

NEIGHBORING RIGHTS PROTECTION

Introduction

Copyright is not extended to any right related to copyright. There are some rights which are recognized to have close relationship with copyright but cannot be the subject matter of copyright law as such. These rights, for different reasons, deserve legal protection. That is why it is common these days, to see some provisions of recently issued copyright proclamations dedicated for the recognition and protection of these rights. Our copyright law is not an exception to this fact. It is in the current proclamation that these rights are clearly given a legal recognition.

Since they are often closely associated with copyrights, any consideration of copyright laws has to take into account this associated rights. These rights are named neighboring rights or related rights.

Objectives

After completing this chapter, students will be able to:

- Explain the nature of neighbouring rights;
- distinguish the specific rights granted for the holders of the rights;
- Identify the relationship of copyright with the neighbouring rights;
- Discuss the limitations imposed on neighbouring rights.

1. Origin and Development of Neighboring Rights

Authors works are intended to be made available to the public at large. Various categories of works are made accessible to the public in various ways: it may be by way of live performances, sound recordings or broadcasts. It means there are intermediaries for making available works of authors to the public. For instance, where some dramatic and musical works, pantomimes, or other types of creative works intended for either auditive or visual reception of such works are communicated to the public, they are produced or performed or recited with the aid of performers. In such cases, there arises the interest of the performers

themselves in relation to the use of their individual interpretation in the performed work. These works may also be produced in sound recordings or broadcast in broadcasts. Thus, the issue of protection of performers, producers and broadcasting organizations, i.e., protection of neighboring rights arise.

The problem with regard to this category of intermediaries has become more acute with rapid technological developments. These technological developments made possible fixing of performances on a variety of materials, viz., records, cassettes, tapes, films etc. What was earlier a localized and immediate phase of a performance in a hall before a limited audience became an increasingly permanent manifestation capable of unlimited and repeated reproduction and use before an equally unlimited audience that went beyond national frontiers. These technological innovations, since they have made it possible to reproduce individual performances by performing artists and to use them without their presence and without the users being obliged to reach an agreement with them, have led to a reduction in the number of live performances. Thus, there is a new dimension to the protection of the interests of performers.

By the same token, “the increasing technological development of phonograms and cassettes and, compact discs (CDs), and their rapid proliferation, was pointing to the need of protection of producers of phonograms.” “The appeal of the phonogram, as also the easy availability in the market of the variety of increasingly sophisticated recording devices, created the growing problem of piracy, which has now become a worldwide scourge.” In addition, there was an increasing use of records and discs by broadcasting organizations; as they became an essential ingredient of the daily programs of broadcasting organizations. Consequently, just as the performers were seeking their own protection, the producers of phonograms began to pursue the case of their protection against unauthorized duplication of their phonograms, as also

for remuneration for the use of phonograms for purposes of broadcasting or other forms of communication to the public.

There are the interests of broadcasting organizations as regards their individually composed programs. The broadcasting organizations required their own protection for these as well as against the retransmission of their own programs by other similar organizations.

Regarding the development of neighboring right in Ethiopia, Articles 1647-1670 of the Civil Code provisions, which are now replaced by the Proclamation, governed copyright only. According to these provisions, copyright is a right granted to an author of a work of mind, which is either literary or artistic in nature. Works of the mind are defined under Art 1648 of the Code. The Civil Code does not incorporate rights of performers, producers and broadcasting organizations. In other words, the question for protection of neighboring rights was not raised.

Thus, in Ethiopia, neighboring right is recognized for the first time in the Proclamation. The Proclamation incorporates the legal protection of performances, sound recordings and broadcasts. Seen in light of Ethiopia's membership to the Convention Establishing the World Intellectual Property Organization, whose prime objective is the promotion and protection of intellectual property, and adopted through Proclamation No.90/1997, this legislation could be said very late to be declared.

2. Nature of Neighboring Rights and Justifications for Protection

2.1. Nature of Neighboring Rights

- The term "neighboring rights" comes from the French "*droits voisins*" referring to those rights which have been developed parallel to and are related to copyrights.
- They may be loosely defined as rights which do not arise directly from the five major types of intellectual property (patents,

copyrights, trade secrets, trademarks and industrial designs) but which are “neighboring” to such rights.

- In other words, there exist rights related to or “neighboring on” copyrights that are generally referred to as “related rights” or “neighboring rights”.
- Thus, neighboring rights are those rights granted to protect **performers, producers of phonograms, and broadcasting organizations** in the performance of their works.

