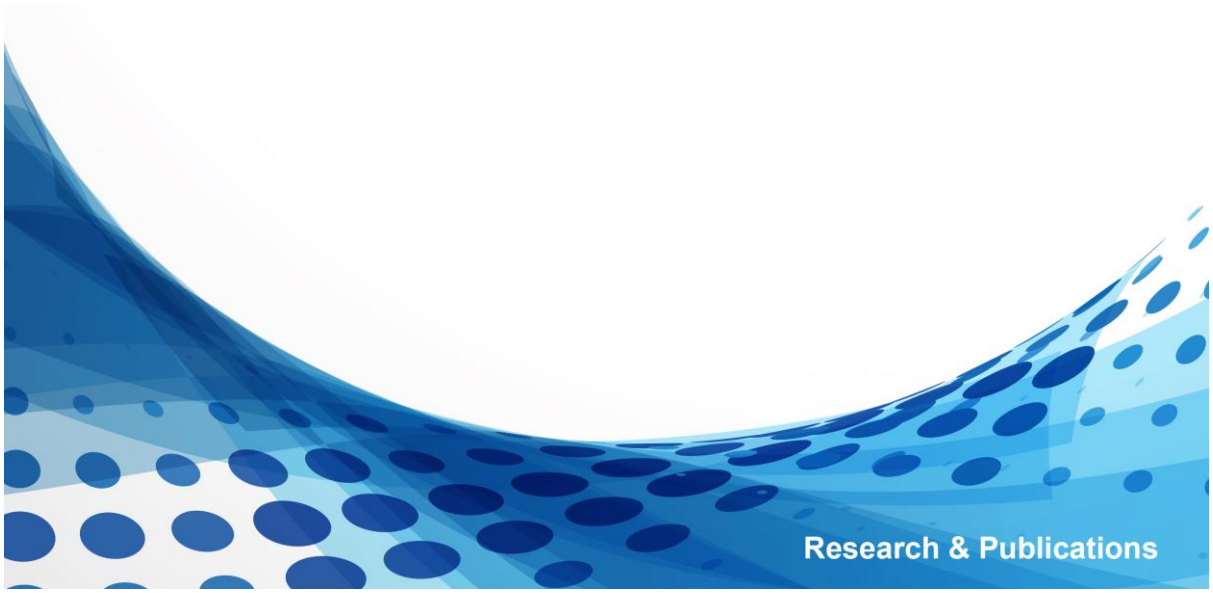
INDIAN INSTITUTE OF MANAGEMENT AHMEDABAD

IIMA
Working Paper

Right to Research and Copyright Law: From Photocopying to Shadow Libraries

(Updated as on 11/05/2022)

M. P. Ram Mohan
Aditya Gupta



Research &
Publications
W. P. No. 2021-09-03

Right to Research and Copyright Law: From Photocopying to Shadow Libraries

M. P. Ram Mohan
Aditya Gupta

September 2021

INDIAN INSTITUTE OF MANAGEMENT AHMEDABAD

Right to Research and Copyright Law: From Photocopying to Shadow Libraries

M P Ram Mohan[*] & Aditya Gupta[ψ]

Abstract

Academic research and publishing are facing a crisis. The importance of access to academic literature in an interconnected world, the ever-growing cost of subscriptions to this literature, different revenue models of journals, and reducing or stagnant library budgets are pushing the academic community to find alternatives for research publications. In its 25 years of existence, the open access movement and models which sought to contain the crisis have become the subject of considerable criticism. At the same time, a significant portion of academic literature remains locked behind steep paywalls. This has led to the growth of pirate websites and shadow libraries which have been met with forceful legal retribution by the publishers using Copyright laws. Using the Sci-Hub case, which is currently facing copyright infringement by a group of publishers before the Delhi High Court, the article evaluates the Open Access Movement, fair dealing in copyright law, academic piracy, and courts cases in the United States, India, and other countries, within the broad meaning of the right to research. The paper concludes that the purposive interpretation of the Copyright Law may have an answer enabling a just outcome.

Keywords: right to research; open access movement; fair dealing; copyright law; academic piracy

Contents

[*] Associate Professor, Strategy Area, Indian Institute of Management Ahmedabad; & Research Affilate, Centre for Peace, Hiroshima University

[ψ] Research Associate, Indian Institute of Management Ahmedabad

We are extremely thankful to Lawrence Liang, Hiral Patel and Vishaka Raj for critical comments. The authors also wish to thank the participants of the 7th Annual IP Mosiac Conference held between October 21 and October 23, 2021, hosted by the Mitchell Hamline University School of Law for their helpful comments and suggestions. Views are authors' alone.

Introduction

Imagine your taxpayer money is being used to construct a road in your neighborhood. The company overseeing the construction does not pay a salary to its workers. Some workers even pay a fee for the privilege of working on the project. The overseers who ensure that the construction complies with the relevant regulatory criteria are not paid either. Further, if the taxpayer with whose money the road has been constructed wants to walk on the road, she has to buy access to it. Access is again provided for fragments of the road. The cost of accessing a significant portion of the road would require a subscription cost in the neighbourhood of a million dollars. Writing for Vox, Brian Resnick and Jullia Belluz took this example to discuss the extremely profitable business of academic publishing.[1] Would you consider this a viable business model?

The commercial and for-profit academic publishers have leveraged uncompensated labour from researchers and academics[2] to create a business that generates over $25.7 billion in annual global revenues.[3] The proverbial workers in Rensnick's comparison are researchers who conduct research, prepare articles and submit them for free to academic publishers. The overseers are the peer review board and the editors of the journals, who often work without any monetary remuneration. In some cases, researchers pay *Article Processing Charges* for the publication of their research which can be understood as the fees paid by the workers. A substantial number of these academics and researchers work with universities and organizations that receive generous government grants. Hence, the involvement of public money. Lastly, students, academicians, and other researchers who want access to the published papers must buy subscriptions, even though their public money generated through taxes have subsidized the research.

Generally, scholarly publications, such as books, are *information goods* with low fixed and high variable costs.[4] However, academic journals have managed to leverage the scholarly community to hedge the fixed costs of their business. The primary goods for their business, i.e.

---

[1] Brian Resnick & Julia Belluz, *The war to free science*, VOX, 2019, https://www.vox.com/the-highlight/2019/6/3/18271538/open-access-elsevier-california-sci-hub-academic-paywalls.

[2] Jon Tennant, 'Time to Stop the Exploitation of Free Academic Labour' (2020) 46 European Science Editing e51839; John Willinsky, *The Access Principle: The Case for Open Access to Research and Scholarship* (MIT Press 2006) 48; Armin Beverungen, Steffen Böhm and Christopher Land, 'The Poverty of Journal Publishing' (2012) 19 Organization 929, 932.

[3] MICHAEL MABE, ROB JOHNSON & ANTHONY WATKINSON, *The STM Report: An overview of scientific and scholarly journal publishing*, 5 (2018).

[4] CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 22–23 (1999).

scholarly research and quality control, i.e. peer review, is provided free of cost by the academic community.[5] A report from the U.K's House of Commons reported that in academic publishing, "*public money is used at three stages in the publishing process: to fund the research project; to pay the salaries of academics who carry out peer review for no extra payment; and to fund libraries to purchase scientific publications.*"[6] This offsets the high fixed costs, a unique feature of information goods, and turns academic journals into *atypical information goods.*[7]

Despite substantially offsetting their costs by using public money and leveraging the scholarly community, the publishers require payment of exorbitant subscription fees for subscribing to academic literature. Total expenditure on journal subscriptions rose by 302% between 1995-2005.[8] The average price of journals has increased at an annual rate of 6% since 2012.[9] It has been estimated that academic libraries spent over $8.1 billion on academic and scientific content in 2016.[10] Reports suggest that Indian research institutes spend over US$200 million every year subscribing to paywalled academic research.[11] This price increase has been accompanied by stagnant and reducing library budgets.[12] Eventually, the number of serials/journals a library can subscribe to has been decreasing year-upon-year. This reduced access is referred to as the *serials crisis.* [13] Esteemed and well-funded universities such as the University of California[14] and Harvard University[15] have expressed their inability to continue

[5] Vincent Larivière, Stefanie Haustein & Philippe Mongeon, *The Oligopoly of Academic Publishers in the Digital Era*, 10 PLOS ONE e0127502, 11–12 (2015).
[6] HOUSE OF COMMONS SCIENCE AND TECHNOLOGY COMMITTEE, *Science and Technology - Tenth Report*, 69 (2004), https://publications.parliament.uk/pa/cm200304/cmselect/cmsctech/399/39902.htm (last visited Aug 12, 2021).
[7] Larivière, Haustein, and Mongeon, *supra* note 5 at 11–12.
[8] Base year being 1996. Glenn Steele McGuigan, *The business of academic publishing: A strategic analysis of the academic journal publishing industry and its impact on the future of scholarly publishing*, 9 ELECTRONIC JOURNAL OF ACADEMIC AND SPECIAL LIBRARIANSHIP (2008).
[9] Stephen Bosch & Kittie Henderson, *Predicting the Future in 3,000 Words and Charts: The Library Journal Serials Pricing Article*, 74 THE SERIALS LIBRARIAN 224–227, 226 (2018).
[10] MABE, JOHNSON, AND WATKINSON, *supra* note 3 at 22.
[11] Smriti Mallapaty, *India pushes bold 'one nation, one subscription' journal-access plan*, 586 NATURE 181–182, 181 (2020); Dunu Roy & Dinesh Mohan, *The Monopoly of Journal Subscriptions and the Commodification of Research*, THE WIRE SCIENCE (2021).
[12] Bosch and Henderson, *supra* note 9 at 226.
[13] Sarah Jurchen, *Open Access and the Serials Crisis: The Role of Academic Libraries*, 37 TECHNICAL SERVICES QUARTERLY 160–170, 161 (2020).
[14] Alex Fox & Jeffrey Brainard, *University of California takes a stand on open access*, 363 SCIENCE 1023.1-1023 (2019).
[15] Ian Sample, *Harvard University says it can't afford journal publishers' prices*, THE GUARDIAN, April 24, 2012, http://www.theguardian.com/science/2012/apr/24/harvard-university-journal-publishers-prices (last visited May 9, 2021).

paying the subscription costs. Other universities have threatened to boycott academic publishers.[16]

Partial blame for the situation can be accrued to the market structure of academic publishing. Five publishers account for more than 53% of all papers published, with the concentration in some disciplines such as psychology and chemistry being as high as 71%.[17] The largest academic publisher, Elsevier, enjoys 16% of the total market share[18] and recorded over $3,376 million in revenue during 2017-18.[19] Elsevier's profit margins have grown from 30.6% in 2006[20] to 34% in 2014[21] and over 37.12% in 2018.[22] Other prominent market players also report similar margins, with SpringerNature recording 22.8%,[23] Wiley 28.3% and Taylor and Francis 35.7%.[24]

Reconciling publishers' profit margins with the *serials crisis* is not easy. The academic publishers have developed a robust digital infrastructure that facilitates easy and wide dissemination of an author's research. They have also managed to coalesce a global network of academics and subject experts to create and maintain journal brands that ensure the credibility and dependability of academic research. The publishers' often cite these developments to argue that their business model accrues substantial costs.[25] However, if publishers accrue such high costs, how do their profit margins remain as high and steady? Deutsche Bank asked a similar question and confirmed that Elsevier adds little value to academic research.[26]

George Monbiot, in 2011, writing for The Guardian, described the academic publishing business model as pure *economic parasitism*, where goods subsidised by public funds have to

[16] Larivière, Haustein, and Mongeon, *supra* note 5 at 13.
[17] Larivière, Haustein, and Mongeon, *supra* note 5.
[18] *Id.* at 10.
[19] Sergio Copiello, *Business as Usual with Article Processing Charges in the Transition towards OA Publishing: A Case Study Based on Elsevier*, 8 PUBLICATIONS 3, 7 (2020).
[20] Larivière, Haustein, and Mongeon, *supra* note 5 at 10.
[21] Kyle Siler, *Future Challenges and Opportunities in Academic Publishing*, 42 THE CANADIAN JOURNAL OF SOCIOLOGY / CAHIERS CANADIENS DE SOCIOLOGIE 83–114, 85 (2017).
[22] Copiello, *supra* note 19 at 7, 9; Also see: Mark W. Neff, *How academic science gave its soul to the publishing industry.*, 36 ISSUES IN SCIENCE AND TECHNOLOGY 35, 40 (2020) The profit margins for 2017 were 36.8%.
[23] CLAUDIO ASPESI ET AL., *SPARC Landscape Analysis: The Changing Academic Publishing Industry – Implications for Academic Institutions*, 21 (2019), https://osf.io/58yhb (last visited Jul 27, 2021).
[24] Larivière, Haustein, and Mongeon, *supra* note 5 at 10.
[25] DAVID J. BROWN, ACCESS TO SCIENTIFIC RESEARCH: CHALLENGES FACING COMMUNICATIONS IN STM 84 (2015).
[26] Kenneth R. de Camargo, *Big Publishing and the Economics of Competition*, 104 AM J PUBLIC HEALTH 8–10, 9 (2014); Beverungen, Böhm, and Land, *supra* note 2 at 931–932.

be bought back for public access at exorbitant prices.[27] While the contemporary structure of academic publishing might not reflect this, one of its core ideals has been maximising access to scientific knowledge. This aspiration can be traced back to 1665, when the first scientific journal, the Philosophical Transactions of the Royal Society, was established.[28]

In the late 20th century, this aspiration gave shape to the Open Access Movement, which lobbied and argued for removing obstacles to accessing, sharing and reusing academic literature.[29] Intrinsically tied to the development of the Internet, the OA movement coalesced throughout the 1990s and eventually culminated in The Budapest Open Access Initiative, 2002.[30]

Unfortunately, in over 25 years of existence, the Open Access (OA) Movement has not radically changed the academic publishing industry.[31] Recent estimates suggest that only 30% of academic literature archived over the internet is available without paywalls.[32] While the contribution made by the OA movement is significant, the fact remains that of every three articles archived over the internet, two articles remain firmly guarded by steep paywalls.[33] Further, the prominent models of the OA movement have encountered inherent problems. For example, the Article Processing Charges levied to defray the cost of publishing have witnessed a 16% price increase between 2013-16.[34] This raises pertinent questions on the sustained viability and future relevance of the OA movement.[35]

---

[27] George Monbiot, *Academic publishers make Murdoch look like a socialist*, THE GUARDIAN, 2011, https://www.theguardian.com/commentisfree/2011/aug/29/academic-publishers-murdoch-socialist (last visited Jun 23, 2021).

[28] Aileen Fyfe, *Journals, learned societies and money: Philosphical Transactions, CA. 1750-1900*, 69 NOTES REC. 277–299, 291, 292 (2015).

[29] Jonathan P. Tennant et al., *The academic, economic and societal impacts of Open Access: an evidence-based review*, 5 F1000RES 632, 2 (2016).

[30] *Id.* at 4.

[31] Toby Green, *We've failed: Pirate black open access is trumping green and gold and we must change our approach*, 30 LEARNED PUBLISHING 325–329, 326 (2017).

[32] MABE, JOHNSON, AND WATKINSON, *supra* note 3 at 135–139.

[33] The authors admit that there are studies that suggest that the overall availability of OA is much higher than 30%. For reference see: Madian Khabsa & C. Lee Giles, *The Number of Scholarly Documents on the Public Web*, 9 PLOS ONE e93949 (2014); Alberto Martín-Martín et al., *Evidence of Open Access of scientific publications in Google Scholar: a large-scale analysis*, 12 JOURNAL OF INFORMETRICS 819–841 (2018); However, after considering many of these reports, it has been identified that a "balanced assessment is that rougly one third of the scholarly literature was available OA in 2016" MABE, JOHNSON, AND WATKINSON, *supra* note 3 at 135–139.

[34] Jurchen, *supra* note 13 at 164; UNIVERSITIES UK, *Monitoring the Transition to Open Access*, 39 (2017), https://www.elsevier.com/__data/assets/pdf_file/0011/547958/UUK_Report_2018_Final_Digital.pdf (last visited May 6, 2021).

[35] Green, *supra* note 31 at 326; See: John Willinsky & Matthew Rusk, *If Research Libraries and Funders Finance Open Access: Moving beyond Subscriptions and APCs*, 80 COLLEGE & RESEARCH LIBRARIES 340, 341 (2019); Julie MacLeavy, Richard Harris & Ron Johnston, *The unintended consequences of Open Access publishing – And possible futures*, 112 GEOFORUM 9–12, 10, 11 (2020).

The lack of an overarching change in academic publishing and inherent problems with OA publishing models has led to the rise of a new form of OA: *Black OA/ Pirate OA*. Motivated by maximizing access, pirate websites have amassed a significant user base.[36] Some of the more prominent 'academic pirates,' such as Sci-Hub, have managed to provide access to over 68% of the world's scholarly literature.[37] Compared with the OA movement, Sci-Hub offers free access to twice the academic literature (68% and 30%, respectively) in less than ten years of its existence.[38]

However, due to the nature of their activities, academic pirates have been the subject of repeated judicial scrutiny. In 2020, five prominent academic publishers initiated copyright infringement litigation in India against two prominent academic pirates: Sci-Hub and Libgen. The authors view this litigation as an opportunity for the Indian judiciary to comment on the '*serials crisis,*' which plagues the academic community of the 21st century. The present study seeks to investigate if the Fair Dealing doctrine, which is an essential part of the copyright regime, can protect Sci-Hub from copyright infringement liability.

