



LEGALITY OF SHADOW LIBRARIES UNDER THE INDIAN COPYRIGHT PROTECTION REGIME: A CRITICAL ANALYSIS

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Introduction

Less stringent copyright protection regimes have historically contributed towards the promotion of knowledge dissemination.¹ Strict devise and implementation of copyright protection laws not heeding the interests of the wider public incentivize piracy.² In such circumstances, even scholars find “piracy” to be “useful and productive”.³ Academic publishing has now become a billion-dollar business and five leading publishers control 50% of the market.⁴ In order to access the research works for which these publishers have exclusive publishing license, one has to pay exorbitant charges. In this background, the shadow libraries come in handy to academicians, researchers and dilettantes. However, legally speaking, these shadow libraries apparently indulge in copyright infringements. Hence, passing the legal muster is so crucial for their survival. In this paper, the researcher attempts to explore the questions regarding the legality of shadow libraries under the Indian copyright protection regime taking into account the issues concerning equitable access to academic resources.

Research Objectives

1. To understand the academic publishing market and the Indian copyright protection laws in that regard.
2. To critically analyse the Indian copyright regime with special reference to shadow libraries.
3. To suggest some workable ways to strike a balance between copyright protection and equitable access to academic resources taking in to account the judicial precedents from the Indian and other jurisdictions.

¹ Tony Volpe and Joachim Schopf. "Dissemination of knowledge and copyright: an historical case study." 11(3) Journal of Information, Communication and Ethics in Society 144 (2013)

² Jimmyn Parc, Patrick Messerlin, and Hwy-Chang Moon. "The secret to the success of K-pop: The benefits of well-balanced copyrights." *Corporate espionage, geopolitics, and diplomacy issues in international business*. IGI Global 130 (2017)8.

³ *Supra* note 1.

⁴ Martin Hagve, "The money behind academic publishing." *Tidsskrift for Den norske legeförening* (2020).

Research Questions

1. Whether the Indian copyright regime enables equitable access to academic and other intellectual resources while balancing the interests of the authors, publishers and the wider public?
2. Whether the scope of the fair dealing and other exceptions in the Indian copyright protection regime is wide enough to permit the operation of the shadow libraries?
3. How other jurisdictions have dealt with the legal issues posed by the academic shadow libraries and what relevance does their reasoning may have for India?

Statement of Problem

The e-publishers publishing journal articles and other research works acquire a long-term exclusive publishing license from the authors by paying meagre or no money to them. At times, the authors are even charged by the publishers for publishing their works. These same e-publishers charge unaffordable amount from those access the academic resources they possess. Alexandra Elbakyan, the founder of one of the largest academic shadow libraries in today's world – *Sci-hub*, asserts that knowledge today has become a money-yielding private property owned by a few mighty businesses at the cost of exploitation of the researchers and obstruction of public's access to academic resources including research works. The academic shadow libraries claim to have effectively addressed these issues. Undoubtedly, these shadow libraries have substantially contributed towards wide dissemination of knowledge and bridging the knowledge divide. Delhi High Court has been now hearing a case seeking a dynamic injunction against these shadow library websites in light of the court's decision in the case of *UTV Software Communications Ltd. v. 1337x.to*.⁵ This decision will have far-reaching consequences withing and without academia. Utility alone cannot render legality. However, the intricate socio-economic issues that may stem from a judicial decision on legality cannot also be ignored. In this context, it becomes crucial to explore the questions regarding the legality of academic shadow libraries under the Indian copyright regime taking the issues concerning equitable access to academic resources into account. In this paper, the researcher attempts to explore those questions in the aforementioned way.

Review of Literature

1. M. P. Ram Mohan, and Aditya Gupta. "Right to Research and Copyright Law: From Photocopying to Shadow Libraries." 11.3 *NYU Journal of Intellectual Property & Entertainment Law* (2022).

