
UNDERSTANDING OPEN ACCESS VIS-À-VIS FAIR DEALING/USE

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1. THE IDEOLOGICAL CLASH BETWEEN OPEN ACCESS ENTHUSIASTS AND RIGHTS OWNERS

The law contains “appropriate scope of private monopoly power that gives authors and inventors a sufficient incentive to create and innovate, while ensuring that the consuming public had adequate access to the fruits of their efforts.”¹

The concept of copyright law, rooted in the traditional theories of intellectual property allows one to claim ownership of a work created out of his skill, labour, judgment and intellect. This allows for reward and incentive in terms of payment to access the creator’s or author’s work. For example, to read a book, we need to buy it, the income from which goes to the author and the publishers. Similarly, a work of art, such as a painting or sculpture can be bought for a certain price to proportionately reward and incentivize the artist. As a result of the copyright, not only is the author entitled to get a monetary reward but is also entitled to claim ownership right of his work and can prevent or exclude others from using or accessing it. However, it may also be possible that such an exclusive right of preventing others from accessing one’s work can seriously prejudice the interests of the public who many not at all times, be able to monetarily afford or pay the price to access such copyrighted works.

This gives rise to the recognition of the “Open Access Movement” which, as the name suggest advocates for openness in terms of accessing academic literature such that it is “*digital, online, free of charge and free of most copyright and licensing restrictions.*”² The Open Access movement has gained better recognition due to the emergence of internet and the greater reliance placed by the global community on sources of digital information. In this regard, an interesting observation made in the Budapest Open Access Initiative was: “*An old tradition*

¹ Vandana Mahalwar, *Copyright and Human Rights: The Quest for a Fair Balance in* MANOJ KUMAR SINHA AND VANDANA MAHALWAR, *COPYRIGHT LAW IN THE DIGITAL WORLD: CHALLENGES AND OPPORTUNITIES* 165 (Springer, 2017).

² PETER SUBER, *4 OPEN ACCESS* (The M.I.T. Press, Cambridge 2012).

and a new technology have converged to make possible an unprecedented public good. The old tradition is the willingness of scientists and scholars to publish the fruits of their research in scholarly journals without payment...The new technology is the Internet.”³ To better understand the contours of the “Open Access Movement”, various definitions of the same as summarised by John R. Beatty⁴ are reproduced below in the table:

Definitions of Open Access				
Statement	Type of Work	Access	Methods	Reuse Rights
Budapest, Open Access Initiative, 2002	Peer-reviewed journal literature	Online at no cost to readers	Recommends self-archiving and OA journals	Read, copy, print, distribute, publicly display, search, index, feed into software
Bethesda Statement on OA Publishing, 2003	Primary scientific literature	Free, irrevocable, worldwide, perpetual right of access	Requires deposit into at least one online repository	Use, copy, print, distribute, publicly display, make and distribute derivative works.
Berlin Declaration on Open Access to Knowledge in Science and Humanities, 2003	Original scientific search results, raw data, source materials, etc.	Free, irrevocable, worldwide right of access	Requires deposit into at least one online repository	Use, copy, print, distribute, publicly display, make and distribute derivative works.

This has led to copyright law now becoming a topic of significant public interest which has multiple stakeholders at its core. Not only do people/ consumers of creative works regularly infringe copyright by downloading pirated copies of movies, songs, videos, books etc. but they also circulate such copyright infringed material across various platforms posing serious challenges to the law of copyright as it stands today. In general, in today’s digitalized India for instance, many people may not have studied or known about copyright law in specific but they are somewhat aware that they can, for instance on Telegram, find and circulate infringing

³ *Id.*

⁴ John Beatty, *Revisiting the Open Access Citation Advantage for Legal Scholarship* (2019) 111 LAW LIBRARY JOURNAL 573, 578–580.

copies of various forms of media. It is an obvious case that these acts constitute copyright infringement and the investing stakeholders have decried such acts of online piracy. They have further made genuine demands to their respective governments to make reforms in copyright law for the better protection of their rights under copyright law.

