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THE CONSTRICTING BOUNDARIES OF THE PUBLIC DOMAIN: ANALYSING THE RAMIFICATIONS OF RESTRICTED ACCESS IN THE DIGITAL EPOCH

Joyson Sajan[1]

The term "public domain" in the context of copyright law typically refers to a category of works not covered by intellectual property rights. Individuals are free to use, distribute, and build on these works in any way they see fit, which encourages creativity and aids in the spread of knowledge. However, recent changes have led to a decline in the public domain, primarily due to the extension of copyright terms, the creation of new intellectual property protection mechanisms, and the digitisation of previously available works. This article aims to examine the effects of the declining public domain, particularly regarding access restrictions and the availability of information. Due to the shrinking public domain, creativity and innovation face significant obstacles in the digital age. Existing works are frequently a source of inspiration for musicians, writers, artists, and other creative people. But the shrinking public domain restricts their freedom to expand upon and alter these works, halting artistic development. This may lead to a "permission culture," where obtaining rights or permissions becomes more difficult and expensive, obstructing the production of transformative works. Additionally, the digitisation of works has given copyright holders more power to control access, which has caused remix culture and collaborative creation to decline.

The public domain's limitations ultimately impede the exchange of ideas and limit the possibility of ground-breaking innovations. Information access is significantly impacted by the declining public domain, particularly in education and research contexts. In the past, the public domain has given teachers, students, and researchers access to a wide range of freely accessible learning materials and academic research tools. However, the inability to engage with cultural, historical, and scientific content is constrained by the restrictions on access to previously freely available works. This makes it difficult to spread knowledge and prevents

[1] Ph.D. Research Scholar, Inter-University Centre for Intellectual Property Rights Studies, CUSAT, Kochi, Kerala.

educational opportunities. In order to conduct thorough and robust scholarly research, researchers may run into challenges in gaining access to the materials they need for their work. The democratisation of knowledge is thus threatened, and academic disciplines are prevented from progressing as a result of the public domain's shrinking. A multifaceted strategy is needed to address the problems brought on by the shrinking public domain. Reassessing copyright terms is necessary to balance the creators and the public's interests. The use of alternative licencing models or the voluntary release of works into the public domain should be encouraged as part of efforts to advance open access initiatives. Technology advancements can also make it easier to preserve and make public domain works accessible. We can ensure that information will always be accessible, encourage creativity, and support innovation in the digital age by realising the value of a vibrant public domain and taking proactive measures. The shrinking public domain significantly hampers information access and creative expression. Finding solutions that balance intellectual property rights and the public's interest in a robust and accessible public domain requires understanding the effects of restricted access in the digital age. By preserving the public domain, we can encourage learning, foster innovation, and preserve our cultural heritage for upcoming generations.

Keywords: Public Domain, Copyright, Intellectual Property, Digitisation, Restricted Access.

Introduction

The principle that knowledge is a shared legacy of humanity finds its articulation in the 1948 Universal Declaration of Human Rights. This declaration proclaims the inherent right of all individuals to actively engage in the cultural fabric of their community, relish the beauty of the arts, and partake in the fruits of scientific progress.[2] The document underscores the significance of unrestricted participation in cultural activities as a fundamental human entitlement. It stresses the value of fostering an environment where individuals can freely explore artistic expressions and intellectual pursuits. Moreover, the declaration emphasises that scientific advancement should not be confined, but its advantages should be accessible to all, ensuring equitable distribution of its benefits. In essence, this declaration recognises the intrinsic worth of knowledge, culture, and creativity as pillars of human rights, promoting a harmonious and inclusive global society.

Fundamentally, intellectual property law supports the idea that authors of creative works and novel approaches deserve to be compensated economically through the grant of legal

[2] The Universal Declaration of Human Rights (UDHR), 1948, art. 27.

protection.[3] Conversely, while supporters contend that IP law inherently fosters greater inventiveness, ingenuity, and societal advancement, there is debate over whether it might also impose unwarranted challenges.[4] These restrictions may hinder free access to information. The delicate balance that intellectual property rights seek to strike between encouraging creativity and preserving public domain accessibility is highlighted by this dual viewpoint. The paradox results from the realisation that while intellectual property protection can encourage creators by securing their financial interests, it raises questions about fair knowledge dissemination. This discussion highlights the complex interactions between legal systems and wider socioeconomic dynamics, underscoring the need for careful balancing.

