

Review Article

Evolution of Pre-Statutory Limitations to Patent Rights: Analytical Study

Dr. Saleena K B*

Assistant professor, Jazan University, KSA, Saudi Arabia

*Corresponding Author

Dr. Saleena K B

Abstract: Patents emerged initially as grants of privilege and in some cases were clearly intended to allow the dissemination of particular technical advances that would benefit ruling groups through wealth creation. When this was the underlying rationale for granting patent, these grants emphasized a public interest concern to further the encouragement of learning and development of industry, even if the notion of “public” was very much limited. The paper analyses the evolution of this ‘public interest’ of patent grants in the pre statutory period.

Keywords: patent, limitations and exceptions.

INTRODUCTION:

On analyzing the archeological excavations of European or Asian civilization or on scrutinizing the golden ages of Greek or Roman period, it is really interesting that perhaps the first practice which separated out an information element was the marking of goods.¹ During the Middle ages, however a proprietary form of trade mark continued to develop from Greek and Roman practices. Guilds required a method of differentiating guild-sanctioned goods from others and of enforcing their chartered monopolies. With a few exceptions, guilds did not exercise monopolies over trades and industries. In the early empire many craft associations took on public services that came to be seen as obligations. From the time of the early principate, the government depended on private associations to carry out the provisioning of the city of Rome.² During the 3^d century, state control over the associations was established. The emperor Severus Alexander (A.D. 222-235) in an expanding autocracy appointed judicial representatives from each guild, placing them under the jurisdiction of certain courts.³ Henceforth guilds operated under government supervision as part of the administration. During the 4th and 5th centuries, associations (now called *corporata*) were charged with increasingly onerous obligations, failure of which resulted in the confiscation of individual members' property. The associations became fully branches of the state; first the provision of goods and services and then hereditary membership became compulsory.⁴ Thus if guild marks were the forefathers of modern intellectual property rights, this kind of state control over guild monopoly can be viewed as the primordial example of the present control mechanisms on intellectual property monopoly.

¹ Adam.D.Moore , “Intellectual Property, Innovation, and Social Progress: The case against Incentive based Arguments”, 26 Hamline Law Review, (2003), pg 601.

² Zorina Khan, Kenneth .L. Sokoloff , “Schemes of Practical Utility: Entrepreneurship and Innovation among Great Inventors in the United States”, 1790-1865, The Journal of Economic History, Vo153 No.2, (1993) Pg 289-307.

³Christine Macleod, “ Strategies for Innovation: The diffusion of new technology in Nineteenth century British industry”, The Economic History Review, (1992),Vol.45, No.2, Pg285-307.

⁴ Edward Walterscheid, To promote the progress of science and useful arts: the background and origin of the intellectual property clause of the united states constitution, Journal of Intellectual Property Law, (1994),p.162.

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The, the guild system followed a system of apprenticeship, which facilitated the process of imparting the techniques of the craft. Thus it can be regarded as communal property, rather than a monopoly held by an individual.⁵ The craft developed within the guild and was shared by all the craftsmen of the guild.⁶ For example, the Venetian glassmakers had reputation for glassmaking during the Renaissance time. Glassmaking was strictly restricted to guild members and was closely controlled by them. There were regulations as to working days, apprenticeship, technical specifications, quality of the glass, ingredients to be used. As the reputation of their craft increased the commercial value also increased, with it the realization that the craft must be strictly forbidden from being exported to other parts of Europe. Thus, the earliest forms of monopoly emerged in the form of a communal property, restricted to a region and the guild.⁷ Patents could have emerged out of the need to develop new industries within in the realm. The need for increased revenue, prevailing high taxes meant that the royalty could fill their coffers by allowing foreigners to practice new art within the realm.⁸ Protection of the trade, tax incentives may have served as inducements to lure the foreigners to introduce new industries. They were to be granted exclusive rights to practice their art for a certain period of time. Thus during this period also the, the apprenticeships were subject to close scrutiny with respect to the nature of the work they performed and quality of the goods they produced, and their privileges stand revoked on failure to ensure the quality.⁹