To put it differently, “neighboring rights” are rights that are related but not identical with copyrights. The rights of these persons are “neighbors” to copyright in the sense that they evolve from an original work of authorship, but are not works of authorship, and thus not copyrightable by themselves.

Accordingly, they concern other categories of owners’ rights, namely: performers, the producers of phonograms, and broadcasting organizations.

- For instance, an actor almost invariably, is not the creator of the role he plays. He rather performs a role in a play written by a playwright. By the same taken, a musician may not necessarily be a composer. He may perform the creative woks of another person.

Yet, their contribution does not make them subjects of copyright. Likewise, the producers of phonograms produce works of authors as performed by the performers; and broadcasting organizations broadcast such works on their station. The fact that they have intervened in the channeling of the works does not entitle them to claim copyright on the works. However, their assistance in making the work available to the public entitles them to certain rights that are called neighboring rights.

Thus, the notion of neighboring rights is understood to mean rights granted in an increasing number of countries to protect the interests of performers, producers of phonograms and broadcasting organizations “in relation to their activities in connection with the public use of author’s works, all kinds of artists’ presentations or the communication to the public of events, information, and any sounds or images”.

In the Ethiopian legal system, neighboring rights are the rights performers, producers of sound recordings, broadcasting organizations have over their works as per **Art 2(14)** of the Proclamation that defines neighboring rights.

Read Art. 2(19)

Protection of performers is provided in order to safeguard the interest of actors, singers, musicians, dancers or other persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works against unlawful uses of their performances.

Read Article 2(21)

The other neighboring right is the right of producers of sound recordings (phonograms). Article 2(21) defines a “producer of sound recordings” as a person that undertakes the initiative and responsibility for the making of sound recording works.

- The right owner is the person that first fixes the sounds. This excludes both the technicians and operators employed by the recording company, and any entity merely pressing records, i.e., duplicating the first fixation which is the original recording.

“Sound recording” means, - Read Article 2(28)

an exclusively aural fixation of the sounds of a performance or other sounds or a representation thereof, regardless of the method by which the sounds are fixed or the medium in which the sounds are embodied. It does not, however, include a fixation of sound and images such as the sound track of an audiovisual work.

It is important to note that the sounds could be sounds of a performance or other sounds or a representation thereof whether fixed on cassette tape or compact disc etc. from which fixed sounds can be perceived, reproduced or otherwise communicated directly or with the aid of machine.

Read Article 2(3), (4)

Broadcasting organizations enjoy neighboring rights. A broadcasting organization shall have the exclusive right to carry out or authorize reproduction of its broadcasts, fixation of its broadcasts and reproduction of a fixation of its broadcast as per **Article 31 (1)** of the Proclamation until the expiry of 20 years following the year in which the broadcast took place.

2.2. Justifications for the Protection of Neighboring Rights

1. Copyright and neighboring rights constitute an essential element in the development process of a country.

The Preamble of the Proclamation asserts that the protection of works of artistic, literary and scientific nature serves to enhance cultural, social, economic, scientific and technological development of a country.

As to the dependence of the enrichment of the national cultural heritage on the level of protection afforded to literary and artistic works, it is said that:

The greater the number of country's intellectual creations, the higher it is renowned the greater the number of production in literature and the arts, the more numerous their so called "auxiliaries" (the performers, producers of phonograms and broadcasting organization) in the book, record and entertainment industries; and indeed, in the final analysis, encouragement of intellectual creation is one of the basic prerequisites of all social, economic and cultural developments. Thus, one of the

justifications for the protection of neighboring right is that **it will serve for the social, economic and cultural development of the country.**

2. To help and facilitate the accessibility (or dissemination of intellectual works to the public

Legislations in many countries provide for the protection not only of the creators of intellectual works but also of auxiliaries that help in the dissemination of such works, in respect of their own rights.

Copyright subsists in works of authorship.

Works of the mind are created in order to be disseminated among as many people as possible. They cannot be done generally by the author himself, for it requires intermediaries whose professional capability gives to the works those forms of presentations that are appropriate to make them accessible to a wide public.

