

COPYRIGHT INFRINGEMENT AS A COGNIZABLE AND A NON-BAILABLE OFFENCE

Written by Siddharth Rawat

4th Year BA LLB Student, Institute of Law Nirma University, Ahmedabad, India

ABSTRACT

This research paper deals with one of the most pressing issues in the field of Intellectual Property Rights (IPR), that is, Copyright Infringement. Copyright is a special and an exclusive right granted to the author or creator of any authentic and an original work. The person who first comes up with any new idea or work (whether literary, artistic, dramatic, cinematographic, etc), that is, the first and original author of any work, is the one who has the right and is entitled to claim sole ownership in the work, excluding all others from using or exploiting the work without his permission for any purpose whatsoever. This ownership that enables the author to exclude others from using his work is called copyright and having a copyright establishes the proof of an author's ownership over a work. Copyright enables the author to protect and preserve his originality and creativity against the world at large. For a better protection and recognition, the copyright must always be registered. Registration of copyright helps in cases of copyright infringement as well. Copyright Infringement is the offence of infringing or violating an author's copyright over a work. When a person comes up with a similar work or an idea that has already been granted a copyright, it amounts to copyright infringement. Copyright Infringement is a grave and a heinous offence. Just as we talk about theft or stealing being a criminal offence, copyright infringement amounts to the theft of ideas and works of another person. Despite this, copyright infringement continued to be a non-cognizable and a bailable offence. However, through a recent judgement of the Apex Court in a case, the offence of copyright infringement has been declared to be a cognizable and a non-bailable offence. This new ruling of the Apex Court is the topic for discussion of the paper, with which it is concerned about. The paper confines itself strictly to the Indian context. It begins by throwing some light on the history of copyright in the country and its evolution. It then discusses the offence of copyright infringement as per the Copyright Act of 1957. Further, it moves on to talk about the

existing loopholes under the Copyright Law. It then moves on to discuss the latest judgement of the Apex Court that declared copyright infringement to be a cognizable and a non-bailable offence. The court's ruling in light of its interpretation of section 63 of the Copyright Act is also discussed. An attempt has been made to analyze the judgement of the Supreme Court from the author's point of view. Moving forward, some of the aspects and areas of concern with respect to the said judgement are also discussed. Finally, the paper would conclude by talking about the valuable solutions and ways of curbing the menace of copyright infringement.

Keywords: Copyright Infringement, Cognizable Offence, Non-Bailable Offence, Section 63 of Copyright Act, 1957, Existing Loopholes under the Copyright Act, Interpretation of Section 63 of Copyright Act, Analysis of the Latest Judgement of the Supreme Court on Copyright Infringement.

INTRODUCTION

The paper would begin by discussing the statutory definition of Copyright, as given under the Copyright Act of 1957. According to Section 14 of the Act, 'Copyright' means the exclusive right subject to the provisions of this Act, to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof, namely:-

- (a) *in the case of a literary, dramatic, or musical work, not being a computer programme,*
- (i) to reproduce the work in any material form including the storing of it in any medium by electronic means;
 - (ii) to issue copies of the work to the public not being copies already in circulation;
 - (iii) to perform the work in public, or communicate it to the public;
 - (iv) to make any cinematograph film or sound recording in respect of the work;
 - (v) to make any translation of the work;
 - (vi) to make any adaptation of the work;
 - (vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);
- (b) *in the case of a computer programme,-*

- (i) to do any of the acts specified in clause (a);
- (ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme:

Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.

(c) in the case of an artistic work, -

- (i) to reproduce the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work;
- (ii) to communicate the work to the public;
- (iii) to issue copies of the work to the public not being copies already in circulation;
- (iv) to include the work in any cinematograph film;
- (v) to make any adaptation of the work;
- (vi) to do in relation to an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (iv);

(d) In the case of cinematograph film, -

- (i) to make a copy of the film, including a photograph of any image forming part thereof;
- (ii) to sell or give on hire, or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;
- (iii) to communicate the film to the public;

(e) In the case of sound recording, -

- (i) to make any other sound recording embodying it;
- (ii) to sell or give on hire, or offer for sale or hire, any copy of the sound recording, regardless of whether such copy has been sold or given on hire on earlier occasions;
- (iii) to communicate the sound recording to the public.

