Bringing Shadow Libraries out of Legal Shadows: An Opportunity for the Delhi High Court

*Rahul Bajaj and Anchal Bhateja**

Abstract *At the heart of the copyright bargain is the need to strike a balance between fostering creativity, by incentivizing producers of intellectual property and promoting the interests of the public at large. These two are often in tension with each other. Some cases bring this tension into sharp focus. The ongoing litigation in the Delhi high Court, on the legality of shadow libraries - Libgen and Sci Hub - is one such case. The case has seminal importance for ensuring that the right to education is duly respected and fulfilled.*

In this paper, we argue that this litigation offers the Delhi High Court an opportunity to build on its progressive jurisprudence on the educational exception embodied in Indian Copyright Law and to further push its frontiers, by regarding these shadow libraries as falling within the ambit of the fair dealing exceptions, and holding their access to be a facet of the Constitutionally guaranteed right to education. We hope that our contribution will assist stakeholders involved in the litigation and others to work towards fashioning a solution to the litigation that enables continued access to these shadow libraries, as that is what the public interest in this case demands.

I. Introduction 2
II. Setting the Scene 3
III. Recalibrating the Debate 5
IV. Constitutional Justification 8
   A. The Historical Background 8
   B. Expansion by the Courts: 10
   C. RTE as Justification for the Continued Existence of Shadow Libraries. 12
   D. Affixing the Liability on the State. 12
V. Comparative Experience 14
VI. Copyright Law Analysis 16
   A. Basic Purpose of Copyright Law 16
   B. Section 52[1][a] of the Copyright Act 17
   C. Educational Exception 19
VII. Conclusion. 26

* Rahul Bajaj is an academic and practitioner in the fields of intellectual property law and constitutional law. Views are strictly personal and must not be attributed to any entity. Anchal Bhateja is a final year student at the National Law School of India University, Bangalore.

I. Introduction

In December 2020, three libraries, Elsevier Ltd, Wiley India Pvt. Ltd. and the American Chemical Society ('ACS') filed a lawsuit in the Delhi High Court, alleging that the copyright of their paywalled material is being breached by 'Sci-Hub' and 'LibGen'. These are open-access online repositories which provide, among other things, free access to various journal articles and books which are paywalled by publishers and are popularly called 'Shadow Libraries'.[1] The lawsuit has brought into sharp relief the appropriate scope of copyright law and the determination of its boundaries.

The petitioners in the case claim that:

> "Pirate sites like Sci-Hub threaten the integrity of the scientific record, and the safety of university and personal data. They compromise the security of libraries and higher-education institutions, to gain unauthorized access to scientific databases and other proprietary intellectual property, and illegally harvest journal articles and e-books."

The petitioners further allege that Sci-Hub uses stolen user credentials and phishing attacks to extract copyrighted articles.[2] The petitioners have sought a dynamic injunction against these platforms.[3]

The legality of these platforms has been challenged in close to eleven-jurisdictions up till now and ex-parte decisions have been handed down in a few of these cases. The consequences in these cases range from blocking of access to these platforms in Austria, Belgium, Denmark, France, Germany, Italy, Portugal, Russia, Spain and Sweden, amongst others, up to the potential arrest of the founder of these platforms. In the USA, the founder has been already held liable for wilful copyright infringement and has also been directed to pay a statutory compensation of USD 15 million.[4] On similar lines, the platform has been brought before the Delhi High Court on the charges of copyright infringement.

---

1 Joe Karaganis J, *Shadow Libraries: Access to Knowledge in Global Higher Education* (The MIT Press 2018).

2 Holly Else, 'What Sci-Hub's Latest Court Battle Means for Research' (2021) 600 Nature 370.

3 Kashish Khandelwal, 'The Sci-Hub Case & the Unique Remedy of a Dynamic Injunction' (*Law School Policy Review & Kautilya Society*, 1 March 2021) <https://lawschoolpolicyreview.com/2021/03/01/the-sci-hub-case-the-unique-remedy-of-a-dynamic-injunction/> accessed 19 June 2022.

4 Sukrita Baruah, 'Hardlook: Copyright vs wrong—the Sci-Hub case being fought in Delhi' *The Indian Express* (29 September 2021) <https://indianexpress.com/article/cities/delhi/delhi-high-court-academicians-scientists-researchers-7536252/> accessed 29 January 2023.

In what follows, we will begin by providing a descriptive account of the lawsuit pending in the Delhi High Court. We will then seek to recalibrate the focal point of the general framing of the debate around this issue to the effect that the dispute is actually between the interests of the publishers and the readers with limited resources and the authors' interests do not lie at the core of this debate. This will not be a commentary on this specific case but on the broader questions as to access to research materials that this case gives rise to. Thereafter, we will provide a constitutional justification for affixing liability on the state to secure the interests of the authors and the publication houses while ensuring that students and researchers have affordable access to knowledge formally secured through the right to education. We will then argue that, owing to the state's failure to secure such access, shadow libraries remain the most effective channel to secure the enjoyment of the right to education in terms of adequate access to research materials. We then argue how the use of such shadow libraries has been dealt with by courts in other jurisdictions. We conclude by arguing that the conduct of the shadow libraries at issue falls within the ambit of the fair dealing provisions in Indian copyright law that pertain to research and education.

II. Setting the Scene

Four plaintiffs, Elsevier, Wiley India, Wiley periodicals and American Chemical Society, have filed a lawsuit against LibGen and Sci-Hub. In their lawsuit, the plaintiffs describe themselves as comprising of entities 'within 3 top-tier, global publishing houses in the field of scientific and academic publications.'[5] They contend that they have expended enormous energy and effort in 'distribution/issuing copies, reproduction, storage, adaptation, communication and/or making available' their materials which are protected as literary works.[6] They contend that they are the exclusive owners of the rights to reproduce, distribute and communicate the works to which this lawsuit relates.[7]

The plaintiffs contend that Sci-Hub and LibGen 'substantially indulge in online piracy by making available for viewing and download, providing access to, and communicating to the public' their copyrighted material. They contend that the defendant websites have the primary purpose/effect of infringing, facilitating or inducing infringement and are also liable for

[5] Plaint in *Elsevier Ltd v Alexandra Elbakyan* 2022 SCC OnLine Del 3677 (Delhi High Court) [on file with the author], [6].

[6] ibid [16].

[7] ibid [19].

contributory infringement. This is because the two websites 'actively encourage viewing/downloading of original literary works for which the Plaintiffs have exclusive rights.' Defendant Nos. 3-11 are Internet/Telecom Service Providers who have been arraigned as defendants for the effective implementation of the court's directions. Defendants 12 and 13 are the Department of Telecom and the Union Ministry of Electronics and Information Technology, whose assistance the plaintiff seeks in ensuring compliance with any orders of injunction and for the protection of their rights.

