

LIMITATIONS AND EXCEPTIONS TO COPYRIGHT : PRE BERNE SCENARIO

Contents	5.1 Evolution of Limitations to Copyright
	5.2 Conclusion

Evolution of limitations appended to copyright monopoly was also designed to serve some vested and solid social, economic and political aspirations of the contemporary sovereign heads. Consequently it was really interesting that the scope and span of these innate and instinct attributes underwent gradual and enduring changes with the changing aspirations of the sovereign. Comparable to the limitations pinned to the patent monopolies the copyright limitations also varied among the territories depending on their level of economic and political developments. Even though, sometimes the patent and printing privileges were issued under one royal decree or even governed by the same regulation, the limitations affixed to the rights were different and of course was tuned to serve distinct purposes. Thus similar to the patent limitations the copyright limitations also remained the brawny and muscular tool in the armory of sovereign for attainment of the perceived goals. In this chapter an attempt is made to explore the evolution of limitations to copyright focusing on the notion of public interest it is serving especially in the pre-Berne scenario where the countries enjoyed the maximum flexibility.

5.1 Evolution of Limitations to Copyright

Even though the birth of copyright as a legal and technical phenomenon owes to the invention of printing,¹ the philosophical and pragmatic tenets of the concept originated much prior to it. The noble task of knowledge and literature in the personal and social life of individual was recognized even before the classical era. Even Quran, Geeta and Bible the earliest known literary works in human history acknowledges the importance of knowledge and the role of knowledge in the progress of civilization. Thus literature was solely related to religion and knowledge was considered as divine. The individualistic and commercial nature of knowledge was ignored and knowledge was considered as a public good and its noble function of enlightenment and development was acknowledged. This establishes the fact that the first principle of copyright law was always the advancement of learning and progress of science rather than rewarding and remunerating the author.² An exploration into the history of literature, science and education in the ancient, medieval and early modern period also authenticates it.

1 Garnett, K., James, R. J. and Davies, G. (1999) *Copinger and Scone James on Copyright*, 14th edition, Sweet and Maxwell, London, p.32. Before the invention of printing, there was little practical need for legal protection of authors against the copying of their works. To start with, bulk of the population was illiterate and had no use for their books. Moreover the copying of manuscripts was a painstaking and time consuming occupation mainly done by monks and limited to the copying of religious works for religious orders and royal courts of Europe. The possibility of printing multiple copies of books cheaply resulted in a new market for books for a public which had not previously had access to the manuscripts which, in the past, had been available only to the most privileged member of the society.

2 It should be remembered that this religious influence on literature continued even after renaissance and reformation. Even in seventeenth century, we can see the printing privileges in the UK, the US, Germany, and France was solely related to religious teachings.

The concept of nobility and divinity of knowledge continued in the ancient period also.³ Knowledge and literature was considered as public domain goods and as the property of the King and nation and the rulers were privileged to acquire and admire literature and art. Christopher May and Susan K Sell corroborates this by pointing out the instance of Sophists of ancient Greece, who considered their freelance teaching activities and their content free from any form of ownership.⁴ The authors or the holders of knowledge received rich patronage from the rulers⁵ and the King accumulated the knowledge for the good of the nation. Every novel literary and artistic excellence was viewed as an offering to the monarch and as the property of the nation. But the class and caste system reigning in the contemporary society confined the enjoyment and learning to certain privileged section of the society.⁶ However it was not the economic interest that the knowledge holders enjoyed at that time, on the other hand they enjoyed a superior position in the social strata and knowledge was never considered as a commodity for sale in the market. Thus apart from the social stratification, literary and artistic creation was considered as the most resourceful and potent weapon of the sovereign for the larger social and political development and was made available to the subjects for their social, ethical and moral well being. This concern for knowledge, literature and education as instruments of social and individual elevation is acknowledgeable from

3 Very early examples of this literature are: Indian Sruthis, Vedas and epics; Egyptian Book of Dead, Epic of Gilgamesh of Sumer, The New Testament And City Of God in Latin and Roman literature etc. for details see history of literature available at - http://en.wikipedia.org/wiki/History_of_literature

4 May, C. and Sell, S.K. (2005) *Intellectual Property Rights: A Critical History*, Lynne Reinner Publishers, London, p.45.

5 The Mauryan and Gupta dynasties in India are a classic example for this. Their court was adorned with poets, artists and scholars from all fields.

6 Prager, F. (1944) 'A History of Intellectual Property from 1545 to 1789', *J Pat. Off. Soc.*, 26 (6), 711.

the existence of mammoth educational institutions⁷ and colossal libraries⁸ of the ancient period.

In the medieval era also the influence of religion on literature continued as before.⁹ However secular works also began to sprang up.¹⁰ During this period also the romantic authorship was not acknowledged and consequently the need for a safety outlet to the monopoly was hardly felt. Any literary and artistic creativity was solely the property of the nation or the sovereign and apart from the religious and caste or class

7 Nalanda, Takshashila University, Ujjain, & Vikramshila Universities in India is classical example. For a detailed study see: http://en.wikipedia.org/wiki/History_of_education#cite_ref-17 [Accessed on August 2010].

8 The libraries of Ugarit (in modern Syria), c. 1200 BC, Library of Ashurbanipal, 7th century BC, in Nineveh (near modern Mosul, Iraq), The Library of Pergamum at Pergamum (in what is now Turkey), also in the 3rd century BC, , fl. 3rd century BC (c. 295 BC) are good examples for this. Private libraries of Ancient Rome were also considerable: Roman aristocracy saw the library as a point of prestige and many of these were transferred to the monasteries of the medieval years. The great seats of learning in ancient India, namely Takshasila, Nalanda, Vikramshila, Kanchipuram and other universities, also maintained vast libraries of palm leaf manuscripts on various subjects, ranging from theology to astronomy. See for details: http://en.wikipedia.org/w/index.php?title=Great_libraries_of_the_ancient_world&redirect=no [Accessed on August 2010].

9 Theological works were the dominant form of literature typically found in libraries during the Middle Ages. Catholic clerics were the intellectual center of society in the Middle Ages, and it is their literature that was produced in the greatest quantity.

10 Secular literature in this period was not produced in equal quantity as religious literature, but much has survived and we possess today a rich corpus. The subject of "courtly love" became important in the 11th century, especially in the Romance languages (in the French, Spanish, Provençal, Galician-Portuguese and Catalan languages, most notably) and Greek, where the traveling singers—troubadours—made a living from their songs. Political poetry was written also, especially towards the end of this period, and the goliardic form saw use by secular writers as well as clerics. Travel literature was highly popular in the Middle Ages, as fantastic accounts of far-off lands (frequently embellished or entirely false) entertained a society that, in most cases, limited people to the area in which they were born. (But note the importance of pilgrimages, especially to Santiago de Compostela, in medieval times, also witnessed by the prominence of Geoffrey Chaucer's *Canterbury Tales*.) See for details: http://en.wikipedia.org/wiki/Medieval_literature [Accessed on August 2010].

principles there was no restriction on access to information.¹¹ However with the invention of printing press the aristocratic and theological nature of knowledge and literature was crashed out. It was not the result of a deliberate public policy measure of the sovereign to make knowledge easily and affordably access to the public, but an unintended and unforeseen product of the new technology. Any way this period immediately following the invention of printing press was the golden era in the history of book trade from the public interest perspective.¹² The position was not different in France, Britain, Italy or Germany.¹³

In this early hours of printing privileges, the major issue to be addressed was the religious adulteration faced by clergy, political destabilization on the King and finally the complex economic insecurity caused to the printers and publishers.¹⁴ So deliberately the printing

11 See: Kostylo, J. (2008) 'Commentary on Johannes of Speyer's Venetian monopoly (1469)', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

12 Eisenstein, E. (1979) *The Printing Press as an Agent of Change: Communications and Cultural Transformation in Early Modern Europe*, Cambridge University Press, London; H. J. Chaytor, (1945) *From Script to Print: an Introduction to Medieval Literature*, Cambridge University Press, London, pp.115-37; Febvre, L. and Martin, H.J.(1976) *The Coming of the Book: The Impact of printing, 1450-1800*, New Left Books, London. These books are available at books.google.com.