Infringement of Copyright poses a big threat to its protection. The idea of copyright protection gained its recognition after the invention of the printing press in the 15th century, which enabled reproduction of literary work. Copyright has come to limelight due to the growing

interest in the topic owing to the progress in Information Technology, advancement in the fields of digital printing, communication and entertainment. Technological progress has made reproduction of copyright material easy. At the same time, piracy of original work has also grown immensely. Copyright is international in nature and hence, many countries together joined to form conventions for protection of copyright. The Berne Convention and the Universal Copyright Conventions are due to that effort. Most countries, including India, are members of these conventions. Therefore, Indian Copyright owners can protect their ownership of copyright internationally. The Copyright Act, 1957, the Copyright Rules, 2013, and the International Copyright Order, 1999, monitors copyright protection in India.

BRIEF HISTORICAL BACKGROUND AND EVOLUTION OF COPYRIGHT IN INDIA

Copyright law emerged in India in 1847 through an enactment during the East India Company's rule. As per the 1847 enactment, the tenure of copyright was for the lifetime of the author plus seven years post-mortem. At no cost, the total term of copyright could exceed a period of forty-two years. The government could grant a compulsory license to publish a book if the owner of the copyright, after the death of the author, refused to allow its publication. The act of infringement was comprised in a person's unauthorized printing of a copyright work for (or as a part of attempt of) 'hire or exportation', or 'for selling, publishing, or exposing to sale or hire'. Any suit or action for infringement was to be instituted in the 'highest local court exercising original civil jurisdiction'. The Act specifically provided that under a contract of service, copyright in 'any encyclopaedia, review, magazine, periodical work, or work published in a series of books or parts', shall vest in the "proprietor, projector, publisher, or conductor'. Infringing copies were deemed to be copies of the proprietor of the copyrighted work. Back then, copyright in a work was not automatic unlike now. Registration of copyright with the Home Office was mandatory for the enforcement of rights under the Act. However, the Act also specifically reserved the subsistence of copyright in the author and his right to sue for its infringement to the extent available in law other than the 1847 Act. In 1914, the legislature enacted a new Copyright Act, that extended to India, most portions of the United Kingdom Copyright Act of 1911. It made a few minor modifications to the then existing Indian Copyright Act. Firstly, it introduced criminal sanctions for copyright infringement (Sections 7

to 12). Secondly, it modified the scope of the term 'copyright'. Under section 4 of the Act, the 'sole right' of the author to produce, reproduce, perform, or publish a translation of the work, subsisted merely for a duration of ten years from the date of first publication of the work. The 1914 Act continued to be in force with minor adaptations and modifications until the 1957 Act was brought into force on 24th January, 1958.

The Copyright Act of 1957 was amended in 1983, 1984, 1992, 1994, and 1999. In May of 2012, both the houses of the Indian Parliament unanimously passed the Copyright Amendment Bill, 2012, making the Indian copyright law to comply with the World Intellectual Property Organization Treaties, such as, the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). There were certain significant amendments made to the Copyright Act in 2012. These were as follows - the Copyright Act of 1957 was brought in conformity with WCT and WPPT, copyright protection was extended in the digital environment, such as, penalties for circumvention of technological protection measures and rights management information were introduced and liability of internet service providers and statutory licenses for cover versions and broadcasting organizations were introduced, authors and music composers were given the right to receive royalty, exclusive economic and moral rights were provided to performers, equal membership rights in copyright societies for authors and other right owners were introduced, and exception was made for the physically disabled under copyright to access any work.ⁱ

