of the flexibilities embodied in the constitutional and human rights provisions. In Geiger’s observation, “fundamental rights would serve not only as a [balancing] guideline for the application of IP law, but also for a reorganization of IP law

¹²⁵⁹ *General Comment No.17*, *supra* note 49 at para 35.

¹²⁶⁰ See *ibid* at paras 4, 15-16 & 22-24.

¹²⁶¹ Helfer & Austin, *Human Rights and Intellectual Property*, *supra* note 33 at 189.

¹²⁶² *FDRE Constitution*, *supra* note 45 at art.13.

in the future.”¹²⁶³ Hence, the relevant human rights and constitutional dimensions are useful to inform the interpretation and application of the various flexibilities.

6.2.4. Flexibilities Related to Ethiopia’s Current Context and Future Prospect

In addition to the constitutional and human rights-related flexibilities, Ethiopia’s current legal context within the global IP system is important for the country to formulate appropriate legal flexibilities without a breach of its international obligations. As mentioned elsewhere in this thesis, Ethiopia’s international obligation related to copyright and tertiary education stems from the pertinent human rights instruments such as the ICESCR. Provided in the ICESCR is a progressive realization of authors’ material and moral interests along with other rights, including education. As pointed out in the *General Comment No.17*, the scope of the authors’ right is distinct from that of international copyright system. For a state with no IP treaty obligation, the variance in the scope will thus leave the state a considerable room to exploit in pursuit of its development objectives. For the moment, this represents Ethiopia’s current legal context. That is, Ethiopia’s sole international obligation for protection of authors’ rights stems from the ICESCR. The extent of its obligation remains within the Covenant’s remit that excludes the extra/expansive scope of international copyright regime.

In this respect, an important reminder is Ethiopia’s non-ratification of the various copyright treaties despite its current accession plan. In effect, Ethiopia bears no obligation to ensure a compliance with the treaties and the conditions attached to the flexibilities embodied therein. In theory, it is thus at liberty to either reject them *in toto* or draw on some appropriate international copyright flexibilities. In the event Ethiopia opts for the latter, its incorporation of the flexibilities can be made through a legislative action or a judicial recourse for their interpretative significance. In so doing, Ethiopia could

¹²⁶³ Christophe Geiger, “The Constitutional Dimension of Intellectual Property” in Paul Torremans, ed, *Intellectual Property and Human Rights*, *supra* note 46 at 114[Geiger, “Constitutional Dimension”]. In order to ensure a fair balance of interests and foundation for the flexibilities as mandatory users’ rights, a re-founding of the system is necessary. *Ibid* at 114-131. To this end, “fundamental rights can offer a suitable basis for a balanced system.” *Ibid* at 118 &131.

have catered to its development priorities. In practice, it has long forgone the chance to exploit the flexibilities. For instance, its copyright law is more restrictive than the international copyright system. Ethiopia's sheer incorporation of some of the treaties entails a self-imposed restraint. Yet, it is free to rethink its approach in a manner that advances its human development.

In the future, Ethiopia will no longer have a privilege of selective incorporation once it joins the international copyright system. No sooner does it accede to the WTO than Ethiopia will be required to make a full incorporation of the international copyright treaties and their respective flexibilities. Hence, flexibilities related to Ethiopia's current legal context will be a short-lived benefit. Its post-accession scenario determines its long-term development direction. Nonetheless, the underpinning principle of balancing private and public interests embedded in the development objectives would remain central to both sets of the general flexibilities under the constitutional and human rights regimes, and the copyright treaties.¹²⁶⁴ Absent a reasonable balance, the interests cannot complement each other.

Suffice to mention, the TRIPs Agreement is notable for its ostensible recognition of a general principle of balancing rights and obligations or private and public interests.¹²⁶⁵ In the same vein, the recent copyright treaties have espoused the principle of balancing private and public interests. For instance, the intended balance is evident from the WIPO Internet and Marrakesh Treaties' specific reference to *education, research and access to information* as instances or constitutive elements of the broad domain of public interests.¹²⁶⁶ In the context of copyright, this would be relevant to inform or

¹²⁶⁴ *FDRE Constitution*, *supra* note 45 at art.40(1) cum (8) & 29(3)(b); ICESCR, *supra* note 8 at arts.4 &15; TRIPs Agreement, *supra* note 163 at arts.7&8.

¹²⁶⁵ TRIPs Agreement, *supra* note 163 at arts.7&8.

¹²⁶⁶ WCT, Preamble, *supra* note 448 at para 5; WPPT, *supra* note 448 at Preamble, para 4; Marrakesh Treaty, *supra* note 497 at Preamble, para 9. Using almost the same wording, all the three treaties recognize "the need to maintain a balance between the rights of [authors/right holders] and the larger public interest, particularly education, research and access to information." Further, with the phrase 'as reflected in the Berne Convention,' the WCT's reference to the statement is further linked to the Berne Convention that has been made integral to the TRIPs Agreement. That is, members' deliberate mention of the Berne Convention in connection with the required balance due to the public interest is important in the future interpretation of the notion under the TRIPs Agreement to include 'education, research and access to information' as aspects of public interest.

guide the interpretation of the FDRE Constitution's generic reference to 'public interests' as a legal limitation imposed upon the right to private property.

Nevertheless, the 'public interest' envisaged in the Constitution is both general and contingent upon a specific legal provision for its application. Although it is implicit in its preamble, the copyright law recognizes the need for maintaining a balance between the protection and access aspects of public interest. This can be inferred from copyright's intended 'major role to enhance the cultural, social, economic, scientific and technological development.'¹²⁶⁷ In this broader context, copyright and tertiary education should be regarded as integral elements of the balance between private and public interests in order to enhance the various aspects of development.¹²⁶⁸

In sum, the afore-cited constitutional provisions can augment the various general international flexibilities. The combination of the flexibilities is pertinent to bring to the fore the constitutional dimensions to inform the incorporation, interpretation and application of copyright-related flexibilities in Ethiopia. In this regard, it is important to consider Ethiopia's recognition of the right to development and the monistic approach of the FDRE Constitution that allows the direct application and supreme interpretative guidance of the human rights instruments, including the ICESCR. Thus, the analysis of the various flexibilities will be made in light of this broad context and the international copyright flexibilities explored in the previous chapters. To this effect, the CA is vital to accommodate and enrich the constitutional and human rights dimensions, and guide the interpretation of the various flexibilities towards sustainable human development. It is also useful to emphasize access to learning materials as an essential material condition needed for a quality tertiary education to expand human capabilities.

¹²⁶⁷ *Copyright Proc. No.410/2004*, *supra* note 136 at Preamble, para 1.

¹²⁶⁸ See Okediji, "International Copyright System," *supra* note 51 at 3 & 6-8. In Okediji's observation, "education, scientific advancement and the spread of information and news [] are still enduring aspects of the public interest in access to protected works. These expressions of the public interest are vital to economic development and growth." *Ibid* at 8.

6.3. Some General Aspects of Copyright-Related Flexibilities

6.3.1. *Idea/Expression Dichotomy and Exclusions*

As noted in the preceding chapter, there are still general copyright flexibilities that are integral to the substantive provisions of copyright treaties or statutes. Seen in the light of the general flexibilities highlighted above, the general flexibilities embedded in the provisions are derived from the basic principles and conditions of copyright protection. Imputed to recent developments in the entertainment industry for its enactment,¹²⁶⁹ the current right-holders-oriented copyright law provides for some general flexibilities. One of the general statutory flexibilities is the principle idea/expression dichotomy. Incorporated in art.5 of the Copyright Proc. No.410/2004, the principle excludes from copyright protection ‘any idea, procedures, system, method of operation, ... and forms of general use, principle, discovery or mere data, even if expressed, described, explained, illustrated or embodied in a work.’ Although not mentioned, mere facts and unoriginal databases can be added to the list.

In so doing, the copyright legislation does not only adopt the principle of idea/expression distinction as enshrined in the TRIPs Agreement and the WCT,¹²⁷⁰ but also goes further to provide a long list of works ineligible for legal protection. The application of the principle leaves the excluded subject matters for free usage, including for educational purposes and for the public domain to flourish. From the freedom of expression perspective, the principle comports with the constitutional stipulation to allow ‘the free flow of information, ideas and opinions which are essential to the functioning of a democratic order.’¹²⁷¹ From protected works, the copyright law intends to advance freedom of expression through the exception for reproduction, broadcasting and other communication to the public

¹²⁶⁹ Eshete & Mengistu, *supra* note 182 at 168.

¹²⁷⁰ See TRIPs Agreement, *supra* note 163 at art.9 (2); WCT, *supra* note 448 at art.2.

¹²⁷¹ *FDRE Constitution*, *supra* note 45 at art 29(4).

for informatory purpose.¹²⁷² As highlighted below, the exclusion dictated by the principle of idea/ expression distinction is related to the condition of originality, and its actual application is often subject to a judicial determination. Outside the principle, the excluded works relevant for tertiary education are official texts of legislative, administrative or of legal nature as well as their *official* translations.¹²⁷³ Given its optional nature under the Berne Convention,¹²⁷⁴ the exclusion of the works is critical to serve basic public interests such as legal education and access to justice.¹²⁷⁵

6.3.2. Flexibilities Related to Conditions and Term of Protection

The other ground of general flexibilities is related to the conditions of protection. As highlighted in the preceding chapter, both originality and fixation constitute mandatory requirements under Ethiopian copyright law.¹²⁷⁶ In this regard, the law makes clear that a work is entitled to legal protection as long as it is original and fixed. As opposed to fixation that has its own definition, what amounts to an original work is left to the courts without a criterion or guidance. Absent a relevant jurisprudence so far, it remains open for the courts to define or determine its criteria in the future. In defining the notion or formulating the criteria, courts are thus free to resort to relevant foreign experiences that require a certain modicum of creativities¹²⁷⁷ or ‘creative choices.’¹²⁷⁸ Depending upon

¹²⁷² *Copyright Proc. No. 410/2004*, *supra* note 136 at arts.13 &32(a). Note that the exception is subject to the prescribed conditions related to the kind of the works and the purposes (i. e, news, reporting current events and public information).

¹²⁷³ *Ibid* at art.5 (2). Note that a *non-official* translation of the works (e.g. legislation or cases) private persons is not excluded from copyright protection.

¹²⁷⁴ Berne Convention, *supra* note 439 at art.2 (4). Further, the exclusion rules out the existence of the so-called crown copyright which is common in Anglo-American jurisdictions.

¹²⁷⁵ See Ricketson & Ginsburg (Vol. I), *supra* note 713 at 501-04.

¹²⁷⁶ *Copyright Proc. No. 410/2004*, *supra* note 136 at art.6 (1). The Berne Convention makes the requirement of ‘fixation’ optional for members to decide. Berne Convention, *supra* note 439 at art.2 (2).

¹²⁷⁷ See *Feist Publications, Inc v Rural Telephone Service Company, Inc*, 499 US 340(1991). In the case, the US Supreme Court rejected the hitherto low standard of the ‘seat of the brow’ doctrine to require ‘a minimal degree of creativity’ for protection of compilations. *Ibid* at 348. See Gervais, *(Re)structuring Copyright*, *supra* note 702 at 94-108 (articulating the approaches in common law and civil law systems).

¹²⁷⁸ Gervais, *Restructuring Copyright*, *supra* note 702 at 114-19. Noting it as a combination of both Feist and civil law definitions that can meet the requirements of international treaties, Gervais defines ‘creative choice’ as “one made by the author that is not dictated by the function of the work, the method or technique used, or by applicable standards or relevant ‘good practice’ (emphasis in the original and footnote omitted)” *Ibid* at 114-16.

whether courts would adopt stringent or lenient criteria to determine the threshold, works that fail to pass muster under the requirement will be free for all to use, both for creative innovation and tertiary education. In this regard, unoriginal scientific databases will be useful for educational use.

In the same vein, works that are left unfixed would remain unprotected and form part of the public domain for free use. Given the increasing use of digital devices as tangible medium for creation, reproduction and storage of works, the technological development itself has made fixation a matter of default situation.¹²⁷⁹ Yet the requirement of fixation entails both positive and negative implications. Related to its significance for dissemination of a work in a tangible form, fixation is relevant for its evidentiary value for ‘an objective determination of the existence of a work.’¹²⁸⁰ As an aspect of general flexibilities, its important positive implication is the non-protection of some works for want of fixation requirement. In Ethiopia, this would allow unimpeded access to unfixed works that can be used for education.¹²⁸¹ Further, for tertiary education that primarily depends upon fixed works such as books and journals, fixation is still critical for the dissemination of relevant works.

Nonetheless, its negative aspect inheres in its exclusion of most oral works including traditional knowledge (TK).¹²⁸² It should be noted that there is a reference to oral works in the law despite their practical exclusion due to the indiscriminate prerequisite of fixation.¹²⁸³ Absent an explicit exception to the requirement, the oral works such as unfixed expression of folklore would in effect be ineligible for want of fixation.¹²⁸⁴ The lack of protection entails the misappropriation of the TK and encroaches upon

¹²⁷⁹ *Ibid* at 120.

¹²⁸⁰ *Ibid*.

¹²⁸¹ Eshete & Mengistu, *supra* note 182 at 180-181.

¹²⁸² *Ibid*.

¹²⁸³ *Copyright Proc.No.410/2014*, *supra* note 136 at arts.2 (30) (b) &6(1) (b).

¹²⁸⁴ Silke von Lewinski, “The Protection of Folklore” (2003) 11 *Cardozo J Intl & Comp L* 747 at 759.

the rights of indigenous peoples.¹²⁸⁵ Due to its distinct attributes, TK is not accommodated within the existing copyright regime to receive the protection it deserves. From fixation perspective, the oral dissemination of folklore from generation to generation warrants a variegated regime. Ethiopia’s rich potential of TK and lack of an relevant law call for appropriate protection.¹²⁸⁶ For a future legislative action, it is useful to consider the evolving “tiered or differentiated” approach to TK in order to accommodate both fixed and unfixed TK as a vital source of creative innovation.¹²⁸⁷ In sum, a strict set of protection criteria can offer some flexibilities useful for future creative innovation and tertiary education. For the latter, unless documented, the significance of unfixed TK might still be limited.

For works that meet the conditions of protection, the various terms of protection accorded to the works can be considered as another relevant aspect of the general flexibilities. In the copyright legislation, the terms of protection stipulated for copyrighted works range between twenty years for broadcasts to fifty years after death for most literary and artistic works.¹²⁸⁸ Except for works of applied art that enjoy a longer term of lifetime-plus-fifty years,¹²⁸⁹ the existing copyright law has incorporated

¹²⁸⁵ See Ruth L. Okediji, “Traditional Knowledge and the Public Domain” (2018) Centre for International Governance Innovation (CIGI) Papers No.176 at 2-4 &8-10 [Okediji, “Traditional Knowledge”].

¹²⁸⁶ As the law stands now, the limited protection of TK in Ethiopia is somehow recognized only for an authorized access to the community knowledge generated and accumulated with respect to the conservation and utilization of genetic resources. See Access to Genetic Resources and Community Knowledge, and Community Rights Proclamation No. 482/2006. An attempt to draft a law for protection of TK seems to be underway at EIPO.

¹²⁸⁷ Okediji, “Traditional Knowledge,” *supra* note 1285 at 14-16; see generally Chidi Oguamanam, “Tiered or Differentiated Approach to Traditional Knowledge and Traditional Cultural Expressions: The Evolution of a Concept” (2018) Centre for International Governance Innovation, CIGI Papers No.185. As Oguamanam—one of the experts associated with this approach at WIPO IGC—observes, “[the approach] has a lot of potential to foster a better understanding and pragmatic integration of TK/TCEs toward fair and balanced global knowledge governance.” *Ibid* at 16.

¹²⁸⁸ The duration for photographic works is twenty-five years, while posthumous, collective works, audiovisual works, sound recordings, and pseudonymous works (except when the identity of the author is doubtful) are all protected for 50 years. See *Copyright Proc. No. 410/2004*, *supra* note 136 at art.20, 26(5), 27(2), 30(3) &31(2).

¹²⁸⁹ Unlike the Berne Convention which provides a minimum of twenty-five years for both photographic works and works of applied art, the copyright legislation limits only the term of photographic works and leaves out the works of applied art. That is, the term of protection for the works would thus be the normal duration that remains a default rule to govern. *Copyright Proc. No.410/2004*, *supra* note 136 at art.20 (1); see Berne Convention, *supra* note 439 at art.7 (4) for a shorter duration.

similar terms of protection embodied in the Berne and TRIPs Agreement.¹²⁹⁰ For works of applied art, the national copyright law has taken a Berne/TRIPs-plus approach. Although a longer term of protection is optional for states to provide,¹²⁹¹ a longer term than required is often detrimental to the public interest due to a belated return of the works to the public domain.¹²⁹² In contrast to the term for works of applied art, the national copyright law makes a full incorporation of the international term of protection adopted for collective works. Consistent with the Berne Convention and TRIPs Agreement, collective works are thus accorded a legal protection for fifty-years starting from the year of their making or publication.¹²⁹³ In sum, the TRIP-plus approach adopted for works of applied art dispenses with the flexibilities related their protection. Yet the minimum terms limits adopted for various works can offer flexibilities that should be retained after Ethiopia's anticipated accession to Berne or TRIPs Agreement.

6.3.3. Flexibilities Related to Scope of Economic Rights

Still related to general flexibilities is the scope or kind of the protected exclusive economic rights. In what amounts to a TRIPs-plus approach, the copyright legislation goes further to provide for *unconditional* rental and exclusive public lending of fixed performances, phonograms and computer programs.¹²⁹⁴ In other words, the law waives the exemption permitted in respect of cinematographic

¹²⁹⁰ Berne Convention, *supra* note 439 at art.7; TRIPs Agreement, *supra* note 163 at arts.12 & 14(5). Note that the term of protection under the Rome Convention (1971) was a minimum of twenty years for performances, phonograms and broadcasts. Hence, much shorter was the duration for performances and phonograms. Nonetheless, the life-time-plus fifty years now provided for photographic works under art.9 of the WCT is not applicable under the copyright legislation.

¹²⁹¹ Berne Convention, *supra* note 439 at art. 7 (6) [The countries of the Union *may grant* a term of protection *in excess of those provided* by the preceding paragraphs.]

¹²⁹² See Ricketson & Ginsburg (Vol. I), *supra* note 713 at 530-31.

¹²⁹³ *Copyright Proc.410/2004*, *supra* note 136 at art.20 (4). Note that the duration for a work of joint ownership is subject to the default rule. *Ibid* at art.20 (2). See Berne Convention, *supra* note 439 at 7(2); TRIPs Agreement, *supra* note 163 at art.12. See Ricketson & Ginsburg (Vol. I), *supra* note 713 at 575-76.

¹²⁹⁴ *Copyright Proc. No.410/2004*, *supra* note 136 at arts.26 (1) (e) &27(1) (d); See also, *Ibid* at art.7 (1) (d) &7(2). See TRIPs Agreement, *supra* note 163 at art.11 [stating 'In respect of *at least.....*']; WCT, *supra* note 448 at art.7; WPPT, *supra* note 448 at arts. 9&13. Correa, *Trade Related Aspects*, *supra* note 137 at 129-130.

works as envisaged in the TRIPs Agreement.¹²⁹⁵ In Ethiopia, *an exclusive* rental right is thus protected without the conditions of *widespread copying* and *material impairment* to the exclusive reproduction right.¹²⁹⁶ In terms of the subject matter the rental right covers, a TRIPs-plus approach is used once again to attach the right to *all* categories of ‘a work’—‘a production in the literary, scientific and artistic fields.’¹²⁹⁷

Given the generic reference to ‘rental’ in the law without the qualifying word ‘to public’,¹²⁹⁸ the provision prohibits a rental made on an individual basis although the act remains consistent with the TRIPs Agreement.¹²⁹⁹ Neither the waiver of the exemption nor the extension of rental right to *all* works is *required* under the TRIPs Agreement. In the same vein, Ethiopia’s protection of *exclusive* public lending right over an original or copies of a work is not stipulated under the TRIPs Agreement.¹³⁰⁰ For such a new right and the *optional* extension of rental right, members are *not required* to conform to the three-step test in crafting appropriate limitations.¹³⁰¹ In a manner that seems to mirror or even exceed the *EU Rental Directive 2006/115/EC*,¹³⁰² the copyright law thus provides for both exclusive rental and public lending rights. The non-prohibition of non-commercial rental and public lending among libraries

¹²⁹⁵ TRIPs Agreement, *supra* note 163 at art.11; WCT, *supra* note 448 at art.7 (2) (ii); WPPT, *supra* note 448 at art.9 (2) &13(2).

¹²⁹⁶ *Ibid.* Correa, *Trade Related Aspects*, *supra* note 137 at 128-131.

¹²⁹⁷ *Copyright Proc. No.410/2004*, *supra* note 136 at arts. 2(23) & 7(1) (d); see also *ibid* at arts.26 (1) (e) &27(1) (d). Correa, *Trade Related Aspects*, *supra* note 137 at 130.

¹²⁹⁸ Correa, *Trade Related Aspects*, *supra* note 137 at 128.

¹²⁹⁹ *Ibid.* As Correa observes, under TRIPs Agreement, the application of rental right in relation ‘to the public’ excludes ‘rental made, even against a price, on an individual basis.’ *Ibid.*

¹³⁰⁰ *Ibid* at 130.

¹³⁰¹ As a right not covered under the TRIPs Agreement, the public lending right will not be subject to its three-step test for compliance. See Correa’s argument in relation to a member’s extension of a rental right to works without being required to do so. *Ibid.*

¹³⁰² See *DIRECTIVE 2006/115/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2006 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property* [2006], OJ, L 376/28 [*EU Rental Directive 2006/115/EC*]. Nevertheless, the *Copyright Proc.410/2004* is silent on the issue of equitable remuneration and the prohibition of public lending among libraries.

can be used for educational purposes.¹³⁰³ But, the exclusion of inter-library lending in Ethiopia undermines the role of libraries.

In its similar emulation of the *EU Resale Right Directive 2001/84/EC*,¹³⁰⁴ the copyright legislation provides for the *optional* resale right (*droit de suite*) with respect to an ‘original work of art or original manuscript of a writer or a composer.’¹³⁰⁵ Treated as an inalienable right,¹³⁰⁶ the purpose of resale right is intended to help an author make an adequate exploitation of the right from subsequent sales of the original manuscript or works of visual arts.¹³⁰⁷ Further, the copyright law has adopted making available right as an exclusive economic right. It is noted that the WIPO Internet Treaties extend the communication to the public right to include making available right.¹³⁰⁸ In the same vein, the national law incorporates the making available right for works, including fixed performances and phonograms.¹³⁰⁹

Nonetheless, its application for other works is rather implicit in the definition of the communication to the public right apparently limited to performances, phonograms and broadcasts.¹³¹⁰ In its reference to ‘a work’, art.7 (1) (i) of the law rather makes it clearer. In the corresponding WIPO

¹³⁰³ See *Copyright Proc No.410/2004*, *supra* note 136 at arts.2 (27) & (23). Unlike the EU Rental Directive 2006/115/EC (Recital, para 10), public lending among libraries, archives and museums or similar institutions is not prohibited explicitly under Ethiopian law. Thus, if public lending (under art.2(23) is defined to mean making the library service available to ‘the public’ for use, including to other libraries (inter-library loans), the broader definition of public lending can promote knowledge-based resource sharing among academic libraries for educational purposes.

¹³⁰⁴ See *Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art* [2001], OJ, L 272/32.

¹³⁰⁵ *Copyright Proc. No.410/2004*, *supra* note 136 at art.7 (3); Berne Convention, *supra* note 439 at art.14*ter*. See Ricketson & Ginsburg (Vol. I), *supra* note 713 at 669-81.

¹³⁰⁶ *Copyright Proc. No.410/2004*, *supra* note 136 at art7 (3). Ricketson & Ginsburg (Vol. I), *supra* note 713 at 677.

¹³⁰⁷ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 676-77. This is intended to enable artists to benefit from the resale of their works due to the inadequate revenue they generate from first sale. *Ibid* at 671-72.

¹³⁰⁸ See WCT, *supra* note 448 at art.8; WPPT, *supra* note 448 at art.10&14. Ricketson & Ginsburg (Vol. I), *supra* note 713 at 718 & 746-48.

¹³⁰⁹ *Copyright Proc. No.410/2004*, *supra* note 136 at arts.7 (1)(1) cum 2(6), 26(1) (f) &27(1)(e).

¹³¹⁰ *Ibid* at arts.2(6) &7(1)(i).

Treaties, making available right is explicit and its application extends to all works under Berne Convention and the TRIPs Agreement.¹³¹¹ Besides, the copyright law neither prohibits the use of TPMs nor does it protect them against acts of circumvention. From users' perspective, the narrow scope of the right and the non-regulation of TPMs seem to offer an additional room for flexibilities that enhance access to available digital content. The potential benefit is not guaranteed, though. A complete failure to safeguard the flexibilities against an abusive use of unregulated TPMs would still pose a significant threat to a legitimate access to digital works. Taking an appropriate legislative action is thus useful to preempt abusive actions and create a legal certainty for a reasonable access to the protected works.

6.3.4. Flexibilities Related to Universities' Exploitation of Copyright

With regard to the exploitation of economic rights, pertinent is the higher education's legislation that requires universities and colleges to dedicate their IPRs for public use. Without prejudice to individual's IPRs, the legislation states that "every institution shall have the responsibility to put at the service of the wider community the knowledge and skills that have hitherto been utilized only for academic purposes."¹³¹² In its reference to IPRs, the provision is thus applicable for copyright and its subject matters. In Ethiopian context, universities' automatic acquisition of copyright over their creative works is more common than the non-existent applications for patent. As per the doctrine of work-for-hire akin to that of the US, copyright vests in an employer or a commissioned person.¹³¹³ Unless agreed otherwise, universities and colleges would thus own the economic rights over their academic staff's creative works produced in the course of the execution of their functions.¹³¹⁴ Outside the doctrine, universities and colleges can also generate and own protected creative works. Therefore,

¹³¹¹ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 718 &746. See WCT, *supra* note 448 at art.8 (encompassing all works without distinction).

¹³¹² *Higher Education Proc. No.650/2009*, *supra* note 117 at art. 26 (6).

¹³¹³ *Copyright Proc. No.410/2004*, *supra* note 136 at art. 21 (4).

¹³¹⁴ *Ibid.*

both sets of works are part of the universities' broad pool of protected knowledge over which the universities exercise their legal rights.

From among the core functions of higher educational institutions, universities and colleges are required to offer community services. To this end, the higher education legislation requires universities and colleges to ensure the public utilization of the pool of their protected knowledge and skills. It should be noted that its scope seems to include both future and existing knowledge and skills that have been limited to utilization for academic purposes. In so doing, the universities and colleges discharge their core function of serving the public on a continuous basis. In allowing users and potential creators to share in the utilization of the protected knowledge, the provision is thus vital to facilitate access to knowledge for human development through creative innovation and learning.

Nonetheless, there remains unclear whether or not universities and colleges are required to make the protected works for 'free' as part of their community service. At issue is the incentive needed for generating the protected knowledge. The incentive might also avoid the imposition of undue burden upon private universities in the discharge of their public duties to serve the community. For public universities, the issue of incentive is of a less concern. Given the use of a public funding for operation of public universities,¹³¹⁵ it is assumed that the protected knowledge hitherto intended for academic purposes should not be a primary object of commercial exploitations. A broader interpretation of this provision can be used to promote an open access to works generated through public funding. While this should be the rule for all public universities, it should be extended to non-profit making private universities that benefit from government subsidies.¹³¹⁶ For others works and universities, the impact of

¹³¹⁵ See *Higher Education Proc.No.650/2009*, *supra* note 117 at art.62.

¹³¹⁶ *Ibid* at art.86. As stated under art.86(1), "[t]he government may give budget subsidy or capacity building support to non-profit making private institutions that strive to strengthen the developmental efforts of the country by preparing particularly good quality professionals."

this approach on the incentive needed for the creation of the works might discourage private universities that operate at their own cost.¹³¹⁷

In its reference to ‘every institution,’ it should be noted that the provision is applicable for both public and private universities and colleges.¹³¹⁸ Although the total exclusion of the protected knowledge is a disservice to the public interest, the sustainable advancement of the public interest demands a reasonable incentive for a continued service to the public. In particular, one might argue for the profit-making private universities and colleges to charge a reasonable license fee in the event their protected works dedicated to the service of the public and intended for academic purposes are subjected to further commercialization. At this juncture, it must be borne in mind that even public universities and colleges are encouraged to be entrepreneurial and run an enterprise to generate a revenue.¹³¹⁹ In this respect, the provision might be construed to exclude from its ambit the spin-offs or protected creative works generated or intended for commercial purposes.

Further, although there is no definition for the ‘wider community,’ it seems to exclude the ‘academic community’ that includes learners and teachers at an institution.¹³²⁰ With respect to dedicating copyrighted works developed for academic purposes, the narrow and exclusive approach would entail the exclusion of the primary beneficiaries. Hence, there is a need for a broader definition. Despite their exclusion from being the direct beneficiaries of the service, learners and educators can still drive an indirect benefit from the service dedicated to the public at large through knowledge diffusion. Thus, subject to the necessary balance and revision, this provision has the potential to offer

¹³¹⁷ In order to maintain the necessary incentive, it might be argued that private universities should be permitted to charge some reasonable fees that allow them to cover their costs.

¹³¹⁸ See *Higher Education Proc. 650/2009*, *supra note 117* at art 2(9) & 26(6).

¹³¹⁹ *Ibid* at arts.62 (3), 63 &66. The legislation provides that an income generating enterprise may be established by public universities and colleges, and the institutions can then use net profits generated in pursuit of their missions and objectives. *Ibid* at art. 66(1) & (5).

¹³²⁰ *Ibid* art. 2 (1).

flexibilities that facilitate the availability and dissemination of free or affordable copyrighted knowledge for users and creators.

6.3.5. Flexibilities Related to Categories of Users

In terms of categories of users, the national copyright law lacks the general flexibilities incorporated in the Marrakesh Treaty for persons with disabilities. Despite its ratification of the UN Convention on Persons with Disabilities (UNCPD) in 2010 and the Marrakesh Treaty in 2020, the existing copyright law is yet to provide for flexibilities relevant to persons with disabilities.¹³²¹ Given their special needs for access to information and inclusive tertiary education¹³²² and their constitutional right to ‘assistance’,¹³²³ such an omission is detrimental to the human development of persons with disabilities. This issue will be highlighted along with other specific copyright flexibilities.

6.3.6. Flexibilities Related to Enforcement Measures

In addition to the substantive content, it is important to consider the general flexibilities related to the enforcement of the protected rights of authors or right holders. In this regard, the current copyright law has failed to incorporate the relevant flexibilities available under international copyright and related treaties. Still worse, the copyright law has eroded from its ambit even the hitherto flexibilities applicable under its predecessor. For instance, the previous copyright law provided for somehow lenient civil and criminal measures limited to intentional acts of infringement. With respect to the civil remedies along with an injunctive relief and destruction of infringing copies, a resort to the

¹³²¹ It is regrettable that the copyright amendment made in 2014 did not make any effort to address the issue despite the country’s international commitment through its ratification of the UNCPD on August 5, 2010. As a result, the treaty, since then integral to the domestic law, was already in force at the time of the copyright amendment. Nonetheless, pending an urgent amendment, the copyright law must be read in a manner that ensures the human rights of the beneficiaries as the rights incorporated in the UNCPD are protected under the FDRE Constitution without any discrimination.

¹³²² See *Higher Education Proc 650/2009*, *supra* note 117 at art.40 (2) (referring to, *inter alia*, ‘educational auxiliary aids’ for ‘physically challenged’ students).

¹³²³ *FDRE Constitution*, *supra* note 45 at art.41 (4) [The State *shall*, within available means, allocate resources to provide rehabilitation and *assistance to the physically and mentally disabled*.....] [Emphasis added].

appropriate rules of tort law was the sole legal recourse for damages.¹³²⁴ In the same vein, a simple imprisonment of not more than a year *or* fine was prescribed for an *intentional* infringement, subject to a private complaint for criminal prosecution.¹³²⁵

In a significant deviation from its predecessor, the current copyright law has adopted an excessive TRIPs-plus approach to provide for a range of stringent provisional, civil, criminal and border measures.¹³²⁶ To start with the last, the Ethiopian Custom and Revenue Authority (ECRA) is authorized to make the detention of alleged or presumed infringing copies *upon its own initiative* or upon a right holder's written request.¹³²⁷ In particular, the authorized *ex officio* action of the Authority and the prohibition of importation under copyright law may tend to include the seizure of even 'goods in transit' as required under Ethiopian customs law.¹³²⁸ In respect of copyright infringement, both the seizure of copyright goods in transit and the *ex officio* action are *not required* under the TRIPs Agreement.¹³²⁹ Further, the flexibilities inherent in relevant terms are left out. For instance, absent from the copyright law are (a) a definition for 'infringement' and (b) even a mention of the word 'commercial scale', both of which the TRIPs Agreement has left to member states to determine.¹³³⁰

¹³²⁴ See *Civil Code 1960*, *supra* note 1011 at arts.1674 & 2027-2178.

¹³²⁵ See *The Penal Code Proclamation of 1957, No. 158 of 1957, Federal Negarit Gazette*, Extraordinary Issue No.1, 5th May 1958, arts. 675 & 676 [*Penal Code of Ethiopia 1957*].

¹³²⁶ *Copyright Proc 410/2004*, *supra* note 136 at arts.33-36(40-43, as amended); see *Copyright Amendment Proc. No. 872/2014*, *supra* note 1047 at art.2 (9). For civil remedies, the right holder may claim adequate compensation based on the damage suffered, or damages based on infringer's unjust enrichment or net profit. *Copyright Proc 410/2004*, *supra* note 136 at art.34 (1-3). For the corresponding international enforcement measures, see arts.41- 61 of the TRIPs Agreement.

¹³²⁷ *Copyright Proc. No.410/2004*, *supra* note 136 at art.42 (1) [as amended]. Note that ERCA's border measure 'upon its own initiative' is added through copyright law amendment. Under TRIPs Agreement, this action is left to the members to provide for in their national laws at their discretion. TRIPs Agreement, art.58. Correa, *Trade Related Aspects*, *supra* note 137 at 447.

¹³²⁸ See *Customs Proc. No.859/2014, Federal Negarit Gazette*, 20th Year No.82, Addis Ababa 9th December, 2014, art.2 (2) and art.4. Given the non-exclusion of 'goods in transit' under the copyright law, the prohibition is quite likely as 'importation' is defined under Ethiopian customs law in a broad manner to include 'goods brought into the customs territory' [Ethiopian territory], although their final destination is not meant to be Ethiopia. *Ibid*.

¹³²⁹ TRIPs Agreement, *supra* note 163 at art.51, footnote 13. Note that there is no corresponding exclusion or clarification under the copyright law. For a discussion related to 'goods in transit,' see Henning Grosse Ruse-Khan, "A Trade Agreement Creating Barriers to International Trade?: ACTA Border Measures and Goods in Transit" (2011) 26:3 *Am U Intl L Rev* 646-724.

¹³³⁰ See *Copyright Proc.No.410/2004*, *supra* note 136 at art. 2. Correa, *Trade Related Aspects*, *supra* note 137 at 411 & 449; Yu, "The TRIPs Enforcement," *supra* note 746 at 1067-68.

Although the former remains to be an issue of judicial determination, the legislative omission of the word ‘commercial scale’ entails the exclusion of the flexibilities attached thereto. As a rule, courts cannot read this requirement into the provision.

In terms of criminal remedies, the copyright law prohibits both *intentional* and *negligent* acts of infringement.¹³³¹ In other words, the law avoids incorporating the flexibilities related to art.61 of the TRIPs Agreement that is limited to ‘*copyright piracy on a commercial scale.*’¹³³² In the US-China enforcement dispute, the WTO Panel defined ‘piracy on a commercial scale’ to mean “piracy carried on at the magnitude or extent of typical or usual commercial activity with respect to a given product in a given market.”¹³³³ As ‘a relative standard’ with ‘qualitative and quantitative elements,’¹³³⁴ the assessment of ‘commercial scale’ and states’ adherence to the threshold are important flexible tools for member states to exploit the reserved policy space in a manner that addresses their development needs.¹³³⁵ In particular, the flexibilities are critical for Ethiopia’s development needs as the country is poised to join the WTO in the near future.¹³³⁶ Despite its limited resources for criminal prosecution of even grave crimes, critical development needs and its current non-membership to the WTO, Ethiopia’s

¹³³¹ *Copyright Proc 410/2004*, *supra* note 136 at art. 36(art.43, as amended); *Copyright Amendment Proc. No. 872/2014*, *supra* note 1047 at art. 2(11). TRIPs Agreement requires the criminalization of only willful or intentional acts of copyright piracy. Correa, *Trade Related Aspects*, *supra* note 137 at 449.

¹³³² ‘Pirated copyright goods’ is defined under the TRIPs Agreement as “any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.” TRIPs Agreement, *supra* note 163 at art.51, fn 14(b).

¹³³³ See Panel Report, *China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009), paras 7.577 & 7.553.

¹³³⁴ *Ibid* at para 7.538-39 & 7.600-604. Yu, “The TRIPs Enforcement,” *supra* note 746 at 1066-67.

¹³³⁵ See Yu, “The TRIPs Enforcement,” *supra* note 106 at 1065-69 (articulating how China succeeded in defending its standard of ‘commercial scale’ that was disputed by the US).

¹³³⁶ In the aftermath of the sweeping reforms of liberalization ushered in under the current leadership of Prime Minister Dr. Abiy Ahmed Ali, Ethiopia has reconstituted an accession committee to resume and finalize its long-stalled accession process within two years. See Kaleab Girma, *Ethiopia to Reinstate WTO Negotiations: The process of joining WTO was halted for the past six years*, Addis Fortune News, June 23, 2019, online: <<https://addisfortune.news/ethiopia-to-reinstate-wto-negotiations/>> (last visited 28 September 2019).

copyright law has already dispensed with the relevant flexibilities envisaged under the TRIPs Agreement.¹³³⁷

In its indiscriminate criminalization of acts of infringement and their public prosecution, the law provides for a punishment of both fine *and* an imprisonment of one to ten years.¹³³⁸ It is ironical that this stringent criminal measure finds no parallel in the developed nations that champion a stronger protection. In addition to its chilling effect upon a sustainable creative innovation, this aggressive and unwise legislative action poses a significant threat to an access to copyrighted learning materials for educational purposes. Given the expansive scope of protection, the wholesale criminalization along with an excessive penal and administrative measures would rather create a climate of fear even for the legitimate uses. Constituting an impediment to expansion of human capabilities and realization of human rights, the approach is detrimental to the roles of copyright and tertiary education for human development.