Subsequent to Professor David Lange's influential advocacy in 1981, recognising the public domain within the scope of intellectual property rights has been the subject of several discussions and debates. Professor Lange contended that the elusive nature of intellectual property poses a challenge in precisely defining and demarcating its limits.[5] Professor Lange asserted that while it is imperative to safeguard intellectual property, the doctrine of intellectual property should acknowledge the notion that a "no man's land" exists parallel to intellectual property rights.[6] Traditionally, in the realm of intellectual property law, the term "public domain" pertains to intangible assets that are not subject to exclusive intellectual property rights, thereby rendering them accessible for utilisation or exploitation by any individual without constraint.[7] The prevalent view in scholarly literature is that there is a solitary public domain, as evidenced by the frequent allusions to "the public domain" in a singular form.[8] Professor Boyle was the pioneer academic who acknowledged and commended the presence of numerous public domains.[9] The assertion is made that recognising the presence of multiple public domains facilitates the development of context-specific interpretations of the term "public domain". Furthermore, this recognition enriches our comprehension of the constituents of public domains, the societal values that these informational resources serve, the individuals and communities that demonstrate an interest in public domains, the legal and institutional

[3] Mark A. Lemley, "Property, Intellectual Property, and Free Riding," 83 *Texas Law Review* 1031 (2005).

[4] Pedro de Paranaguá, "The Development Agenda for WIPO: Another Stillbirth? A Battle between Access to Knowledge and Enclosure" *SSRN Electronic Journal* (2005).
[5] David Lange, "Recognizing the Public Domain," 44 *Law and Contemporary Problems* 147 (1981).
[6] Id.
[7] William van Caenegem, "The Public Domain: Scientia Nullius," 24 *European Intellectual Property Review* 324–30 (2002).
[8] Lucie Guibault and P B Hugenholtz, *the Future of the Public Domain: Identifying the Commons in Information Law* (Kluwer Law International; Frederick, Md, Alphen aan den Rijn, 2006).
[9] James Boyle, "The Second Enclosure Movement and the Construction of the Public Domain," 66 *SSRN Electronic Journal* (2003).

frameworks that can safeguard them, the potential hazards that certain public domains may confront, and the measures that can be adopted to address these perils.[10]

The phenomenon of the shrinking public domain in the realm of copyright pertains to the gradual reduction of the collection of creative works that are accessible to the public for unrestricted usage. This decline is attributed to the expansion of copyright protection in terms of duration and scope, resulting in the curtailment of the availability of works that have previously entered the public domain. The diminishing public domain poses a threat not only to scholars but also to the industry, as most creative activities, including commercial endeavours, are typically collaborative in nature. This collaborative process relies on interactions between co-workers or colleagues and creators and the vast resources of materials available in the public domain.[11] In the contemporary era of digitisation, the significance of the public domain has intensified, owing to the enhanced accessibility and sharing of information and creative works facilitated by digital technologies. The advent of the internet has presented novel prospects for collaboration, participation, and creativity, enabling individuals and communities to interact with culture and knowledge in unprecedented ways. Nevertheless, the digital age has posed formidable obstacles for the public domain, such as the proliferation of copyright law and the escalating employment of digital locks and other technological mechanisms to regulate access to creative works. The focal point of this article is the aspect of the public domain in the context of Copyright law.

History of Copyright and Public Domain:

The origins of copyright law can be traced back to the Statute of Anne in 1710, which is widely regarded as the first copyright law in the world. The primary objective of this legislation was to foster creativity and promote the spread of knowledge by granting authors exclusive rights to their works for a limited period. The rationale behind this approach was to incentivise creators to produce new works while also ensuring that these works would ultimately become available to the public. The notion of the public domain is a relatively modern concept that emerged alongside the development of intellectual property rights.[12] The Statute of Anne of 1710 was introduced at a time when London's booksellers believed that authors held an inherent

[10] Pamela Samuelson, "Enriching Discourse on Public Domains," 55 *Duke Law Journal* (2006).

[11] Laura J. Gurak, "Technical communication, copyright, and the Shrinking Public Domain," 14 *Computers and Composition* 329–42 (1997).

[12] Mark Rose, "Nine-Tenths of the Law: the English Copyright Debates and the Rhetoric of the Public Domain," 66 *Law and Contemporary Problems* (2003).

and perpetual common-law right to their creative works. The Statute of Anne is widely considered the first legal instrument to formally establish the concept of the public domain by curtailing the notion of an author's perpetual common-law right to their intellectual creations.

