The study on the limitations and exceptions to copyright and patent was mainly characterized by its diversity and flexibility. The unique feature of limited monopoly appended to intellectual property was always a matter of wide controversy. The philosophical enquiry substantiated that property rights had an axiomatic correlation in duties. It can be argued that property is essentially a relation created by law and the proprietary norms are molded in accordance with the social system in which the legal system operates and are aimed towards the norms and values of the social system. Even during the classical Roman era of individualism and even in the classical individualist theories of natural law school, individual rights were always regulated for the larger social interest. The existence of absolute rights without corresponding duties remained as a fairytale in our analysis. There are always the rights of escheat and eminent domain, and numerous restrictions on property. It was also obvious that these restrictions vary in nature and scope in accordance with the changing needs of society.

When it comes to intellectual property specifically, Locke’s sufficiency limitation and spoilage limitation together with the requirement of common stock and social contract finds a clear theoretical and pragmatic manifestation. The fulfillment of limitations (provisos) were not left to the discretion of the individuals, but were mandatory duties which they have to comply at the stage of acquisition. Otherwise their acquisitions are not justified. Thus each and every individual was assured
with the right of equitable access to the commons and this right was protected with the duty appended to each and every individual to comply the provisos. Thus while the laborer had a right over his product of labor, the society was also assured with their equitable right over commons which was maintained through the duties appended on the laborer. So when we extend these provisos to intellectual property rights and justify the limitations appended to the rights of the patent and copyright owner, it is quite evident that these provisos should operate as absolute duty on the right holder or it should be incorporated as the fundamental user rights, otherwise the whole balance of acquisition and intergenerational equity which the proviso is trying to achieve will be meaningless. Hegel expressly emphasizes that works of art and products of genius should be left to the enjoyment of the public at large, since potential creativity demands it. In Hegelian philosophy of right, he makes it imperative that all individual rights have their correlated duties and is subordinate to the larger social interest. He views the right ensured by intellectual property system as a negative phenomenon which is justified only because of its larger positive social benefit. Thus his individualistic theory also built up rights with their concomitant social duties. Thus from a philosophical perspective the requirement of a vigorous regime of pre-grant and post-grant limitations to intellectual property was an inevitable requirement for its existence and survival as a social phenomenon. It is also evident that these limitations and exceptions to intellectual property rights are not mere social privileges, but are fundamental user rights which every legal system has to assure to its subjects as the quid pro quo for the award of right.

The historical analysis substantiated this instrumentalist philosophy of intellectual property. The crucial objective of patent system was in effect to promote the growth of human capital. When a useful trade or
invention was brought to the kingdom the king granted the monopoly patent for some reasonable time until the subject may learn the same. So it was evident that these grants were aimed to encourage transfer of valuable trades and technologies to the kingdom. To attain that purpose conditions of local working requirement and apprentice clause were incorporated as post grant limitations. The copyright grants were also a paramount sovereign policy of censorship. The patent grant in Statute of Monopolies was conditional upon it not being contrary to law or mischievous to the State in some way. The patent strategy in this pioneer statute itself was a reflection of the economic policy of the realm. Similarly the statute of Anne by declaring the objective of copyright as an encouragement of learning through the preamble and by limiting the term of copyright and also by its library deposit requirement heralded the arrival of public interest dimension to copyright. Thus limitations and exceptions to patent and copyright were designed to serve some vested and solid social, economic and political aspirations of the contemporary sovereign heads. It was also evident that they remaining the brawny and muscular tool in the armory of sovereign for attainment of domestic interests, there existed a wide diversity on the nature and scope of limitations across the territories. These diversities were quite unpredictable and were also very rich in the absence of international mandate. However in the midst of these diversities the domestic intellectual property regimes maintained a well balanced system. Privileges were issued to attain certain social and economic causes. Rights were a valid subject to the fulfillment of those social duties and stand revoked in their failure to perform the duties. Thus rights and duties enjoyed an equal status and existence of right was dependent on the execution of duties.