6.3.7. Flexibilities Related to Three-Step Test

As elaborated in Chapter Four, the three-step test is essentially a guiding parameter for the formulation and application of the specific flexibilities incorporated as L&Es. Under the test, the L&Es shall be confined to “certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”¹³³⁹ Nonetheless, its flexible and context-tailored application constitutes an aspect of general flexibilities. Despite its substantial emulation of copyright treaties and the TRIPs Agreement for most of its provisions, Ethiopia’s copyright law makes a marginal incorporation of a distorted version of an apparent two-step

¹³³⁷ Yu, “The TRIPs Enforcement,” *supra* note 746 at 1065-68; Correa, *Trade Related Aspects*, *supra* note 137 at 449-450.

¹³³⁸ *Copyright Proc.410/2004*, *supra* note 136 at art.36 [43(4) & (5), as amended]; see *Copyright Amendment Proc No.872/2014*, *supra* note 1047 at art.2 (11); *The Criminal Code of the FDRE, Proclamation No. 414/2004, Federal Negarit Gazette*, Addis Ababa, 9th May 2005, art.721[Criminal Code 2004]. It should be noted that the both the copyright law and the Criminal Code provide for identical length of imprisonment for both intentional and negligent acts of infringement. Nonetheless, the copyright law (through its amendment) is now more stringent due to its provision for punitive damages or fines as *additional* criminal remedies.

¹³³⁹ TRIPs Agreement, *supra* note 163 at art.13.

test. Looked into the test, it is in fact a single-step test adopted in respect of reproduction for personal purposes.¹³⁴⁰ Confined to a natural person, the test is applied to ‘private reproduction of a *published work*’ for one’s own personal use.¹³⁴¹ Constrained in its scope, the private use exception that embodies the test “*shall not extend to reproduction which would conflict with or unreasonable harm [sic] the normal exploitation of the work or the legitimate interest of the author.*”¹³⁴² From the reading, one would glean the non-embodiment of the three-step test even for the reproduction right.

In his comment on the three-step test under the international copyright regime, Gervais notes that the national application of the three-step test is at most a two-step test.¹³⁴³ In this respect, stipulated in the afore-cited provision is in essence a sort of a single-step test with alternative criteria and application limited to a reproduction for private use. From the alternative applications of the test, at least two points are worth noting. First, the test can be invoked when a reproduction for private use is ‘in conflict with’ *or* ‘causes unreasonable harm to’ the normal exploitation of the work. Second, one would also read either ‘the conflict or the unreasonable harm’ requirement along with ‘the legitimate interest of the author’ and draw different conclusions. In both instances, the reading of the provision demonstrates a misfit or a distorted combination of the second and third elements of the three-step test with no parallel under the international copyright regime. Further, in such a poor drafting, the disjunction ‘or’ allows an alternative evaluation of the criteria in isolation to trigger the application of the test. That is, the cumulative application of the criteria is not required. It thus precludes a room for an overall assessment of the exception’s impact.

¹³⁴⁰ *Copyright Proc. No.410/2004, supra* note 136 at art.9 (2) (e).

¹³⁴¹ *Ibid* at art.9 (1).

¹³⁴² *Ibid* at art.9 (2) (e).

¹³⁴³ Gervais, *Restructuring Copyright, supra* note 702 at 84. Bearing in mind the special nature of an exception for its inevitable satisfaction of the condition of ‘certain special cases,’ Gervais considers the first test a mere ‘instruction addressed to law makers to provide for a reasonably narrow and well-defined exceptions.’ *Ibid*. In particular, this holds true for continental countries that provide for a set of specific and delineated exceptions or limitations. It is worth mentioning that Ethiopia emulates the continental model of copyright exceptions and limitations.

In spite of its apparent inspiration to draw on the provision of the Berne Convention, this truncated test lacks an equivalent to mirror the three-step test under the Convention. Neither the Berne nor the TRIPs-all-encompassing three-step test is incorporated in the law to sieve the application of the existing L&Es. Nor is the distorted single-step test itself applicable for other exclusive economic rights and all categories of unpublished works. Hence, one can conclude about the non-existence of the three-step test under the national copyright law. The law is devoid of the international three-step test intended to serve as a general rule of specific flexibilities. As one would ponder about its implication, the nature of the test comes to mind. Given the dual effect of the test, its introduction or omission may entail paradoxical ramifications.¹³⁴⁴

On one hand, a flexible and development-oriented incorporation or the non-incorporation of an inflexible three-step test is useful to offer flexibilities for more access to protected works. On the other hand, in the absence of comprehensive and appropriate self-contained L&Es, the omission of the test altogether or its distorted adoption is also detrimental to a balanced copyright system. Overlooking a flexible and general rule of specific flexibilities, Ethiopia's provision for extensive economic rights with few or narrow L&Es would tilt the overall balance in favor of the right holders.

In sum, it should be noted that granting extensive exclusive rights and an inadequate incorporation of appropriate general and specific flexibilities are tantamount to author's/right holder's entitlement to unencumbered exclusive rights. Indeed, doing so would both undermine the objective of copyright itself and run afoul of the necessary balance between private and public interests as envisaged under the FDRE Constitution. Further, the imbalance would encroach upon the relevant human rights involved. In effect, it hampers a reasonable access to the protected works or knowledge required for human development through sustainable creative innovation and quality tertiary education.

¹³⁴⁴ *Ibid.*

6.4. Specific Flexibilities Related to Tertiary Education

In addition to the general national flexibilities elaborated above, there are a number of specific flexibilities embodied in the national copyright law. Nonetheless, the discussion in this section is focused on the exploration of the specific flexibilities with a direct or related relevance for tertiary education. In the quest for incorporated and relevant specific flexibilities, the analysis of the flexibilities is made in the light of their respective international counterpart as enunciated in the Chapter Four. Further, an integrated approach is taken to read the specific flexibilities in the light of the general flexibilities and the national context. Serving as normative and evaluative framework, the CA-human development perspective remains to inform the analysis.

6.4.1. Private Use Exception

Although it is not explicit under the international copyright regime, the exception for private use is a long-standing national practice.¹³⁴⁵ The need for the exception is often justified due to the normative consideration of privacy and the issue of market failure.¹³⁴⁶ Subject to the common law and continental models of exceptions a nation adopts,¹³⁴⁷ the private use exception is either provided as a specific exception or as a legitimate use integral to the doctrine of fair use or fair dealing.¹³⁴⁸ By the way, lacking the U.S-style fair use doctrine, the copyright law of Ethiopia adopts the continental model of exceptions. In both cases, application of the private use exception is arguably required to be consistent with the three-step test under the corresponding international copyright regime.¹³⁴⁹ As noted

¹³⁴⁵ Gervais, *Restructuring Copyright*, *supra* note 702 at 88; Ricketson & Ginsburg (Vol. I), *supra* note 713 at 781. Okediji, “International Copyright System,” *supra* note 51 at 20.

¹³⁴⁶ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 782 (pointing out both transaction costs/enforceability and privacy as the major justifications). Gervais, *Restructuring Copyright*, *supra* note 702 at 88 (stating that private and research uses are ‘deemed normatively justifiable and in part because it is unlikely/impracticable for individual users/consumers to obtain a license). Okediji, “International Copyright System,” *supra* note 51 at 21.

¹³⁴⁷ Senftleben, “The International Three-Step Test,” *supra* note 914 at 68.

¹³⁴⁸ See Gervais, *Restructuring Copyright*, *supra* note 702 at 88; Ricketson & Ginsburg (Vol. I), *supra* note 713 at 781. Okediji, “International Copyright system,” *supra* note 51 at 21.

¹³⁴⁹ See Ricketson & Ginsburg (Vol. I), *supra* note 713 at 779-82; Gervais, *Restructuring Copyright*, *supra* note 702 at 88-89.

above in relation to the three-step test, the existing Ethiopian copyright law provides for the private use exception. Confined to right holder's reproduction right, it is stated that "*the owner of copyright cannot forbid private reproduction of a published work in a single copy by a physical person exclusively for his own personal purposes.*"¹³⁵⁰ As is evident from the provision, the issues of both 'reproduction' and 'published work' are central to the scope of the exception. Hence, highlighting both statutory concepts here is critical for the elaboration of other specific flexibilities as well.

In its broad definition, 'reproduction' refers to "the making of one or more copies of a work or sound recording *in any manner or form*, including any permanent or temporary storage of work or sound recording in electronic form."¹³⁵¹ It is noted that the wordings 'temporary storage of a work', 'any manner or form' and 'electronic form' are all indicative of the broader scope of the definition to include digital reproduction of a work.¹³⁵² In this regard, the provision is close to art.9 (1) of the Berne Convention whose scope is further clarified in the agreed statement to the WCT to cover the storage of a protected work in a digital form.¹³⁵³ Nonetheless, still unsettled both under the international copyright regime and this law is the scope of reproduction right in relation to the *temporary* storage of a digital work.¹³⁵⁴ It is assumed that the storage of works in an electronic medium would fall within the ambit of

¹³⁵⁰ *Copyright Proc. No.410/2004*, *supra* note 136 at art.9 (1). See *Civil Code 1960*, *supra* note 1011 at art.1660 (2) (refers to a 'work' without a distinction between published and unpublished work).

¹³⁵¹ *Copyright Proc.No.410/2004*, *supra* note 136 at art.2 (25).

¹³⁵² Ricketson & Ginsburg, *International Copyright and Neighboring Rights*, Volume II, 2nd ed (Oxford: Oxford University Press, 2005) at 1261[Ricketson & Ginsburg (Vol. II)].

¹³⁵³ See Agreed Statement to the WCT concerning art.1(4): "The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention." Although a broader interpretation of art. 9 (1) of the Berne Convention arguably includes reproduction of digital works, the Agreed statement underscores 'the full application' of the reproduction right in the digital environment. Ricketson & Ginsburg (Vol. I), *supra* note 713 at 682-87.

¹³⁵⁴ *Ibid*. What is meant by temporary storage is not defined. *Ibid* at 687; Ricketson & Ginsburg (Vol. II), *supra* note 1352 at 1261-62.

reproduction unless excluded otherwise under national laws.¹³⁵⁵ In consequence, what remains contentious is the issue of transient digital copies such as random access memory (RAM) on a computer or temporary copies made in the course of communication of a work on a digital network (Internet).¹³⁵⁶ It is argued that such a broader interpretation is unwarranted for a mere transient digital copy is both incidental in its nature and indispensable for the legitimate use of a digital work.¹³⁵⁷ As hinted in *the EU Information Society (InfoSoc) Directive 2001/29/EC*, such transient and incidental acts of reproduction do not have ‘separate economic value of their own’ to encroach upon the normal exploitation of reproduction right.¹³⁵⁸

In relation to the scope of the definition of ‘reproduction,’ its specific reference to ‘sound recording’ appears to exclude from its ambit the reproduction of fixed performances and broadcasts. In the copyright law, phonograms, performances and broadcasts are all categorized as neighboring rights. As a result, there exists no reasonable justification to single out phonograms and exclude the reproduction of fixed performances and broadcasts from the definition. It is important to note that performers and broadcasters are accorded exclusive rights to authorize fixation and *reproduction* of the fixations.¹³⁵⁹ In order to avoid the apparent misfit, the narrow definition of ‘reproduction’ with a sole reference to phonograms should thus be rectified to encompass the reproduction of fixed performances and broadcasts as provided in the law. Indeed, the law subjects the reproduction right of performers and

¹³⁵⁵ See the *US Copyright Act*, 17 USC 117(exempting certain temporary copies made on a computer); *DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, art.5(1) [EU InfoSoc Directive 2001/29/EC] (requiring mandatory exceptions to exclude certain transient and incidental acts of temporary reproduction); Ricketson & Ginsburg (Vol. I), *supra* note 713 at 683-84. Jorg Reinbothe & Silke von Lewinski, *The WIPO Treaties on Copyright: A Commentary on the WCT, the WPPT and the BTAP*, Second Edition (Oxford: Oxford University Press, 2015) at § 7.4.1.

¹³⁵⁶ Ricketson & Ginsburg, *supra* note 55 at 682-87; Ficsor, *The Law of Copyright*, *supra* note 747 at 96-102; Samuelson, “The U.S Digital Agenda,” *supra* note 792 at 380-92; Jessica Litman, “The Exclusive Right to Read” (1994) 13 *Cardozo Arts & Ent L* 29 at 42 (stating that ‘RAM’ is too transitory to constitute a reproduction); Mark Lemley, “Dealing with Overlapping Copyright on the Internet” (1992) 22 *U Dayton L Rev* 547 at 551(arguing about the lack of a legislative intent to include ‘RAM’ copies within the scope of fixation).

¹³⁵⁷ Litman, *supra* note 1356 at 42; Samuelson, “The US Digital Agenda,” *supra* note 792 at 392.

¹³⁵⁸ *EU InfoSoc DIRECTIVE 2001/29/EC*, *supra* note 1355 at Recital, para 33.

¹³⁵⁹ *Copyright Proc. No.410/2004*, *supra* note 136 at arts. 26(1) (b) &(c), and 31(1) (b) &(c).

broadcasters to similar L&Es prescribed for reproduction of other works.¹³⁶⁰ Further, as elaborated above, the definition of reproduction encompasses both tangible and digital copies.¹³⁶¹ In effect, the exceptions to reproduction would then cover both tangible and digital copies.

For a private use exception in Ethiopia, one writer however observes otherwise. In his opinion, “reproduction for personal uses seems to be excluded in relation to digital copies or (...) in the context of exploitation of creative works on the Internet.”¹³⁶² This restrictive reading of the provision is quite disputable. In the absence of a clear indication to suggest otherwise, such an observation is both unfounded and runs counter the definition of ‘reproduction’ construed above. Indeed, there exists no such a narrow prescription in the international copyright system as long as the three-step test is complied with. In a related definition, the copyright law defines a ‘published work’ in part as ‘a work or sound recording, tangible copies of which have been made available to the public in a reasonable quantity for sale, rental, public lending...’ with the consent of the right holder.¹³⁶³

In its reference to ‘tangible copies,’ the definition seems to exclude an online or a digital publication of works. That is, a ‘work’ is deemed published as long as its tangible copies have been made available to the public in a reasonable quantity with the right holder’s consent.¹³⁶⁴ Constrained in its scope, the definition appears to hinge on the availability of reasonable quantity of tangible copies that would in effect exclude the sole digital publication of works without corresponding tangible copies. In lieu of the broader notion of ‘works made available to the public,’ the adoption of such a

¹³⁶⁰ *Ibid* at art.32 (d).

¹³⁶¹ For a definition of ‘reprographic reproduction,’ see *Copyright Proc. No. 410/2004*, *supra* note 136 at art 2(26).

¹³⁶² Haile, *supra* note 183 at 178. Further, Haile argues that ‘[j]udges should confine the exception to works exploited in physical copies.’ *Ibid*.

¹³⁶³ *Copyright Proc. No.410/2004*, *supra* note 136 at art.2 (22).

¹³⁶⁴ It should however be noted that a reference to ‘work or sound recording’ seems to exclude broadcasting and public performance from the definition of ‘publication,’ unless otherwise the word ‘work’ is broadly construed to encompass broadcasting and public performance. Yet, there remains a misfit between such an extension and the definition. See also Ricketson & Ginsburg (Vol. I), *supra* note 713 at 271-72 (articulating the lines of arguments on the exclusion of broadcast and public performance, while highlighting their possible inclusion through a broad interpretation).

narrow approach overlooks the need to take into account the necessary technological developments. Noting the unaddressed concept of publication under the TRIPs Agreement and the WCT, learned commentators recommend a progressive interpretation of art.3 (3) of the Berne Convention to embrace a digital communication of a work as a publication.¹³⁶⁵

In light of the above definitions, the private use exception covers both a tangible and digital copies of a published work. Indeed, a *contrario* reading of art.9 (2) (c) of the copyright law buttresses this assertion. In its partial application for private use exception, the provision refers to the reproduction of ‘database in a digital form.’ It should however be noted that the scope of the private use exception seems to be limited to a database in a ‘digital form’ alone, regardless of the latter’s possible existence in a non-digital form. In general, bearing in mind the scope of private use exception for reproduction of a ‘published work’ in tangible and digital form, following points are worth noting. First, in terms of the amount and purpose of the use, it is limited to a *single* copy and a use for *personal purposes*. Second, the exception is allowed for a natural person alone that legal entities such as universities are thus excluded. In fact, this is a common practice in other jurisdictions as well.

Nevertheless, as implied in the unqualified use of the word ‘person’ under art.14(2)(b), a broader interpretation allows universities and colleges to enjoy a private use exception for a single reproduction or adaptation of a computer program, subject to the provision’s specific requirements.¹³⁶⁶ For this category of work, legal entities could be eligible. Third, a natural person is required to be a lawful owner of the original work to enjoy the private use exception.¹³⁶⁷ In consequence, a distribution among individuals is prohibited and the permitted use is limited to one’s *own* personal use. In Ethiopia,

¹³⁶⁵ *Ibid* at 277-78. To borrow the example used by the commentators, a work should be deemed ‘published’ as long as the author makes the work available to the public for the latter to make copies through a download from a publicly accessible website. *Ibid* at 278.

¹³⁶⁶ Sanctioned for few *necessary* uses (normal use, backup copy and interoperability), the use permitted is applicable for a person who has lawfully obtained the computer program. *Copyright Proc. No.410/2004, supra* note 136 at art.14 (2) (c). Note that ‘a person’ is defined to include both natural and juridical persons. *Ibid* at art. 2(17).

¹³⁶⁷ *Copyright Amendment Proc. No.872/2014, supra* note 1047 at art.2 (4). Or *Copyright Proc. No.410/2004, supra* note 136 at art.9 (3), as amended). This requirement is also applicable for the exception provided in respect of computer program. See *Copyright Proc. No. 410/2004, supra* note 136 at art.14 (2).

this stringent requirement proscribes a peer-to peer (P2P) file sharing or individuals' acquisition of a copy of a work from friends despite their compliance with the amount and purpose of the use.

Fourth, except for those specifically excluded otherwise, the exception seems to be applicable for all categories of works.¹³⁶⁸ The excluded works are works of architecture in the form of a building or other construction, musical work in the form of notation, and an original or a copy of a signed work of fine art.¹³⁶⁹ As mentioned above, the permitted reproduction of a database for private use is limited to the exclusion of reproduction of the 'whole or substantial part' of the database in a digital form.¹³⁷⁰ Further, it is lawful to make the reproduction of a single copy of a computer for the purpose of its intended use and backup.¹³⁷¹ The law also permits an indispensable adaptation of the software program for its intended use in conjunction with a machine.¹³⁷² Yet, there is no exception for de-compilation of the program or a reverse engineering.

Fifth, the ambit of the private use exception however excludes a gamut of unpublished works despite their relevance for educational purposes. The reason is the exception is limited to reproduction of a 'published' work. Six, a private use exception is subject to the requirement of the 'single-step' test elaborated above. That is, the reproduction for private use 'shall not conflict with or cause unreasonable harm' to the normal exploitation of the work or the legitimate interest of the author. As noted above, this is a desired *albeit* failed attempt to impose a three-step test upon the application of the specific limitation. Worse still, the application of the 'single-step' test could be much more restrictive than its intended international counterpart. Seven, the scope of the private use does not encompass

¹³⁶⁸ See *Copyright Proc. No.410/2004*, *supra* note 136 at art. 32(d). The reading of this provision implies a *mutatis mutandis* application of the limitations to neighboring rights to the exceptions and limitations provided for copyright to neighboring rights. The exception of private use is one such relevant exception that can apply to subject matters of neighboring rights.

¹³⁶⁹ *Ibid* at art.9 (2) (a) & (b).

¹³⁷⁰ *Ibid* at 9(2) (c).

¹³⁷¹ *Ibid* at art.9 (2) (d) *cum* art.14 (1).

¹³⁷² *Ibid*.

other exclusive economic rights. In particular, the provision's specific reference to reproduction right under art.7 (1) (a) of the legislation excludes from its ambit other exclusive rights.

Nevertheless, an inference from art.32 (d) of the legislation's general cross-reference to Part II (arts.9-20) that includes private exception (art.9) appears to cover at least the reproduction of phonograms, fixed performances and broadcasts for personal purposes.¹³⁷³ For its unequivocal *mutatis mutandis* application, this inference needs an affirmation through a judicial interpretation. It is noted that the respective provisions of the WPPT and the Rome Convention affirm the application of a private use exception to neighboring rights in both analogue and digital environment.¹³⁷⁴ Further, under 'private' performance exception, the law allows for a 'private' performance free of charge when made at a family gathering or in a school.¹³⁷⁵ In spite of the inferences, the overall scope and application of the private use exception are subject to strings of conditions.

6.4.2. Quotation

As an exception to exclusive rights, quotation is an integral part of prospective creative or intellectual activities including works of scholarship such as book reviews, historical treaties and critical commentaries.¹³⁷⁶ In particular, the exception is vital to facilitate taking of excerpts of works for educational purposes and scientific publications. In view of its significance for creative freedom and education, the exception for quotation has long been incorporated into the national law.¹³⁷⁷ In a provision that appears to draw on art.10 (1) of the Berne Convention, the copyright law permits the

¹³⁷³ *Ibid* at art.32 (d). The provision reads: "The rights referred to in Article 26-31 shall not apply to acts related to: (d) cases where, under Part II, a work can be used without the authorization of the author or other owner of copyright." Note that arts. 26-31 are dedicated to protection of neighboring rights.

¹³⁷⁴ WPPT, *supra* note 448 at art. 16; Rome Convention, *supra* note 478 at art.15 (1) (a); See also Agreed Statements Concerning Article 16 of the WPPT and Article 10 of the WCT. Ricketson and Ginsburg (Vol. II), *supra* note 1352 at 1217 &1269-70.

¹³⁷⁵ *Copyright Proc. No.410/2004*, *supra* note 136 at art.16. This provision is a verbatim copy of its corresponding provision under the previous law. *Civil Code 1960*, *supra* note 1011 at art.1656.

¹³⁷⁶ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 783; Okediji, "International Copyright System," *supra* note 51 at 12.

¹³⁷⁷ *Civil Code 1960*, *supra* note 1011 at art.1661; *Copyright Proc. No.410/2004*, *supra* note 136 at art.10.

quotation of a ‘published work’ as long as the quotation is ‘compatible with fair practice’ and is within ‘the extent justified by the purpose.’¹³⁷⁸ Although the requirements of compliance with ‘fair practice’ and ‘extent justified by the purpose’ are akin to those enshrined in the Berne Convention, the scope of the statutory provision is limited in various instances.

First, the exception is limited to a ‘published work.’ In addition to works of broadcast and public performance, this narrow exception would exclude all other unpublished works.¹³⁷⁹ The corresponding scope of the exception under the Berne Convention is broader enough to encompass all works ‘lawfully made available to the public’ by any means.¹³⁸⁰ The statutory exception is thus narrower than its international counterpart. As noted above for private use exception, quotation exception should extend to neighboring rights as per art.32 (d) of the legislation that envisages a *mutatis mutandis* application of the exceptions under Part II (arts.9-20). Inclusive of the quotation exception (art.10), the literal reading of the cross-referencing implies the application of the exception under consideration to neighboring rights. Nonetheless, the aforementioned restrictive definition of ‘published work’ would still undercut the application of art.32 (d) to the quotation of neighboring rights. For instance, the narrow definition excludes the quotation of broadcasts and public performance for want of a ‘reasonable quantity of tangible copies.’¹³⁸¹

Second, the quotation must be ‘compatible with fair practice’ the determination of which is left to the national courts to make after an ‘objective appreciation’ of the use.¹³⁸² That is, there is no quantitative limit on the amount as long as the use is objectively fair.¹³⁸³ Third, the issue of fairness is

¹³⁷⁸ *Copyright Proc. No.410/2004*, *supra* note 136 at art.10 (1) & (2).

¹³⁷⁹ See Ricketson & Ginsburg (Vol. I), *supra* note 713 at 271-72 & 785.

¹³⁸⁰ See Berne convention, *supra* note 439 at art.10 (1). Ricketson & Ginsburg (Vol. II), *supra* note 713 at 785-86 & 788. There is nothing in art.10 (1) that entails its restriction to the reproduction right alone. *Ibid* at 788.

¹³⁸¹ See *Copyright Proc.No.410/2004*, *supra* note 136 at arts. 2(22) & 10(1). See Ricketson & Ginsburg (Vol. I), *supra* note 713 at 271-72 & 785.

¹³⁸² See *Copyright Proc. No.410/2004*, *supra* note 136 at art.10 (2). Ricketson & Ginsburg (Vol. I), *supra* note 713 at 786.

¹³⁸³ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 788.

further tied to the judicial determination of the requirement of the ‘extent justified by the purpose’ such as ‘scientific, critical, informatory or educational purpose.’¹³⁸⁴ It is important that the quotation is not limited to a specific purpose. Fourth, the source of the quotation and the name of the author, if known, shall be indicated to safeguard the moral rights of the author—the right of paternity/attribution.¹³⁸⁵ In sum, the overall scope of the exception is narrower than its corresponding scope under the Berne Convention. The incorporation of such a restrictive exception impedes access to relevant copyrighted works that remain crucial for tertiary education and further creative innovation.

6.4.3. Teaching Exception

One of the long-standing exceptions under the Berne Convention, the teaching exception or utilization for teaching purposes is the most direct exception from among the specific flexibilities provided for education. As a matter of practice, continental national laws provide for a specific corresponding exception while it is often subsumed under the doctrine of fair use or fair dealing in the common law nations.¹³⁸⁶ In Ethiopia, art.11 of the copyright legislation provides for a specific exception called ‘reproduction for teaching.’ As a specific exception to the reproduction right under art. 7 (1) (a), art.11 of the legislation allows the ‘reproduction of a published work or sound recording for purpose of teaching.’ As in art.10 (2) of the Berne Convention, the application of the national exception is subject to the requirements of compliance with ‘fair practice’ and ‘the extent justified by the purpose.’¹³⁸⁷ In the same vein, the law requires a due recognition of author’s right to attribution through

¹³⁸⁴ *Copyright Proc.No.410/2004, supra* note 136 at art10 (2). Ricketson & Ginsburg, *supra* note 55 at 786.

¹³⁸⁵ *Copyright Proc. No.410/2004, supra* note 136 at art.10 (3). Berne Convention, *supra* note 439 at art.10 (3). Ricketson & Ginsburg (Vol. 1), *supra* note 713 at 795-96.

¹³⁸⁶ See *US Copyright Act (1976)*, §107: The Section states: “Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, *teaching* (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”[Emphasis added]. *Canadian Copyright Act* (R.S.C, 1985, c. C-42), §29 (“Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.”)

¹³⁸⁷ *Copyright Proc. No.410/2004, supra* note 136 at art.11 (1).

an appropriate indication of the source of the work and the name of its author.¹³⁸⁸ In view of the two substantive requirements, a point that is worth noting is the absence of a quantitative limit on the use as long as the conditions are met.¹³⁸⁹

In fact, the conditions themselves are left undefined that their flexible judicial interpretation could offer some rooms to facilitate access to learning materials. For want of a rich jurisprudence, Ethiopian courts can draw on a guidance from the U.S fair use or Canadian fair dealing doctrine or an appropriate interpretation of the three-step test in their determination of fairness requirement. For instance, the lack of a quantitative restriction can be used to allow the use of ‘course-packs’ subject to the requirements of ‘purpose and fair practice.’ In this respect, a lesson can be drawn from the recent jurisprudential development in India that allows the use of course-packs for educational purposes.¹³⁹⁰ A more relevant source of lesson is the recent copyright bill of South Africa that permits print and electronic course-packs for education.¹³⁹¹ Indeed, the bill is worth considering for its comprehensive set of L&Es relevant for education. Besides, useful are lessons from the US fair use doctrine for its open-ended flexible approach and the Canadian fair dealing for its explicit user-right approach. In this thesis, a reference to the recent developments in these jurisdictions however remains selective and brief. Despite their significance, an in-depth account of the developments and the lessons for Ethiopia deserve an independent work.

In light of art.10 (2) of the Berne convention, the statutory exception is too circumscribed to facilitate access to copyrighted learning materials relevant for tertiary education. It is evident from the

¹³⁸⁸ *Ibid* at art.11 (2). Berne Convention, *supra* note 439 at art.10 (3). See Ricketson & Ginsburg (Vol. I), *supra* note 713 at 795-96. It is worth mentioning that the statutory provision’s reference to ‘sound recording’ is quite erroneous as ‘sound recording’ has nothing to do with moral rights.

¹³⁸⁹ See Ricketson & Ginsburg (Vol. I), *supra* note 713 at 794-95.

¹³⁹⁰ See *University of Oxford v. Rameshwari Photocopy Services* (2016) 2016 SCC OnLine Del 5128 (India). The Delhi High Court ruled that students’ course-packs are eligible under fair dealing for educational purpose. Okediji, “Creative Markets and Copyright,” *supra* note 707 at 39; see Eashan Ghosh, “Fundamental Errors in Fundamental Places: A Case for Setting Aside the Delhi University Photocopying Judgment” (2016) 9:1 NUJS Law Review 1-39.

¹³⁹¹ See Copyright Amendment Bill [B13-B-2017], Section 13B. 2a, Republic of South Africa, online: https://www.gov.za/sites/default/files/gcis_document/201705/b13-2017copyright170516.pdf > [Copyright Amendment Bill B13-B-2017]].

law that there exist considerable disparities between the exception and its international counterpart. First, the statutory exception is limited to an exclusive right of reproduction that relevant acts of translation, adaptation, distribution, public display and making available digital copies are all excluded from the ambit of the exception. Construed in this narrow sense, the wording of the exception departs from its international counterpart that embodies flexibilities in the term ‘utilization’ to extend the limitation to other exclusive rights.¹³⁹² Further, the law overlooks an appropriate extension of the exception to works in the digital environment as envisaged under the WCT and WPPT. That is, except for a digital reproduction of a ‘published work,’ the exception excludes all other acts pertinent for educational activities. Second, the permitted reproduction itself is restricted to a ‘published work’ and sound recording.¹³⁹³ Hence, the exception excludes unpublished works irrespective of the satisfaction of the above-mentioned requirements. Third, in relation to neighboring rights which includes sound recordings, the law permits the reproduction of fixed broadcasts and performances ‘solely for the purpose of face-to-face teaching activities.’¹³⁹⁴

In effect, the scope of this latter exception excludes a distance or web-based education although it remains within the ambit of the term ‘teaching’ that lacks a definition under the law.¹³⁹⁵ As noted with regard to art.10(2) of the Berne Convention, the term ‘teaching’ is broad enough to encompass teaching at all levels and of all modes including correspondence or web-based education.¹³⁹⁶ Thus, the restriction to ‘face-to-face’ teaching under the law undercuts the permitted scope of its international

¹³⁹² For a discussion on ‘utilization’ and ‘by way of illustration’, see Ricketson & Ginsburg (Vol. I), *supra* note 713 at 792-94. See Eshete & Mengistu, *supra* note 182 at 172-73.

¹³⁹³ *Copyright Proc.No.410/2004*, *supra* note 136 at art.11 (1).

¹³⁹⁴ *Ibid* at arts.32(c), 26 (1) (c), 27(1) (a) &31(1) (c). Given the inclusion of ‘sound recording’ under neighboring rights (art.26), the appearance of ‘sound recording’ under art.11 finds no clear justification. Instead, its inclusion under art.11 or its reading under art.32 would rather lead to an inconsistent application of the corresponding limitations with varying scope.

¹³⁹⁵ For a discussion on the scope of teaching, see Ricketson & Ginsburg, *supra* note 55 at 792-93; Eshete & Mengistu, *supra* note 182 at 174-75.

¹³⁹⁶ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 792-93; Okediji, “Sustainable Access,” *supra* note 721 at 177; see also Raquel Xalabarder, “Copyright and Digital Distance Education: The Use of Pre-Existing Works in Distance Education Through the Internet” (2003) 26 Colum. VLA J.L. & ARTS 101.

counterpart. Given Ethiopia's commitment to expansion of tertiary education, its overwhelming population growth and the role of tertiary education for its development, the exclusion of distance or online education has a profound implication both for its citizens' access to tertiary education and the latter's intended role for human development.

With the advent of a digital era, an online education has emerged to overcome the challenges of geographical barriers in promoting enhanced access to education within and across national borders.¹³⁹⁷ Nonetheless, copyright and digital locks operate in tandem to undermine the actual role of online education and digital technologies. In the digital environment, the unabated expansive scope of copyright and the anti-circumvention of TPMs constitute a significant impediment to routine acts of educational activities.¹³⁹⁸ As noted above, the teaching exception precludes from its scope, *inter alia*, the rights to making available digital copies and distribution that are relevant in the digital environment. Further, the national copyright law does not regulate the use or non-use of TPMs in relation to digital works. The sole exception to this gap is a protection of TPMs over software programs and digital contents in the context of a computer crime.¹³⁹⁹ It is argued that a lack of a preemptive legislative action to set a limit or regulate the private enforcement measure can result in right holders' abusive use of digital locks to restrict legitimate access and uses.¹⁴⁰⁰

¹³⁹⁷ Ruth Okediji, "The Limits of International Copyright," *supra* note 188 at 727-28.

¹³⁹⁸ *Ibid* at 729.

¹³⁹⁹ See *Computer Crime Proclamation No.958/2016, Federal Negarit Gazette*, 22nd Year No.83 Addis Ababa 7th July 2016, arts.2(1-10), 7(2-4) & 16. For the purpose of the computer crime, the protection of the TPMs prevents the importation, possession, distribution, offer for sale, making available a circumvention device *exclusively* designed for the commission of computer crimes. *Ibid* at art.7(2&3). (Emphasis added).

¹⁴⁰⁰ See Carys Craig, "Digital Locks and the Fate of Fair Dealing in Canada: In Pursuit of 'Prescriptive Parallelism'" (2010) 13: 4 *Journal of World Intellectual Property* 503 at 508-14 [Craig, "Digital Locks"].

In noting the profound implication of TPMs, scholars caution that TPMs, if not regulated, “cannot differentiate between copyright infringement and legitimate activities.”¹⁴⁰¹ In a counter argument, one might dismiss this contention as a matter of less concern as users are not prohibited from acts of circumvention to unlock the encrypted works for a legitimate use. Yet the practical uncertainties that arise from a legislative inaction would undermine the teaching exception due to right holders’ uncurbed use of TPMs.¹⁴⁰² In fact, the use of TPMs can still entail a *de facto* impediment to educational activities for users’ lack of an exception-based assertive claim against the abusive use and even for want of adequate circumvention devices or services from the local markets in Ethiopia. Despite the appropriateness or otherwise of anti-circumvention, users need legal protection from excessive use of TMs and a preemptive action is useful to maintain an appropriate balance between the owners’ right and public interest.¹⁴⁰³ The combined effect of such a wholesale exemption from a limitation amounts to a severe restriction on access to learning materials for educational purposes in both analogue and digital environments. Thus, it is essential to provide a coherent set of exceptions that facilitate access to digital works for online educational activities.

Given their facilitative roles, the liabilities of intermediaries should also be clarified. With regard to appropriate safe harbours for the intermediaries, two major approaches are worth mention, from among others. Adopted in the US and other jurisdictions, the restrictive notice and take down approach requires intermediaries to remove an infringing digital context upon receipt of a notice. In addition to its encroachment upon users’ privacy, this might entail an abusive or erroneous removal of lawful digital contents upon a mere allegation. In contrast, the Canadian notice-notice approach

¹⁴⁰¹ *Ibid* at 507-12; Jeremy de Beer, “Constitutional Jurisdiction Over Paracopyright Laws,” in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law Journal, 2005) 89 at 101[de Beer, “Constitutional Jurisdiction”]. As the mere circumvention of TPMs entitles right holders to ‘all remedies provided by law,’ Jeremy de Beer observes, “paracopyright provisions are thus a replacement for, not a part of, traditional copyright laws.” *Ibid* at 99.

¹⁴⁰² Craig, “Digital Locks,” *supra* note 1400 at 513-14. Craig notes that “inaction could thus result in the marginalization of copyright and its normative significance as technology and technological self help establish the norms of behavior online.” *Ibid* at 514.

¹⁴⁰³ *Ibid* at 523.

requires notification of intermediaries and the latter's obligation to forward the infringement notice to the users. That is, a removal of the content cannot be sought by the right holders without a judicial oversight. Upon meeting the conditions under either approach, the intermediaries can invoke exemptions from liabilities arising from the acts of their users or customers. Given its potential to avoid an abusive practice, the Canadian approach can be a source of lesson for the regulation mechanisms and safe harbours needed for intermediaries in Ethiopia.

For the face-to-face teaching activities, the permitted exception is further constrained due to its total exemption of performances and sound recordings published as teaching or instructional materials.¹⁴⁰⁴ In consequence, educators and learners are denied an access to such materials as the materials remain immune to a copyright limitation. In the observation of one writer, this approach is intended to protect the incentive required for the production of the instructional materials.¹⁴⁰⁵ Be that as it may, this observation however neglects the other side of the balance. Indeed, the approach runs counter to the required balance equilibrium as it overlooks the public interest aspect of access to the copyrighted works. It is useful to bear in mind that there is no analogous blanket exclusion of published literary works from L&Es. It is true that a reasonable incentive is vital for the creation of both categories of the works. For their normal exploitation, educational market constitutes the core income streams of the right holders for materials produced to be used in educational sector.¹⁴⁰⁶

Nonetheless, an absolute protection that leaves no room for a limitation or a reasonable access is unwarranted and finds no parallel under the international copyright regime.¹⁴⁰⁷ Considering a full range of public interests, it is imperative to restore copyright's major purpose of advancing learning.

¹⁴⁰⁴ *Copyright Proc. No.410/2004*, *supra* note 136 at art.32(c). See Haile, *supra* note 183 at 180-81. Further, the reading suggests that this exclusion does not extend to an educational broadcast.

¹⁴⁰⁵ Haile, *supra* note 183 at 180-81. Haile argues that a reproduction of such materials without compensation 'takes away the very incentive to produce such materials and entail counterproductive effect.' *Ibid* at 180.

¹⁴⁰⁶ Gervais, *Restructuring Copyright*, *supra* note 702 at 90.

¹⁴⁰⁷ See Rome Convention, *supra* note 478 at art.16 (1) (d) [allowing use for purposes of teaching and scientific research]; WPPT, *supra* note 488 at art.16 (permitting the provision of exceptions and limitations that correspond to those for literary and artistic works).

Hence, there is a need for an appropriate limitation to facilitate a reasonable access to performances and sound recordings published as teaching or instructional materials. Fourth, given its poor drafting, the mandatory or permissive nature of the teaching exception remains ambiguous due to the provision's use of the unconventional expression 'cannot forbid' that sounds less binding.¹⁴⁰⁸ The English version of the provision makes a literal use of the words with an equivalent meaning in the Amharic version. That is, the usual legal terms such as 'may' and 'shall' are not used to clarify the mandatory or permissive status of the exception.