The genesis of the patent system and patent laws showed their origin in Venice or Florence.¹⁰ The Venetian history showed instances of a series of patent grants and a number of regulations to control the monopoly of which two deserves mention.¹¹ First is a law passed in 1297 by the Great Council of Venice, a noticeable event in Patent history which showed a reflection of the state control for meeting the public interest. This illustrates the principle of urban regulation combined with communal encouragement of innovation. The Venetian law concerned the manufacture and sale of medicines. They could be sold only in shops organized as public firms that were subject to the strict supervision and control of the officers of the state. Yet the invention of new medicines was encouraged by the following provision: "And if any physician wishes to make any of his own medicine in secret, he may be empowered to make it, if only, of course, of the best materials, and all may hold in confidence, and all guild members may swear not to interject themselves into the above mentioned [matter]."¹² In effect, the council gave the physician monopoly rights over his own invention by allowing him to protect his secret-and sell it-as long as he used high-quality ingredients. The object behind the regulation was to ensure the availability of high quality medicines at low cost. We can see that monopoly was of course a little bit strong because of its long term duration. But the public interest it promised was always kept under strict vigilance.¹³

The next one was the Venetian Statute of 1474, which is generally considered to be the milestone in history of patent laws.¹⁴ They issued a decree by which new and inventive devices, once they had been put into practice, had to be communicated to the Republic in order to obtain legal protection against potential infringers. The period of protection was 10 years.¹⁵ The system envisages concepts of novelty, registration of the new device, term of exclusive right, infringement of patents as well as compulsory license.¹⁶ Thus even before laying the standards of patentability or the conditions of grant or even prior to recognizing the inventive genius of the patent holder; we can see that the legislature

⁵ Trevor Griffith, Philip.A.Hunt, Patrick..O' Brien, *Inventive Activity in the British Textile Industry, 1700-1800*, *The Journal of Economic History*, (1992)Vol.52, pg 881-906.

⁶ *Supra* n.98 at p. 852.

⁷ *Ibid* at p.860.

⁸ Maximilian Frumkin, "The Origin of Patents," *Journal of the Patent Office Society* 27 (March 1945): 143-49.

⁹ Frank D. Prager, "The Early Growth and Influence of Intellectual Property," *Journal of the Patent Office Society* 34 (February 1952): 106-40.

¹⁰ Cuiio Mandich, "Venetian Patents (1450-1550)," *Journal of the Patent Office Society* 30 (March 1948): 166-224 .

¹¹ *Id* at p. 185.

¹².*Id* at p.205.

¹³ *Id* at p. 215.

¹⁴ Cuiio Mandich, "Venetian Origins of Inventors' Rights," *Journal of the Patent Office Society* 42 (June 1960): 378-82-

¹⁵ http://en.wikipedia.org/wiki/History_of_patent_law#cite_note-1

¹⁶ Para 2 of the Venetian Statute of 1474:

"Be it enacted that, by the authority of this Council, every person who shall build any new and ingenious device in this City, not previously made in our Commonwealth, shall give notice of it to the office of our General Welfare Board when it has been reduced to perfection so that it can be used and operated. It being forbidden to every other person in any of our territories and towns to make any further device conforming with and similar to said one, without the consent and license of the author, for the term of ten years. It being, however, within the power and discretion of the Government, in its activities, to take and use any such device and instrument, with this condition however that no one but the author shall operate it."

was conscious of making the patent grant in compliance with certain public interest aspects like limiting the monopolistic duration for a period of ten years. Though the compulsory licensing provision appears to be vague and in practice found to be ineffective because of lack of efficient machinery; the statute deserves mention of its public interest concern at such an infant stage.¹⁷