COPYRIGHT INFRINGEMENT AS PER COPYRIGHT ACT, 1957

Section 51 of the Copyright Act, 1957, says that a work is considered to be copyright infringed when:

1. A person has obtained a license without the permission of the copyright owner or the Registrar of Copyright, or has breached the condition of the license that was granted or any other condition imposed by the authority under the Act:
 - a. If the person has violated the exclusive right of the copyright owner, or
 - b. If the person has the work used for communication to the public which amounts to infringement of the copyrighted work, except if he or she is not aware or had no

reasonable ground to believe that such communication to the general public does amount to infringement of the copyright, or

2. When a person,
 - a. Makes a sale for hire, sells or lends it for hire by way of trade display of the infringed copyright, or
 - b. It is distributed for trade which affects the owner of the copyright or
 - c. It is exhibited in public through trade, or
 - d. It is imported into India any infringed copy of work except one copy of any work, for the domestic or private use of the importer. If a cinematograph film has reproduced a dramatic, literary, artistic, or musical work, it will be a copyright infringement.

However, an act that involves ‘**fair use**’ of a work, does not amount to infringement. However, the ambit of ‘fair use’ is much debatable and it is up to the court to decide it in each case, which varies in facts and circumstances. For example, if the copyrighted work is used for study, research, report, review, legislation, etc, without the permission of the owner, then it will still not amount to copyright infringement. Also, there are certain exceptions to copyright infringement under Section 52 of The Copyright Act, 1957. These are - Personal or private use, which includes research, review, or criticism of a particular work or any other work, the reporting of current affairs, and events that include reporting or a lecture delivered in public. ⁱⁱ

Section **63** of the Copyright Act provides punishment for copyright infringement. Section 63 of the Copyright Act says, “Offence of infringement of copyright or other rights conferred by this Act. —Any person who knowingly infringes or abets the infringement of—

- (a) the copyright in a work, or
- (b) any other right conferred by this Act, [except the right conferred by section 53A] [shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees: Provided that [where the infringement has not been made for gain in the course of trade or business] the court may, for adequate and special reasons to be mentioned in the judgment, impose a

sentence of imprisonment for a term of less than six months or a fine of less than fifty thousand rupees.] Explanation.—Construction of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work shall not be an offence under this section.ⁱⁱⁱ

Initially, Section 63 of the Act prescribed punishment for the offence of copyright infringement to be punishable with imprisonment, which extended to one year or fine or both. Therefore, the maximum punishment prescribed then was one year. The said provision of law underwent an amendment by the Amending Act 65 of 1984. The maximum duration of punishment was changed from one year to three years.^{iv}

Under the Copyright Act, 1957, the owner possesses negative rights, which are to prevent others from using his works in certain ways and to claim compensation for the usurpation of that right. In this Act, there are two types of rights given to the owner. These are – Economic Rights and Moral Rights.^v The economic rights provide the author to enjoy the financial benefits out of their work or creation. The creator can earn royalty by assigning rights to others either fully or partially. The most commonly available economic rights that are provided to copyright holders are - Adaption rights, Distribution rights, Public performance rights, and Public display of works rights. In case of moral rights, the Copyright law always protects the creator even after the assignment of copyright work to others either fully or partially. Moral rights grant an author the right to have his name kept on the work forever and protects them from any distortion or modification of the work, or other offensive action in relation to the work which would damage the author's reputation. Hence, these rights protect and preserve the reputation, image, and goodwill of authors.^{vi}

Section 57 of The Copyright Act,1957 recognize two types of moral rights which are:

- A. Right to Paternity**– It incorporates the author's right to assert his authorship of the work and the right to forestall others from claiming authorship in the work; and
- B. Right to Integrity**- It incorporates the author's right to restrain, or claim damages in case of any distortion, modification, mutilation, or any other act in regards to the said work if such distortion, multiplication, or alternative act, would pose a threat to the author's honor or name.^{vii}

EXISTING LOOPHOLES UNDER THE COPYRIGHT LAW

The Copyright Act is silent on the type and nature of the offence of Copyright Infringement (whether cognizable/non-bailable or non-cognizable/bailable). This interpretation is therefore, left open at the discretion of the courts. So when the specific classification is not there, the provisions of the Code of Criminal Procedure, 1973 (CrPC) are required to be made as it provides the classification for the offence which are cognizable or non-cognizable, irrespective of the statute under which the offence might have been committed.

