## Chapter 8

**LIMITATIONS AND EXCEPTIONS TO COPYRIGHT: POST TRIPS ARENA**

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The inclusion of intellectual property into WTO legal framework resulted in the erosion of the age-old noble and righteous nature of
intellectual property and it increasingly became an economic phenomenon pliable by market mechanism. This paradigm shift from a creator based property approach to an investment related trade perspective has elevated both the creators of intellectual property and the users of intellectual property alike. At no time both in negotiation, incorporation or implementation, the role of limitations and exceptions in serving the public interest was mentioned and this also remained as part of a trade phenomenon. The new norms of intellectual property was devised as a potent weapon to combat piracy rather than as an instrument for disseminating knowledge and technology and it was perceived as a savior of rights rather than as a liberator of public interest. This had alarmed the international legal scenario and was detonated by the WTO DSB Panel reports which interpreted the open lucid and flexible wordings of “Three Step Test” (TST) in a restrictive economic sense. There, once again the international politics made it clear that the real actors and directors behind the international intellectual property norms were the MNC’s representing the pharmaceutical industry and entertainment industry. In this chapter an attempt is made to see whether these fears are real or mere hallucinations in legal vacuum. It has been noted that TST is a double edged sword which if wisely interpreted can be a boon and bane as well. So, how was this utilized by the different members states to achieve their policy objectives is the concern at this point. Whether the flexibility enjoyed by the countries in the pre - TRIPS era was preserved in its serene nature or was actually squeezed and condensed is the question to be examined. The way out for this is a peep into the legislative and judicial developments in select areas in copyright and patent in some of the countries in the post-TRIPS era.
8.1 Post-TRIPS Legislative Developments in the Copyright Arena

It is usually seen that every post-TRIPS literature starts from the nepotism induced notion that, TRIPS\(^1\) had completely blocked the scope of flexibility to the countries making sovereignty, user rights and public interests as mere golden memories.\(^2\) The following analysis of the post-TRIPS legislations points out the ludicrousness of these irrational presumptions. It proves that the glorified attempt of homogeneity and uniformity through international standardization remains, even now a herculean task. But in spite of its failure in achieving the esteemed

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aspirations, it was successful in laying the seeds in a very hybrid manner itself, which could be reaped very soon.

Limitations and exceptions to patents or copyrights in the post-TRIPS legislations were not at all a relic or artifact of TST. They retained the inherent diversity, uncertainty, discrepancy and multiplicity which they have since the inception. The countries drafted the limitations in a haphazard manner sometimes towards their domestic needs, at others under influence of political powers and at odds with copies of other legislations. In this process as we have concluded in earlier chapter, social, economic, political, geographical and international cataclysms have played their own roles.

In spite of a century of inexorable international attempt in unifying the copyright limitations, the diversity was the finale in post-TRIPS status of copyright limitations as well. However unlike their predecessors the post-TRIPS copyright legislations began to manifest a craving towards the economic rights of the author. The concepts of ‘economic rights’, ‘legitimate interests’ and ‘unreasonable prejudice’ got a new orientation from a trade (right holder) perspective in a majority of these new legislations. Another, incredible development of the period was the fair dealing provisions with wordings similar to TST. The US four factor test also manifested in a series of legislations. In sum the post-TRIPS scenario lives through a narrow stream of user rights.

For example in the copyright law of Andorra, each and every instance of fair use is subject to the triple test. After fulfilling the first step by identifying the special situations, the law reproduces

3 This we have discussed in detail in our earlier chapter.
the TST in its full vigor by saying that such use ‘should not conflict with a normal exploitation of the work and does not otherwise unreasonably prejudice the legitimate interest of the author or other owner of copyright’.\(^4\) TST with its cumulativeness can be seen in the copyright legislations of Zambia,\(^5\) Poland,\(^6\) Romania,\(^7\) Rwanda,\(^8\) Serbia,\(^9\) Thailand\(^10\) and Uzbekistan.\(^11\) Even the least developing countries like Uganda\(^12\) and Tonga\(^13\) incorporates TST in

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4 Copyright Law of Andorra, 1999, Article 7-16.

5 Copyright Act of Zambia, 1994, Article 23 (2) An Act which — (a) conflicts with the normal commercial exploitation of a work; or (b) unreasonably prejudices the legitimate commercial interests of the owner of the copyright in a work; shall not, for the purposes of subsection (1) — (i) be treated as fair dealing with the work; or (ii) be treated as an Act to which paragraph (f) of subsection (1) applied.

6 Copyright Act of Poland, 1994, Article 35. Lawful use shall not be prejudicial to the normal exploitation of the work or to the legitimate interests of the creator.

7 Copyright Law of Romania, 2003, Article 33 (1) “The following uses of a work already disclosed to the public shall be permitted without the author’s consent and without payment of remuneration, provided that such uses conform to proper practice, are not at variance with the normal exploitation of the work and are not prejudicial to the author or to the owners of the exploitation rights”.

8 Intellectual Property Law, Rwanda, 2009, Article 203: “use of any work in cases where reproduction would conflict with a normal exploitation of the work or would otherwise unreasonably prejudice the legitimate interests of the author or other owner of the copyright is not permitted”.

9 Copyright Law of Serbia, 2009: Article 41: the scope of limitation of exclusive rights may not conflict with a normal exploitation of the work nor may unreasonably prejudice the legitimate interests of the author.

10 Copyright Act of Thailand, 1994, Section 32. An Act against a copyright work under this Act of another person which does not conflict with normal exploitation of the copyright work by the owner of copyright and does not unreasonably prejudice the legitimate rights of the owner of copyright shall not be deemed an infringement of copyright

11 Copyright Law of Uzbekistan, 1996, Article 27. The use for personal reasons of another's work that has been disclosed is authorized without the consent of the author and without payment of remuneration, provided that such use does not adversely affect the normal exploitation of the work or prejudice the author's legitimate interests.

12 Copyright Law of Uganda, 2006, Section 15: Fair use of works protected by copyright (j) subject to conditions prescribed by the Minister, a reproduction of a literary, artistic or scientific work by a public library, a non-commercial
their copyright laws. After carefully specifying the instances of fair dealings as per the requirement of TST, these laws stipulate that, these acts should not conflict with a normal exploitation of the work and does not otherwise unreasonably prejudice the legitimate interest of the author or other owner of copyright. Thus a visible influence of TST can be seen in post-TRIPS legislations. But here too, just as in the case of international scenario it still remains as a distilling test without appreciating its real nature and scope. It is to be noted that in international arena, it was devised as a yard stick with which countries are capable of structuring their copyright law to meet their domestic needs. It arises out of the incompetency in unifying the diverse interests of the countries. This was also a compromise on the varied domestic interests of the members. But in the domestic arena, it was capable to be used simply as a policy matter through which the countries can design their user rights in accordance with the typical needs of their concerned users. But we can see that, the countries miserably failed to identify its function as an extrinsic aid for interpretation, and made a direct application of the test. They designed TST as a ceiling limit on all user rights, irrespective of the nature and scope of the use. Thus in copyright laws of Uganda and Tonga we can see that TST acts as a dual filtering mechanism. At first, the user rights have to fulfill the minimum traditional obligations and to that an additional layer of control is put by mandating the fulfillment of TST.

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13 Copyright Act of Tonga, 2002, Section 8 (e): use of any work in cases where reproduction would conflict with a normal exploitation of the work or would otherwise unreasonably prejudice the legitimate interests of the author or other owner of the copyright is an infringement.

This direct incorporation of TST in its full vigor, without any dilution itself creates an imminent feeling of blocking of user rights. The status of these least developing countries to satisfy the bare minimum needs of access to knowledge is thus really deplorable. It comes out from the incapacity of these countries in realizing and articulating their needs. Unilateral international standardization ignoring these factual realities makes the situation beyond control. It also gives an impression that the identification of special needs of the society is left to judicial interpretation rather than a definite policy choice of the State.

Another perceptible development in the copyright legislations in the pre-TRIPS era was their charming inclination to the US fair dealing provision. For example, under the Israeli law even in cases of bona fide educational use, the use is subject to the four factor test in the US law.\(^\text{15}\) Similarly the copyright law of Taiwan also incorporates this US fair use doctrine.\(^\text{16}\) The law on fair use begins itself by the stipulation that no reproduction should cause any prejudice to the economic interests of the author.\(^\text{17}\) Similarly in cases of compilations for educational use, the economic rights are asked to be protected.\(^\text{18}\) The copyright law of Jamaica\(^\text{19}\) and Philippines\(^\text{20}\) also has a similar provision.

\(^\text{15}\) Copyright Act of Israel , 2007,S.19 - (1) The purpose and character of the use; (2) The character of the work used; (3) The scope of the use, quantitatively and qualitatively, in relation to the work as a whole; (4) The impact of the use on the value of the work and its potential market.

\(^\text{16}\) Copyright Law of Taiwan Province of China , 2010, Article 65.

\(^\text{17}\) Copyright Law of Taiwan Province of China, 2010, Article 44 .

\(^\text{18}\) Copyright Law of Taiwan Province of China , 2010, Article 62.

\(^\text{19}\) Copyright Law of Jamaica, 1993, Section 54 “For the purpose of determining whether an Act done in relation to a work constitutes fair dealing, the court determining the question shall take account of all fActors which appear to it to be relevant, including— (a) the nature of the work in question; (b) the extent and substantiality of that part of the work affected by the Act in relation to the whole
Another major step in the post-TRIPS legislations are a general narrowing down of the user rights provision. Even the traditional contours of permissible uses are subject to equitable remuneration as a reverence to the economic rights of author. For example, it is the copyright law of Korea that has a broad and comprehensive fair use provision in the post-TRIPS legislations.\textsuperscript{21} Even the use of copyrighted works for judicial purposes is subject to the legitimate interests of the rights holder.\textsuperscript{22} Similarly even in cases of reproductions for library use or educational use, it is subject to equitable remuneration to the author.\textsuperscript{23} The copyright law of Nepal, 2002 mandates that there is no unreasonable prejudice to the legitimate interest of economic rights of authors even in cases of fair dealing for the purpose of libraries, educational use or broadcasting for the general public.\textsuperscript{24} The copyright law of Oman obliges to respect the legitimate interest of authors in cases of use of their work for educational or library use.\textsuperscript{25} Thus the legislations are extremely and exceedingly conscious of the rights of authors even in cases of pure instances of traditional fair use. How can these types of remunerations to the right holder be justified in cases of bona fide

\begin{itemize}
  \item \textsuperscript{20} Philippines intellectual property Code, 1997 –Section 185: In determining whether the use made of a work in any particular case is fair use, the factors to be considered shall include: (a) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit education purposes; (b) The nature of the copyrighted work; (c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (d) The effect of the use upon the potential market for or value of the copyrighted work.
  \item \textsuperscript{21} Copyright Law of Republic of Korea, 2009.
  \item \textsuperscript{22} Copyright Law of Republic of Korea, 2009, Article 23.
  \item \textsuperscript{23} Copyright Law of Republic of Korea, 2009, Articles 24 to 35.
  \item \textsuperscript{24} Copyright Act of Nepal, 2002, Article 16.
  \item \textsuperscript{25} Copyright Act of Oman, 2000, Section 6 (c).
\end{itemize}
educational use, library use, or use by vulnerable sectors like the visually handicapped and physically challenged.

