

## Whether Infringement of Copyright Is a Cognizable Offence?

By Dipak Rao and Nishi Shabana \*

Very rightly quoted by a poet **Michael Bassey Johnson**;

***“If a creative person steals your idea, he’s killing his creative ability, if he steals your art, he’s killing his art, if he makes it available to the world, it won’t create the impact you could have created, because it wasn’t from the right source .”***

Due to the increasing globalization and rapid proliferation of technology, there has been an increasing need to protect copyright thus copyright protection has become the sensitive issue worldwide. According to a report published in March 2009 by United States-India Business Council (**USIBC**) and prepared by EY India, as much as 250.37165 US\$ are lost due to piracy. Alongside, as many as 80,000 jobs were lost directly as a result of theft and piracy, afflicting India’s entertainment industry.<sup>1</sup>.

Copyright infringement is the use of copyrighted work such as the right to reproduce, distribute, display or perform the protected work, or to make derivative works without the permission of the author. Any person who copies others work without consent of the author is liable to be punished for infringement. Under the Section 63 of the Copyright Act, 1957 (the “Act”) any person who knowingly infringes or abets the infringement of the copyright in any work commits criminal offence.

Section 63 of the Act as originally enacted has fine and imprisonment for one year for the offences of copyright infringement. However, due to the increasing incidences of video and music piracy the Act was amended in 1984 and the imprisonment was extended to maximum period of three years along with the fine. Further, Section 64 of the Act gives power to a police officer to seize all infringing copies of the work without giving any warrant to infringer.

Section 63 of the Act clearly states that the infringement of the copyright is a criminal offence. However, in order to establish whether it is a cognizable offence or not, it is important to look into the First Schedule of the Criminal Procedure Code, 1973 in which classification of the offences have been made. The said Schedule is divided in two parts. Part I dealing with the offences under the Indian Penal Code and Part II dealing with the offences made under other laws. Therefore, the offence made under the Act would be covered by Part II.

The scheme of the classification of the offences in the First Schedule of the Criminal Procedure Code, 1973 in cases of offences under other laws, is as under:

Category	Description of Offence	Cognizable	Bailable	Trial By
I	If punishable with death, imprisonment for life, or imprisonment for more than 7 years	Yes	No	Court of Session
II	If punishable with imprisonment for 3 Years, and upwards but not more than 7 Year	Yes	No	Magistrate of first class
II	If punishable with imprisonment for less than 3 Years or with Fine only	No	Yes	Any Magistrate

The punishment for the offence made under the Section 63 of the Act is imprisonment which cannot be less than 6 months but which may extend to 3 years. The Code of Criminal Procedure, 1973 lays down that if the offence is punishable "by imprisonment for three years and upwards but not more than seven years", the procedural law provides that the offence will be cognizable and non-bailable whereas if any offence is punishable with imprisonment of less than 6 months then it is a non-cognizable offence. Therefore, in such circumstances the offence committed under Section 63 has to be held cognizable and non-bailable.

However, there is conflict in the viewpoints of the courts, whether copyright infringement in Section 63 is a cognizable offence or not:

The High Court in **Jithendra Prasad Singh v. State of Assam 2003** held that infringement of copyright is a non-bailable offence.

However, the Andhra Court in **Amarnath Vyas v. State of Andhra Pradesh<sup>2</sup> [2007 CRI LJ 2025 (AP)]** rejected the decision in the abovementioned case and opined that the offence of copyright infringement is bailable and non-cognizable. The Court analysed the contentious provision of the Act with that of the Criminal Procedure Code in juxtaposition. The Court found that the expression "punishment for a term which may extend to three years" under the Act is certainly not similar to the expression "punishment for three years and upwards" of the Criminal Procedure Code and relied on the findings of erstwhile **Rajeev Chaudhary case<sup>3</sup>** and held that "there may be certain other class of offences which may fall in between classification II and classification III of Part-II of First Schedule. Simply because they are not coming squarely within the field of classification-III, they cannot automatically be treated as included in the classification-II. By default, they cannot be considered as coming within the purview of the classification-II". .

