EXCEPTIONS AND LIMITATIONS TO COPYRIGHT:
BERNE AND POST – BERNE ERA

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The period immediately preceding the Berne was the era of maximum flexibility were the nations maintained and enjoyed supreme sovereignty to mould the national copyright policy to achieve their domestic interest. Accordingly, the contemporary international arena was a spectator of incompatible, inconsistent and ill-assorted national curiosities. Among these, two issues that attained international trepidation was the need for combating international piracy and enhanced protection for authors on one hand and the drastic thirst of a set of least resourceful countries for access to knowledge and information on the other hand. Of course, it was not an instantaneous or unique threat faced by the copyright system, but uniqueness was on the nature of the parties affected. What happened was that, the national endeavor in maintaining the balance between public interests and private monopolies got international implication. However in the domestic arena if it was the issue between individual entities; in the international arena it was a herculean task that this balance was to be smacked upon the imperial sovereignty of the nations and of course like any contemporary international document, Berne also remained very sceptical and cynical to touch upon it. Thus Berne made a pioneering
international attempt to address these issues.\(^1\) Hence, how the issue was addressed in Berne together with its impact in post-Berne era is the crux of analysis in this chapter.

### 6.1 Approach of Berne towards Limitations and Exceptions

The balancing process between author centric countries like France for enhanced protection and prevention of international piracy and the demand for access to knowledge and information by least developing countries which began from the preparatory committees of Berne was a central feature of each and every Berne revision.\(^2\) Evolution of exceptions to the authors right from certain specific use like that for education\(^3\), press\(^4\) and quotations\(^5\) to the magic ‘Three Step Test’ (TST) is a saga of these conflicts.

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2. The Berne of 1886 is essentially concerned with the private interests of authors, and with raising the level of protection that is accorded to them. Such questions are not usually of great significance to developing countries. These are at varying degrees of economic development, with the consequence that the standard of living of their population is generally much lower than that found in developed countries. Economic development, even were this means no more than the attainment of a basic level of self-sufficiency, is therefore an overriding goal for these countries. Ways of achieving this object are through the promotion of literacy and through technical and vocational training, and these programmes in turn necessitate ready access to a wide range of educational and informational materials. However owners of these informational stocks will usually be residents of developed countries and the works will be definitely clothed with strong copyright protection. This naturally causes problems for developing nations which are generally deficient in foreign currency to buy these works or to purchase authorisation to reproduce, translate or otherwise utilise them for their purposes. However practically it becomes a hurdle. From the point of view of authors and publishers, however there is no particular reason why they should treat users in developing countries differently from that in developed countries; these works are after all their property and they are not in the business of providing free assistance to less developed countries.

3. Article 10 of Berne of 1886.

4. Article 10bis of Berne of 1886.

5. Article 10(2) of Berne of 1886.
This conflict manifested in the very diplomatic conference of 1884 on the issue of user right for education and press. While a set of countries represented by Germany stood for a broad unconditional educational use, it was trenchantly criticised and opposed by the author centric group of countries represented by France and finally in the draft it was conditioned by requirement of indication of source in case of educational use. Similarly while the German model proposed an unqualified exception of any articles extracted from newspapers or periodicals, privilege was limited by excluding even articles on science and art from its scope. The forceful demand from a set of user nations for permitting copying of scientific articles to encourage the spread of scientific learning was least concerned. In the next diplomatic conference of 1885, which resulted in the codification of Berne, attempt was made to further restrict the scope of user rights. The conference confirmed that expression articles of political discussion only applied to

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6 Article 8 of the draft based on the German model provided that each contracting state was to permit, reciprocally the publication of extracts, fragments and whole parts of a literary or artistic work that had first appeared in another union country, provided that this publication was specially made and adapted for educational purposes or had a scientific character. Equally to be protected was the reciprocal publication of chrestomacies comprised of pieces of works of different authors, as well as the insertion, in a chrestomathy or in an original published in one of the countries of the union, of a whole work of small compass published in another union country.

7 Article 9 of the proposed draft provided that articles extracted from newspapers or periodicals published in any Union country might be reproduced, either in the original or translation in other union countries.


9 The Haitian delegate made a forceful speech, urging the deletion of articles on science from the category of prohibited articles, and pointed to the contradiction that this would otherwise create with respect to article 8 under which such copying is permitted in case of books.
writings on current politics. It was also clear that privilege will not extend to a series of articles appearing in the newspaper.\textsuperscript{10}

Thus in the very first International Convention on copyright the user right received only a mediocre status. But this should not be considered as a defect of the Berne system, because Berne Convention did not intend to create an international mandate on the sovereignty of the countries. Its intention was to create an international hegemony on copyright with minimum obligations, leaving all public policy matters to the sovereignty of the nations. Apart from this, the lack of effective copyright protection did not pose much threat to the user demand for access at that point of time. Further, the social, economic, political and technological scenario was also not compelling for a resourceful user right scheme.

The conflict between user and author interest continued in the subsequent Berne revisions, also in a candid manner. It was only on educational use and press use that Berne Convention had a specific mention.\textsuperscript{11} And even among this, the nature and scope of educational use


\textsuperscript{11} Article 10 of Berne: 1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries; (2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice; (3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.
was left to the absolute sovereign discretion and consequently there was no need for an international convergence or conflict. Thus the international confrontation was on the scope and nature of press use.

Article 10 bis of Berne of 1886:

1. It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed;

2. It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.


This provision has been criticized from various viewpoints, and several amendments were submitted to the Committee. The French authorities wanted to limit the extent to which copyright was undermined by Article 7. They therefore proposed reversing the rule to state that pieces of writing published in newspapers or periodicals could not be reproduced or translated without their authors’ authorization, while continuing to allow reproduction with respect to articles of political discussion, news of the day or miscellaneous facts. This was the most absolute proposal in terms of copyright. The Norwegian delegation was proposing a very simple system. In its view, copyright was not infringed by the reproduction in newspapers or magazines of articles in original or in translation taken from other papers or magazines if the reproduction right had not been specifically reserved. The source would always have to be clearly indicated. Thus the principle of Article 7 as it stands was generalized in that the reservation could apply to any articles, even articles of political discussion or news of the day. Furthermore, when reproducing, the source must be indicated—which the present Article does not require. It should be added that the Norwegian Delegate acknowledged that serial stories did not fall within the application of the Article he had proposed, and thus no reservation would be necessary to prohibit their reproduction. Monaco’s Delegation made a proposal which was very similar to the one which has just been analyzed. The difference lies mainly in that the traditional provision is maintained as regards articles of political discussion, news of the day or miscellaneous facts. The Belgian Delegation’s proposal, supported by the Italian Delegation, differed more from the present right. It first stated the principle that serial stories or any articles, whether from newspapers or periodicals, published in a country of the Union, may not be reproduced or
Thus in course of time this broad privilege envisaged in the Berne Act of 1886\textsuperscript{14} was systematically narrowed in its compass and in course of time serial novels, including short stories were set apart and publication of the rest was allowed only if it was not explicitly forbidden by the author.\textsuperscript{15}

But the subsequent Berne revisions took a progressive attitude towards user rights taking into account of the changing socio-economic milieu and technological challenges. For example from the 1908 Berlin revision onwards, exemptions in favour of newspaper and periodical articles received a broader outlook. Reproduction of articles in

\textsuperscript{14} Berne Act, 1886, Article 7: “Articles from newspapers or periodicals published in any of the countries of the Union may be reproduced in original or in translation in the other countries of the Union, unless the authors or publishers have expressly forbidden it. For periodicals it shall be sufficient if the prohibition is indicated in general terms at the beginning of each number of the periodical. This prohibition cannot in any case apply to articles of political discussion or to the reproduction of news of the day or miscellaneous information”.