Part 1 of the paper studies the OA movement and underlines its shortcomings to highlight the emergence and relevance of academic pirates. Part 2 discusses judicial decisions from different jurisdictions where Sci-Hub has been a part of the litigation. It also examines the relevance of Sci-Hub in the present state of academic publishing along with the moral and ethical justifications for its existence and usage. Part 3 familiarises the readers with the underlying legal framework, which threatens the continued existence of Sci-Hub and has enabled the academic publisher to leverage such a profitable business model. Part 4 discusses a decision from an Indian High Court, where requirements of higher education motivated the Court to interpret the Indian Copyright Law purposively. Part 5 argues that a purposive interpretation of Copyright Law may enable a just outcome favouring the 'academic pirates'.

1. The Open Access Movement in Academic Publishing

The Open Access (OA) movement, at its core, is an argument that all academic literature should be available freely to all the users: in a form that is "*digital, online, free of charge and free of most copyright and licensing restrictions.*"[39] Prof. John Willinsky views the OA movement as

[36] Bastian Greshake, *Looking into Pandora's Box: The Content of Sci-Hub and its Usage*, 6 F1000RES 541 (2017).
[37] Daniel S Himmelstein et al., *Sci-Hub provides access to nearly all scholarly literature*, 7 ELIFE e32822, 4 (2018).
[38] Himmelstein et al., *supra* note 37; MABE, JOHNSON, AND WATKINSON, *supra* note 3.
[39] PETER SUBER, OPEN ACCESS 4 (2012).

"*the next step in a tradition that includes the printing press and penny post, public libraries and public schools.*"[40] The movement seeks to curb two related problems: *the access problem and the impact problem*.[41]

The access problem is a result of a dramatic increase in the price of academic journals and the restrictions placed by publishers on the reuse of published research.[42] It is closely associated with the *serials crisis*.[43] With shrinking library budgets and a consistent annual raise of 6% in the price of academic journals, the access problem has reached an "*uncomfortable equilibrium.*"[44] A dataset published in 2018 reveals that universities in the UK paid over £4 million in 2016-17, up from £3.9 million in 2012-13- an 18.9% rise within four years.[45] A dataset published by Stuart Lawson surveyed 160 UK universities for the subscription fees paid to ten publishers. The data revealed a payment of £108,031,286 in 2017, £110,011,988 in 2018 & £112,800,677 in 2019. An increase of £4,769,391 within three years.[46]

The impact problem is an obvious result of the access problem.[47] Without access to scholars' research, the potential impact of the scholarship is never fully realised. This negatively affects the recognition of individual scholars, impedes scientific progress and demotivates the efforts of funders who support academic research.[48]

Before the 1950s, journals did not operate commercially and favoured practices that are mere aspirations of the present-day OA movement.[49] The physical and biological sciences' scholars were among the first academics who identified the potential of OA publishing and exemplified its viability. In August 1991, Prof. Ginsparg launched the arXiv.org platform, arguably the first

---

[40] John Willinsky, *The Access Principle the Case for Open Access to Research and Scholarship* (MIT Press 2006) 30.
[41] Elizabeth Gadd & Denise Troll Covey, *What does 'green' open access mean? Tracking twelve years of changes to journal publisher self-archiving policies*, 51 JOURNAL OF LIBRARIANSHIP AND INFORMATION SCIENCE 106–122, 107 (2019).
[42] *Id.*; Also see: Stevan Harnad et al., *The Access/Impact Problem and the Green and Gold Roads to Open Access*, 30 SERIALS REVIEW 310–314 (2004).
[43] Jurchen, *supra* note 13 at 161.
[44] Bosch and Henderson, *supra* note 9 at 226.
[45] Rachel Pells, *Top universities' journal subscriptions 'average £4 million,'* TIMES HIGHER EDUCATION (THE), June 12, 2018, https://www.timeshighereducation.com/news/top-universities-journal-subscriptions-average-4-million-pounds (last visited May 9, 2021).
[46] Stuart Lawson, *Journal subscription expenditure in the UK 2017-2019*, (2020), https://zenodo.org/record/3659971 (last visited Jul 23, 2021).
[47] Harnad et al., *supra* note 42 at 312"Other researchers must find the findings useful, as proved by their actually using and citing them. And to be able to use and cite them, they must first be able to access them. That is the research article access/impact problem."
[48] Tennant et al., *supra* note 29 at 3.
[49] Aileen Fyfe, *Publishing the Philosophical Transactions: the social, cultural and economic history of a learned journal, 1665-2015 -AHRC*, 2018 IMPACT 33–35, 35 (2018).

repository promoting OA in publishing.[50] arXiv was developed *to allow any researcher worldwide with internet access to submit and read full-text articles, giving equal entry to everyone from graduate students up.*[51]

The OA movement is marred by many conflicting definitions.[52] However, three influential public statements laid the foundation of the OA movement. The definitions from the three statements can help in defining and theorising the movement.[53] John R. Beatty has summarised the three definitions in the following table:[54]

Definitions of Open Access (*Adapted verbatim from John R. Beatty)*				
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.

[50] Joe Miller, *Why Open Access to Scholarship Matters*, 10 SCHOLARLY WORKS 733, 734 (2006).
[51] Paul Ginsparg, *ArXiv at 20*, 476 NATURE 145–147, 146 (2011).
[52] Amy E. C. Koehler, *Some Thoughts on the Meaning of Open Access for University Library Technical Services*, 32 SERIALS REVIEW 17–21, 18–19 (2006).
[53] Jurchen, *supra* note 13 at 161.
[54] John Beatty, *Revisiting the Open Access Citation Advantage for Legal Scholarship*, 111 LAW LIBRARY JOURNAL 573–590, 578–580 (2019).

The OA movement has developed alongside the Internet and places immense reliance on the Internet's ability to remove the barriers of price and permission in academic publishing.[55] Referring to the Internet, the Budapest Open Access Initiative noted, *"An old tradition 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.*[56]

There are two ways research can be made OA: the Gold road and the Green road.[57] This classification is premised on who provides OA copies of an article: the publisher or the author.

1.1. Gold Open Access

The Gold road is a publication model, where research is made openly available by the publisher to whom it is submitted[58], i.e. "*free access at the original place of publication.*"[59] Paramount importance is placed on the journal as a fundamental unit.[60] Walt Crawford defines Gold OA as "*immediate full-text online access at no charge to readers.*"[61] Journals that follow the gold road maintain the traditional publishing model. They provide similar publication services as conventional journals, including quality control of submissions through peer review and editorial committees.[62] Therefore, Gold OA requires a reform of the existing publication models.[63] The Gold Road to OA contradicts scholarly journals' present "reader-pays" business plan, which means that publishers fostering Gold OA policies must generate an alternate source of revenue.[64]

---

[55] Saimah Bashir et al., *Evolution of institutional repositories: Managing institutional research output to remove the gap of academic elitism*, JOURNAL OF LIBRARIANSHIP AND INFORMATION SCIENCE 1, 3–4 (2021).
[56] SUBER, *supra* note 39 at 19.
[57] Tennant et al., *supra* note 29 at 603; Some literature further subcategorizes these open access modes, See: Heather Piwowar et al., *The State of OA: A large-scale analysis of the prevalence and impact of Open Access articles*, 6 PEERJ e4375 (2018).
[58] Mikael Laakso et al., *The Development of Open Access Journal Publishing from 1993 to 2009*, 6 PLOS ONE e20961, 1, 2 (2011).
[59] Peter Weingart & Niels C. Taubert, *Changes in Scientific Publishing: A Heuristic for Analysis*, *in* THE FUTURE OF SCHOLARLY PUBLISHING: OPEN ACCESS AND THE ECONOMICS OF DIGITISATION , 27 (2017).
[60] Jean-Claude Guédon, *The "Green" and "Gold" Roads to Open Access: The Case for Mixing and Matching*, 30 SERIALS REVIEW 315–328, 315, 316 (2004).
[61] WALT CRAWFORD, OPEN ACCESS: WHAT YOU NEED TO KNOW NOW 18 (2011).
[62] MARC SCHEUFEN, COPYRIGHT VERSUS OPEN ACCESS: ON THE ORGANISATION AND INTERNATIONAL POLITICAL ECONOMY OF ACCESS TO SCIENTIFIC KNOWLEDGE 66, 67 (2015).
[63] Guédon, *supra* note 60 at 315–317.
[64] *Id.* at 315.

To understand the economic viability of Gold OA publishing, we need to identify the different types of Gold OA journals.[65] The first group of journals, *free OA/ platinum OA,* depends on a sponsoring society to cover publishing costs.[66] The second group of journals, *OA journals with APC*, charge authors with article processing charges (APCs). The third kinds of journal are *hybrid OA journals,* which work on the toll-access publishing model and allow a truncated or limited form of OA by providing access to the published material either optionally, retrospectively, in a limited manner or after a certain period.[67]

The APC funded Gold OA nourishes its revenue stream from authors, through APCs, rather than from readers through subscriptions. Therefore, for publishers, "*the move to online open access is utopian*".[68] Springer served as a pioneer in the move to APC funded OA with its Springer Open Choice platform, which imposed a flat rate of $3000 per article.[69] The UK's report titled *Monitoring the Transition to Open Access* reported that over 60% of journals worldwide have an APC funded OA model in place. By imposing APCs, which generally range from $100 to $6700,[70] commercial publishers have managed to retain and, in some cases, maximise their profit margins.[71]

However, APC funded Gold OA, and Hybrid OA should not be cited as solutions to the *serials crisis.* While the two publication models have witnessed tremendous growth,[72] the fact remains that APC funded Gold OA creates barriers to publications for researchers whose funding institutions lack the budget to cover APC costs.[73] The authors provide a simple example: SpringerNature announced their plans of charging $11390 as APC costs for their 33 journals

[65] Li Zhang & Erin M. Watson, *Measuring the Impact of Gold and Green Open Access*, 43 THE JOURNAL OF ACADEMIC LIBRARIANSHIP 337–345, 337–340 (2017).
[66] A. Townsend Peterson et al., *Open access solutions for biodiversity journals: Do not replace one problem with another*, 25 DIVERSITY AND DISTRIBUTIONS 5–8, 7 (2019).
[67] SCHEUFEN, *supra* note 62 at 67; Hybrid OA journals only conditionally fulfil the OA mandate, it is argued that they should not be considered part of the Gold OA movement, See: Steffen Bernius et al., *Open Access Models and their Implications for the Players on the Scientific Publishing Market*, 39 ECONOMIC ANALYSIS AND POLICY 103–116, 106 (2009).
[68] MacLeavy, Harris, and Johnston, *supra* note 35 at 10, 11 Their (academic publishers) profits-unless the cahrges they levy on authors can be regulated- are thus guranteed. .
[69] Jurchen, *supra* note 13 at 162.
[70] *Id.*
[71] Órla O'Donovan, *What is to be done about the enclosures of the academic publishing oligopoly?*, 54 COMMUNITY DEVELOPMENT JOURNAL 363–370, 364 (2019); MacLeavy, Harris, and Johnston, *supra* note 35 at 10.
[72] The number of OA journals has skyrocketed in the recent past. The Directory of Open Access Journals has increased its list from around 33 in 2002 and 9900 journals in 2014 to over 16500 journals in July 2021. SCHEUFEN, *supra* note 62 at 74–79.
[73] MacLeavy, Harris, and Johnston, *supra* note 35 at 11.

from 2021.[74] This price translates to just under ₹850,000: a steep cost for most academics, particularly in developing countries such as India.

The hybrid OA journals, on the other hand, enjoy a very obvious advantage. Referred to as '*double-dipping,'* hybrid OA journals can leverage their publication model to recover the price of an article twice. First, when an author pays APCs and second, when a subscription to the journal is sold to academic libraries.[75] Even the editorial boards of some hybrid OA journals have expressed their concerns about APC funded publication model and issues such as *double-dipping.*[76]

APCs can be viewed as a tax on research publications. The higher a university's research output, the higher its payments towards APCs. Levine-Clark has discussed such a situation in the context of the California Institute of Technology. If all research originating from the institute had been published within an APC funded model, the institute would have spent $7.5 million on publication costs in 2016. These costs are more than double the subscription costs ($3.1 million) paid by the institute in 2016.

The APC funded model may also lead to elitism. Early-career researchers and those working with smaller universities would not be able to pay high APCs.[77] Demands for publications costs will eventually have to be rationed by universities and institutions. Such rationing would favour academics and researchers who can ensure a supply of funds from outside the institutions, "*to the probable detriment of humanities and social sciences scholars.*"[78] This can potentially create a group of self-perpetuating elite researchers.[79]

Therefore, arguing in favour of APC-funded Gold/ Hybrid Open Access is potentially synonymous with replacing the problem of academic publishing from exorbitant subscription costs to ever-rising APCs without affecting the publishers' profit margins.[80] It can potentially

[74] Holly Else, *Nature journals reveal terms of landmark open-access option*, 588 NATURE 19–20 (2020).
[75] Bernhard Mittermaier, *Double Dipping in Hybrid Open Access – Chimera or Reality?*, SCIENCEOPEN RESEARCH, 2–4, 9 (2015) After considering the policies of over 24 publishers, the study concludes that "there is apparently no publisher who never double dips. The spectrum ranges from 100% double dipping to very general statements that cannot be verified on price setting and partial price reductions right up to a case with supposed 0% double dipping."
[76] O'Donovan, *supra* note 71.
[77] Amor Towles, *Open Acces Publishing, in* THE BATTLE FOR OPEN HOW OPENNESS WON AND WHY IT DOESN'T FEEL LIKE VICTORY 45–67, 57–59 (2014).
[78] MacLeavy, Harris, and Johnston, *supra* note 35 at 10.
[79] See: Towles, *supra* note 77 at 57–59.
[80] Peterson et al., *supra* note 66; Beverungen, Böhm, and Land, *supra* note 2 at 933; Siler, *supra* note 21 at 87–89.

dilute decades' worth of efforts to move away from *commercial publishing infrastructure* to *public non-commercial infrastructure for open scientific communication.*[81]

1.2. Green Open Access

Green OA means self-archiving of the research by an author.[82] It places paramount importance on the article or research as a fundamental unit.[83] In general, the Green OA option "*allows an author to post some version of the article"* on the Internet in a freely available manner."[84] From pre-print versions[85] to versions that have been published in toll-access journals,[86] publication of a manuscript at any stage qualifies as Green OA.

The green road to OA remains independent from the business of online publishing. It works *in parallel* to the conventional publishing model serving as a *supplement to toll-access.*[87] The essence of Green OA and self-archiving is best captured in Prof. Guedon's statement: "*It* (Self-archiving) *simply aims at improving the research impact of established scientists and little else. If it should help (or hurt) other categories of people, so be it, but it is neither its concern nor its worry*."[88] Self-archiving is not novel for the academic community. Prof. Willinsky notes that "*the self-archiving concession follows on the tradition of publishers sending neat bundles of offprints to the authors, who then sent them off with a warm note to colleagues, students and family….. The difference is that in archiving a work, the author opens and extends access to it on a more democratic and global basis.*"[89] It is arguably the most cost-effective and affordable means for the promotion of OA.[90]

Green OA copies can be found at many online locations, including institutional repositories, subject repositories and personal/department websites.[91] Articles can also be submitted to academic social networks such as the Social Science Research Network (SSRN). Owing to the push provided by the larger OA movement, the number of online repositories has seen a

[81] Humberto Debat & Dominique Babini, *Plan S in Latin America: A Precautionary Note*, 11 SCHOLARLY AND RESEARCH COMMUNICATION 12–12, 3–4 (2020).
[82] Bo-Christer Björk et al., *Anatomy of green open access: Journal of the American Society for Information Science and Technology*, 65 J ASSN INF SCI TEC 237–250, 237 (2014).
[83] Guédon, *supra* note 60 at 136.
[84] Beatty, *supra* note 54 at 579–581.
[85] Laakso et al., *supra* note 58 at 2.
[86] John Houghton & Alma Swan, *Planting the Green Seeds for a Golden Harvest: Comments and Clarifications on "Going for Gold,"* 19 D-LIB MAGAZINE (2013).
[87] Guédon, *supra* note 60 at 316.
[88] *Id.*
[89] WILLINSKY, *supra* note 2 at 48.
[90] Björk et al., *supra* note 82 at 240–241.
[91] *Id.* at 239.

significant upsurge. The Directory of Open Access Repositories[92] listed only 128 repositories in 2005,[93] which rose to 2200 in February 2012 and over 4725 in 2021 repositories. Professor Ginsparg's arXiv.org is an example of a subject-based repository with over 7.9 million submissions and over 2 billion downloads.[94]

Considering the statistical evidence, it can be argued that the Green OA road has become an integral part of the more extensive OA movement. However, we are yet to understand, what is the overall prevalence of OA publishing. A study published in 2018 notes that only one in three journal articles is available through OA.[95] This proportion includes Green OA publishing, including pre-print versions of an article where authors may archive a version of their research that is not peer-reviewed. The findings on such pre-print versions may not be verified. Relying on such unverified findings can be difficult. Even if we ignore the reliability of Green OA, it is interesting to see that in over 25 years of its existence, the OA movement has only freed roughly 30% of all academic literature.

