PIRACY OF THE PUBLIC DOMAIN

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A postgraduate student, researching a rare early 20th century Kannada novel titled *Chandraprabhe*, accessed it through her university's digital library. The novel was unquestionably in the public domain, so she expected open access. Instead, she found the text locked behind a private tech aggregator's restrictive viewer that blocked copying, downloading, screenshots, and offline reading. A work that the law had released into the commons had been effectively re-privatised through software design rather than copyright.

Her frustration led her to search for another edition. She discovered that an international archive had digitised the same novel under an open licence. However, this version was geo blocked for her region. Automated filters had misclassified the century old novel as restricted material. The paradox was clear. A public domain text was more freely accessible to readers outside India than to scholars within the very community to which it belonged. These barriers were created entirely by code, contracts, and platform policies and not by copyright law. This mismatch between legal rights and digital restrictions reflects a larger systemic shift.

Her incident was more than just a personal trouble, it represented a wider transformation in the digital ecosystem where the limit of public access is gradually being shifted from law to technology. Software works like a hidden boundary. Digital Rights Management tools play the role of gatekeepers. Automatic filters function as covert enforcers, at times stripping off rights that copyright law clearly grants. When code, contracts, and platform rules start to eclipse legislation, public domain works run the risk of being regulated more by private technical design than by the legal framework that was meant to liberate them. This movement is closely associated with how intellectual property evolved in the past.

Intellectual property, comprising copyright, trademarks, patents, and trade secrets, did not gain economic importance until the late 1800s.[1] In earlier times, industrialists were against the adoption of stronger protections due to the fear of losing market share. The emergence of

[1] Julie Heng, Arrizka Faida and Chris Borges, *Explainer: A Brief History of the International IP Regime* (IP LeadershIP, 19 February 2025) https://ipleadership.org/explainer-a-brief-history-of-the-international-ip-regime/

monopolies and cartels, however, led the companies to advocate for more extensive rights over the intangibles.[2] In the USA, this often served as a practical way to bypass antitrust laws. The term intellectual property started to be more commonly used only after World War II, when companies increasingly relied on monopolies backed by the government to maintain their profits.[3] The last thirty years have seen a massive increase in the protection of IP, which has caused scholars and activists to express their concerns that such expansion mainly deprives the technology sector of a lion's share of the market.[4] The same worries are already present in the way that the digital rights of public domain materials are handled.

Digital Rights Management systems are at the main cause of this transformation. They identify and monitor digital works through Rights Management Information and also use Technological Protection Measures to implement license terms and control access. The 2010 Amendment in India legalised this by classifying TPM circumvention under Section 65A as a crime with a maximum imprisonment of two years. The proposal was a topic of discussion. Some industry groups were asking for harsher punishments while others were advocating for civil rather than criminal solutions.[5] Other discussions were about unnecessary record keeping, limitations on the use of circumvention tools, and the concern that TPMs might cut off research, fair use, or access that is otherwise legitimate. Sections 65A and 65B of the Indian legal system are together referred to as the anti-circumvention regime, with Section 65A dealing with the act of breaking down technical barriers and Section 65B being concerned with the elimination of rights management information.[6] The global developments such as the Napster case made these conflicts more evident.

In the year of 1999, Shawn Fanning, a university student of Northeastern University created Napster,[7] a peer to peer system that let people share MP3 files free of charge. The features of

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[2] Daniel McIntosh, 'We Need to Talk About Data: How Digital Monopolies Arise and Why They Have Power and Influence' (2019) *Journal of Technology Law & Policy* https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1188&context=jtlp

[3] David J Kappos, 'The Antitrust Assault on Intellectual Property' (2018) 31 *Harvard Journal of Law & Technology* 665 https://jolt.law.harvard.edu/assets/articlePDFs/v31/The-Antitrust-Assault-on-Intellectual-Property-David-Kappos.pdf

[4] James Boyle, 'A Manifesto on WIPO and the Future of Intellectual Property' (2004) *Duke Law & Technology Review* No 1113 https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1113&context=dltr

[5] *India's New Copyright Law: The Good, the Bad and the Ugly* (Journal of Intellectual Property Law & Practice Blog, 2012) https://jiplp.blogspot.com/2012/12/indias-new-copyright-law-good-bad-and.html

[6] Centre for Internet and Society, 'TPM and the Copyright Amendment' (CIS India, 2012) https://cis-india.org/a2k/blogs/tpm-copyright-amendment

