

COPYRIGHT AND THE PRINCIPLE OF EXHAUSTION IN THE CONTEXT OF ACCESS TO KNOWLEDGE

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Abstract

There has been an increasing overlap and conflict surrounding the principles governing Intellectual Property [“IP”] Law and Human Rights [“HR”]. Through this paper, the author contends that the IP regime should be used as a facilitative tool to achieve broader HR objectives, such as access to knowledge and educational resources. To that end, this paper will specifically look at the principle of exhaustion as an essential tool for increasing access to educational material across the world. The paper will first look at how different international IP and HR treaties and Declarations are interpreted, with regard to access to educational material and the doctrine of exhaustion. It will also look at how different courts, both globally and domestically, have interpreted this doctrine, specifically with respect to educational books and publications. It argues that a universal doctrine of exhaustion, especially pertaining to educational material, should be implemented because the people involved in most cases are students and academicians. This argument is then looked at from the perspective of the digital realm and how this doctrine is applied to e-books, e-libraries etc. Finally, the paper argues for permitting the operation of shadow libraries such as Sci-Hub and Lib-Gen so as to increase access to articles and books, which are usually restricted on account of expensive pay-walls.

I. INTRODUCTION

One of the most contentious debates in the copyright regime is the question of balancing two interests – the rights of copyright holders and the general public’s access to knowledge resources. The underlying theory supporting the premise of copyright is based on the “incentive” granted to the creators of different works, to ensure there is constant innovation and contribution in and to society. It is also necessary to draw the line between overprotecting the rights of the author and ensuring access of these works by people.¹ Article 7 of the Trade-Related Aspects of Intellectual Property Rights [“TRIPS”] stipulates explicitly that the protection of Intellectual Property [“IP”] should *balance* different interests for the overall public welfare.² It thus becomes important to

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¹ George H. Pike, *An Update on Orphan Works*, 24(7) INFO. TODAY 1 (2007).

² Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 7, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS].

balance the right to access knowledge on one hand and the rights of the copyright owners on the other hand.

The Doctrine of Exhaustion is an important principle that needs to be looked at in the context of copyright law and access to knowledge, especially in developing countries and from students' perspective. It implies that the owner of a piece of work would lose control over the distribution of its copy once it has been legitimately sold.³ A subsequent phenomenon resulting from this doctrine is 'parallel importation', often recognised as 'grey market' trade.⁴ Parallel importation is when an "original copyright product (i.e., produced by or with the permission of the copyright owner in the manufacturing country) placed on the market of one country, is subsequently imported into a second country without the permission of the copyright owner in the second country."⁵ While this practice is not looked upon favourably by copyright owners, previous instances have proved that it provides people with different alternatives to a product and ensures economic feasibility in availing books and other essential products.

To that end, the *second* part of the paper will look at the recognition of Access to Knowledge and the Doctrine of Exhaustion in international IP and human rights treaties and their interpretations. The *third* part of the paper will look at the significant developments and important judicial opinions on this principle, specifically relating to access to books and informational material. It will also look at the expansion of this principle in the digital context and the need to rethink its contours. It will look at the challenges facing this application and the recent movements towards combating them as well as the need for a uniform doctrine of exhaustion. The *fourth* and final part of the paper will look at how the exception of fair dealing has been applied to increase accessibility and how it could be further modified to eliminate the existing hindrances in the regime.

II. ACCESS TO KNOWLEDGE VIS-À-VIS INTELLECTUAL PROPERTY RIGHTS

The underlying motivation driving copyright law while discussing academic works is considerably distinct compared to other IP fields. Specifically, the primary incentives behind producing scholarly works are not solely based on monetary compensation, but instead thrive on reputation, dissemination and creating awareness, increasing scientific development, professional advancement, etc.⁶ As such, copyright plays a fundamental role in the promotion of knowledge,

³ Enrico Bonadio, *Parallel Imports in a Global Market. Should a Generalized International Exhaustion be the Next Step?*, 33 EUR. INTELL. PROP. REV. 153 (2011).

⁴ Christopher Heath, *Parallel Imports and International Trade*, WORLD INTELLECTUAL PROPERTY ORGANISATION, https://www.wipo.int/edocs/mdocs/sme/en/atrip_gva_99/atrip_gva_99_6.pdf (last visited May 24, 2022).