\textsuperscript{15} Berlin Act, 1908, Article 9: “Serial stories, tales, and all other works, whether literary, scientific, or artistic, whatever their object, published in the newspapers or periodicals of one of the countries of the Union may not be reproduced in the other countries without the consent of the authors. With the exception of serial stories and tales, any newspaper article may be reproduced by another newspaper unless the reproduction thereof is expressly forbidden. Nevertheless, the source must be indicated; the legal consequences of the breach of this obligation shall be determined by the laws of the country where protection is claimed. The protection of the present Convention shall not apply to news of the day or to miscellaneous information which is simply of the nature of items of news”.
newspapers except that of serial stories was permitted unconditionally, even without the consent of the author. The concern of developing countries as users rather than as producers of copyright got a clear anticipation at this early stage.\textsuperscript{16} Following the Berlin revision, the system of reservations provided a further means of avoiding the full rigors of the requirements of the Convention by allowing states to retain lower levels of protection in certain key areas, notably the making of translations and exceptions to protection.\textsuperscript{17} Even the Rome Act did not entirely end this system, as it allowed states to retain their existing reservations and for new member states to adopt a less rigorous regime with respect to translations.\textsuperscript{18} Further, the sovereignty of the states to ensure their domestic interests was reinstated by the addition of a new provision, entrusting supreme power to the states to maintain public order.\textsuperscript{19} Similarly, in the Brussels revision a French proposal to make press usage more systematic, was strongly opposed on the ground that it may restrict the free flow of information.\textsuperscript{20} It was here that the ‘minor

\textsuperscript{16} Of the initial signatories of the Berne Act, it was only Tunisia and Haiti, that belonged to the category of developing countries and membership of UK brought another great developing country within the union, namely India. In the years leading to Berlin revision, another developing nation Liberia joined the Berne Union, together with one rapidly industrialising nation Japan. In this period of widespread European colonisation and domination, there were relatively few independent developing nations and it was not until after world war 11 that these nations came to form a majority of the international community.

\textsuperscript{17} Berlin Act, 1908, Articles 25 and 27.

\textsuperscript{18} Rome Act, Articles 25(1) and 27(2). Despite these ameliorations in the convention system, it is still true to say that each revision of the convention saw a steady augmentation in the level of protection required, and this made it an instrument that is less congenial to the interests of developing countries.

\textsuperscript{19} Berlin Act, 1908, Article 17: “The provisions of the present Convention cannot in any way affect the right belonging to the Government of each country of the Union to permit, to control, or to prohibit, by measures of domestic legislation or police, the circulation, representation, or exhibition of any works or productions in regard to which the competent authority may find it necessary to exercise that right”.

\textsuperscript{20} Notably the Scandinavian countries, the Poles, Dutch, and Czechs.
reservation doctrine’, which can be denoted as the predecessor of ‘TST’ owed its origin. Even though the fundamental cannon of this doctrine was the ‘de minimis’ principle, this should be considered as the first implied international recognition of the sovereignty of the states in molding limitations. It impliedly gave international sanction to the wide diversity of limitations existing in their national laws. Its intention was to leave untouched the fragile ecosystem of limitations, ensuring maximum flexibility to the nations. Though from a user right perspective, this can be considered as a negative approach, taking into account of the wide diversity in needs and aspirations of the countries this was the most appreciable attitude of the time.

This progressive attitude towards user rights reached its zenith in the Stockholm revision conference. Apart from formulating the central tenet of modern user rights through the most flexible TST, the existing

21 The question of implied exceptions to the convention first arose in the case of public performing rights, which were only recognised in the Brussels Act. Prior to this, member nations were free to impose whatever restrictions they wished on the exercise of these rights, or even to deny them altogether. In fact most national laws contained provisions permitting unauthorised public performance of works in particular instances like; musical performances made in course of religious worship, concerts given by military bands, charitable performances, public concerns organised on the occasion of particular festivals or holidays. In the context of article 11(1) of the Brussels act question arise whether they require express authorisation under the convention or is permissible. The final view was that it would be impossible to list all these exceptions exhaustively in the convention as they were too varied. On the other hand it wouldn’t be possible to demand their suppression, as most were based on long standing exceptions which member countries would be loath to renounce. However in the General Report of the conference, it was agreed by all members to retain the minor reservation doctrine, allowing the countries to retain their national limitations which are of de minimis nature.

22 This is based on the de minimis principle of interpretation, namely that the law is not concerned with trifles. In the present context, this means that exceptions to the rights granted in the relevant articles of the convention must be concerned with uses of minimal, or no significance to the author.

23 It was feared that the adoption of a general provision would positively incite those nations which do not have recognised exceptions to incorporate them in their laws.
limitations were given a liberal interpretation. By the deletion of the adjective ‘short’ and eliminating the restriction that the work quoted must be contained in a newspaper or periodical, the scope of quotation under Article 10(1) was liberalised.\textsuperscript{24} Similarly the range of utilisations permitted by Article 10(2) is now much wider than under the Brussels Act: not only the publications are included, but also broadcast and sound or visual recordings. Just like the recognition of public performing rights had resulted in the development of minor reservation doctrine, the adoption of a general right of reproduction right in the Stockholm, necessitated a leeway to ensure that this provision should not encroach upon exceptions that were already contained in national legislation.\textsuperscript{25} At the same time, it was also necessary to ensure that it did not allow for the making of wider exceptions that might have the effect of undermining the new right of reproduction.

Thus TST was introduced in Article 9(2) as a magic formula to balance these conflicting interests.\textsuperscript{26} On a close scrutiny of the contextual background to the introduction of the TST, it’s quite evident that it is neither an ‘author oriented one’ as designated by Sam Ricketson\textsuperscript{27} or

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25 In the words of Swedish BIRPI Study Group in its 1964 report, if a provision on reproduction right is incorporated in the convention, a satisfactory formula will have to be found for the inevitable exceptions to this right.

