

INTELLECTUAL PROPERTY AND THE PROBLEM OF COLLECTIVE MEMORY

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ABSTRACT

The law of intellectual property has traditionally operated as a regulatory system that shapes markets. However, its reach has come to extend even further into the structure of collective memory. This article argues that the public domain must not be thought of as a secondary category, an afterthought in legislation, or the remainder left over after private rights have been circumscribed. Instead, it is constitutional-cultural infrastructure, the legal condition that makes possible the creation of collective memory. Digital technologies, training algorithms, digital rights management, and platform-controlled distribution have placed this infrastructure under constant and deliberate pressure. Using theories of collective memory and the chief philosophical rationales for intellectual property protection, this article will show that when technological control overreaches statutory limits, it does not simply limit access to cultural works but rather privatizes memory. The article goes further to inculcate the application of aforementioned theories in the Indian Context with assistance from cases such as Shreya Singhal, Puttaswamy etc and with reference to article 19(1)(A). The normative implications are profound: a legal system that allows the permanent lock-down of collective knowledge threatens to destabilize the very cultural environment from which all creation emerges.

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INTRODUCTION

There is, within every legal system, a repository that is akin to a library. This repository does not house books in the classical sense but is instead a repository of norms that have been built up through decisions about what a society may remember, who may have access to memories, under what conditions, and at what price. Intellectual property law, among other things, regulates the functioning of this library. Moreover, the issue of who is in control of its shelves has increasingly come to have constitutional implications.¹

The idea of collective memory has its roots in the sociological tradition. It was developed in the 1920s by Maurice Halbwachs: “Memory is not a static repository of what is past, but a dynamic system of recollection that is always embedded in the groups, institutions, and social frameworks in which individuals are situated.”² Jan Assmann developed this idea in cultural theory, distinguishing between communicative memory, the living transmission of recent experience, and cultural memory, the formalized and institutionally preserved record of a society’s foundational past.³ Both are critically dependent on accessibility: memory that is not accessible ceases to be memory and becomes an archive, sealed and inert.⁴

In the age of technology, accessibility has become a matter of law. Cultural works are now technologically mediated, algorithmically indexed, and commercially exploited. The works by which societies know themselves, literature, film, music, journalism, are no longer primarily maintained in public institutions.⁵ They are instead disseminated through proprietary media, governed by digital rights management, and exploited by corporations whose interests are not identical with those of the public. Intellectual property law mediates these relationships.⁶

A common paradox reappears. Intellectual property law encourages production by providing temporary monopolies on expression.⁷ Without these, it is argued, producers cannot recover costs, and the production of new cultural works may slow.⁸ This is a legitimate worry. But

¹ Neil Weinstock Netanel, *Copyright’s Paradox* (Oxford University Press 2008).

² Maurice Halbwachs, *On Collective Memory* (Lewis A Coser tr, University of Chicago Press 1992).

³ Jan Assmann, ‘Collective Memory and Cultural Identity’ (1995) 65(1) *New German Critique* 125; Jan Assmann, *Cultural Memory and Early Civilization: Writing, Remembrance, and Political Imagination* (David Henry Wilson tr, Cambridge University Press 2011).

⁴ Paul Connerton, *How Societies Remember* (Cambridge University Press 1989).

⁵ Julie E Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (Yale University Press 2012).

⁶ Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press 2006).

⁷ Shamnad Basheer, Intellectual Property and Competition Law in India, in *Intellectual Property, Competition and Development* 305 (Robert D. Anderson & Nuno Pires de Carvalho eds., 2010).

⁸ William M Landes and Richard A Posner, ‘An Economic Analysis of Copyright Law’ (1989) 18 *Journal of Legal Studies* 325.

overreach and technologically enabled control has its own costs: a kind of cultural amnesia, evident in the progressive privatization of the shared cultural works by which identity, discourse, and innovation are facilitated.⁹ The primary argument of this article is simple, and its implications are significant: the public domain must be thought of not as a relic but as the constitutional-cultural foundation of collective memory; the current technological imperatives pose a structural threat to this foundation.¹⁰

WHAT IS COLLECTIVE MEMORY?

Collective memory must be distinguished from nostalgia. It is the social support for the ability of a community to locate itself in time in order to understand the present in terms of a common past and to imagine a future that builds on accumulated knowledge and cultural heritage.¹¹ In this way, it is not simply affective but epistemological.¹² A society that cannot access its own cultural record cannot think clearly about itself.¹³

Three analytically significant aspects of collective memory are these. First, it is a social construct. No community's memory is natural, but rather it is made and remade through the social practices of transmission, education, commemoration, artistic citation, and critical commentary.¹⁴ It is therefore necessarily institutional, including legal institutions. Second, it requires accessibility.¹⁵ Memory requires the possibility of return: works must be returnable, reproducible, and reinterpretable.¹⁶ A cultural text that is locked behind an insurmountable paywall does not go away, but it goes out of memory.¹⁷ Third, it is cumulative and iterative. Cultural memory does not simply store the past but processes it.¹⁸ Each generation reuses,

⁹ Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (Penguin Press 2004); James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (Yale University Press 2008).