⁵ COPYRIGHT AND ACCESS TO KNOWLEDGE: POLICY RECOMMENDATIONS ON FLEXIBILITIES IN COPYRIGHT LAWS 23 (Consumers Int'l. 2006).

⁶ PETER SUBER, OPEN ACCESS 3-4 (MIT Press 2012).

and the regulation of the system directly correlates with the overall well-being and advancement of society.

A. International Human Rights Treaties

Several international treaties and declarations have recognised the right to knowledge and access to resources as a Human Right [“HR”]. Firstly, the Universal Declaration of Human Rights [“UDHR”] lays down that the right to education should be compulsory, free and equally accessible to all individuals.⁷ This right is not restricted to education only in the normative sense but would also include the dissemination of knowledge and the right to access resources and technologies for availing such education.⁸ It also provides the right to equally participate in cultural life and utilise the benefits of scientific developments made in society.⁹ Secondly, the International Covenant on Economic Social and Cultural Rights [“ICESCR”] recognises the rights of an individual to “enjoy the benefits of scientific progress” in society while also ensuring protection to the creators of scientific, literary or artistic works.¹⁰ These provisions point out that the mere availability of resources would be insufficient. Rather, States must take active steps to make resources more accessible and affordable. This also portrays the ‘capabilities approach’ as propounded by Amartya Sen, which assesses social arrangements based on the freedoms that people have to utilise them,¹¹ rather than the mere availability of a particular right.

B. International Intellectual Property Rights Treaties

A brief analysis of the various IPR treaties will point out that copyright acts as a functional tool in facilitating other inherent rights as mentioned above.¹² For instance, the TRIPS agreement under Article 7 states that the IPR regime should contribute to “technological innovation and to the transfer and dissemination of technology”, balancing the advantage of both the creators as well as the end-users and done in a manner beneficial to the overall “social and economic welfare” of

⁷ Universal Declaration of Human Rights, Article 26.1, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

⁸ United Nations Educational, Scientific, and Cultural Organisation, *Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms* (Nov. 19, 1974), <https://www.ohchr.org/en/resources/educators/human-rights-education-training/3-recommendation-concerning-education-international-understanding-co-operation-and-peace-and>.

⁹ UDHR, *supra* note 7, art. 25.1.

¹⁰ International Covenant on Economic, Social and Cultural Rights art. 15, Dec. 16, 1966, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.

¹¹ Sabina Alkire, *The Capability Approach and Human Development*, OXFORD POVERTY AND HUMAN DEVELOPMENT INITIATIVE, available at <https://www.ophi.org.uk/wp-content/uploads/OPHI-HDCA-SS11-Intro-to-the-Capability-Approach-SA.pdf> (last visited Oct. 18, 2021).

¹² Uchenna Felicia Ugwu, *Reconciling the Right to Learn with Copyright Protection in the Digital Age: Limitations of Contemporary Copyright Treaties*, 12 L. DEV. & REV. 41 (2019); U.N., UN Economic and Social Council, Committee on Economic, Social and Cultural Rights, The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant), General Comment No. 17 (2005) dated Jan, 12, 2006, U.N.Doc. E/C.12/GC/17 (2006).

society.¹³ Similarly, Article 8 provides that while formulating IPR law, states should also keep in mind the promotion of public interest, specifically in sectors of vital importance and for the overall development of society.¹⁴ These two provisions of the TRIPs agreement can be seen as the interpretive provisions for the treaty, indicating that copyright law does not exist to merely grant protection to the authors. It should also be balanced adequately with the rights that people hold to access such works for the overall welfare of society.¹⁵ The TRIPS also specifies the importance of reducing the impediments to free trade.¹⁶

The Berne Convention on the Law of Copyright provides for an exception in using protected work while teaching or for educational purposes.¹⁷ However, this right to access does not exist as an independent right and continues to be enforced as an exception, which poses its own problems. Apart from the risk of uncertainty and excessive discretion, implementing a right as an exception would negate the importance of such a right in the first place.¹⁸ In a positive step towards expanding the accessibility of resources, the international community has taken active measures to reduce accessibility barriers for visually impaired and disabled individuals. For instance, the Marrakesh Treaty lists down the obligations on states for making copyrighted as well as other works accessibly to visually impaired individuals,¹⁹ rather than enforcing them as exceptions under the Berne Convention. However, there hasn't been commensurate progress with respect to making educational and academic material accessible to the general public. This theme also becomes important in the context of the digital spectrum, where there haven't been adequate steps taken to expand the principles of both Access to Knowledge and copyright law while dealing with technological resources and online education. This will specifically be looked at in the final part of the paper.

