RECAPITULATION & FUTURE CHALLENGES TO COPYRIGHT LAW

(A) RECAPITULATION:

Holding the entire study in retrospect, it becomes necessary to recap the discussion and make predictions based on the preceding chapters as to the direction in which copyright law is likely to go in future. It emerges from the study that the idea of copyright protection only began to emerge with the invention of printing, which made it possible for literary works to be duplicated by mechanical processes instead of being copied by hand. This led to the emergence of a new trade - that of printers and book sellers, in the United Kingdom called Stationers. These entrepreneurs invested considerable sum in the purchase of paper, in buying or building printing presses, and in employment of labour involving an outlay which could only be recouped with a reasonable return over a period of time. In this situation, without any form of protection against competition from the sales of unauthorised copies, the investment in the printing and selling of books was a precarious and speculative venture, and many were ruined. The pressures grew for some form of protection; and this came in the shape of privileges granted by various authorities; in the United Kingdom and in France by the Kings; and in Germany by the Princes of the Various States. These privileges gave the beneficiaries exclusive rights of reproduction and distribution, for limited terms, with remedies available for enforcement by means of fines, seizures, confiscation of infringing copies, and possibly damages. The resulting situation as
revealed in the chapter on Historical development of copyright exhibited many of the basic features of the copyright system as we know it today.

By the end of the 17th century the system of privileges - i.e., the grant of monopoly rights by the Crown - was being more and more criticized and the voices of authors asserting their rights began increasingly to be heard; and this led in England in 1709 to what is acknowledged to be the first copyright statute - the Statute of Anne. The object of this law was expressed in the long title of the Bill as being - for the encouragement of learning and for securing the property of copies of books to the rightful owner thereof. The emphasis of the Act was on the protection against unauthorised copying of published works, and in practice the principal beneficiaries were the publishers/booksellers. The 18th century saw a continuous dispute and litigation over the relationship between the copyright subsisting at common law and copyright under the Statute of Anne. This was finally settled by the House of Lords in the case of Donaldson V. Beckett in 1774 which ruled that at common law the author had the sole right of printing and publishing his books, but that once a book was published the rights in it were exclusively regulated by the statute. Thus common law in unpublished works lasted until the Copyright Act, 1911, which abolished it. The first Indian statute on copyright, Indian Copyright Act, 1914 was a replica of U.K. Act of 1911. In United States, the common law of copyright, in unpublished works continued until 1976 when the current United States Copyright Act was enacted. But one feature of statute of Anne is still retained in the United States i.e., the requirement of registration and deposit.
The study brings out the conceptual differences between the Anglo-United States systems on the one hand and civil law systems on the other. The common law countries including India treat copyright, in effect, as a form of property, capable of being created by an individual or a corporate author, and once created, susceptible to commercial exploitation in the same way as any other form of property, the component rights being exclusively directed to securing enjoyment of the economic potential of the property. In civil law countries the author’s right is also regarded as having "property" characteristics, and the copyright law seeks to protect the economic content of that property to the same extent as does the common law system but, and herein lies the difference, there is an added dimension to author’s rights, i.e., the intellectual or philosophical concept that the work of an author is an expression of his personality which by natural justice protects just as much as the economic potential of the work. These different approaches do have an impact on the two systems in practice.

The first difference is one of terminology. In common law systems, the protection is described as copyright, whereas in civil law systems the expression is authors right. Thus, in common law the right is related to the work or the property, whereas in civil law systems it is related to the individual creator of the work or property.

The next distinction flows, in a sense, as demonstrated in the chapter on Neighbouring Rights, from the first. Under the philosophy of civil law countries, notably France, only an individual can be the author of a work protected by copyright and in the legislation of such countries, although it is recognised that works brought into existence
otherwise than by individual authors - for example, films created by a film company or a sound recording created by a record producer are entitled to protection, that protection is never described - as an author's right. The term used is *neighbouring right*, i.e., a right analogous to an author's right. In common law countries on the other hand, the protection which is given to broadcasts, audio-visual works, sound recordings etc is described as copyright; and the *author* of such work may be - indeed, usually is not an individual but a corporate body.

