INTERNATIONAL JOURNAL of LEGAL POLICY
Vol. II, Issue 1 : (November, 2025)
ISSN: 3107-4154 (O)

The Vanishing Commons:
An Examination into the Threat of Shrinking Public Domain in Copyright Law

- **K.Ankita Rao**[1],
  Dr. Muhammed Aamir Khan[2]

Abstract

The public domain under copyright law has for the longest time remained an unfamiliar and undiscovered territory. Sometimes it seems to be a blob with no clear dimensions. The public domain grows when term of the copyright expires or as an aftermath of rulings such as Fiest[3] *which declare a work not protected under copyright. This article explores the critical challenges in maintaining a robust public domain within the realm of copyright law. It seeks to identify key threats to the public domain which include technological threats such as technological protection measures, restrictive terms in contractual obligations, copyright term extensions and lack of legal mechanism for public domain dedication. The article argues that these factors significantly contribute to the impediment of the accessibility of works in the public domain while also affecting the free dissemination of information. By identifying and addressing the issues concerning these factors, the article underscores the urgent need for legal and policy reforms to protect and enhance the public domain.*

Keywords

public domain, copyright law, technological protection measures (TPM), contractual obligations, copyright term extension

INTRODUCTION

Public domain under copyright is an ever-growing collection of material that is available to the public and no author can exercise his/her private right over

[1] Assistant Professor (Law), Faculty of Law, Kalinga University, Raipur.
[2] Assistant Professor (Law), Maharashtra National Law University, Mumbai.
[3] Fiest Publications, Inc. v. Rural Telephone Services. Co., 499 U.S. 340 (1991).

the same.[4] It is the end goal that copyright seeks to achieve.[5] It is one of the most debated issues in the realm of IPR because by its very definition it is not subject to intellectual property.[6] Public domain has in fact become endangered, more so because of a lack of a uniform definition for the same.

'Public Domain' has not been defined under any international instrument or national laws per se. In the context of copyright however, public domain has been traditionally understood as comprising of those works which are no longer protected by copyright due to expiration of the term of protection.[7] However, in the modern understanding, public domain is seen as a '*common domain which includes those aspects of copyrighted works which copyright does not protect.*'[8] Scholars argue that this modern definition includes in its ambit the unprotected elements in existing works (such as ideas, facts, methods of operation, principles etc.) as well as those works which are not at all protected.[9] Some scholars even argue that the modern definition of public domain includes all such uses of a protected work that does not require the permission of the right holder such as permitted acts or copyright exceptions and limitations.[10]

There are many threats which revolve around Public Domain including

[4] Greenleaf, Graham & Lindsay, David, *Public Rights: Copyright's Public Domains* 109 (1st ed. 2018).
[5] Dusollier, Séverine, Scoping Study on Copyright and Related Rights and the Public Domain, *World Intellectual Property Organization*, 2010, (Nov. 11, 2025, 5:26 pm), https://www.wipo.int/publications/en/details.jsp?id=4143&plang=EN.
[6] Dusollier, supra note 3, at 11.
[7] William Van Caenegem, The Public Domain: Scientia Nullius?, 24 *Eur. Intell. Prop. Rev.* 324, 329 (2002).
[8] Jessica Litman, The Public Domain, 39 Emory L. J. 965, 969 (1990); Valérie-Laure Benabou & Séverine Dusollier, *Draw Me A Public Domain In Copyright Law: A Handbook Of Contemporary Research* 161 (Paul Torremans ed., 2009).
[9] James Boyle, The Second Enclosure Movement and the Construction of the Public Domain, 66 *Law And Contemp. Probs.* 61, 61 (2003).
[10] Yochai Benkler, Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain, 74 *N.Y.U. L. Rev.* 354, 358 (1999).

extension of the term of copyright, Technological Protection Measures (hereinafter TPM), threats arising out of contracts and unavailability of legal mechanisms to regulate public domain dedications. These threats pose a barrier to access to knowledge and thus make the public domain endangered in one sense.[11] World Intellectual Property Organization (hereinafter, WIPO) has also recognized the need for protection of public domain, supports the idea of a rich and accessible public domain and advocates the preservation of it.[12] Further, it seeks to promote norm-setting activities and also talks about the possibility of laying down guidelines for assisting member countries to identify the subject matters in the public domain in their respective jurisdictions.[13]

THREATS to an ACCESSIBLE PUBLIC DOMAIN

Scholars suggest that the public domain must be the norm and the enclosed domain must be an exception to the same.[14] However, the arena of the works protected by copyright is being expanded continuously in recent times. This is posing a threat to copyright public domain and has a potential of shrinking it.[15] While the list is not exhaustive, the present article deals with the most important threats to copyright public domain in detail.