III. UNDERSTANDING THE DOCTRINE OF EXHAUSTION IN THE CONTEXT OF ACCESS TO KNOWLEDGE

A. Doctrine of Exhaustion

The TRIPs Agreement leaves the enforcement of the principle of exhaustion upon each member state, and as such, one would have to look at the respective domestic laws to ascertain what its

¹³ TRIPS, *supra* note 2.

¹⁴ TRIPS, *supra* note 2, art. 8.

¹⁵ Ugwu, *supra* note 12, at 47.

¹⁶ TRIPS, *supra* note 2, Preamble.

¹⁷ Berne Convention for the Protection of Literary and Artistic Works, Article 10, Sept. 9, 1886, 828 U.N.T.S. 221.

¹⁸ David Nimmer, "Fairest of Them All" and Other Fairy Tales of Fair Use, 66 L. & CONTEMP. PROBS. 263, 28 (2003).

¹⁹ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, 52 I.L.M. 1312.

scope and applicability would be.²⁰ This principle impedes the complete enforcement of IPR and provides an important tool for improving access to resources across boundaries. As the discretion about the enforceability of this principle is left upon the respective states, there exists considerable confusion on this matter. Opinions backed by differing movements have upheld the importance of this principle towards granting better access to resources.²¹ Broadly, there are three different types of exhaustion, i.e., national, regional, and international exhaustion.²² National exhaustion provides the utmost protection to the owner of IP as it stipulates that once a product is sold, the copyright owner would cease to have control over the work within the domestic boundaries of the country. On the other hand, regional and international exhaustion provides for broader geographic markets and narrower protection to the owners. International exhaustion would mean that the copyright owner would cease to have control once their work is sold in any part of the world, while regional exhaustion includes within its ambit a broad geographical region such as the European Union. A system of international exhaustion would thus provide for more accessibility across different countries.

An interpretation of the provisions of the Indian Copyright Act [“the Act”] would point towards the fact that it follows the system of “international exhaustion”. Section 14(a)(ii) of the Act, while providing the owner of a Copyright with the right to distribute their works, also lays down the limitation that it would not extend to copies that are “already in circulation.”²³ The wording of the provision is such that the nature of exhaustion cannot be ascertained. One might argue that since the wording does not stipulate copies already in circulation ‘in India’ explicitly, it should be interpreted to mean that the country would follow the principle of international exhaustion. The argument supporting the interpretation as national exhaustion is that the Act is applicable only in India, and, therefore, this provision would have to be interpreted within the domestic boundaries of the country.²⁴ This argument, however, fails – by recognising a copy already in circulation outside the territory of India, it cannot be said that the Copyright Act has extra-territorial application.

²⁰ TRIPS, *supra* note 2, art. 6.

²¹ NAT'L COUNCIL OF APPLIED ECON. RESEARCH, THE IMPACT OF PARALLEL IMPORTS OF BOOKS, FILMS / MUSIC AND SOFTWARE ON THE INDIAN ECONOMY WITH SPECIAL REFERENCE TO STUDENTS (NCAER 2014).

²² Vincent Chiappetta, *The Desirability of Agreeing to Disagree: The WTO, Trips, International IPR Exhaustion and a Few Other Things*, 21 MICH. J. INT'L L. 333 (2000).

²³ The Copyright Act, 1957, §14(a)(ii), No. 14, Acts of Parliament, 1957 (India).

²⁴ Raman Mittal, *Whether Indian Law Allows Parallel Imports of Copyrighted Works: An Investigation*, 55 J. INDIAN L. INST. 504 (2013).

