

## Reconsidering the Criminalization of Copyright Violation in India: Evaluating the Cognizable and Non-Bailable Regime

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Following several divergent judicial pronouncements, the Supreme Court of India finally held the offence of copyright violation u/s 63, Copyright Act, 1957, to be cognizable and non-bailable in *Knit Pro International v State of NCT of Delhi*, (2022) 10 SCC 221. The judgement, however, neither addresses the inconsistent judicial approaches that it apparently resolved, nor considers the potential effects of such a high-severity classification. Addressing the same, this paper explores the foundational justifications behind criminalizing copyright violation in India. It argues that criminalizing copyright violation as a cognizable and non-bailable offence may jeopardize individuals' fundamental rights and the balance between the rights of creators and users. It also demonstrates how Indian courts have become trapped in a vicious cycle with the misuse of criminal copyright remedies leading to impoverished jurisprudence on the subject. The paper contextualizes the discourse within the broader global framework by comparing the Indian regime with those prevalent in foreign jurisdictions. It concludes with the recommendation to retain the criminalization of copyright violation in India, but as a non-cognizable and bailable offence.

**Keywords:** Copyright, Copyright Act 1957, Section 63 of Copyright Act 1957, Knit Pro International, Criminalization of Copyright Violation, Cognizable and Non-Bailable Offence

Copyright 'relates to literary and artistic creations, such as books, music, paintings and sculptures, films and technology-based works (such as computer programs and electronic databases).'<sup>1</sup> It secures to the authors of literary and artistic work certain exclusive rights thereon to enable them to protect it from unlawful exploitation.

When a person exercises any of the exclusive rights of the author of the work without any lawful authority, she is said to have unlawfully exploited the work and, consequently, violated the copyright thereof.<sup>2</sup> Due to technological advancements, exploitation of intellectual work has become extremely convenient and fast, making the institution of copyright vulnerable to widespread violation. To appropriately deal with the same, countries like India, UK, USA, and France have provided for criminal remedies against copyright infringement. In India, the copyright protection is governed by the Copyright Act, 1957 (1957 Act).

In 2022, the Supreme Court of India delivered a significant judgement in *Knit Pro International v State of NCT of Delhi*<sup>3</sup> declaring copyright violation u/s 63, 1957 Act, to be a cognizable and non-bailable

offence on the basis of the punishment prescribed thereunder. This also applies to the offences under Sections 63A, 63B and 68A due to the same punishment stipulated therein.

However, such high severity of copyright infringement as a cognizable and non-bailable offence raises concerns about potential impingements on individuals' fundamental liberties and freedoms by allowing executive action without judicial supervision, even amidst the possibility of misuse. It may also distort the balance between the authors' copyright and the society's right to access knowledge.

Therefore, the present study seeks to examine the foundational justifications behind the criminalization of copyright violation in India and evaluate its propriety by analyzing the ramifications of its cognizable and non-bailable nature. It also demonstrates how jurisprudence on the criminal enforcement of copyright is waning in India thereby exacerbating the problem of misuse of law. It further discusses the potential harm posed by such severe copyright enforcement regime to individuals' fundamental rights and the creator-user balance. The paper also examines the criminal copyright regimes prevalent in the United Kingdom (UK), United States of America (USA), South Africa, and Germany to contextualize India's position within

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the broader global framework. Lastly, it concludes by arguing that although copyright violation must be criminalized in the country, it must not be made a cognizable and non-bailable offence. The same is followed by recommendations for plausible courses of action to address the issue.

The methodology adopted for the present study is mixed-method research. For the present study, the author examined the criminal copyright cases decided by the Supreme Court (SC) and all the High Courts (HCs) of last ten years starting from 1<sup>st</sup> January 2013 to 31<sup>st</sup> December 2022 using SCC Online on the basis of eighteen keywords.<sup>4</sup>

Firstly, using these keywords, the total number of results in the specified timeframe was ascertained in relation to SC and HCs respectively. The results included articles, commentaries, and notifications. Thereafter, the search was refined through the filters of SC and HC decisions. A total of 224 and 3917 unfiltered cases<sup>5</sup> of the SC and the HCs respectively appeared through this filtration process. After examining all those decisions, the researcher eventually selected 4 SC and 90 HC judgements for detailed analysis. The criteria for selection were novelty of matter<sup>6</sup>, significance of ruling, and exposition of law involved.

The data of search results and the list of profiled cases can be accessed from a Google sheet created in this regard.<sup>7</sup>

The study makes a meaningful contribution to the subject as such high degree of criminalization of copyright violation in India, making it a cognizable and non-bailable offence, has not been the focus of much academic scrutiny. Most extant literature predates the above judgement and thus focuses either on explaining the mechanism of criminal copyright enforcement or on determining the degree of the above offence based on the erstwhile conflicting judicial opinions.