Technological threats: Technological Protection Measures

The problem

[11] Faith O. Majekolagbe, Public domain and access to knowledge, 31 *J. Intell. Prop. L.* 1, 17 (2024).
[12] WIPO, The 45 Adopted Recommendations under the WIPO Development Agenda, (Nov. 10 2025, 10:09 pm) https://www.wipo.int/ip-development/en/agenda/recommendations.html.

[13] *Id.*
[14] Pamela Samuelson, Enriching Discourse on Public Domains, 55 Duke L. J. 783, 789 (2006).
[15] Faith Majekolagbe, supra note 9, at 39.

TPMs refer to use of such technologies which control or prevent access to the work, copying / modifying the work or retention or deletion of the content, primarily available digitally.[16] These TPMs affect the availability and accessibility of the works in the public domain, especially when required for re-use.[17] TPMs such as digital passwords, digital locks, encryption of the work etc. may be used by the copyright owners to form a barrier for the public and restrict access of the content that has effectively fallen into the public domain. There is no restriction on copyright owners under the domestic laws to use such TPMs in order to preclude genuine and legal uses of the work which are not under the control of the copyright holder. Further, the copyright owners are also under no obligation to remove a TPM from the work once the term of copyright expires or copyright ceases to exist in the work for any other reason. Thus, use of TPMs can be said to result in monopolization of the work ultimately leading to censorship of knowledge. Another argument in this respect is that liability shall not arise from circumvention in case of works in the public domain. However, the public should not even be put through this rigorous process of circumventing the technological measure before actually being able to use the work which is in the public domain and is free for use. Further, many countries have gone to the extent of banning circumventing devices altogether.[18] In such countries, even if the public wishes to circumvent the measures post the work falls into the public domain, it becomes very difficult for them to do so.

Jurisdictional Analysis of Anti-Circumvention Laws

[16] Graham Greenleaf, supra note 2, at 186.
[17] Joseph P Liu, The New Public Domain, 4 *Univ. of Ill. L. Rev.* 1395, 1425 (2013).
[18] Copyright Act 1976, § 1201(b), Pub. L. No. 94-553, 101 (1976) (U.S.A.); Copyright Act 1968 (Cth) s 116AO. (Australia); Copyright Act 2001 (Ken) s 35(3).

The major world economies have anti-circumvention laws in place which result in the shrinking of the copyright public domain. In the USA, Section 1201 of The Digital Millenium Copyright Act (hereinafter, DMCA) creates a triennial rulemaking process through which circumventing for non-infringing purposes is allowed.[19] However, the persons seeking the exemption need to make significant investments of both time and money to get an exemption and lawfully use the work every three years.[20] This is an unnecessary burden on such people.

Further, Section 1201 fails such people who wish to reuse the works protected by TPMs by prohibiting the creators from circumventing any TPM unless either granted an exemption by the Librarian of Congress or fall under the specific exemption categories provided under clause (d)-(i) of section 1201. This is even true for lawful uses of the work.[21] This is a very demanding procedure so to say. Even the exemptions granted are limited in scope and ignore the wide fair use exemptions provided under the US Copyright Law. Thus, while it may prima facie seem that the US anti-circumvention laws balance the interests of the copyright owner and the access of public to works, it is in essence causing the public domain to shrink.

EU's Article 6(1) of the Infosoc Directive lays down that a legal protection must be provided against circumvention of TPMs which is carried out by the person having knowledge or reasonable grounds to know that he/she is circumventing the effective protection.[22] Article 6(2) prohibits the manufacture, import, and distribution etc. of a circumventing

[19] Digital Millennium Copyright Act 1998, § 1201 (1)(a), Pub. L. No. 105-304, 112 Stat. 2860 (1998) (U.S.A.).

[20] Art Neill, Fixing Section 1201: Legislative and Regulatory Reforms for the DMCA's Anti-Circumvention Provisions, 19 *Tul. J. Tech. & Intell. Prop.* 27, 44 (2016).

