



## **Proposed Decriminalization of Offenses Under Copyright Act' 1957**

### **-FICCI Recommendations-**

#### **Background**

The Indian industry welcomes the initiatives by Government of India to decriminalize non-compliances of minor, technical or procedural nature, aimed at facilitating and promoting 'ease of doing business' (EODB) in the country. Evidently, the larger effort for statutory reform is primarily attributed towards increasing ease of doing business in India and unlogging the judicial system.

Accordingly, through an amendment in 2019, sixteen compoundable offenses under the Companies Act 2013 were converted to civil defaults. With a view to further decriminalize the Companies Act 2013, a second tranche of recommendations are under review of the Ministry of Corporate Affairs for further rationalization of penalties in respect of 46 compoundable offenses. It is a positive sign that the Government is undertaking an exercise to decriminalize penal provisions under various Acts to improve business sentiments, help unlog court processes, while boosting investor confidence and reviving the economy's growth prospects.

#### **Effect of Decriminalizing Copyright Law on 'Ease of Doing Business'**

While taking note of the government's laudable intent to decriminalize certain minor offenses under the Companies Act 2013, *we respectfully submit that criminal offenses under the Copyright Act 1957 would not fall within the above description, given that these offenses are serious economic offenses, often related to organized crime, which if decriminalized would undercut the incentive to invest in India.*

At the outset, it is submitted that contrary to the objectives of the Government to decriminalize other laws, the decriminalization of copyright offenses would, in fact, remove a key deterrent for infringers, weaken the copyright law and thus disincentivize investments in the creative industries. Global experience, for instance in the entertainment sector, demonstrates that criminal enforcement has a significant deterrent effect on offenses of copyright infringement, with infringing websites shutting down once a pirate site is prosecuted and taken off-line. Decriminalizing copyright infringement will not only promote copying/content-theft/misappropriation, but will hurt the creative industry and adversely impact the overall IP industry, and should not be considered, especially considering that counterfeits and piracy are rampant and increasing with time. As per a report by Irdeto, a world leader in digital platform security, the Indian media and entertainment industry loses \$2.8 billion of its annual revenue to piracy, with India figuring among the top 5 countries in peer-to-peer downloading. Similarly, the Indian music industry, according to a 2019 IFPI-IMI report, is estimated to lose about Rs. 1,000 crore a year due to piracy, which makes up for 67% of the market, while the global piracy average is 27%. And, while there is no data available for the biggest M&E sector, broadcast TV-signal, the book publishers reportedly face a loss of ₹400 crore a year, with an estimated 20-25% of the number of books sold being pirated in India.

## **Proposed Decriminalization may run counter to India's TRIPS Obligations**

As a WTO member and signatory of the TRIPS Agreement, India is obliged to:

*(1) Provide for criminal procedures and penalties, in cases of wilful copyright piracy on a commercial scale (Article 61); and*

*(2) Provide for such enforcement procedures that permit effective remedies that constitute a deterrent for further infringement (Article 41(1))*

Article 61 is extracted and reproduced below:

*Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture & destruction of infringing goods and of any materials and implements the predominant use of which has been in the commission of offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of IP rights, in particular where they are committed wilfully and on a commercial scale.*

Consequently, decriminalizing the copyright infringement offenses in the Copyright Act 1957 may run counter to India's international treaty obligations.

In addition, decriminalizing copyright infringement offences will bring India further away from the required standard of protection under TRIPS Art. 61 as determined recently by the WTO Panel, which has interpreted the phrase "*shall provide for criminal procedures and penalties to be applied*" as meaning that the creation of a formal written law that provides for the criminalization of wilful scale piracy is insufficient; Members need to put such "*criminal procedures and penalties into practical operation*".

### **Regulation of Offenses under the Copyright Act, 1957 "Act"**

Any discussion to decriminalize minor offenses under the Copyright Act should be considered keeping in view of the following:

- (a) The proposal to decriminalize the offences under the "Act" has been floated in the same vein, and with common intention to address EODB and replace criminal sanctions where they are *deemed unnecessary* or where the actions penalized under these laws *'aren't necessarily fraudulent or the outcome of mala fide intent'*. However, in the case of the "Act", the proposal for decriminalisation appears to be counter intuitive to the projected ends.

