
RECONCILING FREEDOM OF EXPRESSION AND COPYRIGHT IN THE AGE OF DIGITAL CONSTITUTIONALISM

Aditya Kumar, LLM (IP), Amity Law School, Amity University, Noida

ABSTRACT

The digital era has transformed the relationship between freedom of expression and copyright. Historically, copyright operated as a limited monopoly to reward creativity, while freedom of expression served as the foundation of democratic participation. Yet, the rise of the Internet, social media platforms, and algorithmic enforcement has blurred the boundaries between creative autonomy and proprietary control.

This paper examines the Indian constitutional framework under Article 19(1)(a) of the Constitution and its reasonable restrictions under Article 19(2), in relation to statutory copyright protection under the *Copyright Act, 1957*. It explores how *digital constitutionalism* a framework advocating for transparency, accountability, and participatory governance of digital platforms can reconcile these competing rights.

Through a comparative study of Indian, U.S., and U.K. jurisprudence, the paper argues that proportionality, public interest, and fair use/fair dealing must guide judicial and policy approaches to balance expression and ownership. It concludes that embedding constitutional principles into digital governance can preserve both creativity and free expression in the modern information society.

Keywords: Freedom of Expression, Copyright, Digital Constitutionalism, Fair Use, Algorithmic Censorship, Platform Governance, Indian Constitution.

1. Introduction

1.1 Historical Evolution of the Conflict

The relationship between freedom of expression and copyright has always been complex. The first modern copyright statute, the **Statute of Anne (1710)**, was enacted in England to protect authors from printer monopolies and to encourage learning¹. Over time, copyright evolved from a limited personal right into a comprehensive property regime encompassing books, art, music, film, and now digital content. The more copyright expanded, the greater its potential to limit free expression became.

1.2 Constitutional Foundation and Its Interface with Copyright

Freedom of expression occupies a fundamental place in India's constitutional architecture. Article 19(1)(a) guarantees every citizen the right to free speech and expression, while Article 19(2) allows reasonable restrictions for public order, morality, decency, defamation, and other limited grounds². The Supreme Court has repeatedly emphasized that restrictions must be narrowly construed and cannot have a chilling effect on legitimate speech³.

In *Romesh Thapar v. State of Madras* (1950), the Court held that freedom of speech is the foundation of all democratic organizations⁴. In *Shreya Singhal v. Union of India* (2015), it struck down Section 66A of the *Information Technology Act, 2000*, ruling that vague and overbroad restrictions on online speech violate Article 19(1)(a)⁵.

Copyright, though statutory, has a constitutional dimension because it affects the same expressive domain. The *Copyright Act, 1957* creates a balance through **Section 52**, which provides exceptions for criticism, review, and educational use, reflecting a recognition that creative works exist within a public dialogue⁶.

1.3 Philosophical Justifications of Copyright

Copyright has been defended through three major theoretical perspectives. The **Natural Rights**

¹ Statute of Anne, 1710, 8 Ann., c. 19 (Gr. Brit.).

² *The Constitution of India*, art. 19(1)(a), 19(2).

³ *S. Rangarajan v. P. Jagjivan Ram*, (1989) 2 S.C.C. 574 (India).

⁴ *Romesh Thapar v. State of Madras*, A.I.R. 1950 S.C. 124 (India).

⁵ *Shreya Singhal v. Union of India*, (2015) 5 S.C.C. 1 (India).

⁶ The Copyright Act, No. 14 of 1957, S. 52, India Code (1957).

Theory, rooted in John Locke's labour theory, views creative effort as a form of property deserving protection⁷. The **Utilitarian Theory**, particularly influential in the United States, sees copyright as a policy tool designed to promote the progress of science and the arts⁸. The **Personality Theory**, inspired by Hegel, conceives creative works as extensions of an author's personality, thus justifying *moral rights* such as attribution and integrity⁹.

While the natural rights and personality theories emphasize the creator's autonomy, the utilitarian view better accommodates free expression because it considers creativity as a public good. Excessive monopolization of knowledge can impede democratic discourse, while balanced copyright protection incentivizes innovation and dissemination simultaneously¹⁰.

1.4 The Digital Shift and the Rise of Digital Constitutionalism

The digital revolution has restructured both expression and ownership. Unlike print media, where infringement was tangible and traceable, the Internet allows instantaneous and global reproduction. Social media platforms YouTube, Twitter, Instagram serve as intermediaries for public discourse, yet they are privately owned spaces governed by opaque algorithms and moderation policies¹¹.

This privatization of communication raises constitutional questions. *Digital constitutionalism*, as developed by scholars such as Nicolas Suzor, advocates embedding constitutional values like transparency, participation, and rule of law into platform governance¹². It challenges the idea that only the state can threaten free speech; private corporations with global reach can now suppress lawful expression through automated copyright enforcement.