Another marked difference is the treatment given by the two systems to the ownership of copyright. Consistent with the concept that copyright is an author's right, the laws of civil law countries always vest the copyright in the author and there are no exceptions to this general principle. But in common law countries, while it is normal practice to declare as a general rule that copyright vests initially in the author, it is also usual to qualify that by enumerating a number of special cases where the copyright vests in some person other than the author, unless he has secured by an express contractual term that it should vest in him. Thus, as discussed in chapters on *architectural plans & copyright in Computer software*, both in United Kingdom and United States as well as in India, there are express provisions which stipulate that where an author is employed under a contract of service and produces a work in the course of his employment, the copyright in that work will initially belong to the employer and not to the author unless the latter is able to reserve by contract the copyright to himself. Within the common law systems, as has been demonstrated throughout the historical survey, most of the major controversies dealing with
copyright can be traced ultimately to the basic debate over the nature of copyright itself. For over two hundred years two conflicting theories of copyright have alternated in ascendancy, one claiming that copyright is a natural-law property right of the author by reason of creation (the creative-work theory), the other asserting that copyright exists only as a statutory grant of a limited monopoly by reason of legislation (the statutory-grant theory). This conflict in theories had its genesis in eighteenth century England, when the booksellers first introduced the claim of an author's common-law copyright. The legacy of that period has been the dual and contradictory theoretical bases for copyright that have generated confusion in both the creation and application of copyright rules ever since. Perhaps the most unfortunate result of this duality is that it has obscured the crucial distinction between a work and the copyright for that work, since only the recognition of a single theoretical base can resolve this problem. Only a unified theory of copyright can ensure that the rules relate to each other and to the whole in a consistent way, which is to say that only a unified theory can provide the needed basis for integrity in the law of copyright.

In modern times, the natural-law property theory of copyright is often referred to simply as the author's property theory. But the natural-law theory continues to have an impact on the judicial interpretation of a statute that clearly makes copyright a limited statutory grant. As a general rule, property is a relative term, subject to many and varying limitations and constraints, and this is true also of copyright. But copyright is deemed to be more than a property right: it is a natural-law property, which gives rise to the idea that it is or should be, an
CHAPTER - 12

absolute right (that is, nothing is more one's own than that which an individual creates). Despite the statutory limitations imposed on copyright, then, the author is still generally thought by many to own a newly created work as a natural-law property. It can't, thus, be concluded that the statutory copyright is merely a codification of the common-law copyright with some limitations added. But it is certainly easy to conclude that the statutory copyright is also ultimately grounded in natural law and is, therefore a plenary property right of the author. From this, it follows that non-recognition of copyright or too many limitations on it is an incursion contrary to the dictates of equity. Yet it can be said by way of conclusion that copyright must accommodate the interests of authors, entrepreneurs as well as users. This accommodation as revealed by the present study can be satisfactorily achieved only by legislation, and only if the court interprets that legislation in a manner consistent with the theory upon which it is based.

As to the subject-matter of copyright, the chapter on the Subject matter & Authors rights & other chapters reveal that in the three countries which are under study there is a general agreement that the quality or merit of a work are matters of taste and don't enter into the question of what is a work. Nor is there a prescribed degree of ability or amount of skill and knowledge necessary to create the work, or a measure of resources used to produce it. In these jurisdictions (U.K., U.S.A., and India) it will in each case be 'a question of degree whether the labour or skill or expense involved' is sufficient to warrant a claim of copyright. Unlike for a patent, where novelty is essential, there is no such requirement for copyright. However, it is generally the case that to
be copyright-protected a work must be original. This has to be understood in a very wide sense and does not mean novelty. It means no more than the creator can truthfully say - This is all my own work. Moreover, as chapter on Copyright in Literary, Dramatic & Musical Works shows, the three legal systems as almost all other do recognise copyright in derivative works i.e., translations, collective works etc. There is copyright in the adaptation of a literary work such as a play adopted from a novel or a film script adopted from a play. In the realm of musical works, adaptations are usually called arrangement, e.g., an orchestral work arranged for piano, or conversely a song written with piano accompaniment orchestrated for voice and orchestra. In popular music there are many arrangements of original songs made to suit a particular performer or a particular language version of the text. Each such adaptation or arrangement is a work provided there is a sufficient element of intellectual creation. The intellectual input of the adapter or arranger may be quite modest to be sufficient. In addition to originality, in all common law jurisdictions fixations are crucial. The work has to be fixed in writing or in some other material form to qualify for a copyright. Fixation thus is a condition precedent to the existence of copyright. As noted in this study, this is not so in most civil law jurisdictions, particularly in France and Germany. In these countries a lecture given without a script or a musical performance of a work without a score is protected. In view of this the Berne Convention doesn't take sides and provides that it is a matter for legislation in the countries of the Union to require fixation in some material form. This gives each country the possibility to demand fixation either generally or for one or more
The third important thing in relation to subject-matter of copyright is the issue of publication. Whereas in the law of libel publication as a term of art has a very narrow meaning, i.e. showing or communicating the writing containing the libel to any person other than the person defamed, in copyright the meaning is wider and closer to the general meaning of the word, i.e. making public. The definition of publication has varied considerably both from country to country and from time to time. In the history of copyright, publication meant originally the making public of copies (i.e. reproductions) of works. When films and phonograms were invented, the old definitions as detailed in chapter on Neighbouring Rights began to present new difficulties, which were dealt with in separate ways in different countries.