Section 14, read along with section 51 of the Act, establishes that the import of copyrighted work into India would be illegal only in those cases where the product was an infringing copy. Thus, as long as the import and the channel of trade is legitimate, there can be no obstacles to such import. However, judicial opinions have not always upheld the principle of international exhaustion and have prioritised territorial exhaustion in copyrighted works. Further, there has been no explicit discussion on the validity of parallel imports in the context of section 14 of the Act. In the 1985 case of *Penguin Books Ltd v. M/s India Books Distributors*,²⁵ the court held that the importation, publication and distribution of books from different countries (the USA in this case) would amount to the importation of infringing copies of the product. However, the rationale behind restricting parallel importation would not remain relevant to the current analysis since, at the time, section 14 of the Act granted owners of Copyright an “exclusive right to publish” their works without other restrictions. After the TRIPs negotiation in 1994, section 14(a)(ii) was amended to its present version, which does not grant owners the right to control works that are “already in circulation”. However, even after the amendment to section 14 of the Act, the courts have prohibited the parallel import of books. For instance, in *Eurokids International Pvt Ltd v. India Book Distributors*, the court in 2005 held that importing books from an American publisher into India would amount to an infringement, given that there existed a licensed publisher of the books in the Indian territory.²⁶ They looked at the contractual agreement between the parties and relied on the decision laid down in the *Penguin Books* case, even though the law had changed during this time. Therefore, it should be held to be *per incuriam*.²⁷

The previous precedent in the case of *John Wiley and Sons Inc v. Prabhat Chander Kumar* points to the fact that parallel exports is not permitted in those cases where books are priced and sold exclusively in certain jurisdictions.²⁸ In the given case, the defendants purchased books legitimately at a substantially cheaper rate in India and put them up for sale in territories outside what was explicitly permitted. While this does not answer the question of the validity of parallel imports, it unambiguously states that such trade would not be permissible. However, even this decision is flawed. Once a book is legitimately purchased within the country, matters relating to export into other countries and whether they would constitute infringing copies should be determined by the

²⁵ *Penguin Books Ltd v. M/s India Books Distributors*, AIR 1985 Del. 29.

²⁶ *Eurokids International Pvt. Ltd. v. India Book Distributors Egmont Books Ltd.*, (2005) 6 Bom CR 198.

²⁷ Pranesh Prakash, *Exhaustion: Imports, Exports, and the Doctrine of First Sale in Indian Copyright Law*, 5 NUJS L. REV. 635 (2012).

²⁸ *John Wiley & Sons Inc. v. Prabhat Chander Kumar Jain*, ILR (2010) 5 Del 510.

courts of that territory. This highlights the fact that the lack of uniform enforceability regarding doctrines that have conflicting international applications would lead to ambiguity.²⁹

B. Digital Exhaustion

The digital arena poses its unique set of challenges in applying the doctrine of exhaustion. Technology has made the dissemination and distribution of works effortless, thus, giving just cause for concern to the owners of copyrighted works.³⁰ It becomes important to examine the applicability of this principle in light of recent developments in this sphere, including the emergence of e-books, music streaming platforms such as sound-cloud as well as the open access movement, including platforms such as Sci-Hub and Lib-Gen and even digital libraries.

The WIPO Treaty on Copyright [“WTC”] firstly provides that adequate protection must be provided to the creators of work against the circumvention of effective technological measures implemented to protect the work.³¹ This has been implemented in several countries, including the USA, parts of Europe and South Africa to a certain extent.³²

The Indian Copyright Act today provides for the doctrine of exhaustion in the context of literary, dramatic and musical works, excluding software. There has been no expansion to accommodate the advancements made in technology.³³ Further, the courts have resorted to a narrow interpretation of this provision and have restricted their understanding to only those works which have been explicitly covered. For instance, the court in the case of *Warner Brothers Entertainment Inc. v. Santosh V.G* stated that the principle could not be expanded to cinematographic films or other mediums of expression.³⁴ This narrow reading of the doctrine would curtail the accessibility of resources even in the educational sphere, especially with the shift to an online mode of education.

In December 2020, a group of publishers filed a case in the Delhi High Court against sci-hub and Lib-Gen. They contended that Indian ISP providers should block these sites, as they served as a means to bypass the paywall required to access these materials. This is not the first time that lawsuits have been filed against these websites, which has also led to a ban on these pages in different countries. Even though these websites provide important research and academic resources to academicians and students in developing countries, they might not be protected under the exception of fair use or the right of first sale. In this scenario, academic works are not

²⁹ Bonadio, *supra* note 3.

³⁰ Eric Fleischmann, *The Impact of Digital Technology on Copyright Law*, 8 Computer L. J. 1 (1987) 23.

³¹ WIPO Copyright Treaty, art. 11, Dec. 20, 1996, 2186 U.N.T.S. 121.

