To be acceptable, any system of intellectual property rights has to strike a balance, on the one hand, between providing incentives and rewards to the right holder, and on the other hand facilitating access to and widespread diffusion and adoption of fruits of creativity and innovation. Thus the challenge is to create and fine tune the balance between the interests of the inventor or creator and that of society in an optimum manner. The unlimited grant or exercise of rights without corresponding and appropriate limitations and exceptions has serious adverse long-term implications not only for development priorities, but indeed for the creative and innovation process itself. As users, creators themselves need an appropriate level of access, and as potential creators, users also require an appropriate incentive structure. Limitations and exceptions are positive enabling doctrines that function to ensure that intellectual property law fulfills its ultimate purpose of promoting essential aspects of the public interest. By limiting the private right, limitations and exceptions enable the public to engage in a wide range of socially beneficial uses of information otherwise covered by intellectual property rights — which in turn contribute directly to new innovation and economic development.

Thus exceptions and limitations to intellectual property constitute a notion that lies at the very heart of the ratio legis of legislation of all intellectual property laws, whether in common law or civil law countries. While intellectual property grants corresponds to a monopoly that society
grants to authors or inventors over their creative work, exceptions and limitations to these exclusive rights appear to be a form of *quid pro quo*, allowing individuals, under certain conditions, to use a work without requiring authorization from the owner of the right, which shows that in granting the owner a monopoly, account has been taken of the need to balance the interests of both parties, namely the right holder and society, which undertakes to protect the author’s or inventors creative work. While remaining as the core facet and pendulum of intellectual property rights, the legislative and judicial approach towards limitations and exceptions were very crucial and delicate for each and every IP systems.

Consequently a country’s specific system of limitations and exceptions seems to be a sacrosanct feature of domestic intellectual property policy tuned to meet the domestic exigencies and remained as a potent weapon in the armory of the sovereign. The principle of balance is most certainly the value which best reflects the expectations of society in respect of intellectual property systems. To maintain this balance between rights holders and users, between authors and other rights holders, and also among the rights holders themselves, the intellectual property system makes use of a set of principles both at the pre-grant and post-grant phase. While at the pre-grant phase the requirement of substantive elements like originality, novelty, obviousness and utility were insisted to maintain a robust public domain, at the post-grant stage the task was accomplished by a numerous set of limitations and exceptions. In our context of study ‘limitations and exceptions’ refers to exceptions to the exclusive rights or certain safe harbor areas of activity were public have access to intellectual property rights without authorization from the author or without paying any compensation. In the patent arena such exemptions include research/experimental use, prior-use exception, pharmacy exception, regulatory review exception etc. In
the copyright arena this balance was maintained by the doctrine of ‘fair use’ allowing a magnitude of uses for the purposes of education, research, library, museums, public speeches etc with the sole intention of public access to information. In addition, any third party can benefit from an exception at any time during the lifetime of a right, and the use is not subject to any compensation.

The balance reflected by intellectual property laws between right owners and public access and the precise equilibrium varied from country to country and reflected philosophical ideals about the nature and function of intellectual property system as well as the different political, cultural and economic priorities. Limitations and exceptions were designed to suit the particular interests of each sovereign jurisdiction and so there was diversity both in the nature and scope of exceptions in each dominions. For example S.107 of the US Copyright Act follows an open ended approach to fair use providing scope for great flexibility to include any kind of use under it. On the other hand countries like India, the UK and European Union follows a closed approach mentioning specific exempted uses. Even with in these commonly mentioned exemptions we can see wide disparity among countries. Some countries allow a wholesale copying for educational and research purposes; some countries put conditions with respect to magnitude and method of copying. Similarly while exemptions for persons with disability under some jurisdictions were confined to persons with visual disability, some countries allow for persons with any kind of disability. Diversity was also apparent on the library use, social and cultural exceptions etc. In the patent arena also the limitations and exceptions varied in depth and scope depending on the economic and technological advancement. For example while the US gave a narrow interpretation for experimental exemption, countries like Australia, Britain, Brazil were having broad provisions on
experimental use. While African country Ghana has no such exception, Kenya adopted research exception by 2001. At the same time it is really interesting that Switzerland, Korea, Taiwan and Japan when they adopted patent laws ample provisions were included for domestic working and reverse engineering for the purpose of technological advancement.