As to the categories of works which are to be given copyright protection, the study has revealed that some national legislations (U.K., U.S.A., India) contain a definition of the works protected, others do not (e.g. Italy). Broadly speaking, there are two categories of works. The first is the one which includes works named in the Berne Convention, 'literary and artistic works' which includes dramatic, musical and dramatico-musical works. The second is a category of recent types of works cinematograph films, sound recordings, broadcasts. The first category works are protected as copyright in the common law jurisdictions while the term used for the second category in the civil law jurisdictions is neighbouring rights.

The chapter on Subject Matter of Copyright and Authors Rights also leads us to conclude that the major rights under copyright
law include both economic rights and moral rights. While copyright is an idealistic concept, starry-eyed idealism should be discouraged. Copyright is largely about money. But then that does not mean that independent of money, copyright is nothing. The importance of moral rights of the author is clearly demonstrated in the definition of the droit moral in French law: ‘The author shall enjoy the right to respect for his name, his authorship, and his work. This right shall be attached to his person. It shall be perpetual, inalienable and imprescriptible’. Its main objective is to safeguard the author’s reputation, what Shakespeare called that immortal part of myself.

The enumeration of the author’s economic rights as discussed in the chapter on this subject also makes it clear that the economic rights under the International Copyright Conventions and in the national legislations are not uniform though there is substantive similarity in them as far as U.K., U.S.A. and India are concerned. These rights differ in the terminology. Several rights do overlap and the precise scope of each right varies from one country to another. Nevertheless, the reproduction right, the adaptation right, the distribution right, the public performance right, the broadcasting right and cablecasting right are found in nearly every national copyright law.

The issue of applicability of International law in relation to copyright was investigated in the chapter on this subject. Since works of knowledge do not know national boundaries, protection to foreign authors is a crucial issue. Once it was conceded that the creators of new works of many kinds should be protected, such protection becomes at best only partially effective and at worst totally ineffective if it is
confined to national frontiers. The idea that copyright arises from the act of creation of the work and not from any administrative act leads naturally to the idea that once the right exists, it should be valid anywhere. There is no good reason why a creator should be entitled both to moral recognition and to the pecuniary rewards of his works only in his own country and not abroad. As most countries including the three which form subject matter of this study are parties to one of the International Conventions, a forgiven author gets copyright protection under the Convention. If this is not the case, the national law gives him protection.

The treatment of foreigners, apart from conventional protection, varies considerably. In the United Kingdom works are protected if the author at the time of publication is a qualified person (qualified persons are British and Irish nationals or persons domiciled or resident in the U.K.) or if they are first published in the U.K. or an associated territory. The United States having won independence from Britain and wanting to create their own culture became protectionalist. Copyright thus was granted only to American citizens and residents in the U.S. Even a century later when copyright was gradually granted to some foreign authors (country by country) copies of foreign works had to be printed in the U.S. (under the so called ‘manufacturing clause’). The Indian law protects foreign authors in the same manner as its own nations subject to condition of reciprocity and International Conventions.

As to the copyright in literary, dramatic and musical works, the study has found substantial similarity in the laws of the three countries studied here. A large variety of works such as compilations, selections,
abridgments, headnotes of law reports, advertisements, examination papers etc. and protected as 'literary works'. The ambit of dramatic works has also been enlarged though actors' gags are still not covered. On the issue of musical works, the study found that U.S. law is far less ambiguous as compared to U.K. and India as it extends copyright protection to 'accompanying words' as well. The protection to musical works in films is still not adequate and the response of Indian judiciary in this regard is indeed unfortunate.

On the issue of 'copyright in software', the study has found that the legislative activity on copyrightability of software has been quite recent one and the countries studied here are bringing quick amendments in quest of keeping pace with the fast changing computer technology.

The 1994 Amendment brings Indian law in conformity with the Uruguay Round Agreement on Trade-related Intellectual Property Rights (TRIPs) which requires countries to provide authors and their successors in title the right to authorise or to prohibit the commercial rental of originals or copies of their copyright works. However, it is to be noted that the TRIPs agreement is less stringent than the amended Indian law in that it allows a purchaser of a copyrighted work to sell his copy and adds the caveat that, in respect of computer programs, this obligation does not apply to rentals where the program itself is not the essential object of the rental.

A traditional exclusion from infringement allows use of a copyrighted work for research criticism or private use, known as "fair dealing". The 1994 Amendment eliminated the "fair dealing" exclud-
sion with respect to computer programs. This is an unusual step as "fair dealing" has been a long standing exclusion which is part of well settled copyright law.

At the same time, a new exclusion from copyright infringement of computer programs has been added. A lawful possessor of a copy of a computer program may make back up copies purely as a temporary protection against loss, destruction or damage in order to use the computer program for the purposes for which it was supplied. Such acts will not constitute either copyright infringement or violation of moral rights of author.

