IP Lecture note: H.N.J, Mak.G/m and J.E

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IP as one study areas of law deals with the protection of copyright, trademarks, innovations (patent) and a collection of other laws. That's why most scholars suggest "IP LAWS" than IP LAW as the correct and logical name of the field. But these (patent, trademark and copyright) are the major study areas of the field. There are some minor study areas of IP than copyright, patent and trademark; like industrial design, industrial models and etc.

Common characteristics of intellectual property rights:

Territorial nature of intellectual property rights;to begin with, there are two types of international laws;public international law which administer the relationships between states and international organizations like UN and AUand private international lawwhich is not really international at all and does not so much subscribed to the name private international law rather it has another alternative name which is conflict of laws.In certain transactions which touch upon different jurisdictions and potentially different laws, the question would be "which aspect of that transaction be governed by which law?" conflict laws are necessary because of the very simple and so obvious fact that most laws are national. Of course, it is true that there are certain laws which are international. There are certain international laws which aimed at pretty much regulating private relationships. These are treaties concluded by states which could be bilateral or multilateral but their aim is to come-down to the individuals. The very good example of such treaties is "International Sell of Goods Convection". This is a treaty signed by different states but it is about sells between the seller in one country and the buyer in another country and it provides for sell rules. Now, why we are saying all these is that most laws are national by their very nature. All our laws enacted by our legislature are Ethiopian laws. All those laws are territorial as long as they are enacted by our legislature.Ourlegislature enacts some of those laws however, in compliance with international treaties. For example, those rules of our book three of the civil code which deal with corporeal chattels are Ethiopian laws. But it is also interesting to note that "why it is true that our laws governing corporeal chattels are Ethiopian laws in terms of territory, we do not so much speak about the territoriality of such laws?"Because the rules which are applied in some other countries need not be similar with ours and

it is territorial. If we go somewhere other than Ethiopia, we have to leave our laws here.

We however, love to speak about the territoriality of intellectual property laws. It is very important to highlight on the territoriality of intellectual property law for one simple reason; all intellectual property products can be exist indifferent places at the same time in contrary to other properties. For example if we take one car, it is impossible for that car to be exist in Sudan and Ethiopia at the same time. But it is possible for a book which was written by an individual be released in Sudan and Ethiopia at the same time. It is also possible for a movie and music to be watched and listened in different countries at the same time.But whether a book, music or movie is possible to be released, listened and watched in different countries at the same time or not, the law which governs their right is the law which gives protection to that product. If, for instance, one book is given an IP protection in 15 different countries, there will be 15 copyright protections for the writer of that book.This writer will have 15 different countries copyright protection due to the territorial nature of intellectual property rights. Assuming Ethiopia and Sudan are found in those 15 countries, his copyright of Sudan is different from his copyright of Ethiopia.

Divisibility; another very important aspect of intellectual property right is the divisibility nature of IPRs. All intellectual property rights are consists of exclusive activities bundled together and by divisibility nature of them the owner can unbundle it and assign it separately.It is not only possible to talk of the divisibility nature of the bundle of intellectual property rights, but it is also possible to speak and think of the geographical divisibility of these rights. If we are the owner of Ethiopian copyright, we can divide it in the Ethiopian nation and assign or transfer it to different person in different parts of Ethiopia. So, there are two divisibility’s in IPRs; the divisibility of the bundle and geographic divisibility. What makes us too much focus on the divisibility nature of IPRs than corporeal ownership is the geographical divisibility nature of IPRs. Of course, it is possible to divide bundles of right in corporeal ownership.But it is impossible even to think about the geographical divisibility of corporeal ownership.Furthermore, the divisibility nature of even the bundles in corporeal or any other ownerships other than IPRs does not happen quite often.These are the two main reasons why we don’t much focus on the divisibility nature of other ownerships.

Part one

Patent law:

As it is clearly stated in the preamble of proclamation no.123/1995, the aim of giving a patent for an individual is to encourage Enovation and creativity and thereby increases the development of the nation by building-up national technological capability. Through encouraging creativity and Enovation, it is possible to boost the technological capacity of the nation and thereby brings about technological development. This technological capability, in turn, has the aim of helping us to grow in economical sense. Because if we can enhance our technological capacity, it is assumed that we can produce more. So, technological capacity helps us boost our production. When we boost our production, it helps the economy. Note only that technological capacity helps us to produce in improved way. Note only we improve the numbers but we also improve the way we do things and bring about efficiency and avoid wastage.

The second aim of patent law is to create conducive environment for the transfer of technology. The transfer in this case is from abroad to our country. The technology is not wanted to transfer from our country to other countries. One question which could possibly be raised in regard to this point is that “how does patent law help us in realizing our dream of importing technologies?”the answer is very simple; we want to promise for foreign technology owners that if they come to our country and introduce their technology, no one will freely use, copy and reproduce their product without their consent. So, the patent law has these 2 declared aims.

But according to different scholars including our instructor, patent law does not directly induce innovative activities. This is because; firstly, a patent law is as such post facto phenomena. Once Enovation is created, there is the creator or innovator who has created something and wants protection; then the patent law grant that protection to that individual. A patent law indirectly helps Enovation but helps it by promising benefits to innovators who are in innovating. The patent law honestly speaking operates best in a society where there is innovation or the potential for innovation. Where there is potential for innovation, innovative activities and innovators and they are about to innovate but they are discouraged by lack of protection, then the law (to mean patent) guaranty to them that their innovation will not be plundered or trespassed by others.

But where there is no innovation, very low level of innovation or where the problem is at creating a culture of innovation, the patent law does not do

pretty much. Generally, patent is theft protection law but not innovation inducing law.

The difference between “patent” and “utility models”; “patent” grants protection to something which is new in the world. “Utility model”, on the other hand, grants protection to some things which is new in Ethiopia. In other words, “patent” is given to inventors who invent something new in the world. Whereas, “utility model” is given to inventors who invent something which may not be new in the world but in Ethiopia. That’s why we have 2 or 3 patents granted to Ethiopians. Because it is very difficult for Ethiopians to produce or make something new in the world.It is relatively much easier for Ethiopians to come-up-with something which is not new in the world but new in Ethiopia and that’s why we have thousands of utility models which were given to Ethiopians. One point we should aware about in regards to “utility model” is that what could be entitled to “utility model” in this country could be something whose patent has expired some years back abroad or which has never been patented abroad. This utility model is possible in Ethiopia for the simple reason that our country is not a party to any international treaties of patent yet.

Patentable subject matters:

Of course, patent law grants protection to innovative activities or products of the mind. But the point here is, not all such innovations are protected under the patent law. Some of them are excluded. So, the issue of patentable subject matter is aimed at identifying which types of things have beenprotected by such law. Our aim is to define the scope of the application of patent law in regard to the subject matter of protection; what should be and should not be protected. The relevant legal provisions for this matter are art.2 (3), (5) and art.4 of proclamation no.123/1995.

Before going deep in to the law, the framework adopted by the Ethiopian patent law should be clear. First, it defines the set; we have got a certain set which is called a set of patent and then it also defines exceptions from that sets or things of which if it had not been for a certainexclusionary rule, it would have been included under the set. So, “what is the set?” the set is defined under art.2 (3) by saying “"Invention" means an idea of an inventor which permits in practice the solution to a specific problem in the field of technology.”.There is also art. 2 (5) which defines what the patent is.It says that “"Patent" means the title granted to protect inventions; the invention may relate to a product or a process.” Art. 2 (3) of the proclamation is telling us that a certain thing is an invention if it is an idea of an inventor which brings a solution for specific problem in the field of technology.

It is very visible that this definition has three components. These are; A. its intangibility; for instance, if one invent machine, the patent is not given over a visible machine. Because a visible machine is a tangible property.Rather the patent is granted over the idea that made the machine possible. B. the idea should be a solution to a practical problem; it is not just only an idea but a practical idea. It is possible to take the invention of remote control for TV sets as the best example of a solution for practical problems. In this case, the practical problem was being “how to control the TV without getting-up from our sit?” The practical solution was being the invention of “remote control". This remote control has been made possible because of certain ideas of a person who made it possible. The idea behind remote control, the first idea to introduce could have been patented or at least it is patentable subject matter. Whether it could be patented or not, depends on other criteria.But it is still a patentable subject matter. C. the area where the problem and the solution lay should be belonging to a field of technology. Finally, if we have a practical solution to a practical problem in the field of technology, the solution will be patentable and title over this invention can be granted unless this practical solution that belongs to a field of technology over which title be given for (patent) is excluded by one of the exclusionary provisions of art. 4. It is generally the framework of Ethiopian patent law.

Now, let’s come back to the definition provided to the term “invention” in art. 2 (3) of the proclamation.Our instructor is suggesting that this definition of “invention” is one of the worst definitions ever for 2 different reasons; 1. “Why do we need to define what invention is?”“Why we should simply grant protection for any innovation unless it is captured by the exceptions (which are to mean art. 4 of the proclamation)?”Because anything is patentable so long as it meets the criteria of patentability unless it was captured by art.4 of the proclamation.
2. It is difficult to deal with this definition because of the field it deals with. Because the definition limited its scope to a field known as “field of technology”. Overall, the term “technology” by itself is a term which is difficult to be defined.So, defining invention by using a difficult term (technology) to be defined is illogical. The reason why “technology” is very difficult to be defined is because of its evolving process.

If we don’t have art.2 (3) in our law, we will either simply refer to the regular meaning of the term “invention” or apply the exclusionary article of the proclamation which is art.4. If the thing which we will go to give a patent is listed in that article, we will just simply deny that patent. But if it does not listed there, we will give a patent to that thing.

Exceptions to patent:

To begin with, human beings have never ever wanted to grant patent right over inventions which are listed in art.4 of our proclamation (123/1995).

1. Discoveries, scientific theories and mathematical methods;

This invention is covered in art. 4 (1) [D] of the proclamation.
Let’s begin with an example; if we take the well known formula of Albert Einstein “E is equal to MC square”, it can be the best example of mathematical method. This theory has been proven to be correct even though it has not been tasted. From discoveries, it is also possible to take different new properties of known plants,animals and substances.Now, the questionis”why these things are not patented?” there are several reasons

for this; A. for the theories and mathematical formula, they have got wide application;these things are broadly stated innovative ideas. They are ideas and innovative but so broad (high at in the sky!) who could potentially have allots of different applications. If,for instance, we were grant monopoly to the person who discovered “germanium”, we would have granted him a huge burdensome or costly monopoly on society. Everyone who is to make new uses of this old discovery will be about to pay for a prior discoverer’s. A second discovery or theory cannot immediately put in to human use; it will undoubtly need someone else to analyze the discovery so as to furthermore, invent a way of using it for human uses.

2. Schemes, rules or methods for playing games or performing commercial and industrial activities and computer programs; these things are covered in art. 4 (1) [c] of the proclamation. Computer programs are emerged in 1950’s. What computer programs used to perform in 1950’s and today is very different things. But then, they used to perform simple calculations. We never had industrial applications of software not to be used then for variety of activities as we are using them today for variety of activities and so expansive fields. So that it is impossible to speak of software engineering or software writing field as a single field; it is as wide as the number of activities we have in this world these days. There is industrially applicable software that we use in the production process. There is also software that we use to help us better utilize other goods like Motor vehicles. Simply, there is software that we use in all aspects of human activities; software for accounting, software for legal practices, software for flying airs, etc. this is the reality of today.

Software are excluded from patent even in the eastern world till 1990’s for simple and obvious simple and background that software are nothing more than mathematical equations and performed nothing better than mathematical calculations. But the reality/fact on the ground is so far different from the actual reality. Because there are too many software’s that have a technical impact in forming allot more than calculations. They are allowing us to get a very direct technical benefit out of anything.