However, there are cases in which the High Court relied on **Jithendra Prasad Singh v. State of Assam 2003** and held that Copyright infringement is cognizable offence. In the case of **Abdul Sathar v Nodal Officer, Anti Piracy Cell, Crime Branch office<sup>4</sup> (2007 (35) PTC 780 (Ker))** the main question was whether the offence under Section 63 of the Act a cognizable one and that the police is correct in taking the offence under Section 63 of the Act as a cognizable offence and proceeding further.

On a bare recital of the First Schedule of the Criminal Procedure Code, it stipulates that if the crime is punishable by imprisonment for between three to seven years, it must be deemed cognizable. Section 63 stipulates that offence shall be punishable by imprisonment up to three years. The Criminal Procedure Code, which used the expression "for more than 7 years" to identify the first category had very cautiously used the words "3 years and upwards, but not more than 7 years" to identify the second category. The offences punishable with imprisonment for 3 years up to 7 years, both inclusive, will fall under this second category. Thus the court is of the view that the offence under Section 63 of the Act is punishable with imprisonment for a period of 3 years. Thus, there is no doubt that this falls under category II referred above and is consequently cognizable offence.

In a recently decided case, **State Govt. of NCT of Delhi vs Naresh Kumar Garg<sup>5</sup> 2011(46)PTC114(Del)** on March 20, 2013 where the main question was, "Whether the offence punishable under Section 63 of the Copyright Act, 1957 (the Act) is bailable or non-bailable?" Here also the Court relied on a judicial decision of the Gauhati High Court in **Jitendra Prasad Singh v. State of Assam 2003 (26) PTC 486 (Gau)** where the offence under Section 63 of the Act was held to be cognizable and non-bailable. The court was of the view that it would be fruitful to refer to the provision of Section 64 of the Act, which empowers a police officer not below the rank of Sub-Inspector to seize the infringing copies of any work. If the offence had been non-cognizable and bailable, there was no requirement to specifically authorize the police officer with the power of seizure.

Further the apex court resorted the question in the case of **State of Andhra Pradesh v. Nagoti Venkataramana**, and was of the opinion that it was unnecessary for the prosecution to trace the owner of

the copyright to come and adduce evidence of infringement of right of reproduction. Therefore, this observation confirms the position that the infringement of copyright is a cognizable offence and that the police must show a great deal of tolerance in collection of evidence.

---

<sup>1</sup> <http://cis-india.org/a2k/blogs/piracy-studies-india>

<sup>2</sup> [2007 CRI LJ 2025 (AP)]

<sup>3</sup> (2001)5SCC34

<sup>4</sup> (2007 (35) PTC 780 (Ker)).

<sup>5</sup> 2011(46)PTC114(Del)

---

\* Dipak is a Senior Partner and heads the Intellectual Property, Project Finance, Infrastructure & Energy practice. He has an experience of more than 33 years in the legal arena of which 20 years have been in the industry. His expertise in Intellectual Property Rights spans across patent, trademark, copyright, design, geographical indication registration, and prosecution (opposition & infringement) for enforcement of IP rights. He assists the clients in potential acquisitions as well. He also advises on IP issues related to due diligence and audits of Intellectual Properties, portals, advertising, e-commerce, and internet transactions. In addition, he has vast experience in advising multinationals, government and state bodies in Project Finance, Infrastructure and Energy matters. Nishi is a Senior Associate with expertise in IPR and Food laws. She manages, protects and enforces intellectual property rights, including patent, design, trademark and copyright issues. Adept in drafting Patent applications, she also handles patent prosecution activities in India and internationally with respective attorneys in Europe, USA and PCT. She regularly contributes on topics related to IPR in several publications.