On the first date of listing, after recording the contentions of the parties, the Court took on record Defendant No. 1's undertaking that no new articles or publications, in which the plaintiffs have copyright, will be uploaded or made available, via the internet, till the next date of hearing.[8] This understanding has continued to hold good to date, as reflected by the order dated May 13, 2022. Pertinently, on February 10, 2022, the Court rejected an intervention application filed by three researchers who sought to intervene in the case. They argued that the works in question are of use to researchers like them and that taking them off the Internet would have a deleterious impact on public interest.[9]

The Court rejected this application on the ground that the mere fact of the researchers being adversely impacted cannot be a valid basis for allowing the intervention.[10] It seemed to be concerned about the 'slippery-slope' effect of allowing the intervention, reasoning that doing so would 'seriously impact the prosecution of the proceedings in the Court.'[11]

With respect, the Court clearly failed to grasp the significance of these proceedings for access to research and academic material. It failed to acknowledge that these infringement proceedings are not 'run-of-the-mill'. Hearing the interveners would have helped it to understand the full consequences of stopping the defendants' activities. This understanding could have fed into an evaluation of whether their activity is fair. The Court's myopic approach does not augur well for its final determination, from the standpoint of promoting access to education and research. For the sake of completion, it bears mention that, vide order dated 03.11.2022, the Court rejected an application by Defendant No. 1, Alexandra Elbakyan, to amend her written statement. Elbakyan sought to change her stance on the admission of the plaintiff's copyright. The Court held that she had admitted in the written

---

[8] *Elsevier Ltd v Alexandra Elbakyan* 2022 SCC OnLine Del 3677 (Delhi High Court) [6.2].
[9] ibid [6].
[10] ibid [7].
[11] ibid [10].

statement that the plaintiffs were the copyright owners with respect to the material on their platform and that she could not go back on this admission vide an amendment. The last order in the case is dated 09.02.2023. In this order, the Court rejected Elbakyan's plea that the plaint should be rejected under Order 7, Rule 11 of the Civil Procedure Code, on the basis that the assignment agreements between the plaintiffs and authors lacked monetary consideration. The Court held that Elbakyan had categorically admitted the plaintiff's copyrights over the works in question, and therefore the issue as to the proper construction to be placed on the assignment agreements, is not a pure question of law. It further held that the issue as to whether these agreements embody adequate and sufficient consideration is a factual question that cannot be determined at this stage. The volume of such agreements placed on record by the plaintiffs prima facie demonstrated their ownership of copyright over the works in question. It finally held that the assignment agreements form the basis for the plaintiff's copyright ownerships over the works that Elbakyan has allegedly infringed and hence rejected Elbakyan's argument that the agreements are not relevant to the plaintiff's case against Elbakyan.[12] The court decided to proceed exparte against Lib Gen as they were not represented by counsel and had not filed written statement despite service of summons[13] and listed the matter next on 12th July.[14]

III. Recalibrating the Debate

The publishing market is a 10-million-dollar market. The publishers have one of the highest profit margins of around 40%. The reason for these high-profit margins is not the price of publishing but the monopoly that these publishers enjoy in this market.[15] Not only lesser affluent countries like India, but even richer universities like Harvard University have expressed concerns over the high prices that can go up to 40,000 Dollars.[16] Resultantly, readers are unable to procure the subscriptions to these journals and are generally dependent on well-resourced institutions for the same.[17] Many authors

---

[12] ibid [5].

[13] ibid [7].

[14] ibid [8].

[15] 'Are Royalties Fair? A Publisher Weighs In' (*The Passive Voice*, 8 June 2021) <https://www.thepassivevoice.com/are-royalties-fair-a-publisher-weighs-in/>accessed 29 January 2023.

[16] Suzanne Day and others, 'Open to the Public: Paywalls and the Public Rationale for Open Access Medical Research Publishing' (2020) 6 Research Involvement and Engagement <https://researchinvolvement.biomedcentral.com/articles/10.1186/s40900-020-0182-y> accessed 29 January 2023.

[17] Theres Sudeep, Copyright Case Sparks Debate on Access to Academic Journals (Deccan Herald, 15 January 2021) <https://www.deccanherald.com/metrolife/metrolife-your-bond-

including Philip Pullman, the president of the society of authors, have repeatedly raised concerns over the increasing turnovers of the publishers and the falling revenues that are eventually shared with the authors.[18]

Even though the authors hold the copyright over literary works, they can assign it to the publisher. As per the 2015 amendment to Section 18 of the Copyright Act, the authors cannot wave off their right to receive royalty. The provision mandates that the authors are entitled a minimum of 50% of royalties. Despite the utopia imagined in this provision, the reality of the industry is very different. Authors often allege that royalty contracts are drafted in legalese, publication houses do not share the sale statements with the authors, they do not respond to correspondences for months, they do not make payments despite reminders and sometimes cite reasons like austerity and charity to evade their legal responsibility to share royalties with the authors. Just besides the opaqueness of the process, the unequal bargaining power between the authors and the publishers compounds the vulnerability of the authors. Given that authors are dependent on the publication houses for printing, marketing, distribution and promotion of their works, they do not raise objections even when the royalty agreements are not fair. This shows that the inequality of bargaining power between the authors and the publication houses is stark.

Further, the authors cannot engage in the business of issuing or granting of copyright licenses except through copyright societies as per Section 33 of the Copyright Act. however, authors still engage in third party licensing under Section 18 and Section 30 of the Copyright Act which enables the authors to assign their copyright to third parties. The conflict between Section 18 and Section 33 has been muddled by various high courts as some say that absolutely no transfer of copyright can take place without the involvement of copyright societies.[19] While others say that the authors can assign their copyright to third parties.[20] Further, even if authors stop third party licensing altogether, copyright societies still have lesser clout as compared to publication houses, as the copyright society can have as less as 7 members. Given the financial capital and power capital held by authors, it is unlikely for these

with-bengaluru/copyright-case-sparks-debate-on-access-to-academic-journals-939283.html> accessed 29 January 2023.

[18] Alison Flood, 'Philip Pullman Calls for Authors to Get Fairer Share of Publisher Profits' (The Guardian, 5 March 2018) <https://www.theguardian.com/books/2018/mar/05/philip-pullman-calls-for-authors-to-get-fairer-share-of-publisher-profits> accessed 29 January 2023.

[19] Writ proceedings in *Event and Entertainment Management Assn v Union of India* 2017 SCC OnLine Del 12740.

[20] *Leopold Cafe & Stores v Novex Communications (P) Ltd* (2014) SCC OnLine Bom 4801.

smaller copyright societies to have much bargaining power. This shows that even copyright societies are unable to bridge the unequal bargaining power between the authors and publication houses.

The above discussion shows that the high selling prices of these books and journal articles are attributable to the publishers and not the authors. In fact, authors are not even decisive voices in the process of pricing. Rather, they are rather in a disadvantageous position as against the big publication houses. When readers are made to pay high prices, they are not benefitting the authors as much as they are benefitting the publishers. Acknowledging the key stakeholders in the Sci-Hub dispute, who are the publishers and readers, instead of framing it in the language of authors versus readers will help us in realising that the contestation is between the commercial interests of the publishers and the reader's right to access knowledge and academic material, and not between the author's right to be fairly compensated and the right of the readers to access academic material. That said, the interests and role of authors cannot be ignored altogether in this equation. Authors have to work with big publishing houses for the reputational capital, editing services, and marketing power that this brings. It is therefore imperative to find middle paths to resolve this issue that also accounts for the interests and concerns of authors, without foregrounding them.

As shown above, publishers hold immense bargaining power and their monopoly hurts the rights of both authors and readers. While legal regulation is doubtless an important step in levelling the playing field, as we have indicated with reference to the royalty example, legal regulation alone is inadequate to achieve this objective. In this paper, we look at the role that the state can play in this situation.