26 Article 9: (1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

27 See, Ricketson, S. (1886-1986), The Berne for the Protection of Literary and Artistic Works: Centre for Commercial Law Studies, Queen Mary College,
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'limit to limitations of copyright’ as pointed by Martin Senftleben. On the other hand it appears to be a wise and sensible balancing of the competing interests in a most diplomatic manner. If the intention of the Convention was to limit the limitations appended to user rights, there was actually no need for such a provision. Simply recognising the reproduction rights were high enough. But the drafters were aware of the threat such an autocratic approach might cause to the existing user rights and it was this fear that culminated in the adoption of TST and not vice versa. Similarly, in course of negotiations France, Netherlands etc., proposed for a narrow approach by limiting the exceptions to strictly private purposes and judicial use. But all these deliberations were rejected in the final draft and a very open ended flexible and user friendly provision was inserted in the final draft. This might be because of the fact that at its genesis, Berne Convention primarily served a coordinative function, which was to correlate existing national laws and practices into a code of international minimum standards for the protection of copyrighted works. Given its elemental goal of building on basic norms and thus eliminating discrimination against works of foreigners, the Berne Convention was originally “pragmatically instrumental.” The absence of a set of minimum exceptions and or limitations to copyright in the Berne Convention reflected the practice


and understanding that the precise nature of such limitations and exceptions was to be left to the reserved powers of the state to protect the welfare interests of its citizens.\textsuperscript{30} Further, throughout the Berne revisions we have seen that, the Convention was quite sensitive to the issue of public interests of the member countries leaving it completely to their discretion. Berne Convention was really fascinated by the wide diversity of limitations existing among the countries, but was not carried away by it. Thus TST should be appreciated as a user friendly provision and guardian of rights of users than that of authors.

On a close perusal of the express provisions on permissible uses under Article 10 of the Convention, a different view is also discernible. That is, when the Convention says that, it is permissible for the countries to make educational use or press use as the case may be, it is very clear and adamant that such provisions should be ‘compatible with fair practice’ and such use is permitted only ‘to the extent justified by the purpose.’\textsuperscript{31} Thus it comes out that while the Convention is least bothered about the permissible uses which countries may or may not use by taking a passive approach, it has a strong vision over author rights. Thus while

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  \item \textsuperscript{31} Article 10(1) of Berne- It shall be permissible to make quotations from a work which has already been lawfully made available to the public, \textit{provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.}
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the Convention ensures a minimum set of author rights, a minimum standard of permissible uses is beyond its scope.

The legitimacy of the minimum obligations contained in the Berne Convention thus lay not in the unassailability of the rights established, because these for the most part merely reflected the prevailing practice in most member states. Instead, the legitimacy of the Berne’s minimum standards lay in the fact that the more closely these standards reflected national practices, the more consistent the Convention would be with the then-dominant international law principle of sovereignty and deference to national prerogatives. This makes compliance also very likely. Importantly, the global economy of the industrial age did not experience the high levels of integration present today, which has been occasioned, in large part, by information technologies that minimize the role of territorial boundaries.

However limitations and exceptions that are clearly permitted by the Berne Convention do not address the most pressing need for developing countries namely, bulk access to creative works available at reasonable prices and translated into local languages. Further since the limitations and exceptions in the Berne Convention are written very flexibly; transforming this broad language into meaningful principles in a specific domestic context requires some institutional capacity, which is generally insufficient in many developing and least-developed countries. Thus the era of maximum flexibility and sovereignty in the

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33 Okedji, R. L. (2006) International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries UNCTAD -
pre-Berne era was continued uninterrupted and of course in a more vigorous manner. Copyright legislations in post Berne era is a spectator of this flexibility resulting in rich diversity.

6.2 Exceptions and Limitations to Copyright in the Post-Berne Era

The Berne, both in its negotiating history and subsequent revisions manifested an unrelenting and inexorable fascination and charm towards the wide diversity of limitations and exceptions that existed among nations. The international arena was thus very careful in defining and illustrating the ‘public interest’ of the member countries, leaving it as an exclusive privilege to them. Upshot of this was an all-embracing diversity and disparity of user rights. While the universal goal of copyright law being the spread of knowledge ensuring access, the means achieved by the legislations remained quite distinct and unique. But this diversity on a unique issue raised a lot of questions to be answered. It remained quite mysterious that, what was the true basis of this diversity: whether this diversity was designed to address any specific domestic interest or is simply the product of the Berne’s flexibility or the result of social, political or economic realities. It is also curious to examine how far this diversity helped in achieving the noble objectives of copyright. A glance into these diversities will definitely counter these mysteries.

We can see that the diversity begins from the very conceptual inclusion of the subject within the copyright frame work. While in some legislations it is incorporated on an equal footing with rights of authors
as ‘limitations to rights of authors’, in other legislations it exists as ‘defence to copyright infringement’. Thus from a philosophical perspective it appears that, in the former legislations user rights has a primary status and in the latter group of countries it only had a secondary concern. A similar diversity exists at the incorporation stage, when certain legislations put up a general user right for different categories of works and others comes with different set of user rights for each and every category of works. These two basic diversities reflects the society’s expectations with respect to access, one having to do with the notion that for different kinds of works different thresholds of access are involved, and other with the question of access within particular categories of copyrighted works.

Among the various copyright laws analyzed a palpable example of utilizing this flexibility by countries to serve their domestic interest is the Copyright Law of Angola. It has an express provision which states that

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34 Some legislation like copyright law of Albania uses the expression ‘use without the permission of the author’- Article 25 of Albanian Copyright Act, 1986. Articles 29 and 30 of Copyright Law of Andorra (1990) use the term exceptions and limitations. Sections 21-24 of Belgium Copyright Law (1994) incorporate it as ‘exception to copyright infringement’. Chapter 3 of Copyright Act of Colombia (1982), Chapter 3 Law on Copyright and Neighbouring Rights of Congo (1982), Chapter six of Copyright Act of Costa Rica (1983), Section 4 of Copyright Act of Korea (1956), Chapter 3 of Copyright Act of Poland(1992) also are examples for this approach.

35 Sections 40-73 of Australian Copyright Act, Part 3 of Canadian Copyright Act(1985), Section 14 of Copyright Law of Cyprus(1973), Sections 32-43 of Thailand Copyright Act (1994), Section 35 -53 of Copyright law of Singapore(1987), Section 57 of Copyright Act of Pakistan (1962) and Section 52 of Copyright Act of India (1957) incorporates it as exceptions to copyright infringement.

36 Many factors can be the basis of this diversity. For example, from a philosophical perspective those countries influenced by the natural law philosophy might be the first country and those influenced by the utilitarian philosophy will be the latter one.