Sometimes another person's contribution, in making of the works available to the public may be necessary. The person may act as a channel or intermediary between the author and the consumer of his work. However, his act or contribution may not be subject to copyright protection, obviously, his effort deserves some sort of protection. Thus, the rights of performers, producers of sound recordings and broadcasting organizations are protected as **they are the means for disseminating works of authors.**

3. For setting up the industry and development of the economy

By protecting the neighboring right holders, particularly in developing countries, the basis for setting up an industry in the tertiary sector of the economy is ensured. Such an industry, "while guaranteeing the dissemination of national culture, both within the country and throughout the world, can additionally constitute a substantial source of revenue for the county's economy and, in those cases where its activities extend beyond the country's frontiers, can represent an inflow of foreign currency".

4. To Protect Rights of the performers, producers & broadcasting organizations

Performers, producers and broadcasting organizations employ their talents or technical skills. Furthermore, they have economic interests on their works. They require economic returns for their investment. Consequently, they have to be accorded with some sort of exclusive legal rights for their respective works.

2.3. Scope of Application of the Proclamation on Neighboring Rights

The Proclamation deals about the extent of the application of the Proclamation on the protection of performances, sound recordings and broadcasts.

Performances, in order to get protection from the Proclamation: **Read Art. 3(3)**

- Performers who have Ethiopian nationality should perform them
- For the performers who do not have Ethiopian nationalities:
 - Performances should take place in the territory of Ethiopia; or should be incorporated in sound recordings the producers of which are nationals of Ethiopia; or sound recordings first fixed or first published in Ethiopia; or if they have not been fixed in a sound recording they should be included in broadcasts of broadcasting organization, the headquarters of which are situated in Ethiopia or transmitted from transmitters situated in Ethiopia.

For sound recordings, **Read Art.3 (5)**

- The producers of those works should have Ethiopian nationality **or**
- The sound recordings should be first fixed or published in Ethiopia.

Broadcasting organizations, the protection shall apply to:

- Broadcasts of broadcasting organizations where the headquarters are situated in Ethiopia **or**

- Broadcasts transmitted from a transmitter situated in Ethiopia.

Moreover, the provisions of the Proclamation will be applied for the works of performers, producers of sound recordings and broadcasting organizations that are eligible for protection by virtue of and in accordance with an international convention or other international agreement to which Ethiopia is a party as per **Article 3(6)** of the Proclamation.

The Proclamation underlines that the provisions concerning copyright and neighboring right **shall not extend to a material object**. I.e. the protection given to the music or painting or dance will not be applicable for the ownership of the musical instrument or the painting materials pursuant to **Art 3(7)** of the Proclamation.

2.4. Owners and Scope of Neighboring Rights

2.4.1. Performers' right

Who is a performer? [see **Art, 2 (19)**]. The term 'performer' refers to as a musician, an actor in a film or a theatre scene, a radio commentator, etc.

These persons, even if they are not exclusive owners of the works they performed, are endowed with privileges reserved beyond the reach of anyone else. Read:

Article 26. Acts requiring authorization of performers

1. Without prejudice to the provision of Article 32 of this proclamation, a performer shall have the exclusive right to carry out or authorize:
 - a) the broadcasting or other communication to the public of his performance, except where the broadcasting or the other communication is made from a fixation of the performance which the performer has authorized to be made; or
 - b) a rebroadcasting made or authorized by the organization initially broadcasting the performance;
 - c) the fixation of his unfixed performance,

- d) the reproduction of a fixation of his performance, in any manner or form,
 - e) making available the first fixation of his performance, or copies thereof;
 - f) rental or public lending of a fixation of his performance, or copies thereof irrespective of the ownership of the copy rented or lent;
 - g) making his fixed performance available to the public by wire or wireless means, in such a way that members of the public may have access to them from a place or at a time individually chosen by them.
2. The provisions of Sub-Article (1) of this Article shall not be applicable where the performer has authorized the incorporation of his performance in a visual or audiovisual fixation.
 3. Notwithstanding the provision of Sub-Article (1) of this Article, the performer can not forbid the reproduction and the communication to the public of his performance, if it is accessory to an event constituting the principal subject of a scene, or of an audio-visual document.
 4. The performer independently of his economic rights or even after the transfer of this right shall have the right:
 - a. to be identified as the performer as regards his live performances, the performances fixed in sound recordings, except where omission is dictated by the manner of the use of the performance.
 - b. to object to any distortion, mutilation or other modification of the performance that would be prejudicial to his reputation.
 5. The provision of Article 8 (2) and (3) shall apply mutatis mutandis to the right of performers granted in this Article.
 6. The right referred to in this section shall be protected until the end of the fiftieth Calendar year, following the year in which the performance was fixed in a sound recording or in the absence of such fixation, from the end of the year in which the performance took place.