There is a need to have a player who is better placed than the authors and the readers to balance out this unequal bargaining power. For all practical purposes, the state clearly has more financial capacity to bear this liability. We are cognizant of the risks to free speech that flow from the state wielding the power to control access to materials. A detailed discussion of this issue is beyond the scope of this paper. However, we submit that with the requisite accountability from academicians and civil society, the state can provide much-needed financial cushion to universities to access paywalled material. While at the same time ensuring that the freedom of speech and expression is not curtailed.

Beyond its ability, there is also a strong constitutional justification for affixing the liability on the state. In the next section, we will delineate this constitutional justification. We will do so by laying down the broad contours

of the Right to Education ('RTE') and will then contextualize it within the debate around shadow libraries.

IV. Constitutional Justification

A. The Historical Background

Before independence, the British government did not show much interest in sponsoring the educational institutions in India.[21] The constituent assembly, however, acknowledged that education was a vital factor in the progress of the nation. In fact, the Sub Committee on Fundamental Rights of the Constituent Assembly had also recommended that that an enforceable right to education ('RTE') should be included in the fundamental rights chapter. However,various members of the constituent assembly including Sir Alladi Krishnaswamy Aiyyar, Sardar K.M. Panikkar and Sir Govind Ballabh Pant believed that an overarching RTE could open a floodgate of claims that the state could not have handled.[22] Pursuant to their opposition, RTE was included in Part IV of the constitution which speaks of the Directive Principles of State Policy ('DPSPs').[23] Resultantly, at the time of the adoption of the constitution, RTE was not an enforceable fundamental right and was a merely an unenforceable principle to guide the state's policies.

In PartIV of the Constitution, the RTE enjoyed an elevated position. Specifically, Article 36 of the draft constitution guaranteed RTE [which was analogous to article 45 in the final draft] started with 'every citizen is entitled to' even when other DPSPs started with the 'state shall endeavour to' language. Various members like Pandit Lakshmi Kante and Rd. B. R. Ambedkar objected to the same noticing the anomaly in the phrasing of the article and stating that such a phrasing could lead to a conflation of DPSPs and fundamental rights.[24] Resultantly, the article was amended and it was rephrased as: "The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

---

[21] Manas Chutia, 'Growth and Development of Education in India During British Period in a Historical Perspective' (2020) 11(9) International Journal of Management 1464.

[22] Nalini Juneja, 'Is Blocked Chimney Impeding Access to Secondary Education in Some Cities and Inducing Dropout in Municipal Primary Schools' (2005) 35 Niepa Occasional Paper <http://niepa.ac.in/new/download/Publications/Occasional%20Paper%20No.%2035.pdf> accessed on 29 January 2023.

[23] Jai S Singh, 'Expanding Horizons of Human Right to Education: Perspective on Indian and International Vision' (2010) 52(1) Journal of the Indian Law Institute 34.

[24] PP Rao, 'Fundamental Right to Education' (2008) 50(4) Journal of the Indian Law Institute 585.

Interestingly, despite being unenforceable, it was the only DPSP to provide a time frame for the government to fulfil its obligation.

The status of this DPSP underwent gradual transformation into a fundamental right. In the case of Mohini Jain v State of Karnataka ('Mohini Jain'), the Supreme Court recognized that RTE was a multiplier that enabled an individual to enjoy other rights.[25] It further noted that 'It is primarily [sic] the education which brings forth the dignity of a man . . . An individual cannot be assured of human dignity unless his personality is developed and the only way to do that is to educate him.' While recognizing the centrality of education in the advancement of an individual, it observed that 'We hold that every citizen has a 'right to education' under the Constitution. The State is under an obligation to establish educational institutions to enable citizens to enjoy the said right.' It categorically read RTE into article 14 and 21 of the Constitution.

Further, in the case of Unni Krishnan, J.P. v State of A.P.,[26] the Supreme Court clarified that the judicially crafted obligation to provide free and compulsory education extended only to children below the age of 14 years. In this case, the court also took an opportunity to reprimand the government institutions for the lackadaisical enforcement of article 45. It concretized the enforceability of this DPSP by categorically remarking that every child who was denied RTE, could seek the issuance of the writ of mandamus against the appropriate authority, for the enforcement of the right.

These judicial interventions fostered a movement outside courts. various non-government and civil society organizations coordinated their efforts which culminated establishment of the National Alliance for the Fundamental Right to Education ('NAFRE'). Other collectives that were committed to the abolition of child labour including the South Asian Coalition on Child Servitude ('SACCS') and Campaign Against Child Labour ('CACL') also joined the NAFRE.[27] In response to this growing movement, the government sort to translate article 45 into a justiciable right via the 83rd Amendment Bill in 1997.

RTE finally translated into a fundamental right through the 86th Constitution Amendment Act, 2002. Pursuant to the same, article 21A was added and it states: "21A. The State shall provide free and compulsory

---

[25] *Mohini Jain v State of Karnataka* (1992) 3 SCC 666.

[26] (1993) 1 SCC 645: 1993 AIR 2178.

[27] John Harriss, 'Universalizing elementary education in India: Achievements and challenges' (2017) 3 UNRISD <https://www.econstor.eu/bitstream/10419/186098/1/1010306782.pdf> accessed 29 January 2023.

education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

This is how the RTE became a justiciable right. The statutory manifestation of this constitutional provision can be seen in the Right to Education Act, 2009 which provides the legal framework and the roadmap for materializing this RTE.

B. Expansion by the Courts:

In the following section, we will trace the evolution of the RTE in the courtrooms, to show how it has acquired the shape and colour of a justiciable right for the citizens and a positive obligation for the state. The Supreme Court has held, in the context of fundamental rights in general[28] and the RTE in particular[29], that the realization of such rights, and the RTE in particular, must be pursued, notwithstanding the existence of resource constraints. The state, therefore, cannot deny fundamental rights to citizens on the ground of austerity. For instance, to draw on an example unrelated to the RTE, in the case of Municipal Council, Ratlam v Shri Vardichan,[30] the inhabitants of Ratlam brought a suit against the municipality on the ground that it had failed to provide for appropriate sanitary facilities, despite the orders from the magistrate under Section 133 CRPC. The municipality argued that it could not comply with the orders of the magistrate due to lack of financial resources. The court held that "The right of the people to live in a clean and healthy environment is a basic human right, fundamental to live a decent life, the violation of which will be considered a violation of basic right to life." It further noted that the municipality could not cite financial difficulties as a reason for denying the right to life to the inhabitants. This general principle is also applicable to the right to education.

More specifically on the question of RTE and resource constraints, the pre-RTE act judgement rendered in Unni Krishnan, J.P., introduced a qualifier to the judicially crafted RTE by stating that the obligation of the state was contingent on capacity constraints.

But besides this judgement, the supreme court has taken a pro-RTE stance in a catena of judgements. For instance, In State of Bihar v Bihar Secondary Teachers Struggle Committee[31], it was held that the interpretation placed on the right must be one that helps make its realization a reality.

---

[28] *Municipal Council, Ratlam v Vardichan (*1980) 4 SCC 162: AIR 1980 SC 1622.

[29] *Avinash Mehrotra v Union of India* (2009) 6 SCC 398.

[30] *Municipal Council, Ratlam v Shri Vardichan* (1980) 4 SCC 162.

[31] (2019) 18 SCC 301.