13 For a detailed study on history of copyright, see: www.copyrighthistory.org. [Accessed on June 2010]

14 See: Kostylo, J. (2008) 'Commentary on Johannes of Speyer's Venetian monopoly (1469)', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].; Kawohl, F. (2008) 'Commentary on the privilege granted by the Bishop of Würzburg (1479)', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010] and Deazley, R. (2008) 'Commentary on Henrician Proclamation 1538', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010]; Rideau, F. (2008) 'Commentary on Eloy d'Amerval's privilege (1507)', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [online]. [Accessed on June 2010]; Kawohl, F. (2008) 'Commentary on the privilege granted by the Bishop of

privileges came with sharp tools to address these issues. These tools were the primary instances of intrinsic mechanisms designed by copyright law to achieve the goals of the system. Though these mechanisms remained much primordial, it laid the platform and pedestal for the future refined set of limitations and exceptions within the copyright system.

The first known printing privilege in history was the privilege granted to Johannes of Speyer's¹⁵ issued by the Italian government in 1469. It was an exclusive right to print the epistles of Cicero and Pliny for a period of five years within the territory of Venice. Thus even in the very first known instance of a privilege, the monopoly was limited both in time and geographical extent. It is really questionable that at the time of imposing this limited monopoly the authorities were aware of the potential impact of an uncontrolled monopoly. Answer to the question is in affirmative. The uncontrolled printing era which immediately preceded the establishment of print technology had logistically and rationally established the adverse impacts of the free trade regime. Since then onwards this limitation on duration and extent remained a typical feature of the copyright system. The privilege granted by the Imperial

Würzburg (1479)', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

15 On 18 September 1469, a German inventor master Johannes of Speyer began printing books in Venice, and received a privilege to publish the letters of Tullio [Cicero], and Pliny", Marino Sanudo recorded in his *Vite dei dogi*. It seems that the diligent Venetian diarist, leafing through the acts of the register of the Venetian Collegio, thought it important to bring to the attention of his readers the record of a five year monopoly awarded to a German immigrant from Mainz, Johannes of Spyer (d. 1469), for printing in Venice. See Kostylo, J. (2008) 'Commentary on Johannes of Speyer's Venetian monopoly (1469)', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

Senate of Germany to Sodalitas Celtica,¹⁶ Prince-Bishop of Wurzburg,¹⁷ Arnold Schlick,¹⁸ Albrecht Durer¹⁹ and Eucharius Rösslin²⁰ also displayed the same limitations. All those privileges were for a period of ten years and their application were limited to certain definite areas even within the territory of Germany.

However in contemporary France the situation was different. There the printing privileges were granted as an economic right considering the inventive effort of the author.²¹ The privileges were exercised without any control till the French Censorship Act of 1547.²² Since then they established a regime of pre-publication censorship and permissions. The subsequent privileges therefore resembled Italian or German model with

16 Imperial Senate privilege to the Sodalitas Celtica (1501), *Primary Sources on Copyright* (1450-1900), eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

17 Privilege of the Prince-Bishop of Würzburg (1479), *Primary Sources on Copyright* (1450-1900), eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

18 Imperial Privilege for Arnolt Schlick (1511), *Primary Sources on Copyright* (1450-1900), eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org. [Accessed on June 2010]

19 Imperial Privilege for Albrecht Dürer (1511), *Primary Sources on Copyright* (1450-1900), eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org. [Accessed on June 2010]

20 Imperial privilege for Eucharius Rösslin (1513), *Primary Sources on Copyright* (1450-1900), eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010]

21 Eloy d'Amerval's privilege (1507), *Primary Sources on Copyright* (1450-1900), eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org. [Accessed on June 2010]

22 Rideau, F. (2008) 'Commentary on Galliot Du Pré's privilege (1515)', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on 7 June 2010].

limitations on duration and extent in addition to the censorships and imperial sanctions.²³

The British history of printing privileges for a period of two centuries preceding the enactment of statute of Anne should be considered as the stage setter of the modern copyright system. All the fundamental principles of copyright law got a concrete footing here. During this period we can see a continuous attempt of authorities to balance and rationalize the conflicting and ever changing perceptions of public interest, with that of individualistic and commercial interests of the copyright system. Apart from the limitations on duration and extent, the requirement of library deposit and compulsory licensing the golden principles of limitation to copyright for ensuring access and flow of information got a solid footing in this adhoc privilege system. Within a short span after the establishment of the printers a strong economic, religious and political control was established on printing privileges. *Magna Carta* may have guaranteed freedom of trade to all merchants within the realm, but it was nevertheless accepted that, so long as the Crown was acting in the general public good, then it had the power, as part of the prerogative, to grant privileges promoting economic and industrial development by restricting competition. By the Trade Acts of 1484, 1513 and 1531 a strong economic control was exercised on the books by regulating the nature of the books to be printed and quantity to be printed.²⁴ By the *Act of Supremacy* which established Henry's authority as Head of the Church of England, as well as by the *Treason*

23 Rideau, F. (2010) 'Commentary on the French Censorship Act of 1547', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

24 Deazley, R. (2008) 'Commentary on early Tudor printing privileges 1553', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

Act²⁵ a strong religious and political control was exercised on the contents of printing. So the concepts of free flow of information or access to knowledge and even the notions of creativity was absent at this point in time. The restrictions to the monopoly were addressed to the contemporarily social and political crisis. Thus even though the privileges were regulated it was not for the sake of public interest but for the achievement of certain vested interest of the rulers. However it should be emphasized that individual monopoly never remained uncontrolled and was tuned to the larger interests of the society inspite of the democratic or representative nature of those interests.

This disgraceful status of knowledge and literature continued till the expiry of the Licensing Act in 1662.²⁶ Printing was always under the

25 It provided that anyone who might "slanderosly and maliciously publish and pronounce, by express writing or words, that the King our Sovereign Lord should be Heretick, Schismatick, Tyrant, Infidel, or Usurper of the Crown" was to be adjudged a traitor, guilty of high treason, and subject to pain of death". See for details: Deazley, R. (2008) 'Commentary on early Tudor printing privileges 1553', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online] Available at www.copyrighthistory.org [Accessed on June 2010].

26 When Henry VIII (1491-1547) began to grant privileges concerning the right to print and publish certain types of books, he did so under the aegis of the royal prerogative, through which he also sought to regulate and administer national economic policy and trade. In 1557 Queen Mary granted a Royal Charter providing the Company of Stationers with corporate legal status within the City of London, and conferring on them exclusive control over printing within England. The grant of the Charter by Mary is often understood as the point at which the monarchy established an effective regulatory institution to control and censure the press, in the guise of the Stationers' Company, in exchange for an absolute monopoly over the production of printed works. During Elizabeth's (1533-1603) reign the consistent use of these privileges took on the shape of strategic national policy, while the privileges themselves took on the character of monopolistic grants. During Elizabeth's reign, parliament passed no less than eleven statutes concerning treason and sedition, statutes that included committing such offences in print. In 1581, for example, parliament mandated the death penalty for anyone guilty of devising, writing, printing, or setting forth any work "containing any false, seditious, and slanderous matter to the defamation of the Queens' Majesty, that now is, or to the incouraging, stirring or moving of any insurrection or rebellion". In addition to these treason statutes, Elizabeth also issued eleven separate royal proclamations concerning works she considered to be seditious, heretical or libellous in some regard; the majority of texts actually censored in

control of the Crown, and it remained a fact that the published books continued to be religious works.²⁷ Thus even though the Statute of Monopolies was enacted in 1624 to cure the anomalies and incongruities of the privilege system, the statute exempted printing privileges from its ambit.²⁸ Certain privileges were subject to the grant to University of London to print books for its purposes.²⁹ It refers to a concern of public interest for the advancement of education. But how far this notion of public interest was practically enforced in the context of social, economic and political turmoil existed at that time was really a doubtful matter. But in this barbarous era of knowledge and literature, this