For instance, the European Union's **Digital Services Act (2022)** requires large platforms to disclose their moderation practices and offer appeal mechanisms¹³. In India, however, the **Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules**,

⁷ John Locke, *Second Treatise of Government*, S. 27 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

⁸ U.S. Const. art. I, S. 8, cl. 8.

⁹ Georg W.F. Hegel, *Philosophy of Right* S.43 (1821).

¹⁰ Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* 90–94 (Penguin 2004).

¹¹ Mark MacCarthy, *Transparency and Accountability in the Digital Age*, 34 Harv. J.L. & Tech. 13 (2021).

¹² Nicolas Suzor, *Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms*, 4 Soc. Media & Soc'y 1, 2–5 (2018).

¹³ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services (Digital Services Act).

2021 largely focus on government oversight rather than user rights, leaving gaps in accountability¹⁴.

1.5 Problem Statement and Significance of Study

The core issue this research addresses is **how to balance creative autonomy and proprietary protection within India's digital environment**. Over enforcement of copyright can suppress transformative uses such as parody, satire, and remix culture, thereby chilling speech¹⁵. Conversely, weak enforcement disincentivizes authors and undermines creative industries.

This research is significant for three reasons:

1. It situates the copyright expression conflict within India's constitutional framework, rather than treating it as a mere statutory issue.
2. It introduces *digital constitutionalism* as a normative model for private governance of expression.
3. It contributes to comparative constitutional studies by linking Indian jurisprudence with U.S. and U.K. practices.

1.6 Scope and Methodology

This study adopts a **doctrinal and comparative legal approach**. It analyses judicial decisions, statutory frameworks, and academic literature across India, the United States, and the United Kingdom. It uses qualitative reasoning to identify principles of proportionality and public interest that can mediate the conflict between expressive and proprietary rights¹⁶.

2. Conceptual Framework: Expression, Copyright, and Constitutional Balancing

2.1 Understanding "Freedom of Expression"

Freedom of expression, as enshrined in **Article 19(1)(a)** of the *Constitution of India*, guarantees every citizen the right to express opinions, disseminate information, and engage in artistic or

¹⁴ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Gazette of India, Extraordinary, pt. II, sec. 3(i) (Feb. 25, 2021).

¹⁵ *R.G. Anand v. Deluxe Films*, A.I.R. 1978 S.C. 1613 (India).

¹⁶ M.P. Jain, *Indian Constitutional Law* 1023–24 (9th ed. 2023).

creative communication. The Supreme Court of India has consistently emphasized that this right extends beyond mere verbal expression to include symbolic and artistic forms of communication¹⁷.

In *Indian Express Newspapers v. Union of India* (1985) 1 SCC 641, the Court held that freedom of expression encompasses the right to circulate information and ideas without interference, which is vital for democracy. The right also includes the freedom to receive information, as reaffirmed in *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal* (1995) 2 SCC 161¹⁸.

2.2 Copyright as a Statutory and Constitutional Construct

Copyright in India is governed by the *Copyright Act, 1957*, which provides authors exclusive rights to reproduce, adapt, and communicate their works to the public. These rights, however, are **statutory**, not **fundamental**. The Constitution does not expressly recognize intellectual property as a fundamental right, but courts have occasionally linked it to **Article 300A** (right to property)¹⁹.

At the same time, copyright affects the domain of expression protected by Article 19(1)(a). When enforcement of copyright limits access to or use of information, a constitutional question arises. The Supreme Court in *Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd.* (2008) 13 SCC 30, acknowledged the need to harmonize copyright with broader public interest, emphasizing that intellectual property cannot override fundamental freedoms²⁰.

2.3 Balancing Competing Rights: Proportionality, Necessity, and Reasonableness

When freedom of expression and copyright intersect, the **doctrine of proportionality** becomes the guiding judicial tool for reconciliation. Adopted from European jurisprudence, proportionality requires that any restriction on a fundamental right pursue a legitimate aim, use the least restrictive means, and maintain a rational connection between the restriction and the goal sought to be achieved²¹.

¹⁷ *Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India*, (1985) 1 S.C.C. 641 (India).

¹⁸ *Sec'y, Ministry of Info. & Broad. v. Cricket Ass'n of Bengal*, (1995) 2 S.C.C. 161 (India).

¹⁹ *Indian Performing Right Soc'y Ltd. v. Sanjay Dalia*, (2015) 10 S.C.C. 161 (India).

²⁰ *Entertainment Network (India) Ltd. v. Super Cassettes Indus. Ltd.*, (2008) 13 S.C.C. 30 (India).

²¹ Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* 131–34 (Cambridge Univ. Press 2012).

The Supreme Court formally adopted this doctrine in *Modern Dental College v. State of Madhya Pradesh* (2016) 7 SCC 353, observing that restrictions on fundamental rights must not be arbitrary or excessive²². Applying this reasoning to copyright, enforcement actions such as injunctions, takedown orders, or algorithmic blocking should be proportionate to the harm caused by infringement. Excessive pre-emptive measures can violate Article 19(1)(a) by suppressing legitimate transformative uses like parody, criticism, or academic commentary.