8.2 Post-TRIPS Legislative Developments in the Patent Arena

Even in the case of exceptions for ‘scientific or experimental purposes’ which remains the most common and traditional among the various limitations to patent rights, post-TRIPS legislations also retained diversity and uncertainty as to its nature, extent and scope. While some confined it to ‘experiments relating to the subject matter,’ others restricted it to pure ‘scientific research,’ while a third category took a very liberal approach by permitting any kind of non-commercial experiments. Astonishing are patent laws of countries like Bahrain, Bangladesh, Georgia etc., who in spite of having provisions on patent limitations fails to have experimental or research uses even in this twenty first century of innovation and R&D. No country remaining under the


most sophisticated umbrella of TRIPS can take such a reluctant and unscientific isolated policies. Equally disappointing are countries like Antigua and Barbuda, Japan, Jordan, Kyrgyzstan, Portugal, Saudi Arabia, Serbia, United Arab Emirates and Zimbabwe who even do not have the internationally accepted patent exception like foreign vessels exception. Thus when we analyze the Patent legislations in the post-TRIPS, we hardly find any instance of influence of TST. Even when the patent legislations remain impervious and impassive to TST, there is a general embarrassed and discomfit approach towards patent exceptions. The comparative analysis of the experimental use exception in the post-TRIPS era itself manifests a tendency of tapering down in scope and extent even in the midst of diversity. A majority of the legislations confines its scope to experiment relating to subject matter and it is only a very few countries that are having a broad provision allowing any kind of non-commercial experiments. It is also unfortunate, that in spite of decades of international promise and assurance of technology transfer and assistance, a vast majority of countries are still ignorant of the potential ways in which the technology

can be transferred and utilized. Thus, while the multilateral initiatives are very sharply focused to protection of rights, they consciously flout the requirement of well established user rights.

8.3 Comparative analysis of development in Copyrights and Patents in the post-TRIPS era

While the post-TRIPS copyright arena was strappingly influenced by TST and showed a clear tapering of limitations, the patent arena remained impassive. Thus the real basis for this difference is worth probing. Here comes the significance in the wordings of Article 13 and Article 30. Whether it is because of the mandatory nature of Article 13 and permissive nature of Article 30, which has made this difference? Or is it because that the US entertainment industry is far more powerful in these countries than its pharmaceutical industry in persuading the international arena towards its undisclosed agenda? The real picture supports both arguments. It appears to be a combination of both. In addition to this lack of industrialization in these countries coupled with the dominant understanding that a trade centered strong intellectual property regime could initiate the process of industrialization lead by foreign industries also seems to be an influential factor.

It is really appalling that in spite of a decade of cry for public health; we hardly find any patent legislation incorporating provisions for upholding the public health even with these flexible wordings in Article 30. This was also proved to be the concerted effort of the multinational pharmaceutical industry. For example during the para.6 negotiations, as

during the original negotiations leading to the TRIPS, there were disagreements on the scope of Article 30, with many developing countries arguing that an amendment to Article 31(f) was not necessary because Article 30 already provided sufficient scope to allow the manufacture and export of generic versions of essential medicines under the terms of a compulsory license. On October 4, 2001, developing countries proposed an Article 30 solution. Paragraph 9 of the developing country proposal stated that: “Under Article 30 of the TRIPS, Members may, among others, authorise the production and export of medicines to persons other than holders of patents on those medicines to address public health needs in importing Members.”

Recourse to Article 30, therefore, would allow generic exports to meet a public health need with only a one-time change in the exporting country's legislation, without requiring authorisation from the patent holder, compensation or the issuing of licences. While an Article 31(f) approach envisaged issuing a compulsory licence specific to a particular country, predominantly for the supply of the domestic market to meet the

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42 Ibid.

requirements for a particular product, the approach under Article 30 would instead focus on a general exception to the rights of a patentee under a country’s patent law through general exceptions like research exemption or the “Bolar exception”. The advantage of an Article 30 exception over one based on Article 31 would have been that, while the latter requires the granting of compulsory licences on a case-by-case basis, an Article 30 exception permitting, for instance, generic manufacturers to produce essential medicines to export to developing countries with insufficient or no manufacturing capacity of their own, would have been by means of a general exception to patent rights which, by its nature, would be more readily available than compulsory licences as a flexible mechanism to alleviate public health crises in developing countries. However the US asserted that Article 30 should be construed narrowly on grounds that it is: “intended to apply to statutory exceptions already provided for in many countries’ laws at the time the TRIPS was negotiated, situations such as non-commercial experimental use and prior user rights”.

Under the US interpretation, using Article 30 to allow WTO members to amend their patent laws to permit compulsory licences to be granted in order to authorise the manufacture and export of patented pharmaceutical products to developing countries might unreasonably prejudice the legitimate interests of the patent owner and contravene

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Article 28. It was strongly opposed by developing countries like Brazil, asserting the wide amplitude of Article 30 in addressing any public interest.\textsuperscript{46} During the initial negotiations on a Para.6 solution, proposals to use Article 30 as a mechanism to alleviate public health crises were not limited to developing countries. Initially, the European Union also advocated an Article 30 solution.\textsuperscript{47} The competency of Article 30, to ensure access to medicines in developing countries was highlighted on grounds that it was the most direct, administratively simple and least contentious approach. So an activity falling within an Article 30 exception is not an infringement of the patent and did not need permission from the patent holder or even notice to be given to the patent holder or compensation to the patent holder arranged, as under the Article 31 compulsory licensing provisions.\textsuperscript{48} However, all these suggestions were met with fierce opposition from the US and, reportedly,

\textsuperscript{46} A communication from Brazil asserted that: “such exceptions do not unreasonably conflict with the normal exploitation of the Patent and do not unreasonably prejudice the legitimate interests of the Patent owner. In the context of the proposed authoritative interpretation of Article 30, the limited exceptions address public health problems outside the territory of the Member and therefore do not conflict with the normal exploitation of the Patent”. “Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health”; communication from Brazil on behalf of the delegations of Bolivia, Brazil, Cuba, China, the Dominican Republic, Ecuador, India, Indonesia, Pakistan, Peru, Sri Lanka, Thailand and Venezuela, IP/C/W/355, 25 June, 2002.“TRIPS Health Amendment Evokes Harsh NGO Reaction, Industry Caution”, IP-Health, 7 December, 2005 [online]. Available at www.ip-watch.org/weblog/index test.php?p=169 [Accessed on June 2011].


from other industrialized countries. As a result, the developed country focus reverted primarily to a solution based on a waiver to Article 31 (f) and ignored Article 30 purposefully realizing its potential to meet the exigencies of public health. Thus even any discussion on the scope of Article 30 to meet the demands of public health was not encouraged and any attempt was suppressed with iron hand.

This was the policy the US adopted on patent exceptions even in FTAs. While they carefully drafted provisions on compulsory


51 Since the failure of the Seattle Ministerial of WTO in 1999, developed countries like the US and the European Union have initiated negotiations on a large number of bilateral and Regional Trade Agreements. They are turning to a new bilateralism because FTAs are permitted in the WTO, and in this context developing countries, which face intense competition in the global market in the wake of the WTO, are willing even eager to trade off non-tariff benefits, including stronger IPR protection, for preferential tariff treatment under FTAs. The traditional wisdom of tying IPR issues to bilateral trade negotiations works here. By taking this strategy, developed countries, such as the United States, have made great progress in upgrading international IPR protection. To a considerable extent, however, the IPR provisions reached in the FTAs are not bilateral but global in nature. They are shaping international IPR protection. Developed countries, especially the United States, have been quick to incorporate “the highest international standards” into FTAs. For a detailed study on FTAs and their impact on international intellectual property norms in post-WTO era See, Roffe, P. (2004) ‘Bilateral Agreements and a TRIPS-plus World: The Chile-US Free Trade Agreement’, TRIPS Issues Papers [online]. Available at http://www.gunto.org/geneva/pdf/economic/Issues/Bilateral-Agreements-and-TRIPS-plus-English.pdf; Drahos, P. (23 April 2011), ‘Bilateralism in Intellectual Property’, (Paper prepared for Oxfam), Available at  http://www.maketradefair.com/assets/english/bilateralism.pdf [Accessed on February 2011]; Nanto, D. (2008) ‘The US-Singapore Free Trade
licensing, exceptions to patentability, test data requirements of pharmaceuticals, they shrewdly and cleverly avoided any user rights. In FTAs by the US between countries like Vietnam, Jordan, Chile, Singapore, Australia, Morocco and Bahrain, the US was successful in even limiting the existing user right regimes particularly in those developing countries. These FTAs enabled patent holders to limit parallel import of pharmaceutical products through licensing contracts. Similarly data exclusivity for pharmaceutical products was extended for a period of five years. In some FTAs like that between Morocco and

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52 All these FTAs are available in www.ustr.gov/trade-agreements. [Accessed on 20.02.2011]. The US currently has FTAs in force with 17 countries.

53 For example see Article 17.9 (4) of US-Australian FTA, Article 15.9 (4) of US-Morocco FTA, Available in www.ustr.gov/trade-agreements [Accessed on February 2011].

54 For example see Article 15.10 of US-Morocco FTA, Article 17 (10) of US – Chile FTA, Available at www.ustr.gov/trade-agreements [Accessed on February 2011].
Bahrain, the US even provided for an additional three year data exclusivity triggered by ‘new clinical information’. These provisions were deviously incorporated to minimize the potential impacts of ‘Bolar’ and compulsory licensing provisions, thereby hampering the availability of generic drugs even after the expiry of the patents. This will result in much higher prices of medicines and block research and development of local drug manufacturers, as generic drugs cannot be developed and there

55 For example see Article 14.8 (6) of US-Bahrain FTA, Article 15.10 of US-Morocco FTA [online]. Available at www.ustr.gov/trade-agreements [Accessed on February 2011].

56 For example through link test data protection to the Patent term, generic manufacturers may not obtain marketing approval at any time during the Patent period, even when a compulsory license is issued, and even in preparation to enter the market upon Patent expiry, both of which are allowed under TRIPS. Thus, and without question, a period of data exclusivity increases the final cost of the marketed product as well as possibly delays its entry onto the market. Data exclusivity can also Act as a de facto Patent, ensuring a minimum period of monopoly for pharmaceutical companies, preventing competition, and in some instances, it may even prohibit a generic manufacturer from seeking registration in a country. Furthermore, a period of exclusivity relying upon the registration in another country potentially deprives a country of the drug for the entirety of that period. Similarly with the linkage of market approval to Patent status, a period of data exclusivity could be detrimental to countries taking advantage of a compulsory license. Again, a manufacturer granted authority to produce a generic drug under compulsory license still must be registered by the national drug regulatory authority and if the generic manufacturer cannot rely on existing data to gain regulatory approval it cannot respond to the compulsory license and supply the needed drug. Thus, where a medicine is protected by Patent, data exclusivity effectively could render the compulsory license meaningless if it cannot make effective use of the license without repeating time-consuming and costly tests to obtain marketing approval of its drug. Therefore, exclusivity provisions can effectively prevent the use of compulsory licensing during the Patent term as well as extend the life of the Patent For a detail study read:

would be no supply of patented active ingredients.\textsuperscript{57} Thus FTAs were very consciously drafted to nip in the bud, any effort by WTO member countries, to utilise the inherent flexibilities in TRIPS in forging a robust patent regime that meets their domestic needs.