In this paper, the researchers herein, through a meticulous reading of various domestic and international legal instruments glean something known as "the right to research". In light of that right and other exceptions to copyright infringement provided under the intellectual property related legal instruments, they make a strong case for the legality of *sci-hub*. This study renders various novel arguments and it cannot certainly be ignored by anyone working on the legality of the academic shadow library in India. However, the study oversees crucial judgments in this regard like the *UTV Software Communications Ltd. v. 1337x.to* and it focuses merely on the nature and functioning of *Sci-hub* alone and ignores other shadow libraries.

⁵ 2019 SCC OnLine Del 8002.

2. Lawrence Liang, "India: The knowledge thief.", in Joe Karaganis (ed.), *Shadow libraries—Access to knowledge in global higher education* 183-222 (The MIT Press, 2018).

In this book chapter, the author herein documents the history of Indian struggles for equitable access to academic resources. This a descriptive work devoid of any legal analysis. Though the study has a lot to say about the movements for equitable access and the publishing market in India, it more of a historical study than a legal one.

3. Shrudula Sandesh, "Copyright and the Principle of Exhaustion in the Context of Access to Knowledge." 5.02 *Journal of Intellectual Property Studies* 83 (2022).

In this paper, the researcher herein makes a comprehensive study on the principle of exhaustion with special reference to copyright protection. He asserts that a compelling case can be made for academic shadow libraries through a radical reading of the aforementioned doctrine from a pro-equitable access standpoint. However, given the extremely limited scope of the doctrine, the author's radical reading of the doctrine broadening the contours of the doctrine is seemingly spurious.

4. Lawrence Liang, "Paternal and defiant access: copyright and the politics of access to knowledge in the Delhi University photocopy case." 1.1 *Indian Law Review* 36 (2017).

In this paper, the author herein critically reviews the judgements delivered by the High Court of Delhi in the *Chancellor, Masters & Scholars of The University of Oxford v. Rameshwari Photocopy Services* case in light of the political economy of access to knowledge. While lauding the progressive aspects of the judgement, the author also points out the problems with the judgment. This is more of a case analysis than a study.

5. Sanya Samtani, *The right of access to educational materials and copyright: international and domestic law*. (2021) (Unpublished Ph.D. thesis, University of Oxford, 2021).

In the Chapter 6 of this Ph.D. dissertation, the author herein makes a comprehensive study on the Indian legal regime including copyright protection regime with reference to access to educational materials. Referring to various legal instruments and judgments, she makes a strong case for equitable access to educational materials in India. however, she does not delve into the question of legality of academic shadow libraries.

Copyright Protection and Equitable Access to Academic Resources in India: A Critique

In 2020, three leading academic journal publishers moved a petition before the High Court of Delhi seeking dynamic injunction against the “libgen” and “sci-hub” groups of websites relying upon the court’s judgment in the *UTV Software communications* case.⁶ A substantial part of the Indian academia threw its weight behind the aforementioned groups of websites and has been defending their venture tooth and nail.⁷ Standing in solidarity with these groups of websites, some prominent IP academicians in India issued a statement urging the court to

⁶ Elsevier Ltd. v. Alexandra Elbakyan, 2022 LiveLaw (Del) 1051.

⁷ M. P. Ram Mohan, and Aditya Gupta. "Right to Research and Copyright Law: From Photocopying to Shadow Libraries." 11.3 *NYU Journal of Intellectual Property & Entertainment Law* 40 (2022).

take social dimensions into account while deciding on the legality of those websites.⁸ They assert that piracy's major objective has always been satisfaction of the society's unmet demands for the access to copyrighted works.⁹ Though such an unqualified defence for pirating copyrighted works would certainly be untenable, there is undoubtedly some merit in the assertion that the prominence of these websites which wilfully defy the copyright protection regime and the extraordinary support they enjoy among the academicians testify to the existence of some pervading problem in the functioning of the academic publishing market.