Thus, the decriminalization of copyright offences may lead to severely diluting the effective deterrence for an infringer causing loss to the rights holder and public exchequer, and essentially disincentivize investments in the market. Moreover, the substantial increase in piracy and infringement would only lead to added burden on the civil adjudicating authorities, enforcement agencies, besides an additional burden on the rights holders. The move from industry's perspective may lead to increase in the burden on businesses as the regulations will lose its much-needed teeth, and proposed measures will not send a positive signal to any future investor.

- (b) Copyright infringement and offences contemplated under the Copyright Act are offences against the society and as such, it would not be prudent to decriminalize them and treat them (*especially, instances of copyright infringement*) merely as bilateral disputes. Copyright infringement involves, independently and jointly, the crimes of theft, cheating and breach of trust in respect of intangible property. Hence, dealing with infringement and piracy should be with a view to address the public impact of addressing crimes against property like theft, cheating, breach of

trust aside from granting copyright owners fair relief to address their loss of value and loss of enjoyment of property itself.

Merely because copyright infringement is in respect of intangible property, the same should not be put at a lower pedestal and decriminalized. Such decriminalization will have an adverse impact on the creators and legitimate licensors of copyrightable works and on persons/entities intending to deal with such works in a legitimate manner resulting in huge losses for all stakeholders, including the public as the beneficiary of the copyrighted works. In fact, the quantum of punishment under the "ACT", unless the infringement is not for gain or business, should be comparable to the offenses of theft, cheating and breach of trust.

- (c) The value of the copyright is exploited in different ways by the rightful owners, licensors and other affiliates. In the case of sporting and live events, for example, the value of the copyrighted asset lays in the exclusivity of the right, which is captured in broadcast and ancillary uses of the content that may be further licensed for games, highlights etc. Piracy of such content effectively destroys the exclusivity, and protecting that necessarily demands timely action, by way of criminal complaints and fast-paced enforcement support by police and adjudicatory authorities. The value of an exclusive broadcast of a premier league match, *for instance*, is totally diminished in a matter of hours by piracy, which makes it available outside of the licensed broadcast channels and ancillary use in interactive events.

Hence, impact is substantial in a short period of time and the dire necessity of deterrence by strict penal actions cannot be overstated for countering copyright infringement. There are numerous news reports highlighting how illegal activity substantially increases during major events like the ICC Cricket World Cup. In spite of strenuous efforts by broadcasters to get injunction from courts, the piracy and unauthorized broadcast continues to rise, while organized and even ad-hoc entities find new mechanisms to expand the illegitimate network.<sup>1</sup> Rogue operations and unlicensed network operators air unauthorized feed of premier channels enabling the availability of content and channels and causing massive losses through the ecosystem.

In the M&E industry, the entities that engage in infringement are often habitual offenders, wilfully indulging in piracy of copyrighted content<sup>2</sup>, which is tantamount to dealing in stolen goods, for example, unlicensed network operators, illegal streaming devices (ISDs), rogue websites, infringing mobile/tablet applications, etc.<sup>3</sup> In fact, there are certain rogue operators who continue with unauthorized criminal activity, notwithstanding initiation of criminal proceedings against them in blatant disregard of the laws.<sup>4</sup> The civil procedures, ensuing long term adjudication or damages cannot effectively address the menace of piracy and specifically when a live event is being broadcast. In all such cases of broadcast piracy, only a robust criminal investigative and enforcement mechanism will address the issue and the threat of criminal sanctions, including imprisonment and fine, will act as deterrence. In terms of economic growth, any proposed decriminalization will increase the risk factor in the industry as the unavailability of the biggest deterrent would embolden potential infringers to indulge in infringement, and potentially use India as a hub for such activity.

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<sup>1</sup> Unauthorized distribution of sports channels during the major sporting events and injunctions issued by court is documented by news reports. Qatari broadcaster, BeIN Sports, refused to participate in the bid for the next cycle of rights for Formula 1 in the Middle East and North Africa (MENA) region due to rampant piracy and lack of support from Formula 1 and Saudi government in dealing with piracy in the region. See <https://www.grandprix247.com/2019/02/08/qatar-based-bein-sports-ditches-formula-1-broadcast/>

<sup>2</sup> Reports refer to British detectives stating that pirated DVDs from Pakistan account for nearly 40% of confiscations in relation to piracy in United Kingdom and that profits made through these DVDs funnel back directly to Al-Qaeda, the terror organization responsible for many attacks including 9/11 attacks in United States of America. see <https://www.armyupress.army.mil/Journals/NCO-Journal/Archives/2018/February/Funding-Terrorism/>