Likewise, when we analysed the copyright legislations in the post-TRIPS era, one common feature among the various legislations was their fair dealing provision identical to the “four factor test” of the US. This is perceived to be the product of the US policy of incorporating their intellectual property laws into developing countries when negotiating FTAs.\textsuperscript{58} This approach could reduce legislative costs as well as learning costs for its domestic companies when doing business in the markets of their trade partners.\textsuperscript{59} However this incorporation of the US “four factor test” into native legislations was a welcome measure in the context of its potential in achieving a laudable public policy. But melancholy was in the miming of the US DMCA provisions into the copyright laws of contracting parties through these FTAs.\textsuperscript{60} As the US experience itself

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\item \textsuperscript{60} US Congress enacted the Digital Millennium Copyright Act ("DMCA") in 1998 in response to two pressures. First, Congress was responding to the perceived need to implement obligations imposed on the U.S. by the 1996 World intellectual property Organization (WIPO) Copyright Treaty. Second (as reflected in the details of section 1201, which go well beyond anything the WIPO treaty required), Congress was also responding to the concerns of copyright owners that their works would be widely pirated in the networked digital world.
\end{itemize}
with the DMCA illustrates, overbroad legal entrenchment for technological protection measures can have serious unintended consequences beyond areas governed by copyright law, including on the technology sector and on educational and research activities.\footnote{Since they were enacted in 1998, the "anti-circumvention" provisions of the Digital Millennium Copyright Act ("DMCA"), codified in section 1201 of the Copyright Act, have not been used as Congress envisioned. Congress meant to stop copyright infringers from defeating anti-piracy protections added to copyrighted works and to ban the "black box" devices intended for that purpose. In practice, the anti-circumvention provisions have been used to stifle a wide array of legitimate Activities, rather than to stop copyright infringement. Experience with section 1201 demonstrates that it is being used to stifle free speech and scientific research. The Lawsuit against 2600 magazine, threats against Princeton Professor Edward Felten's team of researchers and prosecution of Russian Progammer Dmitry Sklyarov have chilled the legitimate Activities of journalists, publishers, scientists, students, programmers, and members of the public. By banning all Acts of circumvention, and all technologies and tools that can be used for circumvention, the DMCA grants to copyright owners the power to unilaterally eliminate the public's fair use rights. Already, the movie industry's Section 1201 which remains the most controversial from user right perspective contains two distinct prohibitions: a ban on Acts of circumvention, and a ban on the distribution of tools and technologies used for circumvention. The "Act" prohibition, set out in section 1201 (a) (1), prohibits the Act of circumventing a technological measure used by copyright owners to control access to their works ("access controls"). So, for example, this provision makes it unlawful to defeat the encryption system used on DVD movies. This ban on Acts of circumvention applies even where the purpose for decrypting the movie would otherwise be legitimate. The "tools" prohibitions, set out in sections 1201 (a) (2) and 1201 (b), outlaw the manufacture, sale, distribution, or trafficking of tools and technologies that make circumvention possible. These provisions ban both technologies that defeat access controls, and also technologies that defeat use restrictions imposed by copyright owners, such as copy controls. These provisions prohibit the distribution of software that was designed to defeat CD copy-protection technologies, for example. Section 1201 includes a number of exceptions for certain limited classes of Activities, including security testing, reverse engineering of software, encryption research, and Law enforcement. These exceptions have been criticized as being too narrow to be of use to the constituencies they were intended to assist. A violation of any of the "Act" or "tools" prohibitions is subject to significant civil and, in some circumstances, criminal penalties. For a useful overview of the many issues surrounding the interpretation of the DMCA's ant circumvention provisions, see Ginsburg, J.C. (1999) 'Copyright Legislation for the Digital Millennium, COLUM.-VLA J.L. & ARTS, 23 (1), 137; Reese,F.A. (2003) 'Will Merging Access Controls and Rights Controls Undermine the Structure of Anti circumvention Law?', BERKELEY TECH. L.J., 18 (4), 654-55; Cohen, J and Schrag, Z. 'Fair Use Since the Digital Millennium Copyright Act of 1998' [online]. Available at http://correctingcourse.columbia.edu/paper_tushnet.pdf [Accessed on March 2011].}
the midst of these controversies of DMCA in restraining access to knowledge and unilateral tilting of copyright balance that, the US callously incorporated these provisions into their FTAs. The contracting parties in their eagerness to enjoy market concessions and tariff reductions have accepted these provisions without appreciating the deplorable consequences of DMCA even in an economically, politically, socially and culturally developed economy like the US. Some of these FTAs like that between Chile, Morocco and Bahrain have much higher standards than the US DMCA, when they eliminate the element of knowledge in copyright infringement and also fails in incorporating the user rights which even DMCA accepts as inevitable for attaining the larger public interests. The consequence of this miming of a copyright use of encryption on DVDs has curtailed consumers’ ability to make legitimate, personal-use copies of movies they have purchased. Rather than focusing on pirates, some have wielded the DMCA to hinder legitimate competitors. For example, the DMCA has been used to block aftermarket competition in laser printer toner cartridges, garage door openers, and computer maintenance services. Similarly, Apple has used the DMCA to tie its iPhone and iPod devices to Apple’s own software and services. For details see: Unintended Consequences: Five Years under the DMCA”.EFF White Paper [online]. Available at https://www.eff.org/wp/unintended-consequences-under-dmca [Accessed on March 2011].

62 For example see the provisions in US FTAs - Jordan (Article 4 (13)), Singapore (Article 16.4 (7)), Chile (Article 17.7 (5)), CAFTA (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic) (Article 15.5 (7)), Australia (Article 17.4 (7)), Morocco (Article 15.5 (8)) and Bahrain (Article 14.4 (7)). The full text of Free Trade Agreements with the US can be downloaded from: http://www.ustr.gov/Trade_Agreements/Section_Index.html [Accessed on March 2011].

policy of a net exporter of knowledge goods by the net importers of it is certainly an idiotic policy choice.

Thus here again, comes out the success story of the US entertainment and software industry in putting dead bolts to the TRIPS flexibilities by carefully closing all doors of policy space without leaving a single foot span. The user rights were once again overthrown by the economic interests of industrial lobbies. So the post-TRIPS era alarms us of the vanishing and sometimes of the evaporation of the golden principles of user rights. Cognizant moves were made to ensure that, the lucid words of TST are never given a progressive interpretation.

But here starts a new twist in the international political game on limitations and exceptions. The very moment the intellectual property balance was tilted unilaterally favouring the authors, the international arena witnessed a strong sense of annoyance and disturbance from the users. Even though it was manifested for the first time in the Doha while answering the international outcry for public health, it got a hefty

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platform in WIPO through the ‘New Development Agenda’ proposed by Brazil and Argentina in 2004.65 The central philosophy of the agenda appears to be that while recognizing that intellectual property is relevant, they stresses that intellectual property is not an end in itself, but a means for promoting public interest, innovation, access to science and technology and the promotion of diverse national creative industries, in order to ensure material progress and welfare in the long run.66 They demanded the same extent of flexibility which developed countries enjoyed at the comparative stage of development.67 It should be

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65 At the 2004 WIPO General Assembly (27 September - 5 October) a group of 14 developing countries, namely Argentina, Bolivia, Brazil, Cuba, the Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania and Venezuela - known as the Group of Friends of Development (FOD) - co-sponsored a proposal for the “Establishment of a Development Agenda for WIPO”. The proposal received overwhelming support from the floor during the General Assembly (GA) from a large number of developing countries including Egypt (on behalf of the African Group) and Sri Lanka (on behalf of the Asia Group), India, Pakistan, the Philippines, China, Oman, Senegal, Ethiopia, Benin, Peru, Colombia, El Salvador, Nicaragua, Uruguay, Trinidad and Tobago and Jamaica. To establish a “Development Agenda” for WIPO, the FOD submission contains four concrete proposals: (1) a review of the mandate and governance of WIPO; (2) promotion of pro-development norm-setting in WIPO; (3) establishing principles and guidelines for WIPO’s technical assistance work and evaluation; (4) establishing guidelines for future work on technology transfer and related competition policies. The proposal was based on the premise that, being a UN agency, development concerns should be given emphasis in WIPO’s Activities, since several international organizations have recognized that much more needs to be done to reach effective results that meet the challenges of development.


67 See for details the ‘Statement of India made at WIPO Development Agenda Meeting’ [online]. Available at http://lists.essential.org/pipermail/a2k/2005-April/000241.html. [Accessed on February 2011]. According to India, “The real "development" imperative is ensuring that the interest of intellectual property owners is not secured at the expense of the users of IP, of consumers at large, and of public policy in general. The primary rationale for intellectual property protection is, first and foremost, to promote societal development by encouraging technological innovation”. 
perceived as a reaction against the realisation of the fact that harmonization of intellectual property laws across countries with asymmetric distribution of intellectual property assets resulted in serving the interest of rent seekers, who are predominantly in developed countries, rather than that of the public in developing countries. 68 It was a concerted movement against the broken promises of development given by the developed world to their fellow beings in developing world in exchange for an elevated standard of IP.

But it is still mysterious why these friends of development were courageous enough to initiate such a proposal in an international forum which pushed for a TRIPS plus standard through its ‘Patent agenda’ 69 and ‘Digital agenda’. 70 It is really interesting that during the discussions on patent


69 It is an initiative begun by WIPO’s Director General in 2001, aimed to create an international Patent system geared towards the upward development and harmonization of Patent Laws. It is designed to benefit the users of the Patent system, i.e. the Patentees, which are mostly from developed countries - the US, Japan and Europe. This “Patent Agenda” is expected to disseminate Patent systems modeled on developed countries to developing countries. For a detailed study see the Patent agenda Available at www.wipo.int/Patent/agenda/en/ [Accessed on March 2011].

70 Among the various proposals of digital agenda, the most controversial are the “WIPO Copyright Treaty” (WCT) and the “WIPO Performances and Phonograms Treaty” WPPT), known together as the “WIPO Internet Treaties”. The WCT is the most controversial and has been very strongly criticized as it goes beyond what is required under TRIPS Agreement. Some critics have suggested that this treaty is a way of ensuring that US copyright standards, which face strong opposition even in the US itself, become international standards which would thus have to be implemented worldwide. For example, the WCT requires countries to provide for effective legal remedies against circumvention of technological protection measures which are promoted by copyright industries in response to the digital technology which allows for the creation of unlimited, perfect and costless copies and their instant distribution worldwide. Critics argue this will reduce the ability of teachers, students, researchers and consumers, particularly from developing countries, to access information. For a detailed study see the texts Available at; www.wipo.int/treaties/en/ip/wct/index.html, www.wipo.int/ treaties/en/ip/wppt/index.html, www.wipo.int/copyright/en/digital_agenda.htm, and also read Sangeeta
agenda which touched each and every aspect of domestic and international patent system, the members kept a conscious silence and feigned ignorance of the user rights realizing its creative destruction. They even discussed about compulsory license and government use in an absurd manner allowing countries to utilise the opportunity to meet their domestic needs. Even at that point of discussion, no reference was made to the free user rights like research use, regulatory review or parallel importing. But a diametrically opposite stand was taken in the case of copyright. Just like any post-TRIPS development every effort was made to maneuver the copyright limitations to protect the interest of the right holder. In spite of the inclusion of the TST in its ditto, the internet treaties casted an absolute duty to protect TPMs, which in effect made the user rights an illusion.\textsuperscript{71} Thus while the WIPO Treaties set forth the

general prohibition against the circumvention of technological protection measures, debate has ensued over how this general principle should be implemented in national law maintaining the age-old copyright balance. Thus while the treaty left no ambiguity in protecting and recognising the author’s right in the digital dilemma, they lacked any clarity with respect to user rights. This was evident from the cold responses and initial oppositions to the new perspective of development proposed. The developed ones stood for some cosmetic changes only and they wanted to confine this as a mere technical assistance program. It was in this ‘forum’ that the developing countries had come with their new agenda. Here we can think the other way round. If development agenda was not proposed in this forum at that time, WIPO might have come up with some new agendas spear headed by the developed world to further strengthening the intellectual property rights focusing on enforcement mechanism. So even though it may not be possible to agree that a paradigm shift has taken place as some scholars argue, one should appreciate that the developing countries were at least successful in developing an international consensus for public interest. This shift in focus toward developing-country issues could also be viewed as a historical rebalancing of a past in which developing countries' needs and


interests had not been adequately taken into account.\textsuperscript{74} International developments towards access to knowledge, access to technology and on minimum limitations and exceptions in relation to copyright and patent protection are really promising.\textsuperscript{75} The most efficient mechanism for enforcement, monitoring and analysis of impact of intellectual property and development is yet to be decided. Similarly the capacity of developing countries to articulate their needs is also cynical. Equally challenging is the diversity in needs and aspirations of developing countries. They considerably differ in their priorities and posture.