[21] Id, at 45.

[22] Directive 2001/29/EC, Art. 6(1) (2001) O.J. (L 167).

device.[23] Article 6(4) requires that members take appropriate measures so that a limitation/exception provided for in the national law can be exercised by its beneficiary.[24] Prima facie it looks like the right holders are made to respect the exceptions or limitations provided by the act however, Article 6(4) subsequently provides that these provisions shall not apply to such works which have been made available to the public on contractual terms agreed.[25] Thus, say if a work is available only on an 'on-demand basis' online, the copyright owner may enter into contractual terms and impose such conditions on the public which are incompatible with the exceptions that would otherwise be available to them.

Under the Australian law, copyright owners have an action against the person who intentionally circumvents a TPM used to protect a certain work.[26] There are 8 exemptions provided to this general rule[27], however, these do not include the free use exceptions provided under the Australian Copyright Law. The only relevant exemption in this regard is for acts prescribed in the regulation based on submissions concerning need. Unlike the EU, Australian Copyright law doesn't require the copyright holder to make the work available to the beneficiary of an exception or limitation as provided under the national law.[28] As a consequence, under the Australian Law, copyright owners may use TPMs to exclude the use of work other than the 8 exemptions provided.

India introduced the law relating to TPMs under Section 65A[29] into the 1957 Act by the Amendment Act of 2012 which provides for criminal liability in case a person circumvents any TPM that

[23] Id., Art. 6(2).
[24] Id., Art. 6(4).
[25] Ricketson and Ginsburg, *International Copyright and Neighbouring Rights* 15.23 (2nd ed. 2005).
[26] Copyright Act, 1968 (Cth) s 116AN(1).
[27] Copyright Act, 1968 (Cth) s 116AN(2-9).
[28] Graham Greenleaf, supra note 2, at 20.
[29] Copyright Act 1957 (India) s 65A.

has been applied to protect the rights provided under the Act with the intention of infringing such rights. The provision makes it sufficiently clear that the application of this provision is restricted to the rights expressly conferred by the Act. This provision is different from that of the US, considering that the US prohibits the act of circumvention itself, however India prohibits circumvention for specific purposes and also takes into consideration the intention of the person using such circumventing measures unlike US and EU.[30] Apart from the general exceptions, specific exceptions are also provided under Section 65A(2)(b) to 65A(2)(g). Thus, the practical implication of section 65A is that the act of circumvention is not per se illegal if it is used against such works which are not protected by Copyright or fall within the 'permitted acts' exception under Section 52 of the Act.[31]

CONTRACTUAL THREATS

The Problem

Copyright owners can also control the access to works by way of contracts usually drafted in a way so as to set out restrictive terms of use of works.[32] A person may make a public domain work available on an online platform however, binds the user through a 'click-wrap' contract[33] containing restrictive terms of use even if the work is in the public domain.[34] Another prevalent method is using licensing models of business by publishers especially with respect to such works which are procured by

[30] Williams, Glanville L., *Textbook of Criminal Law* 75 (2nd ed., 1999).

[31] Copyright Act 1957 (India) s 52.

[32] Rebecca Bolin, *Locking down the Library: How Copyright, Contract, and Cybertrespass Block Internet Archiving*, 19 Hasting Commc'n And Ent. L. J. 29, 35 (2006).

[33] Bradley E Abruzzi, *Copyright, Free Expression, and the Enforceability of Personal Use-Only and Other Use Restrictive Online Terms of Use,* 26 Santa Clara Comput. And High Tech. L. J. 85, 111 (2009).

[34] Id, at 102.

libraries or research institutions.[35] The publishers license the work for use instead of selling digital copies of the work to these institutions. By using this model, the publishers make sure that they subject these users to licensing terms.[36] However, a controversial point in this aspect is that in case the national legislations do not prohibit such contracts, they may be used to override the statutory exceptions to the exclusive rights of the copyright owner.[37]

Jurisdictional Analysis

Section 301 of the US Copyright Act provides that any legal or equitable rights that are equivalent to the exclusive rights falling under the general scope of copyright are to be governed by the Copyright Law[38] meaning any of the rights arising out of contractual obligations but equivalent to exclusive rights under the copyright would be governed by the copyright law. However, the court of 7th Circuit concluded that the rights created by the contract cannot be said to be 'equivalent' to those exclusive rights which are provided under the copyright law as contractual rights are rights in personam.[39] The court opined that the restrictions on reproduction put by way of an agreement were valid. Since the copyright public domain in the USA is largely dependent on the exception of 'fair use' and the US law lacks a provision preventing contracting out of this exception, there is a huge threat on the public domain and the accessibility of works.