For instance, the software which opens the valve and close the calve in a car to control the fuel flow. Should software patented now days? The whole idea behind patent to push prices up and allow the provider to charge monopoly price. A monopoly price is very inefficient and it hearts the economy. The patent system has a bad side but we deal with it. Soft ware, should be patented like for example in the car valve above, it is technical it has just transcended from mere mathematical and to bring technical impact. If it has technical impact then why we deny patent. It is an anomaly to deny patent which perform such functions as they perform today which has very specific fields. So the point is software’s this days and there is no reason to exclude them. Our law is a bit backward. In other countries software’s are the most widely patented.

The next excluded inventions under this articleareschemes rules methods for playing games…. Let us start with methods for playing games. Why they are excluded? The patent model in position of gaming methods is a bad idea. The patent model in the field of developing methods for games is bad idea. Example when a certain coach develops a method and if it is patented when he leaves that club, the club cannot use the method which is unworkable.

The other under this article is rules or methods for performing commercial activities. It is also known as business method exception. It is a new way of doing business or a new way of doing and old business. We do not give patent to it. The rationale behind this is we do not want these business persons to monopolize business ideas. What we want is business competition and the generation of new ideas to bettering your business and business organization. However, business ideas are being implemented by using devices and software's and there is increasing tendency in other countries to patent these as well. The remedy for a person who develops the method is to sign a non disclosure confidentiality agreement and get protection through trade secrete patent.

3. Method for treatment of human body, diagnostic methods and therapeutic methods; this exception is incorporated in art. 4 (e) of our proclamation. All these methods could be done using devices, such as using the stethoscope and x-ray device and others. There are also devices in the field of therapy. There are also drugs which are therapeutic products. We also have surgical methods surgical devices. This exclusion applies on the methods not on the devices and products. This means drugs are patented, x rays are patented and the equipment is patented or patentable. But the methods are not patentable. From all participants in medical field the excluded are the doctors who are powerless but the drug and medical equipment companies are not excluded. Surgery is a procedure, opening the heart may involve innovation but we do not give patent. Why? It is to prevent monopoly and to insure that access to medical services is not obstructed by monopolies or monopoly system. Should be free because if we give a doctor a patent for his methods, the other doctor should apply and in the process a patient might die. It also increases a medical cost. Laboratory methods are excluded but the laboratory equipment's are included

4. Plant and animal varieties; this exception is covered by Art. 4 (1) b. a variety is a class or a level in hierarchy of the classification of plant and animals. Varity is a classification found beneath species. It is found below the lowest position in taxonomy. This is so because it is well known that certain groups within a certain species display a certain common characteristics that are not shared by other members of the species and they display those characteristics homogeneously i.e. by everyone else and stably in successive propagation. Not only shared by a member of the groups but also by their offspring. Varieties are important for betterment of the society by improving yield and productivity. This is the economic importance of variety. And the other importance is for aesthetic purpose like funny looking dogs in Europe.

However much making variety is important for human innovative economic activity, the making does not come under patent law. The reason is 1 historical, patent has always been come out of the fields of technological industries. 2 the presence of plant protection breeders laws (PBP) laws. So if there is another law why we need to protect them in patent is the issue. We also do not have animal protection variety laws. The reason could be there has not really been a lot of economic activity in terms of breeding new animal varieties than plant varieties. It is not because it was not innovative

but rather it is because we have an alternative method of protection. Plants and animals are excluded however you make them.

Biological processes are also excluded. This means non biological processes of making plants and animals is still patentable. 3 things are excluded plant, animal and biological process.

The difference between a product and a process patent; a product patent is a patent directed at the final product. A process patent,on the other hand, is directed at the method making of that product or steps. Whatever process you employ be it biological or non biological, if it enables you to get a plant variety or animal it is not patentable. Since they are excluded irrespective of the process.Whereas, in regard to the process what is excluded is biological. This means if the process is non biological the plant or animal variety is not patentable but the process is patentable. What are non biological? It is genetic engineering. Through cloning you do not make a variety but you get one organism. 2 ways of making varieties 1 biological and 2 non-biological.

5. Inventions contrary to public order or morality;This exception is laydown in art. 4 (1) [a] of the proclamation. The problem in this exception is; A. it is difficult to implement, because we do not have one complete moral standard to judge certain invention against. It is divisive and controversial. B. the second problem is with the people who examine the patent since they are from natural sciences they are not capable of checking the moral and otherwise of the inventions. So the patent office is ill equipped.

Art. 7 right to patent

The first principle or rule is the inventor gets the ownership and the second rule when an invention is resulted from the collaborative effort of certain groups or persons the entitlement of the ownership goes to all the collaborators. The rationale behind this rule is one of fairness and justice.

Art. 7 (3) if the invention was made possible because of a certain employment relationship between an employer who funds the innovative projects in which the inventor gets to the duty to engage in the inventive project, then, the ownership goes to the investor. The rationale in this case is economic efficiency. The state says if you want to more innovations to come, you have to give the ownership to the investor. If you decide to give to the inventor, it would kill the invention it will be stifled. If the inventor is hired to invent, the invention goes to investor. Because the investor wants to get profit. This is so if the knowledge is kept secret and I am the only beneficiary through the patent that I can insure my profit by getting exclusive advantage. The rationale is economic consideration. The 4th rule art.7 (4) the similarity between the third and the fourth rule is somebody is working for some body. Meaning there is an employment relationship. In both cases the employee invents. The difference is the employee is not hired to invent. He is just hired to do something else. It is not his duty to invent. He invents as a side job. The right of ownership goes to the employee. Justice is the rationale here. The technical term for hired to invent is work made for hire. This means a relationship between a certain person and another person by which the first person hires the second person and the second person is bound to work something for the first person, but also he

is to invent, if there is a final invent it is called work made for hire. People who are hired to invent are not duty bound to invent but they research to work in R&D. What principle or rationale dictates sub art. (5) Largely is fairness but it has also economic consideration.

Gaps under art. 7

Under sub on 1 who is the inventor? Do you think it is easy to answer? It is difficult because currently there is nothing that an individual do by himself alone. There are many participants in one invention. And what level of contribution there should be to deem a person inventor. This requires judicial standard. In our Instructor's view, the contribution must be an indispensable meaning it must be key contribution without which the invention as whole or important aspects of the inventive feature would not have been possible. The other issue is how does the law resolves if there is a wrongful application? This is difficult to resolve because the one who is entitled to apply is the one who is entitled to get the patent as it is clearly expressed under art. 9 (1) he who can get the patent is he who can apply. What if he who is not entitled to apply has applied and the one who is entitled shows up in dispute? The question is procedural. Where should the dispute be resolved at the patent office or at the court? The real question is whether the patent office is empowered to handle such disputes determine the issue and render decision? The law in this case is silent. But in practice the patent is resolving the issue just like a court. Do you think a patent right is transferable? Like any property he can transfer it through two mechanisms 1. License,and, 2.Assignment. To assign is to transfer it entirely it is to just sale to you my entire patent right. To license means to grant certain benefit to somebody else without relinquishing all my right. So the rule is patent right is assignable and licensable. The question is whether the right to apply is transferable. Once it is issued it is transferable. Once it is applied for it is also transferable. The answer is yes it is found under art. 6. Patent issued and patent applied are transferable assets. What if you do not yet apply but you have the right to apply so can you transfer your right to apply? Since art. 6 do not say about the right to apply, the right to apply is prohibited from being transferred. Though it is arguable, it un-transferrable. Do you think all patent should be patented? Why would anyone patent it? It is because to get exclusive monopoly right. Since patent is expensive, the person wants to patent only if the market gives him advantage or if he is sure about his product will be needed in the market. There is also another thing you consider the first is personal interest because there are inventors who are anti patent who do not want to benefit from their creation. The second consideration is the economic advantage and the related one is I have to believe in the system of the protection of the patent by the government. third is the government wants full disclosure to give a patent it is a reciprocity agreement to give protection to the patent because after 15 or 20 years the government would want to see that other people also know and work the invention and compete with the inventor. Because lack of competition is inefficient and competition is efficient. So there is another reason that even though it is economically advantage I do not want to seek the patent. That is I am not confident enough as to my capability to keep my knowledge secrete for more than 15 years. If I can keep my knowledge secrete for more than 15 years, why should I go to patent office? The good example is Coca-Cola which is still strong because it is not patented.

What if the person invents a specific thing which was not covered by the contract? The investor is investing in a particular project he has made his desire very clear. The law is rewarding the investors who make their desire clear. It is important to write your contract very clearly and with care. Here the investor is so specific that he forgone what the law gives him in this incidental invention while he was writing his contract. The law does not rectify mistakes.

The personal contribution of the inventor is his mind. The inventor's invention is normally possible through a number of factors, one of them is the inventor's mind and there are other aiding assets. The aiding assets come from the investor. The idea comes from the inventor. In art. 7 sub 3 4 5 there is employment in all of them. Only that in sub 3 there is a duty to engage in RND. And in the rest 2 there is no duty to engage in RND. In sub 4 the inventor made his personal mental contribution and never used any asset. In sub 5, the inventor made use of his mental faculties and also asset. There is also another gap here. How much asset that enables the investor makes to acquire fifty percent share? It must be very indispensable and key without the use of which the invention would not have been possible. This statutory standard is very vague and this is a gap.

Description, steps and Reasons for descriptions:

Anybody can take the product and take it over to the patent office. If we really invented it and have the idea in our mind, we can speak about it.

Maybe what we invented is invented for the first time. In order to show that invention is invented for the first time, we have to show the product or process by detailed description or show how it works or what the invented product or process is for.

It is more important to write about our product rather than taking our product to the patent office. Because when we write something, we describe our inventive steps but if we take our product to the patent office it doesn't by itself show our inventive step. Just because we take something to someone (patent office), doesn't mean that institution will know everything about our invention or how it works. It needs explanation. For instance, if we invent an eyeglass made from plastic and it doesn't break if it's plastic. So we take the plastic. So what? How on earth could anyone know what that plastic is made for? Also the composition that is suitable for different sights, to shape the glass for the purpose of being used? It's difficult. For instance, if one invents a glass which cannot be scratched, and I say "look this is a scratch free glass made from plastic", "how on earth would anybody know what that composition is made from unless we explain it?" So the best way to describe our invention is to write it.

There are some inventions which cannot be taken to the patent office like, for instance, an aircraft because it's too big. There are also other inventions which at all cannot be taken because they don't have corporeal existence such as processes. They are composed of steps. So, the question which could possibly be arise here is, "Can we take steps to the patent office without writing it?"

It is also important for documentation purpose. One of the purposes that results from that delegate balance between the government and the applicant is the fact that other people must be allowed, after the end of the patent period, to reproduce the invention and compete with the patentee. "How on earth are we going to allow those people to know our invention after 15 years?" "Are they just going to take your product?" Well they don't need that because the product is out there already in the market. The best way for them to giving them guidance in how to make the invention is if it is written down.

> The patent system operates on the basis of only documents. We write down our application. Our invention is in the application; we recount on our application. If we are asked, where our invention is, we can say here is the invention just by showing the application.

Patentability or requirements of patent protection:

To get our patent, our application, in which we recounted our invention, and, in which we have explained our invention too, must meet some statutory criteria. Some of those criteria's are substantive criteria's and the rest of them are formal criteria's.