In another exception related to the teaching exception, art.32 (b) of the copyright law permits the reproduction of works of neighboring rights for 'the sole purpose of scientific research.'¹⁴⁰⁹ In the international copyright regime, this exception is provided for in the Rome Convention and is carried over into WPPT for neighboring rights.¹⁴¹⁰ For literary and artistic works, the exception is deemed to fall within the scope of the three-step test under the Berne Convention and WCT.¹⁴¹¹ As noted above in relation to the teaching exception, the scientific research exception in Ethiopia is confined to the reproduction of subject matters of neighboring right. In contrast, the exception is not prescribed for literary, scientific and artistic works that remain crucial for scientific research. No room is left to carve out the exception from the existing law for want of a general rule of exceptions such as three-step test or fair use doctrine in Ethiopia. This results in the exclusion of an access to scientific journals and databases pertinent for scientific research purposes that complement tertiary education.

Further, lacking is a definition of 'scientific research' itself. Hence, it is not clear whether or not its scope is limited to public/academic or private/commercial scientific research or is inclusive of both.

¹⁴⁰⁸ *Copyright Proc. No.410/2004*, *supra* note 136 at art.11(1). Its relevant part reads: '.....the owner of copyright *cannot forbid* (....) a reproduction of a published work or sound recording for the purpose of teaching.' Emphasis added.

¹⁴⁰⁹ See Rome Convention, *supra* note 478 at art 15(1)(d) that provides for a similar exception which the national copyright law appears to emulate.

¹⁴¹⁰ See *ibid* at art.15(1)(d); WPPT, *supra* note 448 at art.16; Ricketson & Ginsburg (Vol. II), *supra* note 1352 at 1218 &1269-70.

¹⁴¹¹ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 782 & 794.

In the same vein, arguable is the distinction between the legislation's references to 'scholarship or private research' under art.12 (2) (a) and 'scientific research' under art.32 (b). In fact, nations take diverse approach to address the issue.¹⁴¹² For instance, in *the CCH Canadian Ltd v. Law Society of Upper Canada*, the Supreme Court of Canada adopted a liberal interpretation of 'research' and a fair dealing exception to include a research for commercial purpose.¹⁴¹³ Nonetheless, the Court also noted the possible variance in the degree of fairness between the use for commercial and non-commercial research purposes.¹⁴¹⁴

In contrast, the *EU InfoSoc Directive 2001/29/EC* is limited to scientific research for non-commercial purpose.¹⁴¹⁵ In Ethiopia, one might argue that a 'scientific research' for a commercial purpose is not within the permitted scientific research exception intended to foster scientific development. Indeed, in the absence of the three-step test or a fair use/dealing doctrine to determine the appropriate scope, unlimited reproduction for a commercial scientific research could be detrimental to the interests of right holders.¹⁴¹⁶ In the same vein, the undue restriction of the exception could still entail universities' deprivation of the commercial exploitation of their scientific research outputs.¹⁴¹⁷ This calls for a legislative action to strike an appropriate balance between the two interests. Suffice to

¹⁴¹² Goldstein & Hugenholtz, *supra* note 157 at 380-81. See *Canada Copyright Act*, §29; *US Copyright Act*, § 107.

¹⁴¹³ *CCH Canadian Ltd vs Law Society of Upper Canada*, [2004] 1 S.C.R. 339, para 51. See also *Canadian Copyright Act*, §29. Goldstein & Hugenholtz, *supra* note 157 at 381.

¹⁴¹⁴ *Canadian Ltd vs Law Society of Upper Canada*, *supra* note 1413 at para 54('research done for commercial purpose may not be a fair as research done for charitable purposes').

¹⁴¹⁵ *InfoSoc Directive 2001/29/EC*, *supra* note 1355 at art.5 (3) (a). See Jerome Reichman & Ruth Okediji, "When Copyright Law and Science Collide: Empowering Digitally Integrated Research Methods on a Global Scale" (2012) 96 Minn L Rev 1362 at 1381-84; Goldstein & Hugenholtz, *supra* note 157 at 381.

¹⁴¹⁶ See Gervais, *Restructuring Copyright*, *supra* note 57 at 89(stating that a non-commercial research is not an issue). Ricketson & Ginsburg (Vol. I), *supra* note 713 at 782.

¹⁴¹⁷ Reichman & Okediji, *supra* note 1415 at 1382.

remind, the need for such a balance has been recognized in the TRIPs Agreement and is even more explicit in the preambles to recent copyright treaties.¹⁴¹⁸

The other issue is the scope of the teaching exception vis-à-vis the exception for scientific research. It is true that an academic scientific research is an integral part of a quality tertiary education. It is however noted that the overlap is not complete for both are not equivalent in their scope. In the international copyright regime, citing its exclusion from the teaching exception, commentators consider the broader right of quotation and the three-step test under the Berne Convention to be adequate to serve the legitimate interests of scientific research.¹⁴¹⁹ In reality, this claim holds true to the extent the said exceptions are crafted at a national level to serve the purpose of scientific research. As noted above, in Ethiopia, the scope of the scientific research exception mentioned in relation to neighboring rights is narrower than the teaching exception.

Besides, except in the context of the restrictive exception for libraries and archives, there lacks a stand-alone statutory exception for ‘scholarship, research and private study’ in Ethiopia. Neither does there exist a general exception comparable to the three-step test to address scientific research. In common law jurisdictions, the exception is integral to a fair use or fair dealing doctrine.¹⁴²⁰ Therefore, for want of the three-step test or a general rule of exceptions such as fair use doctrine to justify their application,¹⁴²¹ the incorporation of these related exceptions remains incomplete. It is important to note that a combination of the exceptions for teaching, scientific research and quotation is instrumental to facilitate access to relevant copyrighted materials for the purpose of education and scientific research.

¹⁴¹⁸ TRIPs Agreement, *supra* note 163 at arts.7 & 8; WCT, *supra* note 448 at Preamble, para 5 (the WCT recognizes ‘the need to maintain a balance between the rights of authors and the larger public interest, particularly *education, research and access to information*, as reflected in the Berne Convention.’). WPPT, *supra* note 448 at Preamble, para 4; Marrakesh Treaty, *supra* note 497 at para 9. Okediji, “International Copyright System,” *supra* note 51 at 25.

¹⁴¹⁹ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 794. The use of scientific works can be allowed under the teaching exception as long as the use is made for the purpose of teaching. *Ibid.*

¹⁴²⁰ See *Canada Copyright Act*, §29; *US Copyright Act*, § 107.

¹⁴²¹ See Ricketson & Ginsburg (Vol. I), *supra* note 713 at 783. Gervais, *Restructuring Copyright*, *supra* note 702 at 88-89. Reichman & Okediji, *supra* note 1415 at 1385-97.

In conclusion, the exception for teaching and its related exception for scientific research are restricted to reproduction right and limited categories of works. The excessive restriction of the exceptions is detrimental to both the objective and instrumental role of tertiary education for human development. In crafting the L&Es, it is imperative to consider the optimal incorporation of the relevant flexibilities and a due regard for their role to facilitate access to copyrighted materials needed for tertiary education, scientific research and future creative innovation.¹⁴²²

6.4.4. Exception for Libraries, Archives & Museums (LAMs)

In spite of its implicit existence within art.9 (2) of the Berne Convention,¹⁴²³ the exception for LAMs is another long-established one under national laws.¹⁴²⁴ In principle, LAMs are instrumental for their mission of ‘collecting, preserving and disseminating of knowledge.’¹⁴²⁵ Given their instrumental role and the technological developments that necessitate a global action,¹⁴²⁶ there has been an ongoing effort at the WIPO for an explicit international regulation of L&Es for LAMs and education.¹⁴²⁷ From the perspective of education, the role of LAMs is crucial to facilitate access to learning materials for education, scholarship and scientific research.¹⁴²⁸ For human development, libraries are thus an important agent of development in enhancing opportunities for knowledge accumulation and diffusion that foster socio-economic and cultural progress.¹⁴²⁹ In Ethiopia, art.12 (1) of the copyright law allows

¹⁴²² See Reichmann & Okediji, *supra* note 1415 at 1476-80.

¹⁴²³ See Okediji, “International Copyright System,” *supra* note 51 at 22. Goldstein & Hugenholtz, *supra* note 157 at 398-99.

¹⁴²⁴ Goldstein & Hugenholtz, *supra* note 157 at 398-99.

¹⁴²⁵ Okediji, “International Copyright System,” *supra* note 51 at 22.

¹⁴²⁶ Okediji, “The Limits of International Copyright,” *supra* note 188 at 732-33; see generally Wendy Lougee, “Diffuse Libraries: Emergent Roles for the Research Library in the Digital Age” 1 (2002); Kingo Mchombu & Catherine Beukes-Amiss, “The Role of Libraries in Contemporary African Society” (2015) 64 *Libraries Trends* 112 at 116.

¹⁴²⁷ See WIPO, *Standing Comm. on Copyright & Related Rights, 21st Session Conclusions*, at 3, WIPO Doc. SCCR/21/CONCLUSIONS (Nov.12, 2010). For the latest update, see WIPO, *Standing Comm. on Copyright & Related Rights, 38th Session Agenda*, at 3-4, WIPO Doc. SCCR /38/Summary (April 1, 2019).

¹⁴²⁸ Okediji, “The Limits of International Copyright,” *supra* note 188 at 732-33.

¹⁴²⁹ *Ibid.*

LAMs and similar institutions operating for non-profit purpose to make ‘a reproduction’ of ‘a work’ in the course of their public services. As noted from the provision, the exception covers all categories of works for a single reproduction.

For a reproduction meant for individuals’ use, the exception is however restricted to ‘a reproduction of a published Article, short work or short extract of a work to satisfy the request of a physical person.’¹⁴³⁰ Hence, except for ‘short’ excerpts, the reproduction of the whole book and ‘unpublished’ Article is prohibited. In addition, the exception leaves out all other exclusive economic rights that are critical for the role of libraries in the analogue and digital environment.¹⁴³¹ In addition to ‘a work’, the cross-referencing made under art.32 (d) of the legislation for the application of limitations under Part II (arts.9-20) allows the extension of the exception to cover neighboring rights. With regard to the scope or kind of libraries, few writers hold conflicting views on the exception’s embrace of the academic libraries of private universities.¹⁴³² However, there are three reasons that substantiate the application of the exception to all academic libraries. First, the general application of the exception is implicit in the provision’s reference to ‘educational institution’ without a qualification.¹⁴³³ Second, there exists no compelling justification for a discrimination between the academic libraries of public and private universities that are intended for educational purposes. Third, the set of stringent conditions attached to the exception and a further constraint on its scope would undermine the access prong of the public interest.

¹⁴³⁰ *Copyright Proc. No.410/2004*, *supra* note 136 at art.12 (2).

¹⁴³¹ For instance, important but prohibited without authorization are the public lending and public communication rights, including making available right. See Okediji, “International Copyright System,” *supra* note 51 at 26-28.

¹⁴³² Haile argues that libraries of private educational institutions are excluded as the institutions are established for profit. Haile, *supra* note 183 at 183. In contrast, Eshete & Mengistu argue that the exception includes the libraries of both public and private educational institutions. For the latter, libraries should be treated as an extension of teaching institutions that enjoy the teaching exception. Eshete & Mengistu, *supra* note 182 at 176.

¹⁴³³ See *Copyright Proc. No.410/2004*, *supra* note 136 at art.12 (2) (c). The provision’s reference to ‘educational institution’ without a qualification (public or private) can be construed to allow both public and private universities (their libraries) to benefit from the exception.

Inclusive of academic and public libraries, the exception is thus applicable (a) to meet the demands of an individual user, and (b) for the preservation and replacement of a lost, destroyed or unusable copy in the libraries' collection.¹⁴³⁴ Nonetheless, the reproduction allowed in both cases is subject to stringent requirements. For instance, a reproduction made at the request and for the use of an individual user shall meet three 'cumulative' conditions. First, a library or archive has to make sure that 'the copy will be used solely for the purpose of study, scholarship or private research.'¹⁴³⁵ Second, the permitted reproduction shall be made in an isolated case, or if repeated, on separate or unrelated occasions.¹⁴³⁶ Third, it is operative in the absence of an administrative organization (e.g., EIPO or CMO) from which the 'educational institution' can obtain a 'collective license of reproduction.'¹⁴³⁷ That is, libraries are not allowed to enjoy the uncompensated exception as long as a CMO is available to grant a collective license.

In the same vein, there exist three conditions for libraries' reproduction of the permitted work necessary for the preservation and replacement of their collection. First, the reproduction is limited to a *single* copy that is *necessary* to preserve or replace the lost, destroyed or unusable copy in its collection or 'in the permanent collection of another similar library or archive.'¹⁴³⁸ From the reference to 'the permanent collection of *another* similar library,'¹⁴³⁹ the reading of the exception appears to allow a library to do the same for the preservation or replacement of a copy in other libraries' permanent collection.¹⁴⁴⁰ This can be done upon the request of other libraries. For the purpose of tertiary

¹⁴³⁴ *Ibid* at art.12 (2) & art.12 (3) (a).

¹⁴³⁵ *Ibid* at art.12 (2) (a).

¹⁴³⁶ *Ibid* at art.12 (2) (b).

¹⁴³⁷ *Ibid* at art.12 (2) (c).

¹⁴³⁸ *Ibid* at art.12 (3) (a).

¹⁴³⁹ *Ibid*.

¹⁴⁴⁰ *Ibid*.

education, this will be crucial to facilitate inter-libraries' collaborative sharing of the existing pool of collections for the purpose of preservation and replacement.¹⁴⁴¹ Nonetheless, its scope is too narrow to allow libraries an acquisition of additional books/published journal articles or works that are not hitherto part of their previous or existing collection.

Outside the case of preservation or restoration, the reproduction is not applicable for the purpose of interlibrary loan akin to the approach in the US.¹⁴⁴² Hence, it should be noted that the exception excludes both lending among libraries and a new acquisition, except upon a compensation. Second, the permitted reproduction itself allowed if an acquisition of the copy is impossible under reasonable conditions.¹⁴⁴³ This condition seems to suggest cases where the works are not available on the market at reasonable prices. Third, the occurrence of the reproduction must be confined to an isolated case or, if repeated, on a separate and unrelated occasion.¹⁴⁴⁴ As noted above, unless otherwise amended, the permitted reproduction of a published work excludes reproduction of performances and phonograms published as instructional materials.

In sum, it is evident from the strings of strict conditions that the narrow-scoped exception limited to reproduction is too constrained to facilitate access to relevant learning materials. Despite their vital significance for libraries to operate in both analogue and digital environments, acts of lending, making available digital copies, distribution, and adaptation into appropriate formats for persons with disabilities are all excluded without an authorization. In turn, this severe restriction of access would

¹⁴⁴¹ Eshete & Mengistu, *supra* note 182 at 176.

¹⁴⁴² See *US Copyright Act*, § 108. South Africa allows interlibrary loans in its amendment bill. See *Copyright Amendment Bill*, *supra* note 1391 at §19C. Goldstein & Hugenholtz, *supra* note 157 at 399.

¹⁴⁴³ *Copyright Proc. No.410/2004*, *supra* note 136 at art.12 (3) (b).

¹⁴⁴⁴ *Ibid* at art.12 (3) (c).

undermine the instrumental role of libraries and archives to promote quality tertiary education that contributes for human development.

6.4.5. Doctrine of Exhaustion and Parallel Imports

As noted in Chapter Four, the issue of exhaustion and parallel imports is left unaddressed under the existing international copyright regime. In particular, as per art.6 of the TRIPs Agreement, the WTO member states are left with a room to maneuver in determining the issue of exhaustion as long as the preferred measure remains consistent with the principle of non-discrimination as embodied in the Agreement.¹⁴⁴⁵ In view of its significance for facilitating affordable access to learning materials in the secondary market, a nation is free to adopt an international exhaustion that allows parallel importation of copyrighted goods. In consequence, countries such as the US has adopted a doctrine of international exhaustion through its recent jurisprudence.¹⁴⁴⁶ In Africa, Egypt has adopted a similar approach in its statute.¹⁴⁴⁷ In contrast, Ethiopia provides for a domestic doctrine of exhaustion for a ‘published work’ under art.19 of its copyright legislation. Thus, the copies of the published work sold on the market in Ethiopia can be redistributed by sale without right holder’s authorization and remuneration. In addition to a published work, the interpretation of art.32 (d) extends the exception to works of neighboring rights such as the tangible copies of sound recordings, fixed performances and broadcasts that are lawfully put on the market. In both cases, the exhaustion doctrine is limited to transfer of ownership through sale and tangible copies. In effect, excluded is its application to a digital environment.¹⁴⁴⁸

¹⁴⁴⁵ Correa, *Trade Related Aspects*, *supra* note 137 at 78-79. Gervais, *TRIPs Agreement*, *supra* note 724 at 198.

¹⁴⁴⁶ See *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 US 519, 530 (2013).

¹⁴⁴⁷ Tobias Schonwetter et al, “Copyright and Education,” *supra* note 91 at 44.

¹⁴⁴⁸ For arguments in support of the application of doctrine of exhaustion in the digital environment, see generally Aaron Perzanowski & Jason Schultz, “Digital Exhaustion” (2011) 58 UCLA L Rev 889-946; Caterina Sganga, “A Plea for Digital Exhaustion in EU Copyright Law” (2018) 9:3 Journal of Intellectual Property, Information Technology and E-Commerce Law 211-39; Okediji, *Creative Markets*, *supra* note 707 at 28-30;

Although this exception is vital for the importation of learning materials from foreign markets, the adoption of a national exhaustion thus excludes the application of parallel imports. Indeed, as an exclusive right under art.7 (1) (e), the sole tangential exception to an exclusive importation is that permitted for a physical person.¹⁴⁴⁹ That is, an individual is allowed to import a *single* copy of a work for his personal purposes. Outside the narrow ambit of the exception is educational institutions' importation of books acquired through purchase or donation from abroad without the right holders' authorization. Even for an individual, the references to a single copy and use for personal purposes are indicative of the constrained scope of the permitted importation. In terms of the works, its reference to 'a work' can be construed to cover all kinds of works.¹⁴⁵⁰ In the same vein, art.32 (d) can be invoked for importation of a single copy of sound recordings, fixed performances and broadcasts for personal use.

Therefore, the nominal exception of importation prohibits a parallel importation of works for resale in the local market. To enforce the prohibition, both provisional and boarder measures are provided to be taken against the alleged infringer.¹⁴⁵¹ Further, the broader definition of importation adopted under the customs law entails the prohibition of importation of even copyrighted goods in transit.¹⁴⁵² As a result, unless otherwise amended, the existing copyright law has taken a restrictive TRIPs-plus approach to exclude the benefits related to international exhaustion and parallel imports. In facilitating secondary markets, parallel imports that hinge on the doctrine of international exhaustion 'offer greater consumer choices and lower prices.'¹⁴⁵³ It is thus imperative to remove the undue restriction imposed upon parallel importation of learning materials.

¹⁴⁴⁹ *Copyright Proc. No.410/2004, supra* note 136 at art.15.

¹⁴⁵⁰ *Ibid.*

¹⁴⁵¹ *Ibid* at arts. 33 &35.

¹⁴⁵² See *Customs Proc.No.859/2014, supra* note 1328 art.2 (2) and art.4.

¹⁴⁵³ Gervais, *TRIPs Agreement, supra* note 724 at 200.

6.4.6. Licensing (Compulsory) Regime

A. Contractual or Voluntary Licensing Regime

For an economic exploitation of exclusive rights, licensing and assignment of the rights constitute the major modes of exploitation. The economic exploitation through licensing can be either contractual, non-contractual or a blend of both. Before delving into the issue of non-contractual or compulsory licensing, it is important to highlight the legal framework on the exploitation of exclusive rights through contractual licensing and assignment. In Ethiopia, right holders are entitled to make a partial or total licensing or assignment of their rights through a written agreement with a defined scope and specified duration.¹⁴⁵⁴ In the absence of a specified scope and duration in the agreement, the licensee would be entitled to the exploitation of the right for the purpose envisaged in the agreement and for a term of five years.¹⁴⁵⁵ Further, three years after licensing, ‘an exclusive license’ may be revoked due to the non-or-inadequate exploitation of the right and a prejudice to the legitimate interest of the author, unless otherwise the cause for the prejudice is attributable to the author.¹⁴⁵⁶ For the exploitation, the licensing can be made between a user and a right holder or the collective management society/organization (CMS/CMO) on his/her behalf.

Formed for a non-profit purpose and subject to the approval of the EIPO for its operation and royalty scheme,¹⁴⁵⁷ the CMS is authorized to issue a contractual license to users who make use of protected works for ‘commercial purpose.’¹⁴⁵⁸ The reading of art.38(1) of Copyright Amendment Proc.

¹⁴⁵⁴ *Copyright Proc No. 410/2004, supra* note 136 at art.23 & 24(1). An assignment without a specified duration will terminate after ten years. *Ibid* at art.24 (3).

¹⁴⁵⁵ *Ibid* at 24(3) & (4).

¹⁴⁵⁶ *Ibid* at art.25. It is important to note that this revocation privilege is non-waivable. *Ibid* at art.25 (4). Further, it seems that the revocation is not applicable for a non-exclusive license as possible prejudice to the author’s legitimate interest can be avoided due to the parallel exploitation of the rights by other non-exclusive licensees.

¹⁴⁵⁷ See *Copyright Amendment Proc. No. 782/2014, supra* note 1047 at art.32-37.

¹⁴⁵⁸ *Ibid* at art. 38(1). For the license to be issued by the CMO/S, the draft regulation provides for both blanket and individual licensing mechanisms. Collective Management Society Regulation, *supra* note 1047 at art.6(14).

No.782/ 2014 refers to the obligation of a user to pay a royalty for a use made for ‘commercial purpose.’ In effect, the reference to ‘commercial purpose’ divests the CMS of its mandate to issue a license to educational institutions and libraries that operate for non-commercial purposes. Yet, it can be argued that the reference to ‘commercial purpose’ is intended to emphasize the obligation of users to obtain a license.

Otherwise, the deprivation of the CMS of its mandate to issue a license to institutions or users that operate for non-commercial purpose contradicts art.12 (2)(c) of the copyright legislation that contemplates libraries or educational institutions’ acquisition of a ‘collective license of reproduction.’ Understood as a collective blanket licensing, it is clear that the intended ‘collective license’ will be acquired from a CMO/CMS as opposed to the individual license obtained from an individual author. Indeed, this line of argument is in line with the legal provision and the intended function of the CMS—effective exploitation and administrative efficiencies. In general, whether acquired from the right holders or the CMOs, the contractual or voluntary licensing scheme remains the most common form of exploitation for authors without losing the ownership of their exclusive economic rights. That is, the contractual licensing scheme is the rule while a compulsory licensing remains an exception.

B. Compulsory Licensing Regime

As an exception to the general rule, a point of vital significance in this thesis is the issue of non-voluntary or compulsory licensing as an element of relevant flexibilities. In this context, it is important to recall the limited and permissible regime of compulsory licensing under the Berne Convention. In addition to the Berne Appendix, member states have the discretion to incorporate compulsory licenses for broadcasting and public communication of a work,¹⁴⁵⁹ and for sound recordings of musical

¹⁴⁵⁹ Berne Convention, *supra* note 439 at art.11*bis*. Okediji, “International Copyright System,” *supra* note 51 at 14; Rickeson & Ginsburg (Vol. I), *supra* note 713 at 819-29. In adopting this compulsory license, states have also the discretion to provide for ephemeral recordings of broadcast works. *Ibid* at 824-29.

works.¹⁴⁶⁰ From the relevant compensated limitations, Ethiopia has adopted a compulsory license with respect to the broadcasting or public communication of a sound recording ‘published’ for a commercial purpose or its reproduction, subject to a single equitable remuneration.¹⁴⁶¹ Drawing, in part, on art.15 (1) of the WPPT that allows for both direct and indirect use, the above-cited provision is restricted to a ‘direct’ use of phonograms ‘published’ for a commercial purpose that tends to exclude phonograms ‘made available to the public.’¹⁴⁶²

Further, the copyright law provides for other instances of compulsory license. To this end, the EIPO is authorized under art.17 (1) of the copyright legislation to issue a non-voluntary license for the reproduction, translation and broadcasting of a ‘published work.’ Seen in the light of the Berne Convention, this provision is somehow distinct as it includes both reproduction and translation.¹⁴⁶³ For want of an explicit international exception, the general application of compulsory license to reproduction and translation might appear to be Berne-minus. Nonetheless, the application of a three-step test and the non-exclusive nature of the license can offset the prejudice, if any, that may arise from this compensated exception. For now, the test is missing from the national law. In its reference to broadcasting of a ‘published’ work, the exception however seems to mirror the exception under art.11 *bis* of the Berne Convention. Yet its scope is narrower than its international counterpart that applies to

¹⁴⁶⁰ Berne Convention, *supra* note 439 at art.13. Okediji, “International Copyright System,” *supra* note 51 at 14-15; Ricketson & Ginsburg (Vol. I), *supra* note 713 at 812-18.

¹⁴⁶¹ *Copyright Proc. No. 410/2004*, *supra* note 136 at art.30 (1). This provision appears to mimic the corresponding provisions of the Rome Convention and WPPT. See Rome Convention, *supra* note 478 at art.12; WPPT, *supra* note 448 at art.15. Provided for a ‘direct’ use alone, the copyright law stipulates for a single equitable remuneration to be due to both performers and producers of phonograms.

¹⁴⁶² *Copyright Proc No.410/2004*, *supra* note 136 at art.30 (1). As Ricketson and Ginsburg note, the word ‘published for commercial purpose’ is restrictive as it is contingent on the availability of tangible copies in reasonable quantity. Hence, they draw attention to a boarder interpretation provided under art.15 (4) of the WPPT to include phonograms made available to the public by wire or wireless means. Ricketson & Ginsburg (Vol. II), *supra* note 1352 at 1268.

¹⁴⁶³ Given the silence in the Berne Convention, an exception to translation is arguably considered one of the implied exceptions. See Ricketson & Ginsburg (Vol. I), *supra* note 713 at 835-40.

all categories of literary and artistic works.¹⁴⁶⁴ Further, it is limited to an act of broadcasting to the exclusion of public communication.¹⁴⁶⁵

Absent from the national law is an explicit provision that corresponds to art.13 of the Convention that allows a compulsory license for a sound recording of musical works.¹⁴⁶⁶ Hence, the statutory compensated limitations are not equivalent to those envisaged under the Berne Convention. Intended to protect the moral rights of an author, the EIPO's mandate precludes an authorization that involves the alteration of the work.¹⁴⁶⁷ For a compulsory license granted by the Office, the right holder is entitled to a 'fair' compensation.¹⁴⁶⁸ Left to a regulation to be issued are the conditions, forms of authorization and determination of the compensation. Its actual operation is thus contingent on the long-anticipated regulation.

From the reading of the afore-cited provision of the copyright law, important are the following salient points. First, the works covered under the regime of compulsory licensing are limited to 'published' works. All works that fall outside the definition of publication are thus excluded although the works are 'lawfully made available to the public.' Outside literary and artistic works, an inference can be drawn from the *mutatis mutandis* application of art.32(d) of the law to subject neighboring rights to the compulsory license. Second, the non-voluntary license is applicable to exclusive rights of reproduction, translation and broadcasting alone. As a result, the exception excludes from its ambit distribution and other exclusive rights such as making available right that is integral to the communication to the public. Third, there can be a room for flexibilities related to the requirement of a

¹⁴⁶⁴ See Berne Convention, *supra* note 439 at art.11 *bis* (2). Ricketson & Ginsburg (Vol. I), *supra* note 713 at 822-23. In view of the provision's reference to 'literary and artistic works,' the authors note that the works include cinematographic works as well. *Ibid*.

¹⁴⁶⁵ *Ibid*.

¹⁴⁶⁶ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 814-18.

¹⁴⁶⁷ *Copyright Proc. No.410/2004*, *supra* note 136 at art.17(3)

¹⁴⁶⁸ *Ibid* at art.17(2).

‘fair’ compensation that can cater to a local context.¹⁴⁶⁹ In striking a balance, the determination of an equitable remuneration is useful to avoid *unreasonable* prejudice to the legitimate interest of the author and to maintain the necessary incentive.

C. The General Compulsory License vis-à-vis the Berne Appendix

In view of the foregoing points, worth asking is the relationship between art.17 and the Berne Appendix and the extent to which the non-contractual licensing scheme would act as a substitute to serve the intended purpose of the Appendix. As mentioned above, Ethiopia is not bound to observe the required compliance with the Berne Appendix before its accession to the Berne or TRIPs Agreement. Nonetheless, it is important to highlight some points of distinction and resemblance. First, in addition to its administrative complexities, the Berne Appendix is limited both in its scope and purpose.¹⁴⁷⁰ Subject to the complex administrative requirements,¹⁴⁷¹ this special regime of compulsory license is applicable for reproduction and translation rights.¹⁴⁷² In particular, the compulsory license of translation is available only for ‘teaching, scholarship and research purposes.’¹⁴⁷³ In the same vein, the compulsory licensing of reproduction is limited to a use in connection with ‘systematic instructional activities.’¹⁴⁷⁴ In effect, the scope of latter arguably precludes ‘private study, research and distance education.’¹⁴⁷⁵

¹⁴⁶⁹ See Correa, *Trade Related Aspects*, *supra* note 137 at 322 (noting the need for interpretation at a national level). For the actual operation of the compensated exception, pending still is the issuance of the contemplated regulation or development of a judicial/administrative guidance to determine the amount of compensation.

¹⁴⁷⁰ See Alberto Silva, “Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright” (2013) 60:4 *Journal of Copyright Society of the USA* 581 at 589-612. Okediji, “Sustainable Access” *supra* note 721 at 162-66.

¹⁴⁷¹ See Ricketson & Ginsburg (Vol. II), *supra* note 1352 at 925-53.

¹⁴⁷² See Okediji, “International Copyright System,” *supra* note 51 at 15-16. Okediji, “Sustainable Access” *supra* note 721 at 163-64.

¹⁴⁷³ Berne Appendix, *supra* note 439 at Article II (5) & (9). Gervais, *Restructuring Copyright*, *supra* note 702 at 342. Okediji, “Sustainable Access” *supra* note 721 at 164. Ricketson & Ginsburg (Vol. II), *supra* note 1352 at 935.

¹⁴⁷⁴ Berne Appendix, *supra* note 439 at Article III(2)(a)(ii). Gervais, *Restructuring Copyright*, *supra* note 702 at 343. Okediji, “Sustainable Access” *supra* note 721 at 164.

¹⁴⁷⁵ Bannerman, *International Copyright*, *supra* note 718 at 66; Štrba, *International Copyright Law*, *supra* note 815 at 203–240.

In contrast, although both are limited to ‘published work,’¹⁴⁷⁶ the scope of art.17 is not limited to educational and research purposes. As a general regime of compulsory license, the license can thus be issued for a range of purposes embedded in the access aspect of the public interest integral to the copyright system itself. In this regard, it is important to bear in mind the constitutional and human rights limits to copyright that are encapsulated in the general public interest considerations envisaged in the FDRE Constitution. Another point of distinction relates to the conditions of the licensing schemes. Save for the possible conditions to be set in the contemplated regulation,¹⁴⁷⁷ there are no distinctions among the conditions for the national compulsory licensing of the reproduction, translation and broadcasting. For instance, no waiting periods comparable to the Berne Appendix are set for the national compulsory license. There still exists a difference in the administrative requirements. ‘Intended’ for bulk access to educational materials produced in developed nations, the Berne Appendix involves the administrative requirements such as proof of prior request and notification to the right holder, and a declaration to WIPO.¹⁴⁷⁸ For the application of art.17, the domestic conditions of compulsory license will remain the sole administrative requirements.

Despite the range of variance between the Berne Appendix and the compulsory license under art.17, there are certain points of similarities. First, both are operative subject to an equitable compensation. This point of resemblance should not however mask the possible difference in the rate of the equitable compensation. In contrast to the prohibitive transaction costs related to the Berne Appendix¹⁴⁷⁹ and the higher standards for the remuneration,¹⁴⁸⁰ the determination of a fair/equitable

¹⁴⁷⁶Berne Appendix, *supra* note 439 at Article II (1) &9(a), Article III (7) (a) (‘..... works published in printed or analogous forms of reproduction....’).

¹⁴⁷⁷ Copyright Proc.No.410/2004, *supra* note 136 at art 17(2).

¹⁴⁷⁸ See Berne Appendix, *supra* note 439 at Article I &IV. Gervais, *Restructuring Copyright*, *supra* note 702 at 344.

¹⁴⁷⁹ Silva, *supra* note 1470 at 619.

¹⁴⁸⁰ Okediji, “Sustainable Access”, *supra* note 721 at 162. Ricketson and Ginsburg (Vol. I), *supra* note 713 at 952-53.

compensation under art.17 would be of a lower rate considering the local realities in Ethiopia. Second, the practical importance of the Berne Appendix and art.17 for tertiary education is limited despite their intended common objective for a bulk access to protected published works. The practical limitation is imputable to both socio-economic and legal factors.

From among the socio-economic factors, the acute factors are Ethiopian higher educational institutions' dependence upon learning materials produced overseas and lack of capable academic/commercial local publishers and translators in Ethiopia. For want of relevant and robust local publishing and printing industries,¹⁴⁸¹ the effective exploitation of the flexibilities related to the licensing mechanism for educational purposes can be limited irrespective of grant of the license. This results in the compelling and increasing need for imported learning materials from overseas. In fact, Africa as a continent is the principal importer of books with an insignificant contribution (0.3%) to the global book exports.¹⁴⁸² In spite of the compelling need for unimpeded importation, one of the legal impediments in Ethiopia is the prohibition of importation of lawful learning materials without right holders' consent.¹⁴⁸³ For instance, the law prohibits the importation of materials produced abroad under the compulsory license without a specific authorization for their importation.

Given the expansive national copyright law, this legal factor relates to the absence of a limitation to the exclusive right of importation in the form of non-contractual licensing and doctrine of international exhaustion.¹⁴⁸⁴ In effect, the undue restriction of parallel importation under the law or the lack of a non-contractual license of importation would deprive higher educational institutions of a better or even

¹⁴⁸¹ Chon, "Intellectual Property 'from Below,'" *supra* note 50 at 832-34 (articulating the concentration of publishing industry in the developed nations and the infrastructural problems for publishing industry in the developing countries that remain being net importers).

¹⁴⁸² Silva, *supra* note 1470 at 594; Chon, "Intellectual Property from Below," *supra* note 50 at 832.

¹⁴⁸³ *Copyright Proc. No.410/2004*, *supra* note 136 at art.15.

¹⁴⁸⁴ See Correa, *Trade Related Aspects*, *supra* note 137 at 82.

comparable use of the bulk access envisaged under the Berne Appendix. Indeed, one of the limitations inherent in the Berne Appendix is its prohibition of exports from or publication of the licensed works outside a qualified state for subsequent importation and use within the latter jurisdiction.¹⁴⁸⁵ Hence, the Berne Appendix restricts a parallel importation of the materials produced under the license.¹⁴⁸⁶ An exception to the export is the limited case of government license that allows export of the copies to other state for use by its citizens residing therein.¹⁴⁸⁷ In spite of its similarities with the Doha Declaration in several aspects,¹⁴⁸⁸ the Berne Appendix still lacks a provision comparable to paragraph 6 of the Declaration or art.31*bis* of the TRIPs Agreement that facilitates production and parallel imports from outside an authorized state.¹⁴⁸⁹

Thus, developing countries such as Ethiopia that lack capable local publishers/translators would not stand to benefit from the Berne Appendix in its current form to meet the increasing demands for bulk access.¹⁴⁹⁰ In the meantime, Okediji suggests that “developing countries should seriously consider resort to compulsory licensing outside the framework of the Appendix to address bulk access for public interest goals.”¹⁴⁹¹ In order to take this advantage, the non-contractual or compulsory license scheme under Ethiopian copyright law needs to be responsive to the demands for domestic and imported learning materials.

¹⁴⁸⁵ Berne Appendix, art. IV (4) (a). Chon, “Intellectual property from Below,” *supra* note 50 at 831. Gervais, *TRIPs Agreement*, *supra* note 724 at 200. Goldstein & Hugenholtz, *supra* note 157 at 403; Okediji, “Sustainable Access,” *supra* note 721 at 165; Ricketson & Ginsburg (Vol. II), *supra* note 1352 at 949. This prohibition prevents a state from benefiting from the printing or reproduction facilities in other states.

¹⁴⁸⁶ Berne Appendix, *supra* note 439 art. IV (4)-(5). Okediji, “Sustainable Access” *supra* note 721 at 162 & 177-78.

¹⁴⁸⁷ Berne Appendix, *supra* note 439 at Article IV (4) & (5). Okediji, “Sustainable Access” *supra* note 721 at 165; Ricketson & Ginsburg (Vol. II), *supra* note 1352 at 951.

¹⁴⁸⁸ Okediji, “Sustainable Access,” *supra* note 721 at 162-64.

¹⁴⁸⁹ Gervais, *TRIPs Agreement*, *supra* note 724 at 399-400; Further, the reference to ‘predominantly’ in Art.31 (f) seems to allow some export. *Ibid* at 198. Correa, *Trade Related Aspects*, *supra* note 137 at 85-86 (discussing the issue of parallel imports and compulsory license in relation to patents). See TRIPs Agreement, 31*bis* as amended pursuant to paragraph 6 of the Doha declaration.

¹⁴⁹⁰ Silva, *supra* note 1470 at 590-98 & 616; See Chon, “Intellectual property from Below,” *supra* note 50 at 827-34 (explaining the factors that limit the effective use of the appendix).

¹⁴⁹¹ Okediji, “Sustainable Access,” *supra* note 721 at 168; Ricketson & Ginsburg (Vol. II), *supra* note 1352 at 958.

In particular, the prohibition of parallel importation should be removed to allow the printing and importation of the licensed works from abroad when found viable and appropriate. Otherwise, the potential of the licensing scheme will be undercut due to Ethiopia's unwise self-restraint upon its sovereign discretion to address its development needs. Critical for its tertiary education as a vital tool for human development, a bulk access to learning materials is imperative in Ethiopia in order to allow its educators and learners an 'access to multiple copies of copyrighted works at affordable prices.'¹⁴⁹²

6.4.7. Exceptions for Persons with Disabilities

As noted in Chapter Four, the adoption of the Marrakesh Treaty is a landmark achievement for persons with disabilities within the international copyright regime.¹⁴⁹³ Prior to the Treaty, neglected was the long-standing concern of the beneficiaries. In the observation of commentators and scholars, the ratification of the Marrakesh treaty is a significant step towards the realization of the human rights embodied in the UNCRPD.¹⁴⁹⁴ Since its adoption in 2007 and ratification in 2010, Ethiopia has been one of the contracting parties to the UNCRPD. In consequence, the Convention is integral to the national law of the country as per art.9 (4) of the FDRE Constitution.