Though we have often been told that incentivizing the creators is the fundamental purpose of the copyright law, interests of the wider public has also never been ignored by the copyright law.¹⁰ Historically, the central problem with which the copyright law has been grappling with from the date of its origin to till date is striking a balance between providing effective incentives for the creators to create and safeguarding the interests of the larger public.¹¹ Even the Statute of Anne, 1710, the first legislative enactment relating to copyright protection, in the interest of the larger public, provides for regulators mechanisms to curb unreasonable pricing.¹² The preamble to the WIPO's Copyright Treaty, recognizes, as it has been reflected in the Berne Convention, that it is necessary to strike a balance between the author's rights and the larger public interest especially regarding research, education and access to information.¹³ As the grant of copyright over a work may exorbitantly inflate the price of the work, it can readily be asserted that acknowledging that risk historically ensuring fair access to copyrighted works has been one of the objectives of the copyright law.

From the overwhelming unqualified support received by the shadow libraries from the Indian academia it can be surmised that the Indian copyright regime has failed in its duty to ensure equitable access to academic resources. According to the statistics given by the sci-hub more than three billion articles had been downloaded from India last month¹⁴ and the usual count is 2-3 billion per month. At this juncture, it is pertinent to look into the functioning of the academic publishing ventures. Academic publishing is a ruthlessly profit-making venture and as mentioned earlier 50% of the market is controlled by five companies.¹⁵ They offer pay-to-read and pay to publish options and make money in both the ways. Elsevier, which controls around 16% of the market and publishes more than 2800 academic journal, functions with a profit margin around 40% which is much higher than any highly successful business corporation like Google, Microsoft, etc.¹⁶ These publishing companies, in an average, charge from 30 USD to 50 USD for providing access to an article.¹⁷ Even the most premier institutions in India do not provide access to all the aforementioned five publishing companies' websites and even the access provided to a publisher's website is not unlimited covering all the articles published by the

⁸ N. S. Gopalakrishnan, T. G. Agitha, *et. al.* "Social Dimensions of Copyright Infringement and Enforcement", *bananaip*, February 28, 2021, available at https://www.bananaip.com/ip-news-center/social-dimensions-of-copyright-infringement-and-enforcement-a-quick-reflection-in-the-context-of-sci-hub-litigation/#_edn1 (last visited on 9 May, 2023).

⁹ *Ibid.*

¹⁰ William M. Landes and Richard A. Posner, "An Economic Analysis of Copyright Law" 18(2) *Journal of Legal Studies* 325 (1989).

¹¹ *Ibid.*

¹² The Statute of Anne, 8 Anne, c. 19 (1710).

¹³ WIPO Copyright Treaty, 1996.

¹⁴ Refer: Annexure - I

¹⁵ *Supra* note 4.

¹⁶ *Ibid.*

¹⁷ Rahul Siddharthan, "An anti-science law suit", *The Hindu*, December 24, 2020, available at <https://www.thehindu.com/opinion/op-ed/an-anti-science-lawsuit/article33405250.ece> (last visited on 9 May, 2023).

company. It is also practically impossible for any institution to subscribe all the academic journal publishers. As no researcher can afford to miss even a single paper published in their area of research, they will be forced to purchase a paywalled article at any cost. The fact that the fund allocated for research in India is relatively so poor aggravates the accessibility issues.¹⁸ The accessibility issues faced by the independent researchers and enthusiasts with intellectual quench due to unreasonable and exorbitant pricing are still worse. As Gautam Bhatia aptly puts it, “doing scholarly work outside the gated precincts of a university is like trying to swim with one arm and one leg.”¹⁹ Given this background and taking into account the fact that these issues have never been acknowledged by the state leave alone remedying, the researchers and enthusiasts are left with no option other than using shadow libraries. It is pertinent to note here that right of access to educational material is recognized by the Indian constitutional law and the states does have an obligation to realize that right.²⁰

Legality of Academic Shadow Libraries Under the Indian Copyright Regime

Promotion of the growth and dissemination of knowledge and science is widely recognized as one of the objectives of the intellectual property protection.²¹ As opposed to the popular perception which understands the aforementioned objective opposite to the “incentivizing the creators” objective, both can be construed harmoniously as existing knowledge forms the building blocks for future creations the grant of freedom to the creators to unhinderedly use the existing knowledge while heavily incentivize the creators and this construction is easily tenable when it comes to academic publishing.²² As discussed earlier, though a strong utilitarian case may be made for the operation of the academic shadow libraries in India and the social, political and economic dimensions of their apparent copyright infringement cannot be overseen, their utility alone is not sufficient to justify their existence legally. It is crucial to look into the legal dimensions too.

