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## **Criminal Remedies Under Indian Copy Right Act, 1957 - A Critique**

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**Abstract:**

*Copyright violations are increasingly being viewed as criminal acts posing a serious threat to the economy of a nation. The Indian Copyright Act provides criminal remedies for infringement of copyright. However, these provisions leave much to be desired. For example, it is not clear whether Copyright infringement is a bailable or a non-bailable offence. The conflicting decisions given by the various High Courts have only added to the confusion. The paper discusses the criminal remedies provided under the Indian Copyright Act, while at the same time arguing that Copyright infringement is a bailable offence. The paper stresses the need for a legislative amendment to settle doubts and specifically declare copyright infringement as a bailable offence.*

**Key words :** *Infringement, Criminal Procedure Code, bailable*

### **1. Introduction**

More than ever before, lawmakers and copyright owners are viewing copyright violations as just not lost profits or 'free riding' by consumers but rather as criminal acts posing a serious threat to financial stability, employment and creative innovation.<sup>i</sup>

Copyright protection is not only the concern of the copyright holder but also of the society at large, through the immediate victim is the owner. Many a thing which has not been intended by the author could be disseminated in the society by copyright piracy. He could be misquoted, quoted out of context with a view to distort the meaning, and thus mislead the society. Moreover, the protection of the individual's right is in the public interest. If a man's right in relation to a subject in which society is also interested, is violated it should be possible for any citizen to turn the wheel of criminal law...<sup>ii</sup>

The Copyright Act, 1957 declares the infringement of copyright or any other right conferred under it as a criminal offense.<sup>iii</sup> Thus, infringers of copyright can, in addition to civil proceedings, be subjected to criminal proceedings. These two remedies are distinct and independent and can be availed of simultaneously.<sup>iv</sup> However, the courts are usually reticent in invoking criminal jurisdiction while a civil suit for infringement of copyright is pending.

The advantages of criminal remedies are obvious. Infringement is likened to theft of intellectual property involved and the sanctions, fines in the first place and imprisonment in case of recidivism have, as all criminal sanctions are intended to have, a deterrent effect.<sup>v</sup> Besides this, criminal proceedings are disposed off faster than civil proceedings.

Criminal remedies, however, have their share of disadvantages. Firstly, a criminal proceeding does not enable the copyright to get an injunction. Secondly, there is a high burden of proof on the prosecution in criminal proceedings. The defendant must be shown to be guilty beyond reasonable doubt and not merely on a balance of probabilities. Thirdly, in criminal proceedings, proof of men's 'rea' in the defendant is essential. This would mean that the defendant either had knowledge or had reason to believe that he was committing an infringing act or other offenses. Fourthly, a criminal proceeding may result either in imprisonment or fine, both of which would fail to compensate the copyright owner, at least monetarily.

### **2. Essentials of Criminal Proceedings for Copyright Infringement**

In order to succeed in a criminal action against copyright infringement, it is essential to prove the following things:

- That the defendant infringed or abetted the infringement of
  - Copyright in a work; or
  - Any other right conferred by the Copyright Act except the right to resale share in original copies conferred by section 53 A.
- That the defendant did so knowingly.

Unlike the U.S. Copyright Act, 1976, which requires proof of either a proscribed motive (commercial advantage or private financial gain), or proscribed effect,<sup>vi</sup> the Indian Act postulates no such requirement. All that it says is that where the infringement has not been made to gain in the course of trade or business, the court may in its judgement record the reason for the imposition of the sentence or fine as the case may be.<sup>vii</sup>

This proviso, it is submitted is in direct contradistinction to the rationale underlying criminal penalties: to provide protection against pirates who 'are both financially irresponsible and transient in their business locations, making injunctions and civil damages futile.

Criminally penalizing a person for infringement in which he might indulge for harmless fun, would stifle the creative process which copyright law aims to promote. A civil remedy would serve the purpose in such cases. Sample this: a college student swapping music files with his friends can be held criminally liable for copyright infringement. This proviso stands like a Damocles sword on the very activities that copyright law aims to promote: the growth of learning and culture for public welfare. It is submitted that while protection of copyright is important, an overzealous approach can have a devastating effect on the dissemination of information which is so essential for progress— both scientific and cultural. It is thus submitted that this proviso which has the potential to turn an innocuous activity into a criminal offense should be deleted.