37 Countries like Australia, India, and Pakistan are examples for this approach.

38 Countries like Austria and Ireland follow this model.
the copyright governed by this law shall be exercised in accordance with the objectives and superior interests of the People's Republic of Angola and with the socialist principles deriving there-from, taking into account society's need for a broad dissemination of literary, artistic and scientific productions. However an evaluation of the fair use provision in the Copyright Act of Angola, gives an impression that it's quite disproportionate to this express noble social vision. The provisions on lawful uses are subject to the condition that the title and the name of the author are stated and that the work is respected. This requirement of ‘respect’ of a copyrighted work is a unique provision. How far this paternal right of the author can be balanced in the context of their socialistic political philosophy is really a matter to be experienced. Apart from this, it is really annoying that the law incorporated a very few user rights even in the absence of a general fair use provision. Even for these permitted uses the law took a very restrictive approach. For

39 Article 2 of Law on Authors' Rights, Angola (No. 4/90 of March 10, 1990).

40 Article 29 of Law on Authors' Rights, Angola (No. 4/90 of March 10, 1990) states that, “the following uses of works already disclosed lawfully shall be permitted, without the authorization of the author and without payment of remuneration, on condition that the title and the name of the author are stated and that the work is respected…..”

The provisions on lawful uses are subject to the condition that the title and the name of the author are stated and that the work is respected. This requirement of ‘respect’ of a copyrighted work is a unique provision. How far this paternal right of the author can be balanced in the context of their socialistic political philosophy is really a matter to be experienced. Apart from this, it is really annoying that the law incorporated a very few user rights even in the absence of a general fair use provision. Even for these permitted uses the law took a very restrictive approach. For example reprographic reproduction is permissible only in public libraries and is not permissible even in educational and scientific establishments. Similarly quotations are preconditioned that it should be short and where justified by scientific, critical, didactic or informative purposes

41 The only permitted uses were: (1) performance, cinematographic projection and communication of recorded or broadcast works for purely didactic purposes, (2) reprographic reproduction in public libraries (3) reproduction of works for reporting of current events (4) exclusive individual and private use and (5) making of short quotations.
example, reprographic reproduction is permissible only in public libraries and is not permissible even in educational and scientific establishments.\textsuperscript{42} Similarly quotations are preconditioned that it should be short and where justified by scientific, critical, didactic or informative purposes.\textsuperscript{43} To illustrate how the flexibilities are used by countries, a few areas are identified and discussed below.

6.2.1 Current Events

Reporting of current events is one example of use of divergent approach by countries on which there exists an international conscience. While some allows an unreserved right of reproduction,\textsuperscript{44} others subject it to the consent of author which can be assumed in the absence of an express prohibition and also mandates the designation of the source of information.\textsuperscript{45} For example, in the Australian law, even if the copyrighted work is used for reporting of news, it is mandatory that it should be a fair dealing.\textsuperscript{46} But in the Austrian law the press use depends on the nature of the subject matter.\textsuperscript{47} Similarly, while some have long and detailed provisions on press use, others mention it in single word by incorporating along with private and research use.\textsuperscript{48} It should be noted that these latter group of countries subjected the author rights to the interest of society in access to information while in

\textsuperscript{42} Article 29 (b) of Law on Authors' Rights, Angola (No. 4/90 of March 10, 1990).
\textsuperscript{43} Article 29 (e) of Law on Authors' Rights, Angola (No. 4/90 of March 10, 1990).
\textsuperscript{44} Copyright law of Netherlands and Nigeria are examples for this approach.
\textsuperscript{45} For example, Section 24 Copyright law of Korea (1957) restricts the application of this exception for political speeches. Article 25 of copyright law of Poland (1994) obliges remuneration to author even in this uses. Section 103B of Australian Copyright Act mandates the acknowledgement of source.
\textsuperscript{46} Section 103B of Australian Copyright Act, 1968.
\textsuperscript{47} Part 3 of Austrian Copyright act of 1936.
\textsuperscript{48} UK and Sweden are examples for this approach.
the other group of countries author’s interest prevails over that of public.

Apart from this diversity on the nature and scope of press use, a unique provision on press use can be seen in the copyright law of Israel and Pakistan. In these countries, unlike in rest of the world where public speeches are public domain works free from any copyright control for reporting and reproduction of news, taking into account of the hostile and sensitive political and religious condition, the freedom is restricted. Here public speeches are not per se public works. The publication in newspaper of reports of speeches of political and religious nature is permitted only if it is not prohibited by conspicuous written or printed notice.  

6.2.2 Library Use

Being the most persuasive and intoxicating weapon of knowledge dissemination and promulgation, the library and educational use remains the significant among the various user rights. Comprehensive and exhaustive study reports published by WIPO portray the rich and enthusiastic diversity existing among the countries.  

On the copyright exceptions for library use, the diversity begins from the nature of libraries to the nature of beneficiaries and kind of uses. The range of applicable libraries may be extensive, or it may be tightly defined. Sometimes the statute applies to a wide range of nonprofit libraries, which could include libraries that are part of various

49 See, Pakistan Copyright Ordinance 1962, Section 57 (d) and Israel copyright Act 1911, Section 1 (v).

institutions, from museums to political organizations. In other cases, the statutes defer to administrative agencies to offer a definition or at least to “prescribe” eligible libraries. The statutes are sometimes applicable explicitly to “libraries.” The laws of many countries often also mention “archives.” Some statutes define not only the eligible institutions, but also the range of individuals who may make copies. The UK law, for example, permits copies by librarians of prescribed libraries. The statute further defines “librarian” broadly as a person acting on behalf of a libraries. Where relevant, the UK statute gives similar treatment to “archivist.” The UK law evidently is not limited to professional librarians, nor is it apparently limited to employees or regular staff of the library. In a different approach, the Copyright Act of Grenada evidently allows any person to make the copies. The statutes address copies for preservation and copies for research. They are relevant to libraries in that they permit the copying of works that are held in a library or other institution that makes the works available to the public. Implicitly, such a statute has the practical effect of applying only to copying in libraries that are open to the public, but once qualified, the work may be copied by the library user or anyone else.

Many countries have a provision permitting the library to make copies of works for users without explicitly limiting the purpose of the

51 Algeria, Australia, Czech Republic, Denmark, France, Indonesia etc are examples for this.
52 Copyright laws of Georgia, Ghana, Albania and Kyrgyzstan are some following this model.
53 Andorra, Antigua and Barbuda, Australia, Canada, Czech Republic etc includes archives also within the ambit of libraries.
56 See Section 34 of Copyright Act of Grenada, 1989.
copy to research, preservation, or any other particular use. Under these general statutes, libraries would presumably have tremendous flexibility when making copies of materials for users. The library is not limited to determining or assessing the precise reasons for making the copy. The purpose may be private study, or it may be for use in government, business, or other context though the statutes usually do include other parameters like the library is not free to make copies of any works in large numbers. But, another set of countries took a very restricted approach. For example Article 12 of Iceland Copyright Act is a general provision, but it is also an authorization for a government agency to make more detailed regulations circumscribing the conditions for the copying. Tunisia takes a similar regulatory approach. Nigeria may have the statute that is open to the widest potential application. The exception applies only to certain libraries, scientific institutions, and other organizations prescribed by regulation and it allows reproduction only up to three copies of works for library use, and that too only if the work is not available for purchase in Nigeria. This appears to be a quite unscientific approach in a developing economy like Nigeria. At the same time, it is really interesting that Kenya, a similar African developing country, has a very liberal library use provision allowing reproductions by public libraries unconditionally for any public interest.