Given the scope of the term “literary works”²³ in light of its definition in the Copyright Act, 1957 (hereinafter, “the Act”) and the judicial interpretations of the term²⁴, the academic research works published within India by the publishing houses are certainly literary works and thereby entitled to copyright protection by virtue of Section 13(1)²⁵ of the Act and published without India are entitled to copyright protection by virtue of the International Copyright Order, 1999 issued by the Union government utilizing the power conferred on it by Section 40 of the Act, if the publication is made from a “Berne Convention Country”.²⁶ Almost all developed countries which substantially contribute towards the academic publishing market are parties to the Berne Convention.²⁷ Hence, according to the Indian copyright protection regime, copyright subsists virtually in almost

¹⁸ Manoj V. Murhekar, and Naman K. Shah, "Research funding in India: need to increase the allocation for public health." 132.2 *Indian Journal of Medical Research* 224 (2010).

¹⁹ John Xavier and Sahana Venugopal, “A shadow library ban pits publishers against free information activists”, *The Hindu*, September 15, 2022, available at <https://www.thehindu.com/sci-tech/technology/a-shadow-library-ban-pits-publishers-against-free-information-activists/article65889736.ece> (last visited on 9 May, 2023).

²⁰ Sanya Samtani, *The right of access to educational materials and copyright: international and domestic law*. 313 (2021) (Unpublished Ph.D. thesis, University of Oxford, 2021).

²¹ N. S. Gopalakrishnan and T. G. Agitha, *Principles of Intellectual Property* 368 (Eastern Book Company, Lucknow, 2014).

²² *Ibid.*

²³ The Copyright Act, 1957 (Act 15 of 1957), s. 2(o).

²⁴ V. K. Ahuja, *Laws Relating to Intellectual Property Rights* 30 (Lexis Nexis, Noida, 2015).

²⁵ The Copyright Act, 1957 (Act 15 of 1957), s. 13(1).

²⁶ The International Copyright Order, 1999.

²⁷ *Ibid.*

all works published by the aforementioned academic publishers. The academic publishers usually, through agreements, acquire exclusive license for publication from the authors and hence their interest in the works should indubitably have to be protected.

Taking cue from their name, firstly it is critical to analyse whether the shadow libraries can seek protection under exception given for libraries under the Act. Sections 52(1)(n), 52(1)(o), and 52(1)(p) deals with exception provided to libraries in India.²⁸ Two exceptions provided to “non-commercial public libraries” include permission **to digitally archive the works for which they possess non-digital copies and reproduce the literary works not available in India** (however, the maximum permitted limit is 3 copies).²⁹ Though the Act does not define “non-commercial public library”, according to the definition rendered by the NDLI’s Copyright Guide the term includes all libraries serving public purpose, either fully or partially government funded or otherwise.³⁰ Another exception generally provided to libraries is the **permission to reproduce unpublished work for academic purpose**.³¹ The scope the provisions are too small to render legality to the functioning of digital libraries leave alone shadow libraries. Even the NDLI’s Copyright Guide for Indian Libraries has nothing to say about digital libraries.³² Though there is no explicit provision to deal with the copyright issues stemming from the functioning of the digital libraries, the doctrine of exhaustion is usually used to defend the lending activities of digital libraries.³³ The doctrine of exhaustion, as Justice Ravindra Bhat puts it, “control the way the copies are used”.³⁴ According to this doctrine, once the person who owns a copyrighted work sells a copy of the work, she cannot control how the copies are used post the sale.³⁵ **As valid sale of the copies is crucial for this doctrine to apply in a case, this cannot be applicable to the shadow libraries as no sale involves there.**