¹⁰ Pamela Samuelson, 'Digital Information, Digital Networks, and the Public Domain' (2003) 68 *Law and Contemporary Problems* 147.

¹¹ Maurice Halbwachs, *On Collective Memory* (Lewis A Coser tr, University of Chicago Press 1992); Jan Assmann, *Cultural Memory and Early Civilization: Writing, Remembrance, and Political Imagination* (David Henry Wilson tr, Cambridge University Press 2011).

¹² Paul Ricoeur, *Memory, History, Forgetting* (Kathleen Blamey and David Pellauer tr, University of Chicago Press 2004).

¹³ Pierre Nora, 'Between Memory and History: Les Lieux de Mémoire' (1989) 26 *Representations* 7.

¹⁴ Halbwachs (n 1); Paul Connerton, *How Societies Remember* (Cambridge University Press 1989).

¹⁵ Jan Assmann, 'Collective Memory and Cultural Identity' (1995) 65(1) *New German Critique* 125.

¹⁶ Assmann (n 1); Connerton (n 4).

¹⁷ Julie E Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (Yale University Press 2012).

¹⁸ Assmann (n 1).

revises, and reinterprets what it inherits. Shakespeare rewrote Holinshed; Joyce undid Homer; hip-hop samples everything. This is not plagiarism but the way culture breathes.¹⁹

The Indian experience of collective memory is particularly revealing in this regard. India's vast repository of traditional cultural expressions, including folk forms such as Ottamthullal of Kerala, Dayro of Gujarat, and Bihu of Assam, represents precisely the kind of cumulative and iterative cultural memory that the law struggles to accommodate, since these traditions have been transmitted orally across generations without any single identifiable author and are therefore systematically excluded from a copyright framework that privileges individual authorship and fixed, reproducible forms of expression.²⁰ The consequence is a double structural vulnerability: such works receive neither the protection of copyright law nor the benefit of a clearly defined public domain status that could shield them from commercial expropriation, since assuming them to be freely usable merely because they lack a single identifiable owner creates a vacuum in which communities lose control over their own cultural memory to actors who fix, reproduce, and claim derivative rights in what was originally communal inheritance.²¹

The relationship between memory and democracy is more than metaphorical. Democracy as deliberation demands a common cultural vocabulary of shared reference, contested history, and accessible texts.²² It also demands the ability to question official versions of history, which in turn requires the ability to access and reinterpret the cultural record independently, rather than simply being presented with it in a packaged, proprietary way.²³ Innovation is also involved, as innovators must be able to access the work of predecessors; the present is the result of extensive immersion in the accumulated past.²⁴

¹⁹ Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (Penguin Press 2004); James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (Yale University Press 2008).

²⁰ Arjun Krishna J and Monisha M, 'Protecting Folk and Indigenous Music in India: Copyright Challenges and the Way Forward' (SSRN Working Paper, January 2026) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6446042> accessed 31 August 2026.

²¹ 'Traditional Knowledge and Public Domain in India: Protecting Cultural Assets' (Mondaq, 19 August 2025) <<https://www.mondaq.com/india/copyright/1667712/traditional-knowledge-and-public-domain-in-india-protecting-cultural-assets>> accessed 31 August 2026.

²² Jürgen Habermas, *The Structural Transformation of the Public Sphere* (Thomas Burger tr, MIT Press 1989).

²³ Jack M Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' (2004) 79 *NYU Law Review* 1.

²⁴ William M Landes and Richard A Posner, 'An Economic Analysis of Copyright Law' (1989) 18 *Journal of Legal Studies* 325; Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press 2006).