Further, art.13 of the FDRE Constitution requires all government organs to respect, protect and enforce the rights enshrined in the FDRE Constitution. In turn, the rights are required to be interpreted in the light of the relevant human rights instruments ratified. For persons with disabilities, the UNCRPD is one such critical human rights instrument to guide the implementation of their constitutional and fundamental human rights on an equal basis with other citizens irrespective of their circumstances. Underpinned, *inter alia*, by the principle of non-discrimination and freedom of choice,

¹⁴⁹² See Okediji, "International Copyright System," *supra* note 51 at 15.

¹⁴⁹³ Helfer et al, *The World Blind Union Guide*, *supra* note 500 at 13-15; Land, *supra* note 642 at 548-49.

¹⁴⁹⁴ *Ibid*.

art. 24 of the UNCRPD stipulates for the right of persons with disabilities to equitable access to education for their human development.

In this respect, the UNCRPD requires States Parties to ‘ensure an inclusive education system at all levels and lifelong learning directed to: ‘[t]he full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity.’¹⁴⁹⁵ Further, the education system shall be directed to (a) the development of persons with disabilities of their personality, talents and creativity to the fullest potential, and (b) the enablement of their effective participation in a free society.¹⁴⁹⁶ To this end, states are required to ensure persons with disabilities an access to tertiary education without a discrimination and on equal basis with others.¹⁴⁹⁷ In order to facilitate their full and equal participation in education of all levels, sates shall take appropriate measures to facilitate the learning of Braille and the use of ‘appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.’¹⁴⁹⁸

Related to the issue of relevant flexibilities, art. 30(1) of the UNCRPD requires states to “take all appropriate measures to ensure that persons with disabilities ... [e]njoy access to cultural materials in accessible formats.” Moreover, art. 30(3) obligates states to “take all appropriate steps, (...) to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.” Thus, Ethiopia bears an international obligation to take ‘all appropriate measures’ to facilitate unimpeded access to learning materials in appropriate formats for the beneficiaries. In order to facilitate access to learning materials in

¹⁴⁹⁵ UNCRPD, *supra* note 502 at art.24 (1).

¹⁴⁹⁶ *Ibid.*

¹⁴⁹⁷ *Ibid* at art.24 (5).

¹⁴⁹⁸ *Ibid* at art.24 (3) & (4) *cum* art.9 (2) (d-h).

appropriate formats for the realization of the right to education and development, the incorporation of relevant flexibilities into the copyright law is one of the appropriate legislative measures. Nonetheless, this legislative measure has not been taken in Ethiopia.

Despite its large number of persons with disabilities, Ethiopia has not incorporated the relevant flexibilities in its copyright law. Its recent accession to the Marrakesh Treaty requires an immediate legislative amendment to the copyright law. Ethiopia's omission of relevant flexibilities from its recent copyright law amendment that took place in 2014—four years after its ratification of the UNCRPD—constitutes the country's failure to take 'appropriate measures.' It is clear that the adaptation right is critical for conversion of relevant copyrighted works into accessible formats for the blind, persons with visual impairments and print-disabilities. In the existing copyright law, except for an indispensable adaptation of a computer program, no explicit limitation has been imposed upon the adaptation right. This in itself can hamper the possible modification or adaptation of learning materials into accessible formats without an authorization.

Therefore, despite its human rights and constitutional obligations, Ethiopia has not incorporated exceptions or flexibilities related to persons with disabilities. As indicated in the UNCRPD, the incorporation of appropriate flexibilities to address disability issues is 'an integral part of relevant strategies of sustainable development.'¹⁴⁹⁹ It is undisputed that Ethiopia's legislative amendment to its copyright law is useful to both accommodate and integrate the L&Es under the Marrakesh Treaty into the copyright system. In the meantime, it should be noted that users can use Ethiopia's monistic approach to invoke the application of the provisions of the Treaty as a regime integral to the corpus of domestic law since its ratification. Nonetheless, the judicial practice is yet to embrace this avenue.

¹⁴⁹⁹ UNCRPD, *supra* note 502 at Preamble, para g.

6.4.8. Flexibilities Related to Anti-competitive Practices

The legal protection of copyright is intended, *inter alia*, to promote creative innovation through a free and fair competition. In principle, ‘promoting creative innovation and enhancing consumer welfare’ are central to the common objectives of copyright and competition (antitrust) systems.¹⁵⁰⁰ Given the exclusive nature of the economic rights of a right holder, the exploitation of the rights tends to restrain a free competition. In turn, unjustified restraint on free competition affects the social welfare intended to be advanced through the underpinning public interests. In particular, this is the case with the abusive exercise of the rights that amount to anti-competitive practices such as refusal to deal/license, undersupply of markets, excessive or price-fixing and other acts of abuse of market dominance.¹⁵⁰¹ As a matter of practice, nations use various mechanisms such as a compulsory license and price control to regulate the anti-competitive practices. To this effect, although it can be indicated in a copyright regime, this external regulatory mechanism is often provided in the competition or related laws. In the international copyright regime, art. 8(1) of the TRIPs Agreement contemplates the adoption of ‘measures necessary to promote public interests in sectors of vital importance’ for member’s socio-economic and technological development. Further, the WIPO Internet and the Marrakesh Treaties recognize the need for maintaining a balance between the rights of authors and the larger public interest such as education, scientific research and access to information within the ambit of the international copyright system.¹⁵⁰² Hence, advancing public interest remains an overarching objective.

¹⁵⁰⁰ Correa, *Trade Related Aspects*, *supra* note 137 at 403.

¹⁵⁰¹ *Ibid* at 399-404. See Goldstein & Hugenholtz, *supra* note 157 at 404-05. Okediji, “Sustainable Access” *supra* note 721 at 166-67.

¹⁵⁰² WCT, *supra* note 448 at Preamble, at para 5; WPPT, *supra* note 448 at Preamble, para 4; Marrakesh Treaty, Preamble, *supra* note 497 at para.9. See also Beijing Treaty, *supra* note 771 at Preamble, para 5.

From among a range of possible measures apt for maintaining appropriate balance, a regime of compulsory license can be taken to promote public interests.¹⁵⁰³ In the context of IP or technology transfer, states are allowed to take appropriate measures to prevent abuse of IPRs or a resort to anti-competitive practices as long as the measures are consistent with art.8 of the TRIPs Agreement.¹⁵⁰⁴ In particular, intended for ‘anti-competitive situations related to licensing agreements,’¹⁵⁰⁵ art.40 of the TRIPs Agreement also permits members to take corrective measures against the anti-competitive practices that constitute an abuse of IPRs and have an adverse effect on competition.¹⁵⁰⁶ Whether construed in the broader scope under art.8 or confined to ‘licensing practices or conditions’ under art. 40, the public interest consideration is thus central to the remedial measures intended to facilitate creative innovation and consumer welfare through affordable bulk access to the protected works.¹⁵⁰⁷

In Ethiopia, the existing copyright law does not address the issue of abuse of copyright or anti-competitive practices. Nonetheless, in its preamble, it does highlight the role of creative works to enhance cultural, social, economic, scientific and technological development. Further, as noted above, the constitutional provision that provides for copyright protection as a private property envisages the possible limitation to the property right when prescribed by a law or on grounds of public interests. In addition to copyright’s internal balance, competition law is thus a legal regime that is relevant to both facilitate and regulate the exclusive exploitation of copyright. In so doing, it serves the public interest through a fair competition and consumer protection. To this end, the Trade Competition and Consumers

¹⁵⁰³ Correa, *Trade Related Aspects*, *supra* note 137 at 318.

¹⁵⁰⁴ Okediji, “Sustainable Access,” *supra* note 721 at 167-68.

¹⁵⁰⁵ Correa, *Trade Related Aspects*, *supra* note 137 at 398-99. Gervais, *TRIPs Agreement*, *supra* note 724 at 433.

¹⁵⁰⁶ Correa, *Trade Related Aspects*, *supra* note 137 at 398-403. Gervais, *TRIPs Agreement*, *supra* note 724 at 433-34.

¹⁵⁰⁷ See Okediji, “Sustainable Access,” *supra* note 721 at 168. Okediji, “International Copyright System”, *supra* note 51 at 16-19 & 33-34.

Protection legislation prohibits an abuse of market dominance.¹⁵⁰⁸ In particular, the list of acts of market dominance includes refusal to deal and price fixing.¹⁵⁰⁹ In the same vein, prohibited are ‘anti-competitive agreements, practices and decisions’ that restrict competition or involve a direct or indirect price-fixing for a purchase or resale.¹⁵¹⁰

For the enforcement of the measures, the institutional regime is constituted of the Trade Competition and Consumers Protection Authority (TCCPA) and the Federal Appellate Tribunal (FAT).¹⁵¹¹ For instance, the Authority (in its first instance jurisdiction) and the FAT (through its appellate power of review) are both authorized to take corrective administrative and punitive measures to regulate the anti-competitive practices.¹⁵¹² It however remains unclear whether or not the administrative measures related to refusal to deal include the grant of a compulsory license in Ethiopia. As envisaged under the TRIPs Agreement and in particular for patent, it is noted that the issuance of a compulsory license is among the appropriate measures that can be taken to regulate anti-competitive practices.¹⁵¹³ In this regard, the practices in the US and EU confirm the long-established role of antitrust regime to serve public interests. In the international context, scholars note that the same practice can be extended to copyright as contemplated in the TRIPs Agreement.¹⁵¹⁴

For a contractual license sought from the CMS/O whose royalty scheme is subject to the approval of the EIPO, there would be limited grounds for an administrative measure related to a refusal to deal

¹⁵⁰⁸ *Trade Competition and Consumers Protection Proclamation No. 813/2013, Federal Negarit Gazette, 20th Year No.28, Addis Ababa, 21st March 2014, art.5(1) [Trade Competition and Consumers Protection Proc.No.813/2014].*

¹⁵⁰⁹ *Ibid* at art.5 (2) (c), (d), (f) & (h).

¹⁵¹⁰ *Ibid* at art.7 (1) & (2).

¹⁵¹¹ *Ibid* at art.27-35.

¹⁵¹² *Ibid* at art.32 & 33.

¹⁵¹³ Correa, *Trade Related Aspects*, *supra* note 137 at 399-404; Gervais, *TRIPs Agreement*, *supra* note 724 at 390-91.

¹⁵¹⁴ Okediji, “Sustainable Access” *supra* note 721 at 167-68; see generally Brett Frischmann & Dan Moylan, “The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and Its Application to Software” (2000) 15 BTLJ 865.

or price-fixing/discrimination. In turn, this tends to limit the instances for a resort to a compulsory license over the rights under the administration of the CMS/O. This still leaves the issue open for other rights that lie outside its administration. In the copyright law, the EIPO has the mandate to issue a compulsory license for reproduction, translation and broadcasting of a published work. It is noted that no specific justification is required although the public interest integral to copyright is implicit in the licensing scheme. Outside the copyright regime, one could still argue for a compulsory license on the grounds of public interest as an additional external limit on the exclusive rights. In this respect, the reference made under 32(2)(b) of the TCCP legislation stating ‘any other appropriate measure that enables to reinstate the victims’ competitive position’ is broader to encompass compulsory licensing as an appropriate measure to restore or remove the adverse effect of the anti-competitive practices.

Contingent on the existence of the anti-competitive practices, the authorization of a compulsory license as a corrective measure is thus grounded in the public interest considerations. Indeed, this measure would remain consistent with both the TRIPs Agreement and the FDRE Constitution as long as the required balance is maintained between the interests of the right holders and the public.¹⁵¹⁵

¹⁵¹⁵ See Gervais, *TRIPs Agreement*, *supra* note 216 at 434.

6.5. Conclusion

As reiterated time and again, both copyright and tertiary education are crucial for the realization of sustainable human development, *inter alia*, through the expansion of human capabilities. In Ethiopia, all the three—copyright, education and sustainable development—have both human rights and constitutional dimensions. Nevertheless, the intrinsic and instrumental roles of copyright and tertiary education for sustainable human development depend upon the existence of appropriate legal flexibilities that facilitate access to knowledge in general and learning materials in particular. As elaborated in-depth above, the quest for relevant legal flexibilities reveals the incorporation, *albeit* partial, of a set of general and specific flexibilities into Ethiopia's legal regimes that can be used to facilitate access to learning materials.

In addition to the broad framework of flexibilities inherent in the notion of sustainable development as human and constitutional right, there exist a number of general flexibilities with both human rights and constitutional dimensions. For instance, the constitutional public interest is a significant aspect of general flexibilities and underscores the need for the constitutional limitation to copyright as a private property. In the same vein, the public interest undergirds the role of copyright to advance the freedom of expression that constitutes an external constitutional constraint upon the former to serve as a ground for flexibilities. From the human rights dimensions, the need for a balance between education and authors' rights itself entails flexibilities to ensure their interdependence and complementarities for their realization. In addition, the subjective adequate standard of living suggested for author's right to material interests and the variance in its scope from the expansive scope of copyright offer another general aspect of legal flexibilities.

In the backdrop of the general legal flexibilities with constitutional and human rights dimensions, there are both general and specific copyright (-related) flexibilities. In spite of their incomplete incorporation, the general flexibilities derived from international copyright treaties include

the principle of idea/expression distinction, subject matters-related exclusion, conditions and terms of protection. In terms of the optional and scope of exclusive rights, a TRIPs-plus approach has been taken to waive the option, expand the scope and introduce new right that altogether constrain the available flexibilities and encroach upon the constitutional and human rights aspects. For instance, *unconditional and exclusive* rental right for all works, provision of resale right and introduction of an exclusive public lending right are all instances of the TRIPs-plus approach. Likewise, the law prescribes for a stringent set of enforcement measures, including an indiscriminate criminalization of all acts of infringement. Further, there exists no general rule of exception such as the three-step test.

From among the specific copyright flexibilities, narrow-scoped L&Es are adopted for private use, quotation, teaching, archives and libraries. In particular, a reproduction of published work is allowed for teaching and library exceptions to the exclusion of all acts of translation, distribution, communication to the public, performance and broadcast. Excluded altogether is a parallel importation. For lack of international exhaustion, the prohibition has a far-reaching implication to undercut the potential of the compulsory license allowed for reproduction, translation and broadcasting. In some cases, the implication goes further to undermine its role to regulate anticompetitive practices. Besides, the law is devoid of L&Es for persons with disabilities and a provision on regulation of TPMs.

In sum, Ethiopia's copyright law leaves out a number of legal flexibilities that are relevant to facilitate access to learning materials for tertiary education. This ill-advised approach calls for an urgent reform to rethink the approach and reintegrate appropriate flexibilities suited to reinforce the complementing roles of copyright and tertiary education for enhanced human development.

Chapter VII: Rethinking Copyright and Tertiary Education for Human Development: Reintegration of Flexibilities

7.1. Introduction

It has been argued that both copyright and tertiary education are instrumental for human development through the enlargement of creative and learning capabilities. In particular, the production and dissemination of knowledge are central to the roles of copyright and tertiary education. In furtherance of their roles, both regimes are interdependent for access to the knowledge in facilitating sustainable creative innovation, formation of human capital and expansion of human capabilities. Nonetheless, the efficacy of their roles and complementarities to advance human development depend upon the existence of development-oriented, coherent and well-aligned policy, legal and institutional frameworks. It has been shown that there exist significant gaps and incoherencies between the existing policy, legal and institutional regimes of copyright and tertiary education. In the same vein, there is lack of a proper orientation towards sustainable human development. Against this backdrop, the major hypothesis of this thesis and which has emerged as the central finding is an incomplete incorporation of relevant copyright-related flexibilities. In consequence, access to learning materials is restricted for want of appropriate flexibilities.

Implicating far-reaching ramifications, all these gaps operate to undermine the roles of copyright and tertiary education to promote the sustainable human development. It is emphasized that the integration of appropriate flexibilities is crucial to facilitate a coherent alignment between copyright and tertiary education in order to strengthen their complementarities for human development. Thus, this chapter underscores the need to rethink the existing regimes and explore approaches for the reintegration of relevant flexibilities essential for human development. To this end, the CA-anchored human development framework is regarded as a more appropriate avenue to undergird a development-oriented users' rights approach for the integration of various copyright-related flexibilities.

7.2. Approaches to Reintegration of Appropriate Flexibilities

As explored in this thesis, the existing international copyright regime provides for or permits various copyright and related flexibilities for educational and creative innovation purposes. Furthermore, the treaties that constitute the international copyright regime require the application of the three-step test to guide the domestic utilization of the flexibilities. In this respect, three major approaches can be gleaned from the relevant scholarship and jurisprudence on copyright flexibilities. In terms of their orientation or emphasis, the approaches can be referred to as defensive, development policy tool and users' right approach.

7.2.1. *The Traditional Defensive Approach*

Given its explicit right-holders-oriented feature, the existing international copyright system underscores the primacy of the exclusive rights of an author/right holder.¹⁵¹⁶ As a result, the interests of the author/right-holder are both framed and articulated as exclusive rights. In contrast, the interests of users or the public at large are construed as L&Es with strings of conditions attached thereto. That is, despite their central role, the flexibilities are not regarded as indispensable and integral elements of the existing global copyright system.¹⁵¹⁷ In effect, the flexibilities are often considered as mere grounds of defense to be raised against the infringement claims of authors/right holders. For instance, a fair use or a fair dealing is traditionally viewed as a ground of affirmative defense to a copyright infringement.¹⁵¹⁸ Designed to safeguard the primacy of authors'/right-holders' exclusive rights, the defensive approach deprives L&Es of the legal status to be asserted as users' rights on an equal footing with the exclusive

¹⁵¹⁶ Okediji, "Reframing International Copyright," *supra* note 154 at 443-45 [Okediji, "Reframing International Copyright"]; ---"International Copyright System," *supra* note 51 at 7-8&12.

¹⁵¹⁷ See Okediji, "International Copyright System," *supra* note 51 at ix, xii & 6-9.

¹⁵¹⁸ Vaver "Copyright Defenses," *supra* note 68 at 667.

rights. As Elkin-Koren opines, “this narrow view overlooks the users’ critical role in serving the goals of copyright law and may therefore ultimately lead to inefficient outcomes.”¹⁵¹⁹

Further, the restrictive/ narrow approach contradicts the very notion of the balance integral to a copyright system.¹⁵²⁰ In the words of Vaver, “balancing a right against an exception is either nonsensical or starts off with a linguistic bias against the exception.”¹⁵²¹ In fact, these conceptual and functional incongruities are often overlooked to emphasize the expansive exclusive rights. The L&Es are thus relegated and subject to the traditional defensive approach embedded in the international copyright system. This imbalanced and restrictive approach has long been critiqued and found inapt for advancing human development.¹⁵²² Inclined towards excessive protection, the approach is not suitable to facilitate a reasonable access to creative works for the promotion of a sustainable creative innovation and tertiary education.

7.2.2. The Development Policy Tools Approach

Seen from the perspective of development, a broader development-oriented approach is proposed to underscore the role of various copyright flexibilities as a development policy tool for development objectives. In its breadth, this approach draws on the broader notion of flexibilities that encompass rights, measures and options as embodied in the existing international legal regimes.¹⁵²³ Noting their potential for human development, Okediji highlights the need to reframe the international copyright policy and its flexibilities as a development policy tool.¹⁵²⁴ It is believed that this approach

¹⁵¹⁹ Niva Elkin-Koren, “Copyright in a Digital Ecosystem: A User Right Approach,” in Okediji, ed, *Copyright Law in an Age of Limitations and Exceptions*, *supra* note 154 at 134[Elkin-Koren, “Copyright in a Digital Ecosystem”].

¹⁵²⁰ David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 171 [Vaver, *Copyright Law*]. As Vaver puts it, “the policy of copyright policy has always been to balance competing owner and user interests according to both contemporary exigencies and transcendental imperatives such as free speech and free trade.”

¹⁵²¹ Vaver, “Copyright Defenses,” *supra* note 68 at 669.

¹⁵²² See Okediji, “Reframing International Copyright” *supra* note 154 at 447-60

¹⁵²³ See Deere, *The Implementation Game*, *supra* note 162 at 68.

¹⁵²⁴ See generally Okediji, “Reframing International Copyright” *supra* note 154.

would allow developing countries a better policy space to design or reframe a set of copyright flexibilities suited to their domestic development needs.¹⁵²⁵

In a broader context, Correa underlines the importance of the policy space reserved under the TRIPs Agreement for members to exploit it for development needs.¹⁵²⁶ For example, members are permitted to “adopt measures necessary (...) to promote the public interest in sectors of vital importance to their socio-economic and technological development” as relevant flexibilities for development objectives at a national level.¹⁵²⁷ In other words, the recognition of members’ discretion to adopt the necessary measures or flexibilities underlines the role of the ‘wobble room’ for sustainable human development. Exploring the interpretative significance of art.7 &8 of the TRIPs Agreement, Yu states that the Agreement “includes a number of flexibilities to facilitate development and to protect the public interest.”¹⁵²⁸ From the substantive rules, the three-step test is considered a guiding rule of specific flexibilities that “allows national law makers to satisfy domestic social, cultural, and economic needs.”¹⁵²⁹ For some commentators, the three- step test is “intended to serve as a flexible balancing tool for nations to address their socio-economic development objectives.”¹⁵³⁰ In the application of the test, the approach is considered useful to take into account relevant human rights obligations.¹⁵³¹

Setting aside the debate on the test, central to the development policy approach is the underpinning malleable notion of public interests that guides the utilization of flexibilities to meet

¹⁵²⁵ *Ibid* at 475 & 482-89.

¹⁵²⁶ See Correa, *Trade Related Aspects*, *supra* note 137 at 104-107.

¹⁵²⁷ *Ibid*. TRIPs Agreement, *supra* note 163 at Preamble at paras 6&7 and Art. 8.

¹⁵²⁸ Yu, “The Objectives and Principles,” *supra* note 160 at 981; Yu, “The International Enclosure Movement,” *supra* note 682 at 863-66; Yu, “TRIPS and Its Discontents,” *supra* note 158 at 387-401.

¹⁵²⁹ Senftleben, “The International Three-Step Test,” *supra* note 914 at 67.

¹⁵³⁰ Geiger, Gervais & Senftleben, “The Three-Step-Test Revisited,” *supra* note 165 at 582.

¹⁵³¹ *Ibid* at 601-05.

development needs.¹⁵³² Given the international recognition of the public interest goals of copyright, Okediji asserts that “[a]n international fair use doctrine would promote and preserve the public interest as an integral component of the post-TRIPS copyright regime”¹⁵³³ Nonetheless, most developing and LDCs have not made an effective use of the relevant flexibilities.¹⁵³⁴ The major reasons for the failure can be attributed to an overbearing pressure of developed nations, the threat of trade sanctions, weak institutions, the WIPO’s right-holders-centric technical assistance, and the proliferating FTAs.¹⁵³⁵ Hence, the LDCs are often less equipped to benefit from the limited development-oriented flexibilities embedded in the international copyright regime.

7.2.3. The Emerging Users’ Rights Approach

Still undergoing transformation, the emerging users’ rights approach reframes copyright flexibilities as users’ rights. In Elkin-Koren’s observation, “[a] user-rights approach holds that permissible uses under copyright law should be articulated and treated as rights.”¹⁵³⁶ In spite of its recent prominence, the conception of the approach traces back to Layman Patterson & Stanley Lindberg’s seminal contribution that claims the copyright system itself as a regime of users’ right.¹⁵³⁷ In

¹⁵³² Okediji, “Reframing International Copyright,” *supra* note 154 at 440-47 & 494-95; Okediji, “Toward an International Fair Use Doctrine,” *supra* note 868 at 87-90.

¹⁵³³ Okediji, “Toward an International Fair Use Doctrine” *supra* note 868 at 90.

¹⁵³⁴ Okediji, “Reframing International Copyright” *supra* note 154 at 436, 439, 475&481-82. The reasons relate to (a) a misalignment between copyright law and domestic institutional environment, and (b) the failure to adopt a strategic and development-oriented policy measures that facilitate access to knowledge goods. *Ibid.*

¹⁵³⁵ See Okediji, “Reframing International Copyright” *supra* note 154 at 436-40; Okediji, “International Copyright system,” *supra* note 51 at 20 & 30-31; see Carolyn Deer, *Implementation Game: The TRIPs Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford: Oxford University Press, 2009) at 196-232 & 303-20.

¹⁵³⁶ Elkin-Koren, “Copyright in a Digital Ecosystem” *supra* note 1519 at 132. For courts and commentators, “user rights” are often referred to “as an all-encompassing category, loosely describing the public domain, exceptions and limitations and other permissible uses.” *Ibid.* at 158.

¹⁵³⁷ See Layman Patterson & Stanley Lindberg, *The Nature of Copyright: The Law of Users’ Rights* (Athens & London: The University of Georgia Press, 1991). Elkin-Koren, “Copyright in a Digital Ecosystem” *supra* note 1519 at 155-56.

the context of L&Es, Vaver's articulation of the notion of users' right was instrumental to shape the recent copyright jurisprudence of Canada.¹⁵³⁸

In his critique of the traditional defensive approach to L&Es as mere 'loopholes,' Vaver underlined the need for a 'fair and balanced reading' of owners and users' rights.¹⁵³⁹ The subsequent judicial embrace of this view led to the articulation and reification of users' right in the *CHH v. Law Society of Upper Canada*.¹⁵⁴⁰ In its ruling that has become a watershed in the jurisprudence of users' right, the Supreme Court of Canada (SCC) stated: "the fair dealing exception, like other exceptions in the Copyright Act, is a user's right."¹⁵⁴¹ In reiterating a fair dealing as an integral element of copyright system, the Court has laid down a principle that underscores the L&Es as users' rights on an equal footing with the exclusive rights.¹⁵⁴² Indeed, it is a significant departure from the predominant right-holder-centered perspective.¹⁵⁴³ The approach is considered vital to underline the active creative role of users to promote the objectives of copyright.¹⁵⁴⁴ In so doing, the users' rights approach calls for a due and balanced consideration of "the rights and duties of both users and authors."¹⁵⁴⁵ For both interests,

¹⁵³⁸ Vaver, *Copyright Law*, *supra* note 1520 at 171; See *Alberta v. Canadian Copyright Licensing Agency*, [2012] 2 S.C.R. 345 (Can.); *Society of Composers, Authors and Music Publishers of Can. v. Bell Can.*, [2012] 2 S.C.R. 326 (Can.). See generally Michael Geist, ed, *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Toronto: Irwin Law, 2013).

¹⁵³⁹ Vaver, *Copyright Law*, *supra* note 1520 at 171.

¹⁵⁴⁰ See *CCH Canadian v. Law Society of Upper Canada*, *supra* note 1413 at paras. 147-150. See also Teresa Scassa, "Recalibrating Copyright Law?: A Comment on the Supreme Court of Canada's Decision in *CC Canadian Limited et al v. Law Society of Upper Canada*" (2004) 3:2 CJLT 89 at 93-98[Scassa, "Recalibrating Copyright Law?"].

¹⁵⁴¹ *CCH Canadian Ltd v. The Law Society of Upper Canada*, *supra* note 1413 at para 48.

¹⁵⁴² *Ibid.* See generally Teresa Scassa, "Users' Rights in the Balance: Recent Developments in Copyright Law at the Supreme Court of Canada", (2005) 22 CIPR 133.

¹⁵⁴³ While appraising the 'salutary effect' of the Canadian approach and the SCC's positive step in support of user's rights, Scassa opines that "the new Canadian orientation may be too little, too late in copyright larger scheme of where copyright law is heading." Scassa, *supra* note 1540 at 89 & 97. In this regard, the major reasons she points out are Canada's international obligation under copyright treaties and the consequent constraining impact of legislative measures. *Ibid* at 89 & 97-98.

¹⁵⁴⁴ Elkin-Koren, "Copyright in a Digital Ecosystem," *supra* note 1519 at 132 & 134-135.

¹⁵⁴⁵ *Ibid* at 132,

this marks a shift in the baseline for the required balance from the hitherto author's right to the creative process itself.¹⁵⁴⁶

In a case related to access to learning materials for the purpose of education, the SCC has re-emphasized the approach in the *Alberta v. Canadian Copyright Licensing Agency*.¹⁵⁴⁷ In essence, the case involved teachers' reproduction of educational material for classroom use. In its ruling, the Court underscored the users-right based nature of the claim and referred to a fair dealing as a "user's right" that can be used for allowable purpose.¹⁵⁴⁸ A similar trend is gathering a momentum in other jurisdictions.¹⁵⁴⁹ From among the recent copyright treaties, the Marrakesh Treaty is the first international legal instrument to embrace this approach.¹⁵⁵⁰ Above all, the approach has drawn a significant attention in the recent legal scholarship.¹⁵⁵¹

Further, the approach is considered useful to reframe users' right in the context of human rights.¹⁵⁵² From a human rights perspective, the approach can be used to maintain a balance between the interest of the public and authors' rights to protection of his/her material and moral interests. In the balancing exercise, the human rights justifications might be invoked to underpin users' rights in the context of the right to culture, the right to benefits of scientific progress and its applications, and the

¹⁵⁴⁶ *Ibid* at 132 & 143-48.

¹⁵⁴⁷ *Alberta v. Canadian Copyright Licensing Agency*, *supra* note 1538.

¹⁵⁴⁸ *Ibid* at para 360; Craig, "Globalizing User Rights-Talk," *supra* note 944 at 24-25.

¹⁵⁴⁹ Craig, "Globalizing User Rights-Talk" *supra* note 944 at 27-37; Elkin-Koren, "Copyright in a Digital Ecosystem," *supra* note 1519 at 132.

¹⁵⁵⁰ Margaret Ann Wilkinson, "International Copyright," *supra* note 498 at 107-27. In the words of Wilkinson, "there is no question that Marrakesh [Treaty] is historic, because it is the first international treaty focused on user's rights." *Ibid* at 118.

¹⁵⁵¹ *Ibid*. See generally, e.g., Patterson & Lindberg, *The Nature of Copyright*, *supra* note 1537; Vaver, "Copyright Defenses," *supra* note 68; David Vaver, "User Rights" (2013) 25 *Intellectual Property Journal* 105. Craig, "Globalizing User Rights-Talk" *supra* note 944; Elkin-Koren, "Copyright in the Digital Ecosystem," *supra* note 1519. Pascale Chapdelaine, *Copyright Users Rights: Contracts and the Erosion of Property* (Oxford: Oxford University Press, 2017); Abraham Drassinower, "Taking User Rights Seriously," in Geist, ed, *In the Public Interest*, *supra* note 1401, 462.

¹⁵⁵² Vaver, "Copyright Defenses" *supra* note 68 at 672.

freedom indispensable for scientific research and creative activities.¹⁵⁵³ In fact, art. 15 of the ICESCR provides for authors' rights on a par with the aforementioned rights. Besides, the intended general balance among the human rights within the Covenant also brings into the equation the right to education in the context of affordable access to learning materials.¹⁵⁵⁴ Hence, the approach is important to draw into the balancing equilibrium pertinent human rights considerations.

Although the users-rights approach has garnered a significant traction, scholars also caution against the 'double-edged effect' of the approach and its indeterminate nature.¹⁵⁵⁵ The usual critiques of rights aside,¹⁵⁵⁶ two major reasons are worth mentioning here. First, users-rights approach tends to create two competing individual rights that might reinforce the owner-centric rights-based copyright regime.¹⁵⁵⁷ In Craig's observation, this approach might result in its legitimation of the entrenched authors' rights as a baseline for balancing.¹⁵⁵⁸ In effect, "the concern is that the judicial embrace of user rights will actually backfire to slow our progress towards a fairer copyright regime."¹⁵⁵⁹ From a human

¹⁵⁵³ ICESCR, *supra* note 8 at art.15(1) (a & b); UDHR, *supra* note 7 at art.27(1); *CESCR General Comment No.17*, *supra* note 49 at para 4.

¹⁵⁵⁴ *CESCR General Comment No.17*, *supra* note 49 at para 35; see Yu, "Reconceptualizing Intellectual Property," *supra* note 647 at 1071-74; Yu, "Challenges to the Development of a Human-Rights Framework for Intellectual Property," in Paul Torremans, *Intellectual Property and Human Rights*, *supra* note at 46[Yu, "Challenges"]; Helfer, "Toward a Human Rights Framework," *supra* note 640 at 996 (pointing out the need for balancing with other rights recognized in the ICESCR as required.)

¹⁵⁵⁵ Craig, "Globalizing User Rights-Talk" *supra* note 944 at 42-73.

¹⁵⁵⁶ *Ibid* at 53-64 (explaining the various critiques based critical legal studies). See Mark Tushnet, "The Critique of Rights," (1994) 47:1 Southern Methodist University Law Review 23-34; Mark Tushnet, "An Essay on Rights," (1984) 62:8 Texas Law Review 1363-1403; Duncan Kennedy, "The Critique of Rights in Critical Legal Studies," in Wendy Brown & Janet Halley, eds., *Left Legalism/ Left Critique* (Durham: Duke University Press, 2002) 178-228.

¹⁵⁵⁷ Craig, "Globalizing User Rights-Talk" *supra* note 944 at 53.

¹⁵⁵⁸ *Ibid* at 62. As Craig notes, "the claim that users' rights are duly recognized within the copyright system will produce "a narrative of legitimation," a language for concluding that the system is fair, objective and unbiased." [footnote omitted]. *Ibid*.

¹⁵⁵⁹ *Ibid*.

rights perspective, a matter of critical concern is corporations' abusive assertion of human rights.¹⁵⁶⁰

Corporation's claim of this sort seems to emerge in the recent jurisprudence in the EU.¹⁵⁶¹

Second, the approach's apparent reduction of the public interest goals into individual claims not only overlooks the overlapping role of creators and users, but also encroaches upon policy room for a flexible public interest.¹⁵⁶² In view of these drawbacks, Craig notes that "[t]he reliance on rights rhetoric therefore threatens to impoverish our discussion around the public interest and the social values at stake in the copyright context."¹⁵⁶³ From its inception, the judicial articulation of users' right has however been made within the broader public interest objectives.¹⁵⁶⁴ In particular, users' rights are regarded as *a means* or an 'essential part' in the furtherance of the public interest objectives of copyright.¹⁵⁶⁵ Noting its possible limitations, a strategic use of users-rights approach along with the development policy approach can serve as powerful tool to counter the effect of the ratchet up in the copyright regime.¹⁵⁶⁶ For the concern related to a human rights-based corporate claim, worth reminding is the CESCR's categorical rejection of such a claim. In its General Comment No.17, the Committee underscored IPRs as *a means* of providing incentives for creative innovation.¹⁵⁶⁷

¹⁵⁶⁰ See Yu, "Challenges" *supra* note 1554 at 84-91.

¹⁵⁶¹ *Anheuser-Busch, Inc. v. Portugal*, [2007] ECHR 73049/01; Laurence Helfer, "The New Frontier? Intellectual Property and European Court of Human Rights 2008 49: Harv Intl LJ 1-52[Helfer, The New Frontier].

¹⁵⁶² Craig, "Globalizing User Rights-Talk" *supra* note 944 at 50-51 & 71-73; Helfer, "Toward a Human Rights Framework" *supra* note 640 at 994-97. In his observation of the multiple test for a restriction on author's human rights, Helfer states that the test is "more constraining than the now ubiquitous 'three-step test' used to assess the treaty-compatibility of exceptions and limitations in national copyright and patent laws." *Ibid* at 994.

¹⁵⁶³ Craig, "Globalizing User Rights-Talk" *supra* note 944 at 62.

¹⁵⁶⁴ *Ibid* at 52.

¹⁵⁶⁵ *Ibid*. In emphasizing the role of copyright for promoting public interest, the Supreme Court of Canada has reiterated its stance on users' rights as "an essential part of furthering the public interest objectives of the Copyright Act." *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, [2012] 2 S.C.R. 326, paras. 9-11 (Can.)

¹⁵⁶⁶ See Craig, "Globalizing User Rights-Talk" *supra* note 944 at 64-70 & 72-73.

¹⁵⁶⁷ *CESR General Comment No. 17*, *supra* note 49 at para 1&2. As the Committee has observed, "intellectual property rights are first and foremost a *means* by which States seek to provide incentives for inventiveness and creativity . . . for the benefit of society as a whole (emphasis added)." *Ibid* at para 1. Yu, "Challenges" *supra* note 1554 at 85.

Even within the human rights regime, there is an implicit room in the General Comment No.17 that can augment the flexibilities. Pertinent in this regard is the ESCR’s articulation of the purpose of material interests of an individual author to safeguard an *adequate standard of living*—a notion that in itself is flexible to determine.¹⁵⁶⁸ This line of interpretation is significant as it rejects the overemphasis on the exclusive economic rights driven by the neoliberal economic theories and restores the necessary balance. As noted by Gervais, taking this “human rights approach brings values back into the [copyright] system.”¹⁵⁶⁹ In effect, this human rights approach to the flexibilities would accommodate the underpinning utilitarian and natural rights justifications for both copyright and human rights to complement each other.¹⁵⁷⁰

To this end, the emerging users’-rights-approach is instrumental for its rhetorical and normative significance.¹⁵⁷¹ Encapsulated in the language of ‘users’ right, the approach allows users to invoke the rights against others, including a copyright holder.¹⁵⁷² That is, a due recognition of users’ right bestows upon users the privilege to vindicate copyright flexibilities as enforceable claims against the right holders. As a result, the latter will be obligated to refrain from encroaching upon the flexibilities.¹⁵⁷³ For instance, “[c]onceptualized as a right, fair dealing establishes a corresponding duty on behalf of the owner to honor the user’s right.”¹⁵⁷⁴ From a human rights perspective, Vaver opines that “[e]quating user rights with human rights would certainly help transform users’ rights beyond mere defenses and give them substantive content.”¹⁵⁷⁵

¹⁵⁶⁸ *CESCR General Comment No.17*, *supra* note 49 at para 2. Yu, “Reconceptualizing Intellectual Property,” *supra* note 647 at 1081-90.

¹⁵⁶⁹ Gervais, “Intellectual Property and Human Rights,” *supra* note 897 at 15.

¹⁵⁷⁰ *Ibid* at 13-23.

¹⁵⁷¹ Craig, “Globalizing User Rights-Talk” *supra* note 944 at 56-58 & 71-72.

¹⁵⁷² Craig, “Digital Locks,” *supra* note 1400 at 511.

¹⁵⁷³ *Ibid*.

¹⁵⁷⁴ *Ibid*.

¹⁵⁷⁵ Vaver, “Copyright Defenses” *supra* note 68 at 672.