Thus until the inclusion of TRIPS in GATT final Act it was the states’ prerogative to calibrate exceptions and limitations to the intellectual property grant. No international convention prior to TRIPS imposed a binding obligation on this aspect. Articles 9&10 of the Berne dealing with limitations and exceptions though specifies some excepted uses provides that it is the discretion of the member countries to set the limits within which such uses are to be permitted. Similarly Article 15 of the Rome Convention dealing with exceptions is also permissive in character. Paris convention on Industrial Property also does not provide for a binding precedence in this aspect. The absence of a minimum set of exceptions and limitations in the conventions reflected the practice and understanding that the precise nature of such limitations and exceptions was to be left to the reserved power of the state to protect the welfare interests of its citizens. As a result, minimum rights were developed internationally through consensus, while specific limitations and exceptions had evolved over time in accordance with domestic needs. Even then domestic compliance with the recognized limitations and exceptions was voluntary. Thus pre-TRIPS were a period of splendid harmony without any public crisis. But how far the countries actually utilized the flexibilities to meet their domestic needs was not obvious. Even then, since there was no international mandate the national legislations were left unconcerned with this issue. So, what is the real background to this research?
Hues and cries for “Access to Knowledge” and “Access to Medicine” are hearing from every corner of the world map. Why? What is the role of limitations and exceptions to copyrights and patents in this public outcry? How these copyright and patent laws are accelerating this havoc and to what extent they can decelerate this turmoil? An exploration to these questions is the background for this research.

Today approximately two billion people worldwide—one-third of the world’s population—do not have access to the essential medicines they need. In some of the lowest-income countries in Africa and Asia, this figure rises to more than half of the population.\(^1\) Access to essential medicines, a fundamental element of the universal human right to health, depends on several factors, such as prices, rational medicine-selection processes, sustainable financing, and reliable health-care and supply systems.\(^2\) The problem of high prices has been observed by the international community in the context of treatable infectious diseases such as HIV/AIDS and malaria.\(^3\) As can be seen from the example of


\(^3\) For example in 2000, for a triple-combination antiretroviral treatment of stavudine (d4T) plus lamivudine (3TC) plus nevirapine (NVP), the price of the lowest-priced branded treatment was about $10,439 for a year’s supply.The high price tag meant patients living with HIV/AIDS would not be able to afford treatment and would be condemned to death. However, the availability of generic versions of branded medicines led to significant price reductions. In 2001, Cipla Ltd., a generic producer based in India, offered the same combination for $350. Over time, with more competition, this cost has been reduced to $99.3 Reduced prices for antiretroviral treatment have been a crucial factor in the scaling up of HIV/AIDS treatment. See Médecins Sans Frontières (2007) ‘Untangling the Web of Price Reduction’ [online]. Available on-line at http://www.msfaccess.org/fileadmin/user_upload/diseases/hiv-aids/Untangling_the_Web/UTW10_RSep_horizontal.pdf [Accessed on August 2011].
HIV/AIDS, competition among multiple manufacturers is essentially the reason for reduced prices.\textsuperscript{4} Many development experts are of the view that TRIPS has very significantly tilted the balance in favor of the holders of intellectual property rights, most of whom are in developed countries, vis-à-vis consumers and local producers in developing countries and vis-à-vis development interests.\textsuperscript{5} The minimum twenty-year patent protection required by TRIPS allows a pharmaceutical company monopoly over the production, marketing, and pricing of patent-protected medicines. This period can be further extended by the company through the use of various strategies, such as applying for patents on usage, dosage, or combinations of drugs — a practice commonly known as “ever greening,” thus keeping the drug free from competition and enabling high pricing. TRIPS further mandates that patents have to be given for both products and processes in all fields of technology. Whereas previously, many developing countries excluded crucial sectors such as medicines and chemicals from patentability, this is no longer an option.