\textbf{8.4 Judicial developments in post-TRIPS era}

Unlike the legislative developments, TST did not leave any remarkable impact in the judicial arena. Just like in the pre-TRIPS era, the judicial doctrines across the countries varied considerably, leaving no

\textsuperscript{74} WIPO Development Agenda itself is built on the basic principle that, “WIPO technical assistance shall be, \textit{inter alia}, development-oriented, demand-driven and transparent, taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States and Activities should include time frames for completion. In this regard, design, delivery mechanisms and evaluation processes of technical assistance programs should be country specific”. It also urges the members to approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns, with a view that “the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations”, in accordance with Article 7 of the TRIPS Agreement.

\textsuperscript{75} WIPO initiative for a draft treaty for visually impaired, its study on library use, educational use, fair use in digital era are really noteworthy. WIPO’s SCCR offers a timely opportunity to present the analysis and research in this area to an informed audience of policy makers, negotiators and experts. Recently WIPO Standing Committee on Copyright and Related Rights (SCCR) has prepared a comparative list of the proposals related to copyright limitations and exceptions and the needs of the visually impaired and other persons with print disabilities, submitted by the Member States of WIPO and the European Union as of March 16, 2011. See www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_8.pdf [Accessed on 12.05.2011].
sign of uniformity and predictability. It is only in a few handful of cases that we can see a direct reference to TST. Even then, it is really interesting that the steps have been interpreted in accordance with local whims and prejudices. Both the liberal and restricted instinct of TST was maneuvered in accordance with the domestic interests. For example the French court in *Mulholland Drive*,\(^{76}\) Brussels Court of First Instance in *Google Inc v. Copiepresse SCRL*\(^{77}\) and the Dutch court in two significant judgments in cases concerning, respectively electronic internal press reviews in government ministries (Ministry Press Reviews)\(^{78}\) and Private Copying from Illegal Sources\(^{79}\) have made a very restrictive economic application of TST. In *Mulholland Drive*, the French Supreme Court held that the private copy exception under French copyright law is not a positive right and must be construed in accordance with the “three-step test” under Article 9(2) of the Berne Convention. This being so, it held that, in the digital environment, the existence of an exception permitting

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the making of private copies of DVDs would impair the normal exploitation of the copyright work and would, accordingly, violate the second step of the “test”. The Supreme Court considered that an impairment of the normal exploitation of the work would arise because there was an increased risk of piracy in the digital environment and because DVD distribution was highly significant for the movie industry. In coming to this decision, it effectively interpreted the statutory private use exception (which was not, at that time, technology-specific) in the digital context. Similarly the Dutch court in the first case held that given the growing importance of digital news sources and the impact of electronic press reviews on this market, the ministries' activities were held to endanger a normal exploitation of the relevant works and unreasonably to prejudice the publisher's legitimate interests in digital commercialization. In the latter case the Dutch court even went to the extent of declaring a private copying as an infringement. Following this line the Brussels court also took a very restrictive stand in Google’s case

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80 This case was brought by a purchaser of a DVD copy of David Lynch's film *Mulholland Drive* who wanted to transfer the film into VHS format in order to watch it at his mother's house. Technological protection measures (TPMs) on the DVD prevented him from doing so. Consequently, he brought proceedings, arguing, inter alia, that the private copy exception under Article L.122-5 of the French intellectual property Code gave him a right to make private copies of the copyright works contained on the DVD and that the denial of his ability to make such copies violated this right. Also read, Jonathan, G. (2009) ‘The ‘Three-Step Test’ In European Copyright Law - Problems And Solutions’, *I.P.Q.*, 4 (4), 428-457.

81 In *Ministry Press Reviews*, the District Court of The Hague considered whether the practice of unauthorized scanning and reproduction of press articles for internal electronic communication in ministries was covered by statutory exceptions under the Dutch code (notably the exception for press reviews). The court decided that it was unnecessary to conclude whether these Activities fell within the detailed terms of the relevant statutory exceptions because, in any event, the use did not satisfy the “three-step test” as set out in Article 5 (5) of the Information Society Directive.

82 In this case the same court had to consider whether private copying from an illegal source fell within the terms of the provision of the Dutch Code concerning private copying.
by confining TST in its economic perspective and ignored the user right claims like criticism, quotations and news reporting on the ground that it causes economic harm to the copyright owner. All these cases can be regarded as exemplifying a strict approach to the TST. In all these cases, the risk of economic harm to right holders was, alone, sufficient to veto even genuine claims of user rights. No attempt to balance that risk against any other relevant factors was made by the court.

The restrictive view of the “three-step test” outlined above contrasts sharply with a much more flexible approach adopted in some other European national courts. Two particularly clear examples of this latter approach are provided by the decision of the German Supreme Court in Supply of Photocopies of Newspaper Articles by a Public Library, Re and the decision of the Swiss Federal Court in ProLitteris v Aargauer Zeitung AG. In addition, in a striking decision concerning Google's caching activities (Google--Caching), the Barcelona Court of Appeal appears to have employed the TST in an extremely liberal manner

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83 Google Inc v Copiepresse SCRL [2007] E.C.D.R. 5 at [120]. In this case the claimant, a copyright management society acting on behalf of a number of newspaper publishers, sued Google for infringement of copyright arising as a result of its French language “Google. News” service, which automatically searched websites carrying current news, extracted articles from those websites and reproduced them. The claimant argued that this Activity infringed the copyright holders' exclusive right to control the reproduction and communication to the public of the articles. The defendant relied, inter alia, upon the Belgian statutory limitations for quotation and news reporting and supported its argument by reference to the right of freedom of expression protected under Article10 of the European Convention on Human Rights. The Court of First Instance of Brussels held that Google's Activities were not covered by the statutory limitations and that Article10 ECHR did not preclude this conclusion. Google Inc v Copiepresse SCRL [2007] E.C.D.R. 5 at [120]

84 Supply of Photocopies of Newspaper Articles by a Public Library, Re [2000] E.C.C. 237

closely resembling the open-ended fair use doctrine in the US copyright law. In the ‘public library’ case the German court was really enthusiastic to give a broader perspective to the library use exception under the copyright law in a way to make the maximum utilization of the opportunities of the digital technology. It arrived at the conclusion by a holistic application of TST and it even denied the need for providing compensation to the author on the principle of TST itself that, the library reproductions are not causing any unreasonable prejudice to the author.

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86 This case has not been reported in English, but has been discussed by Kur in, ‘Of Oceans, Islands and Inland Water’, Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No.08-04, p. 34.

87 In this case the library had an electronic catalogue and sent copies of articles from scientific periodicals to users on request. It charged a fee for this service and advertised throughout the world. A representative body for publishers and booksellers claimed that the library's Activities infringed the reproduction and distribution rights of the authors of the articles at issue. In response, the defendant argued that its Activities were covered by the personal/private use exceptions under the German Copyright Act, which permitted some forms of personal/private use to be carried out by third parties on a user's behalf. The Supreme Court held that the library's Activities were covered by the exception. However, it also held that, as a result of technological advances in the communication of catalogues and copies, the library's copying service had begun to make more intensive use of works than previously and, therefore, had a greater capacity to compete with the distributors of the original periodicals. In such circumstances, it was held that, while the library's Activities were permissible under the exception, the authors of the copied works had a statutory right to a reasonable fee for the use of their work. Re Supply of Photocopies of Newspaper Articles by a Public Library [2000] E.C.C. 237 at [60].

88 In identifying the authors' entitlement to reasonable compensation for the library's Activities, the Supreme Court placed explicit reliance on the “three-step test” as set out in Article9 (2) Berne and Article 13 TRIPs. It held that, in order for national copyright Law to be interpreted compatibly with the third step of the “test”, authors had to be remunerated in return for the uses covered by the exception: “Permission for reproduction by a copying service without compensation in the form of a reasonable fee did not unreasonably prejudice the legitimate interests of authors, given the circumstances which previously prevailed. In view of the far more limited technical facilities at that time for library use, supplying copies did not, until very recently, have the importance it now has as a means of supplying end users with copies of even the very latest periodical publications within the shortest possible time. Consequently it was justifiable to treat the supply of copies as a use of less importance following on from publication and to exempt it under section 53 of the Copyright Act from the author's right of prohibition, without giving him a right to a fee appropriate for
By a similar broad interpretation of TST, the Swiss federal court was successful in evolving a liberal fair use exception for press use and private use. The Swiss court made a very detailed application of TST in its most harmonious manner upholding the interests of users. Just like the German court, the Swiss court was also not worried with the economic rights of author. On the other hand they viewed author rights in the larger context of their obligation in fulfilling the public interest.

In this case a newspaper group challenged the right of a collecting society (established to receive remuneration for the reproduction of literary and artistic works) to collect fees from certain press review agencies, which produced electronic compilations of articles from newspapers and journals (paper and web-based) for commercial and public authority clients. The clients of the press review agencies specified keywords against which the agencies' employees searched to produce the reviews. The fees were only legally payable to the defendant collecting society under the provisions of the Swiss Federal Act on copyright and Related Rights if the agencies' Activities fell within that Act's statutory exception for private use. Effectively, therefore, the newspaper group's claim challenged the application of the private use exception to the agencies.

It concluded that the first step of the “three-step test” did not prohibit the extension of the private use exception in this case because it served only to preclude generalized and poorly targeted exceptions. In this instance, there was no difficulty because the court was simply applying an existing exception to a case in which a third party made a copy of a work on behalf of a person entitled to make private use him or herself. The second step of the “test” required the court to examine the reasonableness of potential markets for the exploitation of the copyright works in question. In this instance, the normal exploitation of a newspaper was the sale and use of online editions and electronic papers. The newspaper group's claim that the Activities of the press agencies had led to a decline in print runs and a loss of readers was, according to the court, unsubstantiated. There was therefore no infringement of the second step.

At the third step the court held that: “a reasonableness examination is to be applied in a narrower sense. An intervention in the legitimate interests of the right holder is unlawful if it cannot reasonably be expected of him. The impairment
It is really welcome that Barcelonan Supreme Court gave a very progressive and proactive interpretation to the TST by holding that, TST not only regulates the scope of existing statutory exceptions, but also functions to impose boundaries on a right holder's exclusive rights. In coming to this conclusion, it made explicit comparison with the “fair use” doctrine in the US and referred to the four factors set out in section 107 of the US Copyright Act to the facts of the case before it.92 Thus in these three cases the court applied the TST which is hailed to be the most ‘author centric’ and ‘egotist’ test in a most flexible manner upholding the user rights even ignoring the potential economic harm to the authors.

Similarly it is also interesting that even on certain unique instances of fair use the countries had come out with different standards. For example while the Canadian Supreme Court was very clear in upholding the fairness of judicial documents for public use,93 the decision of Indian Supreme court lacked clarity.94 However the Indian Supreme Court made a good attempt to interpret the concept of originality to retain the

cannot reasonably be expected if the interests of the third party do not outweigh those of the right holder. The payment of a reasonable fee can mitigate the infringement of legitimate interests caused by a limitation so as to avoid an infringement of the third step of the test”. Pro Litteris v Aargauer Zeitung AG (2008) 39 I.I.C. 990 at Para 6.2. For discussion, see Geiger, C. (2008) ‘Rethinking Copyright Limitations in the Information Society--the Swiss Supreme Court Leads the Way’, I.I.C., 38 (8), 943.