There are some exclusive rights granted for the performer. It follows that a performer, as any other property right owner, enjoys those reserved rights to the exclusion of other person including the government. However, we should not forget the huge fact that the copyright owners of the works involved are not exempted from this exclusion.

Another important factor, which is not to be overlooked, is the impact of the fact that the preformed work was being fixed or broadcast properly upon the authorization of the performer (**see Art. 26 (1) (a) and (b)**).

The authorization to reduce the work he performed in some tangible form, the reproduction thereof, the distribution of the work involved including rental and public lending are of the economic rights legally reserved for the performer.

Apart from the economic rights, our law provides **moral rights** of the complete protection of the right holder. **Art. 26 (4)**. This includes the right of paternity and the right of integrity.

As moral right, these rights are made to exist independently of the economic rights. I.e. they remain with the performer even after the transfer of economic right to third parties.

By the reference made to Art 8 (2) and (3), these rights are made to be transmutable upon the death of the performer to his heirs or legatees. Moreover, the law recognizes there to susceptibility waiver of the performer, his heirs or his legatees. In this regard, we hope **you still remember what we have discussed** while considering the moral rights of the author.

Art. 26 (4)

With respect to the duration of protection, the law provides alternative terms to be applied to two different situations.

- If the performance was fixed in a sound recording, the protection lasts up to the expiry of the fifty years to be counted as of the date of fixation. But
- where the performance has not been fixed the fifty years period will be calculated as of the end of the year in which the performance took place.

The law is so clear, and therefore it does not leave room for interpretation. But it raises at least a question: *What about a performance which was fixed very lately?* Assume that the performance was fixed on the eve of the fiftieth year of the end of the year in which the performance took place? When should the term begin to run?

2.4.2. Rights of Producers of Sound Recordings and Affiliated Issues

Until the second half of the 19th century the printing press was the sole technology involved in taking literary works of all kinds to their public; in the case of dramatic and musical works the main route of the work to its public was live performance and in the case of artistic works, exhibition. In the second half of the 19th century, technology created photography, sound, recordings and silent films and in the 20th century, films with sounds tracks, radio and television. In effect, these creations entirely transformed the copyright scene.

It became fairly clear by the first decade of the 20th century that sound recordings deserved and needed some protection. Gradually advancing technology made record production an act which probably demands as much creativity as any other derivative work.

Thus, the producer who is taking the initiative and responsibility of sound recordings is granted certain exclusive rights in international conventions and national laws of many countries. Hence, the producer of sound recordings enjoys certain rights, independent of the copyright owners, as a neighboring right owner (**Art 2(14) of the Proclamation**).

Regarding rights, a producer of phonograms enjoys five basic rights: the reproduction right, the importation right, the distribution right, the rental or lending right and the making available to the public right, as would be discussed as follows. (**Art. 27 of the Proclamation**).

I. Reproduction

The right of the owner of copyright to prevent others from making copies of his works is the most basic right in copyright laws. For example, making copies of a protected work is the act performed by a publisher who wishes to distribute copies of a text-based work to the public, whether in the form of printed copies or digital media such as CD-ROMs. Likewise, the right of phonogram producers to manufacture and distribute compact discs /CDs/ containing recorded performance of musical works is based, in part, on the authorization given by the composers of such works to reproduce their compositions in the recording. Therefore, the right to control the act of reproduction is the legal basis for many forms of exploitation of protected works including sound recordings.

The right of reproduction is a right "*erga omnes*" or real right to authorize or prohibit any reproduction of a protected phonogram. In the international arena, the Rome Convention gives the producer the right to prohibit reproduction whether such reproduction is direct or 'indirect'. ['directly' - is replaced when works are broadcast and 'indirectly' covered reproduction from a matrix (in case of disc) or from a pre-existing phonogram, such as tape or from a 'recording off the air'].

The last mentioned method of reproduction is known as 'home taping', an activity which is simple with the equipment now available in the market in most countries. Such home taping would be contrary to international law in countries which have ratified the Rome Convention unless it is covered by the private use exception of Art.15 (1) (a) of the Convention which is left as a matter of national law. That is so because it is for national laws to determine the content and scope of what constitutes private use.