Section 52 of the Act renders certain uses legally permissible which would otherwise be considered as copyright infringements.³⁶ Such uses are termed as fair dealing or fair use.³⁷ It is critical to explore whether the operation of the academic shadow libraries fall into any such permissible use. The Indian precedent on the fair dealing doctrine close to the issues involved in this case is a judgment handed down by a division bench of the Delhi High Court in the Rameshwari Photocopying case.³⁸ In that case, a few globally reputed publishers challenged the act of publishing “course packs” by a photocopy service authorized by the Delhi University at a fair amount.³⁹ Those course packs had excerpts of various copyrighted works.⁴⁰ Though the judgments have rightly acknowledged that importance of educational exception provided for under Section 52 by providing various substantiations including that imparting quality education may contribute towards substantial expansion of the market for the copyrighted works in the long run, given the nature of the legal questions involved there, they

²⁸ The Copyright Act, 1957 (Act 15 of 1957), s. 52(1)(n), s. 52(1)(o), and s. 52(1)(p).

²⁹ *Ibid.*

³⁰ Jagdish Sagar, Prabuddha Ganguli, *et. al.*, “Copyright Guide for the Libraries in India 13 (Ministry of Education, 2021).

³¹ The Copyright Act, 1957 (Act 15 of 1957), s. 52(1)(p).

³² *Supra* note 30.

³³ Pranesh Prakash, "Exhaustion: Imports, Exports, and the Doctrine of First Sale in Indian Copyright Law." 5 *NUJS Law Review* 635 (2012).

³⁴ Warner Bros. Entertainment Inc. v. Mr. Santosh V.G, MIPR 2009 (2) 175 Delhi HC.

³⁵ *Supra* note 33.

³⁶ The Copyright Act, 1957 (Act 15 of 1957), s. 52.

³⁷ *Supra* note 24 at 159.

³⁸ The Chancellor, Masters & Scholars of The University of Oxford v. Rameshwari Photocopy Services, (2017) 69 PTC 123 31.

³⁹ The University of Oxford v. Rameshwari Photocopy Services, (2016) 160 DRJ (SN) 678 14.

⁴⁰ *Ibid.*

have widely dealt with Section 52(1)(i) which bears little relevance to the issues at hand. **Even in light of the inclusive definition rendered by the single judge for the term “course of instruction”, it is impossible to accommodate the operation of the shadow libraries within this provision for they operate in a much wider area.** However, one reasoning in the judgment may of some use for the discussion regarding legality of shadow libraries. According to the single judge’s judgment, for, among other things, the purpose of private research, “if a single individual could copy a copyrighted work, then it made no difference if same activity was done in the plural”.⁴¹ However, it is questionable that even such an interpretation of Section 52(1)(a)(i) may help in justifying the legality of the shadow libraries. Given the lack of any good precedent on interpreting Section 52(1)(a)(i), nothing can be authoritatively said in that regard. However, that is the only potential provision that can accommodate the operation of the shadow libraries.

The petition moved before the Delhi High Court seeking dynamic injunction against two groups of shadow library websites has relied heavily on the UTV software communication case.⁴² It is also pertinent note that as the case against two most prominent academic shadow libraries has been pending before a single-judge bench of the Delhi High Court, the ratio laid down by the division bench in the aforementioned division bench will squarely bind the single-judge bench. Hence, it becomes crucial to analyse the judgment with reference to shadow libraries. Categorizing websites intentionally indulging in digital piracy as “rogue websites”, the judgment provided for the grant of dynamic injunctions against the hydra-headed websites.⁴³ If the tests for determining “rogue websites” in the illustrative list given by the judgment are applied to the shadow libraries then they will obviously be categorized as “rogue websites” as they many tests including the intentional copyright infringement. However, it will be highly inappropriate to apply the tests laid down in the UTV software case, wherein the issue was movie piracy, while determining the legality of the shadow libraries as no exception was involved in that case. Here, a strong case can be made for “fair use” exception as they serve educational and research purposes. Hence, there is a need to develop alternative tests while dealing with copyright infringements in relation to access to academic materials⁴⁴