### **Justifications behind Criminalizing Copyright Violation in India**

The 1957 Act specifically defines copyright violation u/s 51. It also engrafts certain exceptions thereto u/s 52 that permit the use of copyrighted works for personal use, research, criticism, review, etc. A careful examination of these two provisions amplifies that copyright violation mainly pertains to the unlawful *commercial* exploitation of the copyrighted work, rather than the personal/private uses.<sup>8</sup> To deal with the same, the 1957 Act stipulates both civil and criminal remedies.

Focusing on the criminal remedies for copyright enforcement, we now explore the justifications behind their adoption in India, which are generally attributed to the Harm principle and the Legal Moralism principle.<sup>9</sup>

#### ***The Harm Principle***

Propounded by J.S. Mill in 'On Liberty' (1859), the Harm principle restricts the application of criminal law only to those acts which cause harm to others in society.<sup>10</sup> This is a 'liberty limiting principle' as it justifies the curtailment of individual liberty through state power in cases where its exercise can harm others.<sup>11</sup> Analysis of the Harm principle involves analysis of: a) harm caused by the act concerned, and; b) harm caused by the criminalisation of such act.<sup>12</sup>

However, what is harm? Joel Feinberg defines harm as 'thwarting, setting back or defeating of an interest'.<sup>13</sup> Professor Ashworth explains it as 'violations of people's legitimate interests' considering the 'moral, cultural and political nature of the interests recognized in a particular system'.<sup>14</sup> According to some, harm also occurs when a person is made worse-off in terms of well-being.<sup>15</sup> Comprehensively put, when the 'personal well-being or proprietary resources' of a person is adversely affected, she can be said to have been harmed.<sup>16</sup> The harm, however, must impact societal interests as a whole because state's intervention in individual liberty to protect the interests of only a few would not be justified.<sup>17</sup>

When an author's copyright is violated, not only her pecuniary interests but, sometimes, her moral rights are also injured. Unchecked copyright violations can hamper the production of knowledge in society by discouraging authors from producing copyright works.<sup>13</sup> They may also entail repercussions for the economy, to which copyright-based industries contribute significantly.<sup>18</sup> Some authors also argue that by fostering parallel black economy of the pirated works, copyright violations also ferment organized crimes.<sup>19</sup> Recognizing such potential harms, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), for the first time, enjoined (member) countries to criminalize willful commercial copyright piracy under Article 61, to create sufficient deterrence against the same.<sup>20</sup>

In India, rampant copyright violation may have deleterious effects on the creative industries. It is reported that piracy caused a loss of around 2.8 billion dollars to the entertainment industry<sup>21</sup>; 20%-30% of

revenue to the OTT platforms<sup>22</sup>, and; as per the 2019 IFPI IMI report, ₹1,000 crores to the Indian music industry<sup>23</sup>. The far-reaching consequences of these losses extend beyond those directly involved, like authors or publishers, and deeply impact various other stakeholders within the creative ecosystem, such as intermediaries or supporting artists.

Moreover, since India is highly fertile in digitalized artistic industries: it is the second largest internet market after China in terms of internet users<sup>24</sup>; it has had 40 million households with 80 million subscriptions to video-streaming services which may rise to 60 million households with 110 million subscriptions by 2024<sup>25</sup>, and; it has one of very large markets for recorded music and ad-supported audio streaming<sup>26</sup>, copyright violations cannot only disrupt the growth of the concerned industries but also tarnish India's economy and its global reputation. An industry report recently listed India in the Priority Watch List, 2023, due to high piracy.<sup>27</sup> Arguably, if copyright violations are left unattended, they might cave the entire intellectual property regime in as creators might lose the will to create.<sup>16</sup>

The criminalization of commercial copyright violation in India, therefore, seems to be justified as they do and can cause considerable harm to both individuals and the society. The same also conforms to India's international obligations under Section 61 of TRIPS.

However, the above analysis cannot be complete without studying the harm caused by the act of criminalization itself. Application of criminal laws to copyright violation may lead to over-deterrence of public access to knowledge and cultural goods, the promotion of which is an equally important goal of copyright.<sup>28</sup> Even innocent and genuine users might be deterred as they would fear implication in criminal proceedings.

In India, the offences of copyright violation u/s 63, 63A, 63B and 68A, 1957 Act are cognizable and non-bailable, and thus, have the same gravity as the classic offences of murder, rape, dacoity, sedition, etc. Such a high degree of criminalization for an offence, which can be as commonplace and frequent as copying from someone's book, begs questions of reasonableness and proportionality. The same is elaborated later in the discussion on the potential harms of such a stringent criminal copyright regime.