The statute recognised authors as the proprietors of their works while limiting the duration of copyright protection. Consequently, upon the expiry of the protection term, a work was deemed to enter the public domain of copyright. Historical evidence suggests that sellers were dissatisfied with the notion of a limited statutory right and persisted in their belief that common-law rights were perpetual.[13] The verdict in *Millar v. Taylor*[14] is an illustrative example of this belief. In this case, the court upheld the view that a perpetual common-law copyright existed. However, the noteworthy aspect of the ruling was the dissenting opinion of J. Yates, who argued that it would be unjust to monopolise the benefits arising from creative works for eternity. He further opined that such a restrictive approach would be a violation of the natural and social rights of individuals, thereby emphasising the public domain as an inherent right of humanity. Joseph Yates believed that perpetual ownership of intellectual creations constituted a violation of the fundamental natural rights of humanity. He advocated for the protection of creative works while emphasising that such protection should not be everlasting.

In the nascent stages, copyright laws were a subject of dispute, as certain authors and publishers proposed perpetual proprietorship of intellectual creations. However, this stance was eventually discarded, and a restricted term of safeguarding copyrighted works was implemented, following which these works would become a part of the public domain once the term elapsed. The interrelation between copyright and the public domain throughout history can be interpreted as a struggle between monopolistic ownership and communal accessibility. While copyright laws intend to encourage ingenuity by providing authors with exclusive rights to their works, they also acknowledge the significance of the public domain as a reservoir of creative works that can be availed and utilised by the larger populace.

The historical evolution of copyright laws, transitioning from perpetual ownership propositions to limited protection, illustrates the balance between creators' rights and public access. This dual role of copyright in incentivising innovation while enriching the public domain is evident. However, the contemporary digital age raises concerns about the shrinking public domain. This

[13] Id.
[14] *Millar* v. *Taylor* (4 Burr. 2303, 98 ER 201)

contraction, driven by digital advancements, underscores the challenges of maintaining an equilibrium between intellectual property protection and communal creative accessibility. Understanding the factors behind this contraction becomes crucial to addressing the ongoing interplay between copyright and public heritage.

The Shrinking Public Domain: Trends and Causes

The shrinking public domain is a notable occurrence that has garnered increasing attention in contemporary times, especially in light of the digital age. It denotes the progressive contraction of the collection of creative works that are readily accessible to the public without any limitations. This segment aims to examine the patterns and drivers contributing to the shrinking public domain.

In his article entitled "Re-crafting a public domain," Lawrence Lessig expressed the viewpoint that the concept of the public domain is being threatened by digital technology, and he expressed concern regarding the shrinking of the public domain.[15] The contraction of the public domain can be attributed, in part, to the expansionist tendencies of copyright law, which in essence, can be termed copyright expansionism. Copyright expansionism refers to the inclination to extend the scope and duration of copyright protection beyond its original purpose of fostering creative expression. This trend is often driven by influential interest groups, such as the entertainment industry, seeking to increase their revenue by exerting greater control over the use of creative works.

An apparent trend that has emerged as a significant contributor to the shrinking public domain is the widening of the duration and ambit of copyright protection. For instance, in the United States, the duration of copyright has undergone multiple extensions over the last century, with the current protection term being the lifetime of the author plus 70 years. This has resulted in a reduced number of works entering the public domain, as their protection is being stretched over longer periods of time. For instance, the first federal copyright law in the United States was passed in 1790 and stipulated that the copyright term would be 14 years, renewable for an additional 14 years if the author was still alive at the end of the first term. There has been a significant expansion from the original 28 years (14 + 14) to the author's lifetime plus 50 or 75 years, established in 1976. Depending on the author's lifespan, it could actually represent an increase of more than twenty times. The Sonny Bono Copyright Term Extension Act, enacted in 1998 in the United States, is a notable example that fits into the context of increasing

[15] Lawrence Lessig, "Re-crafting a Public Domain," 56 *Yale Journal of Law and the Humanities* (2006).

copyright terms. This act extended the copyright term even further beyond what was established in the 1976 Copyright Act. This phenomenon holds considerable implications. It extends beyond mere financial gains for an artist's immediate descendants, as it also paves the way for financial advantages to be reaped by subsequent generations, including the artist's grandchildren.[16] The Sonny Bono Copyright Term Extension Act (CTEA) of 1998 stands out as particularly concerning due to its apparent disregard for the principles of the public domain and the constitutional safeguards established by the Framers.

