

7 July 2020

ADDITIONAL COMMENTS ON PROPOSALS TO DE-CRIMINALISE COPYRIGHT OFFENCES

Further to our submission dated 06/07/20, below are specific comments and language on the existing provisions in the Copyright Act, 1957 which we received from one of our members and which AVIA endorses. We would be grateful if the Department for Promotion of Industry and Internal Trade could take these additions into account alongside our original submission.

No.	PROVISION IN COPYRIGHT ACT	Comments
1.	<p>63. Offence of infringement of copyright or other rights conferred by this Act.</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"> - 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. - <u>consider enhancing the punishment from the current 6 months to 3 years, and which may extend to 5 years from the current 3 years.</u> - <u>Consider 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)</u> <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"> - This will also make copyright infringement a cognizable offence.¹

¹ 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://spicyip.com/2020/04/offence-of-copyright-infringement-cognizable-or-not-still-a-catch-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

		<ul style="list-style-type: none"> - 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.)
2.	<p>63A. Enhanced penalty on second and subsequent convictions.</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> <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>	<ul style="list-style-type: none"> - Consider amending to provide stricter penalty of <u>imprisonment for a term which shall not be less than three (3) years but which may extend to seven (7) years for repeat offenders</u> (as mostly such offenders are engaged in organised criminal activity) - <u>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)</u> (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)
3.	<p>64. Power of police to seize infringing copies.</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>	<p>consider that satisfaction of officer at DCP level is provided for, as opposed to sub-inspector. Will ensure frivolous complaints are not registered.</p> <ul style="list-style-type: none"> - A deadline within which seizures must be placed before a magistrate. - 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.

<p>4.</p>	<p>65A. Protection of technological measures.</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. Its 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 <u>three years for the first offence and 5 years for second and subsequent offences</u> and shall also be liable to a fine <u>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.</u></i></p>
<p>5.</p>	<p>65B. Protection of Rights Management Information.</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</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 <u>to be not less than Rupees five Lakhs (500,000) but</u></p>

	<p>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, the owner of copyright in such work may also avail of civil remedies provided under Chapter XII against the persons indulging in such acts.</p>	<p><u>which may extend to Rupees ten Lakhs (10,00,000)</u></p>
<p>6.</p>	<p>67. Penalty for making false entries in register, etc., for producing or tendering false entries.</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) knowingly makes or causes to be made a false entry in the Register of Copyrights kept under this Act, or (b) knowingly 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>
<p>7.</p>	<p>68A. Penalty for contravention of section 52A.</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 ‘knowingly’ or ‘intentionally’.</p> <p><i>“Any person who knowingly 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>
<p>8.</p>	<p>69. Offences by companies.</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</p>	<p>Consider the following addition, in order to protect against adding of Directors and senior management in criminal prosecutions –</p>

<p>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 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.</p>	<p><i>“69. (1) Where any offence under this Act has been committed by a company, every person who knowingly 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, <u>and had knowledge of the offence,</u> 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>
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