Regarding reproduction right, it was treated in the 1967 Revision Conference of the Berne Convention in the following way:

If it is considered that reproduction conflicts with the normal exploitation of a work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interest of the author.

Thus, it seems clear that any practice of home taping conflicts with a normal exploitation of the work and unreasonably prejudices the legitimate interest of the copyright owner. Therefore, the practice does not seem to be covered by fair use exception but is an infringement. However, the exercise of the reproduction right by the author and by the phonogram producer in these circumstances would be “an intolerable intrusion in the privacy of the user’s home and the right is therefore, unenforceable in practice”.

The reproduction right in phonogram applies to parts of phonograms. This is important as it prevents the copying of one track of long playing record and probably even part of the track if the part is substantial.

This most basic exclusive right of producer, right of reproduction, is stipulated under **Art 27 (1) (a)** of the Proclamation, which reads “a producer of sound recording shall have the exclusive right to carry out or to authorize reproduction of his sound recordings, in any manner or form”.

It allows the producer to exclude all others from reproducing the phonograms in the form of a copy. A copy is any material object from which, either with naked eyes or other senses or with the aid of a machine or other device, the work can be perceived, reproduced or communicated.

It is important to note at this juncture the definition of reproduction under Art 2 (25) of the Proclamation.

It means reproduction includes 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.

Note also the definition of reprographic reproduction under Art 2 (26) which means

the making of facsimile copies of the original or a copy of a work by means other than printing such as photocopying, whether or not they are reduced or enlarged in scale.

It should, therefore, be noted that when we say that the producer has an exclusive right to carry out or authorize reproduction we are certainly referring to all acts enumerated in a not-exhaustive manner under Art.2 (25) and 2(26). These acts should be either undertaken by the producer itself or to undertake those rights, any one should be authorized by the producer subject to the legal limitations to be discussed later.

II. Rental or Lending Rights

New technology in the form of compact discs /CDs/ and digital audio tape /DAT/, apart from improving the quality of the sound base, created a much more durable phonogram. They can be played many times without deterioration. This makes it easier to offer phonograms for hire as well as for sale.

The right here is to authorize or prohibit rental and lending of copies of the sound recordings to the public since the producer has the right to carry out or authorize rental or lending to the public a copy of the sound recording irrespective of the ownership 'of the copy' rented or lent (**Art 27(1) (d)**). Here, it says only of a copy unlike performers rights that also include the fixation of performance under Article 26(1) (e).

Rental is not for the public; it seems private while lending is to the public. Anyway, this is a right to be exercised by the producer except for limitation of this right. "First sale" doctrine does not apply here, that is why it says irrespective of the ownership of the copy rented or lent.

III. Distribution Right

Some laws include a right to authorize distribution of sound recordings for the producers in order to ensure that the basic right of reproduction is respected. The right of distribution is usually subject to exhaustion upon **first sale** or other transfer of ownership of a particular copy, which means that, after the copyright owner has sold or otherwise transferred ownership of a particular copy of a work, the owner of that copy may dispose of it without the copyright owner's further permission, for example, by giving it away or even by reselling it.

One of the rights of a producer of sound recordings that is enshrined under **Art.27 (1) (c)** of the Proclamation is the distribution of the original or copy of his sound recordings to the public by sale or other means of transfer of ownership. This exclusive right guarantees to the producer the right to distribute the original or a copy of the work to the public by sale or donation or any other form of transfer of ownership.

It appears that Art. 27 (1) (c) fits the “**first sale**” **doctrine**. Once a sale has taken place, the first sale doctrine allows the new owner of the sound recordings to treat the object as his own. Hence, although a producer might transfer ownership to a buyer and impose certain conditions, it is not a violation of the rights of the producer for the buyer to sell the sound recordings to another, even if the producer had conditioned the sale upon a promise of no resale.

Therefore, the distribution right only secures to the producer the right to control the first transfer of ownership. The first sale doctrine authorizes continuing sales or other means of transfer of ownership. It should be noted, however, that it does not authorize further copying of the original or its copy. Thus, the distribution right and the first sale limitation upon it apply to the very phonogram that has been sold or otherwise transferred. The producer is however still protected against unauthorized copying of the sound recordings by the reproduction right.

To put it differently, this right is exercisable only to the sound recordings that have not already been subject to a distribution authorized by the producer by sale or other means of transfer of ownership. Means of transfer of ownership other than sale could be acts such as donation and exclusive license; non-exclusive license does not preclude exercising this right against those who are not licensed.

