



**Ethiopian National
Association of
the Blind**



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Assessing Copyright Laws of Ethiopia in Light of the Right to Access Literary and Artistic Works by Persons Who Are Visually Impaired

**A research conducted in collaboration with the Ethiopian National Association for the
Blind (ENAB)**

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Table of content	Page
Acronyms	III
Executive Summary	1
Statement of the Problem.....	3
Objectives of the Research.....	4
Scope of the research	4
Research Method and Methodology	5
Method of Data Analysis	7
Limitations of the Research	7
Structure of the Report.....	7
1.Literature Review	8
2. Doctrinal Findings under Current Ethiopian Copyright Law	14
3. Empirical Findings	22
4. Conclusion and Recommendations	25

Acronyms

ATCB	Addis Hiwot Center for the Blind
CRPD	Convention on the Rights of Persons with Disabilities
DRM	Digital Management Right
ENAB	Ethiopian National Association for the Blind
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
JAWS	Job Access with Speech
L&E	Limitation and Exception
Marrakesh VIP Treaty	Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled
NVDA	Non-visual Desktop Access
OCR	Optical Character recognition
UDHR	Universal Declaration for Human Rights
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Office
WPPT	WIPO Performances and Phonograms Treaty

Executive Summary

Visually impaired persons¹ consist of nearly 4% of the world population. Based on the WHO global data on visual impairments of 2010, the estimated number of people with visual impairment in the world is 285 million, 39 million blind and 246 million having low vision.² Likewise, according to the 2006 survey of Ministry of health (MOH) and other stakeholders working on visual impairment, the number of persons with visual impairment living in Ethiopia was estimated to be 4 million.³ This was nearly 6 percent of the country's total population.

Visually impaired persons have bundle of information and communication rights. They have the right to the provision, in a timely manner and without additional cost, of all information in the public domain in formats that are accessible to visually impaired people, such as Braille, audio, large print and electronic text, regardless of any copyright laws. This is to include all correspondence and information from public services, such as hospitals, public utilities and government departments, as well as those providing an essential service such as banks.⁴ They have the right to access, with or without remuneration, works protected by copyright and related rights. Likewise, they have the right to the provision of adapted equipment and access software to enable visually impaired people to access the Internet and other information whether it is electronically stored or not.⁵

Until recently however, their right to information and communication was not given the required attention. A visually impaired person living in a developed country with a high standard of living has, for example, only one out of every twenty books available to him or

¹ "“Visual impairment” is a general term that describes a wide range of visual function, from low vision through total blindness.” “Low vision is [functionally defined as] uncorrectable vision loss that interferes with daily activities while total blindness is the complete lack of light perception and form perception, and is recorded as “NLP,” an abbreviation for “no light perception.” Available at <https://www.afb.org/blindness-and-low-vision/eye-conditions/low-vision-and-legal-blindness-terms-and-descriptions>

² World Health Organization, “Global Data on Visual Impairments” (2010) available at <https://www.who.int/blindness/GLOBALDATAFINALforweb.pdf>

³ Federal Ministry of Health of Ethiopia, “National Survey on Blindness, Low Vision and Trachoma in Ethiopia” available at

http://www.pbunion.org/Countriessurveyresults/Ethiopia/Ethiopian_National_Blindness_and_trachoma_survey.pdf

⁴ World Blind Union, “Manifesto for a United Nations Convention on the Rights of People with Disabilities” available at https://www.un.org/esa/socdev/enable/rights/03-04-09-2_Blind_Union_Manifesto.pdf

⁵ Id.

her.⁶ In least-developed countries however, availability of published books to a visually impaired person drops to only one book out of every one hundred.⁷ The situation in Ethiopia may be even worse due to low literacy rate among visually impaired persons, absence of access-promoting copyright laws and a well-developed assistive technology supporting local languages.

Neither the International Bill of Human Rights (UDHR of 1948, ICCPR and ICESCR of 1966) nor the WIPO copyright treaties (Berne Convention of 1886, Rome Convention of 1961, WCT and WPPT of 1996) unequivocally dedicate provisions of mandatory copyright L&Es for visually impaired persons. The UN Convention on the Right of Persons with Disability (hereunder the CRPD), compared with the international bill of human rights and WIPO copyright treaties, despite not in the form of ‘access’ L&E, is much better in terms of, at least, promoting ‘accessible format’ for persons with visual impairment to access works regardless of their copyright-protection status.⁸ The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (hereunder Marrakesh VIP Treaty) was adopted by the WIPO Diplomatic Conference on June 27, 2013 in Marrakesh, Morocco to create mandatory ‘access’ copyright L&E in the former two sets of international legal instruments. It puts obligations upon member states **to create a set of mandatory ‘alternative-format’ L&Es for the benefit of the blind, visually impaired and otherwise print disabled.** It also introduces the concept of “authorized entity” and “cross-border exchange” to accelerate the making and distribution of accessible works for beneficiary persons.

Ethiopia ratified the Marrakesh VIP Treaty on March 13, 2020 with Proclamation No. 1181/2020. The proclamation mandates The Ministry of Education and the Ethiopian Intellectual Property Office to cooperate with other relevant organs to implement and follow-up the treaty. However, the treaty cannot succeed, without an additional legislative measure, to meet its humanitarian and social development goals and benefit persons who are blind, visually impaired and otherwise print disabled. First, the existing copyright laws (“Copyright and Neighboring Rights Protection Proclamation No. 410/2004” and "Copyright and Neighboring Rights Protection (Amendment) Proclamation No. 872/2014"(hereunder the

⁶ Judith Sullivan, Study on Copyright Limitations and Exceptions for the Visually Impaired, (2007) available at https://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.pdf

⁷ Id.

