

IS SCIENTIFIC KNOWLEDGE A PUBLIC RESOURCE? A STUDY ON ACADEMIC PIRACY WITH REFERENCE TO ELSEVIER LTD. VS. ALEXANDRA ELBAKYAN

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Abstract

Rapid globalization and integration of the world by the means of the internet and seamless communication has brought us all closer together, making all information accessible at the touch of a screen or a click of a button. However, where we have grown closer in terms of communication, we have a new barrier separating us into the rich and poor; our digital access to information. With increase in internet use, those who are enterprising have found that business in this unchartered water and once such endeavour would be publication of research and academic works. Although all the work has been undertaken mostly by authors and peer-reviewers who work on funds or for free, their work has no value unless published in journals of repute, which are owned by an oligopoly of corporations, who choose to capitalize on this highly profitable business by charging exorbitant prices for subscription. However, as any oligopoly is challenged, there do exist Robin Hoods, in this case, Sci-Hub and Lib-gen, which aim to circumvent these pay gates and provide the same for free. This paper aims to understand the implications of the above Robin Hoods and their scope and inclusion in the provisions of Fair Use under Copyright Laws as well as understanding the object by which they function and their legitimacy holds by analysing the Delhi High Court judgement which challenges the same.

Keywords: Academia, Integrity, Monopoly, Knowledge, Fair Use.

1. Introduction

The proprietors of numerous websites such as Sci-Hub and Lib-Gen (Library Genesis) unashamedly indulge in the illegal act of providing free access to millions of academic papers with minimal prevarication. However, it is debatable as to whether sourcing material through these websites would be deemed as piracy and would these “Academic Robin Hoods” be protected under provisions of fair use under the provisions of Copyright law. Academic Robin Hoods are also popularly known as the Guerrilla Open Access crusaders. This kind of movement is known as the Guerrilla Open Access

Movement that follows the Guerrilla Open Access Manifesto, written by Aaron Swartz in 2008.

From the local context, it is important to note that contemporary India is a knowledge importer, largely due to the scarce funding available for research and academia; while India's expenditure on Research and Development (R&D) amounts to about 0.7% of its GDP¹ as per latest statistics and China stands at 2.19%.²

From the above statistics, we can say that India is less indulgent in research and academia as compared to its most competitive neighbour, placing us on the backfoot when it comes to the ability to innovate and secure technological potential, hindering economic growth.³ When argued in terms of resources available, the process of paying amounts as high as US\$50 per article would be a grand expense for those involved in public funded R&D sectors, forcing them to rely on alternative sources for the same, such as Sci-Hub, which provides the same, free of cost.

With reference to Sci-Hub, it is the first global platform which makes scholarly articles available to the public free of cost, dodging copyright issues. As of December 2020, more than 85 million articles were available on Sci-Hub's database.

Although Sci-Hub and other similar services blatantly disregard copyright provisions in countries, they have great support among academicians and students, who often are concerned with knowledge and not its cost, thus it can be argued that knowledge is free for all who seek it and there must be no barriers.

However, the concept of Sci-Hub or free knowledge has not gone down well with large publishing houses such as Elsevier, Wiley India and the American Chemical Society, who hold a monopoly in the current market and have attempted to secure this monopoly through the case of *Elsevier Ltd and Ors. v. Alexandra Elbakyan and Ors.*⁴ in India, which questions the exact limits of fair use under the Copyright Act under Section 52(1)(i).⁵

¹ Government of India, "Research and Development Statistics 2019-2020" (Ministry of Science and Technology, 2020).

² UNESCO Institute for Statistics, "Research and Development Expenditure" (World Bank, 2018).

³ Ebru Beyra Bayarcelik and Fulya Tasel, "Research and Development: Source of Economic Growth" 58 *Procedia-Social and Behavioral Sciences* 744-753 (2012).

⁴ *Elsevier Ltd and Ors. v. Alexandra Elbakyan and Ors.*, (2021) SCC OnLine Del 17.

⁵ The Copyright Act, 1957 (Act 14 of 1957), s. 52(1)(i).