³² Tana Pistorius, *Copyright in the Information Age: The catch-22 of digital technology*, 20 CRITICAL ARTS, no. 1, 2006.

³³ The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

³⁴ Warner Bros. Entertainment Inc. v. Santosh V.G., 2009 SCC OnLine Del 835.

legitimately purchased in the first instance but are instead pirated and accessed through illegal means. However, there is a need to provide for alternative platforms through which individuals can access resources as several students, academicians, and researchers rely on these services. There is a growing movement pushing towards legitimising the operations of these platforms to improve accessibility across the globe.

This needs to be contrasted with the development of the e-books market. While there has been no Indian case dealing with the issue, the Court of Justice of the European Union has distinguished between physical books and e-books.³⁵ It held that e-books would be considered “communication to the public” as opposed to the sale of physical books classified as “distribution”. It was held in the case that the sale and purchase of e-books would not be hit by the right of first sale, and the ultimate buyer would not have the right to control the further use and distribution of the book. Even in the Indian scenario, conditions restrict the end-users from further transferring the copies. This becomes problematic to the extent that there is increasing demand on libraries to provide e-books instead of physical books. Without the right to lend e-books, the scope of accessibility to resources decreases.³⁶ The position in the USA is similar and was discussed in the case of *Capital Records v. Re. Digi*, where it was held that the sale of used digital music files bought through iTunes would not be covered under the doctrine of first sale and would amount to an infringement of Copyright. What is contentious in this decision is that the court did not consider that for every transfer of a song, the original file was deleted and still considered this transmission as reproduction.³⁷

Devices such as Kindle merely license books to the end-users and do not sell the product, like a physical book.³⁸ At first glance, this provision seeks to protect Copyright owners, however, it is often perceived as ‘extra-copyright law’, as it is a loophole being used outside the scope of the copyright regime.³⁹ This limits the end user’s rights from further transmission of the work and restricts the creation of a legitimate, secondary digital market.

A positive advancement in this direction was the establishment of the ‘National Emergency Library’ in the middle of the pandemic. It operated on the premise of simultaneous, time-bound lending and the maintenance of an “owned to loaned ratio”. However, during the pandemic, they

³⁵ Case C-263/18, *Nederlands Uitgeversverbond v. Tom Kabinet Internet BV*, ECLI:EU:C:2019:1111

³⁶ Balu Nair, *Publisher Restrictions On Ebooks & Impact In India - Spicy IP*, MEDIANAMA (Oct. 19, 2021), <https://www.medianama.com/2016/07/223-publisher-restrictions-ebooks-impact-india-spicyip/>.

³⁷ *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640 (2d Cir. 2018).

³⁸ *Kindle Store Terms of Use*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=200771440> (last updated Mar. 15, 2016).

³⁹ *Growth of A Digital First Sale Doctrine – An Assessment of US and Indian Laws*, ROSTRUM’S L. REV., (Mar. 25, 2016) <https://journal.rostrumlegal.com/growth-of-a-digital-first-sale-doctrine-an-assessment-of-us-and-indian-laws>.

did not adhere to this premise and made books available simultaneously worldwide, thus violating and severely threatening the author's copyright over the work.⁴⁰ Even India's 'national digital libraries' opened up books on the digital platform.⁴¹ Permitting the lending and borrowing of e-books, similar to the operating of a library, where a validly purchased e-copy would be made available to only one person at a time, would further strengthen access in an increasingly digitised world.

Though there is no clarity regarding digital exhaustion, even in international treaties, the "agreed statements concerning the disposition related to distributed rights and exhaustions" adopted on the same day as the WTC stipulated that the term "copies" would be restricted to tangible copies that could be put in circulation only.⁴²

C. Need for a Uniform Doctrine of Exhaustion

Thus, there is a need to lay down the provisions for digital exhaustion of rights in the international and domestic context to increase accessibility even in this realm. Recognising this principle would enable the creation of an alternate market in the digital spectrum and would grant people equal opportunity to access resources.⁴³ Keeping in mind the need to balance the rights of the public and the rights of the owner, the author suggests creating a uniform system of exhaustion while dealing with the transfer of digital works. Keeping in mind the possibility of excessive and easy reproduction, it is important to implement certain technological measures, which have been adopted in the past for digital libraries. Among other things, digital exhaustion of e-books, movies, music etc. should be accompanied by a "delete and forward" feature which would ensure that there is no reproduction. Among other measures, a ratio of bought and borrowed products and encryption should be adopted. By ensuring that anti-circumvention measures are also implemented, one can ensure that such technical protections for copyright are not misused. It is thus possible to ensure that access to resources on the digital platform is enhanced by recognising digital exhaustion, while also taking adequate steps to protect the owner's rights.