As to the question of copyright protection to architectural designs, the study has found that the protection granted to architects under the United States law prior to 1976 was highly insufficient as compared to the protection enjoyed by their counterparts in U.K. and India. The protection to architects in India has been further widened by the 1994 Amendment which replaced by the term architectural work of art by work of architecture.

As to the vital question of 'performers rights', the study has revealed that despite recent legislative activity in U.K. and India and despite specific inclusion of performers rights in the latest amendments, the plight of cine actors performing in films still continues due to conferment of copyright only on the film producers. But these amendments do otherwise give sufficient protection to other neighbouring right owners such as Producers of Phonograms and Broadcasting Organisations.
As to the infringement of copyright and types of infringement such as primary and secondary, the study found remarkable similarity in the copyright laws of the countries studied. As to the infringement in respect of computer programs, the study has revealed that Indian copyright law is infect better than its counter part in the United States.

Finally, the study reveals substantial similarity as far as remedies for copyright violations are concerned. The British remedy of Anton Pillor Order is quite effective and should be expressly recognised in Indian Copyright Act. On the question of Criminal remedies, certainly the American law is much more stringent as compared to U.K. and India.

(B) **FUTURE OF COPYRIGHT LAW**:

On the basis of above conclusions, when considering the future of international copyright law, following three things must therefore be always remembered.

First, the concept of copyright is of fairly recent origin. There have been periods of great flowing of western civilization like the Greek City States, the Roman Empire, the European Renaissance, without it, and there are still many countries where that part of the law doesn’t exist or does not effectively operate.

Secondly, copyright deals with the prevention of theft of intellectual property, which is a concept much more difficult to grasp than ordinary theft and far less deeply rooted in the public consciousness of what is right and what is wrong. The process of convincing the general public that copyright infringement is theft is a long and arduous one which has scarcely begun.
Thirdly, the enforcement of international law, even when laid down in international conventions has not proved easy even in such vital spheres of public International law as Health Regulations or Sea or Air law and the Copyright Conventions have been critically described as having no teeth because they lack machinery for enforcement.

After a century of successful development there are now three major forms of challenges to the concept of copyright:

(i) Challenges to International Copyright law;
(ii) Challenges to National Copyright law, and
(iii) Challenges to the effectiveness of Copyright law arising from the speed of technological development.

This study as seen in the preceding chapters mainly examined the issues relating to the impact of technology on the copyright law and therefore the conclusions on such issues and future of copyright as to them will have to be taken together.

(i) **Challenges to International Law** :

(a) **Philosophical Challenges** :

In the 1940s and 1950s it was feared that a challenge to International copyright would come from countries with communist or totalitarian philosophy which might negate the whole concept of intellectual property on the grounds that all creative people should find their reward and fulfillment in dedicating their works to the community, represented by the state, and the state in return should look after their material needs, and that, therefore, individual rights are unnecessary and may even be positively harmful. As countries inclined to those philosophies
became more common it was feared that this view might spread to many of the new countries which were still uncommitted on the subject of Intellectual Property Rights, that the whole concept of copyright as a private and individual right be endangered and that as a consequence the general level of international protection might be seriously reduced. This challenge as seen in this study didn’t materialise. The COMECON countries of Eastern Europe which had fairly sophisticated and successful copyright systems before the second world war maintained their allegiance to copyright. The erstwhile Soviet Union which, like France and the United States before her, had created a Copyright law immediately after the Revolution, developed it within the framework of its social and economic system, revised it in 1973 and eventually ratified the Universal Copyright Convention in 1974. Recent developments in the people’s Republic of China suggest that they are not averse to recognising the concept of copyright in new legislation and, a first step did enter into bilateral agreements though U.S. is still unhappy about its copyright regime and has imposed trade sanctions recently (June 1996) against her.

Socialist legal theory was restated in terms which completely corresponded to the basic principles of International Copyright law. With the end of socialist block, this challenge has almost come to an end.

(b) Needs of Developing Countries:

Numerically, the importance of the developing countries can hardly be exaggerated. Most countries of the world are developing countries. Many of them are not members of any convention and some
of them do not have a copyright law, or if they have one it is inadequate or inadequately applied in practice. In the 1960s it was feared that the developing countries would challenge the concept of international copyright. This challenge was not based so much on ideological grounds as on the practical proposition that the developing countries needed and welcomed the intellectual property of the developed world, but that they were too poor and certainly too short of hard currency, to pay for it in the same way as developed countries did, nor did they have any copyright material which could readily be offered in exchange. The situation has not changed much on this count even today. The implied challenge, therefore, was that if they could not be accommodated they might opt out of the International Copyright System, at least for the time being, and still take what they needed without payment, pleading that that was, after all, what the U.S. had done to some extent in the not too distant past. An attempt to meet this challenge was made at the Stockholm Conference in 1967 and the Paris Revision of Berne convention in 1971.