1.3. Open Access movement in India

Having understood the development and prevalence of the OA movement globally, this section studies the development and relevance of the movement in India. Indian Mathematicians, Computer Scientists and Biologists were amongst the first to participate in global OA initiatives by depositing pre-print versions of their articles in the arXiv repository.[96] A meeting conducted at the Indian Academy of Sciences, Bangalore, a society registered for open science, in 1999, can be traced back as one of the first calls to public access within the Indian research community. In the meeting, participants underlined the argument for open access to the public data prepared and stored by the Survey of India.[97] By 2002, initial steps for promoting Open Access initiatives started gaining traction at many institutes in India. In 2002, the Indian Institute of Science (IISc) established the first Indian electronic repository: Eprints@IISC.[98]

Apart from institutional mandates, the funders of Indian research also started promoting Open Access. In 2011, the Council of Scientific and Industrial Research (CSIR), an autonomous

[92] Hosted by Joint Information Systems Committee (JISC) on https://www.jisc.ac.uk/opendoar.
[93] Gadd and Troll Covey, *supra* note 41 at 107.
[94] arXiv monthly downloads available at: Monthly Download Rates (arxiv.org)
[95] MABE, JOHNSON, AND WATKINSON, *supra* note 3 at 135–139; Also see: Piwowar et al., *supra* note 57 at 10.
[96] Vivek Kumar Singh, Rajesh Piryani & Satya Swarup Srichandan, *The case of significant variations in gold–green and black open access: evidence from Indian research output*, 124 SCIENTOMETRICS 515–531, 517 (2020).
[97] R. Ramachandran, *Public access to Indian geographical data*, 79 CURRENT SCIENCE 450–467 (2000).
[98] Francis Jayakanth et al., *ePrints@IISc: India's first and fastest growing institutional repository*, 24 OCLC SYSTEMS & SERVICES: INTERNATIONAL DIGITAL LIBRARY PERSPECTIVES 59–70, 62 (2008).

organisation set up by the Government of India in 1942, issued an Open Access Mandate. Each laboratory funded by the CSIR was required to create an interoperable OA repository.[99] All the journals published by the CSIR funded laboratories were required to be made OA compliant. In 2014, two departments under the Ministry of Science and Technology published an Open Access Policy.[100] The policy clearly articulates that since the funds disbursed by the two departments are public funds, the knowledge generated from this research should be publicly accessible. The policy encouraged institutions to create institutional repositories, which, it was hoped, would directly feed into a central harvester: www.sciencecentral.in. Another significant step towards the OA movement in India was signing the Delhi Open Access Declaration (DDOA) in 2018. The stakeholders adopted a ten-point agenda for ensuring the availability of research literature and the dissemination of research outputs.[101]

However, institutional mandates have largely remained checkered, and the OA landscape in India remains fractured without a national OA mandate.[102] In December 2020, the Government of India mooted its ambitious '*One Nation, One Subscription*' policy, where "*for one centrally negotiated payment, all individuals in India will have access to journal articles.*"[103] The policy continues to subscribe to the *reader pays* subscription model and does not subscribe to the *author-pays* OA models advocated by European funders who formed cOAlition S.[104] Such a policy confirms the traditional business model of academic publishing and furthers an "*every country for themselves policy,"* which can be detrimental to the global interests in Open Science and Knowledge.[105]

Coming to the relevance of OA publishing in India, reports suggest that around 24.19% of scholarly articles published by Indian authors in the past five years were available for OA via either the Gold or the Green OA road.[106] Comparing this to the average proportion of OA

[99] CSIR Open Access Mandate available at: http://www.csircentral.net/mandate.pdf; See: B.S. Shivaram & B.S. Biradar, *Grey literature archiving pattern in open access (OA) repositories with special emphasis on Indian OA repositories*, 37 EL 95–107 (2019).
[100] DEPARTMENT OF BIOTECHNOLOGY & DEPARTMENT OF SCIENCE AND TECHNOLOGY, *DBT and DST Open Access Policy: Policy on Open Access to DBT and DST funded research*, (2014).
[101] Anup Kumar Das, *Delhi Declaration on Open Access 2018: An overview*, 65 ANNALS OF LIBRARY AND INFORMATION STUDIES, 83–84 (2018).
[102] Anubha Sinha, *Research Publishing: Is "One Nation, One Subscription" Pragmatic Reform for India?*, THE WIRE SCIENCE (2020).
[103] DEPARTMENT OF SCIENCE AND TECHNOLOGY, *Science, Technology and Innovation Policy*, 13 (2020).
[104] For deatials about Plan S see: Else, *supra* note 74.
[105] Mallapaty, *supra* note 11; Dasapta Erwin Irawan et al., *India's plan to pay journal subscription fees for all its citizen may end up making science harder to access*, THE CONVERSATION (2020).
[106] Martín-Martín et al., *supra* note 33 at 830; Singh, Piryani, and Srichandan, *supra* note 96 at 522–23.

literature available worldwide, which stands roughly 33%,[107] OA publications in India are slightly lower.[108] Among the OA roads in India, the Gold OA road is the most significant, with about 10-12% of OA articles published via the gold road. In comparison, about 6% of OA articles follow the green OA model.[109]

2. Black Open Access: Piratical Access to nearly all scientific literature

Only a third of the world's research has complied with OA publishing in roughly 20 years of the movement's existence. While significant, it is an underwhelming development. *Complex institutional, political, financial and economic conditions that limit access to knowledge at the geographic and institutional periphery of academia*[110] has given rise to the third road to OA: *The Black Road.*[111]

The past decade has witnessed the rise and fall of many shadow libraries, including, Textz.org. a*.org, monoskop and Library.nu.[112] The public catalogues of these libraries made them vulnerable to judicial sanctions. Library.nu was one of the first victims of overarching judicial sanctions when in 2015, a group of seventeen publishers were granted an injunction against the website in the US.[113] However, it was arguably the high-profile investigation into Aaron Schwartz, the founder of Reddit and the author of Guerilla Open Access Manifesto, and the open defiance of the academic publishing model by Sci-Hub that brought the black OA movement to the forefront of scholarly debate and judicial scrutiny.[114]

The most important shadow library, and one which is of primary interest for the present study, Sci-Hub, has also been the subject of many litigations in various jurisdictions. In what has been identified as '*the largest copyright infringement case in the history of the US and the history*

---

[107] MABE, JOHNSON, AND WATKINSON, *supra* note 3 at 135–139.
[108] Singh, Piryani, and Srichandan, *supra* note 96 at 522–23.
[109] *Id.* at 523–24.
[110] Balázs Bodó, Dániel Antal & Zoltán Puha, *Can scholarly pirate libraries bridge the knowledge access gap? An empirical study on the structural conditions of book piracy in global and European academia*, 15 PLOS ONE 1–25, 2 (2020).
[111] The use of the term "Black OA" is not a comment on the possible legality of Sci-Hub and associated shadow libraries. Bo-Christer Björk, *Gold, green, and black open access*, 30 LEARNED PUBLISHING 173–175, 173 (2017) The author uses the color black to refer to pirated academic literature, as the color has an affinity to the classical pirate flag. He does not use the term "Grey OA," as it already has an established meaning in the context of scholarly publishing covering theses, government reports, and th rest. .
[112] For details see: Balázs Bodo, *The Genesis of Library Genesis: The Birth of a Global Scholarly Shadow Library*, *in* SHADOW LIBRARIES: ACCESS TO KNOWLEDGE IN GLOBAL HIGHER EDUCATION 25–52, 25–53 (Joe Karaganis ed., 2018); Stephen Witt, *'The Idealist: Aaron Swartz and the Rise of Free Culture on the Internet,' by Justin Peters*, THE NEW YORK TIMES, January 8, 2016.
[113] Bodo, *supra* note 112 at 26–27.
[114] Bodó, Antal, and Puha, *supra* note 110.

of the world,'[115] Elsevier, in 2017, secured a $15 million injunction against Sci-Hub. The American Chemical Society was also granted an injunction with damages to the tune of $4.8 million.[116] The website has also faced injunctions and blocking orders in France, Russia, Sweden, Belgium and the United Kingdom.[117] However, despite the judicial orders, the website continues to operate through mirror sites and proxy servers.[118] Neither Elsevier nor ACS could recover any of the $19.8 million worth of damages awarded to them.[119]

The following part analyses the relevance of the Sci-Hub database. It will also address the ethical and moral justifications of Sci-Hub's activities.

2.1. The Development and Contemporary relevance of Sci-Hub

Sci-Hub has emerged as one of the largest shadow libraries of academic articles. Alexandra Elbakyan, the founder of Sci-Hub, honed her hacking skills at Kazakh University and then moved to Moscow, where she worked in computer security. After Moscow, Elbakyan moved to the University of Freiburg in Germany in 2010, after which she did a research internship at the University of Georgia. After completing her internship, Elbakyan returned to Kazakhstan, where she could not access the academic scholarship she needed to conduct her research. In one of her interviews, Elbakyan recounts that she needed access to hundreds of articles, each of which would have cost her around 30 USD. Frustrated by the models of Academic publishing, Elbakyan created Sci-Hub, which went live on September 5, 2011.[120] Sci-Hub amassed widespread attention in 2016, which became evident from *Nature* featuring Elbakyan in its "*ten people who mattered*" list.[121] It is interesting to note that Sci-Hub's fame and Elbakyan's citation came around the same time as the U.S. District Court injuncted Sci-Hub on Elsevier's petition.[122]

---

[115] Albert N. Greco, *The Kirtsaeng and SCI-HUB Cases: The Major U.S. Copyright Cases in the Twenty-First Century*, 33 PUB RES Q 238–253, 243 (2017).
[116] Andrea Widener, *ACS prevails over Sci-Hub in copyright suit*, CHEMICAL & ENGINEERING NEWS (2017), https://pubs.acs.org/doi/pdf/10.1021/cen-09545-notw10 (last visited May 6, 2021).
[117] Vivek Singh et al., *Is Sci-Hub Increasing Visibility of Indian Research Papers? An Analytical Evaluation*, 10 JOURNAL OF SCIENTOMETRIC RESEARCH 130–134, 130, 131 (2021).
[118] *Id.* at 131; OFFICE OF THE UNITED STATES TRADE REPRESENTATIEVE, *2019 Review of Notorious Markets for Counterfeiting and Privacy*, 27–28 (2019), https://ustr.gov/sites/default/files/2019_Review_of_Notorious_Markets_for_Counterfeiting_and_Piracy.pdf (last visited May 6, 2021).
[119] Widener, *supra* note 116.
[120] Himmelstein et al., *supra* note 37 at 2.
[121] Sara Reardon, *Nature's 10*, 540 NATURE 507–515, 512 (2016).
[122] T. Plutchak, *Epistomolgy- Three Ways of Talking About Sci-Hub Library Patrons*, 31 AGAINST THE GRAIN 61, 61 (2021).

Sci-Hub provides access to over 68.4% of the world's academic research along with access to over 85% of articles published in toll-access journals.[123] A study conducted in 2018 indicates that out of the 81,609,016 articles identified with Document Object Identifiers (DoIs), Sci-Hub provided access to 56,246,220 articles,[124] over 68% of all scientific literature. Around 85% of paywalled literature, i.e. literature published in toll-access journals, is available in Sci-Hub's database.[125] Sci-Hub provides access to over 97% of articles published in Elsevier's journals.[126]

Further, Sci-Hub's script can download papers on request and fulfil 99% of the download requests made.[127] Therefore, it is possible that apart from the 68.4% of articles available on the database, the remaining 31.6% of articles have never been requested.[128] During 2017, Sci-Hub serviced an average of 458,589 download requests daily.[129] Reports suggest that the search for 'Sci-Hub' on Google has increased more than eight times since 2016.[130]

Another notable element of Sci-Hub is how promptly the database archives newly published scholarship. Louis Houle studied the availability of articles published in Nature and Science to analyse the time frame within which articles published in the two magazines are archived over the Sci-Hub database. For papers published between September 2016 and June 2017, the study reported that, within 24 hours of publication, Sci-Hub archived all the articles published in Science, and 99% of those published in Nature. Google Scholar archived OA versions of only 9% of articles published in Science and 8% published in Nature.[131] In the ongoing litigation before the Delhi High Court, on December 24, 2020, Sci-hub was directed not to upload any new articles in which the plaintiffs own copyright.[132] While it is not clear if Sci-Hub has

[123] Frederik Sagemüller, Luise Meißner & Oliver Mußhoff, *Where Can the Crow Make Friends? Sci-Hub's Activities in the Library of Development Studies and its Implications for the Field*, 52 DEVELOPMENT AND CHANGE 670–683, 671 (2021).
[124] Himmelstein et al., *supra* note 37 at 4.
[125] Office of the United States Trade Representatieve (n 119) 27–28; ibid.
[126] Ibid.
[127] Lindsay McKenzie, *Sci-Hub's cache of pirated papers is so big, subscription journals are doomed, data analyst suggests*, SCIENCE (2017).
[128] *Id.*
[129] Himmelstein et al., *supra* note 37 at 13.
[130] Emad Behboudi, Amrollah Shamsi & Gema Bueno de la Fuente, *The black crow of science and its impact: analyzing Sci-Hub use with Google Trends*, LHT (2021); In the cited study, the authors have analysed the Google search rate of Internet users about Sci-hub in ten countries including India. The searching volume in 4 years was analysed using Google Trends. .
[131] Louis Houle, *Sci-Hub and LibGen: what if… why not?*, *in* 83RD IFLA GENERAL CONFERENCE AND ASSEMBLY , 11, 12 (2017), http://ifla-test.eprints-hosting.org/id/eprint/1892/ (last visited Jul 7, 2021).
[132] In its order dated December 24, 2020, Elbakyan's counsel took a stand that no new articles will be uploaded in the Sci-Hub database. The Court took the counsel's statement on record. An undertaking to the effect was filed by Sc-Hub. Elsevier Ltd. & Ors. v. Alexandra Elbakyan & Ors., CS(COMM) 572/2020.

complied with the order[133], if complied with, it can potentially dilute the '*up to the minute'* nature of the database.

Where do Indian scholars and their scholarship fit in this rubric? The database provides access to over 91% of Indian scholarship, of which 18.46% of articles were available in some form of OA.[134] A study published in April 2020 reveals that out of 67,857 Indian publication records from 2016, 61,706 were available in the Sci-Hub database.[135] Another study from April 2021 examined a 2017 dataset provided by Sci-Hub containing metadata for almost 329 days to determine the download requests made by Indian scholars and researchers. Out of 150,875,861 download requests, 13,144,241 were from India. Sci-Hub serviced an average of 39,952 Indian download requests daily,[136] making India the third-largest user of the piratic website.[137]

2.2. Academic piracy: Civil Disobedience against persistent unfairness

The Sci-Hub database operates in a *legal grey area*, and many countries continue to block its usage.[138] Despite such injunctions, many members of the academic community believe that it is not ethically incorrect to download pirated scholarship. When surveyed in 2017 at a United Kingdom Serials Group Conference, barely any delegates had individually blocked Sci-Hub or considered it should be blocked.[139] A similar survey with over 11000 respondents in 2016 revealed that 88% believed it is not wrong to download pirated papers.[140] Writing for The Guardian, George Monbiot noted that "*as a matter of principle, do not pay a penny to read an academic article. The ethical choice is to read the stolen material published by Sci-Hub*."[141] Some scholars have gone even further to argue that the goals of Sci-hub are altruistic and point

[133] Sci-hub uploaded 24 million new articles on September 5, 2021. The plaintiffs initiated contempt proceedings against Sci-Hub for having violated the undertaking filed before the Court. Sci-Hub argued that the undertaking filed before the court expired on March 8, 2021, after which the court did not extend it any further. See order dated September 15, 2021 in IA 11925/2021 ibid.
[134]Vivek Kumar Singh, Satya Swarup Srichandan & Sujit Bhattacharya, *What do Indian Researchers download from Sci-Hub?*, ARXIV:2103.16783 [CS] 11, 9 (2021).
[135] Singh, Piryani, and Srichandan, *supra* note 96 at 524.
[136] Singh, Srichandan, and Bhattacharya, *supra* note 134 at 2.
[137] *Id.* at 7.
[138] USA: Elsevier Inc. v. Sci-Hub, 2017 U.S. Dist. LEXIS 147462; Quirin Schiermeier, *US court grants Elsevier millions in damages from Sci-Hub*, NATURE, June 22, 2017; Sweden: The Wire Staff, *Elsevier Forces ISP to Block Access to Sci-Hub, ISP Blocks Elsevier as Well*, THE WIRE (2018); Belgium: Scientific publishing houses win copyright case against ISPs, HOYNG ROKH MONEGIER (2019); Russia: Dalmeet Singh Chawla, *Sci-Hub blocked in Russia following ruling by Moscow court*, CHEMISTRY WORLD (2018).
[139] Green, *supra* note 31 at 325.
[140] John Travis, *In survey, most give thumbs-up to pirated papers*, SCIENCE (2016).
[141] George Monbiot, *Scientific publishing is a rip-off. We fund the research – it should be free | George Monbiot*, THE GUARDIAN, September 13, 2018.

to the implosion of the present-day academic publishing models.[142] Dr. Bohannon sums up this scholarly debate when he says that Sci-Hub is *"an awe-inspiring act of altruism or a massive criminal enterprise, depending on whom you ask."*[143] This section seeks to explore some normative justifications on the use of the Sci-Hub database.