<sup>3</sup> There is compelling evidence to suggest that revenue generated from piracy of intellectual property is used in funding terrorism activities and other crimes. A report titled "Film Piracy, Organized Crime and Terrorism" published by RAND Corporation listed seventeen (17) organized crime units that generate funds through piracy. More alarmingly, one of those units is the D-Company led by Dawood Ibrahim who is wanted for many terrorist attacks in India including the 1993 Mumbai serial blasts. see [https://www.rand.org/pubs/research\\_briefs/RB9417.html](https://www.rand.org/pubs/research_briefs/RB9417.html)

<sup>4</sup> Despite multiple FIR investigations pending, and in the absence of a license to operate, Network Operators as Rathi Cable Network and Dharuhera Digital Network continue to transmit Star India's channels without authorization.

- (d) The penalties and fines under Sec. 63 of the “Act”, as proposed to be enhanced, are in fact deterrents against the criminal practices of piracy and plagiarizing, and do not reflect compensation of losses to copyright owners as a result of piracy and copyright infringement. Since copyright subsists in protectable works and does not need to be ‘registered’, the scope of its impact is often difficult to measure or quantify. Consequently, it remains a challenge to estimate the various forms of revenue lost due to copyright infringement/piracy, and it cannot be considered as the sole method to counteract the criminal action. Therefore, criminal sanction with penal action is necessary to prima facie address infringement. The separate civil action to seek damages for infringement is in recognition to compensate for the value that is lost from the unauthorised use of the property and its various direct and indirect uses, which are inherent in the copyright that are all subject to license by the owner.
- (e) The offenses specified and applicable penalties should, in fact, be reviewed to prescribe appropriate remedies to address piracy mechanisms and their network impact in the digital age. As pointed out earlier, the findings of the Irdeto Global Consumer Piracy Threat Report estimates that the media and entertainment sector loses around US\$2.8 billion due to online piracy annually<sup>5</sup> Therefore, a stringent criminal procedure and enhanced punishment will be a real and effective tool to address the offence of infringement/piracy. While a digitally connected content marketplace facilitates greater access to content, an organised criminal enterprise and ecosystem continues to operate around pirate applications for mobile and other compatible devices. App stores/websites provide the portal through which the app can be downloaded. Once downloaded and/or registered/subscribed, these apps provide users access to myriad pirate motion picture and television titles e.g., websites like Tamilrockers receive traffic of nearly 17 million people and illegally make available almost every new Bollywood movie within 24 hours of its release.<sup>6</sup> Instances like this are damaging to the content producers, broadcasters and directly impact all levels of persons and enterprise across the movie industry. The piracy levels in the country have only increased with the increase in use of digital resources during the recent pandemic lockdown, with a 62% rise in March 2020 over February 2020.<sup>7</sup>

Such criminal enterprises operate purely to profit from other creators/copyright owners, evade state taxes and make consumers susceptible to malware, identity theft and ransomware.<sup>8</sup> In a 2016 study analysing 1143 popular pirate sites, it was found that large and medium pirate sites earned revenues of up to \$4 million and \$2 million, respectively, and 361 advertisers on such sites were found to be in the high risk (promoting gambling/pornography/sale of drugs) category.<sup>9</sup> As per a report by GumGum Sports and MUSO, Premier League loses nearly GBP 1 million per match due to piracy across the world and, *more notably*, India ranks 4<sup>th</sup> in the list of countries with the largest audience consuming pirated Premier League content, tarnishing the country’s image.<sup>10</sup>

- (f) The proposal to decriminalize offences under the Copyright Act is not supported by reasons, data or evidence including those of misuse of provisions. The offences under the “Act” should not be deemed to be trivial or marginal or minor in nature which can be considered for being decriminalized.

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<sup>5</sup> <https://www.businesstoday.in/technology/news/what-entertainment-industry-should-do-to-fight-piracy/story/396137.html>

<sup>6</sup> <https://indianexpress.com/article/entertainment/bollywood/mission-mangal-full-movie-leaked-online-by-tamilrockers-akshay-kumar-5907653/>; <https://www.indiatvnews.com/entertainment/bollywood/housefull-4-bigil-full-movie-leaked-online-akshay-kumar-vijay-film-free-download-by-tamilrockers-558998>; <https://indianexpress.com/article/entertainment/bollywood/baaghi-3-leaked-tamilrockers-6302445/>; <https://indianexpress.com/article/entertainment/bollywood/chhapaak-leaked-online-by-tamilrockers-6206419/>;