⁸ See for example, CRPD, Art. 21

proclamation/s)) are incompatible, in many respects, with the Marrakesh VIP Treaty. Second, the proclamation did not incorporate the ‘three-step test’ (“the limitation should be limited to certain special cases”, “it should not conflict with the normal exploitation of the work”, and “it should not unreasonably prejudice legitimate interest of the author”) in its fullest sense. Third, there are literary and artistic works neither the Marrakesh VIP Treaty nor the proclamations cover in their scope of application.

The main purpose of this research is therefore to assess compatibility of the Ethiopian copy right law to the Marrakesh VIP Treaty. It aims at providing adequate legal analysis for the concerned stakeholders on weaknesses and strengths, if any, of the existing copyright law regarding the right to access information by visually impaired persons so that concerned stakeholders including the Ethiopian government would be able to amend the existing proclamation or enact a stand-alone law.

Statement of the Problem

In Ethiopia, persons with visual impairment comprises of close to seven (7) million (6%) of the country’s population.⁹ Although this is a significant amount of the population, they seem to not be receiving the amount of attention needed for visually impaired persons to benefit from power of information; and with the exception of ratifying Marrakesh VIP Treaty, no transformative measure has been taken to oblivate their limited access to information. According to the study conducted by WIPO in 2007, In countries such as Ethiopia, availability of published books to a visually impaired person is one book out of every one hundred. The situation in Ethiopia may be even worse due to low literacy rate among visually impaired persons, absence of access-promoting law and a well-developed assistive technology supporting local languages.

Although Ethiopia has ratified Marrakesh VIP Treaty in 2020, there is still a long way to go to ensure information-access by persons with visual impairment. Existing Ethiopian copyright law is not in conformity with Marrakesh VIP Treaty in terms of, for example, recognizing no mandatory ‘access’ L&Es to copyright and ‘cross-border exchange’ of works; and the treaty itself is not adequate enough to address challenges by persons with visual impairment to access information. To make matters worse, there is no a well-developed

⁹Federal Ministry of Health of Ethiopia, supra note 3

assistive technology supporting local languages. Therefore, persons with visual impairment continue facing challenges to access literary and artistic works on an equal basis with others.

Objectives of the Research

General objective of this research is to assess compatibility of the Ethiopian Copyright law to the Marrakesh VIP Treaty and adequacy of these two contrasting laws to ensure the right to access information by persons who are visually impaired. Within this general objective, the research has the following specific objectives:

- To review the current copyright proclamation (as amended) and examine the level of its compatibility to the principle of mandatory ‘access’ copyright L&Es;
- To evaluate adequacy of Marrakesh VIP Treaty; and show the need to go beyond the scope thereof to respond to access-questions by persons with visual impairment.
- To identify the main challenges of persons with visual impairment to access information.
- To propose workable recommendations to relevant organs to solve the problem.

Scope of the research

The research focuses on assessing existing Ethiopian copyright law vis-à-vis the Marrakesh VIP Treaty. It targets the right to access information of persons who are visually impaired and have completed at least the first stage of formal education, elementary education. Therefore, this research does not address persons with print disability other than those who are visually impaired and have completed elementary education. Persons with print-disability such as those with some specific learning disabilities, or the inability to hold a book are not covered in the research only for discussion purpose, as the researcher was unable to meet respondents with these types of disabilities. In terms of effect however, findings of the research shall apply, *mutatis mutandis*, to all persons with print-disability as well.

Jurisdictionally, the research has invited respondents from Federal and Regional States. At the Federal level, the researcher interviewed national associations of persons who are visually impaired – the Ethiopian National Association of the Blind (ENAB) and Addis Hiwot Center for the Blind (AHCB) – and select federal government institutions. At the regional level, the

researcher interviewed respondents living in the four following regions and/or city administrations: Amhara, Oromia, Tigray and Addis Ababa.

Research Method and Methodology

This research has employed both doctrinal and non-doctrinal (empirical) legal research approaches. However, for the most part of it, doctrinal legal research method has been employed. Doctrinal legal research is a type of research with which the researcher tries to understand the meaning of the law, derive doctrines, rules, principles and so on from court decisions, from the text of the law or from texts about the law.¹⁰ It provides a systematic exposition of the legal principles and analyzes the relationship between rules, and further explains areas of difficulty in order to predict or recommend future developments.¹¹ It is then used “to analyze what norms law should pursue or to advocate what the law ought to be, or what the ‘preferred’ or ‘better’ view might be.”¹² Therefore, the research has extensively employed doctrinal legal research method to assess the Ethiopian copyright law vis-à-vis Marrakesh VIP Treaty and their adequacy to ensure the right to access information of persons with visual impairment.

The research has also employed non-doctrinal (empirical) research method to empirically assess challenges caused by ‘non-access’ law on persons with visual impairment. Empirical legal research is not seeking the meaning, assumptions or doctrines of the law.¹³ It is rather about the law in application/reality.¹⁴ Therefore, the research has employed non-doctrinal legal research to hear opinions of persons with visual impairment, authors, publishers and select government institutions. Using the non-doctrinal method, the research bases itself on a qualitative techniques of data collection.

In general, source of data the research has employed are the following:

¹⁰ Wondemagegn Goshu, “Legal Research Tools and Methods in Ethiopia”, *Journal of Ethiopian Law*, vol. 25, no. 2, (2012) available at

https://www.academia.edu/38042205/Legal_Research_Tools_and_Methods_in_Ethiopia

¹¹ Id.

¹² Id

¹³ L. Epstein and A.D. Martin, “Quantitative Approaches to Empirical Legal Research”, (2012) available at

https://www.researchgate.net/publication/287878162_Quantitative_Approaches_to_Empirical_Legal_Research

¹⁴ Id.