57 African Countries like, United Republic of Tanzania, Turkmenistan, Tunisia, Trinidad & Tobago are some typical countries following this approach. Copyright law of Thailand, Tajikistan, Bulgaria and Cyprus also follows this model.

58 Article 12 of Tunisian Copyright law of, 1994.


The library use provisions of Australia, the US, the UK, etc., sets detailed guidelines on the nature and extent of library uses. Australian law mandates the requirement of a signed declaration by both the user and the person in charge of a library showing the genuinity and bonafideness of the nature and purpose of use. It is also interesting that the copying is confined for the purpose of ‘research or study’ of the user. In the English copyright law, apart from this mandatory requirement of signed declaration, it is also binding that only one copy of the article be supplied and the user should pay a sum not less than the cost (including a contribution to the general expenses of the library) attributable to their production. However the American law is quite flexible towards library use. Spaced out from the absence of these regulations the law stipulates that the fair use provisions will prevail over that of the specific library use provisions. But the law is very clear that the reproduction and distribution must be made without any purpose of direct or indirect commercial advantage and the requested work is not available at a reasonable price. A similar approach can be seen in developed countries like Sweden, Netherlands, and Ireland. They have very detailed and specific guidelines on library use and that too very often

61 See Sections 48 – 53 of Australian Copyright Act, 1968.
63 See Section 38 of 42 of the UK Copyright Act, 1988.
64 Section 38 of the UK Copyright Act, 1988.
65 See Section 108 of the US Copyright Act, 1976.
66 Ibid.
68 Article 16 of Copyright law of Netherland, 1993.
69 See Section 61 of Copyright Act of Ireland, 1968.
with a system of payment. At the same time some countries like Italy and South Africa have a general library use provision without delimiting and defining the nature and scope of library use.

6.2.3 Educational Use

Diversity exists on educational use. The diversity begins from the nature of exempted uses to that of the medium in which the works are communicated and continues to the class of beneficiaries and the extent of the privilege. Unlike the library use provision which lacks any international conscience, teaching exception has an international concord. But the wide connotation which can be given to the words

70 Article 71 of Copyright Act of Italy, 1962.
73 It varies from, limitations or exceptions related to illustration for teaching, use of works, reproduction of works, public communication of works, compilation of works, right of quotation for teaching purposes, examinations, limitations or exceptions relating to note taking in class or lectures, limitations or exceptions relating to research, reproduction (private copying) of works, right of quotation for research purposes, public communication for scientific purposes, use of subject matter protected by related right for research purposes, right of quotation and finally for personal or private copying
74 Article 10 (2) of the Berne: “It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice. Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source and of the name of the author if it appears thereon.
‘teaching’, ‘illustration for teaching’ and ‘fair practice’ together with the permissive nature of Berne Convention increased the scope for manoeuvering making diversity more diverse. Thus among the various approaches followed by the countries one most common pattern is the Berne model which is to provide a general exception to sanction the utilization of any work by way of illustration in publications, broadcasts or sound or visual recordings for teaching to the extent justified for the purpose. Countries under this category confine their exception to sole purpose of instruction, reproductions in course of examinations, the performance in the course of the activities of an educational institution and for preparation of compilations for the purpose of the use of educational institutions.

Copyright Law of countries like Israel fail to identify the various needs of the educational community. In such laws the only exemption for educational use is that for use of the copyrighted material in compilations for use of schools. Though the Copyright Law of Kenya also follows a similar pattern, it acknowledges the reproduction of a broadcast and its use for the systematic instructional activities of any such school or University. Similarly while the Israeli law confines the exemption to schools, Kenyan law specifically includes the universities along with schools. In some countries the exemption is narrow, confining to illustrations for teaching ignoring the other uses proposed by the Berne

75 Some legislation like Pakistan mandates that reproduction should be otherwise than by the use of a printing process.
76 See for example copyright laws of India and Pakistan.
77 Copyright laws of Israel, Netherlands and Sweden have this approach.
78 Unlike the difference on library use between the Kenya and Nigeria the Nigerian law took an exactly similar approach in the case of educational use.
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It’s really disappointing that these developing countries fail to acknowledge and appreciate the need and role of the educational community in the development and progress of a nation. They should have at least followed the Berne Convention model in its fullest extent. These provisions it appears are drafted in a haphazard manner without appreciating the social realities and may be under the influence of dominant powers.

Among the various laws analyzed it is the copyright law of New Zealand that has the most detailed and specific provisions on educational use. The law is very keen and sharp on each and every need of the educational community. It foresees teaching in a four tier level. While the law mandates single copy in the case of reprographic copying, multiple copying is not restricted for non reprographic copying. Thus, while remaining as broad as possible to cover the manifold needs of education the law has painstakingly delimited to avoid any misuse. For performances in educational establishments or for inclusion of materials in compilations or for the use of broadcasted material for educational purpose, the law has clear perspectives avoiding any confusion. In a system like this, where user rights are clearly defined the users are relieved from the pressure of burden of proof and the consumers are free to make bonafide uses according to their needs.

The copyright laws of developed countries like Australia, the UK, Sweden, and Ireland have also put up detailed and clear

79 Barbados, Congo, Cyprus etc are examples for this.
80 See Section 44 – 49 of Copyright Act of New Zealand, 1994.
81 See, Section 44 of Copyright Act of Australia, 1968.
83 See, Article 14 of Copyright Act of Sweden, 1960.
guidelines on educational use. They are not only aware of the various needs of the educational community but also of the potential damage that might cause to economic rights of author if the user rights are left abandoned. At each and every moment of free user right these legislations make a conscious effort to recognize and respect author rights. For example, in Australia, when a copyrighted work is used in preparation of compilations for educational use it is mandatory that apart from the common requirements of grace period and limited quantity of copying, the collection should describe in an appropriate place in the book, on the label of each record embodying the recording or of its container, or in the film, as being intended for use by places of education; the work or adaptation was not published for the purpose of being used by places of education; the collection consists principally of matter in which copyright does not subsist; and finally a sufficient acknowledgement of the work or adaptation that is made. Countries like Sweden, Finland, Iceland, Italy, Austria, etc., mandate that compensation should be paid to authors when their works are used in compilations. Among this category Netherlands authorizes payment of equitable remuneration to even the successors of authors.