⁴⁰ *Internet Archive Continues To Harm Authors*, COPYRIGHT ALLIANCE, <https://copyrightalliance.org/trending-topics/internet-archive-harms-authors/> (last visited Oct. 19, 2021).

⁴¹ Joydeep Thakur, *National Digital Library opens up its digital contents; builds Covid-19 research repository*, HINDUSTAN TIMES, <https://www.hindustantimes.com/education/national-digital-library-opens-up-its-digital-contents-builds-covid-19-research-repository/story-36M8asvDd9GSMiKXTMDN4H.html> (last updated Apr. 26, 2021).

⁴² WIPO, AGREED STATEMENTS CONCERNING THE WIPO COPYRIGHT TREATY, 2-3(1996).

⁴³ Agata Drzewińska, *Digital Exhaustion in European Union* (Unpublished Thesis, Uppsala Universitet 2019), <https://www.diva-portal.org/smash/get/diva2:1325173/FULLTEXT01.pdf>.

IV. FAIR DEALING

While access to educational material is usually protected under the head of fair dealing,⁴⁴ it becomes important to establish a bright-line rule for access to all resources. A case-by-case determination would leave it to the judges' discretion to determine what would constitute educational materials, thereby bringing in the risk of bias and prejudice. Further, the fair dealing exception has not explicitly dealt with digital courses, MOOCs, distance learning etc. In these scenarios, granting a uniform, international exhaustion of rights would reduce the ambiguity prevalent in the field. This principle is widely used in libraries and universities, which enables the distribution of the legitimately procured copy.

In a landmark case, decided in the Supreme Court of the United States of America,⁴⁵ *Kirtsaeng*, a student studying at Cornell imported copies of textbooks manufactured in Thailand from his relatives. These were available at a cheaper rate, and he made a profit by subsequently selling these books in the USA at a slightly higher margin. John Wiley then bought a case against him, and finally, the court held that section 602(1)(a) of the Copyright Act of 1790, which required importers to take prior permission of the owner of the Copyright would also be subject to the Doctrine of First Sale. Thus, any copy legitimately sold, even outside the territory of the USA, could be imported into the country without prior permission of the owner of the work. This makes different options available for purchase and also improves accessibility to books. Uniform application of this principle thus would allow individuals worldwide to access books at rates feasible for them. However, one major criticism which has been put up against this decision is that, by allowing parallel import of books, publishers would resort to increasing the prices of books, even in developing countries, so as to maintain uniformity in their sales and not forgo profits from countries such as the USA. However, market forces in the respective countries would ensure that the prices are adjusted accordingly, thus ensuring that books are easily accessible.⁴⁶

The *Kirtsaeng* case most importantly highlights the problems of not recognising the 'right of first sale' in the context of libraries and museums. Not recognising international exhaustion would imply that libraries might have to ask the author's permission before lending the book each time.⁴⁷

⁴⁴ The Copyright Act, 1957, § 52(1)(i), No. 14, Acts of Parliament, 1957 (India); *The Chancellor, Masters & Scholars of the University of Oxford and Ors. v. Rameshwari Photocopy Services and Ors*, 2016 SCC OnLine Del 6713.

⁴⁵ *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013).

⁴⁶ Ariel Katz, *Copyright, Exhaustion, and the Role of Libraries in the Ecosystem of Knowledge*, 13 ISJLP 81, 88-95 (2016).

⁴⁷ R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 590 (2002).

It is thus important to recognise the validity of parallel importation for the functioning of a free market, improving trade between countries and for cheaper access to copyrighted material.⁴⁸

A. National Perspective

While the Berne convention contains an exception for teaching purposes, the national IP laws of certain countries also include exceptions for private research and studies, educational purposes etc. Accordingly, one needs to look at these exceptions while analysing the issues surrounding Shadow Libraries. Three publishing houses have recently filed a suit for copyright infringement against Sci-Hub and Lib-Gen in the Delhi High Court. The plaintiffs, in this case, have requested the court to grant a dynamic injunction in their favour, blocking the websites providing access to these platforms.⁴⁹ A similar issue was raised in the case of the *University of Oxford v. Rameshwari Photocopy Case*,⁵⁰ in the context of unauthorised photocopying of copyrighted, academic material. The court, in this case, had permitted the reproduction of these works to any extent as long as they were produced for educational purposes.