In 1979 a Joint Consultative Committee was formed by WIPO and UNESCO with the stated objective of facilitating access by developing countries to works protected by copyright. The major task was, and is, to create awareness of copyright generally and of the less obvious but all important fact that a copyright system is of importance to the economic and cultural development of all countries, including developing ones. The Convention establishing WIPO (Stockholm 1967) provides that WIPO ‘shall offer its co-operation to states requesting legal-technical assistance in the field of intellectual property and in the
intervening period WIPO has discharged this obligation by sustained efforts. Thus developing countries can now easily exercise the translation right and reproduction right without incurring liability for copyright infringement or paying royalty in hard currencies.

(ii) **Challenges to National Law**

In the last 30 year as has been observed in this study, there has been a positive response by governments and Parliaments of most leading countries to the need of Copyright law reform to adjust the law to advance technology. New Copyright Acts or major amendments in the United Kingdom in 1956 and 1988, France in 1957 and 1985, India in 1957, 1983 and 1994 and United States in 1976 and 1988 are evidence of this trend.

There are, however, three tendencies which constitute challenges to the development of copyright on the national level: First, consumerism Secondly, the tendency to replace what should be copyright or neighbouring rights by levies which are form of taxation or *sui generis* legislation, Thirdly, difficulties of enforcement.

More accurately described as consumer politics applied to copyright or neighbouring rights, 'consumerism' means that the consumer should have the widest possible access to all copyright material at the lowest possible cost and in many cases have free access. Almost everybody in modern society is a consumer of copyright in several respects: as a reader of books, newspapers or other printed copyright material, as a listener to music, as a viewer of television or as parent of a child at school who needs textbooks, to name only the most common
uses. Thus, put in electoral terms, on most copyright issues the overwhelming majority of voters are on one side and a comparatively very small number of voters, who are copyright owners, are on the other side of the argument. No politician in a democracy can totally ignore the fact that there are no votes in copyright when taking a position on a copyright issue. The counter argument - that without an effective copyright system creative effort would be undermined and the public interest would suffer - is less obvious and will, therefore, have to be reiterated often and in many different forms.

In view of this political situation, it can be concluded that the timing of legislation dealing with new technological phenomenon is essential. The Director General of WIPO has observed that if uncontrolled use of copyright material by means of new technology is allowed to go on for many years, the users will then do everything possible to interpret the alleged 'silence' of the law to mean that the author's exclusive right doesn't exist to this 'new' use and, therefore, their hands are completely free. By the time the discussion reaches legislative bodies or the courts, the users can claim that their free use of works is to be regarded as lawful, that they have acquired the right freely to use the works since their practice has not been sufficiently questioned or challenged.

One of the trends of the last decade as noted in this study has been a certain rapprochement between copyrights and neighbouring rights. Viewed from the common law countries such as U.K., U.S.A. & India to which present study relates, the rights of phonograms producers have for a long time appeared as copyright but with a narrower scope.
Only two or three out of the large bundle of rights of authors are necessary to Neighbouring Rights owners. The phonograms producer as observed in the Neighbouring Rights chapter needs a reproduction right, a distribution right, and a public performance right. The broadcaster needs a reproduction right and possibly a public performance right, the performer similarly needs a recording right, a broadcasting and public performance right and some moral rights. In all cases a shorter term is needed, usually 50 years from publication or broadcasting or fixation instead of 50 years after the death of the author.

Another vital conclusion of the present study is that the fact that the right owner is usually a corporate not a physical person has been no impediment in common law countries which were studied here, whereas to many civil law countries it seemed insuperable. The French legislation of 1985 appears to have been the turning point giving record producers as well as performers extensive neighbouring rights approaching those they have under some common law legislations. In the case of performers who are natural persons the civil law legislations have had fewer difficulties and the courts of the leading civil law countries have long since regarded them as derivative right owners. The legislations of the common law countries on this count have been patchy. However, in some of them, e.g. the United Kingdom, civil rights have been added to the right to bring criminal prosecutions which performers have had for half a century and in U.S.A. the courts have built up a substantial body of case law as discussed in the preceding chapters to protect them in general respects. Nonetheless, particularly in countries where their Trade Unions are strong (e.g. U.S.A. & U.K.),
they have often relied more on Union bargaining power than either copyright or neighbouring rights. Broadcasting organizations with the development of television have become very important copyright owners of both films and phonograms in the common law countries as well as the largest single copyright users in most developed countries. However, this study found that where: s performers rely on trade union strength when they are doubtful about copyright protection, broadcasting organizations tend to rely on public law and regulations for their protection.