IV. Importation Right

Some copyright laws include a right to control importation of copies as a means of preventing erosion of the principle of territoriality of copyright; that is; “the legitimate economic interests of the copyright owner would be endangered if he would not exercise the rights of reproduction and distribution on territorial basis”.

The right to import copies of one’s sound recording is provided under **Article 27(1) (b)** of the Proclamation as follows. “...a producer of a sound recording shall have the exclusive right to carry out or authorize importation of copies of his sound recordings...”

This is a right given to producers of sound recording and authors of a work. It should be underlined that this provision deals with the right to import copies of sound recordings. This is obvious because the original sound recording could be undertaken in a place where the producer thinks fit. It is the copy that can be imported being so copied from the original in the countries other than the country where the original recording has taken place due to several reasons including low cost of reproduction or a better technology that results in efficiency. For instance, the reproduction could be undertaken from a copy which is not possible in the place of recording. It is to curb such kind of practice, which would impair the interest of the producer of sound recording, whom this right is provided.

V. Right of Making Available

Due to the highly developed and profitable communication and entertainment industries and technologies of the contemporary world, the right of the producer, to exclude all others from making available to the public of his sound recordings, is one of the most important rights guaranteed by the Proclamation.

It is because “large segments of the population in our contemporary world receive copyrighted information through mass media, electronic motion pictures, televisions, tapes and discs, radio broadcasts and a host of other technologies by which information is delivered to the public”. Hence, granting a producer to do or to authorize making available to the public of his sound recordings has become invaluable right.

The ‘making available’ right is an exclusive right of producers to authorize or prohibit the dissemination of their works and other protected material through interactive net-works such as the internet and this exclusive right is one of the most important achievements of the WIPO Treaties and constitutes a basic requirement for the development of electronic commerce.

The reason was not only to fight piracy. The international community also recognized that the dissemination of phonograms in digital networks such as the internet constitutes a primary form of exploitation of music, and therefore should be subject to the control of the right owner.

Moreover, the making available right covers both the actual offering of the phonogram or other protected material and its subsequent transmission to members of the public.

This broad formulation is capable of accommodating many different types of exploitation, from services allowing only the listening of music, to services allowing the download of permanent copies of music tracks, to exciting future uses of technology.

As per **Article 27 (1) (e)** of the Proclamation, the producer has an exclusive right of making available to the public of his sound recordings by wire or wireless means and then members of the public have access to such sound recordings from a place or at a time individually chosen by them.

It is an individual access at a place or at a time chosen. This right is designed specifically to deal with things being made available on the internet to be downloaded at the convenience of customers. 'the making available right to the public' is offering sound recordings for download via a web site. Once the producer make his sound recordings available to the public, the consumer can access it individually at his own choice without the transmission.

VI. The Requirement of Labeling a Sound Recording for Commercial Purposes

The right of the producer of the sound recording would be subject to the fulfillment of some requirements under **Article 28 cum Article 27(1)** of the Proclamation. The producer of the sound recording shall state on the label of the recording or on its container: the title of the work or works; the name of the author and of the main performers (a choir or an orchestra shall be referred to by its name and that of its leader, if any); the name or distinguishing mark of the producer and the rights accruing to the producer that we have discussed so far are reserved.

Where a copy of a sound recording is made for a commercial purpose, a notice shall be printed on the label or its container consisting of the symbol (P) and the year in which the recording was first published, placed in such manner as to give reasonable notice of claim to protection of the right of the producer.

The purpose of the notice is to serve **as prima facie evidence** of the facts stated there for the purposes of any proceedings brought under the Proclamation with respect to the rights of the producer of sound recordings (Art 29 of the Proclamation).

It is important to note that the notice is required where a copy of a sound recording is made for commercial purposes. The manner in which the notice is given or placed should be reasonable to be seen and understood as stated by the law. The purpose of the notice is not a requirement for protection; rather it is a purpose of evidence.

The question one may raise in this connection is what if the producer fails to observe the obligation stated under Article 28 in whole or in part? With regard to stating the name or distinguishing mark of the producer and that the rights according to the producer no doubt that are important, it is because; the presumption of ownership requires it. It serves as prima facie evidence and mitigates the burden of proving the said ownership.