### *The Legal Moralism Principle*

Legal Moralism states that if criminalization prevents immorality, it is justified. It implies that 'the justification for criminalizing a given type of conduct depends on the moral wrongfulness of that type of conduct...' <sup>29</sup> In other words, as per this principle, criminalization of inherently immoral acts is rational irrespective of their potential to cause harm.<sup>30</sup>

However, like 'harm' in the Harm principle, what is immoral or wrongful is contentious. Lord Patrick Devlin, an unmissable name in this context, holds that criminal law must be employed to protect the shared morality of society, as determined by the standard of reasonable man, to prevent its disintegration.<sup>31</sup> Thus, anything against the shared morality of society would be immoral regardless of the evilness of such shared morality.<sup>32</sup> This view is critically challenged by HLA Hart which kindled the famous Devlin-Hart debate.<sup>33</sup>

Post Devlin, Robert P George proposed criminalization only to prevent the deprecation of 'truly morally valuable practices', i.e. practices that advance human wellbeing.<sup>34</sup> Antony Duff, however, approaching the issue pragmatically, held criminalization valid only for public wrongs which are acts that disturb the civil order.<sup>35</sup>

Though, there are nuances in legal moralism, a certain sense of right and wrong is common in all the versions. For present purposes, it would be sufficient to understand immorality as something that should better not exist; or whose presence is lamented and elimination is always preferred.<sup>36</sup>

As regards copyright violation, the immorality lies in the unauthorized exploitation of someone else's property, i.e. their work. The institution of copyright can be morally justified through the Labour and Personality theories.<sup>37</sup> Thus, unsanctioned exploitation of a work which is the fruit of author's intellectual labour or an extension of her personality or through which she expressed her will would be an inherently immoral act. Although, such exploitation does not dispossess her of her work, it does deprive her of the benefits she would have received had the work been used lawfully.<sup>16</sup> It is reasonably against the morals of any rational society to allow people to reap benefits from the labour sowed by somebody else or to enrich themselves at the expense of others. The situation is further aggravated when such parasitic tendency materializes in the form of rampant piracy across the globe.

Based on the above discussion, therefore, it would be safe to conclude that copyright criminalization in India can be justified under both the Harm principle and the Legal Moralism principle. However, the determination of the extent to which it is justified requires more detailed analysis due to high degree of criminalization of copyright violation u/s 63, 63A, 63B and 68A, particularly in the context of the second part of the Harm principle.

### Jurisprudence on the Criminal Remedies for Copyright Enforcement

A comparison between the civil and criminal remedies under the 1957 Act would illuminate that unlike the former, the latter requires proof of the offender's knowledge of infringement to prosecute her.<sup>38</sup> As a logical corollary, the threshold for the invocation of the latter is higher than that of the former. It is mainly because criminal remedies allow obstruction on individual liberty, and thus, require caution in application. Therefore, it is vital to study what parameters the Indian courts apply in invoking these remedies before discussing their ramifications.

#### Approach of the Supreme Court

The SC pronouncements on the invocation of criminal copyright remedies are quite scarce. This is also demonstrated by the empirical study conducted by the author on the SC and HCs' criminal copyright cases, which evinces that only 224 unfiltered cases of SC could be identified from 2013 to 2023.

However, recently, the SC had the opportunity to expound the jurisprudence of the Indian criminal copyright regime in *Knit Pro International*<sup>3</sup>, but it missed the opportunity and pronounced the judgement in quite a straight-forward fashion. It merely compared the two laws: Section 63, 1957 Act & Part II of the First Schedule, Code of Criminal Procedure, 1973 (CrPC), to reach its conclusion. The court sketchily reasoned that since the maximum punishment under the former is three years' imprisonment and since the latter declares offences punishable with imprisonment of three years and above but not more than seven years as cognizable and non-bailable, the former is a cognizable and non-bailable offence. It spilt no ink on pertinent aspects such as the judicial history of the conflicting opinions of various HCs, consequences of declaring such high degree of the offence, and balance between users and authors' rights, which would have guided the invocation of the criminal remedies.<sup>39</sup>

One of the other relevant SC cases is *State of AP v Nagoti Venkataramana*<sup>40</sup> wherein the SC converted the sentence of six months with a fine of Rs 3000/- and a default simple imprisonment for one month into a sentence of mere fine and a default rigorous imprisonment for three months without explaining any reasons therefor. It simply stated: '...instead of imposing a sentence of imprisonment, sentence of fine of a sum of Rs 10,000 would meet the ends of justice.'<sup>41</sup> However, what mitigating circumstances led this conversion find no mention in the judgement thereby making this case another instance of missed opportunity.

Furthermore, in *Ramdev Food Products (P) Ltd v State of Gujarat*<sup>42</sup>, the SC, relying on *Lalita Kumari v UOI*<sup>43</sup>, which permitted preliminary enquiry for commercial matters, held that preliminary enquiry can be conducted in copyright cases if the complaint does not disclose a well-founded case against the accused.

Although, this measure might be instrumental in curbing frivolous complaints, it does not appear to have been implemented effectively. A significant number of baseless and abusive infringement complaints have been filed and eventually quashed between 2013 and 2023, thereby invariably causing unnecessary incursions into the liberty of the accused (Tables 1 & 3). The contribution of the SC in developing jurisprudence of criminal copyright remedies, thus, does not seem to be sufficient, firstly, because of limited number of cases at its level, and secondly, due to its own laconic judgements coupled with lethargic enforcement.