The **necessity test** further refines this analysis. It requires the State or a rights holder acting under statutory authority to demonstrate that no less restrictive measure could achieve the same legitimate objective. In the digital context, this means preferring targeted notice-and-takedown systems over blanket content bans.

2.4 “Public Interest” as a Mediating Principle

The notion of **public interest** bridges the two competing values free expression and proprietary control. The Kerala High Court in *Civic Chandran v. Ammini Amma* (1996) held that the fair use of copyrighted work for criticism or parody serves a legitimate public function²³. Similarly, the Delhi High Court in *Academy of General Education v. B. Malini Mallya* (2009) recognized educational use as a vital component of public interest, reflecting constitutional commitments to dissemination of knowledge²⁴.

Public interest ensures that copyright protection remains consistent with India’s socioeconomic context, where access to education and information is a constitutional aspiration under **Articles 21 and 39(f)**. By embedding public interest in interpretation, courts ensure that copyright law aligns with democratic and developmental objectives rather than functioning as a tool of exclusion.

2.5 Theoretical Intersections: Creativity as Expression vs. Property

Creativity embodies dual characteristics: it is both **expression** (a manifestation of thought) and **property** (a subject of ownership). This duality creates inherent friction between freedom of expression and copyright.

²² *Modern Dental Coll. & Research Ctr. v. State of M.P.*, (2016) 7 S.C.C. 353 (India).

²³ *Civic Chandran v. Ammini Amma*, 1996 (16) P.T.C. 329 (Ker. H.C.).

²⁴ *Acad. of Gen. Educ. v. B. Malini Mallya*, 2009 (39) P.T.C. 464 (Del. H.C.).

Under the **utilitarian theory**, copyright's primary function is to incentivize creativity for the public good. The U.S. Supreme Court in *Harper & Row v. Nation Enterprises* (1985) 471 U.S. 539 observed that while copyright grants exclusive rights to authors, those rights are subject to the First Amendment's goal of promoting the progress of knowledge²⁵. Thus, copyright must not inhibit the flow of information but facilitate it through balanced protection.

In contrast, the **U.K. approach** under the *Copyright, Designs and Patents Act 1988* limits fair dealing to specific purposes such as research, private study, and criticism. This provides clarity but less flexibility than the American fair use doctrine. India's hybrid model structured exceptions under Section 52 of the *Copyright Act, 1957* blends the predictability of the U.K. model with the openness of the U.S. system²⁶.

This synthesis reflects India's constitutional culture of “**structured flexibility**” balancing rule based precision with equitable interpretation.

2.6 Case Illustrations Demonstrating the Tension

Indian courts have repeatedly confronted the conflict between expression and copyright. In *R.G. Anand v. Deluxe Films* (1978) AIR 1613, the Supreme Court ruled that similarities in themes do not amount to infringement unless the expression itself is substantially copied²⁷. This judgment recognizes that ideas are free for all, while only their expression attracts protection a principle critical to preserving creative diversity.

In *Super Cassettes Industries v. MySpace Inc.* (2016) 65 PTC 167 (Del HC), the Delhi High Court examined intermediary liability in the digital domain. The Court held that platforms are not automatically liable for user-generated infringement unless they have actual knowledge and fail to act. The ruling aligns with the constitutional value of free expression by protecting intermediaries that facilitate online creativity and communication²⁸.

By contrast, in *Sony Corp. v. Universal City Studios* (1984) 464 U.S. 417, the U.S. Supreme Court held that time-shifting technology like video recording did not constitute infringement, as it enabled private, non-commercial use consistent with fair use principles²⁹. These cases

²⁵ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556–57 (1985).

²⁶ The Copyright Act, No. 14 of 1957, S.52, India Code (1957).

²⁷ *R.G. Anand v. Deluxe Films*, A.I.R. 1978 S.C. 1613 (India).

²⁸ *Super Cassettes Indus. v. MySpace Inc.*, (2016) 65 P.T.C. 167 (Del. H.C.).

²⁹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

collectively illustrate that courts globally are inclined toward a balanced approach that protects creativity while avoiding suppression of legitimate speech.

3. Digital Constitutionalism and the Reconfiguration of Rights

3.1 Introduction: From State-Centered to Digital Constitutionalism

The twenty-first century has witnessed a profound transformation in how rights are exercised and regulated. Traditionally, constitutions constrained **state power**, ensuring that governments respected individual freedoms. However, in the digital era, **private technology corporations** not the state frequently control the architecture of communication. This has led to the emergence of the concept of **digital constitutionalism**, which seeks to apply constitutional values such as transparency, accountability, and the rule of law to private online platforms³⁰.