The international era immediately preceded this domestic arena tilted this balance. There was an unprecedented growth of international
trade by the middle of nineteenth century and towards this move this diversity was not preferred because of rampant piracy. Consequently the first international conscience was to strengthen and unify rights on a uniform scale and the Berne and Paris was immensely successful towards this move by establishing a minimum set of rights. They took a uniform policy towards limitations and exceptions by leaving it as a matter of sovereign prerogative. This policy can be interpreted in two different ways. One, we can view it as a genuine case of safeguarding domestic public interest. It can also be viewed as a calculated and conscious effort to strengthen the rights at the international level without corresponding duties towards this. Whether it was pre-meditated or not, the consequence of this international policy was that ‘rights’ appended to intellectual property grants attained a new dimension. They got managed to get a prime recognition without the corresponding duties. Rights began to be upgraded without appreciating its domestic impacts from a public interest perspective. The instrumentalist function of intellectual property shifted from the public interests to private interest. But at the same time these conventions left open the policy space which the countries enjoyed in the pre-international era. So it was an era of minimum obligations with maximum flexibility. The copyright law of Angola as a whole, translation right in Barbados, the provisions dealing with press use in Pakistan, Israel and Austria, library exception in Kenya and Nigeria and finally the teaching exception in countries like Israel and Malaysia are typical examples of these flexibilities. The technological advancement made by Japan through its broad experimental use exception is also an illustration of the utilization of this flexibility.

But it was also quite unfortunate that a vast majority of countries have failed to manipulate the policy space for accomplishing their domestic needs and priorities. We have seen that quite often the
legislations were drafted in an unscientific and haphazard manner under the influence of geographical affinity and colonial or imperial influences. Typical example for this was the narrow experimental use provisions in countries like Kenya, Ghana, Tanzania, India etc. Indian law on library use and educational use are also a clear demonstration of the failure of a large group of developing countries in appreciating the need for well articulated user rights. Sometimes there were certain legislations which were a carbon copies of other countries legislation without appraising even the actual or potential impacts. The wide diversity in the legislations of Kenya and Nigeria illustrates this. Very often they lacked the institutional, infrastructural and technological capacity to articulate their needs. There was no international consensus to delegate the technical or legal expertise to these countries in distress.

It was at this point of time that the TRIPS under the initiative of the US private sector activists from knowledge-based industries owed its origin with false promises to the developing world of technological assistance and technology diffusion. In the negotiating rounds concentrating on the issue of piracy a vigorous attempts were made to strengthen rights to prevent piracy and at no point in negotiation or drafting did any public interest issue receive the attention. Limitations and exceptions with its binding nature were added into it to fortify rights and not as a public interest mechanism with its righteous duties. It seems that the TST is based on the assumption that the use of works is in principle controlled by the rights holder and exceptionally exempted on the condition that it “does not conflict with a normal exploitation of the work” and “does not unreasonably prejudice the legitimate interests of the author”. Therefore, when we interpret the Three-step test literally, it limits the capacity for the national legislature to implement limitations and thus it produces a biased result in favor of the author. This author
centric economic interpretation to Articles 13&30 got a solid footing with DSB panel reports when it interpreted each and every step in a restrictive cumulative economic sense. It is really interesting to ask how the DSB panel arrived at such a decision in the context of Article 7, 8 and especially in the context of its gracious wordings in the preamble. Article 7 of the TRIPS lays down a principle of balance between rights and obligations and emphasizes that the Agreement has the goal to foster not only the economical development, but also social welfare. This means that while interpreting the provisions of TRIPS the single economic perspective cannot be followed exclusively. Similarly Article 8 of TRIPS goes in the same direction, as it allows the member States to adopt measures for the promotion of “the public interest in sectors of vital importance to their socio-economic and technological development”. Furthermore, the preamble of the TRIPS refers to the objective of promoting effective intellectual property protection mechanisms, recognizing the “underlying public policy objectives of national systems” and even for least developed countries, the needs “in respect of maximum flexibility in the domestic implementation”. Thus the DSB panel report made it clear that all these public interest provisions in the TRIPS are a mere eye wash. This nascent jurisprudence of WTO dispute panels elevates economic benefits of control over economic benefits of diffusion. This jurisprudence, also fails to accommodate the dynamic nature of the creative enterprise. With this express provision on limitations and exceptions as a limit to user right rather than as limitations to author right, the status of user right was again degraded.