VII. Rights of Participation of the Producer and Performer

(Art. 30 of the Proclamation)

Where a sound recording published for commercial purpose or a reproduction of such sound recording is used directly for broadcasting or other communication to the public or is publicly performed a single equitable remuneration for the performer and the producer of sound recording shall be paid by the user to the producer. **(Art. 30 of the Proclamation)**

The producer, in the absence of an agreement to the contrary, shall apportion this payment equally with the performer. I.e. a sound recording published for a commercial purpose or its reproductions can be used for broadcasting or public performance or other communication to the public directly with a payment of a single equitable remuneration to the producer and performer.

A broadcaster may broadcast a sound recording without infringing the neighboring rights of the producer but the broadcaster must pay the producer a single equitable remuneration. In the same vein, once the

owner of a restaurant, hotel, nightclub and others has paid an equitable remuneration, they can perform the sound recordings to the public.

Moreover, there is a right of communication to the public by the user after paying remuneration to the producer. Communication to the public is defined under **Art 2(6)** of the Proclamation as

"the transmission by wire or without wire images or sounds or both of a work, a performance, a sound recording, or a broadcast in such a way that the images or sounds can be perceived by a person outside a normal circle of a family and its closest social acquaintance at a place or places so distant from a place where the transmission originates, that without the transmission the images or sounds would not be perceivable and, further, irrespective of whether the person can receive the images or sounds at the same place and time, or at different places and/or times individually chosen by them".

In case of communication to the public, sounds or images or both are transmitted by wire or wireless means but they would not be perceived without the transmission. In other words, they are perceived by a person outside a normal circle of a family and its acquaintances only from the place where the transmission originates.

However, there is no solution for the questions of how equitable remuneration is determined and who is going to determine such remuneration. On top of this, limiting the rights of the producer only for asking an equitable remuneration from users would ultimately affect his economic benefit.

One thing that should be clear is that the sound recording that we are talking about is that kind of sound recording published for commercial purposes. Thus, it can be argued that, if it is for commercial purposes, it is available in the market for broadcasting or other means of communication to the public or for public performance and it seems

unreasonable to give an exclusive right for the producer on such kinds of sound recordings for public performance or broadcasting or other communication to the public. Further, it would be very difficult, not impossible, to get permission from the producer to broadcast or perform publicly each sound recording works by the user that would ultimately affect the accessibility of sound recordings to the public.

Article 30 (1) does not permit any person to reproduce, import, distribute or rent or lend the sound recording. It only mentions.

1. Where a sound recording is published for a commercial purpose or a reproduction of such sound recording is used. This means that, first, it must be published; secondly it must have been published for commercial purposes. This can be understood from what has been stated on the label or its container, and thirdly, sound recording published as a reproduction of such recording implies that it is the producer himself who does so.
2. Used – directly for broadcasting or other communication to the public or is publicly performed denotes that only using a copy or the original for stated purposes
3. A single equitable remuneration for the performer and producer makes clear that once an equitable remuneration is paid that would be enough, though what equitable remuneration is up to the courts to decide or up to the parties to agree upon.

It has to be noted that the right to equitable remuneration to the producer of sound recording and performers shall subsist from the date of publication of the sound recording until the end of 50 years following the year of publication, when the sound recording has not been published from the date of fixation of the sound recording until the end of the 50th year following the year of fixation (**Art 27(2) and 30(3)** of the Proclamation) However, the Proclamation does not mention the moral right of the producer of the sound recordings.

2.4.3. Rights of broadcasting organizations

Broadcasting organizations are the major channels of works in communicating with the public. In recognition of this fact, the law affirms the protection of some exclusive rights to be granted for broadcasting agencies. It naturally follows that the unauthorized performance of the rights, on which the concerned broadcasting organization is given monopoly rights, is a pure case of transgression of legitimate interests. That means, it is no less a ground of court actions and there by a base for entitlement of compensation if any loss is sustained buy the victim.

Art 31 of the copyright proclamation provides those acts which cannot be performed without the authorization of the involved broadcasting organization.

Art 31. Acts requiring authorization of broadcasting Organization

(1) A broadcasting organization shall have the exclusive right to carry out or authorize

- a) Rebroadcast of its broadcasts
- b) Fixation of its broadcast
- c) Reproduction of a fixation of its broadcasts

2) The rights under this Article shall be protective from the moment the broadcast takes place until the expiry of 20 years following the year in which the broadcast took place.