### 2.1. Infringement

Like a plaintiff in a civil action, the complaint in a criminal proceeding must establish infringement of copyright.

### 2.2. Knowledge of Infringement

Men's 'rea' is an essential ingredient of the offense of infringement in a criminal proceeding. In *Cherian P. Joseph v. Prabhakaran*,<sup>viii</sup> it was held that clear and cogent proof of knowledge is necessary to establish the commission of the offense. In *Gheru Lal v. State*,<sup>ix</sup> Gyanendra Kumar J. observed that the bare perusal of Section 63 shows that the accused must have knowingly infringed the copyright. In order to prove that the accused had knowledge of infringement, production of the infringing copies would clearly be the best evidence.

### 2.3. Sanctions

The offense of infringement of copyright offense is punishable with imprisonment which may extend from a minimum period of six months to a maximum of three years and with a fine which shall not be less than Rs. 50,000 but which may extend to Rs.2 Lac.<sup>x</sup> Where the offense is repeated, the infringer shall be punished for the second and every subsequent offense, with imprisonment for a term which shall not be less than one year but which may extend upto three years and with fine which shall not be less than Rs. 1 Lacs but which may extend upto Rs.2 Lacs.<sup>xi</sup>

The Act prescribes a lesser sentence of imprisonment and lower amount of fine where the infringement has not been made to gain in the course of trade or business.<sup>xii</sup>

## 3. Nature of the Offense of Copyright Infringement

There are three categories of offenses which are created by Part II of Schedule I of the CrPC. The first category of the offenses which prescribe the punishment of death, imprisonment for life, or imprisonment for more than seven years, are 'cognizable', 'non-bailable' and subject to trial, by a Court of Session. The second category of offenses, which prescribe the punishment of imprisonment of three years and upwards, but not more than seven years, are 'cognizable', 'non-bailable' and subject to trial by a Magistrate of First Class. The third category of offenses, which prescribe the punishment of imprisonment for less than three years or with fine only, are 'non-cognizable', 'bailable' and subject to trial, by any Magistrate.

The question that has come for consideration before the Courts is whether Copyright infringement is bailable or non-bailable offense. This, would in turn, depend upon whether it falls in the second or in the third category of offenses postulated under Part II of Schedule I of the CrPC. The difficulty stems from the fact that Section 63 of the Copyright Act prescribes that the intentional infringement or abetment of infringement of Copyright in a work shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years.

There is no clarity with regard to the sphere within which the offense of Copyright infringement which is punishable with "imprisonment which may extend upto three years" falls i.e. it is unclear as to whether it falls in Category II or Category III of Part II of Schedule I of CrPC which in turn would determine whether Copyright infringement is a bailable or non-bailable offence. What has compounded the problem further, are the conflicting decisions given by various High Courts in India. For example, the Gauhati High Court in *Jitendra Prasad Singh v. State of Assam* was of the view that the offense punishable under Section 63 of the Act is non-bailable offense and therefore the provision of the Section 438 of the Code of Criminal Procedure (which deals with anticipatory bail) would get attracted. The underlying basis for the decision rendered was that the punishment prescribed for a term 'which may extend to three years' would include in itself a term of imprisonment which can be for as long as three years.<sup>xiii</sup>

The Andhra Pradesh High Court in *Amarnath Vyas v. State of Andhra Pradesh*<sup>xiv</sup> rejected the decision of the High Court of Gauhati in *Jitendra Prasad*. In this case Amarnath Vyas had filed an application under Section 438 of the Criminal Procedure Code for anticipatory bail having regard to the accusation that he perpetrated the offense punishable under Section 63 of the Copyright Act. Initially the High Court dismissed the anticipatory bail on the ground that the offense alleged was bailable and no application for anticipatory bail could be maintained as it could be provided only for non-bailable offenses. The Public Prosecutor urged the High Court to reconsider its decision and hold that the offense of infringement of copyright is a non-bailable one. The main contention of the Public Prosecutor was that because the punishment prescribed under Section 63 is a minimum sentence of six months and the maximum sentence, which may extend up to three years, it would fall within the domain of the second category of Part II of schedule I. The Court in paragraph 8 of the judgment observed.