In State of H.P. v H.P. State Recognised and Aided Schools Managing Committee[32], it was held that lack of financial capacity could not be cited as an excuse for denial of the RTE to children under the age of 14 years. Further in the case of Avinash Mehrotra v Union of India[33], the Court observed that a RTE placed an affirmative burden on all participants in our civil society for its meaningful realization. Its enforcement was not dependent on the cost involved and capacity constraints of the state.[34] In a similar vein, the supreme court in the case of Ashoka Kumar Thakur v Union of India[35], re-affirmed the judgement in Mohini Jain by stating that RTE enabled the realization of other rights. The Court must supervise the government spending on free and compulsory education as RTE plays an important role in unleashing the potential of the individual and the progress of the nation.[36] Further, in Anuradha Bhasin v Union of India[37], the Supreme Court held that RTE was unique amongst all other fundamental rights. This is because, while the latter are negatively worded, the RTE is positively worded, encompassing an obligation on the state to ensure that children between the age of 6-14 have access to education.

More recently during the pandemic when education shifted online, the Supreme Court heard a plea by the managements of unaided recognized schools in Delhi for exempting them from bearing the cost of providing equipment' and internet packages to students from economically weaker Sections. They further claimed reimbursement from the state for the costs that would be incurred in providing the technological equipment' and internet facilities. The state cited lack of resources and pushed back against the plea. The court recognized that students from economically weaker sections/disadvantaged groups were unable to realize their RTE in a meaningful manner due to the stark inequalities. It further noted "The State cannot wash its hands of the obligation imposed particularly by Article 21 A of the Constitution.' It also held that the 'needs of children from the underprivileged sections to receive adequate access to online education cannot be denied."[38]

Two conclusions emerge from the above survey of case laws. First, the Supreme Court has placed an affirmative duty on the state to realize RTE which puts this right on an elevated footing vis-a-vis other fundamental right

32 (1995) 4 SCC 507.
33 (2009) 6 SCC 398.
34 ibid.
35 (2008) 6 SCC 1.
36 ibid [466].
37 (2020) 3 SCC 637.
38 *Action Committee Unaided Recognized (P) Schools v Justice for All 2021* SCC OnLine SC 3301 [4].

(which are all negatively worded). Second, that resource constraints cannot be cited as a valid justification for a failure to realize the RTE.

C. RTE as Justification for the Continued Existence of Shadow Libraries

These conclusions are extremely relevant for recalibrating the debate around the shadow library case. Even though article 21A provides for free and compulsory education only to children aged between 6-14 years, the recognition of a facet of education as a fundamental right has positively influenced the judiciary's approach to cases involving educational access. To illustrate, in a case concerning the denial of admission to a medical college, the Supreme Court noted:

> We would like to take this opportunity to underscore the importance of creating an enabling environment to make it possible for students, such as the petitioners, to pursue professional education. While the right to pursue higher (professional) education has not been spelt out as a fundamental right in Part III of the Constitution, it bears emphasis that access to professional education is not a governmental largesse.[39]

The Court noted that the government has an affirmative obligation to facilitate access to education, at all levels.[40] It traced the recognition of the right to professional education in international human rights law. Further it noted that a key area where government intervention is mandated is 'economic accessibility' so as to ensure that 'financial constraints do not come in the way of accessing education.'[41]

Consequently, there is a credible basis to obligate state intervention to facilitate access to educational content, even at the professional level.

D. Affixing the Liability on the State

As things stand now, books and articles which can facilitate learning, research and creation of academic works are mostly paywalled by publishers.[42] As the survey of the case law in the above two segments makes clear, the interpretation of the RTE adopted by the Supreme Court [and its impact on the right to access professional education as well] can be interpreted as an

---

[39] *Farzana Batool v Union of India* 2021 SCC OnLine SC 3433 [9].

[40] ibid.

[41] ibid [11].

[42] Isabella Liu, 'Opinion: It's Time for the Academic Paywall to Fall' (The Varsity, 13 March 2022) <https://thevarsity.ca/2022/03/13/opinion-no-more-academic-paywall/> accessed 29 January 2023.

entitlement to access research material that is paywalled or otherwise unaffordable/inaccessible to a majority of students. Given that users themselves are unable to afford access to this paywalled material, the obvious course of action is to affix the liability for the realization of the RTE on the institutions they are affiliated to. Since Article 21-A is only enforceable against the state, the only viable alternative is to obligate the state to enable these institutions to provide access to this academic material, to students and researchers. In a scenario where the full realization of the RTE is contingent on accessing this copyrighted material, it is natural that the state takes up the job of negotiating with the publishers and databases, buying subscriptions and securing licenses. This is not just useful from a rights perspective; but is also likely to yield more efficient results. These macro contracts between the state and the publishers can be far more uniform and certain. This can reduce the transaction cost for both the publishers as well as the government and private universities as one entity that is the state will get involve in these negotiations. Lastly, it can also address the problem of unequal bargaining power between the universities and the publishers where the former is dependent on the latter for facilitating educational research and writing while the latter enjoys immense control and monopoly over the publication and distribution of academic material.

In order to play a more active role in this equation, the government has launched the 'one nation, one subscription' project to buy a bulk subscription to multiple journals.[43] Inspiration can be drawn from the program launched by the European Commission and the European Research Council which aims at providing full and immediate open access to research publications. It focuses on 'Plan S', which mandates that research funders would have to ensure that research publications generated through grants allocated by them are openly accessible and not monetized in any way.[44] In view of the above discussion, a constitutionally ideal outcome would be to have the state to facilitate access to paywalled material so that the RTE can be fully realized through state intervention. This would ensure that authors are fairly compensated for their work and that readers have access to academic material without incurring any out-of-pocket costs. However, doctrinal expectations are often divorced from empirical realities.

---

[43] Anubha Sinha, 'The STI Policy Proposes a Transformative Open Access Approach for India (*Centre for Internet and Society*, 21 January 2021) <https://cis-india.org/a2k/blogs/the-sti-policy-proposes-a-transformative-open-access-approach-forindia> accessed 29 January 2023.

[44] 'About Plan S' (*Plan S*) <https://www.coalition-s.org/> accessed 29 January 2023.

Specifically, there continues to remain widespread unaffordability to research material in India today.[45] We shall develop this point further when discussing the fair dealing educational exception in Indian copyright law. For the present discussion, it suffices to state that the existence of the problem of widespread unaffordability provides evidence of the failure of the government to secure access to copyrighted material for all, making access to shadow libraries imperative.

Given this position, the question that arises is whether the state, acting through its judicial wing, should block access to copyrighted material, thereby imperilling the RTE of those who depend on it. Our answer would clearly be in the negative. When the role of shadow libraries in realizing the RTE is acknowledged, it becomes clear that the court should not frustrate the realization of the RTE by finding the operation of shadow libraries to be illegal.

We will now turn to a consideration of how LibGen and Sci-Hub have been dealt with in other jurisdictions, with a view to determine what lessons can be drawn through this comparison for India.