Academic publishing is essentially a cooperative arrangement between authors, publishers and libraries.[144] Cooperative arrangements are premised on fairness principles, and the participating parties should equally bear the benefits and burdens in such an arrangement.[145] Publishers' activities, such as forcing libraries into "*Big Deal*" licensing agreements by clubbing high-impact and low-impact serials,[146] including non-disclosure agreements that allow price-discrimination,[147] create a perceived lack of fairness in the dealings of academic publishers. Further, the inputs provided by authors, their institutes and the public (as funders of public research) in creating academic scholarship far outweigh the value additions by academic publishers. Despite what Deutsche Bank referred to as "*relatively little*" value addition,[148] publishers and journals extract exorbitant monetary compensations and, in doing so, reduce the circulation and access to research.[149]

Apart from disregarding the cooperative nature of their agreements, the academic publishing industry works on a '*double appropriation*' basis. Without recompensating the producers of the knowledge, the publishers often claim intellectual property rights on the knowledge produced by researchers. This same knowledge is then sold back to libraries at "*massively inflated*" prices back, so the producers can again employ this knowledge to create further

---

[142] Llarina González-Solar & Viviana Fernández-Marcial, *Sci-Hub, a challenge for academic and research libraries*, 28 EPI, 4–5 (2019); Aniruddha Malpani, *The Robin Hood dilemma: Is it ethical to use "unethical" means to achieve something good?*, 05 IJME 170–171, 171 (2020).
[143] John Bohannon, *The frustrated science student behind Sci-Hub*, SCIENCE | AAAS (2016).
[144] Jack E. James, *Pirate open access as electronic civil disobedience: Is it ethical to breach the paywalls of monetized academic publishing?*, 71 JOURNAL OF THE ASSOCIATION FOR INFORMATION SCIENCE AND TECHNOLOGY 1500–1504, 2 (2020).
[145] JOHN RAWLS, A THEORY OF JUSTICE 3–5 (Revised Edition ed. 1999).
[146] The term "Big Deal" was coined by Kenneth Frazier in 2001. It refers to a"comprehensive licensing agreement in which library or library consortium agrees to buy electronic access to all or a large portion of a publisher's journals for a cost basedon expenditures for journals already subscribed to by the institution(s) plus an access fee." Kenneth Frazier, *What's the Big Deal?*, 48 THE SERIALS LIBRARIAN 49–59 (2005).
[147] David Solomon, Mikael Laakso & Bo-Christer Björk, *Converting Scholarly Journals to Open Access: A Review of Approaches and Experiences*, 27 COPYRIGHT, FAIR USE, SCHOLARLY COMMUNICATION, ETC., 95-99,155 (2016).
[148] Beverungen, Böhm, and Land, *supra* note 2 at 931–932 Although, REL "adds relatively little value to the publishing process", it has clearly been very successfuly in extracting value from this process. This combination of a negligible contribution to value on the part of publishers with exceptionally high profit rates is possible because of a double appropriation at the heart of the business model.
[149] James, *supra* note 144 at 2.

research.[150] This and similar practices by academic publishers result in frustration within the academic community, which then perceives Sci-Hub Hub (by extension, academic piracy) as a symptom of an exploitative business model rather than a legal pariah.[151]

Prof. Ramon Lobato reimagines the copyright system and identifies six different forms of piracy, one of which is *piracy as access.*[152] This unique form of privacy is motivated by "*accessibility and economic factors and inspires copyright disobedience due to its capacity to disseminate knowledge culture and capital."*[153] Viewing Sci-Hub as a medium of *piracy as access* allows its normative classification to transcend from a mere violation of copyright law to a necessary form of civil disobedience.

Some scholars,[154] including Elbakyan herself,[155] view Sci-Hub as a medium of protesting against copyright law and civil disobedience. For the sake of the present study, '*civil disobedience*' should be interpreted to mean: "*a public, non-violent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government. By acting in this way, one addresses the sense of injustice of the majority of the community and declares that in one's considered opinion, the principles of social cooperation amount the free and equal men are not being respected.*"[156] The Internet, for example, provides an interesting avenue for civil disobedience movements.

Alexandra Elbakyan views Sci-Hub as a vessel for a global overhaul of the academic publishing industry. Sci-Hub is supposed to underline the unfair business models of academic publishers and ensure that knowledge is within reach of the general population.[157] Such motivations arguably align Elbakyan with the more significant OA movement. However, the advocates of the OA movement have continuously ignored the impact of pirate OA in achieving the goals of their movement.[158] Such ignorance or pre-emptive rejection of pirate OA ignores

[150] Beverungen, Böhm, and Land, *supra* note 2 at 932.
[151] Siler, *supra* note 21 at 91, 92.
[152] The other forms of piracy are: 1] piracy as theft, 2) piracy as free enterprise, 3) piracy as free speech, 4) piracy authorship and 5) piracy as resistance; Ramon Lobato, 'The Six Faces of Piracy: Global Media Distribution from Below' in RC Sickel (ed), *Business of Entertainment*, vol 1 (Greenwood Publishing Group 2008] 29–32.
[153] *Id.*
[154] Bodó, Antal, and Puha, *supra* note 110 at 2.
[155] Marcus Banks, *What Sci-Hub Is and Why It Matters*, 47 AMERICAN LIBRARIES 46–49, 46 (2016).
[156] RAWLS, *supra* note 145 at 320.
[157] Alexandra Elbakyan & Aras Bozkurt, *A Critical Conversation with Alexandra Elbakyan: Is she the Pirate Queen, Robin Hood, a Scholarly Activist, or a Butterfly Flapping its Wings?*, 16 ASIAN JOURNAL OF DISTANCE EDUCATION 111–118, 113–117 (2021).
[158] Also see: Piwowar et al., *supra* note 57 In assessing the growing relevance of the OA movement, the authors did not even consider the relevance of academic piracy.

the ability of the citizens of a democratic society to protest against the perceived unfairness of legal convention through civil disobedience.[159]

Despite there being two roads to OA: green road and gold road, over 70% of academic literature remains paywalled.[160] Therefore, when George Monbiot argues that the *ethically responsible* manner of accessing academic scholarship is through shadow libraries,[161] he is arguing in favour of a conscientious citizens' moral duty to protest the encumbrances placed by the business model of academic publishing and the relevant legal framework, which deters access to public-funded research. Academic piracy can therefore be interpreted as an act of civil disobedience against the perceived unfairness of this transaction, which eventually leads to the monetisation of knowledge.[162]

Given the interesting relationship that Sci-Hub shares with civil disobedience, it is important to understand what is the *unjust law* that Sci-Hub is revolting against. The next part of the paper deals with Copyright Law and its limitations and exemptions.

3. Copyright Law Exceptions: Navigating Fair Use and Fair Dealing

Modern Copyright Law and its exceptions work within an elaborate system of regional, bilateral and international intellectual property treaties. The Berne Convention for the Treatment of Literary Works and Artistic Works, the Agreement on the Trade-Related Aspects of Intellectual Property Law, and the multitude of treaties negotiated under the aegis of the World Intellectual Property Organisation are some of the most important multilateral obligations responsible for the present iteration of Copyright Law.[163]

Copyright law is an intricate balance between creating an incentive structure for rewarding the authors' labour and encouraging a benefit structure for the society through a free flow of information and stimulation of new creations, ideas and inventions.[164] This bargain has been evident since the enactment of the first statute that regulated the copyright monopoly. Enacted in 1710, the Statute of Anne regulated the book trade in Great Britain. Section IV of the Act

[159] James, *supra* note 144 at 3.
[160] MABE, JOHNSON, AND WATKINSON, *supra* note 3 at 135–139.
[161] Monbiot, *supra* note 141.
[162] James, *supra* note 144 at 3,4.
[163] William F. Patry, *A Few Observations about the State of Copyright Law*, *in* COPYRIGHT USER RIGHTS: CONTRACTS AND THE EROSION OF PROPERTY 85, 36–37 (Pascale Chapdelaine ed., First edition ed. 2017).
[164] Dànielle Nicole DeVoss & James E. Porter, *Why Napster matters to writing: Filesharing as a new ethic of digital delivery*, 23 COMPUTERS AND COMPOSITION 178–210, 185 (2006).

provided a "*highly elaborate scheme for averting the monopolistic pricing of books*".[165] Justice O'Connor from the United States Supreme Court explained this bargain incorporated in modern copyright law as:[166]

> *"The primary objective of Copyright is not to reward the labor of authors, but to promote the Progress of Science and useful Arts. To this end, Copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This result is neither unfair nor unfortunate. It is the means by which Copyright advances the progress of science and art. [Copyright law] ultimately serves the purpose of enriching the general public through access to creative works."*

The statutory monopoly granted by the Copyright Law is "*not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations*."[167] There are multiple qualifications to the scope of copyright protection, ranging from a limited monopoly term to a host of limitations and exceptions (L&E). L&Es are essentially carve-outs from the scope of copyright infringement. They allow the use of copyrighted material without the authorisation of the copyright holder.[168] L&Es form an integral part of the copyright law and function on the premise that "*creativity requires copying, often generously, and often without payment or permission.*"[169]

In 1945, Professor Zechariah Chafee sought to answer, "W*hat it is that copyright is trying to achieve?*"[170] Answering the question, he identified six ideals formulated as desirable ends for the law of Copyright. Three of these ideals were affirmative and extended the rationale for protecting the works of a copyright owner. The other three were negative in so much as they limited the scope of protection.[171] The fourth ideal postulated that *the protection should not extend substantially beyond the purposes of protection.*[172] Prof. Chafee identified this ideal as

---

[165] Section 4, Copyright Act, 1710; William Cornish, *The Statute of Anne 1709–10: Its Historical Setting*, *in* GLOBAL COPYRIGHT 13696, 24 (2010).
[166] *Feist Publications Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991); Similar observations have been made by the Supreme Court of India in: M/S. Entertainment Network v. M/S. Super Cassettee Industries, 2008(37) PTC 353(SC) (2008).*
[167] Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARVARD LAW REVIEW 1105–1136, 1107 (1990).
[168] Although, in some cases equitable payments may be required; See: Jane Ginsburg, *Fair Use for Free, or Permitted-but-Paid?*, 29 BERKELEY TECH. L. J. 1383, 1416–1425, 1432–1434 (2014).
[169] William F. Patry, *A Few Observations about the State of Copyright Law*, *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 85, 89 (Ruth L. Okediji ed., First paperback edition ed. 2018).
[170] Zechariah Chafee, *Reflections on the Law of Copyright: I*, 45 COLUMBIA LAW REVIEW 503–529, 503 (1945).
[171] GILLIAN DAVIES, COPYRIGHT AND THE PUBLIC INTEREST 244–247 (2nd ed ed. 2002).
[172] Chafee, *supra* note 170 at 506–511.

the most important goal of copyright policy. The fifth ideal states that the protection afforded to the author *should not stifle independent creation by others*.[173] The premise of this ideal is that the very law that has been developed to reward an author's creativity should not suffocate the creativity of others.

However, Prof. Chafee's insistence on the relevance of L&Es does not reflect in the international copyright framework. Given the lack of coherent guidance on the manner and structure of L&Es on a supra-national treaty level, different countries have adopted different forms and approaches to L&Es.[174] The international copyright treaties and negotiations have failed to conclude international standards for L&Es to promote access and dissemination of copyrighted material.[175] While new rights and novel forms of protecting copyright eligible content dominate treaty obligations, the international copyright framework has failed to balance the growth of copyright protection and L&Es.[176] Most L&Es that form part of the international treaty regime are merely permissive, i.e. they only provide that the member states *may* enact L&Es.[177] In its present iteration, this state of the international copyright regime contradicts the ideals of the copyright policy as advocated by Prof. Chafee.

While there is a considerable difference between the form of L&Es adopted by the different countries, they are developed within either of two models: Fair Use and Fair Dealing. The next section explains these two models in detail. Copyright regimes such as India follow the fair dealing approach, establish a list of enumerated exceptions, and regularly update them in line with the developments in copyright law.[178] Alternatively, other jurisdictions such as the United States of America follow the fair use approach and do not list any exceptions to copyright infringement. Rather, the Courts are called upon to interpret some factors that determine if the defendant's secondary use is fair.[179]

3.1. Fair Use, Fair Dealing and Public Interest

[173] *Id.* at 511–514.
[174] Pamela Samuelson, *Justifications for Copyright Limitations and Exceptions*, *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 12, 24 (Ruth L. Okediji ed., First paperback edition ed. 2018).
[175] Patry, *supra* note 163 at 37.
[176] RUTH L. OKEDIJI, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries*, 2 (2006), https://unctad.org/system/files/official-document/iteipc200610_en.pdf (last visited Jun 7, 2021).
[177] Daniel J Gervais, *Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations*, 5 UNIVERSITY OF OTTAWA LAW & TECHNOLOGY JOURNAL 43, 51–53 (2008) Although, there are some instruments which provide complulsory exceptions; eg: Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, 2013.
[178] Section 52, Copyright Act, 1956.
[179] 17 U.S.C. § 107 Copyright Act of 1976.

3.1.1. Fair Use Model: The American experience

The doctrine of Fair use represents "*breathing space within the confines of copyright law.*"[180] The doctrine represents a countervailing policy concern that requires limiting the scope of the monopoly provided by copyright legislation. The idea of fair use is very expansive and is considered one of the most troublesome concepts of copyright law.[181] The bargain implicit in the fair use doctrine has been explained as "*any use that is deemed by the law to be "fair" typically creates some social, cultural, political benefit that outweighs any resulting harm to the copyright owner.*"[182]

From the genesis of the idea of Copyright, some standard of fair use was considered necessary to promote science and useful arts.[183] The concept of fair use first appeared as *fair abridgement* in English judicial decisions as early as 1740.[184] The doctrine was later appropriated within American Copyright jurisprudence by Justice Story in *Folsom v. Marsh*, decided in 1841.[185] The case involved the letters of George Washington, which were published in a set entitled *The writings of George Washington*. The defendant used selections from the letters to compile a book entitled *The Life Story of Washington in the form of an Autobiography.* Justice Story, in his decision, declared that certain uses of a copyrighted work should be considered fair and should not attract any penalty under copyright infringement. While the defendant incurred liability for copyright infringement, *Folsom v. Marsh* articulated the possibility of *fair use of a copyrighted work* without attracting a penalty.

While the defendant was held liable for copyright infringement, the case articulated the possibility of using a copyrighted work fairly without attracting the penalty from copyright infringement.