*The expression 'punishment for a term which may extend to three years is certainly not similar to the expression 'punishment for three years and upwards.'*<sup>xv</sup>

In *Suresh Kumar v. The Sub Inspector of Police*<sup>xvi</sup> The Kerala High Court was confronted with the question as to whether the offense of infringement of copyright was a cognizable offense. The judgment of the Court was that copyright is a cognizable offense. The judgment of the Kerala High Court is based on the premises that the punishment for the offense of infringement of copyright is imprisonment for three years. This is evident from the fact that at the very outset in paragraph 2, the learned judge has observed,

*Section 63, according to me, is clearly punishable with imprisonment for 3 years and in these circumstances the offense has to be held to be cognizable.*<sup>xvii</sup>

This difference of opinion between the various High Courts merits a closer look at the interpretation of Section 63.

The reference here must be made to the judgment of the Supreme Court in *Avinash Bhosale v. Union of India*,<sup>xviii</sup>. Which was given in the context of the Customs Act. The question before the Supreme Court in this case was whether the offense under Section 135 (1) (II) of the Customs Act of 1962 which is punishable with imprisonment for a term which may extend to three years or fine or with both is bailable or non bailable. The Supreme Court held that the offense punishable under Section 135 (1) (II) of the Customs Act, 1962 (Act of 1962) is bailable.

It is submitted that since Section 63 of the Copyright Act employs the same terminology as Section 135 (1) (II) of the Customs Act, therefore the decision of the Supreme Court in *Avinash Bhosale v. Union of India*,<sup>xix</sup> would also apply in case of Section 63 of the Copyright Act.

What lends further credence to this argument is that Section 64 of the Copyright Act specifically empowers a police officer not below the rank of Sub-Inspector to seize the infringing copies of any work. If the offence had been cognizable and non-bailable, there was no necessity to specifically authorize the police officer with the power of seizure. In *Super Cassette Cassetes Industries v. MySpace & Another*<sup>xx</sup> the Delhi High Court observed "It is well settled canon of construction that the court should adopt the mode of construction which upholds the provisions of the Act and make them workable and the interpretation which makes any provision of the Act otiose must be eschewed."<sup>xxi</sup>

In *High Court of Gujarat and Anr. v. Gujarat Kishan Mazdoor Panchayat and Ors.*<sup>xxii</sup>, The Supreme Court held that "It is also a well-settled principle of law that an attempt should be made to give effect to each and every word employed in a statute and such interpretation which would render a particular provision redundant or otiose should be avoided." It is submitted that if Section 63 is interpreted as implying that the offense punishable under it is non bailable, then such an interpretation will render Section 64 of the Copyright Act otiose or meaningless. The said interpretation thus leads the purpose of Section 64 as redundant. On the contrary, if the Section 63 is read as creating a bailable offense, both the provisions are rendered workable and meaningful.

#### 4. Conclusion

In the light of the foregoing discussion, the judgment of the Supreme Court in *Avinash Bhosale vs. Union of India* and Section 64 of the Copyright Act, it is clear that Copyright Infringement is a bailable offense.

It is however, submitted that for the removal of all doubts, Section 63 should be expressly declared to be a bailable offense.

#### 5. References

1. iBernstein Karen, J. (2001). *The Evisceration On Sentencing guidelines under the No electronic theft* 27 New Eng. J. on Crim. & Civ. Confinement 57, 59-62.
2. Gopalkrishnan, N.S. (1994). "Criminal Law and Intellectual Property: Current Practice", 70 36 JILI 64.
3. Section 63 Copyright Act 1957.
4. Narayana, P. (2002). "Copyright and Industrial Designs" 30 Kolkata.: 3rd ed. Eastern Law House Pvt. Ltd.,
5. See Stewart, S.M. (1989). "International Copyright and Neighboring Rights"36, London : Butterworths.
6. Section 506(a)(1) and (2).
7. Proviso to Section 63. The proviso provides for a sentence for a term of less than 6 months or fine or less than Rs.50,000.
8. AIR 1967 Ker 234.
9. AIR 1965 All 206 at 208
10. Section 63.
11. Section 63 A.
12. Proviso to sec 63,63A and 63B
13. 2003 (26) PTC 486 (Gau).
14. 2007 Cri LJ 2025
15. Ibid
16. 2007 (3) KLT 363.
17. Ibid.
18. (2007) 14 SCC 325
19. Ibid
20. 2011(47) PTC49(Del.)
21. Ibid 102
22. [2003] 2 SCR 799