Elizabethan England were specifically addressed by way of these royal proclamations. The very multiplicity of both the treason statutes and these various royal proclamations serves to underline the point as to the nature of censorship throughout the latter half of the sixteenth century. Namely, that despite the existence of a regulatory institution in the guise of the Stationers' Company, the censoring of printed texts was essentially an *ad hoc* and *reactive* phenomenon, and one that was by and large managed outside of the company itself. For details see: Deazley, R. (2008) 'Commentary on the Stationers' Royal Charter 1557', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010]; Deazley, R. (2008) 'Commentary on Star Chamber Decree 1566', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010]; Deazley, R. (2008) 'Commentary on Star Chamber Decree 1586', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

27 Deazley, R. (2008) 'Commentary on the Elizabethan Injunctions 1559', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on July 2010]

28 Deazley, R. (2008) 'Commentary on the Statute of Monopolies 1624', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org. [Accessed on July 2010]. The 1624 Act included a proviso preserving any existing or future grants "concerning printing"; in relation to such grants it was to be "as if this act had never been had nor made Just as patents "concerning the digging, making or compounding of saltpetre or gunpowder, or the casting or making of ordnance, or shot for ordnance" were exempt from the provisions of the legislation so as not to interfere with the manner in which the Crown managed the defence of the realm, so too the security of the state was to be secure against ideological attack in the guise of critical political speculation and commentary in print.

29 In the grants from Henry VIII (1491-1547) this condition was common.

concern and recognition for education and spread of information – the noblest objectives of the copyright system are really commendable and highly regarded. This also shows that just as in the modern era, the universities acted as the centre of knowledge and they usually might have demanded for copyrighted works the store house of knowledge, for education and spread of learning.

With the lapse of the Licensing Act, an embryonic independent fourth estate began to spring up.³⁰ From the political perspective the glorious revolution and from a philosophical angle the Lockean teachings contributed to this development. Adding fuel to the fire, the situation was made worse by the hike in price of books, cheap quality of printed materials, deteriorating standards of reprints with complete mistakes,³¹ the theological nature of knowledge,³² and above all the

30 As to why the Commons decided to let the Act lapse, much of the substance of its attitude to the legislation in early 1695 had its genesis in the life-long friendship that existed between Edward Clarke and the philosopher John Locke (1632-1704). Locke complained about the monopoly which the stationers exercised over the "ancient Latin authors", the poor quality and high cost of their publications, and the deleterious impact this was having upon the work of scholars. Much of his criticism was picked up and expanded in a highly critical commentary on the 1662 Act and its impact on the printing trade in England which he wrote in 1694. In this commentary Locke did make reference to the importance of securing the "liberty to print"; however, as with the earlier correspondence with Clarke, most of his vitriol was reserved for the "lazy, ignorant Company of Stationers", those "dull wretches" who abused the registration process for their own gain, and whose "monopoly of all the Clasick Authers" resulted in the production of books which were "scandalously ill printed both for letter paper and correctness", for which they charged "excessive rates". For details see: Deazley, R. (2008) 'Commentary on the Licensing Act 1662', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org; [Accessed on 5 June 2010].

31 See : "Reasons Humbly Offer'd to the Consideration of the Honourable House of Commons (1709)", *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

32 See: "More Reasons Humbly Offered for the Bill for the Encouragement of Learning (1709)", *Primary Sources on Copyright (1450-1900)*, eds L. Bently &

neglect of labor and creativity of the genuine authors on one hand and the authentic need of access to knowledge for future creativity and development of learning on the other edge culminated in wide public outcry. Thus the Statute of Anne was enacted with the terrific task of balancing the competing and at the same time converging individual interest and private interest. It was the epitome legislation in copyright history which legalized the author's rights and user's right in a uniform and consistent manner.

The Statute of Anne, 1709 considered as the progenitor of all modern copyright statutes started itself with the stated overarching objective of encouragement of learning. A radical and sweeping change in the objective of the copyright system began to manifest from this point in time. This is reflected in the title describing it as “An Act for the Encouragement of Learning, by vesting the Copies of Printed Book in the Authors or purchasers of such Copies, during the Times therein mentioned”.³³ In order to achieve the stated goal of encouragement of learning the statute has to address two issues: first the injury caused by infringers who pirated the books and secondly the anticompetitive monopolies caused by printers and publishers. The statute addresses the first of these problems in its introductory lines itself.³⁴ To prevent piracy

M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010]

33 For Statute of Anne visit: http://en.wikipedia.org/wiki/Statute_of_Anne#cite_note-Rimmer-3 [Accessed on June 2010].

34 Section 1 of Statute of Anne: “Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting and publishing, or causing to be printed, reprinted and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families or preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books; may it please your majesty, that it may be enacted”. Available at http://avalon.law.yale.edu/18th_century/anne_1710.asp [Accessed on June 2010].

the statute took a philosophical shift from the prior stationers copyright to the statutory authors copyright by vesting a fourteen or twenty one year of absolute economic monopoly on the author or the publisher.³⁵ The second problem that of bookseller's monopoly, was addressed by the statute in several ways. First, it opened up ownership and registration of copyrights to non members of the company.³⁶ Second, it required access to the Company's register book by any person with a legitimate purpose.³⁷ Third, it allowed challenge to unreasonably high prices for

35 Section 2 of Statute of Anne: "That from and after the tenth day of April, one thousand seven hundred and ten, the author of any book or books already printed, who hath not transferred to any other the copy or copies of such book or books, share or shares thereof, or the bookseller or booksellers, printer or printers, or other person or persons, who hath or have purchased or acquired the copy or copies of any book or books, in order to print or reprint the same, shall have the sole right and liberty of printing such book and books for the term of one and twenty years, to commence from the said tenth day of April, and no longer; and That the author of any book or books already composed, and not printed and published, or that shall hereafter be composed, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years, to commence from the day of the first publishing the same, and no longer;"

36 Para 2 to Section 2 of Statute of Anne: "That nothing in this act contained shall be construed to extend to subject any bookseller, printer, or other person whatsoever, to the forfeitures or penalties therein mentioned, for or by reason of the printing or reprinting of any book or books without such consent, as aforesaid, unless the title to the copy of such book or books hereafter published shall, before such publication, be entered in the register book of the company of stationers, in such manner as hath been usual, which register book shall at all times be kept at the hall of the said company, and unless such consent of the proprietor or proprietors be in like manner entered as aforesaid, for every of which several entries, six pence shall be paid, and no more; which said register book may, at all seasonable and convenient time, be resorted to, and inspected by any bookseller, printer, or other person, for the purposes before-mentioned, without any fee or reward; and the clerk of the said company of stationers shall, when and as often as thereunto required, give a certificate under his hand of such entry or entries, and for every such certificate may take a fee not exceeding six pence."

37 Section IV of Statute of Anne: "Provided nevertheless, and it is hereby further enacted by the authority aforesaid, That if any bookseller or booksellers, printer or printers, shall, after the said five and twentieth day of March, one thousand seven hundred and ten, set a price upon, or sell, or expose to sale, any book or books at such a price or rate as shall be conceived by any person or persons to be too high and unreasonable; it shall and may be lawful for any person or persons, to make complaint thereof.....".

books and permitted specified authorities to reform or redress the price according to the best of their judgment.³⁸ Fourth, it required the deposit of nine copies of each work for use in specified national libraries.³⁹ Fifth, it expressly stated that the statute did not prohibit the importation of books in Greek, Latin, or other foreign languages published abroad.⁴⁰ The statute also attacked the monopolies by limiting the term of copyrights to twenty one and fourteen.⁴¹ The statute intended ultimately to end existing perpetual copyrights and to establish a rich public domain. Thus the Statute of Anne created both copyright *proprement dit*

38 Authorities under the statute include “the lord chancellor, or lord keeper of the great seal of Great Britain for the time being, the lord bishop of London for the time being, the lord chief justice of the court of Queen's Bench, the lord chief justice of the court of Common Pleas, the lord chief baron of the court of Exchequer for the time being, the vice chancellors of the two universities for the time being, in that part of Great Britain called England; the lord president of the sessions for the time being, the lord chief justice general for the time being, the lord chief baron of the Exchequer for the time being and the rector of the college of Edinburgh for the time being, in that part of Great Britain called Scotland;”. See Section IV of Statute of Anne.