Insights from Foreign Jurisdictions

The earlier mentioned accessibility issues stemming from the unfair and reasonable pricing done by the oligopolistic academic publishing market not affect India alone. Barring a few exceptions, almost all jurisdictions are affected by these issues giving scope for the flourishing of shadow libraries.⁴⁵ Hence, it may be helpful to know how other jurisdictions have dealt with the issues relating to the legality of shadow libraries.

In 2015, an U. S. District court, granted injunction against sci-hub, one of the largest shadow libraries in the world.⁴⁶ Ignoring the issues in accessing academic literatures, the court superfluously acknowledged the public interest arguments for the functioning of the shadow libraries and illogically held without any substantiation

⁴¹ *Supra* note 38.

⁴² UTV Software Communications Ltd. v. 1337x.to., 2019 SCC OnLine Del 8002.

⁴³ *Ibid.*

⁴⁴ *Supra* note 8.

⁴⁵ *Supra* note 14.

⁴⁶ Elsevier Inc. v. Sci-Hub, 1:15-cv-04282, (S.D.N.Y.).

thus: “Given the importance of scientific research and the critical role that copyright plays in promoting it, the public interest weighs in favor of an injunction.”⁴⁷ Without taking the public interest concerns seriously, the Paris High Court ordered the Internet Service Providers to block sci-hub and lib-gen for operating against the “principle of copyright”. The same has been the case in Belgium, Sweden and United Kingdom.⁴⁸ The problem with all these verdicts is that they simply took a positivist stance unacknowledging the intricate reasons for the shadow libraries to thrive and the impact of a blanket ban on shadow libraries on the academia and the larger public. Ought not to adopt the stance adopted by the aforementioned jurisdictions can be the key take-away for the Indian jurisprudence.





















Conclusion

The inefficient functioning of the oligopolistic academic publishing market charging exorbitant prices from the researchers and creating various accessibility issues led to the thriving of academic shadow libraries. Though a strong utilitarian case can be made for these shadow libraries, that alone is not sufficient to legally justify their operation. At this juncture, it becomes crucial to look into the legality of these academic shadow libraries. In light of the laws pertaining to copyright protection in India, majority of the articles published by the academic shadow libraries are entitled to copyright protection. Neither the statutory exceptions granted to libraries nor the doctrine of exhaustion used to justify the functioning of digital libraries has enough scope to accommodate the functioning of the academic shadow libraries. Even the interpretation of Section 52(1)(i) inclusively interpreter in light of Rameshwari photocopy cannot help in this regard. The potential provision which can accommodate the operation of academic shadow libraries is Section 52(1)(a)(i). These shadow libraries cannot also be categorised as "rogue" websites. There is a need for devising unique tests for determining copyright infringement in cases involving accessibility to academic resources taking the socio-economic dimensions into account.

⁴⁷ *Ibid.*

⁴⁸ *Supra* note 7.

Annexure - I

	country	number of articles			
1	 China	57,538,522	11	 Netherlands	853,453
2	 United States	17,225,494	12	 Canada	778,308
3	 India	3,021,806	13	 Philippines	769,593
4	 Brazil	2,724,454	14	 Iran	766,423
5	 France	2,018,197	15	 Turkey	729,051
6	 Russia	1,902,134	16	 Singapore	627,829
7	 Germany	1,605,690	17	 Japan	626,544
8	 United Kingdom	1,041,943	18	 South Korea	605,853
9	 Indonesia	1,035,216	19	 Romania	585,212
10	 Mexico	917,057	20	 Vietnam	533,788

Statistics on the number of articles downloaded from sci-hub in April, 2023. (Excerpted from the scihub.se website (last visited on 9 May, 2023)).

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