Table 1 — Number of defective cases filed during 2013-2023

Court	Unfounded cases	Cases with procedural irregularities	Abusive of process	Other cases	Total cases
Supreme Court	-	-	-	04	04
High Courts	15	02	09	64	90
Total	15	02	09	68	94
Percentage (%)	15.95%	2.12%	9.58%	72.35%	100%

Table 2 — Ratio of quashment cases to other cases

Court	Quashment cases	Other cases	Total
SC	-	4	4
HC	57	33	90
Total	57	37	94
Percentage (%)	60.64%	39.36%	100%

Table 3 — Grounds for the quashment of cases

Types of cases	Unfounded cases	Settlement cases	Cases with procedural irregularities	Abusive of process	Total
Number of cases	13	26	02	09	50
Percentage (%)	26%	52%	4%	18%	100%

**Approach of the High Courts**

The HCs have played a significant role in building the jurisprudence of criminal remedies for copyright enforcement in India. One of such early HC cases is *Venkata Rao v Padmanabha Raju*<sup>44</sup> wherein the court held that copyright could be enforced through criminal remedies even without registration.<sup>45</sup>

Furthermore, the Allahabad HC in *Nagin Chand Jain v State of UP*<sup>46</sup>, dealt with the right to complain of copyright infringement u/s 63, 1957 Act. It observed that since copyright is statutorily conferred upon the author of the work who can either assign it or grant its license, only an author, an assignee or a licensee can be aggrieved or financially affected by the infringement thereof. Therefore, only they can decide whether to pursue criminal remedies for the infringement or not.<sup>47</sup>

The HCs have also deprecated the practice of authors conferring powers of attorney upon professional agents to invoke criminal remedies on their behalf in case of alleged copyright violations.<sup>48</sup>

In another significant case, *Girish Gandhi v UOI*<sup>49</sup>, the Rajasthan HC upheld the constitutional validity of Section 64, 1957 Act, which empowers the police to seize infringing copies without warrant. It was contended that the provision confers unguided arbitrary powers upon police while also highlighting the instances of its misuse by police officers. Refuting these contentions, the court observed that the provision was introduced to arrest increasing piracy and contains sufficient implemental safeguards to prevent its abuse.

This reasoning, however, stands contrasted by the data in Table 1 below which establishes that the provision is susceptible to the possibility of abuse or mindless exercise. Reference to Table 1 below would show that despite the conduct of search & seizure by the police u/s 64, a number of defective cases, i.e. unfounded or abusive cases or cases involving misuse or faulty exercise of the power u/s 64, have been filed.

Nevertheless, the above discussion highlights that the HCs have endeavoured to formulate certain guiding pathways regarding the invocation of criminal remedies for copyright enforcement. However, these

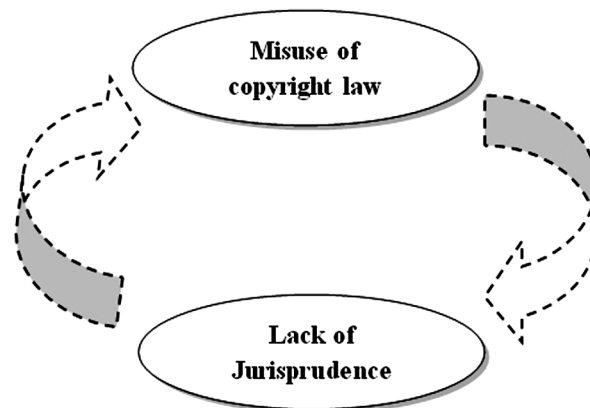


Fig. 1 — Vicious cycle of misuse of copyright law and lack of jurisprudence

rulings and guidelines possess only persuasive value outside their jurisdiction.

**Stagnant Jurisprudence**

The jurisprudence for the invocation of criminal copyright remedies in India is arguably underdeveloped. It has shrunk at the SC level and even that developed by the HCs is marred by its limited authority. Its future appears to be even bleaker due to the stagnancy rendered by the adjudication of similar kinds of cases in HCs in bulk, i.e. cases for quashment of criminal proceedings. A significant number of cases between 2013 and 2023 revolved around quashment (Table 2).

In quashment cases, the HCs’ inquiry is generally factual and confined only to determining whether the offence was sufficiently made out in the complaint and whether the proceedings adhered to the statutory procedure. These cases do not require the courts to expound the jurisprudential underpinnings of the law, which hinders its doctrinal growth.

Though the Indian courts have strived to weave guidelines for the invocation of criminal remedies against copyright violation, they have fallen into a vicious cycle with their misuse (Fig. 1). The cases arising out of misuse require quashing, thus, depriving the courts of opportunities to develop the jurisprudence of the law, which, in turn, can lead to further misuse of the law. The same is also evidenced by the high number of quashment cases.