Similarly, when the English law allows reprographic copying for educational uses it is mandatory that it should be done by the educational establishment and not individuals and not more than one percent of the work is copied in a quarter of a year and reprographic copying is expressly prohibited when licences are available authorising the copying in question and the person making the copies knew or ought

84 See, Sections 53-58 of Copyright Law of Ireland, 1968.
85 See, Section 44 of Copyright Act of Australia, 1968.
86 See, Article 16 of Copyright Act of Netherlands, 1972.
to have been aware of that fact. Among the copyright laws of the developed countries, the US has an exclusive approach towards the educational use. While it has detailed provisions on library use anticipating the various needs of the library community, it has a very apathetic attitude towards educational use. It deliberately ignores the Berne Convention model and also does not propose an alternate model. It completely disregards the conventional educational uses like quotations, compilations, illustration for teaching and reproduction in course of examinations. But it recognizes the need for a leeway for educational community in course of protection of certain performances or display of works and transmission of those performances or displays. But this privilege is confined to face-to-face teaching activities of a non-profit educational institution, in a classroom or similar place devoted to instruction. Unlike in the case of an exception, which appears to be general without mentioning any specific modes of teaching, when it inscribes that it extends to face to face teaching only, the other modes of teaching like distance and online is put in a miserable position. Thus unpredictability and imperfectness of each and every free use continues.

6.2.4 Fair Use

Apart from the above diversity there is some uniformity among the countries when it comes to the issue of fair use. Among the various laws analysed the copyright laws of New Zealand, Australia, Ireland, Israel, Kenya, Nigeria, the UK, Zimbabwe, Cyprus, South Africa, Pakistan and

88 See Section 110(2) of Copyright of the US, 1976.
89 See Section 112(f) of Copyright of the US, 1976.
90 It is these failures of the copyright law in addressing the needs of the educational community that lead to the enactment of the Teach Act, 2002.
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India have a specific fair dealing clause privileging reproductions for reporting of current events, criticism, review and research or private study. It is in some author centric legislations like Netherlands, Italy, Sweden, Austria, Congo, Costa Rica, Finland, Iceland and Sweden that this privilege is not recognised. Among this group Austria and Sweden, though do not have fair use provision have a private use exemption. It’s really perplexing why developing countries like Congo and Costa Rica took such a policy. It might definitely be the product of French political and philosophical influence. The significant element is that no legislation defines what a fair dealing is. However some countries have designed a tricky formula to identify a use as fair or not.91 This reflects the most visible uniformity among these countries inspite of the expansive and extensive diversities. The formulae contains a four step analysis starting with the purpose and character of the use, then looking to the nature of the copyrighted work and thirdly to a quantitative analysis of the amount and substantiality of the work used; and finally to the effect of the use upon the potential market for or value of the copyrighted work.92 Thus the standard involves a quantitative, a qualitative and finally a normative analysis suitable to a highly developed social and economic system. Fortunately none of the developing countries had accepted this standard in their legislations at this period of copyright development. Even some developed countries like Ireland, the UK, Finland and Zimbabwe leave it as a matter of judicial discretion. When these fair use standards are put on user rights as a precondition for any kind of free use, it acts as a sign of danger or caution put on high frequency electrical lines reminding the users to be very cautious before they make free use of the rights. But

91 The formula evolves from the fair use doctrine evolved by Justice Story which we have discussed earlier.

92 See Section 107 of the US Copyright Act, 1976, Article 43(3) of New Zealand Copyright Act and Section 40(2) of Australian Copyright Act.
when the law is general without imbibing the prerequisites, the users are in a privileged position. But, both the situations has its own negative impacts. If the users are left as unruly horses the age-old balance of the system will be completely shattered. At the same time a closed system with strict boundaries will squeeze out the scope for free uses.

The judicial attitude to this copyright issue in the post-Berne runs parallel with the legislative policy. Diversity persists there as well, irrespective of the fact that the policy itself originated from the fundamental cannons proposed by Justice Story. Each jurisdiction exercised the judicial discretion in accordance with their own social, cultural, economic, political and philosophical perspectives. Response of the judiciary to the issues confronted by the two major technological challenges (photocopying and audio and video recorders) is a clear evidence for this. To this, the international arena witnessed three major judicial approaches. At one stance is the judicial policy headed by German judiciary that visions this as a great threat to authors and put restrictions on the extent of copying and also provides compensation to the authors for each and every reproduction. A second set of judicial attitude represented by countries like the US and the UK is to apply their traditional notion of fair use as if they are untouched by this spanking scenario. A third group of countries like Australia takes a middle path, by accepting user rights in context of the new technology and at the same time compensating the authors for the new mode of reproduction.

In 1955 the German Federal Supreme Court upon a complaint of photocopying of articles of a scientific journal by a commercial enterprise, held that the authors and publishers have the right to condition

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the copying upon payment of adequate compensation and they can also impose some levy on the manufactures of copying machine.\textsuperscript{94} Deeply imbibed by the natural right theory of authors, it is little surprising that the German court reached such a conclusion. It is really interesting that this judicial pronouncement was made at a time when the large scale use of reprography and its consequences was not experienced by the society. This judicial attitude showed a mirrored reflection, when a legislative attempt was made to address this issue. Thus the German Copyright Act made explicit provision for remunerating the authors when a copyrighted work is reproduced for genuine educational purpose or for library use.\textsuperscript{95} Under this law the obligation to pay equitable remuneration to the author is vested on the manufacturers and importers of copying machines, in respect of the possibility to make reproductions.\textsuperscript{96} When appliances of such type are operated in schools, universities or vocational training institutions or in other educational institutions, research institutions, public libraries or in institutions which have available appliances for


\textsuperscript{95} German copyright Act, 1965, Article 54 (2) : Where the nature of the work is such that it may be expected to be reproduced in accordance with Article 53(1) to (3) by the photocopying of a copy or by some other process having similar effect, the author of the work shall be entitled to payment of equitable remuneration from the manufacturer of appliances intended for the making of such reproductions, in respect of the possibility of making such reproductions created by the sale or other placing on the market of the appliances; in addition to the manufacturer, any person who commercially imports or reimports such appliances into the territory to which this Law applies shall be jointly liable. Where appliances of such type are operated in schools, universities or vocational training institutions or in other educational and further education institutions (educational institutions), research institutions, public libraries or in institutions which have available appliances for the making of photocopies on payment, the author shall also be entitled to payment of equitable remuneration from the operator of the appliance. The amount of the remuneration to be paid in total by the operator shall depend on the type and extent of utilization of the appliance that is to be expected in view of the circumstances, particularly the location and the habitual use.