<sup>7</sup> <https://www.livemint.com/news/india/india-sees-big-spike-in-film-piracy-post-covid-19-11589183182123.html>

<sup>8</sup> According to the 2018 Global Piracy Report published by MUSO for the year 2017, India was ranked third (3<sup>rd</sup>) in the list of countries from where the greatest number of hits were received on piracy websites with 17 billion hits. See <https://www.muso.com/magazine/global-piracy-increases-throughout-2017-muso-reveals>

<sup>9</sup> [http://www.verisiteglobal.com/Badvertising\\_Report.pdf](http://www.verisiteglobal.com/Badvertising_Report.pdf)

<sup>10</sup> <https://www.insidesport.co/pirated-feed-costs-epl-1-mn-a-match-india-4th-in-illegal-streaming-report/>

- (g) The availability of requisite measures to protect content creation and enhance the consumer's viewing experience is in the public interest. However, in the absence of enough protection to safeguard content value and broadcast technologies, broadcasters and content creators would be constrained to pass the burden of expenses and investment in arduous civil actions and protective technology, instead of investing in the creative economy, for creation of quality content and delivery.

**Contrary to any proposed decriminalization, there is an urgent need for review of criminal sanctions under the "Act"**

Instead of decriminalizing offences under "Act", Government should rather make the existing laws more stringent (*e.g. proportionately increasing the fine and the term of imprisonment to upto 10 years under Section 63 and 63A*) as persons/entities continue to blatantly violate the Copyright Act, for want of effective provisions with stringent criminal procedure and enforcement.

- a) **Stricter enforcement mechanism.** A robust and stricter enforcement mechanism needs to be put in place and punishments should be enhanced to create a stronger deterrent for anyone who commits offence punishable under the Copyright Act. Further, there is an imminent need to specifically classify copyright infringement and related offences, especially those that are wilful and on commercial scales as cognizable and non-bailable offences enabling law enforcement agencies to take immediate action as may be necessary.

India should be fortified by the enhanced enforcement in foreign jurisdictions with respect to copyright infringement, reflecting the public and administration's acknowledgement of the importance of IP, and recognition that the value of the copyright as an asset is entirely vested in the exclusive ownership and the licensed/authorized assignment of those rights.<sup>11</sup>

- b) **State's intervention is imperative.** For collecting evidences against infringer of copyrights, intervention and support of state machinery is of utmost importance. The nature of investigations may require disclosure of information/documents by third parties, and it may be easier for law enforcement agencies to cause such third parties to make disclosures (*when compared with requests for information/documents from individual rights holders for their private civil disputes*).
- c) **Harsher punishments and harmonization of punishments.** Offences under the Act deal with issues pertaining to theft, fraud, cheating, misappropriation and computer related offences and punishments for such offences should be same as provided for similar offences under Indian Penal Code and/or Information Technology Act 2000. As such, instead of a proposal for decriminalization of offences punishable under the Copyright Act, the term of imprisonment under the Copyright Act ought to be aligned with the term of imprisonment for relatable offences under IPC and IT Act.
- d) **Provision for the element of Mens Rea/intention.** Any amendment to the minor offences of falsification of records or statements should proceed with a view to clearly provide for mens rea/intention to invite criminal sanction and increased punishments/stricter penalties to deter offenders/repeated offenders.
- e) With a view to curtail the extent and impact of piracy, DPIIT should consider introducing statutory damages, due and payable to the copyright owners and licensors, as an additional legal recourse for copyright owners in its ongoing consultation to amend the Copyright Act.

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<sup>11</sup> <https://advanced-television.com/2020/03/10/fast-furious-7-film-pirate-jailed/>; <https://advanced-television.com/2020/06/02/pirate-device-seller-jailed/>