2. Importance of Investment in Knowledge for Economic Growth

Investments in knowledge, particularly education and research are by far the single most important determinant of sustainable economic growth of a country. It is important to note that education can increase human capital and quality of a labour force, in turn increasing productivity, leading to higher economic growth in an economy.⁶

Further, it is important to note that education has the ability to create a class of educated individuals and leaders who fill vacancies in the bureaucracy, corporations and other businesses, making them more able and qualified to fill those positions and provide a higher output with regard to the same.⁷ An important component of education that determines the impact of education would be the quality of education and the exposure available to individuals or citizens of the state in which it is being provided.⁸

Beyond the provisions of basic skills and education, it is important to inculcate a culture of research and academia which instilled a sense of innovation and creativity in the population, which translates to economic development and growth in the long run. However, it would be possible to attain such a knowledge-based economy when the resources that provide this knowledge are accessible and attainable by all in the country, including the most vulnerable and poor at ease; keeping the costs and access universal and not controlled in the hands of a few who seek to control the power of knowledge.⁹

An important resource in this ambit would be research and academic discoveries which not only benefit current societies with their findings, but also have the potential to lay foundations to future research and discoveries as well as critical thinking and creative abilities among people, hence the ambit of this knowledge is not restricted to a few, rather concerns the public at large.

However, in a realistic scenario, the ability to provide universal knowledge to all lies only in the hands of a few rich countries and developing countries are forced to make the work done with limited resources that are available to them and pay gates to research findings are nothing but an addition to such burden on individuals.

⁶ Liping Liao *et. al.*, “The impact of educational investment on sustainable economic growth in Guangdong, China: A cointegration and causality analysis” 11 *Sustainability* 766 (2019).

⁷ *Ibid.*

⁸ *Supra* note 6.

⁹ *Ibid.*

Thus, in the current scenario, we see that academia in India largely depends on alternative sources for their research and findings, turning to sources such as Sci-Hub and Libgen to attain the same. The present article seeks to answer mainly two research questions - whether the provision of Fair Use must be exercised in the given Instance? Secondly, whether there are grounds to protect scientific knowledge as a public asset?

3. Current Situation of the Publication Market: exorbitant prices and demand

In a study conducted by the All-India People's Science Network (AIPSN), in 2016 it was found that Indian Academicians and Researchers downloaded and consumed about 7 million research papers via Sci-Hub in that year alone.¹⁰ The magnitude of research materials would cost about ₹15 Billion if not for alternatives.¹¹ This dependence is a clear indicator that academia in India desists from opting for the conventional publishing houses and depend on Sci-Hub for their needs, as publishing houses and their exorbitant pricing petrifies academia who depend on meagre resources available to them.

The market of publishing is one which has the highest rates of profit margin in any setting. It is a US\$ 10 Billion industry with profit margin up to 40%, which is twice as much as the profit margin rates of organizations such as Google.¹² Clearly, from these rates of profit margin, it can be inferred that those profits do not arise from low cost of publishing, rather it is the impact of a monopoly or oligopoly that certain large publishers hold over a market; it is only certain publishers such as Elsevier, ScienceDirect, HeinOnline among others who publish these articles.

Moreover, the monopoly is not restricted to procuring these papers, but also includes submission of papers and research. Alexandra Elbakyan in an interview with The Wire stated that an academician's relevance is their publication number in "high impact" journals, which mostly belong to the monopoly; it is the researcher who does all the work, yet they cannot simply publish the same in an individual blog of their own as it

¹⁰ All India Peoples Science Network (AIPSN) Statement, "Stop Monopoly Publishers Efforts to Deny Public Access to Scientific Publications", available at: <https://aipsn.net/2020/12/29/stop-monopoly-publishers-efforts-to-deny-public-access-to-scientific-publications/> (last visited on October 15, 2022).

¹¹ *Ibid.*

¹² *Ibid.*

would hold no value. In the case of peer reviews, both the reviewers and authors work for free, yet it is the monopoly which profits.¹³

With respect to the same, numerous universities have voiced their concern as it is these institutes that pay subscriptions to the journals for research and reference. Harvard in 2012 stated that subscription prices nearing US\$40,000 was unaffordable and raised concerns on the same.¹⁴ The same was cited by the University of California, who went a step ahead to sever ties with Elsevier.¹⁵

The excessive pricing of publishing houses is not prima facie justified considering that a majority of research globally is funded by taxpayers' money, done by researchers and reviewed by the community, all for free. Therefore, the publishing houses have little to contribute, yet make notable profits while not remunerating original authors for their work.