- Document interpretation: the research makes use of primary and secondary sources; i.e., texts of the law and texts about the law. As the research is mainly based on doctrinal analysis of laws, existing copyright legislations, as primary sources, will be searched and analyzed in order to arrive at a more comprehensive understanding of the research problem. The study also counts on secondary sources such as books, journal articles, dissertations, and internet sources to make a robust analysis of the law and address the research problem.
- Interview: The research adopted a one-to-one telephonic interview—aimed at identifying major challenges to access information by people with visual impairment in the absence of ‘access’ law. The research employed Interviewer-administered questionnaire, which were administered to people with visual impairment, publishers, relevant government offices and authors. The sample was 30, comprised of 20 persons with visual impairment, 3 publishers, 3 authors and 4 relevant government institutions. Respondants with visual impairment were selected from Addis Ababa, Amhara, Oromia and Tigray regional states based on their educational level and exposure to assistive technology. Five of them are students of secondary and preparatory schools while four and six of them represent high-school teachers and lawyers with visual impairment respectively. The remaining five are assistive technology trainers. Eight of them were female respondents, each two representing one region. Twelve of them are male respondents, each 3 representing one region. They have all completed elementary education; and trained for basic computer skill supported by screen-reader technology. It is thus believed that they can tell more challenges they are facing due to absence of ‘access’ law than their counterparts. The regions were selected for the reason that they each have better special needs schools than others; and are major sources of literates with visual impairment. Three publishers were selected just because they are willing to participate in the interview. Three authors were selected because of their popularity and number of works they published. Four government institutions (Ministry of Education, Ethiopian Intellectual Property Office, National Archives & Library of Ethiopia and Addis Ababa University) were selected for obvious reasons; i.e. the former two were chosen for they are legally given the responsibility to follow-up implementation of Marrakesh VIP Treaty. The latter two were chosen for they are major sources of both published and unpublished works in different forms.

Method of Data Analysis

The research used qualitative analysis to analyze opinions of the respondents. The interview was conducted from January 30 to February 26, 2021. Before the interview, the purpose was explained; and all consented to give their opinions.

Limitations of the Research

The first limitation is that the researcher was unable to meet respondents other than those with visual impairment; i.e., those with some specific learning disabilities, or the inability to hold a book. Dearth of domestic literature for the issue in question was another limitation. As the research is mainly doctrinal, secondary sources such as legal commentaries and journals could contribute much to the research. To the best of his knowledge, the researcher has found only two pieces, one short article from Bahir Dar University Journal of Law and one LL.M thesis of direct relevance submitted to Civil Service University in 2020. Therefore, the researcher mainly employed black letters of the law, copyright L&E principles, rules of interpretation and few domestic sources. Moreover, the research follows ‘critical’ approach in his literature review.

Structure of the Report

This research report has four sections. Section one makes literature review on the right to access information of persons with visual impairment. Due to dearth of secondary domestic sources, the research employs, in its section of literature review, the binding components of international bill of rights, the CRPD the WIPO copyright treaties, the Ethiopian copyright legislation and few other domestic secondary sources. Section two shows findings of doctrinal assessment of the Ethiopian copyright law. Under the third section, findings of the empirical assessment will be summarized. Finally, section four concludes the research and provides recommendations.

1. Literature Review

Recognized as one of the ‘International Bill of Human Rights’, the ICESCR comprises of concrete legal rights – aimed to ensure the protection of economic, social and cultural rights of individuals. The ICESCR provides specific rights and clarifications of rights with respect to information access and the right to education, and indirectly addresses the rights to meaningfully participate in cultural activities and political life, enjoy an adequate standard of living, and benefit from technological and scientific advancements.¹⁵ Moreover, it obliges states to create “secondary education in its different forms, including technical and vocational secondary education and make it generally available and accessible to all by every appropriate means”.¹⁶ The ICESCR underscores the “use of right to education as enabling all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.”¹⁷ It also requires ensuring the right to work by taking different steps—including “technical and vocational guidance and training programmed, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions which safeguard fundamental political and economic freedoms to the individual.”¹⁸

The ICCPR also underscores the right to access information. It recognizes for everyone, “the right to freedom of expression [including] freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”¹⁹ It also recognizes for everyone “The right of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests”—effective use of which requires information access.²⁰ Such a right of everyone to participate in a “free society” creates for persons with visual impairment, as much as another person, a right to access the information required effecting that participation, through whatever media which is appropriate.

¹⁵ ICESCR, Arts 11, 13 and 15

¹⁶ Id. Art. 13 (2) (b)

¹⁷ Id. Art. 13 (1)

¹⁸ Id. Art 6

¹⁹ ICCPR, Art. 19 (2)

²⁰ Id. Arts. 21 and 22

However, even if Ethiopia joined the two covenants in 1993, neither the ICESCR nor the ICCPR is able to clearly extend certain rights to persons with visual impairment such as the right to access the information in a way appropriate to their needs. Moreover, neither scholars nor international organizations argue that both ICESCR and ICCPR, despite anti-discrimination provision in them, create a positive obligation for states to provide persons with visual impairment with information access in a way fitting their needs.²¹ Therefore, an argument for the advancement of a right to access information for persons with visual impairment based exclusively on ICESCR and ICCPR would likely be contested or disregarded.

Ratified by Ethiopia with Proclamation No. 676/2010, the CRPD is the first comprehensive international human rights treaty to realize the rights of persons with disability, the genus of which also includes persons with visual impairment. It provides additional compliance requirements for signatory states to the ICESCR and ICCPR to promote protect and fulfill the rights of persons with disability on an equal basis with others. Moreover, with respect to political, cultural and national/community life, the CRPD echoes the ICCPR in generally protecting for all persons “the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice.”²²

It requires signatory states to ensure provision of “information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost.”²³ It also requires states to facilitate “the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions.”²⁴ Moreover, states are obligated to take all appropriate measures “urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities.”²⁵ These provisions clearly recognize different accessible formats and technologies to guarantee the right to access information for persons with visual impairment—nonetheless, increasing the states compliance standards.