When a new right is introduced such as a Public lending right, or an old right has to be resorted such as the reproduction right in the case of ‘reprography’ or ‘hometaping’, the study in hand found that there is a great temptation for governments to take the new right out of the copyright system. In the case of a public lending right this may be done because a limited fund is created from taxpayer’s money as governments do not want borrowers from public libraries to have to pay a royalty and the government wants only nationals to benefit from this fund, which would otherwise be depleted. If a public landing right is introduced as a copyright the International Conventions would apply and give all Convention nationals the right to claim against the fund. In case of ‘home taping’ a levy on recording equipment or on blank tapes can be treated as a royalty to be divided among copyright owners as in Germany. However it can also be treated largely as a tax, as in Sweden where 90 per cent goes to public funds and only 10 percent to the right owners (authors, performance and phonograms producers).
has to be concluded here that such solutions are inconsistent with a free market economy. It amounts to an expropriation of the rights of the copyright owner, as his most fundamental right, the reproduction right, is seriously eroded and the equitable remuneration which is due to him for the copying of his work is taken away from him by the state. Another problem is that many copyright and neighbouring rights, particularly reproduction rights, are becoming increasingly difficult. 'Reprography' and 'home taping', 'down loading' are outstanding examples. It would, however, be wrong to conclude from this that these rights should be abandoned and replaced by what would amount to free use exceptions. When public performance rights in music were first introduced at the beginning of the 20th century, it was argued that because of the multiplicity of rights and a very large number of locations where music is performed in public, the right would be unerforceable. These fears have proved groundless and the performance right has become of very great value to copyright owners without in any way harming the public. Thus different forms of enforcement by collecting societies, blanket licencing and cleaning house systems and only in last resort equitable remuneration and compulsory licence would appear to be correct answers to the problem.

Henry Maine rightly observed that 'social necessities and social opinion are always more or less in advance of the law. We may come indefinitely near to closing the gap between them, but it has a perpetual tendency to reopen. The greater or lesser happiness of a people depends on the degree of promptitude with which the gap is narrowed.' The gap can often be narrowed by the courts. The classic example as repeatedly
noted in this study is the development of the droit d' auteur in France. Two brief copyright laws (1791 and 1793) passed in the wake of the French Revolution were shaped in the course of century and half into one of the most highly developed copyright systems of the world solely by the courts, until the law was eventually codified in 1957. Similarly, it can be concluded that in the United Kingdom, when piracy of phonograms threatened to erode both the recording rights of authors and the reproduction right of producers of phonograms and the ordinary processes were found to be too slow to cope with the new phenomenon, it were British judges who timely intervened and created a procedural remedy which was discussed in the chapter on Remedies for copyright violations i.e. the, Anton Piller Order. The remedy indeed proved to be quite swift and effective and did enable copyright to resort itself in good time. The Indian courts so far have not shown such an activism with regard to copyright laws.

As copyright is in essence an individual property right which benefits a small minority (the creators of copyright material) against a large majority (the users of copyright material), the judges who are irremovable under democratic Constitutions may be in a better position to hold the balance between private and public interest, fairly than members of Parliament who, however enlightened, have to keep an eye on the next election.

(iii) **Technological Challenges**

As indicated in the introduction of this study, the study was mainly designed due to technological challenges which continue to pose new problems for the copyright law.
New technology as can be concluded from present study poses two quite distinct challenges to the copyright law.

In the first place, the rapid pace of technological change has led to the evolution of new forms of creative expression, such as computer programs. The challenge here is whether National laws and International Conventions can show sufficient flexibility to accommodate these new technologies within the existing copyright regime. As seen in the chapter on software protection, the copyright system now appears to have surmounted the challenge of assimilating computer programs within the existing framework of national laws (including the ones which were studied here i.e. U.K., U.S.A. & India) and International Conventions, and computer programs are almost universally recognised as literary works for copyright purposes.

The second challenge to copyright posed by technological development is the proliferation of new uses of existing works. The rapid development of technology has given a considerable impulse to copyright law because of the large number of uses to which a work can be put, thus increasing, the potential rewards for its creators. 'Copyright is the cinderella of the law. Her rich older sisters, Franchises and Patents, long crowded her into the chimney corner. Suddenly the Fairy Godmother, Invention, endowed her with mechanical and electrical devices as magical as the pumpkin coach and the mice footmen. Now she whirls through the mad mazes of a glamorous ball'. These 'mechanical and electrical devices' are many: recording and audio and video tape recording, broadcasting and broadcasting by cable and satellite, photocopying, computerised storage and retrieval systems and misuse of
Internet. The challenge to the copyright lies in the ease with which one or many copies can be made, and in the fact that such copies are being made in private homes or in offices and other non-public places where any control over the reproduction of copyright material is either impossible (at home) or very difficult (in offices etc.). Future researchers on the subject of copyright have to concentrate on this emerging challenge and have to find a viable answer. The solutions of various countries such as royalty on the recording equipment in Germany or royalty on the blank tapes in Austria have not made any major dent.