In highlighting its significance at a global level, Craig also notes that “[t]he international recognition of ‘users rights,’ it seems reasonable to assert, might provide a more reliable shield for users against the incursion of copyright.”¹⁵⁷⁶ In spite of its limitations, the users right approach has thus the potential to facilitate a better access to copyrighted learning materials. As Craig cautiously notes, “[u]ser rights may still be the most effective tool at our disposal to advance the interests of users of protected works and the public in general in the face of the powerful rights-based claims of authors and corporate owners.”¹⁵⁷⁷ Nevertheless, as Craig rightly observes, it is better to emphasize “not whether but how the language of the rights will be used.”¹⁵⁷⁸ Hence, a more appropriate approach is needed to place it in a broader framework to harness its rhetorical potential for human development.

7.2.4. The CA/Human Development Approach

It is noted that both development policy and users-rights approaches have their own merits and demerits. Yet, advancing public interest constitutes the common goal of the approaches.¹⁵⁷⁹ In Craig’s observation, “the stated objectives of our copyright system require a teleological lens.”¹⁵⁸⁰ In contrast, “claims to right focus on origins and present-day entitlements”¹⁵⁸¹ In spite of its limited focus, the approach has a ‘protective function of [safe]guarding individuals [and] their entitlements’ to rights.¹⁵⁸² That said, the balancing mechanism grounded in the users-rights approach is not flexible enough to accommodate a development-oriented objective of copyright to advance a broader public interest.¹⁵⁸³ In

¹⁵⁷⁶ Craig, “Globalizing User Rights-Talk” *supra* note 944 at 41.

¹⁵⁷⁷ *Ibid* at 72.

¹⁵⁷⁸ *Ibid*.

¹⁵⁷⁹ See Okediji, “Reframing International Copyright” *supra* note 154 at 440-47 & 472-79; Craig, “Globalizing User Rights-Talk” *supra* note 944 at 52.

¹⁵⁸⁰ Craig, “Globalizing User Rights-Talk” *supra* note 944 at 63

¹⁵⁸¹ *Ibid* at 63.

¹⁵⁸² Carys Craig, “Technological Neutrality: Recalibrating Copyright in the Information Age” (2016) 17 *Theor Inq L* 601 at 626[Craig, “Technological Neutrality”].

¹⁵⁸³ *Ibid* at 627; Craig, “Globalizing User Rights-Talk” *supra* note 944 at 50.

harnessing its strategic rhetorical force, one would suggest placing the users-rights approach within the more flexible development policy approach. In its framing, the latter is more anchored in a broader public interest for sustainable creative innovation.¹⁵⁸⁴ Further, the strategic combination of the approaches should be oriented towards the rich goals of human development.

Building upon the underpinning public interests, the CA offers a better framework to accommodate both development policy tools and users-right's perspectives. Indeed, as its recent articulation affirms,¹⁵⁸⁵the development policy approach dovetails with the CA-driven human development.¹⁵⁸⁶ In the same vein, the users-rights approach can serve as “a particular institutional and rhetorical means”¹⁵⁸⁷ for the advancement of basic human or social values such as creative innovation and education.¹⁵⁸⁸ In rethinking the objective of copyright for the promotion of sustainable human development, the CA provides a sufficient flexible room to mediate and direct the perspectives towards their common ends—promoting public interest. For the desired policy and legal reform, a human development perspective offers a robust normative grounding to reframe copyright and related flexibilities in terms of human capabilities.

In order to advance human development, it is thus vital to reframe the users-rights and related general flexibilities as users' freedoms or human capabilities. As Elkin-Koren notes, “[u]nderstanding users rights as a matter of freedom (...) may strengthen the theoretical basis for user rights.”¹⁵⁸⁹ In this respect, the capabilities are understood as individual's creative freedoms to access and use the relevant

¹⁵⁸⁴ See Craig, “Technological Neutrality” *supra* note 1582 at 626; Okediji, “Reframing International Copyright” *supra* note 154 at 440-47&482-89.

¹⁵⁸⁵ See generally Okediji, “Reframing International Copyright” *supra* note 154; Okediji, “The Limits of International Copyright,” *supra* note 188.

¹⁵⁸⁶ See Okedjiji, “Reframing International Copyright” *supra* note 154 at 441 & 494-95.

¹⁵⁸⁷ For instance, Jennifer Nedelsky notes rights as “a particular institutional and rhetorical means of expressing, contesting, and implementing . . . values.” Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2011) at 238 & 241.

¹⁵⁸⁸ Craig, “Technological Neutrality” *supra* note 1582 at 627-29. For Nedelsky, value means “any of the big abstractions used to articulate what a given society sees as essential to humanity or to the good life for its members.” Nedelsky, *supra* note 1587 at 241 & 246.

¹⁵⁸⁹ Elkin-Koren, “Copyright in the Digital Ecosystem” *supra* note 1519 at 168.

knowledge for individual and collective human development.¹⁵⁹⁰ Due to its multifaceted nature to serve as a policy and normative tool to balance author's and users' interests, the CA is useful to inform flexibilities whether framed as public policy goals or rights grounded in human rights norms.¹⁵⁹¹

In this regard, worth noting is the existence of a conceptual overlap between CA and human rights as well as their potential to complement each other.¹⁵⁹² Indeed, the HDR (2000) has long underscored the conceptual and functional complementarities between human rights and human development.¹⁵⁹³ As Nussbaum points out, “[c]apabilities can supplement the language of rights in clarifying the basic concept of human rights, by emphasizing the material and social aspect of all rights and the need for government action to protect and secure all rights.”¹⁵⁹⁴ In the same vein, “[h]uman rights makes clear that the idea of capabilities is not an optional entitlement, but an urgent demand that should not be ignored nor compromised in pursuit of other objectives such as expansion of aggregate wealth.”¹⁵⁹⁵

Hence, “[c]apabilities are complementary to and augment, rather than competing with, human rights.”¹⁵⁹⁶ It is noted that ‘a more integrated approach can thus bring significant rewards’ for the advancement of human development.¹⁵⁹⁷ In our case, a human development perspective will allow the integration of the users rights and the development policy tool to enlarge users’ opportunities for access to, creation, and dissemination, of knowledge. As Benkler notes, “the freedom to use basic resources

¹⁵⁹⁰ Okediji, “Reframing International Copyright” *supra* note 154 at 440.

¹⁵⁹¹ *Ibid* at 440-47.

¹⁵⁹² Helfer & Austin, *Human Rights and Intellectual Property*, *supra* note 33 at 211.

¹⁵⁹³ UNDP, *Human Development Reports (2000)*, *supra* note 561 at 19-26. See generally Sakiko Fakuda-Parr, “The Metrics of Human Rights: Complementarities of the Human Development and Capabilities Approach” (2011) 12:1 *Journal of Human Development and Capabilities* 73-89.

¹⁵⁹⁴ Nussbaum, “Capabilities, Entitlements, Rights,” *supra* note 422 at 26.

¹⁵⁹⁵ *Ibid*.

¹⁵⁹⁶ *Ibid*.

¹⁵⁹⁷ UNDP, *Human Development Reports (2000)*, *supra* note 561 at 19.

[such as knowledge] and capabilities allows an improved participation in the production of information and information-dependent components of human development.”¹⁵⁹⁸

Grounded in the public interests,¹⁵⁹⁹the integration of international copyright and related flexibilities should thus be directed towards enhancing individual’s creative freedoms to access and use the creative works for education and creative innovation. In sum, a human development lens offers a broader perspective to evaluate or analyze the instrumental role of copyright and its flexibilities to promote sustainable human development. Further, this human-centric development approach is useful to guide appropriate policy and legal reforms to redirect the objectives of copyright and tertiary education towards sustainable human development. Likewise, the CA/HDA brings together the relevant human rights and constitutional dimensions to inform the (re)incorporation and application of copyright flexibilities for enhanced access to learning materials.

7.3. Rethinking the Policy, Legal and Institutional Regimes

As noted in Chapter Five, copyright and tertiary education in Ethiopia tend to operate in isolation from each other. In spite of their potential complementarities and instrumental roles for enhancement of human capabilities, both are neither well aligned nor oriented towards human development. As a testament to this mismatch, gaps and incoherencies are evident from the policy, legal and institutional frameworks of copyright and tertiary education in Ethiopia. In the same vein, there exist gaps between the respective regimes and the national development objectives. Economic growth being the overriding national focus, the development policy objectives themselves are not sufficiently oriented towards a sustainable human development.

For the incorporation of appropriate flexibilities and their effective roles, it is vital to rethink the existing regimes and re-establish coherence in the policy, legal and institutional frameworks of

¹⁵⁹⁸ Benkler, *The Wealth of Networks*, *supra* note 4 at 14.

¹⁵⁹⁹ Okediji, “Reframing International Copyright” *supra* note 154 at 440-47. Okediji, however, observes the expansion of the international copyright’s protection without ‘any overarching theory of an international public interest.’ *Ibid* at 444-45.

copyright and tertiary education. A strategic shift in the development orientation and creation of coherence between the respective regimes are essential to strengthen their complementarities and reorient them towards sustainable human development. For its rich normative and evaluative significance, the framework of the CA should be used for appropriate policy, legal and institutional reforms to advance sustainable human development.

7.3.1. Policy Re-Orientation and Coherence

As explained in this thesis, the copyright system in Ethiopia lacks a comprehensive policy of its own. Even the tangential references made to copyright in the pertinent policy regimes are neither consistent nor aligned with the appropriate constitutional provisions of national policy objectives. Further, there is a similar misfit or incoherence between copyright's intended objective and its relevant substantive content. The perusal of the copyright law unveils the gap between its substantive provisions and the intended role of creative works for, *inter alia*, scientific, technological and cultural development.¹⁶⁰⁰ That is, the substantive provisions are not directed towards the stated aspects of development.

In effect, all these policy vacuums, incoherencies and fragmentations call for an integrative formulation of a comprehensive and coherent policy framework to promote creative innovation and an equitable access thereto. As emphasized in this thesis, both objectives are integral to a balanced copyright system. For the achievement of the objectives, vital are the facilitative role and legislative incorporation of appropriate copyright flexibilities. In formulating the policy, Ethiopia should take a CA-driven human development perspective, and formulate a robust and coherent policy. In so doing, its

¹⁶⁰⁰ See *Copyright Proc. No.410/2004*, *supra* note 136 at Preamble & the substantive provisions with restrictive exceptions.

central focus should be promoting the creation and dissemination of creative works as essential components of human capabilities.¹⁶⁰¹ To this end, the overarching policy objective of copyright should envision to ‘maximize the development of human [creative innovation]’¹⁶⁰² through enhanced freedoms.

In this regard, CA is a useful normative framework to both promote and balance author’s opportunities or freedoms to create and users’ opportunities to access and learn from the creative works. In taking such a broad and multidimensional perspective, the policy framework can be grounded in the constitutional policy development objectives to promote technological, socio-economic and cultural development. Setting human development— ‘human flourishing in its fullest sense’¹⁶⁰³—as its ultimate objective, the policy framework should build upon insights from creators and users as well as other stakeholders through a democratic, participatory and transparent process of policy formulation.

Within the framework of human development, the process of policy-making and its implementation need to integrate the relevant constitutional and human rights dimensions to support appropriate human capabilities. In particular, the integration of the dimensions is useful to inject into the policy framework the *triple duties* of the government and stakeholders to *respect, protect and fulfill* the human and constitutional rights of creators and users.¹⁶⁰⁴ For the expansion of creative human capabilities, this right-based human development perspective offers the policy a legal scaffolding to make the stakeholders more committed, accountable and responsible for its appropriate implementation.¹⁶⁰⁵

¹⁶⁰¹ It is important to recast copyright as the freedoms (capabilities) *to create* that needs to be balanced against, *inter alia*, the freedom to access knowledge and participate in cultural life. See Gervais, “Intellectual Property and Human Rights” *supra* note 53 at 22-33.

¹⁶⁰² Gervais, *(Re)structuring Copyright*, *supra* note 702 at 216 & 279.

¹⁶⁰³ Sabina Alkire, “Dimensions of Human Development” (2002) 30:2 World Development 181 at 182.

¹⁶⁰⁴ See *FDRE Constitution*, *supra* note 45 at art.13(1).

¹⁶⁰⁵ Nussbaum, “Capabilities, Entitlements and Rights,” *supra* note 422 at 31-36. Nussbaum, “Capabilities and Human Rights,” *supra* note 317 at 295-97.

In contrast to copyright regime, a tertiary education in Ethiopia has a policy guidance derived from the general educational policy framework.¹⁶⁰⁶ Nonetheless, the policy does not sufficiently reflect the constitutional provisions related to the grand development policy objectives. As elaborated elsewhere, the overriding policy objective of tertiary education is producing human capital and scientific research for Ethiopia's economic growth. Such an overemphasis upon human capital renders the learners a mere instrument of economic growth. In effect, this view neglects the broad human development dimensions envisaged in the FDRE Constitution.¹⁶⁰⁷

Hence, it is essential to reconsider the existing approach to both restore a policy coherence and re-conceptualize tertiary education in terms of human capabilities. This re-orientation is both inclusive of its role for human capital and crucial to foreground the expansion of human capabilities as its core objective.¹⁶⁰⁸ To this end, Melanie Walker notes that “[h]uman development and human capabilities [approach] offers a rich resource to policy-makers and to universities for addressing the formation of socially good graduates, while also taking up access, equity and quality, and educational processes and outcomes.”¹⁶⁰⁹

For a tertiary education's policy orientation towards sustainable human development, human development values such as wellbeing, equity, democratic justice and social inclusion, sustainability, active participation and empowerment are all important to inform the policy objectives.¹⁶¹⁰ In embracing these values, the approach would enhance the freedom of learners and educators to be active

¹⁶⁰⁶ Given the recent structural development in its institutional framework and the increasing attention it has drawn as a vital tool for national development, it is rather fitting for the tertiary education to have its own comprehensive policy within the broad framework of the national educational and development policies.

¹⁶⁰⁷ See *FDRE Constitution*, *supra* note 45 at arts. 43, 81(1) & 89-91.

¹⁶⁰⁸ Melanie Walker, “A Human Development and Capabilities ‘Prospective Analysis’ of Global Higher Education Policy” (2010) 25:4 *Journal of Education Policy* 485 at 488-89[Walker, “A Human Development and Capabilities”]. Walker argues that “human capital goals out to be subsumed into the more expansive policy of human development.” *Ibid* at 489.

¹⁶⁰⁹ *Ibid* at 497.

¹⁶¹⁰ *Ibid* at 492. Melanie Walker, “Universities and a Human Development Ethics: A Capabilities Approach to Curriculum” (2012) 47:3 *European Journal of Education* 448 at 454 & 456-57[Walker, “Universities and Human Development”].

agents of changes in the process of sustainable human development.¹⁶¹¹ In this context, Walker underscores universities' potential role to “form graduate citizens who are self-knowing agents capable of purposeful action for individual and collective change.”¹⁶¹² In short, promoting a sustainable human development should be considered an overarching policy objective of tertiary education through the formation of human capabilities.¹⁶¹³

For a cross-sectoral policy coherence and integrative re-orientation, the respective policy orientation and coherence made for copyright and tertiary education should further be aligned and consolidated to reinforce their complementarities for the advancement of sustainable human development. As noted in this thesis, there is a significant gap and cross-sectoral policy incoherence between copyright and tertiary education. In principle, an inter-sectoral policy incoherence or the problem of coordination stems from “a structural misalignment between government policies and the regulatory frameworks in place to achieve intended policy objectives.”¹⁶¹⁴ In turn, the misalignment undermines the complementarities between the sectors and their appropriate orientation towards their ultimate objective—human development.

Therefore, it is imperative to take an integrated or holistic approach in the (re)formulation of the relevant policies in order to facilitate a cross-sectoral policy collaboration and coherence for the expansion of creative innovation and learning capabilities. In formulating a coherent and consistent copyright policy framework, the norm-setting process should be evidence-based, inclusive, deliberative and participatory to reflect Ethiopia's national priorities and level of development.¹⁶¹⁵ In this respect,

¹⁶¹¹ Walker, “Universities and Human Development” *supra* note 1610 at 456. Walker, “A Human Development and Capabilities,” *supra* note 1608 at 487-88 & 493-94. As Walker notes, “graduates equipped with knowledge, practical skills and public service values can make a positive difference in the everyday lives of the people with whom they come into contact.” *Ibid* at 487.

¹⁶¹² Walker, “A Human Development and Capabilities” *supra* note 1608 at 494

¹⁶¹³ *Ibid* at 488-90 & 493-96.

¹⁶¹⁴ Okediji, “Reframing International Copyright” *supra* note 154 at 466. In Okediji's observation, the major reasons for the policy incoherence or problem of coordination in developing and least developing countries are: defect in the design of the law, weak institutions, under enforcement of laws and underinvestment in research and development. *Ibid* at 466-67.

¹⁶¹⁵ See WIPO DA, Cluster B: Norm-Setting, Flexibilities, Public Policy and Public Domain, Recommendations No.15.

the integrative policy collaboration should also take into account the linkages between copyright and other pertinent policies such as innovation, cultural and competition policies.¹⁶¹⁶ As recommended in the WIPO DA, such a development-oriented norm-setting approach is vital for the promotion of creative innovation and knowledge diffusion “to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”¹⁶¹⁷

Within this broad context of societal interests, an appropriate bridge must be built between copyright and tertiary education policies through relevant policy flexibilities. Once the linkage is created, the flexibilities can be used to promote the policy objectives for the expansion of human capabilities. Both the human capital and the narrow metric of economic growth that animates the national development policies should be revisited and subsumed within the rich and broad framework of sustainable human development. In so doing, the human development perspective can inform a proper alignment among the policy regimes and direct them towards sustainable human development.

As suggested for the respective sector, the relevant constitutional and human rights enshrined in the FDRE Constitution and relevant human rights instruments should be integrated into the human development objectives to inform the overall policy alignment and re-orientation. In her version of the CA, Nussbaum contends that her list of central human capabilities—inclusive of creative and learning capabilities—can serve as basic constitutional principles to underpin the constitutional and human rights dimensions.¹⁶¹⁸

¹⁶¹⁶ See WIPO DA, Cluster B: Norm-Setting, Flexibilities, Public Policy and Public Domain, Recommendations No. 22 & 23; Cluster C: Technology Transfer, Information Communication Technology (ICT) and Access to Knowledge, Recommendations 25, 28 & 32. See Gervais, *Restructuring Copyright*, *supra* note 702 at 217 & 280 (noting the emerging global perspective on copyright in particular and IP in general ‘as part of a broader landscape of innovation policies’).

¹⁶¹⁷ See WIPO DA, Cluster F: Other Issues, Recommendations No. 45; TRIPs Agreement, *supra* note 163 at art.7.

¹⁶¹⁸ Nussbaum, “Capabilities and Human Rights” *supra* note 317 at 277. Martha Nussbaum, “Introduction: Aspirations and the Capabilities List” (2016) 17:3 *Journal of Human Development and Capabilities* 301 at 301. Nussbaum, regards her list of capabilities as a ‘blueprint’ for nations’ to take them into account as ‘fundamental constitutional entitlements.’ *Ibid.*

7.3.2. Legal Re-orientation and Coherence

As noted in the legal frameworks of copyright and tertiary education, the existence or lack of a coherence between copyright and tertiary education can be considered at several levels. For a legal coherence between authors' rights and education with human rights dimensions, a legal coherence of prime significance at national level is the integration and implementation of the human rights instruments. In the same vein, the constitutional dimension of authors' rights and tertiary education is another important layer of legal coherence. In this regard, there appears to be a better starting point for the legal coherence as the FDRE Constitution envisages a set of constitutional flexibilities grounded in public interests. Nonetheless, the constitutional flexibilities and the underpinning public interests are not incorporated into the existing legislation. In fact, no reference is made to the appropriate provisions of the FDRE Constitution and pertinent human rights instruments. Nor has a relevant jurisprudence evolved to date in order to fill in the legislative gap and draw a linkage between the legislations and the constitutional/human rights provisions.

For the reasons stated above, there lacks an explicit and clear articulation of the constitutional dimensions of copyright and tertiary education. Even among the statutes, there are incoherencies and gaps between the legislation of copyright and tertiary education. For instance, the teaching exception in copyright law is quite narrow while there is a complete silence of the higher education legislation on the issue of educational materials. This problem of coordination or incoherence is thus related to the design of the legislation themselves that fail to forge a linkage to achieve the common objectives.¹⁶¹⁹ In the context of access to learning materials, it is important to rethink the narrow-scoped copyright flexibilities and the silence of the higher education legislation. Hence, there needs to be a bridge between the policy objectives and the legal frameworks. For instance, in its new copyright bill (soon to be signed into law), South Africa enshrines a myriad of L&Es that mirror its development-oriented IP

¹⁶¹⁹ Okediji, "Reframing International Copyright" *supra* note 154 at 467.

policy objectives.¹⁶²⁰ In addition to a long list of L&Es, the bill incorporates a catch-all cause of a fair use doctrine that draws on the major attributes of the doctrine under the US law.

In addition to the cross-sectoral (horizontal) and vertical (statutes vis-à-vis constitutional/human rights provisions) incoherencies, the constitutional dimensions of both author's right and tertiary education themselves are not well-oriented towards the constitutional right to sustainable development.¹⁶²¹ It is undisputed that a proper integration is essential for the progressive realization of the right to sustainable human development. Further, the existing legal frameworks are not placed within the framework of sustainable human development. Thus, it is important to articulate the constitutional and human rights aspects, forge reinforcing legal coherences and re-orient the linkages towards sustainable human development. In this regard, the constitutional and human right to sustainable development can serve as a springboard to establish the legal basis for the framework of sustainable human development.

To this end, a legislative action should be taken to revisit the existing legal frameworks and incorporate appropriate legal flexibilities that are geared towards sustainable human development. In line with the suggested approach for the policy reform, the legislative action (including WIPO's legislative assistance) for the incorporation of the relevant international copyright-related flexibilities should be scrutinized to reflect Ethiopia's level of human development and its priorities.¹⁶²²

¹⁶²⁰ See *South African Copyright Amendment Bill* [B13-B-2017], *supra* note 1391 at § 12 (A-D) & 19(B-D); see also Intellectual Property Policy of the Republic of South Africa, Phase I, International Trade and Development, November 2018, online: dti <www.dti.gov.za/gazzettes/IP_Policy.pdf>

¹⁶²¹ In principle, legislative practices in Ethiopia are required to remain consistent with the FDRE Constitution. FDRE Constitution, art. 9(1) [stipulating: “*Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect.*”].

¹⁶²² See WIPO DA, Cluster A: Technical Assistance and Capacity Building, Recommendations No. 1& 13. It is worth mentioning that WIPO has already submitted to the EIPO a proposed set of draft provisions to reform the existing copyright law. Ethiopia needs to be cautious with the legislative/technical assistance that tends to favor a stronger protection. As indicated in the DA, “WIPO's legislative assistance shall be, *inter alia*, development-oriented and demand-driven, taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of member states.” *Ibid* at Recommendation No.13.

7.3.3. *Institutional Re-Orientation and Collaboration*

An institutional coherence builds upon policy and legal coherence to promote the institutional coordination and collaboration. One of the reasons for the problem of coordination is the existence of weak institutions and lack of collaboration on policy formulation and implementation.¹⁶²³ Further, an institutional practice reflects the misalignment in the underpinning policy and legal regimes. As noted above, the incoherencies in the policy and legal frameworks of copyright and tertiary education have implications for the institutional coherence. In Ethiopia, the lack of coordination and collaboration in the relevant institutional frameworks has led to inconsistent institutional practices. In fact, both the policy and the legal frameworks have failed to create appropriate linkages between the institutional frameworks for the collaborative operation of the existing institutions.

Therefore, it is crucial to build a bridge between the institutional frameworks of copyright and tertiary education in a manner that facilitates their mutual and cooperative operations for the realization of sustainable human development objectives. For instance, “universities should embrace their obligations to promote well-being and quality of life in society through their research, [societal engagement], and educative functions.”¹⁶²⁴ In the same vein, copyright administrative institutions and creative industries’ core functions should be oriented towards advancing human development.¹⁶²⁵ Moreover, this broad and integrative development approach should be taken to galvanize the institutional reforms and forge an interdepartmental collaboration among the sectoral institutions.

In so doing, the institutional recalibration and coherence ought to be geared towards the expansion of learning and creative human capabilities. In particular, the institutional cooperation and collaboration should facilitate access to knowledge or learning materials in order to enhance quality

¹⁶²³ Okedij, “Reframing International Copyright” *supra* note 154 at 467.

¹⁶²⁴ Walker, “A Human Development and Capabilities” *supra* note 1608 at 493.

¹⁶²⁵ See Gervais, *Restructuring Copyright*, *supra* note 86 at 279-94. In general, Gervais notes the goal of copyright—‘maximiz[ing] the development of human creativity and innovation’—to be ‘justified as a matter of human development’ and ‘welfare enhancing.’ *Ibid* at 279.

tertiary education and creative innovation. To this effect, human development perspective is vital to inform the institutional policy and legal frameworks, regulations and practices through the incorporation of appropriate flexibilities. Including the role of courts, the existence of strong and conducive institutional environment is essential to translate the international flexibilities into national development-inducing flexibilities.¹⁶²⁶

7.4. Revisiting and Incorporating Copyright-Related Flexibilities

As enunciated in Chapter Six, the national copyright law has left out from its ambit most international copyright (-related) flexibilities explored in Chapter Four of this thesis. In spite of the various reasons behind the self-imposed TRIPs-plus approach, such an-ill-suited approach is detrimental to an equitable access to the creative works for a sustainable creative innovation and educational purposes. In effect, this would encroach upon the human/constitutional aspects of users' rights and hinder the realization of the right to sustainable human development. In order to remove the impediment, the existing legal regimes should be revisited to incorporate or re-integrate the relevant copyright(-related) flexibilities. In addition to the reform, a strategic integration of the flexibilities is crucial for the advancement of human development through enhanced access to creative works. To this effect, a CA-driven right-based human development perspective should be taken to incorporate or integrate the unincorporated general and specific copyright (-related) flexibilities as integral components of the copyright regime.

¹⁶²⁶ One of the reasons that affect the optimal implementation of flexibilities is “the misalignment between the design of copyright law and the domestic institutional environment.” Okediji, “Reframing International Copyright” *supra* note 154 at 475. Okediji, “International Copyright System,” *supra* note 51 at 20 & 30-31.

7.4.1. Reintegrating General Copyright-Related Flexibilities

A. Human Rights and Constitutional Dimensions

In the preceding chapter, various general flexibilities with constitutional and human rights aspects have been elaborated. Given their normative significance, the pertinent human rights and constitutional dimensions should inform the incorporation of the relevant general copyright(-related) flexibilities pointed out in the chapter. In so doing, the CA-guided human development perspective should be adopted due to its integrative approach to accommodate both development policy and the emerging-rights-based approaches to copyright flexibilities. This integrative normative approach offers a broader room with maximum flexibilities in order to address the national development priorities and realities. From the general flexibilities, pivotal are the public interest-related constitutional flexibilities and the human rights-related flexibilities to strike an appropriate balance between creators and users' interests/rights.¹⁶²⁷ In particular, the constitutional and human rights aspects should be articulated or recognized in the copyright and pertinent legislation.¹⁶²⁸ Further, the constitutional and human rights norms should be regarded as a set of overarching guide in the incorporation, interpretation and application of the general and specific copyright(-related) flexibilities for the advancement of human development.¹⁶²⁹ Taking into account human rights dimension offers a teleological framework for L&Es and guide courts in their interpretation.¹⁶³⁰ Further, human rights have a normative role in re-scoping the exclusive rights.¹⁶³¹

¹⁶²⁷ See Geiger, "The Constitutional Dimension," *supra* note 1263 at 114-131.

¹⁶²⁸ *Ibid* at 115-122.

¹⁶²⁹ See Gervais, "Intellectual Property and Human Rights" *supra* note 53 at 13-23.

¹⁶³⁰ *Ibid* at 18. As Gervais notes, "a human rights framework can provide specific normative guidance in the elaboration and interpretation of copyright rules." *Ibid* at 23. For him, 'human rights provide purpose' to L & Es. Gervais, "Human Rights and Philosophical Rights," *supra* note 209 at 90 & 97.

¹⁶³¹ *Ibid* at 21.

B. International Norms of Development-oriented Flexibilities

From the international norms of development flexibilities, both the policy and legislative reforms should draw on the flexibilities inherent in arts. 7&8 of the TRIPs Agreement to entrench a balance between the twin aspects of the public interest that underlie a robust copyright system. In line with the provisions, an explicit recognition of education at all levels and in all modes should be made to underscore its role as a 'sector of vital importance' and an instrument of sustainable human development. It is worth noting that the principle of sustainable development enshrined in the WTO Agreement can serve as an overarching guidance for the integration of the TRIPs-development flexibilities. In the same vein, the norm-setting process of flexibilities envisaged in the WIPO DA is pertinent to emphasize the role of copyright flexibilities for the advancement of human development. In the national integration of the flexibilities, the above-mentioned general development objectives and principles are relevant to inform the policy formulation and legislative reform in a manner that reflects Ethiopia's level of development and national context.¹⁶³²

C. Public Interest-Driven Flexibilities and Remunerative Approach

From within the copyright system, a human development-oriented approach should inform the interpretation of the principle of idea/expression distinction, conditions of protection and the exclusions of optional works such as legislative and administrative documents. Such a holistic approach is useful to advance the intended public interest via a robust public domain. In order to curb its 'enclosure' and advance the public interest,¹⁶³³the enrichment of a public domain should be at the centerpiece of the policy and legal reforms intended for the promotion of creative innovation. Further, a structural reform in the copyright regime is worth considering in order to accommodate a non-market approach more suited to creative works in the educational sector. In Ethiopia, despite its recent expansion in the private

¹⁶³² The WIPO DA acknowledges taking due account of the level of development in norm-setting process for flexibilities. WIPO DA, Recommendation No.13.

¹⁶³³ See generally James Boyle, "The Second Enclosure Movement and the Construction of the Public Domain" (2003) 66 Law & Contemp Probs 34-74.

sector, tertiary education has been integral to the core public-funded sectors. Hence, a blend of incentive mechanisms should be explored to reflect Ethiopia's socio-economic context. For instance, an equitable remunerative mechanism is more suitable for creative works in the educational sector. Considered as an alternative or in combination with the existing approach, the remunerative mechanism can be tailored to Ethiopia's development needs. In developed nations themselves, not all creative sectors depend on the exclusive rights regime for incentives.¹⁶³⁴ It is thus vital to consider appropriate reforms.

For the structural reform, a useful insight can be drawn from Gervais' recent proposed 4-quadrants reform approach that distinguishes between the kind of copyrighted works, industries and categories of creators/users.¹⁶³⁵ In particular, his suggested structural reform under quadrant I (for public dedication) and II (for non-commercialization) resonates with educational sector as a sector of vital importance.¹⁶³⁶ In fact, the creators in both quadrants are often active and share the values in the education sector.¹⁶³⁷ For the creators, public funding and non-economic considerations are the prime incentive mechanism to drive knowledge creation and diffusion.¹⁶³⁸ For instance, authors such as academics and scientists depend on a distinct incentive mechanism (a mix of salary, grants and reputation) and are often supportive of the emerging open access models.¹⁶³⁹ As a distinct sector, the educational sector can be illustrative of the inappropriateness of the 'one-size-fits-all' and exclusive

¹⁶³⁴ Gervais, *Restructuring Copyright*, *supra* note 702 at 193 & 286-91. As Gervais observes, "[n]ot all IP rights are the same, nor do all industries respond the same to changes in IP protection." *Ibid* at 289.

¹⁶³⁵ *Ibid* at 192-206 & 289-290. For Gervais, authors in quadrant I are those who 'dedicate their work to the public domain' while authors in quadrant II are creators who are 'otherwise compensated for their work' and care about attribution. In contrast, those in quadrant III care about both income and attribution, but lack a real control over the dissemination. This category is considered 'a very significant part of the core of copyright policy.' Called 'commercial custodian,' those in quadrant IV represent copyright industries engaged in active commercial exploitation of the works. *Ibid* at 193-98.

¹⁶³⁶ *Ibid* at 289-91.

¹⁶³⁷ *Ibid* at 204-05. Given their primary concern with attribution in lieu of commercialization, several academics and scientists fall in this quadrant II while those waive protection altogether and dedicate their works to the public domain belong to quadrant I. *Ibid*.

¹⁶³⁸ *Ibid* at 195 & 290-91.

¹⁶³⁹ *Ibid* at 195, 198 & 204-205.

proprietary regime.¹⁶⁴⁰ As scholars suggest, “liability rules may be preferable to property rights in certain sectors such as education or scientific publishing.”¹⁶⁴¹ The proponents contend that liability rules regime is useful to prevent misappropriation while it facilitates access to creative works and spur a follow-on creative innovation.¹⁶⁴²

As an alternative to the exclusive rights approach, the equitable (just) remunerative mechanism is thus instrumental for enhanced access to learning materials.¹⁶⁴³ From a human rights perspective, the remunerative mechanism is consistent with the required protection of authors’ material interests for the purpose of an adequate living standard.¹⁶⁴⁴ As stated in the *General Comment No.17*, under certain circumstances, limitations may be imposed subject to “compensatory measures, such as payment of adequate compensation for the use of scientific, literary or artistic productions in the public interest.”¹⁶⁴⁵ The remunerative scheme can thus be used to avoid authors’ unreasonable loss of income and facilitate access to their creative works.¹⁶⁴⁶ Further, this comports with the statutory provision in the higher education legislation that requires a dedicated public use of creative works (knowledge and skills) developed for academic purposes.¹⁶⁴⁷

¹⁶⁴⁰ Instead, as Okediji points out, “[a]ddressing access to education and knowledge in developing countries will require a combination of policy instruments ranging from compensation schemes for producers of educational materials, educational L&Es, and public investments in cultural institutions such as libraries, archives, and museums.” Okediji, “Reframing International Copyright” *supra* note 154 at 487. For the problems related to the ‘one-size-fits-all’ paradigms, see Michael Carroll, “One Size Does Not Fit All: A Framework for Tailoring Intellectual Property Rights” (2009) 70 Ohio State Law Journal 1361; Jerome Reichman & David Lange, “Bargaining Around the TRIPs Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions” (1998) 9 Duke J Comp & Intl L 11 at 50.

¹⁶⁴¹ Okediji, “Reframing International Copyright” *supra* note 1 at 476.

¹⁶⁴² Jerome Reichman & Tracy Lewis, “Using Liability Rules to Stimulate Local Innovations in Developing Countries” in Keith Maskus & Jerome Reichman, eds, *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Cambridge: Cambridge University Press, 2005) 337 at 349-51; Reichman, “Of Green Tulips,” *supra* note 1009 at 1746-47. But see Robert Merges, “Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations” (1996) 84 Cal L Rev 1293 (disputing the appropriateness of liability rules and in particular compulsory licenses for digital content).

¹⁶⁴³ Several jurisdictions have adopted an equitable remuneration scheme for works that are relevant for educational purposes. See Jane Ginsburg, “Fair Use for Free, Permitted-but-Paid?” (2014) 29 BTLJ 1383 at 417-32.

¹⁶⁴⁴ *General Comment No.17*, *supra* note 49 at paras 16 & 24; Yu, “Reconceptualizing Intellectual Property,” *supra* note 647 at 1089-92.

¹⁶⁴⁵ *General Comment No.17*, *supra* note 49 at para 24.

¹⁶⁴⁶ Gervais, *Restructuring Copyright*, *supra* note 702 at 195, 198, 204-205 & 289.

¹⁶⁴⁷ *Higher Education Proc. No.650/2009*, *supra* note 117 at art.26(6).

In the event the suggested remunerative mechanism is opted for, an appropriate amendment in the provision of the legislation needs to be accorded a corresponding recognition in the copyright law. In this regard, the equitable remunerative mechanism should be limited to the commercial use of creative works of academics and researchers in the educational sector.¹⁶⁴⁸ From the perspective of copyright protection, this non-exclusive right of remuneration can be anchored in the public interest justifications contemplated under art.40 of the FDRE Constitution.¹⁶⁴⁹ Hence, there are both constitutional and statutory rooms to embrace the approach.

Rather, what remains an issue is the approach's compliance with the international three-step test. As hinted at in the WTO jurisprudence but left undefined,¹⁶⁵⁰ the existence of stronger normative considerations may justify an equitable remunerative scheme within the reach of the three-step test as long as there is no conflict with normal exploitation.¹⁶⁵¹ In this respect, the Max Planck Institute's proposed interpretation of the test is relevant for its articulation of normative considerations in the context of public interest.¹⁶⁵² While taking into account the public interest of users' access, the remunerative scheme would avoid 'unreasonable prejudice to the legitimate interest' of the right holders.¹⁶⁵³ As noted in the proposed interpretation, this approach will offer a room for the legitimate interest of third parties. Further, the economic realities in Ethiopia evidence the lack of opportunities for a commercial exploitation and the practical insignificance of the anticipated conflict with the

¹⁶⁴⁸ Nonetheless, these require: (a) improving the current incentives for academics, (b) remunerating publishers for their services (in lieu of copyright transfer), and devising a guide for assessment of the compensation.

¹⁶⁴⁹ This approach has been endorsed elsewhere. For instance, interpreting a constitutional provision that resembles art.40(1) of the FDRE Constitution, the German Constitutional Court once confirmed the constitutional basis of an equitable remunerative approach for use of complications of protected works in textbooks. See Alain Strowel & François Tulkens, "Freedom of Expression and Copyright Under Civil Law: Of Balance, Adaptation, and Access," in Jonathan Griffiths & Uma Suthersanen, eds, *Copyright and Free Speech: Comparative and International Analyses* (Oxford: Oxford University Press, 2005) 287 at 293 (quoting German Constitutional Court, July 7, 1971, 1972 GRUR 481).

¹⁶⁵⁰ Reichman & Okediji, *supra* note 1415 at 1390-93, 1402-03 & 1436.

¹⁶⁵¹ *Ibid* at 1403 & 1409-10. See Ricketson & Ginsburg (Vol. I), *supra* note 713 at 769-76, 853 & 859. Gervais, "Intellectual Property and Human Rights" *supra* note 897 at 8-10 & 18-23. Carlos, *Trade Related Aspects*, *supra* note 137 at 154-55.

¹⁶⁵² See generally Geiger et al, "Towards a Balanced Interpretation," *supra* note 728; Patrick Goold, "The Interpretive Argument for a Balanced Three-Step Test?" (2017) 33:1 Am U Intl L Rev 187-230.