A fair-use analysis includes a four-prong test which courts have often applied in different jurisdictions, especially the USA.⁵¹ The *first* part of the test looks at the ‘character’ or ‘purpose’ of the use and whether it has been used for a commercial purpose. Shadow Libraries’ primary objective is to improve access to knowledge, and they make no profit in their operations. Further, the purpose for which it is used, i.e., education, usually comes under the broad contours of the fair-use exception listed under domestic laws.⁵² The *second* prong of this analysis looks at the ‘nature of use’. Works utilised for creative purposes would usually not fall under this exception, while informational and educational content would.⁵³ As Shadow Libraries provide access to paywalled, published academic works, their operations would likely be exempted.⁵⁴ While the *third* factor, i.e., the extent of copying, would probably go against Shadow Libraries, several cases have upheld that reproduction and copying for educational purposes might still be categorised as fair use. For instance, in the *DU Photocopy case*, Justice Pradeep Nadrajog emphasised the “extent justified by the purpose” as a measure to look at this prong. Thus, copying for educational purposes was held to be fair use. The *fourth* and final factor looks at the “effect of the use upon the potential market”.

⁴⁸ Aaron Perzanowki & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889, 894 (2010).

⁴⁹ Anushka Jain, *Case Leaning Against Sci-hub, Says Delhi High Court*, MEDIANAMA (May 18, 2022), <https://www.medianama.com/2022/05/223-sci-hub-publishers-lawsuit-hearing-delhi-high-court/>.

⁵⁰ *University of Oxford v. Rameshwari Photocopy Case*, 235(2016) DLT 409.

⁵¹ Copyright Act of 1790, 17 U.S.C. §107 (2021).

⁵² The Copyright Act, 1957, § 52(1)(i), No. 14, Acts of Parliament, 1957 (India).

⁵³ *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁵⁴ *Fair Use*, UNIVERSITY OF CALIFORNIA, <https://copyright.universityofcalifornia.edu/use/fair-use.html> (last visited Nov. 25, 2021).

It is interesting to note that Shadow Libraries have existed for several years, and despite that, publishing houses continue to report profits.⁵⁵ As such, there is no discernible impact on the operations of publishing houses as their primary services cater to universities, research centres and other organisations via a subscription fee. Shadow Libraries, on the other hand, seek to disseminate information to students and researchers who do not have such institutional access or whose universities do not have the requisite funding to avail such resources.⁵⁶

Most importantly, looking at the exception carved out in the *DU Photocopy case*, the courts have rightly held that, irrespective of the extent of infringement, it would be permissible if it is done for educational purposes. This creates a strong argument supporting the operation of Shadow Libraries.

Legalising Shadow Libraries would not only provide an impetus in the enforcement of HRs but would also help overcome the existing norm, which expects only *developed* countries to improve access in *developing* countries. It reduces the prevalent biases and provides an equal opportunity to all worldwide, to access free resources without any of the prevailing obstacles.⁵⁷

B. Copyright Issues in the Context of Shadow Libraries

Shadow libraries are a product of digital innovation, and they host pirated and digital copies of academic resources and books, providing free access to people across the world.⁵⁸ They were primarily created to respond to economic and political conditions that restricted access to academic resources.⁵⁹ Aleksandra Elbakyan, the founder of Sci-Hub, was a Master's Neuroscience student when she began her thesis on biometric scanning. Sci-Hub was a product of personal struggle by Aleksandra as a student and has now turned out to be one of the most significant movements towards open access.⁶⁰ Lib-Gen, on the other hand, is a copyright-infringing digital collection of textbooks, scholarly books etc., accessible easily through a straightforward interface.⁶¹ Both Lib-Gen and Sci-Hub have been declared as copyright infringers in a few courts,⁶² and their

⁵⁵ Katherine Cowdrey, *Elsevier profits up 3% despite 'steeper' print declines*, THE BOOKSELLER (Feb. 23, 2017), <https://www.thebookseller.com/news/elsevier-profits-3-despite-steeper-print-declines-493781>.