The post-TRIPS scenario came with unforeseen and unintended consequences. While the countries were already in a highly elevated standard of intellectual property rights with minimum flexibility and
maximum obligations, post-TRIPS arena witnessed international efforts for TRIPS plus standard. The FTAs under the auspices of developed countries reduced the scope of limitations and exceptions in a considerable manner. In FTAs by the US between countries like Vietnam, Jordan, Chile, Singapore, Australia, Morocco and Bahrain, was successful in even limiting the existing user right regimes particularly in those developing countries. These FTAs enabled patent holders to limit potential impacts of parallel import, ‘Bolar’ use and compulsory licensing provisions, thereby hampering the availability of generic drugs. Similarly the newly enacted intellectual property legislations of the Middle East and African countries incorporated TST with its economic ramifications without appreciating the domestic needs. Even now, countries like Jordan, Kyrgyzstan, Portugal, Saudi Arabia, Serbia and United Arab Emirates do not have a fair use provision. Further, in spite of international initiative for harmonization, the diversity and unpredictability on the nature, scope and extent of limitations persists. In effect, despite over a century of international norm setting in the field of copyright, limitations and exceptions have largely remained “unregulated space.”

Why, a policy matter which was developed as a duty concomitant to the right at the time of the privilege system and in early intellectual property legislations have deteriorated to the status of defense to infringement and termed as instances of permissible uses. It is true that, some legislations have given user rights the primary role when incorporating them as restrictions to rights. But even in those countries rights and duties were not parallel and the control mechanism which the premier statutes had were also absent. In those prime legislations, the duties were under the incessant scrutiny of sovereign and any deviation from the assigned duty was met with revocation of patent. When human
creativity was assigned the status of property rights, the sovereigns were very clear that these rights are purely instrumental in nature and so private rights were given only the same legal status as that of public interest. But subsequent developments witnessed a right biased approach, with continuous deterioration of limitations to rights in nature, scope and use. But the rights showed a tremendous and progressive development in accordance with technological developments and economic dimensions. Thus in this transformation, the intellectual property law has lost touch with its basic rationale: to serve the interests of society. So, what happened in this course of evolution is to be found out and cured. We began the study from a legal space characterized by diversity and flexibility and end up in that legal space being characterized by homogeneity and standardization.

If the status of the rights and duties has diminished proportionately, this could have been perceived as an inevitable legal collapse. But since, it was an iniquitous development; it was quite evident that there is a clear lobbying by the other side. With the unveiling power in the hands of intellectual property rights holders, the users were in a very weak bargaining position and were deprived of their age old rights. Just like the sovereigns of 12th and 13th centuries, sovereigns of the contemporary era were also concerned with the immediate, and of course the competing economic development of their concerned territories. However the sovereigns of the contemporary international era are in a very weak bargaining position unlike their predecessors who were czars in their respective territories. It comes out that widening horizons of economic rights and its lobbying by the right holders resulted in setting a new agenda of maximum protection with minimum limitations. So now the laws both at the national and international era are framed and reframed to suit the vested economic interests of a handful of multinational corporate
giants. Their claims are, undoubtedly legitimate, but certainly incomplete from the perspective of the public policy.

Another puzzling question is, why the countries took a liberal approach to limitations and exceptions in their nascent stage of economic development and restricted them the moment they became technologically proficient? So what is the real nature of these limitations? Thus in course of time, the philosophical and pragmatic nature of the terms ‘user’ and ‘user rights’ acquired a new economic status. This new paradigm shift itself was something that flouts the underlying cannons of IP. The philosophical enquiry has clearly substantiated that even the most ardent supporters of individual rights, subjugated that for the larger social interest. Similarly, the historical foundations to intellectual property also corroborated that limitations to rights played a significant role in satisfying the quest for access to knowledge and flow of information. For example, when Justice Story developed the experimental use exception the rational he found was satisfaction of philosophical curiosity and not simply technological and economic advancement. Similarly when Statute of Anne, insisted for library deposit it also had a noble vision of learning and knowledge. As well they were not bothered with the economic rights of the author or patentee as the case may be. Thus along with the degradation of status from user right to mere user defence, its intrinsic righteous nature was also seriously affected.