¹⁶⁵³ Ricketson & Ginsburg (Vol. I), *supra* note 713 at 773-77. Okediji, "Toward International Fair Use" *supra* note 868 at 111-13.

normal exploitation.¹⁶⁵⁴ That is, there is a scenario of market failure as most consumers (learners and educators) are unable to afford the price of learning materials such as books.¹⁶⁵⁵

In Foster's observation of the interface between copyright and right to education, this scenario of market failure entails a 'false conflict' for want of material interest or trade impact.¹⁶⁵⁶ In the absence of market opportunities for normal exploitation, the remunerative mechanism would preempt a concern related to the three-step test. In dealing with the test, the public interest that underpins education as a sector of vital importance with a constitutional and human rights dimensions should suffice to constitute stronger normative considerations.¹⁶⁵⁷ In the same vein, a remunerative mechanism may be justified for related works to serve similar ends.¹⁶⁵⁸ In sum, facilitating adequate access to relevant learning materials requires a structural reform that takes into account a combination of compensation schemes for the creators, appropriate set of L&Es and public investment in the cultural institutions such as libraries and archives.¹⁶⁵⁹

D. Retracting the TRIPs-Plus Approach

It is imperative to withdraw the ill-advised TRIPs-plus approach applied to the scope, terms of protection and enforcement measures. Its continued existence entails serious ramifications for a vibrant creative innovation and quality education through a severe restraint on access to knowledge in general and learning materials in particular. In relation to the terms, the default term of protection adopted for

¹⁶⁵⁴ In the absence of actual or potential market for the learning materials, there exists no actual conflict with the author's or publishers' normal (commercial) exploitation. It is important to bear in mind that the average per capita income in Ethiopia (≈\$800) is less than or almost equal to the price of most important textbooks published abroad and sold online the costs of which includes shipping and related expenses.

¹⁶⁵⁵ Foster, *supra* note 46 at 305-306. See Gordon, "Fair Use," *supra* note 879 at 1605-27.

¹⁶⁵⁶ Foster, *supra* note 46 at 305-306. As Foster notes, "[i]n the case of market failure due to a state's inability to afford to pay there would be a false conflict as there is no reasonable expectation of material gain but moral interests would have to be protected." *Ibid* at 306.

¹⁶⁵⁷ *Ibid* at 305-06; Ricketson & Ginsburg (Vol. I), *supra* note 713 at 771-73; See Reichman & Okediji, *supra* note 1415 at 1402-03. Gervais, "Intellectual Property and Human Rights" *supra* note 897 at 8-10 & 18-23.

¹⁶⁵⁸ From the proposed Gervais' quadrant, this can be accommodated under quadrant III for authors (poets, artists, singers, etc) who demand a fair remuneration and attribution. Gervais, *Restructuring Copyright*, *supra* note 702 at 195-96, 198 & 203.

¹⁶⁵⁹ See Okediji, "Reframing International Copyright" *supra* note 154 at 487.

works of applied art should be reduced to the international minimum standard (i.e. 25 years). Setting appropriate limits is critical to promote a vibrant public domain that allows a free use and sustainable access to creative works. By the same token, the excessive scope of rental right and the introduction of public lending (both provided as *exclusive rights*) must be retracted or at least exempted for educational and library purposes. Consistent with the TRIPs Agreement, the legislative action is vital to facilitate unrestricted rental of relevant works and interlibrary lending of learning materials. Reframed as rights of remuneration in lieu of exclusive rights, the rights can be safeguarded against acts of commercialization through an equitable remuneration.

In revisiting the scope of exclusive rights in general, Gervais underscores the significance of setting proper limits to the rights in accordance with their intended purpose.¹⁶⁶⁰ Situated within copyright's 'inherent teleological limit' as their 'normative anchor',¹⁶⁶¹ a new perspective is essential for re-scoping exclusive rights. For instance, Gervais proposes an 'effect-based' analysis of use or a demonstrable 'interference with actual or predictable commercial exploitation' as a determining factor to redefine the scope of economic rights.¹⁶⁶² As an actual or predictable commercial impact is the crux of the exploitation, this perspective is useful to inform both legislative reform and judicial interpretations to exempt non-commercial uses.

In addition to re-scoping the rights, there is a need to rethink the strict enforcement measures that undermine the very purpose of copyright itself and frustrate users' rights. In particular, unintentional and non-commercial acts of infringement should be exonerated from the indiscriminate criminalization and its severe penalties. In principle, the use of creative works for educational purposes

¹⁶⁶⁰ Gervais, *Restructuring Copyright*, *supra* note 702 at 213.

¹⁶⁶¹ *Ibid.*

¹⁶⁶² *Ibid* at 213-14. Drawing on the three-step test and subject to the appropriate limitations, Gervais, in proposing this approach, argues that "the objective is to *build intrinsic limits in the scope of the right itself* and make it *independent of the technical nature of the use made.*" [emphasis in the original], *Ibid* at 214. For the effects-based perspective, what matters is not the use but the effect/impact of the use on the commercial exploitation of the work. In Gervais' opinion, this approach is flexible to exempt private use or use for research. *Ibid* at 211-14.

falls within acts of non-commercial uses. It is thus plausible to consider a total exoneration of the acts from criminalization. The combination of provisional measures and civil remedies should suffice to safeguard author's rights or maintain the *necessary* incentive.

Indeed, the criminalization required under international copyright regime is limited to commercial acts of infringement and leaves out from its scope non-commercial acts for educational purposes. In a broader context, the flexible requirements of 'piracy on a commercial scale' should be inserted into the law. In the same vein, the TRIPs-plus border measures, including seizure of goods in transit, should be re-considered along with an appropriate amendment under the customs law. It must be noted that a harsh enforcement mechanism is often counterproductive and tends to undermine a respect for the law.¹⁶⁶³

E. Crafting a Blend of Three-Step Test and Open-ended Fair Use

As a general rule of copyright flexibilities, a careful integration of the three-step test is important to exploit the international copyright flexibilities. Given its anticipated accession to the TRIPs Agreement and relevant copyright treaties, Ethiopia should take a strategic proactive measure to integrate the test in light of its human rights obligations and sustainable human development objectives. In their critique of the test for its vagueness and double-edged effect,¹⁶⁶⁴ scholars have suggested a number of approaches for its adoption and application at national levels. From the range of proposed approaches,¹⁶⁶⁵ the Max Planck Institute's public-interest-oriented holistic approach to the test can be used for its national adoption.¹⁶⁶⁶ Yet it remains to be seen whether or not the WTO DSB will endorse

¹⁶⁶³ *Ibid* at 229-230; Armstrong et al, *supra* note 145 at 333.

¹⁶⁶⁴ *Ibid* at 84. See Okediji, "International Copyright System," *supra* note 51 at 13-14.

¹⁶⁶⁵ See generally Gervais "The Reverse Three-Step Test," *supra* note 896. In contrast, Okediji has proposed the adoption of international standard of fair use. See generally Okediji, "Toward International Fair Use" *supra* note 17. Nonetheless, Okediji acknowledges the possible challenges against the adoption of the international fair use on the grounds of its indeterminacy and breadth. *Ibid* at 124-36.

¹⁶⁶⁶ See generally Geiger, et al, "Towards a Balanced Interpretation," *supra* note 728.

this interpretative approach. For the sake of compliance, worth keeping in view is thus the evolving WTO jurisprudence on the test although the existing one has drawn mixed comments.¹⁶⁶⁷

Further, the proposed infusion of the test with the open-ended US fair use doctrine is useful to consider for the domestic application of the various flexibilities.¹⁶⁶⁸ It is important to note that the three-step test is an international guiding rule for states to design domestic flexibilities.¹⁶⁶⁹ In contrast, the fair use doctrine serves as a legal standard for national courts to apply the flexibilities.¹⁶⁷⁰ Within the international limit, states can opt for the doctrine or an enumerative list of flexibilities or a combination of both models. For Ethiopia, a strategic blend of both models may prove useful to reframe specific flexibilities as users' rights. The users' rights perspective can be drawn from the Canadian fair dealing jurisprudence.¹⁶⁷¹

For its open-ended nature and subject to customization, the flexible US fair use doctrine¹⁶⁷² is worth adopting. In effect, a blend of the perspectives is believed to offer courts with a concrete and flexible balancing tool for the interpretation and application of the test to advance public interests. As Elkin-Koren points out, interpreting a fair use as a right is “necessary in order to achieve the goals that copyright law is designed to promote.”¹⁶⁷³ It should be kept in mind that embracing a fair use doctrine itself involves legal uncertainties¹⁶⁷⁴ and its application requires a rich judicial experience.

¹⁶⁶⁷ See Justin Hughes, “Fair Use and Its Politics-at Home and Abroad,” in Okediji, *Copyright in an Age of Digital Limitations and Exceptions*, *supra* note 154 at 241-46 [Hughes, “Fair Use and Its Politics”].

¹⁶⁶⁸ Senftleben, “The International Three-Step Test,” *supra* note 914. Comp. Okediji, “Toward an International Fair Use Doctrine” *supra* note 868 at 141.

¹⁶⁶⁹ Gervais, *Restructuring Copyright*, *supra* note 702 at 65.

¹⁶⁷⁰ *Ibid.*

¹⁶⁷¹ See *CCH Canadian, Ltd. v. Law Soc'y of Upper Canada*, *supra* note 1413; *SOCAN v. Bell Canada* *SOCAN*, *supra* note 1538; *Alberta (Educ.) v. Canadian Copyright Licensing Agency*, *supra* note 786. Vaver, “Copyright Defenses” *supra* note 3 at 667-70.

¹⁶⁷² See generally Piere Leval, “Toward a Fair Use Standard,” *supra* note 930; Martin Senftleben, “The Perfect Match: Civil Law Judges and Open-Ended Fair Use Provisions” (2017) 33 *Am U Intl L Rev* 231–86. Okediji, “Toward International Fair Use,” *supra* note 868. But see, Hughes, “Fair Use and Its Politics” *supra* note 1667 at 234 at 234-274 (arguing that US should not lobby for its adoption).

¹⁶⁷³ Elkin-Koren, “Copyright in the Digital Ecosystem” *supra* note 1519 at 156. Yet this reframing a fair use as a user right is critiqued, inter alia, due to its indeterminacy and for want of correlative duties. *Ibid* at 161-62.

¹⁶⁷⁴ Hughes, “Fair Use and Its Politics” *supra* note 1667 at 255-56.

However, the adoption of fair use doctrine as a catch-all clause along with an illustrative list of L&Es would mitigate the uncertainties and rigidities associated with the respective models of flexibilities.¹⁶⁷⁵ In this regard, South Africa’s copyright bill that adopts a new fair use doctrine can offer a good lesson.¹⁶⁷⁶ Elsewhere, Yu has explored the various modalities nations have taken to adopt the doctrine.¹⁶⁷⁷ In so doing, he underscores the need for proper customization of the U.S. fair use doctrine as an instance of legal transplants.¹⁶⁷⁸ Crafting a blend of an open-ended fair use and the three-step test as a guiding rule of users rights needs to take into account the local legal and institutional context.

7.4.2. Reframing Specific Copyright-Related Flexibilities

It should be recalled that a CA-driven human perspective is suggested for its potential to subsume both the development policy strategy and the emerging users’ rights approaches. Hence, an integrative CA should be used for an optimal integration of copyright and related flexibilities. Including the copyright system itself, the development policy prong of the approach is useful to accommodate the general flexibilities. Within this broad framework and in line with the relevant constitutional and human rights dimensions, the users-rights component of the approach is vital to underscore the normative significance of the specific copyright flexibilities as users’ rights.¹⁶⁷⁹ Recast as users’ rights, the flexibilities should be articulated, interpreted and applied on a par with author’s exclusive rights.¹⁶⁸⁰ As Elkin-Koren notes, “[t]he framing of permissible uses as rights offers a legal framework for

¹⁶⁷⁵ Tobias Schonwetter & Caroline Ncube, “New Hope for Africa? Copyright and Access to Knowledge in the Digital Age” (2011) 13:3 Info 64 at 67-68.

¹⁶⁷⁶ As a catch-all clause intended to complement the specific L&Es, South Africa’s new fair use doctrine is framed as an open-ended doctrine with an illustrative list of purposes. See *South African Copyright Amendment Bill[B13B-2017]*, *supra* note 1391, § 12A.

¹⁶⁷⁷ Peter Yu, “Customizing the Fair Use Transplants” (2018) 7:9 Laws 1-15[Yu, “Customizing the Fair Use”].

¹⁶⁷⁸ *Ibid.*

¹⁶⁷⁹ Elkin-Koren, “Copyright in the Digital Ecosystem,” *supra* note 1519 at 164-66; Craig, “Using Global Rights-Talk” *supra* note 944 at 58-59.

¹⁶⁸⁰ Vaver, “Copyright Defenses” *supra* note 68 at 669. Users’ rights approach is thus useful to restore the real balance between author’s right and user’s rights. *Ibid.* Elkin-Koren “Copyright in the Digital Ecosystem,” *supra* note 1519 at 134.

analyzing the potential threats to desirable uses which serve copyright purposes.”¹⁶⁸¹ In effect, restoring the long-sought balance will advance its objectives.

The restoration of the balance can be achieved through the imposition of a corresponding obligation upon the right holders to respect the rights of users.¹⁶⁸² To leverage its rhetorical significance, the users’ right approach should be kept in view to integrate the appropriate specific flexibilities as an integral component of a balanced copyright system. As cited in the *CCH v Law Society*, “[b]oth owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.”¹⁶⁸³ Nonetheless, it must be noted that not all flexibilities readily fit into the users-rights framework. For instance, a non-statutory compulsory licensing may better be understood as a regulatory mechanism than an *ex ante* designated users’ right. Perhaps, once granted, the permissible use might be regarded as users’ right. As for specific flexibilities, it is crucial to (re)incorporate the flexibilities into the legal regime as mandatory L&Es and integral elements of the copyright system.

A. Private Use Exception

In this digital era that holds a great promise for users across the globe, private users’ access to knowledge is essential for individual human development through participation in cultural life and learning process.¹⁶⁸⁴ Nonetheless, the existing exception is too restrictive to allow users a freedom to access and use creative works for personal purposes. It is thus important to redesign the existing exception as a mandatory user’s right available for both natural and juridical persons. Further, save the specific exclusions such as original works of fine art, the private use should be extended to all creative

¹⁶⁸¹ Elkin-Koren, “Copyright in the Digital Ecosystem,” *supra* note 1519 at 135.

¹⁶⁸² *Ibid* at 134-35; Craig, “Globalizing User Rights-Talk” *supra* note 944 at 58.

¹⁶⁸³ *CCH Canadian Ltd v. Law Society of Upper Canada*, *supra* note 1413 at para 48. Vaver, *Copyright Law*, *supra* note 1520 at 171.

¹⁶⁸⁴ See Elkin-Koren, “Copyright in the Digital Ecosystem,” *supra* note 1519 at 153-55.

works and all categories of exclusive rights as long as the use is for private or personal purposes. It should be reframed as a users' right.

It should also be made clear in the statute that the exception is applicable for both digital and non-digital works. In consequence, this requires redefining the existing restrictive definition of 'published work' to encompass all creative works that are *lawfully made available to the public*. In the digital environment, this user's right must be safeguarded from an abusive digital and contractual restriction. In the same vein, the exception should be exempted from the wholesale criminalization presumed to curb a piracy on a commercial scale. For the sake of a compliance with the international three-step test, the suggested fair-use-infused test will serve to set the exception within a proper limit.

B. Quotation Exception

It should be recalled that quotation exception is the sole mandatory exception under the Berne Convention. Framed as 'a mandatory user freedom,'¹⁶⁸⁵ the exception's special status is said to reflect a 'freedom of expression' and authors' 'essential privilege' to quote.¹⁶⁸⁶ In Ethiopia, it is not framed as a mandatory exception under the copyright law. Given its role for creative freedom, education and scientific research, quotation should be reframed as a mandatory user's right in the national copyright law. As mentioned above, its scope that is restricted to 'published work' should also be re-scoped to include all creative works lawfully made available to the public. This re-scoping is in line with the Berne Convention.

As a self-contained exception, the requirements of fair practice, the extent justified by the purpose and the proper attribution are intended to maintain a balance between authors and users' interests. It is thus useful to both reframe the exception and shield its legitimate exercise from digital

¹⁶⁸⁵ Hugenholtz & Okediji, "Contours of an International Instrument," *supra* note 688 at 481.

¹⁶⁸⁶ *Ibid.*

locks and criminalization. In the academic sector where the prohibition of plagiarism discourages a substantial quotation without due attribution, the social norm is more effective than criminalization.

C. Teaching and Scientific Research Exceptions

As noted in this thesis, teaching exception is the most direct and crucial exception for educational purposes. In spite of its significance, the existing exception under the national law is too restrictive to serve the intended purpose. Worth reminding is the restriction of the exception to reproduction of a ‘published work’ alone. Besides, there is no stand-alone exception for scientific research and scholarship, except in the context of the exception for libraries. It is thus vital to reframe the teaching exception and introduce an exception for scientific research as essential users’ rights.¹⁶⁸⁷ The exceptions should cover all exclusive rights over works lawfully made to the public in both analog and digital environments. In particular, it is important to extend the exceptions to encompass acts of translation, adaptation, distribution, communication, rental, importation, rental/lending, display and so on for non-commercial uses. For instance, an access to a work for a distance or online education implicates several exclusive rights.¹⁶⁸⁸

Placed within the proposed fair use-driven three-step test,¹⁶⁸⁹ the introduction of a suitable exception for scientific research and a scholarship will promote quality tertiary education and scientific research for human development.¹⁶⁹⁰ In view of its instrumental role, Reichman & Okediji recommend the adoption of a tailor-made mandatory exemption for scientific research without the restrictions of commercial/non-commercial distinction, digital locks and contractual overrides.¹⁶⁹¹ Indeed, carving out

¹⁶⁸⁷ See Elkin-Koren, “Copyright in the Digital Ecosystem,” *supra* note 1519 at 151-53.

¹⁶⁸⁸ Kenneth Crews, “Distance Education and Copyright Law: The Limits and Meaning of Copyright Policy” (2000) 27:1 JC & UL 15 at 21-24.

¹⁶⁸⁹ See generally Senftleben, “The International Three-Step Test” *supra* note 914.

¹⁶⁹⁰ See Ricketson & Ginsburg (Vol. I), *supra* note 713 at 783. Gervais, *Restructuring Copyright*, *supra* note 702 at 88-89. Reichman & Okediji, *supra* note 1415 at 1439-49.

¹⁶⁹¹ Reichman & Okediji, *supra* note 1415 at 1439-49. In their view, “any mandatory exception for scientific research must [] be cloaked in some substantive content that promotes flexibility within an inherently pro-science framework and deflects narrowing legalistic interpretation in advance.” *Ibid* at 1433.

development-oriented exceptions for education and research are contemplated in the WIPO Internet and Marrakesh Treaties. In their respective preambles, the Treaties recognize ‘the need to maintain a balance between the rights of authors and the larger public interest, particularly *education, research and access to information*.¹⁶⁹²

As mentioned above, the exceptions for teaching, scholarship and scientific research should be exempted from the digital locks.¹⁶⁹³ In this respect, worth a lesson is Morocco’s exemption of L&Es for educational institutions from TPMs.¹⁶⁹⁴ This carve-out is crucial to facilitate a legitimate access to and use of the creative works. Further, subject to the requirement of fair practice, the teaching exception should make clear the possible use of course-packs for educational purposes in order to legitimize the existing practice.¹⁶⁹⁵ An explicit provision is also needed to exempt a breach of the exceptions from a threat of criminalization. Given the growing significance of distance or online tertiary education, the teaching exception must be applicable for education of all levels and modes.¹⁶⁹⁶ After all, promoting education both as an essential element of human rights and basic capabilities is vital for the realization of human development.

Set within the broad framework of flexibilities critical for human development, providing for mandatory teaching and scientific research exceptions is thus vital to facilitate access to digital and non-digital learning materials.¹⁶⁹⁷ For their optimal utilization, the mandatory status of the exceptions

¹⁶⁹² WCT, *supra* note 448 at Preamble, para 5; WPPT, *supra* note 448 at Preamble, para 4; Marrakesh Treaty, *supra* note 497 at Preamble, para 9.

¹⁶⁹³ See Okediji, “International Copyright System,” *supra* note 51 at 27.

¹⁶⁹⁴ *Copyright and Related Rights Law No.2-00* (as amended by Law.34-05 on February 14, 2006), art.65.1 (TPMs are not applicable to non-profit entities: libraries, archive services, educational institutions and public broadcasting organizations); Schonwetter & Ncube, “New Hope for Africa,” *supra* note 158 at 70-72.

¹⁶⁹⁵ For instance, a clear provision that allows use of course-packs has been included in South Africa’s copyright amendment bill. Copyright Amendment Bill[B13B-2017], *supra* note 1391, § 12D (2).

¹⁶⁹⁶ Ricketson & Ginsburg (Vol. I), *supra* note 134 at 792-93. Okediji, *International Copyright System*, *supra* note 1 at 21; Susan Strba, “A Model for Access to Educational Resources and Innovation in the Developing World” in Daniel Gervais, *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era*, 2nd ed (Oxford: Oxford University Press, 2014) 287 at 297-98[Strba, “A Model for Access”].

¹⁶⁹⁷ See Okediji, “Reframing International Copyright” *supra* note 154 at 487 & 493.

will be important to shield users against technological and contractual overrides.¹⁶⁹⁸ Mandatory exceptions are also useful to promote affordable access to disadvantaged learners.¹⁶⁹⁹ To this end, governments can use the exceptions as a strategic baseline to negotiate with publishers over the price of learning materials.¹⁷⁰⁰

D. Exception for libraries and archives

Given its role to facilitate access to learning materials for tertiary education and scientific research,¹⁷⁰¹ the exception for libraries and archives is another vital exception that needs to be reframed as users' rights and adapted to the digital environment. It is undisputed that digital information technologies have transformed the role of libraries. As Okediji observes, libraries and archives are “the most accessible and dependable source of information, scientific materials and knowledge.”¹⁷⁰² Nonetheless, the lack of appropriate L&Es constitutes an impediment to their role of facilitating access to knowledge, supporting education and providing opportunities for knowledge accumulation.¹⁷⁰³

As noted in the preceding chapter, the exception is restricted to ‘a reproduction of a published Article, short work or short extract of a work’ to exclude all other exclusive rights under art.7 of the copyright law.¹⁷⁰⁴ For instance, acts of distribution, making available digital copies, adaptation and public lending are all excluded. This prohibition is detrimental to the public interest role of libraries in the digital environment.¹⁷⁰⁵ Further, the reproduction of the whole work such as books and unpublished

¹⁶⁹⁸ Elkin-Koren, “Copyright in the Digital Ecosystem” *supra* note 1519 at 166. Reichman & Okediji, *supra* note 1415 at 1371, 1414-18 & 1441-49.

¹⁶⁹⁹ Okediji, “Reframing International Copyright,” *supra* note 154 at 469.

¹⁷⁰⁰ *Ibid.*

¹⁷⁰¹ See Okediji, “The Limits of International Copyright,” *supra* note 188 at 732-33.

¹⁷⁰² Okediji, “Reframing International Copyright” *supra* note 154 at 490.

¹⁷⁰³ *Ibid* at 491.

¹⁷⁰⁴ Copyright Proc.No.410/2004, *supra* note 136 at art.12(2).

¹⁷⁰⁵ Okediji, “Reframing International Copyright,” *supra* note 154 at 489-92; Elkin-Koren, “Copyright in a Digital Ecosystem,” *supra* note 1519 at 137-39.

works is not allowed. This severe restriction of the role of libraries should be removed and the exception should encompass all the relevant exclusive rights. In terms of the works, it should be applicable for works lawfully made available to the public. The strict conditions attached to the exception need to be relaxed. In this regard, lessons can be drawn from countries with boarder exceptions for libraries.

In taking a legislative inspiration, Ethiopia should devise an appropriate mandatory exception in compliance with the broadest possible interpretation of the three-step test. It is important to reframe the exception as users right in order to enable users to assert it against restrictive practices. In recognition of its role to advance public interest, the exception must further be insulated against criminalization and the restrictive effects of TPMs.¹⁷⁰⁶ Indeed, reframing and safeguarding appropriate exceptions for libraries and archives are crucial to advance human development through access to creative works.¹⁷⁰⁷

E. Exhaustion Doctrine and Parallel Imports

Due to foreign-inspired educational curricula and lack of local publishers, learning materials produced overseas constitute an essential educational input for tertiary education in Ethiopia. In particular, materials published in English are critical as English is an official medium of instruction for tertiary education. This defacto dependence on imported copyrighted materials and the current blanket prohibition of parallel importation call for an urgent adoption of doctrine of international exhaustion. As noted earlier, the TRIPs Agreement has left this issue quite open for member states to determine. In view of its role to facilitate affordable access to learning materials,¹⁷⁰⁸ both copyright law and the

¹⁷⁰⁶ Okediji, “International Copyright System,” *supra* note 51 at 28; Schonwetter & Ncube, “New Hope for Africa,” *supra* note 1675 at 71 & 72 (recommending either permitted circumvention for or exemption of L&Es from TPMs). As mentioned above, it is important to adopt the approach followed by Morocco that exempts, *inter alia*, libraries and archives from TPMs. See *Moroccan Copyright and Related Rights Law No.2-00* (as amended by Law 34-05), art.65.1.

¹⁷⁰⁷ See Okediji, “Reframing International Copyright,” *supra* note 154 at 491-92. Elkin-Koren, “Copyright in the Digital Ecosystem,” *supra* note 1519 at 138-40 & 166 As mentioned above, it is important to adopt the approach followed by Morocco that exempts, *inter alia*, libraries and archives from TPMs. Schonwetter & Ncube, “New Hope for Africa,” *supra* note 1677 at 70-72.

¹⁷⁰⁸ Gervais, *TRIPs Agreement*, *supra* note 724 at 200. In terms of its economic significance, parallel importation is ‘one way of reducing the cost of learning materials.’ Strba, “A Model for Access” *supra* note 1696 at 294.

pertinent customs law should be amended to permit parallel imports. Even in the developed nations such as the U.S that champion a stronger protection, the rule of international exhaustion is adopted to advance their public interests. In Africa, both Egypt and South Africa (in its new bill) are among countries that provide for the doctrine of international exhaustion.¹⁷⁰⁹

Noting the functional equivalence between first sale and commercial licensing in the online markets, scholars also argue for the doctrine's careful extension to the digital environment in order to facilitate access to digital copies.¹⁷¹⁰ In short, the existing TRIPs-plus approach must be reconsidered to integrate the doctrine as an important form of flexibilities.

F. Compulsory Licensing

In a country without an effective CMOs, the role of compulsory license is vital to facilitate access to creative works in order to serve the public interests such as education. Due to the nascent CMOs system in Ethiopia, the operation of an effective and efficient voluntary licensing mechanism would take some time to materialize. Further, as a remedial measure to address the concerns of anticompetitive or unfair licensing practices, a compulsory licensing regime remains instrumental to facilitate access to learning materials. As a form of compensated exception, the existing compulsory licensing is however narrow in its scope. Thus, legislative steps should be taken to revise the regime.

First, its narrow scope that is limited to 'published' work should be revised to include works *lawfully made available to the public*. Second, in addition to the permitted rights, compulsory licensing should be applicable for acts of distribution and making available right. Both are critical for educational institutions and libraries. Further, a resort to compulsory license should be indicated as an authorized measure to regulate anticompetitive or unfair practices. To this end, a coherent linkage must be created

¹⁷⁰⁹ See *Egypt Law on the Protection of Intellectual Property Rights, Law No.82 of 2002*, art.147; South African Copyright Amendment Bill[B13B-2017], *supra* note 1391, § 12 B (6).

¹⁷¹⁰ See generally Caterina Sganga, "A Plea for Digital Exhaustion in EU Copyright Law" (2018) 9 JIPITEC 211 at 237-39; Aaron Perzanowski & Jason Schultz, "Digital Exhaustion" (2011) 58 UCLA L Rev 890 at 890-946; Okediji, "Creative Markets and Copyright," *supra* note 707 at 24-31. For instance, the doctrine's extension is considered appropriate for e-books. *Ibid* at 31.

between copyright and competition (antitrust) laws. As a public policy tool, a compulsory license should be designed to serve the public interest.

G. Exception for Persons with Disabilities.

As noted in thesis, Ethiopia has now acceded to the Marrakesh Treaty long after its ratification of the UNCRPD. Despite its repeated revision, the existing copyright law does not provide for relevant L&Es to allow disabled users an access to copyrighted materials in accessible formats. This legislative silence implicates several other rights, including access to education. In order to conform to its international and constitutional obligations, Ethiopia is required to integrate into the existing copyright system those flexibilities enshrined in the Marrakesh Treaty. Predating the Treaty, art.30 (3) of the UNCRPD itself obligates states to take ‘all appropriate steps’ to remove IP-related ‘discriminatory barrier to access by persons with disabilities to cultural materials.’ In adopting the appropriate flexibilities to facilitate the beneficiaries’ access to learning materials, commentators suggest taking into account the overarching human rights objectives of the treaties and a broader definition of beneficiaries.¹⁷¹¹ In so doing, Ethiopia is required to enable persons with disabilities to “[e]njoy access to cultural materials in accessible formats” for their sustainable human development.¹⁷¹² To this end, relevant entities should be authorized to promote access to copyrighted materials in accessible formats.

In sum, the reintegration of the specific copyright-related flexibilities should be made in order to facilitate access to copyrighted learning materials. Seen through the prism of human development, broader public interest objectives should guide the (re)incorporation of the flexibilities as users’ rights. Provided as development-inducing mandatory L&Es,¹⁷¹³the flexibilities should be immune to both criminalization and TPMs. In this regard, the recent WIPO’s technical assistance to Ethiopia that calls

¹⁷¹¹ Helfer et al, *The World Blind Union Guide*, *supra* note 500 at 38.

¹⁷¹² UNCRPD, *supra* note 502 at Preamble, para g & art. 30(1).

¹⁷¹³ Okediji, “The Limits of International Copyright” *supra* note 188 at 733(stating that “[m]andatory L&Es for libraries, archives, and other educational and cultural institutions are essential to facilitate both liberty-enhancing and development-inducing goals.”)

for, *inter alia*, an indiscriminate use of TPMs should be resisted or considered with a great caution. It must be underlined that the protection of TPMs is not required to be made “in a manner inconsistent with copyright’s fundamental goals.”¹⁷¹⁴

7.5. Exploring the Prospects and Challenges of Licensing Models

7.5.1. Blanket and Extended Collective Licensing Models

For the exploitation or dissemination of creative works, there exist a number of licensing models. Each one of the models has its own merits and limitations. No single licensing model does suit all categories of works and markets. For instance, blanket (repertoire) licensing is considered to offer ‘an attractive alternative in the online environment.’¹⁷¹⁵ Thus, an appropriate combination of licensing schemes offers better benefits. In addition to the traditional individual/transactional licensing, both collective license and ECL models are important models CMOs often depend on to operate. As “the mainstay of most CMOs,” blanket licensing facilitates “the unlimited use of all works within the organization’s repertoire for a specific period of time.”¹⁷¹⁶ In facilitating an ‘immediate access to a broad array of creative content,’ blanket licensing is both time and cost efficient to reduce transaction costs associated with negotiation for specific works.¹⁷¹⁷ Nonetheless, given its “all or nothing” bargaining nature, it is less flexible and expensive for selective or particularized use of the repertoire.¹⁷¹⁸ For universities and colleges in Ethiopia, this would foreclose the option for affordable and selective access to relevant learning materials. For instance, Addis Ababa University was once forced to cancel its subscriptions with foreign-based academic publishers. Further, it will remain a

¹⁷¹⁴ See, e.g., Okediji, “International Copyright System,” *supra* note 51 at 27.

¹⁷¹⁵ Gervais, *Restructuring Copyright*, *supra* note 702 at 250.

¹⁷¹⁶ Laurence R. Helfer, “Collective Management of Copyright and Human Rights: An Easy Alliance Revisited,” in Daniel Gervais, ed, *Collective Management of Copyright and Related Rights*, 3rd ed (The Netherlands: Kluwer Law International, 2015) 81 at 95. Jeremy de Beer, “Legal Strategies To Profit From Peer-Production” (2008) 46 Can Bus LJ 269 at 284 [de Beer, “Legal Strategies”] (stating that “[c]ollective blanket licensing could also work well to enable the creation of a wide range of derivative works.”)

¹⁷¹⁷ Helfer, “Collective management of Copyright,” *supra* note 1716 at 95.

¹⁷¹⁸ *Ibid.*

challenge for the nascent CMOs to reach a reciprocal agreement with their foreign counterpart for the repertoire. The mitigation of the drawbacks of blanket licensing requires appropriate regulation.¹⁷¹⁹

Built upon the same principles and known in the Nordic countries, ECL is deemed more useful for a range of works including learning materials for educational purposes and libraries.¹⁷²⁰ Subject to the opt-out clause for the non-members, the ECL offers an efficient access to significant portion of foreign copyrighted works through local CMOs.¹⁷²¹ Indeed, the ECL is considered a more comprehensive option for being inclusive of both national and foreign right holders.¹⁷²² As used in Norway, ECL is also important to facilitate a mass digitization of out-of-print books and access to the digital databases of in-copyright works.¹⁷²³ The ECL can thus be useful to promote access to orphan works.¹⁷²⁴ This will be critical for educational purposes. In this regard, Ethiopia's approach to orphan works seems to endorse an implicit ECL for their exploitation. This can be inferred from the legal authorization of the CMOs to license orphan work after court's determination of its status and upon a notification from the EIPO.¹⁷²⁵ Compared to others, the ECL is thus more comprehensive. Hence, Ethiopia needs to consider adopting the ECL.

¹⁷¹⁹ Ibid at 96-108.

¹⁷²⁰ Alain Strowel, "The European 'Extended Collective Licensing' Model" (2011) 34:4 Colum JL & Arts 665 at 666 [Strowel, "Extended Collective Licensing"]; Pamela Samuelson, "Legislative Alternatives to the Google Book Settlement" (2011) 34:4 Colum JL & Arts 697 at 706 [Samuelson, "Legislative Alternatives"].

¹⁷²¹ Gervais, *Restructuring Copyright*, *supra* note 702 at 251; Daniel Gervais, "Collective Management of Copyright and Neighboring Rights in Canada: An International Perspective" (2002) 1:2 CJLT 21 at 30[Gervais, "Collective Management"].

¹⁷²² Helfer, "Collective Management of Copyright," *supra* note 1716 at 98.

¹⁷²³ Samuelson, "Legislative Alternatives," *supra* note 1720 at 709-10. Strowel, "Extended Collective Licensing," *supra* note 1720 at 666-67.

¹⁷²⁴ Strowel, Strowel, "Extended Collective Licensing," *supra* note 1720 at 667 & 69; Samuelson, "Legislative Alternatives," *supra* note 1720 at 719-21; Gervais, *Restructuring Copyright*, *supra* note 702 at 251.

¹⁷²⁵ *Copyright Proc. No.410/2004* (as amended), *supra* note 136 at arts. 34(6) & 39. Without authorization and for a non-member, the draft regulation strictly prohibits the CMS from administering a right or granting a license over a work.

In addition to the need for appropriate legislative action and its considerable merits,¹⁷²⁶ there are however some limitations related to the operation of ECL. First, while foreclosing other options,¹⁷²⁷ ECL requires effective CMOs and works best where right holders are well informed and organized.¹⁷²⁸ Second, given its unsettled consonance with the international copyright regime,¹⁷²⁹ the use of ECL in a mass digitization of works might be constrained due to the three-step test.¹⁷³⁰ Third, foreign right holders might not get a due remuneration as ECL tends to favor local authors.¹⁷³¹ In both models of collective licensing, the blanket licensing is useful to allow an efficient access to the entire repertoire of learning materials for education and research.¹⁷³² In addition to its inaptness for some works,¹⁷³³ the licensing has its own limitations.

From users' perspective, its potential might be undermined due to the practice of 'big deals' commercial publishers or CMOs often use in a compulsive "all or nothing" bargain for an authorized access to the repertoire.¹⁷³⁴ Absent appropriate L&Es and regulation through antitrust law, the exploitative subscription fee attached to blanket licensing would constitute an impediment for academic libraries. For the local CMOs in Ethiopia, the EIPO's approval of the licensing tariffs might mitigate

¹⁷²⁶ Samuelson, "Legislative Alternatives," *supra* note 1720 at 714-29 (describing the various benefits of ECL to facilitate access to copyrighted works).

¹⁷²⁷ De Beer, "Legal Strategies," *supra* note 1716 at 287 (pointing out the difficulty for "licensees to choose to use only pre-cleared or Creative common contents").

¹⁷²⁸ Gervais, "Collective Management," *supra* note 1721 at 30.

¹⁷²⁹ Samuelson, "Legislative Alternatives," *supra* note 1720 at 714-15. In this regard, Gervais dismisses the argument of alleged inconsistency with art.5(2) of Berne Convention as long as there is efficient, transparent and uncostly opt-out system; Gervais, *Restructuring Copyright*, *supra* note 702 at 252. Mahly Ficsor, "Collective Rights Management from the Viewpoint of International Treaties, with Special Attention to the EU'Acquis", in Gervais (ed), *Collective Management of Copyright*, *supra* note 1716, 31 at 66-68. pointing out four conditions for ECL's compliance with international copyright regime).

¹⁷³⁰ Strowel, "Extended Collective Licensing," *supra* note 1720 at 668-69.

¹⁷³¹ *Ibid* at 669; Samuelson, "Legislative Alternatives," *supra* note 1720 at 714.

¹⁷³² Gervais, "Collective Management," *supra* note 1721 at 30.

¹⁷³³ De Beer, "Legal strategies" *supra* note 1716 at 286 (noting the complex clearance process for audiovisual works and the inefficiencies related to negotiation for fragmented rights).

¹⁷³⁴ Helfer, "Collective Management of Copyright," *supra* note 1716 at 90. For a discussion on the practice of 'big deals,' see generally Aaron S. Eldin & Daniel L. Rubinfeld, "Exclusion or Efficient Pricing?: The Big Deal Bundling of Academic Journals" (2004) 72:1 Antitrust LJ 119.

the concern related to anti-competitive practices, such as excessive fees. In a nutshell, the benefits of the foregoing licensing models presuppose an effective operation of the CMOs. For the moment, their actual benefits are limited due to the embryonic stage of the inexperienced CMOs in Ethiopia.¹⁷³⁵ Further, market failure is another challenge against the roles of commercial licensing schemes.