Substantive criteria's;

The three most important substantive criteria's are:

1. The requirement of novelty: It means the invention must be novel.

When the law says that an invention must be novel, it simply means that it has to be new. We are really granting exclusive rights for something that is new. Invention means new product or process. The new thing brought must be something that no human being has ever seen.

"When do we say that something is novel?" In order to be entitled to be to an Ethiopian patent, one must have produced something new not only in Ethiopia, but new globally. If anybody asks you the meaning of new for

Patent law purpose, the article is not found elsewhere but in Article 3(2) of the Patent law of Ethiopia. An invention is new if it not anticipated by prior art. It means, it is never disclosed in prior art.

What is prior art? To begin with, prior art means disclosure. “Disclosure of what?”Disclosure of knowledge. “Disclosed when?” Disclosed before the date of application of patent. If certain things are fulfilled the patent office give the application what is known as filling date. See article 12. Whole purpose of Article 12 is recordance of filling date. Filling date is very important for patent establishment. Everything departs from the date of filling. The date of filling is when the application was submitted. The day we submit our application, we can only be given filling date if some things are fulfilled. If the things that the law requires to be fulfilled to give the filling date are not fulfilled, then it will wait until our fulfillment. If that is so, the filling date will not be the day of actual application, it (the filling date) will be the day when we actually fulfill the missing things.

If we bring an application and we fulfill requirements under Article 12, we will be given filling date. The other thing is description. Wherever we apply for patent, the office will always expect full description of our invention. Always the beginning of the description of any application has to be the background of the invention. We start from recounting the history of your invention.

Let’s say application is filled on day x. and suppose it fulfilled all those things. So day x will is the filling date of that application. The application is an application for patent on the invention which has been recounted or explained in the application. So the applicant is saying that his application discloses something which is new, something which involves an inventive step and something which is industrially applicable. And the patent office check this, the law says, against prior art to deem whether it is new or not. And prior art is in the case of the application filled on day x is all disclosures anywhere in the world until the day before day x. So prior art will consist of, for the purpose of application filled on day x, each and every disclosure up until day x. You judge the invention in the application against a body of world knowledge that has been disclosed to the world until day before day x. Therefore, if the world never knew until day before day x anything that is being disclosed in the application, it means the application discloses a new invention.

Coming back to novelty, an invention shall be considered new and therefore novel, if it's not anticipated by prior art. That means the world has never seen anything like that before. This country has adopted what is known as the "absolute novelty standard" and by that we mean that we are only ready to grant patents to inventions which are new not only in this country but also in anywhere in the world. So if application is submitted to Patent office, they will examine the patent and check it's novelty against world prior, against disclosures that has been made anywhere in the world before.

The disclosure could have been done through different mechanisms. Hence, there are two disclosures. One is the disclosure in the application. The second disclosure is disclosure in prior art. Now we are discussing the disclosure in prior art. And the disclosure could have been learned in three ways: by use, oral disclosure, publication and any other way to disclose.

These mechanisms must be public disclosure. Meaning that, it must be a knowledge that is found in the prior art and which, if you want to look for it you can find it without too much inconvenience. There should not be any unusual efforts. If it was a knowledge that was secretly kept, there was a disclosure but it was confidentially/secretly kept then it is not public disclosure. And therefore, a secretly kept inaccessible type of knowledge cannot be used to defeat the novelty of the disclosure in the application. Numbers don't matter. What we must see is whether it is really open. This understanding would be translated into all the three methods of disclosure.

A. Written disclosure; in written disclosure, there is nothing in the law which says that it should be published in order to call it public disclosure. It should be publication in tangible form. Publication in tangible form means any writing. These time around, the term 'in tangible form', really hasn't made any sense at all. Tangible object means something that we can hold in our hand; something corporeal. It could be written in softcopies which are not tangible. To resolve this, there is a catch all part which says 'any other disclosure'.
B. Oral disclosure; oral disclosure is any form of speech that has been spoken anywhere in the world but it shouldn't be confidential. Only public oral disclosure can make up the prior art and be capable of being used to check the novelty of an application. Obviously there should be sufficient explanation of the invention. Once it has come out of the mouth of the inventor and didn't bind them to secrecy it will spread. Even though he (inventor) told them (listener) to keep it in

secrecy, it has a possibility of spreading out, it will actually become public but not by law.

C. Disclosure by use; It is any kind of use. What kind of use? Well, it depends on the nature of the invention.

Other public uses like public exhibition, displaying things are also a method of disclosure. It is not by use, tangible expression or oral disclosure. It falls under the ‘catch all’ clause.

Finally, the rule of novelty is that if the invention as it is not been found in the prior art, its not parts or features of the invention that shouldn’t be found in the prior art, if just features and parts of the invention are found in the prior art but not the invention in its entirety, then its novelty is not defeated.

All these examinations are to be undertaken by the examiner in the patent office. The examiners are experts at or who have studied in the field of the invention. Hence, they have to measure the invention Vis a Viseach and every world knowledge related to the invention.

“What is the widely used written disclosure that patent examiners use in order to measure the novelty of an invention for which patent is claimed?” Previous applications for similar inventions whether they have succeeded or not and previous patents but not yet granted. The most used prior arts are patent document of the major patent offices in the world. There are three major comprehensive patent offices in the world: the U.S. (USPTO), European (EPO) and Japanese (JPO) patent offices.

The second widely used patent documents are well known encyclopedic materials. Next is to check books on different subjects. There are some well known, well recognized and recommended which are very important.

Each application is measured against each singled out prior art references. Prior art reference means any one document from within the prior art ideally a patent document. We call it reference because it refers us to prior art. For the assessment of novelty, you make one to one comparison between the application and each prior art.

2. The invention must involve inventive step:

The law is a little bit strict. It says, ok it (the invention) should be new; it should be something that we have never seen before. But on top of that, we

also need to be assured that the new thing created is really inventive. That means it has really made a real measurable and visible advance in the field.

In USA, inventive step is known as the requirement of non-obviousness. What it means is the U.S. likes to say, the invention must be new. But not only should it be new, the new thing we have created must not be an obvious derivation. It is new but it shouldn't be something which is easy to derive from whatever existing knowledge we have. It must be non-obvious. There is an existing body of knowledge in a certain field. It doesn't mean the existing body of knowledge with all of us. Let us say that the invention is an improvement in a product. First it should be new. Second, it should involve inventive step, or as it is said in the U.S., it should be non-obvious. For the people involved in the making of that improved thing, the skilled persons, that improved product for which patent is sought, when the skilled persons have a chance to read the patent document they shouldn't be able to say; "well, this is obvious. Of course this guy made something new, but it's not really that new. It's just obvious from whatever is existing now. It's an obvious derivation from what we already knew." If it likes that it doesn't involve inventive step. Whereas if it is not obvious, it is something people skilled in the field would say "wow, it's a real advance in the art".

Not only should it be new, but it should really involve an inventive step. It should be non-obvious, the thing we call invention for which patent is claimed, must not be something that you can derive easily or obviously from whatever skilled people in that field so far knew.

In one application it is possible to claim patents for one product and another process if the product and the process are related. In principle, it is not at all possible to claim patents for more than one invention. One application is only for one invention. One of the ways they could be related is there could be a product patent but then he could also claim in the same application the process of making that particular product. But each one of them is going to be treated separately. If product is non novel then you don't need to swell on whether it involves an inventive step or not. Because by definition an invention is considered to have an inventive step if it is new and a real advance in the science.

Relatively speaking, it's more difficult to assess inventive step rather than novelty. In the case of novelty the things are really technical. The only area of the assessment of novelty that would give rise to different and valid opinions is the issue whether or not the public disclosure of prior art goes

really public. Other than that everything is technical. There is less of subjectivity relatively speaking in the case of assessment of novelty whereas there is more of subjectivity in the case of assessment of inventive step.

From border of prior art, if the invention is seen nearer to prior art it doesn't involve inventive step because it is obvious derivation of the prior art. But if it is not visible from the border of prior art then really it's a good invention, it's so advanced, so it means it has an inventive step. The view needed here is that of an average person having ordinary skill in the field of the invention. It's an imaginary person. How the mind of this imaginary person would determine the invention? Law requires thinking of this imaginary person.

Again in this case, our departure is from the prior art. In the case of inventive step, relevant to the prior art whether or not it could have been simple to imagine the invention or not. If it is simple no patent, if it is not simple patent is approved.

Here we compare the invention Vis a Vis a combination of prior art references as opposed to novelty.

It is imagining what an imaginary person would think of a certain invention in regard whether it has really made a great and measureable and necessary advance from the prior art. At the end of the day the determination whether a patent involves an inventive step is the examiner. Formally, other people who are empowered to have a say on this issue is the judge. There could be patent disputes and the final arbiter of the patent disputes is the judge.

Some disputes that could arise in courts relating to patent is, for instance, if a patent was issued by the patent office without fulfilling the requirements of patent it is invalid. Anybody can go and ask for its invalidity. So the judge must determine whether the invention contains all the requirements. The issue of whether or not a patent involve all the requirements could be the issue that arises out of a patent dispute and be in need of judicial determination.

Note that, the statutory standard used by both the judge and the patent examiner is the same standard given in the law. But the approach of the patent examiner and the judge is different. The patent examiner has more tasks than the judge. He must refer to lots of documents and must make use of his own knowledge. He has to look for the relevant information. In the

case of the judge, the judge presides over the dispute. We tend to follow a procedural system that is more adversarial. The advantage of this system for the judge is, if it is adversarial, the parties take care of the case. So the judge will be fine for ruling in favor of that party which has strongly argued his case and has brought his more convincing evidence. So in the judicial venue even though formally the judge is tasked to determine whether a certain invention contains the requirements, e.g. inventive step, the judge gives decision based on witnesses and evidence provided. So, at the end of the day experts that determines the fulfillment of the requirements because they go to the court to give testimony.

Finally, inventive step is rather a very subjective process. The determination is subjective because it depends on the individuals thinking and the individuals evaluation. It is not entirely subjective. The decision maker, judge or examiner, departs from certain known facts. But the decision depends on the evaluation of the facts by his mind of the decision maker. There have been certain attempts at objectifying the analysis of inventive step. One of the standards put out is surprising effect. If there has been several attempts by several participants in a given industry or a given human field of activity and in the face of some pessimism about the success of certain work, and if it proves to be successful then the fact that the research has proven to be successful against the backdrop of pessimism could be a good indicator of the fact that it involves an inventive step.

Commercial success could also indicate if a certain product that has been made possible due to a certain inventive appeal has become commercially successful. It means there was a long felt need for that product and the failure of others to provide a solution to the long felt need.

3. The invention must be industrially applicable:

It simply means that the invented product must be capable of being employed by human beings. It must solve something. Thus, if there is a product but it can never be used by human beings it cannot be patented because it lacks industrial applicability. In USA, the term preferred is, for industrial applicability, the utility requirement. When it is said ‘use for human beings’ it doesn’t necessarily mean that it has to be used by human beings and human beings only. They can apply the product perhaps on animals. But the beneficiaries of the products are human beings because they want to apply it, the product, on animals.

So you can get patent if the invention is:

a. Patentable: meaning that it should not be captured by Article 4.
b. Second if it meets the above three requirements. But there are some more requirements. Just because you have fulfilled the above three grounds doesn't mean you will get patent.

Patent prosecution

The patent is acquired after applying for a patent to a certain designated government office. In the law it was known as commission. But it was transferred to another office established by a latter coming law, known as Ethiopian Intellectual Property Office (EIPO). One of its tasks is to examine applications and grant patents.

Prosecution here means the steps involved in the patent office before the patent is granted or denied.