As clearly expressed, the law tries to discourage free riders. That means the law is against those who want to get benefit at the effort of others without paying a penny. In the affirmation of the competition between broadcasting organizations, the law requires other broadcasting organizations to secure the blessing of the organization which first broadcast a certain work, if they want to rebroadcast it. It has also been indicated that the fixation, its broadcasts and the reproduction thereof is left to the concerned broadcasting organization.

The term of protection, as any other related protections, is not eternal. It is limited by time. It stays for twenty years following the year in which the broadcast took place.

3. Limitations imposed on Neighbouring rights

Neighbouring rights are not exceptions to the imposition of limitations on the right holders. However, to explain the nature and purpose of limitations at this level can be justified on no ground. This is mainly because we had enough of it in our previous relevant topics. Therefore, now it is time just to indicate what is considered in the pertinent legal provision. **Art 32. Limitations of rights**

The rights referred to in Articles 26-31 shall not apply to acts related to:

- i. Using short excerpts for reporting current events to the extent justified by the purpose of providing current information
- ii. Reproduction solely for scientific research
- iii. Reproduction solely for the purpose of fact to face teaching activities, except for performances and sound recordings as teaching or instructional material
- iv. Cases where, under part II, a work can be used without the authorization of the author or other owner of copyright.

In general, the above-mentioned legal provisions share a single purpose, that is, **the attainment of public interest**. After having emphasized an excuse of reproduction for educational and research purpose under provisions of (b) & (c), the afore-mentioned legal provision establishes that those limitations we noted herein before in relation to the rights of the author and his assignee, are also valid to limit the entitlement of owners of neighbouring rights on the works involved. The law, which limits the right of the author who is the original source of the work, for stronger reasons, restricts the rights of those who establish neighboring rights on the items.

Thus, exclusive rights of the neighboring right owners, however, are only apparently absolute. For the law is not meant to “permit the protections given here to turn into barriers walling off part or all of our society from the use and enjoyment of sound recordings”, the public is entitled to some uses of such works without authorization. This is so because the law provides various exceptions to the rule that ‘only the owner enjoys

those rights'. So, in a way, the law takes away with one hand some of what it has given by the other. It should be borne in mind that neighboring rights, like copyrights, are a compromise between two interests, i.e. owner's interest to be remunerated and the public interest to get easy access to the phonograms.

Accordingly, there are exceptions which uses do not infringe neighboring right owners rights. These exceptions are presented hereunder to serve as springboards for the in-depth discussions on infringements in the next part.

Firstly, they cannot forbid using excerpts for reporting current events to the extent justified by the purpose of providing current information (Art 31(a) of the proclamation) It appears that this limitation applies to all neighboring right owners. And note carefully that this limitation is similar, though not identical, with the limitation provided for authors under Art 13 (2). Article 13(2) allows broadcasting whereas Art 32(a) does not mention broadcasting, though broadcasting is one of the means to report current events to provide current information. Article 13 (2) also provides that other means of communication to the public other than means of broadcasting is allowed. Here, under Art 32(a) means of communication to the public could be broadcasting stations or any other mass media.

Secondly, they cannot forbid reproduction if it is solely for scientific research. Here what cannot be prohibited is reproduction. (Art 31(b) of the Proclamation). The number of copies is not indicated at all. One should ask whether it is one copy or more than one copy depending on the need of the person undertaking the scientific research. This is not clear but definitely it should not prejudice the interest of the producer.

Thirdly, they cannot forbid reproduction solely for the purpose of face-to-face teaching activities, except for sound recordings, which have been

published as teaching or instructional materials. (Art.31(c) of the Proclamation) The reproduction is only face-to-face teaching activity when, for instance, the reproduction is used in classroom or elsewhere the teacher and the student are face to face. Performance and sound recordings, which have been published as teaching or instructional materials cannot be reproduced and used for face-to-face teaching activities.

In addition, the proclamation envisages other grounds of limitation. In this regard, Art 32(d) of the Proclamation provides that cases where, under part II of the Proclamation a work can be used without the authorization of the author or other owner of copyright are the limitations on the rights of owners in appropriate cases. These limitations are those provided from Article 9-20 of the Proclamation.

Review Questions

- 1) Discuss the justifications of the protection of neighboring rights.
- 2) Does a producer of sound recording have adaptation right on his work?
- 3) If a producer is a natural person, does he have a moral right?
- 4) What peculiar features distinguish neighboring right from copyright?