²¹ Aaron Scheinwald, “Who Could Possibly be Against a Treaty for the Blind?” available at <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1512&context=iplj>

²² CRPD, Art. 21

²³ *Id.* Art. 21 (a)

²⁴ *Id.* Art. 21 (b)

²⁵ *Id.* Art. 21 (c)

The CRPD further obligates states to ensure, without discrimination and on the basis of equal opportunity, “an inclusive education system at all levels and lifelong learning...”²⁶ It also requires that “cultural materials, like —television programmed, films, theatre and other cultural activities,” and “cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services” be accessible to persons with visual impairment. Lastly, it requires states to ensure, for persons with disabilities, the right to work²⁷ and the right to participate in election, public administration, conduct of public affairs and decision-making processes on an equal basis with others.²⁸

As seen in different provisions, The CRPD underlines “accessible format” as central to the implementation of these and other rights unstated here. The specificity of these CRPD obligations is significant because: 1) it makes avoidance of implementation on grounds of vagueness difficult to justify; 2) it stands as a barrier to one of the arguments against a WIPO copyright-exemption treaty for persons with visual impairment; i.e., vaguely phrased obligations in the international instruments tend to create reticence and distrust among states. However, the CRPD is not comprehensive enough in this respect as it, through Article 21 on Freedom of expression and opinion, and access to information, mandates state parties only to encourage and urge mass media and private entities to make their services accessible respectively.

The 1967 Stockholm revision to the Berne Convention introduced to international copyright law the three-step test for exempting from illegality an otherwise rights-infringing reproduction of a person’s work. Copyright L&Es are granted if three requirements are satisfied:

- (1) There is a —certain “special case” or use
- (2) That does not —conflict with a “normal exploitation of a work” and
- (3) That does not —“unreasonably prejudice the legitimate interests of the author”.²⁹

As noted in a report to WIPO on existing L&Es, a reading of the Berne Convention that provides sufficient production of materials to satisfy the needs of persons with visual impairment seems possible, but it is likely to need unambiguous drafting to comply with the

²⁶ Id. Art. 24

²⁷ Id. Art. 27

²⁸ Id. Art. 29

²⁹ Berne Convention, Art. 9 (2)

conditions.³⁰ The report stated that a L&E provision for the rights of persons with visual impairment would likely only work if the use under the exemption does not conflict with existing and potential future markets for the rights holder, or otherwise create economic competition with the rights holder.³¹ Moreover, prominent rights-holders have strongly opposed non-market solutions, such as a treaty-based mandatory copyright exemption for persons with visual impairment, even where market has failed to develop solutions in any meaningful way.³² Thus, neither the three-step test nor the Berne Convention have facilitated the right to access information by persons with visual impairment.

The Rome Convention, a 1980 treaty that protects performers, producers of phonograms and broadcasting organizations,³³ similarly offers limited opportunities for exempted use of copyrighted material for public interest. Article 15(1) of the Convention provides treaty-specific exemptions, allowing states to create national exemptions for four types of uses: “private use, brief excerpted use for news reporting, ephemeral fixation of broadcast organization material by that organization and for its own use only, and scientific and teaching use.” The latter three exceptions by their terms do not provide access for persons with visual impairment, and the “private use” exception suggests non-public use incompatible with general right to access information by persons with visual impairment.³⁴

From the perspective of increasing human rights instruments ratified in the years preceding ratification of the WPPT³⁵ and WCT³⁶, it is plausible to believe that these treaties could grant broader rights than the Berne or Rome Conventions. However, the L&Es in both the WCT and the WPPT are not of difference from the three-step test from the Berne Convention.

The nesting of WCT copyright exemptions within the Berne Convention and its three-step test is clearly visible. Article 1(4) of the WCT unequivocally states that “contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.” Further, “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

³⁰ Judith Sullivan, *supra* note 6

³¹ *Id.*

³² Aaron Scheinwald, *supra* note 21

³³ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (hereunder the Rome Convention), (1961)

³⁴ Aaron Scheinwald, *supra* note 21

³⁵ The WIPO Performances and Phonograms Treaty (WPPT), (1996)

³⁶ WIPO Copyright Treaty (WCT), (1996)

in digital form.” However, limiting its L&E to the right of distribution, rental and communication of literary and artistic works in digital forms to the public, the WCT does not fully address the right of persons with visual impairment to access information—in the form of accessible formats—beyond the foundational Berne Convention.³⁷

The WPPT updates the copyright protections and limitations established in the Rome Convention. It does not require compliance with the preceding treaty, in this case the Rome Convention.³⁸ However, this does not improve the realization of the right to access information by persons with visual impairment, as the only exemption in the WPPT is the — same kind test, which, as noted previously, does not address this problem.

Simply stated, the three-step test only marginally recognizes the right of persons with visual impairment to access information and thus provides insufficient support for the right to be enforced.³⁹ Furthermore, the three-step test is not a mandatory test: states are free to reject copyright L&Es for persons with visual impairment or any other population, regardless of whether those L&Es are statutory or policy-based. Thus, although some commentators believe that the three-step test can in fact be the vehicle of meaningful assistance to persons with visual impairment⁴⁰, multilateral IP treaties only minimally support the right of persons with visual impairment to access information in born-accessible or alternative publication. Furthermore, with the exception of the former three human rights instruments, Ethiopia is not yet a party to any of the latter WIPO copyright treaties.