Steps in the prosecution of patents;

The basic steps involved are:

- ✓ Application.
- ✓ The secondis giving of filling date.
- ✓ The third step is formal examination.
- ✓ The fourth step is search.
- ✓ The fifth step is substantive examination.
- ✓ The sixth step is grant or denial of patent.
- ✓ The seventh step is, if granted, registration of the grant, issuance of the patent and publication of the patent. It is registered at the patent office. It is published on an official gazetta.

1. Application; the starting point for the prosecution is application. The very first issue in the context of application is who may apply? See Article 9(1). He who can apply is he who can get the patent. So it may not be the inventor that applies. It could be the investor.

There are a lot of requirements in Article 9.Some of them are procedural. There are others which are formal, i.e.,something related to fulfilling a certain form. If we are required to write certain content, it is substance.Ifwe are asked to write certain content, however, in a certain way,you are being asked a question of form and therefore that requirement is formal.Formal

requirements include procedural requirements. There are also substantive requirements like the requirement of presence of a request in sub-article 3. One of the formal requirements of applications is to be made in writing (Art. 9(2)).

The application has to be in writing and it must have a request for grant of patent. Why is the request necessary? Right from the very beginning governments have always granted patents to those who sought them. They have never conferred patent on those who never sought them. That is how the patent law was structured from the very beginning. That's one of the foundational features of patent law.

If the application is made by a foreigner, there are certain requirements more than that is required from an Ethiopian as provided under Article 10.

One application is for one invention. You cannot group all our inventions in one application, because it's the principle of unity of invention. What happens if several inventions are filled in one application? Generally, the problem is one of management. It is difficult to manage, from the perspective of the patent office, the context issues that each one of them could face along way.However there is an exception to that.The several inventions should belong to the single general inventive concept. They should be related.

Several examples; (A) if there is an invention of a product patent and there is a certain process of making that product, then you may claim the two inventions together in one application if the process is to make the product. Another is it is possible to claim a process patent together with a device invented to carry out the process. It is also possible to claim a product patent and then a process of making the product and then a device involved in the carrying out of the process.

(B) It is also possible to have one general claim of an invention and several dependent claims. If there is one independent claim and several independent claims deriving from the independent claim then these also are deemed to belong to the same individual claim. There is that general idea but then there are several variations of that idea. If each one of them is distinct ways then the technique involved is to claim the general idea and the different distinct variations. But it's limited in Article 9 (2).

Description (Article 9 [4]):full disclosure is necessary so that others, according to that disclosed information, create similar objects to the one

disclosed and compete after end of patent period. One of the bulkiest parts in doing patent is making a description. The description part is the part where we write all information that we know about the invention. The law says “the description part could be considered when it is written sufficiently and acceptably.” It is said acceptably written when it is fully understandable to the person having an ordinary in the art to reproduce the invention. So, if the description is written in any less way then, the description is not legally or fully written and patent should not be given. This requirement has its own name which is “the enablement requirement”.

The naming is crystal-clear from the purpose of the requirement. It’s called enablement requirement for the obvious fact that the whole aim is to enable a person having an ordinary skill in the art. Then, the question is, “why is this requirement put in the law?” it is because of the addressees of the description are the competitors.

Mode of execution and enablement requirement; in the course of describing our invention, it is obvious that we need to describe it. But, the question is, how we carryout the invention?”For instance, in the course of making certain substance let’s say it “a drug”.The making of a drug is composed of certain steps. There are certain steps to be fulfilled before the substance (drug) is really acquired or made. As part of the steps, it is important to separate the chemical opponent of certain substance (nitrogen). Then, the key question is, “how to remove separate nitrogen from the component?” because separating nitrogen is an eminent step without that it is impossible. The person in the skilled art knows that the carrying out of the invention requires the separation of nitrogen. So, “how to separate it?”

Now, the point is, for the purpose of fulfilling the enablement requirement, it is enough if we write “nitrogen must be separated”. But, by doing so, the person does not fulfill the second requirement which is “how to execute the invention?” or the writing of the way of separating the nitrogen from the component. Now, this second steps is the mode of execution requirement.

In all modern patent laws, it is required of you to just write “the separation of the nitrogen is important”. But, you are also required to show how it works or how the nitrogen will be separated from the component.

The difference between our law and US law is that in our law, you are required to tell the way known to you; one way of separating the nitrogen. In the US law, the legal and strict requirement under the pain of suffering the nullity of the patent is that you have to write the best mode of

execution. For instance, if the inventor knows three ways of separating the nitrogen and he knew out of the three ways known to him that of separating nitrogen, one of them is really the best, the US law says “write the best way known to you.” “If you don’t write the best way known to you while you know that it is the best of all for your invention and we held that information, then your patent could never be patented and will be invalidated.

Claims; How can we proof the ownership right of incorporeals?The purpose of claim is just answering this specific question. Art. 9 (4) [c] of our proclamation states that “the claim or claims shall define clearly and concisely the matter for which protection is sought. The claim or claims shall be fully supported by the description;”claim, in patent law, means that “this invention is mine which I invent by employing my own knowledge”.
We can only define our invention by using a tool called “language”. But for the law recognizes some problems in using language, it has set some standards for language used for claiming an invention. These standards are clear and concise. Claim is also a means of determining the scope of our invention.

A patent is valid if the invention over which a patent is given could be fully understood. A good understanding of how we structured our speech allows us to have a good understanding of our subject matter. Then, as we have already stated above, a patent is fully valid if it is novel, involves inventive steps, is industrially applicable and it fulfills the other substantive and procedural requirements such as the way of writing the application, enablement requirement, claims, unity of invention, etc.

Challenges in regards to writing claims; to begin with, in writing our claims, we must be very clear: claim writing in a patent law is the area where utmost care is needed. Because if we write, we must be careful not to capture an idea which is not ours which may be the idea of a prior art.If we capture an idea that belongs to prior art, then, we face a risk of invalidating our patent at all for that simple error.

In contrary, the other challenge of writing a claim is not to miss capturing an idea that really is ours but we forgot it.

Let’s take one example to signify what we are talking about;

What is claimed is an apparatus for shaking articles comprising;

A. A container for that articles;

B. a base;

C. a plurality of parallel legs; each leg connected pivotally at one end to the containerand at the other end to the base to support the container for oscillating the movement with respect to the base. A question may arise here “why does the inventor select plurality and parallel to express the legs?” or “why he didn’t say 4 parallel legs?” the reason is the invention is not related to the number of legs either 4, 5, 6, or 7; it could be any number. If the inventor writes saying “4 parallel legs”, he will be a foolish inventor. Even by the existing claim itself there is a gap left by the inventor in his claim writing. Since he says a plurality of legs, what if another person come-up-with one leg? It is outside of the scope of the first invention. An appropriate expression of such claim should have been “at least 1 or a plurality of legs”. Generally, the challenge is, not capturing anything which is not ours and not leaving anything that is ours.

For example, in the above claim the term “parallel” is incorporated as one expression of the claim. If the term parallel is not essential for the operation of the invention, the inventor is leaving something which belongs to him. Because if being parallel is not a necessary thing for the operation, he could say simply a plurality of legs just by excluding parallel.

But if the operation of the invention is not possible without the paralellity of legs and the inventor avoided the term parallel and simply says plurality of legs, he is capturing something which does not belong to him.

Types of claims; we have different types of claims. These are;

A. Productclaim; this type of claim can be claimed in three different ways; I. a structural claim, II. Product claim directed at composition; this type of claim is pertinent irrespective of chemical substance; III. Functional claim which could be symbolized by “a means”. Generally, in this type of claims, the appropriate words which should have been used for differentiating this type are apparatus (structural), composition or means.
B. Process claim; what is claimed is a process for making Compound Xcomprising of steps;

I. Mixing waterwith compound A to form a mixture;
II. Hitting a mixture at a temperature of about 150-250;
III. Distilling the mixture;
IV. Permitting the mixture to cool at room;

Generally, a process claim is identified from other types for they start with the “a process”.

c. Use patent; use patent and functional claim are different; functional patent is a product claim but we recount it by explaining the function of the product. In use patent, on the other hand, what is explained is the way we use certain substances. This use patent is always identified from others for it starts with “a method”.

For instance, a method of treating baldness which comprises applying to the scalp an aqueous solution of sodium chloride having a concentration of 30-40 percent by way of the sodium chloride.

If, for instance, the substance we use for the above method itself is a new, we will have at least 2 claims; product and use claim respectively. We have to first write the product which is a new chemical substance by using a composition product claim by saying a composition of water made of…” and then as a second claim we write by saying “the product in claim number one is used for this and that purpose and this is how you use it.”

Since in the above claim, the substance used (sodium chloride) is an old chemical substance, “what is the novelty about of our invention?” if we are not capable of answering this question, we cannot talk of patent for the sole fact that the invention should be novel if it has to be patented. The novelty of the above example is the possibility of using an old substance (sodium chloride) for avoiding baldness. This is why we say it is a use patent.

2. The giving of filling date; the second steps after writing our application will be the giving of filling date.As clearly stated in art. 12 of the proclamation, the simple requirements for giving a filling date are;

A. The application has to have an explicit claim for patent. This is effectively addressed in art. 9 (1) [a] of the proclamation which reads as “an express or implicit indication that the granting of a patent is sought;”.

B. After a simple look to the content, the receiver of the application should have at least got something which could seem a description. It is not as such challenging for one to identify something which seems a description. It is sufficient for the receiver if he gets the title saying description. This is what art. 12 (1) [c] provides for. This sub-article states that “a part which, on the face of it, appears to be a description of an invention;”

C. Indications allowing the identity of the applicant to be established; this requirement is put in art. 12 (1) [b] of the proclamation.
From this simple requirement for the giving of the filling date, we can possibly conclude that if there is a description, the patentee will be given a filling date. In other words, the presence of claim in our application is not important for getting a filling date. What is required is just a description even not a description in a full sense rather which appears as a description.

We said previously an application must be in writing, must disclose all the applied inventions, an express request, must also have abstract, description, claims and drawings.

Abstract is a legally known part of the application. “What do we mean by that?” It means there is no any legal consequence. You would not lose your patent because you did not write your patent well. And you would not get because you write it beautifully. You just have to write it. But these requirements that makes you lose your applications are or your patent are 1. Claims, 2.Description, 3

After you submit the application to the patent office then the patent office will give it a final date.

Alternative date which is known as priority date. Filing date is important in relation to art. 3. The importance of art. 3 in relation to filing date is that it is the date distinguishing the idea of invention from prior art.

“What is priority date?” We follow absolute novelty that means judging our invention with the rest of the world knowledge.If an applicant were to apply in Germany 2 weeks ago, and comes to Ethiopia 2 weeks later applies to the patent office, by the time he applies to the patent office, his own patent application 2 weeks before will already make the knowledge fall in to prior art. If we give the Ethiopian application a filing date of the date it was submitted, this would not do justice. Because his own filing in Germany would defeat his own application in Ethiopia.see art. 11 (2)

“In what types of countries do you think a person applies?” This law is a commercial law. I would only seek patent in those countries where I am afraid that there is a copying capacity. But the problem is if all those countries fallow absolute novelty, to solve this problem countries came together in the Paris convention for the protection of industrial products which instituted what is known as the priority right system.

Priority right system; It is a system that countries developed to handle some specific issues so that applicants have access to the mechanisms of simultaneous protection in different countries. The prior right system is the system in which the date of your first application in the country you choose to apply first, will be taken as the filing date for all subsequent applications before the countries which are members of the treaty. In this countries what a person is given is a priority. Priority right is the right to apply in those member countries before anyone else.