### **Potential Harm caused by the Cognizable and Non-bailable Offence of Copyright Violation**

The pragmatic effects of the cognizable and non-bailable offence of copyright violation u/s 63, 63A, 63B and 68A, 1957 Act, are as follows: any person—whether the alleged copyright holder or assignee or licensee (assuming scrupulous obedience to the *Nagin Chand Jain*<sup>46</sup> judgement)—can lodge an FIR or complaint against the alleged accused for copyright infringement; the police can then take action without a warrant, such as making arrests or seizing infringing copies; consequently, the concerned premises of the accused may be raided; and the accused might also be arrested, unless she has the protection of anticipatory bail. The chargesheet would be submitted, and the trial would begin following the aforementioned events. Such intense criminal procedure for copyright enforcement can cause the following harms:

#### ***Violation of Fundamental Rights***

##### ***Invasion of Individual Liberty***

Another significant ramification of such a grave criminal procedure for copyright enforcement is that if later on the matter is quashed for being unfounded<sup>50</sup> or abusive<sup>51</sup> or if the case is settled between the parties<sup>52</sup>—situations that are quite plausible, as shown below (Table 3)—there is no way to remedy the suffering caused by the invasion of liberty, a fundamental right u/A 19 and 21, that the innocent accused may have endured due to the above-mentioned ‘prompt’ procedure. Even if the accused is not arrested, the staple raid conducted by the police u/s 64 can entail enough injury thereto.

The above process can be initiated merely by a complaint, regardless of its authenticity and sincerity, as demonstrated by Table 1, thereby leaving the accused’s liberty at the mercy of police officers. Moreover, since registration of copyright is not compulsory for invoking criminal remedies, the complainant is not required to prove ownership before subjecting an individual to criminal law procedure. This further exposes individual liberty to the hazards posed by the menace of malicious or baseless complaints.<sup>39</sup> The same is substantiated by Table 3 below, which, in reference to Table 2, showcases the grounds on which 50 out of 57 quashment cases have in fact been quashed.

Even in settlement cases, the courts have remarked that the matter was substantially civil/ personal or commercial and that criminal remedies were invoked merely to bring the other party to a settlement.<sup>53</sup>

Interestingly, in several other cases<sup>54</sup>, the police identified and seized duplicate branded products as the infringing copy and registered cases, which thereafter were quashed by the HCs as the seized infringing copy did not even constitute the subject matter of copyright, i.e. a literary or artistic work.

The discretionary relief of anticipatory bail u/s 438, CrPC, also might not be effective enough to protect the accused from the above repercussions. Anticipatory bail can be sought only when the accused ‘has reason to believe that he may be arrested’, which may not be the case always with malicious or abusive complaints, wherein the accused generally comes to know about the accusation either at the time of arrest or police raid.

#### ***Infringement of other Fundamental Rights***

The aggravated degree of the offence of copyright violation may also jeopardise the fundamental right to freedom of speech and expression u/A 19(1)(a) under the Indian Constitution.

The copyright law can be used as a tool of censorship by both the private persons and the government to stamp out criticism/opposition.<sup>55</sup> Such weaponizing of copyright is often referred to as copyright silencing.<sup>56</sup> For example, a private firm recently employed the strategy of repeatedly making copyright infringement claims against YouTube channels that criticized it, so that they could be taken down.<sup>57</sup> Likewise, a similar technique was allegedly used by the Bangladesh government by creating fake websites to lodge copyright infringement complaints against critical works, and thus, compelling the authors to take them down.<sup>58</sup> Though, criticism or review of any copyrighted work falls under the realm of exceptions to infringement, the above discussion shows that even exempted/fair users can be harassed, if not punished.

Recently, in *Ramesh Chandra Sharma v State of UP*<sup>59</sup> the SC, while expounding the fifth prong of the proportionality test, held that a state action, which may breach fundamental rights, must, inter alia, ‘provide sufficient safeguards for the possibility of an abuse of such rights infringing interference...’<sup>60</sup> to be valid u/A 14 of the Indian Constitution. Further, the general obligations under TRIPS also state that the procedures of copyright enforcement shall be applied to, inter alia, ‘provide for safeguards against their abuse.’<sup>61</sup>

However, as shown above, the present scheme of cognizable and non-bailable offences of copyright

violation in India is highly abusable, and thus, is clearly incompatible with these paramount obligations.

#### ***Restriction of Users' Rights***

In India, prominently, the Utilitarian/Incentive theory or the Labour theory is invoked to justify copyright.<sup>62</sup> The former justifies the conferment of copyright on the ground that it promotes social welfare by incentivizing the production of knowledge. Whereas, according to the latter, since copyright works are created by the intellectual labour of the author, she is justified in receiving proprietary rights thereon. It is not certainly clear as to which of the two theories is preferred in the Indian regime: the former<sup>63</sup>, the latter<sup>64</sup> and sometimes, even both the theories<sup>65</sup> have been used as the foundation of copyright law in India.<sup>62</sup> However, both the theories, though for different reasons, provide for striking equilibrium between the creators' exclusive rights and the users' right to access knowledge. The Utilitarian theory advocates for this balance because overpowering of either of these rights can hamper social welfare; and, under the Labour theory, such equilibrium is necessary to prevent the birth of moral inequalities.