Senator Orrin Hatch initiated the Copyright Term Extension Bill, which eventually gained support from a cross-party group of peers and became law. The additional twenty-year extension of the copyright duration received little attention during the discussion surrounding the passage of this legislation.[17] The Act's ability to be applied retroactively is more unsettling than the elongation itself, which raises questions because it seems to have no reciprocation requirements. This is emphasised by the extension of copyright tenure for works already protected for an extended period. This foundation served as the basis for Eric Eldred's argument against the CTEA.[18] It becomes clear that the CTEA's justification goes beyond a romanticised view of authorship in the legislative sphere. Its main beneficiaries are not the authors of copyrightable works but rather their beneficiaries, particularly corporate entities to which authorial rights have been assigned. The driving force behind the passage of this extension seems to be linked to the lobbyists' ability to persuade lawmakers.[19] A pivotal case in point came from the late 1990s when the Walt Disney Corporation faced the impending threat of copyright expiration.[20] The copyrights to important works featuring Mickey Mouse, such as the classic silent film “Steamboat Willie,” were about to expire. Disney organised a concerted lobbying effort to secure the extension of copyright terms because it anticipated the impending loss of sizable royalties and licencing revenues.

The ruling rendered by the Supreme Court in the case of *Eldred* v. *Ashcroft*[21] holds noteworthy import, stemming from both its explicit content and the subjects it omits. The Court engaged in a notably stringent interpretation of the Constitution, adhering closely to its literal phrasing.

[16] Jane Ginsburg et al., “The Constitutionality of Copyright Term Extension: How Long Is Too Long,” 18 *Cardozo Arts & Ent. L. J.* 651 (2000).
[17] Cong. Rec. H9946-9952 (Oct. 7, 1998) (record of debate over Fairness in Music Licensing Act provisions of Sonny Bono Copyright Term Extension Act).
[18] *Eldred* v. *Ashcroft*, 123 S. Ct. 769 (2003) (No. 01-618)
[19] PA Legal, “How Did Disney Influence US Copyright Law?” *PA Legal*, 2021 *available at*: https://thepalaw.com/copyright/how-did-disney-influence-us-copyright-law/.
[20] Timothy B. Lee, “15 Years ago, Congress Kept Mickey Mouse out of the Public domain. Will They Do It Again?” *The Washington Post*, 25 October 2013.
[21] 123 S. Ct. 769, 790 (2003).

However, it conspicuously abstained from delving into the original intentions of the Framers. This judicial deliberation centred on justifying the extension of the copyright term by two decades, positing that this elongation still adhered to the Constitutional mandate of a "limited time."

Furthermore, copyright protection has been broadened to encompass new modes of creative expression, such as software and databases, which were initially not included under copyright law. The United States Copyright Act of 1909 significantly broadened the scope of protected material. Notably, it encompassed an extensive range of an author's creations by extending coverage to encompass "all writings."[22] The increasing prevalence of digital technologies has also contributed to the phenomenon of shrinking the public domain. The advent of digital technology and the rapid expansion of the internet have sparked debates regarding the potential obsolescence of copyright. However, copyright holders have been swift to capitalise on these technological advancements, creating various forms of technological protection measures designed to safeguard their intellectual property from unauthorised use. While these technologies have made it more convenient to access and distribute creative works, they have also facilitated greater control over the usage of such works through mechanisms like digital rights management (DRM) and other technological measures. Consequently, concerns have been raised regarding the potential for private entities to wield excessive power over the use of creative works, particularly in the context of digital media.

Over the course of time, there has emerged a growing apprehension surrounding the scope and implications of Technical Protection Measures (TPMs) and their accompanying provisions. This unease stems from an observed departure from their initial raison d'être. The circumvention clauses in the Digital Millenium Copyright Act of 1998 in the USA appear to have a scope that is significantly wider than what is required by the WIPO treaties, despite appearing to be aligned with them. This expanded breadth prevents users from interacting with digital content in ways that were previously protected as fair use within the parameters of earlier copyright statutes.[23] Conceived as a response to the escalating challenges posed by intellectual property (IP) infringement and the proliferation of piracy due to technological

[22] Marshall A Leaffer, *Understanding Copyright Law* (LexisNexis, 2010).
[23] Unintended Consequences: Fifteen Years under the DMCA, "Unintended Consequences: Fifteen Years under the DMCA" *Electronic Frontier Foundation*, 2013 *available at*: https://www.eff.org/pages/unintended-consequences-fifteen-years-under-dmca.

advancements, TPMs and their attendant regulations were formulated to ensure the robust protection of IP rights. The evolving landscape of Technical Protection Measures prompts a bridge between historical intent and contemporary implications. This evolution prompts a comparison between the impact of TPMs and copyright legislation, both of which empower rights holders to control the utilisation of information, potentially entailing compensation for such usage. Frequently it has been asserted that the impact of implementing technological measures shares similarities with the impact of copyright legislation. In both cases, a rights holder is granted the ability to restrict others from utilising information, thereby conferring upon them the authority to demand compensation for such use.