It is quite unfortunate that the policy makers paid scant attention to this uneven tilting of intellectual property balance. The impact was not simply on individual users or their collective user rights, but the shocking impact was definitely felt on the intellectual property structure itself. The platform which the intellectual property system has
maintained since its inception for future creativity and innovation stood disturbed. It appears the policy makers are of the strong belief that once a minimum standard of development is achieved, the intellectual property will maintain the balance itself. If the principle of creativity and innovation is based on the principle of standing on the shoulders of giants, how can the system promise a minimum creativity or innovation by blocking access to knowledge through this gradual progression of rights?

So, not an individual or a group of individuals, not a nation or a group of nations, but the whole intellectual property system from a national and international level is affected. Though some section of the world population will be very severely affected, the problem is unique from an international perspective. The adverse impact of a set of narrowly tailored limitations to rights in DMCA in the US and its subsequent revisions is an epitome for this. The questions relating to the scope of flexibility in the pre-TRIPS era, impact of TRIPS and finally the status of limitations in post-TRIPS are clear. So, now the questions to be answered are, whether the splendid harmony and diversity in pre-TRIPS era is to be restored, or is TRIPS itself adequate or should we go for an innovative solution shifting from TRIPS taking into account of the exigency of the situation. The equally important task is to suppress with an iron hand any bilateral and multilateral move to expressly overcome the flexibility in TRIPS by negotiating for a trade oriented narrow set of limitations and exceptions to patent or copyright through the FTAs. So the attempt to bring back the pre-TRIPS era or thinking about the adequacy of the TRIPS is worthless in the current scenario, because the national and international intellectual property framework has to accept TRIPS as a universal truth. So now the only solution is to have a holistic approach from within the TRIPS.
Towards this move, the Declaration on Balanced Interpretation of TST in a joint project of the Max Planck Institute for intellectual property and the School of Law at Queen Mary, University of London by a group of experts and an International Instrument on Limitations and Exceptions propounded by Okediji and Hugenholtz are really welcome. The declaration will give a bit of guidance and courage to the countries in interpreting and implementing TST and will also remove the myth surrounding the vagueness and at the same time lucidity associated with TST. The declaration would have been more effective if it had a procedural guidance as how to persuade DSB or national policy makers in adopting such a balanced approach. Further it would have been more appreciable if it had a provision to the effect that in case of conflict between private rights and public interest, the public interest will prevail.

Equally appreciating is the international consensus towards an instrument on limitations and exceptions. The push is not from a group of developing countries like Brazil or LDC’S, but it should be viewed as a voice from developed countries, depicting the realization of a universal catastrophe. It is a realisation of the principle that maximum protection will undermine the foundational commitment of intellectual property rights to the public good. But the core principle on which they base their instrument is flexibility and autonomy to the States in meeting their social and cultural needs. Because countries vary in their state of development and policy interest, any rigid and uniform system of limitations is undesirable. But with that grund norm, it is quite impracticable to have an instrument of limitations and exceptions. It will be quite illogical and irrational to classify limitations and exceptions as mandatory and permissible. What may be mandatory for a country may be only permissive for the other, due to the disparity in technological development and cultural aspirations. However, their core concern for
extending technical and legal assistance for countries in need is also well-timed. But, even WIPO is encountering a series of difficulties in fulfilling this task as part of its Development Agenda. These include the ability of developing countries to articulate their own needs and approaches with regard to intellectual property, the ability of developing countries to participate in the project-based approach to implementation, and financial assistance for developing country participation. So, not all an easy task, it is really a hectic task. Who will initiate, who will enforce and who will bear the financial and technical burden are to be properly envisaged. However a minimum mandatory set of international limitations addressing the most pressing uses and users is highly preferable.

At the end, we are left with three complex issues to be resolved. Primarily, we have to devise a solution to the iniquitous right oriented upgradation of intellectual property rights. The second task is to maintain the international flexibility and sovereignty which the countries enjoyed in the pre-TRIPS era and a way out has to formulate to rectify the inherent defects of TST. And finally, we have to develop a binding international obligation towards extending technical and legal assistance to the developing countries to utilize the flexibilities and also to avail the potentialities inherent in limitations and exceptions to meet their domestic exigencies.