The Indian copyright law attempts to achieve this balance through the exceptions to copyright violation u/s 52. The determination of whether a particular use is exempted u/s 52, however, will take place only after the trial. The police officers cannot be expected to finely ascertain what usage is permitted or not u/s 52 at the time of making arrest or police raid u/s 64.<sup>66</sup>

However, by the time the trial declares the use to be exempted, a genuine and permitted user may have already suffered harassment and infringement of her fundamental rights. Such chilling repercussions even on permitted/exempted users would surely dissuade the use of copyrighted works and hinder the production of knowledge.<sup>39</sup>

Therefore, the cognizable and non-bailable nature of the offences of copyright violation may disturb the above balance by unduly subjecting the users' right to access knowledge to the authors' monopoly rights. Thus, it may frustrate the purpose of the exemptions u/s 52 and defeat the fundamental justifications of copyright itself.

#### **International Perspectives on Copyright Criminalization**

A brief overview of the criminal copyright regime prevalent in other jurisdictions would help position

India globally on the subject. The following countries have been selected conveniently, considering, however, the representation of the diverse legal systems.

Pertinently, a clarification is in order that the Indian classification of offences into cognizable and non-cognizable, and bailable and non-bailable categories is not found in the following jurisdictions. Thus, the basis of such bifurcation, i.e. the police power to arrest sans warrant and the release of the accused on bail as a matter of right at the time of arrest, respectively, has been analysed for drawing this comparative analysis.

#### **UK**

The UK became the first modern state to introduce criminal provisions in the copyright regime through the Fine Arts Copyright Act 1862.<sup>67</sup> The current copyright statute is Copyright, Designs and Patents Act, 1988 (CDPA), which under Section 107 provides for criminal remedies against copyright violation. CDPA has been majorly amended by Copyright, etc. and Trademarks (Offences and Enforcement) Act, 2002, and Digital Economy Act 2017. The former raised the maximum imprisonment for physical copyright violations from two to ten years, upon conviction on indictment; the latter aligned this punishment with that for online infringements.

In the UK, the Police and Criminal Evidence Act, 1984 (PACE Act) deals with the power to effect warrantless arrests under part III. Section 24 empowers constables to arrest without warrant when the reasons mentioned therein such as identification of the person, facilitation of prompt and effective investigation, and unhindered prosecution, etc. exist. Hence, in the UK, the police can effect warrantless arrests for any offence, irrespective of the quantum of the prescribed punishment, if these conditions are met.

As regards bail, Sections 30(1) and 30A(1) and (1A), of the PACE Act indicate that a person arrested outside a police station may be released on bail if the constable deems it necessary and proportionate in all circumstances, and the custody officer also authorizes the same. Section 30A(1B) stipulates factors such as prevention of further offence, safety of victims and witnesses, and management of public risk, to be considered by the constable for deciding when granting bail is necessary and proportionate. As per sub-section

(1C), a person may also be released without bail, in case sub-section 1(A) does not apply.

Therefore broadly, the framework regarding the grant of bail and arrest without warrant in the UK vests considerable discretion in the police officials (constable and custody officer). This makes its position comparable to that in India, birthing similar concerns for individual rights and liberty.

#### USA

Prompted by industry's concerns regarding the inefficacy of the civil remedies, the USA adopted criminal penalties for copyright enforcement for the first time through the Musical Public Performance Act of 1897.<sup>68</sup> With rapid technological developments facilitating piracy and counterfeiting, the US copyright law evolved to its current enactment i.e. Copyright Act of 1976.

Copyright infringement was a misdemeanor until the Piracy and Counterfeiting Amendments Act, 1982, which introduced felony penalties for first-time offenders. Such 'felon-ization' was extended to mass piracy of copyrighted works by the Copyright Felony Act, 1992, allowing maximum five years' imprisonment for first-time offenders, while categorizing other offences as misdemeanors. Further, No Electronic Theft Act, 1997, an aftermath of the controversial case of *United States v LaMacchia*,<sup>69</sup> was enacted to criminalise copyright infringement even for non-commercial uses.

Regarding enforcement, the law enforcement authorities in the USA have limited powers to effect warrantless arrests in view of the Fourth Amendment guarantees. Nevertheless, such arrests find support in the common law principles applicable to felony offences. The US Supreme Court also relied on the same to uphold the constitutionality of warrantless arrests in public places in *United States v Watson*.<sup>70</sup> Moreover, the Federal Bureau of Investigation may also arrest without warrant under 18 U.S. Code § 3052 for intellectual property violations that qualify as organized crimes or threaten national security or have significant impacts on the economy.<sup>71</sup> Most states in the USA also allow for warrantless arrests of suspected felons if there is a probable cause to do so.<sup>72</sup> Thus, in the USA, an accusation of copyright violation may result in warrantless arrests.