## **(1) Rationale for criminalisation of copyright offenses**

- a) Research reveals that major economies of the world (USA, Australia, UK, Singapore, Brazil, Canada, Germany, France, EU) have criminal sanctions in place for copyright offences.<sup>12</sup> Notably, USA, Australia and Singapore have TRIPS plus compliances in place where even if the infringement in consideration were not committed for commercial or financial gain, it would fall under the scope of criminal liability.<sup>13</sup> In fact, as opposed to decriminalising copyright infringements or reducing penalties, jurisdictions across the world have consistently increased the severity of penalties in light of advancement of technology leading to easier ways and means to indulge in mass-scale infringements without detection. The history of increased criminal sanctions in the US copyright law is one good example.<sup>14</sup> Copyright infringement related laws are being revisited across the world and are being made more robust and deterrent. *An example* is Singapore where after amendment of its Copyright Act, it is now a criminal offence with up to 5 years' imprisonment for anyone who commits wilful infringement of copyright.
- b) The advent of the digital world has set up new challenges for the law to keep pace with the technology and has created new, albeit anonymity providing, avenues for entities to indulge in infringing acts. It is particularly in this context that criminalization of copyright offences is not only desired but also essential to dissuade potential offenders or repeat offenders.
- c) As noted in Copinger and Skone James,<sup>15</sup> while discussing the history of the introduction of the criminal provisions under the English copyright statutes, the stricter criminal penalties introduced into their copyright statutes via the 1982 and 1983 amendments were necessitated in light of the acknowledgement by the Government that not only was video piracy spreading rapidly but that such piracy was under the control of "*substantial criminals*" with London becoming the world centre for pirate video production.
- d) The nexus between IP infringement and funding for criminal activities has increased since 1982-1983. It has been the experience of rights owners around the world that copyright piracy in works such as computer programmes/software CDs, films, songs, cable piracy, etc. are often controlled by large drug / criminal cartels.<sup>16</sup>
- e) The requirement of criminal sanctions in copyright laws have gained significance, despite copyright primarily being territorially governed, due to the growth of international trade and the collective global desire to protect copyright considering the emergence of digital piracy. As one of the steps towards this end, various countries have entered into bilateral and multilateral agreements wherein they have stipulated for criminalization of copyright offences.<sup>17</sup>
- f) Moreover, at a time when the National IPR Policy is calling for examining the introduction of penal provisions in the Cinematograph Act, 1952 for illegal duplication of films,<sup>18</sup> and at a time when the Home Minister is calling for special training of police officers in IPR violations due to their link with terror funding,<sup>19</sup> to decriminalise copyright infringement or to reduce the penalty for the offence of copyright infringement would be antithetical to the Government's stated objective of creating a safer and stronger legislative regime for encouraging business investments.

<sup>12</sup> See Copyright Laws and Regulations, 2018, ICLG (<https://iclg.com/compare/copyright#>)

<sup>13</sup> SAW, Cheng Lim, The case for criminalizing primary infringement of copyright – Perspectives from Singapore, (2010), International Journal of Law and Information Technology, pg. 3-4 (available at [https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=4566&context=sol\\_research](https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=4566&context=sol_research))

<sup>14</sup> [https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1483&context=law\\_lawreview](https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1483&context=law_lawreview) - see pages 853-856

<sup>15</sup> 16<sup>th</sup> Edition, para 22-04, Copinger and Skone James, quoting Hansard

<sup>16</sup> [https://www.washingtonpost.com/world/americas/drug-cartels-muscle-in-to-piracy-business/2011/05/28/AG93GLEH\\_story.html](https://www.washingtonpost.com/world/americas/drug-cartels-muscle-in-to-piracy-business/2011/05/28/AG93GLEH_story.html), <https://www.infosecurity-magazine.com/news/drug-cartels-supplying-malware-infected-pirated/>

<sup>17</sup> See ACTA, CAFTA, FTA-Australia, FTA-Chile, FTA-Columbia, TPP

<sup>18</sup> [https://dipp.gov.in/sites/default/files/National\\_IPR\\_Policy\\_English.pdf](https://dipp.gov.in/sites/default/files/National_IPR_Policy_English.pdf) - see objective 3.7

<sup>19</sup> <https://economictimes.indiatimes.com/news/politics-and-nation/piracy-copyright-violation-sources-of-terror-funding-rainath-singh/articleshow/60174244.cms>, <https://www.smh.com.au/technology/software-piracy-funding-terrorism-20030321-gdggtp.html>

On the contrary, such a move would likely lead to making India a hub of piracy as opposed to a hub for manufacturing/creating content. While the National IPR Policy, *inter alia*, commits to strengthen the enforcement mechanisms for better protection mechanism of IP rights and sensitizing inventors, creators of IP on measures for protection and enforcement of their rights, we need to create more robust mechanisms to facilitate copyright protection.