39 The list of libraries specified under the statute are: “the royal library of London, the libraries of the universities of Oxford and Cambridge, the libraries of the four universities in Scotland, the library of Sion College in London, and the library commonly called the library belonging to the faculty of advocates at Edinburgh”. See Section V of Statute of Anne.

40 “That nothing in this act contained, do extend, or shall be construed to extend to prohibit the importation, vending, or selling of any books in Greek, Latin, or any other foreign language printed beyond the seas; any thing in this act contained to the contrary notwithstanding” - Section 7 of the Statute of Anne.

41 Section 2 of Statute of Anne: “That from and after the tenth day of April, one thousand seven hundred and ten, the author of any book or books already printed, who hath not transferred to any other the copy or copies of such book or books, share or shares thereof, or the bookseller or booksellers, printer or printers, or other person or persons, who hath or have purchased or acquired the copy or copies of any book or books, in order to print or reprint the same, shall have the sole right and liberty of printing such book and books for the term of one and twenty years, to commence from the said tenth day of April, and no longer; and That the author of any book or books already composed, and not printed and published, or that shall hereafter be composed, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years, to commence from the day of the first publishing the same, and no longer”.

(that is exclusive rights arising out of the creations of authors rather than compensating or encouraging printers' investments) and the concomitant public domain.⁴²

In its eagerness to reward authors for stimulating creativity, the statute declared any 'use' of the copyrighted works without the 'consent' of the author during the assured monopolistic period as an offence subject to fine and forfeiture.⁴³ It was quite perplexing and at the same time confusing that while the statute clarified the concept of 'consent' in objective and subjective standards making the position of the right holder more safe and secure, it left extensive ambiguity on the concept of 'use'. This left much confusion as to the nature and ambit of permissible and non-permissible uses. Thus, when in legal history the author's right got

42 For a detailed analysis of the concept of public domain see: D, Lang. (1981), 'Recognizing the Public Domain', *Law & Contemp. Probs.* 44(2),147 and of J, Litman. (1990). 'The Public Domain', *Emory L.J.*, 39(7), 965. See, e.g., Tyler T, Ochoa. (2002) 'Origins and Meanings of the Public Domain', *U. Dayton L. Rev.*, 28(2), 215; J,Boyle. (2003) 'The Second Enclosure Movement and the Construction of the Public Domain', *Law & Contemp. Probs.* 66(1), 68; M, Rose. (2003) 'Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain', *Law & Contemp. Probs.*, 66(1), 75; P, Samuelson. (2003) 'Mapping the Digital Public Domain: Threats and Opportunities', *Law & Contemp. Probs.*, 66(1), 147 and Y, Benkler. (1999) 'Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain', *N.Y.U L. Rev.*, 74(3), 354, 361-62

43 Section 2 of Statute of Anne: "That if any other bookseller, printer or other person whatsoever, from and after the tenth day of April, one thousand seven hundred and ten, within the times granted and limited by this act, as aforesaid, shall print, reprint, or import, or cause to be printed, reprinted, or imported, any such book or books, without the consent of the proprietor or proprietors thereof first had and obtained in writing, signed in the presence of two or more credible witnesses; or knowing the same to be so printed or reprinted, without the consent of the proprietors, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, any such book or books, without such consent first had and obtained, as aforesaid: then such offender or offenders shall forfeit such book or books, and all and every sheet or sheets, being part of such book or books, to the proprietor or proprietors of the copy thereof, who shall forthwith damask, and make waste paper of them; and further, That every such offender or offenders shall forfeit one penny for every sheet"

an ingenuous recognition, the users were confused as to the nature, scope and extent of their rights. In spite of the stated objective of spread of knowledge and information, the statute failed to make a comprehensible set of user rights to make this protected knowledge available to public for progress and development. This neglect of user rights might never be considered as a deliberate parliamentary attempt.

On the other hand it should be born in mind that, the statute was successful in addressing the public policy issues of the scenario immediately previous to it.⁴⁴ Further the statute begins itself by declaring the objective as advancement of learning and we can see that it envisages only a very limited monopoly and put controls wherever possible. The price control mechanisms, deposit requirements, short duration of monopoly etc., sounds like a well baked policy rather than a half baked one. Apart from all this, we can see that while it penalizes unauthorized uses the statute is very specific that such use is a commercial one.⁴⁵ So all noncommercial and innocent uses were outside the scope of infringement. It was when infringements were looked upon and when the author became powerful to exercise his rights there crop up the need for breathing space to the public.⁴⁶ Thus a public consciousness and

44 See, Deazley, R. (2008) 'Commentary on the *Statute of Anne 1710*', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

45 Section 2 of Statute of Anne: ".....without the consent of the proprietors, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, any such book or books, without such consent first had and obtained, as aforesaid....."

46 This consciousness of rights by authors was manifested in the untold story of *Tonson v Baker* [C9/371/41 (Ch. 1710)], the first lawsuit brought under the statute filed in the Court of Chancery three months after the statute went into effect. *Tonson* pitted the most famous publisher of the day, Jacob Tonson Sr., a strong proponent of copyright and the Statute of Anne, against a gang of notorious book pirates led by John Baker, a publisher known at the time for dealing in books (many of them dangerous) on behalf of outspoken but anonymous authors, including for his most famous client Daniel Defoe. The dispute centered around

apprehension for user right began to jack up the moment law recognised the author's right. This conflict between the author and user, immediately followed after the Statute clearly established that before the recognition of author's right by the legal system the users and public were having an uncontrolled and liberal use of literature and knowledge. However courts were flooded with a series of cases relating to the determination of rights of both authors and users and in this conflict the judiciary was successful in upholding and safeguarding the public interest values. A robust copyright regime rationally balancing the competing interests began to open out.

Prior to the enactment of the statute, abridgments and translations were the most common permissible free uses carried outside the purview of copyright infringement. But once the authors were put in a privileged position by the statute, they began to bargain for all related rights and consequently confusion aroused on the legality of the free uses. In spite of the dilemma created in the beginning the response of the courts clarified that they were aware of the need for a vigorous and strapping public domain. *Burnet v Chetwood* (1721) reported to be the first case before the court on the interpretation of Statute of Anne was on the question of translation.⁴⁷ Restraining the translation of a Latin work to

the right to print the trial proceedings of Henry Sacheverell, Doctor of Divinity, who had been impeached by the House of Commons and tried in the House of Lords for high crimes and misdemeanors. Tonson received the exclusive right to print the trial from the Lords in March 1710, and registered his work pursuant to the statute. But one month after Tonson published his account, Baker published his own book on the whole affair. Baker's edition copied the trial portions directly from Tonson's. The suit was over soon after it started and never led to a decree or judgment.

47 This case concerned an English edition of Dr Thomas Burnet's (c.1635-1715) Latin treatise *Archaeologia Philosophica*.

English, the court tried to retain the hegemony of upper class on Latin.⁴⁸ Unfortunately in this case the court was carried away by the censorship ideal of state and theosophical ideology and failed to appreciate the cherished goal of the statute in advancement of learning.