At present, few computers in which copyright material is stored are interconnected (at least in a developing country like ours), and access to networked computers is limited for the most part to business users. However, with the dramatic growth in the use of personal computers in the home, accompanied by the rapid spread of computer networks not only between businesses but also among individuals, the copyright problems posed by computer use are likely to increase exceptionally. In fact, the latest use of Internet has already posed greatest ever challenge to copyright law. The globe-girdling Internet links 3.2 million computers in over 150 countries.\textsuperscript{12} This network is virtual. That is it doesn't exist in physical form. Highly sophisticated computer software makes computer-to-computer connectivity possible. Apparently seamless, and silently creating a global library is the World Wide Web. In this library are located many many Web sites (or bookshelves of the electronic type on computer). And these bookshelves are crammed with books. Internet jargon calls them \textit{Home Pages}. Each page combines texts, graphics and pictures. Basically, information in the multi-
media format. An Internet user who visits a Web site has freedom for random access. Web users are thus able to see, select, read and copy what may be a copyrighted material. Thus the problem of the nature of 'home-taping' has emerged in a highly dangerous manner and the law as it exists today is unable to cope with it. The U.S. Government has constituted a Committee in March 1996 to examine the issue and recommend amendments in the copyright law to meet the worst challenge posed by technology to it. The Internet's development has indeed totally changed the dissemination of information even to the extent of replacing printed works completely. The day has come when a large number of houses and offices throughout the globe are linked to a computer centre via viewer/printer consoles'. The result is that the supply of one copy of a new work to a central point would make it or selections from it, available to all offices and houses which are linked to the central point. Bearing in mind as discussed in this study that the whole concept of copyright in modern times arose from the invention of the printing press, even its partial replacement by computers amounts to a revolutionary change. It is suggested that in this changed scenario the copyright owners have to exercise their copyright at the input stage and look to the computer disseminator for the royalties in the same way that they have looked towards their publishers in the past. As copyright owner has always been recognised both under International law and under most national laws (including U.K., U.S.A. and India) entitled to his reproduction right, there seems no good reason why he should not be entitled to control copyright through Internet and payment of royalties before his work is put on Internet Web.
Another challenge to copyright law is posed by cable diffusion. The chapter on Neighbouring rights examined this issue at length and it is concluded that because of great number of works involved or the practical difficulties of locating copyright owners, national laws should provide for 'institutionalised collective administration' of the rights. Similarly the national laws should provide for payment of an equitable remuneration for performers and producers of phonograms whose performances or phonograms are used in cable transmission. The necessity for 'institutionalised collective administration' applies to these rights as well. Broadcasting organisations, it is suggested, on the other hand should be given an absolute right to authorise the distribution by cable. This is the equivalent to a reproduction right for broadcasting organisation and must therefore include the right to forbid the distribution by cable. The recent use of 'Direct Broadcasting Satellite where signals are more high powered and receivable by members of the public in their homes after an adaptation of their receiving sets have also raised new challenges to the copyright law. Here when using these satellites the originating broadcasting organisation emits a signal which is directly receivable by the public in their private homes. These 'direct broadcasting satellites' combined with cable transmission have radically changed the pattern of broadcasting and do significantly influence the use of copyright works and make it very difficult for copyright owners to control this new use of their works. The solution, it is suggested, to meet this challenge, is to be found in the contracts. Keeping in view facts such as the size of the territory covered by the broadcast and that of size of the audience, royalties payable by the
emitting broadcasting organisations be determined. The recent example of litigation on the question of televising of Wills World Cup 1996 by the World Tel is a case in point where negotiation alone could pave the way of reasonable settlement of the dispute. The contract law therefore is going to be extensively used.

Thus there is little doubt that the number of consumers of copyright will continue to grow in the field of information and education as well as in the field of entertainment. Both scholastic and vocational education are constantly being extended and as people become better educated they become more eager for more widely accessible information in all fields. As technology in broadcasting develops, more and more programme hours will have to be filled and much of the longer broadcast day and increasing number of broadcast channels will consist of copyright material. The age span of each consumer of copyright is growing as people earn earlier and live longer. Working hours continue to get shorter thus increasing leisure hours (i.e. five day week scheme) which tends to increase copyright consumption. Copyright owners will thus create works for ever-increasing markets which should add to their economic return from such works. The problem of future, therefore, is whether they will be able to control these new markets.