- g) The argument that existence of civil remedies in the form of damages is enough to withstand the import of criminal measures into the realm of IPR is antithetical to the fundamental understanding that criminal sanctions play a role separate and distinct from civil remedies. The very purpose of criminal remedies is to provide deterrence and punishment, especially against recalcitrant offenders. The importance of imprisonment as a deterrent form of punishment should not be ignored. Removing this deterrent form of punishment may by itself result in a spike in instances of copyright infringement and other related offenses. In his article, relying upon the 'Harm Principle', Cheng Lim Saw argues that if the scale of infringement were left unchecked, it would lead to undermining and eventual collapse of the IP system.<sup>20</sup> Further, decriminalizing may not only increase instances of violations, but it may also increase number of civil suits being filed, thus further burdening the already overburdened courts. This would lead to unavailability of a swift and meaningful remedy. Also, the slow and delayed civil process would render a large portion of the evidence and witness statement as redundant. There may also be instances where losses may not be quantifiable in monetary terms making criminal punishment crucial. Furthermore, since quantum of loss suffered due to copyright infringement is not measurable, civil remedies in the form of injunctions and damages may not be adequate.
- h) At present there is enough protection already built-in in the Copyright Act by way of Section 52 which specifies safe harbour provisions in respect of actions that may not be deemed to be infringement of copyright. As such there is no need to further enhance scope of Section 52 by *inter-alia* decriminalizing other offences under the Act.
- i) Additionally, decriminalizing copyright infringement will put the burden of protecting copyright solely on the copyright creators who may otherwise be inept to do so due to various reasons, including but not limited to insufficient monetary funds. The additional cost of pursuing civil remedies would lead to the increased cost of content, as creators would need to address the cost of reclaiming the lost value, along with cost of protecting the asset.

## **(2) Comments on the existing penal provisions in Copyright Act, 1957**

Chapter XIII, Section 63 to 69 of the "Act" provides for criminal sanctions against infringement of copyright.

In light of the above comments, the following proposals to the existing provisions may be considered to align them with India's international obligations and criminal liability principles, and also to strengthen the legislation in order to ensure that content creators are incentivised to innovate, and India does not become a hub of piracy.

It is submitted that substantial offenses related to copyright infringement (such as Sections 63, 63A, 65A, and 65B) may be retained as their continued presence is important to assure protection to right owners and content creators. However, keeping the spirit of the government's initiative, undertaken for ease of business, we suggest amendments to certain sections (Sections 64, 67, and 68A) which impose strict liability in the absence of *mens rea*.

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<sup>20</sup> Supra Note 8 at pg. 10

No.	PROVISION IN COPYRIGHT ACT	Comments
1.	<p><b>63. Offence of infringement of copyright or other rights conferred by this Act.</b></p> <p>Any person who knowingly infringes or abets the infringement of—</p> <p>(a) the copyright in a work, or</p> <p>(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:</p> <p>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 judgement, impose a sentence of imprisonment for a term of less than six months or a fine of less than fifty thousand rupees.</p> <p>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</p>	<ul style="list-style-type: none"> <li>- Currently, penalty for violation of 65A, 65B, and 52A are higher than for copyright infringement. This shows an inclination towards disproportionate penalty. Copyright infringement and circumvention measures ought to have the highest penalty.</li> <li>- <i>We recommend respectfully that the government should consider enhancing the punishment from the current 6 months to 3 years, and which may extend to 5 years from the current 3 years.</i></li> <li>- <i>We further respectfully recommend enhancing the fine to be not less than Rupees five Lakhs (500,000) but which may extend up to Rupees ten Lakhs (10,00,000)</i></li> </ul> <p>(inter alia, to be commensurate at least with the proposal for enhanced fine as amended in the Cinematograph Act, on deliberation by the IT parliamentary subcommittee)</p> <ul style="list-style-type: none"> <li>- This will also make copyright infringement a cognizable offence.<sup>21</sup></li> <li>- <i>To address instances of innocent infringement as a first offence (by students or individuals) the Proviso may be amended to impose only a fine in case the infringement is not for gain or business (making it in line with Proviso to Section 63B). Fine should be levied in proportion to the magnitude of the offence.</i></li> </ul>
2.	<p><b>63A. Enhanced penalty on second and subsequent convictions.</b></p> <p>Whoever having already been convicted of an offence under section 63 is again convicted of any such offence shall be punishable for the second and for every subsequent offence, with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:</p>	<ul style="list-style-type: none"> <li>- Consider amending to provide stricter penalty of <i>imprisonment for a term which shall not be less than 3 years but which may extend to 7 years for repeat offenders</i> (as mostly such offenders are engaged in organised criminal activity)</li> <li>- <i>Consider enhancing the fine to be not less than Rupees five Lakhs (500,000) but which may extend to Rupees ten Lakhs (10,00,000)</i></li> </ul>