But very soon the court showed its eagerness to maintain the public domain for ensuring access to knowledge and spread of learning by laying the foundation of modern fair use doctrine. It was Lord Hardwicke in *Gyles v Wilcox*⁴⁹ introduced the concept of fair abridgment and laid the foundation of the broader fair use doctrine through which courts carved out a series of user rights in the subsequent era. Apart from laying the foundation of modern fair use doctrine, Lord Hardwicke made a tremendous innovation in copyright infringement suits by introducing the scientific test of comparison and filtration, which remains a sound test even in the digital millennium to identify the infringements. In addition to that, he breathed a new life into copyright suits by interpreting it in the context of the very stated objectives of the copyright envisaged by the Statute of Anne. Lord Chancellor began by noting that the *Statute of*

48 Lord Chancellor Macclesfield (1667-1732) was sympathetic to the argument that a translation of a work was not an infringement within the terms of the 1710 Act; however, he continued that the book contained "strange notions" which should not be made available in the "vulgar" tongue (that is, in English). Rather, he considered it should remain in Latin only "in which language it could not do much hurt, the learned being better able to judge" the work. Asserting that the court had "a superintendency over all books, and might in a summary way restrain the printing or publishing any that contained reflections on religion or morality", he granted the plaintiff his injunction.[4]

49 *Gyles v Wilcox, Barrow, and Nutt* (1741) 2 Atk. 141. In *Gyles* the plaintiffs complained about an abridgement of Sir Matthew Hale's *Pleas of the Crown*, in which they alleged the defendants, Wilcox and Barlow, had transcribed "the said Treatise or the greatest part thereof in the very words thereof" into a Book under the title of a *Treatise of Modern Crown Law*.⁴⁹ Counsel for Wilcox denied that the second work had been transcribed from the former in the straightforward manner in which the plaintiffs suggested. Rather, he set out that "several entire chapters" of the original work had been deliberately omitted, while "several chapters of different material not to be found" in the original had been included within the defendants' book.

Anne was "an Act made for the Encouragement of Learning, and is useful to that end. This shows that the Act is for the public Benefit and Advantage, and therefore the Act is not to be construed strictly, but according to the intention of the Legislature".⁵⁰ Considering the words of the statute "any such Book or Books", he proffered that the relevant question has and should always be "whether the second book has always been the same Book with the former".⁵¹ If it is a mere colorable imitation of the former it will be definitely within the meaning of the statute and will never be considered as fair abridgment.⁵² "Whether the second Book is the same as the former", Lord Hardwicke continued, "Is a Matter of Fact, and a Fact of difficulty to be determined."⁵³ In this case the court referred that task to a Master of the Court, assisted by "two Persons skilled in the Profession of Law."⁵⁴ This scientific and rational attitude of the court at such an infant stage of legal evolution was really momentous and noteworthy.

Thus, a balance had struck between protecting the author who as a result of his own efforts, had produced something of use to the learned world, and the genuine abridger who through his own invention, learning, and judgment very often produced a work that was similarly extremely useful. The fair use doctrine developed in this case was a very broad one without appreciating the subjective and objective standards of copyright infringement. It was solely based on the objectives enshrined

50 (1741) 3 Atk 269.

51 *Gyles v Wilcox* (Atkyn's Reports) (1741), *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer www.copyrighthistory.org at p.2. [Accessed on 15 June 2010].

52 *Gyles v Wilcox* (Atkyn's Reports) (1741), *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer www.copyrighthistory.org at p.2. [Accessed on 15 June 2010].

53 (1741) 3 Atk 270.

54 (1741) 3 Atk 271.

under the Statute of Anne in advancement of learning and progress of science. Fairness of the use was determined by comparing the works and identifying the labor and effort of the author and abridger. The yard stick of the fairness of use and originality of a new work were in a muddled up form. Similarly inspite of the fact that the statute made a clear demarcation between commercial and non-commercial uses, judiciary was not concerned with the nature and purpose of use but solely with the quality and quantity of abridgement. However the decision gave a solid footing to the concept of keeping certain innocent uses outside the purview of copyright infringement for advancement of learning and progress of science. It was through this leeway created by the judiciary that the modern legal system framed a series of free user rights in the nineteenth and twentieth century.

Even before the landmark pronouncement in *Gyles v Wilcox*, in *Austen v Cave* (1739)⁵⁵ the court on the issue of an abridgment of an original work had accepted the pleading of the defendant and opined:

"[T]he design of an abridgement is, to benefit mankind by facilitating the attainment of knowledge, and by contracting arguments, relations, or descriptions, into a narrow compass; to convey instruction is the easiest method, without fatiguing the attention, burdening the memory, or impairing the health of the student ... By this method the original author becomes, perhaps, of less value, and the proprietor's profits are diminished; but these

55 In this case the proprietors of Dr Joseph Trapp's (1679-1747) book, *The Nature, Folly, Sin and Danger of Being Righteous Over Much*, complained that one Cave, under the pretence and title of printing an extract of the work, was in fact printing the whole of their work, by installment, in his *Gentleman's Magazine*.

inconveniences give way to the advantage received by mankind from the easier propagation of knowledge..."⁵⁶

In short, the right to abridge a work was a liberty to be enjoyed for the same reasons as writing itself - "for the discovery and propagation of truth."⁵⁷ Even though the court was pleased with these arguments of the defendants the case went without a final decree.

The doctrine in *Gyles* was reaffirmed a number of times throughout the eighteenth century,⁵⁸ and was extended and developed in the early nineteenth century into a more general doctrine of "fair use". In *Cary v Kearsley*,⁵⁹ for example, Lord Ellenborough observed thus:

"A man may fairly adopt part of the work of another: he may so make use of another's labours for the promotion of science, and the benefit of the public: but having done so, the question will be, Was the matter so taken used fairly with that view, and without what I may term *animus furandi*?" In *Wilkins v Aikin*, Lord Eldon accepted the principle of "fair quotation" albeit subject to the caveat that "a man cannot under the pretence of quotation, publish either the whole or part of another's work."⁶⁰

56 Deazley, R. (2008) 'Commentary on *Gyles v Wilcox* (1741)', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer www.copyrighthistory.org [Accessed on 5 June 2010].

57 Deazley, R. (2008) 'Commentary on *Gyles v Wilcox* (1741)', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer www.copyrighthistory.org [Accessed on 5 June 2010].

58 See for example: *Tonson v Walkr* (1752) 3 Swans 672; *Dodsley v Kinnersley* (1752) 3 Swans 672; *Hawkesworth v Newbery* (1774) Lofft 775.

59 *Cary v Kearsley* (1804) 4 Esp. 168, 170.

60 *Wilkins v Aikin* (1810) 17 Ves. Jun. 422, 424.

Similarly in *Whittingham v Wooler*⁶¹ the use of extracts to "serve as the foundation for" a critical review was not considered to be a transgression against the legislation. Thirty years later, in *Campbell v Scott*,⁶² Shadwell VC commented that "if a critical note had been appended to a series of poems in an edited collection by way of illustration, or to show when the author had borrowed an idea, or what idea he had communicated to others" such use of another's work would be "fair criticism."⁶³ Thus in course of time a list of permissible uses like abridgments, quotations, and criticisms got judicial recognition and were absorbed into the Copyright Act of 1911.⁶⁴

Apart from the development of new user rights, over the period the judiciary also had developed some basic principles of fair use. Firstly it allowed the defence of fair use in certain privileged cases like criticisms, quotations, abridgments etc., which best addresses public interest and not for all uses. Secondly, though in the eighteenth century economic detriments and prejudices to the owner was least bothered, from nineteenth century onwards it was taken care of and defence of fair use was not allowed when it prejudicially affects the author.⁶⁵ Finally in

61 *Whittingham v Wooler* (1817) 2 Swanst. 428, 430; see also *Mawman v Tegg* (1826) 2 Russ. 385 in which Lord Eldon observed: "Quotation, for instance, is necessary for the purpose of reviewing; and quotation for such a purpose is not to have the appellation of piracy affixed to it; but quotation may be carried to the extent of manifesting piratical intention".

62 *Campbell v Scott* (1842) 6 Jur. 186

63 See also *Martin v Wright* (1833) 6 Simons' 296, in which the Vice Chancellor commented that "any person may copy and publish the whole of a Literary Composition, provided he writes Notes upon it, so as to present it to the Public, connected with matter of his own".