The implication is straightforward. Memory demands reuse, reinterpretation, and access. These demands in turn require a public domain, a realm of cultural materials removed from private control and made available for transformation and transmission. The public domain is not, therefore, an accident of intellectual property law or a temporary reprieve before which exclusivity begins. Rather, it is the structural prerequisite for the kind of cultural reproduction that memory requires. If this is true, then the public domain is not an exception to intellectual property law but a temporary departure from the default state of knowledge.²⁵

THE PUBLIC DOMAIN AS LEGAL MEMORY INFRASTRUCTURE

The classic understanding of intellectual property regards the private right as the rule and the public domain as the remainder. But in a technical sense, this is just the opposite of the truth. Knowledge, expression, and cultural content are, in their natural form, for all. IP rights are temporary, limited, and justified remedial measures, motivated by their incentive effects. Upon expiration of a copyright, the work does not pass into a kind of second-class status; rather, it returns to its natural state: the public domain. The public domain is a “leftover” in a misinterpretation of the legal construct. The anomaly is the monopoly, not its expiration.²⁶

There are three aspects of this infrastructure that are worth exploring. First, the temporal aspect: copyright used to have a finite, fixed term because everyone agreed that the public should gain access to works and that they should return to the commons. But terms have expanded to life plus seventy years in many countries, often further extended through industry pressure, as a deliberate shrinking of the public domain. Works that should be in the public domain are still locked away.²⁷ Second, the functional aspect: fair use, fair dealing, and statutory limitations recognize that the incentive rationale for exclusivity is not applicable in all instances. Commentary, parody, scholarship, and education—all of these serve to preserve memory and culture, which the public domain is intended to safeguard.²⁸ Third, the restoration of the public domain through expiry: the expiration of a copyright is not merely the lapse of a right; it is a form of cultural restitution. When technology prevents this restoration even after the statutory

²⁵ Shamnad Basheer, *Intellectual Property and Competition Law in India*, in *Intellectual Property, Competition and Development* 305 (Robert D. Anderson & Nuno Pires de Carvalho eds., 2010).

²⁶ Shamnad Basheer & Prashant Reddy, *Create, Copy, Disrupt: India's Intellectual Property Dilemmas* (Oxford Univ. Press 2017).

²⁷ Boyle (n 9); Pamela Samuelson, ‘Digital Information, Digital Networks, and the Public Domain’ (2003) 68 *Law and Contemporary Problems* 147.

²⁸ Jessica Litman, ‘The Public Domain’ (1990) 39 *Emory Law Journal* 965.

right has lapsed, the infrastructure of collective memory is impaired in ways that the law did not intend.²⁹

India's Copyright Act, 1957 occupies a distinctive position within this global landscape. Section 22 of the Act provides for a copyright term of the lifetime of the author plus sixty years, preserving a shorter standard than the life-plus-seventy-year regime now prevailing in the United States and the European Union.³⁰ This statutory distinction means that works enter the Indian public domain on a somewhat earlier timeline, offering a marginally more accessible cultural commons. However, the advantage is substantially narrowed in practice: the operation of digital rights management systems and proprietary platform licensing agreements has the practical effect of restricting access to cultural works irrespective of whether their statutory protection has lapsed, thereby perpetuating enclosure well beyond the point at which the Copyright Act itself would permit open access.³¹

THE TECHNOLOGICAL DISRUPTION OF MEMORY

A. ALGORITHMIC MEMORY: AI AND THE TRAINING CORPUS QUESTION

Artificial intelligence systems do not produce culture *ex nihilo*. Rather, they are trained on massive datasets of culture, including text, image, audio, and video, that, taken together, represent a significant part of the recorded human cultural output.³² In the most literal sense, this is the mining of collective memory, a process that has given rise to a significant legal tension.

Copyright owners have sued AI developers in a variety of jurisdictions, arguing that training on copyrighted materials without permission constitutes infringement.³³ Under United States law, the doctrine of fair use, particularly the transformative use prong of fair use as articulated in cases such as *Authors Guild v. Google*, provides the most plausible doctrinal basis; but this

²⁹ David Lange, 'Recognizing the Public Domain' (1981) 44 *Law and Contemporary Problems* 147.

³⁰ Copyright Act 1957, s 22. Under this provision, the duration of copyright in literary, dramatic, musical, and artistic works is the lifetime of the author plus sixty years from the beginning of the calendar year next following the year of death.

³¹ Shamnad Basheer and Prashant Reddy, *Create, Copy, Disrupt: India's Intellectual Property Dilemmas* (Oxford University Press 2017) 1-32.

³² Shamnad Basheer & Prashant Reddy, *Create, Copy, Disrupt: India's Intellectual Property Dilemmas* (Oxford Univ. Press 2017).; Mark A Lemley and Bryan Casey, 'Fair Learning' (2021) 99 *Texas Law Review* 743.; Pamela Samuelson, Generative AI Meets Copyright, 73 *J. Copyright Soc'y U.S.A.* 1 (2025).