However, at the same time, on the other side, we also have certain dedicated pirate groups who are completely opposed to the idea of copyright laws and who are the harbingers of change in challenging the enforcement of copyright laws.⁵ The basic presumption behind copyright law and its enforcement is that it exists as a law for the authors and to give recognition to their rights,⁶ and therefore most literature and discussion has centered around their rights. As James Meese notes in *Authors, Users, and Pirates*:

“Still, it is of interest that the most notable early analyses of the author emerged from interdisciplinary scholars—Martha Woodmansee, Peter Jaszi, and Mark Rose—who were influenced by the work of Michel Foucault and Roland Barthes. These researchers were committed to deconstructing the author, challenging its uniqueness as a legal subject, and placing copyright law in a broader historical and theoretical context.”⁷

2. ACADEMIC PUBLISHING AND OPEN ACCESS

“The academic custom to write research articles for impact rather than money may be a lucky accident that could have been otherwise. Or it may be a wise adaptation that would eventually evolve in any culture with a serious research subculture.”⁸

In recent years, with the students getting better and easier access to internet and information, they have started to become increasingly knowledgeable and have wanted to acquire global access to knowledge for their intellectual development and growth. However, most of the refined studies are found in exorbitantly charged journals and books coming from leading publishers which most people cannot afford. Technology has offered a very lucrative alternative to people in such a scenario as there is cheaper and easier access to most copyrighted

⁵ PATRICK BURKART, *PIRATE POLITICS* (The M.I.T. Press, Cambridge 2014).

⁶ Julie E. Cohen, *The Place of the User in Copyright Law* (Georgetown University Law Center 2005).

⁷ JAMES MEESE, *AUTHORS, USERS, AND PIRATES: COPYRIGHT LAW AND SUBJECTIVITY* (The M.I.T. Press, Cambridge 2018).

⁸ PETER SUBER, *OPEN ACCESS* (The M.I.T. Press Cambridge 2012).

content without paying a single penny and simply at the single click of a mouse, which give chilling fear to the publishers that they may be driven out of business by such technological advancements.

Since the number of students attending universities globally has also increased, there is immense pressure on the libraries to provide books in huge numbers of students which again is a herculean task to achieve, given the limited budgets that the libraries often have, the effect of which is more pronounced in developing countries. However, the irony lies in the fact that the published content itself is coming from the academicians who teach in the universities, and their research once published is owned and copyrighted by the publishers, and to get access to the copyrighted work of their own employees and academicians who generally don't make huge money out of their own work, the universities are forced to pay. In fact, the major concern here is regarding the fact that most academicians are generally open to the idea of sharing their academic research free of cost to anyone who is interested in reading. However, since the publishers always have a contractual clause which forces authors to give the copyright in their intellectual property to the publishers, the academicians have no other choice.

A recent practical trend that has been observed, for instance on LinkedIn, a professional networking site is that when someone's paper gets published in a certain journal, most of these people put up posts stating that their papers are behind the paywall and if someone wants access to or is interested in reading their paper, he or she could personally message them so that the authors can share a copy of the same with them. This is the reason why and how such copyrighted academic works start getting circulated through other, probably unauthorized means thereby breaching the copyright of the publishers. This brings us to the question if an 'open source model' would help in resolving most of these conflicts which have been continuing for years now. However, it must also not be forgotten that such an 'open access' model is generally met with a lot of resistance from the proponents of intellectual property rights who believe in copyright to be an exclusionary right of the authors/publishers.

The major area of concern here is the role of education both for economic and social growth. It is an undeniable fact that "universities, for example, play a distinctive and valuable role in modern societies, whilst recognising the need to be cautious about some of the more exaggerated claims that are made for their special status."⁹ In furtherance of this is the claim

⁹ A. MONOTTI AND S. RICKETSON, UNIVERSITIES AND INTELLECTUAL PROPERTY: OWNERSHIP AND EXPLOITATION

that a good education system strongly depends on the impetus provided to “educational writing and publishing” and under the status quo, it is not possible to suggest the most appropriate new means to adjust claims of both the sides. Therefore, any suggestion in this regard or any reformative approach must be taken with utmost caution.

Internet and technological advancements are indeed changing how scientific and academic research is produced and communicated to people sitting in remote parts of the globe. A person sitting in Africa may easily be reading content published by Oxford University Press in the U.K. sitting at the comfort of his home. This is definitely one of the most profound impacts of internet and digitisation, where eventually people need not resort to the traditional means of procuring printed materials of research to read and build upon them to write their own scholarly works. While the idea of printing press was indispensable few decades ago for “typesetting, bookbinding, and managing the logistics of shipping reams of paper to colleges all over the world, digitization and current computer software have made creating and sharing the written word very simple.”¹⁰ This has also created a grey area for publishers’ profits who have since always benefitted out of the “academic research and the largely unpaid efforts of peer reviewers by reselling the results of their labour to universities.”¹¹

It is an established fact that with the advent of internet and easy access to material online, “the marginal costs of disseminating digital knowledge are virtually nil; publishing extra copies of online articles is virtually free.”¹² While the publishers currently use the model wherein the universities pay for the subscription of paywalled content and give privileged access to their students to access the same, advocates of the open access movement emphasize on the need of doing away with the system of paywalls and create a “free digital publication world, where excluding anyone from access is impractical or impossible.”¹³ This is so because, anyway the quick circulation of material online freely without much hassle has contributed to shaking such traditional systems which focus extensively on profits and exclusivity. An argument advanced by Peter Suber, who advocates for Open Access is that many people suggest Open Access publication as the apparent solution because of the relative simplicity of storing and spreading

ch. 2 (Oxford University Press, 2003).