Equally alluring is the situation created by copyrights. There was unpredictable explosion of intellectual property rights to copyright holders in the form of long duration of copyright, new subject matters

\textsuperscript{4} However, the existence of competition has very much been threatened since the coming into force of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement of the World Trade Organization (WTO) in 1995. TRIPS for the first time set out minimum standards and requirements for the protection of intellectual property rights—for example, trademarks, copyrights, and patents. It obliges all WTO members to adopt and to enforce high standards of intellectual property protection derived from the standards used in developed countries, except where provision for a transition period that delays the implementation of the agreement is made.

such as computer programs and nonoriginal databases. Owners of knowledge goods asserted increasing rights over such goods, often seeking and receiving at the domestic and international spheres unprecedented levels of control over these otherwise public goods. In effect, while the digital era has created remarkable opportunities for greater access to information and knowledge goods by developing countries and consumers more broadly speaking, it has also spurred new forms of private rights, negotiated multilaterally, to effectuate absolute control over access, use, and distribution of information and knowledge. The efforts to control the dissemination of digitized knowledge goods have been largely technological, and reinforced by the emergence of international laws to protect these technologies of control as part of the international copyright system. This uneven ratcheting up of rights has completely tilted the balance set by copyright law denying access to knowledge at reasonable conditions and reasonable prices.

Among the vast array of factors which contributed towards these upshots, elevation of intellectual property rights into the WTO framework was considered as the most crucial. Let it be in the public health crisis appended to patent law or to the concern for access to knowledge attached to copyright the role of limitations and exceptions was crucial. It was through a well articulated system of limitations and exceptions that patent and copyright laws maintained the balance between public interest and private interest. However this was made more grave by the incorporation of limitations and exceptions in TRIPS. Negotiators in the Uruguay Round of GATT recognized the absence of a well-defined international fair use standard, and the creation of such a standard was an issue in the drafting of the TRIPS. Accordingly TRIPS championed for a binding norm for limitations and exceptions. Plurality of limitations and exceptions coupled with conflicting and contradicting philosophical and
policy perspectives proved it to be a herculean task for the drafters to come with a uniformly accepted standard. Finally the havocs were settled by the adoption of the ‘Three Step Test’ (TST) of Berne Convention.

Thus the saga of permissible uses begins in TRIPS with the reproduction of Berne provisions in Article 13, with the wordings that “members shall confine limitations or exceptions to the exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder”. A substantial similarity of words is used with slight changes but with difference in scope and content in Article 30 for exceptions to patent. But the elevation of Berne standard into TRIPS and that too on a uniform scale irrespective of the nature of rights and subject matter alarmed the legal scenario. Major concern was from the developing countries, who argued that TRIPS ignored the diversity of national needs and forced them to sacrifice the ‘policy space’ that richer countries had harnessed in their early stages of development. The inclusion of IP into WTO legal framework resulted in the erosion of the age-old noble and righteous nature of IP 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 IP and the users of IP 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 IP 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 TST in a restrictive economic sense. The situation is made worse by the international scenario after TRIPS. The FTAs and post-TRIPS legislations imposes TRIPS Plus standards that further reduces the flexibility and ignores the developing country cry for an intellectual property regime suitable for their domestic needs. Here comes the significance of our study.

However it is to be noted that as in the case of patents, effective generic equivalents will come into the market even during the twenty years of patent protection if these TRIPS flexibilities—measures such as compulsory licensing or parallel importation of drugs, exceptions to patent rights, exclusions from patentability, and transition periods are used. For example, apart from the proviso “those exceptions do not unreasonably conflict with the normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner taking into account the legitimate interests of third parties”, Article 30 of the TRIPS does not define the scope or nature of the permissible exceptions. The result is that countries have considerable freedom in this area. In addition, paragraph 5(a) of the Doha Declarations stresses the importance of the object and purpose of the TRIPS in the implementation and interpretation of the Agreement. Consequently, exceptions crafted to achieve objectives related to the promotion of the transfer of technology; the prevention of abuse of intellectual property rights and the protection of public health are justifiable and desirable. In particular, the early working or the ‘Bolar’ exception is an important mechanism in

---

facilitating the production of, and accelerating the introduction of generic substitutes on patent expiry. This exception has important implications for developing countries, especially if they are currently or potentially producers of generic medicines. Similarly, a well drafted liberal and open ended fair use provision can successfully solve the public demand for access to knowledge and information. The concern of libraries, educational institutions, physically disabled or any section of the public can be well addressed by a holistic interpretation of TST.