Justice Story enunciated the fair use analysis to include: "*In short, we must often, in deciding questions of this sort, look at the nature and objects of the selection made, the quantity and*

---

[180] *Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (1994).*
[181] *Dellar v. Samuel Goldwyn, Inc., 104 F. 2d 661 (2d. Cir. 1939).*
[182] LEE WILSON, FAIR USE, FREE USE, AND USE BY PERMISSION: HOW TO HANDLE COPYRIGHTS IN ALL MEDIA 67–69 (1st edition ed. 2005).
[183] CAMPBELL V. ACUFF-ROSE MUSIC, INC., *supra* note 180 at 574.
[184] Martine Courant Rife, *The fair use doctrine: History, application, and implications for (new media) writing teachers*, COMPUTERS AND COMPOSITION 154–178, 165–167 (2007).
[185] Mark Rose, *The Statute of Anne and authors' rights: Pope v. Curll (1741)*, *in* GLOBAL COPYRIGHT: THREE HUNDRED YEARS SINCE THE STATUTE OF ANNE, FROM 1710 TO CYBERSPACE , 76 (Lionel Bently, Uma Suthersanen, & Paul Torremans eds., 2010); There is some lliteraute which argues that the case of Folsom should not be viewed as the point of genesis of the fair use doctrine. See: Matthew Sag, *The Pre-History of Fair Use.*, 76 1371 43 (2011).

value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or superseded the objects, of the original work."[186] This enunciation assumes relevance in modern copyright law, and parallels can be drawn between Justice Story's opinion and the modern-day iteration of the fair use doctrine. Since 1841, the doctrine of fair use has witnessed overwhelming litigation and has become one of the most important limitations on the scope of copyright protection. In 1990 Justice Neval noted that "*Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design.*"[187]

The inclusion of the fair use doctrine in copyright law can be interpreted as an acceptance of the principle that "*certain acts of copying are defensible when the public interest in permitting the fair use far outweighs the author's interest in copyright protection.*"[188] Amongst the many user actions protected within copyright law, displaying lower-resolution versions of copyrighted images by an internet search engine to direct the viewer to the copyright owner's original work,[189] creating a recording of a broadcast television show for viewing at a later time,[190] publication of copyrighted photographs by a newspaper to inform and entertain the readers.[191]

The framework Justice Story articulated in 1841 was codified in the American Copyright Statute as Section 107 in the Copyright Act of 1976. Section 107 requires a court to examine any secondary use by a Defendant on four pedestals. The results of such exploration are to be weighed together to determine if the secondary use is eligible for protection within the fair use doctrine.[192] These four factors are:[193]

1. **The purpose and character of the infringing use:** The first factor requires a comprehensive analysis of the infringing use. Determining the purpose of the secondary use requires an analysis of multiple aspects, including the commercial relevance of the

[186] Rose, *supra* note 185 at 76.
[187] Leval, *supra* note 167 at 1110.
[188] Benjamin Ely Marks, *Copyright Protection, Privacy Rights, and the Fair Use Doctrine: The Post-Salinger Decade Reconsidered*, 72 NYU LAW REVIEW 1376, 1377 (1997).
[189] Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 16 1165 (9th Cir. 2007);; Kelly v. Arriba Soft Corp., 336 F.3d 811, 818-22 17 (9th Cir. 2002).
[190] *Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 104 S. Ct. 774 (1984).*
[191] Nunez v. Caribbean 20 Int'l News Corp., 235 F.3d 18, 25 (1st Cir. 2000).
[192] CAMPBELL V. ACUFF-ROSE MUSIC, INC., *supra* note 180 at 18.
[193] Section 107(2); See: Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549–624, 594–621 (2007); Also see: Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978-2019*, 10 NYU JIPTEL 1, 23–33 (2020).

secondary use.[194] To adjudge the character of the secondary use, the Court considers if the secondary work"*supersedes the objects or purpose of the original creation."*[195] If the secondary use qualifies as transformative or for an educational purpose, it is persuasive for a finding of fair use.[196]

2. **The nature of the copyrighted work:** Different works of Copyright deserve different levels of protection.[197] E.g., public policy dictates that factual works should be widely disseminated when compared to fictional works. Therefore, the secondary use of a factual work would be protected within fair use with relative ease compared to the secondary use of a creative or fictional work.[198]
3. **The portion used in relation to the copyrighted work as a whole**: The third-factor analyses *if the secondary use employs more copyrighted work than is necessary*. The analysis is both quantitative and qualitative. The nature and the purpose of the secondary use becomes very important when addressing the *sufficiency* of subsequent use.[199] Although, it is essential to mention that *there are no absolute rules regarding how much of a copyrighted work may be copied and still be considered fair use.*[200]
4. **The effect of the use upon the potential market for or value of copyrighted work**: The fourth factor considers the market harm caused by the secondary use and whether the *unrestricted and widespread* secondary use would have a substantial adverse effect on the market of the original work,[201] or usurps the market of the original work.[202] The primary analysis in the fourth factor is that the secondary use should not serve as a "*substitute for the original work*".[203]

The United States Supreme Court, in *Campbell v. Acuff-Rose*, shifted the contours of the doctrine of fair use.[204] The Court held that the four factors have to be treated together, and a Court should not provide any preference to any one of the four factors.[205]

---

[194] Basic Books, Inc. v. Kinko's Graphics Corporation, 758 F. Supp. 1522, S.D.N.Y, (1991).
[195] CAMPBELL V. ACUFF-ROSE MUSIC, INC., *supra* note 180 at 579.
[196] Kyle Richard, *Fair Use in the Information Age*, 25 RICHMOND JOURNAL OF LAW AND TECHNOLOGY 1, 14 (2018).
[197] See: Leval, *supra* note 167 at 1117.
[198] *Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) 563.*
[199] CAMPBELL V. ACUFF-ROSE MUSIC, INC., *supra* note 180 at 586–587.
[200] Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1263 (2d Cir.1986). 1263.
[201] CAMPBELL V. ACUFF-ROSE MUSIC, INC., *supra* note 180 at 590.
[202] *Nxivm Corp. v. Ross Institute, 364 F.3d 471 (2d Cir. 2004) 482.*
[203] CAMPBELL V. ACUFF-ROSE MUSIC, INC., *supra* note 180 at 591.
[204] Leval, *supra* note 167.
[205] CAMPBELL V. ACUFF-ROSE MUSIC, INC., *supra* note 180.

Within the distinction between rules and standards, where, unlike rules, standards give vague guidelines to citizens and more discretion to the courts, the fair use doctrine is a standard and not a rule.[206] While enacting Section 107, Congress intended to retain adequate room for judicial interpretation of the limits of copyright protection and therefore, deliberately vague statutory guidelines were adopted.[207] No relative weights have been provided to the four factors, and any additional factors that a court deems relevant can be considered.[208]

3.1.2. Fair Dealing Model: The Indian Movement

Fair dealing doctrine developed from English judicial practice in the early nineteenth century and was first codified in the United Kingdom by the Copyright Act of 1911.[209] David Bradshaw traces the doctrine of fair dealing to *Cary v. Kearsley,* decided in 1802.[210] The facts of the case were that Plaintiff had published a book after surveying different roads. Defendant copied verbatim passages from Plaintiff's book. Lord Ellenborough instructed the jury to decide if what had been transmitted to the defendant's secondary work *"was fairly done with a view of compiling a useful book, for the benefit of the public…or taken colourable, merely with a view to steal the copyright of the plaintiff."*[211]

While the term "*fair dealing*" does not appear in the case of 1802, "*fairly doing*" and "*fairly adopting*" and "*using fairly*" are repeatedly used in the judgement. Bradshaw acknowledges that the judicial opinion in the case does not explicitly refer to the term "*fair dealing* " but argues that it is perhaps, "*merely a matter of historical fortuity that today the defence concept under discussion* (fair dealing) *has not become known as a doctrine of "fair do-es" or "fair adoption*""[212] The term "*fair dealing*" did not appear in an English judicial opinion until the British Parliament codified in 1911.[213]

---

[206] Justin Hughes, *Fair Use and Its Politics – at Home and Abroad, in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 234–274, 237–240 (Ruth L. Okediji ed., 2017).
[207] 1377–1378; S. REP. No. 473, 94th Cong., 1st Sess. 62 (1975); H.R. REP. NO. 1476, 94th Cong., Ist Sess. 66 (1975), reprinted in 1975 U.S.C.C.A.N. 5659, 5680.
[208] *Id.* at 1378; SONY CORP. OF AM. V. UNIVERSAL CITY STUDIOS, INC., *supra* note 191 at 78.
[209] Section 2(1)(i), Copyright Act, 1911.
[210] Cary v. Kearsley, (1802) 4 Espinasse 168.; David Bradshaw, *Fair Dealing as a Defence to Copyright Infringement in UK Law: An Historical Excursion from 1802 to the Clockwork Orange Case 1993*, 10 DENNING LAW JOURNAL 65, 68 (1995).
[211] CARY V. KEARSLEY, *supra* note 210 at 171.
[212] Bradshaw, *supra* note 211 at 69.
[213] *Id.* at 71.

Countries such as United Kingdom,[214] Canada,[215] Australia,[216] India[217] are the primary flagbearers of the fair dealing doctrine. The doctrine denotes certain acts as laid down under the statute, the commission of which do not attract any liability despite being covered within the scope of copyright infringement.[218] In contrast with the fair use approach, fair dealing is limited to the purposes explicitly listed in the relevant copyright statute. The exception assumes applicability when affirmative answers are returned for two questions: 1) is the use for one of the listed purposes; 2) if yes, is the use fair, considering the fairness factors.[219] The Courts have been very liberal in interpreting the contours of the first question, i.e. the purposes listed in the statutory text. Therefore, the first hurdle is cleared with relative ease.[220]

The fair dealing doctrine found relevance in Indian colonial copyright law as far back as 1842. The Bombay High Court, in *McMillan v. Khan Bahadur Shamsul Ulama Zaka* held that the English Law on Copyright would be applicable in India.[221] With the passage of the Copyright Act, 1914, again in colonial India, the fair dealing doctrine was statutorily introduced in Indian copyright legislation.[222]

Presently, within the post-colonial Copyright Act, 1957, Section 52 shapes the exceptions and limitations to copyright infringement as affirmative defences. These defences can be divided into[223] Fair Dealing of works,[224] permitted reproductions,[225] permitted publication,[226] permitted performance and recitation,[227] exceptions in respect to sound recording and cinematograph film[228], exceptions for library use,[229] permitted use of artistic works,[230] reconstruction of work of architecture,[231] permitted use of computer and computer programmes,[232] permitted

[214] Section 29-30A, Copyright, Designs and Patents Act, 1988.
[215] Section 29-29.2, Copyright Act, 1985.
[216] Section 40-42, Copyright Act, 1968.
[217] Section 52, Copyright Act, 1957.
[218] Narayan Prasad & Pravesh Aggarwal, *Facilitating Educational Needs in Digital Era: Adequacy of Fair Dealing Provisions of Indian Copyright Act in Question: Facilitating Educational Needs in Digital Era*, 18 WORLD INTELLECTUAL PROPERTY 150–163, 152 (2015).
[219] *Id.*
[220] LIONEL BENTLY & BRAD SHERMAN, INTELLECTUAL PROPERTY LAW 203 (3rd ed ed. 2008).
[221] *McMillan v. Khan Bahadur Shamsul Ulama Zaka, (1895) ILR Bom 557.*
[222] Section 2(1)(i), Copyright Act, 1914.
[223] See: ALKA CHAWLA, P. N BHAGWATI, & INDIA, LAW OF COPYRIGHT: COMPARATIVE PERSPECTIVES (2013).
[224] Section 52(1)(a), Copyright Act, 1957.
[225] Section 52(1)(e), (f), (i), (m), (p), (q), Copyright Act, 1957.
[226] Section 52(1)(h), (r), (s), (t), Copyright Act, 1957.
[227] Section 52(1)(j), (za), Copyright Act, 1957.
[228] Section 52(1)(k), (u), (y), Copyright Act, 1957.
[229] Section 52(1)(n), (o), Copyright Act, 1957.
[230] Section 52(1)(v), (w), Copyright Act, 1957.
[231] Section 52(1)(x), Copyright Act, 1957.
[232] Section 52(1)(b), (c), (aa), (ab), (ac), (ad), Copyright Act, 1957.

broadcasting,[233] permitted use for persons with disability[234] and permitted importation of goods.[235] For the scope of the present study, the most important of these classifications is the 'fair dealing of works', which provides that fair dealing of any work for *private or personal use, including research*, shall not accrue any liability for copyright infringement.[236] Before interpreting the scope of this limitation, it is important to understand what constitutes "*fair dealing.*"

In terms of defining what constitutes fair dealing, a single-judge bench of the Delhi High Court in 2012 held that it is "*both inadvisable and impossible"* to define the precise limits of fair dealing.[237] The adjudication is essentially a question of degree and cannot be the subject of absolute determination.[238] Further, the latitude of interpretation available in the Indian iteration of the fair dealing doctrine is far more than the limits placed by the UK Fair Dealing doctrine.[239] Partial credit for such latitude can be given to the Indian Courts' reliance on the four-factor fair use test, as applicable in the American jurisprudence.[240]

There are two judgements from the Delhi High Court: *ICC Development v. New Delhi Television*[241] and *Rameshwari Photocopy case*[242], which are of primary significance when dealing with the relevance of the four-factor test in a fair dealing assessment within the Copyright Act, 1957. In 2012, Justice Nandrajog in the *ICC Development case* opined that the four-factor test enshrined in Section 107 of the American Copyright Act helps determine fair dealing within Section 52(1)(a) of the Indian Copyright Act.[243] Further elaborating his position in 2016, Justice Nandrajog, while deciding the *Rameshwari Photocopy case,* opined that the four-factor test is essential for the import of Section 52(1)(a), i.e. the fair dealing assessment is concerned. However, the rest of the provision, which enumerates other permitted acts,[244]

[233] Section 52(1)(z), Copyright Act, 1957.
[234] Section 52(1)(zb), Copyright Act, 1957.
[235] Section 52(1)(zc), Copyright Act, 1957.
[236] Section 52(1)(a)(i), Copyright Act, 1957.
[237] *ICC Development (International) Ltd v. New Delhi Television Ltd., (2012) 193 DLT 279 [17].*
[238] *Hubbard v. Vosper, (1972) 2 Q.B. 84. as cited in; Super Cassettes Industries Ltd. v. Hamar Television Network Pvt. Ltd. & Anr., (2011) 45 PTC 70.*
[239] HARBIR SINGH, ANANTH PADMANABHAN & EZEKIEL J. EMANUEL, INDIA AS A PIONEER OF INNOVATION (2017).
[240] *Chancellor Masters & Scholars of The University of Oxford v. Narendera Publishing House and Ors., (2008) 38 PTC 385; Syndicate of the Press of the University of Cambridge v. B.D. Bhandari & Ors., (2011) 185 DLT 346 (DB).*
[241] ICC DEVELOPMENT (INTERNATIONAL) LTD V. NEW DELHI TELEVISION LTD., *supra* note 237.
[242] *The Chancellor, Masters & Scholars of University of Oxford & Ors. v. Rameshwari Photocopy Services & Ors., (2017) 69 PTC 123 31.*
[243] ICC DEVELOPMENT (INTERNATIONAL) LTD V. NEW DELHI TELEVISION LTD., *supra* note 237.
[244] *Ibid* 227-238.

cannot be held to the strict standard of the four-factor test and are only subject to a general idea of fairness. [245]

Over the years, the Courts have developed guidelines that educate the general idea of fairness. Some of these guidelines are:

i. If the defendant's secondary use infringes the Copyright in the original work for commercial gains, the defence of fair dealing is not available, even if the secondary use is for research of private study.[246] However, the "*commercial nature of the secondary use cannot simpliciter make it unfair*."[247]
ii. Section 52, Copyright Act 1957, does not negatively prescribe what is infringement. The section seeks to promote "*private study, review or reporting of current events*".[248]
iii. Discerning whether the secondary use constitutes a fair use of copyrighted work, the standard employed should be that of a "*fair-minded*" and "*honest person*."[249]
iv. In some circumstances, the public interest may be so overwhelming that courts would sometimes refrain from injuncting the verbatim use of the copyrighted work to convey a message to the public at large.[250]
v. Public interest and the interests of the public need not be the same.[251]
vi. Multiple factors, including the purpose of creation, the purpose of use, the intended commercial exploitation, are all relevant for the adjudication of fair dealing.[252]

Given that there are two alternate models of incorporating Limitations and Exceptions (L&Es) in copyright statutes, the manner and scope in which national statutes incorporate L&Es is very different. While fair dealing is arguably a more restrictive approach where protection is available only when the secondary use is for one of the listed purposes in a copyright statute, fair use provisions incorporate broad considerations that determine the applicability of the exception. However, even the fair use provision explicitly lists some exemplary purposes for which the exception has been designed.[253] One such purpose which appears in both fair use

[245] THE CHANCELLOR, MASTERS & SCHOLARS OF UNIVERSITY OF OXFORD & ORS. V. RAMESHWARI PHOTOCOPY SERVICES & ORS., *supra* note 242 at 31; Also see: Anupriya Dhonchak, *Can User Rights under Section 52 of the Indian Copyright Act be Contractually waived*, 13 NALSAR STUDENT LAW REVIEW, 121–122 (2019).
[246] *Rupendra Kashyap v. Jiwan Publishing House, 1996 (38) DRJ 81.*
[247] *Super Cassettes Industries Limited v. Yashraj Films Private Limited, (2012) 49 PTC 1.*
[248] *Wiley Eastern Ltd. v. Indian Institute of Management, 61 (1996) DLT 281 (DB).*
[249] SUPER CASSETTES INDUSTRIES LTD. V. HAMAR TELEVISION NETWORK PVT. LTD. & ANR., *supra* note 238.
[250] SUPER CASSETTES INDUSTRIES LIMITED V. YASHRAJ FILMS PRIVATE LIMITED, *supra* note 247 at 81.
[251] *Id.*
[252] *ESPN Star Sports v. Global Broadcast News Ltd., (2013) 53 PTC 71 (DB).*
[253] The omnibus provision of Section 107 reads, "*for purposes such as criticism, comment, news reporting, teaching, scholarship, or research.*" Copyright Act of 1976, 17 U.S.C. § 107 (1994).

and fair dealing provisions is '*research*.' The following section seeks to determine parameters for the right to research, its constitutional justifications and studies it as a Copyright Law exemption across various domestic copyright legislations.