According to Fentahun, the general L&E provisions of Ethiopian copyright proclamation do not unequivocally demonstrate facilitation of published works in alternative format for persons with visual impairment.⁴¹ He added that the mere ratification of the Marrakesh Treaty is not an end itself. It is just one step forward to ensure accessibility of published works for beneficiary persons. It requires amendment of the existing copyright law to avail published works in alternative formats. He failed however to address inadequacy of the treaty itself to

³⁷ See *Id.*, Arts. 6-10

³⁸ WPPT, Art. 1 (2-3)

³⁹ Aaron Scheinwald, *supra* note 21

⁴⁰ *Id.*

⁴¹ Fentahun Mengiste, “Access to Published Works for Print-disabled Persons in Ethiopia” (2020), Civil Service University

respond to questions by persons with visual impairment, in particular, living in least-developed countries.

Biruk also argues, except in relation to limitations to the exclusive right of reproduction under Article 9 (2) (e) the Proclamation does not provide for the three-step test.⁴² Biruk however failed to show that, even in relation to limitations to the exclusive right of reproduction, the proclamation did not incorporate the three-step test in its fullest sense. He also failed to see that the law did not have ‘access’ provisions aimed at ensuring the right to access information of persons with visual impairment.

According to Mandefro and Molla, Article 9 of the proclamation allows the private reproduction of a published work in a single copy.⁴³ Such copy could be made only by a physical person for his/her own purposes. Moreover, as opposed to the Berne Convention, the Ethiopian Copyright L&E exceptions apply to the reproduction of published works and sound recordings only. They didn’t examine the L&E however from the perspective of the right to access information of persons with visual impairment.

Asrar and Tajebe argue, based solely on the existing national copyright law, Ethiopia cannot realize the obligations imposed under the Marrakesh Treaty.⁴⁴ According to them, “, though the present copyright law provides exceptions or limitations applicable to all persons, including print-disabled persons, they are inadequate to address the special needs of print-disabled persons and thereby to attain the objective of the Treaty.”⁴⁵ They argue, the existing problem could only be addressed by amending the existing copyright proclamation.

However, Asrar and Tajebe seem to have not realized that amending proclamation should be the last resort as it is probably the least to address challenges faced by persons with visual impairment. In other words, they didn’t realize that the copyright law covers only part of works that persons with visual impairment are failing to access.

⁴² Biruk Haile, “Scrutiny of the Ethiopian system of Copyright Limitations in the Light of International Legal Hybrid resulting from (the Impending) WTO Membership: Three-Step Test in Focus”, *Journal of Ethiopian Law*, vol. 25, no. 2, (2012)

⁴³ Mandefro Eshete and Molla Mengistu, “Exceptions and Limitations under the Ethiopian Copyright Regime: An Assessment of the Impact on Expansion of Education”, *Journal of Ethiopian Law*, vol 25, no. 1, (2011)

⁴⁴ Asrar and Tajebe, “Print-Disabled Persons’ Right to Access to Copyrighted Works in Ethiopia: An Appraisal of Ethiopian Copyright Law in Light of the Marrakesh Treaty” *Bahir Dar University Journal of Law*, vol. 11, no. 1, (2020)

⁴⁵ *Id.*

2. Doctrinal Findings under Current Ethiopian Copyright Law

Under the current Ethiopian Copyright Proclamation No. 410/2004 (as amended), limitations to copyright are provided under Articles 9 through 19. However, except in relation to limitations to the exclusive right of reproduction under Article 9 (2) (e) the Proclamation does not attempt to incorporate the three-step test. Even worse, the three-step test – although incorporated in respect of the exclusive right of reproduction – has been recognized—missing its major component, “special case”. This and other legal lacunae as shown in the following paragraphs have made the Ethiopian copyright laws – devoid of additional legislative measure – (also necessitated to enforce Marrakesh VIP Treaty, which is already ratified) – dysfunctional to ensure the right of persons with visual impairment to access information in Ethiopia.

A. Reproduction for personal purposes Article 9 (1) of the Proclamation states: “Notwithstanding the provisions of Article 7 (1) (a) of this Proclamation, 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.”

This provision allows every user of copyright material to reproduce a copy of the work without being constrained by copyright considerations. It does not require that the copy from which a reproduction is made has to be acquired lawfully. Furthermore, there is no requirement that the copy be made by the consumer himself, i.e., it can be made even by third parties acting for commercial considerations as long as the reproduction is made on individual request and for personal purposes of the consumer. Such approach benefits those who do not have their own means of reproduction. This kind of L&E provision is meant good for developing and least-developed countries.⁴⁶

However, it has been amended by Proclamation No. 872/2014. The added sub-article 3 of article 9 of the (Amendment) Proclamation reads, “Private reproduction of published work in accordance with sub-article one of this article shall be allowed if that physical person is owner of an original copy.” It was amended subsequent to the posing of questions by the

⁴⁶ Interview with Biruk Haile, Professor of Intellectual Property Law, Addis Ababa University, College of Law and Governance Studies, School of Law

working party to Ethiopia.⁴⁷ Note should be made that only physical persons—not authorized entities—benefit from this L&E provision.

The policy rationale before the amendment was to insure an access to a protected work which was not sufficiently available in the market. In other words, Article nine before the amendment was, inter alia, about people who have hardly had access to a protected work. The justification after the amendment becomes however a matter of promoting convenience and keeping a backup copy. Hence, the amendment is about people who have access to a protected work.

Unfortunately, neither the pre nor the post-amendment provision of Article 9 has given persons who are visually impaired the time of day. First, as beneficiaries of this L&E are physical persons only, authorized entities such as the Ethiopian National Association for the Blind cannot reproduce the work for private consumption by persons who are blind, visually impaired or print-disabled. Second, the legislator did not contemplate, ab-initio, the absence of adverse economic effect by the most destitute Ethiopians who are visually impaired on copyright owner. A far greater proportion of Ethiopians with visual impairment do have ‘low consumer buying power’ to purchase goods at current market prices; hence, little, if any, interest and power to purchase original copy of a protected work. Third, this L&E provision fails to take an account of the market failure. The market may fail to accommodate the needs of people who are visually impaired when:⁴⁸

- i) Albeit buying power to purchase the original copy, the protected work may not, for numerous reasons, available in the market.
- ii) Although the work is available in the market, it may not be a ‘born-accessible’ publication or have been made accessible to persons who are visually impaired in an alternative format.
- iii) Although the market tries to offer born-accessible works or make them accessible in alternative format, it cannot be a perfect supplier to count on. There are a number of categories of people who are visually impaired. In most cases, availability of

⁴⁷ Id.