Nonetheless, a significant distinction exists between the two approaches. Unlike copyright law, which contains several limitations, technological measures endow a rights holder with unrestricted control over any usage.[24] The protection of technological measures has led to an increasing commodification of information usage, thereby expanding the range of information that is susceptible to commodification. This trend may impede the growth of the public domain, defined as the reservoir of information accessible for use by next-generation creators, at a slower pace compared to the period of "classical" copyright. Consequently, fewer information products may be made available, and those offered may incur higher costs, leading to a contraction of the public domain in the sense of readily accessible information.[25] Nevertheless, an apparent trend has emerged in which TPMs have progressively broadened their scope of application to encompass scenarios that do not necessarily involve piracy.[26] By widely integrating TPMs, this development has given content producers a significant boost in their control over their creative outputs beyond the scope of protection envisaged by copyright. This change prompts a critical evaluation of the balance between the rights of creators and the public's increased access to knowledge. Therefore, a careful evaluation is necessary to determine whether TPMs remain true to their original intent or unintentionally interfere with other legitimate interests.

The causes contributing to the shrinking public domain are multifaceted and intricate and involve legal, economic, and cultural factors.[27] Some contend that the expansion of copyright protection is motivated by influential interest groups, like the entertainment industry, which

[24] *Supra* note 7
[25] Id.
[26] Vincent Ooi, "Licence to lock: The Overextension of Technological Protection Measures," 35 *International Review of Law, Computers & Technology* 270–87 (2021).
[27] Melanie Dulong and Juan Carlos, *the Digital Public Domain* (Open Book Publishers, 2012).

endeavours to maximise their profits by asserting greater control over the use of creative works.[28] This was evident in the formulation Sonny-Bonno Act in the United States. Others suggest that the privatisation of cultural heritage is an outcome of neoliberal policies that prioritise private ownership and control over public access and use.[29] In conclusion, the shrinking public domain is a complex and multifaceted phenomenon that has significant implications for access to knowledge and culture in the digital era. Understanding the trends and causes behind the shrinking public domain is essential for devising strategies to encourage greater access to creative works and ensuring that the public domain maintains its crucial role in promoting creativity and disseminating knowledge.

The complex reasons behind the shrinking public domain involve numerous elements shaped by influential interests and neoliberal policies. This contraction significantly impacts knowledge access. Analysing its effects underscores the challenge of obtaining and using creative works freely. This dynamic relationship highlights the importance of comprehending the complex interplay between intellectual property and public accessibility.

The Impact of the Shrinking Public Domain on Access to Knowledge and Culture

Unfettered access to knowledge undoubtedly stands as a pivotal factor for emerging nations endeavouring to elevate the educational standards of their populace, particularly when faced with a pre-existing deficit in cognitive resources.[30] Unfortunately, the essence of knowledge once deemed a collective societal asset, has been transmuted into a proprietary commodity, and wielded for exclusive economic gains by a select few, courtesy of the extensive safeguards afforded by contemporary copyright jurisprudence within the digital sphere. This metamorphosis not only distorts the fundamental tenets of equitable distribution but also perpetuates a milieu wherein the unrestricted dissemination of erudition remains stymied, thereby impeding the organic growth and enrichment of less-endowed societies. Consequently, a pressing imperative arises to recalibrate the balance between intellectual property protection and the broader public interest, fostering a milieu wherein knowledge is truly set free for the greater good.

[28] James Boyle, *the Public Domain: Enclosing the Commons of the Mind* (Yale University Press, 2008).
[29] Id.
[30] Thipsurang Vathitphund, "Access to Knowledge Difficulties in Developing countries: a Balanced Access to Copyrighted Works in the Digital Environment," 24 *International Review of Law, Computers & Technology* 7–16 (2010).

The diminution of the public domain bears noteworthy consequences on the accessibility of knowledge and culture. With each passing day, the public domain's shrinking size exacerbates the challenge for individuals and organisations to obtain and employ creative works without any limitations. This segment shall scrutinise the influence of the shrinking public domain on the accessibility of knowledge and culture.