In the UK however, it has been continually argued that contracting out of the permitted acts is allowed.[40] In fact,

[35] Rebecca, *supra* note 30, at 35.
[36] Faith, *supra* note 9, at 34.
[37] J. Carter, E. Peden, K. Stammer, *'Contractual restrictions and rights under copyright legislation,* 23 J. OF CONTRACT L. 32, 46 (2007).
[38] Copyright Act 1976, § 301(a), Pub. L. No. 94-553, 101 (1976) (U.S.A.).
[39] ProCD v. Zeindenberg, 86 F 3d 1447 (7th Cir 1996).
[40] BURRELL, R. & COLEMAN, A., COPYRIGHT EXCEPTIONS: THE DIGITAL IMPACT 69 (Cambridge University Press 2005).

there are specific provisions which allow copying or use of extracts by educational institutions.[41] Reports show that even though there are exceptions to copyright available, beneficiaries are often prevented from using them due to restrictive contracts.[42] The UK in fact follows what may be called a 'piecemeal approach' of gradually adding prohibitions on acts that may be contracted out. However, these prohibitions are a miniscule part of the permitted acts exceptions provided. Thus, currently the prohibitions are almost non-existent from the perspective of the public domain.

Australia does not have a provision similar to the USA or UK. There is only one provision relating to contracting out of copyright exceptions under the Australian law which prohibits any agreement which affects or has any effect on the permitted acts relating to computer programs.[43] As a result of the absence of any other provision restricting the terms of contracts, parties are allowed to enter into such contracts which have the potential to either restrict or modify the exceptions available against infringement under the Copyright Act. Thus, the Copyright Law Review Committee (*hereinafter*, CLRC), in its report concluded that such agreements were being used by parties in order to restrict innocent users of copyrights falling under the ambit of exceptions to infringement of copyright and contractual overrides are adversely affecting the copyright balance in Australia.[44] The Australia Law Reform Commission[45] as well as Productivity

[41] Copyright, Designs and Patents Act 1988 (U.K.) c. 48, s 36(6).

[42] Hargreaves, Ian, *'Digital Opportunity: A review of Intellectual Property and Growth'*, Department for Business, Innovation and Skills, UK Government (Nov. 3 2025, 6: 33 pm) https://assets.publishing.service.gov.uk/media/5a796832ed915d07d35b53cd/ipreview-finalreport.pdf.

[43] Copyright Act 1968 (Cth) s 47H.

[44] Copyright Law Review Committee, *Report on Copyright and Contract* 262 (2002).

[45] Australian Law Reform Commission, *Report on Copyright and the Digital Economy* 450 (2014).

Commission[46] also recommended that agreements having adverse effect on the exceptions to copyright must be declared unenforceable and contracting out must be completely prohibited. However, no such express provision has been added to the Australian Copyright Law.

In India, however, the scope of contracting out of copyright exceptions is sufficiently limited by Section 16 of the Copyright Act which provides that all rights in the nature of copyright shall be governed by the Act alone.[47] Thus, it does not allow for creation of any right which is equivalent to copyright outside the scope of the Act. Further, the courts in India have time and again reiterated that private contracts cannot override statutory provisions[48] and special laws in India.[49] Therefore, it is safe to conclude that the copyright public domain in India is not bothered by the contractual threats like the other jurisdictions.