³³ *Kadrey v. Meta Platforms, Inc.*, No. 3:23-cv-03417-VC (N.D. Cal. filed July 7, 2023).; *Andersen v. Stability AI Ltd.*, No. 3:23-cv-00201-WHO (N.D. Cal. filed Jan. 13, 2023).; *The New York Times Co. v. Microsoft Corp.*, No. 1:23-cv-11195 (S.D.N.Y. filed Dec. 27, 2023).

is still a matter of controversy for large-scale generative models.³⁴ Under European law, the text and data mining exceptions established by the DSM Directive provide a limited safe harbor for AI training activities, subject to the ability of rights holders to reserve their rights and opt out of the exception.³⁵

The Indian jurisdiction has recently furnished a particularly instructive illustration of this tension. In *ANI Media Pvt Ltd v OpenAI Inc and Anr* [CS(COMM) 1028/2024], the Delhi High Court issued an interim ruling in July 2026 declining to restrain OpenAI from using the copyrighted content of a prominent Indian news agency for training its ChatGPT model, holding on a prima facie basis that such use falls within the fair dealing exception under Section 52(1)(a) of the Copyright Act, 1957, as private or personal use including research.³⁶ The proceeding drew interventions from the Digital News Publishers Association, the Indian Music Industry, and several leading print and broadcast media groups, all of which contended that the unrestricted use of copyrighted cultural works for commercial AI development systematically degrades the economic infrastructure that sustains cultural production and, by extension, the very corpus from which collective memory is constituted.³⁷ The episode also highlights a critical legislative gap: the Copyright Act, 1957 contains no explicit text and data mining exception of the kind introduced by the European DSM Directive, and Indian courts have had to develop the law by analogy with general fair dealing provisions in the absence of any tailored statutory framework for large language model training.³⁸

The normative conflict is sharp. If AI systems must have access to collective memory to operate, and if this access is granted, then limiting this access not only limits the activities of AI developers but also limits the terms under which new cultural production can take place.

³⁴ *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214–25 (2d Cir. 2015) (holding Google's digitization of copyrighted books and creation of a searchable database to be highly transformative and therefore fair use); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96–99 (2d Cir. 2014).

³⁵ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market arts. 3–4, 2019 O.J. (L 130) 92.; Directive (EU) 2019/790, art. 4(3), 2019 O.J. (L 130) 92 (permitting text and data mining unless rights holders have expressly reserved their rights in an appropriate manner).

³⁶ *ANI Media Pvt Ltd v OpenAI Inc & Anr*, CS(COMM) 1028/2024 (Delhi HC, 24 July 2026). The court held, on an interim basis, that the use of copyrighted content to train large language models falls prima facie within the fair dealing exception under Section 52(1)(a) of the Copyright Act 1957, as "private or personal use including research."

³⁷ 'Fair Dealing in the Age of AI: Delhi High Court's Ruling in ANI v OpenAI' (Trademark Lawyer Magazine, 29 July 2026) <<https://trademarklawyermagazine.com/fair-dealing-in-the-age-of-ai-delhi-high-courts-ruling-in-ani-v-openai/>> accessed 31 August 2026.

³⁸ 'Generative AI and Copyright Law in India: Who Owns the Training Data?' (Lexology, 5 September 2025) <<https://www.lexology.com/library/detail.aspx?g=763e3419-add9-48f5-bcf7-43ea0183d2bb>> accessed 31 August 2026.

The question is whether a legal system that prohibits AI systems from learning from the cultural record effectively limits one of the primary ways in which modern knowledge systems interact with collective memory.³⁹

B. TECHNOLOGICAL PROTECTION MEASURES

One of the most significant developments is the relationship between technological protection measures and the public domain. Under the WIPO Internet Treaties and national laws such as the DMCA, the circumvention of digital rights management systems is itself illegal, regardless of whether the original act would or would not constitute copyright infringement.⁴⁰

A work could be in the public domain, its copyright long expired many years before.⁴¹ However, if such a work is digitized and placed behind a Digital rights management system barrier, the only way to gain access to it is to circumvent the technological protection measure, which is illegal. The law provides access in one way but denies it in another. Anti-circumvention laws create a new system of perpetual control not based on property rights but on technological design.⁴² Memory is enclosed not because the law permits enclosure but because the law does not prohibit the means by which enclosure is achieved.⁴³

C. PLATFORM CONTROL AND STRUCTURAL AMNESIA

The culture of streaming adds a new layer to the analysis of cultural consumption. The current behavior of cultural participation is becoming increasingly non-acquisitive: the subscriber has access to the work for the period of a contractual agreement with a service but acquires no ownership.⁴⁴ When services change licensing agreements or go under, the work can literally vanish in physical, rather than metaphorical, fashion.⁴⁵ Orphaned works are a problem that

³⁹ James Boyle, *The Public Domain: Enclosing the Commons of the Mind* 40–43 (2008).; Yochai Benkler, *The Wealth of Networks* 35–59 (2006).