<sup>21</sup> The issue of whether copyright offence u/s 63 is cognizable or non-cognizable is much debated with different High Courts taking different views. See <https://spicvip.com/2020/04/offence-of-copyright-infringement-cognizable-or-not-still-a-cat-ch-22-situation.html>; Also see Rajya Sabha Debate on 1982 Copyright Amendment Bill available at [https://rsdebate.nic.in/bitstream/123456789/362937/1/PD\\_127\\_04081983\\_9\\_p231\\_p299\\_12.pdf](https://rsdebate.nic.in/bitstream/123456789/362937/1/PD_127_04081983_9_p231_p299_12.pdf)

	<p>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 one year or a fine of less than one lakh rupees:</p> <p>Provided further that for the purposes of this section, no cognizance shall be taken of any conviction made before the commencement of the Copyright (Amendment) Act, 1984.</p>	<p>(inter alia, to accurately reflect at least the enhanced fine, deliberated and accepted by the Parliamentary Subcommittee on IT, for any violation of Cinematograph Act)</p>
3.	<p><b>63B. Knowing use of infringing copy of computer programme to be an offence.</b></p> <p>Any person who knowingly makes use on a computer of an infringing copy of a computer programme shall be punishable with imprisonment for a term which shall not be less than seven days 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:</p> <p>Provided that where the computer programme has not been used for gain or in the course of trade or business, the Court may, for adequate and special reasons to be mentioned in the judgment, not impose any sentence of imprisonment and may impose a fine which may extend to fifty thousand rupees.</p>	<p>Here, the provision for imprisonment may be removed where the infringement has not been made for gain or in the course of trade or business. However, it is respectfully recommended that the penalty clause should be retained but with enhanced upper cap.</p> <p><i>Notably, this section is aimed at the end-user of the pirated product, and not the person who is responsible for creating an infringing copy. As a result, the provision does not create deterrence against persons who indulge in making pirated copies of software programmes, which is a specialized skill. Therefore, targeting the end-user will have limited deterrent impact because the use of infringing copies of software is all too prevalent in our society.</i></p>
4.	<p><b>64. Power of police to seize infringing copies.</b></p> <p>(1) Any police officer, not below the rank of a sub-inspector, may, if he is satisfied that an offence under section 63 in respect of the infringement of copyright in any work has been, is being, or is likely to be, committed, seize without warrant, all copies of the work, and all plates used for the purpose of making infringing copies of the work, wherever found, and all copies and plates so seized shall, as soon as practicable, be produced before a Magistrate.</p> <p>(2) Any person having an interest in any copies of a work or plates seized under sub-section (1) may, within fifteen days of such seizure, make an application to the Magistrate for such copies or plates being restored to him and the Magistrate, after hearing the applicant and the complainant and making such further inquiry as may be necessary, shall make such order on the application as he may deem fit.</p>	<ul style="list-style-type: none"> <li>- Consider that satisfaction of officer at DCP level is provided for, as opposed to sub-inspector. This will ensure frivolous complaints are not registered.</li> <li>- A deadline within which seizures must be placed before a magistrate.</li> <li>- Consider narrowing down the definition of 'plates' which may be subject to seizure, so that only those plates used specifically or overwhelmingly for committing infringement can be seized.</li> </ul>