COPYRIGHT TERM EXTENSION

The Problem

The public domain is a sort of warehouse of knowledge, which expands with each subsequent addition as copyright expires in a work every year.[50] The minimum term of copyright as provided under both Berne Convention[51] and TRIPs Agreement[52] is Life+ 50 years of the author. Many countries have extended their copyright terms in the past in order to provide incentives to the authors of

[46] Productivity Commission, *Report on Intellectual Property Arrangements* 5.1 (2016).
[47] Copyright Act 1957 (India) s 16.
[48] Shri Shivdev Singh & Anr. v. Sh. Sucha Singh & Anr, (2000) 4 SCC 326; Modern Hotel v. Commissioner of Central Excise and Ors. AIR 2015 SC 346.
[49] M/s N.N. Global Mercantile Pvt. Ltd. v. M/s Indo Unique Flame Ltd., 2021 SCCOnline SC 13.
[50] Lydia P Loren, *Technological Protections in Copyright Law: Is More Legal Protection Needed?* 16 Int'l Rev. Of Law, Comput. And Techn. 133, 136 (2002).
[51] Berne Convention for the Protection of Literary and Artistic Works, art. 7(1) (revised at Paris 24 July 1971, amended 1979), 1161 U.N.T.S. 3 (1886).
[52] Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 12 (adopted 15 Apr. 1994, entered into force 1 Jan. 1995), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

the work.[53] There have been several claims, especially by the US, that the extension of terms of copyright helps in dissemination of information as the publishers get incentives to publish old works which were unavailable and unused before such publication.[54] However, in reality it hampers the availability of and access to works especially for libraries which have to pay a higher amount in order to get an access to the work.[55] Copyright term extension in reality not only freezes the public domain for the extended term of copyright,[56] but makes access to the work costlier.[57]

Jurisdictional Analysis

The EU Term Directive sought to harmonize the term of protection by providing minimum and maximum term of protection for the member countries.[58] Before the Directive, there were considerable differences in the terms of protection with a few countries following 50 years *pma*, few following 60 years *pma* and there were also countries like Germany which followed seventy years *pma*. Article 1 of the Term Directive[59] provided that all the categories of work protected under the Berne Convention would have a term of protection of seventy years *pma*. According to reports, this term extension had created a sort of

[53] Jacob Flynn et al., *What Happens When Books Enter the Public Domain: Testing Copyright's Underuse Hypothesis across Australia, New Zealand, the United States and Canada*, 42 Univ. of New S. Wales L. J. 1215, 1216 (2019).

[54] Joseph P Liu, *The New Public Domain*, 4 Univ. Of Ill. L. Rev. 1395, 1422 (2013).

[55] Paul J Heald, *Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers*, 92 Minn. L. Rev. 1031, 1039-1050 (2008).

[56] Faith, *supra* note 9, at 19.

[57] Frankel, Susy & Gervais, Daniel J., *Advanced Introduction to International Intellectual Property Law* 103 (Edward Elgar 2016).

[58] Directive 2006/116/EC, art. 6 (2006) O.J. (L 372).

[59] Directive 2006/116/EC, supra note 89, art. 1.

a 'cultural black hole in EU.'[60] Many times, it might not be financially feasible for the right holders to print new editions of already existing books.[61] However, these works still remain under copyright protection and thus, it cannot be published by anybody else. This leads to the work disappearing completely creating a vacuum in the dissemination of work.[62] At the time of implementation of the term directive, some EU countries had longer terms of protection (say seventy years *pma*) and the others had a shorter term of protection (say fifty years *pma*). Thus, some works were still protected in the countries having longer terms while were already in the public domain for the countries having shorter protection. To deal with this situation, Article 10(2) of directive[63] provided that the directive shall be applicable to all the works which are protected even in one state. This revived copyright in the states where the term of protection had already expired thereby, shrinking the public domain further.

In the USA, Section 102 of the 1976 Act provided for a term of fifty years *pma*.[64] However, copyright owners such as Disney Corporation as well as the heirs of music composers lobbied in order to get the term increased. This, along with major push from the EU[65] led to the US enacting Copyright Term Extension Act, 1998 (*hereinafter*, CTEA)[66] whereby this was increased to seventy years *pma* to match EU. Though CTEA did not revive protection for the terms that were

[60] EDRI, *'Copyfail 5'*, https://edri.org/our-work/copyfail-5/ (last visited 30 Oct. 2025).

[61] Lessig, Lawrence, *Free Culture: The Nature and Future of Creativity* 122 (1st ed., 2005).

[62] Doctorow, Cory, *'Will EU repeat US Copyright error?'*, The Guardian (Oct. 30, 2025, 10:04 am) https://www.theguardian.com/technology/2008/dec/06/cory-doctorow.

[63] Directive 2011/77/EU, art. 10(2) (2011) O.J. (L 265).