The Venetian practice was followed by European countries with England as its leader. Till the middle of nineteenth century almost all countries were an American or English colony and so naturally the law that reigned the whole world was either the English law or the American law. On analyzing the American history of evolution of patent law we can see that they followed the English practice. Thus the English patent grants and statute of Monopolies formed the threads of patent history. The historical milieu behind the evolution of the Statute of Monopolies in 1623 under King James I, is a clear illustration of the development of patent monopoly, its abuses, and evolution of a strong legal hand to control the monopolistic abuses for the larger public interest.¹⁸

The earliest form of patents issued in England would resemble the charters granted by the Kings permitting the conduct of business in the region.¹⁹ With the emergence of the guild system in England, group monopolies came into being. These guilds had obtained exclusive right to sell certain goods within a region. Outsiders could not trade in that region but the members of the guild could compete with each other. The state sanctioned monopolies seemed to be acceptable to people as it lead to quality products and regulated prices. These guilds were under the control of the municipality. The rules of practice, the price of the goods, wages and working conditions were decided by the guild. This was kind of a regional monopoly which did not apply to the whole of England. It limited the expansion of the guild to other parts of England as similar guild existed elsewhere. This was an impediment in terms of national growth especially with the expansion of manufacturing sector and increasing trade.²⁰ Thus, the local phenomenon was nationalized and the group monopoly gave way to individual monopolies. To encourage manufacturing the crown used to grant certain privileges to certain native inventions and new imports. The privileges were short of a monopoly, offering protection and franchises to the inventor or introducer of a new art.²¹ But, in order to attract foreign artisans to practice their art and train the locals, the Crown resorted to grant privileges to the artisans which allowed him to practice his craft exclusive others for a limited period of time, all the while training the locals in this craft.

By the 14th and 15th centuries, industrial patent grants given as a prerogative of the crown were well developed. Letters patent were granted by King Edward III in the fourteenth century, protecting the trade foreigners willing to practice their trade within his realm and train his subject. John Kempe of Flanders was issued letters patent in 1331 to practice his trade in England. This contained a general promise of the similar privileges to foreign weavers, dyers, and fullers on the condition that they settle in the country and teach their art to those willing to be instructed therein.²² Henry Smyth was granted a letters patent in 1552 to make Normandy glass subject to condition that he instructs others to make such glass during the such period as a the letters patent subsists as well as sell at a reasonable rate. He had the exclusive right to produce the Normandy glass for a period of twenty years. The grant specified that no person other than the person licensed or authorized by Henry Smyth could produce glass.²³ A grant of 1561 for the manufacturers of soap requires that at least two of the patentee's servants be of native birth and that products be submitted for inspection by municipal authorities; upon proof of defective manufacture the grant would be cancelled.²⁴ A grant of 1586 for a procedure to work oil out of woolen cloth requires that instruction in that art be given to any member of the public for a reasonable recompense.²⁵ The requirement that the new art actually be taught is also expressed in general provisions regulating employment of apprentices and their efficient education, which are contained in many grants to foreigners in order to secure the continuity of the particular art in case of the original grantees withdrawal.²⁶ Another type of

¹⁷ <http://www.patentshub.com/history-patent-law/>

¹⁸ <http://en.wikipedia.org/wiki/Patent#History>

¹⁹ Frank D. Prager, "The Inventor's Right in Early German Law: Materials of the Time from 1531 to 1700," *Journal of the Patent Office Society* 43 [February 1961]: 121-39,

²⁰ Jeremy Phillips, "The English Patent as a Reward for Invention: The Importation of an Idea," *Journal of Legal History* 3 (May 1982): 75-76.

²¹ Frank D. Prager "Examination of Inventions from the Middle Ages to 1836," *Journal of the Patent Office Society* 46 (April-1964): 268-91,

²² For history of early European and English Patent Systems, see P. J. Frederico, "The Origin and Early History of Patents", 11 *JPOS* (1929) 292.

²³ E .W Hulme, "The History of Patent System under the Prerogative and at Common Law", 12 *Law Quarterly Review* (1896) 141.