⁴⁰ WIPO Copyright Treaty art. 11, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 2186 U.N.T.S. 121.; Digital Millennium Copyright Act, Pub. L. No. 105-304, § 103, 112 Stat. 2860, 2863–77 (1998) (codified at 17 U.S.C. § 1201).; 17 U.S.C. § 1201(a)(1)(A) (2024).

⁴¹ Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 Berkeley Tech. L.J. 519, 551–59 (1999).

⁴² Shamnad Basheer & Prashant Reddy, *Create, Copy, Disrupt: India's Intellectual Property Dilemmas* (Oxford Univ. Press 2017). Julie E. Cohen, *WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive?*, 21 Eur. Intell. Prop. Rev. 236, 240–43 (1999).; Lawrence Lessig, *Code and Other Laws of Cyberspace* 85–99 (1999).

⁴³ James Boyle, *The Public Domain: Enclosing the Commons of the Mind* 41–47 (2008).

⁴⁴ Aaron Perzanowski & Jason Schultz, *The End of Ownership: Personal Property in the Digital Economy* 1–24 (2016).

⁴⁵ Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, *Notice and Takedown in Everyday Practice*, 64 J. Copyright Soc'y U.S.A. 597, 615–19 (2017).; Abigail De Kosnik, *Rogue Archives: Digital Cultural Memory and Media Fandom* 1–18 (2016).

worsens this situation; while still under copyright, they have no identifiable rights owner and can neither be copied nor archived, effectively rotting away in limbo that benefits no one.⁴⁶ Technological advancements make it possible for ownership to become not only a reward but a means of permanent control over memory.⁴⁷

The Indian context gives particular urgency to this observation. India's burgeoning OTT streaming ecosystem, which by 2023-24 had attracted investment of over thirteen thousand crore rupees in original content production alone, operates predominantly on contractual licensing arrangements under which subscribers acquire access but not ownership.⁴⁸ When platforms consolidate, exit the market, or renegotiate licensing terms, works that subscribers have relied upon for cultural engagement simply disappear without legal recourse, a consequence that falls disproportionately on communities whose cultural memory is mediated through regional-language platforms serving India's extraordinary linguistic plurality.⁴⁹ The Prasar Bharati Archives, India's largest publicly accessible audio-visual collection, offers a partial countermodel, demonstrating both the feasibility and the necessity of institutional public archiving as a structural safeguard for collective memory, a function that commercially driven proprietary platforms are structurally disinclined to perform.⁵⁰

OWNERSHIP VERSUS CULTURAL CONTINUITY

The major philosophical foundations for intellectual property rights, when scrutinized, fail to correlate with the level of control currently possible through law and technology. The Lockean labor theory argues that property rights are earned in the products of one's labor, but only if there is a proviso: "enough and as good left for others."⁵¹ A system that progressively removes cultural resources from the commons contradicts this proviso systematically.⁵²

⁴⁶ U.S. Copyright Office, *Report on Orphan Works* 1–7 (2006).

⁴⁷ Yochai Benkler, *The Wealth of Networks* 35–59 (2006).; James Boyle, *The Public Domain: Enclosing the Commons of the Mind* 37–69 (2008).

⁴⁸ FICCI and EY, *Media for the Masses: The Promise Unfolds -- Indian Media and Entertainment Industry Report 2024* (EY 2024). The report records original content investment exceeding Rs 13,000 crore across OTT platforms during 2023-24.

⁴⁹ Aaron Perzanowski and Jason Schultz, *The End of Ownership: Personal Property in the Digital Economy* (MIT Press 2016) 1-24.

⁵⁰ Prasar Bharati, 'Prasar Bharati Archives' (Prasar Bharati, 2024) <<https://prasarbharati.gov.in/prasar-bharati-archives/>> accessed 31 August 2026. The archive, which is the largest publicly accessible audio-visual repository in India, houses rare recordings, documentaries, and programmes spanning the full breadth of post-Independence Indian cultural life.

⁵¹ John Locke, *Two Treatises of Government* bk. II, ch. V, § 27, at 287–88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

⁵² Wendy J. Gordon, A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property, 102 Yale L.J. 1533, 1540–49 (1993).; James Boyle, *The Public Domain: Enclosing the Commons of the Mind* 37–69 (2008).