[64] Copyright Act 1976, § 102, Pub. L. No. 94-553, 101 (1976) (U.S.A.).

[65] R. Posner, *The constitutionality of the Copyright Term Extension Act: economics, politics, law, and judicial technique in Eldred v. Ashcroft*,4 Supreme Court Rev. 143, 145 (2003).

[66] Sonny Bono Copyright Term Extension Act of 1998, Pub L. No. 105-298, tit. I, 112 Stat. 2827 (1998) (USA).

already in the public domain, it delayed the entry of several works to the public domain. This Term Extension froze the public domain of the United States for a period of twenty years and was especially made in order to delay the entry of the character Mickey Mouse as it appeared in the Steamboat Willie in 1928.[67] Though the character was scheduled to enter the public domain in the early 2000s, it actually entered the public domain on January 1, 2024 (approximately 20 years later than the scheduled date).[68]

In 2005, Australia signed a Free Trade Agreement (*hereinafter*, FTA) with the USA, as a result of which it extended the term of protection for works from fifty years *pma* to seventy years *pma.* Reports suggest that while Australia did try to defend the existing terms of protection, agreeing to extended terms was necessary for securing the agreement.[69] Until 2017, there was distinction between published and unpublished works in Australia with a perpetual term of protection for unpublished works. However, in 2017, by way of an amendment,[70] the term for unpublished works was harmonized with that of published works and now stands at seventy years *pma*. Thus, while Australia has taken a step towards stopping the perpetual protection of unpublished works, the provisions provide an opportunity for an author/owner to protect their works for an extremely long period of time.

In India, the term of copyright has been extended only once post the coming into effect of the Copyright Act, 1957 by way

[67] *The incredible shrinking public domain*, Duke Law, (Nov. 2, 2025) https://web.law.duke.edu/cspd/publicdomainday/2024/shrinking/.

[68] Times of India, https://timesofindia.indiatimes.com/entertainment/english/music/news/early-avatar-ofmickey-mouse-enters-the-public-domain/articleshow/106536397.cms (last visited May 12, 2025).

[69] Australia-United States Free Trade Agreement, art. 16.50 (entered into force 1 January 2005).

[70] Copyright Amendment (Disability Access and Other Measures) Act 2017 (Cth) No. 49.

of the Copyright Amendment Act, 1992. Under the amendment act, the earlier term of 50 years *pma* was increased to 60 years *pma*.[71] Section 3 of the amendment act[72] provides that copyright in LDMA words shall not subsist in any work in which copyright did not subsist immediately preceding this act. Thus, while it may be said that the act extended the term of protection of the works which were in the middle of protection when the act came into force, it did not extend protection to works in which copyright had expired earlier and the works had fallen into the public domain.

LACK of LEGAL FRAMEWORK for PUBLIC DOMAIN DEDICATION

The Problem

Yet another issue which effectively poses a threat to the copyright public domain is the lack of a legal framework relating to public domain dedication or copyright relinquishment under many national laws. The International Instruments relating to copyright are by and large silent on the issue of relinquishment of copyright.[73]Copyright does not require registration and is granted by default as soon an original work comes into existence.[74] An implication of this is that even a person who does not wish to have such rights conferred on him/her would need to take a positive action in order to opt-out of such system.[75] Most of the countries do not have a legal mechanism in order to enable an opt-out from the grant of copyright.[76] The absence of legal mechanisms for copyright relinquishment can impede the free flow of knowledge, creativity, and cultural heritage, limiting access to valuable resources and inhibiting innovation and cultural exchange wherein the copyright

[71] Copyright Amendment Act 1992 (India) s 2.
[72]Copyright Amendment Act 1992 (India) s 3.
[73] Faith, *supra* note 9, at 29.
[74] Brett M Frischmann & Mark A Lemley, *Spillovers,* 107 Columbia L. Rev. 257, 265 (2007).
[75] Graham Greenleaf, *supra* note 2, at 101.
[76] Benabou, *supra* note 6, at 161.

author himself wants his work to contribute to such end goals.[77]