<p>5.</p>	<p><b>65A. Protection of technological measures.</b></p> <p>(1) Any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by this Act, with the intention of infringing such rights, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine.</p> <p>(2) Nothing in sub-section (1) shall prevent any person from, —</p> <p>(a) doing anything referred to therein for a purpose not expressly prohibited by this Act:</p> <p>Provided that any person facilitating circumvention by another person of a technological measure for such a purpose shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated; or</p> <p>(b) doing anything necessary to conduct encryption research using a lawfully obtained encrypted copy; or</p> <p>(c) conducting any lawful investigation; or</p> <p>(d) doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorisation of its owner; or</p> <p>(e) operator; or</p> <p>(f) doing anything necessary to circumvent technological measures intended for identification or surveillance of a user; or</p> <p>(g) taking measures necessary in the interest of national security.</p>	<p>Consider enhancing punishment in line with amended Section 63, i.e. raising term of imprisonment to 3 to 5 years, as technological advancements and the increased technological ability of the general public has also increased the possibility of circumventing of technical measures. It is relevant for the appropriate development and protection of technological measures to set out the parameter for deemed knowledge and provide stricter penalties to act as a deterrent to potentially rampant copyright infringement by technological manipulation.</p> <p><i>65A. (1) Any person who circumvents a technological measure applied for protecting any of the rights conferred in the Act, with the intention of infringing such rights, shall be punishable with imprisonment which may extend to three years for the first offence and 5 years for second and subsequent offences and shall also be liable to a fine to be not less than Rupees five Lakhs (500,000) but which may extend to Rupees ten Lakhs (10,00,000), wherein all offences shall be treated as cognizable and non-bailable. Anyone who commits the offence shall be deemed to have committed the offence with knowledge.</i></p>
<p>6.</p>	<p><b>65B. Protection of Rights Management Information.</b></p> <p>Any person, who knowingly, —</p> <p>(i) removes or alters any rights management information without authority, or</p> <p>(ii) distributes, imports for distribution, broadcasts or communicates to the public, without authority, copies of any work, or performance knowing that electronic rights management information has been removed or altered without authority, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine:</p> <p>Provided that if the rights management information has been tampered with in any work,</p>	<p>- (ii) consider enhancing punishment in light with amended Section 63, i.e. raising term of imprisonment that may extend to 3 to 5 years;</p> <p>- (ii) Consider clearly providing the fine amount <i>to be not less than Rupees five Lakhs (500,000) but which may extend to Rupees ten Lakhs (10,00,000)</i></p>

	the owner of copyright in such work may also avail of civil remedies provided under Chapter XII against the persons indulging in such acts.	
7.	<p><b>67. Penalty for making false entries in register, etc., for producing or tendering false entries.</b></p> <p>Any person who,— (a) makes or causes to be made a false entry in the Register of Copyrights kept under this Act, or (b) makes or causes to be made a writing falsely purporting to be a copy of any entry in such register, or (c) produces or tenders or causes to be produced or tendered as evidence any such entry or writing, knowing the same to be false, shall be punishable with imprisonment which may extend to one year, or with fine, or with both.</p>	<p>- Element of <i>mens rea</i> is currently absent in sub-clauses (a) and (b) of Section 67. Hence, may consider adding the words ‘knowingly’ or ‘intentionally’.</p> <p><i>“Any person who,— (a) <b>knowingly</b> makes or causes to be made a false entry in the Register of Copyrights kept under this Act, or (b) <b>knowingly</b> makes or causes to be made a writing falsely purporting to be a copy of any entry in such register, or (c) produces or tenders or causes to be produced or tendered as evidence any such entry or writing, knowing the same to be false, shall be punishable with imprisonment which may extend to one year, or with fine, or with both.”</i></p>
8.	<p><b>68A. Penalty for contravention of section 52A.</b></p> <p>Any person who publishes a sound recording or a video film in contravention of the provisions of section 52A shall be punishable with imprisonment which may extend to three years and shall also be liable to fine.</p>	<p>- Element of <i>mens rea</i> is currently absent in Section 68A. Consider adding the words ‘<b>knowingly</b>’ or ‘<b>intentionally</b>’.</p> <p><i>“Any person who <b>knowingly</b> publishes a sound recording or a video film in contravention of the provisions of section 52A shall be punishable with imprisonment which may extend to three years and shall also be liable to fine.”</i></p>
9.	<p><b>69. Offences by companies.</b></p> <p>(1) Where any offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for, the conduct of the business of the company, as well as the company shall be to be guilty of such offence and shall be liable to be proceeded against and punished accordingly:</p> <p>Provided that nothing contained in this sub-section shall render any person liable to any punishment, if he proves that the he exercised all due diligence to prevent the commission of such offence. (2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company, and it is proved that the offence was committed with the consent or connivance of, or is attributable to any negligence on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be</p>	<p>Consider the following addition, in order to protect against adding of Directors and senior management in criminal prosecutions –</p> <p><i>“69. (1) Where any offence under this Act has been committed by a company, every person who <b>knowingly</b> at the time the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company, <b>and had knowledge of the offence</b>, as well as the company shall be to be guilty of such offence and shall be liable to be proceeded against and punished accordingly:”</i></p>

liable to be proceeded against and punished accordingly. Explanation. For the purposes of this section— (a) "company" means anybody corporate and includes a firm or other association of persons; and (b) "director" in relation to a firm means a partner in the firm.	
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