

CRIME AND COPYRIGHT INFRINGEMENT

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

Rakeysh Omprakash Mehra was discharged in 2021 by a judicial magistrate in Aurangabad in a case of copyright infringement filed by a scriptwriter who claimed that *Rang De Basanti* was based on his script. A still from the 2006 film. | Photo Credit: Special Arrangement

The Supreme Court of India has passed a far-reaching judgment resolving the question of whether copyright infringement, which is punishable with imprisonment for a term which may extend up to three years under the Copyright Act of 1957, is a cognisable offence under the Code of Criminal Procedure (CrPC), 1973. While the *Knit Pro International v. The State of NCT* judgment is sparse in its reasoning, its conclusion is clear: copyright infringement is a cognisable offence under the CrPC.

In simple English, this means that the police can begin investigations into allegations of copyright infringement on receiving a complaint. If the court had held copyright infringement to be a non-cognisable offence, the police could have started investigations only after a judicial magistrate had taken cognisance of the offence and directed the police to initiate an investigation. The immediate consequence of this judgment is that many copyright owners, especially in the software and music industries, will use the threat of police involvement to scare potential infringers, to extort licence fees in excess of the amount payable in a scenario where the police cannot get involved without prior judicial authorisation. As a result of the offence being made cognisable and non-bailable, it takes away the right of the accused to post a bail bond with the police and shifts the responsibility on to the courts for judicial determination on a case-by-case basis.

There are several reasons to be sceptical about allowing the police to begin criminal investigations into copyright infringement. To begin with, unlike trademark law, it is not mandatory under the Copyright Act to register copyrights as a necessary precondition in order to enforce the same. Rather, a copyright is created the moment a piece of art or music or literature is fixed on a medium, provided it is original. Now, whether or not the said piece of art or music or literature is in fact 'original' is another complicated question of law, especially since a 2008 Supreme Court judgment. Even presuming that the question of originality is undisputed, there is the question of whether the use of the copyrighted work is permissible under all the provisions in Section 52 of the Copyright Act outlining the limitations and exceptions to copyright infringement. One of the provisions in Section 52 deals with 'fair dealing', which in itself a vexatious question of law. Then there are special clauses under the Copyright Act which extinguish copyright in copyrighted works in certain circumstances — for example, if a work is qualified for protection under the Designs Act of 2000, it can no longer claim protection under the Copyright Act once it is reproduced beyond a certain threshold. Even the very question of determination of copyright infringement would require the court to apply the test of substantial similarity (both qualitative and quantitative) on a case-by-case basis.

Any investigation by the police into copyright infringement will have to take into account all of the above issues, many of which have vexed the most experienced of lawyers, judges and academics. As a country, do we have faith in the ability of the average police sub-inspector, given their present levels of training and funding, to conduct an efficient investigation into copyright infringement, particularly on complicated questions of law? We think not.

The deeper question that requires a re-look is the criminalisation of copyright infringement in

India. In 1914, when the British extended the Imperial Copyright Act, 1911, to India, copyright infringement was punishable only with a monetary fine. It was independent India that introduced imprisonment for one year as punishment for the offence of copyright infringement in 1957. Since then, the prison term for copyright infringement has been tripled by Parliament to three years.

India's international law obligations under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) do not require India to criminalise all kinds of copyright infringement. Article 61 of the TRIPS agreement requires criminal measures to be applied for at least "wilful copyright piracy" on a "commercial scale". Although the term copyright piracy itself remains undefined in TRIPS, a World Trade Organization panel in the *China — Enforcement of intellectual property rights* dispute observed that the law does make a distinction between copyright infringement and copyright piracy. In fact, the panel cited negotiating documents to show that the term infringement of copyright on a commercial scale was specifically rejected. Consequently, all piracy of copyrighted works is an act of infringement, but all infringement cannot be termed as piracy. So, for example, a person indulging in the mass reproduction of copyrighted books without the authorisation of the copyright owner would be guilty of copyright piracy. On the other hand, a dispute between two publishing houses on similar content in their textbooks would qualify only as copyright infringement and not copyright piracy. This is an important distinction made in TRIPS because most cases of copyright infringement not amounting to copyright piracy involve tricky questions of law. Establishing guilt beyond reasonable doubt is almost impossible in such cases, given the ambiguity of the law. Why then do we insist on criminalising conduct, where it is not possible for reasonable persons to know with some degree of certainty whether certain acts qualify as criminal conduct, particularly when civil remedies are available?

At best, the Indian Copyright Act makes a distinction between commercial and non-commercial infringement by allowing the courts to impose a sentence of less than six months or a fine of less than 50,000. But it does not simply decriminalise acts of infringement that are non-egregious in nature, except where a building/structure is allegedly violating a copyrighted work (for example, in drawings). As a result, almost every Bollywood production house that delivers a box-office success inevitably faces criminal investigations by police forces because of criminal complaints filed by scriptwriters who claim that the 'hit' was based on a script written by them. These cases can then drag out for years. For example, Rakeysh Omprakash Mehra was discharged in November 2021 by a judicial magistrate in Aurangabad in a case of copyright infringement filed by a scriptwriter who claimed that *Rang De Basanti*, which released in 2006, was in fact based on his script.

Unless the law is amended to not only differentiate between the different acts of copyright infringement but also require prior judicial cognisance as a precondition of criminal investigation by the police, the Supreme Court's recent decision will pave the way for the police to impinge on civil liberties, impede the ease of business and have chilling effects on free speech.

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