64 These included "fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary"; Copyright Act, 1911, s.2(1)(i).

65 *Wilkins v Aikin* (1810) 17 Ves. Jun. 422, 424. See also, D. Vaver, "Abridgments and Abstracts: Copyright Implications", [1995] 5 E I P R 225-235. Vaver, in his commentary upon abridgements and abstracts of copyright works, recounts the

certain cases the court tried to identify the true intent of the user in advancement of learning and propagation of truth⁶⁶ and evasive abridgments were brought out from the ambit of fair use.⁶⁷ In addition to the codification of the fair use doctrine, two common limitations to the copyright monopoly - the limited term of copyright and library deposit provision and a system of compulsory licensing also got a solid legal foundation at this period.⁶⁸

Next major issue on which the judiciary was bound to make a balance between individual monopoly and public interest was on the duration of copyright, which is termed in history as the 'battle of

evolution of the concept of 'fair abridgement' throughout the nineteenth century when "attitudes changed as writing for money became a respectable calling and Parliament expanded notions of copyright. Economic harm to the publisher and the author, especially when the author depended upon royalties from sales, could not be dismissed as breezily as it had been in the 18th century". He continues that "by the last quarter of the 19th century ... the days of the free-roaming abridger were clearly numbered", such that with the passage of the *Copyright Act 1911* the right to abridge a work was brought within the copyright owner's control.

66 *Cary v Kearsley* (1804) 4 Esp. 168, 170

67 *Tonson v Walker* (1752) 3 Swans 672. In this case the court granted injunction to the plaintiff, since the abridgment was evasive. See *Tonson v Walker* (1751), *Primary Sources on Copyright* (1450-1900), eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on 5 June 2010].

68 Compulsory licensing of copyrighted works showed its first appearance in the Booksellers Bill of 1737. The bill took an unusual departure from earlier practice by letting anyone publish any work that had been allowed, by its proprietor, to become "scarce and out of print". With the existence of the right to print the work free from invasion, there came a concomitant duty to ensure that the work would always be publicly available. Should the owner of the work refuse to do so, a system of compulsory licensing was to operate to ensure that no work need ever fall out of print. Like the deposit provisions, failure to adhere to these statutory requirement was to result in the author or publisher losing "all benefit and advantage" of the Act in relation to that, as well as having to pay the substantial penalty of "£50 to any person who shall sue for the same". See: Deazley, R. (2008) 'Commentary on the Booksellers' Bill (1737)', *Primary Sources on Copyright* (1450-1900), eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010]. Also read Deazley, R. (2008) 'Commentary on Copyright Amendment Act 1842', *Primary Sources on Copyright* (1450-1900), eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org. [Accessed on June 2010].

booksellers'.⁶⁹ This controversy on the nature of copyright as a perpetual individual monopoly or a limited statutory public interest concept started with *Tonson v Collins*⁷⁰ ended with two land mark judgments in copyright history - *Millar v Taylor*⁷¹ and *Donaldson v Becket*⁷² was

69 The case of *Midwinter v Hamilton* (1743-48) signaled the beginning of a thirty-year period, often referred to as 'the battle of the booksellers', in which the metropolitan booksellers locked horns with a resurgent Scottish book trade over the right to reprint works for which the term of copyright protection provided by the 1710 Act had expired. In *Midwinter*, tentative arguments had been proffered concerning the nature of copyright at common law, but they were never seriously developed. When the case was appealed to the House of Lords, as *Millar v Kincaid* (1751), William Murray (1705-1793) and Alexander Lockhart, acting on behalf of the London booksellers, cultivated the common law argument. The *Statute of Anne* they suggested "admits a property in copies of books to have existed in authors before the making of it", which property: "is grounded upon Principles of Common Right, and Public good, and is not created to support the actions given by the statute; but on the contrary, those actions are given to fence and preserve that property, as their object and foundation". When the Scottish booksellers responded they avoided engaging with the common law argument, instead relying upon objections of a more technical nature to derail the Londoners' appeal. The Lords agreed and the appeal was rejected. The arguments for and against the existence of copyright at common law would not be extensively debated before the courts until the case of *Tonson v Collins* (1762). See for detailed study: Deazley, R. (2008) 'Commentary on *Tonson v Collins* (1762)', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

70 *Tonson v Collins* (1762) 1 Black W. 32. *Tonson* concerned a reprint of Joseph Addison (1672-1719) and Richard Steele's (*bap.* 1672, *d.* 1729) *The Spectator*, first published in 1711. Lord Mansfield, the "champion of the author's common law right", took a line of reasoning that operated in the booksellers favour.

71 *Millar v Taylor* (1769) 4 Burr. 2303. In this case Millar and James Dodsley (1724-1797) complained that the defendant Taylor had printed 'several thousand copies' of Edward Young's (*bap.* 1683, *d.* 1765) book of poems *Night Thoughts* and sought an account of profits and an injunction from the court. In 1743 and 1744 Young had sold his rights in the first volume of the work to Robert Dodsley (1704-1764), which had, in 1759, been subsequently transferred to James Dodsley. In his defence Taylor relied squarely upon s.11 of the 1710 Act. Admitting that he had exchanged one hundred and fifty copies of Young's work for other books with Alexander Donaldson, he countered the plaintiff's claim, arguing that "the Author of Books of Genius and Composition of the Brain or their Assignees have not vested in them by Law a perpetual indefinite Right or property to the copies of such Books".

72 *Donaldson v Becket* (1774) Hansard, 1st ser., 17 (1774): 953-1003. In this case in November 1765 counsel for the bookseller Andrew Millar (1705-1768) appeared before the Court of Chancery alleging that Robert Taylor, a printer from Berwick, had "vended and sold" copies of his copyright work *The Seasons* by the poet

again a success story of public interest over the private monopoly. In *Millar v Taylor*, even though Justice Yates obscured the wider social ramifications of a perpetual monopoly which overlooks the rest of the mankind and supported for limitations of statute for cause of learning,⁷³ majority opinion headed by Justice Mansfield ended up by upholding the perpetual copyright monopoly.⁷⁴ But in *Donaldson* the House of Lords understood the copyright regime, first and foremost as addressing the broader interests of society.⁷⁵ A purely statutory phenomenon copyright was fundamentally concerned with the reading public, with the encouragement and spread of education and with the continued

James Thomson (1700-1748). Taylor responded that, as Thomson had died in 1748, the work was no longer within the copyright term provided by the 1710 Act and the controversy started.

- 73 Justice Yates: "Shall an *Author's* Claim continue, *without Bounds of Limitation*; and *for ever restrain all the Rest* of Mankind from their natural rights, by an *endless Monopoly*? The exclusive property sought by the booksellers would hand them the opportunity either to suppress works or sell them at whatever exorbitant price they considered appropriate. Could this really be considered "an encouragement of the propagation of learning?" A perpetual property right would "embroil the peace of society with frequent contentions, most highly disfiguring the face of literature, and highly disgusting to a liberal mind". See: Deazley, R. (2008) 'Commentary on *Millar v Taylor* (1769)', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].
- 74 Lord Mansfield: "Because it is *just*, that an Author should reap the pecuniary Profits of his own Ingenuity and Labour. It is *just*, that another should not use his Name, without his consent. It is *fit*, that He should judge when to publish, or whether he will ever publish. It is *fit* he should not only choose the Time, but the Manner of Publication; how Many; what Volume; what Print. It is *fit*, that he should choose to Whose care he will Trust the Accuracy and Correctness of the Impression; in whose Honesty he will confide it, not to foist in Additions ... I allow them sufficient to show it is agreeable to the Principles of Right and Wrong, the Fitness of Things, Convenience, and Policy, and therefore to the Common Law to protect before Publication ... The 8th of Queen Ann is no Answer. We are considering the *Common Law*, upon Principles *before* and *independent* of that Act." See: Deazley, R. (2008) 'Commentary on *Millar v Taylor* (1769)', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].
- 75 Deazley, R. (2008) 'Commentary on *Donaldson v Becket* (1774)', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

production of useful books. In deciding the case as they did, these eighteenth century parliamentarians did not primarily seek to advance the rights of the individual author. Rather, explicitly denying the existence of a common law copyright, they acted in the furtherance of much broader social goals and principles.