Nicolas Suzor defines digital constitutionalism as the process of "using constitutional principles to evaluate and guide the legitimacy of governance by digital platforms"³¹. It recognizes that corporations like Google, Meta, and X (formerly Twitter) now act as *quasiconstitutional authorities*, shaping who may speak, what may be seen, and which content is removed.

The global nature of these digital intermediaries means their decisions often have **constitutional consequences** especially when automated systems remove lawful speech under copyright claims or content moderation policies.

3.2 Core Principles of Digital Constitutionalism

Digital constitutionalism rests upon several **foundational principles** that aim to reconcile the tension between private power and public rights:

1. **Transparency** – Platforms must disclose their content moderation and copyright enforcement criteria to ensure due process for users.
2. **Accountability** – Companies must provide mechanisms for appeal and correction when

³⁰ Edoardo Celeste, *Digital Constitutionalism: The Role of Internet Bills of Rights* 4–6 (Routledge 2023).

³¹ Nicolas Suzor, *Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms*, 4 Soc. Media & Soc'y 1, 2 (2018).

lawful expression is wrongfully removed.

3. **Participation** – Users should have a voice in shaping platform governance through consultative or community-driven processes.
4. **Fundamental Rights Protection** – Digital policies should align with constitutional and human rights norms.

In India, these principles find partial recognition in the **Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021**, which impose due diligence obligations on intermediaries. However, these rules have been criticized for enabling state surveillance rather than user empowerment³².

In contrast, the **European Union’s Digital Services Act (2022)** explicitly codifies transparency and accountability obligations for online intermediaries, requiring periodic transparency reports, independent audits, and appeal mechanisms³³. The EU approach demonstrates that platform regulation can coexist with fundamental rights protection a model India may emulate.

3.3 Digital Platforms as Modern Public Spheres

Social media and online platforms have become the **new public squares** spaces where individuals debate, organize, and create. The Supreme Court of India recognized the Internet’s integral role in *Anuradha Bhasin v. Union of India* (2020) 3 SCC 637, holding that freedom of speech and trade over the Internet is constitutionally protected³⁴.

However, when digital spaces are privately governed, they effectively determine the boundaries of expression. Algorithms and automated moderation systems decide which content is amplified or suppressed, often with minimal transparency.

In *Packingham v. North Carolina* (2017) 137 S. Ct. 1730, the U.S. Supreme Court likened social media platforms to “the modern public square,” observing that exclusion from them

³² Usha Ramanathan, “A Surveillance Framework in Disguise,” *Indian Express* (Mar. 2021).

³³ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services (Digital Services Act).

³⁴ *Anuradha Bhasin v. Union of India*, (2020) 3 S.C.C. 637 (India).

could amount to a denial of free speech. While private platforms are not state actors under U.S. law, the case underscored their functional importance in democratic discourse³⁵.

Similarly, Indian scholars have argued that constitutional values must extend “horizontally” to private actors that control essential communication infrastructure. The doctrine of **horizontal effect** though not formally adopted in India has gained traction in comparative constitutional scholarship.

3.4 Algorithmic Enforcement and Copyright Expansion

Digital constitutionalism becomes particularly relevant when analyzing **automated copyright enforcement**. Systems like YouTube’s *Content ID* employ algorithmic detection to remove allegedly infringing material. Although efficient, these systems frequently suppress **lawful uses** such as parody, commentary, or transformative remixing.

In *Super Cassettes Industries v. MySpace Inc.* (2016) 65 PTC 167 (Del HC), the Delhi High Court addressed intermediary liability for user uploaded content. The Court held that platforms are not automatically liable unless they have “actual knowledge” of infringement and fail to act echoing the safe harbor model in the U.S. *Digital Millennium Copyright Act (DMCA) 1998*³⁶.

However, automated systems often exceed these thresholds, effectively performing pre-emptive censorship without judicial oversight. Scholars argue that such algorithmic filtering transfers decision-making from courts to private software, undermining procedural fairness³⁷.

The **European Court of Justice (CJEU)** in *Glawischnig Piesczek v. Facebook* (Case C-18/18, 2019) warned that global takedown orders could violate proportionality and freedom of expression principles, illustrating the risks of overreach in automated enforcement.

3.5 Private Power, Constitutional Guarantees, and Platform Governance

One of the central concerns of digital constitutionalism is the **privatization of constitutional**

³⁵ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

³⁶ *Super Cassettes Indus. v. MySpace Inc.*, (2016) 65 P.T.C. 167 (Del. H.C.); Digital Millennium Copyright Act of 1998, 17 U.S.C. S.512.

³⁷ Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* 53–59 (Yale Univ. Press 2018).

authority. When platforms remove content, suspend users, or algorithmically demote speech, they effectively perform functions analogous to state regulation. Yet, traditional constitutional theory binds only state action.