This particular development shows us that the infringement of these scientific papers or knowledge does not directly affect the remuneration of the author's work, however does have a significant impact on the rights of the publishing corporation, who have bought the same from the author, albeit unequal.

4. Implication of the Case of Elsevier Ltd. versus Alexandra Elbakyan in the Indian Context

Corporations such as Elsevier and ScienceDirect, without doubt, consider websites such as Sci-Hub to be an inherent threat to their business and the cause of lack of revenue and hence have resorted to bringing an end to their worries by filing lawsuits for copyright violations in numerous countries such as the USA, Russia, Sweden and Belgium among others. Of these lawsuits, numerous judgements have led to Sci-Hub's ban in their respective jurisdictions. Observing the same, Indian Academia feared a similar ban in India, which would be a misfortune.

¹³ Sidharth Singh, "An Interview with Sci-Hub's Alexandra Elbakyan on the Delhi HC Case," *Science The Wire*, 22.02.2021, available at: <https://science.thewire.in/education/interview-alexandra-elbakyan-sci-hub-elsevier-academic-publishing-open-access/> (last visited on June 29, 2022).

¹⁴ Justice Norrie, "Harvard: journal subscription fees are prohibitive," *The Conversation*, Apr 24, 2012, available at: <https://theconversation.com/harvard-journal-subscription-fees-are-prohibitive-6659> (last visited on July 15, 2022).

¹⁵ Office of Scholarly Communication, "UC and Elsevier", available at: <https://osc.universityofcalifornia.edu/2021/03/uc-and-elsevier-march-2021/> (last visited on July 29, 2022).

Thus, considering the above, the Delhi High Court in the matter of *Elsevier Ltd. v. Alexandra Elbakyan*¹⁶ considered the case to be of public interest and allowed applications for objections and interventions to be submitted by students, researchers and other academia. Of these intervention applications, the intervention by the Delhi Science Forum's Society for Knowledge Commons was most notable, which stated that under Indian Law, Scientific Knowledge is a public resource and cannot be commercialized.¹⁷ However, on the other hand, the petitioners in the case i.e., Elsevier Ltd. and Wiley India Pvt. Ltd among others have argued that the defendants (Alexandra Elbakyan), by providing such protected material without prior permissions were in violation of Section 51¹⁸ of the Copyright Act.

The petitioners also cited the case of *UTV Software Communication Ltd. v. 1337X.To*¹⁹ where the petitioners requested a dynamic injunction before the court and prayed that the court declare these sites as rouge websites. It was imperative that there was a dynamic injunction to ensure that the order also quashed mirror websites that would circumvent the orders of the court.

In addition to the above, it is important to take note of the rulings of the case of the *Chancellor, Masters & Scholars of the University of Oxford & Ors. v. Rameshwari Photocopy Services & Ors.*²⁰ or more popularly known as the DU Photocopying case, where the international publishers took legal action on a photocopy shop on the campus of University of Delhi (DU), claiming the photocopying and selling of protected materials without a licence or prior permissions amounted to copyright infringement. The Delhi High Court dismissed the plea of the publishers stating that the defendants i.e., the photocopying shop fell under the ambit and restrictions of Section 52(1)(i) of the Copyright Act, 1957.

Thus, the question of the legality or illegality of websites such as Sci-Hub lie not on whether the acts constitute an infringement under Section 51 of the Copyright Act,

¹⁶ *Supra* note 4.

¹⁷ Divya Trivedi, "Cases against Sci-Hub and Libgen imply long-term consequences to research and education in India", *Frontline*, February 04, 2021, available at: <https://frontline.thehindu.com/the-nation/locking-up-research-cases-against-sci-hub-and-libgen-imply-long-term-consequences-to-research-and-education-in-india/article33641506.ece> (last visited on July 16, 2022).

¹⁸ *Supra* note 5, s. 51.

¹⁹ (2017) CS (COMM) 724/2017.

²⁰ (2016) RFA(OS) 81/2016.

rather the same would depend on whether the nature of the acts by Sci-Hub and other such websites qualify under the exceptions to infringement mentioned in Section 52 of the Copyright Act.