Superiority of user's right over that of individual authors manifested to the most extremes in the library deposit requirement under the Statute of Anne and subsequent enactments. We have earlier seen the mandatory obligation on the publisher or author to deposit prescribed number of copies of their works once they are registered with the Stationers Company and failure was met with statutory penalties. But this provision was vanquished by the publishers without registering their works at the Stationer's hall. House of Lords decision in *Beckford v Hood*⁷⁶ supported this vanquishment by allowing damages for infringement under common law inspite of the fact that the work has not been registered under the statute. Corollary to this drop in registration was that fewer and fewer works were being deposited with the Company for the benefit of the libraries, a situation that was not helped by the wording of the *Copyright Act 1801* which seemed to suggest that unless a book was registered with the Company then there was no need to deposit a copy of the same for the use of the libraries.⁷⁷ Fearful of the

76 *Beckford v Hood* (1798) 7 D. & E. 620. In *Beckford* the plaintiff had failed to register his work in accordance with requirements of the *Statute of Anne 1710* and so could not pursue for the remedies provided therein. Instead he sought damages at common law, by way of an action on the case, and the issue for the court was whether such an action could be sustained. The court, under Lord Kenyon (1732-1802), decided that it could. In effect, this meant that booksellers no longer needed to register their works with the Company of Stationers to ensure that a copyright infringer might be held financially liable for their actions before the courts.

77 Para 6 of the decree imposed a mandatory duty on stationers company to deliver a copy of the registered work to the use of the library of trinity college of Dublin and also to the library of the society of kings law, Dublin. If any copyright owner,

fact that the intention of the legislature, to assist in the regular augmentation of the library, was likely to be defeated strong public consciousness was raised and a series of petitions were filed to the parliament for waiving the registration requirement and imposing a mandatory obligation on the publishers to adhere to library deposit.⁷⁸ Consequently the Copyright Act of 1814 was adorned with detailed and mandatory library deposit requirements.⁷⁹ Library deposit was made mandatory irrespective of registration with Stationers Company.⁸⁰ The Act of 1842 also followed a similar approach.⁸¹ Though the concept of ‘library deposit’ was quite different from the ‘library use’ provision under the modern copyright statutes, the mandatory library deposit requirement showed the importance of libraries in maintaining access to knowledge and spread of learning. Even though the provisions did not clarify the nature and scope of uses that can be carried on with the copyrighted works by the libraries, the statutes conferred an absolute monopoly to the libraries and

proprietor, booksellers or printers makes default in delivering the aforesaid copies shall be liable to penalties. See Deazley, R. (2008) ‘Commentary on *Copyright Act 1801*’, *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

78 Deazley, R. (2008) ‘Commentary on *Copyright Act 1814*’, *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

79 Copyright Act (1814), *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

80 Sections 2 to 8 of the Copyright Act, 1814 contain detailed provisions on library deposit. See Copyright Act (1814), *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

81 Sections 2-10 of Copyright Act, 1842. Copyright Act (1842), *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

universities for even sale of the copyrighted works.⁸² This exclusive privilege of the universities in spread of information was accepted by House of Lords as early as 1750's itself.⁸³ However these mandatory deposit requirements laid a strong platform from which it transgressed from the status as a duty of the author to the absolute privilege of users.

A greater concern for education and spread of learning manifested again in the new arena through the Publication of Lectures Act, 1835.⁸⁴ While recognizing the authorship over oral lectures for the first time in history, the Act expressly excluded lectures delivered in universities and educational institutions from its ambit.⁸⁵ So lectures as part of education and learning process was devoid of copyright and their reprinting and publication without any intention to make profit was a legitimate privileged use under the Act.⁸⁶

82 Section 27 of Copyright Act, 1842. Copyright Act (1842), *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

83 1758) 2 Keny. 397, 1 Black W. 105, 2 Burr. 661

84 Legislation conferring the exclusive right of printing and publishing certain lectures for the same term of protection provided by the existing copyright. This was the first occasion on which the legislature extended copyright protection to works in the oral form. The legislation is of interest in terms of the distinction it draws between lectures delivered within the 'public' and the 'private' spheres (lectures delivered at a University, for example, are not protected), in terms of articulating the nature of the relationship between a speaker and his audience, and in specifically clarifying that newspapers are similarly prohibited from reporting protected lectures. See Publication of Lectures Act (1835), *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

85 Section 5 of the Publication of Lectures Act, 183, See Publication of Lectures Act (1835), *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

86 The first time the issue of what rights, if any, someone delivering an oral lecture (as opposed to a dramatic or musical performance) might enjoy arose in *Abernethy v*

Thus unlike the copyright history of France, Italy, Germany or the US, the UK had a very rich and splendid copyright tradition with a brawny and muscular regime of both authors rights and users rights. With the recognition of authors individual right by the Statute of Anne, it was the user's right that gained much attention and through a sequence of judicial and parliamentary intervention a comprehensible and lucid set of user's right got adorned with the magnificent doctrine of fair use. However in France, Germany and Italy the position was different. Either due to the lack of growth of literature or because of the absence of an enlightened community, in these countries copyrights and related issues was felt in a somewhat mild form. And very often the British philosophy and practical principles of copyright exerted a very strapping influence in these countries. In France till the twentieth century, French Literary and Artistic Property Act (1793) reigned the copyright regime and limitation to the copyright monopoly in the form of limited duration and library deposit was the sole public interest concerns that reflected in the copyright Act.⁸⁷ Unlike in the UK, in France priority was given to the author's right and in the French Civil Code of 1804, copyright was categorized under property.⁸⁸ In Germany copyright continued as a measure of censorship even till the end of eighteenth century.⁸⁹ Subsequently the idea of the "sacredness of property" influenced by

Hutchinson (1825) 1 H. & TW. 28. John Abernethy (1764-1831) was a surgeon and lecturer at St Bartholomew's Hospital. Hutchinson was a student who, attending a series of Abernethy's lectures on the principle and practice of surgery, transcribed and published the first of those lectures in *The Lancet*, with the promise of publishing in the future each lecture as and when it was delivered. In this case court made a distinction between publishing for profit and for educational purpose and publication for non profit purpose was held to be permissible.

87 French Literary and Artistic Property Act (1793)

88 French Civil code of 1804

89 Austrian Statutes on Censorship and Printing (1785), *Primary Sources on Copyright* (1450-1900), eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

French revolutionary writings exerted a strong pressure in Germany and was emulated by the Baden provision of 1806.⁹⁰ So in France and Germany users right enjoined only a secondary or mediocre position.

The US history of copyright was again a product of social, cultural, economic and political diversities. Until the attainment of independence in 1776,⁹¹ the US followed the privilege system of the UK. Even where printing was not completely banned it was heavily restricted. The setting up and the operation of a press required governmental permission, which usually was not easily given. There was also prior licensing of the content of publication. The impulse for restriction of the press was as much internal to colonial government as it came from England. The licensing and prior restraint limitations survived in the colonies well into the eighteenth century, much longer after they declined in the UK with the lapse of the 1662 Licensing Act in 1695. The absoluteness of the licensing regimes in the colonies, however, was more a matter of theory

90 Baden Civil Code (1809), *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

91 The American Revolutionary War (1775–1783) or American War of Independence began as a war between the Kingdom of Great Britain and thirteen former British colonies in North America, and concluded in a global war between several European great powers. The war was the culmination of the political American Revolution, whereby many of the colonists rejected the legitimacy of the Parliament of Great Britain to govern them without representation, claiming that this violated the Rights of Englishmen. The First Continental Congress met in 1774 to coordinate relations with Great Britain and the by-then thirteen self-governing and individual provinces, petitioning George III for intervention with Parliament, organizing a boycott of British goods, while affirming loyalty to the British Crown. Their pleas ignored, and with British combat troops billeted in Boston, Massachusetts, by 1775 the Provincial Congresses formed the Second Continental Congress and authorized a Continental Army. Additional petitions to the king to intervene with Parliament resulted in the following year with Congress being declared traitors and the states to be in rebellion. The Americans responded in 1776 by formally declaring their independence as one new nation — the United States of America — claiming their own sovereignty and rejecting any allegiance to the British monarchy.

than practice.⁹² Governmental intervention tended to be sporadic and inconsistent. When the authorities decided to act their actions could be quite harsh. Persons who published unlicensed materials could find themselves fined, jailed or even deprived of their equipment and copyright remained as the major weapon of State craft. A shift in attitude began to manifest since the William Billings Privilege of 1773, where for the first authorship was recognised under the US Copyright law.⁹³

After independence the US experienced for the first time a surge of interest in the protection of authors' rights in their writings. The first wave of such interest focused on the regional rather than the national, level and consisted of two main developments: the issuance of ad-hoc legislative privileges to authors, and the lobbying for an enactment of general copyright statutes.⁹⁴ The State statutes were a result of a growing awareness of the need to "encourage" local authors and learning, intense lobbying on the national level, and the existence of an established institutional model in the form of the British Statute of Anne.⁹⁵ The statutes were promoted and justified on the basis of three characteristic arguments: the natural rights of authors, the social benefit of promoting learning, and the national interest of the young republic in establishing its

92 Reasons for objecting to the renewal of the Licensing Act (1695), *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on 5 June 2010].