The shrinking of the public domain has a pronounced effect on the availability of creative works that can be employed for educational and research objectives. Specifically, scholarly researchers may encounter obstacles in obtaining and utilising particular works without obtaining consent from the copyright proprietors, a process that is both arduous and expensive. This predicament impedes the generation of new knowledge and progress in research endeavours. A complex issue requiring careful consideration of the interests of both creators and the general public is the effect of the shrinking public domain on access to knowledge and culture. While it is critical to acknowledge copyright protection's role in encouraging creativity, it is also crucial to maintain the public domain's crucial role in advancing creativity and sharing knowledge. The diminishment of the public domain carries ramifications for safeguarding cultural heritage and conserving historical artefacts. As the number of works entering the public domain decreases, the task of preserving and digitising historical works for posterity becomes increasingly onerous for both individuals and organisations. This is especially concerning in situations where the copyright holder is indeterminate or untraceable, impeding the digitisation or accessibility of these works to the public.

The impact of the shrinking public domain has been criticised for failing to take into account how digital technologies have changed the environment for creative production and distribution. More opportunities than ever before exist for creators in the digital age to reach new audiences and disseminate their works widely, frequently without the help of conventional intermediaries like publishers and record labels. The advent of the internet and digital technology has introduced novel prospects for creative production and distribution, affording creators the capability to circumvent conventional intermediaries and reach a more extensive audience. Consequently, the conventional demarcation between public and private spaces is becoming increasingly blurred, and the significance of the public domain is experiencing a transformation in the digital epoch.[31]

[31] *Supra* note 27

Another critique is that the impact of the shrinking public domain on access to knowledge and culture is unevenly distributed across different sectors of society. For example, while academic researchers may find it difficult to access and use certain works without permission from copyright owners, commercial entities may be better positioned to negotiate access to these works, creating a situation in which access to knowledge is limited to those with the financial resources to pay for it.[32] Boyle posits that this circumstance engenders a scenario where access to knowledge is constrained solely to individuals or entities with adequate financial resources, thereby exacerbating existing societal inequalities.

As a result, even though the effects of the declining public domain on access to knowledge and culture are complex and multifaceted, it is obvious that these effects have a big impact on the creation of new knowledge, the preservation of cultural heritage, and the encouragement of creativity. It is critical to develop policies that support increased accessibility to creative works while also upholding the rights of creators to maintain control over and make a living from their creations.

The Intersection of Copyright Law and the Public Interest:

Legal scholars, theorists, and historians frequently portray the ongoing legal conflict surrounding intellectual property as a struggle between flimsy utilitarian entitlements and strong inherent property rights.[33] This ongoing discussion centres on the conflict between giving creators strong, intrinsic property rights that are comparable to tangible possessions and giving them limited, utilitarian privileges to encourage innovation. While the latter emphasises the fundamental idea that creators should exercise firm control over their intangible creations, similar to physical assets, the former emphasises the societal benefits derived from encouraging creativity through temporary monopolies. This dichotomy highlights the fundamental problem with intellectual property law: how to strike a balance between fostering innovation for the greater good and defending the fundamental ideas of ownership and control. The doctrine of copyright law aims to reconcile the rights of copyright owners and the public's interests. The latter, frequently discussed in copyright law, pertains to the broader social advantages obtained through the distribution and utilisation of artistic creations. This chapter scrutinises the intersection of copyright law and the public interest and the potential means by which copyright law can uphold or subvert the public interest.

[32] Id.

[33] Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (Stanford University Press, Stanford, Calif., 2003), L Ray Patterson and Stanley W Lindberg, *The Nature of Copyright: A Law of Users' Rights* (University of Georgia Press, London, 1991).

The doctrine of fair use or fair dealing represents a crucial intersection of copyright law with the public interest. Fair use, as a legal exception to copyright law, permits the usage of copyrighted material, without acquiring the copyright owner's authorisation, for purposes such as criticism, commentary, news reporting, teaching, scholarship, or research. This exception is intended to strike a balance between the interests of copyright owners and the public by allowing for a restricted application of copyrighted material that does not encroach upon the copyright owner's exclusive rights. Nonetheless, the extent and implementation of fair use or fair dealing diverge among different legal jurisdictions and are subject to diverse factors, encompassing legal precedent, societal conventions, and economic interests. In specific jurisdictions, fair use may receive limited interpretation and exclusively pertain to distinct categories of uses. Conversely, other jurisdictions might construe fair use more expansively, thereby permitting a broader range of uses.