5. Analysis of Legal Provisions in India

On analysing the copyright provisions in India, it is observed that the copyright is largely administered and protected by the Copyrights Act, 1957, under which Section 51 exhaustively defines what can be termed as copyright infringement and Section 52 provides an equally exhaustive list of what is exempted from the provisions of the Act. Keeping this in mind along with the DU Photocopying case, it is important to note that a significant part of the resources procured from websites such as Sci-Hub are used by academicians for their research or educational purposes and hence it is only natural for any individual to draw a parallel line between the provisions of the DU Photocopying case to that of Sci-Hub.

However, Sci-Hub in the objects mentioned on its website clearly self-admittedly states that it provides research material for anyone who wishes to access the same and hence the exemption of educational purposes cannot be claimed here. Further, the provisions of Section 32A²¹ of the Act also provides substantially in the case. Section 32A is a result of the development of IPR in developing countries and numerous negotiations in Stockholm and Paris.

Under this section, a third party can seek permissions of the Copyright Board to reproduce copyrighted material for “systematic instructional activities” if such material is not available in the Indian domain or the prices of the same are exorbitant. These particular provisions make it clear that there is scope to accommodate tools such as Sci-Hub keeping in mind the cost of academic research otherwise.

It would be unfair to impose a cost of ₹1500 crores on an already underfunded academic infrastructure as it would only decrease productivity due to the commercialization of public knowledge, which can, if utilized for research, bring about betterment to society in general.

²¹ *Supra* note 5, s. 32A.

6. Conclusion

It can be established that the odds are stacked against these Academic Robin Hoods and there is a reasonable chance that the Delhi High Court may issue a dynamic injunction against Sci-Hub. This would not only bring an end to the source of academia to many, but would also set a precedent and disincentivize other websites that indulge in privacy, including those on the film and infographic fronts as well.²² Further, it is argued that the onus to make more quality academic research accessible to the public should not be on piracy-based websites, rather must lie on the government in a country like India, where most research is publicly funded.

It is further stated that piracy in any form must be desisted from and relying on the same would reduce the credibility of the same, hence the author is against the mode of which Sci-Hub operates, however is not in opposition of the purpose and object *i.e.*, “Knowledge for All”. To replace dependency on sources such as Sci-Hub, the government or concerned legitimate organizations would need to formulate policy and infrastructure to accommodate the same.

One such example would be ‘cOAlition S’ launched by the European Research Council and the European Commission, which aims to make open access to all research a possibility by focusing on a ‘Plan S’²³, which makes the requirement of ensuring that research publications as a result of grants are allocated by the Coalition is in no way mandatorily monetized.

The “Project Deal” focused on by the German Reactors’ Conference has been given the task to negotiate open access deals with large commercial publishers such as Springer Nature. Observing the same, numerous countries such as Finland and Netherlands have followed suit.

In the Indian Context, the government has already expressed its ambition through the “One nation, One Subscription” policy, by which it proposes to purchase subscriptions to numerous scientific journals in bulk and provide free access to everyone in India. Although this is mooted as a permanent solution to the high prices to the

²² SCI-HUB Case: Legally Removing the Barriers in the Way of Science, *available at*: <http://www.nlujlawreview.in/sci-hub-case-legally-removing-the-barriers-in-the-way-of-science/> (last visited June 30, 2022).

²³ What is cOAlition S, *available at*: <https://www.coalition-s.org/about/> (last visited on July 18, 2022).

exorbitant prices that the normal citizen would otherwise have to shell out, it is to be noted that the burden would still remain on the citizen as it would increase the tax burden on the tax paying population by ₹1500 crores, which is a large amount for a country as large as India.

The author is in strong belief that a system where researchers are remunerated for their research be implemented so as to check the excessive and unjustifiable profits of the publishing houses. Further, key research work as may be identified must be reclassified as open access so as to provide the entire world free access to knowledge that would otherwise be very expensive to avail.

Thus, in conclusion, the author argues that the matter in question is a balancing act between legitimacy of copyright claims, the access to knowledge and the affordability thereof. The current Delhi High Court case will stand as a testament and would tip the scale towards determining whether India depends on free knowledge without conditions or whether there are strings attached.