Utilitarian incentive theory is perhaps the most straightforwardly applicable, as rights are defended on the basis of future benefits. However, this rationale is necessarily contingent on the limitations of incentive effects.⁵³ If the creation incentive does not require perpetual control, and it strongly appears that it does not, then control beyond the incentive period is simply rent-seeking. The periodic extension of copyright terms far beyond any incentive calculation is inexplicable on utilitarian rationale and can only be explained as regulatory capture.⁵⁴

Hegelian personality theory is a third foundation: creative works are a manifestation of self, and rights are a recognition of personhood.⁵⁵ This rationale has real power for living artists. However, it is difficult to take seriously in the context of corporate rights, works whose authors are dead for a century, or technological systems intended to lock public domain resources behind perpetual paywalls.⁵⁶

Intellectual property rights cannot be morally legitimate if they damage the very cultural environment that makes creativity possible. Rights in expression are a means, not an end in themselves.⁵⁷ When the means impacts the rationale for the means, when copyright law impacts access that innovation requires, or when anti-circumvention laws preclude recovery of works made free by statute, a structural imbalance has occurred.

REIMAGINING THE PUBLIC DOMAIN

Necessary reform must precede technical reform. The conversation begins at the conceptual level: the public domain must be positively asserted as a constitutional and cultural norm, rather than being seen simply as the remainder after rights have been exhausted.⁵⁸ Correspondingly broad interpretation is necessary for limitations and exceptions. Courts that see fair use as a narrow exception to an otherwise absolute right have fundamentally misunderstood their

⁵³ William M. Landes & Richard A. Posner, An Economic Analysis of Copyright Law, 18 J. Legal Stud. 325 (1989).; U.S. Const. art. I, § 8, cl. 8.

⁵⁴ William M. Landes & Richard A. Posner, Indefinitely Renewable Copyright, 70 U. Chi. L. Rev. 471 (2003).; Lawrence Lessig, *Free Culture* 95–131 (2004).

⁵⁵ G.W.F. Hegel, *Elements of the Philosophy of Right* §§ 41–71 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821).

⁵⁶ Justin Hughes, The Philosophy of Intellectual Property, 77 Geo. L.J. 287, 330–50 (1988).; Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957, 959–91 (1982).

⁵⁷ U.S. Const. art. I, § 8, cl. 8.; *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991).

⁵⁸ Pamela Samuelson, Enriching Discourse on Public Domains, 55 Duke L.J. 783, 815–24 (2006). ; James Boyle, The Public Domain: Enclosing the Commons of the Mind 38–40 (2008).

statute.⁵⁹ These provisions are structural components of copyright law, designed to keep IP rights in line with their proper rationale.⁶⁰

A shift in focus from AI systems' participation in collective memory to copyright infringement is both normatively justifiable and necessary.⁶¹ Text-and-data mining exceptions should be broadened, not narrowed; opt-out regimes should be reviewed for constitutional validity.⁶² Anti-circumvention law should be reviewed from a proportionality perspective: technical measures that prevent access to public domain works or circumvent statutory limitations do not promote creative incentive; they extort it. The public domain is not charity; it is justice.⁶³

COLLECTIVE MEMORY AS AN ARTICLE 19(1)(A) VALUE IN INDIAN CONSTITUTIONAL LAW

The line of argument used hitherto has been Western in its orientation, drawing upon authors like Halbwachs, Assmann, Locke, Hegel, and utilitarian instrumentalism. This position is not without consequences. The argument that the public sphere needs to be reconceptualized as constitutional cultural infrastructure receives greater strength if based in a certain constitution, and indeed, Indian constitutional law proves particularly hospitable to this reconceptualization. Why? This is a structural point, and the significance of which cannot be overstated in this context: Article 19(1)(a) of the Constitution of India does more than safeguard the right to freedom of speech as a negative right; it guarantees the conditions of speech itself.⁶⁴

A crucial domestic legal development that bears on this argument is India's introduction of anti-circumvention provisions through Section 65A of the Copyright (Amendment) Act, 2012. It is significant that Parliament, when incorporating these provisions, did so in deliberately narrower terms than the United States DMCA: criminal liability under Section 65A requires proof of an intention to infringe, and the provision expressly preserves all limitations and exceptions recognized under Section 52, including fair dealing.⁶⁵ The Parliamentary Standing Committee that reviewed the 2012 amendment explicitly flagged the risk that overbroad anti-circumvention rules could come in the way of legitimate fair dealing and public access to

⁵⁹ Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1107–12 (1990); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575–79 (1994).

⁶⁰ *Eldred v. Ashcroft*, 537 U.S. 186, 219–21 (2003).

⁶¹ Directive (EU) 2019/790 arts. 3–4, 2019 O.J. (L 130) 92.

⁶² Martin Senftleben, *Bermuda Triangle—Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market*, 41 Eur. Intell. Prop. Rev. 480, 489–95 (2019).

⁶³ Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 Berkeley Tech. L.J. 519, 551–70 (1999).