In India, the Supreme Court in *Zee Telefilms Ltd. v. Union of India* (2005) 4 SCC 649 clarified that private bodies performing public functions may, in limited contexts, attract constitutional scrutiny under Article 226. Extending this reasoning to the digital sphere suggests that major platforms exercising public communicative functions should similarly respect constitutional guarantees³⁸.

Comparatively, the United Kingdom's **Online Safety Act 2023** introduces "duty of care" obligations on platforms, emphasizing risk mitigation, transparency, and user safety while recognizing free expression as a protected value³⁹. The Indian government's forthcoming **Digital India Act** draft also aims to codify user rights and responsibilities in the digital ecosystem, potentially offering an avenue to embed constitutional values into platform regulation.

3.6 Global Debates on Digital Rights and Expression

Internationally, debates on **digital rights** revolve around the tension between free expression, data protection, and intellectual property. The **UN Human Rights Council (2021)** reaffirmed that rights offline must also be protected online, emphasizing transparency and accountability of private intermediaries⁴⁰.

The **Council of Europe's Recommendation CM/Rec(2018)2** further underscored the need for human rights compliant algorithms, urging member states to prevent excessive content filtering. In the United States, the discourse remains polarized between **Section 230 of the Communications Decency Act** (which shields platforms from liability) and calls for reform to ensure accountability without undermining free speech⁴¹.

For India, which seeks to position itself as a global digital power, embracing these global standards is crucial. By embedding transparency, procedural fairness, and participatory

³⁸ *Zee Telefilms Ltd. v. Union of India*, (2005) 4 S.C.C. 649 (India).

³⁹ Online Safety Act, 2023, c. 50 (U.K.).

⁴⁰ Human Rights Council Res. 47/16, U.N. Doc. A/HRC/RES/47/16

⁴¹ Communications Decency Act of 1996, 47 U.S.C. S.230.

oversight in its digital governance framework, India can promote both innovation and rights-based regulation.

4. Judicial and Legislative Approaches to Reconciling Expression and Copyright

Judicial and legislative developments across jurisdictions demonstrate that the conflict between freedom of expression and copyright is neither novel nor intractable. Courts and legislatures have repeatedly attempted to draw a constitutional balance that safeguards both the author's proprietary rights and the public's right to access and use creative works. In India, this process has been shaped by constitutional interpretation under **Articles 19(1)(a) and 19(2)**, as well as by the evolving framework of the *Copyright Act, 1957*⁴².

4.1 Indian Judicial Trends

Indian courts have taken a nuanced approach, recognizing both the statutory exclusivity of copyright and the constitutional value of free expression. In *R.G. Anand v. Deluxe Films* (1978) AIR SC 1613, the Supreme Court held that copyright does not protect ideas, plots, or themes, but only their specific expression. This principle prevents the monopolization of creative thought, ensuring that ideas remain part of the public domain⁴³.

In *Civic Chandran v. Ammini Amma* (1996) 16 PTC 329 (Ker HC), the Kerala High Court addressed the use of copyrighted material in a political parody. The Court ruled in favor of the defendant, emphasizing that "criticism, review, or comment" falls within fair dealing and constitutes an exercise of free expression. The Court explicitly linked the interpretation of Section 52 of the *Copyright Act* to the constitutional guarantee of Article 19(1)(a)⁴⁴.

In *Super Cassettes Industries v. MySpace Inc.* (2016) 65 PTC 167 (Del HC), the Delhi High Court examined intermediary liability for copyright infringement. It held that platforms are not liable for user-generated infringing content unless they possess *actual knowledge* of infringement. This judgment harmonized copyright enforcement with the right to free communication online, consistent with the proportionality principle⁴⁵.

⁴² *The Constitution of India*, arts. 19(1)(a), 19(2); *The Copyright Act*, No. 14 of 1957, India Code (1957).

⁴³ *R.G. Anand v. Deluxe Films*, A.I.R. 1978 S.C. 1613 (India).

⁴⁴ *Civic Chandran v. Ammini Amma*, 1996 (16) P.T.C. 329 (Ker. H.C.).

⁴⁵ *Super Cassettes Indus. v. MySpace Inc.*, (2016) 65 P.T.C. 167 (Del. H.C.).

4.2 Legislative Balancing under the Copyright Act, 1957

The *Copyright Act, 1957* strikes a delicate balance between protection and access. Section 52(1) enumerates exceptions criticism, review, reporting, teaching, and research that embody the concept of *fair dealing*. These exceptions ensure that expressive activities essential to democracy and education remain lawful⁴⁶.

The 2012 Amendment to the Act further expanded access rights, particularly for persons with disabilities and educational institutions, reflecting the legislature's recognition of copyright's public function. The inclusion of statutory licensing provisions for broadcasting (*Section 31D*) also advances the principle of equitable access.

By codifying such limitations, Parliament affirmed that copyright must be exercised in harmony with constitutional guarantees and public interest, rather than as an unqualified property right.