¹⁰ *Id.*

¹¹ *Id.*

¹² Kent Anderson, *96 Things Publishers Do* (2016) <https://scholarlykitchen.sspnet.org/2016/02/01/guest-post-kent-anderson-updated-96-things-publishers-do-2016-edition/> (accessed on 22-03-2022).

¹³ Kate Murphy, *Should All Research Papers Be Free?* *New York Times*, (Mar. 12, 2016) <https://www.nytimes.com/2016/03/13/opinion/sunday/should-all-research-papers-be-free.html> (accessed on 22-03-2022).

materials digitally. Open Access publications make intellectual research available to anyone with an internet connection for free.¹⁴

The problem with paywalled content is that such paywalls which are supposed to ensure that the content is protected and exclusively available to only those who pay for it have failed miserably at keeping such content secure since more often than not, it has been observed that the professors who actually wrote the research papers share their publications for free on the internet and university websites etc. rendering the whole idea of paywall redundant and of little practical relevance. However, the sad part about the same is that sometime in 2013, “Elsevier issued takedown letters to the Campus of Calgary, the University of California-Irvine, and Harvard University, alleging that academics were sharing published manuscripts on university webpages.”¹⁵

However, if we were to analyse this situation from a logical perspective it would not sound good on the face of it as it is an act which would instead increase the friction between the academicians, students and researchers on one hand and the business-oriented publishers on the other hand. It also seems impractical *prima facie* since it is practically not possible for all the publishers to regulate all the time what content is being shared on the internet for free. Further, whether or not a content is actually behind the paywall, it is practically very easy in the age of internet to procure the same from anywhere without having to pay costs for the same.

Furthermore, under Green Open Access regulations and repositories, one can get access to published articles that are lawfully shared online. Otherwise, requesting a copy of an article from a scholar via email is quite simple. Furthermore, the hashtag #icanhazpdf on Twitter stimulates and enables the online sharing of published manuscripts. Currently, the most popular manuscript sharing website is Sci Hub, and it poses a serious threat to the paywall/subscription business model in scientific publishing. According to Elsevier, one of the leading academic publishers specializing in science, “Sci-Hub is an international network of piracy and copyright infringement by evading legal and permitted channels of access”.¹⁶ On the other hand, Sci-Hub

¹⁴ PETER SUBER, 4 OPEN ACCESS (The M.I.T. Press, Cambridge 2012).

¹⁵ Andrea Peterson, *How One Publisher is Stopping Academics from Sharing their Research*, *Washington Post*, (Dec. 19, 2013) <https://www.washingtonpost.com/news/the-switch/wp/2013/12/19/how-one-publisher-is-stopping-academics-from-sharing-their-research/> (accessed on 24-03-2022).

¹⁶ Michael S. Rosenwald, *This Student Put 50 Million Stolen Research Articles Online, and They're Free*, *Washington Post*, (Mar. 30, 2016) https://www.washingtonpost.com/local/this-student-put-50-million-stolen-research-articles-online-and-theyre-free/2016/03/30/7714ffb4-eaf7-11e5-b0fd-073d5930a7b7_story.html (accessed on 24-03-2022).

has been praised, claiming that it constitutes “essential civil disobedience” against publisher greed and exploitation.¹⁷ Elbakyan defends her actions in part by quoting the United Nations Declaration of Human Rights, which declares that everyone has the right to benefit from scientific progress.¹⁸ It is going to be an important decisive ruling for a country like India if Sci Hub and Lib Gen are taken down or they are allowed to continue under the “fair dealing exception” for educational and research purposes, and it will definitely challenge the current paradigm for academic publishing not only in India but may have ramifications abroad as well.

3. OPEN ACCESS AND PEDAGOGICAL OPPORTUNITIES

The power of open access publishing to improve student educational experiences is often overlooked in higher education.¹⁹ University funds are indirectly allocated to sustain library subscriptions to paywalled scholarly journals. The cost of textbooks adds a substantial amount to the cost of attending university. Increases in journal costs are a similar but less visible affliction, as students suffer when university funds are diverted to pay for rising library fees. Students from low-income families bear a disproportionate share of tuition increases. Small amounts of money can have a large impact on certain students’ life²⁰, as many undergraduates take significant time and energy away from their studies to work in order to pay off their student loans and fund their expenses.²¹

Adopting Open Access textbooks for undergraduates may also have educational benefits. It was discovered that open access textbooks were utilized more frequently and produced superior learning outcomes.²² When it comes to textbook purchases, students appear to be price sensitive. Open access textbooks offer the benefit that less stringent copyrights make sharing, collaboration, and text refinement easier. Needless to add, while selecting textbooks – or other materials – in class, pedagogical autonomy and academic excellence should take precedence. Undergraduates, on the other hand, pay higher tuition for larger class sizes than prior

¹⁷ Björn Brembs, *Sci-Hub as Necessary, Effective Civil Disobedience*, <http://bjoern.brembs.net/2016/02/sci-hub-as-necessary-effective-civil-disobedience/> (accessed on 24-03-2022).