3.2. Right to Research: Constitutional justification and exception to Copyright Law

Research has been available as an exception to the English Copyright Law since 1956. Section 6 of the UK Copyright Act, 1956 excluded fair dealing with a literary, dramatic or musical work for research and private from the scope of infringement. In 1983, Justice Davies opined that fair dealing with any copyrighted work for research or private study would not constitute infringement.[254] In 2003, the Copyright and Related Rights Regulation limited the research exception of English Copyright Law to non-commercial purposes.[255] In its present iteration, the UK Copyright, Designs and Patents Act, 1988 excuses "*fair dealing with a work for the purposes of research for a non-commercial purpose…provided that it is accompanied with sufficient acknowledgement*."[256]

The High Court of England in 2007 provided some guidelines for differentiating between commercial and non-commercial research. In *The Controller of HM Stationery Office & Anr. v. Green AMPS Ltd.,*[257] the defendants gained unlicensed access to a mapping database made available only to universities and the public research communities.[258] The Court ruled that if the defendants' ultimate use of the research has commercial value, it will lose the protection provided within Section 29 of the Act of 1988, which embodies the UK fair dealing doctrine.[259]

In short, motivation determines whether research is commercial or not. Given the insistence on the purpose of the research, there can be situations where private research organisations generate non-commercial research while a public university's research may be considered commercial.[260] Similarly, an academic's research for publishing a book may be commercial and can lose the protection of the fair dealing doctrine.[261]

---

[254] Sillitoe v McGraw-Hill Book Company (U.K.) Ltd [1983] FSR 545.
[255] Section 9(a), The Copyright and Related Rights Regulations 2003.
[256] Section 29(1), Copyright, Designs and Patents Act, 1988.
[257] The Controller of Her Majesty's Stationery Office, Ordinance Survey v. Green Amps Ltd., [2007] EWHC 2755(Ch).
[258] Estelle Derclaye, *Of maps, Crown copyright, research and the environment*, 30 EUROPEAN INTELLECTUAL PROPERTY REVIEW 162, 162 (2008).
[259] THE CONTROLLER OF HER MAJESTY'S STATIONERY OFFICE, ORDINANCE SURVEY V. GREEN AMPS LTD., *supra* note 260 at 25; Derclaye, *supra* note 258 at 163.
[260] BENTLY AND SHERMAN, *supra* note 221 at 208.
[261] Derclaye, *supra* note 258.

The distinction between commercial and non-commercial research is far from clear. A researcher may eventually publish academic research as a book: at which point in its lifecycle would such research become commercial? Further, there potentially can be a difference between commercial and *for-profit* research. Lack of judicial and academic opinion on the issue means that the distinction will largely be decided on a case to case basis.[262]

Other countries have also witnessed litigation for determining the scope of the right to research as a copyright law exception. For example, in *CCH Canadian v. Law Society of Upper Canada*,[263] the Supreme Court of Canada gave a very broad reading to Canadian Copyright law's research and private study exception.[264] The Law Society of Canada operated a Great Library in Ontario, which offered a not-for-profit photocopying service to its members. Referring to the service provided by the library, the publishers initiated copyright infringement proceedings against the law society.

Similar to English copyright law, Canadian law also provides an exemption for research from the scope of copyright infringement.[265] Interpreting the scope of this exemption, the Canadian Supreme Court admitted that the library's activities were largely commercial in nature. However, the Court stated, "*research for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research*."[266] The term '*research'* was interpreted very liberally to ensure that users' rights are not "*unduly constrained*" or "*limited to non-commercial or private contexts*."[267]

In Germany, the Copyright law provides that up to 15 % of a work can be reproduced, distributed or made available either to "*a limited circle of persons for their personal scientific research*" or to others to monitor the quality of scientific research.[268] Scientific researchers can also reproduce up to 75% of a work for personal scientific research.[269] The Delhi High Court explicitly omitted such quantitative restrictions on the Indian fair dealing doctrine. The Court opined that quantitative and qualitative restrictions are of no concern to a fair dealing

[262] BRITISH ACADEMY AND THE PUBLISHERS ASSOCIATION, *Joint Guidelines on Copyright and Academic Research - Guidelines for researchers and publishers in the Humanities and Social Sciences*, 18–20 (2008), https://www.thebritishacademy.ac.uk/publications/joint-guidelines-copyright-and-academic-research-guidelines-researchers-and-publishers/ (last visited Jul 12, 2021).
[263] *CCH Canadian Ltd v. Law Society of Upper Canada* 2004 SCC 12 [2004].
[264] Section 29, Copyright Act, 1985.
[265] Section 29, Copyright Act, 1985
[266] CCH CANADIAN LTD V. LAW SOCIETY OF UPPER CANADA, *supra* note 263 at 51.
[267] *Id.*
[268] Section 60c(1), Act on Copyright and Related Rights, 1965.
[269] Section 60c(2), Act on Copyright and Related Rights, 1965.

assessment.[270] The German copyright law also permits text and data mining under specific conditions.[271] This exception was pioneered by Japan in 2009[272] and has since been adopted by U.K.,[273] France[274] and the EU. The EU law on the subject is governed by the Copyright Single Market Directive, adopted in 2019. The directive provides two exceptions: One is unconditional and allows text and data mining for not-for-profit research.[275] The second promotes text and data mining for commercial purposes, subject to certain exceptions.[276]

Turning to the Indian law, the Indian Copyright Act creates a categorical exception for research. Any person can escape the incidence of copyright infringement liability during their research or private study if he deals with the copyrighted material fairly.[277] Section 52(1)(a)(i) of the Copyright Act, 1957 reads as follows:

> *"52.(1) The following acts shall not constitute an infringement of Copyright, namely,-*
>
> > *(a) a fair dealing with any work, not being a computer programme, for the purposes of-*
> >
> > > *(i) private or personal use, including research;"*

The present iteration of the provision results from a substantial amendment from the Copyright (Amendment) Act, 1994, which substituted the term "*research or private study*" with "*private or personal use, including research.*" The 1994 amendment and the use of the term *includes* raises a pertinent question: Is commercial and for-profit research protected within the Indian Fair Dealing doctrine?

It is an established principle of statutory interpretation that the use of the term '*include*s' in an interpretation clause extends the scope of the definition.[278] The usage of the term *includes* in statutory language often signifies the legislature's intent to "*enlarge the meaning of the words*

---

[270] THE CHANCELLOR, MASTERS & SCHOLARS OF UNIVERSITY OF OXFORD & ORS. V. RAMESHWARI PHOTOCOPY SERVICES & ORS., *supra* note 243 at 30.
[271] Section 60d, Act on Copyright and Related Rights, 1965 as amended by the Copyright Knowledge Society Act, 2018.
[272] PAUL GOLDSTEIN & P. B. HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 358 (Fourth edition ed. 2019).
[273] Section 29A, Copyright, Designs and Patents Act, 1988 as amended by The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014.
[274] Art. L. 122-5(10), Intellectual Property Code as cited in GOLDSTEIN AND HUGENHOLTZ, *supra* note 272 at 358.
[275] Article 3, E.U. Copyright in the Digital Single Market Directive, 2019.
[276] Article 4, E.U. Copyright in the Digital Single Market Directive, 2019.
[277] *Rupendra Kashyap v. Jiwan Publishing House, (1996) 16 PTC 439.*
[278] GURU PRASANNA SINGH & A. K PATNAIK, PRINCIPLES OF STATUTORY INTERPRETATION: INCLUDING THE GENERAL CLAUSES ACT, 1897 WITH NOTES 72–77 (10 ed. 2016).

and phrases occurring in the body of the statute."[279] In the case of *S.M James*, the Patna High Court pointed out that the word *including* is a term of extension and adds to the subject matter already comprised in the definition.[280] The Supreme Court of India in 2009 clarified that inclusive definitions are used:

"*(1) to enlarge the meaning of words or phrases so as to taken in the ordinary, popular and natural sense of the words and also the sense which the statute wishes to attribute to it, 2) to include meaning about which there might be some dispute, 3) to bring under one nomenclature all transactions possessing certain similar features but going under different names.*"[281]

Apart from the established meaning of inclusive definitions, there are constitutional justifications for providing a broad interpretation to Section 52(1)(a)(i), Copyright Act, 1957. The exception can be interpreted as a statutory recognition of the right to research. Despite the lack of explicit legislative recognition, the right to research arguably has a constitutional basis. The freedom of speech and expression and the right to life and personal liberty, enshrined respectively in Article 19(1)(a) and Article 21 of the Constitution of India, can be interpreted to encompass a right to research.

In 1966, a full bench of the Delhi High Court expanded the scope of Article 21 to include "*a right to acquire useful knowledge,"* which in the opinion of the Court. was "*necessary for the orderly pursuit of happiness by free men.*"[282] The Supreme Court of India in 1980 opined that the ambit of Article 21 includes the provision for facilities of "*reading, writing and expressing oneself in diverse forms.*"[283] Again in 1997, the Supreme Court of India included "*social, cultural and intellectual*" fulfilments as a part of the right to life.[284] Such a broad conception of Article 21 would include knowledge acquisition by scientists/academics and researchers and could therefore be understood to harbour the constitutional protection of "*right to research.*"

This interpretation is consistent with the opinion of Prof. Robertson, who argued that a broad conception of the term liberty, as used in the Fourteenth Amendment of the American Constitution, could incorporate a right to research.[285] In making the argument, reliance was

[279] *Id.* at 174.
[280] *S M James and another v. Dr. Abdul Khair, AIR 1941 Pat. 242.*
[281] *Karnataka Power & Anr. v. Ashok Iron Works, (2009) 1 SCC 240 16.*
[282] *Rabinder Nath Malik v. The Regional Passport Officer, New Delhi, AIR 1967 Del 1 (FB) 24, 25.*
[283] *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, 1981 AIR 746 8.*
[284] Samatha v. State of UP, (1997) 8 SCC 191 247–248.
[285] John A. Robertson, *The Scientist's Rights to Research: A Constitutional Analysis*, 51 S. CAL. L. REV. 1203, 1212 (1977).

placed on the decision of the United States Supreme Court in *Meyer v. Nebraska* where '*liberty,*' was held to include *the right to acquire useful knowledge.*"[286]

Further, in *Wiley v. Indian Institute of Management*, the Delhi High Court held that the purpose of Section 52 in Indian Copyright law is to protect the freedom of speech and expressions, which is guaranteed by Article 19(1)(a) of the Constitution of India.[287]

Hence, both the established interpretation of inclusive definitions and the constitutional basis of the right to research requires the Courts to interpret Section 52(1)(a)(i) in its broadest possible enunciation. Therefore, a liberal interpretation of the fair dealing exception can protect both commercial and non-commercial research within the Indian context.

Having identified the guiding principles for the determination of fair dealing in Indian Copyright Law, the following part aims to understand the judicial appreciation of these principles. The next part discusses the two judgements where the Delhi High Court recognised the overwhelming needs of higher education and purposively interpreted copyright law.

4. Rameshwari Photocopy Case and a normative reading of fair dealing exceptions

The Rameshwari Photocopy case is arguably one of the most important judicial decisions of the Indian copyright jurisprudence.[288] Five publishers, namely, Oxford University Press; Cambridge University Press, United Kingdom; Cambridge University Press, India Pvt. Ltd.; Taylor and Francis Group, U.K.; Taylor and Francis Books India, sued Delhi University, a major public university and a photocopy service provider within the campus, Rameshwari Photocopy, for copyright infringement. Support poured in favour of the defendants, with students across the country taking to the streets, demonstrating and conducting "*acts of civil disobedience targeted at the publishers.*"[289] Even Dr. Amartya Sen wrote a letter to the publishers expressing his distress on the plaintiffs' actions.[290] Professor Satish Deshpande

[286] *Meyer v. Nebraska, 262 U.S. 390 (1923).*
[287] WILEY EASTERN LTD. V. INDIAN INSTITUTE OF MANAGEMENT, *supra* note 249.
[288] See: Lawrence Liang, *Paternal and defiant access: copyright and the politics of access to knowledge in the Delhi University photocopy case*, 1 INDIAN LAW REVIEW 36–55, 50 (2017).
[289] *Id.* at 37.
[290] Amlan Mohanty, *Authors, Academics and Students Protest Publishers' Move in Delhi University Copyright Case*, SPICYIP, https://spicyip.com/2012/09/authors-academics-and-students-protest.html (last visited Jul 19, 2021).

successfully articulated the stakeholders' concerns when he argued that "*quality higher education is not compatible with an overzealous copyright system.*"[291]

The Delhi University had authorised a photocopy shop on the university campus to prepare and distribute course packs. These course packs were designed based on the course curriculum prescribed by the university faculty and contained extracts from the plaintiffs' copyrighted works. Five publishers initiated copyright infringement proceedings against the university and the photocopy service provider to restrain them from reproducing and distributing the copies of publishers' works and selling coursepacks. The plaintiffs claimed that the Delhi University has "*institutionalised infringement by prescribing chapter from the publications of the plaintiffs as part of the curriculum and permitting photocopy of the said chapter and sale thereof as course packs*."[292] The defendants sought protection under Section 52(1)(i) of the Copyright Act, 1957, which protects the reproduction of a copyrighted work by a teacher or a pupil "*in the course of instruction.*"

In September 2016, a single-judge bench of the Delhi High Court ruled in favour of the defendants and opined that Section 52(1)(i) protected the defendant's actions.[293] Justice Endlaw relied on the structural logic underlying the Copyright Act.[294] He held that the permitted uses of a copyrighted work mentioned in Section 52 should not be interpreted as exceptions to copyright monopoly. Rather, these acts were never a part of the copyright bargain and were never granted to the author of a copyrightable work.[295] The legislature has drafted the contents of Section 52 to be outside the scope of infringement. Interpreting thus, the Court expanded the ambit of Section 52 from mere limitations and exceptions to users' rights. Thus, the Court dismissed the petition because no question of copyright infringement arose in the present case.

The plaintiffs appealed against the single judge's decision before a Division Bench of the Delhi High Court, which delivered its judgement in December 2016.[296] The publishers had contended that the Court must employ the four-factor test for determining the scope of Section 52(1)(i).

---

[291] Satish Deshpande, *Copy-wrongs and the invisible subsidy*, THE INDIAN EXPRESS (2016), https://indianexpress.com/article/opinion/columns/delhi-high-court-judgement-banning-order-photocopy-extracts-of-books-and-journals-3069347/ (last visited Jul 19, 2021).
[292] *Rajiv Sahai Endlaw, University of Oxford v. Rameshwari Photocopy Services, (2016) 160 DRJ (SN) 678 14.*
[293] *Id*.
[294] Liang, *supra* note 289 at 42.
[295] ENDLAW, *supra* note 292 at 41.
[296] THE CHANCELLOR, MASTERS & SCHOLARS OF UNIVERSITY OF OXFORD & ORS. V. RAMESHWARI PHOTOCOPY SERVICES & ORS., *supra* note 243.

Given the last two factors of the four-factor test require the quantum and the impact of the secondary use on the potential market to be taken into account, Plaintiffs' insistence to transplant the test into Indian law is self-explanatory. Neither the single judge nor the Division Bench agreed.[297] The Division Bench held that whenever somebody else utilises a person's result of labour, "*fair use must be read into the statute.*"[298] However, since the legislature, while permitting reproduction during the course of instruction, has not created an express limitation of fair use, "*only a general principle of fair use would be required to be read into the clause*," and not the four-factor test.[299] The general principle of fairness shall apply as long as the secondary use is justified for education. The Division Bench explicitly held that "*No qualitative or quantitative threshold* (on secondary copying) *can be read into the statute*."[300]

The appellants/ publishers had argued that the respondents' manner of using the copyrighted material would adversely affect the appellant's potential market. The Court replied negatively. The Court asserted that the reproduction of an entire work as part of a literacy programme does not affect the potential market of the publisher as the beneficiaries of the literacy programme are not potential customers. Similarly, a student/pupil is not a potential customer for buying thirty/forty reference books. If course packs are not available, such a student will go to the library for accessing the books. The Court eventually held that it '*could well be argued that by producing more citizens with greater literacy and earning potential, in the long run, improved education expands the market for copyrighted materials.*'[301]

The Court then turned to the interpretation of the phrase '*in the course of instruction*' from Section 52(1)(i), Copyright Act, 1957.[302] The appellants had favoured a restrictive interpretation of the phrase. In their opinion, the phrase was limited to direct face-to-face interaction between the teacher and the student. Interpreting the phrase, the Court opined that using the word '*course'* means that the protection covers the entire process of education in a semester. Interpreting the phrase to give an expansive interpretation to the term '*instruction*' is

[297] *Id.* at 35; ENDLAW, *supra* note 292 at 43.
[298] THE CHANCELLOR, MASTERS & SCHOLARS OF UNIVERSITY OF OXFORD & ORS. V. RAMESHWARI PHOTOCOPY SERVICES & ORS., *supra* note 243 at 31.
[299] *Id.*
[300] *Id.* at 33.
[301] *Id.* at 36.
[302] *Id.* at 56–60; CHANCELLOR MASTERS & SCHOLARS OF THE UNIVERSITY OF OXFORD V. NARENDERA PUBLISHING HOUSE AND ORS., *supra* note 243 at 52–55.

possibly the most important part of the two judgements. The Division Bench relied on a judgement from the High Court of New Zealand[303] to come to this conclusion.[304]

When the appellants argued that the photocopy service provider acted as an intermediary, which cannot be protected, the Court opined that the argument concerning the use of an agency was irrelevant. The core of the activity, the division bench elaborated, was photocopying to impart education. It was irrelevant as to what was the arrangement between the teacher and the pupil.[305]

The Division Bench eventually remanded the issue to the Court of Justice Endlaw for a fact-specific determination of whether 1) the coursepacks were necessary for instructional use by teachers and 2) complete photocopies of books found on the photocopy service provider's premises were permissible. At this stage, the publishers decided not to prefer an appeal to the Supreme Court and withdrew the suit.[306] Three publishers published a joint statement, where they acknowledged the importance of the course packs and decided to work with the stakeholders involved to understand and address their needs.[307]

5. Retain the normative reading of Copyright Law: Sci-Hub as Fair Dealing in Indian Copyright Law

In 2017 Prof. Lawrence Liang speculated that the pirate OA movement for academic articles would soon be subjected to judicial scrutiny. He believed that if the DU Photocopy judgements can be appreciated as examples of "*how the law can and indeed must respond to the real-world challenges of access to learning materials*," then their precedential relevance would be interesting when piracy of academic literature is adjudged on the pedestal of Copyright Law.[308]

In December 2020, three academic publishers, Elsevier, Wiley and American Chemical Society, appeared before the commercial jurisdiction of the Delhi High Court and sued

[303] *Longman Group Ltd. v. Carrington Technical Institute Board of Governors, (1991) 2 NZLR 574.*
[304] THE CHANCELLOR, MASTERS & SCHOLARS OF UNIVERSITY OF OXFORD & ORS. V. RAMESHWARI PHOTOCOPY SERVICES & ORS., *supra* note 243 at 40–50.
[305] *Id.* at 60.
[306] The Chancellor, Master & Scholars of the University of Oxford & Ors. v. Rameshwari Photocopy Services & Anr., CS(OS) 2439/2012, Delhi High Court, order dated March 10, 2017; The Chancellor, Master & Scholars of the University of Oxford & Ors. v. Rameshwari Photocopy Services & Ors., RFA(OS) 81/2016, Delhi High Court, order dated March 30, 2017.
[307] Joint statement by Oxford University Press, Cambridge University Press and Taylor & Francis, March 9, 2017 available at: http://fdslive.oup.com/asiaed/News%20Items%20and%20Images/Joint%20Public%20Statement.pdf.
[308] Liang, *supra* note 289 at 52.