So far, Ethiopia is not a party to any treaty. Currently Ethiopia uses reciprocity to give priority right to foreign applicant. This way is very narrow because reciprocity is not much applicable.In this context the treaty can be between two countries i.e bilateral agreement.

3. formal examination; After the filing date is given, the next step is formal examination. Formal examination is the examination as to form. Then search they compare your application with prior art. Then comes substantive examination e.g.novelty, inventive step, industrial applicability, full disclosure, enablement sufficiency and efficiency. And clarity and concise of the claim. The fact that the claim is supported by description. If the person asks below he describes, he will be given a patent. But if he asks more than he describes, he will not get.

3 things will be triggered up on granting of the patent; the first is the patent will be registered at the office, second Certificate will be issued to the inventor,and,3 there will be a public announcement. All the part of the patent will not come out in the public announcement and other modes. It is only some essential part of the application would be available. E.g the name of the applicant, the name of the inventor, the number of the patent or serial number. Like many other property rights, the patentee has an exclusive right to exclude others from using his invention without his permission.

Art 22 the right of the patentee;

The first right is the right to use the invention. It means to use what he has invented. This is his first right. The second right is making or producing;Without him there is no body that can use his invention other than himself without his authorization. The third right is exploit otherwise; this right refers to his right to sale, abandon, offer to sale, transfer the entire patent or part of the patent, donate license the patent exhibit the

patent. These are the activities. How long this right exists for 15 years. And 20 years if the patentee can prove that he worked the invention in Ethiopia, in this case he can be given an extra five years to make it twenty. The question is,“when does this fifteen years starts to run?” Logically, the actual years of the exploitation of the patentee is EITHER LESS THAN FIFTEEN OR LESS THAN TWENTY on account of the time it takes for the prosecution. For instance, the patentee did not apply for the additional five years and the prosecution took six years, the actual exploitation would only last for 9 years.In order to continuously validate your patent you need to pay maintainance fee. If you do not pay you will lose your patent.

As we said above,the first right of the patentee is the right to use.nowlet’s suppose that Mr. X bought an eye glass from the shop owned by the patentee or from someone who is licensed by the patentee. “Can Mr. X use the eye glass?” The answer is found in art. 25 (1) (c) if the patentee himself or the licensee of the patentee himself put the patented product on the market and if we buy that, then automatically certain rights of the patentee will vanish. This is called exhaustion.Because art. 25 isa limitation. If the patentee puts 6 thousand of eye glass on the market, but the remained 5 thousands are in the ware house, this article applies only to the 6 thousands. His right does not apply to the 6 thousand he has sold. The moment we bought the product,the patentee’s right over the use is extinguished. We can also sale it. Then, the question is,“canwemake that product?” No the make right of the patentee will not extinguish or exhaust. The principle of exhaustion is a principle which states that the first sale of the patentee’s article will exhaust the patentee’s certain rights over that article he owns. The right that exhaust are the right to use and the right to further sale but the other rights will not exhaust.

On process patent, this principle does not apply. Because there is no problem here as in the product patent because the problem which is related to the product patent is what happens to those people who bought the article if we said that the patentee has a right to use? This kind of problem will not occur in the process patent. There is the right to use in relation of process patenttoo. “Is there exhaustion?” Process is not a product, so it cannot be sold as a product. There is no problem of making people who bought use it.

Art. 22 (2) this sub article is also talking only about product patents. It says If the patentee choses to make the products abroad and import them and exploit only through the importation, and wants to prevent others from

importing it the law says you cannot do this. This means others can compete with him by importing his own product from abroad. This provision is like wiping out what has been given because it is difficult for him to compete because they may be import it from the country in which it is produced at a cheap cost. Production cost in Ethiopia is high because of legal uncertainty and wastage and lack of skilled labor force. So if the patentee does not get a monopoly price in Ethiopia, why he needs Ethiopian patent is the issue. This is the downside of this provision.

The question is,“why the Ethiopian government chose this rule?” The government thought this would benefit the public. The public will be benefited if the production is made in Ethiopia. There will also be a transfer of technology and employment issues.It is to encourage them work their invention here. But another logical question might still be raised; “how do we relate working the invention in Ethiopia with that of preventing/excluding others?”

The problems in relation of this rule are; 1.by denying him import monopoly, we deny him price monopoly over the patent. So the attraction of Ethiopian patent will diminish. 2.investment is market oriented. So,the patentee can invest only if he can make money or profit. He decides to work his patent in Ethiopia if the market conditions are good. The fact that he has a patent should neither force him to produce nor to invest. Rather what force him to invest/produce is a market.

Art. 25 (1) (c) in order for the right to use and further sale the invention to be exhausted, “Where should the first sale takes place?”,“What if the patentee sale it in Sudan in where he has a patent also there?”, “Will his right extinguish or exhaust?” The sale should take place in Ethiopia.If the patented product sold in sudan come to Ethiopia, the patentee would disallow the sale of the product since art. 25 (1) [c] does not exhaust his right. This rule only works as with the presumption of the absence of art. 22 (2) but as long as this rule is there we cannot talk about it. One of the use of the patentees on the patented product is through market segmentation. This means they inter in to each and every market and get monopoly by seeking patents in those countries. The price of the product will not be the same in each market since there may not be global market for all products. Market segmentation works in national exhaustion. Because we have to stop a person from importing our patent from abroad and sale it here since it does not exhaust our right. This is the market understanding of the patent.But the law in this case is not market oriented because of the

presence of art. 22 (2)denying import monopoly will not encourage production in Ethiopia. The first and important precondition that makes a patentee require Ethiopian patent is the market; the presence of people who demand his product. There should also be people who copy an sale his invention. If this kinds of people are absent patent again is not important. Because if there is no body thatcopys our patent, we will produce in abroad and import and sale in Ethiopia. If we have denied patent, we will return back the patent.Because there is any reason for us to get bankrupted by continuing to produce.

Limitations to patent right:

The major limitations of patent right has been incorporated in art. 25 of proclamation no.123/1995. We will start with sub-article 1(b).

the research and experimentation exception; The rationale behind this exception is to avoid the most likely situation where in unauthorized use of a patented invention is necessary for research and experimentation. And this idea is in turn based on the essential truth that science is always incremental. Scientific development is always incremental. Most inventions are innovative improvements of previous inventions. If a certain information is a patented information but is important to use it for research and to make improvement thereof obviously the patentee will not allow you to do the research for fear of any improvement to be done on his product. And those kind of situations must be curtailed or must not be allowed to happen. With that in view, the law permitted unauthorized use of a patented information if that information is sought for research and experimentation.

Basically, the exception says that so long as the use of the patented information is necessary for research, then, you don’t have to seek the patentees authorization. You just can proceed to use the patented information with a view to do research. It is in view of the incremental nature of sciences, to avoid patents to become obstacles for scientific cause that the law puts such kind of limitation to the patentees right.

One could logically question here, saying, “What if the product is only important for research?” Due to the reason that the product is only used on research and if the product is going to be encompassed by this sub article (exception) every time research is made, it is better to give the product away charitably. It wipes of the inventors patent. This is the problem of this article. Thus this sub-article should be read in light of the nature of patentable product in question. Since the products sole use is for research

and people may use it in the cover of research while the patentee does not get any benefit from the patent right and a situation will be created where the patentee is going to get hurt. This sub-article shouldn't be read in such a manner.

Normally a mere use of a patented product does not fall under this exception. This provision was intended a situation where in you must analyze the internal workings of a certain patented information.

Article 25 (3) is only confined to products. The "research and experimentation" exception applies for both products and processes.

Article 25 (1) [d]; this article stands for situations where in some crafts, e.g. Aircraft, land craft, sea craft, etc, the patentee must not be allowed to prevent the entry of any of these things just because the craft happens to be embodying something that it hasn't invented. Imagine a certain aircraft embodying an invention which been patented in this country. And if that craft is about to enter and if it so happens that the embodiment inside the aircraft has not been licensed by the patentee the moment it enters this country, it becomes an infringement. So, if this article was not to exist, then the patentee would have had the possibility of saying "no" to the entry of the aircraft because it comprises a part which is an infringement of his right. This is public transportation system vis a vis patentees interest. The law has leaned more towards preventing any disruption of global public transportation systems that may likely be caused by the assertion of patents. The whole idea is patents must not be asserted, even though it could be rightly, but should not be asserted to an extent that has to potentially disrupting transportation.

Article 25 (1) [a] non-comercial use; The idea of this sub-article is if infringing products are being used by the public at large and is being used as an end user or by the end user, then, the end users use is always non-commercial. The patentee must not be allowed to assert his patents on end users. To our Instructor, the lawmakers' idea seems to be based on the fact that the mental truth that it is nearly impossible for the patentee to go after each and every end user. Here end users are members of the public who are customers of a particular patented product. Clearly, this cannot be interpreted to encompass processes.

If this Article was to be taken literally, some problems may arise. This exception must not be taken so literally as to include instances where in the Making Of the product is very simple, it can be done at home, everybody

does it and finally the patentee has no one to sell the product too. The other instance could be instances where somebody is deploying patented products saying he is doing it for charitable purposes not commercial.

The downsides of Article 25 (2); The article is self explanatory. The advantage of this provision is self evident. It is to protect interest of public using the patented invention to prevent to address national emergency situations. National emergency situations must be addressed because they are emergencies. The patentee must not be standing in the way. You should be allowed to use his invention without seeking his patent because you're addressing national emergency situations or things which really need urgent actions. If that requires the use of the patent, it has to be used.

However, there are problems. The first problem is with regards to scope. Second, it may not be equitable. Another more serious problem is from the statement "… the development of other vital sectors of the national economy." Our instructor is suggesting that there may be a situation or a dangerous loophole that our patent may be unnecessarily exploited.

First to file and first to invent rules;

This country (Ethiopia) follows a first to file rule.

In the context of a race, which one should we favour? It is to the one who filled first or the one who invented first? This country has followed the European solution for this problem. We give patent to the person who was smart and organized enough to reach the patent office first. Now, the question may arise, "From the perspective of fairness and equity who should we have in favour?" Naturally, it is the first to invent. "Why are we favouring the first to file over the first to invent?" If we follow first to invent rule, and if one applicant come, patent office may accept if first nobody else did it and secondly this person might have went to the patent office after thieving others inventions. The patent office doesn't concern itself with the second point, it may accept it unless another person comes claiming that he did the invention first. The main problem of first to invent rule is, it is hard to prove that the one who came latter claiming, really did the invention first. It is in fear of such impossibility that the likes of Ethiopia and Europe resorted to the much less complicated first to file rule.

End of patent right:

For this sub-topic, our focus will base itself on articles 34-36 of our proclamation. They discuss termination of patent, surrender of patent and

invalidation of patent respectively. Among these, we are only interested to deal with invalidation for the rests are self-explanatory;

invalidation of patent;

A patent which has been granted without fulfilling, particularly the substantive requirements of patent will be invalidated. The invalidation cold is put into effect in the following way.

I. Any interested party could go to court and ask the court to nullify the patentee's patent. The plaintiff must have an interest. Competitors are interested persons. Companies who just want to do experimentation may also be interested party.
II. The other avenue which permits the proclamation of the invalidity of a patent is in actions that are brought by the patentee himself alleging infringement. The patentee becomes a plaintiff. Then, the question is, "How does this invalidates patent?" It comes from the defendant side first of all believing he has infringed patent rights of patentee but claims that plaintiff got patent right in an illegal manner.

In such actions, invalidation actions could be converted into infringement action through the defendant defending through committing act the invalidators act. It is known as affirmative defence. It is called affirmative because defendant admitting he infringed patentee's right only that he is defending by saying that he is not liable.