¹⁸ John Bohannon, *Who’s Downloading Pirated Papers? Everyone*, SCIENCE (Apr. 28, 2016) <http://www.sciencemag.org/news/2016/04/whos-downloading-pirated-papers-everyone>

¹⁹ Kyle Siler, *Future Challenges and Opportunities in Academic Publishing*, 42 THE CANADIAN JOURNAL OF SOCIOLOGY, 83-114 (2017).

²⁰ Christine Williams, *College Costs versus College Jobs: The Economics Don’t Add Up* (2016) <https://workingprogress.oowsection.org/2016/09/02/college-costs-vs-college-jobs-the-economics-dont-add-up/> (accessed on 25-03-2022).

²¹ *Id.*

²² Feldstein et al., *Open Textbooks and Increased Students Access and Outcomes*, EUROPEAN JOURNAL OF OPEN, DISTANCE AND E-LEARNING (2012).

generations, and they frequently study in areas with high living costs and insecure job markets for millennials. Professors and colleges can have a good impact on students' educational experiences and lives by making available for use quality, inexpensive open access textbook alternatives.

4. CASE STUDY: Elsevier Ltd. and Ors. v. AlexandRa Elbakyan and Ors.: “Sci Hub Case”

Public Interest versus Copyright Infringement

The Delhi High Court has considered this case to be an “*issue of public importance*”.²³ This case seems quite similar to the DU Photocopy case, since both pertain to the larger Access to Knowledge movement and emphasise on ensuring easier access to knowledge at the higher education level and ensuring that there is cheaper access to academic research material and scholarly papers.

4.1 Brief Background of the Case

Sci-Hub is a popular pirate website extensively used by students and researchers to access copyrighted academic works for free, as they cannot pay the high subscription fee of the journals, research papers and books. The website aims to “remove all barriers in the way of science”. To further this aim, the website provides free access to copyrighted works of others. However, a case has been brought before the Delhi High Court in India against Sci-Hub which has however, received a lot of support from the academic community in India.

This suit was filed in December 2020 by the leading publishers- American Chemical Society, Wiley and Elsevier in the Delhi High Court against Libgen and Sci-Hub. Libgen is one of the other pirate websites providing free access to millions of subscription research papers. The main accusation against them was that of infringement of copyright and the petitioners demanded the authorities to block their access. The publishers believe 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 unauthorised access to scientific databases and other proprietary intellectual property, and

²³ Elsevier Ltd. & Ors. v. Alexandra Elbakyan & Ors., 2021 SCC OnLine Del. 17.

illegally harvest journal articles and e-books.”²⁴

A decision in favour of Sci-Hub and Libgen will add to their popularity expanding their already wide user base. This could be said to affect the “business model of the publishers” which is based on the revenues earned from subscription fee. The founder of this website, Ms. Alexandra Elbakyan, is a Kazakhstan national, is being represented by Indian legal practitioners “devoted to the cause of free and open access of resources” who are fighting the case of Alexandra *pro bono*.

Multiple cases have been filed against Alexandra in other countries as well, however she went unrepresented in most of them as she was possibly not aware of such suits or could not find lawyers to defend her case. In numerous European countries Libgen and Sci-Hub are banned on the grounds of “unlawful activity”. However, in India by virtue of the public interest exemption as provided under the Copyright Act of 1957, the courts have opined differently. For example, for research and private use, reproduction of published literature is allowed under the exceptions of “fair dealings”.

This case reminds us of the 2016 *DU/Rameshwari Photocopy case*, which has its known popularity amongst the students of Delhi University. The court relying on the fair dealings clause had dismissed the suit and said that copyright is “not an inevitable, divine or natural right”. On similar lines, the defence in the Sci Hub case is also “rooted in principles of public interest and it should therefore, extend to facilitator of research websites such as Sci-Hub”.²⁵ Since our country is one, where there is immense challenge in securing meaningful access to latest scientific developments, due to the exorbitant prices of journals, coupled with the socio-economic conditions of most Indians, Sci Hub provides a major relief to most Indian students and researchers in their scientific endeavours.