7.5.2. Open Access Licensing Model: A Promising Alternative/Complementary Means?

Suited to unencumbered dissemination of knowledge, an OA licensing model is another emerging licensing regime with an increasing significance in the academic environment.¹⁷³⁶ As noted in Chapter One, OA licensing mechanisms are founded upon the proprietary copyright regime *albeit* with added flexibilities.¹⁷³⁷ In fact, OA is anchored in the access prong of the public interest with a prime focus on collaborative creation and dissemination in lieu of a commercial exploitation. In contrast to the exclusive all-rights-reserved practice, the OA licensing model operates on the basis of ‘some rights-reserved’ approach.¹⁷³⁸ To this extent, copyright law remains the basis to regulate the reserved rights— attribution, integrity and related aspects.¹⁷³⁹ In the same vein, users-driven contractual regime plays a key role for the operation of OA.¹⁷⁴⁰

¹⁷³⁵ As Helfer has noted, “many developing countries have *only limited experience* in encouraging creativity within their borders and *in promoting the licensing of copyrighted works.*” Emphasis added. Helfer, Collective Management of Copyright, *supra* note 1716 at 94.

¹⁷³⁶ Paulo Guarda, “Creation of Software within the Academic Context: Knowledge Transfer, Intellectual Property Rights and Licences” (2013) 44 IIC 494 at 514.

¹⁷³⁷ See Suber, *Open Access*, *supra* note 75 at 1-27 (explaining open access).

¹⁷³⁸ Marc Sheufen, *Copyright Versus Open Access: On the Organization and Political Economy of Access to Scientific Knowledge* (Geneva: Springer, 2015) at 110 [Sheufen, *Copyright Versus Open Access*]. In particular, this is true for the OA model based on creative commons. Niva Elkin-Koren, “What contracts Cannot Do: The Limits of Private Ordering in Facilitating Creative Commons” (2005) 74 *Fordham L Rev* 375 at 389 [Elkin-Koren, “What Contracts Cannot Do”].

¹⁷³⁹ Jeremy de Beer & Chidi Oguamanam, “Open Minds: Lessons from Nigeria on Intellectual Property, Innovation and Development,” in Smith & Reilly, *Open Development*, *supra* note 76, 249 at 264 [de Beer & Oguamanam, “Open Minds”]. For instance, CC licenses essentially depend on rights management information practices and end user license agreements for managing digital rights. *Ibid.* Elkin-Koren, “What Contracts Cannot Do” *supra* note 1738 at 392-94.

¹⁷⁴⁰ Elkin-Koren, “What Contracts Cannot Do” *supra* note 1738 at 406-20 (exploring the merits and demerits of the contractual regime that underpins the Creative Commons).

Due to its resonance with the freedom of users and creators for unencumbered access, collaborative creation and diffusion of knowledge in the educational sector,¹⁷⁴¹ OA licensing mechanism has become quite popular among educators and scholars. Further, policy, legislative and institutional initiatives have been taken across countries and continents such as the US, Europe, Asia, Latin America and South Africa to promote OA for public-funded research reports and publications.¹⁷⁴² Another inspiring initiative is the Egyptian Knowledge Bank—the national online library in full operation since 2016—that allows all Egyptians a free access to databases of knowledge housed in several regional and international publishing industries. In view of Ethiopia’s human development imperatives, these access-oriented attributes of OA licensing models have the potential to *complement* appropriate copyright-related flexibilities and facilitate enhanced access to learning materials for education. It is thus important to examine the prospect and challenges of adopting the licensing mechanism in Ethiopia.

7.5.3. Prospects of Open Access Licensing Models

In view of its increasing acceptance among educators, researchers, libraries and academic publishers, OA holds a great promise for a free access to relevant digital learning materials such as scientific journals, software and research reports. Indeed, several public and private initiatives have been taken both in developed and developing nations to adopt OA mechanisms in order to promote collaborative creation, sharing and dissemination of digital contents. In this regard, it is important to note the widespread use of the OA licensing models such as GNU/GPL for open source software and

¹⁷⁴¹ See Helfer, “Collective Management of Copyright,” *supra* note 1716 at 97. In allowing uses without remuneration, open content licenses “facilitate sharing of ideas, information and protected content between authors and users and directly promote ‘the public interest in enjoying broad access to new knowledge’ –two goals endorsed by Article 15 of the Covenant and by the ICESCR Committee.” *Ibid.*

¹⁷⁴² Sheufen, *Copyright versus Open Access*, *supra* note 1738 at 69-75; Thomas Eger & Marc Sheufen, *The Economics of Open Access: On the Future of Academic Publishing* (Cheltenham: Edward Elgar, 2018) at 81 &87.

the Creative Commons (CC) for digital contents. Often used for scientific publications, the creative commons ‘offers a number of licenses with different degrees of permission barriers.’¹⁷⁴³

Constituted of four general elements, the CC offers a combination of six core licenses on three levels.¹⁷⁴⁴ For instance, “attribution” being the basic element of all the combinations, the CC Attribution License (CC BY) offers users the utmost freedom to reproduce, distribute, adapt and use the works for all purposes subject to an attribution to the original creator.¹⁷⁴⁵ With a lesser freedom, the CC BY-SA version encourages sharing of digital contents including derivate ones under the same rules. Indeed, the CC licensing model becomes popular for its users-oriented flexibilities.¹⁷⁴⁶ Somehow, there still remains a concern on the issue of moral right in relation to allowing derivative works across jurisdictions.¹⁷⁴⁷ In spite of its limited creative freedom, the CC BY-NC-ND is often used to resolve the concern and ensure the non-commercialization of the digital contents.¹⁷⁴⁸ This version however limits users’ freedom to create derivate works and commercialize them to cover their expenses for sustainable creative activities.¹⁷⁴⁹

For a number of reasons, OA mechanism has the potential to complement the existing flexibilities and mitigate the impediments against access to learning materials in developing and least developed countries such as Ethiopia. First, OA is more suited to the reputation-induced ethos of scholars and academic researchers that produce a large amount of scientific publications and research

¹⁷⁴³ Eger & Sheufen, *supra* note 1742 at 14. Nonetheless, the creative commons’ strategy is critiqued for lack of standardization in licenses, reliance on proprietary and contractual regimes, and the consequent limitation of access. See generally Elkin-Koren, “What Contracts Cannot Do,” *supra* note 1738. Guibault, “Owning the Right to Open Up Access,” *supra* note 79 at 158-59.

¹⁷⁴⁴ Sheufen, *Copyright Versus Open Access*, *supra* note 1738 at 110. See Creative Commons, About the Licenses, online: <<https://creativecommons.org/licenses/>>.

¹⁷⁴⁵ *Ibid.* Marshall Smith, “Open Educational Resources: Opportunities and Challenges for the Developing World,” in Smith & Reilly, *Open Development*, *supra* note 76 at 133 [Smith, “Open Educational Resources”].

¹⁷⁴⁶ See Catharina Maracke, “Creative Commons International: The International License Porting Project – Origins, Experiences, and Challenges” (2010) 1 JIPITEC 4-18.

¹⁷⁴⁷ *Ibid* at 7-9.

¹⁷⁴⁸ Elkin-Koren, “What Contracts Cannot Do” *supra* note 1738 at 401.

¹⁷⁴⁹ Smith, “Open Educational Resources” *supra* note 205 at 1745. Elkin-Koren, “What Contracts Cannot Do” *supra* note 1738 at 401.

reports.¹⁷⁵⁰ In a reputation-driven academic environment, OA enlarges the authors' audience, makes the works visible and increases their impact through a wider dissemination.¹⁷⁵¹ In addition to reputation, peer recognition and readership as the driving non-pecuniary incentive mechanism, the academic authors depend upon a blend of salaries, grants/prizes, and public funding for compensation.¹⁷⁵²

Second, the advent of digital technologies, the commercial publishers' sky-rocketing prices or subscription fees, and the consequent shift in demands have led to a growing OA publishing market.¹⁷⁵³ Serving as an access-driven viable business model, OA academic publishing operates on the basis of the gold (open access journals) and green roads (self-archiving or repositories) for scientific journals.¹⁷⁵⁴ In fact, the commercial publishers have started to adopt a hybrid model to offer an OA to articles published through articles processing fees (ACP).¹⁷⁵⁵ In effect, this has led to the so-called 'author pays' rule to determine OA to the articles.¹⁷⁵⁶

Third, the OA models facilitate both North-South as well as South-South transnational collaborative creation and efficient dissemination of digital works at a lesser cost. In so doing, OA is instrumental to bridge the digital divide, overcome geographical barriers and reduce the transaction costs related to the traditional licensing negotiation and distribution.¹⁷⁵⁷ This constitutes a significant technical and economic advantage over the limited access to print materials fenced within the exclusive

¹⁷⁵⁰ Reichman & Okediji, *supra* note 1415 at 1427. De Beer, "Legal Strategies," *supra* note 1716 at 284 & 86. As de Beer observes, "Creative Commons licences are especially well suited to non-commercial contexts where peers produce content for reasons other than financial reward." *Ibid* at 286.

¹⁷⁵¹ Sheufen, *supra* note 1738 at 121; Peter Suber, *Science Dissemination Using Open Access: A Compendium of Selected Literature on Open Access* (The Abdu Salam International Centre for Theoretical Physics, 2008) at 12.

¹⁷⁵² Eger & Sheufen, *supra* note 1742 at 11 & 47-55. Guibault, "Owning the Right to Open Up Access," *supra* note 79 at 160.

¹⁷⁵³ *Ibid* at 29-32; Priest, "Copyright," *supra* note 80 at 390. Guibault, "Owning the Right to Open Up Access," *supra* note 79 at 137-38.

¹⁷⁵⁴ Eger & Sheufen, *supra* note 1742 at 29-32; see Guibault, "Owning the Right to Open Up Access," *supra* note 79 at 139 & 153-57 (for a discussion on the gold and green roads).

¹⁷⁵⁵ *Ibid* at 33.

¹⁷⁵⁶ *Ibid*. For instance, for OA journals published by the big commercial academic publishers, authors are charged ACP or submission fee of up to USD 3000. *Ibid*.

¹⁷⁵⁷ Sheufen, *supra* note 1738 at 120.

copyright regime. In harnessing online educational opportunities, critical is the role of access to digital contents and open educational resources (OERs), including massive online open courses (MOOCs).¹⁷⁵⁸ The combination of OA and OERs facilitates both national and transnational access to tertiary education.¹⁷⁵⁹ In facilitating access to education, OA enlarges the educational opportunities of Ethiopia's population for sustainable human development. In effect, OA promotes a cooperative creation, learning and sharing of global educational resources from across the globe.¹⁷⁶⁰ In particular, the South-South collaboration across nations and universities within a nation promotes access to relevant knowledge more suited to the local context of the nation.¹⁷⁶¹ Given its role in fostering knowledge sharing and collaboration, a recent study exploring the potential role of OA in Ethiopia calls for the adoption of OA.¹⁷⁶²

From a creative innovation perspective, OA comports with the users-driven open, commons-based peer production and collaborative innovation process.¹⁷⁶³ In this regard, digital technologies such as Internet or ICT can be harnessed to facilitate access to knowledge produced in the developed nations for the purposes of creative innovation and tertiary education in Ethiopia. To this effect, Ethiopia's recent increased focus on the ICT as a tool for development is important to pave the road towards embracing OA models. From human development perspective, ICT and networked digital platforms are considered to "hold great promise for human flourishing even in the most desperate communities

¹⁷⁵⁸ It is important to note that several prestigious universities in the developed nations such as Harvard University, UC Berkley, MIT and so on have embraced OA to run MOOCs that are accessible to students all over the world. Smith, "Open Educational Resources" *supra* note 1745 at 138-39.

¹⁷⁵⁹ *Ibid* at 145-48 &150-57.

¹⁷⁶⁰ Chan & Gray, "Centering the Knowledge Peripheries through Open Access," *supra* note 76 at 197.

¹⁷⁶¹ *Ibid*. Chan & Gray note that the South-South flow of knowledge is "far more essential for local [research] and development since the Global Southern countries have more in common than those of the Global North." *Ibid*. Guibault, "Owning the Right to Open Up Access," *supra* note 79 at 137.

¹⁷⁶² See generally Getaneh Alemu, *The Role of Open Access in Fostering Knowledge Sharing and Collaboration in Ethiopia: A Case Study* (Master Thesis, Oslo University College, Tallin University & Parma University, 2009) [unpublished].

¹⁷⁶³ See generally Benkler, *The Wealth of Networks*, *supra* note 4; Eric Von Hippel, *Democratizing Innovation* (Cambridge: The MIT Press, 2005); Reichman & Okediji, *supra* note 1415 at 1478-79.

around the world.”¹⁷⁶⁴ It is noted that “inexpensive and reliable access to the Internet is becoming essential to the development of capabilities in other areas, such as education.”¹⁷⁶⁵ Facilitated through Internet, “[a]ccess to information is crucial for high-quality education and thus for expanding opportunities.”¹⁷⁶⁶

In harnessing the potential of OA, the technological platforms are instrumental to facilitate a wider range of access to and dissemination of knowledge, creative interactions and collaborative opportunities for the enlargement of human capabilities. Fourth, the adoption of OA licensing models would offer options that augment the existing copyright system.¹⁷⁶⁷ As the economics of open access reveals, “a well-designed system of OA journals will not destroy the authors’ or the publishers’ incentives to provide and disseminate academic articles.”¹⁷⁶⁸ This finding attenuates the concern of incentive mechanism that drives publishing industries. Indeed, a study concludes that OA “should be the future of academic publishing.”¹⁷⁶⁹ As Margaret Chon observes, “[o]pen course content initiatives in the tertiary textbook arena indicate that market-based mechanisms for distribution are only one possible means for providing access to textbooks.”¹⁷⁷⁰

¹⁷⁶⁴ Okediji, “Reframing International Copyright” *supra* note 154 at 1457 [original citations omitted].

¹⁷⁶⁵ UNDP, *Human Development Report 2016*, *supra* note 121 at 69.

¹⁷⁶⁶ *Ibid.*

¹⁷⁶⁷ It should be borne in mind that OA licensing models are based upon a combination of copyright and contractual regimes. Nevertheless, lack of international standardization in the CC licensing model and the principle of choice of law grounded in territoriality would pose a challenge. Sheufen, *supra* note 1738 at 112.

¹⁷⁶⁸ *Ibid* at 122.

¹⁷⁶⁹ *Ibid* at 141.

¹⁷⁷⁰ Chon, “Intellectual Property ‘from Below,’” *supra* note 50 at 842.

7.5.4. *Rooms and Initiatives for Integration of OA in Ethiopia*

In view of its potential to facilitate free or affordable access to relevant learning materials, OA licensing models require policy and legal frameworks. For the policy and legal action, it is important to highlight the need for a policy action and the legal rooms available under the relevant national and international regimes. From a policy perspective, OA models need to be emphasized as a strategy intended to promote, *inter alia*, the policy objectives of creative innovation and education for sustainable human development. Critical in this regard is the linkage between OA and the ICT for their collaborative roles in promoting sustainable human development.¹⁷⁷¹ Thus, the explicit adoption of OA models as a complimentary access strategy and its inclusion in the policies are vital to facilitate collaborative production and enhanced diffusion of knowledge for creative innovation and education. In fact, several universities and research institutions in Ethiopia have started to embrace OA into their respective institutional policies.

For instance, several journals published in Ethiopia are available on the institution's website for free access while over ten journals are accessible from the African Journals Online (AJOL).¹⁷⁷² In particular, Addis Ababa University Library has been at the forefront to advocate for OA since 2004. In the last decade, the initiative has expanded to bring on board other universities in collaboration with the Consortium of Ethiopian Academic and Research Libraries (CEARL). Intensified through the collaboration, the OA movement in Ethiopia gathered a momentum upon the conception of "Open Access in Ethiopia" project in 2014 and culminated in the launch of Ethiopian Journals Online (EJOL).¹⁷⁷³ For the moment, around 24 journals have been hosted at EJOL that serves as an online

¹⁷⁷¹ See Dalindyabo Shabalala, "Knowledge and Education: Pro-access Implications of New Technologies" in Wong & Dutfield, eds, *Intellectual Property and Human Development*, *supra* note 428, 250 at 251-57.

¹⁷⁷² See UNESCO, online: UNSECO <<http://www.unesco.org/new/en/communication-and-information/portals-and-platforms/goap/access-by-region/africa/ethiopia/>>.

¹⁷⁷³ *Ibid.*

platform for digital articles. Furthermore, the National Academic Digital Repository of Ethiopia (NADRE) serves as a major platform for digital contents.

In this regard, using NADRE as a platform, the Ethiopian Education and Research Network is crucial for promoting collaborative research and educational activities, and facilitating sharing of ICT-related resources among higher educational institutions. Although universities have better internet connections and ICT services, Ethiopia has still low internet bandwidth and users' penetration. The technological and financial constraints for the necessary infrastructure, and lack of a comprehensive national policy on OA affect the full-fledged development of OA in the country.¹⁷⁷⁴

In the backdrop of these initiatives, the MOSHE in collaboration with the CEARL has adopted an OA policy in 2019 for all public-funded research data and publications that should be deposited in the NDRE. It should be noted that this is a policy confined to educational institutions alone. Further, the OA policy is subject to a critique for want of an inclusive participation of, and sufficient deliberation among, all the relevant stakeholders. Nevertheless, its adoption is a milestone towards a robust and comprehensive policy. For the policy in place, it is important to consider all possible options to respect authors' freedom to publish their research outputs in outlets of their choice. In the event a closed publication outlet is chosen, the authors' would then be required to self-archive the publications. As discussed in this thesis, facilitating this additional option requires a coherent policy and legislative approach. To this end, this thesis underscores the need for a *development-oriented* national policy and legal frameworks that consolidate the existing initiatives into a coherent policy to guide the development of consistent institutional policies.

In particular, the formulation of the national policy is expected to be aligned with the copyright and other pertinent regimes. Such an integrative policy initiative will encourage academic and research institutions to embrace OA and develop a consistent set of institutional policies. For the policy

¹⁷⁷⁴ *Ibid.*

formulation or implementation, relevant insights can be drawn from soft norms such as the draft treaty on access to knowledge, the various OA declarations and the national practices of other nations. It is vital to have an all-inclusive OA policy across relevant sectors.

In addition to the initiatives for a policy regime, there are rooms in the existing legal regimes for the legislative measures needed to ensure the adoption of OA. From the international perspective, both the TRIPs Agreement and the WCT do recognize a possible variance in the legal means for the implementation of the treaties as long as the national law remains consistent. For instance, art.1.1 of the TRIPs Agreement states that “members shall be free to determine the appropriate method of implementing the provisions of this agreement within their own legal systems and practice.”¹⁷⁷⁵ Save for the minimum standards,¹⁷⁷⁶ no *specific form* of implementation is required from states.¹⁷⁷⁷ Further, a legal room can be carved out from the recognition accorded to the public interest in the sectors of vital importance and the need to maintain a balance between rights and obligations.¹⁷⁷⁸ Education should thus be considered a critical element of a public interest that falls within the reserved policy space.

In this respect, the WCT is more explicit in its reference to education, research and access to information as essential aspects of the public interest.¹⁷⁷⁹ For its implementation, art.14(1) of the WCT allows member states “to adopt, in accordance with their legal systems the necessary measures” to ensure the application of the treaty. As Reichman and Okediji observe, the afore-cited provisions allow

¹⁷⁷⁵ See also WCT, *supra* note 448 at art.14(1). This provision authorizes members to “undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this treaty”

¹⁷⁷⁶ Okediji, “Reframing International Copyright,” *supra* note 154 at 437-38. The international minimum standards include “what counts as protectable expression, and the terms and conditions of access and use of protected works.” *Ibid* at 437.

¹⁷⁷⁷ As Myra Tawfik has rightly noted, “the international copyright law system does not mandate or compel specific outcomes for domestic legislation nor does it require the international harmonization of laws. National legislatures retain a great measure of discretion in the way in which they interpret and implement their international copyright obligations.” Myra Tawfik, “International Copyright Law: Wi[h]ether User Rights?” in Michael Geist, ed, *In the Public Interest*, *supra* note 1401 at 72.

¹⁷⁷⁸ *Ibid* at 76-77. TRIPs Agreement, *supra* note 163 at art.7 &8.

¹⁷⁷⁹ WCT, *supra* note 448 at Preamble, para 5.

a flexible room for appropriate legislative measures.¹⁷⁸⁰ Taking advantage of the policy space under the treaties, a nation can adopt policy and legislative measures that accommodate OA to advance its public interest. In contemplation of its future compliance with the treaties, Ethiopia should take a proactive measure to exploit the policy space in order to promote its public interest through enhanced access to knowledge for education and research.

Yet, carving out exceptions to integrate OA will be constrained due to the three-step test unless otherwise the test is relaxed to offer a sufficient room.¹⁷⁸¹ For instance, Marc Sheufen argues that the Max Planck's interpretation of the test and its proposed insertion of 'the legitimate interest of third parties' into the test can serve as an entry point to embrace OA.¹⁷⁸² Indeed, worth considering are the relevant insights from the proposed interpretation. In Ethiopia, the 'legitimate interest of third parties' should be considered an integral element of the constitutional public interest. In so doing, a legislative action can be justified to integrate OA into the existing legal framework. In the same vein, relevant dimensions are the human rights to development and the right of every one to share in scientific advancement and its benefits.

In a knowledge era, it is obvious that the realization of these human rights and the advancement of public interests require unfettered access to knowledge through broader access mechanisms. Further, art.26(6) of the higher education legislation that requires universities public dedication of the knowledge produced for academic purposes is a relevant provision to support OA for research publications. To this effect, the provision should be revised to make all public-funded research to be available for public use through OA. In taking a legislative measure, it is essential to ensure a proper alignment between the copyright law and the legislation.

¹⁷⁸⁰ Reichman & Okediji, *supra* note 1415 at 1452-53.

¹⁷⁸¹ *Ibid* at 1453.

¹⁷⁸² Sheufen, *supra* note 1738 at 106-08; Reichman & Okediji, *supra* note 1415 at 1454-55(noting the importance of incorporating the proposal in reinterpreting the test).

7.5.5. *The Challenges of Adopting Open Access*

In spite of the prospects of the OA model to enhance access to learning materials, there remain a number of challenges. Seeking a political will for resolution, the first set of challenges relates to policy and legal constraints. Despite the encouraging initiatives towards OA, for years, there lacked a national policy to support, guide and consolidate the initiatives. Given the institutional OA policy in place to begin with, a remaining challenge is the legal constraint. As stated above, the legal impediment stems from the absence of appropriate legislation and the existing restrictive copyright regime. In principle, OA requires no legislative action to operate as it is a regime of private ordering.

In Ethiopian context, there however needs to be a coherent approach in its implementation and a legislative action to support the policy. In addition to the general reforms, amending the existing work-for-hire doctrine and introducing a ‘teacher exception’ are essential for the operation of OA in the educational sector.¹⁷⁸³ As there is no ‘one-size-fits-all’ incentive mechanism,¹⁷⁸⁴ it is argued that an equitable remunerative mechanism is more suited to educational sector.¹⁷⁸⁵ Indeed, it is not in the best interest of both academics and scientists to lock up their works for the sake of permission and commercialization. Rather, their major interest lies in the widest dissemination of the works and the consequent reputation. To this end, the non-exclusive mechanism is more appropriate to serve their interest through OA with a proper attribution of authorship.¹⁷⁸⁶ Further, the equitable remuneration will remain consistent with author’s human right. In considering this approach, Ethiopia should make a strategic use of the available policy space in its integration of relevant flexibilities.

¹⁷⁸³ See Priest, *supra* note 80 at 400-08 (discussing the application of the doctrine in the US, the unclarity on teacher’s exception and suggesting the need for a clear teacher exception for works that are academic in nature to facilitate OA).

¹⁷⁸⁴ See Gervais, *Restructuring Copyright*, *supra* note 702 at 191-206 &287(explaining the various categories of creators/industries and the respective motivation or incentive mechanisms). Priest, *supra* note 213 at 398-400.

¹⁷⁸⁵ This scheme is more apt to embrace OA as authors will have a non-exclusive right to equitable remuneration. Once equitable compensation is made, the works will then be available for public use without restriction, save for moral rights.

¹⁷⁸⁶ Jerome Reichman, “The Limits of ‘Limitations and Exceptions’ in the Copyright Law,” in Okediji, *Copyright Law in an Age of Limitations and Exceptions*, *supra* note 154 at 308-14[Reichman, “The Limits of L&Es”].

In fact, taking the existing global copyright system as a ‘given,’¹⁷⁸⁷ possible amendments to the national laws are still critical to integrate OA into the existing system. For instance, introducing a statutory ‘teacher/researcher’ exception to the doctrine will entitle academic authors/researchers to ownership of rights over their creative works.¹⁷⁸⁸ As a national doctrine, nations are free to design the doctrine as it is deemed fit for the purpose. Vested with the right, authors will be able to retain their right of authorship while granting the recruiting research and academic institutions a non-exclusive license over the creative works.¹⁷⁸⁹ Otherwise, divesting academic authors of rights over their works tends to conflict with their academic freedom and limits the operation of OA.¹⁷⁹⁰

In practice, academic authors in Ethiopia seem to bypass the doctrine of work-for-hire and transfer copyright ownership to reputable academic publishers overseas. To avoid inconsistent practices, a clear legal amendment is thus important to allow academic authors to both publish and self-archive their works without a legal restriction. In the same vein, the non-exclusive license vested in the institutions will enable the institutions to self-archive or dedicate the academic works for public use as required in the higher education legislation.¹⁷⁹¹ For authors, contractual mandates from their institutions or funders can be used to induce or encourage self-archiving.¹⁷⁹² In the exclusive copyright regime, it is useful to consider the introduction of an inalienable non-exclusive right that remains operative after a copyright transfer to publishers. In the digital era, scholars even question publishers’ entitlement to

¹⁷⁸⁷ See Daniel Gervais, “IP, Trade and Development,” *supra* note 159 at 535 (stating that “TRIPs should be seen, and accepted, as a given”).

¹⁷⁸⁸ Priest, “Copyright,” *supra* note 80 at 403-08. It should be noted that art.21(4) of the *Copyright Proc. 410/2004* does not provide for a statutory exception to the doctrine. Rather, it provides for a general doctrine of work-for-hire unless agreed otherwise.

¹⁷⁸⁹ Priest, “Copyright,” *supra* note 80 at 403-08. To quote Priest, “[n]on-exclusive licenses, therefore, are the lifeblood of open access.” *Ibid* at 418; Guibault, “Owning the Right to Open Up Access,” *supra* note 79 at 163.

¹⁷⁹⁰ *Ibid* at 411-417. Eger & Sheufen, *supra* note 1742 at 106 & 114-15 (noting that an absolute mandate be a challenge for OA journals due to lack of reputation and a conflict with academic freedom).

¹⁷⁹¹ *Higher Educational Proc. 650/2009*, *supra* note 117 at art.26(6). See Priest, “Copyright,” *supra* note 80 at 423-24.

¹⁷⁹² Reichman & Okediji, *supra* note 1415 at 1469-70. Sheufen, *supra* note 1738 at 115. Priest, *supra* note 80 at 396-97.

exclusive rights over research publications.¹⁷⁹³ It is rather suggested that publishers should be remunerated for their publishing services.¹⁷⁹⁴

In addition to allowing the academic authors the freedom to use and adapt their works after a copyright transfer, the retention of a non-exclusive right would facilitate authors' second publication or self-archiving.¹⁷⁹⁵ It also minimizes the bargaining imbalance and protects academic authors against exploitative commercial publishers that force a copyright assignment from the authors on a routine basis.¹⁷⁹⁶ In this respect, a lesson can be drawn from German copyright law that provides for an inalienable right of a secondary publication.¹⁷⁹⁷ From Africa, South Africa is poised to be one of the countries allowing a similar right for state-funded research publications.¹⁷⁹⁸

In short, both policy implementation and legislative measures should be taken at the national level to address the above concerns and mitigate the challenges posed by the existing copyright system. Nonetheless, a national legislative reform will be constrained due to lack of a global harmonization of L&Es that create uncertainties for a cross-border OA.¹⁷⁹⁹ The lack of harmonization gives rise to the issue of conflict of laws that undermines the potential of OA.¹⁸⁰⁰ It should be noted that harnessing the potential of OA to the fullest depends upon a networked and global collaboration. Yet, taking a strategic

¹⁷⁹³ Reichman & Okediji, *supra* note 1415 at 1465-69. The authors argue that “[r]ecognizing that publishers must charge for their technical *services* need not extend to endowing them with exclusive rights to downstream uses or reuses of the scientific *product* they make available.” *Ibid* at 1466. Reichman, “The Limits of L & Es” *supra* note 1786 at 308.

¹⁷⁹⁴ *Ibid*. Guilibat, “Owning the Right to Open Up Access,” *supra* note 79 at 148-50 (articulating how publishers acquire broader rights from authors).

¹⁷⁹⁵ Sheufen, *supra* note 1738 at 155. Suber, *Open Access*, *supra* note 75 at 125-32. Guibault, “Owning the Right to Open Up Access,” *supra* note 79 at 161-62.

¹⁷⁹⁶ See Reichman & Okediji, *supra* note 1415 at 1460 & 1476.

¹⁷⁹⁷ For instance, German copyright law provides for the retention of right of secondary publication 12 months after the original publication. *German Copyright Act*, art.38(4). See Copyright Act of 9 September 1965, § 38(4), (as last amended by Article 1 of the Act of 1 September 2017) [Federal Law Gazette I p. 3346]. Sheufen, *supra* note 1738 at 118.

¹⁷⁹⁸ See *South African Copyright Amendment Bill [B13B-2017]*, *supra* note 1391, §12D (7).

¹⁷⁹⁹ See Maracke, *supra* note 1746 at 7; Okediji, “Reframing International Copyright” *supra* note 154 at 89-94; see generally Andrew Rens, “Implementing WIPO’s Development Agenda: Treaty Provisions on Minimum Exceptions and Limitations for Education” in de Beer, ed, *Implementing the World Intellectual Property Organization’s Development Agenda*, *supra* note 193 at 158-169.

¹⁸⁰⁰ Maracke, *supra* note 1746 at 11-13. Rens, *supra* note 1799 at 165-66.

national policy and legislative action, drawing lessons from relevant countries, and forging institutional collaborations or consortia with relevant global partners are important steps to mitigate the implications of the challenges.

As for several developing countries, Ethiopia's acute challenge stems from economic and technical constraints. The implementation of OA requires both financial and technical capacities to invest in the relevant infrastructure and harness its potential. Despite the recent developments, better internet access at higher educational institutions and ubiquitous cell phones in Ethiopia, there still remain severe economic and technical factors. These factors are implicated in building and maintaining ICT infrastructure, ensuring sustainable and high-speed Internet bandwidth, electric power and acquisition of hardware and software equipment.¹⁸⁰¹

In particular, financial and technical resources are critical for academic and research institutions to run institutional repositories for the green OA models. It is noted that public universities and colleges' increasing investment in the ICT infrastructure offers some leverages to reduce the challenges. A lasting solution to overcome the hurdles however demands a concerted effort from the government, funding organizations, universities and relevant stakeholders.¹⁸⁰² For academic scholars to embrace OA journals, the financial implication for "author pays" model requires a sustainable funding scheme and subsidies.¹⁸⁰³ Further, there needs to be an improvement in the existing incentive mechanisms in place for academic authors in Ethiopia who are often underpaid to earn even their living.

The third challenge arises from social factors. For instance, lack of awareness among the stakeholders, resistance from market-driven publishers, authors' preference of closed access journals

¹⁸⁰¹ Sheufen, *supra* note 1738 at 100.

¹⁸⁰² Reichman & Okediji, "*supra* note 1415 at 1474-75.

¹⁸⁰³ *Ibid* at 1464.

for their reputational advantage, are among the social factors.¹⁸⁰⁴ Some of the factors are related to the issues of quality, publication (APC) costs and mandates.¹⁸⁰⁵ In order to mitigate the challenges, it is crucial to set up a sustainable incentive and effective quality assurance mechanisms that encourage authors to embrace OA journals.¹⁸⁰⁶ For the OA mandate to be effective, academic and funding institutions should also use contractual requirements to facilitate archiving of digital contents.¹⁸⁰⁷ From the global perspective, there still remains a challenge due to the existing Global North-oriented metrics for the assessment of the quality and impact factor of journals.¹⁸⁰⁸ As a result, few journals from the Global South fit into the established metrics to earn a significant impact factor and attract experienced authors. Lamenting the status quo, scholars hope that a wider embrace of OA has the potential to counter the biased and hegemonic global publishing system.¹⁸⁰⁹

In sum, it is argued that the OA has enormous benefits to promote creative innovation and tertiary education in Ethiopia through enhanced access to knowledge. Yet, legal, financial, technical and social factors constitute critical challenges against the potentials of the OA licensing models. Hence, appropriate steps should be taken to address the challenges in order to harness its benefits. In addition to the need for investments in the infrastructure, inclusive policy and legal reforms are vital to integrate OA into the broad framework of copyright-related flexibilities to promote access to creative works. As suggested for other flexibilities, CA-inspired human development perspective is useful to facilitate its integration and role in promoting users' rights. From among various models of OA, the licensing models such as GNU/GPL for open source/free software and CC licenses for OA journals are

¹⁸⁰⁴ *Ibid* at 1463-64 & 1471-72.

¹⁸⁰⁵ Eger & Sheufen, *supra* note 1742 at 102-106 & 108-115. Eger & Sheufen note that mandate is not helpful for green OA journals due to lack of reputation and a conflict with academic freedom. *Ibid* at 106 & 114-15. Sheufen, *supra* note 1738 at 154-55 (suggesting, *inter alia*, monitoring mandates, reconsideration of incentive structure, awareness creation).

¹⁸⁰⁶ *Ibid* at 108-115. Chan & Gray, *supra* note 76 at 208-09.

¹⁸⁰⁷ Reichman & Okediji, *supra* note 1415 at 1469-72.

¹⁸⁰⁸ Chan & Gray, *supra* note 76 at 200-203 & 211.

¹⁸⁰⁹ *Ibid* at 198 & 206-208. If not countered, such systemic marginalization of relevant knowledge from the global south would both deepen the existing knowledge divide and perpetuate the epistemological bias.

instrumental to promote access to digital contents.¹⁸¹⁰ For the policy and prospective legal reform to take root, an institutional mandate or funders' contractual requirement is vital to facilitate scholars' embrace of OA for the public-funded research publications now required to be deposited on the NADRE.¹⁸¹¹ In a nutshell, it is important to underscore the potential of OA towards enhanced freedoms of access, learning and collaborative innovation to facilitate the expansion of human capabilities.

7.6. Conclusion

As discussed in this thesis, there is a plethora of copyright and related flexibilities that are scattered and embedded in various legal regimes. Despite this fact, a significant number of relevant international copyright flexibilities are left unincorporated. In addition to copyright that remains the principal legal regime, the Constitution, ratified human rights instruments, competition law and higher education legislation provide for pertinent flexibilities to promote access to learning materials. Nonetheless, there lacks a coherence among the relevant policy, legal and institutional frameworks. As a result, the disparate flexibilities are not tied together into a coherent whole to facilitate the collaborative realization of the underlying development objectives. For their coherent integration, it is imperative to rethink the development orientation and alignment in the policy, legal and institutional regimes in order to promote a sustainable human development.

Seen through the CA-anchored human development lens, making appropriate policy and legal reforms are essential to ensure a comprehensive and coherent integration of the flexibilities, including the open access licensing models. In the integration of the pertinent flexibilities, a set of broad and mandatory exceptions should be designed, *inter alia*, for private use, quotation, teaching, scientific research, libraries and archives as well as for persons with disabilities. These flexibilities are critical for tertiary education and creative innovation. In the same vein, the scope of compulsory licensing should

¹⁸¹⁰ Reichman & Okediji, *supra* note 1415 at 1470.

¹⁸¹¹ *Ibid* at 1466-67& 1469-70. Priest, *supra* note 80 at 394-95. Guilibat, "Owning the Right to Open Up Access," *supra* note 79 at 158-59. The OA policy adopted in 2019 requires deposit of public-funded publications on the NADRE-a national repository platform administered by the MOSHE. See MOSHE, National Open Access Policy of Ethiopia for Higher Education, June 2019, Ethiopia.

be extended while an international exhaustion should be adopted to facilitate affordable or bulk access to copyrighted materials. Informed by the human rights and constitutional dimensions, it is crucial to reframe the flexibilities as positive users' rights. Further, these flexibilities should be insulated from criminalization, digital locks and abusive contractual overrides. For concerns related to digital locks, scholars point out the roles of a competition authority and positive users' right to circumvent TPMs for lawful purposes.¹⁸¹²

In a nutshell, an integrative and human development perspective should be taken to incorporate and align relevant development-oriented flexibilities. In particular, the formulation of robust and comprehensive copyright and educational policies should embrace both the existing international copyright-related flexibilities and the emerging open access models. With a proper alignment and coherence, a strategic combination of the flexibilities is useful to facilitate enhanced access to knowledge in general and learning materials. Considering the context and level of human development, reframing or incorporating legal flexibilities as users' rights is important to empower users and promote the expansion of human capabilities. However, the proper integration and effective utilization of flexibilities require strong, robust and collaborative institutions. Thus, promoting institutional collaboration and capacity building is vital for sustainable human development.

¹⁸¹² See, e.g, Michel Geist, "Anti-Circumvention Legislation and Competition Policy: Defining a Canadian Way?" in Geist, ed, *In The Public Interest*, *supra* note 1401 at 248-50.

Chapter VIII: Concluding Summary

8.1. Introduction

Despite its fast-growing economy, Ethiopia is still one of the least developed countries (LDCs) in Africa with a very low-ranking human development index.¹⁸¹³ Given its growing and young population, Ethiopia is endowed with potential opportunities while facing formidable challenges. For instance, educating the youths and tapping into their potentials will create enormous opportunities for development. After all, ‘people are the real wealth of a nation.’¹⁸¹⁴ Yet, it takes a while for Ethiopia to harness the potentials through increased access to tertiary education. In Ethiopia, improving the low rate of enrollment and the deteriorating quality of tertiary education requires a considerable amount of its meagre resources.

Nonetheless, Ethiopia has made strides to expand tertiary education. In fact, education is considered a key tool for economic growth through the formation of human capital. It is true that education is a vital tool for development and poverty eradication. Over the last decade, Ethiopia has thus undertaken a mass expansion of higher educational institutions in order to promote access to tertiary education. In consequence, there is an increasing demand for a bulk access to copyrighted learning materials both for tertiary education and scientific research. Due to the dire economic conditions of learners and educators, lack of robust local publishers and the rising global licensing fees, the increasing demand for access to learning materials is posing serious challenges for tertiary education in Ethiopia. From among several factors, a restrictive copyright regime constitutes a significant impediment against access to relevant learning materials. As the findings reveal, Ethiopia

¹⁸¹³ See UNDP, *Human Development Report 2018*, supra note 97 at 24. Ranked 173rd in 2018, Ethiopia has shown a little change in rank, albeit positive HDI trends over the last three decades. *Ibid* at 28.

¹⁸¹⁴ UNDP, *Human Development Report (1990)*, supra note 2 at 9.

has a restrictive copyright regime that exacerbates the conditions and impedes access to knowledge. The restrictive regime has far-reaching repercussions for creative innovation, tertiary education and development.