Jurisdictional Analysis

In the UK, there is no specific provision dealing with copyright abandonment. The idea of adding a provision relating to such abandonment was proposed but later rejected by the UK Whitford Committee in its report published in 1977.[78] Further, the court in UK also rejected the idea of accidental abandonment of copyright in the case of *British Leyland Motor*[79] holding that it is extremely difficult to divest oneself from a right provided by statutes. Some scholars argue that in case a dedication is made to abandon copyright in the UK, it would be nothing but a mere licence that may be revoked.[80] Further, since there is an express provision under the UK Copyright Law allowing waiver of moral rights, it may be argued that the waiver of other rights is not possible under the same.[81]

Under the European civil law jurisdictions, courts usually do not accept abandonment of copyright.[82] The German courts in particular have rejected the idea of abandonment completely.[83] One of the most relevant examples in this regard is the Wall Pictures case of Germany[84] in which a large-scale mural painted by a few artists on the Berlin wall in late 1980s was

[77] Gaudamuz, Andres, *Comparative Analysis of National Approaches on Voluntary Copyright Relinquishment*, World Intellectual Property Organization (Oct. 30, 2025, 10:25 pm), https://www.wipo.int/publications/en/details.jsp?id=4141&plang=EN.

[78] Whiteford Committee, *Copyrights and Designs Law: Report of the Committee to Consider the law on Copyright and Designs* 655 (1977).

[79] British Leyland Motor Corporation v. Armstrong Patents Co. Ltd., [1982] FSR 481, 492.

[80] P. Johnson, *Dedicating copyright to the public domain*, 71 Mod. L. Rev. 587, 591-96 (2008).

[81] Copyright, Designs and Patents Act 1988 (U.K.) s 87.

[82] Hudson and Burrell, *Abandonment, copyright and orphaned works*, 35 Mel. Uni. L. Rev., 971, 990 (2011).

[83] Sterling, J. A. L. & Cook, T., *Sterling on World Copyright* 12.27 (Sweet & Maxwell, 4th ed., 2015).

[84] United States Department of State, 'In Photos: History of Berlin Wall', Share America (Nov. 7 2025, 6:21 pm), https://share.america.gov/in-photos-history-of-berlin-wall/.

dismantled during the unification of Germany and the parts of the wall were sold in an auction. The artists demanded a share in the proceeds received from the auction. However, the defendants argued that the artists had abandoned their rights. The court, rejecting the argument of the defendants, held that the concept of abandonment of property under the property law is unknown to copyright law and therefore cannot be accepted.[85] Under the French Copyright Act, while Article L131-1 provides that the total transfer of the copyright in future works shall be null and void,[86] Article L122-7-1[87] allows the authors to make his works freely available to the public. Though the former provision only talks about future works, it nonetheless places some restriction on the will of the author. Moral rights on the other hand are considered non-transferable and perpetual under the French Law.[88]

There are no express provisions concerning the abandonment of copyright under the Australian Copyright Law.[89] The situation is further complicated by Section 195AW of the Act[90] under which the author (of Cinematograph films or LDMA works included in a cinematograph film) is not given the authority to abandon his rights completely, however, a breach of certain moral rights can be consented to. Such consent may be given under limited circumstances. However, a few judicial decisions hint towards the acceptance of copyright abandonment. In *Millar v. Taylor*, Aston J. noted that if an author has truly and openly relinquished their rights, it could be determined; otherwise, the plaintiff would not succeed in their

[85] Time Magazine, https://time.com/3879870/berlin-wall-photos-early-days-cold-war-symbol/ (last visited May 12, 2025).
[86] Intellectual Property Code 1992 (Fr.) art. L131-1.
[87] Intellectual Property Code 1992 (Fr.) art. L122-7-1.
[88] Intellectual Property Code 1992 (Fr.) art. L121-1.
[89] Graham Greenleaf and Catherine Bond, *Public Rights in copyright: What makes up Australia's Public Domain?*, 23 Aust. Intell. Prop. J. 111, 138 (2013).
[90] Copyright Act 1968 (Cth) s 195AW.

case based on such evidence.[91] Thus, the situation in Australia is no less than the UK in case of relinquishment provisions.