[7] Vaidehi Ajith Prabhav, 'A Brief Study on Napster Case and Its Impact on the Modern World' (2021) *International Journal of Advanced Legal Research* Vol 2 Issue 2

ripping CDs, easy search tools, and quick downloads were combined and made the platform immensely popular. Unfortunately, such a convenience not only got rid of the copyright that used to be a barrier but also fast tracked the process of devaluation of MP3s. Major music companies like Sony Entertainment and A&M Records went to court and accused Napster of contributory and vicarious infringement especially as most of the content (about 70%) was copyrighted. Napster based its case on the Sony v. Universal City Studios Betamax[8] defense and claimed that it offered a significant amount of non-infringing use. The courts did not agree. The United States District Court decided that Napster knew about the copyright infringement and was therefore able to control it, and that it did not implement its guidelines properly which were meant to prevent misuse. The Ninth Circuit confirmed the order that had been given. It did not accept Napster's arguments concerning fair use. Usage for sampling was considered commercial. Space shifting was not relevant as the files were publicly accessible. Mass sharing was not allowed under the permissive distribution terms. The Betamax exception was not applicable in this case since the service was mainly based on uncontrolled illegal copying. Ultimately, Napster was found guilty.

The Napster case had a major impact on copyright enforcement worldwide. It was the case that opened the door for stricter online protection regimes, contributed to the evolution of laws regarding telecom and copyright, and was the main reason why the Digital Millennium Copyright Act, 1998 and similar statutes were made even more powerful. Even though Napster had a very short-lived comeback as a paid service in 2001, it could not hold its ground against more advanced and better organized platforms that were based on its concept. The service ceased operations altogether in 2002, but it was the turning point for licensed streaming services like Spotify and Apple Music that were copied from it but combined with licensing, subscriptions, and strict compliance.[9] This worldwide change draws attention to the inconsistencies in India’s copyright law.

The Copyright Act tries to establish a balance between the rights of the creators and the access of the public. The Third Party Section protects the activities of research, education, and fair use. Nevertheless, the two Sections 65A and 65B may somehow disturb this balance. Availability under Section 52 completely gives access to that work but through the DRM system, it becomes unreachable. The law allows one to access it. The platform refuses it.[10] This

[8] Sony Corporation of America v. Universal City Studios, Inc, 464 US 417 (1984)
[9] Prabhav (n 6)
[10] The Copyright and Free Expression Forum, ‘The Unholy Trinity: Pirates of the Academia, Digital Rights

inconsistency demonstrates that the public's rights in the digital era are often determined by the technological designs of private intermediaries rather than by legal protections. This is the reason why the public domain needs to have structural safeguards that are strong enough.

A Digital Commons Integrity Framework that regards the public domain as civic infrastructure is one possible solution. All platforms that provide content from the public domain would be required to use a Public Domain Stamp, which is a cryptographically verifiable watermark given by a neutral public authority, as it is a way of identifying the public domain. It is the case that the imposition of DRM, paywalls, or licensing terms on a PDS marked work would be considered a False Rights Assertion and would invite the same penalties as misrepresentation under consumer protection law. Besides, every platform provider would have to operate a Public Domain Mirror Layer, which is basically a never-ending free edition of every PDS marked file that is kept at a national repository that is open for the public to access. This is a measure that will effectively make it impossible for any private entity to control the access to the public domain materials. The discussion then transitions from one of circumvention to that of prevention of wrongful appropriation and it is ensured that technology does not have the power to create monopolies over works that have already been released into the commons.

There is a need for legislative reinforcement. It is recommended to amend Section 52 in such a way that it would clearly state that non-appropriation of public domain works is considered and would thus, prohibit the exclusive claims, license wrapping, DRM or paywalls on such materials. This compliance should be made part of the safe harbour obligations under Section 79 of the Information Technology Act. If a platform does not apply the Public Domain Stamp or does not provide a free mirror then it would lose its intermediary immunity. Violations of rights assertions, like applying DRM to PDS marked works, could result in civil liability under the Consumer Protection Act for misleading claims of ownership or licensing. These actions may also be classified as an abuse of dominant position under the Competition Act, if a platform using access controls does eliminate competition, restrict market access or impose unfair conditions on users.

The Kannada novel is an excellent example of how digital restrictions can slowly and silently take away the rights that the law has given to the public. The use of DRM, filters, or paywalls

Management and Fair Use in India' (9 November 2025) https://tclf.in/2025/11/09/the-unholy-trinity-pirates-of-the-academia-digital-rights-management-and-fair-use-in-india/

on works that are undeniably in the public domain by the platforms makes the access to those works determined by technology rather than law. Thus, it becomes imperative to create stronger barriers that prevent the re-privatisation of such works. Public Domain Stamp, open mirror copies, and penalties for false claims of ownership are some of the measures that would help keep public-domain materials available without any restrictions. In a digital world, the preservation of the public domain is crucial for research, education, and the free exchange of knowledge.