⁵⁶ John Bohannon, *Who's downloading pirated papers? Everyone*, SCIENCE (Apr. 29, 2016), <https://www.science.org/doi/10.1126/science.352.6285.508>.

⁵⁷ B.S Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L CMTY L. REV. 3 (2006).

⁵⁸ Joe Karaganis, *Introduction: Access from Above, Access from Below*, SHADOW LIBRARIES: ACCESS TO KNOWLEDGE IN GLOBAL HIGHER EDUCATION 1 (Joe Karaganis ed., 2018).

⁵⁹ BALAZS BODO ET. AL., OPEN ACCESS IS NOT A PANACEA, EVEN IF IT'S RADICAL – AN EMPIRICAL STUDY ON THE ROLE OF SHADOW LIBRARIES IN CLOSING THE INEQUALITY OF KNOWLEDGE ACCESS, (University of Amsterdam 2020).

⁶⁰ Karaganis, *supra* note 58.

⁶¹ Balazs Bodó, *Library Genesis in Numbers: Mapping the Underground Flow of Knowledge*, in SHADOW LIBRARIES: ACCESS TO KNOWLEDGE IN GLOBAL HIGHER EDUCATION 53-55 (Joe Karaganis ed., 2018).

⁶² Elsevier Inc. et al v. Sci-Hub et al, No. 1:15-CV-04282l; American Chemical Society v. Sci-Hub/d/b/a www.sci-hub.cc, John Doe 1-99, 2017, 1:17-cv-00726-LMB-JFA.

administrators do not oppose this fact. However, there is an almost unanimous moral consensus in the academic sphere about the acceptability of shadow libraries. They represent a bottom-up approach to accessing resources because it is sourced by mutual cooperation between academics, scholars, volunteers, etc., in resistance to the excessive pricing models charged by publishers.⁶³ Without dwelling into the specifics of how the current publishing system works, it is important to note that the establishment is skewed towards publishing houses as opposed to the authors, and many agreements between the author and publishing house transfer several rights, including copyright, to the publishers.⁶⁴ In this light, the author will examine the copyright infringement that shadow libraries engage in against the publishing houses and in some cases, the author.

Article 9 of the Berne Convention lays down the rights granted to authors (the publisher in this case) and includes the exclusive right to authorise reproduction. Shadow libraries transcend paywalls and provide pirated copies of academic works to users, thus infringing the right of the publisher to allow reproduction. Most importantly, article 9(2) permits the union to authorise reproduction in certain situations, as long as it does not “prejudice the legitimate interests” of the author. It has been argued that the operation of shadow libraries has a detrimental impact on the copyright holders as they provide an exhaustive alternative to the authorised works. The Berne Convention provides an exception that is restricted to teaching purposes, not encompassing the broad contours of education transmitted through shadow libraries.

V. CONCLUSION

Throughout this paper, one can see that the doctrine of exhaustion in the realm of copyright plays a fundamental role in increasing accessibility. It is important to provide clarity in this field, both physically and in the digital realm. A uniform regime of exhaustion of rights would benefit the overall society, as price discrimination based on an individual’s country or region is now contentious. The distinction between the “first-world” and the “third-world” has blurred. There is a group of financially strong individuals even in developing, third-world countries, and there is an entire group of below-poverty line individuals in first-world countries such as the USA.⁶⁵ This group also extends to students and academicians worldwide who cannot afford the high ranged books. Thus, exhaustion of rights creates a secondary market and provides every individual with the equal opportunity to avail resources in any part of the world. This movement towards accessibility would be furthered with the expansion of the principle to the digital realm and

⁶³ TRIPS, *supra* note 2.

⁶⁴ *Understanding Publishing Agreements*, THE UNIVERSITY OF MELBOURNE, <https://copyright.unimelb.edu.au/information/copyright-and-research/understanding-publishing-agreements> (last visited Oct. 21, 2021)

⁶⁵*Id.*

adequate safeguards for the owners. Digital exhaustion of rights would make books and other material accessible to all individuals at economically feasible rates. Also, with the introduction and increasing popularity of Shadow Libraries, several students and academicians would have the opportunity to access resources that would otherwise be outside their reach, thus contributing to society's overall development and progress.