\textsuperscript{96} See, Article 54 (2), German copyright Act, 1965.
making of photocopies on payment, the author shall also be entitled to payment of equitable remuneration from the operator of the appliance.\textsuperscript{97} Thus author is entitled to have a dual remuneration from the users in addition to the compensation from manufacturers. Further it is mandatory on the manufacturers of these machines to supply to, author information on the nature and extent of recording mediums sold or otherwise put into circulation on the territory to which this law applies.\textsuperscript{98}

On a similar situation, in \textit{Williams and Wilkins Co. v United States}\textsuperscript{99}, on a complaint by a publisher of medical journals serving physicians, schools and libraries against the National Institute of Science and National Library of Medicine alleging infringement of copyright by photocopying articles from its journals for distribution both within and out the two institutions, the US Supreme Court held it to be a fair use on the ground that the medicine and medical research will be injured by holding these particular practices to be an infringement.\textsuperscript{100} Following this, in the new the US Copyright Act of 1976, special provision\textsuperscript{101} was incorporated to protect the existing practice of library photocopying, outlining the circumstances under which a library or archive make a single copy of an entire copyrighted work.\textsuperscript{102} The persons in charge of library are free to make up to three copies of the whole or substantial part of works kept in library, provided they are satisfied of the genuinity of


\textsuperscript{98} Ibid.

\textsuperscript{99} 180 USA.P.Q. 49 (Nov 29, 1973)


\textsuperscript{101} See Section 108 of USA Copyright Act, 1976.

such reproduction and in case of reprographic machines kept in their premises they are absolved from liability if notice of warning that it is subject to copyright law is affixed there. The US legal scenario responded very cautiously to accommodate the new technology, realising its vital role in accelerating the spread of information. Their stand was that the right owners should be vigilant in administering and enforcing their rights.

While in Australia in a comparable situation a university was held liable for infringement of the copyright in a book of short stories because it made available, without supervision, both the copyright work and photocopy machine, by means of which the work was in fact copied. Similarly in another case, a memorandum issued by director general of education enabling teachers any amount of copying without any need to make records and payments was held violative of section 40 and section 53-B of the Copyright Act and the court ordered to withdraw the memorandum. Following the Moorhouse judgment the Australian Copyright Act 1968 was amended in 1980 which prescribed a form of notice for library photocopy machines that would absolve libraries from liability of copyright infringement by users. Its main thrust has been to increase copyright owner’s right to remuneration in respect of photocopying, while at the same time effecting some reduction and

103 Morehouse v The University Of New South Wales, 1974-1975 CLR 1, High Court of Australia.
105 Haines and another v Copyright Agency Limited and Others The judgment at first instance was noted at (1982), E.I.P.R, 6(2), 134.
simplification in the administrative and recording burden on the educational institutions associated with the statutory licensing schemes set up under the legislation. Thus the Australian legislation made a safe way in between the USA approach and German approach. It tried to appreciate the advent of technology, keeping in mind the sweat of authors.

The issue of audio and video recorders was triggered by the introduction of a levy system in Germany in 1965 by two seminal decisions of German Federal Supreme Court in 1955 and 1964 respectively, both of which involved the sale of sound recording


109 On analysing the response of national scenario to this subject, we can see that countries who responded to this new technology take either the German or the USA or the Australian approach. At the same time there are a number of countries who felt they were least affected by this phenomenon. Fifty percent of copyright legislations in the world, either deliberately or otherwise makes no reference to reprographic reproductions. Countries like India, Ghana, Pakistan, Poland, Korea, United Arab Emirates, Columbia, Thailand, China, etc make no reference to reprographic reproductions. In such countries we have to draw an inference from their general approach towards fair use, that whether exemptions are allowed subject to the consent of the author and paying him royalty or whether all exempted uses are absolutely free. In Thailand all permissible uses are allowed in quite flexible manner not obliging payment of compensation or obtaining the consent of the author. There we can infer that reprographic reproductions will be welcomed enthusiastically as in the case of Saudi Arabia, Qatar or Italy, where the statutes expressly allow reprographic reproduction without any restrictions. Countries like Japan, Hong Kong and Netherlands have expressly brought out reprographic reproduction from the free uses for education and library use. On the other hand countries like Portugal allow reprographic reproductions by limiting it in quantity and quality. A similar position prevails in Australia, Canada and America, where reproduction is limited in number and subject to the payment of compensation to the author. A unique feature of these legislations are they absolve the persons in charge of educational establishments or library from copyright infringement if a notice warning copyright law is affixed in their premises.


equipment. In the first case the court considered whether the producers and retailers of recording equipment could also be held liable for copyright infringement, even if they did not realize the reproductions themselves, but only provided the individuals the necessary for doing so. The court answered this question in the affirmative pointing out that producers of recording equipment took express advantage of the popularity of private home taping. The court held that recording of copyrighted works by means of a tape recorder constitutes a copyright infringement even if intended for private use without any intent to earn profit.\(^{112}\) The court held that home audio recording would lead to a decrease in the sale records and thus would adversely affect the economic interests of copyright holders. Court further directed that tape recorders should be sold subject to a notice that “no recording without copyright owners consent.”\(^{113}\) In the latter case the court was confronted with the validity of the requirement of a collecting society that the producers of recording equipment be obligated, upon delivery of such recording equipment to wholesalers or retailers to request from the latter that they communicate the identity of purchasers to the collecting society, so as to enable the society to verify whether these customers engaged in lawful activities. Court reiterated the stand in the previous case that producers of recording equipment are infringers, but the obligation to reveal identity was in the opinion of the court conflicted with each individual’s right to inviolability of his home.\(^{114}\)


\(^{114}\) Following this judicial stand, in 1965 under the copyright act the obligation on manufacturers of recording equipments to compensate the authors was made clear and mandatory. In 1985 this position was modified by introducing a levy on
An extremely contrary opinion was adopted by countries representing the US when they were confronted with a similar issue. Following a landmark judgment which set a new precedent the US Supreme Court had very simply applied the age old fair use formulae to this new technology. It was in *Sony Corporation of America v Universal City Studios Inc.*\(^{115}\) (*Betamax case*), the court dealt specifically with the home video recording issue. In this case two of the major world copyright holders of televised motion pictures, Universal Studios and Walt Disney Productions sued Sony, the manufacturer of the “Betamax” video recording machine to restrain Sony from manufacturing and selling Betamax or Betamax tapes for use by purchasers thereof to copy or otherwise infringe copyrighted motion pictures owned by plaintiffs.\(^{116}\) But the court held that copyright act never gives the copyright holder monopoly power over an individual’s off-the-air copying in his home for private, non-commercial use. The court further held that even if such blank tapes, in addition to the levy on the sale of recording equipment. The main argument for imposing levy on blank tapes was that remuneration collected on the sale of recording equipment no longer equalled the dimension assumed by the legislator when the provisions was enacted in the year 1965. This was partially due to the rapid increase in private home copying and partially because of the reduction in the price of those of equipments. Today, most of the countries have followed the German model and have granted authors, publishers, performers, and phonogram and video gram producers a remuneration right for the private use of their works. This is not simply the attitude of countries like Japan, France, Netherlands or Switzerland, who even impose royalty on reprographic reproduction, but also of countries like India, Pakistan, Sri Lanka who while keeping silent on the issue of reprography, mandates the payment of royalty in cases of sound and video recording.

\(^{115}\) 464 USA 417 (1984).