India however, has a specific provision which allows relinquishment of copyright. Under Section 21 of the Copyright Act,[92] the author may relinquish some or all of his rights in a work by either giving a notice to the Registrar of Copyrights or by providing a public notice. The provision specifically provides that from the date of notice, the rights of the author in the work cease to exist.[93]

CONCLUSION AND SUGGESTIONS

The article identifies key barriers and threats to the accessibility of the public domain. International copyright laws have predominantly favoured the interests of a narrow group of right-holders, often neglecting the broader interests of the public in accessing knowledge. There has been insufficient emphasis on creating policies that foster a thriving public domain for the benefit of society at large. Certain copyright regulations have the potential to diminish the public domain and prolong the time before a work enters it for unrestricted use. Therefore, future efforts in setting international norms must carefully consider how proposed rules may impact the public domain, with the aim of safeguarding and enhancing it. In this final limb of the study, the article, the authors wish to put forth certain suggestions regarding the possible future course of action.

Recognizing and Defining a Global Public Domain

The existence of the public domain must not rely solely on inference but should be explicitly recognized as a distinct domain where proprietary rights are not permitted to intrude. Therefore, there is a

[91] Taylor v. Millar, [1769] EngR 44.
[92] Copyright Act 1957 (India) s 21.
[93] Copyright Act 1957 (India) s 21(2).

crucial need for a positive legal framework to preserve the public domain and ensure the free availability and accessibility of its contents. Within the international copyright system, it is imperative to define the public domain in affirmative terms, delineating it as a distinct realm with its own boundaries. By positively defining the elements of the public domain, legal recognition of a domain immune to encroachment by property rights can be established. To achieve this, new rules should be adopted within the international copyright system to identify and define the elements of the public domain and ensure clarity of its scope; safeguard the public domain against re-monopolization; and facilitate free and equal access to its contents.

Combating the threats to the Public Domain

- *Technological protection measures*
  Technological barriers to access and usage have the potential to serve as significant constraints beyond legal frameworks. None of the alternative national strategies significantly support the public domain. In this regard, the Indian Copyright Regime provides a suitable answer. It may become a great learning example for other countries to follow, considering its futuristic vision and progressive nature. The Copyright Act, 1957 provides for an exception to fair dealing and permitted uses allowed under the act from the ambit of anti-circumvention laws against technological protection measures. Further, a list of other exceptions to the anti-circumvention laws are also provided under the Indian Act.

- *Contractual threats*
  The International Law is mostly silent on contractual overrides. Thus, it is upon the national legislation to protect the public

domain from the contractual threats. While the harm attached to contractual threats may not be as extreme as possible in theory, however it is still significant in nature. There are three policy options to consider:

- Firstly, maintaining the current Australian stance, this imposes no restrictions on contracting out of public rights.
- Secondly, adopting a blanket prohibition on contracting out of any copyright exceptions.
- Finally, implementing a legislative framework that distinguishes between exceptions where contracting out should be permitted and those where it should not.

The most feasible option to protect the public domain is the third one, with the caveat that the objectives and advantages of the public domain must be thoroughly considered, and the default position should be against contracting out unless a specific exception demonstrates a clear necessity.

- *Copyright Term Extensions*

It is suggested that an international maximum term for copyright protection be established to set a global limit on copyright duration, beyond which domestic legislation cannot extend. Further, there should also be a separate maximum term of protection that must be provided for an individual category of work considering the varied nature of such works. The responsibility for advancing this initiative lies with the WIPO, given its mandate to promote the harmonization of national copyright legislation. WIPO should actively promote harmonization efforts in copyright legislation to ensure access to knowledge and the realization of

development goals. In standardizing the copyright term, the instrument should explicitly specify that the maximum term applies universally, both at the international and national levels. This approach would establish an international framework conducive to a unified global public domain and curb unilateral extensions of copyright terms through national legislation. Another system that may be made applicable at the domestic level is a system of renewals. Under this system, the copyright term may expire post an initial term of protection; unless it is renewed by the copyright-holder. This will ensure that a positive step is taken towards the protection of one's own copyright.

- *Lack of Legal Framework for Public Domain Dedication*

  The lack of significant court decisions challenging public domain dedications may lead to the temptation to maintain the current approach with a 'if it's not broken, don't fix it' attitude. However, it is important for copyright owners to have the ability to make their works available for public use in a manner that offers legal certainty to future users while also safeguarding copyright owners against baseless claims of relinquishing their rights. Documenting copyright dedication in writing must be mandated so as to provide clarity to both copyright owners and potential users of such content. Given the on-going uncertainty under common law, it appears advisable for countries to enact statutory provisions addressing this issue, either within copyright legislation or through other means.