⁶⁴ INDIA CONST. art. 19(1)(A).

⁶⁵ Copyright Act 1957, s 65A(2). The provision explicitly states that circumvention is permissible where it is done for a purpose that falls within the exceptions in Section 52, including fair dealing; the penalty provisions do not apply where the circumvention is for such a purpose.

knowledge, and directed that the judiciary be left to evolve the law in line with the public interest of facilitating access to works.⁶⁶ This legislative history carries important normative weight: the Indian legislature has itself acknowledged that the relationship between technological protection and public access must be calibrated in the public interest, and that acknowledgment provides a textual and structural foundation within domestic law for the constitutional argument that the present article advances.⁶⁷

The Supreme Court has previously observed that airwaves, being a natural resource, are limited in their capacity and cannot be appropriated by the State or any other individual entity to the exclusion of the general public.⁶⁸ The legal precept is not simply an administrative one but a constitutional one, since access to the means of communication is an element of freedom of expression. There can be no such thing as a right to impart and receive information where the infrastructure used for imparting information is monopolized by a particular entity. Translated to the present context, the rationale is simple enough. Just as airwaves cannot be monopolized for the sake of closing down the means of communication, similarly, the cultural commons, i.e., the entire body of textual, visual and intellectual inheritance of a society cannot be monopolized either, at least not without breaching Article 19(1)(a), because to do so would be to close down the exact same means of communication, viz., the means by which a society can communicate with itself through its inheritance.

In *Shreya Singhal v. Union of India*, the Court invalidated Section 66A of the Information Technology Act, in part, on the basis of the chilling effect doctrine, namely, that restrictions on speech need not even prohibit speech directly in order to infringe the right to free speech guaranteed by the Constitution; it suffices for them to create an atmosphere of fear and uncertainty in which speakers self-censor.⁶⁹ This is precisely the effect of technical protection measures, digital lock-in, and anti-circumvention rules. A scholar who would find herself in legal jeopardy if she accessed a digitized archive protected by technological protection measures is not necessarily facing censorship; it suffices that she is faced with a structural deterrent which leads her to self-censor. Similarly, a documentary filmmaker who cannot afford to pay licensing fees for footage which, under any statutory system of copyright, should

⁶⁶ Centre for Internet and Society, 'Technological Protection Measures in the Copyright (Amendment) Bill, 2010' (CIS India, 2012) <<https://cis-india.org/a2k/blogs/analysis-copyright-amendment-bill-2012/tpm-copyright-amendment>> accessed 31 August 2026.

⁶⁷ Prashant Iyengar, 'Circumvention Laws in the Copyright (Amendment) Act, 2012' (2015) 6(1) *International Journal of Intellectual Property Rights* 22.

⁶⁸ *Secretary, Ministry of Information & Broadcasting v. Cricket Ass'n of Bengal*, (1995) 2 SCC 161.

⁶⁹ *Shreya Singhal v. Union of India*, (2015) 5 S.C.C. 1, ¶¶ 83–87.

be in the public domain is not facing any censorship order; he simply chooses not to make the film. That *Shreya Singhal* teaches us that such structural forms of silencing are constitutionally cognizable does not mean we should confine it only to state restrictions on speech but must take it equally seriously here.

The judgment of *Justice K.S. Puttaswamy v. Union of India* adds an important aspect, namely the connection between informational autonomy and identity. The constitutional guarantee of a right to privacy in a pluralistic context implies a right to be in control of one's informational self, that is, being able to define oneself in one's own terms and being remembered in accordance with those terms.⁷⁰ Collective memory is part of collective identity, and the privatisation of collective memory amounts to informational dispossession of communities as opposed to individuals.⁷¹ In cases where the cultural archive through which a community defines itself is controlled by proprietary algorithms, the ability of the community to be in control of itself is thus weakened.⁷² In light of the Puttaswamy judgment extended to a communal level in a manner consistent with the constitutional text and the Directive Principles, it follows that informational autonomy has a communal component and that its violation amounts to constitutional damage as opposed to a mere policy inconvenience.

Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd. then goes on to confine this claim to the sphere of copyright. The Court's approach to the idea of compulsory licensing reflects a constitutional consciousness: private rights in expression are not inviolable, and there exists an identifiable public interest in the circulation of cultural works which courts cannot simply overlook while elevating copyrights to a form of property.⁷³ While this judgment may not use the language of collective memory, its normative commitments coincide with those of collective memory. In terms of statutory construction guided by constitutional values, what this article argues theoretically is that intellectual property rights in cultural works are ultimately justified by their public purpose, and where they fall short of achieving this end, the law should be so declared.⁷⁴

⁷⁰ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1, ¶¶ 297–298 (per Chandrachud, J.).