Elbakyan and Libgen for copyright infringement.[309] When the case first came before the Delhi High Court, Justice Rajiv Shakdher directed the defendants not to upload any article, the copyright to which remains with the plaintiffs.[310] Similar to the DU Photocopy case, this infuriated a large segment of the academic community. With multiple blog articles[311] and opinion pieces[312] published regularly, the issue became the subject of national academic and editorial comments.

Soon enough, nineteen academics and three organisations approached the Delhi High Court to intervene in the case. On January 6, 2021, Justice Midha admitted that the litigation in the case is an "*issue of public importance*" and allowed the parties to submit their intervention applications.[313] At the time of writing this paper, i.e. August 2021, the case is *sub*-judice before the Delhi High Court, and detailed arguments remain to be heard from both sides. The Sci-Hub litigation and the DU Photocopy case bear many similarities. Both the cases align with the larger Access to Knowledge movement and further the cause of higher education and academic research. Therefore, the purposive interpretation of Copyright Law as was favoured in the DU Photocopy case may considerably impact the Sci-Hub litigation.

The publishers' primary argument is that they hold the exclusive right to reproduce, issue copies for the public, and communicate the concerned work to the public.[314] Since the defendants have made Plaintiff's copyrighted works available on their website, without due authorisation, they are liable for copyright infringement.

Given the structure within which Sci-hub operates, it would not be difficult for the plaintiffs to establish copyright infringement within the terms of Section 51 of the Copyright Act, 1957. The primary contention in the case of Sci-Hub would be the interpretation of Section 52(1)(a)

---

[309] ELSEVIER LTD. & ORS. V. ALEXANDRA ELBAKYAN & ORS., *supra* note 132.
[310] *Id.* See order dated December 24, 2020. .
[311] Arunabh Saikia, *Why Indian researchers oppose efforts to have a pirate website banned*, SCROLL.IN (2020), https://scroll.in/article/982146/push-to-ban-sci-hub-pirate-website-will-blunt-indian-research-projects-warn-academics (last visited May 15, 2021); Nitin Pai, *Why blocking Sci-Hub will actually hurt national interest*, THEPRINT (2020), https://theprint.in/opinion/why-blocking-sci-hub-will-hurt-national-interest/575577/ (last visited May 20, 2021); Prabir Purkayastha, *Elsevier and Wiley Declare War on Research Community in India*, THELEAFLET (2020), https://www.theleaflet.in/elsevier-and-wiley-declare-war-on-research-community-in-india/ (last visited May 20, 2021).
[312] Arul George Scaria, *Sci-Hub Case: The Court Should Protect Science From Greedy Academic Publishers*, THE WIRE, December 22, 2020, https://thewire.in/law/sci-hub-elsevier-delhi-high-court-access-medical-literature-scientific-publishing-access-inequity (last visited May 15, 2021); Rahul Siddharthan, *An anti-science lawsuit*, THE HINDU, December 24, 2020, https://www.thehindu.com/opinion/op-ed/an-anti-science-lawsuit/article33405250.ece (last visited May 20, 2021).
[313] ELSEVIER LTD. & ORS. V. ALEXANDRA ELBAKYAN & ORS., *supra* note 132 order dated January 6, 2021.
[314] These rights are accorded to the publishers vide a conjoint reading of Section 14 and Section 51 of the Copyright Act, 1957.

of the Copyright Act, 1957.[315] As has been elaborated in Part 3.1.2, for application of the fair dealing doctrine, a Court has to appreciate two questions: 1) is the use for one of the listed purposes; 2) if yes, is the use fair, considering the fairness factors, both of which are discussed in detail in this part:

5.1. Sci-Hub supports and facilitates research?

An important question, in this case, is to test whether the activities of Sci-Hub facilitate research and, in doing so, fall within the purview of the fair dealing exception.[316] Section 52(1)(a)(i) of the Indian Copyright law reads:

"*(a) a fair dealing with any work, not being a computer programme* ***for the purposes of:***

(i) Private or personal use, including research;"

Part 3.2 of the present study has already elaborated on the possible import of Section 52(1)(a)(i). This part of the paper seeks to investigate which activities would be protected by the use of the phrase "*for the purposes of research*" and examining if the provision covers the activities of Sci-Hub.

Interpreting Section 52(1)(a)(i), the Court can take a restrictive approach and limit the exception's applicability to only the person engaged in research. Such a construction can be fatal for the Sci-Hub litigation. Alternatively, the Court can liberally interpret the provision and extend the protection offered by the exception to third parties, the activities of whom *facilitate* research.

The decision of the Supreme Court of India in *CGT v. P. Gheevarghese*[317] provides support for a liberal interpretation. In the *Gheevarghese case,* the income tax assessee claimed exception from the payment of gift tax under Section 5(1)(xiv) of the Indian Gift Tax Act, 1958[318] , which provides:

"5 (1) *Gift Tax shall not be charged under this Act in respect of gifts made by any person:*

> *(xiv) in the course of carrying on a business, profession or vocation, to the extent to which the gift is proved to the satisfaction of the Gift Tax Officer to have been made bona fide* ***for the purpose of*** *such business, profession or vocation.*"

[315] Vandana Mahalwar, *On Copyright Protection*, 56 EPW 7–8, 7 (2015).
[316] *Id.*
[317] *CGT v P. Gheevarghese, Travancore Timbers and Products* (1972) 4 SCC 323.
[318] The Act has subsequently been repealed with effect from October 1998.

In determining if the exemption claimed by the assessee is valid, the Supreme Court had to understand the import of the term "*for the purpose of.*" In doing so, the Court relied on Webster's New International Dictionary's definition: "*it is that which one sets before himself as an object to be attained; the end or aim to be kept in view of any plan, measure, exertion or operation.*"[319] The Court opined that the plan or design for being covered by the relevant provision must have a relationship or connection with the business. In other words, as long as the object of making the gift was related to business, the protection provided under Section Section 5(1)(xiv) of the Gift Tax Act, 1958 shall be applicable.

If the Supreme Court's view is applied to the Sci-Hub litigation, use of the phrase *for the purpose of* in Section 52(1)(a)(i) will assume applicability as long as the impugned activity has a relationship with research. As long as the object of secondary use is related to research, the fair dealing provision should assume relevance.

A second argument favouring a liberal interpretation is that Sci-Hub's activities are in consonance with the fundamental reason fair dealing has been included in Copyright Law. Copyright law, in itself, is premised on the promotion of creativity. The Copyright bargain grants a statutory monopoly limited by various L&Es, which recognise the competing need to ensure that the law of Copyright does not stifle the dissemination of information. The L&Es, coupled with a limited copyright term, guarantees "*not only a public pool of ideas and information but also a vibrant public domain in expression, from which an individual can draw as well as replenish.*"[320] The Courts can interpret L&Es to balance the copyright holders' exclusive rights and the possibly competing interest of enriching the public domain.[321]

As discussed in Part 3.2 of the present study, "*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 and criticism or review or reporting of current events could be protected.*"[322] As far back as 1965, the Jammu and Kashmir High Court had highlighted that "*under the guise of a copyright the authors cannot ask the court to close all the doors of research and scholarship and all frontiers of human knowledge.*"[323] The Courts can interpret such constitutional and

[319] CGT v. P. GHEEVARGHESE, TRAVANCORE TIMBERS AND PRODUCTS, *supra* note 317 at 6.
[320] *University of Cambridge v. B.D. Bhandari, (2011) 47 PTC 244 (DB) 105.*
[321] *Id.* at 105.
[322] WILEY EASTERN LTD. V. INDIAN INSTITUTE OF MANAGEMENT, *supra* note 249.
[323] *Romesh Chowdhry v. Kh. Ali Mohamad Nowsheri, AIR 1965 J&K 101 6.*

public policy based justifications to liberally and purposively interpret Section 52 and ensure that a purely statutory right, i.e. Copyright, does not stifle academic and scientific research.

The Supreme Court and the High Courts have not appreciated a similar argument in a factual matrix comparable to the case of Sci-Hub. The only instance where Section 52(1)(a)(i) has been substantively interpreted by an Indian appellate court is the 1996 case of *Jiwan Publishing House.*[324] Plaintiff therein had an exclusive license from the Central Board of Secondary Education to publish and reproduce the past year's question papers for Class 10th and 12th. The defendants published the subject question papers for commercial exploitation. When sued for copyright infringement, amongst other defences, the defendants sought refuge under Section 52(1)(a)(i). The Court relied on the commercial aspect of the defendants' business to hold that "*if a publisher publishes a book for commercial exploitation and in doing so infringes a Copyright, the defence under Section 52(1)(a)(i) would not be available.*"[325] Justice Lahoti's judgement in *Jiwam Publishing* heavily relies on the commercial aspect of the defendants' business,[326] which, as explained in the next part, looks to be absent from the business model of Sci-Hub.

5.2. Fairness of Secondary Use by Sci-Hub

As far as Section 52(1)(a) is concerned, as explained in Part 3.1.2, fairness would be determined based on the four-factor test of fair use as incorporated in Section 107 of the American Copyright Act. This section deals with each of the four factors and examines whether the use of academic literature by Sci-Hub qualifies the fair use scrutiny:

5.2.1. The purpose and character of the infringing

On multiple occasions, Elbakyan has communicated her altruistic motivations behind creating and managing Sci-Hub.[327] In February 2021, an Indian news agency, The Wire, published an interview with Alexandra Elbakyan, where she further underlined her motivations:[328] "*Sci-*

[324] RUPENDRA KASHYAP V. JIWAN PUBLISHING HOUSE, *supra* note 278.
[325] RUPENDRA KASHYAP V. JIWAN PUBLISHING HOUSE, *supra* note 247 at 21.
[326] SUPER CASSETTES INDUSTRIES LTD. V. HAMAR TELEVISION NETWORK PVT. LTD. & ANR., *supra* note 239.
[327] Example: Elbakyan and Bozkurt, *supra* note 157; Simon Oxenham, *Meet the Robin Hood of Science, Alexandra Elbakyan*, THE BIG THINK, February 9, 2016, https://bigthink.com/neurobonkers/a-pirate-bay-for-science (last visited May 9, 2021).
[328] Sidharth Singh, *An Interview With Sci-Hub's Alexandra Elbakyan on the Delhi HC Case*, THE WIRE SCIENCE (2021), https://science.thewire.in/the-sciences/interview-alexandra-elbakyan-sci-hub-elsevier-academic-publishing-open-access/ (last visited May 21, 2021).

Hub's view is that science should not be controlled by a few big companies but it should be a dynamic network of learned societies."

As understood, Sci-Hub does not intend to build an archive of the world's scholarly literature. Their sole motivation seems to be the removal of paywalls and providing free access to scientific literature.[329] This position is underlined by the fact that in 2015, Sci-Hub deactivated the archiving of several journals that "*exemplify openness.*"[330] Therefore, it may not be difficult to argue that the purpose of the secondary use by Sci-Hub is facilitating research and democratising the availability of academic scholarship.

The next question that needs to be addressed is whether the Sci-Hub' business model is commercial? Sci-Hub primarily works on donations and does not profit from the access it provides.[331] It does not charge its users for accessing research literature. Till 2013 Sci-Hub accepted donations over payment gateways such as PayPal. Although, after Elsevier sent a notice to PayPal, Sci-Hub turned to BitCoin.[332] Reports suggest that up to 2018, Sci-Hub received over 1232 donations totalling 94.494 bitcoins.[333] However, Sci-Hub may be accepting donations to unrevealed bitcoin addresses, and the overall value of donations can be much higher than the anticipated value.[334]

Irrespective of the donations received by Sci-Hub, it has been widely accepted that Sci-Hub does not generate any profits from its services.[335] Therefore, an argument can be made that Sci-Hub's activities qualify as non-commercial educational use. Coming to the character of Sci-Hub's activities, it is difficult to argue that Sci-Hub's secondary use is transformative. However, judicial precedent favours fair use in the case of non-commercial secondary use for educational and informational purposes.[336]

5.2.2. The nature of the copyrighted work:

---

[329] *Id.*
[330] Himmelstein et al., *supra* note 37 at 12.
[331] Singh, Srichandan, and Bhattacharya, *supra* note 134 at 8–11.
[332] Ian Graber-Stiehl, *Science's pirate queen*, THE VERGE, February 8, 2018, https://www.theverge.com/2018/2/8/16985666/alexandra-elbakyan-sci-hub-open-access-science-papers-lawsuit (last visited May 8, 2021); admin, *Blackballed by PayPal, Scientific-Paper Pirate Takes Bitcoin Donations*, BITCOIN LEVELS (2020), https://timesnews.in/blackballed-by-paypal-scientific-paper-pirate-takes-bitcoin-donations/ (last visited Jul 21, 2021).
[333] Himmelstein et al., *supra* note 37 at 12.
[334] *Id.*
[335] Malpani, *supra* note 142 at 171.
[336] Cambridge Univ. Press v. Patton, 769 F.3d 1232 1283 (2014); See: Brandon Butler, *Transformative Teaching and Educational Fair Use after Georgia State*, 48 CONNECTICUT LAW REVIEW 473, 509–514 (2015).

The second factor for assessing fair use does not weigh in as significantly as the other three factors.[337] The second fair use factor requires a Court to recognise that "*some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.*"[338] A Court should assess the second factor based on *"the originality and creativity of the work and its value to the public."*[339] Examination of this factor becomes difficult as there are no bright-line rules for determining which end of the spectrum is occupied by academic and scholarly literature.[340]

In the US, the District Court for the Northern District of Georgia in *Cambridge University Press v. Becker* attempted to *rulify*[341] the fair use analysis. In reference to the second factor, the Court summarily held that the books copied to create the electronic reserve were informational and factual rather than creative.[342] This attempt to *rulify* the fair use analysis was obstructed by the Court of Appeals by the Eleventh Circuit,[343] which disagreed and opined that without individual examination of the subject books, the Court could not make such a summary judgement.[344] The Court of Appeals held:

> "*where the excerpts of Plaintiffs' works contained evaluative, analytical, or subjectively descriptive material that surpasses the bare facts necessary to communicate information, or derives from the author's experiences or opinions, the District Court should have held that the second factor was neutral, or even weighed against fair use in cases of excerpts that were dominated by such material*."[345]

The Court of Appeals eventually remanded the case back to the District Court. After individual examination, the District Court opined that the scholarly books and literature only incorporate

---

[337] 4 NIMMER ON COPYRIGHT, 13.05 (Melville B. Nimmer & David Nimmer eds., 1963).
[338] CAMPBELL V. ACUFF-ROSE MUSIC, INC., *supra* note 180 at 1175.
[339] CAMBRIDGE UNIV. PRESS V. PATTON, *supra* note 336 at 1289.
[340] A comparison of Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381 (1996) ("[T]he excerpts copied for the coursepacks contained creative material, or 'expression;' it was certainly not telephone book listings that the defendants were reproducing. This factor . . . cuts against a finding of fair use."); and Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (1991) ("The books infringed in suit were factual in nature. This factor weighs in favor of defendant.") reveals that no bright line rules can be accepted ; This position has been ratified by the Court in CAMBRIDGE UNIV. PRESS V. PATTON, *supra* note 336 at 1269.
[341] Rulification broadly means converting the flexible, case specific deliberation 'standards' to 'rules' and adopting uniformity, predictability and low decision costs at the expense of rigidity and inflexibility; For details see: Michael Coenen, *Rules against Rulification,* 124 YALE L. J. 644 (2014).
[342] *Cambridge Univ Press v Becker* 863 F. Supp. 2d 1190, 1242 (N.D. Ga. 2012).
[343] For a detailed assessment of the Court's argument and it's criticism, see: Niva Elkin-Koren and Orit Afori, 'Rulifying Fair Use' (2017) 59 Arizona Law Review 161, 186–199.
[344] CAMBRIDGE UNIV. PRESS V. PATTON, *supra* note 336 at 1270.
[345] *Id.* at 1270.

weak copyright.[346] A similar judgement can be traced back to 1992, where the Court treated scholarly articles as factual, meaning they are farther from the core of intended copyright protection, which favours fair use.[347]

This route of individual examination poses a problem for the Sci-Hub case. If a summary ruling on the nature of Sci-Hub's database is not possible, an exercise by the Court to determine the nature of each of the 56,246,220 articles[348] may not be possible either.