⁴⁸ Paul Harpur, “Discrimination, Copyright and Equality: Opening the E-book for the Print-disabled”, (2017); also see Wendy Gordon, “Fair Use as Market Failure: A Structural and Economic Analysis of the BetamaxCase and its Predecessors”, available at <https://core.ac.uk/download/pdf/229123173.pdf>

accessible copies in the market may favor only one or two categories of visual impairments, leaving out the others.

- iv) Although market supplies an E-Book which is accessible in terms of format, digital rights management (DRM) may be placed on it, which in turn prevents people who are visually impaired from utilizing adaptive technologies to access its content. The most popular screen-reader today, Non-Visual Desktop Access (NVDA), for example, sends a digital request to Adobe Digital Editions to provide access to the content of an E-Book. If the E-Book has security settings, then Adobe Digital Editions responds to NVDA that there is no available content. However, if there are no security settings, then Adobe Digital Editions will provide access to the code and text in the E-Book and NVDA will convert the content into a usable audio format that can be consumed by persons who are visually impaired. Hence, devoid of laws introducing exceptions to anti-circumvention schemes, albeit accessible E-books in the market, rights management, accordingly, has the capacity to lock persons with print disabilities out of digital libraries.

B. Pursuant to Article 9 (2) (e), “The provision permitting private reproduction of a published work in a single copy by a physical person exclusively for his own personal purposes do not extend to ‘reproduction’ which would conflict with or unreasonable harm the normal exploitation of the work or the legitimate interest of the author.”

As can be seen from this provision, the three-step test has not been included in its fullest sense; i.e., of the three components of it (“the limitation should be limited to certain special cases”, “it should not conflict with the normal exploitation of the work”, and “it should not unreasonably prejudice legitimate interest of the author”), the first one, “special case”, has been removed. On the other hand, there is no question that persons who are visually impaired constitute a ‘special case’ under the first limb of the three-step test. However, with the requirement of ‘special case’ removed from the three-step test, persons who are blind and partially sighted cannot claim, whenever legally challenged, the protection extended by the first component, ‘special case’.

C. As seen the aforementioned provision (9 (2) (e)), the L&E in question is limited to the exclusive right of reproduction. Such a narrow L&E cannot, to end or at least reduce the book-famine by people who are visually impaired, bring the required result. It should have extended its effect—beyond the right of reproduction—to the right of distribution and of

making works available to the public, which are core areas of focus for Marrakesh VIP Treaty—as provided under Articles 4 (1 (A)), (2) and 5. Hence, this L&E provision may hardly serve, while limiting itself to the right of reproduction, to promote the right to access information by people who are visually impaired.

D. Pursuant to Arts. 9 (2) (d) and 14, “The provision permitting “private reproduction of a published work in a single copy by a physical person exclusively for his own personal purposes do not extend to ‘reproduction’ of a computer program except . . . “single copy reproduction, or adaptation of a computer program.”

In Ethiopia, Computer program is, regardless of its technical quality, a copyrightable subject-matter. Article 2 (30) of the proclamation states:

“Work” means a production in the literary, scientific and Artistic fields. It includes in particular:

A) “books, booklets, articles in reviews and newspaper, computer programs.””

As the listing is illustrative, the definition can also include ‘mobile applications’ by analogy. Induced by the fact that computer and mobile apps are becoming popular in the market, nowadays, authors are showing high tendency to turn their books into apps to sell in the major app stores, including Google Play, iTunes, and the Amazon. Unfortunately, these apps are not, for all intents and purposes, screen-reader friendly.

On the other hand, the L&E to the right of reproduction under the above provision does not oblige the author to make his work screen-reader friendly; nor permit, without authorization by the right holder, reverse-engineering or the writing of “add-ons” or “scripts” to modify and make apps screen-reader friendly. Similarly, the Marrakesh VIP Treaty does not cover literary and artistic works turned into computer programs or mobile apps in its definition of “works”.

E. Some works, albeit ‘public domain’, may be as important as the protected ones for people who are visually impaired; hence whether or not they are accessible matters a lot.

Under Article 5 (b) of the proclamation, any official text of a legislative, administrative or of legal nature, as well as official translations thereof is, for example, non-copyrightable subject-matter.

A plethora of case-books and laws are physically and digitally published and freely available for the public these days. The major accessibility barriers to access these works today are two-fold; 1) it remains costly to print them in Brail or digitize them; and 2) their electronic versions are often released in formats that are not screen-reader friendly. However, it is very cost-effective if, from the outset, they are released as born-accessible publication. Be that as it may, the proclamation, perhaps and ambiguously enabling digitization, does not impose requirements that publishers make such kind of e-books accessible.⁴⁹ Nor the Marrakesh VIP Treaty covers “works”, despite literary and artistic, if they are non-copyrightable. A possible solution would be to take legislative measure in a way to force publishers to release a born-accessible publication, which is the most efficient one, or to make them accessible in alternative formats.

F. A far greater portion of public-domain works, albeit non-copyrightable, may not be automatically published or made publicly available. They may be accessed by everyone only on an individual request basis. They are, however, usually inaccessible, in terms of format, to requesters who are visually impaired. Moreover, apart from their non-copyrightability, neither the proclamation nor the Marrakesh VIP Treaty covers such kind of works due to the fact that they do not satisfy the ‘publication’ or ‘public availability’ requirement.