²⁴ *Id.*, at 145

²⁵ E .W Hulme, "The History of Patent System under the Prerogative and at Common Law", 16 *Law Quarterly Review* (1900) 48

²⁶ E .W Hulme, "On the Consideration of Patent Grant, Past and Present," 13 *Law Quarterly Review* (1897)314.

requirement for actual utilization is expressed in a grant of 1571 for an engine for land drainage and water supply, issued with the condition that it should be void unless the engine is erected within two years or if should not prove to work efficiently.²⁷

Scrutinizing these grants it is crystal clear that technology transfer was at the heart of this desire to establish patents driven by the desire to reduce imports and to expand exports. Thus all patent monopolies were conditioned by a public purpose and none of them was absolute. Early patents were a method for encouraging the migration of skilled artisan into the territory concerned. Thus the award of monopoly rights over the trade would ensure not only technological transfer but also a cohort of accomplished practitioners once the monopoly expired. The patent system was intrinsically concerned with the development of industry. During these periods the grant was issued to anyone who brings the industry into the commonwealth. It was not necessary that he must be the person who devised the invention. Similarly crown was not concerned whether the invention for which grant was given is a new manufacture. The patentee was not bound to disclose his invention. The only condition was to establish a new industry in the realm and to teach the trade to those willing to learn.²⁸

This was the public interest the patent tried to achieve in the initial days; a public interest coupled with vested economic and political aspirations of the concerned sovereigns. But these vested monopolistic interests were finally successful in achieving a larger social, economic and political development of kingdoms, which in turn benefited each and every individual. Further, even at this primitive stage these grants were of short duration to make the patent available to the public within a short span of time. Similarly the crown was anxious in ensuring the compliance of the preconditions to the grant. Their were large number of instances were the monopolies were revoked by the crown on the ground of abuses.²⁹ It is interesting to note that the Crown refrained from grating privileges to practice pre-existing works and mere improvements as it would hurt the existing trade.³⁰ Even in the absence of well codified laws or strict rules of application, these primitive intellectual property rights was controlled by the king and his arms to meet the exigencies of the public and monopolistic abuses were also under the sword of monarchy.³¹

The reign of Queen Elizabeth showed a large number of patent monopolies and their political and economic manipulations.³² Queen Elizabeth in the early years of her reign issued letters patent to encourage foreigners to introduce new manufacturing product and technology in England. Her policies seem to attract the foreigners. But in the latter part of her rule she used the same system to grant patents even on well established trade. The abuse of letters patent provoked the Parliament to legislate against such monopolies. She managed to pacify them by assuring them that such letters patent will not be issued any further. The letters patents issued during this period seemed more like monopoly grants rather than privilege grants. Although monopoly was generally abhorred, it was not regarded as illegal if the good to the realm could be demonstrated. The crown slowly seems to shirk the responsibility of introducing the new trade by shifting it upon the recipient of the letters patent. Prior to this, the crown was responsible for the administration of the earlier privilege patents as a result the new industry was subject to control of the crown. Thus, crown had power to not only grant but also decide the disputes arising from the acts of the recipient.³³

Some historians suggest that in course of time patent grants began to be misused. She wanted to reward her faithful servants but hard on cash, she resorted to use the existing system to grant monopolies to those faithful to her. These were granted by the Crown in the form of letters patent authenticated by the Great Seal and addressed to the people at large. Those who received such patents exploited it to the hilt by selling it at higher prices. The grant included salt, iron paper, cards, drinking glasses etc. This obviously prevented the traders from carrying on their trade and also resulted

²⁷ Nicholas A. Vonneuman, "Conditionally Exclusive Patent Grants and the Patent Clause of the Constitution", *The American journal of comparative law*, vol.5 (1956) 398.