Elsevier claims that it allows free access when “the need is greatest and it can make the biggest difference in a sustainable way. This is done through initiatives such as the one that allows Elsevier’s authors to share their peer-reviewed, accepted manuscript on non-commercial personal homepages or blogs, within their institution, and with collaborators.”²⁶ However, Ms.

²⁴ Debarshi Dasgupta, ‘Pirate Queen’ for Scientific Publications on Trial in Key Copyright Case in India, The Strait Times <https://www.straittimes.com/asia/south-asia/pirate-queen-for-scientific-publications-on-trial-in-key-copyright-case-in-india> (accessed on 05-02-2022).

²⁵ *Id.*

²⁶ *Id.*

Elbakyan claims that the cost incurred on publication is very small when compared with those involved in the research. She says that such costs can be recouped by ways other than a paywall. An unfavourable verdict of the Delhi High Court according unlawful status to Sci-Hub could lead to its ban and would dent its accessibility by users in India. But there will still be some who will find ways to bypass the ban. However, a ruling in favour of Sci-Hub will open new horizon for users and pave the path for accepting the legality of the website in other countries as well.

4.2 Sci-Hub's undertaking not to upload copyrighted papers of Plaintiffs'

Sci-Hub submitted an undertaking in the Delhi High Court on January 26th, 2020 in which it has undertaken that till the next date of hearing it will not indulge in providing access, uploading or publishing any work on which publication houses like Wiley India Private Ltd., Elsevier Ltd., and American Chemical Society have copyright. This undertaking was submitted in furtherance of the suit filed by the aforementioned publication houses on the grounds of copyright infringement on December 24th, 2020 against online portals like Libgen and Sci-Hub which are popular amongst academic fraternity as they provides free access to subscription or paywalled content.

Elsevier, Wiley and American Chemical Society are publication giants. However, the court questioned the plaintiffs that why it took them so long to come up with petition when Sci-Hub was in operation right from the year 2011. To this, the plaintiffs claimed that litigation was pending in other jurisdictions and this was the main reason for delay.

4.3 Delhi High Court considers this to be a "matter of public importance"

While Sci-Hub responded to the summon of the Delhi High Court and gave an undertaking on January 26th, 2020 that it will not indulge in putting up anything new on their website till the date of next hearing. However, Libgen was neither represented on that hearing nor did it respond to the summon of the court issued in furtherance of the case filed by Elsevier, Wiley and American Chemical Society. Furthermore, Libgen went unrepresented on hearing held on January 6th, 2021 as well. The Single Judge Bench chaired by Justice Midha refused the demand of the plaintiffs to pass a restraining order against Libgen. The court opined that passing such order would be detrimental to the scientific community as the issue involved "matter of public

importance”.²⁷ The court also allowed intervenors in this case, as according to the court, this is a “matter of public importance, concerning the entire scientific community.”²⁸

4.4 The Sci-Hub Case in Other Jurisdictions

The most interesting aspect of this case lies in the fact that it is being heard in the Delhi High Court and that the defendants are being represented in India, particularly so because similar cases have been filed against Sci Hub in other jurisdictions as well, wherein Sci Hub went unrepresented. In the U.S., the Sci Hub case was considered to be “*the largest copyright infringement case in the history of the US and the history of the world.*”²⁹ Further, huge costs were imposed on the defendants along with an injunction.³⁰ Further, the website has also received “blocking orders in France, Russia, Sweden, Belgium and the United Kingdom.”³¹ However, despite these orders, the website continues to run successfully and help millions of academicians, researchers and students who heavily rely on the website for the research they conduct.

5. THE DU PHOTOCOPY CASE – LAYING THE GROUND FOR “FAIR DEALING” FOR INSTRUCTIONAL USE IN INDIA

5.1 Brief Background of the Case

Around the year 2012, some of the leading academic publishers, that is, the Oxford University Press, Cambridge University Press, Taylor and Francis filed a copyright infringement case against a small photocopying shop at Delhi University, known as Rameshwari Photocopy Service along with Delhi University and this was about course packs that the photocopy shop was selling to the students of the Delhi University.³² So, typically for the graduate level, a lot of courses are designed using extracts from different books and the publishers claimed that this

²⁷ Matter or Public Importance Concerning Entire Scientific Community: Delhi HC Refuses to Restrain LibGen Publications (Jan. 6, 2021) <https://www.livelaw.in/news-updates/delhi-high-court-copyright-sci-hub-lib-gen-elsevier-168051> (accessed on 05-02-2022).

²⁸ *Id.*

²⁹ Albert N Greco, *The Kirtsaeng and SCI-HUB Cases: The Major U.S. Copyright Cases in the Twenty-First Century* 33 Publishing Research Quarterly 238, 243 (2017).