G. as can be understood under Article 3 of the Proclamation, the L&E seems to be unnecessarily restricted to 'published' works only;⁵⁰ i.e., 'works' lawfully made available to the public in different modes other than publication are not unequivocally copyright-protected and subject to L&E. Fortunately, the Marrakesh VIP treaty covers 'works lawfully made available to the public in different ways other than publication. What remains is thus to take the necessary legislative measure—aimed at making the proclamation in conformity with and enforcing the treaty.

⁴⁹ Some countries such as UK follow rule of interpretation stating: “Something which is not expressly forbidden is allowed;” while those such as Germany use a contrary rule: “Something which is not expressly allowed is forbidden.” Our judges may use any of these rules to interpret Article 3 of the proclamation to include or exclude digitalization.

⁵⁰ *Id.*

H. Some works such as correspondences are produced and made available only to specific addressee. They are not published or made available to everyone even upon request. However, these works may by chance be addressed to anyone because of business or any other relationship. Court summons, receipts, and statement of claim are good example. These works are not produced born-accessible or made in alternative format for Addressees with visual impairment. Neither Marrakesh VIP Treaty nor the proclamation offers solution as the two laws exclude such works under the umbrella of their protection.

I. While the common law system maintains a closed system of rights and open system of limitations – the “fair use doctrine” –, the civil law tradition maintains a reverse system where rights are defined broadly and limitations are strictly defined and closed – “the three-step test”.⁵¹ The former approach provides broadly worded limitation that gives discretion for courts to establish whether a specific circumstance falls within the fair use doctrine. On the contrary, the latter one provides specific and narrowly defined exceptions (the three-step test) with little space for courts to swing.

Their difference lies on the adoption of two contrasting theories—natural right theory where right of the author is understood as absolute and unrestricted individual right and utilitarian theory where social good is mainly promoted instead.⁵²

In the Ethiopian copyright legislation, there is no common law-style open system of limitation known as ‘fair use doctrine’. The three-step test is instead incorporated, but with one important organ of it removed. Therefore, courts in Ethiopia are of little, if any, discretion to broadly construe the three-step test and benefit people who are visually impaired.

J. As stated repeatedly, the proclamation has modified and incorporated the three-step test in a vague manner. Such a vaguely phrased three-step test tend to make government be reserved and reticent—unsure of the motives for questions by people who are visually impaired to access information on an equal basis with others. Moreover, the choice of public policy considerations whether an act is 'reasonable' or 'justified' under the three-step test, even though it may entail economic loss, is left to national government. Therefore, promotion of the right to access information by people who are visually impaired, without taking additional

⁵¹ Biruk Haile, *supra* note 41

⁵² *Id.*

legislative measures, will remain at stake if the leeway to use the vaguely incorporated three-step test and choose public policy consideration is not taken away from the government and rather given to the judiciary.

K. Some persons, putting special emphasis to ratification of the CRPD, invoke sufficiency of Article 21 of it as to access information, particularly for non-copyrightable ones, on an equal basis with others. However, on the scope of paragraphs (c) and (d) of Article 21, it is obvious that the Convention uses a wording more elastic concerning private entities compared with paragraphs (a) and (b) concerning States. In These paragraphs, the mass media (including via the Internet) are merely ‘encouraged’ to promote accessible services to persons with disabilities, while private undertakings that offer services to the general public are ‘urged’ to make their services accessible to persons with disabilities.

The terms ‘urge’ and ‘encourage’ make it unclear how the State is to act in relation to private entities in order to ensure that the rights of persons with disabilities are exercised on an equal basis with others.⁵³ Of course, they do not imply that States can instruct private entities and provide enforceable sanctions if they do not make their services accessible and in usable formats for persons with disabilities.⁵⁴ So, it may be argued that relying on the mere encouragement of private actors to provide information-access could be unlikely to overcome the accessibility barriers faced by persons with visual impairment.

What’s more, the CRPD has its own limitations deriving from its treaty nature that is binding only on Contracting Parties, not also on natural and juridical persons.⁵⁵ It is upon States Parties to bring such persons to comply with treaty obligations only through their own domestic legislation.

L. In general, from the perspective of the right to access information by people who are visually impaired, the proclamation is outdated; and the treaty is not absolute. Taking legislative measure is thus necessitated to: i) make the proclamation in consonance with the

⁵³ Rachele Cera in V. Della Fina et al. (eds.), “The United Nations Convention on the Rights of Persons with Disabilities: A Commentary” (2017)

⁵⁴ *Id.*

⁵⁵ *Id.*

treaty; ii) enforce the treaty as it is; and iii) address literary and artistic works neither the proclamation nor the treaty covers.

3. Empirical Findings

In this section, the research summarizes major challenges faced and identified by respondents to access information owing to the absence of ‘access’ law.

As repeatedly stated, persons with visual impairment cannot, devoid of ‘access’ legislation, benefit from the principles of non-discrimination, equal opportunity, accessibility, full and effective participation and inclusion in socio-economic and political life of their society. They would continue, devoid of access to information, facing challenges that are prejudicial to their complete development. They do not have ‘the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society’. This in turn limits their “freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds on an equal basis with others, including through all forms of communication of their choice”, their enjoyment of the right to education, work, health and the opportunity to leave independently. In Ethiopia, the problem becomes worse, not only due to absence of ‘access’ law, but also extreme poverty of people with visual impairment, their low literacy rate and absence of a well-developed assistive technology. With this in mind, respondents with visual impairment were asked to identify challenges they are facing due to absence of ‘access’ law and assistive technology that supports local languages.

According to them, they believe that persons with visual impairment are discriminated from accessing information on the basis of their disability. The limited access to information has greatly impeded persons with visual impairment from education, healthcare, employment, cultural and other socio-economic participation. Subsequently, people with visual impairment have been denied of their right to enjoy freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds on an equal basis with others. They are denied of the opportunity to develop and utilize their creative, artistic and intellectual potential.