92 This case concerned the caching of content by Google in the operation of its search engine service. Right holders argued that the exemption of Google's Activities from liability for copyright infringement would violate the "three-step test", which had been explicitly incorporated in the Spanish copyright legislation. For details read Kur, “Of Oceans, Islands and Inland Water”, Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper SeriesNo.08-04, p. 34.

93 CCH Canadian Ltd. v Law Society of Upper Canada, 2004 (1) SCR 339.

public domain space for promoting creativity and competition.\textsuperscript{95} Similarly on the issue of ‘parody’ as fair use, while the American judiciary took a positive stand,\textsuperscript{96} the German Federal Court held it to be an instance of copyright infringement.\textsuperscript{97}

Just like in the case of post-TRIPS legislative developments, in the judicial arena also the diversity and flexibility was evident. The US Judiciary in \textit{Madey v. Duke University},\textsuperscript{98} and \textit{Integra Lifesciences I, Ltd. v. Merck KGaA},\textsuperscript{99} continued the restrictive approach in interpreting the experimental use exception. The judicial stance was to apply the exception in its literal sense without even looking to the nature of research and consequences of research.\textsuperscript{100} This has the potential to upset the equilibrium regarding research uses of patented inventions and may heighten any problems raised by uncertainty over the reach of the

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\begin{itemize}
  \item The judicial pronouncements of the Apex Court would be in the public domain and its reproduction or publication would not infringe the copyright. To secure a copyright for the judgments delivered by the court, it is necessary that the labour, skill and capital invested should be sufficient to communicate or impart to the judgment printed in SCC some quality or character which the original judgment does not possess and which differentiates the original judgment from the printed one. For detailed comments see, Gopalakrishnan, N.S. (2009) ‘Intellectual Property Laws’, \textit{XXXVII ASIL}, 373-394.
  \item In \textit{Madey v Duke Univ.}, 307 F.3d 1351 (Fed. Cir. 2002) the court held that the experimental use privilege does not apply to Activities that are “in keeping with the alleged infringer’s legitimate business”, even though the business of the defendant, Duke University, was nonprofit research.
  \item 331 F.3d 860, 867 (Fed. Cir. 2003);
  \item "Regardless of whether a particular institution or entity is engaged in an endeavor for commercial gain, so long as the act is in furtherance of the alleged infringer’s legitimate business and is not solely for amusement, to satisfy idle curiosity, or for strictly philosophical inquiry, the act does not qualify for the very narrow and strictly limited experimental use defense. Moreover, the profit or nonprofit status of the user is not determinative." \textit{Madey v Duke Univ.}, 307 F.3d 1351 (Fed. Cir. 2002) at p. 323.
\end{itemize}
exceptions and limitations to patent and copyright in the post – TRIPS arena

Chapter -8

experimental use defence. The UK also followed the suit. In Monsanto’s decision the Court concluded that “experimental purposes” would include trials carried out “in order to discover something unknown, or to test a hypothesis, or even in order to find out whether something which is known to work in specific conditions will work in different conditions”. The emphasis was on acts which generate new knowledge. But some jurisdictions like Germany and Japan took

101 In Monsanto v Stauffer (1999) RPC 397 CA, the court of appeal limited the word ‘experimental’ in accordance to its size, scale, recipient and methodology. The court held that experiments done at one’s own premises were held to be not infringing. However those done outside in different conditions or to amass information to satisfy a third party were held to be infringing. In Inhale Therapeutic systems Inc v Quadrant Healthcare Plc (2002) RPC 21, the Patents court held that since the defendant had carried out experiments to exploit and sell the technology to third parties, experimental use exception would not apply.

102 Monsanto v Stauffer (1999) RPC 397 CA at p.403.

103 The German Federal Court in Klinische Versuche I (clinical trial 1)[1997] R.P.C. 639, the court found that using a Patented polypeptide in tests to ascertain further medical uses for the Patented product fell within the statutory experimental use exemption. The court gave a broad interpretation to the word "experiment," holding that it includes any procedure for obtaining information irrespective of the intended use of the information, provided that the experiment relates to the subject matter of the invention. Following this interpretation, any experiment directed at gaining information for scientific research into the subject matter of the invention is permitted as an experimental use. This includes use of the invention. Importantly, the court held that because the statutory language contains neither quantitative nor qualitative limits on the experiments that may be performed, it does not matter whether the experiments are performed solely to verify statements made in the Patent claim or to extract further unknown information. It also does not matter whether these experiments are employed for wider purposes such as commercial interests. Once the initial requirement of an experimental purpose is satisfied the exemption will be granted regardless of the way in which the results of the experiment are used. The Court's interpretation was particularly informed by the view that further technical development is in the public interest and is the aim of Patent Law. In Klinische Versuche I1 (clinical trials 11) [1998] R.P.C. 423 the court held that: According to the wording of the Law it does not make any difference whether the experiments supply scientifically or commercially usable results, or whether the test achieves the aim of obtaining data for legal pharmaceutical permission, thus preparing the access to the market for after the expiration of the term of protection of the Patent. The court found that using a patented polypeptide in tests to ascertain further medical
a very liberal attitude. Germany allowed experimental uses irrespective of nature and object of research. The judicial in-activism in this field once again clearly corroborates the lack of awareness of the international community on the potential of patent limitations in serving the wider public interest. Thus diversity and flexibility never ends in the pre-TRIPS era. Even in this era French culture of individual liberty did not ban the judiciary from taking a restrictive attitude towards social interest. Similarly the German culture of broader social outlook also kept untouched. Thus the judicial developments also portrays that TST is never couched in iron clothes. It has the potential and prospective in addressing the larger social interests. At the same time it has also the competency to remain as an author centric phenomenon. The influence of the international trade lobby is definitely a determining factor in a country making the above policy choice.

uses for the patented product fell within the statutory experimental use exemption.

104 In the case of Ono Pharmaceutical Co. Ltd. v Kyoto Pharmaceutical Co. Ltd (1999, August), the Japanese Supreme Court has held that it is not an infringement of a Patent for a new chemical compound or a medicine for a third party to carry out any necessary testing that will be required to obtain approval to market a medicine containing the same Active ingredient after the Patent on it has expired. The Japanese Patent Law contains a specific provision excluding from infringement Acts carried out for the purposes of experiment or research. The court reasoned that to read this exception narrowly so as to allow Patentees to prevent experiments required to allow others to market a medicine that had been the subject of Patent protection until after the Patent had expired would have the effect of extending the effective life of the Patent. At the same time, the Supreme Court reaffirmed that any use beyond that strictly required for the purpose of securing marketing approval, such as manufacture and stockpiling of product prior to the Patent expiration preparatory to a launch immediately after the Patent's expiration, would be an infringement. For discussion see [online]. Available at, http://www.ladas.com/BULLETINS/1999/BULLETIN.0899.html [Accessed on February 2011]
8.5 Indian posture on limitations and exceptions in the post-TRIPS era

India is a typical developing country that was least influenced by the TST, especially of its claimed rigidity. At the same time, the dynamism and enthusiasm which the post-TRIPS patent and copyright amendments showed towards user rights, substantiated the scope of flexibility and adaptability of TRIPS in meeting domestic exigencies. Though not full-fledged, India experienced a robust user right regime in the post-TRIPS era.

Since its inception, by granting limitations to patent rights a two tier protection (primarily as an absolute condition to the grant of the patent and secondly as defense in infringement suits),\textsuperscript{105} our patent law was relatively a user friendly legislation. However, while defining the scope of research exemption; the use of the expression ‘merely for experiment’ gave it a narrow outlook leaving uncertainty and ambiguity. Apart from that, it failed to incorporate provisions for private use, parallel importing, Bolar exception extemporaneous preparation in pharmacy etc. But the triumph of the Indian pharmaceutical industry in the world market in full vigor, made her bold enough to survive with the current policy. But simultaneous with change in the patent policy, when she realized that she could not survive with the existing user right regime she made some bold moves through the patent amendments in 2002 and 2005. These amendments have been usually criticized for the unilateral upgradation of patent standards in tune with international mandate ignoring the domestic needs. But the incorporation of Bolar provisions and parallel importation rights in 2002, with its scope being broadened by the subsequent amendment in 2005 should be upheld as an attempt of maintaining the intellectual property balance.

\textsuperscript{105} See Sections 47,48,49,66, 82 and 107 of Indian Patent Act, 1970.
India was bold enough, when it excluded from infringement “the act of making, using or selling a patented invention” for the purpose of obtaining information to be submitted to a regulatory authority under any law in India or in any other country that regulates the manufacture, construction, sale or use of any product.106 Thus our regulatory review exemption was applicable to any product irrespective of their nature and it was not mandatory that activities exempted are for any law applicable in India. Hence it extends even to acts of making, using or selling a patented invention for a regulatory review procedure in territories outside India. Thus it has the potential to attract industries in countries with no similar exemption to India to conduct research including selling and using of the articles and thereby we have more chances for R&D. Our law is again too broad when it says any act of making, using, or selling in association with a regulatory review process is exempted. The exemption is not confined for experimental and research activities. It was a clear reflection of the anxiety and agonies’ which Indian pharmaceutical industry envisaged on the change of patent policy. They were devising means to combat the adverse impacts of the abolition of distinction between a ‘process patent’ and ‘product patent’ regime. And this nervousness was much hastened up in 2005 with the deadline for TRIPS compliance. It resulted in further broadening the regulatory review provision to include within its ambit of excluded activities ‘importing’ along with ‘use, sale or make’.107 This will no doubt aid the efforts of generic manufacturers, who are exploring all possible means to help mitigate the adverse consequences of a pharmaceutical patent regime.

107 In section 107A of the principal Act,— (a) in clause (a),— (i) for the words "using or selling", the words "using, selling or importing" shall be substituted; (ii) for the words "use or sale,", the words "use, sale or import" shall be substituted - Patent (Amendment) Act, 2005.
They can now import patented products or process from outside and can use, make or sell them for any regulatory review process without any control. But how far we can subsist with this broad provision is really doubtful. It appears to be really ephemeral, in the context of TRIPS. The lucid and open ended wording of TST is capable of accommodating any public interest policy. It has also the inborn potential and propensity to outlaw them. Consequently the validity of the provision before DSB panel is unpredictable.

It is only a few countries like Iceland, Bhutan, Albania, Korea, Canada and Poland that have incorporated regulatory review provisions in their patent laws. Even then, except Canada which had a broad provision\(^\text{108}\) similar to that of India, rest of the countries have drafted the Bolar provisions confining to Pharmaceutical industry. For example, when regulatory review provision was incorporated into the Patent law of Iceland in 2006, it was clear that the exception is applicable only to studies and trials and other related procedures that are necessary to make possible an application for marketing authorization for e.g. a generic medicinal product and an improved pharmaceutical form.\(^\text{109}\) Parallel provisions were incorporated in the patent laws of Bhutan,\(^\text{110}\)

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108 Canada Patent Act, 1985, amended on 1993: 55.2 (1) Exception, 55.2. (1) “It is not an infringement of a Patent for any person to make, construct, use or sell the Patented invention solely for uses reasonably related to the development and submission of information required under any Law of Canada, a province or a country other than Canada that regulates the manufacture, construction, use or sale of any product’.