In this situation control of copyright works by individual copyright owners is impossible, but it is suggested that control by collecting societies on behalf of all copyright owners is still possible. Performing rights & music are outstanding examples. Infact the choice is between control by these societies or no control at all and once control of a right
is lost it is very difficult to regain and in the long run the right will atrophy. Now that recording equipment is sufficiently to be owned by individual members of the public and be used in their homes, any control at the stage of making copies becomes impossible and copyright protection can only remain effective if exercised at a much earlier stage. This can to some extent solve the challenge of Internet as well. Thus the purpose of copyright, which is to assure to the owners of copyright material an equitable remuneration for each use of the copyright material they have created, can only be achieved by a reinterpretation of the concept of copyright in the light of these new circumstances. That widened concept must include the restoration of the original and most basic copyright - the reproduction right. It doesn't matter 'whether the rights are directed against a communicator making the work available to the public or against an enterprise producing the equipment making reproduction by the public possible or even against the members of the public themselves. Nothing short of this will assure the effectiveness of copyright protection in the electronic communications of 21st century. But if the collective administration doesn't work as discussed above then the choice remains between a 'statutory licence' and a 'compulsory licence'. The former is a licence under which protected works could be freely used on condition that the user paid a fee, fixed by the law or by a competent authority. The latter is a licence requiring the copyright owner to grant the necessary permission without however depriving him of the right to negotiate the terms of authorisation. Thus authors right to claim an equitable reward for the use of his work is to be protected and limitation imposed in the public interest does not lead
to the unjustified advancement of commercial interests of users. This expresses the basic principle that the remuneration in order to be equitable should be freely negotiated. These negotiations for the equitable remuneration should take place in the form of collective bargaining which in many cases will be between two near monopolies representing right owners and right users, the law should provide for a special tribunal to adjudicate if agreement can't be reached between these parties. Such copyright royalty tribunals already exist in U.K. Germany etc.

If large areas of the use of copyright material remain uncontrolled and therefore not remunerated and copyright owners can not stop this mass of large scale infringement, the whole currency of copyright risks devolution from indifference and common contempt. What is, therefore, needed today is what Professor Cornish calls 'techniques for converting paper rights into revenue generating realities'. These techniques, it is suggested could be of three kinds:

i) maintaining a complete copyright and exercising it by a blanket licensing system administered through a collecting society making collective agreements with large single users or categories of smaller users;

ii) reducing the absolute right to authorise or forbid the use of the protected material to a right of equitable remuneration which will still in most cases be exercised in the same way as those under (i) above.

The precedents for the collective exercise of copyrights, whether they are absolute rights or rights to equitable remuneration, are the
collecting societies set up by the owners of performing rights, most of which in the field of musical copyright have more than half a century of experience of blanket licensing. These licences are granted in advance of the use to organisation which regularly perform copyright material. Such a society relating to music was established in India in 1995 under the leadership of famous musician Naushad Ali and in a year's time royalty worth 60 lakh rupees was collected and distributed amongst the musicians.

(iii) Putting a royalty on equipment which is used by the public for the reproduction of copyright material.

Whatever solution is adopted to solve these problems, there will still remain, as suggested above, a need for a certain amount of supervision of the collecting societies.

Before this study is closed, few specific words as to the Indian experience of copyright law and justice are necessary. How does this study evaluate the Indian experiment? The question is important and adequate knowledge has to be developed to respond to it. First, we need close empirical examination of copyright problems in India. The present work is not the end but only a humble beginning. Many more researches are to be conducted to arrive at plausible conclusions and solutions. Secondly, we need to know more fully the ratio, and the rationale, of copyright litigation settled out-of-court as compared with those fully litigated. The future researches should move in this direction as well. Thirdly, we need some assessment of probable copyright infringements which go unredressed at law for a whole variety of
reasons - ignorance of rights, difficulties of access to courts, the slow
growth of copyright law, associational weaknesses among producers of
different genres of protected works and bureaucratic styles of adminis­
tration of copyright legislation.

Pending such knowledge bases, all one has is the Copyright Act.
statutory amendments in the Act to keep pace with the technological
revolution and slender corpus of decisional law.

On this basis, all one could say in that Indian law as on the statute
book does not sound all that immature yet it has not so far been put to
any real use. What, therefore, is needed is to increase copyright
conciousness as an aspect of the Indian social and cultural development
and justice. Clearly, as a priority task, the obstacles imposed by the
crises of the Indian adjudicatory system, especially enormous delays,
staggering costs and wavering decisional law, have to be redressed and
access to adjudication improved. The present structural disincentives to
the use of protective provisions of copyright legislation have to be
removed. And this can, perhaps, be best done through a network of
easily accessible copyright tribunals throughout the country. Further
the improved working of Copyright Board in this regard is also must
and will go a long way to make copyright protection in India a reality.
The Board should not remain as described painfully by the learned
scholar, Prof. D.C. Pandey\textsuperscript{14}, a forum which is infertile to provide
measures and relief to helpless authors against infringers of copyright.


4. As per the Director General of WIPO (1986) Copyright 333.


8. For instance in the Federal Republic of Germany; German Copyright Law 1965, Section 27

9. German Copyright Law 1965, Section 55.

10. MAINE, HENRY, ANCIENT LAW, at p. 24