Limited access to published or publicly available works can also limit, they believe, ability of people with visual impairment to perform their day-to-day tasks; make them over dependent; affect their quality of life; and ability to interact with their surroundings.

Devoid of access to published or publicly available works, people with visual impairment may hardly enjoy independent living and personal autonomy. They do not attain professional and personal development to get the knowledge and skills they need. They remain to be benchmark for the poorest standard of living.

Many of them are with Low Self-Esteem. They lack confidence about who they are and what they can do. They often feel incompetent, unwelcome or worthless. People may have no trust or confidence in them to engage them in socio-economic and political affairs—resulting in poor social integration and communal involvement. This prevents them from participating in the socio-political and cultural life of their community, to enjoy the arts and to share scientific progress and its benefit on an equal basis with others.

To make matters worse, assistive technologies in the market tend to overlook local languages. For example, access software such as Jaws, Abby Fine Reader and Dolphin softwares do not recognize all local languages, with the exception of Afaan Oromo to a certain extent. In particular, Absence of a well-developed OCR technology has just added more fuels to the fire.

Authors and publishers were also asked to identify challenges to make their works available for persons with visual impairment in alternative formats. According to them, they are not fully cognizant that they can make their works accessible for readers with visual impairment—using alternative format. Some are even totally ignorant whether people with visual impairment can read electronic copy of works.

Moreover, albeit awareness, publishers may not be willing or able to finance the reformatting of works into accessible formats. This is mainly because of quite low market opportunity for accessible publications and low rate of return. They do not also want to count on the existing regulatory system to prevent piracy.

Authors share the same concern. They believe that there is no yet technological and legal environment locally promoting the paper-to-digital transformation. Possible distortion, mutilation or other alteration of works also scare them out of their wits – when they think making their works available in alternative formats.

Respondents from government institutions were likewise asked to identify challenges to make their services and works accessible for persons with visual impairment on an equal basis with others.

According to them, Ethiopia does not have robust copyright law addressing the needs of readers with visual impairment. Thus, institutions such as libraries and universities are unable to address the needs of people with visual impairment. Although the existing copyright law—excluding Marrakesh VIP Treaty—provides L&E to Reproduction for teaching or by Libraries, Archives and Similar Institutions, it couldn't be 'access law' on its own—even for its qualified beneficiaries. Relevant government institutions are devoid of professionals or staff trained in Braille or other accessible formats.

Government wouldn't have been as tardy as this to meet the needs of people with visual impairment to access literary or artistic works—had “Special Needs Education” worked as expected. Failure in quality of Special Needs Education is of course a ramification of Declining Quality of Education in general. Educational institutions do hardly pay attention for persons with visual impairment. This is not without denying that it may be too costly for these institutions to digitize existing print books; or to import assistive technology devices. To make matters worse, to date, there is little, if any, impact of lobbying on government by interest groups.

4. Conclusion and Recommendations

People may not hesitate to conclude that persons with visual impairment have the right to access information. And just like people with normal sight, people with visual impairment who want to read may want to do so for a variety of reasons, for example, as part of an educational activity, for leisure or in order to obtain information. There are, of course, many reasons for which any person cannot read a text; for example, a person may fail to read because he doesn't have the ability to do so; the text has not actually been made available to the public; he cannot afford to buy the text even though it is available in a suitable format; he has no access to a library from which he might loan the text because the local library has not acquired the text even though it exists in a suitable format; or the text is in a language that they cannot understand. People with visual impairment do however become unable to read not only because of those mentioned herein above but also unavailability of works in accessible format.

As regards making works available in accessible format, there may be no specific provision in different human rights and copyright treaties, which specifically provides for L&Es to copyright for the benefit of people with visual impairment. The Marrakesh VIP Treaty has come into picture with a view to circumvent the 'book famine' by the visually impaired or print disabled because of unavailability of works in accessible format for them. Ethiopia has recently ratified this treaty with Proclamation No. 1181/2020. Mere ratification of the treaty cannot be however sufficient enough to ensure the right to access information of persons with visual impairment. The treaty is not even comprehensive enough to cover as many literary works as possible. Likewise, domestic copyright laws do not provide sufficient room to the right of people with visual impairment to access information. Therefore, despite ratification of Marrakesh VIP Treaty, persons with visual impairment in Ethiopia continue facing challenges resulted from absence of 'access' law that promotes availability of works in suitable format. The following recommendations are made with a view to facilitate, beyond the treaty provides, availability of works for persons with visual impairment on an equal basis with others.

- ✚ In order to end the 'book famine' by people with visual impairment, the government should amend its copyright legislations—aimed at complying with the CRPD and Marrakesh VIP Treaty. Nonetheless, due to abundance of works not covered by the

existing copyright law, including the treaty, a “stand-alone” proclamation should be preferred to “amendment” proclamation. Such legislative measure would remain effective however if people with visual impairment or their representatives are given the leeway to participate

✚ Although not copyrightable, works that are published or made publicly available automatically or upon request or correspondences addressed to specific addressee, are not less important than the copyrightable ones. Thus, the recommended legislative measure should equally pay special attention to address the limited access to non-copyrightable works.

✚ In the United States, an authorized entity called Book Share enables people with print disabilities to legally share digitally accessible books which are created by volunteers and members who submit books. Authors and publishers can also submit digital versions of the books, thus saving time and additional work for digitizing. Government should support ENAB to play the role of Book share in Ethiopia or facilitate the creation of similarly advanced ‘accessibility’ institutions.

- Government should support the development of full-fledged assistive technology, including OCR technology, that supports local languages. In its absence, access to literary or artistic works created in local languages would remain to be a daunting task.