110 Bhutan Industrial Property (amendment) Act, 2007.S.15: “conduction of necessary researches and tests for the purpose of filing a marketing authorization request for a generic medical product to be used in the human medicine or a generic medical product to be used in the veterinary medicine, as well as any other Act related to subsequent practical requirements in connection with the filing of the request.
Bahrain,\textsuperscript{111} Poland\textsuperscript{112} and Korea.\textsuperscript{113} They confine the exception for conducting trials and experiments for regulatory approval to pharmaceuticals, especially to generic drugs. Thus from a comparative perspective, Indian law on Bolar use appears to be too broad. India remaining as a generic pharmaceutical hub of the world, this broad provision is really going to be a boon to the developing world to continue the availability of drugs at reasonable prices.

Parallel importing was also the counterpart of this liberal social policy. In 1970’s itself we have identified the need for parallel importation when the Patent Act provides that every patent is subject to the absolute right of the government to import medicines or drugs.\textsuperscript{114} But

\textsuperscript{111} Bahrain Industrial Property Law, 2006, Article 13 : “Use of the Patent subject for purposes of supporting an approval to market a pharmaceutical product provided that the product is not manufactured, used or sold in the Kingdom unless it is for the sole purpose of meeting the terms of the approval to market the product upon elapse of the Patent protection period. In this case it is prohibited to export the product outside the Kingdom unless for the purpose of meeting the terms of approving the marketing of the product in the Kingdom” - Bahrain Industrial Property Law, 2006.

\textsuperscript{112} Poland, Industrial Property Law 2000, Article 69 (iv) “the exploitation of an invention to a necessary extent, for the purpose of performing the Acts as required under the provisions of Law for obtaining registration or authorisation, being, due to the intended use thereof, requisite for certain products to be allowed for putting them on the market, in particular those being pharmaceutical products”.

\textsuperscript{113} Republic of Korea, Patent Law, 2009, Article 96 “ (i) working a Patented invention for research or experimental purposes (including researches and experiments for item permits and reports of medical supplies under the Pharmaceutical Affairs Act and for registration of agrochemicals under the Agrochemical Management Act)”.

\textsuperscript{114} Indian Patent Act, 1970 - Section 47 (4) of : “in the case of a Patent in respect of any medicine or drug, the medicine or drug may be imported by the Government for the purpose merely of its own use or for distribution in any dispensary, hospital or other medical institution maintained by or on behalf of the Government or any other dispensary, hospital or other medical institution which the Central Government may, having regard to the public service that such dispensary, hospital or medical institution renders, specify in this behalf by notification in the Official Gazette.”
the provision was too restrictive as it confined the right of importation to
the government and that too for medicine and drugs. It was also
mandatory that the imported articles are used in government owned
dispensaries. We did not feel the need for a much strong provision for
parallel importing, since we were the major exporters of pharmaceutical
products in the world. But, the changed patent policy and the emergence
of pharmaceutical giants throughout the world, made us to change our
stand. Much strength was added to the thought by Doha Declaration
when it declared that member countries have the absolute discretion to
frame the policy of exhaustion in accordance with their domestic
needs.\textsuperscript{115} Consequently when we incorporated parallel importation in
2002 as an exception to patent infringement we found no hurdles in the
international context.\textsuperscript{116} And we end up in unique provision with rich
flexibility. It provided that the importation of patented products by any
person from a person, who is duly authorized by the patentee to sell or
distribute the product, shall not be considered as an infringement of
patent rights.\textsuperscript{117} So now there is no ceiling on the nature of person, nature

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\item Article 5 (d) of the Doha Declaration states that “the effect of the provisions in
the TRIPS Agreement that are relevant to the exhaustion of intellectual property
rights is to leave each member free to establish its own regime for such
exhaustion without challenge ...”
\item Article 28 of TRIPS mandates that every patentee shall have the exclusive right
to make, use, offer for sale, sell, or import the patented product or process in
question. However, footnote (6) to Article 28 adds a small caveat to the
exclusive right to import, by clarifying that “This right [i.e. the right of
importation], like all other rights conferred under this Agreement in respect of
the use, sale, importation or other distribution of goods, is subject to the
provisions of Article 6.” Article 6 in turn states that “nothing in this Agreement
shall be used to address the issue of the exhaustion of intellectual property
rights.” The meaning of Article 6 is made clear by Article 5 (d) of the Doha
Declaration.
\item Indian Patent Act, 1970, (S.107) - Defenses, etc. in suits for infringement: (1) In
any suit for infringement of a Patent, every ground on which it may be revoked
under section 64 shall be available as a ground for defence. (2) In any suit for
infringement of a Patent by the making, using or importation of any machine,
apparatus or other article or by the using of any process or by the importation,
of products or purposes for which importation is permitted. Any person is allowed to import any patented products with the only condition that it should be from a person duly authorized by patentee. So doubt arises that, whether the system envisages a licensee or assignee or those category of persons having a firsthand contact with the patentee and excludes others. Thus it remained as a real hurdle to identify the persons duly authorized by patentee in a global market. And it will finally strike at the validity of importation itself. Such an interpretation would thwart the very idea of international exhaustion and the laudable intent of helping Indian consumers avail of lower prices, when the patentee has already placed a product in the global market and made profits on the first sale thereon. Apart from this, it should be noted that parallel importing is based on the doctrine of ‘first sale’ and the moment the patentee exercise his right, he moves out from the scene. It is irrelevant that products are obtained from persons duly authorized by the patentee. So this requirement is something beyond the real philosophy of parallel importing. Thus to cure this anomaly, the law was amended in 2005, which held that it is not an infringement provided that importation is from “a person duly authorized by law”. Thus, in

S. 107A: Certain Acts not to be considered as infringement: For the purposes of this Act,— (a) any art of making, constructing [using, selling or importing] a Patented invention solely for uses reasonably relating to the development and submission of information required under any Law for the time being in force, in India, or in a country other than India, that regulates the manufacture, construction [use, sale or import] of any product; (b) importation of Patented products by any person from a person [who is duly authorized under the Law to produce and sell or distribute the product], shall not be considered as an infringement of Patent rights."

118 Section 107A (b) read: “importation of Patented products by any person from a person who is duly authorized under the Law to produce and sell or distribute the product shall not be considered as an infringement of Patent
contrast with the earlier position under the 2002 Act, once the “first sale” of any product had been authorized by the law of the country, a parallel importer could buy that product from any reseller and not necessarily from the one that had the express permission of the patentee to resell or distribute. In other words, such importer does not need to ensure that any of the sellers from whom he buys the goods (whether second, third or fourth) were expressly or impliedly authorized by the patentee.\(^{119}\) This can accommodate situations of compulsory licensing also. It is evident that this is much broader in scope and can capture more instances. It permits importation of patented products even from countries not recognizing patent for that invention as even in such cases the importing person or the person from whom he buys it is acting legally. The word ‘patented product’, used in this section, only means the product patented in India, and not in the country from where the product is imported, as the exclusion from infringement is evidently of the patent granted in India.\(^{120}\) Similarly the word ‘law’ used in this section is the law applicable in the county from where the product is imported and not the Indian law. In addition, this can also cover importing of products from countries where there exit no patent right. Thus the new provision has wider amplitude of including both instances of authorization by the patentee and by law. Likewise while a majority of the patent laws confine the exhaustion right to domestic or regional

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120 *Id.*
arenas, India adopts the principle of international exhaustion. Thus from a comparative analysis of parallel importing provisions across the countries, we can see that India is fully flavored with public interest. The main reason seems to be the healthy debate that took place in India in the post-TRIPs era on the negative impact of strengthening intellectual property rights ignoring the social realities. It appears that the intervention of public interest groups put pressure on policy makers to make policy choices giving due wait to public interest while promoting trade. Thus it comes out that the Indian provision is structured to take the full advantage of the flexibility available under the TRIPS to make the patented products available to the Indian public at cheapest possible price through market mechanism.

121 For example see -Albania Industrial Property Law, Article 39 Exhaustion of rights: “The rights conferred by a Patent shall not extend to Acts committed in the Republic of Albania with regard to a product protected by the Patent after the said product has been put on the market in the Republic of Albania by the Patent's owner or with his consent”. Article 23 of Patent Law of Andorra 1999, (4) The rights conferred by a Patent shall not extend to: Acts concerning a product covered by the Patent after that product has been put on the market by the proprietor of the Patent, or with his express consent, in Andorra or in any other territory specified in the Implementing Regulations. Article 69 Patent Law of Republic of China 1984 - The following shall not be deemed to be Patent right infringement: (1) After a Patented product or a product directly obtained by using the Patented method is sold by the Patentee or sold by any unit or individual with the permission of the Patentee, any other person uses, offers to sell, sells or imports that product. Article L613-6 of French intellectual property Code, 2006: The rights conferred by a Patent shall not extend to deeds concerning a product covered by that Patent which are done on French territory after such product has been marketed in France or in the territory of a State party to the Agreement on the European Economic Area by the owner of the Patent or with his express consent. Ghana Patent Law, Article 30 --The rights under the Patent shall— (a) extend only to Acts done for industrial and commercial purposes and in particular not to Acts done for scientific research; (b) not extend to Acts in respect of articles which have been put on the market in Ghana by the owner of the Patent or with his express consent.
The Copyright amendments also witnessed a corresponding progression of limitations. Each amendment was a reflection of the innate relation of copyright laws with technological developments. While remaining technology sensitive, these amendments were also sensible to the noble role of copyright in ensuring access to knowledge. However, unlike the contemporary copyright laws they did not exhibit an inclination towards TST or to an author oriented economic perspective. They were also true specimen of a TRIPS flexibility maneuvered to meet the domestic interests.

When computer programs were brought under the ambit of literary work in 1984 the law was very conscious of the rights of authors but it was silent on the issue of user rights. This resulted in much confusion on the scope and nature of fair use in digital context. Confusion rose whether all the fair dealing provisions, applicable to literary works can be extended to computer programmes or whether they need some specific provisions. But this silence on user rights had the benefit of extending all the fair dealing provisions of literary works to computer program. However this silence can be perceived as a deliberate policy to protect our domestic software industry which was witnessing a promising development in the global market. Though it was too broad, it was a viable mechanism. But the functional nature of computer programmes compelled to evolve a new regime of user rights. Equally challenging was the potential of copyright infringements in the existing user right regime. Hence the 1994 amendment was an attempt to cure this anomaly. In its haste to protect authors, apart from introducing a broad definition for computer programmes and introducing rental

122 The 1994 amendment Act came with a broad definition of computer programmes. Section 2 (ffc) "computer programme" means a set of instructions expressed in words, codes, schemes or in any other form including a machine,
rights to the author of a computer programme, the Act took out all the fair dealing provisions applicable to literary works from the ambit of computer programme. The amendment took a very restrictive attitude towards user rights. It failed to appreciate the need for de-compilation, reverse engineering, security testing, data correction etc which the contemporary copyright legislations foreseen. The only permitted uses were those for the reproduction and adaptation of the computer programme by a lawful possessor for the purpose for which it was supplied and for making back up copies for the temporary protection against loss, destruction or damage. It also took away the legitimate fair use of literary works by the users. The incompetency of the law in meeting the public interest and that of industrial demands was very evident. Even the most developed countries like the US and European Union were having much broader user right provisions.

So within a short span, we amended the law to make it more user friendly. At this time though our law had a close resemblance to the readable medium capable of causing a computer to perform a particular task or achieve a particular result.

123 Section 14 (b) - “in the case of a computer programme,-- (i) to do any of the Acts specified in clause (a); (ii) to sell or give on hire, or offer for sale or hire, any copy of the computer programme, regardless of whether such copy has been sold or given on hire on earlier occasions”.