Here, it would be relevant to refer also to the provision of Section 64 of the Copyright Act, which empowers a police officer, not below the rank of Sub-Inspector, to seize and confiscate the copies of any work which are infringing and observed that if the offence had been cognizable and non-bailable, why was there a necessity to specifically authorize the police officer with the power of seizure. The classification of offences in Part II of the First Schedule of the Criminal Procedure Code, 1973, in cases of offences under other laws, is as follows :

- The first category consists of offences that are ‘punishable with death, imprisonment for life, or imprisonment for 7 years’. These are cognizable and non-bailable offences.
- The second category consists of the offences that are ‘punishable with imprisonment of 3 years and upwards but not more than 7 years’. These are cognizable and non-bailable offences.
- The third category consists of offences that are ‘punishable with imprisonment for not less than 3 years or with fine only’. These are non-cognizable and bailable offences.

According to Section 63 of the Copyright Act of 1957, imprisonment for a minimum term of six months and a maximum term of 3 years and/or fine from Rs. 50,000 to Rs. 2,00,000, is given for offences of copyright in India. ^{viii} It is the phrase ‘which may extend to three years’, which is the root cause of all confusion as the next question which comes up is whether the offence of copyright infringement would fall under the second category or the third category of Part II of Schedule I of the Criminal Procedure Code, 1973. ^{ix} It is this very issue that has come up before the courts for consideration in several cases but has continued to remain unresolved.

POSITION TAKEN BY THE COURTS WITH RESPECT TO THE INTERPRETATION OF SECTION 63 OF THE COPYRIGHT ACT, 1957

Various High Courts in the country have given a different interpretation to Section 63 of the Copyright Act. Some held the offence of copyright infringement to be a cognizable/non-bailable offence, while others held it to be a non-cognizable/bailable offence. Thus, the nature of the offence remained uncertain. This was however, recently clarified by the Supreme Court in the case of '**M/s Knit Pro International Versus The State of NCT of Delhi & Another**'. The Apex Court held that, for the offence under Section 63 of the Copyright Act, the punishment provided is imprisonment for a term which shall not be less than six months but which may extend to three years and with fine. Therefore, the maximum punishment which can be imposed would be three years. Therefore, the accused for a period of three years also. In that view of the matter considering Part II of the First Schedule of the CrPC, if the offence is punishable with imprisonment for three years and more but not more than seven years, the offence is a cognizable offence. Only in a case where the offence is punishable for imprisonment for less than three years or with fine only, the offence can be said to be non-cognizable. In view of the above clear position of law, the decision in the case of **Rakesh Kumar Paul** relied upon by the Learned Counsel appearing on behalf of Respondent No. 2 was held to be non-applicable. The language of the provision in Part II of the First Schedule is clear and unambiguous. Under the circumstances, the High Court committed a grave error in holding that the offence under Section 63 of the Copyright Act is non-cognizable. Hence, the High Court committed a grave error in quashing and setting aside the criminal proceedings and the FIR against the Respondent No. 2. The Supreme Court, thus, reversed the impugned judgment and order passed by the High Court quashing and setting aside the criminal proceedings/FIR under Section 63 of the Copyright Act. The court was of the view and held that, the offence under Section 63 of the Copyright Act is a cognizable and non-bailable offence. Consequently, the impugned judgment and order passed by the High Court taking a contrary view was set aside and dismissed and the criminal proceedings against Respondent No. 2 for the offence under Sections 63 and 64 of the Copyright Act shall go ahead according to the law and on its own merits, treating the same as a cognizable and a non-bailable offence.^x