4.3 The U.S. Perspective: Fair Use and the First Amendment

The United States has long treated copyright as a **limited monopoly** consistent with the First Amendment's guarantee of free speech. The *fair use* doctrine, codified in **Section 107 of the U.S. Copyright Act (1976)**, allows reproduction for purposes such as criticism, comment, news reporting, and education, evaluated through a four-factor test⁴⁷.

The landmark case *Campbell v. Acuff-Rose Music, Inc.* (1994) 510 U.S. 569, involved a parody of Roy Orbison's song "Oh, Pretty Woman." The U.S. Supreme Court held that parody constituted transformative use and was therefore protected under fair use. Justice Souter noted that "the goal of copyright is to promote the progress of science and the arts," emphasizing that the doctrine's flexibility ensures harmony between copyright and free expression⁴⁸.

Similarly, in *Eldred v. Ashcroft* (2003) 537 U.S. 186, the Court acknowledged that copyright law incorporates "built-in First Amendment accommodations," including the idea/expression dichotomy and fair use. Thus, the American system integrates constitutional considerations

⁴⁶ The Copyright (Amendment) Act, No. 27 of 2012, India Code (2012).

⁴⁷ Copyright Act of 1976, 17 U.S.C. § 107 (2018).

⁴⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

within statutory design, rather than treating them as conflicting domains.

4.4 The European Union and United Kingdom: Proportionality and Rights Based Balancing

The European Union and United Kingdom approach the relationship between copyright and expression through the **Charter of Fundamental Rights of the European Union** (2000), which recognizes both the “freedom of expression” (Article 11) and the “right to property” (Article 17). Courts are required to balance these rights using the proportionality test.

In *Ashdown v. Telegraph Group Ltd.* [2001] EWCA Civ 1142, the Court of Appeal held that while copyright protects creative labor, it cannot override freedom of political expression where publication serves the public interest⁴⁹. The judgment incorporated **Article 10 of the European Convention on Human Rights (ECHR)** directly into copyright reasoning, thereby constitutionalizing the balance between the two rights.

Similarly, the Court of Justice of the European Union (CJEU) in *Deckmyn v. Vandersteen* (Case C-201/13, 2014) emphasized that exceptions like parody must be interpreted consistently with freedom of expression. This proportional, rights-based approach contrasts with the more rule oriented Indian model but provides valuable interpretive guidance for future reform.

4.5 Comparative Evaluation

A comparative analysis of these jurisdictions reveals a gradual convergence toward **constitutional balancing**. The United States relies on the internal flexibility of fair use; the United Kingdom applies proportionality tests under human rights frameworks; and India uses statutory exceptions aligned with Article 19 jurisprudence.

However, India faces unique challenges in the digital era. Algorithmic enforcement and takedown systems often operate without due process, leading to suppression of lawful content. Courts must therefore develop jurisprudence that not only applies proportionality but also incorporates **digital constitutionalism** ensuring that both state and private actors respect free expression within copyright governance.

⁴⁹ *Ashdown v. Telegraph Grp. Ltd.*, [2001] EWCA (Civ) 1142 (U.K.); Charter of Fundamental Rights of the European Union, arts. 11, 17.

Incorporating transparency, procedural safeguards, and participatory review mechanisms into copyright enforcement especially in digital contexts will harmonize India's approach with global standards while preserving its constitutional distinctiveness.

5. Challenges and Emerging Concerns in the Digital Era

The digital revolution has blurred the boundaries between authorship, ownership, and audience participation. While technology democratizes creativity, it also introduces unprecedented challenges for balancing freedom of expression with copyright protection. Issues such as **algorithmic censorship**, **platform governance**, and **AI-generated content** have redefined the traditional parameters of expressive and proprietary rights.

Indian law, though robust in its constitutional protection of free speech, is still adapting to these digital realities. As copyright enforcement becomes automated and globalized, it risks undermining the participatory and pluralistic ideals enshrined in Article 19(1)(a) of the *Constitution of India*.⁵⁰

5.1 Algorithmic Enforcement and Overreach

One of the most pressing challenges is the overreach of **automated copyright enforcement systems**. Platforms like YouTube and Facebook rely on algorithmic filters such as *Content ID* to detect and remove allegedly infringing material. While these systems streamline enforcement, they frequently result in **false positives**, where lawful uses such as parody, criticism, or educational content are removed without due process⁵¹.

This form of “machine censorship” raises serious constitutional questions. Since platforms function as primary spaces for speech, their automated decisions can indirectly limit freedom of expression. As Mark MacCarthy observes, “algorithmic moderation lacks the transparency and accountability that constitutional law demands of state regulation”⁵².

The Delhi High Court's reasoning in *Super Cassettes Industries v. MySpace Inc.* (2016) already hinted at this problem. By holding that intermediaries are liable only when they have *actual*

⁵⁰ *The Constitution of India*, art. 19(1)(a).