Consequently in the present context a study into the implications of limitations and exceptions on a country’s intellectual property policy for serving the domestic interests throughout the historical development is worth. A philosophical enquiry into the real nature of property rights and its related restrictions from a general perspective and specifically addressing intellectual property rights deserves great significance. A jurisprudential look into the available flexibility and the major impediments under the present international conventions to the countries especially the developing and the least developing country’s to serve their domestic interests is obvious. It is also really important to consider how far the domestic interest was served by the countries by maneuvering the limitations and exceptions within their sovereign prerogative. The diversity among the countries in solving their public interests even in the context of international harmonization is also an interesting matter to consider. The study examines the rationale behind the limitations and exceptions and considers the approach of international and selected national legislations prior to TRIPS, in the context of TRIPS and after TRIPS. At this point of enquiry, the question on the adequacy of limitations and exceptions in meeting the domestic interests and to what extent limitations and exceptions changed in their nature and scope in accordance with the growth of technology and social
and economic needs is also scrutinized. Thus the purpose of the study is to have a critical and analytical look into the nature, scope and significance of limitations and exceptions to patent and copyright in the context of national and international scenario. The study aims to find out the true scope of flexibility available in the TRIPS and post TRIPS scenario and also tries to find out to what extent this flexibility is maneuvered by the countries to satisfy their domestic needs and what are the hurdles in it. How to make a balance between mandatory TRIPS provisions and provisions of public policy in the context of the vague and general expressions used in the TRIPS for limitations and exceptions is also attempted in this study. It is also interesting to examine the endeavor of national legislations in using the flexibilities in TRIPS in framing exceptions for protecting their public interest and why there is wide spread disparity among the countries on limitations and exceptions even after the introduction of the horizontal three step under Articles 13 & 30 of the TRIPS. The approach of international conventions after TRIPS to limitations and exceptions is also considered. The study proceeds to two general questions on limitations and exceptions: whether we need a uniform interpretation of the provisions or one suited to the diverse interests of the countries and whether it is possible to draw a minimum set of limitations and exceptions derived from national practices and laws into international system just as the current practice of minimum rights. Thus the study finally attempts to suggest some policies and strategies to countries in using limitations and exceptions to achieve their domestic requirements.

Chapter Break-Up

The study begins with a philosophical enquiry into the justifications of limitations and exceptions appended to intellectual property. Whether
this limited nature of monopoly is unique to the intellectual property system or is common to all property norms is the fundamental question answered in this chapter. It was really interesting to examine whether the very property character of the intellectual property would survive without this limitations and exceptions. The enquiry is significant in the context of the origin of intellectual property as a state assured and regulated monopoly for attaining the larger public interest of access to information and industrial growth. So before turning to the nature of rights appended to intellectual property, it is important to ascertain the real nature of origin of property as a legal phenomenon. Whether it originated simply as a natural phenomenon to meet individual interest or as a legal concept to meet the requirements of society? These issues are analyzed in second chapter taking recourse to the contributions made by the philosophers justifying private property in general and intellectual property in particular.

The philosophical enquiry proceeds to the pragmatic perspective. Here the study aims to extend the philosophical rationale into the intellectual property framework and tests the philosophical underpinnings in the context of actual intellectual property practices. At this juncture the thesis undertakes an analytical and critical look into the nature, scope and significance of limitations and exceptions to patent and copyright in the context of national and international scenario in the pre-TRIPS, TRIPS and post-TRIPS period. The study proceeds on a chronological classification with TRIPS as central figure. While chapter three and four concentrates on the limitations and exceptions attached to patents in pre-TRIPS era, chapter’s five and six are exclusively devoted to the limitations and exceptions attached to copyright in pre-TRIPS era. Chapter seven focuses on the nature and scope of limitations and
exceptions under the TRIPS and the eighth chapter is on the destiny of limitations and exceptions in post-TRIPS era.