In principle, copyright protection is premised on the desire to promote the production and dissemination of creative works for the purpose of public interest. In particular, the Anglo-American utilitarian objective of promoting “the progress of useful arts” emphasizes the primacy of the interest of the public at large.¹⁸¹⁵ In contrast, the continental conception of copyright is grounded in the natural-right based individual and creative freedom of an author.¹⁸¹⁶ In spite of the variance in emphasis, both perspectives are instrumental for the advancement of human development.¹⁸¹⁷

In its instrumental role for human development, copyright is further interlinked with education. Indeed, promoting learning as one of the vital public interests has been integral to copyright from its inception. The most direct interaction occurs in the context of access to learning materials. As essential inputs required for a tertiary education, most learning materials are subject to copyright protection.¹⁸¹⁸ This scenario brings to the fore the relationship between copyright and tertiary education as well as their roles for human development. Given its fundamental significance for human development, education has been recognized in legal regimes at various levels. In fact, both international and regional human rights instruments underscore the need to take all appropriate measures to make tertiary (higher) education accessible to all. At international level, the human right status of tertiary education with an immediate application is contested and its provision is rather contingent upon capacities and/or merits.

Nevertheless, Ethiopia’s legal context seen in tandem with the art.14 of the African Charter

¹⁸¹⁵ See Goldstein, *International Copyright*, *supra* note 55 at 3.

¹⁸¹⁶ *Ibid* at 4.

¹⁸¹⁷ *Ibid*.

¹⁸¹⁸ See Okediji, “*International Copyright System*,” *supra* note 51 at 8 & 31-32.

suggest the existence of a less debatable human rights status of tertiary education. In line with the Charter's distinctive approach, its generic right to education of all levels, and its affirmation in the relevant jurisprudence, tertiary education—an integral element of the recognized right—should be embraced as such in Ethiopia. The normative conundrum aside, the progressive realization of tertiary education is both essential in itself and instrumental for the realization of other human rights. In view of its prime objective and instrumental link, tertiary education is thus pivotal for human development. In Ethiopia, the issue of human development is so vital that it is accorded both constitutional and human right status.

Further, Ethiopia's low level of human development requires its treatment as the core and overarching national policy objective. As adopted in this thesis, the notion of human development is understood as the enlargement of freedoms or human capabilities for valuable achievements. Education of all levels is instrumental for the expansion of freedoms. As a matter of fact, the realization of tertiary education and its instrumental role for human development depend, *inter alia*, upon the availability of or access to relevant learning materials. In turn, access to relevant learning materials is contingent upon the existence of appropriate copyright flexibilities.

Given this interdependence, the central issues examined in this thesis are: (a) the (in)existence of relevant international copyright flexibilities, (b) the extent of their incorporation in the national copyright law, and (c) approaches for comprehensive integration of all relevant copyright-related flexibilities to promote human development. This set of research questions stems from the central thesis argument premised upon (a) lack of a comprehensive and coherent incorporation of relevant copyright flexibilities, (b) the consequent restricted access to learning materials, and (c) the negative implications for the progressive realization of sustainable human development. In this thesis, it is believed that the emerging findings do confirm the assumptions and answer the research questions in affirmative.

8.2. Copyright and Tertiary Education for Human Development

8.2.1. Mapping the Conceptual Linkage

As indicated above, both copyright and education share common objectives of promoting development. Copyright contributes to development by promoting creative innovation and scientific progress. In the same vein, education fosters development through the cultivation of human personalities and advanced skills. Thus, development is the ultimate end of both regimes. Indeed, development is a critical issue at global, regional and local levels. In Ethiopia, the issue of development is not a mere aspiration or policy objective. It is rather affirmed as a constitutional and human right that demands concrete and progressive steps for its realization. Given its central significance in African context, the right to development has been embodied in the African Charter and the national constitution of Ethiopia.¹⁸¹⁹Hence, both copyright protection and tertiary education are instrumental for the progressive realization of development in Ethiopia.

In their immediate linkage, the instrumental roles of copyright and tertiary education for development center upon access to learning materials. In other words, the need for an access to learning materials constitutes a ground for the interaction between copyright and education. This point of nexus requires a careful examination in the light of their intended common goals towards development. In principle, a balanced copyright protection is crucial to incentivize the production and efficient utilization of knowledge for creative innovation, advanced education and scientific research. That is, copyright is a means for the generation and dissemination of knowledge. In turn, the generated knowledge is an essential input for both creative innovation and tertiary education that contribute for sustainable human development. It is important to note that a robust creative innovation itself depends upon balanced copyright system and quality education.¹⁸²⁰

¹⁸¹⁹ African Charter, *supra* note 10 at art.22; *FDRE Constitution*, *supra* note 45 at art 43.

¹⁸²⁰ Spence, *Innovation and Prosperity in an Age of Transition: Foreword*, *supra* note 673 at xiii (“[P]eople as [the] most important investable resource... are the source of innovation, creativity and dynamism.”).

In addition to knowledge generation, tertiary education is crucial for the formation of human capital and expansion of human capabilities. These are all essential inputs for vibrant creative innovation. Hence, quality tertiary education and scientific research are instrumental to cultivate range of capabilities used for sustainable creative innovation.¹⁸²¹ Indeed, an advanced education is a key to unleash the creative potential of the learners and expand their human capabilities. In this context, both copyright and tertiary education complement each other for the expansion of creative and learning capabilities. The enlargement of people's creative and educational capabilities will foster sustainable human development.

8.2.2. Theoretical Justifications of Copyright, Education and Development: A Synopsis

The emergence and development of copyright, education and human development are grounded in their respective philosophical foundations. The theoretical foundations are useful to offer insights into the purpose, significance and attributes of each of the subject matters under consideration. Despite some overlapping attributes, each theoretical justification has evolved to advance various values and interests. Yet, subject to a variance, the theoretical justifications share one basic objective—development.

For instance, anchored in the economic incentive, the utilitarian justification predominates copyright protection. Intended to advance an aggregate welfare of the society, the legal protection is granted to recompense and safeguard a necessary incentive for the development of creative works.¹⁸²² The justification is however critiqued for its overemphasis on welfare maximization without a due regard for distributional concerns. In contrast, the labor theory is used to justify copyright protection as

¹⁸²¹ See Medhora, *New Thinking on Innovation*, *supra* note 672 at 5&8.

¹⁸²² See Drahos, *A Philosophy of IP*, *supra* note 217 at 29-46.

a product of an author's labor mixed with commons.¹⁸²³ Subject to Lock's provisos of non-waste and leaving 'enough and as good' commons for others, creators are entitled to rights due to the labor invested in the creative works. The provisos are meant to recognize public interests. Entrenched in a similar natural rights tradition, the personality theory justifies the protection of authors' rights for the purpose of self-actualization or personal development.¹⁸²⁴ As an embodiment of individual freedom, the protection of a creative work is essential for the personhood of the creator and its manifestation.

Evident in the short-term and disclosure bound patent regime, the contractarian theory is another justification with some relevance for copyright regime.¹⁸²⁵ The justification is anchored in an implicit social contract between creators and the public at large for their mutual interests.¹⁸²⁶ Related to this justification is the social planning theory under construction. Considered an eclectic blend of the above-mentioned justifications, the social planning theory underscores the role of copyright to foster a just and democratic culture.¹⁸²⁷ As such, it emphasizes the need to strike a balance and accommodate social goals. In short, combinations of various theoretical justifications underpin the existing legal protection of copyright.

As timeless and unconditional entitlements, the protection of human rights shares similar natural rights justification that foregrounds human rights in a human dignity. From among the natural, social justice/deliberative, protest and discursive schools of thought, the first two have been highlighted in this thesis. According to the dominant natural rights theory, a human person is entitled to human rights upon birth by virtue of humanity.¹⁸²⁸ That is, human rights are inherent in the human person.

¹⁸²³ *Ibid* at 47-50. See Hughes, "The Philosophy of IP," *supra* note 212 at 297-98 & 314-16; Gordon, "A Property Right in Self-Expression," *supra* note 221 at 1544-70; see Waldron, *supra* note 223 at 184-252 (critiquing Lock's theory).

¹⁸²⁴ Hughes, "The Philosophy of IP," *supra* note 212 at 310-11; Drahos, *A Philosophy of IP*, *supra* note 9 at 85-106. Waldron, *supra* note 223 at 347-78.

¹⁸²⁵ Oguamanam, "Beyond Theories," *supra* note 244 at 112-16.

¹⁸²⁶ See generally Ng, "The Social Contract and Authorship," *supra* note 238.

¹⁸²⁷ Fisher, "Theories of IP," *supra* note 204 at 172-94.

¹⁸²⁸ See generally Donnelly, "Human Rights," *supra* note 266.

Emerging as an alternative view, the social justice theory conceives human rights as a subset of social justice and products of social cooperation.¹⁸²⁹ The focus of this theory is the socio-economic rights. In essence, the *inherency* and the *acquisition* of human rights and the respective sources remain the basic distinction between the theories. It is worth noting that both theories have their own critiques directed against their respective philosophical basis. In fact, the same holds true for the protest and discursive schools of thought.

For education, its significance is justified both on intrinsic and instrumental grounds. For instance, the liberal (general) theory of education underscores the value of education for the development of a democratic individual freedom and social interaction.¹⁸³⁰ Distinct from the general theory, human capital theory underpins the instrumental role of education for an economic growth.¹⁸³¹ It is however critiqued for its treatment of human beings as a mere means of economic development. In the quest for a more inclusive justification, the CA is adapted to underline both intrinsic and instrumental values of education.¹⁸³² As a robust approach, the CA treats education as an essential form of human capabilities. Education is thus valued both for its enhancement of individual freedom and its instrumental role in a socio-economic development. Further, the proponents tend to construe the right to education as an entitlement to human capabilities.¹⁸³³

For both copyright and education at all levels, it is undisputed that a human development should remain central to their objectives and respective human rights/constitutional dimensions. Like its constituents, the notion of development itself has different philosophical justifications. Despite the recent shift in the notion and theoretical foundations of development, almost all the theories that

¹⁸²⁹ See generally Beitz, "Human Rights and Social Justice," *supra* note 270; Beitz, *The Idea of Human Rights*, *supra* note 279.

¹⁸³⁰ Dewey, *Democracy and Education*, *supra* note 288 at 94-108.

¹⁸³¹ Becker, "Human Capital Revisited," *supra* note 298 at 17-25; Lucas, "On the Mechanics," *supra* note 361 at 17-41.

¹⁸³² See generally Walker, "Framing Social Justice," *supra* note 306; Saito, "Amartya Sen's Capability Approach to Education," *supra* note 306.

¹⁸³³ McCowan, *supra* note 22 at 120-125.

evolved in the last several decades focus on an economic development. This is true of the linear growth, structural-change, dependency, neoliberal and the contemporary theories of economic development. Capital accumulation, technological progress, labor, investment and markets are all common to most of the theories. The extent of the roles of the market and government intervention are the central points of distinction among the theories and within their major variants. Associated with the knowledge-based economies, the endogenous growth model has become prominent for its treatment of knowledge as the driver of economic development.¹⁸³⁴

In its departure from the rest, the HDA has emerged to be comprehensive enough to accommodate the hitherto neglected social aspects of development. Indeed, the HDA has made a major shift both in the notion and the conventional metrics of development. Placing human beings at its center, HDA defines development as the expansion or enlargement of individuals' freedom to lead worthwhile lives. As used in the HDRs for decades, the measure of human development is thus the expansion of the capabilities that are essential for valuable functionings.¹⁸³⁵ In line with this notion, the CA is adopted in this thesis both as a normative and analytical framework to explore the complementarities between copyright and tertiary education and their roles for a sustainable human development. Gaining a traction among IP scholars for being a better framework to explore IP's role for development, the CA is rich to embrace the above justifications for human flourishing.

¹⁸³⁴ See generally Romer, "Endogenous Technological Change," *supra* note 299; Lucas, "Ideas and Growth," *supra* note 357.

¹⁸³⁵ See generally Sen, *Development as Freedom*, *supra* 1.

8.2.3. International Development Context

Despite the difference in the scope and degree of emphasis, the issue of development has been central to both international copyright and human rights systems. In fact, development was one of the major driving forces behind the emergence of both systems. From its inception, the expansion of international copyright system has been driven by the economic interests of the right holders and the intermediaries. In the same vein, the issue of development has been among the pillar objectives of the UN Charter. In furtherance of the Charter's objectives, the UDHR and ICESCR, among others, have all articulated and enshrined various aspects of development. As hinted above, there remains a variance in the depth and breadth of development notion in the international copyright and human rights regimes. In terms of historical junctures, both regimes emerged at different times and have thence evolved with their own prime orientation.

In the evolution of the international copyright system, the Berne Convention is the cornerstone with in-built principles for the subsequent proliferation of other international copyright treaties. In particular, the expansive trajectory and author-centric approach set in the Berne Convention have remained the governing rules. Building upon the core rules, the Rome Convention, the Geneva Phonograms Convention, and the WIPO Internet Treaties altogether constitute the major substantive regimes for the international copyright system. All the treaties are dedicated to ensure the protection of the rights of authors or right holders. Marking IP's shift to the trade regime, the TRIPs Agreement has both globalized and reinforced the existing international copyright system through its incorporation of the major copyright treaties, including the Berne Convention. Further, the copyright system has been injected with effective enforcement measures under the auspice of the WTO system. For its firm entrenchment, a binding set of minimum substantive standards is developed to ensure the legal protection of the rights both in the analog and digital environments.

In its lopsided evolution, the international copyright regime lacks a holistic approach to development. A critical gap in this regard is its over emphasis on economic growth and marginalization of L&Es from among relevant copyright flexibilities. As a manifestation of an imbalanced system, this approach undermines the integral role of the flexibilities to serve the public interest through access to the protected works. It is true that states are permitted to design their own L&Es and incorporate the available flexibilities. In this context, arts. 7 & 8 of the TRIPs Agreement and pertinent copyright treaties allow considerable development related-flexibilities. The incorporation of the permissible flexibilities is however subject to the in-built structural restriction and the constraining requirements of the three-step test. Adopted within the restrictive system, the Marrakesh Treaty is the sole international instrument with a mandatory set of L&Es for a specific class of users. In short, the marginalization of the L&Es in the copyright regime is counterproductive for sustainable human development.

Besides the substantive legal regimes, both the UN-affiliated WIPO and the WTO are central components of the global copyright system. Vested with a broad mandate to promote the global protection of IP, the WIPO has played a key role in facilitating and overseeing the adoption and implementation of major copyright treaties. For an obvious reason, the WIPO also advocates for a stronger IP protection through its technical assistance. In the aftermath of IP's integration into the trade regime, the WTO has emerged as a strong institutional framework intended, *inter alia*, to promote the globalization and enforcement of copyright protection.

In contrast to the copyright regime, the evolution of international human rights system is a recent phenomenon. In fact, its emergence has been integral to the foundation of the UN system in the post-WWII period. As indicated in arts. 55 & 56 of the UN Charter, one of its pillars is promoting "a universal respect for, and observance of, human rights and fundamental freedoms for all" without a discrimination. This commitment led to the emergence of a comprehensive set of human rights. Originating from the UDHR that served as their blueprint, the International Covenants and other human

rights instruments were all adopted to articulate the various human rights and fundamental freedoms. In addition, the adoption of, *inter alia*, the African Charter, the European and the American Conventions on Human Rights was foundational for the development of the regional human rights system within the international framework. In addition to the substantive human rights regimes, there are several international, regional and national human rights institutions that are mandated to promote the protection of human rights. For instance, the UNHRC, the CESCR, and the African Human Rights Commission are among the most important instruments and institutions at international and regional levels.

From among a range of human rights, authors' rights, the right to education and other constituent elements of the right to development are enshrined in most of the major human rights instruments. In this regard, the UDHR and the ICESCR articulate both rights. In contrast, the UNCRC is another relevant human rights instrument dealing with the right to education. In particular, the ICESCR and the UNCRC are more significant for their detailed articulation of the right to education at all levels. From among the regional human right instruments, the African Charter is notable for its recognition of the right to property, the right to education and the right to development. Indeed, the African Charter is the sole binding regional human rights instrument to recognize the right to development. At international level, the DRD is dedicated to the right to development. Nonetheless, its evolution into a binding status is still a subject of debate. Following its articulation as a human right in the DRD and the African Charter, its status as such has been re-affirmed in several declarations and resolutions. In terms of their legal status, the declarations and resolutions however remain soft norms.

Further, the emerging development norms within the UN system such as the MDGs and SDGs are important initiatives for the enrichment, concretization and operationalization of the right to development. In the international copyright regime, similar important development context is constituted of the various development-oriented provisions and the WIPO DA that incorporate

numerous flexibilities. Dedicated to the issue of development, the implementation of the WIPO DA is expected to align with the UN development goals and priorities. Thus, the roles of copyright and tertiary education for human development should be explored within the broader development context. Indeed, situating both regimes in the broader development context is essential for a nation to underscore their complementarities and promote its human development.

In sum, all the relevant elements of development context should further be consolidated in the light of the principle of sustainable human development. The notion of sustainable development is noted as a process of change that involves, *inter alia*, the direction of investments and orientation of technological development in order to advance both current and future capabilities to meet human needs and aspirations.¹⁸³⁶ Seen through the lens of the human development approach that enriches and guides the development objective of copyright and tertiary education, the broader and holistic notion of sustainable human development offers a useful context.

8.2.4. National Policy, Legal and Institutional Regimes: Human Development Perspective

In Ethiopia, the emergence of both tertiary education and copyright systems dates back to the mid-twentieth century. In particular, the evolution of copyright system is a product of mass legal transplants. For both systems, the onset of the millennium has marked a period of significant developments in the relevant policy, legal and institutional frameworks that undergird the respective systems. A glaring gap is however Ethiopia's lack of a comprehensive policy framework for its copyright system. In the copyright regime, the brief preamble to the copyright law stands as its sole statutory policy statement to highlight its development policy objectives. In contrast, the tertiary education derives its policy guidance from the general educational policy in operation. However, in place for both tertiary education and copyright are the respective legal and institutional frameworks. Despite its lack of proper integration into the legal frameworks of both regimes, the issue of human

¹⁸³⁶ See UNWCED, *Our Common Future*, *supra* note 400 at 48.

development is vital for its explicit constitutional and human rights dimensions. Further, the implicit references to copyright and tertiary education can be inferred from the relevant constitutional provisions. In this respect, Ethiopia's monistic approach to international law itself is instrumental to ensure the integration of relevant human rights instruments. In effect, this brings into the fore the human rights instruments that inform the issues of authors' rights, education and development.

In sharing an overarching objective, both copyright and tertiary education are further interlinked in their contribution to sustainable human development. In Ethiopia, the issue of development has been around for ages. Nevertheless, a narrow lens of economic growth has remained central to Ethiopia's policy and legal regimes. This departs from the more holistic constitutional pillars of policy guidance intended for sustainable development. In terms of a legal framework, the adoption of the FDRE Constitution has now transformed the hitherto mere development policy objective into a concrete right with constitutional and human rights dimensions. In principle, the FDRE Constitution is notable for its explicit embrace of the holistic notion of the right to sustainable development. Yet, there remains a clear gap between the constitutional provisions, and their integration into the legislative and policy practices.

Further, the policy and legal linkages between copyright and tertiary education are not informed by the relevant attributes of human development. For instance, despite their inevitable linkage in the context of access to learning materials or knowledge, there is a lack of appropriate set of general policy and legal flexibilities. In consequence, a significant incoherence is evident from copyright and tertiary education regimes. In fact, the lack of coherence is undermining their potential to complement each other in their roles for sustainable human development. Thus, it is imperative to forge a coherence between the policy and legal frameworks. In doing so, crucial is an incorporation of the appropriate flexibilities in the light of the CA-driven human development. In this regard, the people-centered notion of sustainable development can draw on the normative framework of human development to

inform copyright and tertiary education systems. To this end, the CA is useful to recalibrate and reorient the respective objectives towards sustainable human development. The approach is also helpful to integrate into the policy and statutory frameworks both human rights and other pertinent dimensions. Indeed, the FDRE Constitution offers a relevant legal framework and policy guidance to articulate and incorporate the appropriate flexibilities. Once incorporated, the flexibilities will have the role to interconnect copyright and tertiary education for sustainable human development.

8.3. Existing and Emerging Copyright-Related Flexibilities for Human Development

8.3.1. International Copyright-Related Flexibilities

The appropriate incorporation of international copyright flexibilities is instrumental both for a sustainable creative innovation and quality tertiary education in the context of access to knowledge and formation of human capital. Further, more important is the role of the flexibilities for the expansion of human capabilities. The enlargement of human capabilities constitutes an enriching and overarching conceptual framework for a sustainable human development. From this perspective, the set of relevant flexibilities under the existing international copyright system is neither directed towards nor informed by the core objective of human development. In the existing international copyright legal regime, an issue of central focus has been the harmonization and primacy of exclusive rights. In contrast, the corresponding flexibilities are neither harmonized nor treated as an integral part of the regime.

Instead, their domestic integration is left to members *albeit* with a significant circumscription. Setting a baseline for the exclusive rights, the Berne Convention leaves to member states the discretion to design most domestic L&Es. This discretion is nonetheless subject to the Convention's in-built upward trajectory of author's right and the three-step test. From the few L&Es provided in the Convention, pertinent are the teaching exception, exception for quotation and the contested Berne Appendix for the purposes of education. Except for the self-contained ones, the L&Es to reproduction right are thus cabined within the three-step test.

Further, the general flexibilities related to the subject matter, conditions of protection, and term limits are embodied in the Convention. The various general flexibilities enshrined in or permitted under the TRIPs Agreement and the WIPO treaties could also be utilized for further creative innovation and tertiary education in order to promote human development. From among the existing international copyright treaties, the Marrakesh Treaty is the sole legal regime that provides for mandatory L&Es. In a Berne-plus approach, common to all copyright treaties is the all-encompassing application of the three-step test introduced in the TRIPs Agreement. Serving as a parameter, the test is intended to safeguard the exclusive rights. In the same vein, it is a guiding rule for the national incorporation or creation of copyright flexibilities contemplated under the international copyright system.

In view of their central role for human development, various approaches have been highlighted in the legal scholarship and emerging jurisprudence. In addition to the traditional approach that subordinates flexibilities to the exclusive rights, the emerging approaches to copyright flexibilities regard the flexibilities as development policy tools and/or users' rights.¹⁸³⁷ Going further and with the potential to embrace both, the CA-based human development perspective is important to enhance the instrumental role of the international copyright flexibilities for tertiary education and creative innovation. Given its normative reach to encompass the emerging approaches to the copyright flexibilities, CA/human development approach reinforces the significance of the flexibilities to facilitate access to knowledge or learning materials for tertiary education.

Due to its multifaceted nature to serve as a policy and normative tool to balance author's and users' interests, the CA is crucial to inform flexibilities whether framed as public policy goals or rights grounded in human rights norms. Further, human development perspective is more useful for the interpretation and application of the notion of "development" in the TRIPs Agreement and other

¹⁸³⁷ Okediji, "Reframing International Copyright," *supra* note 154 at 475 & 482-89; TRIPs Agreement, Preamble at paras 6&7 cum Art. 8; Correa, *Trade Related Aspects*, *supra* note 137 at 104-107; Vaver, "Copyright Defenses," *supra* note 68; Craig, "Globalizing User Rights-Talk," *supra* note 944 at 71-73.

international copyright treaties. In particular, the CA is pivotal for an explicit articulation of human development as the core objective of copyright.¹⁸³⁸ In the same vein, it is useful to reframe flexibilities as an instrumental aspect of human capabilities.¹⁸³⁹

As noted in the preamble to the WTO Agreement, the principle of sustainable development can be a useful guide for the interpretation and application of the development objectives and relevant flexibilities embodied in the TRIPs Agreement.¹⁸⁴⁰ Indeed, this integrative principle is well-suited to embrace human development to underscore a notion of sustainable human development. For the international copyright regime, the principle provides an entry point for a coherent reintegration of the flexibilities in the light of a broad framework of sustainable human development.

8.3.2. Exploring National Copyright-Related Flexibilities

As emphasized in this thesis, both copyright and tertiary education are crucial for the realization of sustainable human development, *inter alia*, through the expansion of human capabilities. In Ethiopia, the right to sustainable development—has both human rights and constitutional dimensions. Nevertheless, the intrinsic and instrumental roles of copyright and tertiary education for sustainable human development depend upon the existence of appropriate legal flexibilities that facilitate access to knowledge in general and learning materials in particular. As elaborated in-depth above, the quest for relevant legal flexibilities in Ethiopia’s legal regimes reveals an incomplete incorporation of general and specific copyright (-related) flexibilities. There are however some relevant flexibilities in the

¹⁸³⁸ See generally Osei-Tutu, “Human Development as a Core Objective,” *supra* note 1179; Osei-Tutu, Human Development,” *supra* note 1179.

¹⁸³⁹ See generally Okediji, “Reframing International Copyright,” *supra* note 154.

¹⁸⁴⁰ WTO Agreement, Preamble, para 1. See Ruse-Khan, “Sustainable Development,” *supra* note 523 at 1-3. As Ruse-Khan observes, [s]ustainable development as a treaty objective is well equipped to guide and direct the utilization of [state’s] discretion towards a reconciliation of all relevant economic, social and environmental concerns in domestic decision-making processes. He further notes that “[t]reaty objectives that focus on overreaching and inclusive goals such as sustainable development and a balance of all interests involved can re-shape the interpretation and implementation of specific IP provisions.” *Ibid* at viii.

national legal regimes that that need to be reintegrated into the copyright law to facilitate access to learning materials.

First, the notion of sustainable development itself should be construed as a broad framework of flexibilities to accommodate various interests.¹⁸⁴¹ Framed as an important right, sustainable development has both human rights and constitutional dimensions to guide the interpretation of specific flexibilities. Second, there are relevant set of general flexibilities with similar dimensions. For instance, the constitutional public interest is a significant and core aspect of general flexibilities. It underscores a constitutional limitation to copyright as a means of private property protection that should serve a social function. In the same vein, the public interest undergirds the role of copyright to advance the freedom of expression. Indeed, the latter constitutes an external constitutional constraint upon the former to serve as a ground for flexibilities. Likewise, striking a balance between tertiary education and authors' rights itself requires appropriate flexibilities to ensure their interdependence and complementarities for their progressive realization. Further, the subjective adequate standard of living suggested for author's right to material interests and the variance in its scope from the expansive scope of copyright offer another general aspect of legal flexibilities.

Yet, the above general legal flexibilities with constitutional and human rights dimensions are not integrated into the copyright law. As explained above, the law does not make appropriate incorporation of most general and specific copyright flexibilities integral to the global copyright system. For example, the general flexibilities that are derived from international copyright treaties include the principle of idea/expression distinction, subject matters-related exclusion, conditions and terms of protection. Most of these flexibilities appear in the law *albeit* with different scopes. In terms of the optional and scope of exclusive rights, the adoption of a TRIPs-plus approach has resulted in the

¹⁸⁴¹ *Ibid* at viii &1-3.

erosion or waiver of the available flexibilities. This occurs through the untamed expansion and introduction of exclusive rights. For instance, *unconditional exclusive* rental right for all works, provision of resale right and introduction of an *exclusive* public lending right are all instances of the TRIPs-plus approach. In the same vein, the copyright law prescribes for a stringent set of enforcement measures, including an *indiscriminate* criminalization of *all acts of infringement*. This expansive legislative action impoverishes the public domain that ought to flourish in order to foster a sustainable creative innovation. Indeed, the erosion of the available flexibilities has far-reaching implications for the constitutional and human rights aspects of the right to sustainable human development.

From among the specific copyright flexibilities, the narrow-scoped L&Es adopted in the national copyright law includes exceptions for private use, quotation, teaching and libraries. Further, a compulsory license is allowed for reproduction, translation and broadcasting of copyrighted works. Despite their incorporation, the L&Es are too restrictive to facilitate access to learning materials. For instance, the permitted reproduction, which is confined to published work, excludes from its ambit other works useful for teaching and libraries. In the same vein, the narrow L&Es permitted for teaching and libraries exclude all acts of translation, distribution, adaptation, display, public lending, and public communication. Likewise, the law prohibits a parallel importation of copyrighted works. For lack of international exhaustion, the prohibition forecloses opportunities for bulk access to relevant learning materials. In some cases, this restrictive approach goes further to undermine the potential role of compulsory licensing to regulate anticompetitive practices.

From the vantage point of categories of users, another significant gap in the law is the absence of exceptions for persons with disabilities. For its failure to take appropriate steps, this amounts to Ethiopia's breach of its international obligation to implement the UNCRPD. As of its accession to the Marrakesh Treaty, Ethiopia is required to incorporate mandatory L&Es for users' with disabilities. Further, a critical the issue is the non-regulation of TPMs that tends to restrict legitimate uses. Except

in the context of a computer crime, the (anti)-circumvention of TPMs is unregulated. Neither is a regulation of the role of intermediaries.

In sum, Ethiopia's copyright law leaves out a number of legal flexibilities that are relevant to facilitate a sustainable creative innovation and access to learning materials for tertiary education. Due to Ethiopia's continental approach to L&Es, the law lacks the open-ended fair use doctrine. Nor does the law incorporate the three-step test as a rule for L&Es. In addition to the expansive scope of exclusive rights, the restrictive L&Es have serious legal ramifications. This ill-advised approach calls for an urgent reform to rethink the approach and reintegrate appropriate flexibilities suited to reinforce the complementing roles of copyright and tertiary education for enhanced human development.

8.4. Re-Integration of Policy and Legal Flexibilities for Sustainable Human Development

8.4.1. Revisiting Policy, Legal and Institutional Regimes

As discussed in this thesis, there is a plethora of copyright and related flexibilities that are scattered and embedded in various legal regimes. Yet, several relevant international copyright flexibilities are left unincorporated. In addition to copyright that remains the principal legal regime, constitutional, human rights, competition law and higher education legislation provide for pertinent flexibilities that facilitate access to learning materials. Nonetheless, there is lack of a coherence among the relevant policy, legal and institutional frameworks to interweave the disparate flexibilities into a coherent whole. Reforming the regimes and forging appropriate coherence are crucial to promote the collaborative realization of the underpinning development objectives. Hence, it is imperative to rethink the development orientation and alignment in the policy, legal and institutional regimes towards a sustainable human development.

8.4.2. Re-Incorporating Copyright Flexibilities

Within the framework of general flexibilities that involve constitutional and human rights aspects, it is crucial to ensure a complete incorporation of the relevant copyright flexibilities elaborated in this thesis. In so doing, CA-guided human development perspective is apt for its integrative approach to accommodate both development policy and the emerging users' rights approaches to copyright flexibilities. This integrative normative approach offers a broader room with maximum flexibilities in order to address the national development priorities and realities. From the general flexibilities, pivotal are the public interest-related constitutional flexibilities and the human rights-related flexibilities to strike an appropriate balance between creators and users' interests/rights. In particular, the constitutional and human rights aspects should be integrated into or recognized in the copyright and pertinent legislations. Further, the constitutional and human rights norms should be regarded as a set of overarching guides in the incorporation, interpretation and application of the general and specific copyright-related flexibilities for the advancement of human development.

From the international norms of development flexibilities, both the policy and legislative reforms should take the utmost advantage of the flexibilities inherent in arts. 7&8 of the TRIPs Agreement. The flexibilities can be used to entrench a balance between the twin aspects of the public interest that underlie a robust copyright system. In line with the provisions, an explicit recognition of education at all levels and in all modes should be made to underscore its role as a 'sector of vital importance' and an instrument of sustainable human development. As enshrined in the WTO Agreement, the principle of sustainable development and the flexibilities envisaged in the WIPO DA can be used in the policy formulation and legislative-norm setting process to reflect Ethiopia's level of development and context.¹⁸⁴²

¹⁸⁴² The WIPO DA acknowledges taking due account of the level of development in norm-setting process for flexibilities. WIPO DA, Recommendation No.13.

In revisiting the existing law, it is critical to eliminate the TRIPs-plus approach adopted for the scope of exclusive rights, the exceptions and the stringent enforcement measures. In particular, the wholesale criminalization of acts of infringement and the prescribed severe penalties should be amended to insulate legitimate uses made for non-commercial purposes. It is also important to consider an equitable remuneration scheme for use of works relevant for education.¹⁸⁴³ Pertinent are the proper integration and judicial interpretation of general flexibilities inherent in the expressions/idea distinction and conditions of protection. For the L&Es, an *appropriate* integration of the three-step test is vital to serve as a general rule of copyright flexibilities. Given its anticipated accession to the TRIPs Agreement and relevant copyright treaties, Ethiopia should take a strategic and proactive measure to integrate the test in light of its human rights obligations and sustainable human development objectives.

In their critique of the test for its vagueness and double-edged effect,¹⁸⁴⁴ scholars have suggested a number of approaches for its adoption and application at national levels. From the range of proposed approaches such as a reverse reading of the steps,¹⁸⁴⁵ a holistic approach with an overall assessment of the steps¹⁸⁴⁶ and the infusion of the test with the open-ended US fair use doctrine,¹⁸⁴⁷ the adoption of the last approach in the light of the CA-driven right-based human development is useful to offer a concrete and flexible balancing framework to mediate between the public and private interests. In Ethiopia, the adoption, interpretation and application of the test should take a holistic approach.

In order to improve sustainable human development, Ethiopia needs to take appropriate policy and legal reforms that facilitates comprehensive and coherent integration of the flexibilities, including

¹⁸⁴³ Several jurisdictions have adopted an equitable remuneration scheme for works that are relevant for educational purposes. See Ginsburg, “Fair Use for Free” *supra* note 1643 at 417-32.

¹⁸⁴⁴ Gervais, *(Re)structuring Copyright*, *supra* note 702 at 84; Okediji, “International Copyright System,” *supra* note 51 at 13-14.

¹⁸⁴⁵ See generally Gervais “The Reverse Three-Step Test,” *supra* note 896.

¹⁸⁴⁶ See Geiger et al, “Towards a Balanced Interpretation,” *supra* note 728.

¹⁸⁴⁷ See generally Senfileben, “The International Three-Step Test,” *supra* note 914; Okediji, “Toward an International Fair Use Doctrine,” *supra* note 868.

the open access licensing models. For the specific flexibilities, a set of broad and mandatory L&Es should be designed for private use, quotation, teaching, scientific research, libraries and archives as well as for persons with disabilities. As emphasized in this thesis, the flexibilities are critical for tertiary education and creative innovation that advance the formation of human capabilities. In the same vein, the scope of compulsory license should be extended while an international exhaustion should be adopted to facilitate affordable or bulk access to copyrighted materials. Informed by the human rights and constitutional dimensions, the flexibilities should better be reframed as users' rights. Further, these flexibilities need to be insulated from criminalization, digital locks and contractual overrides.

8.4.3. Exploring Licensing Models: Embracing Open Access Models

As noted above, both blanket licensing and ECL models are important to facilitate access to learning materials. In particular, the ECL is considered to promote an access to a broader repertoire. In addition to the limits, their benefits are still contingent upon an effective and a well-organized operation of CMOs. As a regime of private ordering, a more decentralized and collaborative OA model can offer a better access to digital contents for educational purposes. The access model is enjoying an increasing traction among educators, researchers, libraries and academic publishers. In this sense, an OA model holds a great promise for a free access to relevant digital learning materials such as scientific journals, software and research reports. Indeed, several public and private initiatives have been taken both in developed and developing nations to adopt OA mechanisms to promote collaborative creation, sharing and dissemination of digital contents. The OA mechanism has the potential to complement the existing flexibilities and mitigate the impediments against access to learning materials in developing and LDCs such as Ethiopia. It is instrumental to facilitate a trans-border access to relevant knowledge housed in other countries.

It is true that OA has enormous benefits to promote creative innovation and tertiary education through improved access to knowledge. Yet, the legal, financial, technical and social factors constitute

critical challenges for the effective exploitation of the potentials of the OA models. In order to address the challenges and harness the benefits of OA, appropriate steps should be taken. First, an unawareness creation about OA should be made along with investments in the necessary infrastructure. Second, policy and legal reforms are needed to integrate OA into the broad framework of copyright-related flexibilities to promote access to creative works. An OA policy operating in isolation will be ineffective to promote access to learning materials. As suggested for other flexibilities, CA-inspired human development perspective is useful to facilitate its integration and role in promoting users' rights. From the emerging variants of the models, the licensing models such as GNU/GPL for open source software and CC licenses for OA journals are instrumental to promote access to digital contents.¹⁸⁴⁸ In the implementation of the policy and legal reforms, an institutional mandate or funders' contractual requirement is vital to facilitate scholars' embrace of OA for public-funded research.¹⁸⁴⁹ In sum, it is important to underscore the potential of OA for enhanced freedoms of access, learning and collaborative innovation to facilitate the expansion of human capabilities. As it is not a sole means of access, OA can complement other access models.

8.5. Concluding Remarks on the Core Policy and Legal Reforms

As Ethiopia is still trailing several sub-Saharan African countries with a low-ranking human development, advancing sustainable human development is critical both for its realization as a constitutional right and the enlargement of human capabilities. In this regard, creative innovation and tertiary education should be regarded as essential components of sustainable human development. In order to promote the complementarities between copyright protection and tertiary education, there need to be coherent and appropriate linkages in the policy, legal and institutional frameworks. The integration of copyright-related flexibilities is vital to strengthen the linkages and promote the

¹⁸⁴⁸ Reichman & Okediji, *supra* note 1415 at 1470.

¹⁸⁴⁹ *Ibid* at 1466-67& 1469-70; Priest, "Copyright," *supra* note 80 at 394-95.

complementarities to advance a sustainable human development. An integrated human development perspective is thus useful to incorporate and align relevant development-oriented flexibilities.

In so doing, the formulation of robust and comprehensive copyright and educational policies should incorporate both the exiting international copyright-related flexibilities and the emerging open access models. Such an integrative approach will offer more choices to facilitate enhanced access to knowledge in general and learning materials in Ethiopia. To this end, the following measures need to be taken. First, it is essential to consider the national context and level of development in order to free up more policy space for sustainable human development. Second, the necessary alignment should be made across relevant laws in order to realize the constitutional and human right to sustainable human development. Third, the significance of reframing or incorporating legal flexibilities as users' rights must be underlined to empower users and promote the expansion of human capabilities. Fourth, appropriate institutional coherence and collaboration must be forged. Indeed, the proper integration and effective utilization of copyright-related flexibilities require strong, robust and collaborative institutions. Further, promoting institutional collaboration and capacity building is instrumental to strengthen complementarities and mainstream sustainable human development in the institutional practices. While meriting an in-depth exploration on their own, the recent developments in Canada, India and South Africa can be relevant sources of lessons for Ethiopia in its future legislative and policy reforms.

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