V. Comparative Experience

In France, a complaint was filed in the High Court of Paris by the publishers Elsevier and Springer Nature against, inter alia, LibGen and Sci-Hub. This led to an order to four Internet Service Providers in France to block Sci-Hub and LibGen sites for the year to come. The court reasoned that the two sites 'clearly claim to be pirate platforms rejecting the principle of copyright and bypassing publishers' subscription access portals.'[46]

In Sweden, in December 2019, the Swedish Patent and Market Court issued a dynamic blocking injunction on December 9, in case PMT 7262-18 between AB Svensk Film industri and the Swedish digital service provider Telia Sverige AB. The same court further issued a dynamic blocking injunction against the aforesaid DSP. The injunction directed the DSP to block customer access to file sharing services on current domain names and web addresses and artifices designed to circumvent the ban. Claimants were to

---

[45] Swaraj Paul Barooah, 'Time to More Seriously Question the Spectre of Copyright in the Realm of Education' (*SpicyIP*, 23 December 2022) <https://spicyip.com/2020/12/time-to-more-seriously-question-the-spectre-of-copyright-in-the-realm-of-education.html> accessed 29 January 2023.

[46] Ernesto Van der Sar, 'French ISPs Ordered to Block Sci-Hub and LibGen' (*TorrentFreak*, 31 March 2019) <https://torrentfreak.com/court-orders-french-isps-to-block-sci-hub-and-libgen-190331/> accessed 3 January 2022.

inform the DSP of infringing access on which the DSP were to act within two to three weeks to block those services.[47]

In the United States, a temporary and permanent injunction was granted against Sci-Hub. A lawsuit was instituted by the American Chemical Society('ACS') in the Southern District of New York. In an order in October 2015, the judge held that ACS had established a good prima facie case based on the evidence to show Sci-Hub's activities and Alexandra Elbakyan's admission as to Sci-Hub's activities. The court held that, while there is certainly a need to ensure broad access to scientific material, Elbakyan's solution is not in the public interest. This is because it upsets the delicate ecosystem that fosters scientific research. Inadequate protection of copyrighted material might imperil scientific research, it reasoned.[48] Importantly, the fair dealing exception for research and education in Indian copyright law, it is submitted, make this reasoning in apposite for India. In the US case, the court did briefly consider the fair use exception. However, it held that the exception would only permit the use of Elsevier's articles in certain circumstances and not wholesale infringement.[49] The fair dealing exceptions that we shall subsequently discuss are encoded into the delicate ecosystem created in India to foster the creation of copyrighted material. The moment a use falls within the ambit of a recognized fair dealing exception, it is legally permissible. We will explain why the finding of the US court as to the application of the fair use exception will not hold good in the Indian context, given the broad language of the relevant fair dealing exceptions and the judicial interpretation that has been placed on them. The way the operation of shadow libraries falls within these two fair dealing exceptions shall be discussed later in this paper.

Reverting to the US case, in October 2017, the court granted ACS a permanent injunction against Sci-Hub. It found that Sci hub had: 'systematically infringed ACS's copyrighted works.'[50] In Austria, following guidance from the regulator, LibGen and Sci-Hub were blocked.[51]

---

47 Neil Wilkof, 'The Swedish Patent and Market Court Issues its First Dynamic Blocking Injunction' (*The IPKat, 23 January 2020*) <https://ipkitten.blogspot.com/2020/01/the-swedish-patent-and-market-court.html> accessed 3 January 2022.

48 *Elsevier Inc. v www.Sci-Hub.org*, 15 Civ 4282 (RWS).

49 ibid 16.

50 Andrea Widener, 'ACS Prevails over Sci-Hub in copyright suit' (*Chemical & Engineering News*, 7 November 2017) <https://cen.acs.org/articles/95/i45/ACS-prevails-over-Sci-Hub.html> accessed 25 January 2023

51 Glyn Moody Fri, 'Elsevier Gets Sci-Hub and LibGen Blocked in Austria, Thereby Promoting the Use of VPNs and Tor in the Country' (*Techdirt*, 15 November 2019) <https://www.techdirt.com/articles/20191112/08504743369/elsevier-gets-sci-hub-libgen-blocked-austria-thereby-promoting-use-vpns-tor-country.shtml> accessed 3 January 2022.

A brief survey of comparative jurisprudence, therefore, makes clear that the operation of shadow libraries has been frowned upon by courts. However, as Elbakyan points out in her written submissions,[52] none of these jurisdictions had the progressively worded research and educational exceptions that India does and nor were the shadow libraries represented in these cases. This is therefore a unique opportunity for an Indian court to adopt a progressive interpretation of Indian copyright law that is consistent with the constitutional culture around the RTE, the need for accessibility and the socioeconomic realities that prevail in India.

The matter can be looked at through another angle also. The operation of these shadow libraries arguably fits within the ambit of the fair dealing provisions that relate to research and education in Indian copyright law. It is this fair dealing argument that we turn to next.

VI. Copyright Law Analysis

A. Basic Purpose of Copyright Law

It would be instructive to commence the analysis of fair dealing provisions by first exploring the purpose of copyright law, emerging from the case law. This understanding of the contextual peculiarities that prevail in India is also critical for making good our argument that the judgments in other countries, referenced above, would not have much persuasive force in India. Two cases in this regard bear emphasis.

First, the Jammu and Kashmir High Court held in Romesh Chowdhry v Kh. Ali Mohamad Nowsheri[53] 'it is well settled that under the guise of copyright, authors cannot ask the court to close all the doors of research and scholarship and all frontiers of human knowledge.' What is crucial in the quoted excerpt for this paper is the Court's insistence that copyright cannot be weaponized to thwart access to knowledge.

Second, in Rameshwari Photocopy Services,[54] the single judge held that copyright is not a divine right or a natural right, and is a statutory right, which is subject to certain exceptions enumerated within the provisions of the Act. Copyright law is designed rather to stimulate activity and progress in the arts, for the intellectual enrichment of the public, and is intended to

---

[52] Written Statement on behalf of Defendant No 1 in *Elsevier Ltd v Alexandra Elbakyan*, 2022 SCC OnLine Del 3677 (Delhi High Court) [on file with author] [81-82].

[53] 1965 SCC OnLine J&K 1: AIR 1965 J&K 101.

[54] *University of Oxford v Rameshwari Photocopy Services* 2016 SCC OnLine Del 6229.

increase, and not to impede, the harvest of knowledge. This finding was not disturbed by the Division Bench which affirmed the single judge's verdict.

As Defendant No. 1's written submission in the shadow library case indicates, the basis of the fair dealing provisions in copyright law can be traced to Article 19[1][a] of the Constitution.[55] This sentiment is evident from the Delhi High Court's judgment in the case of Wiley Eastern Ltd. v Indian Institute of Management[56] in which the court held as follows: "the basic purpose of Section 52 is to protect the freedom of expression under Article 19(1) of the Constitution of India- so that research, private study, criticism or review or reporting of current events could be protected." This Constitutional basis for fair dealing provisions assumes significance, as it underscores the importance of having robust exceptions to a well-functioning copyright system. We submit that an Indian court that is called on to interpret whether the operation of shadow libraries falls within the four squares of Section 52[1][a] and 52[1][i] ought to foreground the above articulated purpose of copyright law. Having this purpose in mind will enable the court to evaluate the importance of shadow libraries from this vantage point.

B. Section 52[1][a] of the Copyright Act

The text of the exception embodied in Section 52[1][a] supports the interpretation being offered by the defendants. Specifically, the exception explicitly states that it is worded as 'including research'. Since it is a settled position that the use of 'including' is meant to give the terms used in a provision a broad interpretation,[57] the term 'research' has to be given an interpretation that means something. Further, such research envisaged by the provision would not merely be of a private nature. This is because, if the legislature's

---

[55] Written Statement (n 52) [9].