³⁰ Andrea Widener, *ACS Prevails over Sci-Hub in Copyright Suit* 2017 Chemical & Engineering News <https://pubs.acs.org/doi/pdf/10.1021/cen-09545-notw10> (accessed on 06-02-2022).

³¹ Vivek Singh et. al., *Is Sci-Hub Increasing Visibility of Indian Research Papers? An Analytical Evaluation*, 10 Journal of Scientometric Research 130-131 (2021).

³² *The Chancellor, Masters & Scholars of the University of Oxford v. Rameshwari Photocopy Services*, (2016) SCC OnLine Del 5128.

is a violation of copyright. An intervention was filed on behalf of the students and teachers arguing that this was actually legally permissible in the law. The importance of the issue was that this was a test case both for India and for other developing countries on what the extent of the fair use exception in copyright law would be to facilitate access to knowledge in a situation where learning materials are extremely expensive and in a country as sharply divided as India is, this could mean a great impact on the ability for students to access learning.

The photocopy shop is located within the University, they have a contract with the University and they were in fact given library cards which would allow them to take books before the start of the term to create the course packs. Second, the efficiency of the photocopy shop became one of the important reasons why this case was filed against them since it became the most popular and go to place for people and for students to access material. In many libraries in India, we either have a single copy of a book or in many instances, we don't even have a copy of the book and therefore, when the exams start approaching, a lot of students rely on getting these books photocopied through photocopy shops like these.

The crux of the case was that there is an exception in copyright law in India which allows for the reproduction of the work for educational purposes and it literally says "reproduction of a work in the course of instruction." The publishers wanted a narrow reading of this to mean literally giving a copy to the student in the class and taking it back from them whereas the interveners argued that this could not be the interpretation and it had to be on a much wider terrain. The second big issue was the question of how much could be copied, that is, in legal terms, the amount and substantiality of the work copied.

5.2 Statutory Provisions involved in the Case

Under the Indian Copyright law, the defendants relied on Section 52(1)(i) of the Copyright Act, 1957. The section is reproduced below for the present purposes:

“(h) the reproduction of a literary, dramatic, musical or artistic work-

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

As a student pursuing law from Indian universities and who is aware of the situation in our libraries, firstly, sometimes very few number of original copies of books are available in the library and secondly, since the books coming from renowned publishers are otherwise also

very expensive to buy, then in that case, when exams approach or when professors teach students, they heavily rely on such copyrighted works and simply ask the students to get the research material photocopied for their own reference. Same was the case here in this case, wherein it is almost unaffordable for students to buy their own individual copies of such exorbitantly priced books and journals owned and published by leading publishers, so an easy way to get access to these works is simply to get a photocopy of the same. This was contended by the defendants to not constitute an act of commercially exploiting the copyright owners' works.

5.3 Legal Issues raised in the Case

As is very much pertinent from the facts of the case and the major underlying questions on which this research is based are:

1. Whether the photocopying of publishers copyrighted works is permitted under the Copyright Act?
2. Whether such use amounts to "fair use" or alternatively falls under the "fair dealing" exceptions specified in the Copyright Act?

5.4 Reference to the U.S. Copyright Law

Making a reference to the US Copyright law, we know that in a series of cases over the decades, they have laid down a quantitative restriction of 10 percent of a book being permissible for education. For a country like U.S. where the infrastructure of education is already very well established, then in that case, if you have a rule of 10 percent, then the question is would that be adequate for a country like India should there be a differential standard for developing countries on education and that is why it is an important case for the rest of the world because in a way the globalisation of intellectual property in a global regime has also been accompanied in a way by the use of standards from cases primarily from the U.S. and it is very rare that we actually have cases from developing countries that lay out what kind of different philosophical premise on how we understand copyright law.

One major difference between the U.S. and India in terms of the structure of copyright law is that in the U.S., there are no enumerated exceptions, what is there in the U.S. Copyright law are the general principles, so there are four principles that would determine whether the use of

a work is fair or not but in the Indian context, there are enumerated exceptions, for instance, there are other exceptions for private use but that's primarily for research. So, for instance, if one wants to photocopy JK Rowling's Harry Potter books and give it to someone that would not fall within fair use. The provision under which arguments were made by the defendants in this case was specifically about educational uses, so the question is assuming one wanted to do in an English Literature course, photocopy two chapters of Rowling's Harry Potter, would that be allowed and the answer is absolutely yes.