⁵¹ Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* 56–59 (Yale Univ. Press 2018).

⁵² Mark MacCarthy, *Transparency and Accountability in the Digital Age*, 34 Harv. J.L. & Tech. 13 (2021).

knowledge of infringement, the Court implicitly rejected blanket takedowns. Yet, in the digital age, the line between notice and knowledge is increasingly blurred, demanding clearer regulatory safeguards⁵³.

5.2 Chilling Effects on Speech and Creativity

Excessive copyright enforcement especially through algorithmic or pre-emptive measures can create a **chilling effect** on lawful speech. Creators may avoid producing content that could be flagged as infringing, even when it qualifies as fair dealing or transformative use.

The Supreme Court in *Shreya Singhal v. Union of India* (2015) warned that vague or overbroad restrictions chill speech by compelling self-censorship⁵⁴. Although the case concerned online speech regulation, its rationale applies equally to copyright enforcement: uncertainty about permissible expression discourages participation in cultural and political discourse.

This chilling effect is particularly visible in India's **digital creative economy**, where small creators depend on platforms for livelihood. Automated takedowns can disrupt incomes and reputations, effectively penalizing expression before any adjudication of infringement.

5.3 Platform Governance and Quasi-Constitutional Power

Platforms such as YouTube, X (Twitter), and Meta exercise **quasi-constitutional authority** they determine what speech is permissible and what content must be removed. This private governance creates a new layer of regulation beyond the reach of public law.

India's **Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021** attempt to regulate intermediary accountability but primarily from a **state control perspective** rather than a rights-based one⁵⁵. By contrast, the **EU Digital Services Act (2022)** adopts a human rights-oriented framework, requiring transparency reports, appeal mechanisms, and algorithmic accountability⁵⁶.

⁵³ *Super Cassettes Indus. v. MySpace Inc.*, (2016) 65 P.T.C. 167 (Del. H.C.).

⁵⁴ *Shreya Singhal v. Union of India*, (2015) 5 S.C.C. 1 (India).

⁵⁵ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Gazette of India, Extraordinary, pt. II, sec. 3(i)

⁵⁶ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services (Digital Services Act).

The challenge for India is to extend constitutional principles especially procedural fairness and proportionality to the governance of private platforms. Courts may need to adopt the “**functional public authority**” doctrine, treating dominant intermediaries as entities performing public functions subject to constitutional scrutiny.

5.4 Remix Culture, Parody, and Transformative Use

The rise of **remix culture** and participatory creativity presents another tension. Social media has normalized the reuse and transformation of existing works through memes, parodies, or short videos as forms of expression. While these practices promote cultural dialogue, they often challenge traditional notions of authorship and infringement.

The Kerala High Court in *Civic Chandran v. Ammini Amma* (1996) set an early precedent by upholding the use of copyrighted material for political critique, underscoring that copyright cannot stifle creative dissent⁵⁷. In the U.S., *Campbell v. Acuff-Rose Music, Inc.* (1994) extended similar protection to parody as a transformative use under fair use principles⁵⁸.

Indian law under Section 52 of the *Copyright Act, 1957* recognizes fair dealing for criticism, review, and reporting, but lacks explicit acknowledgment of parody and transformative use. Judicial expansion of this provision could align Indian law with evolving global standards while safeguarding creative autonomy.

5.5 Artificial Intelligence and Ownership Dilemmas

The advent of **artificial intelligence (AI)** introduces new uncertainties in copyright law. AI systems generate music, art, and literature, often trained on massive datasets of copyrighted material. This raises two core questions:

1. Can AI-generated works attract copyright protection?
2. Does AI training on copyrighted material constitute infringement?

In India, the *Copyright Office* has thus far required a **human author** for copyright subsistence, aligning with global practice. However, as AI becomes more autonomous, the boundary

⁵⁷ *Civic Chandran v. Ammini Amma*, 1996 (16) P.T.C. 329 (Ker. H.C.).

⁵⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

between human and machine creativity blurs.

In *Authors Guild v. Google, Inc.* (2015) 804 F.3d 202 (2d Cir.), the U.S. Court of Appeals held that digitizing and indexing books for search purposes constituted fair use because it was transformative and non-exploitative. This precedent is now cited in debates over AI training, suggesting that such uses may qualify as fair use if they serve informational or transformative purposes⁵⁹.

Still, the ethical and economic implications remain unresolved: unlicensed data scraping can disadvantage authors and distort creative markets. Hence, AI governance must incorporate principles of **transparency, consent, and compensation** while balancing innovation with fairness.

5.6 Digital Monopolies and Constitutional Risks

The growing concentration of communicative and economic power in a handful of tech corporations poses **constitutional risks**. Platforms not only influence markets but also determine access to speech. This “platform capitalism” challenges democratic accountability, as these companies often operate beyond the jurisdictional reach of national regulators.