In the USA, unlike India's concept ofailable offences, there is no mechanism that enables individuals to avoid immediate arrest. Rule 5(a) of the Federal Rules of Criminal Procedure 2023 mandates

that the arrested person must be produced forthwith before a magistrate judge for decision on her release or detention under 18 U.S. Code § 3142.

We need not thus delve any deeper into the US criminal legal framework to conclude that upon a complaint of copyright violation, even if false or unfounded, an accused will have to surrender her liberty to the law enforcement authorities, subject only to later judicial scrutiny. This blurs the distinction between the impacts of the Indian and the US criminal copyright enforcement on individual liberties.

#### South Africa

The criminal copyright law in South Africa originated as an offshoot of the UK's Copyright Act of 1911, through the South African Patents, Designs, Trade Marks, and Copyright Act 1916.<sup>73</sup> The criminal remedies continued in successive copyright enactments up to the current Copyright Act, 1978. Section 27 of the 1978 Act provides for the penalty of a maximum fine of thousand rand or of a maximum imprisonment of three years or both for first-time convicts.

Like the UK and the USA, but unlike India, in South Africa, the quantum of punishment does not dictate the powers of the enforcement agencies to arrest without warrant or grant bail. The Criminal Procedure Act, 1977, governs such powers under Sections 40 and 59 respectively. Section 40 precisely specifies the situations wherein warrantless arrests are permitted. It states that any person whom a peace officer reasonably suspects of committing a Schedule 1 offence, except escaping from lawful custody, can be arrested without a warrant. Offences under Schedule 1 include serious offences like murder, rape, treason, sedition, etc. Neither Section 40 nor Schedule 1 includes copyright violation. Thus, a person accused of copyright violation may only be arrested with a warrant issued by a magistrate or justice.

However, as per Sections 43(2), 50(1)(a) and 59(1)(a) of the 1977 Act, upon arrest, the accused may have to be taken to the police station or a lower court. In the former case, police officials decide on the person's release; in the latter, the court may release the accused considering factors under Sections 50(6) and 60 of the 1977 Act.

In a nutshell, the South African criminal justice system does not provide for release on bail at the time of arrest, unlikeailable offences in India. Consequently, the accused will necessarily have to

surrender her liberty and undergo warranted arrest and its ramifications.

#### Germany

The copyright regime in Germany is governed by the Copyright Act of 1965. The German copyright law criminalises both personal<sup>74</sup> and commercial exploitation<sup>75</sup> of copyrighted works as felonies (Verbrechen).<sup>76</sup> Copyright violation for personal uses is punishable with maximum three years' imprisonment or a fine; for commercial exploitation, the penalty is maximum five years' imprisonment or a fine.

Section 127 of the German Code of Criminal Procedure 1987 provides for provisional arrests (warrantless arrests) when either the person is "caught in the act or is being pursued...if there is reason to suspect flight<sup>77</sup> or if his or her identity cannot be immediately established" or "if the conditions for issuance of a warrant of arrest" are fulfilled. An arrest warrant authorizing/directing remand detention may be issued when there is strong suspicion about the guilt of the accused together with the existence of grounds of arrest.<sup>78</sup> The grounds of arrest exist mainly when there is a risk of flight or suppression of evidence or trial-evasion.<sup>79</sup> The scope of police powers to make warrantless arrests thus appears relatively narrow as police discretion, dressed up as 'strong suspicion', must also satisfy additional criteria for exercise.

However, although the 1987 Code provides for suspension of enforcement of arrest warrant upon provision of securities when less intrusive measures suffice<sup>80</sup>, no such provision exists for provisional or warrantless arrests. In such cases, the accused will have to undergo physical detention and wait for her release upon judicial examination.<sup>81</sup>

The conclusion for the German criminal copyright framework, therefore, takes after its South African counterpart. While the restricted scope of warrantless arrests, a lesson from the Nazi past, may protect against arbitrary invasions of liberty<sup>82</sup>, the lack of provisions for release on bail in case of detention under such arrests appears to dilute the same.

#### Pulling the Threads Together

The above comparative analysis demonstrates the broad similarities between Indian and international approaches to the treatment of individuals accused of copyright violation, thus giving rise to similar concerns. High penalties, wide discretionary powers with the

enforcement agencies, the absence or insufficiency of provisions for on-the-spot or police bail at the time of arrest, and consequent room for liberty-violations are some of the prominent motifs characterizing these regimes. Lack of landmark and jurisprudentially rich judicial precedents on the subject-matter marks another latent yet significant trope.<sup>83</sup> However, such global framework for criminal copyright enforcement raises questions about its legitimacy, especially concerning its potential threat to various fundamental freedoms and interests.