²⁸ The judiciary also examined the scheme of patent grant in that period in *Darcy v. Allen and Cloth Workers of Ipswich Case*. The court spelled out the justification for grant thus:

" But if a man hath brought in a new invention and a new trade within the kingdom in peril of his life and consumption of the estate of stock, etc., or if a man hath made a new discovery of anything, in such cases the king of this grace and favour in recompense of his costs and travail may grant by charter unto him that he shall only use such a trade or traficque for some time, because at first people of the kingdom are ignorant, and have not the knowledge and the skill to use it. But when the patent is expired the king cannot make a new grant thereof".

²⁹ Terrell, "Law of Patents", London, Sweet & Maxwell, 2000, p.3.

³⁰ The history shows that once a person named, Bircot was refused letters of patent for a method of melting lead ore. It was considered as an improvement over the existing practice.

³¹ *Supra* n.93 at p.52.

³² For a detailed history of Elizabethan era see: http://en.wikibooks.org/wiki/US_Patent_Law#History_of_patent_law

³³ Frank D. Prager, "Brunelleschi's Patent," *Journal of the Patent Office Society* 28 (February 1946): 109-35.

in high prices of commodities.³⁴ David Hume in his history of England says, "these monopolists were so exorbitant in their demands that in some places they raised the price of salt from sixteen pence a bushel to fourteen or fifteen shillings."³⁵ It is recorded that she granted more than 52 patents during her regime. Once such grant to Darcy over playing card, set the momentum against odious monopolies which ultimately lead to the Statute of Monopolies of 1624 during the reign of James I. The case of Darcy, more popularly known as the Monopolies case stood as a landmark case for the coming centuries.³⁶ The case of Darcy v. Allen,³⁷ popularly known as the Case of Monopolies is regarded as the first case wherein patents were viewed as a legal right of the inventor rather than the royal prerogative.³⁸ Though the result of case is not of much relevance but the opinions expressed on monopolies in course of arguments are relevant in the present context.

Coke the then Attorney General argued on behalf of Darcy.³⁹ Allen argued if the monopoly would be deserving in case of anyone who would bring a new trade into the realm as it would aid in furtherance of trade that never existed in the realm, moreover he might use his wit in inventing it. In such instances a grant of a monopoly patents for a limited time would enable the others to learn the trade. A look at the modern patent law also suggests that Allen's arguments involve the concepts of novelty, working of the patent, term of the patent as well as the argument that the patents are for the larger good of the society. Probably Allen intended to suggest that patent monopolies should not be granted over well established trade or art. He cited the essential conditions laid down in the first monopoly grant to Smyth and followed by Queen Elizabeth during the first half of her reign. He argued that the crown may grant a patent for a reasonable time to a man who "brings a new trade into the realm" by "his own charge and industry" and through "his own wit or invention" "until the subjects may learn" how to practice the trade themselves. He argued that Darcy's patent "doth but take the trade of making and selling of cards from many persons, and give that trade to one, which is unlawful." Thus, he reiterated the law governing the issuance of letters patent for inventions. It is interesting that given the circumstances, he could argue against the monopoly grants and the courts didn't want to either. There was no discussion at any point in the case as to whether monopoly was in accordance with the common law.⁴⁰

Although Coke argued on behalf of Darcy he later reports that such grants of monopoly was against the freedom of trade and the common law. He condemned it as a dangerous innovation and being against the law. He regarded it as an odious monopoly. Monopoly was stated to be prima facie against the common law, the statute law, and the liberty of the subject because it damages not only those working in the trade but all other subjects of the realm as well by raising prices, reducing merchantability, and reducing employment These were strong words, but is not reflected in the outcome of the case as Darcy's monopoly grant was upheld.⁴¹

In 1606, King James I issued a declaration known as Book of Bounty which stated that monopolies were against the law of the land but the crown reserved the right to reward new inventions and the discretion to withdraw them in case of rise in prices due to such grant. The Book of Bounty did little as he continued to grant patents of monopoly in the

³⁴FrankD. Prager, "A Manuscript of Taccola, Quoting Brunelleschi, on Problems of Inventors and Builders", Proceedings of the American Philosophical Society 1 12 (June 1968): 131-49.