Utility model certificate law:

See Articles 38 – 45.

We give utility model certificate models to all in respect of minor inventions. On account of are they deemed minor? Why do we call them minor? First reason is out of the three major substantive requirements of patent, it does not involve inventive step. The second important reason is there is no requirement of absolute novelty standard. To check whether the invention is novel or not, it is not against world knowledge but it is with the national knowledge. This means if the invention is new in the country it will be given utility model certificate.

Part two

Copyright and neighboring right law

This law is basically governed by proclamation no. 410/2004. The proclamation has two distinct laws, on the one hand the copyright law part and on the other hand, the neighboring rights law part.

In the Continental Europe, it is known as “Literary and artistic ownership laws”. In the UK and US, it is known as “copyright law”. When we look at our laws use of the term “copyright”, it is indicative of a decision to lean more towards the Anglo-American tradition.

In respect of our neighboring law, we seem to have leaned more towards the continental tradition. The concept of neighboring rights is purely and solely Continental European. In the UK and the U.S. they don’t have a separate law on neighboring rights.

We had our copyright law before this proclamation in the Civil Code Book 3, Title 11, named as Literary and Artistic Ownership. Neighboring Rights is newly introduced to Ethiopia in this Proclamation. Under the Civil Code, the Continental European tradition was adopted regarding Copyright law. The Civil Code part is now repealed.

We have copyright law pretty much the same reason why we have patent law. It is to encourage creativity in artistic and literary works. We want to protect creativity in artistic and literary works because; we as community, as a nation, as an economic union want to see growth. Literary and artistic works no less important than the field of technology because:

1. We want to enjoy. We want to make our lives more wonderful and enjoyable.
2. It is also a very important economic field of activity. If it is properly cared for it may be economically productive and supportive field.

Maybe at this time in Ethiopia, taking the current economic situation, it is not a key economic field as that of let’s say agricultural field. To make this field one of the key economic sectors, one of the steps is to make sure that this field is not used by free riders and to prohibit infringement. It is by giving copyright to owners of copyrighted content.

Copyright law:

Copyrightable subject matter:

When it is said copyrightable subject matter, it means at least belongs to a field of copyright. The issue of whether or not it belongs to the field of

copyright is different from the issue of whether or not it gets protection. Whether or not it gets protection is dependent upon the meeting of certain criteria's.

It is provided under Articles 2 (30), 4 and 5.

Article 5 is an exclusionary article. It excludes certain things from the copyright law. It is a counterpart to Article 4 of the patent law proclamation. Article 2(30) enumerates or provides for works that are made for the first time. Article 4 provides in its two sub-articles to a new work but not entirely new. It is based on a pre-existing work a new work that has been made out of a previously done work which falls under Article 2 (30).

Article 2(30) is an enumerative list not an exhaustive one. All the examples under 2(30) belong to either literary or artistic field.

Article 2(30, a) tells us "books, booklets, articles in reviews and newspaper, computer programs" are protectable. Note that copyright protection is granted irrespective of whether the work is good or not. Protection is earned irrespective of popular acceptance.

Here, all type of books is covered as long as something is a book or booklet or a newspaper article. Any kind of writing is copyright protectable. It might or might not be copyright protected. If one is writing something what is exactly said by another person, for example a lecturer in a class room, it is that of the lecturer but not the writer. If it is written in the writers own expression, it may be copyright protectable for the writer not the lecturer even if the idea is not the writers. Note that ideas are not protected under copyright law, only expressions.

"Speeches, lectures, addresses, sermons ('sibket') and other oral works" is also a copyrightable subject matter as per 2 (30, b). The difference between 'a' and 'b' is, under 'a' we have written works. We call them literary works. Under 'b' we have got what are known as oral works. Is there any art in oral works? Yes, there is a way you arrange your thoughts, sentences, gestures that you make that distinguishes you from other speakers. It is an art of communication. We call it communicative art.

2 (30, c) entails "dramatic, dramatic-musical works, pantomimes, choreographic works, and other works created for stage production". We call them works of stage production. Pantomimes is a way of expressing information or telling a story without words by using body movements and facial expressions or a performance in which a story is told without words

by using body movements and facial expressions. Mostly pantomimes in performances, the movement are mostly entailed with dance. In choreographic works, the subject matter of copyright protection is not the performance of the dancers. The performance by the dancers could be protected by the neighboring rights part of the law. By choreographer we refer to the person who is responsible for having thought of those particular dance movements. Even in the case of stage production, like theaters, we are not protecting the actors or actresses but the work of the person who is responsible for having organized that show, the theater director. The one protected is the person responsible for determining the final look of what we see in the theater. Note that, we are not actually talking about the persons rather we are talking about the work. What is protected under 'c' is the final look that resulted from the creative efforts of the person who decides or determines of the final look.

2 (30, d) says "musical compositions". "Musical composition" is defined in Article 2 (13) as:

"Work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music."

It seems more of a warning than that of a definition. When we say musical composition we refer to the music. When we are making music latter to get copyright protection for it, we don't need to think about the lyrics, person playing the song. Music is, for copyright purpose, is composition of the music to play in a certain manner. For a composition to be made, we necessarily don't have to play musical instruments. It could be produced vocally, through instruments or written using musical writing language called nota. The one that gets protection is the written musical composition.

In the process of producing music, if the first step is to write the composition and suppose you wrote the composition using musical composition language on a piece of paper, is that enough to market the song? No. it has to be converted into something which is audible which could come through vocalists, and also listening to musical instruments being played. And also musical compositions must be converted into musical arrangements. Then the musical arrangements must be recorded. Finally we listen to it. All of them separately could earn different protection. Musical arrangements does not gain copyright as a composition but as an arrangement. What is meant to be said here is, there are a number of entering products before it can be made audible. And what come under copyright are the composition and the arrangement.

"Audiovisual works" is under Article 2 (30, e). "Audio-visual work" is defined under Article 2 (1) as a:

“Work that consists of a series of related images, which impart the impression of motion, with or without accompanying sounds, susceptible of being made visible; by any appropriate device, and includes a cinematographic or other film”.

It is a technical meaning of audio-visual work. First of all, we are not seeing motion. But it seems that we are seeing motion. What it is said here is, it’s impossible to capture the motion as a motion. What the device would do for us is, it has got a technology inside it which takes separate still pictures successively at a very fast pace so the shutter, which every camera has in front of the lens, opens and closes very quickly for millions of times when we take a picture of a certain motion. And each one of those still pictures is printed in a certain printing media, which could be digital or magnetic tape. And once we take the picture it must be capable being fed into a certain displaying device. And when we see the still pictures very quickly, we think that we are seeing the motion as a whole.

In Article 2 (30, f) “works of architecture” are there. It is not defined, but architecture refers to the looks of any building or other structures. What is being protected here is the final looks, the image of the buildings or structures it has. Architectural features include the line and contours of the building and also the materials chosen to make the building.

Article 2 (30, g) puts “works of drawing, painting, sculpture, engraving, lithography, tapestry, and other works of fine arts”. All of them refer to any fine arts. It doesn’t have to be good, bad or mediocre. Lithography means font in which words are written. You choose a font because you think it is pleasing for you. It’s a work of art.

Article 2 (30, h) there is “photographic works”. What is the creativity or artistic in photography? Capturing the moment, from which angle is the picture taken, the circumstance in which the picture is taken and when it is printed makes it artistic. At the end it brings an impact. Previously it is printed using chemicals and some mechanical machines. Now digital printers are used.

Article 2 (30, i) refers to “illustrations, maps, plans, sketches, and three dimensional works related to geography, topography, architecture or science.”

If something has three dimensions (3D), effect of that is that it is physically existent. Whereas if something is appearing in a two dimensional (2D) form

then it means it’s just a painting on a plain. Then that plain can only exist on a piece of paper or on a computer output screen. If one draws a map of any given city on a piece of paper then that map is two dimensional (2D). Whereas when sand model of that same map on the paper then the sand model is three dimensional (3D). What the law is saying is any illustration is copyrightable.

Sketch is normally a term used to refer to drawings of materials, things, furniture’s, and utensils, devices and all those things. Drawing sketches are important steps in the production of the said things. It has two components. One is the esthetics component and the second is the functional component. Any mass produced product like devices, machinery, and aircrafts and so on, they are made the way they appear by starting from sketch.

Three dimensional works are related to geography, topography, architecture or science. Most of two dimensional works have been replicated into three dimensions. There are two commonest examples in this regard. One is when the sketch or the plan is translated into a final product. You make a drawing of a cell phone, and then you make the cell phone. The drawing of the cell phone and the final product which is the cell phone itself look alike. The drawing is in two dimensional while the cell phone itself is three dimensional looks like. So not only we protect the drawing but also the final looks of the product. The other common example is in the case of architecture. Architecture starts from drawing on paper which we call the architectural design. Following the paper the building is made. The building is also protected in regards to its looks.

When we say looks are protected it is meant that no one else can make product or building appearing in exactly the same way as the protected one without the authorization of the copyright owner in the looks of the building or the product.

General remarks on art. 2 (30);

this sub-article contains a very vast field. The thing in common between all the works listed in Article 2 (30, a-i) that makes them deserve copyright protection is in the course of creating these works the creators of these things are availed with artistic opportunities. As far as copyright law is concerned is made up of fields on one hand, some of the field give tremendous artistic opportunities to their creators enabling them to create whatever they create employing all the liberties they have to determine the final product in the way they like. And on the other hand, there are fields

where artistic opportunities, at least in choices but are very much limited. Creative choices are limited. And the final looks of the product are dictated by external rules from the creator. As much as there are artistic options available to the artist to determine the looks of the product, the artist is limited by functional considerations. All of those works have got esthetic (artistic) considerations and functional considerations. Only that some of them are largely dictated by functions and very little dictated by art whereas the others are largely dictated by art and very little dictated by functions. And some are dictated by no function at all but only by art such as paintings and works of fine art. But all of them have artistic considerations. Choice of materials to make the product has also an artistic side to it. But if this choice of material is defeated by the functional considerations necessary, it is not artistic.

Those works coming under Article 2 (30, i), particularly plans and sketches but not other, either in 2D or 3D are in copyright law known as applied art. Those covered in applied art are known as applied art because their end product has an application or utility function that gives a certain benefit to human beings.

Is there a difference between protection through applied art under copyright law and protection through applied art through industrial design law? Some things could conveniently fall under industrial design protection and at the same time fall under copyright protection. This accumulation of protection emanating the fact that both laws protect looks of utilitarian products. There are only alternative solutions not … solutions. These are:

1. One is the solution known as the unity of art principle entertained by the French. They say art is art, whether it is applied art designed it does not matter. So let’s embrace accumulation. They mean the art gets protected by both laws. The right holder will have free choice of either seeking protection from copyright law or seeking protection from industrial design law.
2. On the other hand, there is this approach of the British known as suppression of the art. The artist doesn’t have the two choices but must seek only one of them.
3. There is also the German solution which is a mix of the French and the British solution. In certain respects accumulation is allowed and in certain other respects accumulation is not allowed.

Here in Ethiopia there aren't really any cases which have perplexed our courts to choose between applied and applied to part with design law. However, there is a big difference between the requirements of copyright law and the requirements of industrial design law. Under copyright law the work have to be a copyrightable work and original, whereas in industrial design law, the design has to be novel. And there is a world of difference between the requirement of originality and the requirement of novelty.