124 In section 52 of the principal Act, in sub-section (1),-- (1) in clause (a),-- (i) after the words "artistic work", the words, "not being a computer programme" shall be inserted (Copyright Amendment Act of 1994).

125 After clause (a), the following clause shall be inserted, namely:-- " (aa) the making of copies or adaptation of a computer programme by the Lawful possessor of a copy of such computer programme, from such copy-- (i) in order to utilise the computer programme for the purpose for which it was supplied; or (ii) to make back-up copies purely as a temporary protection against loss, destruction or damage in order only to utilise the computer programme for the purpose for which it was supplied".

126 In section 52 of the Principal Act, in sub-section (1),-- (a) after clause (aa), the following clauses shall be inserted, namely:— “ (ab) the doing of any Act necessary to obtain information essential for operating inter-operability of an
US and European Union regulations, we drafted it in a manner most
suiting our domestic needs. This was most evident in the provision
dealing with the inter-operability of computer programmes. The
wordings are so liberal that all type of reverse engineering acts, including
the most contentious ‘de-compilation method’ is arguably covered under
the act.

For example while the contemporary legislations allowed inter-
operability and decompilation subject to numerous conditions, we had a
liberal stand. The only condition under our law is that it should be done
by a lawful possessor and should be for information which is otherwise
not readily available. There is no quantitative and qualitative limit of
copying. Similarly, there is no condition on the extent and nature of
activities that are permitted. Starting from the issue of persons entitled to
carry decompilation Indian law took a liberal stand. Under our law any
lawful possessor of a computer programme can do decompilation. The
Act does not lay down any guideline as to who is a lawful possessor.
From a legal perspective it can be any person except the possessor of an
infringing copy. The UK also took an analogous approach.127 However
some countries like Australia128, Andorra129 and Singapore130 mandates

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independently created computer programme with other programmes by a Lawful
possessor of a computer programme provided that such information is not
otherwise readily Available; (ac) the observation, study or test of functioning of
the computer programme in order to determine the ideas and principles which
underline any elements of the programme while performing such Acts necessary
for the functions for which the computer programme was supplied; (ad) the
making of copies or adaptation of the computer programme from a personally
legally obtained copy for non-commercial personal use”.

127 UK Copyright Act- 1988, Section 50 B .
128 Article 47 D (a) the reproduction or adaptation is made by, or on behalf of, the
owner or licensee of the copy of the program (the original program) used for
making the reproduction or adaptation – inserted by the Australian Copyright
amendment Act, 1999
that such decompilation should be done by or behalf of the owner or licensee of a computer programme. Indian law is too liberal on the nature of permissible activities and extent of those of activities. Our law permits doing any acts necessary to carry decompilation. Analogous to it, there is no restriction on the extent of these permissible activities in course of decompilation. But unlike Indian law which uses the expression ‘any act’, the European Union Directive lists the specific nature of activities permitted for the fair dealing of computer programmes.\footnote{As per Article 5 of the EU Directive, the permitted activities are loading, displaying, running, transmission or storage of the computer program.} The directive also mandates that those acts are confined to the parts of the original program which are necessary in order to achieve interoperability.\footnote{EU Directive, Article 6 (c).} We can see parallel provisions in Australian law also. But there is no such quantitative restriction in Indian law. Similarly in the UK, Australia, European Union etc decompilation of a program is permitted only for the purpose of obtaining the information necessary to create an independent program which can be operated with the program decompiled or with another program and the information so obtained should not be used for any purpose other than the permitted objective. Under Indian law there is no similar provision on "the permitted objective". So there is no restriction on the purpose for which the information obtained though decompilation is obtained. It can be used for any lawful purpose. In countries like the UK,\footnote{UK Copyright Act, Section 50 A.}
Australia\textsuperscript{134} and Israel\textsuperscript{135} using the information for an unpermitted objective is infringement. So even though the preparatory activities may be legal, its subsequent use will throw it out from the scope of fair use. Under some copyright laws passing of such information to third parties are prohibited.\textsuperscript{136} So under Indian law there can be chances for subsequent misuse of the information obtained. Whether such activities will be vetoed by law is a practical matter which needs to be seen.

Finally it comes out that we had a unique and liberal provision on fair use of computer programme. But being lucid, the wordings have the potential to be interpreted narrowly subsidizing the objective of technology transfer and knowledge dissipation. Extension of ‘adaptation’ right is a similar situation. Adaptation in its pure sense as applicable to literary works includes abridgement, rearrangement or alteration of the work. This situation rises questions that whether such a wide ambit is perceived for computer programmes also. Equally challenging is the uncontrolled decompilation without any quantitative, qualitative and purposive limits on the scope of author’s right. Likewise, when the fair dealing for the observation, study or test of functioning of the computer programme is couched in broad terms, it has the prospective of including both less contentious ways of reverse engineering as a limited research use and also can include complex decompilation methods. Likewise, while a majority of copyright legislations expressly bars ‘non-commercial private use’ of computer programmes from

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\item \textsuperscript{134} For a detailed study see Australian Digital Copyright Agenda [online]. Available at http://www.wipo.int/wipolex/en/details.jsp?id=297 [Accessed on 12.05.2010].
\item \textsuperscript{135} Israel Copyright Act, 2004, Article 24.
\item \textsuperscript{136} Copyright Law of Kazakhstan 1996, Article 24 (3) - “the information may not be transmitted to other persons, except where necessary to ensure the interactive capability of the independently created computer program with other programs and may not be used for the development of a computer program of a type essentially comparable to the decompiled program”.
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the ambit of fair use being alarmed of the supremacy of technology in making copyright infringements, the Indian law takes a bold step ahead.\textsuperscript{137}

The ultimate question here is, whose public interest are we addressing through the fair dealing provisions. Whether it is the unilateral public interest of the software industry that we are addressing? It failed to incorporate a bundle of user rights within the scope of computer programme. Interestingly if we look into the Copyright Law of Thailand, we can see that computer programmes are freely available for research or study, personal use, comment, criticism and preparation of compilations, reporting of news, educational use and use in judicial and administrative proceedings. The scope of computer programmes in serving multiple facets of public interest have been fully realized and exploited in Thai legislation. Why India remaining too broad and liberal towards fair use, has shut its eyes towards the challenges of digital technology towards users? Definitely it will never be an instance of legislative imprudence. On other hand, it will be a deliberate policy of the government. Equally deplorable is our failure to devise leeway to overcome the hurdles of licensing contracts on fair use. However considering that public access to copyrighted knowledge has been the cornerstone of Indian Copyright Law, any contract that prohibits fair use is prima-facie void.

Indian fair use policy reaches its zenith in the proposed Copyright Amendment Bill, 2010 by its enthusiastic extension of fair dealing to

\textsuperscript{137} Private non commercial use is expressly barred in a majority of legislations like Rwanda, Andorra, Albania, Kazakhstan, Australia, UK, European Union etc.
'any' works. Earlier we confined it to literary, artistic, dramatic or musical works. Realizing the impact of digital technology in communication and dissipation of information, the Bill attempts to create a safe harbor for Internet Service Providers (ISPs) and Online Service Providers (OSPs) in Indian copyright law through amendments to Sections 52(1) (b) and 52(1) (c) of the Indian Copyright Act, 1957. It is anticipated that the proposed Section 52(1) (b) would primarily apply to ISPs and that the proposed Section 52(1) (c) would focus on OSPs, and shield them from accusations of copyright infringement in respect to User Generated Content uploaded without their consent, and, presumably, without their encouragement and/or facilitation. There is, however, nothing in the proposed amendments which makes this differentiation clear, and the distinction may be drawn not from the explicit words of the proposed amendments but from the kinds of activities each of these provisions exempts from the scope of copyright

138 In section 52 of the principal Act, in sub-section (1),— (i) for clause (a), the following clause shall be substituted, namely:— " (a) a fair dealing with any work, not being a computer programme, for the purposes of— (i) private or personal use, including research; (ii) criticism or review, whether of that work or of any other work; (iii) the reporting of current events, including the reporting of a lecture delivered in public. For details see, Copyright Amendment Bill [online]. Available at http://copyright.gov.in/Documents/CopyrightAmendmentBill2010.pdf [Accessed on March 2011].

139 The safe harbour is proposed to be established as follows: firstly, it is proposed to incorporate a provision in Section 52 (1) (b) which would state that “the transient and incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public” would not constitute copyright infringement. In addition to this, it has been proposed to include, vide amendments in respect of Section 52 (1) (c), provisions which would state that the “transient and incidental storage for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy” would also not constitute copyright infringement. Further, a person takes down allegedly infringing content pursuant to the issue of a takedown notice may require whoever has issued the notice to produce an order from a competent court within 14 days for continued takedown.
infringement. Interestingly, there have been some recommendations which have been made by those active in the digital world suggesting, however, that the proposed Section is not wide enough, and that it should not exempt merely the “transient and incidental storage” but the “transient or incidental storage” of works or performances purely in the technical process of electronic transmission or communication to the public.140 But from a syllogical construction of the conjunction ‘and’, it appears that it can cover all those situations.

Another significant innovation in the proposed amendment is a fair dealing provision for persons suffering from disabilities. The law permits the adaptation, reproduction, issue of copies or communication to the public of any work in a format, including sign language, specially designed only for the use of persons suffering from a visual, aural or other disability that prevents their enjoyment of such works in their normal format.141 But the provision has been criticized by the stakeholders for its restrictive scope. However a plain reading of the section reveals its broad vision. Interestingly a comparative analysis of the sister provisions in contemporary legislations also substantiates that ours is a well foresighted provision.142 The scope of permissible activities under our law is too wide when it allows ‘adaptation, reproduction, issue of copies or communication to the public’. In the international arena there are only few countries that allows this much activities.143 Though we do not explicitly mention about audio recordings

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141 Section 52 (zb) of Indian Copyright Act, 1957.

142 WIPO study for visually impaired.

143 The exceptions provided in Austria, the Czech Republic, Estonia, Germany, Hungary, Latvia, Slovenia, Ukraine and the United States of America, as well as
and making the work available through broadcast, adaptation and communication to public, which include within its ambit any kind of most modern developments. Likewise on the nature of works that can be made accessible, while countries are concerned that the work has already been published or otherwise disclosed or disseminated to the public, we have an unreserved policy. In India it is immaterial that whether the works have been published or otherwise made accessible. On the making reproductions of works, it is clearly possible to distribute the accessible copies made, and in Australia and Italy the exceptions provide for reproduction and communication to the public, with sound broadcasting being specifically possible too under a separate exception in Australia. There is scope to provide visually impaired people with accessible copies that have been made in Slovakia and Sweden by more than one method as both these countries have exceptions that apply to both distribution and communication to the public as well as reproduction, although in the case of Slovakia, distribution cannot be by sale but does include lending, and in the case of Sweden more conditions apply where there is communication to the public. In the Dominican Republic, El Salvador and Panama, the exceptions only permit what is in effect a performance in public of a work where the end beneficiaries are at the performance. The Law in France permits reproductions, and also a performance for the personal use of the end beneficiary of the exception [online]. Available at http://www.wipo.int/meetings/en/html.jsp?file=/redocs/mdocs/copyright/en/sccr_15/sccr_15_7.html [Accessed on 21.02.2011].