It is now clear that copyright infringement is a cognizable and a non-bailable offence, for which, the police can arrest the accused without obtaining a warrant from the court. Another

aspect of section 63 that has to be looked into is the phrase ‘**knowingly infringes or abets the infringement of copyright**’. If we look closely at the language of Section 63, it brings out the fact that copyright infringement is punishable in case someone ‘**knowingly** infringes or abets the infringement of copyright’ of any work. Thus, it can be said that having ‘**knowledge**’ is a precondition for making the offence of copyright infringement punishable. But what exactly constitutes knowledge is something that has to be seen and looked into. In the case of ‘**AK Mukherjee vs State**’, the Delhi High Court held that, “The words used in section 63 demand the existence of knowledge at the end of the accused of his infringement of copyright. The proof of a mere possibility of his possessing the knowledge alone would not be enough. It is imperative that there exists a clear and conclusive proof of the said knowledge. In a way, the use of the word ‘**knowingly**’ in the provision requires possessing the criminal element of ‘**intention**’ or ‘**mens rea**’ in the full sense”.^{xi}

ANALYSIS OF THE JUDGEMENT OF THE SUPREME COURT IN ‘M/S KNIT PRO INTERNATIONAL VERSUS THE STATE OF NCT OF DELHI & ANOTHER’

The judgement of the Supreme Court is well acknowledged and appreciated. It provides a huge sigh of relief to those, who actually and truly are worthy of reward for their hard and meritorious labour. The judgement has made an attempt to ensure that the intellectual property rights of authors are well protected and recognized in the eyes of each and every individual in the society. By making copyright infringement a cognizable and a non-bailable offence, the judgement will instill a sense of fear in the minds of copyright infringers, who would stay away from committing the offence due to the constant pressure of facing harsh penal consequences. The Police has now been given the power to arrest the infringer directly and immediately without obtaining a warrant from the Court. This will save a lot of time and prevent further damage and harm to the author since the investigation will proceed in a fast fashion and the accused will be brought to justice in no time.

The judgement overall, seems to be in the best interests of authors and creators of different works under copyright. It has taken into consideration the pain and agony encountered by authors in the form of heavy losses and damages when the work of their own genius is stolen

by an infringer and fraudulently taken credit for. The judgement will restore and preserve the honour, dignity, and goodwill of copyright holders. Further, as copyright infringement has been made a cognizable and a non-bailable offence, the infringers, due to the fear of arrest and no bail, will be forced to come up with something new and original of their own rather than aping the work of someone else. This would further boost and promote creativity and innovation in the nation.

Besides the merits of the judgement pronounced by the Supreme Court, there are also some concerns with respect to the same. Firstly, the copyright owners may threaten the infringers by using police involvement to extort excess license fees, in a situation where the police cannot get involved without prior judicial authorization. As the offence has been made cognizable and non-bailable, the accused has lost the right to post a bail bond with the police and it has shifted the burden on the courts for judicial determination on a case-by-case basis. There are issues in allowing the police to begin criminal investigations into copyright infringement. This is because under the Copyright Act, it is not compulsory to register the copyright for enforcing the same. A copyright is created at the very moment when any work of art or music or literature is fixed on a medium, provided the work is original. It may be difficult to assess whether the said work of art or music or literature is 'original' in the true sense. Even if we presume that originality is undisputed, the question is whether the use of the copyrighted work is permissible under all the provisions in Section 52 of the Copyright Act, that deals with the limitations and exceptions to copyright infringement. One of the provisions in Section 52 deals with '**fair dealing**', which is a vexatious question of law in itself. There are also special clauses under the Copyright Act which extinguish copyright in copyrighted works in certain cases. For instance, if a work is qualified for protection under the Designs Act of 2000, it cannot claim protection under the Copyright Act. Further, in order to determine whether the offence of copyright infringement has been committed or not, the court applies the test of '**Substantial Similarity**' that is both qualitative and quantitative, on a case-by-case basis. Also, the current standards of training and funding of the investigation officers to carry out a sound investigation into complicated issues of law is low and poor. Thus, we cannot give them the benefit of doubt.^{xii}