Therefore, it is safe to argue that some bright-line rule shall have to be devised and espoused by the Court for determining the second factor. Such bright-line rule should rely on judicial precedent, which argues that scholarly literature is more factual than creative, which may favour Sci-Hub in the present case. If such a bright-line approach is not favoured, the Court should declare that the factor is neutral, in which case the factor would not favour either party in the fair use analysis.

5.2.3. The portion used in relation to the copyrighted work as a whole:

There is no denying that Sci-Hub, for its secondary use, has appropriated the entirety of the publishers' copyrighted material. However, it is not necessary that such copying will inevitably invite a copyright penalty.[349] For substantiating this position, reference can be made to two particular American judicial controversies, both originating from a similar set of facts.[350]

The first controversy relates to the *HathiTrust Digital Library*. In 2004, a group of universities allowed Google to create digital copies of copyrighted books available in their libraries for public use. The universities came together to create HathiTrust, and the digital library was known as HathiTrust Digital Library. The Trust permitted three uses of the copyrighted work: 1) full-text searchability of books, 2) access for people with certified print disabilities, and 3) preservation. When the authors' association sued the Trust, the District Court for the Southern

[346] *Cambridge Univ. Press v. Becker, 371 F. Supp. 3d 1218 (2016).*
[347] Am. Geophysical Union v. Texaco, Inc., 802 F. Supp. 1, 16 (S.D.N.Y. 1992), aff'd, 60 F.3d 913 (2d Cir. 1994), However,the Plaintiff prevalied based on other factors. .
[348] Himmelstein et al., *supra* note 37 at 4.
[349] Swatch Group Mgmt. Servs. v. Bloomberg L.P., 756 F.3d 73 (2d Cir. 2014); Wendy J. Gordon, *The Fair Use Doctrine: Markets, Market Failure and Rights of Use, in* HANDBOOK ON THE ECONOMICS OF COPYRIGHT: A GUIDE FOR STUDENTS AND TEACHERS 77, 82 (Richard Watt ed., 2014).
[350] For details see: Matthew Rimmer, *The Foxfire of Fair Use: The Google Books Litigation and the Future of Copyright Laws, in* OXFORD RESEARCH ENCYCLOPEDIA OF COMMUNICATION (2017); Argyri Panezi, *The Role of Judges in Deciding the Future of Digital Libraries*, 17 GLOBAL JURIST (2017), https://www.degruyter.com/document/doi/10.1515/gj-2015-0025/html (last visited Sep 22, 2021).

District of New York[351] and the Court of Appeals for the Second Circuit[352] returned a finding of fair use.

Authors Guild v. Google, Inc., the second controversy, also involves the same secondary use, i.e. creating a digital library. After delivering digital copies to partner libraries, Google created an electronic database, which allowed readers to view full texts of publicly available books and view snippets of copyrighted books. The database also allowed search functionality in the books. When sued by the Plaintiffs, the District Court of the Southern District of New York[353] and the Court of Appeals for the Second Circuit[354] returned a finding of fair use favouring the Google Books project. In April 2016, the Supreme Court of the United States sided with the Court of Appeals and dismissed an appeal from the judgement.[355]

In both *HathiTrust* and *Google Books,* the hierarchy of judicial opinion discussed the public importance of the Defendants' secondary use.[356] In both the controversies, the Courts returned a favourable finding of fair use despite a complete appropriation of copyrighted material.

The authors admit that the secondary use in the two controversies was substantially different from the use of copyrighted material by Sci-Hub. However, what is important is that, when public interest dictates, a complete appropriation of the copyrighted material cannot be the singular yardstick to determine a fair use analysis. Therefore, if interpreted liberally, this factor can continue to remain neutral.

5.2.4. The effect of the use upon the potential market for or value of copyrighted work:

Nimmer on Copyright argues that the analysis under the fourth factor essentially balances "*between the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied."*[357] Public benefit compensates for the adverse monetary effect of a secondary use on a Plaintiff's copyrighted material. In this

[351] *Authors Guild v. HathiTrust, 902 F. Supp. 2d 445 (S.D.N.Y. 2012).*
[352] *Authors Guild, Inc. v. Hathitrust, 755 F.3d 87 (2d Cir. 2014).*
[353] *Authors Guild v. Google, Inc., 954 F. Supp. 2d 282, 289 (S.D.N.Y. 2013).*
[354] *Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).*
[355] Adam Liptak & Alexandra Alter, *Challenge to Google Books Is Declined by Supreme Court*, THE NEW YORK TIMES, April 18, 2016, https://www.nytimes.com/2016/04/19/technology/google-books-case.html (last visited Jul 22, 2021); Panezi, *supra* note 350.
[356] Haochen Sun, *Copyright Law as an Engine of Public Interest*, 16 NORTHWESTERN JOURNAL OF TECHNOLOGY AND INTELLECTUAL PROPERTY 123, 127–130, 137, 138 (2019).
[357] 4 NIMMER ON COPYRIGHT, *supra* note 338 at 13.05.

analysis, the Court should not be concerned with the impact of a Defendant's work who has only copied the non-copyrightable factual material from the Plaintiff's work.[358]

Both Justice Endlaw and the Division Bench of the Delhi HC dealt with the implications of photocopying of the Plaintiff's copyrighted works on their potential market. Justice Endlaw argued that if photocopy services were not available, the students would have to spend long hours in the library and make notes from the prescribed readings. He argued that "*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."*[359] The Division Bench observed that a student could not be a potential customer for the reference books or the suggested readings for a semester. For reference, a student would visit the library which houses the books rather than buying the said books.[360]

In academic publishing, it is no secret that the primary consumers are academic libraries.[361] The business for academic journals is not predicated on sales to individual researchers.[362] A report published in 2018 concludes that personal subscriptions account for less than 3% of journal publishing revenues.[363]

The price of individual journal articles further supports this hypothesis. For example, in preparing the present study, the authors have used 176 journal articles and book chapters. If we can rely on statistics, 20% of articles were available via OA.[364] Placing the price of each journal article/book chapter at a conservative 30$, the authors would have spent approximately 4224$ in preparing this research which would translate to Indian Rupees ₹313,492. Despite being backed by one of the well-funded management universities globally, the authors cannot imagine having borne this price from their research grant. In simpler terms, this study would not have been possible without the support of the university's library, which provided access to most of the cited and referred literature, either through subscription or via inter-library loans.

---

[358] *Id.*"Only the impact of the use in defendant's work of material that is protected by plaintiff's copyright need be considered under this factor. Thus, a court need not take into account the adverse impact on the potential market for plaintiff's work by reason of defendant having copied from plaintiff noncopyrightable factual material."
[359] ENDLAW, *supra* note 293 at 87.
[360] THE CHANCELLOR, MASTERS & SCHOLARS OF UNIVERSITY OF OXFORD & ORS. V. RAMESHWARI PHOTOCOPY SERVICES & ORS., *supra* note 243 at 36.
[361] Larivière, Haustein, and Mongeon, *supra* note 5 at 11.
[362] MABE, JOHNSON, AND WATKINSON, *supra* note 3 at 21 Journals publishing revenues are generated primarily from academic library subscriptions (68-75% of the total revenue), followed by corporate subscriptions (15-17%), advertising (4%), membership fees and personal subscriptions (3%), and various author-side payments (3%).
[363] MABE, JOHNSON, AND WATKINSON, *supra* note 5.
[364] ibid 135–139 'the consensus view suggests that roughly 15- 20% of new articles were immediate (gold or hybrid) OA by 2016,'.

Having concluded the fair dealing analysis, the position stands thus:

Factor	Findings	Favours Publishers or Sci-Hub
The purpose and character of the infringing	Purpose: Educational and Non-Commercial Character: Non-transformative	Either neutral or favours Sci-Hub
The nature of the copyrighted work	If the Court cannot rely on a bright-line rule	Neutral
	There is precedent that favours appreciating scholarly literature as factual and informative, rather than creative	Favours Sci-hub
The portion used in relation to the copyrighted work as a whole	Entire copyrighted works form part of secondary use. Although, total appropriation doesn't need to be detrimental.	Neutral
The effect of the use upon the potential market for or value of copyrighted work	Individual researchers are not the market for academic publishers	Favours Sci-Hub

Discussion and Conclusion

Academic publishing is in flux. With the growth of the OA movement, the academic publishing marketplace is abounding with business models, each with its own merits and demerits. Unfortunately, initially seen as a potential solution to the *serials crisis*, the progress of the OA movement has remained underwhelming in the past two decades. With the cost of subscriptions far outpacing the growth of library budgets,[365] the *serials crisis* can further suffocate the libraries and academics in the coming decades.

In this background, the growth of academic pirates has left academic publishers mourning over lost profits. On the other hand, libraries have lost patrons who now rely on pirated literature to find access to relevant scholarship. One may concede that academic pirates, including Sci-Hub,

[365] Lindsay Cronk, *Resourcefully: Let's End the Serials Crisis*, 79 THE SERIALS LIBRARIAN 78–81, 79–81 (2020).

may not be the answer to the problems faced by the academic publishing market. Sci-Hub may solve the access problem. However, academic publishers' restrictive and closed licensing terms would discourage research endeavours such as legal machine reading or text and data mining, which will limit the secondary use of research and scholarship.[366]

Apart from licensing issues, Sci-Hub does not bring a cultural change in the academic community. Career trajectories of academics will continue to be dominated by metrics such as Impact factors, H-Index etc. They will continue to willingly forego their intellectual property in research articles to for-profit publishers and perform editorial and peer-review related tasks without compensation. The publishers will monetize this free labour in the interest of their shareholders. What if the publishers navigate a solution to academic piracy? The academic community will continue to be plagued by its problems, and the *access problem* will endure.

Further, the legality of the Sci-Hub database remains highly contested across jurisdictions. The fair dealing doctrine may protect the database from copyright infringement liability. However, the arguments made in Part 5 of this study are admittedly very optimistic. Most of the judicial opinions relied upon in Part 5 do not share a factual similarity with the Sci-Hub litigation. The Court can easily distinguish these judgements and discredit their precedential applicability. Apart from Copyright Law, many other legal challenges plague the database. For example, various reports of data phishing by and on behalf of Sci-Hub have come to light,[367] which is why the City of London Police's Intellectual Property Crime Unit has warned students against using the database.[368]

Given all these reservations, it is important to underline what Sci-Hub represents. The widespread user base that the pirate website amassed emphasises two crucial aspects: the academic publishing market's implosion and the serials crisis's omnipresence.

As for finding a solution for the issue, the authors highlight three approaches amongst the many solutions discussed in scholarly literature. First, the researchers can spread awareness about Green OA and learn how to leverage the Green OA literature already archived over the Internet. There are tools available as websites and browser extensions that use Open DoI to identify

[366] Ernesto Priego, *Signal, Not Solution: Notes on Why Sci-Hub Is Not Opening Access*, THE WINNOWER (2016).
[367] Sean Coughlan, *Police warn students to avoid science website*, BBC NEWS, March 19, 2021, https://www.bbc.com/news/education-56462390 (last visited Jul 24, 2021).
[368] PIPCU Press Release, *Police warn students and universities of accessing an illegal website to download published scientific papers*, CITY OF LONDON POLICE, March 19, 2021, https://www.cityoflondon.police.uk/news/city-of-london/news/2021/march/police-warn-students-and-universities-of-accessing-an-illegal-website-to-download-published-scientific-papers/.

Green OA versions of the required research articles. Some examples are Unpaywall, Open Access Button, Kopernio and LazyScholar.[369] Academic Social Networks, such as SSRN, ResearchGate etc., should also be explored for their contribution to the OA movement.

Second, the publishing industry and its revenue stream need to be radically changed. Scholars have taken different positions on how to achieve this. Toby Green, in 2019, argued for a two-step publishing process, where a pre-print repository filters articles worthy of being formally published in OA journals. This would reduce the overall number of publications and thus reduce the costs of academic publishing. Further, it would also require that researchers and scholars "*self-promote*" their articles to ensure publication, thus ensuring wider dissemination of research.[370] Professor Jeff Pooley argues that the libraries should take their rightful place in the academic publishing business and redirect their subscription costs to develop a "*collectively funded publishing ecosystem.*" This would include library partnerships, in-house-library publishing units etc. He also discusses some journals and libraries which have subscribed to this model as proof of concept.[371] Advertising can be another avenue to flourish publishers' revenue streams. Articles can be archived over the Internet, where access can be provided without payment. A threshold can be placed where only a limited number of articles can be downloaded per user per day

Thirdly, the *serials crisis* can be solved by legislative intervention. Multiple scholars have suggested models, which redefine the Copyright Law to accommodate the unique interests of scholarly research and academic publishing. Professor Steven Shavell published a paper in 2010 where he argued eliminating copyright for academic works.[372] While radical, Prof. Shavell's model has been widely discussed and critiqued.[373] Professor Wadim Stielkowski argues that a subscription model similar to Apple Music, Spotify, or Netflix should be developed. Individual authors buy access to a publisher's database and pay a small monthly/

[369] Mahesh Gadhvi, Shival Srivastav & Rajesh Sharma, *Access to scientific literature: Legitimate channels*, 64 INDIAN JOURNAL OF PHYSIOLOGY AND PHARMACOLOGY 155–157, 156 (2020).
[370] Toby Green, *Is open access affordable? Why current models do not work and why we need internet-era transformation of scholarly communications*, 32 LEARNED PUBLISHING 13–25 (2019).
[371] Jeff Pooley, *The Library Solution: How Academic Libraries Could End the APC Scourge*, ITEMS (2019), https://items.ssrc.org/parameters/the-library-solution-how-academic-libraries-could-end-the-apc-scourge/ (last visited May 24, 2021).
[372] Steven Shavell, *Should Copyright of Academic Works be Abolished?*, 2 JOURNAL OF LEGAL ANALYSIS 301–358 (2010).
[373] For example see: SCHEUFEN, *supra* note 62 at 142–144.

annual subscription fee. Prof. Stielkowski relies on the fact that such subscription models have bulldozed the rampant music piracy from the early 2010s.[374]

Another issue with academic publishing is the *Ingelfinger rule,* which provides that a journal "*reject a paper if it had been published elsewhere, in whole or substance*".[375] This precludes authors from making their articles available through Green OA.[376] To counter this rule, an *inalienable secondary publication right* should limit copyright protection in academic works.[377] This would allow authors to archive their research at any stage despite their contractual obligations towards the publisher. Germany can be understood as the proof of concept for such a law, as they enacted *an inalienable right of secondary publication* on June 27, 2013.[378] The law provides any researcher with an inalienable right to make her research available to the public one year after the primary publication.[379]

While all these models have merit, no single option can alleviate the *serials crisis.* The academic publishing industry needs to look at Sci-Hub's download corpus as a sign that their business model is outdated and need to develop an alternate approach. At the same time, the international copyright regime needs to respond to the serials crisis and negotiate some limitations on copyright monopoly, ensuring that the commodification of knowledge cannot extract very high-profit margins. Before these models become viable and can be scaled across the entire industry, the Green OA movement needs to gain traction. Researchers and academics need to be made aware of the *serials crisis* and the Green OA road. Funding organisations should also develop mandates promoting Green OA.

[374] Wadim Strielkowski, *Will the rise of Sci-Hub pave the road for the subscription-based access to publishing databases?*, 33 INFORMATION DEVELOPMENT 540–542, 541 (2017).
[375] L.K. Altman, *The Ingelfinger rule, embargoes, and journal peer review-part 1*, 347 THE LANCET 1382–1386, 1383–1384 (1996).
[376] Larivière, Haustein, and Mongeon, *supra* note 5 at 12.
[377] SCHEUFEN, *supra* note 62.
[378] *Id.* at 144.
[379] Section 38(4), Contirbutions to Collections, Act on Copyright and Related Rights, 1965.