In India, the Supreme Court’s evolving **right to privacy jurisprudence**, beginning with *K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1, recognizes informational autonomy as a constitutional value. Extending this reasoning, excessive data control and speech regulation by private actors could be interpreted as infringing citizens’ autonomy and dignity⁶⁰.

To mitigate these risks, India must develop a **digital rights charter** or statutory bill that extends constitutional safeguards into private digital environments. Such a framework would align with international norms and the vision of *digital constitutionalism*.

6. Conclusion

6.1 Synthesis of Findings

The study has traced the evolution of the conflict between **freedom of expression** and

⁵⁹ *Authors Guild v. Google, Inc.*, 804 F.3d 202, 219–22 (2d Cir. 2015).

⁶⁰ *K.S. Puttaswamy v. Union of India*, (2017) 10 S.C.C. 1 (India).

copyright from its historical origins to the challenges of the digital age. It established that both rights, while distinct in nature and purpose, share a common democratic foundation: each seeks to promote creativity, knowledge dissemination, and cultural participation.

Indian constitutional jurisprudence anchored in **Article 19(1)(a)** treats freedom of expression as a fundamental right essential for democracy, while copyright, though statutory, draws legitimacy from its contribution to creative progress. The courts have interpreted these rights harmoniously rather than hierarchically, ensuring that neither eclipses the other.

From *R.G. Anand v. Deluxe Films* (1978) to *Super Cassettes v. MySpace Inc.* (2016), Indian courts have refined the doctrine of fair dealing to safeguard expressive autonomy within intellectual property regulation⁶¹. This alignment of copyright with constitutional principles embodies a balanced, rights-oriented approach consistent with India's democratic ethos.

6.2 Digital Constitutionalism as a Transformative Framework

The digital revolution has fundamentally altered how expressive and proprietary rights are exercised. Platforms, algorithms, and AI systems have assumed quasi-constitutional power regulating access to speech and culture on a global scale. **Digital constitutionalism** responds to this transformation by embedding constitutional values such as **transparency**, **accountability**, and **participation** into digital governance⁶².

Comparative analysis shows that the **EU's Digital Services Act (2022)** and the **UK's Online Safety Act (2023)** already operationalize these principles through procedural fairness and algorithmic transparency. India's **Information Technology Rules, 2021**, though a step forward, remain oriented toward state control rather than user rights. By reforming this framework into a participatory model emphasizing user autonomy and platform accountability, India can ensure that constitutional principles extend into digital private spheres.

6.3 Evaluating the Effectiveness of India's Current Approach

India's current copyright regime embodies a cautious but incomplete reconciliation between

⁶¹ *R.G. Anand v. Deluxe Films*, A.I.R. 1978 S.C. 1613 (India); *Super Cassettes Indus. v. MySpace Inc.*, (2016) 65 P.T.C. 167 (Del. H.C.).

⁶² Nicolas Suzor, *Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms*, 4 Soc. Media & Soc'y 1, 2–5 (2018).

expression and ownership. While **Section 52** of the *Copyright Act, 1957* incorporates essential fair dealing provisions, it lacks explicit recognition of **parody**, **remix culture**, and **transformative use** forms of expression central to the digital era.

Moreover, judicial oversight of algorithmic moderation and platform governance remains limited. The proportionality and necessity doctrines so vital in free speech jurisprudence must now guide copyright enforcement as well. Courts must require **transparency in automated takedown systems**, ensuring that technology serves creativity, not control.

6.4 The Path Forward

Moving forward, the reconciliation of freedom of expression and copyright in India requires a multi-pronged strategy:

1. **Judicial Reinforcement of Proportionality:** Courts should apply the proportionality test to copyright restrictions, ensuring that enforcement is narrowly tailored to legitimate aims.
2. **Expansion of Fair Dealing:** Legislative reform should explicitly include parody, satire, and transformative works within Section 52 exceptions.
3. **Constitutionalization of Platform Governance:** Intermediary liability and content moderation frameworks should incorporate due process, user participation, and appeal rights.
4. **Integration of Digital Constitutionalism:** Future digital laws such as the proposed *Digital India Act* should embed constitutional safeguards across public and private online spaces.

These measures together would preserve India's cultural pluralism and democratic integrity while fostering innovation and creative enterprise.

6.5 Conclusion

The convergence of constitutional and digital paradigms marks a pivotal moment in the evolution of Indian copyright law. Freedom of expression and copyright are not antagonistic

forces but **complementary instruments of creativity** each enabling the other when balanced through principles of proportionality, fairness, and transparency.

By embracing **digital constitutionalism**, India can lead a rights-based model of digital governance that preserves its constitutional vision in an era dominated by global platforms and algorithms. The challenge ahead lies not in choosing between freedom and ownership, but in reimagining both as cooperative foundations of a democratic, creative, and digitally inclusive society.

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