Insight into the Nature of Offence of Copyright Infringement

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The paper discusses judicial decisions rendered on interpretation of offence of copyright infringement under Section 63 of the Copyright Act, 1957 in the backdrop of two recent conflicting decisions of the Andhra Pradesh High Court and the Kerala High Court on the same matter. The paper attempts to clear confusion, which has arisen post-Amarnath Vyas regarding cognizability and bailability of the offence of copyright infringement. The authors highlight intention of the legislature in enacting the Copyright (Amendment) Act, 1984 to argue that the decision of the Andhra Pradesh High Court is erroneous.

Keywords: Copyright infringement, cognizable, non-cognizable, non-bailable, bailable

An artistic, literary or musical work is the brainchild of the author, the fruit of his labor and so, considered to be his property so highly is it prized by national and international conventions.¹

This quote sums up the underlying idea behind copyright protection, which is to award fruits of labour to only that person who has worked hard and produced the work with the addition of modern day emphasis on originality and to prevent economic exploitation of the work of a creator by third parties. Keeping this objective in view, the Indian Copyright Act of 1957 provides for penal sanction for the offence of infringement of copyright. Furthermore in the context of the rampant rise in the crime of piracy there is an urgent need to effectively arm the police to tackle menace of copyright piracy so that protection given under copyright is preserved and this can be done by interpreting sections of the Act in such a manner which is conducive to curbing of the said crime. The paper resolves the conflict surrounding interpretation of Section 63 of the Copyright Act 1957 which prescribes punishment for the offence of infringement of copyright or other rights conferred by the Act. This conflict has arisen on account of diametrically opposite interpretations given by the Andhra Pradesh High Court and the Kerala High Court on Section 63 of the Copyright Act. The judgments have given rise to a raging debate as to whether the offence of infringement is bailable or not interlinked with the question of whether the offence is cognizable or non-cognizable.

The Andhra Pradesh High Court in Amarnath Vyas v State of Andhra Pradesh², which was decided on 19 December 2006 has expressed a firm opinion that the offence of copyright infringement is bailable and non-cognizable.

On the contrary, the Kerala High Court has on 29 May 2007 in Sureshkumar S/o Kumaran v The Sub Inspector of Police³ ruled that the offence is cognizable and non-bailable.

The paper analyses the said decisions to arrive at the correct interpretation of Section 63 in order to combat offence of copyright infringement in the most effective manner. In addition to this, the authors suggest a way out of the imbroglio.

In the next section of the paper, the authors have focused on the exact wording of the Section 63 of the Copyright Act to get at the root of the controversy.

Deconstructing Section 63 of the Copyright Act

Section 63 of the Copyright Act prescribes that the intentional infringement or abetment of an infringement of the copyright in a work shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years.

In all the cases regarding copyright infringement the query which came up before the courts was whether anticipatory bail could be granted to the accused offender under Section 438 of the Criminal Procedure Code, 1973 and this as a logical corollary

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led the courts to the question of bailability of the offence of copyright infringement as anticipatory bail can be granted only for non-bailable offences. To find out the nature of an offence, the courts look into the First Schedule to the Criminal Procedure Code, 1973 in which classification of offences has been made. The said Schedule is divided into two parts with Part I dealing with offences under the Indian Penal Code and Part II dealing with offences under other laws. The offence of copyright infringement is covered by Part II as it is an offence under other laws, which in the present context is the Copyright Act, 1957.

There are three categories of offences, which are essentially created by Part II of Schedule I. The first category of offences which prescribe the punishment of death, imprisonment for life, or imprisonment for more than seven years, are ‘cognizable’, non-bailable’ and triable by a Court of Session’. The second category of offences, which prescribe the punishment of imprisonment for three years and upwards, but not more than seven years, are ‘cognizable’, ‘non-bailable’ and ‘triable by a Magistrate of the First Class’. The third category of offences which prescribe the punishment of imprisonment for less than three years or with fine only, are ‘non-cognizable’, ‘bailable’ and ‘triable by any Magistrate’. The scheme of the classification of offences made by Schedule II of the Criminal Procedure Code, in case of offences under other laws, is as follows:

<table>
<thead>
<tr>
<th>Offence</th>
<th>Cognizable or non-cognizable</th>
<th>Bailable or non-bailable</th>
<th>Court triable</th>
</tr>
</thead>
<tbody>
<tr>
<td>If punishable with death, imprisonment for life, or imprisonment for more than 7 years</td>
<td>Cognizable</td>
<td>Non-bailable</td>
<td>Court of Session</td>
</tr>
<tr>
<td>If punishable with imprisonment for 3 years and upwards but not more than 7 years</td>
<td>Cognizable</td>
<td>Non-bailable</td>
<td>Magistrate of the first class</td>
</tr>
<tr>
<td>If punishable with imprisonment for less than 3 years or with fine only</td>
<td>Non-cognizable</td>
<td>Bailable</td>
<td>Any Magistrate</td>
</tr>
</tbody>
</table>

The punishment for the offence copyright infringement as prescribed by Section 63 of the Copyright Act is imprisonment for a term which shall not be less than six months but which may extend to three years. It is this phrase ‘which may extend to three years’ which is the root cause of all confusion as the next question which comes up is whether the offence of copyright infringement would fall under the second category or the third category of Part II of Schedule I of the Criminal Procedure Code, 1973 and this was the precise question which came up before the Andhra Pradesh High Court and the Kerala High Court and they reached different conclusions to decide on the issue of whether copyright infringement is bailable or not.

The paper further deals with judicial pronouncements on the issue of nature of offence of copyright infringement.

Judicial Trends vis-à-vis Nature of Copyright Infringement

In this section, first case of Jitendra Prasad Singh v State of Assam is dealt with before plunging into a discussion of the conflicting decisions of Andhra Pradesh and Kerala High Court as it is the sole case prior to these decisions involving the issue of whether copyright infringement is bailable or not.

Jitendra Prasad Singh v State of Assam

Having regard to the provisions of Section 63 of the Copyright Act, 1957, the Gauhati High Court was of the view that the offence punishable under Section 63 of the Act is a non-bailable offence and therefore the provisions of Section 438 of the Code of Criminal Procedure would get attracted. The underlying basis for the decision rendered was that the punishment prescribed for a term ‘which may extend to three years’ would include in itself a term of imprisonment which can be as long as three years. However, the third category of offences, which talks about a term of imprisonment for less than three years, does not include an imprisonment of a term of three years. Thus it is the second category, which would apply.

Though the Andhra Pradesh High Court in Amarnath Vyas rejected this decision, it is of prime importance being the only case on this issue pre-Amarnath Vyas and Suresh Kumar.

Amarnath Vyas v State of Andhra Pradesh

Amarnath Vyas had filed an application under Section 438 of the Criminal Procedure Code for anticipatory bail having regard to the accusation that he perpetrated the offence punishable under Section 63 of the Copyright Act. Initially the High Court dismissed the anticipatory bail on the ground that the
offence alleged was bailable and no application for anticipatory bail could be maintainable as it could be provided only for non-bailable offences. The Public Prosecutor urged the High Court to reconsider its decision and hold that the offence of infringement of copyright is a non-bailable one. The main contention of the Public Prosecutor was that because the punishment prescribed under Section 63 is a minimum sentence of six months and the maximum sentence, which may extend upto three years, it would fall within the domain of second category of Part II of Schedule I.

The Judgment sums up the issue in this statement in paragraph 8 of the judgment,

Whether the second category of the classification will attract or not is the only point germane for consideration in the instant case.6

In the same paragraph, it is observed,

The expression 'punishment for a term which may extend to three years is certainly not similar to the expression 'punishment for three years and upwards'.

The Public Prosecutor cited two authorities to support his contention that the offence of infringement of copyright is a non-bailable offence. One was the judgment of the High Court of Gauhati in Jitendra Prasad Singh v State of Assam.7 The second authority relied upon was the judgment of the Kerala High Court in C K Boban v Union of India8 wherein it was opined that the expression ‘three years and upwards’ would definitely include an offence punishable for a ‘term upto three years’ so that the offence enjoined under Section 135 (1)(ii) of the Customs Act would come within the second category of classification of Part II of the Schedule. At this stage, details of the Kerala High Court judgment are not taken as the issue in this case concerns interpretation of a provision of the Customs Act while the issue, which is discussed in this paper, pertains to Copyright Act.