³⁵ M. I. Finley, "Technical Innovation and Economic Progress in the Ancient World", The Economic History Review, New Series, Vol. 18, No. 1, Essays in Economic History Presented to Professor M. M. Postan. (1965), pp. 29-45.

³⁶ M. I. Finley, "Technical Innovation and Economic Progress in the Ancient World", The Economic History Review, New Series, Essays in Economic History Presented to Professor M. M. Postan. Vol. 18, No. 1 (1965), pp. 29-45.

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³⁸The facts of the case is as follows: A playing card monopoly was granted to Edward Darcy in 1598 facilitating Darcy's complete monopolization over all manufacture, importation and sales of playing cards. Darcy did not hesitate to enforce his privilege; he appealed to the Privy Council in 1600, for instance, to do something about violators of his monopoly grant. The Council responded by declaring that all those in contempt of the royal prerogative shall be sent to the prison. There was no examination of the kind of monopoly power granted to Darcy, although many alleged that he had monopolized a well established trade. The Council avoided ordering anything against the royalty as they might have felt that the royal prerogative must not be limited in any manner. The monopoly on the importation, manufacture, or sale of playing cards had prevailed in one form or another since 1576. A patent had been originally granted to Bowes and Bedingfield in 1576, reissued in 1578, and in 1588 reissued to Bowes alone. Bowes died before the full term of the patent had expired, and in 1598 it was reissued to Darcy with a term of 12 years. There were widespread infringements which resulted in actions against the infringers. The Privy Council seemed determined to uphold the grant despite opposition to it.

³⁹ For a detailed study of the case see: <http://altlawforum.org> :PUBLICATIONS /documents/2004.

⁴⁰ Ibid.

⁴¹ Supra n.144.

same fashion.⁴² The issue snowballed into a case questioning the powers of the King. The Cloth workers of Ipswich Case in 1615⁴³ marked the beginning of the end of royal prerogatives as it ultimately led to the Statute being enacted against monopolies. The judgment lays down the doctrinal principles for issuing such patents. It clearly lays out justification for the monopoly: it enables the introduction of the new industry, training of the Englishmen in the trade, no monopoly patent can be issued for pre-existing industries and moreover it still considered the patents as royal privileges.⁴⁴

Even after the decision in the Ipswich case, grant of odious monopolies continued unabated forcing the Parliament to act upon it. In 1620-21, a review was conducted in the House of Commons concerning public grievances relating to patents of monopoly. Due to the agitation in Parliament, James declared void some eighteen patents and with regard to some seventeen others relating to manufacture and importation (monopoly patents of invention) provided "that if any subject should find himself grieved, injured, or wronged by reason of any of the said grants, he might take his remedy therefore by the common laws of the realm or other ordinary courts." Thus, ultimately the crown allowed the courts to adjudicate on the grants. But, this did not prevent the Parliament from passing legislation against monopolies in 1624. Thus finally the grand father of our present patent laws came into being.⁴⁵

The Statute of Monopolies enacted in 1623 became the basis of the patent practice in England for nearly two centuries. It succeeded in reiterating the common law principles in the statutory form. It rendered void all grants of monopolies and dispensations with one exception. The exception was the grant of 'letters patent for the term of 14 years' of the sole working or making of any manner of new manufactures within this realm to the true and first inventor and inventors of such manufactures which others at the time of making such letters patent and grants shall not use, so as also they be not contrary to the law or mischievous to the State by raising prices of commodities at home or hurt of trade or generally inconvenient'.⁴⁶ It is this provision which remained the cornerstone of subsequent patent legislations. Pure public interest was the only legislative intent behind this provision. The term of the patent may not exceed fourteen years. The term of fourteen years made sense as that would allow at least two apprentices to have been trained in the new industry. As the duration of apprenticeship lasted for seven years, fourteen years would enable two generations of artisans to be trained in the new art. Another principle was that patent "must be granted to the first and true inventor only. It must be of such manufactures, which any other at the making of such Letters Patents did not use. It must not be contrary to law. It must not be mischievous to the State by raising of prices of commodities at home. It must not "hurt trade and must not be generally inconvenient."⁴⁷