One of the plausible reasons behind the adoption or sustenance of such regimes can be industrial pressure and lobbying. Creative industries have significantly influenced legislation on criminal copyright remedies due to perceived insufficiency of the civil counterparts.<sup>84</sup> Similarly, international obligations also drive the adoption of strict criminal copyright regimes.<sup>85</sup>

However, due to limited critical scholarship, the detrimental ramifications of these frameworks on individuals' liberties and freedoms often remain overlooked, allowing them to perpetuate. Thus, the need for a thorough exploration of the effects of such harsh criminal copyright regimes cannot be underscored enough. This discourse would generate awareness and encourage states to meticulously consider the interests of all the relevant stakeholders before enacting or continuing such legislation.

#### Conclusion

Copyright infringement is problematic and deserves serious attention. However, the provision of remedies against the same should be such that the harms are neutralised and not exacerbated. The 1957 Act enacted severe, high-degree offences to deter copyright violation; however, they risk infringing individuals' fundamental rights and freedoms. They may also disrupt the creator-user balance in copyright by allowing violation of the users' right to access knowledge and the statutory exceptions. Therefore, though copyright violation under the 1957 Act in India appears to be rightly criminalized, the offences thereunder (offences u/s 63, 63A, 63B and 68A), in the absence of any guidelines for their invocation, must not be made cognizable and non-bailable.

#### Copyright Violation: A Non-cognizable and Bailable Offence

The foremost suggestion is to make the offences of copyright violation under Sections 63, 63A, 63B, and 68A of the 1957 Act non-cognizable and bailable.

Decreasing the severity of these offences and making them non-cognizable and bailable would ensure that judicial mind is applied before any executive action is taken on a complaint. This might curb the peril of frivolous complaints and abuse of the law, ensuring that individuals' rights are affected only for lawful reasons without relying excessively on police discretion. It might also check the possibility of arbitrary arrests by making bail a matter of right for the accused.

If such a change is brought by reducing the maximum punishment of three years' imprisonment contained under these provisions, it would align with Schedule I part II of CrPC, ensuring legal viability. However, the said change can also be introduced without such a reduction in the maximum punishment by enacting a specific provision in the 1957 Act making a declaration to this effect. Schedule I part II of CrPC, which categorises all offences punishable with imprisonment for three years or more but less than seven years as cognizable and non-bailable, stipulates only a general rule for offences under laws other than the Indian Penal Code, 1860 (IPC), since the Code cannot be amended every time a new statutory offence is legislated.<sup>86</sup> This general rule can be altered to suit nuanced situations by crafting specific provisions in the concerned law.<sup>86</sup> This has been applied to the offences under the Protection of Civil Rights Act, 1955, where punishment for all offences, except for subsequent offences u/s 11, is, inter alia, imprisonment of not more than six months. However, a specific provision u/s 15 has been enacted to make all these offences cognizable. Moreover, there are offences even under the IPC which are punishable with a maximum imprisonment of three years or more but are still declared to be non-cognizable and bailable, and vice-versa, for example, offences u/s 193, 205, 494, 269, and 270. The general classification of offences envisaged under Schedule I part II of CrPC, thus, is not cast in stone and can be modified according to the type of the concerned offence.

#### Strict Enforcement

Now, if the degree of the above offences is so decreased, how would the country match up to the international standards which call for greater deterrence against copyright infringements?<sup>20</sup>

It is submitted that the international obligations of copyright protection only mandate provision of such criminal remedies which create deterrence against willful commercial copyright infringements (piracy);

they do not prescribe the degree of criminalization required.<sup>20</sup> It is up to the sovereign member-states to decide the degree of criminal remedies under their domestic copyright regimes. India is currently taking a TRIPS+ approach in this regard by mandating the imposition of both imprisonment *and* fine on the convicts.<sup>87</sup> Additionally, it stipulates high levels of punishment and also requires the judge to specify reasons, if a lesser punishment is imposed on the convict.<sup>88</sup> Thus, as long as India ensures sufficient deterrence against commercial-level copyright infringements through its criminal remedies, it can fine-tune the degree of criminalization without violating its international obligations.

Furthermore, as economists like Isaac Ehrlich have pointed out, there are generally two models of criminal enforcement: first, 'high probabilities of apprehension and conviction, but with low severity of punishments'<sup>89</sup> and second, 'low probabilities of apprehension and conviction, but with high severity of punishments'.<sup>89</sup> Scholars note that as regards copyright enforcement, the latter model is followed in India.<sup>90</sup> However, as this research demonstrates the adverse consequences of such a high degree of criminalization of copyright remedies in India, a review of the basic framework of criminal enforcement under copyright law appears necessary.

The second suggestion, therefore, is to strengthen the enforcement of criminal copyright remedies in India to ensure sufficient deterrence against copyright violation. Such proactive implementation would also be guided by judicial oversight secured by making the offence non-cognizable.

Certain generic suggestions made by scholars to fortify copyright enforcement include speedy trials, increased establishment of dedicated and active intellectual property crime units,<sup>91</sup> and inter-agency co-operation across the country.<sup>91</sup> However, their efficacy and suitability to the Indian regime might have to be deeply analysed. Hence, for now, it is safe to conclude that a shift to a model with a high probability of apprehension and conviction may yield more optimal results than retaining a model with a high degree of punishments.

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