CONCLUSION

Copyright Infringement is a serious and an unpardonable offence, just like any other ordinary crime. The Supreme Court has given a remarkable judgement by declaring copyright infringement a cognizable and a non-bailable offence. This serves the interests of the copyright holders by protecting and preventing their work from any sort of cheating or imitation. The judgement is a big shout out to those who think that it is easy to get away with invading upon someone else's property (intellectual property) without facing any consequences for the same. But this myth has now been broken. However, it must be kept in mind that under copyright, it is not the idea but, the expression of the idea that is protected. Hence, efforts must be made to restrain oneself from indulging in blind imitation. However, this does not mean that one cannot take ideas from a copyrighted work at all. The very purpose of copyright is to enable and encourage new innovation and development. It intends that the people take inspiration and help from the copyrighted idea to come up with something new of their own. It is the expression of that idea that must not be similar to that of the author's. Expression is something that stems from your own thoughts and imagination. Hence, the expression of each individual is different and unique. Coming up with one's own expression facilitates creativity and innovation in the society. And if this is not done so, it amounts to the offence of copyright infringement, for which the accused can now be arrested by the police without obtaining any warrant from the court. As far as the author is concerned, he can claim the necessary costs, damages, and compensation from the accused. Further, the author can also seek various remedies available under the law. There are civil as well as criminal remedies available under the law. After all, copyright infringement is not only a violation of the author's intellectual property, but it also tarnishes his image and reputation in the eyes of the public at large.

REFERENCES

-
- ⁱ Suvrashis Sarkar, History and Evolution of Copyright in India, 5 PARIPEX – I.J.R. 274, 274 – 75 (2016).
ⁱⁱ Ashutosh Singh, All you need to know about copyright and trademark offences, IPLEADERS (Aug. 27, 2021), <https://blog.ipleaders.in/need-know-copyright-trademark-offences/>.
ⁱⁱⁱ The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).
^{iv} Poonam Gandhi, Section 63 of Copyright Act is a cognizable offence, hence police can register FIR on receiving complaint, TAXGURU (Feb. 05, 2022), <https://taxguru.in/corporate-law/section-63-copyright-act-cognizable-offence-police-register-fir-receiving-complain.html>.

^v Shalu Gothi, An overview of the Copyright Act, 1957, IPLEADERS (Mar. 30, 2020), <https://blog.ipleaders.in/an-overview-of-the-copyright-act-1957/>.

^{vi} Dhairya Varshney, Analysing Copyright Law : Historical Evolution, Rights, Limitations, Exceptions and Remedies, LINKEDIN (July 02, 2021), https://www.linkedin.com/pulse/analysing-copyright-law-historical-evolution-rights-dhairya-varshney?trk=public_profile_article_view.

^{vii} Gothi, *supra* note 5.

^{viii} Singh, *supra* note 2.

^{ix} Shivendra Singh „&“ Aprajita , Insight into the Nature of Offence of Copyright Infringement, 13 JOURNAL OF I.P.R. 583, 584 (2008).

^x M/s Knit Pro International v The State of NCT of Delhi & Another, A.I.R. 2022 S.C. 807 (India).

^{xi} Dan Poynter, Offences and Appeals under Copyright Act, LAWCIIRCA (Dec. 05, 2020), <https://lawcirca.com/offences-and-appeals-under-copyright-act/>.

^{xii} <https://www.dhyeyaias.com/current-affairs/daily-current-affairs/crime-and-copyright-infringement>.