The Andhra Pradesh High Court in Amarnath Vyas rejected decision of the High Court of Gauhati in Jitendra Prasad. It is respectfully submitted that the Andhra Pradesh High Court has misunderstood the ratio of the Gauhati High Court in Jitendra Prasad. The ratio of the Gauhati High Court has a fundamental premise. In a particular case, it is possible that the offence of copyright infringement could be punished with imprisonment for three years and then it would be anomalous to place it in the third category in Table II of Schedule I. In effect, it would lead to the absurdity that an offence, which has been punished with a clear term of three years, would be considered to be bailable and non-cognizable despite an explicit legislative mandate to the contrary!

One more reason given by the Andhra Pradesh High Court for not considering the Kerala and Gauhati High Court judgments was the fact that these courts had failed to consider judgment of the Supreme Court in Rajeev Chaudhary v State (NCT) of Delhi.9

Rajeev Chaudhary v State (NCT)of Delhi9

The accused Rajeev Chaudhary was produced before the Metropolitan Magistrate, New Delhi on 31 October 1998 in connection with an offence punishable under Section 386 of the Indian Penal Code, which provides for a term, which may extend to ten years. Initially he was remanded to police custody up to 1 November 1998 and after that to judicial custody. Later the accused Rajeev Chaudhary made an application under Section 167 (2) of the Criminal Procedure Code, and Magistrate released him on bail on the ground that Clause (ii) of Section 167 (2)(a) would apply when investigation related to an offence punishable with imprisonment for a term which may extend to ten years and maximum period of detention would be sixty days. The State preferred to file a revision petition, which was heard by the Additional Sessions Judge who set aside the order of Magistrate and directed the accused to surrender before the trial court. The accused challenged the order of the Additional Sessions Judge in the High Court and the High Court upheld the order of the Additional Sessions Judge.

The High Court observed that in the case of a particular offence, even though the Court may have discretion to award punishment of imprisonment for a term less than ten years, the above mentioned Clause (i) of Section 167 (2)(a) will apply if the accused can be punished with imprisonment for a term of ten years.10

The accused preferred an appeal to the Supreme Court. The Supreme Court resorted to an interpretation wherein it sought to give full effect to the natural grammatical meaning to the expression used by the legislature in Section 167(2)(a)(i).

The Supreme Court observed that the expression ‘not less than’ would mean imprisonment should be 10 years or more and would cover only those offences for which
pursuit could be imprisonment for a clear period of 10 years or more. The Court commented:

‘Under Section 386 punishment provided is imprisonment of either description for a term which may extend to 10 years and also fine. That means imprisonment can be for a clear period of 10 years or less. Hence, it could not be said that minimum sentence would be 10 years or more.’

Thus, the Supreme Court held that Section 167(2)(a)(i) would apply only in case of offence where minimum sentence would be ten years or more and not for the offences for which punishment could be imprisonment for less than 10 years.

The Andhra Pradesh High Court by applying the interpretation given in Rajeev Chaudhary came to the conclusion that the term of imprisonment for three years or upwards, but not more than seven years, cannot be equated with term of imprisonment which may extend to three years.

The judgment states that merely because a particular offence is not coming squarely within the domain of classification III, it cannot automatically be treated as included in the classification II. It therefore refuses to place the offence of copyright infringement under the second category and observes that the offence punishable under Section 63 of the Copyright Act cannot be considered as ‘non-bailable’ one and by doing makes the offence bailable.

The authors would like to submit that the decision of the Supreme Court concerned the interpretation of a provision of the Indian Penal Code and the Andhra Pradesh High Court committed an error in stretching the same logic to the offence of copyright infringement. The judgment of the High Court completely ignores the basic purpose behind the enactment of the penal provisions in the Copyright Act.

The object and reasons of the Copyright Act and other provisions of the Copyright Act should have been looked into before coming to any conclusion. The authors in the subsequent section establish that the offence of copyright infringement is indeed non-bailable but for now focus on the decision rendered in Amarnath Vyas.

The judgment of the Andhra Pradesh High Court finds no mention in a judgment of the Kerala High Court in Suresh Kumar v Sub-Inspector of Police which strikes a different chord on the same issue.

Interpretation of Section 63: Solving the Conundrum

To solve the conundrum of interpretation of nature of the offence of copyright infringement mentioned Section 63 of Copyright Act, 1957 one needs to look into the intention of the legislature while drafting that section. A statute is an edict of the legislature and a statute is to be construed according to the intent of the legislature – the mens or sentential legis. If a statutory provision is open to more than one interpretation, the Court has to choose that interpretation which represents the true intention of the legislature. In order to find out the true intention of a statutory provision it is imperative that the object and purpose or the reason and spirit behind a statute be taken into consideration. When the question arises as to the meaning of a certain provision in a statute that provision must be read in its context, which means, the statute as a whole, the previous state of the law, the general scope of the statute and the mischief that it was intended to remedy.