So the primary task is to elevate the status of limitations and exceptions. From the status of defense to infringement, they should be incorporated as concomitant duties to the author rights. Users' rights must transcend the whole of the intellectual property system to match the rights of owners. Just like the philosophical rationale of duties or restrictions to property rights, intellectual property policy should be
reframed to give holders of intellectual property and users of intellectual property an equal footing. It is not all an innovative challenge for policy makers. Because, since from the very inception intellectual property laws were drafted in that model only. Along with the grant of privileges corresponding duties were affixed and its observance was under rigorous surveillance, subject to revocation of privileges. So an absolute duty should be cast on the legislatures to counterbalance an extension of rights by an extension of the scope of the correlated duties. Towards this, it is proposed that since patent rights or copyrights as the case may be are individual in nature, the right holders will automatically enforce and monitor its violation. But on the other hand since user rights are public rights and since State is the guarantor and supporter of public interest, the State should itself monitor and enforce the user right. An administrative body should be constituted under the intellectual property legislations with enough judicial powers to monitor the public interest functioning of the intellectual property system itself. A nodal agency to administer various categories of rights and its duties can be constituted on a national level where right holders will deposit their rights and users can access them subject to proper guidelines. Similarly it is also proposed to shift the burden of proof to right owners in infringement suits where public interest defenses are pleaded and let the right owners substantiate their economic loss. This will also raise the status of user rights and users, especially vulnerable sections like the blind will be more benefitted.

Here comes the relevance of an international instrument on limitations and exceptions. An international mandate with minimum user rights, which each and every country has to enforce despite their diverse social, economic, technological and cultural ideologies is an ideal solution. It is high time to eliminate the inconsistency and
unpredictability of limitations and exceptions across the borders. It has been explained in a working paper of ICTSD that a new international instrument on limitations and exceptions could help eliminate diverging interpretations of the TRIPS TST across national jurisdictions and thus provide coherence and predictability in an environment of dynamic innovation. While in the copyright arena, the new mandatory minimum exceptions and limitations is required to foster private use, education, libraries and archives and facilitate uses by disabled persons, in patent we need an international standard for minimum research and non-commercial uses. This international mandate should be made in such a way that they may not be contracted away. It should also positively oblige right holders to ensure that beneficiaries can exercise their exceptions in spite of any contract or license Agreement to the contrary, and all such contractual agreements restricting the minimum user rights should be held null and void. Such an international instrument has the defect of again ignoring the domestic priorities. But there we have the argument of minimum standards, which will continually maintain the sovereignty. But this will again revert to the issue of harmonization, because the minimum standards will result only in heterogeneity. There, it should be emphasized that our task is not to achieve international uniformity, but recognition and enforcement of a set of basic user rights form an international level.

The issue of flexibility and restrictiveness in the context of TRIPS is the next challenging task. Before devising flexibility to TST, the question to be answered is whether such a mechanism is desirable in the context of TRIPS. Even though it is not desirable in the context of mandatory nature of TRIPS together with its enforcement mechanism, since an umbrella instrument for intellectual property a deletion of the fundamental characteristic of intellectual property is not preferable. So
the only way out is to make the provision more user friendly. If we go for a progressive interpretation discarding the classical approach, it is possible to perceive TST as no more than a “proportionality test” allowing national legislatures a relatively broad measure of discretion in codifying limitations and exceptions while balancing the interests of right holders against those of users and society at large. But, it is really challenging to contemplate TST as a limiting and enabling clause alike at the same time. So it should be clarified. Unlike the other provisions, anyhow these articles dealing with limitations and exceptions should be immunized from the enforcement mechanisms taking into account of the sovereignty of States in meeting their domestic exigencies. No absolute liability is imposed on the member countries with respect to the public interest mechanism. So an open ended, lucid and discretionary wording is suggested. So that it will allow nations to retain their autonomy to interpret the limitations in accordance with their local values.