As we have already stated in patent law, A work is said to be novel if it is not anticipated by prior art. A work is said to be original only if it originated from the mind of the author and therefore is not copied from previous works. But something closely similar to that might be existing in the prior art therefore is not novel. It is of a lesser degree. It is most likely possible for a work which is novel and is therefore is protected by industrial design law to additionally be original and also come under copyright protection.

derivative works;

these works are effectively addressed in art. 4 of our proclamation. A derivative work is a work based on a previous work. If a work has never been created before and is created anew for the first time then its treatment falls under Article 2 (30) whereas if a work is a derivation of a previous work then it comes under Article 4. We have very good examples under sub-article 1 'a' and 'b'. Under 'a':

Translation is a very good example. The translation is a new work. The original work is written in one language while the translated one is written in another language. The question may arise, "What makes translation deserving of copyright protection?" there is plenty of chance to the translator to use his own expression, style, writing techniques and so on.

Another example is adaptation meaning transforming a work from one category to another category.

The third example is arrangements. It is also possible to modify other works like movies where an animated movie is changed into a movie where human beings perform but only and best example we have of arrangements is from music into musical arrangements. In the musical word it's called remix. There was music before which has changed tremendously with new artistic elements in it totally not found in the previous music but the basic tune or melody or composition is the same. So when you listen to it you would identify which song it is. The modification art is under the law would also

need the concept of authorization. But again it's different from the previous one. There is a challenge in the case of modifications supposing that the modification is consented to the modification artist might face, not form the copyright owner of the previous work but from other people. In an infringement action he may be bringing against other people who have infringed his copyright, the defendants might point at his work and through affirmative defense say his work lacks originality. It is not sufficiently modified. This means a modification can only be deemed to be a modification if it keeps a sufficient distance from the original work. It may not be deemed original, the modification, if largely it's a copy of the previous work.

Under 'b':

The whole idea is that there are pieces of works each one of them independent. Each one of them is copyrighted but copyright has expired or copyrighted or not at all copyrighted. And you compile these independently existing works into one new work which is compilation or also known as collection of previous works. What the law is saying that the new resulting work will earn the copyright. We call it compilation copyright. One example is encyclopedia. It's called derivative because it's a compilation derived from previous works. Another example is a database. It is a systematically arranged information permitting easy expediting and logical retrieval. We call all under 'b' collection of works. They are copyrightable only if they are original by reason of their arrangement and selection. There is an artistic work here in the selection and the arrangement.

In Article 4, it doesn't really matter for the copyright ability of the compilation. It doesn't matter if independent works that have been compiled have been copyrighted before. The new compilation, irrespective of the copyright of the element, will get a copyright. Even if those elements would not have gotten copyright separately, the compilation might.

Copyright excluded subject matters:

These exceptions are effectively addressed in art. 5 of the proclamation. This article is divided into 'a' and 'b'. In both subs, there are excluded subject matters of copyright law. But the reasons for the exclusion under 'a' and the reason for the exclusion under 'b' are different.

The things under 'a', they couldn't have been copyrightable in the first place because they lack artistic choice.

Idea; Any literary and artistic idea is not protected by copyright. Because for an idea to be protected it has to be expressed. It's only in the expression that we can find artistry. The 2 reasons for not giving a copyright protection to ideas are; 1. The idea is not an art itself. The art is the way that idea is expressed. 2. If ideas are given protection under copyright law, it will bring a frightening block to the flow of creation of ideas and also unwanted monopoly.

Procedure; Procedure also could not gain copyright. If we give copyright to the procedure, then, no one else will be enabled to speak about it or to write about it.

Mere data; Mere data is not also copyrightable. Because a mere data, procedure and so on are not the fruits of a single persons mind. But the way persons transmitted any of the list in 'a' could be copyrighted.

List under 'b', which could be called official documents, do not get copyright. They don't get copyright because of public policy of making the work accessible.

Requirements of copyright protection:

According to Article 6, we have two requirements for copyright protection. They are:

1. Originality and
2. Fixation.

To start with the simpler one, fixation is defined in Article 2 (11) as:

""Fixation" means the embodiment of works or images or sounds, or of the representations thereof, from which they can be perceived, reproduced of communicated through a device prepared for the purpose;"

Embodiment is necessary so that patent could be granted. Embodiment means, something is keyed in where in a situation you can see or hear it again at a latter time in something that can be held physically. Some things unless embodied cannot be created like painting and any other work of fine arts, books, architecture and so on; while some other can be created without embodiment like music, theater and speeches.

Generally we can classify works as those that can be made without being embodied and those which can be made only if embodied. But the law has made them all one by saying "I give copyright only if it is embodied". This

hurts those that can be made without being embodied. This is typical Anglo-American tradition. The Continental Europeans, almost all, are more “pro artist” which does not require fixation protection purposes. They only require originality. The Europeans don’t like the Anglo-American solution because they think it is unfair for the artist to require him of an additional requirement. So long as it can be proven it has been created it should be protected. On the other hand, the Anglo-American think unless a work is fixed how on earth you could know that it’s being created? It’s hard to prove if it’s not fixed. So whoever fixed it first gets the copyright.

Originality is the other requirement. A work to be deemed original has to meet two criteria’s. Originality has two cumulative meanings. On the one hand, a work is said to be original if it is not copied from a previous work, a work that originated from within the mind of the author. A work is said to be original if the author/artist authored it. That means owes it’s origin in the mind of the author. The other meaning is, a work is said to be original if it displays certain creativity.

All the works in Article 2 (30) must include being original in the sense that they are not copied from a previous work and are creative enough to deservecopyright protection. Now the question is, “how do you measure creativity?” It is difficult to define creativity. Only we know that when we look at something, creative or not, if the artist had choices of determining its final appearance and made a particular deliberate choice then it means it is creative. Creative doesn’t mean beautiful or popular. And as we said before a work may not be popular or liked to be entitled to protection.

The question of originality is a perplexing question and is difficult to determine only in the case of those borderline field of works, works that make you doubtful whether they have creativity or not. Now, from the list in Article 2 (30), “which of them are really borderline cases?” the logical answer which could be drawn for this question is “maps”. Because maps are functional. As long as artistic options are being restricted questions on originality increases. In most cases, works that lead us to the question of whether it contains originality or not, is if it has functional nature like illustrations.

After all, Originality is a two tiered question. One of the two tiers is the work originates from within the minds of the author claiming copyright. In other words, did he not or did he copy it from the pre-existing work? If the

work owes its origin from the mind of the author and is therefore not a copy of a previous work then we move on to the next question.

The second tiered question is, “is the work creative enough?” If the response of this question is positive too, then, the work is original. Then it will automatically earn protection.

There is no one who checks by way of administrative procedure whether a work is original or not for the simple reason that copyright is automatically granted by the law if the requirements are fulfilled. There is no prosecution of copyright since there is no application.

As far as the second question in the two tiered questions is how much creative the work should be is concerned, the law doesn’t give you a direct and a steed fast solution. In other words the question of how much creativity is required of a work is a question that is left unanswered in the law and therefore seeking further definition, clarifications and standards. The issue of whether a work meets the originality standard arises in the context of litigation when there is an affirmative defense brought by the defendant who has been taken to the court in an infringement action.

It is most unusual, and our instructor dare says even impossible, to bring an invalidity action as far as copyrights are concerned, i.e., in this respect copyright is to be contradistinguished from patent wherein it is possible to bring invalidation action against the patentee.

In respect of written works the question of creativity could become a veritable question worth huge consideration if it is a trivial work that does not give creative options and opportunities to the writer(s). And we have very little of such situations.

The issue of originality really arises in respect of fringe kind of works, works on the boundary like pie charts, illustrations, graphs, sketches for utilitarian articles and writing of procedures where the creative opportunity is admittedly very low.

There are globally two traditions as far as the issue of creative requirement is concerned. It is the Anglo-American tradition and the Continental European tradition. The Europeans require higher creativity and the Anglo-Americans require lower creativity. It is because the Continental Europeans are so affluent in art.

Scope of Application of Copyright law:

Which kind of works does this law grant protection for? This issue becomes an important issue given the cross border characteristics of copyright products. The rules as far as the copyright part is concerned are pint clear.

Article 3 (1(a)); this sub-article is clear. We need to discuss the consequences. As long as the work is authored by a person who is Ethiopian citizen, the work will get protection by Ethiopian Copyright law. This is irrespective of who owns the copyright. The Article is not speaking about the copyright owner becoming an Ethiopian. It is referring to the author of the work. The work should authored by an Ethiopian human being irrespective of who will finally own the copy right, it could end up being owned by a non-Ethiopian. The fact that it is protected under Ethiopian law means that it cannot be infringed in Ethiopia. If copies of a book, authored by Ethiopian citizen owned by anybody, are made in Sudan, Ethiopian copyright law doesn't apply because of the territorial nature of Intellectual Property Rights.

It also protects non-Ethiopians domiciled in Ethiopia. The word used in the Article is not domicile, but, suggested by our instructor. It is principal, referring principal residence.

This sub-Article is irrespective of where the work was issued or published. The reason behind this is none other than the nationality linkage, the philosophical desire to link your copyrights to your nationals. After all this law is intended to promote art by Ethiopians wherever they live. Another related question could be in view of the law enacted in 2003 G.C.
Which assimilates into certain economic activities foreigners with Ethiopian origin; also assimilate them for copyright purposes? The answer is not in the copyright law but in the legislation enacted in 2003 G.C. Our instructor thinks that they should be assimilated because it's an economic activity that is not excluded in the 2003 legislation.

Article 3 (1(b)); this follows a quite different philosophical background. We grant protection not only to Ethiopians or people domiciled in Ethiopia, but also to anything that has sprung up on the soils of Ethiopia, or is simultaneously published in Ethiopia or is published abroad but is also published in Ethiopia within 30 days. The key term here is "published" which id defined in Article 2 (12). You publish a work if you make available to the public sufficient copies of the work by means convenient for the publication of the work with consent of the owner.

Article 3 (1(c)); we grant protection to audiovisual works only if the producer has his headquarters in Ethiopia. The producer is defined in Article 2 (20). What is defined there is producer. We also have another producer, known as the producer of sound recording. The term producer in Article 2 (20) refers to audio-visual producers.

For audio-visual work purposes, the producer is a person who initiates the making of the work and also takes responsibility for the making of the work until the end. Someone decides to make a movie and suppose that someone doesn't have the artistic skill but wants to invest in making a movie, takes the initiative. Then he will start to assemble those people who are the artistic brains behind what we finally see on the screen, the cast. Next step is financing. The money could have any source. He may go to other financers. In some countries there are institutions that just do financing movies and they would take the copyright in return. Once all these are secured, the person who oversees all this things on anything except the artistic element of the movie is the producer.

Regarding headquarters, the country of registration is a very important indicator of the nationality of the company. Normally, companies are said to be nationals of a nation where they are registered. But this law is on purpose, our instructor believes, has avoided "place of registration" and has stuck to "headquarters". And our instructor would like to believe that what was intended is to refer to that place where it is the center of the operation, not registration. So long as majority of the operation, the decision making of the company is in Ethiopia, whatever comes out of that organizational setup or branch should be protected under Ethiopian law.

The producer is not an author. Author is always human. Producer could be either natural or juridical person but is not an artist. The producer gives decision on financial, logistical and organizational issues. The creator of the audio-visual work is the cast selected by the producer like the cameraman. But there is a person who has a final say on the final product of the audio-visual work which is the director.

Neighboring right law

Subject matter of neighboring right law

Article 2 (14) reads:

““Neighboring rights” means the right of performers, producers of sound recordings, broadcasting organizations over their works.”

It contains three neighboring rights owners; performers, sound recording producers and broadcasters. Accordingly, the subject matter of protection of neighboring rights law is three; performance, sound recording production and broadcast. These are the only subject matters.