The Copyright Act, as originally enacted, prescribed fine and maximum imprisonment of one
year for the offence of copyright infringement. The Copyright Act was amended in 1984 to curb widely prevalent piracy in videotaping and musical record taping and punishment for the offence of copyright infringement was enhanced substantially by amending Section 63 as imprisonment may now extend to a maximum period of three years. Section 64 of the Copyright Act arms the police with the power to seize without warrant, all copies of the work which are in violation of Section 63. The object and reason of the Copyright (Amendment) Act 1984 are as follows:

“Piracy has become a global problem due to the rapid advances in technology. It has assumed alarming proportions all over the world and all the countries are trying to meet the challenge by taking stringent legislative and enforcement measures...The emergence of new techniques of recordings, fixation and reproduction of audio programmes, combined with the advent of video technology have greatly helped the pirates. It is estimated that the losses to the film producers and other owners of copyright amount to several crores of rupees. The loss to Government in terms of tax evasion also amounts to crores of rupees...In view of these circumstances; it is proposed to amend the Copyright Act, 1957, suitably to combat effectively the piracy that is prevalent in the country”.

In view of the conflicting opinions in Amarnath Vyas and Suresh Kumar, it becomes essential to use the mischief rule of interpretation under which factors like history of the Act and the reasons which led to its being passed play a critical role in interpretation.\(^\text{18}\) The statement of object and reasons of the Copyright (Amendment) Act, 1984 makes it abundantly clear that the amendment sought to remedy mischief of copyright piracy. It is an established principle of criminal law that that for every bailable offence, bail may be sought as a matter of right.

It has been expressly stated by the Copyright Office of India on its official website that the Copyright (Amendment) Act, 1984 has made the offence of copyright infringement cognizable and non-bailable.\(^\text{20}\)

Amarnath Vyas: Muddying the Waters

The judgment of the Andhra Pradesh High Court in Amarnath Vyas has squarely followed the judgment of the Supreme Court in Rajeev Chaudhary. The Court has concluded,

*Therefore, the expression 'imprisonment for a term which may extend up to three years', in my considered view, would not come squarely within the expression 'imprisonment for three years and upwards'.\(^\text{6}\)*

The Court’s conclusion that the offence of copyright infringement is bailable shows that it has placed the offence of copyright infringement in the third category of the Second Part of Schedule I of Criminal Procedure Code.

The placing of the offence of copyright infringement in the third category of Second Part of Schedule I makes copyright infringement a non-cognizable offence which goes against the well settled notion that the offence of infringement of copyright is a cognizable offence. For instance, the Hand Book of Copyright Law, a Government of India publication, states that the offence of infringement of copyright in India is cognizable.\(^\text{22}\) Even Business Software Alliance has thus stressed on the cognizability of offence of copyright infringement:

*The copyright laws of India are one of the strictest in the world. The Copyright Act of 1957 makes copyright infringement a civil as well as a criminal offence. Civil Remedies include injunctions, damages, an account of profits, costs, and delivery up of infringing goods. Copyright infringement is a cognizable criminal offence, which is punishable (for both, the management of the companies and individuals) by imprisonment for up to 3 years and fine up to Rs 2 lakhs. Police also have powers to make spot arrests without any court warrant.\(^\text{23}\)*

In the case of State of Andhra Pradesh v Nagoti Venkatatraman,\(^\text{24}\) the Supreme Court made an observation that it was unnecessary for the prosecution to trace owner of the copyright to come and adduce evidence of infringement of copyright. The observation of the Supreme Court also affirms the view that the offence of infringement of copyright is a cognizable offence and that the police must be given a lot of leeway in collection of evidence.\(^\text{25}\)

Thus, it is submitted that the offence of copyright infringement is a cognizable and bailable offence and falls under the second category of the classification in
Second Part of Schedule I of the Criminal Procedure Code, 1973. The judgment of the Andhra Pradesh High Court in Amarnath Vyas case is in fact a step backward in the battle against copyright infringement in India.