Equally important is reorienting the structure of TST in the context of our first policy suggestion. TST now will sound like a formula for protecting authors from any kind of limitations. It commands the policy makers to be more cautious while delimiting the rights of authors or the patentee as the case may be. It is an extension of rights simply. Apart from the primary rights, a secondary right to protect the primary right from any kind of encroachment appears to be the objective. So TST has to be completely restructured keeping the fundamental cannons of limitation and exceptions. It should be streamlined in TRIPS as a user right and not at all as a legal mechanism to protect the authors. Or it should be incorporated as a correlated duty of each and every right assured by the Agreement. It should be worded in such a way that, no exclusive right assured by the Agreement will impede the public interest aspirations of the intellectual property system. Realizing the potential of
limitations and exceptions in meeting public interest, at least in this particular provisions, TRIPS should forgo their imperial interest. Here the TRIPS has to accept that it was, and the only potent weapon through which intellectual property law can achieve the larger social interest. Is also to be realized that, public interest is not something solely related to economic perspectives. Public interest is multi dimensional. So, what is suggested is to amend Article 13 and 30 of the TRIPS. So users' rights must be woven into the very fabric of TST.

All this policy making and academic writings will be futile without concrete practical efforts. What happened to WIPO Development Agenda and the international call for amending Article 31 of TRIPS in the context of Doha Development Agenda? We have seen that, even in pre-TRIPS era in the midst of flexibilities, a very few countries had utilized it to meet their local needs. The major reason for this is the lack of institutional capacity and technical expertise of a vast majority of the countries. In the Uruguay round of TRIPS, Doha and finally in WIPO through its Development agenda, a dozen of promises are given to the countries on technical assistance and legal expertise. A host of recent studies and surveys depict that absence of the institutional capacity and local technical expertise still continues to be the major impediment to put TRIPS flexibilities into practice. The technical and legal support offered in the process of implementation, being primarily provided by industrialized countries and organizations influenced by them, is not at all directed towards an optimal use of those options for flexibility in the interest of developing countries.

Enabling developing countries to act in their own interests is crucial and, to this end, a first step towards improving this situation should be ensuring that technical assistance donors provide advice that is
appropriate for the needs of developing countries. So the first task is to ascertain the real nature of technical and legal expertise which each country needs. For this mandatory initiative under the auspices of WTO, TRIPS council and active participation from NGO’s like WIPO is to be coordinated. Further the technical assistance programs can be made more effective with the enhanced South-South regional or bilateral cooperation, with developing countries breaking their dependency on advice provided by developed nations and instead drawing upon each other’s experience. As part of this, the exchange of detailed information on all exceptions and limitations provisions in national or regional legislations, as well as on the experience of implementation of such provisions among the countries as proposed by Brazil in WIPO is a welcome measure. A look into why and how countries use or how they understand the possibility of using the limitations and exceptions provided in their legislations is also preferable and also important to evaluate how national capacities affect the use of exceptions and limitations. The elaboration of an exceptions and limitations manual, in a non-exhaustive manner, to serve as a reference to WIPO Members is also considerable under the auspices of WIPO (proposal from Brazil). So it is finally suggested that in order for the developing countries to have a good bargaining power and efficiency to utilize the flexibilities, they should coordinate themselves as a supra power in the multilateral and bilateral level. Then they will be in a position to utilize the policy space in which they may implement domestic policy to suit their public interest and will also gain the confidentiality to ward off the US and European Union threats.

In conclusion it is submitted to reorient the intellectual property framework in the context of the noble public interest objectives. It is to be recognized that intellectual property rights are not inherent private
rights but are created and protected by the State, and hence that their scope and form should be defined in the public interest. The mission and vision of the intellectual property law cherished should be reinforced. Limitation and exceptions should be raised to the status of user rights and an absolute duty should be cast on right holders to maintain the balance of intellectual property system as a whole. The balancing mechanism should be initiated from the grass root level and once the countries are successful in that, TRIPS will never be an impediment. While ensuring public interest, special privilege should be given to 'users' like physically challenged and ‘uses’ like public health and access to medicines and access to knowledge. Neither Art. 30, 13 nor the TRIPS as a whole disclose any restrictions of any kind with respect to the grounds on which an exception must or could be based. Exceptions to the exclusive rights conferred by a patent and copyright are not to be interpreted narrowly but rather according to their objectives and purposes. The decisive factor must therefore be whether an exception significantly impairs the incentive structures. If not, then a broad discretionary public oriented interpretation should be given to these provisions.