CONCLUSION

Thus, it is clear from the analysis of the above history of patent grants from medieval Europe to the statute of monopolies; the only intention behind the grant was a politically tainted public purpose (the social and economic development of the empire). It is noticeable that neither the Statute nor the common law refers to the grant of letters patent as a privilege. It does not refer the letters patent as a right in the property. There was no obligation on the Crown to grant letters patent to the inventor as a matter of right. It remained the discretion of the crown for nearly two centuries.⁴⁸ Although some suggest that with the Statute of monopolies the privilege became a right, there is no concrete evidence in this regard. It was only in the eighteenth century that the common law would come to recognize it as a special form of

⁴² Christine MacLeod, "Accident or Design? George Ravenscroft's Patent and the Invention of Lead-Crystal Glass", *Technology and Culture*, Vol. 28, No. 4. (Oct., 1987), pp. 776-803

⁴³ In this case, a group of tailors incorporated and chartered by King James to sell their services in Ipswich brought an action against an individual tailor who was not part of the corporation but nonetheless practiced his trade within the town.

⁴⁴ The case report reads: It was agreed by the Court, that the King might make corporations . . . but thereby they cannot make a monopoly for that is to take away free-trade, which is the birthright of every subject. . . . But if a man hath brought in a new invention and a new trade within the kingdom, in peril of his life, and consumption of his estate or stock, &c. or if a man hath made a new discovery of any thing, in such cases the King of his grace and favor, in recompense of his costs and travail, may grant by charter unto him, that he only shall use such a trade or traffic for a certain time, because at first the people of the kingdom are ignorant, and have not the knowledge or skill to use it: but when that patent is expired, the King cannot make a new grant thereof: for when the trade is become common, and others have been bound apprentices in the same trade, there is no reason that such should be forbidden to use it.

⁴⁵ Hunt, R.M., "Patentability, Industry Structure, and Innovation," *Journal of Industrial Economics*, 2004, LII(3), 401-425.

⁴⁶ S.6 of the Statute of monopolies.

⁴⁷ C.Coleman & Christine Macleod Attitudes to new techniques: British businessmen, 1800-1950, *The Economic History Review*, (1986), Vol.39, p.586-61

⁴⁸ Zorina Khan, Kenneth .L. Sokoloff, Schemes of Practical Utility: Entrepreneurship and Innovation among Great Inventors in the United States, 1790-1865, *The Journal of Economic History*, (1993) Vol.53 No.2, P.289-307.

property known as a chose in action. There was no anxiety in rewarding the inventive genius of the patentee or recognizing the fruits of his labour. The only intention was the technological development of the kingdom. The only dominant limitation to the patent monopoly was its restricted duration.⁴⁹

Further monopoly during these period was not the same as we witness or experience in the present century. It was something wholly dependent on the mercy of the king or queen. Similarly the need for strategic limitations or exceptions was not felt necessary, because prima-facie the purpose of grant was serving the kingdom, making it technologically and economically self sufficient. Limitations to suit this public purpose were very well put in concrete terms in the grant itself. All the grants contained clauses stipulating the introduction of the industry within a fixed period and also included apprenticeships or efficiency clauses which relate to the employment and efficient education of the native artisan.⁵⁰ The inclusion of these clauses in the grant itself helped a lot in controlling the monopoly and was also successful in ensuring technology transfer. The modern private use, research use or crown use exceptions were implicit in these working clauses and apprenticeship clauses attached to the grants. In history we have come across a series of instances where these privileges stand revoked on failure to fulfill the conditions and we can see that public at large along with the crown was anxious in safeguarding their rights and also their need for further development. So during these periods it is very hard to trace the beginning of modern free uses of patent since the technology behind the patents and their end products was available to the public at large without much difficulty. Otherwise we can infer that the apprenticeships clause or working clauses together with section 6 of the statute of monopolies formed the 'grund norm' for future free user rights to the patent right.