Performance is not defined but a “performer” is defined under Article 2 (19) as ” actor, singer, musician, dancer, and other person who act, sing, deliver, declaim, play in, or otherwise perform literary and artistic works ;” Here what is being performed? For a performance to be deemed performance the thing performed must be a literary or artistic process. A performer can only be a human being. A juridical entity cannot be a performer. A performer is a human individual who makes it possible for audiences to hear or see and enjoy a work of art. The work of art was created by an author.

Are performers’ creators? No they are not. They perform a work created by someone else. That’s why we don’t consider them under copyright law. So, “What are they then?” They transmit art to the public. They are transmitters. Well, “Why did we call their protection neighboring rights?” Because the protection they get has similarity. But it is not totally the same.

Sound recording is defined in Article 2 (28) as:

““Sound Recording” means 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 embodied. However, it does not include a fixation of sound and image such as the sound track of an audiovisual work”

The Producer of sound recording is defined in Article 2 (21) as:

““Producer of sound recording” means a person that undertakes the initiative and responsibility for the making of sound recording works;”

The input of these individuals or recording labels is investment. Their second input is they transmit the work from the artist to the public. If the, let’s say the music is not provided to the public embodied, they will get entertained by the music only when the artist performs the work.

Broadcasting is defined in Article 2 (3) as:

““Broadcasting” means transmission by wireless means for public reception of sounds or of images and sounds.”

There are two modalities of TV transmission as far as it is concerned. On the one hand, there is wireless transmission using a receiving device which has got Antennas. On the other hand, it is also possible to have cable retransmission of wireless TV transmissions. It is transmitted by wireless means, by satellites, and received at one end by another satellite and that is retransmitted through cable networks. Only wireless TV transmissions are covered in our laws. Because the way broadcasting is defined is very narrow.

Requirements of neighboring rights

Neighboring rights law is not relegated on any requirements. As long as there is performance, sound recording production and broadcast it is protected. Performance even if not fixed is protected.

The right of the performers:

The performers right under neighboring right is provided under article 26 of the copyright proclamation. The Instructor would always like to begins discussing the performers’ rights from (b) of sub-art. 1 of article 26 of the proclamation because, (a) of the same sub-art. Talks about broadcast and (b) speaks about fixation. So, which one should precede? Though it could be arguable, the instructor believes one should first speak about fixation before broadcast. Now, (b) of sub-art. 1 of the article under consideration talks about the performers exclusive right to carry out or authorize the fixation of his unfixed performance. Put simply, the performers’ performance can’t be fixed/recorded either through sound recording or through audio-visual fixation without the consent of the performer. The performer can’t be recorded by audio-visual recording mechanisms or audio recording mechanisms without his consent. Then, supposing that the performer has authorized the fixation of his performance, what rights has the performer got over the fixation of his performance? i.e. the performer has already authorized the recording of his performance does he have any right over the fixation? The answer to this question lies in identifying whether the fixation/recording is an audio-visual fixation or an audio-fixation. Nowing this is important because, performers who have authorized the audio-visual fixation of their performance don’t have any right whatsoever afterward over the fixation or over the copies of their fixation. Sub-art 2 of art. 26 of the proclamation also talks about this rule. So, if the performance of the

performer is captured on video and audio, (DVD or VCD) then, the performer has only got the right to authorize the fixation of the DVD or VCD, but does not have any right afterwards. The implication of this is that law is prohibiting the audio-visual performers from having any control over the DVD and VCD markets. They only have the control to authorize the fixation of their images. For example, suppose that there is a man called Leonardo Dicaprio and as known he is an actor/performer. But what does performer mean? Article 2/19 of the proclamation defines a performer to include actor, singer, musician, dancer, and other person who act, sing, deliver, declaim, play in, or otherwise perform literary and artistic works and this actor seems to have the rights provided under article 26 of the same proclamation. But in reality, sub-art. 2 Of the same article has limited the rights of the actors/actresses to only permitting others to take/film their images. Therefore, the audio-visual performers have only the rights provided under (b) of sub-art. 1 of article 26 of the copyright proclamation. Now it can be safely concluded that except for (b) of sub-art. 1 of article 26, other rights are rights that accrue to performers who permit audio-fixation. i.e. article 26 except for (b) is meaningful in respect of singers and instrument players.

So, with regard to right of performers, article 26 of the copyright law makes distinction between performers of audio-performance and audio-visual performance. The performer, according to sub-art. 1 of this article, have the right over audio performance which goes beyond the performance of the work. E.g. a singer has an exclusive right over the music, the composer over the composition and the arranger over the arrangement. i.e. the performers in this case have the right to prohibit the reproduction, carrying out or authorization of his work. But sub-art. 2 of the same proclamation provides that the performers of visual and audio-visual performance don’t, except for (b) of sub-art. 1 of art. 26 have such rights provided under sub-article 1 of this proclamation. On the other hand, audio-visual performers have only the right to authorize the fixation of their images. i.e. they don’t have the right beyond permitting others to take their pictures. Once their image is fixed or taken, they don’t have the legal right over the performance. E.g. A singer has an exclusive right over the reproduction of performance through CD but not over performance made by DVD which is audio-visual by its nature. On the other hand, audio-visual performers have only personal right of authorizing the fixation of their images and this is right of any human person. But, we have an exception in case of public figures. Therefore, actors/actresses have no exclusive right over their fixed images once they

have authorized someone to fix it. In this case of audio-visual performance, the law fixed in this manner because, it is the producer, not the performer, who owns (copyright owner) the performance. So, in the case of audio-visual performance, the actors/actresses are excluded from controlling the distribution of the movie. Conclusion: the audio-performers have right over the distribution and audio-fixation of the performance unlike audio-visual performers.

Coming to (1) (a) of article 26 of the proclamation, it bestows the performer an exclusive right to say yes or no over the live broadcast/transmission of his performance. This live transmission could be via internet or radio or TV. So, whatever the media of broadcast/transmission, the performer has the right to say no or yes to the live transmission of the performance. So, the accontrario reading of this rule is that the performer has no control over the broadcast/transmission of his performance from fixation. The issue becomes difficult when we read (1) (a) of art. 26 of this proclamation in relation to (1) (f) of the same proclamation. Because, the rule under (a) talks about the dissemination of the performance through other ways of communication to the public, and communication to the public is identified to include internet as per article 2/6 of the same proclamation. And article 26 (1) (a) provides that the performer has no an exclusive right over an internet dissemination of his performance from fixation. but sub-art. 1 (f) of article 26 of the proclamaytion clearly provides that transmission via internet, (wire or wireless) is the exclusive right of the performer. So, these two provisions are head-on collisions. So, “what is the way out?” “the solution is,” the instructor said, “the provision under (f) is preferable because, internet is a vast market, and it wouldn’t be fair to disallow the performer to take a benefit out of it”. Read Sub-art. 3 and 4 of this article on your own.

According to article 27 of this proclamation, the producer of sound recording has an exclusive right over the reproduction, importation, distribution and internet dissemination of the master copy of sound recordings. Now, it has to be noted that, both the producer of sound recording and the performer have parallel rights over the master copy. i.e. the right of the producer of the sound recording is not really exclusive, as the music publisher has to check with the performer. Thus, if the publisher reproduced a certain amount of copies, it can’t without stinting go on to selling the copies. But he has to get the okayof the performer. Bear in mind that the performer should also authorize the publisher to make the first master copy (audio-fixation). The publishers, to get out of this impending trouble, should buy the performance, and that’s what they usually do. But this does not mean that rights of the

performer perish. As the producer of sound recording only has the right over internet dissemination and not broadcast, and in this regard, the producer is on equal footing with the performer. But the performer has one additional right which the sound producer does not, and that's broadcasting live performance. The background of article 30 of the proclamation bases itself on the fact that the performer and the sound recording producer have no right over the broadcast. i.e. both may not prevent the broadcasting company not to make performance on air, if the broadcast is from the fixation. But the performer and the producer of sound recordings have the right to get a payment called "single, equitable remunerat"on" which the performer and sound recording producer share between themselves. But the question may arise :how much is the single, equitable remuneration?" "it is easier said than done to tell such amount." :so what's the response?" "time will respond." Article 31 offers a list of the exclusive rights of the broadcaster. So, the broadcasting organization shall have the exclusive right of carry out or authorize: (a) rebroadcasting of its broadcast; i.e. a broadcaster may rebroadcast a given performance after obtaining it from other broadcaster in Ethiopia. In other words, the broadcaster broadcasts the performance after getting the consent of the other broadcaster which first broadcasted the performance in Ethiopia. Therefore, this does not apply to the broadcast of performances by broadcasters outside Ethiopia. Does this seem ridiculous? The second and critical point is that it is illegal to record what the broadcaster broadcasted without the consent of the broadcaster. It is also illegal to reproduce and sell what the broadcaster received from another broadcaster. So, the fixation, reproduction and sale of the broadcast of another broadcaster is prohibited. Now therefore, it could be said, both copyrights and neighboring rights are bundles of rights. Because, article 7 and 26 of the proclamation has enumerated rights and if the neighboring or copyright protectable work is made and if such work is fixed and original, the right owner of that work will automatically be given all the rights provided under those articles. When a given work is made, within it, there are bountiful of rights. The arranger, the composer and the lyrics writer have rights provided under article 7 of the copyright law while the singer, the companions and the instrument players have rights stated under article 26 of neighboring right part and the producer has the rights stated under article 27 of the proclamation.

Exceptions:

The exceptions to the copyright; the limitations part is the part that brings the balance to the relationship. This is what the Americans like to call the

“allowing fair use” regarding exceptions, the law of continental Europe clearly spells out the exceptions and our law also follows that example. But the tradition of the United states is different because, in USA, there are no statutory copyright exceptions or copyright exceptions are judicially curved out as the judges look in to the scope of the statutory claimed right and the allegedly infringing act and form an issue whether the allegedly infringing act is a fair use by fair use they mean, the use by the public of the copyrighted product, and if they find it fair, they wouldn’t deem that act as an act of infringement but as an act of fair use.

Now let’s start with article 9 of the proclamation. The first is called “the backup copy exception”. the prime idea behind this exception is the thinking that the acquirers/purchasers must be entitled to have one more copy for their collection. “but why?” a physical person has the right to reproduce one copy for his personal use if he had purchased or lawfully acquired work. But the phrase “lawfully acquired” is missing in the Ethiopian copyright law. The absence of this phrase in the Ethiopian copyright law is dangerous because, the original intention of the exception under this article was not this. Rather, it was to allow them to have one more copy besides the copy they lawfully acquired. So, it applies to the user. This is because, it is a backup as it may be lost, damaged or stolen, and this is to allow the user to have the reserve for himself. So, this is unlike the rule provided under article 7 of the same proclamation. There still exists exception to this exception, i.e. where the principle under article 7 may not be derogated. And that’s in such cases as a backup for an architecture. since once the building is constructed, it is illogical to build another as a backup. The musical work in the form of notation, because, it is not the nota we enjoy and it would be with bad faith if such is done. The same applies to pictures and data bases. In the case of data bases either you access it freely or upon the payment of the bill and there is no reason to have a backup of a data base. Computer programs are excluded not because the law does not want you to have a backup copy, the law support you otherwise. The reason is merely for it is treated under article 14 of the proclamation. Having a backup in case of softwares is necessary. The first time you have the software on computer, the computer program “asks” you whether you want to run the program, or whether you want to install on your computer, and you have copied it when you installed that program. So, it is certain that the computer program will be copied.