5.5 What the Court held?

The Single Judge Bench decided that photocopying portions of books from copyrighted works did not constitute copyright infringement since it was being done for educational purposes, and therefore such acts are precluded under the ambit of Section 52(1)(i) of the Act. The Court remarked that: "supplying of copies of the book by the DU library would be proper as the principle of exhaustion, which is the genesis of libraries, educational institutions and field of resale of books, directly comes into picture."³³

When the case went in appeal to a Division Bench of the Delhi High Court, the Judges rejected the appeal and upheld the judgment of the Single Judge Bench. In fact, the Division Bench further held that: "photocopying of copyrighted material was permitted under the Copyright Act and that there could not be any caps on how much of a book could be photocopied if the same was warranted by the demands of the course. It thus promoted student's right to economical education."³⁴

Therefore, the court held that there was no *prima facie* infringement claim that had been made, the reason being that if copyright is a right that is granted by statute, it is also accompanied by exceptions. This is the reason why the major tilt of the Court is towards the interpretation of Section 52(1)(i) of the Copyright Act, 1957 in such a manner so as to facilitate access to knowledge to university students, even if it by way of making and selling photocopied course packs for them, because in essence, the focus is not on the commercial aspect of the act but on the fact that photocopying is being done for "educational and teaching purposes."³⁵ While

³³ The Chancellor, Masters & Scholars of The University of Oxford & Ors v. Rameshwari Photocopy Services & Anr. 2016 (68) P.T.C. 386 (Del.).

³⁴ The Chancellor, Masters & Scholars of The University of Oxford & Ors v. Rameshwari Photocopy Services & Anr. 2017 (69) P.T.C. 123 (Del.).

³⁵ Fair Dealing in Copyrights: Is the Indian Law Competent Enough to Meet the Current Challenges? Mondaq,

ordinarily and especially in the U.S., the “fair use” test requires an analysis under the four statutory factors, the Delhi High Court in the present case adopted a different approach altogether in cases of fair use for educational purposes and brought to the fore the question “whether the extent of the use is justified by its purpose”. The Court summarised its opinion on the same by noting: “so much of the copyrighted work can be used which is necessary to effectuate the purpose of the use, i.e., make the learner understand what is intended to be understood.”³⁶

Copyright, we must remember, began as a law that wanted to facilitate public access, so the very first statute, the Statute of Anne is entitled “a law for the advancement of learning” but over the decades copyright has primarily become about the protection of the rights of private interests and about the rights in a way of the owners of copyright, so it is in the manner of maintaining a balance between public interests and access to learning material and promoting creativity while at the same time ensuring that there are some incentives for the creators of works. So the Judges brought this balance together to say that in the case of education there is a policy kind of a premise which informs why there is an exception carved out for education and that does not interfere with the legitimate interests of the publishers and if that is the case then there can be no claim that there was an infringement for making of course packs.

Further, another noteworthy point of observation made by the judges here was the fact that the use of photocopied materials of these copyrighted works would not be detrimental to the commercial interests of the publishers. This is so because eventually even if the students had no access to the course packs, they could have never thought of purchasing those expensive books, and therefore they were not competitors in the economic market of the publishers. However, I must not shy away from accepting one weak point in this line of thought, and that is the fact that the students would definitely never be competitors of the publishers in the market, however, the publishers wanted the university to get a license and pay a certain fee after which the students could have got the copyrighted works photocopied.³⁷

The main argument of the publishers then was that the university should have got a license from the Indian Reprographic Rights Organisation (IRRO) as otherwise there was a huge

<http://www.mondaq.com/india/x/299252/Copyright/Fair+Dealing+In+Copyrights+Is+The+Indian+Law+Competent+Enough+To+Meet+The+Current+Challenges> (accessed on 15-03-2022).

³⁶ The Chancellor, Masters & Scholars of The University of Oxford & Ors v. Rameshwari Photocopy Services & Anr. 2017 (69) P.T.C. 123 (Del.).

³⁷ Princeton University Press v. Michigan Document Services, Inc., 99 F.3d 1381 (1996, 6th Cir.).

financial burden on the publishers and absolute benefit for the students and the university.³⁸ Licensing to IRRO would have doubled the cost of course packs for students³⁹ but the university in such a case would then be precluded from investing in buying books as they would just buy one book and the students would be free to get multiple copies of the same. This severely deprives the publishers from getting a lot of money that they could have ideally earned.⁴⁰ This judgment could then simply be extensively favouring the university such that it is precluded from either getting a license or buying a reasonable number of books, both of which could have been sources of revenue for the publishers. Their line of argument was that there would not have been much difference for the students had the University opted for a license, barring a few more additional pennies being spent on the photocopy but that would still be minimal but the publishers could have also earned their legitimate revenues in that case.

Under this line of argument, it can also be argued that in the case of academic textbooks and research articles, journals etc. the audience or the consumers are restricted or limited to a certain class, that is, the teachers, researchers and students,⁴¹ particularly because of the complex and technical subject matter of such printed publications which would be required to be read only by a select few who wish to consume specialised knowledge in their respective fields. Eventually, if the only few audience that is there for such publications is allowed to get these publications photocopied it could be said to affect the potential economic market of the publishers, who do not seem to have other sources of revenue. This brings to the fore the fact that the Court in this case completely ignored all the aspects of economics in this case and heavily tilted its approach towards the public or student welfare policy that a developing nation like India should adopt.