[56] 1995 SCC OnLine Del 784: (1995) 15 PTC 375.

[57] See, for instance, *CIT v Taj Mahal Hotel* (1971) 3 SCC 550:

> The purport of interpretation of the expression 'includes' has to be in the context of the Act. This Court has held thus... The word 'includes' is often used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute. When it is so used, those words and phrases must be construed as comprehending not only such things as they signify according to their nature and import but also those things which the interpretation clause declares that they shall include.

See also, *S.K. Gupta v K.P. Jain* (1979) 3 SCC 54:

> 24. The noticeable feature of this definition is that it is an inclusive definition and, where in a definition clause, the word 'include' is used, it is so done in order to enlarge the meaning of the words or phrases occurring in the body of the statute and when it is so used, these words or phrases must be construed as comprehending not only such things which they signify according to their natural import, but also those things which the interpretation clause declares that they shall include... But where the definition is an inclusive definition, the word not only bears its ordinary, popular and natural sense whenever that would be applicable but it also bears its extended statutory meaning.

intent was to merely cover private research, it would have stopped short at referring to 'private or personal use'. There would have been no need to cover 'research' separately.[58]

As Elbakyan points out in her written submissions, the sole purpose for which Sci-Hub makes available material on its website is research.[59] The use would therefore squarely fall within the ambit of the research exception.

This interpretation of the exception also has Constitutional backing. As MP Ram Mohan and Aditya Gupta point out, the judicial interpretation of Article 19[1][a] and Article 21 indicates that these fundamental rights encompass a right to research.[60] Specifically, in offering an expanded interpretation of Article 21 in the celebrated Francis Mullen case, the Supreme Court read the right as including facilities for: 'reading, writing and expressing oneself in diverse forms.'[61]

A 1997 Supreme Court judgment read the right to life as including 'social, cultural and intellectual' fulfilments.[62] A Delhi High Court judgment interpreted Article 21 as including 'a right to acquire useful knowledge.'[63] Based on the broad conception of the right to life adopted in these cases, they conclude that Article 21 harbours constitutional protection for the right to research.[64]

In the only Indian judgment that has thus far interpreted Section 52[1][a][i], the facts were as follows. The plaintiff had an exclusive license from the Central Board of Secondary Education to publish and reproduce class 10th and 12th question papers. The defendants published the same question papers for commercial gain.[65] The Court rejected the defendant's argument on Section 52[1][a][i] on the ground that the defendant's publication was for commercial exploitation.[66] Speaking through Justice Lahoti, the Court held:

> "If a publisher publishes a book for commercial exploitation and in doing so infringes a copyright, the defence under Section 52(1)(a)(i)

---

58 Written Statement (n 52) [33].

59 ibid [31].

60 M.P. Ram Mohan and Aditya Gupta, 'Right to Research and Copyright Law: From Photocopying to Shadow Libraries' (2022) 11(3) NYU Journal of Intellectual Property and Entertainment Law 249.

61 *Francis Coralie Mullin v UT of Delhi* (1981) 1 SCC 608 [8].

62 *Samatha v State of A.P.* (1997) 8 SCC 191 [247], [248].

63 *Rabinder Nath Malik v The Regional Passport Officer, New Delhi* 1966 SCC OnLine Del 41 [24], [25].

64 Mohan and Gupta (n 60). See generally Vandana Mahalwar, 'On Copyright Protection' (2015) 56 Economic and Political Weekly 7.

65 *Rupendra Kashyap v Jawan Publishing House 1996* SCC OnLine Del 466.

66 ibid [21].

would not be available.'[67] As Mohan and Gupta note, the critical difference between the instant case and the shadow library case is that shadow libraries do not aim to obtain commercial returns."[68]

An expanded understanding of what constitutes research can also be found in a Canadian Supreme Court judgment. In Law Society of Upper Canada v CCH Canadian Ltd.,[69] the Canadian Supreme Court adopted a broad interpretation of research, holding that activities incidental to research are also covered within the ambit of the term 'research'. The Court held that users' rights should not be 'unduly constrained' or 'limited to non-commercial or private contexts.'[70] The Court held: 'Although the retrieval and photocopying of legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process.'

In addition to the research exception, the conduct of the defendants would also fall within the ambit of the educational exception, as discussed below.

C. Educational Exception

Section 52[1][i] of the Copyright Act reads as follows:

(i) the reproduction of any work-

(ii) by a teacher or a pupil in the course of instruction; or

(iii) as part of the questions to be answered in an examination; or

(iv) in answers to such questions;

This exception fell for the interpretation of the Delhi High Court in the DU photocopy case.[71] The Division Bench began its analysis by foregrounding the importance of education. In particular, the Court's emphasis on equitable access to education is crucial here. It noted: 'So fundamental is education to a society - it warrants the promotion of equitable access to knowledge to all segments of the society, irrespective of their caste, creed and financial position. Of course, the more indigent the learner, the greater the responsibility to ensure equitable access.'[72]

---

67 ibid.

68 Mohan and Gupta (n 60) 43.

69 2004 SCC OnLine Can SC 13: (2004) 1 SCR 339.

70 ibid [55].

71 See generally Lawrence Liang, 'Paternal and Defiant Access: Copyright and the Politics of Access to Knowledge in the Delhi University Photocopy Case' (2017) 1 Indian Law Review 36, 50.

72 *University of Oxford v Rameshwari Photocopy Services* 2016 SCC OnLine Del 6229 [30].

The Division Bench adopted a capacious interpretation of the exception. It held that the phrase 'course of instruction' means the entire process or programme of education in a semester and not the process of teaching in the classroom alone. Reliance was placed on the judgment of the High Court of New Zealand in Longman Group Ltd. v Carrington Technical Institute Board of Governors[73] where it was held that 'course of instruction' includes:

> "anything in the process of instruction with the process commencing at a time earlier than the time of instruction, at least for a teacher, and ending at a time later, at least for a student. So long as the copying forms part of and arises out of the course of instruction it would normally be in the course of instruction."

The Division Bench's interpretation of the exception in the above terms assumes significance in the shadow library case. Education does not take place in silos. Activities including mandatory submission of projects and dissertations, writing of books and scholarly articles for academic accreditation form a part of the super structure of the educational system. Even if one of these activities is halted by paywalls, the pursuit of education is bound to be affected. This analysis supports the conclusion that the service offered by shadow libraries would fall within the educational exception.

Furthermore, there is convincing literature to demonstrate the inaccessibility of education in India. As Professor Scaria argues, given that many liberally funded universities in the West struggle to easily access scientific materials, one can only imagine the condition of researchers in the Global South.[74]

In a paper, late Professor Basheer and colleagues show that most of the titles acquired by leading law schools in India were procured at prices corresponding to or higher than those prevailing in the West. At a leading law school, the National Law School of India University, some books are purchased using the concerned distributor's foreign currency, further increasing the charge. The price also rises further in light of the cost of shipping.[75]

In the same vein, Basheer and colleagues estimate the cost of two books for an American purchaser, assuming that such a purchaser would have to pay the same percentage of their income on buying the book as an Indian

---

[73] (1991) 2 NZLR 574.