⁷¹ *Nat'l Legal Servs. Auth. v. Union of India*, (2014) 5 S.C.C. 438.

⁷² *E. Book Co. v. D.B. Modak*, (2008) 1 S.C.C. 1.

⁷³ *Ent. Network (India) Ltd. v. Super Cassette Indus. Ltd.*, (2008) 13 S.C.C. 30, ¶¶ 113–114.

⁷⁴ *The Chancellor, Masters & Scholars of the Univ. of Oxford v. Rameshwari Photocopy Servs.*, CS(OS) No. 2439/2012, judgment dated Sept. 16, 2016 (Del. High Ct.).

Table 1: Indian Constitutional Cases and Their Public Domain Implications

Case	Core Holding	Memory/Public Domain Implication
<i>Cricket Association of Bengal (1995)</i>	Airwaves are a public resource; their monopolisation violates Article 19(1)(a)	Cultural commons, like airwaves, cannot be captured by private actors without foreclosing the communicative conditions that free expression requires
<i>Shreya Singhal (2015)</i>	Structural chilling effects on speech are constitutionally cognisable under Article 19(1)(a)	Technological lock-in and anti-circumvention liability produce chilling effects on cultural access that are constitutionally equivalent to direct speech restrictions
<i>Puttaswamy (2017)</i>	Informational autonomy is a constitutional right; privacy protects the conditions of self-definition	Privatisation of collective memory constitutes informational dispossession at the community level, implicating constitutional values beyond individual privacy
<i>Entertainment Network v. Super Cassette (2008)</i>	Copyright is not absolute property; public interest in dissemination is constitutionally cognisable	Compulsory licensing logic confirms that IP rights in cultural works are justified by public purpose and must yield when that purpose is frustrated

The materials of a constitutional doctrine of the public domain are already available within the Constitution of India. The argument does not call for the Court to make any dramatic departure from its current path; all it demands is a clearer articulation of the path.⁷⁵ A legal tradition that has held that airwaves cannot be privatized contrary to public interest, that structural chilling effect constitutes a violation of the right to freedom of expression, that informational privacy is a constitutional right, and that copyrights must give way to public interests in dissemination has, in effect, constitutionalized the public domain.⁷⁶ All that is left now is its clear articulation.

⁷⁵ Shamnad Basheer & Prashant Reddy, *Create, Copy, Disrupt: India's Intellectual Property Dilemmas* 1–32 (Oxford Univ. Press 2017).

⁷⁶ INDIA CONST. art. 39(b).

CONCLUSION

The key question of this article is deceptively simple: who owns the past? From a legal standpoint, the answer to this question is increasingly private actors, protected by contracts, code, and anti-circumvention laws that function independently of the natural limits of copyright.⁷⁷ From a political-philosophical standpoint, however, this trend is simply unacceptable.

The collective memory is not a nicety; it is the very tool through which democratic societies make decisions, maintain identities, and produce new knowledge.⁷⁸ When this tool is progressively locked down by copyright extensions and platform dependencies trade access for ownership, the problem becomes wholly structural.⁷⁹ Culture becomes not only more costly to access but also more brittle, more biased, and more reflective of the interests of those who control the distribution infrastructure.⁸⁰

The reconceptualization outlined below, the public domain as constitutional-cultural infrastructure and IP as a temporary and proportionate departure from that infrastructure, is not a radical shift in the current state of affairs.⁸¹ Rather, it is a return to the logic that originally underwrote that state of affairs. Intellectual property was never meant to serve as a tool for the privatization of culture; instead, in the current digital era, it threatens to devolve into just that.⁸² There is a library within every legal system. The key question, ultimately, is whether the public is still allowed access.

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⁷⁷ Shamnad Basheer & Prashant Reddy, *Create, Copy, Disrupt: India's Intellectual Property Dilemmas* (Oxford Univ. Press 2017).

⁷⁸ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1; *Secretary, Ministry of Information & Broadcasting v. Cricket Ass'n of Bengal*, (1995) 2 SCC 161.

⁷⁹ Aaron Perzanowski & Jason Schultz, *The End of Ownership: Personal Property in the Digital Economy* 1–24 (2016).

⁸⁰ James Boyle, *The Public Domain: Enclosing the Commons of the Mind* 37–69 (2008).

⁸¹ Shamnad Basheer & Prashant Reddy, *Create, Copy, Disrupt: India's Intellectual Property Dilemmas* 1–32 (Oxford Univ. Press 2017).

⁸² *Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd.*, (2008) 13 SCC 30, ¶¶ 113–14.