\(^{116}\) The plaintiff’s main contentions were that they would suffer great monetary damage if home video recording of their copyrighted motion pictures were allowed to continue. Further, the plaintiffs alleged that Sony, as a manufacturer of video recording was either a direct or contributory infringer or vicariously liable for the infringements by private home video-recording. The defendant contended that home copying for home use was not an infringement and even if it were, the defendant couldn’t be held liable under any theory of infringement or vicarious liability.
recording was an infringement the defendants could not be held liable under any theory of direct, contributory or vicarious infringement.117 The court was convinced that the artistic benefit arose from the wider audiences provided by time shift; part of a benefit which when weighed in the equitable rule of reason, balance appeared to be of greater weight than the right of copyright owners to prevent reproduction.118 Traditional concept of a private use exception not requiring either permission or payment was followed. This decision in the Betamax case remained as a mile stone development resulting in the US producing more programmes and films for broadcasting via television, and has more television receivers than, any other nation in the world. Countries like England, Luxemburg, Ireland though representing a bare minimum took this stand. Thus judicial approach to the issue of limitations and exceptions also manifested exactly the same diversity which the legislative policies retained. However unlike the legislative policy which is a combination of a multiple of factors, judicial attitude is definitely the influence two legal philosophies, the natural law and utilitarianism. While German judiciary was deeply influenced by the natural rights of authors, the US judiciary was carried by the utilitarian objective of copyright.

### 6.3 Conclusion

The analyses of the select areas of copyright exemptions from the different legislation of countries with diverse back ground leave us with ample options to answer the questions we raised. Just like the pre-Bern era, post-Berne era was also a golden age of flexibility. There were no obstacles and international obligations to the countries in copyright


policy making and enforcing, apart from their social, economic and political challenges. Further each and every country was free to frame their policy to meet these challenges. We have seen an express declaration of the socialism of Angola in its copyright law. Similarly, there is a provision in the copyright law of Barbados enabling large-scale translations of copyrighted works to English language even without the consent of authors. This is a unique provision in their law to meet their domestic exigency of access to knowledge and lack of sufficient materials to spread knowledge. We have also seen typical provisions for press use in the laws of Pakistan and Israel to suit their disturbed political climate. Thus the limitations to author’s rights remained a strategic weapon in the armoury of the countries to achieve their domestic social goals. It should also be noted that a majority of the countries failed in manoeuvring these flexibility to meet their domestic needs. For example, all socialist countries do not have an express declaration of socialism in their copyright laws. All politically disturbed countries do not have a lee way framed by Pakistan or Israel. Correspondingly all least developed countries do not have a provision for translations as in Barbados.

Thus public interests of the countries can be pondered as the prime and of course the most vibrant root of the diversity in the exercise of limitations, though other factors like geography, political dominations, standard of economy and philosophical ideals also exercised considerable impact. When the African countries like Congo, Costa Rica and Nigeria share uniformity in their laws one could infer that it is definitely the influence of the close geographies. But when a similar African developing country Kenya, still follow a different policy with well codified law on user right it draws the example of French colonial hangover. French colonialism has given these poor developing countries the influence of classical natural right philosophy, resulting in an
apathetic attitude towards user rights. At the same time when we say that colonialism leaves a considerable influence on limitations, it should be noted that inspite of the fact that English copyright tradition being the parental law for a majority of worlds colonialist countries, these colonies in their post-independent copyright laws has taken a very sharp deviation when we analyze the provisions on user rights as a whole. While in these countries the colonialist and imperialists share a common thread on authors rights, when it comes to the users right they mold it for their domestic interest. The best example for this deviation is the copyright laws of India, Pakistan, Cyprus and Barbados. Realizing the special requirements of the domestic users while protecting the economic rights of the authors they codified their user rights in their own way. They are free from the new generation detailed water tight compartments of user rights with remuneration packages.

Standard of economic development among the countries has exercised a marked influence on the policy towards user rights. The developed countries have detailed provisions on fair use. They are sceptical to the users, that they are the patrons of authors and their rights. Further, it is also a manifestation of their policy that, they are no more the consumers of information, but the producers and owners of information that are consumed by the rest of the world. Further it also shows economic and social maturity of their publishing industry and also of the consumer class in respecting and enforcing the rights of both authors and users. Countries like Australia and the US have expressly accepted the economic rights of authors even in cases of fair dealing. They are not only beware of the actual economic infringement but also are conscious of the potential economic damages. When countries are too much concerned about the fair use, it becomes confusing that whether they are actually trying to protect the authors or users. Unlike a general
provision, the detailed and minute provisions shows the national awareness of the conflicting interests. While a general provision gives much room for users, a detailed and specific provision will obviously narrow it. A close scrutiny of such legislations also points it. This inference will be watered by the user rights provisions in developed countries like Sweden, Zimbabwe etc., when they took an ill assorted approach.

However, majority of the developing countries have an unsystematic and unscientific attitude towards user rights. Best example is our own copyright law. Indian law on educational use itself is badly codified. It fails to address the needs of distance and online education and fails to appreciate the multifaceted modes of instruction. While at some circumstances it takes a restrictive attitude by confining copying in a particular manner and limiting the quantity (two passage limit), at other occasions it does not impose any limitation on the portion that may be reproduced (reproduction in course of instruction). Similarly, on the library use too India took a very restrictive attitude towards the definition of library, class of works, conditions for applicability of works, manner of copying and finally to the manner of exploitation. This is the situation in a majority of developing countries. However legislations like Kenya and Tonga have broad user rights provisions.

Philosophical influence is evident when some legislations like Austria, Finland, Germany and Sweden begin their user rights provision with a precondition for respecting author rights. In Austria and Germany even for pure educational uses the authors are bound to be remunerated. These are pure instance of natural law philosophy. This also reflects the social, cultural and economic conditions of these countries.
Thus the diversity and disparity manifests in all minute aspects of user rights and the raison d'être also varies. When the Nigerian law took a broad attitude towards educational use and a narrow approach towards library use, the situation in Italy is vice versa. Likewise when the US has detailed provision on library use, it neglects the educational use. So there is no predictability even within a particular legal system on the nature of a user right. What is the pattern of limitations remains thus is a hard puzzle. Very often, it remains a blind copy of other legislations without appreciating the domestic needs. It is the fundamental cannon of international law that it is the civil law countries that have detailed guidelines on fair use and common law countries that have left it as a matter of judicial discretion. Even this presumption is tilted by the common law countries like Australia, the UK and New Zealand when they have detailed guidelines on user rights. Thus unpredictability, randomness and uncertainty run throughout the user right policy. While there is an international mandate on author rights, the user rights remain in a situation of chaos and confusion. What might be fair use in one country might be an author right in a neighboring country. Though from a territorial perspective this may appear to be a sovereign wisdom, but from an international perspective this is quite irrational. So, definitely there might have been an international craving for a system with some sort of uniformity and predictability retaining the flexibility and manoeuvring capacity of the countries.