Australia and the UK, the permission depends on the question that whether the work has been published or not. It is quite common for exceptions to include a requirement that the work to be used has not been published already in a special format for visually impaired people. Examples of countries that include this sort of provision are Azerbaijan, Georgia, Kazakhstan and Kyrgyzstan, most of which also have a requirement regarding publication. All the countries that express the limitation to works that can be used by ruling out works already made in special formats for visually impaired people do, in fact, only permit Braille or other specialized formats to be produced so this limitation is quite logical. In Moldova, the test seems to be only to check that there is not a Braille copy already available, but this is logical too as only accessible formats in Braille can be made under the exception. In some countries, the test is not so much whether there is a special format already available, but whether there is an accessible format, which could, of course, be a format that has not necessarily been made Available specifically for visually impaired people, but is nevertheless capable of being accessible to them in some way. Examples of countries that include a test of this sort are Germany and Slovenia. A more developed form of this sort of test, which has already been mentioned above in connection with the making of sound recordings in Australia, involves considering how difficult and how expensive it is to obtain an accessible version that has already been made.
question of beneficiary of the exception too, we have a broad vision. We extend the privilege to persons suffering from any kind of disability.\textsuperscript{145} But there is restriction on the type of formats in which a work can be made accessible.\textsuperscript{146} We are also not concerned about the commercial or non-commercial nature of use\textsuperscript{147} and are least bothered about the persons

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\item[145] Often countries define the scope of beneficiary. Australia which targets people with a print disability, defined as a person without sight, a person whose sight is severely impaired, a person unable to hold or manipulate books or to focus or move his or her eyes, or a person with a perceptual disability; and Canada which targets people with a perceptual disability, defined as a disability that prevents or inhibits a person from reading or hearing a literary, musical, dramatic or artistic work in its original format, and includes such a disability resulting from \((a)\) severe or total impairment of sight or hearing or the inability to focus or move one’s eyes, \((b)\) the inability to hold or manipulate a book, or \((c)\) an impairment relating to comprehension. In United States of America test of disability includes those who are eligible or may qualify to receive books for blind people under other legislation; and in France there is a numerical measurement of the extent of the disability, measured against relevant standards. Another, arguably more flexible, type of test where impairment other than blindness is at least partly judged against those who have normal sight or perception is provided in countries such as: - Norway which targets blind people and people whose sight is impaired and others who due to a disability cannot perceive the work in the normal way; and - the United Kingdom which targets a visually impaired person defined as a person \((a)\) who is blind, \((b)\) who has an impairment of visual function which cannot be improved by the use of corrective lenses to a level that would normally be acceptable for reading without a special level or kind of light, \((c)\) who is unable through physical disability to hold or manipulate a book, or \((d)\) who is unable through physical disability to focus or move his eyes to the extent that would normally be acceptable for reading.
\item[146] Some countries like Cameroon, China, Iceland, Indonesia, Republic of Moldova and Ukraine, confines the conversion into Braille only. Countries like Australia, Czech Republic and Germany have a comprehensive covering including even electronic versions.\item[147] In countries, such as Ireland and New Zealand, the body that is permitted to undertake the Activity under the exception in order to assist visually impaired people must not be profit-making. A requirement of this type also applies to bodies undertaking Activity under exceptions in Singapore and the United Kingdom, except where the body is an educational establishment. In Canada, this same type of limitation applies to Activity by an organization, but Activity by individuals is also possible and is not similarly constrained. A limitation to Activity by not-for-profit organisations could be achieved in, for example, Nigeria and Japan where the Activity under the exception is undertaken by government approved establishments.
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who can utilize the exception. So sometimes the law appears to ignore the right of authors and has the risk of tilting the copyright balance. But taking into account of the righteous objective of the provision, any prejudice to the right holders can be ignored.

But the proposed amendment to the exceptions in favor of library and educational use, not only fails to appreciate the growing demands of access in the context of digital technology, but also narrows the existing provision. The use of the expression ‘instructional use’ instead of ‘educational use’ in clause (h) definitely narrows the scope of the provision. ‘Instruction’ refers to act of instructing, teaching or imparting knowledge. ‘Education’ on the other hand refers to a systematic development and cultivation of natural powers or knowledge through instruction. Education is a wider phenomenon embracing instructional activities also. So while all instructional use can be an educational use, every educational use need not be an instructional use. Likewise by adding the adjective ‘non-commercial’ to the term public library, the existing scenario has been more complex. Even the use of the expression public library itself was controversial because of its restricted scope. The changed scenario now makes it clear that earlier the law had a wider perspective of embracing all libraries to which public has access.

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148 Only bodies or organisations which are specifically authorised or designated are able to make sound recordings in Japan and Nigeria. In the Republic of Korea, there may still be no restriction on who can make sound recordings, but those recordings can only be used at facilities established for the promotion of the welfare of the blind and as prescribed by Presidential Decree. In Finland and Sweden, a greater range of copies can be made without any restriction regarding who can do this, but only institutions as defined by decree can make copies that are sound recordings.

149 See S.52 (o) of the Copyright Act, 1957: “the making of not more than three copies of a book (including a pamphlet, sheet of music, map, chart or plan) by or under the direction of the person in charge of a public library for the use of the library if such book is not Available for sale in India”.

Perplexingly, the proposed bill thus exacerbates the ambiguities and uncertainties on educational use and library use.

The judicial attitude is also not different. The judicial developments in the post-TRIPS era corroborate this. On the issue of re-publication of certain works, Madras High Court re-instating the public interest in access to works ended up in a new motto for copyright, “let hundred flowers and thousand thoughts contend”.\(^\text{150}\) The court held that, when right to property creates a monopoly to which public must have access, withholding same from public will amount to unfair trade practice.\(^\text{151}\) The court also held that in our constitutional scheme, statutory monopoly is not encouraged.\(^\text{152}\) This was not a novel policy evolved by the court. On the other hand it followed the dicta established by Supreme Court in Entertainment Network (India) limited’s case, wherein the court held that property rights vis-à-vis individual rights are incorporated within the multiversity of human rights and any claim of adverse possession has to be read in consonance with human rights.\(^\text{153}\) A holistic approach was followed by the court in Gramophone Company’s case to uphold the public interest targeted by the copyright amendment act of 1994.\(^\text{154}\) But it

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\(^{150}\) Periyar Self Respect Propaganda Institution v Periyar Dravidar Kazhagam 2009 (41) PTC 448 (Mad), Para-42. The case was about the issue of re-publication of the works (various articles, write-ups and various things covering political, economic and social thoughts) of EV Ramaswamy, in his newspaper Kudiyarasu by a reporter of the newspaper Kumudam.

\(^{151}\) Periyar Self Respect Propaganda Institution v Periyar Dravidar Kazhagam 2009 (41) PTC 448 (Mad), Para-34.

\(^{152}\) Id.

\(^{153}\) Entertainment Network (India) limited v Super Cassette Industries Ltd, (2008) 13 SCC 301, para25. Though it was on the issue of compulsory licensing of certain sound recordings the court held that copyright is not absolute and it is always subject to the interests of the society.

\(^{154}\) Gramophone Company of India Ltd v Mars Recording Pvt Ltd, 2000 (28) PTC 487. By the amendment Act of 1994, the word ‘and’ has been deleted. Court held that this makes it clear that the legislature intended that these two provisions of Law should
should be noted that the Indian judiciary is never carried away by public interest ignoring the rights of authors.\textsuperscript{155} It acknowledges the need for rewarding the creativity of the author and recognizing his creativity for a robust copyright regime. Thus a balanced approach, with a tinge of socialism was evident.

At the end of the analysis, we represent a most promising and competent regime of user rights. As nothing is infallible there are some loopholes and puzzles in our law too. But it comes out that we were least concerned on following the same wording of TST. From a positive perspective we can acknowledge that India attempt to avail the maximum of the flexibility available in the international era. It also substantiates that there is enough ‘wiggle room’ left out by TST which can be effectively calibrated by the international community.

8.6 Conclusion

The legislative and judicial developments in the post-TRIPS era portrays that TRIPS has been a ‘veritable nightmare’ for developing countries. However it is to be noted that, not at any single point in the post-TRIPS era the international arena was disturbed by the unbending and unyielding wordings of TST. On the other hand we can see that, be it at the time of Doha development agenda, FTAs or WIPO Development Agenda, the policy makers were confronted with the proper utilization of the flexibilities of TRIPS. In Doha and WIPO development agendas, the

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\textsuperscript{155} Syndicate of Press of University of Cambridge v B.D Bhandari 2005 (31) PTC 58 (Del); Syndicate of Press of University of Cambridge & Anr v Kasturilal & Sons 2006 (32) PTC 487 (Del).
countries were struggling to devise means to effectively use the flexibilities. They did not complain about the rigidity of TRIPS wordings. Similarly the Bilateral Agreements were the manifestation of frustration of the developed world with TRIPS standards which they considered to be too minimum. The “flexibilities” and options open to developing countries in interpreting and in implementing obligations are often removed or reduced through provisions in the FTAs that are proposed by developed countries. TRIPS plus standards set by WIPO through the patent agenda and digital agenda also corroborates this. Thus the international initiatives in the post-TRIPS era were smart shots to smash the ‘policy space’. Thus it comes out that TST was flexible enough to meet any social exigencies. It also points out the incompetency of TST to find a solution to the issues which it was addressed. It was neither successful in shielding the rights of creators by combating piracy, nor in defending the noble rights of users. But the restrictive interpretation sermonized by the DSB panel reports, nipped in bud, the potentialities of the flexibility inherent in TST. It might be the draconian impact of DSB panel reports, that the countries thereafter became reluctant to take a liberal attitude towards permissible uses. So once again the international arena is strained to devise a viable mechanism to maintain the age-old balance of intellectual property rights.

But how to exploit this policy space is the crucial matter. In the above analysis we come across some legislation that do not even have the basic user rights provisions like research use of patents, Bolar use, regulatory review, library use, educational use and even fair dealing of computer programmes. There are instances where countries remain technology neutral and also remain outdated to the growing demands of the user community. Our law on educational use and library use is a classical example for this. Equally challenging is the legality of bold
moves some legislation make. For example the legality of Indian Bolar use or that of fair dealing of computer programmes or that for visually impaired in the proposed amendment bill before a DSB panel is really unpredictable. But the situation can to a great extent be overcome by a balanced interpretation of TST as proposed by a group of experts.\textsuperscript{156} We should accept that there is nothing in TST which urges us to interpret it narrowly. But the real task is to create an international awareness on the scope of policy space and also on the scope and nature of bountiful stream of limitations and exceptions.

\textsuperscript{156} Declare as follows: 1. The Three-Step Test constitutes an indivisible entirety. The three steps are to be considered together and as a whole in a comprehensive overall assessment. 2. The Three-Step Test does not require limitations and exceptions to be interpreted narrowly. They are to be interpreted according to their objectives and purposes. 3. The Three-Step Test’s restriction of limitations and exceptions to exclusive rights to certain special cases does not prevent (a) legislatures from introducing open ended limitations and exceptions, so long as the scope of such limitations and exceptions is reasonably foreseeable; or (b) courts from - applying existing statutory limitations and exceptions to similar factual circumstances \textit{mutatis mutandis}; or - creating further limitations or exceptions, where possible within the legal systems of which they form a part. Limitations and exceptions do not conflict with a normal exploitation of protected subject matter, if they are based on important competing considerations or have the effect of countering unreasonable restraints on competition, notably on secondary markets, particularly where adequate compensation is ensured, whether or not by contractual means. 5. In applying the Three-Step Test, account should be taken of the interests of original right holders, as well as of those of subsequent right holders. The Three-Step Test should be interpreted in a manner that respects the legitimate interests of third parties, including - interests deriving from human rights and fundamental freedoms; interests in competition, notably on secondary markets; and other public interests, notably in scientific progress and cultural, social, or economic development. The declaration is available at, http://www.ip.mpg.de/shared/data/pdf/declaration_three_steps.pdf. [Accessed on March 2011].