93 William Billings' Second Petition (1772), *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on 25 June 2010].

94 Deazley, R. (2008) 'Commentary on the Statute of Anne 1710', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

95 Statute of Anne (1710), *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

literary and cultural status among the leading civilized nations.⁹⁶ As opposed to the sporadic colonial "encouragements" of printing projects, authors rather than printers or publishers now became the figures dominating copyright thought. Influenced by Anne, the two major limitations to author's right were the limitation of copyright monopoly for ten or fourteen years and library deposit requirement. This situation continued until the enactment of the Constitutions Intellectual Property Clause in 1789. The clause appears to be a wise blending of the natural right and utilitarian argument and in case of conflict between the two utilitarian perspectives will prevail over the natural right of the author because the clause itself says that natural right of the author is limited for securing larger social interest. However when the first federal copyright statute was enacted in 1790 inspite of strong technical and philosophical influence of Statute of Anne, the two major public interest measures 'the deposit requirement and price control provisions' were almost lacking in the new enactment. While the price control provision was completely neglected in the statute, the deposit requirement was much relaxed.⁹⁷ This casts doubt on the existence of a different copyright philosophy supported by a noble natural right privilege of author. Similarly in the copyright enactments of 1802 and 1834 also much concern was not raised on the public interest aspects inspite of the controversy over the scope and duration of author's rights.

96 Deazley, R. (2008) 'Commentary on the *Statute of Anne 1710*', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

97 Deazley, R. (2008) 'Commentary on the *Statute of Anne 1710*', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

But the landmark decision of Justice Story in *Folsom v Marsh*,⁹⁸ laying the foundation of modern fair use doctrine has remarkably raised the status of the US copyright tradition from a public interest perspective.⁹⁹ Justice Story's analysis of the issue was an important transitory moment in American copyright. In the early nineteenth century copyright was still, for the most part, seen in traditional terms as a narrow entitlement to print and vend a copy. But according to Story, even beyond the zone of verbatim or evasive reproduction, the question was always whether a particular derivative use was "fair and bona fide."¹⁰⁰ The answers to such questions depended on a fine calculus involving such factors as "the nature and objects of the selections made,

98 The case concerned two works about President Washington, one derivative of the other. The first was a major 12 volume work by Jared Sparks - being a biography of George Washington (from which no copying was alleged) and 11 supplemental volumes containing his writings and letters etc. with explanatory notes and some illustrations. There were nearly 7000 pages in total in all the 12 volumes. The defendants wrote a shorter 2 volume biography of Washington intended for less specialized readers, which consisted of 866 pages written by Rev Charles Upham. It told George Washington's story as a narrative, using letters and papers taken from the last 11 volumes of the work by Mr Sparks. It was found that about 353 of its 866 pages were letters and other such papers copied verbatim from the earlier work and so the case. For details read, Bracha, O. (2008) 'Commentary on *Folsom v Marsh* (1841)', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

99 The significance of the case derives from the important role it played in the development of three related aspects of American copyright law and ideology. First, *Folsom v Marsh* was an important part of a group of copyright cases decided by Justice Story in the first half of the nineteenth century that began to transform the traditional legal and intellectual framework of copyright law. These cases constituted a shift from a narrow understanding of copyright as a right to print and sell a copy of a particular text to a broader understanding of copyright as a general control of the market value of an intellectual work. Second, the case expressed a tension that characterized most nineteenth-century copyright debates in America: a tension between a republican ideology that celebrated the "cheap press" and popular access to printed texts, and developing concerns over commercial exploitation and authorial rights. Third, the texts at the heart of the litigation were no ordinary books, but rather the letters of George Washington.

100 *Folsom v Marsh* (1841), *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."¹⁰¹ The engine behind Story's doctrinal innovation was his new emphasis on seeing the intellectual works in terms of market value. If previous doctrine focused on the new contribution of a user of a copyrighted work, Story shifted the emphasis to protecting the market value of the original work. Time and again he resorted to criteria such as whether the "value of the original is sensibly diminished" or "the value of the materials taken, and the importance of it to the sale of the original work."¹⁰² Thus in course of time a new market-oriented approach to copyright was developing. It was thus one of the earliest dramatic clashes between private property rights on one hand and the public interests for access to copyrighted works on the other hand.¹⁰³

101 *Folsom v Marsh* (1841), *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

102 Bracha, O. (2008) 'Commentary on *Folsom v Marsh* (1841)', *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer [online]. Available at www.copyrighthistory.org [Accessed on June 2010].

103 The major legal questions in the case divided into two groups: the validity of the copyright in the alleged work, and the infringement by defendant. Justice story upheld the copyright in the letters of George Washington because otherwise "it would operate as a great discouragement upon the collection and preservation thereof; and the materials of history would become far scantier, than they otherwise would be". Justice Story was of the opinion that "What descendant, or representative of the deceased author, would undertake to publish, at his own risk and expense, any such papers; and what editor would be willing to employ his own learning, and judgment, and researches, in illustrating such works, if, the moment they were successful, and possessed the substantial patronage of the public, a rival bookseller might republish them, either in the same, or in a cheaper form, and thus either share with him, or take from him the whole profits? It is the supposed exclusive copyright in such writings, which now encourages their publication thereof, from time to time, after the author has passed to the grave.

5.2 Conclusion

Thus in the pre-Berne era there existed wide diversity across the countries on limitations and exceptions. Remaining the central tool in the armory of the State for attaining vested social, economic, political and cultural needs the countries enjoyed ample flexibility to mold these strategic tools for achieving the desired goals. For example, while censorship was the need of time strict control was exercised on each and every word of the literature and the moment the objective shifted to rapid economic and political upliftment, they were freed from abusive controls and monopoly became the rule. When this uncontrolled monopoly resulted in price rises and access control, limitation was introduced on these monopolies to cure the respective abuses by incorporating price control mechanisms, deposit requirements and fixed monopolistic duration. Thus while Statue of Anne is well thought-out as the champion of the author right in copyright history, it is this legal ingenuity that has led the need for users right. With a highly enlightened social strata and well built university system, Britain developed a series of user rights at each and every moment the public confronted with new uses of the copyrighted work and established a sound balancing of public interests and private interests. Apart from economic factors, political cataclysms also influenced the copyright policy. With the supreme social, political and economic imperialism enjoyed by Britain at that point in time, the British copyright philosophy and practice had exercised a tremendous influence not only in their colonies, but even in independent states. However independent dominions like France and Germany influenced by their revolutionary ideas took an individualistic attitude and established an author oriented copyright regime in these countries user rights enjoyed only a secondary status. Similarly the US in its eagerness to attain economic and political supremacy shortly after attaining

independence reoriented its copyright strategy towards author's right. But apart from the wide disparities and discrepancies in the philosophies and practices the need for a regulated copyright regime was homogeneously accepted among the countries and the limitations and exceptions were framed to suit their domestic interests. However it was from the midst of these diversities that there developed the fundamental principles of user right like 'existence of an overwhelming public interest', consideration of 'legitimate interest of the author' and incarceration of the limitations to very 'special cases'.