[74] Arul George Scaria and Rishika Rangarajan, 'Fine-tuning the Intellectual Property Approaches to Fostering Open Science: Some Insights from India' (2016) 8 WIPO Journal 109, 111.

[75] Shamnad Basheer and others, 'Exhausting Copyrights and Promoting Access to Education: An Empirical Take' (2012) 17 Journal of Intellectual Property Rights 335, 341.

purchaser. They find that a book by Tsepon Wangchuk DedenShakabpa would cost anoverwhelming US$ 5236. Similarly, the book 'The Politics of Global Governance: International Organizations in an Interdependent World' by Diehl and Frederking would cost US$ 373.93 using this methodology.[76]

In Delhi University, for instance, the subscription to around 40 journals have not been renewed since 2019.[77] A few other reports suggest that Indian Universities have outdated andsub-standard libraries.[78]

Echoing the same sentiment, Sara Bannerman[79] argues that there exists a significant gap between developed and developing countries in terms of access and production of academic material. She points out that researchers indeveloping jurisdictions have hardly any access to academic materials because of high costs of subscription and the inaccessible and expensive distribution mechanisms. Researchers and other stakeholders involved in the research process have been adversely impacted by this gap.

It is also important to bear in mind the importance of shadow libraries in facilitating access to research and education for persons with disabilities ['PwDs']. For PwDs, lack of access to research materials is a huge issue. In India, for instance, only 1% of available books are accessible to the visually challenged. This is because such content is generally not available in soft copy form. Since shadow libraries make such content digitally available, they make content accessible to the visually challenged.[80] For those with locomotor disabilities, physically accessing libraries containing the research material they seek is a challenge. Shadow libraries make such access possible.[81]

This lack of access to research has a number of second order effects. For one thing, it results in the production of research outputs that are not as robust as they could be. Lack of affordable and accessible pathways to research means that individuals from marginalized backgrounds remain shut out from the research process. Absence of participation and inclusion

---

76 ibid.

77 Sukrita Baruah, 'Subscriptions to More than 40 Databases not Renewed in DU, Research Takes a Back Seat' (The Indian Express, 10 November 2019) <https://indianexpress.com/article/education/subscriptions-to-more-than-40-databases-not-renewed-in-du-research-takes-a-back-seat-6112226/> accessed 29 January 2023.

78 'Govt College Library in Uttarakhand Keeps Outdated Books, Students Protest' *National Herald* (13 July 2019) <https://www.nationalheraldindia.com/national/govt-college-library-in-uttarakhand-keeps-outdated-books-students-protest> accessed 29 January 2023.

79 Sara Bannerman, *Access to Scientific Knowledge in International Copyright and Access to Knowledge* (Cambridge University Press 2016) 32-52.

80 Rahul Cherian Jacob and others, 'The Disability Exception and the Triumph of New Rights Advocacy' (2012) 5 NUJS L Rev 603.

81 Written statement by Defendant No 1, p 90 [on file with the author].

of individuals from diverse backgrounds in the research process affects the diversity of the research produced and in turn also the quality of the research, and may also result in afailure to identify relevant research issues.[82] As Cristin Timmermann points out, the unequal access to science for poorer researchers has the second order consequence of curtailing the diversity of scholarly outputs by making it one dimensional.[83]

It suffices to say that shadow libraries serve the important function of ensuring equitable access to education and research – a goal whose importance the Division Bench in Rameshwari was at pains to underscore. Similarly, Professor David Vaver argues[84] that the grant of copyright is accompanied by a duty to keep the prices of copyrighted material reasonable and affordable. This is the essence of the copyright bargain. When copyright owners fail to uphold their side of the bargain (as is clear from the inaccessibility of research material), it is submitted that shadow libraries must be allowed to function as a legitimate corrective against this state of affairs.

Along the same lines, in General Comment 25, the Committee on Economic, Social and Cultural Rights emphasizes equal access to opportunities to participate in science. It recognizes the social function of IP. It calls on states to take measures to prevent: "unreasonably high costs for access to essential medicines, plant seeds or other means of food production, or for school books and learning materials, from undermining the rights of large segments of the population to health, food and education."[85]

Reverting back to the Division Bench's judgment in the DU photocopy case, in order to determine if a use is fair, the Court held that the purpose of the use has to be seen.[86] And the determination of how much usage is fair will be decided based on whether the extent used is justified by the purpose. The Court held:

---

[82] ibid.

[83] Cristian Timmermann, 'Sharing in or Benefiting from Scientific Advancement?' (2014) 20 Science and Engineering Ethics 111.

Also see, written statement by Defendant No. 1 [99] [on file with the author].

[84] David Vaver, 'Publishers and Copyright: Rights Without Duties' (2006) 24 Oxford Legal Studies <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=902794> accessed 29 January 2023.

[85] Committee on Economic, Social and Cultural Rights, 'General Comment No. 25 (2020) on Science and Economic, Social and Cultural Rights (arts 15(1)(b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights)' (UN Economic and Social Council, 30 April 2020) [62] <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQdxONLLLJiul8wRmVtR5Kxx73i0Uz0k13FeZiqChAWHKFuBqp%2B4RaxfUzqSAfyZYAR%2Fq7sqC7AHRa48PPRRALHB > accessed 29 January 2023.

[86] *University of Oxford v Rameshwari Photocopy Services* 2016 SCC OnLine Del 6229 [32].

> "33. In the context of teaching and use of copyrighted material, the fairness in the use can be determined on the touchstone of 'extent justified by the purpose'. In other words, the utilization of the copyrighted work would be a fair use to the extent justified for purpose of education. It would have no concern with the extent of the material used, both qualitative or quantitative."

Therefore, unlike Germany, for instance, where the fair dealing doctrine has quantitative limits, the Court eschewed the adoption of any such limits.[87]

The Court therefore held that it does not matter whether the course-pack is reproduced in full from the textbook. The relevant question was whether the material used by the defendants was justified for the purpose of instructional use by the teacher to the class. This would require a consideration of the defendant's course-packs with reference to: 'the objective of the course, the course content and the list of suggested readings given by the teacher to the students.'[88]

It may be argued that the DU photocopy judgment is inapplicable to the case at hand because the use here is of 100% of the copyrighted work. However, the above paragraph provides a complete answer to this charge. Arguably, the purpose of the use in the instant case is to enable affordable access to reading materials. This is self-evidently a fair purpose, as distinct, say, from the purpose of gaining commercial returns or capturing the plaintiff's market. Since the purpose of the defendants is to serve as an affordable library, the extent justified is, arguably, the content in its entirety. This thus makes the defendant's use acceptable as per the test outlined in the DU photocopy judgment.

Another crucial consideration in the fairness inquiry is the impact of the defendant's work on the potential market for the plaintiff's work. On this count, in the DU Photocopy judgment, the single judge [Justice Endlaw] concluded: 'the students can never be expected to buy all the books, different portions whereof are prescribed as suggested reading and can never be said to be the potential customers of the plaintiffs.'[89] The Division Bench reaches two conclusions: [a] the beneficiaries of educational content are not 'customers. [b]: the educational access provided by course-packs expands the market for the underlying copyrighted works, by making more people aware of the copyrighted content. Both these conclusions can be applied in the case at hand. First, the beneficiaries of the educational content that shadow libraries

---

87 Mohan and Gupta (n 60) 32.
88 ibid [56].
89 *University of Oxford v Rameshwari Photocopy Services* 2016 SCC OnLine Del 6229 [87].

provide are also not 'customers', using the same logic that the DB deploys. Second, arguably, but for shadow libraries, students would not be exposed to much of the content provided by shadow libraries in the first place, settling instead for whatever resources they can readily access. By providing access to such content, shadow libraries expand the possibility of the content they host reaching more people and potentially expanding the footprint of the relevant publishers.