Another major development in the history of patents system was the requirement for a specification along with a patent application. Although a specification as understood in the modern sense was not required, basic requirements about the description of the new industry may have been necessary to obtain letters patent. Although, it is uncertain when the specification arose, there are records that suggest that the first specification arose some time around 1611. Sturtevant along with his petition filed a manuscript which described the working of the new industry. It is not clear as to whether a detailed working of the new industry was given in that manuscript, nevertheless it can be said that the earliest specification was made out of the inventors own volition. But the early specifications can be said to be nowhere as detailed as in the present times. It was only later in the eighteenth century that some officers began to demand a specification for the patent, which became a practice and a formal requirement to obtain a letters patent. The case of *Liardet -Vs- Johnson*,⁵¹ is a landmark case in the patent history as it lead to the development of concepts like specification being regarded not just as a supplement to the petition for the grant of a patent but it came to be regarded as a consideration for the grant of a patent. The earlier view that working of the patent was a consideration for the grant of the patent was replaced by the specification. With it, the concepts such as prior art might have evolved. To deprive the inventor of the benefit of his invention for the sake of the public" and to permit "monopolies of what is in use and in the trade, at the time they apply for the letters patent"--Mansfield instructed the jury that a plaintiff-patentee must meet three conditions in order to prevail. There are three grounds that must be made out to your satisfaction: 1. whether "the defendant did use that which the plaintiff claims to be his invention"; 2. "whether the invention was new or old"; and 3. "whether the specification is such as instructs others to make it". The third requirement of the specification that it should be capable of instructing the art to others is a clear way to the development of the modern patent law exceptions like experimental use , Bolar use etc which required a well articulated specification.

⁴⁹Edward C. Watershed To Promote The Progress Of Science And Useful Arts: The Anatomy Of A Congressional Power, *The Journal of Law and Technology*, (2002) vol.5, p.1

⁵⁰ Wyndam Hulme, "On the Consideration of the Patent Grant, Past and Present", *Law Quarterly Review*, vol. 13, 1897, p.313-318.

⁵¹ In this case, Liardet filed suit against Johnson, alleging infringement of Liardet's patent for a certain composition of cement. Johnson defended himself by attacking both the validity of the specification and the novelty of the invention itself. Liardet applied for a patent on the composition of a type of cement on the 3rd of April 1773. He received a patent and within four months of the grant he filed his specification. Liardet assigned his patent to Adams family, as he wanted to apply for an extension of term, the patent was reassigned to him. The parliament extended the patent for another 18 years provided that he filed a specification as to the improvement on cement. The patent was not reassigned to Adams but with the acquiescence of Liardet the Adams family continued to use it. In May 1777 Liardet and Adams filed to suit praying for an injunction and the accounts of the John Johnson as he infringed upon the patent by making, imitating and counterfeiting cement specified in their patent. Johnson questioned the novelty of Liardet's invention and claimed that it was already in use prior to the grant of the patent. To establish this he showed two earlier publications which point to the same composition mentioned in Liardet's specification. He also contended that there was no significant improvement for the term of the patent to be extended. Probably, by showing prior publication he meant to establish that it was already in practice. This may be regarded as first instance where a written publication was used to prove prior use or knowledge of the patent granted.

It is really interesting that on a closer analysis of history of patents, it is evident that it is nothing more than the history of patent in English jurisprudence. The Statute of Monopolies with its cardinal provision section six remained the crux of the patent system for the next two hundred years.⁵² It influenced not merely the law of Europe but all most all parts of the world, because they were the then colonial masters

⁵² <http://eh.net/encyclopedia/article/khan.patents>