Chapter three is confined to the evolutionary analysis of limitations and exceptions to patents in the pre-Paris era. The role of limitations and exceptions in achieving the ends of the patent system or ends of social system from a wider spectrum is the concern of this chapter. Thus the study really aims to find out the true rationale behind the patent grants and the role of limitations and exceptions in meeting this objective from a historical perspective. The chapter then explores the flexibility enjoyed by the national jurisdictions in the pre-multilateral era. It is also aimed to explore the raison d'être in difference in approaches to limitations and exceptions by different legal systems, the importance of limitations and exceptions in meeting the domestic interests and also the general approach of nations to limitations and exceptions. Chapter five is also endeavored to solve the same issues from the perspective of copyright law. Here also the study is restricted to pre-Berne era.

Chapter four examines the status of limitations and exceptions in the international era of Paris Convention. The task is to find out the approach of Paris Convention towards limitations and exceptions. The study also focuses on the scope of flexibility enjoyed by countries in the post-Paris era in framing limitations and exceptions. To what extent limitations and exceptions changed in their nature and scope in accordance with the changing social and economic needs also forms a central concern of this chapter? The study is undertaken by a comparative analysis of patent legislations of selected developing and developed countries in the pre-TRIPS era. In the copyright arena, the international concern for limitations and exceptions was for the first time
manifested in the Berne Convention. Consequently, chapter six scrutinizes the impact of Berne on copyright limitations and exceptions. And it proceeds to the diversity and flexibility on limitations and exceptions in the pre-Berne era. Here also study is undertaken by a comparative analysis of copyright legislations of selected developing and developed countries in the pre-TRIPS era. Why and how countries use or how they understand the possibility of using the limitations and exceptions provided in their legislations and an investigation into what exceptions or limitations are effective to address development concerns and what are the conditions for their implementation is the crux of these two chapters. It is also undertaken to evaluate how national capacities affect the use of exceptions and limitations.

Chapter seven delves into the nature, scope and extent of limitations and exceptions in the context of TRIPS. Whether TRIPS have narrowed down the discretion states’ enjoyed under the Berne and Paris Conventions to enact limitations and exceptions and would significantly constrain the ability of member countries to preserve balanced IP regimes tailored to local needs and conditions is the pivotal focus of this chapter. A detailed examination of the test is undertaken to find out how it is understood and interpreted to achieve the objectives for which it was included in TRIPS. It should be noted that in spite of a uniform international standard of limitations and exceptions TST is worded differently for patents and copyrights. This discrepancy between Article 13 and 30 is also a matter of serious analysis and all these issues are discussed in the light of WTO panel reports on US - Canada Copyright case and EC- US Patent case of 2000. It has been noted that TST is a double edged sword which if wisely interpreted can be a boon and at the same time bane. So how this was utilized in the post-TRIPS era is the concern in chapter eight.
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 answered here. To what extent the inexorable international attempt to harmonize limitations and exceptions will also be revealed in course of the study. The puzzle is solved by a comparative analysis of post-TRIPS legislations and international developments including FTAs, WIPO Development Agenda etc.

However the next chapter concludes the thesis by pointing it out 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, let it be 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. Thus the international initiatives in the post-TRIPS era were smart shots to smash the ‘policy space’. In conclusion, despite an unmistakable “ratcheting up” of levels of intellectual property protection at the international, regional and bilateral levels, enough “wiggle room” appears to be left to the parties. But the real task is to augment the bargaining and technological capacity of developing countries. 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 in spite of 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 is also submitted to restructure the provisions on limitations and exceptions retaining the age old philosophical and pragmatic noble rationale. They should be elevated to the primary status of user rights.