In addition, as Mohan and Gupta argue, individual researchers rarely buy subscriptions of libraries; they access research material principally through libraries. Pointing to their own paper, Mohan and Gupta argue that it would have been impossible for them to formulate the same, were it not for their university's library access, either through subscriptions or inter-library loans.[90]

Further, as defendant no. 1 points out in its written submissions, it earns no financial returns for its services. The only financial returns that it earns are in the form of voluntary donations. And the amount so donated is not used for 'personal profit, for the purpose of trade, or to prejudicially affect the economic interests of the copyright owners.'[91]

To those contending that this interpretation of Section 52[1][i] is overbroad and makes the rights of copyright owners a dead letter, the DB offers a good answer. The court holds: "Thus, it is possible that the melody of a statute may at times require a particular Section, in a limited circumstance, to so outstretch itself that, within the confines of the limited circumstance, another Section or Sections may be muted."[92] Given the above analysis, the holding of DU photocopy commends itself for application on all fours to the case at hand.

In the DU photocopy judgment, the DB rejected the four-factor analysis for evaluating whether a defendant's conduct constitutes fair dealing that had been affirmed by the Delhi High Court in the case of India TV Independent News Service (P) Ltd. v Yashraj Films (P) Ltd.[93] and ICC Development (International) Ltd. v New Delhi Television Ltd.[94] Even so, we have evaluated the instant case from the standpoint of these four factors, for the sake of completeness. These four factors have been statutorily spelt out in Section 107 of the US Copyright Act, embodying the fair use doctrine in that jurisdiction. The factors are:

---

[90] Mohan and Gupta (n 60) 47.
[91] Written Statement (n 52) [23].
[92] *University of Oxford v Rameshwari Photocopy Services* 2016 SCC OnLine Del 6229 [77].
[93] 2012 SCC OnLine Del 4298.
[94] 2012 SCC OnLine Del 4919.

(1) the purpose and character of the use, including whether such use is of a commercial nature oris for non-profit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

Nikhil Purohit has conducted an illuminating analysis of how these factors can be applied in the case at hand.[95] Apropos the first factor [purpose and character of use], the defendants are making academic articles available free of cost, making the use one for a 'non-profit educational purpose'. As Elbakyan indicated in an interview to the Wire, Sci-Hub's aim is to ensure that science is not monopolized by a few but is in fact 'a dynamic network of learned societies'.[96] Further, in 2015, Sci-Hub removed from its archive some journals that 'exemplify openness.'[97] Based on this evidence, as Mohan and Gupta contend, it can be plausibly argued that the purpose of the operation of these shadow libraries is: 'facilitating research and democratising the availability of academic scholarship.'[98] The defendants, we submit, could also argue that their use of the underlying content is transformative. This is because they index the content and make it more easily available. While the defendants do receive donations for their operations, these are not sufficient to make the activity they engage in commercial, as explained earlier.

On the second factor [nature of the work copied], typically, the more creative the content that is copied, the less likely the copying is to constitute fair dealing. Conversely, the more factual the underlying content, the more likely is the court to support a finding of fair use.[99]

---

[95] Nikhil Purohit, 'Sci-Hub and Libgen Up Against Academic Publishers: A Death Knell for Access to Research? – Part II' (*SpicyIP*, 28 December 2020) <https://spicyip.com/2020/12/sci-hub-and-libgen-up-against-academic-publishers-a-death-knell-for-access-to-research-part-ii.html> accessed 18 June 2022.

[96] Sidharth Singh, 'An Interview With Sci-Hub's Alexandra Elbakyan on the Delhi HC Case' (*The Wire Science*, 22 February 2021) <https://science.thewire.in/the-sciences/interview-alexandra-elbakyan-sci-hub-elsevier academic-publishing-open-access/> accessed 21 February 2022.

[97] Daniel S Himmelstein and others, 'Research: Sci-Hub Provides Access to Nearly All Scholarly Literature' (2018) 7 eLife e32822, 4.

[98] Mohan and Gupta (n 60) 43.

[99] 'More Information on Fair Use | U.S. Copyright Office' <https://www.copyright.gov/fair-use/more-info.html> accessed 18 June 2022.

In the instant case, this determination would depend on the content of each article being copied. In general, however, as Purohit argues, it is safe to assume that academic articles are more factual than creative. This factor, therefore, would support a finding of fair dealing.

On the third factor [amount and substantiality of use], the defendants reproduce the full text of the articles concerned. Consequently, this factor would, prima facie, weigh in the plaintiffs' favour. However, as Mohan and Gupta point out, copying a plaintiff's copyrighted material in its entirety is not dispositive in a fair dealing/use analysis. Specifically, relying on the Hathi Trust and Google Books cases in the United States, they argue that: 'when public interest dictates, a complete appropriation of the copyrighted material cannot be the singular yardstick to determine a fair-use analysis.'[100]

The fourth factor [the effect of the use upon the potential market for or value of the copyrighted work], is likely to be the subject matter of some contestation. However, as explained earlier, the defendants, on balance, have a good case on this score. Consequently, an evaluation of the defendants' conduct through this framework would also support a finding of fair dealing.

VII. Conclusion

The shadow library litigation brings into focus the need to introspect on whether the publishing industry is attaining its founding objectives. As Divij Joshi notes, Sci-Hub is not the ideal solution (notwithstanding our argument that it is legal) to the problem of access to research. However, the litigation should serve as a launching point to initiate a conversation on developing new business models in the publishing industry, the way Napster did for the music industry or Netflix did television.[101] The fact of the matter is that even though these shadow libraries are unable to ensure optimal access to research materials; they are able to improve the level of access. It is necessary to explore systemic solutions to overhaul the publishing industry. Possible solutions could include: [a] government funding of publishing houses that can ensure affordable and widespread access; [b] a system for depositing

---

[100] Mohan and Gupta (n 60) 46.

[101] Divij Joshi, 'Driving Them Up the (Pay) Wall – Sci-Hub and the Disruption of the Academic Publishing Industry' (SpicyIP, 25 July 2017) <https://spicyip.com/2017/07/driving-them-up-the-paywall-sci-hub-and-the-disruption-of-the-academic-publishing-industry.html> accessed 29 January 2023.

research outputs in national library repositories for wider access; and/or giving peer reviewers a greater say in ensuring affordable access.[102]

A thoughtful judgment by the Delhi High Court, that rules in favour of shadow libraries and outlines some of the aforementioned questions for the consideration of relevant stakeholders could be a valuable contribution. It can set in motion a well-considered thought process for addressing the ills that currently plague the publishing industry.

---

[102] Swaraj Paul Barooah, 'Time to More Seriously Question the Spectre of Copyright in the Realm of Education' (SpicyIP, 23 December 2020) <https://spicyip.com/2020/12/time-to-more-seriously-question-the-spectre-of-copyright-in-the-realm-of-education.html> accessed 29 January 2023.