Even though the 1976 Copyright Act of the United States significantly extended the duration of copyright, its creators did show some consideration for the public domain. They attempted to codify the "fair use" doctrine, which shows that they made a sincere effort to strike a balance between the rights of copyright holders and the interests of society at large. This was perhaps most obviously demonstrated by their efforts in this regard.[34] Robert Kastenmeier, an influential figure in the House Committee on the Judiciary, who was instrumental in shaping the 1976 Act, recognised the delicate balance between public interests and copyright holders' needs, acknowledging the complex nature of regulating access to various forms of content in a rapidly changing society. Kastenmeier emphasised the cautious approach required to navigate this balance effectively, considering the evolving landscape of information dissemination and commerce.[35]

Copyright law intersects with the public interest through the utilisation of licensing agreements and collective rights organisations, which allow copyright owners to monetise their works while promoting access to them by the public. However, the terms and policies of these mechanisms may impede access to creative works and limit the ability of the public to use them for certain purposes. Moreover, discussions on copyright law reform and policy-making frequently invoke the public interest.[36] Proponents of copyright reform assert that copyright

[34] Nadine Farid, "Not in My Library: Eldred v. Ashcroft and the Demise of the Public Domain," 5 *Tulane Journal of Technology & Intellectual Property* (2003).

[35] 133 Cong Rec H1293 (March 16, 1987)
[36] Jessica Litman, "Copyright Compromise and Legislative History," 72 *Cornell Law Review* (1987).

law should prioritise the public interest by facilitating access to knowledge and culture while simultaneously safeguarding the rights of copyright owners. Detractors of the current copyright law contend that it overly emphasises the interests of copyright owners and undermines the public interest by restricting access to creative works.

The intersection of copyright law and the public interest presents a multifaceted and intricate issue requiring careful consideration and examination. A crucial element of this intersection is the delicate balance that must be struck between the interests of copyright owners and the broader societal advantages that may arise from the utilisation and dissemination of creative works. The doctrine of fair use or fair dealing, licensing agreements, and collective rights organisations are all mechanisms that influence the relationship between copyright law and the public interest. However, the use of these mechanisms is not without criticism, as they can both facilitate and restrict access to creative works and may limit the ability of the public to use them for certain purposes. A critical examination of the intersection of copyright law and the public interest highlights the importance of developing policies and practices that promote greater access to knowledge and culture while safeguarding copyright owners. Such policies and practices should aim to balance both parties' interests, considering changing social needs and technological advancements.

The Need for a Robust Public Domain in the Digital Era

In 2004, developing countries voiced their demand for a Development Agenda at the World Intellectual Property Organization (WIPO) due to their long-standing grievances that the WIPO's work mainly benefits the wealthiest nations and the commercial interests of intellectual property right-holders. Developing countries highlighted the shortcomings of WIPO's 'development cooperation' efforts, including capacity-building, legal assistance, and training. They and other civil society groups asserted that WIPO had failed to adequately inform them of the 'flexibilities' available when implementing international norms such as the TRIPS. It did not effectively assist them in tailoring national intellectual property systems to suit local development needs. During the 2007 annual Assemblies of WIPO Member States, developing countries successfully advocated for the adoption of a 'WIPO Development Agenda' consisting of 45 recommendations aimed at integrating development considerations into WIPO's work. Development Agenda recommendations 16 and 20 encompass several objectives aimed at preserving and promoting a rich and accessible public domain within the normative processes

of the World Intellectual Property Organization (WIPO). Firstly, these recommendations seek to safeguard the public domain within WIPO's normative processes. Secondly, they call for a comprehensive analysis of the implications and benefits of a thriving public domain that is widely accessible. Thirdly, the recommendations promote norm-setting activities that support the establishment of a robust public domain in WIPO's Member States. Finally, they advocate for the development of guidelines to assist interested Member States in identifying subject matters that have fallen into the public domain within their respective jurisdictions. These objectives reflect the growing recognition of the importance of preserving and promoting the public domain as a vital component of intellectual property regimes that balance the interests of both rights holders and the wider public.