Notwithstanding this, we must also remember that this is a case that was about the future of education and it could not have been fought without the voice of students and teachers being heard. One of the ironies of the case was that the petitioners, that is, the publishers cited the use of textbooks and academic books by a number of academics. These academics signed on in the case to say that they did not have a problem with students using their material for courses.

³⁸ Shammad Basheer, *Breaking News: IRRO Registration Refused!*, *SpicyIP*, 2013 <https://spicyip.com/2013/12/breaking-news-irro-registration-refused.html> (accessed on 15-03-2022).

³⁹ Prashant Reddy, *Is this a 'Fair' Solution to the OUP/CUP-DU Copyright Infringement Lawsuit?* *SpicyIP*, 2012 <https://spicyip.com/2012/09/is-this-fair-solution-to-oupcup-du.html> (accessed on 15-03-2022).

⁴⁰ *The New Copyright Law: Photocopying for Educational Use*, *Jstor*, <https://www.jstor.org/stable/40225000?seq=1#page-scan///-tabcontents> (accessed on 25-03-2022).

⁴¹ Namit Saxena, *Delhi HC's Fresh Air on Photocopying Law*, *Deccan Herald*, (Sept. 29, 2016), available at <http://www.deccanherald.com/content/572994/delhi-hcs-fresh-air-photocopying.html> (accessed on 25-03-2022).

Also, there was a claim made by the students that “a photocopied course-pack cost only Rs. 250, against the cost of buying all the books at an estimated cost of Rs. 80,000.”⁴² Further, as Prof. Lawrence Liang notes, “this amount of Rs. 80,000 was a particularly compelling argument and served as a very graphic illustration of the serious impediments posed by the question of cost and availability of learning materials.”⁴³

6. CONCLUDING REMARKS

One of the key challenges in terms of global copyright and the access to education movement has been the question of how do we balance between- on the one hand, the country’s obligations under international law because all countries are a signatory to the TRIPS Agreement which lays out a common minimum standard in copyright but at the same time because the needs of every country are unique and the developmental challenges are extremely individual, how does one country balance between its legal obligation versus the flexibilities that a country can use. What this case leaves down is a very good precedent for other countries to follow especially from a developing countries work perspective on how that country can interpret their copyright laws even while remaining compliant with the international standards.

Students and teachers are not the greatest enemies of the publishers, they are in fact, the publishers’ greatest allies so the publishers must think in a way of how they should create and think about a business model that ensures that it is feasible for the publishers while at the same time not impeding access to knowledge. It is important here to note that the Indian market is a particularly lucrative one both in terms of the size of the student but also because the primary language of education at the University level is English, so in a way this is one of the most important markets for the academic publishers, which is why they wanted to use this as a test-case. This has, of course, happened in developed countries and in the U.S. this has been happening for many decades, but in terms of the developing countries, this is one of the first major cases. This case is part of a much larger movement that has been taking place for the last few years and Yale has had a very important role to play in that because the Yale Law School which is very active on debates on intellectual property from a global perspective, it has been crucial and anchoring an access to knowledge movement. This is seen and followed by the

⁴² Madhur Tankha, *Students are Heavily Dependent on Studying from Photocopies* (The Hindu, 2013) <http://www.thehindu.com/news/cities/Delhi/students-are-heavily-dependent-on-studying-from-photocopies/article4399672.ece>

⁴³ Lawrence Liang, *Paternal And Defiant Access: Copyright And The Politics Of Access To Knowledge In The Delhi University Photocopy Case* 1 INDIAN LAW REVIEW 50 (2017).

global community of people working on intellectual property from a public interest perspective.

The basic premise of the tension in India pertaining to the law of copyright is the one intricately intertwined with the aim of ensuring greater public access to educational and research works for students and researchers and the like. While it is an obvious case for the Indian laws to be inspired by the British laws since we were colonised by the Britishers and most of our laws were originally even drafted by the Britishers, however the peculiar circumstances in India, owing to our developmental needs and the impetus required for research and better access to quality education with minimal resources is one of the most important facets of education (both primary and higher education) in India today. After gaining independence from the Britishers, the focus of our country's law makers shifted towards our needs as a nation and these issues have been taken up both at national and international levels to ensure the best possible outcome for the recipients of copyrighted works, that is, the consumers. The main concern here is to ensure balancing of the copyright owners with the access to knowledge and the educational needs of a developing country where knowledge is indeed a harbinger of change in the society.