Offence of Copyright Infringement: The Ground Reality

It is often lamented that there is a difference between enacting a law and ensuring that it is properly enforced. The copyright laws in India offer a very good illustration of this enigma. Despite the protection provided by the Indian Copyright Act, 1957, India has acquired notoriety by being on the Priority Watch List year after year mainly because of abominable high piracy rates and dearth of appropriate measures of enforcement.25

The 2007 report of the International Intellectual Property Alliance(IIPA) on India documented that India suffered trade losses worth 496.3 million US dollars due to copyright piracy.25 In such a dismal situation, it is extremely logical that wider powers must be given to the police to conduct suo moto raids to curb piracy. It is noteworthy that the 2007 IIPA Report also recommends that the number of suo moto ex officio raids must be significantly increased in all the states as part of creation of deterrence needed to drive piracy rates down.25 The 2003 IIPA report on India had made a very pertinent observation with regard to the procedural hurdles at the police level that hamper enforcement. Ironically the Report lamented.

For example, even though police can act on their own to seize pirate product under the copyright laws, and in fact, are obliged to do so under the Criminal Procedure Code, the police in many cities simply refuse to act ex officio and invariably require a complaint from the right holder.25

The 2007 IIPA report has shown some optimism and has commended the Indian state governments and various police forces for recognizing the importance of and actually taking suo moto ex officio action. The report observes.

But we know that raiding alone will not provide the level of deterrence needed to drive down piracy rates significantly; criminal cases with deterrent sentences actually imposed will be the true arbiter of whether these raids have had their ultimate desired effect.25

Therefore there is an urgent need to effectively implement the Copyright Act and put to use the wide powers given under it to the police to combat the menace of copyright piracy. It is also crucial that the interpretation of the provisions of the Copyright Act be made in a manner that no ambiguity has the effect of obfuscating the purpose of the Act.

Conclusion

In the face of growing concerns expressed by the creators of work and other countries regarding ineffective protection given to copyright it is high time that the position with respect to the nature of offence of copyright infringement be clarified at the earliest. The basis for making the offence of copyright infringement bailable and non-cognizable is inconsistent with the intention of the legislature and the purpose for which Section 63 was amended.

Any confusion in the judiciary regarding the interpretation of Section 63 of the Copyright Act must be put to rest as soon as possible. Copyright piracy could be stopped effectively only if the offence of copyright infringement is considered to be non-bailable and cognizable. The decision of the Kerala High Court in Suresh Kumar enunciates the correct position of law for it has considered the seriousness of the offence of copyright infringement. On the other end of the spectrum, the decision of the Andhra Pradesh High Court has interpreted Section 63 overlooking the impact it would have on the measures which are often taken to prevent copyright infringement. It is submitted by the authors that the decision of the Andhra Pradesh High Court requires reconsideration.

References
1 Gramophone Company v Birender Bahadur Pandey, AIR 1984 SC 667 at 676.
2 2007 Cri LJ 2025 (AP)
3 2007 (3) KLT 363.
4 Section 438 (1) of the Criminal Procedure Code reads as follows, “When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for direction under this section; and that court may, if it thinks fit, direct that in the even of such arrest, he shall be released on bail.”
5 2003 (26) PTC 486 (Gau).
6 Amarnath Vyas v State of Andhra Pradesh, 2007 Cri LJ 2025 (A P), paras 8,11,12
7 Jitendra Prasad Singh v State of Assam, 2003 (26) PTC 486 (Gau).
8 C K Boban v Union of India, 2005 Cri LJ 2801 (Ker)
9 Rajeev Chaudhary v State, AIR 2001 SC 2369, para 5.
10 Rajeev Chaudhary v State, 2001 Cri LJ 2023 (Del), para 4.
11 Suresh Kumar S/o Kumaran v The Sub Inspector of Police, 2007 (3) KLT 363.
14 Institute of Chartered Accountants of India v Price Waterhouse, AIR 1998 SC 74.
18 Thompson v Lord Clanmorris, (1900) 1 Ch 718.
19 Section 436 (1) of Criminal Procedure Code reads as follows, “(1) When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at, any, time-, while-in, the custody of such officer or at any stage of the proceeding before such court to give bail, such person shall be released on bail.”
26 Desai Rachana, Copyright infringement in the Indian film industry, Vanderbilt Journal of Entertainment, Law & Practice (Spring 2005), 259-278.