The significance of the public domain cannot be overstated, yet it is currently facing a challenge in the digital era. The expansion of copyright protection and advancements in digital technologies have contributed to a gradual reduction in the number of creative works that are freely available for use by the general public. This phenomenon is particularly noticeable in the United States, where copyright protection has been extended both in duration and scope multiple times over the past century, thereby reducing the number of works that have entered the public domain.[37]

To ensure that the public domain continues to play an important role in the promotion of creativity and the dissemination of knowledge, measures to protect and promote it in the digital era are necessary. Reform of copyright laws to limit the scope and duration of copyright protection, promotion of open access and open licencing models, and development of digital tools and platforms to facilitate access to public domain works may be among these measures. Furthermore, it is critical to recognise the intersection of copyright law and public interest, and to ensure that copyright laws are designed to serve the public good rather than the interests of powerful private entities. Greater transparency and accountability in developing and implementing copyright laws, as well as a more nuanced understanding of the relationship between copyright protection and the promotion of creativity and access to knowledge, may be required. A robust public domain can be significant in:

Preserving cultural commons: Preserving our shared cultural heritage in the digital age is critical in safeguarding the vast array of human creations. In a landscape characterised by

[37] *Supra* note 27

robust copyright protections, nurturing a strong public domain becomes of utmost importance. By cultivating a sphere where creative works and knowledge are exempt from rigid ownership constraints, we guarantee the ongoing accessibility of historical artefacts, literature, art, and scientific progress for current and forthcoming generations. This initiative not only upholds the diverse amalgamation of cultures but also cultivates an environment where our collective legacy flourishes. This unconstrained access fuels creation and innovation while mitigating the potentially stifling effects of proprietary limits on the natural progression of our cultural heritage.

Balancing Access and Control: In the digital era, finding a balance between access and control is critical. Copyright protections must coexist with open access to foster knowledge dissemination. While creators deserve recognition, overly strict regulations can hinder broader access to cultural and intellectual content. Achieving equilibrium requires acknowledging creators' rights and enabling public engagement with these resources. This balance empowers learners, scholars, and innovators to build upon existing works, driving progress and enriching cultural discourse in the digital realm.

Catalysing Cultural Evolution: The robust presence of a vibrant public domain catalyses the ongoing transformation of societal expressions, facilitating cultural evolution. It allows artists, academics, and innovators to interact with historical legacies and influence future trajectories by enabling unrestricted access to and utilisation of previously created works. This phenomenon not only fosters the fusion of various influences, which results in the emergence of novel ideas and cultural narratives, but it also encourages the emergence of new perspectives and interpretations. This motivating force fosters a dynamic interplay between tradition and innovation in a cultural tapestry that enriches interactions between people.

Encouraging Ethical Reuse: A fundamental tenet of the modern digital landscape is to promote the ethical reuse of creative works. This principle emphasises the value of thoughtfully repurposing existing content, encouraging an environment where creators can draw inspiration from classic and modern sources while respecting their original contexts. The idea of ethical reuse supports transformative and innovative projects that significantly advance the fields of art, education, and research. Respecting ethical principles helps to preserve the essence of the original work while incorporating new interpretations and narratives, acknowledging the efforts and intentions of forerunners, and promoting community collaboration.

Championing Democratic Values: By ensuring equal access to a wide range of knowledge and creative works, preserving a strong public domain in the digital age upholds democratic values. Informed participation and inclusive discourse are made possible as a result. A vibrant public sphere encourages openness, diversity, and the free exchange of ideas, reinforcing the idea that knowledge and culture ought to be accessible to all people and shared for the benefit of society.

Conclusion

The evidence strongly supports the claim that the public domain is vital for encouraging innovation and creativity. Creators can greatly benefit from the availability of a pool of resources that can be used and modified without restriction because they can build on pre-existing works to produce new and creative works. Additionally, the public domain is crucial for promoting access to knowledge and culture, particularly for underprivileged and marginalised groups who might not have access to proprietary works. This is especially true in the modern era when the internet has made it possible for ideas and creative works to spread quickly and widely.

However, the shrinking of the public domain poses a threat to these benefits. When fewer resources are available for creators to draw upon, it can limit their ability to innovate and create new works. Additionally, it can reinforce existing power structures by creating barriers to entry for those who cannot afford to access proprietary works. Copyright law and other measures to protect intellectual property can be crucial in promoting creativity and protecting the interests of creators. However, when they are too expansive, they can stifle innovation and limit access to culture and knowledge.

Therefore, recognising and protecting the public domain is of utmost importance in the digital age. Doing so can help promote creativity and innovation and ensure everyone has equal access to culture and knowledge. It also ensures that the public domain remains an inexhaustible source of creativity and innovation and a pillar of democratic culture and the expansion of human knowledge. However, achieving this requires a careful balance between the need to protect intellectual property and the need to promote access and innovation. Policymakers and stakeholders must work together to develop legal and institutional frameworks that strike this balance appropriately.

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